Government-Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life

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Two significant public issues have been the limits of partnership between government and religion and government's role in helping citizens cope with disasters. One intriguing intersection of these issues is local governments' use of chaplaincy programs to address the human face of trauma, both large-scale and personal. This Article asserts that the constitutional analysis differs for mass disaster response and the daily human dramas, clearly painful, addressed by local police and fire departments. There is an important and valid role for clergy and faith-based assistance as part of the broad spectrum of governmental disaster relief. In the everyday tragedies, however, any governmental facilitation of religious counsel must be a true accommodation based on a victim's request and not the automatic result of a 911 call. Analyzing Establishment Clause constraints in these two scenarios leads to a new working model for analysis of all government-sponsored chaplain programs, just as one of them is now being challenged after some twenty years of litigation silence on this topic.

The terrorist attacks of September 11, 2001, gave rise to a new national focus by all on emergency preparedness.[1] The nation's clergy

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1. A few examples among many include: creation of the U.S. Department of Homeland Security (*see* http://www.dhs.gov), national emergency exercises, such as the multi-agency bioterrorist simulation, TOPOFF2 in May 2003, and new state laws authorizing multiple emergency powers, including quarantine and isolation without prior court order. *See, e.g.*, H.R. 5164, 93rd Gen. Assem., P.A. 93-829 (Ill. 2004).

were among those rallying to respond.[2] In the intervening years, much critical work has been done to develop credentialing and training programs, which prepare clergy to respond in a manner both respectful of victims' beliefs and conditions and consistent with the needs of law enforcement and humanitarian aid.[3] These nascent plans showed some success in the country's next mass disaster: Hurricane Katrina and its refugee resettlement. Local governments relied on clergy to accommodate the religious needs of survivors, who lacked access to their ordinary religious support systems.[4] In large- or even medium-scale disasters, there is room for this partnership under the broad tent of governmental and non-profit emergency response.

Simultaneously, a new, smaller scale initiative has expanded, encouraged by the Bush administration's faith-based initiative[5] and Supreme Court trends. A growing number of local governments are calling on volunteer chaplains to provide immediate (and unrequested) on-the-scene support to persons who have been traumatized by tragic incidents, such as homicide, suicide, or accidents.[6] That type of program, referred to here as the "Crisis Chaplaincy Model," has two unconstitutional aspects. First, the identifiable use of the term "chaplain" as an integral and automatic part of a local police department's urgent crisis response is governmental endorsement of religion and inherently coercive. Second, this model imposes a religious test on its volunteers. Some programs are open only to clergy, while in others a potential volunteer must produce a detailed letter of reference from his or her ordained clergy.

The impropriety is especially clear in light of secular programs provided by municipalities with greater sensitivity to their constitutional obligations and to the vulnerability of victims, such as Los Angeles' "Crisis Response Team."[7] No one can doubt the good intentions, selfless dedication, and frequent effectiveness of crisis chaplains. The Establishment Clause requirement is that when crisis counseling is provided in partnership with government's first responders, its focus must be humanistic, not religious and, as even passionate advocates of

2. The legacy of the FDNY Catholic Chaplain who perished with New York City's firemen heroes provides a lasting inspiration. *See generally* MICHAEL FORD, FATHER MYCHAEL JUDGE: AN AUTHENTIC AMERICAN HERO (2002).

3. *See infra* Part I, pp. 7-8.

4. *See infra* Part I, p. 7.

5. *See generally* White House Office of Faith-Based and Community Initiatives, http://www.whitehouse.gov/government/fbci. *See also infra* note 8.

6. *See infra* Part I, pp. 5-7.

7. *See infra* Part I, pp. 5-6.

Charitable Choice would acknowledge, its providers must be chosen based on secular criteria.[8] The policy imperative is respect, both of the non-believer victim and of those non-religious volunteers who can bring compassion and sensitivity to comforting others in their first moments of loss.[9] This is a spiritual task in the very broadest sense.

This Article proposes that three criteria should determine the constitutionality of a given governmental relationship with chaplains or clergy. First, the greater the situational burden on the recipient's religious exercise, the greater the government latitude to accommodate by providing access to clergy or other religious personnel. Where the recipient is not somehow restricted from access to his own clergy or religious activities, any religious test for the provider of government-sponsored empathic or counseling services is unconstitutional. Second, the state must be neutral, including as between religion and non-religion, which precludes any express or implied governmental suggestion that a religious response is superior, or necessary, in the face of trauma. And third, any provision of religious content facilitated by the government and justified as a matter of private choice, must be wholly voluntary. This factor is less likely to be satisfied where the arranged interaction is one-on-one between a religious provider and a person made vulnerable by tragedy. The Crisis Chaplaincy Model fails on all three levels: It is not a lawful accommodation and it violates the endorsement and coercion tests.

Chaplains have become common in numerous institutions, including the military, hospitals, and police and fire departments, and yet only a handful of decisions, most more than twenty years old, have confronted the constitutionality of government-provided chaplains.[10] The issue has resurfaced: The Freedom From Religion Foundation (FFRF) recently challenged the VA hospital system's chaplain program.[11] This Article

8. "Charitable Choice" refers to the laws and regulations intended to encourage faith-based organizations to obtain federal funding to provide social services. *See generally* Michele Estrin Gilman, *If At First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103 (2007); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

9. As discussed *infra*, this affects a significant number of Americans, given that some 10-20% identified themselves as nonreligious or refused to answer such questions in the most recent census. *See* Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, text accompanying n.174 (2006) (citing U.S. Dep't of Commerce, Bureau of Census, Statistical Abstract of the U.S. 58 (125th ed. 2006) (Table No. 69)).

10. *See infra* Part II.

11. FFRF v. Nicholson, 469 F. Supp. 2d 609 (W.D. Wis. 2007), *appeal docketed*, No. 07-1292 (7th Cir. 2007) (parties argued merits and issue of taxpayer standing in light of Hein v. FFRF, 127 S.Ct. 2553 (2007) on January 17, 2008). If the case is dismissed on taxpayer standing

provides a framework to guide analysis in those contexts and also fills a gap in the legal scholarship. The commentary has addressed only the military chaplaincy and its troubles with proselytizing chaplains and denominational distinctions, which presents different issues from those raised by pastoral counseling in the civilian world.[12]

Part I will further explain the Crisis Chaplaincy Model, the use of clergy in disaster response, and training and practice for chaplains. Part II will set forth the existing case law on chaplain programs and the several rationales courts have used to uphold them. Part III will review the governing Supreme Court principles, including the endorsement and coercion tests which, for the most part, were ignored by the chaplain cases. This Part also will show why the Crisis Chaplaincy Model is unconstitutional. Finally, Part IV will provide new guidelines for evaluating all the other contexts in which government uses chaplains.

Part I. Government's Use of Chaplains for Those in Crisis

The troublesome aspects of the Crisis Chaplaincy Model can best be appreciated by comparing Los Angeles' secular "Crisis Response Team" with Seattle's "Community Chaplaincy."[13] In both cities, the police department contacts a trained volunteer to provide assistance in a wide variety of tragedies, including homicides, suicides, drive-by shootings, major traffic accidents, sexual assaults, and child death. The term "victim" is used broadly here to mean not only the victim of the crime, if any, but

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grounds, FFRF is likely to re-file on behalf of plaintiff harmed by the VA's promotion of religion (based on author's telephone conversation with FFRF Director August 8th, 2007).

A second recent chaplaincy case, FFRF v. Roob (filed May 2, 2007, S.D. Ind.), which was an Establishment Clause challenge to a novel paid position of chaplain for the State of Indiana's Department of Health and Human Services, recently was dismissed after the State terminated the disputed position. THE ROUNDTABLE E-NEWSLETTER (Aug. 21, 2007), http://www.socialpolicyandreligion.org/newsletters/8-21-2007.html (last visited Jan. 16, 2008).

12. *See* Richard D. Rosen, Katcoff v. Marsh *at Twenty-Two: The Military Chaplaincy and the Separation of Church and* State, 38 U. TOL. L. REV. 1137 (2007) (only article discussing constitutionality of chaplaincy, as well as specific issues of compulsion and nondiscrimination); David E. Fitzkee & Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. REV. 1 (2007); William J. Doobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers for Mandatory Army* Events, 2006 WIS. L. REV. 1493 (2006); Kenneth J. Schweiker, *Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy*, 8 RUTGERS J. L. & RELIGION 5 (2006); Emilie Kraft Bindon, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247 (2004).

13. *See* LAPD "Crisis Response Team Fact Sheet" [hereinafter *LAPD Site*], http://www.lapdonline.org/get_involved/content_basic_view/23491 (last visited Aug. 2, 2007); SPD Community Chaplaincy, http://www.spdcommunitychaplaincy.org/faq.html [hereinafter *Seattle CC Site*] (last visited Aug. 2, 2007).

any person traumatized by the tragedy, such as a witness, family member, or those specified by the police as needing support. The volunteer strives to arrive within twenty to thirty minutes to provide immediate, on-scene help to the victims, including emotional support, practical assistance, outreach to existing support systems (including family, friends and clergy, as appropriate) and referral to other resources for long-term support. The request is triggered by departmental policy and not by a victim's request for such help. In addition, the volunteer serves as a liaison between the victim and law enforcement and other emergency workers, thus freeing up police and fire personnel from the "soft" tasks of consolation to enhance attention to their primary roles.[14]

The common purpose of this immediate crisis intervention is as follows:

> According to mental health experts, following a traumatic [e]vent, crime or disaster, people may feel helpless, confused, and undergo emotional shock. Victims' and families' experiences in the critical hours immediately following a traumatic event strongly influence how these tragedies will impact the rest of their lives. Those receiving effective support are more likely to eventually resume healthy and productive lives, while those who do not are at higher risks of mental and physical health disorders.[15]

The Los Angeles Crisis Response Team members are screened and specially trained for this sensitive role.[16] L.A.'s program is similar to local chapters of Trauma Intervention Programs, Inc., a national volunteer not-for-profit, which trains volunteers of all backgrounds to assist emergency personnel to help victims in crises.[17]

Seattle's "Community Chaplaincy" program, however, includes an additional component:[18] community chaplains "must be formally

14. *Id.*

15. *See supra* note 13, LAPD Site.

16. *Id.* (LAPD volunteers receive over 48 hours of mandatory training). *See also* http:///www.sandiego.gov/volunteer-program/opportunities/police.shtml (last visited Dec. 16, 2007) (a similar secular program in San Diego requires that crisis intervention volunteers have no criminal record, communicate well with people, and complete a 100-hour training).

17. *See* Trauma Intervention Programs, Inc., Portland/Vancouver Chapter, http://www.tipnw.org (last visited Dec. 16, 2007) (TIP, which began in 1985, now has programs operating in Portland, Las Vegas, Atlanta, and many smaller municipalities).

18. *See* Law Enforcement Chaplaincy of Sacramento, http://www.sacchaplains.com (last visited Jan. 14, 2008) (this organization appears to be the originator of this model, but the text discusses the Seattle chaplaincy because Seattle's web site contains a more complete description; Sacramento originally required its community chaplains to profess faith in Jesus Christ, a practice it was forced to stop amidst controversy). *See, e.g.*, Freedom From Religion Foundation,

recommended by their own faith congregation."[19] If they are laity rather than ordained clergy, they must be laypersons "who are in leadership in their 'faith group' as long as they remain under [its] authority."[20] While they are to provide "nonsectarian, nondiscriminatory support" to all and asked not to proselytize, Seattle's web site states that, even though the victims typically do not know the chaplain's particular religion, "the spiritual dimension *implicit in the chaplain's role* is often profoundly critical to preserving whatever 'seeds of hope' are left when people's lives have been ravaged by the sudden death of a loved one."[21] This faith-based approach to victim assistance has been supported financially by the United States Department of Justice's Office of Victims of Crime, which has given grants to the U.S. Community Chaplaincy, a not-for-profit organization that assists local police departments in creating community chaplaincies.[22]

In preparing for and responding to disasters, the faith community's role is more extensive, in both breadth and depth. Several examples illustrate the work done to follow up on the post-9/11 groundswell of volunteerism. New York Disaster Interfaith Services (NYDIS) provides preparedness training to clergy, houses of worship, and other religious organizations. It also serves the NYC Office of Emergency Management as one of many agencies staffing the City's crisis command center, when activated, and as the City's liaison with the faith community.[23] The City of Chicago has also worked with local clergy on disaster response training and has integrated spiritual care into its disaster planning.[24] Faith communities are an integral part of municipal emergency preparedness, both as one type of the local institutions relied on for communications and emergency social

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http://www.ffrf.org/fttoday/2002/may02/ newsnotes.php, (which may account for its more muted public face).

19. *See supra* note 13, Seattle CC Site.

20. *See* Seattle CC Site - Chaplains, http://www.spdcommunitychaplaincy.org/chaplains.html (last visited Jan. 14, 2008).

21. *See supra* note 13, Seattle CC Site (emphasis added).

22. *See* Office for Victims of Crime, http://www.ojp.usdoj.gov/ovc/help/faithbasedmatrix.htm (last visited Jan. 14, 2008) (listing OVC-Funded Victim Services Grantee Programs for Faith-Based Organizations); http://www.ovc.gov/publications/infores/focuson2005/faithbased (last visited Jan. 14, 2008) (listing "U.S. Community Chaplaincy" as a Topic-Specific OVC Initiative). Note that USCC has changed its name to U.S. Crisis Care Network and works with secular crisis response organizations, as well as chaplaincies. *See also* U.S. Crisis Care, http://www.crisishelp.us (last visited Jan. 14, 2008) (no longer discussing religious test for volunteers; instead describing the volunteers' personal characteristics, which include "genuine compassion for every human being, even those most unlike themselves.").

23. *See* New York Disaster Interfaith Services, http://www.nydis.org (last visited Jan. 14, 2008).

24. *See* Hyde Park Union Church, http://www.hpuc.org/HPUCHome.htm (last visited Jan. 14, 2008); *see also infra* at text accompanying notes 25-27.

services, and as providers of spiritual care, especially where disaster disrupts normal delivery systems for religious services.

The evacuation and resettlement of Katrina refugees called on these newly developed capacities. One example is useful for comparing spiritual care in the large-scale disaster versus the crime-victim context. The Fosco Center, Chicago's intake and welcome center for Katrina refugees, offered spiritual care along with a broad spectrum of assistance offered by the Red Cross, the Heartland Alliance, the Salvation Army, and numerous city agencies.[25] This response was readily mobilized based on emergency preparedness work done post-9/11 by the City and the Council of Religious Leaders of Metropolitan Chicago, a broad ecumenical group. The volunteers, who included Protestants, Catholics, Jews, Muslims, and Buddhists, were required to provide proof that they were ordained clergy, certified chaplains, or otherwise officially recognized by a religious body. They received training, which included instruction not to proselytize, background checks and detailed rules of conduct.[26] They were able to provide simple comfort or fill a religious role, solely upon request from people bereft of all their own resources. Secular mental health counseling services also were available within the large facility.[27]

One apparent reason for the growth of local Crisis Chaplaincy programs is their synergy with clergy disaster response. For example, a Baptist group known as Victim Relief Services began working in a local role with the Dallas Police Department and, after participating in the 9/11 response, created Victim Chaplain and Counselor Association of America (VCCAA), which trains ecclesiastically-endorsed persons to counsel crime victims.[28] In addition, many of the Crisis Chaplaincies are closely tied to,

25. Cathleen Falsani, *Evacuees Find Spiritual Solace; Chicago's ministers, priests, counselors help victims here*, CHICAGO SUN-TIMES, Sept. 18, 2005, at 18.

26. *Id.*; *see also* *"Spiritual Provider Agreement"* (copy on file with author); Brian C. Ryckman, *Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, 9 U. PA. J. CONST. LAW 929 (2007) (discussing faith-based organizations responding to Hurricanes Katrina and Rita by housing and feeding of refugees and the constitutionality of subsequent FEMA reimbursement).

27. Note that mental health services also have worked to prepare to counsel in disasters. *See generally* DIANE MYERS & DAVID F. WEE, DISASTER IN MENTAL HEALTH SERVICES: A PRIMER FOR PRACTITIONERS (2005); ROBEN J. URANO, ED., TERRORISM AND DISASTER: INDIVIDUAL & COMMUNITY MENTAL HEALTH INTERVENTIONS (2003).

28. Victim Chaplain & Counselor Association of America, http://www.victimchaplains.org (last viewed Jan. 14, 2008) (one requirement for participation in a VCCAA program is that a "Victim Chaplain should be ecclesiastically certified in good standing with, and endorsed for Chaplaincy by a recognized religious body."). Note that VCCAA is associated with Crisis Chaplaincy Care, Inc., a division of The Faith Based Counselor Training Institute, Inc. ("counseling from a Biblical dynamic") (*see* http://www.faithbasedcounseling.com). Similarly, USCC's curriculum recently expanded to include preparation for mass violence such as terrorism.

or identical with, police or fire department chaplains programs.[29] Organizations such as the International Conference of Police Chaplains serve to organize and mobilize local police chaplains to serve in mass disasters; the experience of counseling the public, in turn, can lead to an expanded agenda at home. From the emergency preparedness perspective, there is a clear benefit to maintaining a pool of chaplains who practice their crisis counseling skills for the benefit of crime victims.

This Article focuses on the roles of chaplains sponsored by government to counsel members of the public in crises of varying scale. The issues of chaplains who counsel police and fire personnel and government hospital patients will be analyzed secondarily, as part of general proposed guidelines. At this point, before discussing the existing case law on chaplains, it is worthwhile to introduce their terminology, credentialing, and function.

A chaplain is a member of the clergy or a trained layperson who provides religious services and spiritual counseling in an institutional setting such as the military or hospitals. Typically, chaplain positions require training in "clinical pastoral education" (CPE), interfaith supervised work with persons in crisis, which emphasizes empathic listening and responsiveness to the person's degree and type of religion.[30] Usually, they are certified by an organization representing their own faith tradition,[31] but some organizations certify chaplains based on the particular function served, such as police or hospital chaplain.[32] In addition, there is a related certification as a "pastoral counselor," a newer tradition that affirmatively

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29. *See, e.g.*, Spokane Washington Police Department, http://www.spokanepolice.org (search for "chaplain") (explaining that chaplains can serve needs of both police officers and public); Santa Clara County Office of the Sheriff, http://www.sccgov.org/portal/site/sheriff/ (follow "Chaplaincy Program" hyperlink under "Administration"). *See also* International Conference of Police Chaplains, http://www.icpc4cops.org (last visited Jan. 14, 2008); The Federation of Fire Chaplains, http://www.firechaplains.org (last visited Jan. 14, 2008).

30. The Association for Clinical Pastoral Education, Inc., http://www.acpe.edu (last visited Jan. 14, 2008) (CPE credits are required for most chaplain positions).

31. The main certifying organizations are the Association of Professional Chaplains (a Protestant Christian organization) (*see* http://www.professionalchaplains.org), the National Association of Catholic Chaplains (*see* http://www.nacc.org), and the National Association of Jewish Chaplains (*see* http://www.najc.org).

32. These credentialing authorities include the International Conference of Police Chaplains (*see* http://www.icpc4cops.org) (last visited Jan. 14, 2008) and the Healthcare Chaplains Ministry Association (*see* http://www.hcmachaplains.org) (last visited Jan. 14, 2008), and the newer emergency-focused Crisis Chaplaincy Care, Inc. (http://www.faithbasedcounseling.com/crisis.htm) (last visited Jan. 14, 2008); *see generally* DAVID W. DEREVERE ET AL., CHAPLAINCY IN LAW ENFORCEMENT: WHAT IT IS AND HOW TO DO IT (1989); MARK COBBS, THE HOSPITAL CHAPLAIN'S HANDBOOK (2005); Lawrence E. Holt, ed., HOSPITAL MINISTRY (1985).

integrates psychology and spirituality.[33] All available certifications appear to require ecclesiastical endorsement, which is an official statement from the governing body of an established religious organization or denomination that the individual is in good standing with that body and qualified to serve as its representative.[34]

Part II. The Chaplaincy Cases

The single Supreme Court chaplain opinion, *Marsh v. Chambers*, upheld Nebraska's long-term use of a paid chaplain to open state legislative sessions with a prayer.[35] This particular form of "ceremonial deism" was permitted in light of Congress' unbroken tradition of such prayer, including while adopting the First Amendment.[36] It thus offers little guidance here, in a relatively novel context that is highly interactive rather than passively ritualistic.

There are only a handful of cases challenging government chaplaincies. While they could be categorized easily by type—military, hospital, police—that would not bring to light the obscured but essential point that these cases are based on two completely different rationales. The military chaplaincy is based on accommodation; there, the government purposely, and unabashedly, provides religious services. The remaining cases focus on governments' use of religious personnel to perform primarily secular counseling for purposes of holistic health. This second

33. The American Association of Pastoral Counselors trains and certifies pastoral counselors. (*See* http://www.aapc.org). *See generally* DAVID G. BENNER, STRATEGIC PASTORAL COUNSELING: A SHORT-TERM STRUCTURED MODEL (1992).

34. *See* Bindon, *supra* note 12 (discussing general requirement of ecclesiastical endorsement in context of military chaplaincies).

35. Marsh v. Chambers, 463 U.S. 783, 792-95 (1983).

36. *Id.* at 788. The term "ceremonial deism" was coined by then Yale Law School Dean, Eugene Rostow, and has been used by Justice O'Connor. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) (referring generally to minimally religious practices deemed to be merely ritual through long customary usage). *See* Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the* Marsh *Wild Card*, 40 IND. L. REV. 529 (2007); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996); Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381 (6th Cir. 1999) (calling *Marsh*'s allowance of state-sponsored prayer "one-of-a-kind"). *See also* Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. 2005) (holding clergy-led prayer during presidential inauguration within *Marsh* exception because inaugural prayer also practiced at Nation's founding); Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) (*Marsh* inapplicable to supper prayer at state-operated military college held unconstitutional because public universities and military colleges did not exist when the Bill of Rights was adopted); Doe v. Village of Crestwood, 917 F.2d 1476, 1479 (7th Cir. 1990) (saying of *Marsh*, "When the Court held that a state legislature may open with prayer, it did so because of the deep roots of the practice, not because prayer in the context of legislation is secular.").

rationale requires a more layered analysis to understand and evaluate. This Part II provides a description and some initial critique of these few cases.

A. Government-Provided Clergy and the Accommodation Principle

In the well-known case of *Katcoff v. Marsh*, the Second Circuit upheld the extensive chaplaincy system of the United States Army, primarily to protect the free exercise rights of the armed forces.[37] Many military personnel and their families are stationed internationally or in rural areas where the local clergy are insufficient in number and diversity to meet the troops' religious needs, and unpredictable deployment and severe stress are part of army life. The challenge was to the public funding of the very extensive program that seeks to replicate the diversity of religious experience in civilian life, which at that time, included more than 500 chapels and 100 Religious Educational Facilities.[38]

The court began by acknowledging that, viewed in isolation, the program violates the often criticized *Lemon* test, which remains the starting point of much Establishment Clause analysis.[39] This test asks whether (1) there is a secular purpose, (2) the government action has a primary effect of advancing (or inhibiting) religion, and (3) it leads to "excessive entanglement" between church and state.[40]

The court found that most of the religious worship, education, and counseling provided to army personnel and their families was done in circumstances where otherwise, as a practical matter, the practice of their religion would be substantially unavailable. Bolstered by the chaplaincy's deep historical roots, going back to the Continental Army, and the deference due congressional action under the War Powers Clause, the

37. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

38. *Id.* at 229.

39. Lemon v. Kurtzman, 403 U.S. 602 (1971). *See, e.g.*, Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L.REV. 795 (1993). *But see, e.g.*, McCreary County v. ACLU, 545 U.S. 844 (2005) (finding a Ten Commandments display unconstitutional and showing that the *Lemon* test remains a predominant structural approach in Establishment Clause cases).

40. *Lemon*, 403 U.S. at 613-12. Also, in *Katcoff*, the Second Circuit found that administration of the program, which involves hiring and choosing among denominations, at a minimum entangles the government with religious accrediting bodies. 755 F.2d at 232. This entanglement causes very real, predictable problems, as shown by the recent spate of litigation claiming denominational discrimination. *See, e.g.*, Larson v. United States Navy, 486 F. Supp. 2d 11 (D.D.C. 2007) (rejected applicants, all non-liturgical Protestant ministers, challenged the Navy's chaplaincy program, alleging that Navy denominational quotas do not sufficiently reflect the number of adherents in the Navy); *In re* England, 375 F.3d 1169 (D.C. Cir. 2004) (non-liturgical Protestant sued Navy based on alleged religious discrimination favoring Catholics and liturgical Protestants).

program met "the more appropriate standard of relevancy to our national defense and reasonable necessity."[41]

The Second Circuit, however, questioned the constitutionality of government-funded chaplains in large urban areas, where military personnel "commute daily to their homes and spend their free hours (including weekends) in locations where civilian clergy and facilities are just as available to them as to other non-military civilians."[42] Where religious exercise is not burdened, another constitutional justification is required. For the military, the court asked on remand whether this practice is reasonably necessary for purposes of national defense. The case was dismissed before further judicial analysis, so the issue remains unresolved. Possible institutional reasons for an urban military chaplaincy include the need to station chaplains in cities to conduct military funerals and to handle the program's administration and maintenance of morale by rewarding chaplains with more desirable postings.[43]

The Supreme Court expressly approved of the Second Circuit's accommodation opinion more recently in *Cutter v. Wilkinson*.[44] There, the Court reaffirmed that the Establishment Clause allows government to provide special accommodation for religious needs, where doing so is necessary to alleviate "exceptional government-created burdens on private religious exercise," so long as others are not unduly burdened and the accommodation is administered neutrally among different faiths.[45]

In *Cutter*, a unanimous Court upheld Section Three of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which imposes strict scrutiny on governmental burdens on the religious exercise of institutionalized persons such as prisoners. Privileging religious exercise beyond the neutral treatment that now generally satisfies the Free Exercise Clause is permitted under the Establishment Clause; the reason is that where a person is institutionalized, the government exerts a degree of control over his life that is not found in civilian society. In such contexts, private religious expression is completely dependent on assistance from the government.[46]

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41. *Katcoff*, 755 F.2d at 237. *See* U.S. CONST. art. I, § 8.

42. *Katcoff*, 755 F.2d at 237-38.

43. *Id.* at 238-39 (Meskill, J., dissenting). *See also* Rosen, *supra* note 12, and text accompanying nn.76-80 (discussing issue and referencing related army regulations).

44. Cutter v. Wilkinson, 544 U.S. 709 (2005).

45. *Id.* at 722 (citing *Katcoff* with approval).

46. *Id.* at 721. Prior to enacting RLUIPA, Congress held three years of hearings documenting barriers to religious exercise for institutionalized religious persons. *Id.* at 716.

Cutter's rationale supports the constitutionality of establishing some form of chaplain programs in prisons, psychiatric hospitals and other institutions where residents experience restricted movement and little freedom.[47] Similarly, after *Cutter*, the military chaplaincy (or at least those aspects that can be shown necessary to remove a severe burden on religious exercise) is no longer subject to any real challenge.

Thus, the accommodation principle reflected in military and prison chaplaincies provides one constitutional mode—as this Article will argue, the only defensible reason—for government deliberately and affirmatively to provide a chaplain for the purpose of providing religious services. Where government is actively involved in reproducing the religious experience found in the community for a given population, the relevant question is how severe is the contextual restriction on religious exercise.[48] Under this analysis, the disaster chaplain passes, while the crime-victim chaplain fails.

Applying this principle to the crisis and disaster contexts requires a principled extension of existing doctrine because the Court has only expressly permitted accommodation to alleviate *government*-imposed burdens. In *Cutter*, the burden was confinement in a government prison based on application of the criminal laws. In *Corporation of the Presiding*

RLUIPA is one of Congress's efforts to provide additional protection for religious exercise following the Supreme Court's *Smith* decision, which held that the Free Exercise Clause is not violated by enforcement of general, neutral laws that incidentally burden religious conduct. *See* Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) (holding that the Free Exercise Clause did not bar Oregon from enforcing drug laws against Native Americans' religious use of peyote). Following *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, which imposed strict scrutiny on all federal and state law, and was held unconstitutional as applied to state and local governments in City of Boerne v. Flores, 521 U.S. 507 (1997). Many states enacted their own RFRA statutes, which this author has argued are overly broad. *See* Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRA's Don't Work*, 31 LOY. U. CHI. L.J. 153 (2000).

47. *See generally* articles cited *supra* note 12. One of the factual allegations in *Cutter* (not addressed in this facial challenge) concerned a prison's failure to provide chaplains trained in plaintiffs' non-traditional religions, which included Wiccan and Satanism, while providing chaplains for traditional religionists. How extensive and diverse such a prison chaplaincy need be to satisfy RLUIPA is a different issue from the general permissibility of state-provided prison chaplains.

48. The remaining, narrow category of cases involving government-facilitated chaplains is that of the airport chaplain. They have been approved by implication in the few challenges to the chapel facilities, with one court briefly referencing the underlying accommodation rationale. *See* Hawley v. City of Cleveland, 24 F.3d 814 (6th Cir. 1994) (airport chapel built and run by Catholic Archdiocese, open to all, but only providing Catholic services; below-market lease constitutional, where free rent to Traveler's Aid and USO and chapel needed to accommodate travelers' religious needs); Brashich v. Port Authority of New York and New Jersey, 484 F. Supp. 697 (S.D.N.Y. 1979) (allowing Catholic, Protestant and Jewish chapels at JFK Airport where funded by the religious organizations and opportunity offered to all faiths).

Bishop v. Amos, the other leading Supreme Court accommodation case, the burden was a federal law prohibiting employers from considering religious affiliation in hiring, which arguably interfered with churches' ability to carry out their religious mission through their not-for-profit community activities.[49] And as noted in *Katcoff*, once a person enters the military, the government controls many aspects of life and it is the residential situation imposed by the government that creates the burden.

In the disaster scenario, government does not create the burden. Instead, the deprivation of access to religious practices and personnel results from the source of the disaster, whether flood, terrorist attack or contagious disease epidemic. When a crisis has reached the point where government is attempting to provide replacement religious services, however, the state has become a caretaker for the disaster's victims. Where the government has assumed a protective role, it is in the best position to lift the burden and assist the victims by seeking to replicate their own community religious practices, even if religious exercise has been burdened by *circumstances* and not government action. Thus, in situations such as the Fosco Center for Katrina refugees, the City's providing access to clergy of many denominations should be viewed as defensible accommodation.

Accommodation, however, does not function to permit the government to send a chaplain to address everyday tragedy. The family and witnesses affected by an untimely death, while suffering emotionally, do not suffer any significant burden on their religious activity. On the scene following an accident or homicide, or at home receiving a death notification, the person is only a phone call away from her clergy. Without such a burden, there is no defensible religious accommodation need for a government-sponsored crisis counselor to be a chaplain, ready to respond immediately in a religious manner. Some victims will have no previous religious affiliation or leanings. Where a municipality furnishes a chaplain for those persons (drawing on the distinction made in *Amos*), there is an unconstitutional primary effect because "the *government itself* has advanced religion through its own activities and influences."[50] Crossing that line violates the Establishment Clause for "accommodation is not a principle without limits."[51]

49. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 335-36 (1987).

50. *Id.* at 337.

51. Bd. of Educ., Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 697, 706 (1994).

B. Government-Provided Counselors, Holistic Health and Choice

In the several cases upholding government chaplaincies in the hospital or police context (including one similar to the Crisis Chaplaincy Model) the courts all explicitly eschew reliance on the accommodation rationale set forth above. Rather, these opinions focus on the nature of the "pastoral counseling" model employed, approving of the CPE approach, and its non-sectarian, non-proselytizing, non-intrusive ways, while glossing over the requirement that its practitioners be ecclesiastically endorsed. These courts reason that providing mostly secular counseling for purposes of holistic health is a secular purpose, and that there is no unconstitutional primary effect because the recipient chooses any religious content. As shown below, their shared analysis (1) does not squarely confront the issue of government imposing a religious test and (2) wrongly conflates several Establishment Clause paradigms.

1. Government Hospital Chaplaincies

Shortly after *Katcoff*, the Eighth Circuit broadly approved of a county hospital chaplaincy in *Carter v. Broadlawns Medical Center*.[52] The district court had approved of only a subset of the program—the provision of religious services to the hospital's prisoner and psychiatric population—as a permissible accommodation under *Amos*.[53] However, the Eighth Circuit held that there was a valid secular purpose for the whole program (which included the religious counseling of outpatients and families): improving the patient's health and well-being by attending to spiritual and emotional needs affecting bodily health.[54] There, the chaplain was a United Church of Christ deacon, trained in CPE. Her duties included calling on patients, whether or not they had requested to see a chaplain, providing counseling to all, with the patient directing any religious content in the conversations, as well as conducting worship services and administering the sacrament of communion.[55] The Eighth Circuit also held that the chaplaincy did not violate the "effects" prong of the *Lemon* test because of the chaplain's neutral approach and because there was no link to a particular denomination.[56] The only restriction imposed was on the chaplain's

52. Carter v. Broadlawns Med. Ctr., 857 F.2d 448 (8th Cir. 1988).

53. *Id.* at 457.

54. *Id.* at 451, 454.

55. *Id.* at 451, 455. The Eighth Circuit expressly stated that accommodation was not its rationale. *Id.* at 457.

56. *Id.* at 456 (comparing to Baptist-only police chaplain in *Voswinkel*. *See infra* Part II.B.2.

religious counseling of hospital employees because that counseling typically focused on problems other than the patients' illnesses.[57]

The current litigation challenging the Veterans Administration's chaplaincy, *FFRF v. Nicholson*, builds and expands on the reasoning of *Carter*.[58] The district court decision explained that in the past, the VA chaplain's role was primarily sacramental, but the focus is now on addressing the spiritual dimensions of health.[59] Like the Eighth Circuit opinion it followed, the *Nicholson* court emphasized the non-sectarian, non-proselytizing nature of the CPE-trained VA chaplains, but also painted a more detailed picture. Chaplains are trained to "encourage helpful religious and spiritual coping processes."[60] Counseling on existential issues like the meaning of life, illness, and death is provided to both religious and non-religious patients.[61] All the chaplains who provide such services, however, are necessarily approved practitioners of a specific organized religion. The opinion acknowledged that, as in most hospitals, VA chaplains must be ecclesiastically endorsed by their faith tradition.[62]

The FFRF did not challenge the provision of such services to hospitalized patients, whose mobility is restricted, but asserted that the VA crossed the line by providing such religious services to outpatients and by vigorously promoting religion over non-religion. One example of this alleged excess was a sample "spiritual assessment" (an in-depth analysis of a patient's spiritual beliefs), which goes beyond the regular admission form screening for special religious needs such as dietary restrictions or communion delivery.[63] The court approved the process because some level of inquiry into a patient's spiritual needs and preferences is required by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO, the hospital accrediting agency), at least for patients with end-of-life, long-term care and substance abuse issues. One sample illustrated the grounds for FFRF's concerns. It included extensive, detailed questions such as how often the patient attends church, and the VA's written statement: "We believe that faith plays an important role in a person's sense of health and wellness."[64] While not mentioned in the *Nicholson*

57. *Carter*, 857 F.2d at 457.

58. FFRF v. Nicholson, 469 F. Supp. 2d 609 (W.D.Wis. 2007). *See also* note 11 and accompanying text).

59. *Id.* at 612.

60. *Id.* at 613.

61. *Id.* at 621.

62. *Id.* at 612.

63. *Id.* at 613.

64. *Id.* at 614.

opinion, the relevant JCAHO standards focus on patients receiving care that respects their personal values and spiritual preferences, and the spirituality inquiry is part of a broad-based assessment of patients' social, emotional, and cultural needs.[65]

Nicholson echoed *Carter*'s finding that promoting "holistic health care" is the valid secular purpose of providing government hospital chaplains. The district court took it a step further by accepting the VA's claim that "research shows" that access to spiritual and pastoral care improves health, reduces hospital admissions, and thus saves costs.[66]

A closer look at independent research done for this Article, however, undermines the strength of that claim. The positive impact of religion and spirituality on physical health, while a subject of frequent study in recent years, is far from settled.[67] Much of the correlation for church-going and health, for example, can be explained as relating to coexisting variables such as social support, improved health behaviors and compassionate personality.[68] Several studies support the proposition that patients benefit from the opportunity to discuss "meaning in life" issues without regard to the religious identity of the provider.[69] The strongest proven link, in fact, is between the practice of "transcendental meditation" (T.M.), a non-

65. *See* The Joint Commission 2007 Requirements Related to the Provision of Culturally and Linguistically Appropriate Health Care (May 2007), http://www.jointcommission.org/NR/rdonlyres/1401C2EF-62F0-4715-B28A-7CE7F0F20E2D/0/hlc_jc_stds.pdf (last visited Jan. 15, 2008) [hereinafter "JCAHO Standards"].

66. *Nicholson*, 469 F. Supp. 2d at 620.

67. *See, e.g.*, Carl E. Thoresen & Alex H. S. Harris, *Spirituality and Health: What's the Evidence and What's Needed?*, 24 ANNALS OF BEHAV. MED. 3 (2002) (relation between religion/spirituality and physical health "appears far more complex and modest than some contend," and which factors are relevant "remains unclear"); Richard P. Sloan & Emilia Bagiella, *Claims about Religious Involvement and Health Outcomes*, 24 ANNALS OF BEHAV. MED. 14 (2002) (meta-analysis hundreds of articles on topic concluded that among the relevant studies, "many either had methodological flaws or were misrepresented, leaving only a few articles that could truly be described as demonstrating beneficial effects of religious involvement").

68. *See, e.g.*, Doug Orman & Carl E. Thorson, *"Does Religion Cause Health?": Diverse Interpretations and Diverse Meanings*, 7 J. OF HEALTH PSYCHOL., 365 (2002); Patrick R. Steffen & Kevin S. Masters, *Does Compassion Mediate the Intrinsic Religion-Health Relationship?*, 30 ANNALS OF BEHAV. MED. 217 (2005).

69. *See, e.g.*, Timothy P. Daaleman et al., *Religion, Spirituality, and Health Status in Geriatric Patients*, 2 ANNALS OF FAM. MED. 49 (2004) (concluding that geriatric patients who report greater spirituality, but not greater religiosity, are more likely to report good health); Michael F. Steger & Patricia Frazier, *Meaning in Life: One Link in the Chain from Religiousness to Well-Being*, 54 J. OF COUNSELING PSYCHOL. 574 (2005) (benefit from discussing ultimate issue in terms of "meaning in life" gained even with persons with differing perspectives on religion).

organized, non-theistic potentially spiritual practice, and health.[70] It does not appear that an experienced teacher of T.M. would be able to secure a position as a VA hospital chaplain.

Finally, the *Nicholson* court held that the VA hospital chaplaincy does not have an unconstitutional primary effect of advancing religion because the patient is free to indicate his refusal of pastoral counseling or the spiritual assessment. The judge saw no issue of coercion on the grounds that the patients are adults, not "young impressionable students," referring to Supreme Court cases in the school prayer context, discussed in Part III.[71]

As discussed, *Nicholson* did not rely on the accommodation principle because the FFRF's challenge involved chaplain services to outpatients. While not mentioned by the district court, however, an earlier Seventh Circuit case involving the VA hospital chaplaincy identified an alternative accommodation rationale that could arguably be extended to encompass outpatients' rights and should be mentioned here. In *Baz v. Walters*, while dismissing the claims of a fired chaplain whose evangelical style undermined his therapeutic role, the court noted that if the VA did not provide a hospital chaplaincy program, it would force veterans to choose between the free medical care earned by their military service and going elsewhere to freely exercise their religion while in the hospital.[72] This rationale could arguably be used to support furnishing everyone in the VA system with whatever degree of religious and spiritual counseling has become the standard in private hospitals, at least those without an express evangelical mission. This line of reasoning will be addressed in Part IV, which provides guidelines for analysis of all types of government chaplaincies. The next portion of this section will present the remaining chaplain cases that are based on the secular purpose/no primary effect rationale.

2. Police Chaplains and the Crisis Chaplaincy

Despite their prevalence, only one published decision addresses a constitutional challenge to the "internal" police chaplaincy, in which a chaplain counsels police department employees on their unique stressors.

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70. *See* Teresa E. Seeman, et al., *Religiosity/Spirituality and Health: A Critical Review of the Evidence for Biological Connection*, 58 AM. PSYCHOLOGIST 53 (2003) (finding supportive evidence linking religiosity/spirituality to physiological processes, concluding that "the strongest evidence comes from interventional trials reporting the beneficial physiological impact of meditation (transcendental meditation)").

71. *Nicholson*, 469 F. Supp. at 621 (construing Lee v. Weisman, 505 U.S. 577 (1992) as limited to school children).

72. Baz v. Walters, 782 F.2d 701, 709 (7th Cir. 1986) (citing Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985)).

Voswinkel v. City of Charlotte involved a Baptist chaplain who provided primarily secular counseling and did not engage in proselytizing.[73] Similar to the Second Circuit's concern over the role of military chaplains in large cities, the district court in *Voskwinkel* questioned the defensibility of any police chaplaincy on the grounds that police officers are wholly able to meet their religious needs without government assistance.[74] The case turned, however, on the unlawful agreement between the city and a Baptist church to provide a full-time police chaplain, which the court held imposed an unconstitutional religious test and created the appearance of favoritism.[75]

The other chaplaincy cases have pointed to *Voswinkel* as support that government chaplain programs are allowed so long as they are non-sectarian. The final piece of the chaplaincy case law picture is a Washington Supreme Court decision essentially upholding the Crisis Chaplaincy Model. *Malyon v. Pierce County* involved a sheriff's department contract with the Tacoma-Pierce County Chaplaincy (TPCC), a non-profit Christian ministry, to provide death notification and twenty-four-hour crisis counseling for victims of major crimes.[76] TPCC requires its members to be credentialed pastors of local congregations; fourteen of the fifteen volunteers in the Pierce County program were Christian.[77] While the chaplains were unpaid volunteers, the County provided some material support, including the use of police radios, liability insurance, and sheriff's jackets for identification purposes.[78] From the public's perspective, these chaplains effectively were a part of the Pierce County law enforcement response team.

The Washington court found the hospital chaplain context analogous and followed the Eighth Circuit's analysis in *Carter*. It held that the mostly secular counseling, provided to people of all religions and none, satisfied the *Lemon* test.[79] As in *Carter*, the opinion stated there was no religious test for the position because the chaplains came from various denominations. In addition, no religious test was imposed by the government, the court found, because TPCC was "neutrally chosen through

73. Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D.N.C. 1980).

74. *Id.* at 597; *compare* Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988) (court approved of the county-funded chaplain providing secular counseling to hospital employees, but noted that any religious counseling of that group would cross the line).

75. *Id.* at 595-96.

76. Malyon v. Pierce County, 935 P.2d 1272 (Wash. 1997).

77. *Id.* at 1275.

78. *Id.* at 1275, 1277.

79. *Id.* at 1288.

a bidding process open to all."[80] While the sheriff's department did issue a bid request and TPCC was the sole respondent, this was done at the expiration of a seven-year contract with TPCC, seeking an organization with at least ten volunteers "qualified and ready to serve" the County's crisis intervention needs.[81]

3. Introductory Analysis of the Non-Accommodation-Based Chaplaincy Cases

As described above, there are two distinct categories of chaplaincy cases. First, government necessarily imposes a religious test when it selects and provides chaplains to accommodate otherwise unmet religious exercise needs Indeed, it is involved in the challenging task—the essence of "entanglement"—of selecting which denominations should be represented, in what proportion, and whether a given candidate has the proper credentials to represent his denomination. This unusual, and typically unconstitutional, role is accepted by the courts in the name of protecting religious freedoms. As described, where the government's purpose is accommodation, the relevant question is how closely the facts of the restriction on religious exercise resemble those found in the military or prison life.

Second are contexts lacking such tangible, situational deprivations as justification for government-provided chaplains. As discussed, the courts upholding hospital chaplain services for outpatients and crisis chaplains for crime victims did not pretend to rely on those recipients' restricted movement. Instead, they first found a valid secular purpose in promoting holistic health. For the sick, the goal is improving physical health. For the crisis victims, the goal generally translates as preserving mental health and thus quality of life. In both cases, the means are government provision of religious personnel to provide comfort and counseling, of the secular, religious, and spiritual type, with a special focus on issues involving of life and death. Second, these courts held that there is no unconstitutional "primary effect" because any religious talk in response to the presence of a government-provided religious figure is the recipient's private, voluntary choice. Thus, the argument goes, the government is not advancing religion because the chaplains it provides do either secular or religious counseling, upon request, so that the circuit is broken by individual choice.

This argument, however, wrongly conflates the direct and the indirect paradigms governing Establishment Clause limitations on government aid

80. *Id.* at 1287.

81. TPCC provides similar chaplaincy services to ten other Washington State and municipal agencies. *Id.* at 1277.

to religious organizations. Before turning to the applicable Supreme Court cases and tests, it may be helpful to provide a more parallel analogy. Suppose a city administration wanted to turn its policy focus to the hard-core unemployed, and the mayor believed strongly that only a "transformational" model, in which participants turn to God to change their lives, can reach this intractable target population. So the city selects a group, "Faith Works," which approaches social problems from a faith-based perspective and requires its volunteers to have a personal relationship with God. With a nod to the Establishment Clause, but believing its limits quite diluted given the reconstituted Court and the White House Faith-Based Initiative, the city establishes certain program rules. The volunteers, who refer to themselves as "disciples," are to provide one-on-one mentoring and encouragement to program recipients, but are prohibited from discussing religion unless asked by one of the unemployed persons. The group will not be paid, but will be given use of city office space, some equipment, and will be referred clients by and meet regularly with the city's workforce development agency to review policy and coordinate efforts.

With this picture in mind, along with the courts' stated rationales, we now turn to Part III, which sets forth the Supreme Court standards that would be applied to any constitutional challenge to the Crisis Chaplaincy Model. Because the rationale used in *Carter*, *Nicholson*, and *Malyon* is more complex and multi-layered than that used in *Katcoff*, review of these Supreme Court cases is required before any further unpacking of their analysis. Part III also will show how these precedents would apply to the government's use of clergy in disaster response; while that practice would likely be analyzed primarily as a permissible accommodation, looking at the two contexts provides a useful foil.

Part III. Supreme Court Tests and Concern for the Non-Religious

Much has been written about the incoherent, confusing state of the Supreme Court's Establishment Clause jurisprudence, the intractable dissension in the Court, and its shifting, unpredictable standards.[82] One recent commentator identified ten different approaches that have been used

82. *See, e.g.*, Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33 (2005); William P. Marshall, *"We Know It When We See It," The Supreme Court and Establishment*, 59 S.CAL. L.REV. 495 (1986).

by at least one justice,[83] and valuable effort has been expended lining up the individual justices' votes on various tests in specific contexts in order to predict future outcomes.[84] There have been seismic changes in how the Establishment Clause is interpreted, with increasing leeway for government to partner with religious organizations for social service purposes, as well as expanding acceptance of government's favorable acknowledgment of the country's religious history and majority affiliations. Many have expressed well-grounded concern about the expected continued march in these directions.[85]

That said, under current law, there are several tests to which the courts would turn, selecting one or more to evaluate the crisis chaplaincies. For the most part, government neutrality toward religion is an essential illuminating value in the Establishment Clause cases. Courts still usually, though not always, employ the modified *Lemon/Agostini* test, looking for a secular purpose with an increasingly generous eye, and more easily finding that the primary effect of the government's actions is that the government has not advanced religion.[86] The endorsement test, which asks whether a reasonable person would view the challenged action as the government favoring religion, remains viable.[87] The core Establishment Clause value that the government may not use its awesome power to coerce religious conduct is agreed on by all, with significant disputes about whether coercion requires a threat of penalty or something less than wholly voluntary participation.[88] Given the extent to which the Crisis Chaplaincy Model violates the Establishment Clause, however, resolving the

83. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006).

84. *See, e.g.*, Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of* Van Orden v. Perry *and* McCreary County v. ACLU, 71 MO. L. REV. 317 (2006).

85. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097 (2006) (attacking historical support for Justice Scalia's originalist argument that the Establishment Clause allows government to favor Judeo-Christian religions); Garrett Epps, *Some Animals are More Equal Than Others: The Rehnquist Court and "Majority Religion,"* 21 WASH. U. J.L. & POL'Y 323 (2006); *but see* L. Scott Smith, *From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527 (2007) (criticizing neutrality as unworkable and calling for government to advance traditional Judeo-Christian values).

86. Agostini v. Felton, 521 U.S. 203 (1997) (essentially dispensed with "excessive entanglement" as a separate prong of the test, instead folding it in as one aspect of the "primary effect" prong).

87. *See infra* Part III.C.

88. *See infra* Part III.D.

differences surrounding these tests has less urgency here than it otherwise might, especially given the speculative nature of that task.

This Part will first look at government's newly enhanced ability to treat religious and secular organizations similarly in sharing government assets. As shown below, this religion-blind requirement has been permitted solely where the government is contracting with a number of entities, religious and secular, as part of a broad neutral scheme. Next, this Part will view the government's provision of a crisis chaplain from the recipient's perspective and evaluate whether and when doing so constitutes unconstitutional endorsement or coercion.

A. Neutrality, Primary Effect, and Religious Criteria

Neutrality has increasingly become the touchstone of the First Amendment. It is "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion."[89] There is scholarly and judicial debate about the nature of neutrality, whether religion should enjoy a favored status in some contexts and whether neutrality should bend to preserve civic values.[90] Still, under the Court's current approach to government aid programs as reflected in *Mitchell v. Helms*, neutrality is a necessary (and to that plurality, a sufficient) condition.[91] As this section will show, the Court's current precedent does not support, and likely prohibits, a local government's creating a unique partnership with a religious organization for providing a social service where there are no other secular partners.

Mitchell upheld a federal program in which state and local agencies loaned material and equipment to schools, including parochial ones. The case turned on the constitutionality of giving computers (which have no fixed content and can be used for religious purposes) to religious elementary schools, which long had been categorized as "pervasively sectarian."[92] Except in the accommodation context, direct government aid

89. Bd. of Educ., Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).

90. *See, e.g.*, Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935 (2005) (asserting that neutrality is insufficient to preserve liberal civic values); Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529 (2005) (exploring widespread disagreement over meaning of religious equality); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

Justice Breyer, author of the controlling concurrence in Van Orden v. Perry, 125 S.Ct. 2722, 2868 (2005) (Breyer, J., concurring), reiterated that the Establishment Clause requires governmental neutrality between religion and irreligion.

91. Mitchell v. Helms, 530 U.S. 793 (2000).

92. *Id.* at 840.

is deemed to have an unconstitutional "primary effect" of advancing religion if it is used for religious purposes. Prior to *Mitchell*, that test was violated automatically where such aid flowed *directly* to a pervasively sectarian organization.[93]

Justice O'Connor's controlling concurrence declared that the state may give even divertible assets to core religious organizations, when done as part of a broad neutral program also benefiting secular organizations, so long as there are enforceable promises to use those assets exclusively for secular purposes.[94] Note that the Establishment Clause requirement that a religious organization benefiting from government support be one among many in a broad neutral program is a long-standing requirement.[95] *Mitchell* is discussed here because it is the Court's most recent pronouncement in this area, and it expanded the landscape of the types of religious organizations that are eligible for government programs. Even Justice Thomas' plurality opinion in *Mitchell* acknowledged that satisfying the Court's precedential "primary effect" test requires that government "not define its recipients by reference to religion."[96]

At least under current law, actual diversion (i.e., use of government aid for religious purposes) has been approved by the Court only in true private choice "indirect aid" cases.[97] These indirect aid cases include

93. *See* Hunt v. McNair, 413 U.S. 734 (1973) (defining "pervasively sectarian" as institutions, such as churches and parochial elementary schools, where religion is so pervasive that "a substantial portion of its functions are subsumed in the religious mission").

94. *Mitchell*, 530 U.S. at 843. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. U.S., 430 U.S. 188,193 (1977).

95. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (allowing religiously-affiliated organization to participate in government counseling program because it was a broad neutral program, involving secular organizations as well). The Court's tax subsidy cases confirm that government cannot give a benefit exclusively to religious entities, although doing so is permissible when provided on a broad neutral basis, such as to all not-for-profit charitable organizations. *Compare* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (exempting only religious periodicals from state sales tax unconstitutional) *with* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for religious organizations as part of broad, neutral exemptions for charitable non-profits).

While distinguishable on numerous bases, the public forum free speech cases also support the rise of neutrality as a governing principle for Establishment Clause considerations. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (extending line of cases requiring equal access for religious speech in public forums to religious clubs using public school space after school). In these cases, government entities refused access to religious groups on grounds of compliance with the Establishment Clause, and the Court held that this was viewpoint discrimination in violation of the Free Speech Clause.

96. *Mitchell*, 530 U.S. at 822 (plurality opinion).

97. *Id.* at 840 (O'Conner, J., concurring).

Zobrest (where the state did not violate the Establishment Clause by providing an interpreter for a deaf child who chose to attend a parochial high school because the state provided interpreters for all deaf children),[98] and *Witters* (holding that state-provided tuition assistance for blind students can be used to attend a Christian college for religious training).[99]

Where government aid flows to a religious purpose solely through private choice, it has been upheld even where the vast majority of choices were religiously affiliated, as in the ground-breaking school voucher decision, *Zelman v. Simmons-Harris*.[100] Even in *Zelman*, however, eighteen percent of the private schools at which families could use the vouchers were secular. Finally, the outer limits of the indirect aid paradigm are shown in *FFRF v. McCallum*, where the Seventh Circuit allowed the state to skip the "intermediate step" of providing a paper voucher.[101] That case allowed the state to contract directly with a faith-based halfway house, which had religious programming, because it was one among several choices (the rest of them secular) and any payment to them was based on the parolee's individual choice.[102]

One might argue that the Crisis Chaplaincy Model should not be evaluated under the government-aid rubric because the volunteer chaplain organizations are assisting the government, and they are not paid government funds, but that point does not change the analysis. First, *Mitchell* itself involved the loan of equipment and materials and not grant funds. Most chaplaincies receive some sort of tangible assets from the government, such as office space or vehicles or, as in *Malyon*, the use of police radios, sheriff's jackets and liability insurance. Second, the same argument—that the religious organization is not truly receiving government aid because it is helping the government by participating in the program—could be made in most similar cases. The fact that there is a secular purpose requirement, and that the government has decided to provide assets or dollars for a neutral program, means that the delegate agency is performing some task that the government wants done—one that the government often is performing itself in some form. It is typical for the

98. Zobrest v. Catlina Foothills Sch. Dist., 509 U.S. 1 (1993).

99. Witters v. Wash. Dept. of Serv. for the Blind, 474 U.S. 481 (1986). The Court recently established, however, in the controversial decision of *Locke v. Davey*, that while such indirect aid is permitted by the Establishment Clause, a state's choice to restrict such a religious use of its aid funds does not violate the Free Exercise Clause. Locke v. Davey, 540 U.S. 712 (2004) (upholding Washington college financial aid program that excluded state payment for religious ministry degrees).

100. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

101. FFRF v. McCallum, 324 F.3d 880 (7th Cir. 2003).

102. *Id.* at 882.

private and public entities to be working together, in concert, to achieve an important social service, or for a former government function to be privatized in whole or in part.

Moreover, government conferral of a special status or unique relationship on a religious organization can alone violate the Establishment Clause. In *Kiryas Joel*, the Court struck down New York's creation of a special school district for an Orthodox Hasidic Jewish community that was designed to permit them to receive the special education services provided to all in a more familiar environment. This was done on the grounds that there was no assurance "the benefit received by the Satmar community [was] one that the legislature [would] provide equally to other religious (and nonreligious) groups."[103] While some have limited the case to its narrow facts as disallowing sect-specific accommodations, it does show that government benefits do not have to include funding to trigger neutrality concerns. This Establishment Clause concern over government favoritism to religion outside the funding context is developed further in the next section, which covers the endorsement test.

B. Unpacking the Conflated Application of the *Mitchell/Zobrest* "Direct/Indirect Aid" Paradigms to the Crisis Chaplaincy Scenario

The hospital/crisis-chaplaincy cases appear to provide a multi-layered, implied argument that goes beyond any approved in the Supreme Court precedent. The possible assumptions are laid out below as guideposts to further analysis.

At times, these cases appear to acknowledge that one of the government's purposes is to make religious counseling available, even for those persons whose religious exercise rights are not restricted, because such religious counseling is a good thing. If that is a government's purpose for choosing a religious person to perform the role, there is a clear primary effect of the government itself advancing religion. The unconstitutionality of this scenario will be discussed in the endorsement and coercion sections.

At other times, however, the argument seems to be that these chaplains are providing primarily secular counseling, and that any religious counseling is at the recipient's request, so that the indirect aid paradigm applies. One unstated step to the argument is the assumption that there is no constitutional violation for the government to select a single religious provider for the job, so long as that selection only favors organized religion over non-religion, but does not specify a denominational preference. Alternatively, the Washington Supreme Court allowed the single provider

103. Bd. of Educ., Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 702 (1994).

organization itself to impose the religious requirement on its volunteers, on the grounds that the government was open to using either a secular or a religious provider. Regardless of which entity, public or private, imposes the religious test, there is another problematic and unusual facet to this characterization: it is a single individual, in the person of a chaplain—rather than a selection of organizational providers—who is charged with giving each program beneficiary that critical choice between secular and religious counseling services. This section will address each of these three points in turn.

First, nothing in the Supreme Court's precedent at this point would allow a government to intentionally select a single religious organization as the provider of government-sponsored secular counseling services solely because the selection is nondenominational and only favors organized religion over non-religion. As discussed above, the *Mitchell* and *Bowen* line of cases all rest on government offering the government-owned assets or participation in the social service program to a wide range of organizations, using neutral, secular criteria to select providers.

Further, any test imposed by the government as a job condition, which requires a person to be certified as a believer in good standing with an organized religion, violates not only the Establishment Clause but is likely to violate the little-used Article VI of the Constitution as well. Article VI provides in part: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[104]

In *Torcaso v. Watkins*, the Supreme Court specified that this ban on religious tests encompasses any requirements "which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religion founded on different beliefs,"[105] including "Secular Humanism."[106] *Torcaso*, relying on both Article VI and the First Amendment, struck down a Maryland constitutional provision that required state office holders to declare their belief in God. The Court held that the plaintiff, who was appointed notary public by the Governor, could not be denied his commission because he refused to swear the oath.

One can debate whether a volunteer position as a crisis chaplain could ever be construed as an "Office or public Trust," but the role certainly is official, cloaked with the mantle of authority and created to encourage trust. Moreover, *Torcaso* remains precedent for the point that generally,

104. U.S. Const. art. VI, cl. 3.

105. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

106. *Id.* at 495 n.11.

government cannot decide whether someone is qualified to carry out a public position based on whether they believe in God or whether their stated religion is theistic. Express religious hiring by the government is limited to cases governed by the accommodation principle, which as of now the Court has not extended beyond the military and prison chaplain programs and the position of legislative chaplain based on historical grounds and ceremonial deism.

The second permutation looks at what would happen if the government did not actively recruit a religious provider, but instead ended up with one through a neutral selection process. There, the law may allow the religious provider organization itself to impose a religious requirement on its members (or employees or volunteers), but only within the context of simultaneously prohibiting those members from engaging in religious activities during the government program.

As noted above, one leading accommodation decision, *Corporation of the Presiding Bishop v. Amos*, extended religious organizations' Title VII exemption from the ban on religious employment discrimination to include all their secular nonprofit activities.[107] The current debate is whether religious organizations should forfeit their right to religious choice in hiring if they accept government aid.[108] At President Bush's request, federal agencies have modified their regulations to preserve that right to discriminate, or preserve their religious identity, depending on one's perspective.[109] These controversial new federal regulations, however, still simultaneously prohibit religious organizations from engaging in any religious activities while providing services in the government program. Now that government programs are actively promoted to more intensely religious organizations (including those previously labeled "pervasively sectarian"), federal regulations also clearly specify that any inherently religious activities (including worship, instruction or proselytization) must be conducted separately in time and location from the government program activities.[110]

Indeed, such restrictions on religious use may be the last remaining prohibition still required by the Establishment Clause. Thus, while current

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107. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 328 (1987) (citing section 702 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-2).

108. *See, e.g.*, Lupu & Tuttle, *supra* note 8, at 51-57; Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002).

109. *See* Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002). All new federal regulations promulgated in response to this Executive Order are compiled at http://www.whitehouse.gov/government/fbci. *See also* Gilman, *supra* note 8, for a critique of this extraordinary exercise of administrative authority.

110. *See, e.g.*, Dept. of Health and Human Serv. Reg., 45 C.F.R. § 87.2(c) (2007).

law might allow a government to use a religious organization to provide crisis counseling and that organization, when selected pursuant to a true open bidding process, might be able to select its members using a religious criterion, that organization's members would not be allowed to engage in religious counseling or prayer while engaged in the government crisis counseling program.

In addition, where the final result of the application of neutral secular criteria is a single religious provider, the assertion of government selection via an open neutral process would have to stand up to some scrutiny. In a case like *Malyon*, where the "open bid process" took place in response to litigation (after the religious chaplain group had performed the job for seven years and was the provider in numerous local counties and municipalities), the suggestion of a neutral process was transparently weak.[111] There is, however, some case law support for a government using a religious provider in a "sole source" contract to perform a secular function where the process is neutral and the religious organization is uniquely able to perform the task.[112] Again though, while the organization would be able to continue to enforce its religious identity through a religious hiring or membership criterion, that organization would not be at liberty to then use its new unique governmental position to engage in religious discussions with program participants. And in the case of the Crisis Chaplaincy Model, the partnership is close enough that there are separate problems under the endorsement test.[113]

Third, and finally, nothing in the government aid cases supports the idea that aid is "indirect" where a *single person*—rather than a selection of organizational providers—is charged with providing the individual recipient her critical choice between secular and religious counseling services. The indirect aid cases involve applying a government voucher to help pay for the school the recipient has chosen, or informing a parole officer which of several halfway houses a parolee has chosen to attend. The decision, whether religious or secular, is made in advance, outside the presence of the providers, and without any identifiable emotional or time pressure. Here, the beneficiary is in an emotional situation, whether due to illness or tragedy, and physically with an identifiably religious person. The only substantive limitation on the government program is that the

111. Maylon v. Pierce County, 935 P.2d 1272, 1275 (Wash. 1997).

112. *See, e.g.*, Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991) (holding constitutional federal aid for construction of religious secondary schools abroad if, on remand, government could show some compelling interest, such as that grantee was, as a practical matter, the only real channel for aid in that country or area).

113. *See infra* Part III.C.

beneficiary first has to indicate an interest in taking advantage of the religious provider's clearly observable religious expertise before that provider is allowed to engage in inherently religious activities. Laid out in this detail, it is clear that the Crisis Chaplaincy Model sets the "indirect aid" approach on its head. This scenario is so redolent with endorsement and coercion concerns, it is time to turn our attention to those alternate Establishment Clause tests.

C. Endorsement

There is unconstitutional government endorsement of religion where a government gives special treatment to the religious and there is no burden on religious exercise to justify that action as an accommodation. Limiting participation in a city's crisis response team to "chaplains" who are recommended by their clergy makes a loud public statement that the administration believes religion is needed in times of crisis.

The "endorsement test," proposed by Justice O'Connor and originating in the holiday display cases, asks whether a reasonable observer would perceive the challenged religious activity as a government endorsement of religion, when looking at it in the context as a whole.[114] The heart of the rationale for this approach is that "[e]ndorsement sends a message to 'nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[115]

While the endorsement test is used only sporadically by the Supreme Court, it is frequently part of the lower courts' Establishment Clause tool kit, where it is often viewed as a subset of the *Lemon* test.[116] In addition, while there is serious doubt as to the test's command of a majority of the new Supreme Court, it retains some importance. As recently as *Van Orden v. Perry* (one of two recent cases addressing a Ten Commandments display), Justice Breyers' controlling concurrence employed analysis very much like the endorsement test in approving the monument on the grounds of the Texas state capitol. He looked to the circumstances of its placement

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114. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (city's inclusion of a crèche, among secular objects in its holiday display in a private shopping area, held constitutional). *See also* Allegheny v. ACLU, 492 U.S. 573 (1989) (holding unconstitutional a county's Christmas-time display of a crèche, standing alone on the grand staircase of the county courthouse).

115. *Lynch*, 465 U.S. at 688 (quoted in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000)).

116. *See, e.g.*, Mellon v. Bunting, 327 F.3d 355 (4th Cir. 2003) (military college supper prayer violated *Lemon* because of unconstitutional primary effect where state institution endorsed the need for religion so unequivocally).

on the capitol grounds and its presence for forty years without challenge as evidence that it had been perceived as conveying a primarily secular message.[117] Moreover, whatever its future in that context, it retains viability for interactive situations like the chaplaincies. When Justice Kennedy (one of the Court's current swing votes) repudiated the endorsement test's detailed contextual focus, his rejection was based on reasoning that "the risk of infringement of religious liberty by passive or symbolic accommodation is minimal" because there is no coercive aspect.[118] Finally, the Court used the endorsement test relatively recently in *Santa Fe Independent School District v. Doe*,[119] a case with strong similarities to the Crisis Chaplaincy Model.

In *Santa Fe*, the Court held unconstitutional a school policy authorizing the student body to elect a student to deliver a "brief invocation and/or message" before home football games to "solemnize the event" and promote good sportsmanship.[120] A dominant issue was whether the prayer that resulted was private speech or attributable to the school district.[121] Its reasoning forecloses the two methods a city might use to distance itself from the endorsement problem inherent in implementing a Crisis Chaplaincy. One is the assertion that the not-for-profit entity it contracts with, and not the city itself, is the party that imposes a religious test on volunteers. Another is the argument that the city is not advancing religion by providing a chaplain on the scene because any religious conversations that take place originate with the victim.

In *Santa Fe*, the Court applied the endorsement test and found a violation based on several factors despite the school's attempt to separate itself by a two-step election process.[122] The students first voted whether to have an invocation at football games and next selected the student speaker for the year.[123] The Court rejected the characterization of the student's pre-

117. *Van Orden v. Perry*, 545 U.S. 677, 698-705 (2005) (Breyer, J., concurring). *See also id.* at 681-92 (Rehnquist, J., plurality opinion) (upholding display based on monument's historical significance and passive nature of the symbolism). *But see McCreary County v. ACLU*, 545 U.S. 844 (2005) (display of Ten Commandments on court house wall violated Establishment Clause; Justice Souter applied *Lemon* test and found unconstitutional religious purpose for display).

118. *Allegheny*, 492 U.S. at 662 (Kennedy, J., dissenting). *See also id.* at 655-79 (objecting to "the very nature of the endorsement test, with its emphasis on the feelings of the objective observer" and the analysis of "minutiae" accompanying its contextual focus).

119. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

120. *Id.* at 298, 298 n.6.

121. *See generally* G. Sidney Buchanan, *Prayer in Governmental Institutions: The Who, The What, and The At Which Level*, 74 TEMP. L. REV. 299 (2001) (discussing *Santa Fe*).

122. *Santa Fe*, 530 U.S. at 301.

123. *Id.* at 297-98.

game prayer as private speech based on the degree of school involvement: the board required the elections, authorized only one student speaker, regulated the content of the message, and delivered it over the school's public address system at a school function on school property.[124] Also, the policy, by its own terms, "invites and encourages religious messages."[125] Not only is a "religious message . . . the most obvious method of solemnizing an event," but an "invocation" was the only format the school expressly suggested.[126] The Court examined the definition of "invocation" and noted it was "a term that primarily describes an appeal for divine assistance."[127] In addition, the school had a tradition of a student chaplain that the election procedure replaced. For these reasons, the alleged "'circuit-breaker' mechanism of the dual elections and student speaker [did] not turn public speech into private speech . . . ."[128]

For a closer analogy, which mirrors the endorsement impact of the Crisis Chaplaincy Model, the "Clergy in the Schools" case provides a compelling argument. In *Oxford v. Beaumont Independent School District*,[129] the court held unconstitutional a program in which clergy were invited into the public schools to discuss moral and lifestyle issues with middle-school students. Although the program rules specified that the discussions be secular and banned proselytizing,[130] it violated the First Amendment based on the exclusionary religious criterion for participation and the school district's apparent endorsement of religious leaders as the best persons to discuss such issues with students.[131]

The district court's analysis applies readily to the Crisis Chaplaincy Model:

> The whole . . . volunteer program conveyed the message that clergy are "uniquely qualified" to carry out counseling and mentoring on the broad range of secular topics covered by [Clergy in the Schools]. Thus, [the] program failed both the second prong of the *Lemon* test

124. *Id.* at 304.

125. *Id.* at 306.

126. *Id.*

127. *Id.* at 306-07.

128. *Id.* at 310. *See also* Wallace v. Jaffree, 472 U.S. 38 (1985) (holding uncon-stitutional a moment of voluntary prayer or meditation in public school based on school board's documented religious purpose and on unconstitutionality of government endorsing prayer and sending a message of state approval to school children).

129. Oxford v. Beaumont Indep. Sch. Dist., 224 F. Supp. 2d 1099 (E.D. Tex. 2002), *remanded from* Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462 (5th Cir. 2001) (*en banc*).

130. *Beaumont*, 240 F.3d at 465.

131. *Beaumont*, 224 F. Supp. 2d at 1114.

> and the endorsement test because it conveyed the message that religion is preferred over non-religion.[132]

The Fifth Circuit opined that if the clergy were one among many types of persons invited to discuss such issues with the students, then a clergy program would be permissible.[133] On remand, the district court, after reviewing the school programs, found none that were comparable in terms of the types of access to the students and the depth of discussions; all programs that were arguably similar turned out to be smaller, or lecture-format, or distinguishable in some other way.[134]

Turning to the Crisis Chaplaincy Model, two distinct attributes violate the endorsement test. First, the use of the term "chaplain" to identify the volunteers that police call to the scene to assist victims conveys the message that the government believes religion is necessary to face traumatic events. Indeed, some municipalities using that model frankly explain that "the spiritual dimension implicit in the chaplain's role" is critical to helping people cope at such times.[135] Without saying a word, when someone is identified by an official badge or jacket emblazoned with "Chaplain" and "Metropolis Police Department," the title alone introduces the issue of religion into the city's law enforcement response. In *Santa Fe*, the Court found that the school board's use of the word "invocation," which by its common meaning "invites the divine," was a factor showing endorsement of a religious message.[136] A city's use of the term "chaplain," which suggests to the public that the person is clergy or at least has religious training and identification,[137] has a similar impact.

Second, the reasonable person in endorsement analysis is assumed to be familiar with the program as a whole, so that the imposition of a

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132. *Beaumont*, 224 F. Supp. 2d at 1114. (citations omitted). Compare the incomplete approach taken in *Carter* (which was decided prior to *Allegheny*), where the Eighth Circuit rejected the argument that the County's hospital chaplain program unconstitutionally advanced religion because of the symbolic tie it created between government and religion, on the grounds that the chaplain was nonsectarian, not addressing the endorsement of the religious over the secular. Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 456 (1988).

133. *Beaumont*, 240 F.3d at 472.

134. *Beaumont*, 224 F. Supp. 2d at 1113.

135. *See, e.g.*, Seattle CC Site, *supra* note 13.

136. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000).

137. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (defining "chaplain" as: "1.a. a clergyman appointed to officiate in a chapel . . . 2. a clergyman officially attached to the army or navy, to some public institution, or to a family or court, 3. Any person chosen to conduct religious exercises (as for a society)").

religious test for crisis counseling volunteers also is unconstitutional.[138] The problem exists whether the criterion is ordination, ecclesiastical endorsement, or a detailed letter of reference from one's clergy. As explained in the "Clergy in the Schools" decisions, this barrier to entry conveys the unmistakable governmental message that only religious persons—specifically, those affiliated with and approved by traditional, organized religious bodies—are qualified to carry out the essential human job of helping another cope with the immediate impact of facing death and loss.[139]

Santa Fe also shows that governments cannot distance themselves from this message of endorsement by claiming that the volunteer organization is the one promoting a religious response.[140] The role of a local Crisis Chaplaincy cannot be characterized as solely private speech because of the degree of government involvement. The city (or county) often initiates the program and, at a minimum, structures and implements the relationship between the volunteer organization and law enforcement. By calling chaplains to the scene of a homicide or accident, and requesting their assistance within twenty to thirty minutes, the government gives the chaplains a special kind of access and a unique official role. They are relied on and perceived as part of the city's law enforcement team. One reason for such programs, in fact, is to free up officers' and emergency personnel's time by relieving them of the "soft" duties of assisting family members and witnesses. Also, the city often provides the volunteers with the use of some city assets such as jackets or office space. By choosing to create and benefit from this relationship, a city cannot avoid all responsibility for the organization's identity or religious discrimination. Indeed, this type of partnership is so close that it likely would violate the endorsement test even if the religious chaplain organization was the sole responder to a city's request for a volunteer organization.[141]

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138. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) (describing the "reasonable observer" of the endorsement test as both rational and understanding the practice's history and context); *compare* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 806 (1995) (Stevens, J., dissenting) (reasonable observer test should focus on what is apparent to the passerby, so should be violation where private speech appears to be government speech; courts should not be permitted to dismiss an Establishment Clause problem based on a hypothetical person with additional contextual knowledge).

139. *Beaumont*, 224 F. Supp. 2d at 1114.

140. *Santa Fe*, 530 U.S. at 290.

141. Moreover, the court in *Malyon* simply erred on this point, given the sheriff's seven years experience with the Christian Chaplaincy prior to the allegedly open bid. Under similar circumstances in *Santa Fe*, the Court viewed the school's election process with skepticism because it was instituted after years of having a student chaplain give the prayer. Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).

In contrast, inviting clergy and pastoral counselors to participate in disaster assistance does not send an unconstitutional message of endorsement. In any governmental response to a large- or medium-scale emergency, a broad variety of helpers are called to the scene. The full response likely will include secular grief counselors and social workers, as well as practical assistance. As the Fifth Circuit determined in "Clergy in the Schools," there is no unconstitutional endorsement where others have similar roles, so that there is no suggestion of governmental favoritism.

D. Coercion

The coercion test represents the rock-bottom value underlying the Establishment Clause. As Justice Kennedy declared in the case that coined that value as a test, *Lee v. Weisman*: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[142] What is debated, however, is the degree of coercion required, including whether psychological coercion should suffice[143] and the extent to which *Lee* applies outside the school children context.[144] By any reasonable interpretation of *Lee*'s principles (as reaffirmed by *Santa Fe*),[145] the Crisis Chaplaincy is unconstitutionally coercive.

The *Lee* Court held it unconstitutional for a school to invite a clergy person to give a nonsectarian invocation and benediction to solemnize a high school graduation. The principal had invited the clergy person (a rabbi), provided him with "Guidelines for Civic Occasions," and instructed him that the prayers must be nonsectarian.[146] This effort to avoid divisiveness, however, did not remedy the problem of prayers promoted by the state. "That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors."[147] The school had argued that graduation was so important an occasion that it needed to be

142. Lee v. Weisman, 505 U.S. 577, 581 (1992).

143. *See id.* at 643 (Scalia, J., dissenting) (coercion only violates Establishment Clause where participation required by force of law); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 7 WM. & MARY L. REV. 933 (1985) (arguing for requirement of legal coercion).

144. *See* Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1 (2006) (finding unlikely any attempt to extend *Lee* beyond the school context, given the current Court's stated Establishment Clause views).

145. *Santa Fe*, 530 U.S. at 312 (regarding student prayers to open school football game, the Court held that even if attendance is deemed purely voluntary for every student, there is still an "improper effect of coercing those present to participate in an act of religious worship").

146. *Lee*, 505 U.S. at 579-80.

147. *Id.* at 594.

solemnized by official recognition of God's help. The Court saw the argument as a "fundamental inconsistency" because what many might see as a "spiritual imperative" was for the objectors "religious conformance compelled by the State."[148]

Two factors led to the finding of unconstitutional coercion. First, as a practical matter, there was little real choice in participation. The Court pointed to the social pressure and strong desire to attend such a significant rite of passage and contrasted it to the legislative prayer in *Marsh*, "where adults are free to enter and leave with little comment and for any number of reasons."[149] Second, those offended have a special vulnerability. In *Lee*, the Court relied on the heightened concerns that elementary and high school students are more vulnerable to subtle coercive pressure than are adults.[150] Later in the decision, however, Justice Kennedy also expressed that the "concern [about coercion] may not be limited to the context of schools . . . ."[151]

The Crisis Chaplain Model is unconstitutionally coercive under the *Lee* framework. It also involves a situation where a city has initiated or agreed to such a program, selected the provider and provided guidelines on when prayer may occur. Any requirement that the chaplains represent various denominations or pray in a nonsectarian way is insufficient, just as the insistence on a more generic prayer did not save the practice in *Lee*. Further, as previously discussed, the expressed reason for using the title "chaplain" and requiring clergy endorsements is the majoritarian belief that people need the presence of religion in times of tragedy and that an unchurched helper is inadequate. This is exactly analogous to the school's view, rejected in *Lee*, that some type of prayer was needed to solemnize the significant occasion.

The final, essential elements of coercion are present as well: forced encounter with the religious and special vulnerability of the audience. When a chaplain comes to stand by the side of someone who has just suffered a tragic loss, been abused, or witnessed a terrible death, that person is in a uniquely vulnerable position. This point is supported by social science research and psychological practice[152] and, indeed, the

148. *Id.* at 595-96.

149. *Id.* at 597.

150. *Id.* at 592.

151. *Id.*

152. *See generally* DEBORAH SPUNGEN, HOMICIDE: THE HIDDEN VICTIMS: A GUIDE FOR PROFESSIONALS (Interpersonal Violence: The Practice Series, Jon R. Conte ed., Sage Publications 1998); JUDIE A. BUCHOLZ, HOMICIDE SURVIVORS: MISUNDERSTOOD GRIEVERS (John D. Morgan ed., Baywood Publishing Company 2002); Chris R. Brewin, et al., *Meta-*

victims' helpless and confused post-tragedy state is the very reason proffered to have these programs.[153] While most recipients of such services may be adults, at that moment and in that context, they cannot be presumed free to explain calmly any objections they may have to a chaplain's participation in their tragedy. The physical setting also is coercive because the government has sent a chaplain to visit in one's home or to stand by one's side. While the policy (and in most cases the practice) is that engaging in prayer or discussing God is voluntary, simply meeting one-on-one with a chaplain is a religious experience—one that has not been chosen by the participant.

At least one recent case supports the contention that *Lee* is not limited to the "peculiar susceptibility" of grade school and high school children.[154] While several cases had held that prayer at a public college graduation ceremony was not coercive, based on the participants' adult age and maturity, the Fourth Circuit held unconstitutional a supper prayer conducted at a military college in *Mellon v. Bunting*.[155] While understanding that coercion is less likely with older students, the court recognized that certain aspects of the military school environment were calculated to break down the will of the cadets and breed conformity. In that atmosphere, even older students were vulnerable to coercion. Similarly, the experience of the trauma that creates the need for a crisis chaplain at least temporarily breaks down the autonomy and independence of the adult victims left behind. Under these circumstances, the coercion test should be applicable to adults of any age.

In the disaster response context, there is less risk of coercion. While these adults also are suffering from severe stress, there is no government-planned individual encounter with a chaplain, except upon the victim's initiative. Where the timing and situation allows the government to implement its plan and muster the community's resources to help people (as in the welcome centers established in host states for Katrina refugees),

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analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults, 68(5) J. OF CONSULTING AND CLINICAL PSYCHOL. 748 (2000); *see also* Alexander C. McFarlane, *Psychiatric Morbidity Following Disasters: Epidemiology, Risk and Protective Factors*, *in* JUAN LOPEZ-IBOR, DISASTERS AND MENTAL HEALTH 37 (Juan José López-Ibor et al. eds., John Wiley & Sons Ltd. 2005) (noting importance of immediate post-trauma period as critical factor in recovery); Anthony V. Rubonis & Leonard Bickman, *Psychological Impairment in the Wake of Disaster: The Disaster-Psychopathology Relationship*, 109(3) PSYCHOL. BULL. 384 (1991).

153. *See supra*, note 15 and accompanying text.

154. *See* Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003) (discussed in Doobosh, *supra* note 12, at 1514-16); *see also* Bindon, *supra* note 12 (arguing that coercion test should apply to military because the culture promotes conformity, which makes personnel susceptible to coercion, similar to high school students).

155. *Mellen*, 327 F.3d at 356.

any chaplains provided will be part of a broad array of services, including mental health professionals. In addition, meeting in a large gathering center is qualitatively different from meeting in one's own home. Moreover, in an unfolding public emergency, where there can be no deliberate government assignment of a chaplain to a particular person, any interaction will lack any coercive meaning. Finally, victims in a disaster often are deprived of their usual community structure, including religious care. In those circumstances, for government to provide clergy to conduct worship services or engage in other religious conduct is an accommodation, not an endorsement or coercion.

Part IV. Towards a Comprehensive Model

The conclusions drawn about the Crisis Chaplaincy Model and clergy disaster response provide some helpful guidelines that may be used to shed light on the other types of government chaplaincies, including those that are the subject of current interest and those yet to receive judicial scrutiny.

The argument has already been made for extending the accommodation rationale from situations where government itself restricts persons' movement (and thus burdens religious exercise) to contexts such as hospital inpatients and disaster relief, where one's access to religious services is burdened by exigent circumstances, and the government is in some sort of caretaker role.[156] There, following the military and prison model, government makes an effort to replicate the types of religious experiences to which the affected persons would have access "but for" the difficult situation taking them outside their ordinary milieu. Because the restricted movement is more temporary, one would expect the corresponding accommodation to be less extensive and precise—and typically it is. Few hospitals, if any, will employ chaplains representing the diversity found in the military system, for example.

While most of this Article has separated the two types of rationales for government chaplaincies for purpose of clearer and deeper analysis, this Part begins to examine how the two rationales intersect and proposes graduated guidelines along a more nuanced continuum. As the argument becomes increasingly attenuated for lifting a circumstantial burden impeding religious exercise, government's role must be correspondingly less active with respect to facilitating religious exercise. Once there is no identifiable burden to be lifted, government no longer may provide exclusively religious personnel or religious counseling. When government's purpose is helping people by attending to their emotional or

156. *See* discussion *supra* Part II.A.

spiritual needs—needs that go beyond physical and material care—any facilitation of a religious response must be wholly voluntary, supported by government neutrality and choice. The next step is to analyze possible accommodation arguments for the common existing practices: chaplains for government hospital outpatients and for fire and police department personnel.

The VA hospital outpatient context may be the next step along the continuum. Looking at the argument put forth by the Seventh Circuit years ago in *Baz*, if veterans would get a certain level of pastoral counseling and chaplain services at any private hospital, then perhaps they should not have to forfeit their earned right to free medical care in the VA in order to obtain those now-standard services. The "burden" potentially associated with free government health care is being preemptively lifted, by affording the same type of spiritual care services offered elsewhere. This argument imposes a clear limit, however, on the types of services that the government hospital can offer; it cannot be on the forefront of integrating religious faith and healthcare, but rather must be limited to those services that are *standard* elsewhere. The burden should be on the government entity providing religious care to show that each particular service it offers is required by JCAHO standards.

When the circumstances are that far departed from the accommodation model, however, government's actions need to be constrained further to safeguard their primary effect and the message sent by the unusual conduct of providing religious services to persons who are able to obtain them independently. Where the government offers chaplains to outpatients as part of its healthcare system, it is critical that (1) such services be one among many choices, including functionally similar secular alternatives, so that any use of them is truly voluntary, and (2) there is no express or implied government message preferring or recommending the religious provider.

One further twist in the government hospital chaplain context is the dual role they play. The hospital is permitted, constitutionally, to employ personnel to provide religious services to those with restricted movement, such as inpatients. There may be some facilities where finances only allow for one person to perform both the accommodation needs of inpatients and the mind-body care of outpatients. In the face of well-established institutional constraints, and analogizing to the administrative reasons for military chaplains in large cities, allowing one person to perform both roles may be defensible. This is distinguishable from the Crisis Chaplaincy Model because there, the chaplains have only one role, which is to assist persons who are out in the community.

Such situations, however, require extra care to communicate government neutrality and protect freedom of choice. There can be no defense, for example, for the excesses cited in the *Nicholson* opinion, where one VA hospital provided a written statement to its patients: "We believe that faith plays an important role in a person's sense of health and wellness." "Faith" most commonly translates as "religious faith" and, in the context of a "spiritual assessment," asking the patient how frequently she attended church would be understood as such. Once a government hospital is offering a more religious program than is generally available or stating opinions promoting religion as part of patient care, then the government has crossed the line and is "itself advancing religion." In addition, any type of detailed questioning about a patient's religious practices and spiritual leanings must be administered in a neutral context, which means by someone other than a chaplain. Where a clergy person is asking those questions in a one-on-one meeting, with the only limit being the patient's theoretical right to request that the questioning be stopped, there is a clear and unconstitutionally coercive effect.

Turning to the police and fire chaplaincies requires developing and testing different rationales. Neither the long shifts common in fire departments nor the "para-military" authority structure of the police department provide much traction as grounds for providing these government employees with chaplains. What is unique about their roles, and reminiscent of the military, is that these men and women lay their lives on the line to protect society. The nature and severity of that stress understandably may lead to a need for counseling, of the religious or the secular type. Unlike in the military, however, their government employment situation does not impose an obstacle to obtaining that counseling.

Facing death, however, may create a need for organized religion's sacramental response. The court in *Nicholson* observed that there have always been chaplains in military hospitals; in the past, however, their role was sacramental, including the role of administering last rites, which is essential in many faith traditions. This rationale provides some support for fire department chaplains, at least for deploying clergy to the scenes of fires where lives are at risk and to other similar emergency responses. It fails with respect to police department chaplains, however, because the nature of the risk is so different. Typically, when police officers are risking death, it is on the streets tracking down and confronting alleged criminals, which are not the sorts of situations where a police chaplain would participate or stay on the scene. The sacramental rationale functions well only where the risk of death is in a fixed location and at a predictable time.

Where police, fire or other government emergency personnel want the religious counseling of a chaplain to sort out their emotional and spiritual response to the issues of violence and death they face, they are in a situation fairly analogous to the victims in the Crisis Chaplaincy Model. While the endorsement and coercion problems are less prominent in the institutional setting than in the one-on-one meetings between chaplain and victim, the ability to meet one's own religious needs in the community is similarly clear-cut.

Nevertheless, many people have a spiritual need to obtain comfort and guidance from a distinctly religious perspective and from religious personnel when faced with tragic death and loss. While it is not the proper role of government to provide that religious counsel where it can be obtained in the community, it is in everyone's interest for that fundamental need to be met and for clergy and chaplains to train and prepare to fulfill that role in a large-scale disaster.

One constitutional method of accomplishing that goal is to maintain referral lists of clergy and credentialed chaplains, from a diversity of faith traditions, who are trained in the art of responding to crisis and loss and willing to volunteer (or respond on a fee-for-service basis) in response to requests. Police, fire and other front-line government agencies could provide such information to their employees, in a neutral manner, as part of a broad spectrum of available services without negative constitutional impact. Similarly, where cities deploy a "crisis response team" to meet the immediate emotional needs of victims, it would be constitutional to give those responders a clergy/chaplain referral list. As they go about the task of helping victims by calling on established support networks, for those victims who express some religious need but do not have a clergy person to call, offering to contact a trained clergy person or chaplain to meet that need is an appropriate middle ground. At least one court has upheld the constitutionality of government maintaining and providing a list of trained and willing clergy in the government health clinic context.[157]

With this approach, clergy could prepare for disaster response and meet any immediate religious needs of victims in crisis without affecting the freedom of nonreligious victims and nonreligious crisis volunteers. Also, this route removes the coercion concern. It is human nature to feel more comfortable declining an interaction with an unknown, absent person, and less so when already speaking face-to-face to someone who is helping

157. *See* Greenville Women's Clinic v. Comm'r S.C. Dep't of Health and Envtl. Control, 317 F.3d 357, 364 (4th Cir. 2002) (upholding South Carolina statute regulating abortion clinic by interpreting it as satisfied by clinic's maintaining list of clergy available for counseling, to be provided upon a woman's request).

you. Finally, only this alternative route succeeds in placing government's role in providing religious counseling in the "indirect aid" category. For the municipality interested in addressing the entire spectrum of needs of its hardest-hit citizens, and the generous clergy and chaplains who feel called to help, a referral process is a practical approach and the farthest the Establishment Clause can be stretched.

Conclusion

The impact of demonstrating the unconstitutionality of the Crisis Chaplaincy Model will not be to deprive victims of support in the immediate aftermath of tragic circumstances. Looking at the inspiring work done through the Trauma Intervention Programs (TIP), which was founded by a mental health professional, for example, shows that citizen volunteers can successfully provide twenty-four hour responsive, emotional support to those traumatized by loss without a religious litmus test.[158] For a local government to determine that the crisis volunteers who perform that function in their city should be called chaplains and to require that they first obtain a formal recommendation from their clergy to qualify is insupportable. It would be more surprising absent the current context, where a Supreme Court Justice argues that government may promote a majoritarian religious worldview, and states embrace religion-permeated, "transformational" prison programming.[159] The Establishment Clause is in a state of great flux, haunted by a parting question by Justice O'Connor: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"[160]

As government partners more frequently with increasingly more sectarian organizations on social service initiatives, more attention will need to be paid to issues of endorsement and coercion. To say that only school children are subject to such forces is to turn a blind eye to the reality

158. *See, e.g.*, Robert M. Winston, *TIP Trauma Intervention Program: Angels of Mercy & Compassion*, FIREHOUSE, July 22-26, 2003, at 116, *available at* http://www.firehouse.com.

159. *See* McCreary County v. ACLU, 545 U.S. 844, 885-912 (2005) (Scalia, J., dissenting) (asserting that this is a monotheistic country). *See, e.g.*, Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *aff'd*, 2007 U.S. App. Lexis 27928 (8th Cir. Dec. 3, 2007) (holding unconstitutional Iowa program offering special privileges and training for prisoners who participated in "transformational" evangelical Christian program). *See also* Shelia Suess Kennedy & Linda McIntyre Hall, *What Separation of Church and State?*, 5 J. L. SOC'Y 389 (2004) (approx. 70% of religious leaders surveyed did not think they had to exclude prayers while delivering services funded directly by the state).

160. *McCreary County*, 545 U.S. at 882 (O'Connor, J., concurring).

that adults are not operating as mature, rational, wholly-autonomous persons at all times, especially at the point where many social services are needed and offered. These doctrines will need to be reanimated and further developed as the full implications of the Faith-Based Initiative and the Roberts Court continue to unfold.

The people who perform the selfless and demanding work of comforting victims of personal tragedy and public catastrophe are heroes and deserve nothing but praise for their efforts, which appear to be carried out with the greatest respect and sensitivity. The Establishment Clause line is often hard to draw. In this case, however, it is clear that those who do this work as persons of faith must do so alongside those who do it solely as persons of compassion.