UNIQUELY QUALIFIED: THE CONSTITUTIONALITY OF POLICE AND CLERGY ALLIANCES

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In October 2013, the American Atheists and the Freedom From Religion Foundation both threatened to sue Montgomery, Alabama over a controversial new initiative: Operation Good Shepherd. This initiative was designed by the city to leverage the resources of local clergy to help prevent crime and comfort victims and their families at crime scenes. While Operation Good Shepherd has received significant media attention following the publication of a September 2013 article in The Atlantic *magazine questioning its constitutionality, it is not unique. Dozens of police departments in the past few decades have been teaming up with local clergy to create so-called "police and clergy alliances."*

This Note will analyze the constitutionality of Operation Good Shepherd and similar police and clergy alliances by applying several of the Supreme Court's Establishment Clause tests to different aspects of the program. This Note will then argue that police and clergy alliances do not violate the Establishment Clause so long as volunteers respect the programs' secular purposes and refrain from proselyting or talking about religious issues without the consent of program beneficiaries.

INTRODUCTION

IN October 2013, the American Atheists and the Freedom From Religion Foundation both threatened to sue Montgomery, Alabama over a controversial new initiative: Operation Good Shepherd. This initiative has allowed the Montgomery Police Department to leverage the resources of local churches and religious groups to help prevent crime and comfort victims and their families at crime scenes. While Operation Good Shepherd has received significant media attention following the publication of a September 2013 *The Atlantic* magazine article questioning its constitutionality,[1] it is not unique. Dozens of police departments in the past few decades have been teaming up with local clergy to create so-called police and clergy alliances, and at least one other city has been threatened with a similar lawsuit.[2]

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[1] Ray Downs, *Using Christianity to Fight Crime*, THE ATLANTIC (Sept. 27, 2013), http://www.theatlantic.com/national/archive/2013/09/using-christianity-to-fight-crime/280038/.

[2] An almost identical controversy is developing in Lacrosse, Wisconsin. *See* Anne Jungen, *Group Claims La Crosse Police Chaplains Are Unconstitutional*, LA CROSSE TRIB. (Feb. 21, 2014), http://goo.gl/rbuuVY ("The Freedom from

There are several reasons why these programs warrant in-depth consideration. First, the heated controversy over Operation Good Shepherd is not likely to dissipate. The American Atheists and the Freedom From Religion Foundation have said that they will continue fighting against this program even if they have to sue, while the Mayor of Montgomery stated that the city will stand up for the program in court. Second, these programs potentially implicate several different Establishment Clause concerns, touching on issues related to the endorsement of religion, financial benefits for religious groups, and even coercion of belief. Third, few academic articles or court opinions have addressed police and clergy alliances, meaning that many of the arguments are novel and potentially concern issues of first impression. Finally, this controversy could potentially serve as an appropriate vehicle for clarifying the Supreme Court's Establishment Clause jurisprudence.

For many of the same reasons discussed above, however, attempting to discern how the Court might analyze a crisis chaplaincy program based on the current precedent and scholarship is very difficult. First, every program is unique and typically not well publicized by the local government agency running it. This means that any analysis of police and clergy alliances will include a number of assumptions and generalizations. Second, any attempt to discern the current state of the Supreme Court's Establishment Clause precedent is inherently difficult given the fractured opinions that characterize recent Establishment Clause cases and the lack of a unifying theory underlying those decisions. As Justice Thomas has remarked, the Court's jurisprudence on this issue is "in shambles."[3] Finally, further complicating this analysis, these programs do not easily fit into any preexisting category created by the Court.

This Note will start by synthesizing the goals and practices of several police and clergy alliances to come up with a set of characteristics that are representative of a typical crisis chaplaincy program. Next, this Note will apply the Supreme Court's current Establishment Clause jurisprudence to police and clergy alliances by using the framework created by the famous "Lemon test"—a three-factor test drawn from *Lemon v. Kurtzman* in which the Supreme Court explained what was necessary to satisfy the Establishment Clause.[4] This Note will then argue that police and clergy alliances do not violate the Establishment Clause as long as volunteer clergy respect the program's secular purpose and refrain from proselyting or talking about religious issues absent the consent of program beneficiaries. Lastly, as part of the analysis section, this Note will

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Religion Foundation wants La Crosse police to discontinue using chaplains, arguing they are an endorsement of religion that entangles church and state.").

[3] Mark Walsh, *Thomas: Establishment Clause Jurisprudence 'In Shambles'*, EDUC. WK. (Oct. 31, 2011), http://blogs.edweek.org/edweek/school_law/2011/10/justice_thomas_courts_establis.html.

[4] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

respond to some of the criticisms levied against police and clergy alliances.[5]

I. OVERVIEW OF POLICE AND CLERGY ALLIANCES AND THE RESULTING CONTROVERSY

This Part will provide a brief overview of several different police and clergy alliances by focusing on the services they provide, their membership criteria, and their stated goals. This analysis will ultimately show that police and clergy alliances typically have two primary purposes: to employ volunteer clergy as first responders in crises and to use the unique skills of the clergy as part of community outreach and crime prevention initiatives. In choosing which programs to highlight, I attempted to find programs that represented the full range of police and clergy alliances, but was somewhat limited by the lack of information available on many of these programs.

A. Houston Police and Clergy Alliance (PACA)

The Houston PACA is one of eight volunteer initiatives run by the Houston Police Department (HPD) and is unique in that the program does not limit volunteers to clergy members.[6] Instead, it "is comprised of a diverse group of volunteer clergy who represent various faiths and religious beliefs, as well as lay people willing to abide by all City Ordinances and HPD policies."[7] The Houston PACA, however, is representative of most police and clergy alliances in the scope of its initiatives: PACA volunteers participate in call-outs,[8] "visit apartment complexes and schools to mentor at-risk students or those needing additional guidance in their lives, assist with disaster relief efforts, and [assist with] other significant events occurring within the city limits of Houston."[9]

These different initiatives dovetail with HPD's rationale for creating this program. First, clergy are typically leaders in the community and in their congregations. This allows clergy members to model good behavior both for members of their congregation and other neighborhood residents by working to prevent crime and make their neighborhood safer.[10]

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[5] *See* Mary Jean Dolan, *Government Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life*, 35 HASTINGS CONST. L.Q. 505 (2008).

[6] *Houston Police Department: Volunteer Initiatives*, THE CITY OF HOUS.: OFFICIAL SITE FOR HOUS., TEX., http://www.houstontx.gov/police/vip/index.htm (last visited December 14, 2013).

[7] Charles McClennand, Jr., *Police and Clergy Alliance (PACA) Policies and Guidelines* (April 26, 2012), *available at* http://www.houstontx.gov/police/pdfs/PACA_2012.pdf.

[8] Call-outs require PACA volunteers to respond to "situations where they can offer support to victims and their families" after a crisis-type situation. *Id.*

[9] *Id.*

[10] *Id.*

Second, PACA members can help deter violence and quell community unrest through the "timely and accurate dissemination of information" in the aftermath of significant community incidents that could lead to violence.[11] Finally, "PACA access to police leaders will reinforce their credibility within the community" because they will be an authoritative source for accurate information about police activities, initiatives, and procedures.[12]

B. Fort Worth Clergy and Police Alliance (CAPA)

The Fort Worth CAPA is similar in purpose and scope to the Houston PACA but it is also just one of at least five volunteer initiatives set up by the city of Fort Worth to help prevent crime and assist the public in crisis situations.[13] Understanding the range of volunteer programs offered by the city is particularly important here because, unlike the Houston PACA, the Fort Worth CAPA requires that all volunteers be clergy or religious leaders.[14] This is an important detail to note because a similar restriction proved problematic for the Clergy in Schools initiative[15] in *Doe v. Beaumont Independent School District* when the Fifth Circuit found that clergy members were not uniquely qualified to teach secular ethics in secondary schools, thus concluding that there was no secular justification for the restriction.[16]

In addition to CAPA, the Fort Worth Police Department (FWPD) has several volunteer programs open to all citizens allowing them to assist in both a neighborhood watch capacity[17] and in response to "their community's immediate needs in the aftermath of an extreme disaster, when

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[11] *Id.*

[12] *Id.*

[13] FORT WORTH CLERGY & POLICE ALLIANCE, http://www.clergyandpolicealliance.com (last visited Dec. 14, 2013).

[14] *Id.* ("The Clergy and Police Alliance program (C.A.P.A.) is a coalition of Clergy from every faith and denomination who work in partnership with the Fort Worth Police Department.").

[15] The Clergy in Schools initiative invited "[clergy members to] conduct[] group counseling on secular issues including race, divorce, peer pressure, discipline, and drugs [in public schools]. The program's stated goals were to provide (1) meaningful dialogue between the clergy and students regarding civic values and morality; (2) a safe school atmosphere; and (3) volunteer opportunities." Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 465 (2001).

[16] *Id.* at 470.

[17] FORT WORTH POLICE: CITIZENS ON PATROL, http://www.fortworthpd.com/get-involved/citizens-on-patrol.aspx (last visited Dec. 14, 2013) ("'Citizens on Patrol' undergo a twelve hour training session at the police academy, meet with officers on a regular basis, and are given radios and jackets that bear the Citizens on Patrol insignia. There are over 2600 members of the program active in 120 neighborhoods that patrol the streets in an attempt to strengthen their communities by serving as catalysts of change, reporting suspicious activity and working with citizens on general neighborhood support services.").

emergency services are not immediately available."[18] The FWPD has also created the "Operation Partnership Emergency Network" (OPEN) to facilitate the delivery of critical information between the government and the private sector in emergency and nonemergency situations.[19]

These organizations have many of the same goals as the Fort Worth CAPA: to strengthen neighborhoods, prevent crime, facilitate the sharing of accurate and timely information, and respond to disaster scenarios. In addition to these goals, however, the Fort Worth CAPA program also states that its mission is to "pray for our city, city leaders, police officers and special needs; assist[] the police in non-traditional roles; provide calm in crisis situations to prevent an escalation to violence; assist in domestic situations where a minister is requested or needed; [and] offer support to victims . . . ."[20] CAPA members also receive "distinct clothing and official governmental identification that will identify [them] as a CAPA member."[21]

This program is typical of what one can find in many major police departments across the country, including in Arlington, TX; Boston, MA; Dayton, OH; Desoto, TX; Newark, NJ; and Philadelphia, PA, just to name a few.[22] Most of these programs have similarly broad goals and require members to be clergy or church leaders.

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[18] FORT WORTH POLICE: GET INVOLVED, http://www.fortworthpd.com/get-involved (last visited Dec.14, 2013).

[19] OPERATION PARTNERSHIP, http://operationpartnership.org/open.htm (last visited Dec. 14, 2013).

[20] FORT WORTH CLERGY & POLICE ALLIANCE, http://www.clergyandpolicealliance.com/ (last visited Dec. 14, 2013).

[21] *Id.*

[22] *See, e.g.*, Barry Carter, *Clergy Join Police on the Beat in Newark*, NEWARK TALK: REMEMBERING NEWARK N.J. (Dec. 5, 2005, 11:08AM), http://newarktalk.com/talk/viewtopic.php?t=1323&sid=e9f06ebe7a76a36feb742bc2411e53e6; *DeSoto Police, Clergy Mark Year of Cooperation*, FOCUS DAILY NEWS, http://focusdailynews.com/desoto-police-clergy-mark-year-of-cooperation-p3571-1.htm (last visited Dec. 14, 2013); Robert Moran, *Clergy and Police: Right Hand of God, Long Arm of the Law a Longstanding Partnership Is Now Undergoing a Rebirth*, PHILLY.COM (Feb. 3, 1999), http://articles.philly.com/1999-02-03/news/25502311_1_clergy-and-police-timoney-philadelphia-police-department; *Police Department: Clergy & Police Partnership*, CITY ARLINGTON, TX, http://www.arlington-tx.gov/police/programs-and-initiatives/clergy-police-partnership/ (last visited Oct. 20, 2014); *The Story: Alliances*, BOS. STRATEGY TO PREVENT YOUTH VIOLENCE, http://www.sasnet.com/bostonstrategy/story/04_alliances.html (last visited Dec. 14, 2013); *Virginia Burroughs, Police and Clergy form PACT, Work Together*, DAYTON DAILY NEWS (June 19, 2013, 12:00 AM), http://www.daytondailynews.com/news/news/local/police-and-clergy-form-pact-work-together/nYJwk/.

C. Operation Good Shepherd

Operation Good Shepherd is an initiative launched in the summer of 2013 by the Montgomery Police Department (MPD) in response to an alarming increase in homicides throughout the city.[23] "The program allows ministers to work alongside police to comfort crime victims, defuse potentially volatile situations and offer alternatives to violence."[24] As part of this program, clergy from all faith denominations are placed on a rotating schedule to respond to crime scenes and serve as secular grief counselors for victims.[25] However, perhaps the major focus of Operation Good Shepherd is crime prevention. To that end, members of the program are asked to be active in their community, "spread the word about Operation Good Shepherd," and serve as liaisons between their faith community and the police department.[26] As Bishop Roosevelt Crawford of Connecting the Body of Christ Fellowship put it, "'[a] lot of people out committing crimes are a member of one of our churches, if they know their pastor is out it may cause them to think.'"[27]

Operation Good Shepherd, like most similar programs across the country, appears to limit its volunteers to clergy or religious leaders in the community.[28] In addition, although the clergy are volunteers, the city

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[23] Erin Edgemon, *Montgomery Police Department Partners with Church Leaders to Support Victims of Violent Crime,* AL.COM (June 7, 2013, 6:00 AM), http://blog.al.com/montgomery/2013/06/montgomery_police_department_p_1.html; Downs, *supra* note 1 ("So far this year, 39 people [] have been murdered in Montgomery, Alabama, the vast majority of them black. With a population of only 200,000, those numbers make Montgomery among the most violent cities per capita in the country. If the pace keeps up, 2013 will be the city's most violent year in four decades.").

[24] Kala Kachmar, *MPD to Continue Operation Good Shepherd Despite Threats of Lawsuit*, MONTGOMERY ADVERTISER (Nov. 17, 2013, 1:37 AM), http://web.archive.org/web/20131127075157/http://www.montgomeryadvertiser.com/article/20131117/NEWS01/311170042?nclick_check=1.

[25] *See* Letter from Kimberly O. Fehl, City Att'y, City of Montgomery, Ala., to David Silverman, President, Am. Atheists, Inc. (Oct. 22, 2013), *available at* http://ftpcontent4.worldnow.com/wsfa/linkedwebdocs/Scanned%20from%20CC_COPIER001.pdf.

[26] Edgemon, *supra* note 23.

[27] *Id.*

[28] One wonders whether an atheist minister would be permitted to participate in such a program. *See, e.g.,* FIRST CHURCH ATHEISM, http://firstchurchofatheism.com/ (last visited Sept. 24, 2014). Presumably this would not ameliorate the concerns of the FFRF or the American Atheists, however, because there is still the concern that—regardless of the religion—there could be excessive entanglement, endorsement, or coercion by the minister when participating in such a program. Including a wider variety of ministers in such a program would not necessarily ameliorate the concerns of one who strongly favors a strict separation of church and state.

pays all administrative and training costs for the program.[29] However, according to the city, this program is just "one of a number of initiatives" recently created to help curb the alarming increase in violent crime: "[m]any different communities and entities throughout the city—including the Chamber of Commerce, civic clubs, neighborhood associations, private businesses, higher education, social service organizations and faith-based communities—have engaged with the city out of concern for Montgomery's increase in homicides."[30]

Even though on its face Operation Good Shepherd is similar to several other programs currently in existence, it has sparked significant media attention and elicited both strong praise and outrage.[31] Much of this attention came in response to an article in *The Atlantic* magazine that questioned the program's constitutionality.[32] This is presumably because the article includes quotes suggesting that at least some proponents of the program see Operation Good Shepherd as an opportunity for clergy members to preach a Christian message while on police call-outs. For example, E. Baxter Morris, the MPD's official chaplain, is quoted saying:

> Anytime you find a group of people whose lives have been adversely affected . . . this gives us an opportunity to meet people and show them the kind of love and compassion that all human beings need . . . . There is an evangelistic advantage. That is, that once I float to your comfort zone, and we become one in our crisis, I determine what your spiritual needs may or may not be, and I may be able to share with you a word from Christ.[33]

In *The Atlantic* article, even Professor Erwin Chemerinsky[34] weighed in, stating that he thought any use of ministers as a formal part of the police department's initiatives violated the Establishment Clause: "[t]he government cannot take actions that appear to endorse religion. Using ministers in this way does exactly that."[35]

Just a few weeks after *The Atlantic* article was published, both the American Atheists and the Freedom From Religion Foundation (FFRF)

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[29] Downs, *supra* note 1.

[30] Fehl, *supra* note 25.

[31] *See generally id.*; Edgemon, *supra* note 23.

[32] Downs, *supra* note 1.

[33] *Id.*

[34] Dean of the University of California Irvine School of Law and distinguished Constitutional law scholar. *Erwin Chemerinsky*, U. CAL. IRVINE SCH. LAW, http://www.law.uci.edu/faculty/full-time/chemerinsky/ (last visited Sept. 23, 2014).

[35] *Id.*

threatened to sue the city if the program was not shut down.[36] The ACLU, before deciding how to proceed, also requested more information about the program under Alabama's Open Records Act.[37] FFRF's letter, dated October 9, 2013, characterizes Operation Good Shepherd as "a publically funded Christian ministry that seeks to lower crime by converting people to Christianity."[38] The letter also states, relying on media reports including the article in *The Atlantic*, that the MPD is taking advantage of crime victims in their fragile state and attempting to use that leverage to convert them. Finally, the letter also alleges that the program is unconstitutional because the government is taking actions that appear to endorse religion and is therefore sending a message to those who are nonreligious that they are outsiders and not full members of the political community.[39]

In response to the FFRF's letter, the MPD and others have attempted to make it clear that the program is intended to fight crime and not spread Christianity.[40] According to Montgomery Public Safety Director Chris Murphy, the department took steps in creating this program to ensure that it was not a purely Christian effort by reaching out to Jewish and Muslim communities as well.[41] Murphy also stressed that the program was just one of many initiatives being developed by the city to fight crime. Dwayne Waterford, a local pastor and Operation Good Shepherd volunteer, also spoke out in response to these accusations. When volunteers are called out, he said, they respond as neutral liaisons and counselors, bringing calm to the crime scene and freeing up police to focus on other tasks instead of comforting victims and their families.[42]

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[36] Letter from Andrew L. Seidel, Staff Att'y, Freedom from Religion Found., to Kevin J. Murphy, Chief, Montgomery Police Dep't (Oct. 9, 2013), *available at* http://www.wsfa.com/link/662308/document-freedom-from-religion-foundation-letter; Letter from David Silverman, President, Am. Atheists, Inc., to Kevin J. Murphy, Chief, Montgomery Police Dep't (Oct. 7, 2013), *available at* http://news.atheists.org/2013/10/08/atheists-threaten-separation-of-church-state-lawsuit-against-montgomery-alabama/.

[37] Letter from Randall C. Marshall, Legal Dir., ACLU of Ala., to Kevin J. Murphy, Chief, Montgomery Police Dep't (Oct. 3, 2013), *available at* http://media.al.com/montgomery/other/ACLU%20letter.pdf.

[38] Seidel, *supra* note 36.

[39] *Id.*

[40] Fehl, *supra* note 25 ("The purpose of Operation Good Shepherd is an effort to aid in crime prevention within our community and not for the purpose of religious promotion or recruitment.").

[41] Heather Clark, *Atheists to Sue Alabama City after Police Partner with Pastors to Fight Crime with Christianity*, CHRISTIAN NEWS (Oct. 28, 2013), http://christiannews.net/2013/10/28/atheists-to-sue-alabama-city-after-police-partner-with-pastors-to-fight-crime-with-christianity.

[42] Erin Edgemon, *Atheist Group Says Montgomery Won't Respond, Plans Suit Over Dispatching Clergy to Crime Scenes*, AL. COM (Oct. 21, 2013, 3:56

Waterford also made it clear that the program was based on the needs of each individual victim: "[e]verything is centered around that victim and what they ask for."[43] No one is forced to engage in unwanted religious dialogue or pressured to accept a certain religious message.

Ultimately, while it seems that much of the hype and outrage surrounding the program was the result of poorly chosen language on the part of some MPD officials and supporters of Operation Good Shepherd, the strong rhetoric also served to bring to the forefront a debate over the constitutionality of police and clergy alliances more generally. Presumably, even if the MPD could show that Operation Good Shepherd is religiously neutral and that volunteers serve only to counsel victims and their families based on the individual needs of the victim, free from any coercion or proselytization, the FFRF would continue to fight against it. Admittedly, many may have a strong, negative, gut reaction upon first hearing about these programs and thus conclude they are unconstitutional. The use of clergy at crime scenes many seem to violate the principle of neutrality between religion and nonreligion and even to implicitly endorse certain religious views. However, after analyzing current Establishment Clause jurisprudence, several compelling arguments can be made in defense of these programs.

D. Distilling General Principles

This section will serve to synthesize a few of the key purposes common to most police and clergy alliances. This list will serve as a foundation for later analysis of police and clergy alliances since it neatly summarizes the most common secular justifications for these programs.

At the most basic level, the goals and purposes of most police and clergy alliances can be lumped into two broad categories: crime prevention and grief counseling. Under the first category, volunteers often (1) relay information back to the community relying on their existing networks and channels of communication, (2) build or improve the relationship between the local police force and their congregation to reinforce the understanding that police are the "good guys," (3) use their standing in the community to encourage and model alternative, law-abiding behavior, and (4) encourage their congregation to report suspicious behavior to the police.

Under the second category, volunteers also act as secular grief counselors for victims of crimes. Most programs use a rotational system to randomly select which volunteers are on call and can be summoned to a crime scene. Once called to the scene, volunteers (1) serve as liaisons between officers and victims or their families (these individuals will be called "program beneficiaries" below) to free up police officers to per-

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PM), http://blog.al.com/montgomery/2013/10/atheist_group_says_montgomery.html.

[43] *Id.*

form other tasks and (2) provide comforting words and secular grief counseling at the request of the program beneficiaries.

II. LOCATING THIS DEBATE IN THE CURRENT CHAPLAINCY PRECEDENT

This Part will place the current debate over police and clergy alliances in the context of the case law and relevant literature on chaplaincy programs generally. First, this Part will distinguish police and clergy alliances from military and major disaster response chaplaincy programs that are often justified on Free Exercise grounds. Second, this Part will lay out the framework created by current case law on police chaplaincy programs and will situate this case within that framework.

A. Military, Hospital, Prison, and Disaster Response Chaplains

It is important to recognize at the outset that the case law regarding military chaplaincy programs is justified on a theory that is generally not available to police and clergy alliances. The current understanding of military chaplaincy programs was first set out in *Katcoff v. Marsh* in 1985.[44] In that case, the Second Circuit recognized the inherent tension between the Free Exercise Clause and the Establishment Clause, finding on the one hand a strong interest in protecting the free exercise rights of military personnel and on the other recognizing that the program would fail the *Lemon* test[45] because its primary purpose is to advance religion.[46] Ultimately, the court upheld the program despite the Establishment Clause concerns. The reasoning behind this decision was well stated by Justice Brennan in *School District of Abington Township v. Schempp*: "[t]here are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example."[47]

This Free Exercise rationale also helps to justify the provision of chaplains in hospitals, prisons, and in response to major disasters that can displace individuals and sever them from their normal faith net-

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[44] Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

[45] The *Lemon* test will be described in detail *infra* in Section III, but briefly: the *Lemon* test was formulated by the Court to determine whether a law has the effect of establishing religion in violation of the First Amendment. This test has three parts: (1) the statute must have a secular legislative purpose, (2) its primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive entanglement with religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Amy J. Alexander, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 PHOENIX L. REV. 641, 663 (2010).

[46] *Katcoff*, 755 F.2d at 232.

[47] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 296 (1963).

works.[48] In these situations, either a government institution or a natural disaster has made it difficult or impossible for individuals to access private religious services, making it permissible for the government to provide access to alternative religious resources under the Free Exercise Clause. Nevertheless, this Free Exercise rationale is not nearly as strong with respect to "everyday" police emergencies. Victims and their families can still reach out through normal channels to seek the services of a minister from their particular faith tradition—perhaps even from their regular place of worship.

That being said, one possible line of reasoning to support this rationale could go as follows: perhaps police at crime scenes have an interest in only allowing trained personnel access to victims and their families for a short period of time while the investigation or operation is still underway. If this is the case, then during this critical period, a potential program beneficiary may be faced with a situation in which their Free Exercise right is burdened, allowing what might otherwise be an unconstitutional establishment of religion as discussed above. To solve this problem, volunteer chaplains, who are trained to respond in these very situations, can provide temporary access to religious services under a Free Exercise rationale while also serving as a liaison between police and crime victims.

However, even if this rationale could be compelling in some situations, in most cases this would likely be a very limited restraint on one's exercise of religion. Accordingly, any Free Exercise justification could easily become fact-bound because the outcome would depend on the way in which each police department secures crime scenes and restricts access to victims. Also, in most cases, this seems unlikely to win in court because the restriction on access to religious services is extremely limited in nature in comparison to the situations in which the Supreme Court has found Free Exercise claims compelling.

B. Current Case Law on Police Chaplaincy Programs

Recognizing that most of the case law on military and hospital chaplaincies, while useful for developing different arguments, is not directly applicable to police and clergy alliances, this section will briefly outline two cases that create a general framework for analyzing these programs. These two cases highlight the factors courts consider in their analyses and create a spectrum on which future crisis chaplaincy cases can be placed.

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[48] *See generally* Cutter v. Wilkinson, 544 U.S. 709 (2005); Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 457 (8th Cir. 1988); W.E. Shipley, *Provision of Religious Facilities for Prisoners*, 12 A.L.R. 3d 1276 (1967); Mary Jean Dolan, *Government-Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life*, 35 HASTINGS CONST. L.Q. 505, 517 (2008).

1. *Voswinkel v. City of Charlotte*

In *Voswinkel*, the District Court for the Western District of North Carolina found that an agreement between the city of Charlotte and Providence Baptist Church to provide the city with a full-time police chaplain, half of whose salary was paid by the city, violated the Establishment Clause.[49] Unlike Operation Good Shepherd, the chaplain's main responsibility was to act as a secular counselor for Charlotte police officers and their families. The city justified hiring a chaplain for this position because, unlike a secular psychologist, a chaplain would be available around the clock and would cost a lot less than a psychologist.[50] However, the plaintiffs disputed this rationale and claimed that the city could have found a suitable social worker or trained psychologist that fit the cost and availability requirements of the city.[51] The contract between the city and Providence Church also included language suggesting that the chaplain would assist police personnel in crises.[52] However, there is no clear description of what the chaplain's role in crises would be or how often he or she would be called to assist.

In striking down this program, the district court pointed to several features that raised concerns under the second and third prongs of the *Lemon* test. First, under the primary effects prong, the program created a religious test for public office, afforded Baptists the superior opportunity to disseminate their religious views to police personnel, and favored religion over nonreligion by choosing a minister to provide secular counseling services to police department employees.[53] Second, under the excessive entanglement prong, the program created ambiguity regarding who had authority over the chaplain and attempted to secularize the chaplain's actions, thereby "creat[ing] precisely the potential for entanglement in religious matters that the Supreme Court has repeatedly indicated is forbidden by the Establishment Clause."[54] Finally, the court distinguished police chaplaincy programs from those designed to protect Free Exercise rights in the military, in hospitals, and in prisons while also distinguishing legislative chaplaincy programs based on their historic pedigree and the courts' unwillingness to interfere with the internal affairs of the legislature.[55] For these reasons, the court found that the challenged program was inconsistent with the "fundamental rule of neutrality" and that it threatened to create excessive entanglement between church and state.[56]

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[49] Voswinkel v. City of Charlotte, 495 F. Supp. 588, 588–91 (1980).
[50] *Id.*
[51] *Id.* at 592–93.
[52] *Id.* at 590–91.
[53] *Id.* at 595–97.
[54] *Id.* at 598.
[55] *Id.* at 597.
[56] *Id.*

2. *Malyon v. Pierce County*

In *Malyon*, the Washington Supreme Court found that a police chaplaincy program created by the Pierce County Sheriff's Department was not an establishment of religion in violation of the Constitution.[57] Several aspects of the program led the Court to this conclusion. First, the volunteer organization providing the chaplains had responded to a neutral advertisement posted by the county to solicit "the services of a volunteer organization with at least ten members qualified and available to serve the crisis intervention needs of the law enforcement personnel of Pierce County, their families, and the citizens of this county who are the victims of crime."[58] The Tacoma-Pierce County Chaplaincy (TPCC), a nonprofit Christian ministry, was the only organization to respond. Second, the chaplains were volunteers and only received modest support from the county to aid in their work as crisis counselors. Chaplains were loaned radios, a sheriff's jacket for emergency purposes, a bulletproof vest, and the use of a police vehicle to reach the crime scene in addition to liability and medical insurance while serving as volunteers.[59] The program cost the county on average $3000 per year.[60]

In analyzing the constitutionality of this program, the Court explicitly affirmed the use of the *Lemon* test, reversing the intermediate appellate court's determination that the *Lemon* test was limited to school cases.[61] Under the *Lemon* test, the Court distinguished this case from *Voswinkel*, noting that the chaplains "were neutrally chosen through a bidding process open to all without regard to religious affiliation and the chaplains actually volunteering come from all denominations."[62] The court also found that the volunteer chaplains "do not proselytize but do provide broad-based counseling to people of all religions, and those with no religion at all, in a secular manner."[63] Finally, the chaplains were clearly under the authority of the sheriff's department alone and thus avoided one of the main excessive entanglement concerns in *Voswinkel*.[64]

3. Conclusions

These two cases mark the outer boundaries of current Establishment Clause precedent regarding police and clergy alliances. On the one hand, directly funding half of the salary for a single police chaplain hired pur-

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[57] Malyon v. Pierce Cnty., 131 Wash. 2d 779, 784 (1997).

[58] *Id.* at 787.

[59] *Id.* at 789.

[60] *Id.*

[61] *Id.* at 807.

[62] *Id.* at 810.

[63] *Id.*

[64] *Id.* at 812; Voswinkel v. City of Charlotte, 495 F. Supp. 588, 597–98 (1980).

suant to a contract between the city and one local church likely violates the Establishment Clause. On the other hand, a county may work with the only respondent to a religiously neutral advertisement seeking volunteer secular crisis counselors under the exclusive control of the sheriff's office. Most police and clergy alliances seem to fall somewhere in the middle. Like *Voswinkel*, they usually limit volunteers to ordained clergy of a recognized faith and are run directly by the police department. However, most programs are similar to *Malyon* in that the chaplains are volunteers who only receive incidental benefits from the county to assist with their volunteer service. The chaplains must also refrain from proselytizing and are usually under the sole control of the sheriff while on duty.

III. APPLICATION OF SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

Now that Operation Good Shepherd has been placed in context, it is finally appropriate to grapple with the ever-changing and sometimes disjointed Supreme Court Establishment Clause jurisprudence.[65] The structure of this Part will be based on the three operational principles set forth in *Lemon*: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'"[66] While this test has evolved over time in response to the Supreme Court's post-*Lemon* decisions, its three-part structure still provides a useful framework for considering how a program like Operation Good Shepherd might interact with the Establishment Clause.[67] For example, under the second prong of the *Lemon* test, this Part will address three subsidiary Establishment Clause doctrines: coercion, endorsement, and neutrality.

Finally, as discussed above, a few assumptions will be made regarding Operation Good Shepherd. These assumptions are used simply because there is not enough reliable public information on Operation Good Shepherd to definitively draw conclusions about all the aspects of the program that must be defined to perform a full analysis under the Establishment Clause. Thus, it will be assumed that (1) the program was designed to perform the two broad goals of crime prevention and secular grief counseling, (2) the program requires that all volunteers are clergy

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[65] *See* Dolan, *supra* note 48 at 524; Robert Sedler, *Understanding The Establishment Clause: The Perspective of Constitutional Litigation,* 43 WAYNE L. REV. 1317, 1318–20 (1997).

[66] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). *See generally* Robert Sedler, *Understanding the Establishment Clause: A Revisit*, Wayne State University Law School Legal Studies Research Paper series No. 2013–18 at 15.

[67] *See generally* Sedler, *supra* note 66. The Supreme Court has continued to uphold and apply the *Lemon* test in cases like McCreary Cnty. v. ACLU, 545 U.S. 844, 859 (2005).

members, but solicits clergy from all faith traditions,[68] and (3) the program requires volunteers to address the counseling needs of the individual program beneficiary as defined by the individual, not the chaplain. Accordingly, proselytization or any effort to impose religion or religious beliefs upon a program beneficiary would be inconsistent with the goals of the program and would be grounds for dismissal from the program.

A. Secular Legislative Purpose

The first prong of the *Lemon* test asks if the challenged legislation or government-sponsored program lacks a valid secular purpose.[69] Under the Supreme Court's most recent gloss of this prong, "the secular purpose . . . has to be genuine, not a sham, and not merely secondary to a religious objective."[70] This purpose inquiry, however, does not look into the subjective intentions of the program's creators. As the Court in *McCreary* noted, courts should look at objective evidence in the text, history, and implementation of the program to determine its purpose.[71] As a corollary to this principle, the Court recognized that in some cases there might be a latent religious purpose that is well masked by other secular purposes:

> If someone in the government hides [a] religious motive so well that the objective observer, acquainted with the text, legislative history, and implementation of the statute cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides.[72]

Thus, while the Court in *McCreary* seems to reinvigorate the secular purpose inquiry, the focus is on the outward, objective attributes of the

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[68] Kachmar, *supra* note 24.

[69] This section will not address any arguments related to O'Connor's endorsement test. While it is true that O'Connor in Lynch v. Donnelly, 465 U.S. 668 (1984), intended her endorsement test to clarify both the secular purpose and the primary effects prong of the *Lemon* test, both elements of O'Connor's test will be dealt with together under the primary effects prong. See *infra* text accompanying notes 103–135. For examples of cases in which a court found a valid secular purpose, see *Lynch*, 465 U.S. at 680–81 (town's display of a Christmas crèche is constitutional because it has a legitimate secular purpose in depicting the origins of the national holiday of Christmas) and Carter v. Broadlawns Medical Ctr., 857 F.2d 448 (1988) (county hospital's hiring of a paid Christian minister as chaplain held constitutional because it had the secular purpose of enhancing a holistic approach to patient care), *cert. denied*, 489 U.S. 1096 (1989).

[70] *See McCreary Cnty.*, 545 U.S. at 864 (striking down a display of historical documents, including the ten commandments, not for advancing religion, but because the purpose of the display was to promote religion).

[71] *Id.*

[72] *Id.* at 863 (citations omitted).

program that can be used to divine a program's true purpose. This same type of analysis is used when courts consider the programmatic (as opposed to the individual) purpose of other police actions such as roadblocks or *Terry* stops.[73]

Police and clergy alliances have several important secular purposes that are not simply shams intended to allow the government to advance religion. As discussed earlier, these programs train volunteers to help prevent crime, provide secular grief counseling, and serve as liaisons between officers and program beneficiaries.[74] As the court in *Malyon* found, "[t]he sheriff's department's chaplaincy program . . . has the valid secular purpose to provide secular counseling."[75] Combining these important secular purposes with the ban on proselytizing or even *discussing* religion without the program beneficiary's consent, it is harder to argue that the secular purposes of these programs are simply shams and that the true purpose is to promote religious belief. As will be discussed below in more detail, there are additional purely secular values to having clergy and similar religious leaders serve in these roles.[76]

Looking at how courts have applied this test in practice makes it even more apparent that the secular purposes discussed above are likely to satisfy this prong of the *Lemon* test. In *Carter v. Broadlawns*, the Eighth Circuit found that a paid hospital chaplain, independent of any Free Exercise justification, satisfied the secular purpose prong of the *Lemon* test because the chaplain "enhance[d] [the hospital's] wholistic treatment approach to patient care."[77] The Fifth Circuit in *Beaumont* also found that the Clergy in Schools initiative had a sufficient secular purpose: "to provide dialogue between the clergy and students regarding civic values and morality, a safe school atmosphere, and volunteer opportunities . . . . It is permissible for a school to promote discussions on morality, safety, and volunteering from the community."[78] If the two above purposes were sufficient to satisfy the first prong of the *Lemon* test, it is unlikely that a court would find the secular purposes of a crisis chaplaincy program lacking. In addition, the Court's reasoning in *McCreary* seems to cut back on some of the strict language in the secular purpose test's initial formulation: "the government's action was held un-

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[73] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 46 (2000).

[74] While this is admittedly a very cursory overview of the secular purposes of a police and clergy alliance, these claims will be further addressed below under the endorsement analysis. *See infra* text accompanying notes 122–134.

[75] *Malyon*, 131 Wash. 2d at 808.

[76] *See infra* text accompanying notes 125–140.

[77] Carter v. Broadlawns Medical Ctr., 857 F.2d 448, 455 (1988). It is important to note going forward that, unlike most hospital chaplaincy cases, the Eighth Circuit did not rely on the Free Exercise justification when it held that a paid hospital chaplain did not violate the Establishment Clause. *Id* at 457. Thus, the analysis from this case is applicable to the controversy at hand.

[78] Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001).

constitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action."[79] This seems to suggest that only programs with pervasive religious purposes and weak secular purposes will be struck down under this prong.

This is true even if some proponents of police and clergy alliances are motivated predominately by a desire to advance their religious beliefs. When considering Operation Good Shepherd, for example, some proponents of the program seem to support it precisely because they believe it will promote religion.[80] These subjective beliefs, however, are not sufficient to undermine the objective purpose analysis the Court used in *McCreary*. In fact, this tension between subjective and objective purpose is very similar to the situation faced by the Fifth Circuit in *Beaumont*. The plaintiff in *Beaumont* claimed that the secular purpose of the Clergy in Schools initiative was a sham because some proponents of the program made statements endorsing prayer in school and school-church alliances. The Fifth Circuit, however, drew a distinction between the actual, objective purposes of the program and the speech made by certain proponents. The court found that the program did not officially sanction the speech and there was no evidence that the program's stated purposes were simply shams.[81] The same analysis can be applied to Operation Good Shepherd. A court would likely consider the program's purposes—inferred from its general policies and structure—and conclude that the city affirmatively took measures to ensure it did not advance religious interests by, for example, banning proselytizing and putting volunteer clergy under the direct control of the police department. Thus, Operation Good Shepherd would likely pass the secular purpose prong of the *Lemon* test.

B. Primary Effect of Advancing or Inhibiting Religion

The second prong of the *Lemon* test asks whether the program in question has the primary effect of advancing or inhibiting religion.[82] However, in practice this test is not easy to apply and is certainly not self-executing.[83] This test alone does not explain how to determine what the primary effect of the program is, nor does it say what counts as advancing or inhibiting religion. For this reason, courts have developed and applied subsidiary tests aimed at determining whether a program actually has an impermissible effect.[84] This section will analyze police and clergy alliances under three subsidiary doctrines (or "subtests"): coercion, en-

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[79] McCreary Cnty. v. ACLU, 545 U.S. 844, 863 (2005).

[80] Downs, *supra* note 1.

[81] *Beaumont*, 240 F.3d at 468.

[82] Sedler, *supra* note 83 at 19; *Beaumont*, 240 F.3d at 469.

[83] Sedler, *supra* note 83 at 19.

[84] *Beaumont*, 240 F.3d at 469.

dorsement, and neutrality.[85] These three doctrines cover the vast majority of approaches courts take when applying the effects prong of the *Lemon* test.[86]

For any analysis under this prong, however, it is important to identify the allegedly impermissible effects that benefit or hinder religion. When analyzing police and clergy alliances, there are three commonly asserted benefits to religion, all of which will be further discussed when applied to the tests below. First, police and clergy alliances create access. They allow religious leaders to talk with individuals who are often in a vulnerable or mentally compromised state. The concern here is that volunteers will take advantage of this access and use it to pray with or attempt to convert the program beneficiary. This concern will be addressed under the coercion doctrine as "content coercion" and under the endorsement doctrine as "access." Second, police and clergy alliances create a visible link between the police and clergy members. This link will be addressed under the coercion doctrine as "inherent coercion" and under the endorsement doctrine as "symbolic union." Finally, police and clergy alliances do require some funding—police departments often pay for incidental expenses associated with police and clergy alliances. This concern will be addressed under the neutrality doctrine as "financial benefit." These three concerns also cover the three overlapping groups of citizens who are likely most interested in ensuring that these programs do not advance religion: program beneficiaries who might be coerced, citizens who might see the program as an endorsement of religion over nonreligion by the state, and taxpayers who are forced to fund the program.

1. Coercion

Perhaps the most basic Establishment Clause doctrine, the coercion subtest was well articulated by Justice Thomas in his *Van Orden* concurrence. Justice Thomas argued that the original intent of the Establishment Clause was to prevent the government from compelling or coercing the participation in or funding of any religious sect or organization.[87] As Thomas put it, "government practices that have nothing to do with creating or maintaining . . . coercive state establishments simply do not implicate the possible liberty interest of being free from coercive state establishments."[88] Thomas argued that this understanding of the Establishment Clause would better reflect the intent of the founders,

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[85] While it is also true that these doctrines are used independently, they can conceptually be applied in this way as well. *See generally* Sedler, *supra* note 83.

[86] Sedler, *supra* note 83; *Establishment Clause Overview*, FIRST AMENDMENT CENTER (Sept. 16, 2011), http://www.firstamendmentcenter.org/establishment-clause.

[87] Van Orden v. Perry, 545 U.S. 677, 693 (2005).

[88] *Id.* at 693–94 (internal citations omitted).

simplify and clarify what violates the Establishment Clause, and limit litigation over trivial offenses that do not rise to the level of an establishment of religion.[89] This test—at least in name, even if in application there may be some disagreement—is accepted by most members of the Court as a floor for what the Establishment Clause requires. As Justice Kennedy writing for the majority in *Lee v. Weisman* said, "[i]t 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."[90]

There are two main concerns frequently raised regarding the coercive nature of a crisis chaplaincy program. The first concern is that members of the clergy will not be able to refrain from discussing religion or from proselytizing while on call-outs. The concern here is that the *message* presented by the clergy on the scene will be coercive and influential, especially given the vulnerable state of many program beneficiaries. As the Freedom From Religion Foundation claimed, "[t]he MPD is deliberately taking advantage of the victims of crime or loss and using their fragile, vulnerable state to attempt to convert them."[91]

The second argument many critics make is that police and clergy alliances are inherently coercive:

> 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. . . . 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.[92]

This same argument is made by the dissent in *Malyon*: "[t]o a person in crisis, having the police call to the scene an 'official' chaplain to help counsel the person could potentially create an atmosphere of implicit coercion—a situation which clearly violates the Establishment Clause."[93] Essentially, the very presence of the chaplain and his association with the police department creates a coercive environment that leads individuals to believe that the state is pressuring them to participate in or at least tolerate the religious beliefs and practices of the chaplain.

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[89] *Id.* at 694.

[90] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[91] Seidel, *supra* note 37.

[92] Mary Jean Dolan, *Government-Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life*, 35 HASTINGS CONST. L.Q. 505, 539–40 (2008).

[93] Malyon v. Pierce Cnty, 131 Wash. 2d 779, 821 (1997).

While many of these concerns overlap with the analysis below relating to endorsement and the symbolic link between clergy and the police, it is important to address them under the coercion test as well, since the viability of the endorsement test is in doubt following O'Connor's departure from the Court.[94]

a. Coercive Content

When considering concerns related to the *content* of a chaplain's message while comforting a program beneficiary, it is important to note that the Supreme Court in *Bowen v. Kendrick* held that "when the aid is to flow to religiously affiliated institutions that [are] not pervasively sectarian, as in *Roemer,* we refuse[] to presume that it would be used in a way that would have the primary effect of advancing religion."[95] Taking this one step further, as the Fifth Circuit found in *Beaumont*, "[a]n interfaith group of clergy in [public schools] is not 'pervasively sectarian.' The volunteers are working in a secular setting with other volunteers who subscribe to different faiths. Thus, we presume that the volunteers will comply with the program's secular guidelines."[96]

If this presumption holds—as long as the stated policies, goals, and procedures of the program require that volunteers refrain from proselytizing or discussing religious issues unless first brought up by the victim—any facial challenge based on this concern will be rebutted by the presumption that the volunteers complied with the program's secular guidelines. This presumption precludes a finding of content coercion because, as the Court has noted in school funding and voucher cases, the independent, private choice of program beneficiaries serves to break the chain connecting the discussion of religious issues to the government's funding of the chaplaincy program.[97] Of course, if a plaintiff could come

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[94] *See generally* Christopher Linas, Salazar v. Buono, *A Blow Against The Endorsement Test's Core Principle*, 88 DENV. U. L. REV. 603 (2011). Indeed the endorsement test may be further weakened following *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), in which the Supreme Court overturned the Second Circuit's ruling—resting largely on the endorsement test—that legislative prayer in the Town of Greece was unconstitutional. The Supreme Court instead barely mentioned the endorsement test and relied on the coercion test in finding the practice constitutional. *Id.* at 1825.

[95] Bowen v. Kendrick, 487 U.S. 589, 612 (1988). In *Roemer*, the Court also stated that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 761 (1976).

[96] Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 469 (5th Cir. 2001).

[97] Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) ("[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.' It is precisely for these

forward with evidence that volunteers were disregarding the program's policies and attempting to convert program beneficiaries, the program would face serious scrutiny.

b. Inherent Coercion

The second concern is that volunteer chaplaincy programs lead to inherent coercion. Ultimately, however, this argument stretches the definition of coercion too far. Presuming that if an individual is not interested in religious counseling, the chaplain will refrain from any religious dialogue, it is difficult to see how this kind of conversation could qualify as a *coercive* religious experience. A trained volunteer chaplain following program guidelines would not be exerting coercive pressure on a program beneficiary, especially when the conversation was wholly secular. Indeed it seems a stretch to say that the encounter is a religious experience at all.

To make this point more concrete, one could imagine the analysis of an individual crisis chaplaincy program in which the fact finder came to the same conclusion as the district court in *Broadlawns*:

> The record is clear that Chaplain Rogers does perform her duties consistent with the concept of Clinical Pastoral Education (CPE). The explanation of this concept demonstrates that in this setting, the chaplain's function is not the traditional parish- or institutional-style ministry. Rather, its purpose is to address the needs of the individual patient, as defined by the patient, not the chaplain. Proselytization or any effort to impact [sic] religion or religious beliefs upon individuals who do not already have such beliefs is totally inconsistent with the CPE concept and is scrupulously avoided . . . .[98]

If such a finding were made during the investigation of a crisis chaplaincy program, anyone arguing that the program was coercive would have to take the view that simply identifying oneself as a volunteer *chaplain*—even though you are providing wholly secular counseling—is coercive. This is because there is no mechanism by which the program beneficiary would be exposed to an unwelcome religious message or experience. Unlike school or legislative prayer, there is no religious content that program beneficiaries are being forced to tolerate. Arguing that simply talking with a crisis chaplain at the crime scene is an unwanted religious experience is similar to arguing that receiving secular social

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reasons that we have never found a program of true private choice to offend the Establishment Clause."). While it is true that the type of private choice in police and clergy alliances is different from that contemplated by the Court in *Zelman*, these differences will be addressed below. *See infra* text accompanying notes 136–141.

[98] Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 455 (8th Cir. 1988).

services from an organization like Catholic Charities is an unwanted religious experience. Many of the program beneficiaries of Catholic Charities are in equally vulnerable positions and have nowhere else to turn. This does not, however, lead to the conclusion that providing grants to religious charities creates unacceptable religious coercion—indeed the Supreme Court held the opposite in *Bowen v. Kendrick*.[99]

While one could argue that in *Kendrick* the government gave aid neutrally to religious and secular nonprofits, this distinction is not relevant to the individual beneficiary of the aid in question. The appeal made by the FFRF regarding the inherent coerciveness of these programs is made from the perspective of the emotionally compromised victim, not from the perspective of a reasonable observer who sees how aid is distributed. All the victim sees is a public benefit being provided *to him or her* by a religious organization. It would not matter to that individual whether most of the other program beneficiaries received the same benefit from a secular provider. Accordingly, the argument would not change if there were five secular programs that also took turns providing crisis-counseling services to individuals at crime scenes. The mere fact that in a particular case the program beneficiary identified the service provider as a chaplain would make the program inherently coercive.

If instead it were assumed that the recipient of the benefit were the fictional "reasonable observer," the concern over inherent coercion would have even less traction because, as discussed in detail below,[100] a reasonable observer would likely recognize that the crisis chaplaincy program's exclusive reliance on volunteer clergy was justified by the secular benefits only these particular volunteers could provide. The reasonable observer would also likely recognize that the program prevents any discussion of religion that is not initiated by the program beneficiary and thus would feel free to discuss (or not discuss) religious issues with the chaplain. A reasonable observer, in short, would understand the program's secular purpose and thus recognize that the government is not attempting to impose religious values on program beneficiaries.

In addition, this attempt to broadly construe the restrictions imposed by the coercion test has not been adopted by the Supreme Court. Instead, the Court has upheld programs providing funding to Catholic hospitals and other organizations providing similar social services despite the fact that they are religiously affiliated.[101] This conclusion, however, does not shut the door to similar arguments regarding the purported symbolic link between police departments and volunteer clergy. It is just that these arguments do not gain much traction under the coercion test; they fall more naturally under the endorsement test.

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[99] Bowen v. Kendrick, 487 U.S. 589, 597 (1988) (upholding the constitutionality of the Adolescent Family Life Act which gave federal grants to—among others—organizations with institutional ties to religious denominations).

[100] *See infra* text accompanying notes 108–09.

[101] *See generally* Bradfield v. Roberts, 175 U.S. 291 (1899).

2. Endorsement

The endorsement test essentially asks whether a reasonable observer would find that the program in question communicates a message of either religious endorsement or disapproval.[102] This test is often employed when the government is perceived to symbolically endorse religion over nonreligion.[103] This test is not usually used to address financial benefits to religious organizations—monetary aid has more recently been addressed under neutrality principles.[104] As mentioned earlier, the continuing validity of this test is unclear based on the current composition of the Court. This test was championed by Justice O'Connor and strongly criticized by Justice Kennedy.[105] Accordingly, there may not be sufficient support on the current Court to uphold this test, although some disagree.[106] Nevertheless, it is often still used by lower courts and provides a good framework under which the two nonmonetary benefits to religion can be addressed.

This test also helps to clarify the purpose and effects prongs of the *Lemon* test by asking two questions: (1) did the government intend to convey a message of endorsement or disapproval of religion and (2) did the government program, intentionally or unintentionally, have the effect of communicating endorsement or disapproval of religion.[107] For purposes of this analysis, however, we assume that the police department's true purpose is to prevent crime and comfort victims on call-outs. We must operate under this assumption because it is impossible to assess the intent behind a representative crisis chaplaincy program—intent is fact intensive and situation specific. Therefore, instead of looking at questions of intent, this analysis considers whether a police chaplaincy program created for the twin purposes previously discussed is constitutional.

To fully understand the endorsement test, however, it is also important to appreciate the attributes of the so-called "reasonable observer," since the conduct is viewed through his or her eyes. As the Tenth Circuit in *Davenport* put it, "the court must determine whether a fully informed, intelligent, and judicious 'reasonable observer' would conclude that the display effectively sends a message that the government prefers one religion over another. . . . [T]he extent of the reasonable ob-

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[102] *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984); American Atheists v. Davenport, 637 F.3d 1095, 1102 (10th Cir. 2010).

[103] For example, this test was used to analyze displays of the Ten Commandments and nativity crèches. *See generally* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

[104] *See generally* Zelman v. Simmons-Harris, 536 U.S. 153 (2002).

[105] Justice Kennedy asserted that the endorsement test "is flawed in its fundamentals and unworkable in practice." *Allegheny*, 492 U.S. at 627.

[106] Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 5 (2013).

[107] *Lynch*, 465 U.S. at 690–94.

server's knowledge is vast."[108] The court then goes on to find that based on previous cases, the reasonable observer is expected to know all the details of the program in question, its history, the motives of its creators, and other information not generally available to the average citizen.[109]

a. Access to Individuals in Vulnerable Situations

The first perceived benefit to religion that will be analyzed under the endorsement framework is access. The Freedom From Religion Foundation (FFRF) highlights this point in particular in its letter to the city of Montgomery: "[t]he government cannot seek to convert citizens to one religion or another. And the government cannot, in this most disturbing and appalling manner, use its privileged position as first responder to emergencies to teach the Christian religion."[110] Essentially, the FFRF argues that the government has given religious leaders access to individuals in particularly vulnerable and suggestible positions and thus has created an atmosphere ripe for proselytizing. While this concern is now being addressed under the endorsement test instead of the coercion test, the same reasoning applies.

First, to bring a successful challenge, a plaintiff must overcome the presumption in *Bowen v. Kendrick* that religious individuals are able to abide by the guidelines of a secular program. Perhaps because the endorsement standard is thought to be more stringent, plaintiffs could argue that the vulnerability of the program beneficiaries makes this presumption invalid because of an increased susceptibility to a religious message. However, there are two problems with this argument. First, in *Bowen* the Court upheld this presumption even though the program in question gave grants to religious organizations that provided counseling and education to adolescents relating to adolescent premarital relations.[111] Thus, the Court was willing to apply this presumption to a situation in which it could be argued that the program beneficiary was equally (if not more) susceptible to religious proselytizing. Second, the Eighth Circuit in *Broadlawns* found a similar claim regarding the susceptibility of hospital patients to proselytizing insufficient to strike down the chaplaincy program. This finding is particularly helpful because the relevant factors considered in *Broadlawns* are similarly present in police and clergy alliances. First, the director of psychiatry at the hospital testified that the clients with whom the chaplain would work were vulnerable and suggestible.[112] Second, the role of the chaplain is very similar—in *Broadlawns* the chaplain served as a liaison between the doctors, the patient,

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[108] American Atheists v. Davenport, 637 F.3d 1095, 1102 (10th Cir. 2010).

[109] *See id.*

[110] Seidel, *supra* note 37.

[111] Bowen v. Kendrick, 487 U.S. 589, 622 (1988).

[112] Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 451 (8th Cir. 1988).

and even the patient's family.[113] Third, the district court determined that the chaplain followed proper Clinical Pastoral Education Guidelines and refrained from proselytizing. Taking all three of these factors into consideration, the Eighth Circuit recognized that access alone is not sufficient to find such a program unconstitutional even under the endorsement test.[114]

Considering the Eighth Circuit's decision in *Broadlawns* in conjunction with the presumption in *Bowen v. Kendrick*, the concerns regarding intentional proselytization in violation of the program's guidelines are not the type of concerns the Establishment Clause was designed to prevent. The hypothetical reasonable observer would understand the program's secular purpose and see the safeguards put in place to prevent proselytizing. This would therefore dispel the concern that providing chaplains with access to program beneficiaries promotes or endorses religion. This does not preclude, however, an as-applied challenge to any individual program if there is evidence that either the program guidelines are being ignored or the program affirmatively encourages proselytizing by volunteers. The Supreme Court would certainly strike down any program that promotes or turns a blind eye toward proselytizing by its volunteers.

b. Symbolic Link Between Clergy and Police

Absent express endorsement, it is also possible that the symbolic link created between police and clergy by a crisis chaplaincy program would be an unconstitutional endorsement of religion.[115] As the Fifth Circuit in *Beaumont* put it:

> This is not a case involving devotional activities, proselytization, or benefits to religion. We are presented with a symbolism case, but a unique version of one: one whose symbolism draws not from a visual symbol, as in *Allegheny v. ACLU*, but from a government-sponsored activity.[116]

Applying the endorsement framework to crisis chaplaincies in this way, a court would ask whether the perceived symbolic union between the police department and the volunteer clergy would lead a reasonable observer to believe that the government endorsed religion over nonreligion. Put differently, would a crisis chaplaincy program "send[] a message to non-adherents that they are outsiders, not full members of the political

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[113] *Id.* at 451–52.

[114] *Id.* at 455.

[115] *See generally* Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

[116] Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 470 (5th Cir. 2001).

community, and an accompanying message to adherents that they are insiders, favored members of the political community[?]"[117]

To answer this question, it is helpful to consider how the Fifth Circuit in *Beaumont* analyzed the Clergy in Schools initiative.[118] For the controlling minority in *Beaumont*, the outcome depended on whether the Clergy in Schools initiative was just one of several programs with similar missions and means that fell within the umbrella of volunteer opportunities in the District. Just as the Supreme Court, when asked to consider the constitutionality of a crèche and Menorah at a county court house in *Alleghany v. ACLU* considered these items in conjunction with all the other elements of the holiday display,[119] the controlling minority in *Beaumont* said that the Clergy in Schools program had to be analyzed in its proper context.[120] The controlling minority then stated that if the umbrella of volunteer programs was not neutral with respect to religion, "[the Clergy in Schools program] is impermissible because it could convey the message that the religion-oriented recipients are uniquely qualified to [serve as volunteers]. Put another way, it is impermissible for the government to 'endorse' religion by conveying a message that religion is preferred over non-religion."[121]

This analysis is helpful because it hints at the two theories a court could rely on in upholding a crisis chaplaincy program even against a rigorous endorsement test analysis of the symbolic link created by such a program. First, the state could show that it does not favor religion over nonreligion by creating a "mosaic [of programs] neutral with regards to religion."[122] This is the approach adopted in *Beaumont*. However, the court theoretically sets up a second argument: the government could argue that, for secular reasons, clergy *are* "uniquely qualified" to serve as program volunteers. The validity of this argument, however, is premised

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[117] *Lynch*, 465 U.S. at 688.

[118] *Beaumont*, 240 F.3d at 465 ("In 1996, the Beaumont Independent School District instituted a volunteer program in its elementary and middle schools called 'Clergy in the Schools.' The District solicited volunteers from area clergy of all local faiths, the majority of which are Protestant Christian. Participants conducted group counseling on secular issues including race, divorce, peer pressure, discipline, and drugs. The program's stated goals were to provide (1) meaningful dialogue between the clergy and students regarding civic values and morality; (2) a safe school atmosphere; and (3) volunteer opportunities.").

[119] *Allegheny*, 492 U.S. at 596–600 ("the effect of the government's use of religious symbolism depends upon its context.").

[120] *Id.* On remand, however, the district court found that the school district did not provide sufficient programs of similar mission and means to ensure that the Clergy in Schools program was part of a mosaic neutral toward religion. *Id.* The only other similar program, Special Friends, was a small one-on-one counseling program that did not provide students with a real opportunity to get secular counseling anywhere but through the Clergy in Schools program. *Id.*

[121] *Beaumont*, 240 F.3d at 470.

[122] *Id.* at 464.

on the assumption that a reasonable observer would recognize that the government is not endorsing religion over nonreligion if (1) there is no benefit to any religious organization[123] and (2) there are valid secular justifications for the government's decision to require crisis chaplaincy program volunteers to be clergy members.[124]

i. Mosaic Neutral Toward Religion

When considering police and clergy alliances in the abstract, it is impossible to determine if a police department has created a mosaic neutral toward religion. It is therefore important to recognize that this is a situation-specific inquiry that would depend on the details of each program.[125] That being said, under the district court's strict analysis in *Beaumont*, it would be very difficult to assert that programs like a neighborhood watch or Citizens on Patrol are truly similar in mission and means to a crisis chaplaincy program. Of course, however, other courts may not apply this analysis in the same way, and it is certainly possible that a police department could create a variety of programs open to all citizens and thus present a mosaic neutral toward religion. For example, one could imagine a police department with several different programs performing vocation-specific tasks all geared toward crime prevention. Such a diverse set of programs might allow a court to conclude that this "mosaic" allows for vocation-specific requirements within each individual program.

ii. Uniquely Qualified

Assuming, nevertheless, that reliance on the mosaic theory is untenable, police and clergy alliances could potentially be justified if it were shown that their exclusivity served a valid secular purpose and the program did not advance religion over nonreligion. Such a finding is contemplated by the dissent in *Beaumont*: "[t]he clergy members were avowedly recruited because of their expertise in counseling, communica-

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[123] Monetary benefits will be discussed below. *See infra* text accompanying notes 137–141.

[124] The argument would proceed as follows: a reasonable observer would know why the government chose to limit participation in a particular volunteer program. Thus, if the reasons for the limitation were wholly secular, the reasonable observer would understand that the government was not endorsing religion and was merely putting to best use the particular skill set of its volunteers. While there may be concerns that this would allow the government to use a secular purpose simply as a pretext for religious advancement, the Court has dealt with these concerns by considering the objective intent behind challenged program on a case-by-case basis. *See generally* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

[125] The city of Montgomery seems to be invoking this argument when they assert that the police are partnering with a large number of other volunteer organizations in an effort to fight crime in the city. Fehl, *supra* note 25.

tion, and understanding of the community—in other words, for their secular, not their religious skills."[126] The rest of this section will present the argument that police and clergy alliances may be justified under the endorsement test because, unlike the Clergy in Schools initiatives, clergy members are uniquely qualified to provide the secular benefits *this* program was designed to advance.[127]

One argument that could be used to support this claim is that, as church and community leaders, clergy have established networks and channels of communication through which they can disseminate information from the police department to local residents who may not otherwise have access to the information. In addition, the information is disseminated by an individual with standing in the community who is often respected and trusted by members of his or her congregation. While there are not a lot of studies concerning the effects of clergy activism on crime prevention, much has been written about the unprecedented eighty percent drop in homicides during the 1990s in Boston—an unbelievable outcome at least partially attributable to the Ten Point Coalition of activist African American ministers taking to the streets.[128] The results were so incredible that it was dubbed the "Boston Miracle."[129]

In addition, the importance of creating police legitimacy through outreach—something the Houston crisis chaplaincy program emphasized—has also been recognized by Malcolm Gladwell in his book *David and Goliath*. Gladwell essentially finds that one of the keys to preventing crime is to change the perception of the police in high-crime neighborhoods. Using two case studies, Gladwell shows how so-called "soft policing"[130] (in Brownsville police brought turkeys to local residents on Thanksgiving) can be incredibly effective at increasing police legitimacy.[131] Accordingly, from a purely secular perspective, clergy

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[126] *Beaumont*, 240 F.3d at 482.

[127] Bringing in nonpolice volunteers is not a novel idea, and even restricting who can be a volunteer in a certain program is not unheard of. Often volunteer initiatives are delineated by vocation, allowing them to be tailored to the specific skill set of the volunteers. The problem with police and clergy alliances is that by doing so, the government also creates a distinction that could be perceived as endorsing religion over nonreligion.

[128] Christopher Winship, *End of a Miracle? Crime, Faith, and Partnership in Boston in the 1990's*, *in* LONG MARCH AHEAD: AFRICAN AMERICAN CHURCHES AND PUBLIC POLICY IN POST-CIVIL RIGHTS AMERICA 171–72 (R. Drew Smith, ed., Vol. II 2004).

[129] *Id.*

[130] COMMUNITY POLICING DISPATCH (July 2008), http://www.cops.usdoj.gov/html/dispatch/July_2008/nugget.htm ("Community policing encourages agencies to leverage the assets of strategic partners to address crime and disorder problems.").

[131] Malcolm Gladwell, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 327 (2013) ("Brownsville is a neighborhood full of black male high school dropouts, which means that virtually every one of

members are very effective allies in the community because they have access to and respect from community residents and can use that respect to call attention to the police department's efforts to make the community safer. In addition to having these community leaders as allies, however, it is also beneficial to get them involved as volunteers.

As active volunteers, clergy members can see firsthand that police officers are the "good guys" and should be trusted. They can then personally convey this message to their congregations. This is very important today because many inner-city residents do not have a positive perception of the police. One particularly troubling study found that African Americans and Hispanics were more likely to remain silent when approached by a police officer due to distrust, fear, and cross-cultural differences that disproportionately affected those ethnic minorities.[132] Particularly in high-crime neighborhoods, there is often strong suspicion of the police and "little desire in these communities to cooperate or to answer their questions."[133] These findings make it all the more important for police departments to find ways to reach inner-city neighborhoods and show residents that the police are there to help.

When considering the ways in which a police department could most effectively use a group of volunteer clergy and leverage their unique skills, crisis-response situations are also near the top of the list. As religious leaders, clergy are often called on to comfort and simply be with those who are grieving or are otherwise affected by a tragic event. Clergy members therefore have significant experience doing the kind of counseling and comforting that is most needed at a crime scene. In addition, clergy members must be effective communicators if they are to be effective as church leaders and facilitators. Accordingly, clergy are also well equipped to serve as liaisons between the grieving victim and police officers on the scene.

Police and clergy alliances can also help decrease excessive entanglement. To expand on the argument made in *Broadlawns*, when individuals are confronted with life and death situations, many of these individuals are forced to deal with issues related to their religious beliefs

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those juvenile delinquents on Jaffe's list would have had a brother or a father or a cousin who had served time in jail. If that many people in your life have served time behind bars, does the law seem fair anymore? Does it seem predictable? Does it seem like you can speak up and be heard? What Jaffe realized when she came to Brownsville was that the police were seen as the enemy. And if the police were seen as the enemy, how on earth would she be able to get fifteen- and sixteen-year-olds—already embarked on a course of mugging and stealing—to change their ways?").

[132] Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 40, 45–49 (2008).

[133] Brief for Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curie Supporting Petitioner's Petition for a Writ of Certiorari at 12, Salinas v. Texas, 133 S.Ct. 2174 (2013) (No. 12-246), 2012 WL 4459595.

regardless of whether they are interacting with a police officer or a volunteer chaplain. However, unlike a police officer, a volunteer chaplain "is able to serve as a moderator between persons experiencing the most profound religious problems and the public employees who must care for those persons."[134] This can reduce the concern that a police officer or other public employee—who might not be skilled at handling these issues in a neutral and balanced way—would inadvertently endorse religion or vice versa when a program beneficiary is not interested in having a religious conversation.

All of these benefits must be compared to the benefits of the Clergy in Schools program. If the argument that clergy are uniquely qualified to serve as crisis chaplains is to be successful, police and clergy alliances must be distinguished from the Clergy in Schools program in which the Fifth Circuit rejected this argument. According to the Clergy in Schools literature, the program was designed to provide "(1) meaningful dialogue between the clergy and students regarding civic values and morality; (2) a safe school atmosphere; and (3) volunteer opportunities."[135] In comparison to police and clergy alliances, these goals do not align as clearly with the expertise of clergy members. Any properly organized volunteer program creates a safe school atmosphere and volunteer opportunities. In addition, as the court in *Beaumont* noted, the argument that clergy members are uniquely qualified to teach *civic* virtues and morality is not nearly as strong—almost any upstanding citizen could teach such values.

It is also worth noting that the presumption created by the Clergy in Schools program, namely that clergy members are better able to teach morality and civic virtues, leads one to believe that the state may be endorsing clergy members as models of virtue and by extension endorsing religion over nonreligion. This same concern is not present when one considers the message sent by police and clergy alliances. Clergy members are chosen for their communication skills, community connections, and experience as grief counselors—all secular skills that do not lead to the assumption that clergy members are somehow more "moral" individuals and should be looked to as models of civic virtue. Accordingly, police and clergy alliances are distinguishable from the Clergy in Schools initiative and thus better support the argument that clergy members *are* uniquely qualified to run such a program.

3. Neutrality

The final element under the second prong of the *Lemon* test is the neutrality subtest. This doctrine has typically been employed by the Court to analyze situations in which the government gives financial aid to a religious nonprofit or a parochial school. Essentially:

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[134] Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 452 (8th Cir. 1988).

[135] Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 465 (5th Cir. 2001).

> [T]he government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits. Under this doctrine, the Court has held that the Establishment Clause is not violated by tax exemptions for religious, charitable, and educational organizations or by allowing parents to take tax deductions for educational expenses, notwithstanding that most of the deductions will be taken for tuition payments made by parents who are sending their children to parochial schools.[136]

In *Mitchell v. Helms* and *Zelman v. Simmons-Harris*, the Court upheld programs in which students at parochial schools received benefits on the same terms as students at public schools because the programs were neutral with respect to religion.[137]

However, applying this test to police and clergy alliances is complicated by the fact that the government does not directly give financial aid to any religious organization or individual. Rather, the police departments cover the costs that would be associated with *any* volunteer program: they train the volunteers for free, lend them the tools they need to safely and effectively serve as volunteers, and, in some cases, provide volunteers with liability insurance. No money flows directly from the state to any religious group or individual. In *Malyon* the cost of the crisis chaplaincy program was approximately $3000 per year—a small expense in comparison to the amount of money saved by having volunteers perform secular grief counseling and liaison services at crime scenes.[138] Thus, it is difficult to see how a financial benefit argument could be made out in the first place. To put it another way—by importing principles from the endorsement analysis—a reasonable observer would recognize that the government is not providing any financial benefit to religious organizations. If anything, the volunteers are providing a financial benefit to the police departments by providing valuable services free of charge.

Presuming, however, that one were to press forward with this line of argument, there seems to be two levels of neutrality that could dissipate this perceived benefit. First, as discussed earlier, police and clergy alliances are often one of many volunteer initiatives run by police depart-

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[136] Sedler, *supra* note 65, at 1358.

[137] Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002); Mitchell v. Helms, 530 U.S. 793, 809 (2000) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

[138] Malyon v. Pierce Cnty, 131 Wash. 2d 779, 790 (1997).

ments. Even though the different initiatives might not be similar enough to all share the same motive and means under the district court's analysis in *Beaumont*, there may be a sufficient number of programs all receiving the same incidental benefits that this scheme would be considered neutral with respect to religion. For example, the Fort Worth and Houston police departments have five and eight total volunteer initiatives respectively.[139] In addition, both police departments provide volunteers in their other initiatives with similar equipment. Fort Worth Citizens on Patrol, a program with over 2600 active volunteers, lends each group of volunteers a radio and gives each individual volunteer a cap, t-shirt, and windbreaker with Citizens on Patrol insignia on them.[140]

Second, there is a component of individual choice that is one step removed from the funding. As discussed earlier, volunteer chaplains must refrain from discussing religion without the program beneficiary's consent. This provides the program beneficiary with a choice to discuss or not discuss religious issues. This choice serves to break the chain between the government's funding and any discussion of religion with a consenting program beneficiary. While the mechanics of this program are different from a school voucher system, the principle is the same: government funding is separated from any religious activity by an individual's free choice. Here, however, it is impossible to give the individual that free choice beforehand—when police respond to a crisis situation they do not know who they will encounter and cannot foresee whether that individual would want a secular or religious volunteer even if both were available. Instead the choice comes later, when the individual decides whether he or she wants to discuss religious issues with the chaplain.

In addition, the Eighth Circuit's holding in *Carter v. Broadlawns* bolsters the finding that this program does not financially benefit religious organizations. In *Broadlawns*, the court found that a *paid* hospital chaplain, independent of Free Exercise justifications, did not violate the second prong of the *Lemon* test because the money spent on the chaplain was not given to a sectarian religious organization, instead "the money [wa]s spent to employ a counselor who ha[d] the versatility and training to help persons all along the continuum of religious dispositions, from those who only desire nonreligious counseling to those who desire religious discussion and ritual."[141] Accordingly, a much smaller expenditure

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[139] FORT WORTH POLICE DEP'T: GET INVOLVED, http://www.fortworthpd.com/get-involved/Default.aspx (last visited December 14, 2013); HOUSTON POLICE DEP'T: VOLUNTEER INITIATIVES, http://www.houstontx.gov/police/vip/ (last visited December 14, 2013).

[140] FORT WORTH POLICE DEP'T: CITIZENS ON PATROL, http://www.fortworthpd.com/get-involved/citizens-on-patrol.aspx (last visited December 14, 2013).

[141] Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 456 (8th Cir. 1988).

to provide volunteers with necessary equipment would likely satisfy this prong of the *Lemon* test.

C. Excessive Entanglement

The final element of the *Lemon* test—excessive entanglement—has been severely undermined in recent Supreme Court cases, with some commentators suggesting that it is no longer a separate prong.[142] Under the original *Lemon* formulation, the Court found that placing public school teachers in religious schools to teach remedial classes created excessive entanglement because these teachers would be pressured to endorse or promote religious values in the classroom.[143] Thus, these teachers required significant monitoring—leading to excessive entanglement. However, the Court abandoned this presumption and later held in *Agostini* that pervasive monitoring was no longer necessary because "after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment."[144] The Court in *Agostini* also held that, without more, the fact that a program might create political divisiveness or require coordination between the school district and the religious school was not enough to find excessive entanglement.[145] Applying this standard, the Court found that there was no excessive entanglement in *Bowen v. Kendrick*, despite the fact that the government reviewed the material and content of adolescent counseling programs run by religious institutions and continued to monitor the programs with periodic visits in order for them to continue receiving federal grants.[146] Nor was there excessive entanglement in *Roemer v. Board of Public Works* when the state conducted annual audits of program beneficiaries to ensure that funds were not used to teach religious subjects.[147]

Comparing the level of entanglement in the above cases to police and clergy alliances, there is comparatively little risk of excessive entanglement as long as the clergy members are not subject to the authority of both their religious organization and the police department simultaneously. In *Voswinkel*, the district court was concerned that the contract between Providence Baptist Church and the police department would sub-

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[142] *See* Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Waltz*—as an aspect of the inquiry into a statute's effect."); Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the* Lemon *Entanglements Prong*, 7 FIRST AMEND. L. REV. 253 (2009) ("[I]n recent years, numerous scholars and Supreme Court Justices have attacked the entanglements prong. Indeed, the Court has poked so many holes in the entanglements inquiry that it may no longer exist.").

[143] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[144] *Agostini*, 521 U.S. at 234.

[145] *Id.* at 233.

[146] Bowen v. Kendrick, 487 U.S. 589, 615–17 (1988).

[147] Roemer v. Board of Public Works of Md., 426 U.S. 736, 764–65 (1976).

ject the minister to potentially conflicting duties, since half his salary came from each institution.[148] Most police and clergy alliances, however, seem to function more like the program in *Malyon*, in which the volunteers report only to the police department and thus "the chaplains are clearly under the authority of the sheriff's department alone, do not serve as representatives of their personal denominations, and are not paid a state salary. Here there is no impermissible union of ecclesiastical and state control nor is any church enmeshed in the processes of government."[149] Thus, it would be difficult to argue under current precedent that police and clergy alliances create an excessive entanglement with religion.

CONCLUSION

This Note presents several arguments in defense of police and clergy alliances and concludes that these programs pass constitutional muster. This is not to say, however, that these programs do not raise important and controversial issues. From concerns regarding content coercion to allegations of symbolic union, different aspects of these alliances potentially implicate the full range of tests used by the Supreme Court in attempting to make sense of the Establishment Clause.

It is also important to note that a few tangential issues beyond the scope of this Note may ultimately prove dispositive in court. For example, who has standing to challenge a crisis chaplaincy program? Does such a program create a religious test for public office under Article VI of the Constitution? How strong are the Free Exercise justifications in practice? All of these questions will need to be further developed if this controversy continues.

Ultimately, however, an in-depth analysis of the competing substantive concerns based on the Court's current Establishment Clause jurisprudence leads to the conclusion that Operation Good Shepherd and similar programs do not cross the necessary threshold to be considered an establishment of religion. This is because the strong secular justifications and strict limitations on proselytizing work to neutralize any potential endorsement, neutrality, or coercion concerns.

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[148] Voswinkel v. City of Charlotte, 495 F. Supp. 588, 597 (1980).

[149] Malyon v. Pierce Cnty, 131 Wash. 2d 779, 811–12 (1997).

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