

# **WHEN THE EYES AND EARS BECOME AN ARM OF THE STATE: THE DANGER OF PRIVATIZATION THROUGH GOVERNMENT FUNDING OF INSULAR RELIGIOUS GROUPS**

## **ABSTRACT**

*The Shomrim, Hebrew for “guards,” operate as an ancillary police force in Hasidic communities. Defined by devout adherence to traditional norms, Hasidic Jews confine themselves to insular communities within America. However, like many insular or inherently religious communities, they appear to have a propensity to discriminate against outsiders in their attempts at seclusion. Although the Shomrim hold themselves out as their community’s primary police force, they frequently commit bias crimes and other discriminatory acts. This Comment advances the novel argument that the Shomrim are state actors and that government funding to the Shomrim may also violate the Establishment Clause. The Shomrim receive substantial government funding, maintain close ties and connections with the police and the state, and perform a public function. Because these connections constitute a “close nexus,” the Shomrim’s actions are fairly attributable to the state. As state actors, the Shomrim would be subject to constitutional limitations and prohibited from discriminating against outsiders. However, remedying this attribution of state action implicates additional constitutional problems. This Comment proposes that under current state action doctrine and Establishment Clause jurisprudence, the only permissible solution in this context is to remove government ties and funding.*

*Using the Shomrim as a case study, this Comment addresses the problem of privatization through government funding of insular religious communities and organizations. The Shomrim demonstrate that when the government funds inherently religious providers of social services, a constitutional gray area is created in the attempts to reconcile state action with the Establishment Clause. This Comment asserts the government should be careful in funding inherently religious providers of social services because such providers increase the likelihood of discrimination.*

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## INTRODUCTION

In a predominantly Jewish area in 2010, an African-American teen was beaten with a radio and told “[y]ou don’t belong around here” just blocks away from his own neighborhood.<sup>1</sup> Nearly a decade earlier, men in navy blue uniforms<sup>2</sup> struck a group of Hispanic girls with umbrellas and sprayed them with a chemical substance.<sup>3</sup> In another Jewish area, men driving patrol cars struck an African-American male with a baton and sprayed him with mace.<sup>4</sup> Ten years before, a group of West Indian teens were pursued and run off the road by a man shouting racial slurs.<sup>5</sup>

Unifying these attacks are the perpetrators—men who wear navy blue, police-style uniforms and drive blue and white patrol cars.<sup>6</sup> Often confused with the police, they are not police but the Shomrim—licensed citizen patrol groups found in many Hasidic<sup>7</sup> communities across the United States.<sup>8</sup> Reports are replete with accusations against the Shomrim of targeting blacks and committing other bias crimes.<sup>9</sup> Articles frequently cite minority community members who have been stopped simply for not looking like the Hasidic Jews the Shomrim aim to protect.<sup>10</sup> Even more of these crimes likely go unreported.

<sup>1</sup> See Daniel Burke, *Volunteer Unit Accused of Racism*, WASH. POST, Feb. 5, 2011, at B2 (internal quotation marks omitted).

<sup>2</sup> Corey Kilgannon, *In Protecting Hasidic Neighborhoods, Squads Patrol Without Guns or Badges*, N.Y. TIMES, Sept. 4, 2010, at A14 (noting the Shomrim “wore blue jackets with emblems . . . [and displayed] forelocks of the Hasidic”).

<sup>3</sup> Anna Schneider-Mayerson, *Hispanic Activists Want Shomrim Disbanded*, N.Y. SUN, May 10, 2002, at 1.

<sup>4</sup> See Alex Mindlin, *Patrolling the Streets, and Dissing the Rivals*, N.Y. TIMES, June 1, 2008, at CY6.

<sup>5</sup> *Driver Is Accused of Chasing Youths*, N.Y. TIMES, Apr. 26, 1997, at 27.

<sup>6</sup> See MATTHEW SHAER, *AMONG RIGHTEOUS MEN: A TALE OF VIGILANTES AND VINDICATION IN HASIDIC CROWN HEIGHTS 27* (2012); see also *supra* notes 1–5; cf. SHAER, *supra*, at 13 (entering a room, one man “saw seven men in navy blue uniforms and thought, *Police*”).

<sup>7</sup> Hasidic Jews represent a sect of extremely religious, mystical Orthodox Judaism. Within the Hasidism are different sects with particular views and specific norms and dress (e.g., Satmar, Bobovich, and Lubodovich Hasidim). Although they tend to live and work within their own groups, they interact substantially with one another. This Comment refers to the various Hasidic sects collectively. See Joseph Berger, *Killing Rattles a Jewish Community’s Long-Held Trust of Its Own*, N.Y. TIMES, July 15, 2011, at A1. See generally *Hasidism*, in *ENCYCLOPEDIA OF RELIGION IN AMERICA* (Charles H. Lippy & Peter W. Williams eds., 2010), available at [http://library.cqpress.com/era/encyra\\_943.1](http://library.cqpress.com/era/encyra_943.1).

<sup>8</sup> Nick Pinto, *Gotham’s Crusaders*, VILLAGE VOICE, Sept. 7, 2011, at 9.

<sup>9</sup> See, e.g., Karen Matthews, *Orthodox Communities Rely on Patrols for Safety*, ASSOCIATED PRESS, July 16, 2011, available at [http://www.usatoday.com/news/nation/2011-07-16-brooklyn-boy-volunteer-patrol\\_n.htm](http://www.usatoday.com/news/nation/2011-07-16-brooklyn-boy-volunteer-patrol_n.htm) (“[C]ritics have accused some of being vigilantes who target blacks.”).

<sup>10</sup> See, e.g., David Kocieniewski, *Hasidic Patrol Group Faces Questions After a Crown Heights Clash*, N.Y. TIMES, May 11, 1996, at 21 (noting that members of the Shomrim randomly stop black pedestrians to ask

Although the Shomrim work with and act like the police and receive funding primarily from direct government grants, they are not held liable in the same way as ordinary police officers. Because they are assumed to be private actors, constitutional provisions protecting individual rights do not apply.<sup>11</sup>

This Comment addresses the problem of privatization and government funding of insular religious communities and organizations, using the Shomrim in Brooklyn, New York as a case study. Although the Shomrim may seem unique in many respects, they are a salient example of government funding of religious social service providers. The Shomrim emphasize an important and interesting intersection of the privatization of government power and government funding of insular religious organizations and social service providers.

Contention and debate surround the funding of religious groups, particularly with the tremendous amount of money funneled to religious organizations through charitable choice and faith-based initiatives.<sup>12</sup> On the one hand, religious organizations are often considered the most effective providers of social services.<sup>13</sup> On the other hand, there are many problems associated with funding religious organizations, including the potential for discrimination, a lack of religious autonomy, and the tension between the Establishment Clause and the Free Exercise Clause.<sup>14</sup>

The debate is further compounded by the propensity for inherently religious or insular groups, such as the Shomrim, to discriminate against outsiders. The provision of government funds to these groups should be suspect due to the “significant pressure on those institutions to discriminate . . . [to] fulfill their broad religious mandates.”<sup>15</sup> This is especially concerning because of the potential for religious entities to use government funding to further partisan political ends, promising votes for money.<sup>16</sup> While a religious group’s

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why they are in the neighborhood to make outsiders feel unwanted); Pamela Newkirk, *Ice Slowly Thawing Ethnic Tension Seen Lessening*, NEWSDAY (N.Y.), July 28, 1991, at 1.

<sup>11</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.” (emphasis added)).

<sup>12</sup> See generally Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005) (identifying the partnership between religious entities and government agencies and describing the constitutional challenges such partnerships present).

<sup>13</sup> 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 353 (2009).

<sup>14</sup> See generally Lupu & Tuttle, *supra* note 12.

<sup>15</sup> David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1366 (2003).

<sup>16</sup> See *id.* at 1364–65.

proclivity to discriminate is normally discussed in the terms of religious discrimination, the issue of discrimination against outsiders is significant and unfortunately given little attention.

The question is whether these providers, who have been providing social services for years, should now be able to “benefit from the government’s desire” for privatization.<sup>17</sup> There is some concern about whether there are certain areas that are so “governmental,” such as punishment, that they should not be privatized.<sup>18</sup> This question of government privatization using religious social service providers “has significant constitutional implications for religious entities, which have rarely, if ever, been litigated.”<sup>19</sup>

In an age of increasing privatization and judicial deference to administrative decisions,<sup>20</sup> decisions regarding the regulations that create semi-private actors may be immune from review.<sup>21</sup> Privatization poses the additional danger that “private actors will exploit their position in government programs to advance their own financial or partisan interests at the expense of program participants and the public.”<sup>22</sup> This concern is striking in the context of religious organizations that choose to insulate to keep to themselves. The Shomrim highlight this concern as a government attempt to privatize a religious social service provider.

This Comment advances the novel argument that the Shomrim are state actors and may present an Establishment Clause problem. Because the Shomrim, like other private actors, are not held to the confines provided under the Constitution, the victims of discrimination at the hands of religious social service providers are left with little recourse. Even more concerning, in the face of accusations of racial discrimination and violence the Shomrim are said to receive large amounts of public funding from politicians in order to buy their votes.

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<sup>17</sup> Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1240 (2003).

<sup>18</sup> See Saperstein, *supra* note 15, at 1383 (responding to Martha Minow’s statement).

<sup>19</sup> *Id.*

<sup>20</sup> Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL’Y 362, 364–65 (2008); see also Hadar Aviram et al., *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 FORDHAM URB. L.J. 709, 727 (2010).

<sup>21</sup> See Aviram et al., *supra* note 20, at 727.

<sup>22</sup> Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1372 (2003).

Due to the self-imposed insulation of the Hasidic community, it is unsurprising no one previously has written about the Shomrim. However, in the aftermath of more publicized discriminatory actions, as well as a young boy's murder,<sup>23</sup> the media has paid increasing attention to some of the ongoing tensions and problems posed by the Shomrim.<sup>24</sup> While the Hasidic community generally avoids the American legal system,<sup>25</sup> one case currently pending presses Hasidic patrol groups and the State to be held to greater liability for their actions.<sup>26</sup>

In Part I, this Comment describes the Shomrim and their role in the Hasidic community, and it explains the Shomrim's relationship, similarities, and ties to the police and state. Part I then explores criticisms of the Shomrim and addresses the legal issues they present. Part II considers the Shomrim in a religious context, suggesting the government's interactions with the Shomrim may violate the Establishment Clause. The Establishment Clause bars excessive funding or non-neutral delegation to the Shomrim, but it cannot stop the Shomrim in their discriminatory actions.

Part III advances the argument that the Shomrim are state actors and are subject to constitutional limitations because they perform a public function and maintain a close nexus with the state. The discriminatory nature of the Shomrim's conduct also renders a finding of state action more likely. A state action argument would regulate the Shomrim as to constitutional limitations, giving the Shomrim or the government a problematic choice—regulation according to the Constitution, thus limiting their ability to keep out outsiders, or disentanglement and a halt to funding and ties with the state. Analysis under both the state action doctrine and the Establishment Clause provides an important view of the constitutional boundaries confronted when working with insular religious organizations.<sup>27</sup> Further, in this age of privatization where the lines between public and private are increasingly blurred, “the contours of the

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<sup>23</sup> See Berger, *supra* note 7.

<sup>24</sup> See *infra* Part I.

<sup>25</sup> The Hasidim also avoid secular courts, “which they view as less than perfectly attuned to their interests,” because Jewish law (halacha) calls on Jews to go through *beis din*, or rabbinical arbitration, first. SHAER, *supra* note 6, at 3.

<sup>26</sup> See Amended Complaint and Demand for Jury Trial, Crown Heights Shomrim Volunteer Safety Patrol, Inc. v. City of N.Y., No. 11 CV 0329 (KAM)(JMA) (E.D.N.Y. Sept. 6, 2011).

<sup>27</sup> Although there is some criticism of whether the Establishment Clause and the state action doctrine should overlap, the intricacy of the relationship between the two doctrines is beyond the scope of this Comment. For a more in-depth discussion, see Lupu & Tuttle, *supra* note 12.

state action doctrine may come to define the contours of our most basic constitutional rights.”<sup>28</sup>

Part IV assesses possible solutions to the constitutional issues implicated by the Shomrim and asserts that disentanglement and defunding are the only constitutionally permissible solutions. The inclination of an insular community to discriminate against outsiders to maintain its insularity highlights the danger of government allocation of funds and close ties to religious social services. Finally, this Comment concludes by asserting that the government should be careful in its relationships with insular communities.

#### I. THE SHOMRIM: THE “EYES AND EARS” BECOME AN ARM OF THE STATE

This Part first depicts the Shomrim and their relationship to the Hasidic community, and then it explains the relationship between the Shomrim and the police. Second, this Part focuses on frequent criticisms of the Shomrim, and it concludes by highlighting the legal issues pertaining to the Shomrim.

##### A. *The Shomrim and the Hasidic Community*

The Shomrim exist for two primary reasons: (1) to act as a police force “to protect against criminality,” and (2) to protect the Hasidic community’s way of life, “erect[ing] a human barrier between the Jewish settlement and the bustle of the world outside city limits.”<sup>29</sup> Shomrim organizations exist wherever large Hasidic communities are located.<sup>30</sup> While different Hasidic communities each have their own group,<sup>31</sup> this Comment refers to the Shomrim of Brooklyn in a general sense because of their similarity and unified work.

In Brooklyn, Hasidic communities live in an enclosed, closeted world that “foster[s] a sense of community, solidarity, and intimacy.”<sup>32</sup> Known for their strict adherence to traditional Jewish law and custom,<sup>33</sup> the Hasidic sects in

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<sup>28</sup> *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010) (citing Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83, 85 (2004)).

<sup>29</sup> SHAER, *supra* note 6, at 2 (emphasis omitted).

<sup>30</sup> Matthew Shaer, *A Shtetl Divided: Messianic Vigilantes, Brawling Hasidim, and the Battle for Jewish Brooklyn*, HARPER’S MAG., Jan. 2011, at 53, 54.

<sup>31</sup> E.g., Flatbush Shomrim, Crown Heights Shomrim, Crown Heights Shmira, Williamsburg Shomrim, Borough Park Shomrim, and Kings County Shomrim.

<sup>32</sup> SHAER, *supra* note 6, at 8.

<sup>33</sup> Shaer, *supra* note 30, at 54 (“Their lives are circumscribed by prayer, study, familial obligation, and a deep commitment to their Rebbe, or grand rabbi, who is considered closer to God than are other mortal men.”).

Brooklyn are considered a “textbook example of a ‘discrete and insular minority.’”<sup>34</sup> The sanctity of their religion is omnipresent in the Hasidic Jews’ eyes, and all aspects of life are ordered in accordance with the direction and authority of their Rebbe, the grand or head rabbi.<sup>35</sup> Therefore, it is unsurprising that the Shomrim both promote and patrol the barrier between the larger city and their religiously mandated life.

In an emergency, the Shomrim are the Hasidim’s<sup>36</sup> first line of defense.<sup>37</sup> The Shomrim are the preferred police because they know the territory, are trusted by their insular community,<sup>38</sup> and are able to speak Yiddish, their community’s primary language.<sup>39</sup> Even the police utilize the Shomrim as a liaison in the community.<sup>40</sup> The New York Police Department (NYPD) considers the Shomrim its “eyes and ears,” relying on them to go beyond the NYPD’s normal reach.<sup>41</sup>

### *B. The Shomrim Act like the Police and Are Intricately Tied to the Police*

Composed of Jewish volunteers, the Shomrim function similarly to an auxiliary police force.<sup>42</sup> Although the Shomrim began many years ago as a few individual volunteers, the organization has matured into a government-funded supplement to the NYPD.<sup>43</sup> But the Shomrim are no ordinary citizen patrol or neighborhood watch group—they follow suspects, trap perpetrators,<sup>44</sup>

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<sup>34</sup> T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 596 (1993) (referring to the Hasidim in Brooklyn regarding *United Jewish Organizations v. Carey*).

<sup>35</sup> See 2 GREENAWALT, *supra* note 13, at 229.

<sup>36</sup> Hasidim, meaning “pious one,” refers to the Hasidic Jewish people.

<sup>37</sup> Kilgannon, *supra* note 2 (“Many area residents are more likely to call the patrol’s hot line number than 911.”).

<sup>38</sup> The Hasidic community is frequently untrusting of outsiders. *See id.*

<sup>39</sup> Corey Kilgannon, *For Hasidim, First Call for Help Often Isn’t to 911*, N.Y. TIMES CITY ROOM (July 15, 2011, 2:35 PM), <http://cityroom.blogs.nytimes.com/2011/07/15/in-hasidic-areas-first-call-for-help-isnt-to-911>.

<sup>40</sup> Jordan Heller, *Jewish Street Patrols Curb Crime—and Generate Controversy*, CHRISTIAN SCI. MONITOR, Feb. 11, 2009, at 25.

<sup>41</sup> Kilgannon, *supra* note 2. Additionally, the Shomrim have come in conflict with the NYPD as well as the community they aim to protect. *See* SHAER, *supra* note 6, at 3.

<sup>42</sup> Pinto, *supra* note 8, at 10. Some Shomrim members are NYPD auxiliary force members, and some participate in the COP program (Community Oriented Policing). SHAER, *supra* note 6, at 73, 165.

<sup>43</sup> *See* Pinto, *supra* note 8, at 12.

<sup>44</sup> Kilgannon, *supra* note 2.



encounter dangerous situations,<sup>45</sup> and “rule the streets like real cops—driving unmarked cars, flashing emergency lights and snatching people they think are criminals.”<sup>46</sup> The Shomrim also maintain twenty-four-hour hotlines and dispatch stations.<sup>47</sup> Fiercely proud of their work, the Shomrim post pictures of their arrests with the NYPD and their aid in collecting crime-scene evidence on neighborhood websites and the Shomrim Facebook pages.<sup>48</sup> Even critics admit that while the patrols have their flaws, the Shomrim provide a beneficial service to the community at large.<sup>49</sup>

The Shomrim bear a striking resemblance to the NYPD. Listening to police scanners, the Shomrim cruise the neighborhood<sup>50</sup> and carry radios to keep in touch with one another.<sup>51</sup> Members wear blue jackets with emblems resembling the NYPD logos, rope off areas with yellow crime-scene tape,<sup>52</sup> and drive blue and white patrol cars with “official emblems,”<sup>53</sup> lights, and sirens.<sup>54</sup> The patrol cars<sup>55</sup> look exactly like the NYPD patrol cars; from the pictures below it is apparent why the Shomrim may be confused with the NYPD.<sup>56</sup>

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<sup>45</sup> For example, in 2010 four Shomrim members were shot after pursuing and confronting a known perpetrator. Anahad O’Connor & Mick Meenan, *Man Shoots Four Members of Jewish Patrol in Brooklyn*, N.Y. TIMES, Sept. 3, 2010, at A16.

<sup>46</sup> Simone Weichselbaum, *Praise & Scorn for Hasidic Patrols. Some Say They Target Minorities*, N.Y. DAILY NEWS, July 5, 2011, at 3.

<sup>47</sup> Heller, *supra* note 40.

<sup>48</sup> See, e.g., *CrownHeights Shomrim*, FACEBOOK, <http://www.facebook.com/crownheights.shomrim> (last visited June 18, 2013); YESHIVA WORLD NEWS, <http://www.theyeshivaworld.com/local/nyc> (last visited June 18, 2013).

<sup>49</sup> Heller, *supra* note 40.

<sup>50</sup> Weichselbaum, *supra* note 46.

<sup>51</sup> Kilgannon, *supra* note 39.

<sup>52</sup> The Shomrim use yellow crime scene tape labeled “shomrim.” Kilgannon, *supra* note 2.

<sup>53</sup> See *id.*; see also *infra* note 57.

<sup>54</sup> See *infra* notes 57–58. The Shomrim even have the same “courtesy, professionalism, respect” emblem that the NYPD has on its patrol cars. See *id.*

<sup>55</sup> The Shomrim also maintain legions of scooters similar to those used by the NYPD and command centers that also mimic NYPD command centers. *Compare Photos: Shomrim Roll Out New Vehicle Design*, CROWNHEIGHTS.INFO (May 12, 2010), <https://crownheights.info/picture-of-the-day/26270/photos-shomrim-roll-out-new-vehicle-design/> (picturing Shomrim patrol cars marked the same way as NYPD older design scooters), with *Picture of the Day—The Police Response to Carjacking*, CROWNHEIGHTS.INFO (Feb. 14, 2011), <http://crownheights.info/picture-of-the-day/32393/picture-of-the-day-the-police-response-to-carjacking/>.

<sup>56</sup> See *infra* notes 57–58. The only discernible difference in the two cars is that the NYPD emblem is replaced with either “SHOMRIM” or an acronym representing the particular neighborhood patrol.

A Shomrim Patrol Car<sup>57</sup>:An NYPD Patrol Car<sup>58</sup>:

Similar to undercover police, the Shomrim utilize unmarked cars to tail suspected wrongdoers in matters requiring more stealth.<sup>59</sup> The Shomrim also use police-style red rotating lights.<sup>60</sup> These flashing lights are most likely an attempt to assert the Shomrim's authority.<sup>61</sup>

The NYPD maintains a close relationship<sup>62</sup> with the Shomrim and relies on them for much of the police work done in the Hasidic communities. The

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<sup>57</sup> *Shomrim Put Out First Marked Patrol Car*, CROWNHEIGHTS.INFO (Oct. 3, 2006), <http://crownheights.info/general/3271/shomrim-put-out-first-marked-patrol-car/>. CHVP stands for Crown Heights Volunteer Patrol, a Shomrim patrol in Brooklyn.

<sup>58</sup> POLICE CAR WEB SITE, <http://policecarwebsite.net/fc/ny/nypd/nypd567.jpg> (last visited June 18, 2013).

<sup>59</sup> O'Connor & Meenan, *supra* note 45.

<sup>60</sup> Weichselbaum, *supra* note 46. However, reports assert that their use of the "red-and-blue backlight package" is illegal. *Id.*

<sup>61</sup> The fact that the police have not stopped the Shomrim's use of the lights may indicate their de facto allowance. *See infra* Part III.

<sup>62</sup> *See, e.g.*, Shomrim – שומרים, *Levaya of Leiby Kletzky HY"D*, FACEBOOK, <http://www.facebook.com/media/set/?set=a.226042130772432.53081.162855353757777&type=1> (last visited June 18, 2013) (showing

manpower of the Shomrim “allows the police to go further in their search,” adding value and efficiency to the understaffed and overworked NYPD.<sup>63</sup> Some Shomrim members work directly with the police, and many receive or undergo training with the NYPD.<sup>64</sup> Like the police, they are subjected to background checks and are fingerprinted.<sup>65</sup> In 2009, one group even received space to work in the squad room of the Seventy-First Precinct House.<sup>66</sup> They received “keys to several city vehicles . . . caps and uniforms, and badges,” becoming members of the Civilian Observation Patrol and reporting to the community affairs desk.<sup>67</sup> Some members are also members of the NYPD auxiliary force.<sup>68</sup>

### C. *Funding of the Shomrim and Ties to the State*

In addition to the close ties with the police department, the Shomrim receive and rely on a substantial amount of local government funding that enables them to function. Funding comes from city council appropriations, as well as from various local government officials through member-items.<sup>69</sup> The Shomrim receive more money than other community patrol organizations and are “without peer when it comes to securing public money for their operation.”<sup>70</sup> Government funding facilitates the purchase of sophisticated equipment, including state-of-the-art, police-style mobile command center

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the Shomrim working, literally, hand-in-hand with the NYPD to control the crowds at a young boy, Leiby Kletzky’s, funeral).

<sup>63</sup> Matthews, *supra* note 9.

<sup>64</sup> See SHAER, *supra* note 6, at 165; see also Jacob Sugarman, *Watchmen*, TABLET MAG. (May 26, 2011, 7:00 AM), <http://www.tabletmag.com/jewish-news-and-politics/68298/watchmen> (noting the Shomrim’s “biennial training regimen” with the NYPD).

<sup>65</sup> See Sean Gardiner & Alison Fox, *Civilian Patrol Was Family’s First Call*, WALL ST. J., July 16, 2011, at A15.

<sup>66</sup> See SHAER, *supra* note 6, at 165.

<sup>67</sup> *Id.* Shaer asserted the group (Shmira) received this space to “keep a tight rein on the Shmira” and in retaliation against another Shomrim group that refused to cooperate with the NYPD. For further discussion of this as well as the rivalry and split between two Shomrim groups in Crown Heights, see *id.*

<sup>68</sup> *Id.* at 73.

<sup>69</sup> Pinto, *supra* note 8, at 13. Member-items, “portion[s] of state funding allocated by the [New York] Senate and Assembly,” must be “used for a public purpose.” *Resources: Member Items*, N.Y. OPEN GOV’T, [http://www.nyopengovernment.com/NYOG/resources\\_member.html](http://www.nyopengovernment.com/NYOG/resources_member.html) (last visited June 13, 2013).

<sup>70</sup> Pinto, *supra* note 8, at 13; see also Editorial, *Shomrim Shanda*, N.Y. POST, Aug. 7, 2011, at 24 (noting that the Shomrim received \$130,000 in city council member items from the 2011 budget); Matthews, *supra* note 9 (explaining that office rent and two-way radios were funded by donations, with some support from local elected officials, and that the Shomrim wear vests and jackets donated by the police department). Despite this criticism, some politicians assert that it is good sense to help equip community organizations like the Shomrim. See Pinto, *supra* note 8 (noting that Brooklyn politicians assert good sense to equip community organizations like the Shomrim).

trucks.<sup>71</sup> The receipt of “an iniquitous amount of government funding . . . and preferential treatment from the fire and police departments and municipal services,” engender feelings of resentment among outsiders in the community.<sup>72</sup>

Like any government funding, the money appropriated to the Shomrim is not without political motivations. Hasidic communities are well-known for being “the most disciplined voting bloc.”<sup>73</sup> Because of the predictable voting bloc—community members vote for whomever the Rebbe proposes—Hasidic communities are frequently utilized by politicians, both locally and nationally.<sup>74</sup> Unsurprisingly, the community wields tremendous power in New York politics; this is often cited as a reason police strive to keep relations with the Shomrim amicable.<sup>75</sup> This political power would be troubling, especially if the city turns a blind eye to the Shomrim’s blatant violations.

#### D. Criticisms of the Shomrim

The Shomrim’s funding and close relationship with the state is not without its costs and criticisms. While police credit the Shomrim for aiding them in arrests, the Shomrim are also accused of discrimination against outsiders, the nonreporting of certain crimes, vigilantism, and a lag time in reporting crimes.<sup>76</sup> The Shomrim frequently begin searches themselves, without waiting or calling for police aid and intervention.<sup>77</sup> There is a “longstanding issue”

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<sup>71</sup> Pinto, *supra* note 8; cf. John Doyle, *Van with a Plan—Orthodox Patrollers Holy Rollers in Luxeunit*, N.Y. POST, May 25, 2009, at 17 (criticizing the \$250,000 command center paid for by grants from the city). In March 2012, the Borough Park Shomrim received a new “state of the art” mobile command center through funding from the city council. The unveiling was celebrated by a wide array of government officials that included a U.S. Representative, the New York City comptroller, a state senator and state assemblyman, city council members, and NYPD inspectors. See *A New State of the Art Command Center for Borough Park Shomrim*, ASSEMBLYMAN DOV HIKIND (Mar. 26, 2012), <http://dovhikind.blogspot.com/2012/03/new-state-of-art-command-center-for.html>.

<sup>72</sup> Shaer, *supra* note 30, at 54.

<sup>73</sup> Pinto, *supra* note 8, at 13 (internal quotation marks omitted).

<sup>74</sup> *Id.*; see also SHAER, *supra* note 6, at 52. The “enormous power [insular group] voting blocs have in American politics” is well recognized, despite the famous *Carolene* footnote arguing for protection of such powerless groups. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728 (1985).

<sup>75</sup> Pinto, *supra* note 8, at 10 (noting the police were “careful not to antagonize the Shomrim”); see also Newkirk, *supra* note 10 (describing the disproportionate Hasidic presence on the school board and preferential treatment of Shomrim when they stormed the precinct).

<sup>76</sup> See Kilgannon, *supra* note 2.

<sup>77</sup> See Kilgannon, *supra* note 39.

with the Shomrim's delay in notifying the police of suspected crime and other incidents.<sup>78</sup>

Internally, the Shomrim enforce the norms of their ultrareligious sect, which may include covering up<sup>79</sup> sexual abuse and child molestation.<sup>80</sup> The police are so closely tied to the Shomrim that police will often call them when the police receive reports of sexual abuse.<sup>81</sup> This frequently results in the Shomrim dissuading individuals from pressing charges,<sup>82</sup> perpetuating the cycle of abuse.

Vigilantism is a persistent problem with the Shomrim, and it usually manifests itself through racially discriminatory actions.<sup>83</sup> The Shomrim are repeatedly charged with targeting minorities, beating up black men and children,<sup>84</sup> and racial profiling.<sup>85</sup> Minorities venturing into the Hasidic communities frequently are stopped and questioned on their presence in the area.<sup>86</sup> Black residents who were stopped stated the Shomrim “are always trying to make you fe[e]l unwanted” and watched.<sup>87</sup> One author stated: “Locals regularly reported being stopped and asked for identification; several men said they had been collared and shoved into the back of a squad car, for no discernible reason other than the fact that they were black.”<sup>88</sup>

Community websites, videos on YouTube, and the Shomrim's Facebook pages depict the Shomrim detaining and assisting in arresting suspected criminals, who are invariably depicted as minorities—outsiders to the Hasidic

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<sup>78</sup> *Id.* (internal quotation marks omitted).

<sup>79</sup> An issue with *mesira*, the Talmudic prohibition against telling on another Jew, is also implicated as a reason invoked by rabbis to justify not reporting abuse to secular authorities. *See* Pinto, *supra* note 8, at 10.

<sup>80</sup> *See id.* at 14. When these crimes are reported to the Shomrim, the issues frequently are covered up and the cycle is perpetuated where “rabbis, youth leaders, and yeshiva teachers caught molesting children [are] shielded from the secular justice system.” *Id.* at 11; *see also* Berger, *supra* note 7.

<sup>81</sup> *See* Pinto, *supra* note 8, at 12.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *See* Kilgannon, *supra* note 2 (describing 1996 case where members were arrested after accusations of beating up a black man); Matthews, *supra* note 9 (noting criticisms of the Shomrim as “being vigilantes who target blacks”); Newkirk, *supra* note 10 (noting that a Hispanic leader described the Shomrim as “‘vigilantes who have terrorized our community’”).

<sup>84</sup> *See* Matthews, *supra* note 9.

<sup>85</sup> *See* Heller, *supra* note 40.

<sup>86</sup> *See, e.g.*, Dan Morrison, *Heights of Anger*, NEWSDAY (N.Y.), May 11, 1996, at A05 (noting that law enforcement sources stated the Shomrim stop blacks and question why they are there).

<sup>87</sup> *See* Kocieniewski, *supra* note 10 (internal quotation marks omitted).

<sup>88</sup> *See* SHAER, *supra* note 6, at 52.

community.<sup>89</sup> A promotional video demonstrates the Shomrim's pointedly discriminatory pursuits.<sup>90</sup> For example, the Shomrim video depicts the Shomrim in pursuit of a purse thief (a black man) and calling the police only after the man is caught and surrounded.<sup>91</sup>

Minority groups claim the Shomrim receive preferential treatment from the NYPD and the city. Alleged preferential treatment of the Hasidic community in housing, parking tickets, and arrests in the past have resulted in investigation.<sup>92</sup> For example, Hispanics claimed that the NYPD displayed favoritism by only arresting one Hasidic man after over three hundred Hasidim stormed a police precinct to protest a Hasidic man being charged with sexual abuse.<sup>93</sup>

### *E. The Legal Issues Presented by the Shomrim*

The Shomrim should be held accountable for their discriminatory and wrongful actions, especially when they commit such actions under the auspices of the police and are supported almost entirely through government funding. However, the current recourse is insufficient to effectively control the Shomrim's wrongful actions. One problem lies in the fact that the insularity of the community may prevent reports of wrongdoing from the inside.<sup>94</sup> Outside of their community, criminal law is a possibility. Although a limited number of cases have been filed, criminal law is significantly underused. This may also be due to the Shomrim's authoritative appearance in their community and to outsiders, as well as their pervasive ties with the police, who may be inclined to let charges slide.<sup>95</sup> Tort liability is an additional route; however, the

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<sup>89</sup> See, e.g., Shomrim – שומרים, *One Arrested for Robbery & Bomb Scare by Boro Park Shomrim (BSSP)*, FACEBOOK, <http://www.facebook.com/media/set/?set=a.196550410388271.45111.16285535375777&type=1> (last visited June 18, 2013); Shomrim – שומרים, *Robbery at Gunpoint, and Attempted Carjacking 5/3/11*, FACEBOOK, <http://www.facebook.com/media/set/?set=a.196547460388566.45109.16285535375777&type=1> (last visited June 18, 2013).

<sup>90</sup> See Pinto, *supra* note 8, at 12 (describing a video released by the Shomrim). To view the video, see *Brooklyn South Safety Patrol*, YOUTUBE (July 19, 2011), [http://www.youtube.com/watch?v=G-s4RoaAt1g&feature=player\\_embedded](http://www.youtube.com/watch?v=G-s4RoaAt1g&feature=player_embedded).

<sup>91</sup> Later in the video, Shomrim members heroically scale a balcony to catch a Hispanic man breaking into an apartment after a scared Hasidic child calls the Shomrim, rather than 911. See Pinto, *supra* note 8, at 12.

<sup>92</sup> Newkirk, *supra* note 10.

<sup>93</sup> *Id.* Forty-six officers were injured. *Id.*

<sup>94</sup> This is also an issue stemming from the Jewish law of *merisah*, which prevents Jews from reporting other Jews. See Pinto, *supra* note 8, at 10.

<sup>95</sup> Cf. Pinto, *supra* note 8 (discussing the political power held by the Hasidic populations because of the uniform way they vote).

potential plaintiffs are typically limited to disadvantaged groups that may not have access or interest in the legal system.

The political power wielded by the Shomrim further insulates the Shomrim from liability. Local government officials, along with the NYPD, repeatedly express their gratitude for and utilize the Shomrim as a supplemental police force in their busy state. As a result, a perverse incentive exists for the government to privatize the Shomrim, thus allowing the Shomrim (as private actors not held to the Constitution) to do what the government could not constitutionally do otherwise.<sup>96</sup> The Shomrim are accused of behavior that would be unquestionably unconstitutional if engaged in by public police officers. Thus, without appropriate recourse from politics, tort law, or criminal law, the Shomrim continue with their wrongful acts unfettered and funded by the government.

The following two Parts of this Comment consider the actions of the Shomrim from a constitutional standpoint, examining the Shomrim under the Establishment Clause and the state action doctrine. There are difficulties inherent in these areas of law—both state action and Establishment Clause jurisprudence are complex, value laden, fact intensive, and lacking specific guidelines from the Supreme Court. However, considering the publicly funded discrimination committed by the Shomrim, an attempt at such an analysis is imperative. This analysis also highlights some of the implications resulting from the privatization of inherently religious organizations.

## II. THE SHOMRIM AND THE ESTABLISHMENT CLAUSE: CAREFULLY TOEING THE LINE OF RELIGIOUS ENTANGLEMENT

Given the inherently religious nature of the Shomrim, an observer might naturally think that government involvement with the Shomrim results in an Establishment Clause problem. This Part explores a potential Establishment Clause claim and finds the Shomrim may present an Establishment Clause problem.

The First Amendment provides that “Congress shall make no law respecting an establishment of religion.”<sup>97</sup> At its core, the Establishment

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<sup>96</sup> Cf. Metzger, *supra* note 22 (describing the perverse reasons why private actors seek to perform traditional government functions).

<sup>97</sup> U.S. CONST. amend. I. The Establishment Clause was incorporated and applied to the states under the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Clause is meant to prevent a “fusion of governmental and religious functions.”<sup>98</sup> Unfortunately, the convoluted Establishment Clause jurisprudence renders it difficult to precisely draw the line of where government establishes religion. Strict interpretation of the Establishment Clause would deem the provision of “even the most essential public services”<sup>99</sup> to religious organizations a violation of the Establishment Clause.<sup>100</sup> Like other religious organizations, it is clear that the Shomrim are not required to be completely isolated from government or society.<sup>101</sup> Problems arise, for example, when religious leaders make government decisions or when religious matters receive invasive review and supervision by public officials.<sup>102</sup>

The state then must act neutrally with religious organizations, allowing a certain degree of accommodation.<sup>103</sup> However, within this proscribed neutrality the state must take care not to accommodate direct support to a religious organization too much, where the “breach of neutrality . . . today a trickling stream may all too soon become a raging torrent.”<sup>104</sup> Although the Establishment Clause typically forbids “sponsorship, financial support, and active involvement of the sovereign in religious activity,”<sup>105</sup> the issue is “one of degree.”<sup>106</sup> In analyzing the aid provided, determination of an Establishment Clause violation hinges to a large extent on the degree of the independent secular function.<sup>107</sup> Most challenging, and most likely to present an Establishment Clause violation, are institutions that are pervasively religious without a clearly independent secular function.<sup>108</sup> These institutions are problematic because they require many safeguards in order to both keep religion separate and prevent excessive entanglement.<sup>109</sup> For instance, aid to

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<sup>98</sup> See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

<sup>99</sup> *Brandon v. Bd. of Educ.*, 635 F.2d 971, 975 (1980) (including public services such as fire, police, and transportation).

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (explaining that the Establishment Clause does not create a complete wall between church and state).

<sup>102</sup> See 2 GREENAWALT, *supra* note 13, at 11.

<sup>103</sup> See generally *id.* at 336–51.

<sup>104</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

<sup>105</sup> *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973) (internal quotation marks omitted).

<sup>106</sup> *Meek v. Pittenger*, 421 U.S. 349, 359 (1975) (internal quotation marks omitted), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>107</sup> 6 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 21.4(c)(v) (4th ed. 2008).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*



certain social service providers (e.g., religious hospitals) is frequently deemed to have an independent, secular function of providing medical care.<sup>110</sup>

This Part analyzes the Shomrim in the context of the Establishment Clause.<sup>111</sup> First, using the nondelegation framework articulated in *Larkin v. Grendel's Den*,<sup>112</sup> it is clear that the Shomrim are not delegated government authority in violation of the Establishment Clause. Second, consideration of the Shomrim using the test provided in *Lemon v. Kurtzman*<sup>113</sup> aids in discovering the nature of the Shomrim. Application of the *Lemon* test, or any Establishment Clause test, is novel in this circumstance.

While it is possible the Shomrim violate the Establishment Clause, given the most recent direction of the Supreme Court's Establishment Clause jurisprudence<sup>114</sup> ultimately it may be unlikely a court would find the government truly "establishes" religion through the Shomrim. Regardless, analysis of the Shomrim under the Establishment Clause provides insight into the constitutional problems posed by the privatization of government power in inherently religious organizations.<sup>115</sup>

#### A. *Delegation and the Village of Kiryas Joel*

Government power that is delegated to religious institutions may violate the Establishment Clause and is particularly suspect in the context of insular communities, "an electorate defined by common religious belief and practice."<sup>116</sup> In *Larkin*,<sup>117</sup> a Massachusetts law allowed churches to block the issuance of liquor licenses to establishments within 500 feet of the church.<sup>118</sup>

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<sup>110</sup> See, e.g., *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899). See generally 6 ROTUNDA & NOWAK, *supra* note 107, § 21.4(c)(v).

<sup>111</sup> While standing is another hurdle that must be overcome in bringing an Establishment Clause claim, for the purposes of this Comment standing is not substantively considered. The Court has tightened standing requirements in recent years, but standing would likely not be an issue here. See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 170–73 (3d ed. 2011).

<sup>112</sup> 459 U.S. 116 (1982).

<sup>113</sup> 403 U.S. 602 (1971).

<sup>114</sup> See generally Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583 (2011) (noting that given recent Establishment Clause jurisprudence, courts are unlikely to find an impermissible establishment of religion).

<sup>115</sup> See *infra* Part IV.

<sup>116</sup> *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 710 (1994).

<sup>117</sup> While the Supreme Court analyzed *Larkin* as "entanglement" under the three-pronged *Lemon* test, delegation was used independently in *Kiryas Joel*, without mention of *Lemon*, and is significant enough to be considered on its own.

<sup>118</sup> 459 U.S. 116, 117 (1982).

The Supreme Court held the delegation of veto power over liquor licenses vested “discretionary governmental powers in religious bodies.”<sup>119</sup> Such power “enmeshes” churches with the exercise of government power without any standards or guarantees that the power will be exercised in a religiously neutral way.<sup>120</sup>

While the Shomrim do not receive a specific delegation of government power, some facts suggest they receive a de facto delegation of government police power.<sup>121</sup> The Shomrim may be “enmeshed” with the government by exercising police power. The Shomrim receive a license that is neutrally applied to all security, watch, and patrol groups to simply patrol their areas.<sup>122</sup> This is permissible, and had the delegation in *Larkin* been a generic power granted to all churches, it likely would not have violated the Establishment Clause.<sup>123</sup> The problem with the Shomrim may stem from their “fusion” of “united civic and religious authority.”<sup>124</sup> The answer turns on whether the Shomrim receive this power *because* of their religion. The Supreme Court’s reasoning in *Board of Education of Kiryas Joel Village School District v. Grumet* provides some guidance.

In *Kiryas Joel*, the Supreme Court applied the impermissible delegation framework from *Larkin* and held the drawing of school districting lines around an insular Hasidic community unconstitutional. Of particular concern to the Court was a lack of neutrality on behalf of the legislature.<sup>125</sup> The Hasidic community used its power as a voting bloc to obtain public special education services for its children in the segregated atmosphere preferred by its tradition.<sup>126</sup> Delegation was not facially suspect and was not made in terms of the Hasidic religion, but rather as the village of Kiryas Joel.<sup>127</sup> However, the Kiryas Joel district was created around and for the Hasidic group, and thus delegated power to “a group defined by its character as a religious

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<sup>119</sup> *Id.* at 123.

<sup>120</sup> *Id.* at 125–26.

<sup>121</sup> *See supra* Part I.

<sup>122</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 170.1 (2013).

<sup>123</sup> *See* Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1018 (2011).

<sup>124</sup> *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696–97 (1994) (plurality opinion).

<sup>125</sup> *Id.* at 702 (majority opinion).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 699 (plurality opinion).

community.”<sup>128</sup> The problem lay in the “identification . . . of the group to exercise civil authority in terms not expressly religious.”<sup>129</sup> Ultimately, a plurality of the Court found the legislature delegated power purposefully on the basis of religion, rather than incidental to their religious identities.<sup>130</sup>

Like the school board in *Kiryas Joel*, the Shomrim are part of a “united civic and religious authority”<sup>131</sup> where their public lives are inseparable from their religion. Yet it is not clear that a religious purpose is the motivation behind the power given to the Shomrim, or that they are truly delegated any power. The police may simply view them as extra hands to perform their police work. Ultimately, *Kiryas Joel* highlights an important facet of the Shomrim—their status as members of a cohesive sect that excludes outsiders. Religious groups that are able to employ government power on their behalf, to the exclusion of others, should be viewed as suspect.<sup>132</sup> However, a stronger argument lies in the Shomrim as recipients of government aid. Special privileges should not be afforded to small communities of particular religions.<sup>133</sup>

### B. *The Lemon Test*

Government aid provided to the Shomrim may violate the Establishment Clause because the aid could have a primary effect of advancing religion. This section assesses this claim with the factors articulated in *Lemon v. Kurtzman*<sup>134</sup> and modified in *Agostini v. Felton*.<sup>135</sup> The test inquires as to (1) “whether the government acted with the purpose of advancing or inhibiting religion”; and

<sup>128</sup> *Id.* at 696. This created, illegally, “a space in which they can hide from the general American constitutional framework and thereby protect their beliefs, practices, families, and children.” Shauna Van Praagh, *Changing the Lens: Locating Religious Communities Within U.S. and Canadian Families and Constitutions*, 15 ARIZ. J. INT’L & COMP. L. 125, 132 (1998).

<sup>129</sup> *Kiryas Joel*, 512 U.S. at 699 (plurality opinion).

<sup>130</sup> *Id.* at 699–701. In reaching this conclusion, the plurality looked beyond the text of the statute, finding that legislative history explained the true creation of the school district. *Id.*

<sup>131</sup> *Id.* at 697.

<sup>132</sup> See 2 GREENAWALT, *supra* note 13, at 234.

<sup>133</sup> *Id.* at 235; see also *id.* at 234 (noting “it is highly doubtful whether members of a religion should be able to use government to promote their religion by excluding outsiders, if they have no plan for a close integrated social life, only a wish not to live near nonadherents”).

<sup>134</sup> 403 U.S. 602 (1971). The original, three-pronged *Lemon* test provided: “First, 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.’” *Id.* at 612–13 (citation omitted).

<sup>135</sup> 521 U.S. 203 (1997). In *Agostini*, the Court enveloped the third prong, entanglement, under the second prong “as an aspect of the inquiry into a statute’s effect.” *Id.* at 233.

(2) “whether the aid has the ‘effect’ of advancing or inhibiting religion.”<sup>136</sup> *Lemon* is regarded as a guideline rather than a precise limit.<sup>137</sup> Overall, the government must not appear to promote non-neutrality among religions. Of course, government neutrality in this case—equal funding, perhaps, to all religions—would cure the endorsement problems noted above.

### 1. *Secular Purpose*

The first prong of *Lemon*, a secular legislative purpose, is typically easy to pass. All that is required for the first prong is a substantial secular purpose, which may be in addition to a religious purpose.<sup>138</sup> However, it is possible for the government to have a “secret” or “sham” purpose beyond the stated purpose.<sup>139</sup> A primary secular purpose of funding the Shomrim may be improving crime control. Although there is possibly also a religious purpose—promoting and insulating the Hasidic sects—this does not detract from the Shomrim’s significant secular purpose.<sup>140</sup>

It is possible for the Shomrim to have a secular purpose but still fail the other prong of the *Lemon* test when the aid has the primary effect of advancing religion. Failing any one of the prongs renders government action unconstitutional under the Establishment Clause.<sup>141</sup> The rest of this section turns to the second prong, considered the “most significant part of the entire test . . . [where] [m]ost important cases [have been] resolved.”<sup>142</sup>

### 2. *Primary Effect*

The second prong is most problematic because aid to the Shomrim may have the principal or primary effect of advancing the Hasidic religion. In

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<sup>136</sup> *Id.* at 222–23.

<sup>137</sup> See 2 GREENAWALT, *supra* note 13, at 160 (“*Lemon*’s day as a complete test has already passed; but that does not mean its various elements are irrelevant.” (footnote omitted)). Although approaches to Establishment Clause litigation may vary, the *Lemon* test is used here because “cases decided under *Lemon* are treated as authoritative,” and other approaches “are best understood either as versions of or alternatives to *Lemon* as a whole, or to its various components.” *Id.* at 161.

<sup>138</sup> *Id.* at 161.

<sup>139</sup> See, e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860–61, 864 (2005). A “secret” motive may be so secret that an objective observer does not see its impermissible purpose. In such a case, this does not cause the law to fail the purpose prong. Additionally, for “secret” motives, the Court in *McCreary County* advocated a “wait and see” approach as to whether the action actually did advance religion. *Id.* at 863.

<sup>140</sup> See 2 GREENAWALT, *supra* note 13, at 175 (noting that “improper effects may also flow from acceptable purposes”).

<sup>141</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1202 (3d ed. 2006).

<sup>142</sup> 2 GREENAWALT, *supra* note 13, at 174.

*Agostini*, the Court provided three primary criteria to evaluate whether government aid or action has the effect of advancing religion: (1) government indoctrination or endorsement;<sup>143</sup> (2) recipients of aid defined by reference to religion; and (3) creation of an excessive entanglement.<sup>144</sup>

An impermissible advancement of religion may occur when a state directly funds a religious program, or where there is a close identification between the state and the religious denomination.<sup>145</sup> Courts look to whether the government action can be seen as suggesting a symbolic endorsement, sending the message that the government endorses or evinces a particular preference for a religion or practice.<sup>146</sup>

The Shomrim highlight the problem of government endorsement of a particular group. If the Shomrim racially and even religiously discriminate, the government should not be seen as endorsing such a practice by funding and working with the religious group. Here again the focus must be on whether the government itself is seen as advancing religion through its activities and influence.<sup>147</sup> In *Parents' Ass'n of P.S. 16 v. Quinones*, female Hasidic students were taught Yiddish in public school classrooms only they could use.<sup>148</sup> The Second Circuit found the government's support could be deemed symbolic endorsement of the Hasidic sect's "inherently divisive" separatism.<sup>149</sup> In *Bollenbach v. Board of Education of Monroe-Woodbury Central School District*, another case involving the same Hasidic group in *Kiryas Joel*, the school district promoted male bus drivers with lesser seniority over a group of female bus drivers in order to accommodate the separatist tenets of the Hasidic sect.<sup>150</sup> The court held the accommodation demonstrated symbolic endorsement of the discriminatory practice, which had the primary effect of advancing religion.<sup>151</sup>

Direct aid received by the Shomrim may pose Establishment Clause problems because the aid gives the appearance of government endorsement.

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<sup>143</sup> Because *Agostini* focused on school funding, where indoctrination is more relevant, the proceeding analysis will focus on endorsement.

<sup>144</sup> 521 U.S. 203, 234 (1997).

<sup>145</sup> *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985), *overruled by Agostini*, 521 U.S. 203.

<sup>146</sup> See CHEMERINSKY, *supra* note 141, at 1204.

<sup>147</sup> See *id.* at 1205.

<sup>148</sup> 803 F.2d 1235 (2d Cir. 1986).

<sup>149</sup> *Id.* at 1241.

<sup>150</sup> *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450 (S.D.N.Y. 1987).

<sup>151</sup> *Id.* at 1475.

Endorsement turns on whether funding results from the private individual's decision making, or through state decision making.<sup>152</sup> A direct subsidy or "unrestricted cash payments"<sup>153</sup> to organizations or persons who inculcate religious beliefs may be seen as government indoctrination, thus advancing religion.<sup>154</sup> In contrast, indirect aid does not pose the same problems because government funds flow to the sectarian organizations through the private choice of individuals.<sup>155</sup> For example, many school vouchers are held as permissible because the government money reaches the schools "only as a result of the genuinely independent and private choices" of the parents.<sup>156</sup>

The Shomrim's receipt of direct subsidies presents a strong argument for endorsement, and thus an impermissible advancement of religion. The Shomrim's existence and practice is founded on their intent to live an insular life. The government aid, without which the Shomrim would not be able to function, has the primary effect of endorsing and advancing this purpose premised on exclusion. As discussed earlier, aid to the Shomrim may be seen as advancing the Hasidic religion because of the "united civic and religious authority" represented in the insular Hasidic sects.<sup>157</sup>

Because the Shomrim do not receive their money through criteria that identify beneficiaries according to religion, the second "primary effect" consideration is not at issue. Aid that is allocated on a neutral basis, rather than by definition of a particular religion, does not favor religion.<sup>158</sup> When aid is not based on neutral criteria, there may be financial incentive to indoctrinate.<sup>159</sup> While there is not a great deal of information regarding the availability of the aid received by the Shomrim to other religions, it does not appear that the Shomrim receive money on the basis of religion. Of course, like the town in *Kiryas Joel*, there is an argument that the Shomrim are part and parcel of the Hasidic religion. However, lacking evidence to the contrary a court would

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<sup>152</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

<sup>153</sup> *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 612 (7th Cir. 2001).

<sup>154</sup> *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995).

<sup>155</sup> *See Agostini v. Felton*, 521 U.S. 203, 225 (1997). However, indirect aid still presents the problem of fungibility—the idea that government aid to one part is support to the whole—because it frees up other money to be spent on religious activities. *See Saperstein, supra* note 15, at 1384.

<sup>156</sup> *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986).

<sup>157</sup> *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 697 (1994) (plurality opinion); *see also supra* Part II.A.

<sup>158</sup> *See Agostini*, 521 U.S. at 231–32.

<sup>159</sup> *Id.* at 231.

likely presume the aid received by the Shomrim would be available to all religions.

It is possible that aid to the Shomrim violates the Establishment Clause because it fosters an excessive entanglement. In *Agostini*, the Supreme Court identified a few factors indicative of an excessive entanglement, including continued monitoring, administrative entanglement, and the danger of increased “political divisiveness.”<sup>160</sup> Administrative entanglement may result from the extra safeguards, such as monitoring, that are required to keep religion separate.<sup>161</sup> Political divisiveness is concerned with the possibility of ““continuing political strife””—the “serious potential for divisive conflict over the issue of aid to religion.”<sup>162</sup>

It should be noted that the entanglement must truly be excessive, as entanglement can usually be overcome by less than *pervasive* monitoring.<sup>163</sup> For example, impermissible entanglement results when the government pays parochial teacher salaries.<sup>164</sup> Such aid would require excessive, continuing government entanglement with religion in order to monitor and ensure teachers were not impermissibly indoctrinating or endorsing religion.<sup>165</sup> In *Bollenbach*, providing male bus drivers to accommodate the Hasidic community would have resulted in excessive entanglement.<sup>166</sup> Administrative entanglement would have resulted from the “substantial increase in the number of administrative contacts” and continuing consultations on implementation problems.<sup>167</sup> Further, political division had already ensued in *Bollenbach*, illustrated by the national attention the bus controversy attained.<sup>168</sup> Conversely,

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<sup>160</sup> See *id.* at 233–34 (internal quotation marks omitted); see also 6 ROTUNDA & NOWAK, *supra* note 107, at 113.

<sup>161</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (warning that “a comprehensive, discriminating, and continuing state surveillance” might be necessary to ensure the First Amendment is respected).

<sup>162</sup> *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973)), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>163</sup> *Mitchell*, 530 U.S. at 861–62 (O’Connor, J., concurring in the judgment) (noting that “*pervasive* monitoring” is not necessary for “constitutionally sufficient” safeguards); see also Volokh, *supra* note 123, at 993 n.59 (noting self-auditing and occasional monitoring visits would be sufficient monitoring, but would not create excessive entanglement). Additionally, Volokh asserted “the Establishment Clause concern isn’t pervasive monitoring as such, but pervasive monitoring that leads to entanglement with *religion*.” *Id.* at 994 n.59.

<sup>164</sup> See *Agostini*, 521 U.S. 203.

<sup>165</sup> CHEMERINSKY, *supra* note 141, at 1206.

<sup>166</sup> *Bollenbach v. Bd. of Educ. of Monroe–Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1465–66 (S.D.N.Y. 1987).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1466.

excessive entanglement was not found in the sale of public land to a Hasidic sect in *Southside Fair Housing Committee v. City of New York*.<sup>169</sup> While the plaintiffs represented an exclusionary community, the completed sale foreclosed the potential for continuing government interaction and entanglement.<sup>170</sup>

With the Shomrim, a court might be able to find that the administrative safeguards and diversions are necessary, as well as that any resulting political division reaches a constitutionally impermissible level. Like the school district in *Bollenbach*, the Shomrim would require ongoing monitoring to ensure funds are diverted to nonreligious uses; therefore *pervasive* monitoring would be required.<sup>171</sup> Criticism of the Shomrim's actions and their unparalleled level of government funding already exists, and lately such criticism has received more attention.<sup>172</sup> The strongest argument lies in the speculation that the Shomrim receive the amount of funding they do because of their existence as a voting bloc.<sup>173</sup> However, the Supreme Court's recent Establishment Clause jurisprudence complicates the result. Because the Supreme Court has increasingly approved of more forms of aid<sup>174</sup> and retreated from strict rules governing aid, an Establishment Clause argument, while possible, may not be the strongest argument.

Although the Establishment Clause argument would bar the excessive funding of the Shomrim, ultimately it would not regulate their discriminatory actions. In the case of the Shomrim, this issue is best explored in the next Part discussing state action. State action provides a stronger argument and a better recourse to solve the aforementioned problem of bias crimes and discriminatory policing. The following Part argues the Shomrim are state actors.

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<sup>169</sup> 750 F. Supp. 575, 581 (E.D.N.Y. 1990), *aff'd*, 928 F.2d 1336 (2d Cir. 1991).

<sup>170</sup> *Id.*

<sup>171</sup> Note that this ongoing monitoring is different from the case in another Hasidic neighborhood, where ongoing monitoring was not necessary because it was a closed sale. *See Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *see also supra* note 105 and accompanying text.

<sup>172</sup> *See supra* Part I.

<sup>173</sup> However, some political division exists within the Hasidic sects—one rival Shomrim group has gone so far as to sue the City of New York for its relationship with another Shomrim group. *See Amended Complaint and Demand for Jury Trial, Crown Heights Shomrim Volunteer Safety Patrol, Inc. v. City of N.Y.*, No. 11 CV 0329 (KAM)(JMA) (E.D.N.Y. Sept. 6, 2011). Although the case alleges the City of New York's work with the Shmira transforms the Shmira into state actors, the argument is applicable here as clear political strife results from perceived unequal/non-neutral government funding. *See also* SHAER, *supra* note 6, at 65–66.

<sup>174</sup> *See* WITTE, *supra* note 111, at 186 (“The emerging trend . . . is that the establishment clause . . . is becoming weaker and therefore less attractive to religious liberty litigants.”).



### III. THE SHOMRIM QUALIFY AS STATE ACTORS: WHEN THE “EYES AND EARS” BECOME THE STATE

Because the Shomrim have close ties to the state and perform a policing function, they should be considered state actors. While the Constitution and its amendments protect certain individual rights and liberties, most provisions apply only to actions fairly considered to be those of the government.<sup>175</sup> In the case of the Shomrim, whether constitutional limitations apply depends on whether there are sufficient contacts with and embodiments of the government to transform otherwise private actors into “state actors.”<sup>176</sup> If the Shomrim are private actors and there is no state action, the Shomrim’s exclusion of others on the basis of their race or religion does not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>177</sup>

When otherwise private conduct takes on a public character and has interrelated, sufficient contacts with the government, the action and its subsequent liability may be reached through the state action doctrine. The Shomrim go beyond merely acting as “eyes and ears” of the NYPD, working closely with the government in aid of a public function.<sup>178</sup> This transforms private conduct into state action. The discriminatory nature of the Shomrim’s conduct further strengthens the likelihood that a court would find state action. Consideration as state actors would implicate both constitutional liability and government liability for the Shomrim.

First, this Part analyzes the Shomrim under two tests for state action, as performing a public function, and having a close nexus with the government. Then, this Part incorporates the theory of substantive legal claims as a decisive factor in finding state action, and it finds that the discriminatory nature of the Shomrim render them more likely to be considered state actors. Finally, this Part places the Shomrim in the context of privatization and considers the perverse incentives of state action.

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<sup>175</sup> 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE 1053 (5th ed. 2012).

<sup>176</sup> See *id.* at 1056–58.

<sup>177</sup> See *id.* at 1058.

<sup>178</sup> See Kilgannon, *supra* note 2 (noting that a police spokesman has called the Shomrim the “‘eyes and ears’” for the police); News Release, N.Y. State Senator Eric Adams, NYS Senator Eric Adams Joins Other Elected Officials and Community Leaders to Present Citations of Merit for Hatzolah and Shomrim (Jan. 24, 2008), available at <http://www.nysenate.gov/news/nys-senator-eric-adams-joins-other-elected-officials-and-community-leaders-present-citations-me> (noting that the Shomrim “serv[e] as vigilant eyes and ears”).

### A. *The State Action Doctrine*

Proving the Shomrim are state actors would provide a vehicle for constitutional liability.<sup>179</sup> However, establishing that a private actor is a state actor is rarely easy. Academics, attorneys, and even Supreme Court Justices acknowledge that state action is a “conceptual disaster area,”<sup>180</sup> where the caselaw distinguishing public and private spheres “[has] not been a model of consistency.”<sup>181</sup>

When private actors wield government power, private actions fairly attributable to the government are treated as state action and are therefore subject to constitutional constraints.<sup>182</sup> State action works both to provide constitutional restraint on those acting as the government, as well as to detach liability for actions that are purely private and individual.<sup>183</sup> Government accountability, along with an individual’s rights, is of primary concern when a private actor is exercising government power.<sup>184</sup>

Analysis of state action<sup>185</sup> begins with the general premise that “the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.”<sup>186</sup> In this case, the question is whether the Shomrim’s actions are fairly attributable to the state. If they are, then their conduct would be deemed to cause a deprivation under both the Equal Protection Clause and the substantive due process provision of the Fourteenth Amendment.<sup>187</sup> To

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<sup>179</sup> The Fourteenth Amendment made the Constitution applicable to state and municipal actors. U.S. CONST. amend. XIV, § 1 (“nor shall any *State*” (emphasis added)). Early on, in the *Civil Rights Cases*, 109 U.S. 3, 11 (1883), the Supreme Court clarified that the Constitution’s protections were not intended to apply to private actors, and the Supreme Court more recently affirmed that Congress cannot regulate private conduct using Section 5 of the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598, 621 (2000).

<sup>180</sup> Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

<sup>181</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting)) (internal quotation marks omitted).

<sup>182</sup> See CHEMERINSKY, *supra* note 141, at 507–39.

<sup>183</sup> See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

<sup>184</sup> See Metzger, *supra* note 22, at 1370–73.

<sup>185</sup> This is the same test for “color of law” under § 1983. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 n.2 (2001) (“If a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action ‘under color of state law’ for § 1983 purposes.” (quoting *Lugar*, 457 U.S. at 935)).

<sup>186</sup> *Lugar*, 457 U.S. at 937.

<sup>187</sup> The Shomrim violate the Equal Protection Clause because their discriminatory treatment of outsiders violates an individual’s right to equal treatment by the state. U.S. CONST. amend. XIV, § 1 (“nor deny to any person within its jurisdiction the equal protection of the laws”). Although it is beyond the scope of this Comment, a court would consider whether the action was done through a classification, and whether the action

resolve the question of whether a party is a state actor, courts apply this general principle along with various tests encompassing factors articulated by the Supreme Court.<sup>188</sup> In the following sections, this Comment addresses state action by applying the two main tests used—public function and close nexus.<sup>189</sup> These tests demonstrate the Shomrim are state actors who inflict injuries that are “aggravated in a unique way by the incidents of governmental authority.”<sup>190</sup>

Thus, the Shomrim provide a novel and important application of the state action doctrine in the realm of privatization.<sup>191</sup> Although scholars have confronted the question of whether private police should be considered state actors,<sup>192</sup> few have confronted whether community-watch groups may be state actors,<sup>193</sup> and most assume they are simply private actors.<sup>194</sup> Even if the Shomrim are deemed state actors, other similarly licensed community-watch organizations are not necessarily rendered state actors.

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met the appropriate level of scrutiny (in this case, likely strict scrutiny because of race). There is a violation of substantive due process because the Shomrim’s actions infringe on an individual’s fundamental right to be free from discrimination. *See id.* (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

<sup>188</sup> Cases often involve discussions of and fall under multiple different tests or standards. CHEMERINSKY, *supra* note 141, at 518. Chemerinsky also noted the Court is not always clear on which test it is using and discussing. *Id.*; *see also* Metzger, *supra* note 22, at 1412–13 (describing the factors considered and asserting the Court sometimes adopts formalistic and distinct “tests”).

<sup>189</sup> For the purposes of this analysis, ensconced under close nexus includes what some courts and scholars may otherwise call the “joint action” and “symbiotic relationship” tests.

<sup>190</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991).

<sup>191</sup> A case is currently pending in the Eastern District of New York against the City of New York and one of the Shomrim groups under a state action theory. *See* Amended Complaint and Demand for Jury Trial, Crown Heights Shomrim Volunteer Safety Patrol, Inc. v. City of N.Y., No. 11 CV 0329 (KAM)(JMA) (E.D.N.Y. Sept. 6, 2011). The case was filed by a rival Shomrim group. For an interesting history of the Shomrim–Shmira rivalry in Crown Heights, see SHAER, *supra* note 6, at 101–11, 116–17.

<sup>192</sup> *See, e.g.*, Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573.

<sup>193</sup> Jack Wenik brought up the question of auxiliary police and block-watcher liability in a footnote. *See* Jack Wenik, Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1797 n.77 (1985). However, with the highly publicized murder and trial for the killing of Trayvon Martin, an African-American teenager by a neighborhood-watch member on patrol, questioning the liability of neighborhood-watch-style policing may be on the rise. *See* Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88 (2013).

<sup>194</sup> *But see* M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State’s Allocation of Force*, 59 DUKE L.J. 519, 553 (2009). Enion argued certain “private police” forces, including residential security guards, should be considered state actors because they act as “arms of the state,” responding to a “public demand for order and security” by supplying force. *Id.*

The Supreme Court has repeatedly acknowledged that “to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an ‘impossible task’ which [t]his Court has never attempted.”<sup>195</sup> As each situation and application is unique, “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>196</sup> While the lack of clear principles and bright-line tests renders an analysis of state action complicated, it is not an insurmountable task. This section considers the cases where the courts have found state action to explain why the Shomrim are state actors.

### 1. *The Shomrim Perform a Public Function*

Because the Shomrim perform police services, one might think the Shomrim perform a public function. For state action under the public function test, the private entity must exercise “powers traditionally exclusively reserved to the State.”<sup>197</sup> The Supreme Court has found state action with a company-owned town,<sup>198</sup> a public park,<sup>199</sup> and private parties carrying out primary elections.<sup>200</sup>

State action exists where an entity performing a public function works for the purpose of “maintaining order and controlling crime . . . paradigmatic governmental functions.”<sup>201</sup> For example, in *Evans v. Newton*, the Supreme Court held that the transfer of a park from the public to private sector did not dissolve its “tradition of municipal control” and “public character.”<sup>202</sup> A basic government function is protecting the security of the individual and property,<sup>203</sup> something the Shomrim work fervently to protect. Although policing in general has never been entirely public,<sup>204</sup> today many see the maintenance of order and crime control as “inherently public functions,”

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<sup>195</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 556 (1947)).

<sup>196</sup> *Id.*

<sup>197</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

<sup>198</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>199</sup> *Evans v. Newton*, 382 U.S. 296 (1966).

<sup>200</sup> *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944). *See generally* 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS & DEFENSES § 5.14(A) (4th ed. Supp. 2011).

<sup>201</sup> David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168 (1999).

<sup>202</sup> *Evans*, 382 U.S. at 301, 302.

<sup>203</sup> Sklansky, *supra* note 201, at 1188.

<sup>204</sup> *Id.* at 1225. If taken to its logical extreme, even the public police would not be considered government actors because the police were originally private. 1 SCHWARTZ, *supra* note 200, § 5.14(A).

rightly assumed by the government or its actors.<sup>205</sup> While Justice Rehnquist suggested in *National League of Cities v. Usery* that police protection is a “traditional government function[],”<sup>206</sup> it is unclear and unlikely that police power is “traditionally reserved” exclusively to the state.<sup>207</sup>

The Supreme Court addressed the constitutional status of the private police just once, in 1964. In *Griffin v. Maryland*, the Supreme Court held a specially deputized, private security guard was a state actor when he “purported to exercise the authority of a deputy sheriff” and publicly enforced the park’s private racial segregation policy.<sup>208</sup> Typically, the lower federal courts have largely considered private police to be state actors only when they are officially deputized.<sup>209</sup>

Private police are more likely to be deemed state actors when they look and function like the police.<sup>210</sup> For instance, the auxiliary police are generally considered state actors, particularly because of their appearance of authority similar to the regular police.<sup>211</sup> The auxiliary police function as unarmed, uniformed patrols that assist the police and operate police-style vehicles.<sup>212</sup> Uniforms and similar patrol cars provide auxiliary police with “the symbolic authority of the public police.”<sup>213</sup> Auxiliary police volunteers are trained by the police to provide additional “eyes and ears” to the police, assisting with patrol

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<sup>205</sup> Sklansky, *supra* note 201, at 1194. Sklansky asserted “if policing is *not* a public function, it is hard to imagine that much else is,” and asserted policing as a good test case for the vitality of the public function doctrine. *Id.* at 1259. He also argued the state action doctrine proves unable to distinguish private police from either public law enforcement or private citizenry. *Id.* at 1229.

<sup>206</sup> 426 U.S. 833, 852 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>207</sup> 2 ROTUNDA & NOWAK, *supra* note 175, § 16.2. *But see* *Evans*, 382 U.S. at 302 (comparing a park that had been transferred from public to private control, to a “police department that traditionally serves the community”).

<sup>208</sup> 378 U.S. 130, 135–36 (1964). It is not entirely clear how much weight this case still holds. The Court later “express[ed] no view” on whether a state could delegate police functions to private parties, thus “avoid[ing] the strictures of the Fourteenth Amendment.” *Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 (1978). *But see id.* at 172 n.8 (Stevens, J., dissenting) (“[I]t is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action.”).

<sup>209</sup> Sklansky, *supra* note 201, at 1229–30.

<sup>210</sup> *See* *Evans*, 382 U.S. at 302 (looking at the character and purpose of a park as municipal, despite its private ownership); *cf.* *Griffin*, 378 U.S. at 135 (noting the guard was a state actor because he “purported to exercise . . . authority” when he arrested and instituted prosecutions against trespassers).

<sup>211</sup> *See, e.g.,* *People v. Luciani*, 466 N.Y.S.2d 638 (Sup. Ct. 1983); Peter J. Gardner, Comment, *Arrest and Search Powers of Special Police in Pennsylvania: Do Your Constitutional Rights Change Depending on the Officer’s Uniform?*, 59 TEMP. L.Q. 497 (1986).

<sup>212</sup> N.Y. AUXILIARY POLICE DEP’T, AUXILIARY POLICE PROGRAM OVERVIEW 10 (2008).

<sup>213</sup> Sklansky, *supra* note 201, at 1228.

of residential and commercial areas, at community events, traffic control, and crime prevention.<sup>214</sup>

Like the auxiliary police, the Shomrim are also unarmed, uniformed, and function in a similar fashion. Some Shomrim members are even members of the NYPD auxiliary force.<sup>215</sup> The Shomrim emit an appearance of authority, similar to the auxiliary police, and operate police-style vehicles.<sup>216</sup> Driving such analogous patrol cars likely causes others to confuse the Shomrim with police.

The Shomrim look, act, and consider themselves a part of the police—and frequently so do the police.<sup>217</sup> Articles are replete with examples and statements of the “close relationship” that exists between the NYPD and the Shomrim.<sup>218</sup> The Shomrim sometimes work directly with the police<sup>219</sup> and are similar to the police in their uniforms, patrol cars,<sup>220</sup> decals, and logos.<sup>221</sup> Officials recognize the Shomrim for their contribution to the suppression of crime and increased safety,<sup>222</sup> and the officials thank them for their work “in conjunction with [the] NYPD to promote a secure neighborhood environment.”<sup>223</sup> One local government official promulgates the Shomrim’s number on a flyer of emergency numbers.<sup>224</sup> Notably, one police lieutenant

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<sup>214</sup> *Careers—Auxiliary Police*, N.Y. POLICE DEPARTMENT, [http://www.nyc.gov/html/nypd/html/careers/auxiliary\\_police.shtml](http://www.nyc.gov/html/nypd/html/careers/auxiliary_police.shtml) (last visited June 18, 2013). While on duty, auxiliary police are considered city employees and receive workers compensation for on-duty related injuries. N.Y. AUXILIARY POLICE DEP’T, *supra* note 212, at 18; N.Y.C. ADMIN. CODE § 14-147 (2013), available at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$ADC14-147\\$\\$@TXADC014-147+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=53422701+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ADC14-147$$@TXADC014-147+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=53422701+&TARGET=VIEW).

<sup>215</sup> SHAER, *supra* note 6, at 73.

<sup>216</sup> See *supra* notes 57–58; see also N.Y. AUXILIARY POLICE DEP’T, *supra* note 212, at 10.

<sup>217</sup> Uriel Heilman, *Policing the Hassidim*, JERUSALEM POST, June 5, 2003, at 8 (quoting a commander at the 66th precinct as saying “I look at the Shomrim like they’re the NYPD”).

<sup>218</sup> See, e.g., Cate Doty, *New Yorkers Oppose Site of Islamic Center, Poll Finds*, N.Y. TIMES CITY ROOM (Sept. 3, 2010, 9:19 AM), <http://cityroom.blogs.nytimes.com/2010/09/03/new-yorkers-oppose-site-of-islamic-center-poll-finds/> (noting the longtime “close relationship” between the Shomrim and the local precinct).

<sup>219</sup> See, e.g., *supra* notes 62–68 and accompanying text.

<sup>220</sup> See *supra* notes 57–58.

<sup>221</sup> See *supra* notes 50–58 and accompanying text (describing and depicting the visual similarities between the Shomrim and the NYPD).

<sup>222</sup> Pinto, *supra* note 8; cf. *On Roshhashana, Baltimore County Police Express Gratitude*, BALTIMORE SUN, Sept. 10, 2010, at A4 (including the Baltimore police chief crediting Shomrim for their work and contribution to the decline in crime). While this report refers to the Shomrim in Baltimore, it is likely parallel in New York and other areas where the Shomrim patrol.

<sup>223</sup> News Release, N.Y. State Senator Eric Adams, *supra* note 178.

<sup>224</sup> See, e.g., ASSEMBLYMEMBER JIM BRENNAN’S IMPORTANT PHONE NUMBERS & WEBSITES, [http://assembly.state.ny.us/member\\_files/045/20110830/index.pdf](http://assembly.state.ny.us/member_files/045/20110830/index.pdf) (last visited June 18, 2013).

stated police patrols are increased on both the weekly Sabbath and holy days,<sup>225</sup> days when the Shomrim do not patrol.<sup>226</sup> These actions suggest the Shomrim perform part of the police's "public function."

The Shomrim work closer with the police than typical private police, and they have the same agenda as the police in the protection of the community. One argument against holding the private police as state actors distinguishes the private police from state police because of divergent goals.<sup>227</sup> While the state may primarily be concerned with crime prevention, private policing is client driven and focused on specific loss prevention.<sup>228</sup> Thus, private policing is not actually fulfilling the "essential" public function of the police. This policy rationale does not apply to the Shomrim or groups like the auxiliary police, who supplant the police and patrol with the analogous aim of preventing crime.<sup>229</sup>

State action under the public function test is frequently found in conjunction with some of the other indicia of state action.<sup>230</sup> The argument for the Shomrim as state actors is particularly strong when considering their public function as an additional factor in their close nexus to the state. Thus, the next section examines the Shomrim under the close nexus test.

## 2. *The Shomrim Have a Close Nexus with the State*

While the Shomrim are likely state actors because they perform a public function, an even stronger argument for finding state action lies in the Shomrim's close nexus with the government. Whether a private party is a state actor depends on the relationship between the government and the private party. Although the Supreme Court has eschewed setting a bright-line test, a "close nexus" resulting from contacts and a close connection with the government may render the actions of a private party state action.<sup>231</sup> The Supreme Court provided the following test for state action in *Brentwood*

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<sup>225</sup> Ari L. Goldman, *The Talk of Williamsburg: Hasidic Enclave: A Step Back to Older Values*, N.Y. TIMES, July 7, 1986, at B1 (noting the NYPD increases patrols on these days because "the Hasidim are likely to spend most of the day in synagogues or . . . out of town").

<sup>226</sup> While the Shomrim do not patrol on the Sabbath, they do have a twenty-four-hour hotline.

<sup>227</sup> See Joh, *supra* note 192.

<sup>228</sup> *Id.* at 587.

<sup>229</sup> Although there is a valid argument that the Shomrim are client-driven, they are not looking at loss prevention, but crime prevention in aid of the state.

<sup>230</sup> See CHEMERINSKY, *supra* note 141.

<sup>231</sup> See generally 2 ROTUNDA & NOWAK, *supra* note 175, at 1087–101.

*Academy v. Tennessee Secondary School Athletic Ass'n*: “[S]tate action may be found if . . . there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”<sup>232</sup> Primarily, state action assesses whether there is government animus behind otherwise “private” conduct.

In deciphering “[w]hat is fairly attributable,” the Supreme Court has identified a “host of facts” bearing on a “close nexus” of state action.<sup>233</sup> Although the “close nexus” test<sup>234</sup> is far from black and white, certain factors can be ascertained from the Court’s jurisprudence.<sup>235</sup> Each case is necessarily contingent on the particular facts and circumstances presented in order to give proper significance to the “nonobvious involvement of the State.”<sup>236</sup> The Shomrim’s performance of a public function<sup>237</sup> is one factor weighing in favor of state action. This section proceeds by discussing some of the other factors that have resulted in an attribution of state action: government entwinement with control or management, coercive power and significant encouragement, and willful participation in joint activity with the state.<sup>238</sup>

#### *a. Entwinement*

Private action may be fairly attributed to the state when government is “entwined in [its] management or control.”<sup>239</sup> In *Brentwood Academy*, the Supreme Court held state action existed because of the “pervasive entwinement of public institutions and public officials” in an interscholastic athletic association.<sup>240</sup> The state had oversight of the association’s rules and regulations, and the organization’s officials were largely public school officials.<sup>241</sup> The state board acknowledged the association’s official character “by winks and nods.”<sup>242</sup> The state board’s use of the program for public school

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<sup>232</sup> 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

<sup>233</sup> *Id.* at 295–96.

<sup>234</sup> Although the names for tests differ, each considers the same set of facts and circumstances in deciphering state action.

<sup>235</sup> *Brentwood*, 531 U.S. at 295–96.

<sup>236</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

<sup>237</sup> *See supra* Part III.A.1.

<sup>238</sup> *Brentwood*, 531 U.S. at 296.

<sup>239</sup> *Id.* at 296 (alteration in original) (quoting *Evans v. Newton*, 382 U.S. 296, 301 (1966)).

<sup>240</sup> *Id.* at 298.

<sup>241</sup> *Id.* at 299–301.

<sup>242</sup> *Id.* at 301.



education requirements, as well as the review and approval of the association's rules and regulations, confirmed a close relationship.<sup>243</sup>

Courts also look to whether the benefits obtained from the relationship with the state are unique and indispensable. In *Rendell-Baker v. Kohn*, the Court found the relationship between the school and the state was no different from the relationship of “many contractors performing services for the government.”<sup>244</sup> Similarly, in *Gallagher v. “Neil Young Freedom Concert,”* the Tenth Circuit held the benefits derived from a government lease to a university were not an “indispensable element[] in the University’s financial success.”<sup>245</sup>

Like the association in *Brentwood*, the Shomrim’s actions are entwined with the state. The close relationship between the Shomrim and the NYPD is frequently acknowledged.<sup>246</sup> Without this close relationship and the resulting mutual benefits, there would be no recognizable Shomrim.<sup>247</sup> Acting as additional police, the NYPD is able to lessen its load by relying on the Shomrim to fill the gap and do part of the work within their neighborhoods.<sup>248</sup> As mentioned previously, the police rely on the Shomrim to such an extent that they must increase police patrols in Jewish areas on days the Shomrim do not patrol.<sup>249</sup> In some cases, police may even delegate duties to the Shomrim.<sup>250</sup>

The Shomrim and the state’s close relationship extend even further. Not only are some members involved with the NYPD as auxiliary police officers and through the COP (Civilian Observation Patrol) programs, the Shomrim also undergo training with the NYPD.<sup>251</sup> The NYPD has specific community liaisons well versed in and understanding of the particular Hasidic culture.<sup>252</sup>

<sup>243</sup> *Id.* This may be similar to what has been termed a “symbiotic relationship” in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). See 2 ROTUNDA & NOWAK, *supra* note 175, § 16.4(b). While *Burton* is now rarely regarded as good law, it demonstrated another close relationship between the state and a private actor.

<sup>244</sup> 457 U.S. 830, 843 (1982).

<sup>245</sup> 49 F.3d 1442, 1453 (10th Cir. 1995).

<sup>246</sup> *E.g.*, Pinto, *supra* note 8, at 10.

<sup>247</sup> See *Brentwood*, 531 U.S. at 300 (“There would be no recognizable Association, legal or tangible, without the public school officials . . .”).

<sup>248</sup> See *supra* Part I.

<sup>249</sup> Goldman, *supra* note 225. The Shomrim do not patrol on Shabbat (Friday evenings and Saturdays) and other Jewish holidays. See *id.*

<sup>250</sup> *Cf.* Justin George, *For 30 Years, Watching Out for Northwest*, BALTIMORE SUN, Nov. 30, 2012, at A1 (referring to the Shomrim in Baltimore).

<sup>251</sup> See SHAER, *supra* note 6, at 165–66; see also *supra* text accompanying note 66.

<sup>252</sup> See SHAER, *supra* note 6, at 32.

This relationship is specific to the Shomrim, as “in no other neighborhood do the police enjoy as positive a relationship with the people they protect.”<sup>253</sup> The NYPD is “sensitive” to the needs of the Hasidic community, “continually looking out for the community in every respect.”<sup>254</sup> One journalist asserted that the imbalance of power found in these Hasidic neighborhoods resulted from their “unparalleled unity and ability to deliver a bloc vote [enabling] the Hasidim to wield tremendous political power in the local arena and to garner a disproportionate percentage of local services.”<sup>255</sup> Many sources cite the voting power of the Hasidic community as a reason why the police frequently turn a blind eye to some of the Shomrim’s transgressions.<sup>256</sup> The benefits inured through the government are an indispensable part of the Shomrim’s actions.

*b. Coercion and Encouragement*

The Supreme Court provided that “a State normally can be held responsible for a private decision only when it has exercised *coercive* power or has provided such *significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>257</sup> Of course, mere funding is insufficient to find state action where coercion or encouragement is absent,<sup>258</sup> as is mere licensing.<sup>259</sup> For example, in *Moose Lodge No. 107 v. Irvis*, the Supreme Court held state action did not exist where the state licensed a private club that exercised racially restrictive policies.<sup>260</sup> The state’s action in *Moose Lodge* was that of a neutral licensing board, and the discriminatory conduct was not encouraged by the state.<sup>261</sup> Even pervasive government regulation of a privately run program is not enough to turn private conduct into state action without government coercion or encouragement. Therefore, while the

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<sup>253</sup> Heilman, *supra* note 217. Additionally, the patrol members often aid the state by offering eyewitness or expert testimony in criminal cases, free of charge. *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Elizabeth Kadetsky, *Turf Wars in Williamsburg: My Neighbor, My Enemy*, 253 NATION 839, 840 (1991).

<sup>256</sup> Pinto, *supra* note 8, at 13.

<sup>257</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis added).

<sup>258</sup> *See id.* (deciding that funding and state regulations did not turn nursing home decision into state action); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (finding no state action in discharge of employee despite private school’s state funding).

<sup>259</sup> *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (finding the private club’s racial discrimination was not state action due to neutral licensing).

<sup>260</sup> *Id.* at 179.

<sup>261</sup> *Id.* at 178–79. However, the Supreme Court’s opinion in *Moose Lodge* focused on the fact that it could perceive little real harm done by the racially restrictive club. *But cf. infra* Part III.B.

Shomrim are licensed<sup>262</sup> and regulated<sup>263</sup> by the state, this does not by itself indicate state action.

Thus, analysis hinges on the animus behind the action—was the government coercing the action or providing significant encouragement? If the answer is yes, then there is more reason to find state action because the government seemingly sanctioned the action. This is an important distinction, especially in situations regarding government funding. For instance, in *Rendell-Baker v. Kohn*, despite significant funding from the state, the Supreme Court held state action did not exist when a private school discharged an employee over a dispute.<sup>264</sup> The state could not be responsible for the private decision because the school's choices regarding employment practices were not compelled or even influenced by the state's funding or state regulation.<sup>265</sup> The funding and regulation in no way changed the “relationship between the school and its teachers.”<sup>266</sup>

In contrast to generalized government aid and services, the allocation of specialized aid or benefits has the potential to imbue the action with government support for discriminatory practices.<sup>267</sup> Providing aid in a limited and specific fashion has the potential to be seen as the state's choice to directly aid or support a particular private action.<sup>268</sup> In *Norwood v. Harrison*, the Supreme Court found the provision of free books to students<sup>269</sup> attending racially discriminatory schools could be seen as manifesting the state's choice to encourage discrimination.<sup>270</sup> “[T]angible aid” should not “facilitate, reinforce, [or] support private discrimination.”<sup>271</sup> In *Gilmore v. City of Montgomery*, the Court found the city's choice to give racially segregated

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<sup>262</sup> Kilgannon, *supra* note 2.

<sup>263</sup> See DIV. OF LICENSING SERVS., N.Y. DEP'T OF STATE, PRIVATE INVESTIGATORS, BAIL ENFORCEMENT AGENTS, WATCH, GUARD OR PATROL AGENCIES AND SECURITY GUARDS LICENSING LAW (2011).

<sup>264</sup> *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–43 (1982).

<sup>265</sup> *Id.* at 841–42. *But see id.* at 849–50 (Marshall, J., dissenting) (“When an entity is not only heavily regulated and funded by the State, but also provides a service that the State is required to provide, there is a very close nexus with the State. Under these circumstances, it is entirely appropriate to treat the entity as an arm of the State.”).

<sup>266</sup> *Id.* at 841 (majority opinion).

<sup>267</sup> See 2 ROTUNDA & NOWAK, *supra* note 175, § 16.4(c).

<sup>268</sup> *See id.*

<sup>269</sup> The court called the books “tangible aid in the form of textbooks.” *Norwood v. Harrison*, 413 U.S. 455, 464–65 (1973).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 464, 466.

groups exclusive use of public facilities presented a state action problem.<sup>272</sup> In both *Norwood* and *Gilmore*, the Supreme Court found the choice could be perceived as belonging to the states. Above all, states cannot “induce, encourage or promote private persons to accomplish what [they are] constitutionally forbidden to accomplish.”<sup>273</sup>

The government’s specific aid and encouragement transforms the Shomrim’s otherwise private actions into state action. The government here may be seen as encouraging, facilitating, and supporting discriminatory actions that would be constitutionally forbidden if performed by the state. Funding is specifically apportioned to the Shomrim and supplemented by donations or purchases from the state. One New York state senator appropriated funds for the purchase of bulletproof vests for additional safety after Shomrim members were shot.<sup>274</sup> This suggested the state expected the Shomrim to be in the same dangerous line of duty as the regular police. This evidence should call into question the claim that Shomrim are considered police only for their own community. One would expect enforcing traditional customs—the segregation of women, celebrations of religious holidays, and prayer, to name a few—would rarely necessitate protection from bullets. Considering the history of the Shomrim and their relationship with the NYPD,<sup>275</sup> the police cannot deny their knowledge of the Shomrim’s actions. While one may argue the Shomrim act to further their own ends (keeping their community safe and free from outsiders to their religion), it is hard to argue their actions are not also in some way intended to help law enforcement efforts to keep the community safe.

Unlike the aid in *Rendell-Baker*,<sup>276</sup> the Shomrim’s discriminatory actions are influenced by the direct aid and encouragement of the NYPD. The funding encourages the Shomrim to go beyond their community police work and function more like the NYPD. The NYPD explicitly encourages the Shomrim to catch criminals and hold them until the NYPD gets there. If it were not for

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<sup>272</sup> 417 U.S. 556 (1974).

<sup>273</sup> *Norwood*, 413 U.S. at 465 (quoting *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)) (internal quotation marks omitted).

<sup>274</sup> News Release, N.Y. State Senator Eric Adams, NYS Senator Eric Adams Holds a Press Conference to Donate Bullet Proof Vests to Members of the Boro Park Safety Patrol, in Response to Shooting of Three of the Group’s Members (Sept. 8, 2010), available at <http://www.nysenate.gov/press-release/nys-senator-eric-adams-holds-press-conference-donate-bullet-proof-vests-members-boro-p>.

<sup>275</sup> See *supra* Part I.

<sup>276</sup> 457 U.S. 830 (1982). In *Rendell-Baker*, the Court found there was no state action in the discharge of an employee, despite the private school’s state funding.

this encouragement, the Shomrim, who typically avoid the American legal system, would be unlikely to even go to the police.

*c. Willful Participant in Joint Activity*

State action may also be present where public officials and private actors work together to reach a common objective. In *Dennis v. Sparks*, the Supreme Court held that state action existed because the defendant was “a willful participant in joint action with the State or its agents.”<sup>277</sup> Decisive acts of private parties carried out by a state official may be state action if “jointly engaged with state officials in the prohibited action.”<sup>278</sup> For example, a private business may be considered a state actor when an off-duty police officer, working as a security guard, acts on behalf of the business and is perceived by the public as a police officer.<sup>279</sup> In *Wickersham v. City of Columbia*, the Eighth Circuit found joint action between a private corporation and the police department converted private action into state action when the police department knowingly agreed to enforce rules that restricted free speech.<sup>280</sup>

Under the Fourth Amendment, the Shomrim’s actions may be attributed to the state when they act jointly with the police. The Shomrim make a concerted effort with the police; the Shomrim catch alleged criminals, and the police are called to arrest them.<sup>281</sup> This joint action may convert the Shomrim into state actors if there is no independent investigation of the alleged criminal.<sup>282</sup>

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<sup>277</sup> 449 U.S. 24, 27–28 (1980).

<sup>278</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)) (internal quotation marks omitted).

<sup>279</sup> *Griffin v. Maryland*, 378 U.S. 130, 135 (1964). Courts have also been more willing to find state action in private police who are deputized or made “special police” and given greater powers of arrest than an ordinary citizen. *See, e.g., Hughes v. Meyer*, 880 F.2d 967, 972 (7th Cir. 1989) (finding no state action when a Wisconsin Department of Natural Resources conservation warden’s acts were “functionally equivalent to that of any private citizen reporting to the police the details of an alleged criminal act”); *United States v. Lima*, 424 A.2d 113, 118 (D.C. 1980) (en banc); *cf. United States v. McDougald*, 350 A.2d 375, 378 (D.C. 1976) (noting “[t]he power of arrest . . . is the sole factor which distinguishes the holder of a special police commission from a private citizen,” but distinguishing the special officer at issue as being motivated by private interests). *See generally* WILLIAM E. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* § 2:4 (2012). However, while the Shomrim are not deputized, such a finding is not necessary for state action to exist. For instance, other considerations such as continuing ties to the police may be sufficient to show state action. *See id.* (noting that a private citizen’s actions in conjunction with police may be construed as state action for purposes of a civil rights action under 42 U.S.C. § 1983).

<sup>280</sup> 481 F.3d 591, 599 (8th Cir. 2007).

<sup>281</sup> *See supra* Part I.B.

<sup>282</sup> *See* 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.8 (5th ed. 2012).

Further, when officers make arrests at the behest of private citizens, the lack of an independent evaluation may render the private citizens state actors.<sup>283</sup> The NYPD acknowledges the Shomrim's propensity to respond immediately to calls or situations, rather than calling and waiting on the police.<sup>284</sup> Although the extent of the police's independent investigation is unknown, it seems highly plausible that the NYPD knowingly acquiesces to the Shomrim's exclusionary actions.

One criminal procedure scholar has suggested certain features of private police that, when performed, ought to subject them to "the commands of the Fourth Amendment."<sup>285</sup> These features include when private police "actually supplant the public police," "deal regularly with the general public," and have an interest in criminal convictions.<sup>286</sup> The Shomrim are certainly interested in criminal convictions of the criminals they catch. Additionally, as discussed in the previous section,<sup>287</sup> their similar uniforms, cars, perceived authority, and work in connection to the police may indicate to an observer that they are an arm of the police.<sup>288</sup> There is some indication that the Shomrim seem to impliedly supplant the NYPD in certain areas of Brooklyn,<sup>289</sup> and they certainly deal daily with the public.<sup>290</sup> Obtaining criminal convictions of those they find breaking the law is an objective; their actions are taken to catch criminals<sup>291</sup> and they call the police to make arrests.<sup>292</sup> Aiding their "employer" can only be said to be their community, and therefore the public. While the Shomrim arguably are pursuing private objectives—keeping

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<sup>283</sup> See *Hernandez v. Schwegmann Bros. Giant Supermarkets*, 673 F.2d 771, 772 (5th Cir. 1982) (per curiam) (holding that no state authority was conveyed to the private actor because the arresting police officer made an independent "determination of cause to arrest").

<sup>284</sup> Kilgannon, *supra* note 39. Police Commissioner Raymond W. Kelly stated a "longstanding issue with [the] Shomrim" was their delay in police notification. *Id.*

<sup>285</sup> See generally 1 LAFAYETTE, *supra* note 282, § 1.8. Another issue, beyond the scope of this Comment, is whether evidence obtained through private citizens working with the police should be subject to the exclusionary rule. See *id.*

<sup>286</sup> *Id.* The California Supreme Court has held private police to be state actors subject to constitutional limitations due to the "increasing reliance placed upon private security personnel by local law enforcement authorities." *People v. Zelinski*, 594 P.2d 1000, 1005 (Cal. 1979) (in bank).

<sup>287</sup> See *supra* Part III.A.1.

<sup>288</sup> See *supra* Part I.

<sup>289</sup> See, e.g., Heilman, *supra* note 217 (quoting a commander at the 66th precinct as saying "'I look at the Shomrim like they're the NYPD'").

<sup>290</sup> See *supra* Part I.

<sup>291</sup> Cf. Kilgannon, *supra* note 39.

<sup>292</sup> For a running count of the Shomrim's work catching "perps," see for example, YESHIVA WORLD NEWS, <http://www.boroparkcoop.com> (last visited June 18, 2013).

outsiders from their midst—they are, at the same time, aiding in catching and convicting criminals.

*B. An Infringement on Substantive Rights Makes State Action More Likely*

State action is even more likely to be found where, as here, the case involves racial discrimination. While this is not the stated law, it is argued in many dissents and scholarly articles. Finding state action may in part depend on a differential analysis for the varying substantive rights.<sup>293</sup> Many commentators have alleged that the finding of state action is “inextricably linked to the Court’s view as to whether there is a violation of equal protection.”<sup>294</sup> Under a substantive rights approach to state action, competing constitutional values are leveled against one another to weigh which is more important.<sup>295</sup> A weighing of competing values also may aid in explaining why in some situations state action is found where, for example, a person is employed directly by the state and vice versa.<sup>296</sup>

This substantive rights approach is echoed in the courts as well. Judge Friendly of the Second Circuit advocated consideration of a litigant’s substantive rights in a state action analysis.<sup>297</sup> While much of this may be an implicit consideration,<sup>298</sup> there is a clear “tendency of reviewing courts to apply different standards of analysis depending upon the nature of the Constitutional right involved.”<sup>299</sup> A handful of Supreme Court dissents have acknowledged the role the varying substantive interests play in the state action analysis.<sup>300</sup> Many lower federal courts actively embrace this substantive rights analysis.<sup>301</sup> This suggests that, if litigated, a challenge to the Shomrim would

<sup>293</sup> See, e.g., Jody Young Jakosa, *Parsing Public from Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193, 208 (1984) (providing a hierarchy of state action standards).

<sup>294</sup> See, e.g., CHEMERINSKY, *supra* note 141, at 538.

<sup>295</sup> See, e.g., Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99, 110 (2004).

<sup>296</sup> See *id.* at 111. Wells additionally argued that ignoring substance leads to the confusing state action tests. *Id.* at 111–12.

<sup>297</sup> Henry J. Friendly, *The Public–Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291 (1982).

<sup>298</sup> See Wells, *supra* note 295, at 107 (“[T]he modern view distinguishing between state action and the substantive merits has become entrenched . . . . All the Justices seem to take it for granted.”).

<sup>299</sup> Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public–Private Partnerships*, 11 GEO. MASON U. C.R. L.J. 203, 215 (2001).

<sup>300</sup> See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 373–74 (1974) (Marshall, J., dissenting); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190–91 (1970) (Brennan, J., dissenting).

<sup>301</sup> Jakosa, *supra* note 293, at 194–97.

be more likely to win because the claims involve the Equal Protection Clause and discrimination. The substantive right of equal protection outweighs the Shomrim's right to government funding.

The strongest application of the substantive rights approach is demonstrated in the courts' approach to racial discrimination and the First Amendment. The level of government activity required to find state action appears to be less in these cases.<sup>302</sup> Many scholars have asserted that cases where the Supreme Court did not find state action would have had a different outcome had there been a stronger substantive right at play. The confusing case of *Shelley v. Kraemer* is one case where many consider the discriminatory effect to have been the dispositive factor in finding state action.<sup>303</sup> In the case of government subsidies, state action is most likely to be found when the "government's purpose is to undermine the protection of constitutional rights."<sup>304</sup> Often, the analysis focuses on whether there is truly any real harm done discriminatorily.<sup>305</sup>

In the case of the Shomrim, under a substantive rights approach the fact that they discriminate renders a finding of state action more likely. It is the specific situation giving rise to discriminatory actions that compels state action where it might otherwise not be found. Using a substantive rights approach may be especially imperative given the complexities and confusion surrounding the state action doctrine. Substantive rights may serve to ensure that the most egregious violations are addressed.

### C. *Privatization and the Perverse Incentives of State Action*

The substantive rights approach aids in deciding when government should be held accountable and where the line between public and private conduct lies. This line between privatization and government conduct and, therefore,

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<sup>302</sup> See Kennedy, *supra* note 299, at 215 n.78. Many scholars have also posited that the state action doctrine was used during the Civil Rights Era when Congress was unable to enforce civil rights legislation. Thus, state action provided a useful tool. See, e.g., David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 413 (1993).

<sup>303</sup> 334 U.S. 1, 23 (1948). Many commentators cited the substantive-rights approach to explain the limited application of *Shelley*. See, e.g., Strauss, *supra* note 302, at 409, 413. Chemerinsky provided two case examples of state action where the government gave aid with the intent of undermining school desegregation. CHEMERINSKY, *supra* note 141, at 536 (citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974); *Norwood v. Harrison*, 413 U.S. 455, 464–65 (1973)).

<sup>304</sup> CHEMERINSKY, *supra* note 141, at 536.

<sup>305</sup> See 2 ROTUNDA & NOWAK, *supra* note 175, § 16.3 (asserting the analysis in *Moose Lodge No. 107 v. Irvis* focused on whether any real harm was done discriminatorily).



where constitutional liability begins and ends, is especially blurred in an era of greater privatization.<sup>306</sup> Not only is it increasingly challenging to discern where the line between private action and state action is drawn, but also criticism of the failings of the state action doctrine to address privatization abounds.<sup>307</sup> Privatization frequently removes what was formerly, or should be, government programs and activities from constitutional scrutiny, as “few instances of privatization are likely to trigger a finding of state action.”<sup>308</sup> Particularly problematic is when government power, exercised by private actors, allows the private actors to then control third parties *because* of the government’s allocation of power.<sup>309</sup>

The Shomrim highlight this problem by serving as an example of privatization that does trigger state action. Finding state action here is especially important because otherwise, the Shomrim’s discriminatory actions are not only shielded from constitutional scrutiny, but also largely from the political process, tort law, and criminal law.<sup>310</sup> The Shomrim’s allocation of government power allows them to control third parties, yet it is insulated from challenges.

Application of the substantive rights approach may be especially imperative when considering what Gillian Metzger termed the “perverse incentives” of state action.<sup>311</sup> The state action doctrine is both under- and over-inclusive, and it is ultimately a “poor vehicle” with which to preserve government accountability.<sup>312</sup> State action is over-inclusive because it unnecessarily restricts a government’s ability to flexibly use available resources when it applies constitutional constraints on private action that exercises government power that is otherwise properly constrained.<sup>313</sup> Conversely, state action is under-inclusive because it fails to take account of the many instances of privatization that erroneously escape the ill-defined confines of state action.<sup>314</sup> Overall, this creates perverse incentives for the

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<sup>306</sup> See generally Metzger, *supra* note 22. Metzger argued that “[p]rivate involvement in government is addressed primarily through the state action doctrine, which inquires whether, in a particular context, ostensibly private parties should be considered ‘state (or federal) actors.’” *Id.* at 1370.

<sup>307</sup> See, e.g., *id.*

<sup>308</sup> *Id.* at 1375.

<sup>309</sup> *Id.*

<sup>310</sup> See *supra* Part I.E.

<sup>311</sup> Metzger, *supra* note 22, at 1371.

<sup>312</sup> *Id.* at 1375.

<sup>313</sup> *Id.*

<sup>314</sup> See *id.*

government to allocate private partners “broad discretion over government programs,” minimizing government involvement and further endangering the threat privatization poses to constitutional accountability.<sup>315</sup>

The line between public and private is further blurred when, like the Shomrim, state actors are also religious actors. The next Part discusses the constitutional issues implicated in religious state action and explores possible solutions to the Shomrim.

#### IV. POSSIBLE SOLUTIONS FOR RELIGIOUS STATE ACTION: A CONSTITUTIONAL GRAY AREA

Thus far, this Comment establishes that the Shomrim are state actors under the Constitution. As state actors, the Shomrim will be held liable for discriminatory conduct under the Fourteenth Amendment. While treating the Shomrim as state actors provides the strongest constitutional argument, this does not necessarily render the best solution.

First, this Part goes through some possible solutions to the problem presented by the Shomrim. Such an exercise demonstrates constitutional gray areas and discovers that the only constitutionally permissible solution is to defund the Shomrim and remove their ties to the state. This constitutional gray area should serve as an indication of the problems inherent in funding insular groups and organizations like the Shomrim. Because these groups aim to operate around their own private interest, they run an inherent risk of discrimination against the outside community. Privatizing such organizations should be inherently suspect. This Part concludes by asserting that in these situations, the best policy is for the government to keep its hands and money away.

##### A. *Possible Solutions to the Shomrim Problem*

As state actors, the Shomrim would be subject to liability for their constitutional torts or violations of constitutional rights.<sup>316</sup> For instance, minorities unfairly pursued and beaten by the Shomrim could sue under 28

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<sup>315</sup> *Id.*

<sup>316</sup> A constitutional tort is an “action[] brought against government[] [and those fairly said to be government actors] . . . seeking damages for the violation of federal constitutional rights, particularly those arising under the Fourteenth Amendment and the Bill of Rights.” SHELDON H. NAHMOD, MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL TORTS I (3d ed. 2009).

U.S.C. § 1983 for infringing on their individual rights protected under the Constitution.<sup>317</sup> The Shomrim would be liable for damages and equitable relief, such as declaratory relief or an injunction ordering them to stop. Additionally, the government might be open to liability for the Shomrim's actions.<sup>318</sup> Applying constitutional norms solves the problem of discrimination; however, it would come at a significant cost.<sup>319</sup> Holding private entities to constitutional norms obstructs their autonomous nature at large, as well as individually because the entity may be subject to the government's regulatory prerogatives.<sup>320</sup> Determining who is subject to constitutional norms is an additional concern because it arguably raises a separation of powers problem, where the judiciary decides who is acting as a part of the government.<sup>321</sup> Extension of constitutional constraints on the Shomrim also intrudes on the government's ability to utilize useful private agents providing social services.<sup>322</sup>

While classification as a state actor would extend constitutional requirements to the Shomrim, the government would be unlikely to leave the Shomrim as they are. First, the possibility of a lawsuit and liability<sup>323</sup> for the government would be too great to ignore. Second, the public outrage over an arm of the state policing in such a discriminatory fashion would likely compel the government to either regulate the Shomrim or remove the state from the state action. The following paragraphs consider these solutions.

One solution might be for the government to institute regulations or monitoring to limit liability for the Shomrim's unconstitutional actions. However, further regulation might result in an Establishment Clause violation. As the Shomrim currently operate, it is not clear there is an Establishment Clause violation.<sup>324</sup> Additional regulations and potentially "pervasive" monitoring might result in excessive entanglement reaching a constitutionally impermissible level.<sup>325</sup> While the Shomrim, the NYPD, and the state are

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<sup>317</sup> A plaintiff would probably sue for violations under the Equal Protection Clause, as well as the Due Process Clause, of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.

<sup>318</sup> The plaintiff would likely argue the Shomrim were acting pursuant to the government's policy or custom, also under 28 U.S.C. § 1983.

<sup>319</sup> Metzger, *supra* note 22, at 1406.

<sup>320</sup> *Id.* at 1406–07.

<sup>321</sup> *Id.* at 1407–08.

<sup>322</sup> *See id.* at 1427.

<sup>323</sup> *See supra* notes 306–07 and accompanying text.

<sup>324</sup> *See supra* Part II.

<sup>325</sup> *See supra* Part II; *see also* Mitchell v. Helms, 530 U.S. 793, 794 (2000).

already closely entwined and work together, further regulations would provide even more government endorsement of their discriminatory actions.<sup>326</sup> Further, it is also possible that such regulation would raise concerns regarding the infringement on the free exercise of religion,<sup>327</sup> as government intrusion via regulations and monitoring “threatens religious autonomy.”<sup>328</sup> A regulation may unduly restrict exercise of what the Hasidim consider part of their religion. This is further compounded by the fact that the courts are not free to define *religion*.<sup>329</sup> Therefore, further regulation and monitoring might exacerbate the constitutional problem rather than fix it.

If unable to regulate the Shomrim, the government would likely remove its presence and funding because it would be exposed to liability. This removes the “state” from state action and remedies the Establishment Clause problem by withdrawing funding. The government would take away at least some funding<sup>330</sup> and halt the close relationships the Shomrim have formed with the local police and local legislators. While defunding and cutting some of the ties with the state would no longer render the Shomrim subject to constitutional limitations, they also may not be able to function effectively. The Shomrim rely almost entirely on government funds, and it may prove impossible to privately provide the funds necessary to continue.<sup>331</sup> This is unfortunate because, other than their discriminatory actions, the Shomrim provide a valuable service to their community. Although defunding and removing the ties with the state is a dismal conclusion, it appears to be the only constitutionally permissible solution.

### *B. The Problem of Privatization of Inherently Religious Organizations*

Ultimately, the Shomrim demonstrate the inability of the Constitution to adequately address the problems posed by privatized social services provided

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<sup>326</sup> Cf. Kennedy, *supra* note 299, at 218 (suggesting contract monitoring in charitable choice religious social services might amount to “entanglement” under the Establishment Clause).

<sup>327</sup> “Congress shall make no law . . . prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

<sup>328</sup> Saperstein, *supra* note 15, at 1366–67.

<sup>329</sup> See 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 136–42 (2006). However, the free exercise argument may not be as large a hurdle, as there might be a compelling purpose to the law.

<sup>330</sup> One could argue that indirect funding, rather than direct funding, could lessen the problem; however, logistically it is unclear how one could indirectly fund the Shomrim or make the funding resultant from individual choice. While prison vouchers seem plausible, *see, e.g.,* Volokh, *supra* note 123, at 988, police vouchers might be a little far-fetched.

<sup>331</sup> Cf. Fernanda Santos, *Reverberations of a Baby Boom*, N.Y. TIMES, Aug. 27, 2006, § 1, at 23 (noting that 62% of families live below the poverty line in Kiryas Joel, a Hasidic enclave).

by inherently religious organizations. In these cases, the government must be especially careful in how it decides to fund and work with religious social services. Not all government funded religious actors are state actors. However, in an age of increased privatization of religion through the use of government funds, state action—along with the substantive-rights approach—is necessary to identify instances of discrimination. State action may provide an important vehicle to keep these organizations in check and give proper accordance to constitutional rights.

The previous section highlights the constitutional gray area resulting from the privatization of religious social services. In any formulation where the government is involved, a constitutional problem arises. In the tense realm between the Free Exercise Clause, the Establishment Clause, and the state action doctrine, attempting to remedy constitutional issues serves to further exacerbate the constitutional problem.

In addition to the Shomrim, a striking example of this is the debate over whether religious organizations funded by the government have the right to discriminate in hiring.<sup>332</sup> While the employment discrimination discussion is beyond the scope of this Comment, it serves as another demonstration of the tensions between the constitutional doctrines that result from government funding of inherently religious organizations. The murky waters of this constitutional gray area should serve as an indication of the problems in privatizing the services of inherently religious organizations. The government should be extremely careful in funding and working with these organizations.

As set forth in the beginning of this Comment, commentators have suggested that insular or inherently religious groups may be more likely to discriminate against outsiders.<sup>333</sup> In previous eras, the Supreme Court has been

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<sup>332</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Emp't Div. v. Smith*, 494 U.S. 872 (1990). See generally 1 GREENAWALT, *supra* note 329.

<sup>333</sup> See *supra* Intro. This argument may be extended to other common interest, but nonreligious, communities. For example, in gated communities, where residential associations are “fraught with potential for discrimination on the basis of race and class.” David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 768 (1995). Not only are streets privatized through judicial means, but also these communities frequently use security guards or private police. *Id.* at 771. Similar to the Shomrim policing Hasidic communities, “[a] black person who shows up in one of these places is likely to get busted” by the private police employed by the communities to keep them out. *Id.* (alteration in original) (internal quotation marks omitted). Scholars argue that residential associations may be transformed into state actors because they receive and utilize public resources, serve a public function, and have an interdependent relationship with local governments. See *id.* at 783–84; see also

extremely wary of allowing the funding of “pervasively sectarian” organizations because of their inability to separate and pursue strictly secular goals. As one scholar asserted, “Discriminatory practices have been considered indicia of a pervasively sectarian environment.”<sup>334</sup> It is the “inherent religious mission and culture” of these insular, inward-looking, and pervasively sectarian institutions that exerts great pressure to discriminate.<sup>335</sup> To ensure compliance with government regulations, these groups thus require extensive monitoring. However, this in itself carries a “catch-22” of entanglement with religion and “threatens religious autonomy.”<sup>336</sup>

Consider the social or cultural implication of privatization: “an individual’s withdrawal from civic life and reorientation towards the pursuit of self-interest.”<sup>337</sup> The Shomrim, along with other insular or pervasively sectarian communities, remove themselves from the public world and reorient toward their own pursuits.<sup>338</sup> Privatization in the context of the government, however, implies the transfer of public power, money, and responsibilities to private hands.<sup>339</sup> It should be suspect for the government to employ privatization to transfer public power to organizations that are oriented around their own self-interest, especially given an increased likelihood of discrimination. As Professor Kent Greenawalt warned, these religious organizations may “use government to promote their religion by excluding outsiders.”<sup>340</sup> The Shomrim demonstrate the particular concern in religious privatization of the danger “of turning vulnerable client populations over to well-meaning ministries arguably unconstrained by the Fourteenth Amendment.”<sup>341</sup>

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Angel M. Traub, Comment, *The Wall Is Down, Now We Build More: The Exclusionary Effects of Gated Communities Demand Stricter Burdens Under the FHA*, 34 J. MARSHALL L. REV. 379, 393–94 & n.91 (2000).

<sup>334</sup> Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 47 (2002).

<sup>335</sup> Saperstein, *supra* note 15, at 1366.

<sup>336</sup> *Id.* at 1366–67.

<sup>337</sup> Metzger, *supra* note 22, at 1377.

<sup>338</sup> Recent spotlight from the media may make it especially imperative to further examine the Shomrim’s actions. See, e.g., Berger, *supra* note 7; Jen Chung, *Photos: Liev Schreiber as Williamsburg Shomrim Officer, Woody Allen as a Pimp*, GOTHAMIST (Nov. 13, 2012, 3:17 PM), [http://gothamist.com/2012/11/13/photos\\_liev\\_schreiber\\_as\\_williamsbu.php#photo-1](http://gothamist.com/2012/11/13/photos_liev_schreiber_as_williamsbu.php#photo-1) (showing Liev Schreiber playing a Brooklyn Shomrim officer).

<sup>339</sup> Metzger, *supra* note 22, at 1377.

<sup>340</sup> 2 GREENAWALT, *supra* note 13, at 234.

<sup>341</sup> Kennedy, *supra* note 299, at 217.

## CONCLUSION

The disconcerting issue of discrimination by government-funded, inherently religious organizations is a difficult constitutional question. While government funding of religious organizations and social services has been hotly debated in the past decade, the issue of discrimination by these organizations has received limited attention. Constitutionally, if these religious organizations are private actors they may be free to discriminate. However, when contacts with the state, along with public money transform religious organizations into state actors, they must act in accordance with the Constitution. Attempts to remedy the problem demonstrate there is no easy solution.

Thus, this Comment ties together a variety of arguments and research—the propensity for discrimination by insular or inherently religious communities, the increase in government privatization, and funding of religious social service providers—to suggest there is a danger in government privatization of insular religious organizations. It should be viewed as inherently suspect for the government to become involved with such exclusive communities. Using the Shomrim, this novel application of the Establishment Clause and the state action doctrine demonstrates the constitutional gray areas that may result from the privatization of insular religious communities. Going forward, the Shomrim problem teaches that these constitutional gray areas indicate an area where government is not meant to go.

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