THE VOLUNTEER PROTECTION ACT: A RESPONSE TO THE LIABILITY LITIGATION CRISIS

Consuelo L. Kertz*

I. INTRODUCTION

Volunteerism is important to American society, and volunteers provide many social services to their communities which would otherwise burden governments and cause increased taxes across the board to pay for such services. The number of Americans regularly volunteering has dropped consistently over the last ten years.[1] The perceived tort liability crisis and fear of litigation are often cited as primary causes for the decline in volunteers willing to serve on boards of directors or in other capacities for nonprofit organizations.[2] As a result, there have been many efforts to enact state and federal legislation to protect volunteers from tort liability. Proponents of volunteer-protection legislation cite several well-publicized and frivolous lawsuits against volunteers to support such legislation. The case most often cited is the lawsuit brought against the Little League coach in Runnemeade, New Jersey.[3] A ten-year-old boy suffered an eye injury when struck by a fly ball. His parents alleged the coaches were negligent in moving him from the infield to the outfield without giving him fielding pointers. The case was settled, but the fact that the lawsuit itself was brought and had to be defended is said to have had a chilling effect on volunteers and organizations.

In fact, there have been very few successful lawsuits brought against volunteers.[4] But there have been enough lawsuits in which volunteers were named as defendants and have had to expend the time and expense of defending their

* Professor, Emory University; J. D., 1975, Emory University; A. B., 1969, University of Chicago.

[1] The Independent Sector, a national coalition of 800 organizations, found that the percentage of Americans volunteering dropped from 54% in 1989, to 51% in 1991, and to 45% in 1993. Independent Sector, *America 's Nonprofit Sector in Brief, reprinted from* NONPROFIT ALMANAC 1996-1997 (Spring 1998). *See also* H.R. REP. No. 101, 105th Cong., 1st Sess. pt. 1, at 7 (1997). The Gallup study *Liability Crisis and the Use of Volunteers of Non Profit Associations,* found that approximately 1 in 10 nonprofit organizations has experienced the resignation of a volunteer due to liability concerns and that 1 in 6 volunteers reported withholding services due to fear of exposure to liability suits. *Id.* Eighteen percent of those surveyed had withheld their leadership services due to fear of liability and 2% had actually been sued as a volunteer for a non-profit organization. *Volunteer Liability Before the U.S. House of Representatives Judiciary Committee.* 105th Cong., 2d sess. 2 (1997) (statement of Fred Hanzalek, American Society of Mechanical Engineers).

[2] 42 U.S.C.A. § 14501 (a)(1) (1997).

[3] *Liability of Charities Before the Senate Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism.* 105th Cong., 2d Sess. 2 (1997) (statement of Senator John Ashcroft). Mary Jacoby, *House OKS Liability Protection for Volunteers.* CHI. TRIB., May 22, 1997, at 13.

[4] *Id.*

actions to deter volunteers.[5] As a result of the perception of a liability crisis, some nonprofits have restructured their organizations and eliminated services and have reduced reliance on volunteers due to the perceived threat of liability.[6] There have been many attempts to give volunteers tort liability protection through state and federal legislation. The legal issues raised by volunteers protection legislation are similar to those raised by tort reform proposals. There are serious problems in actually structuring any legislation which appropriately limits liability while providing relief for the injured victim. And further, the area of tort law has been traditionally left to the state legislatures and courts and is not uniform from state to state. Attempts to impose a federal tort law standard raises Constitutional questions.

After years of debating the need for and structure of volunteer protection legislation, the Congress finally passed the Volunteer Protection Act of 1997 ("VPA").[7] While the VPA is intended to protect volunteers from liability, its supporters overstate the amount of liability protection the VPA actually provides. The VPA does act as a deterrent to litigation because it provides a defense to liability in some cases of ordinary negligence; however, it does not prevent lawsuits. Volunteers will still be called upon to defend lawsuits brought against them and the protection the VPA offers may be illusory. The VPA contains many statutory ambiguities which will have to be litigated in order to qualify for VPA protection. These ambiguities, of course, lessen the efficacy of its liability defenses. Opponents also argue that, beyond the numerous statutory ambiguities discussed at length below, the VPA raises serious constitutional issues. The VPA raises some of the same constitutional problems that exist in tort reform in general; that is, how to constitutionally balance the role of the federal and state governments in regulating tort liability, an area traditionally left to state control.

II. PROVISIONS OF THE VOLUNTEER PROTECTION ACT: LIMITS ON LIABILITY

The Volunteer Protection Act provides that no volunteer shall be liable for harm caused by ordinary negligence as long as the volunteer was acting within the scope of the volunteer's responsibilities at the time of the act, and the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the

5.143 CONG. REC. H3096-01, H3100 (daily ed. May 21, 1997).

6.The increased attention given to these suits has also caused an increase in the cost of volunteer liability insurance for nonprofit organizations. The House Report statistics found that the average reported increase for insurance premiums for nonprofits from 1985-1988 was 155 percent, while one in eight organizations reported an increase of over 300 percent. H R. REP. No. 101, 105th Cong., 1st Sess. pt. 1, at 7 (1997). Not surprisingly from 1984-1989 the cost of liability coverage for local Little League Baseball programs shot up from $75 to $795 a year. *Id.* A May 2, 1995 article in the Washington Times reported that the Washington, D.C. area Girl Scout council must sell 87,000 boxes of Girl Scout cookies each year just to pay for liability insurance. *Id.* Some organizations have just abandoned insurance altogether. Between 1982 and 1987, 22% of non-profits had their liability insurance canceled or non-renewed. Michael Singsen, Comment, *Charity is No Defense: The Impact of the Insurance Crisis on Non-Profit Organizations and An Examination of Alternative Insurance Mechanisms,* 22 U. SAN FRANCISCO L REV 599,601-609(1988).

7 42 U.S.C.A. §§ 14501-14505 (1997).

activities or practice in the state in which the harm occurred.[8] The VPA specifically does not apply to harm caused by a volunteer operating a motor vehicle, vessel, aircraft, or other vehicle.[9] While there is no liability for ordinary negligence, the volunteer is still liable in damages for gross negligence or reckless misconduct and punitive damages may be awarded for willful misconduct.[10] The VPA prohibits punitive damages based on the action of a volunteer acting within the scope of the volunteer's responsibilities, "unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."[11] If there is a showing by clear and convincing evidence that a volunteer acted with willful or criminal misconduct, then punitive damages can be awarded. In some earlier versions of the VPA, if gross negligence was proven by clear and convincing evidence, then punitive damages might be awarded as well.[12] However, the final version of the statute does not permit punitive damages for gross negligence.[13]

This description of the scope of liability and punitive damages clauses in the Volunteer Protection Act can be interpreted to mean that punitive damages are not available for acts that constitute ordinary or gross negligence. The volunteer is not liable for ordinary negligence, is liable for gross negligence, and may even be liable for punitive damages for willful misconduct. The volunteer is still liable in compensatory damages for acts of gross negligence, while there is no liability for acts of ordinary negligence, so long as the volunteer is acting within the scope of his/her duties, is properly licensed when required, and was not operating a motor vehicle.[14]

Some legislators were afraid that hate groups, racist groups, or groups advocating violence would hide behind the VPA liability protection because all the

[8] 42 U.S.C.A. § 14503(a) (1997).

942 U.S.C.A. § 14503(a)(4) (1997).

[10] 42 U.S.C.A. § 14503(a)(3) (1997).

[11] 42 U.S.C.A. § 14503(e)(1) (1997).

12 143 CONG. REC. S3763-04, S3764 (daily ed. April 29, 1997).

[13] 42 U.S.C.A. § 14503(e)(1) (1997). The report issued by the House Committee on the Judiciary includes gross negligence among the scope of liability of the volunteers:

> The bill provides that a volunteer of a nonprofit organization or government entity will generally be relieved of liability for harm caused if. . . (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the volunteer

H. R. REP. No. 101, 105th Cong., 1st Sess. pt. 1, at 12 (1997) (report from House Committee on the Judiciary). However, the report's discussion of punitive damages two paragraphs later does not include gross negligence in the scope of applicability of punitive damages:

> [Pjunitive damages against any [volunteer] defendant will be available only where the claimant demonstrates by clear and convincing evidence that the volunteer proximately caused the harm through willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed. This ensures that punitive damages, which are intended to punish the defendant and not to compensate the plaintiff, are available only where a volunteer has acted in an egregious fashion warranting such an award.

Id.

[14] *Id.*

members were volunteers. The final statutory language makes it clear that the limitations on liability do not apply to conduct that constitutes a crime of violence or act of international terrorism for which the defendant has been convicted, conduct that constitutes a hate crime, conduct that involves a sexual offense for which the defendant has been convicted, misconduct for which the defendant has been found to have violated a Federal or State civil rights law, or misconduct where the defendant was under the influence of alcohol or drugs at the time.[15]

In those cases in which a volunteer is acting within the scope of his responsibilities to the nonprofit organization, but is still liable for damages to an injured party, there is an additional limitation on that volunteer's liability. The VPA limits a volunteer's liability for noneconomic harm by rejecting the concept of joint and several liability. Instead, each volunteer defendant is liable only for the amount of noneconomic loss allocated to that defendant "in direct proportion to the percentage of responsibility of that defendant for the harm to the claimant with respect to which that defendant is liable."[16] Noneconomic loss means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish and all other non-pecuniary losses of any kind or nature.[17] The trier of fact determines the percentage of responsibility.[18]

A. VOLUNTEER DEFINED

The term *volunteer* means an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation or any other thing in lieu of compensation in excess of $500 per year. Reimbursed out of pocket expenses are not deemed compensation, so long as the expenses qualify as "reasonable reimbursement or allowance for expenses actually incurred."[19] The definition includes a volunteer serving as a director, officer, trustee, or direct service volunteer.[20]

> The term "volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive -
> (A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or
> (B) any other thing of value in lieu of compensation, in excess of $500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.[21]

While most volunteers do not receive cash compensation, many receive *benefits*, such as discounts in museum shops or free lunches in the cafeteria. These

[15] 42 U.S.C.A. § 14503(f) (1997).
16 42 U.S.C.A. § 14504(b)(1)
17 42 U.S.C.A. § 14505(3) (1997).
18 42 U.S.C.A. § 14504(b) (1997).
[19] 42 U.S.C.A. § 14505(4)(A)
[20] 42 U.S.C.A. § 14505(6)(B)
[21] 42 U.S.C.A. § 14505(6)(A)

benefits are not a concern so long as the total value does not exceed $500 in any given year. Whether such benefits in excess of $500 are compensation is an open question. If, for example, someone volunteered several times per week and were given lunch each day and the annual value exceeded $500, it is unclear whether such benefits would be compensation which would remove a person from volunteer status. This ambiguity would allow a plaintiff to claim the value of these volunteer perks exceeds $500 as a tactic in a lawsuit against a volunteer. If a plaintiff is successful in challenging volunteer status, the volunteer would be unable to benefit from the Volunteer Protection Act immunity because that volunteer would be given employee status for purposes of the lawsuit.

Some guidance may be provided by recently promulgated regulations proposed by the Treasury Department to define *economic benefits* for purposes of the intermediate sanctions on excess benefits paid by exempt organizations.[22] No sanctions are imposed on an exempt organization which pays only a reasonable amount for whatever it receives in return, for example *reasonable* compensation, in return for services rendered. But in measuring the amount that has been paid, the exempt organization has to measure and include all benefits received by the person in question. An exempt organization can provide reimbursement for expenses, but reimbursement for reasonable expenses does not include luxury travel or spousal expenses.[23] An organization can also provide inconsequential member benefits such as discounts at a gift shop, as long as that same benefit is provided to members of the public in exchange for a membership fee of $75 or less.[24] This suggests significant *member benefits* for volunteers that are not *inconsequential,* and therefore must be counted when measuring the amount of the payments made.

B. NONPROFIT ORGANIZATION DEFINED

The Volunteer Protection Act defines a nonprofit organization as any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and is exempt from tax under section 501(a) of the Code.[25] The definition of nonprofit organization also includes "any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes."[26] The nonprofit must not practice any action which constitutes a hate crime as referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act.[27] The original bill also did not address hate crimes. Representative Sheila Jackson Lee (D-TX) offered the amendment to the bill in the Judiciary Committee.[28] The amendment provides that volunteers accused of hate crimes, according to the Hate Crime Statistics Act, remain subject to prosecution. Lee amended the measure to prevent members of organizations such as the Ku Klux Klan from arguing that they are immune from

[22] Treas. Reg. § 53.4958 (1998).
[23] Treas. Reg. § 53.4958-4 (a)(3)(I) (1998).
[24] Treas. Reg. § 53.4958-4 (a)(3)(ii) (1998).
[25] 42 U.S.C.A. § 14505(4)(A) (1997).
[26] 42 U.S.C.A. § 1405(4)(B) (1997).
[27] *Id.*
[28] 143 CONG. Rec. H3096-01,3097,3098 (daily ed. May 21,1997).

prosecution for hate crimes because of their volunteer status.[29] The term *nonprofit organization* means:

> (A) any organization which is described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of Title 26 and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or
>
> (B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).[30]

What organizations exactly constitute this second group of *not-for-profit* organizations is very unclear because the definition does not correspond to any established exempt organization definition. According to the House Judiciary Committee Report:

> The term "nonprofit organization" includes organizations which have obtained tax exempt status under section 501 (c) (3) of the internal Revenue Code. It also includes organizations which may or may not have obtained certification as tax-exempt organizations under the Internal Revenue Code, but which are nevertheless conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare or health purposes. For example, the definition is intended to include trade and professional associations and other business leagues which are exempt from taxation under section 501 (c) (6) of the Internal Revenue Code. It would also include organizations which are not tax-exempt but which meet the "public benefit" and "operated primarily" tests.[31]

This explanation is very confusing and seems to be an attempt to add trade and professional associations to the protected group of organizations without correcting the statutory language. Previous unenacted versions of the VPA protected any organization that fell under any of the many subparts of § 501(c).[32] This would have included various other exempt organizations such as labor unions under

29 *Id.*

30. 42 U.S.C.A. § 14505(4) (1997); 26 U.S.C.A. § 501(c)(3) (1986).

31. H R. REP. No. 101, 105th Cong., 1st Sess. at 12 (1997) (from the House Committee on the Judiciary).

32. *See. e.g.,* 141 CONG. REC. S17776-02, S17778 (November 29, 1995) ("the term 'nonprofit organization' means any organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code").

501(c)(5), some social clubs under (c)(7), fraternal lodges under 501(c)(10) and others. The enacted version of VPA is narrower in scope than earlier versions.[33] Internal Revenue Code section 501(c)(3) embraces most traditional charities and already includes organizations that are organized and operated primarily for charitable, educational, and religious purposes. '[4] Therefore, the provision of the Volunteer Protection Act extending coverage beyond section 501(c)(3) organizations contains ambiguity.[35] Clearly the VPA definition encompasses organizations that could be *certified* as section 501(cX3) organizations, but which have not yet obtained their exemption recognition. In this way, part (B) of the definition of *nonprofit organization* overlaps part (A) by including organizations that would otherwise be tax-exempt under section 501(cX3) because they operate for public benefit and primarily conduct activities which are charitable, educational, or religious. What other organizations might be included is more problematic.

Civic and welfare organizations are defined in section 501(c)(4) of the Internal Revenue Code.[36] The regulations for section 501(c)(4) define civic organizations to include organizations that are organized for the promotion of social welfare.[37] "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[38] But these organizations may not be covered by the statutory language of the VPA unless a showing is made that they fit the statutory test on being operated *primarily* for *civic* purpose and for the *public benefit.*

The committee report cites trade and professional organizations under section 501(c)(6) as examples of organizations operated primarily for public benefit and whose volunteers are protected under the VPA. A conflict exists between the legislative history and the statute because the "public benefit" organizations named in the VPA do not fit into the section 501(c)(6) definition. The committee used section 501(c)(6) as an example of the types of organizations to be included in the definition of "nonprofit organization."[39] But the use of section 501(c)(6) organizations as an example is beyond the specific statutory language of the VPA because very few section 501(c)(6) organizations would be involved in activities that constitute a public benefit. They are instead associations of persons with "some common business interest."[40]

Section 501(c)(6) applies to business leagues, chambers of commerce, real estate boards, and boards of trade: "[Activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons." The business leagues and trade associations that qualify for tax-exempt status under section

[33] *See also* 135 CONG. REC. S2257-03, S2259 (March 7, 1989) (floor debate on S 520 indicating the bill defined "nonprofit organization" as any organization meeting the requirements of § 501(c) of the Internal Revenue Code and being tax-exempt under § 501(a)).

[34] 26 U.S.C.A. § 501(c)(3) (1986).

35 *See* 42 U.S.C.A. § 14505(4) (1997) (defining nonprofit organization).

36. 26 U.S.C.A. § 501(c)(4) (1986).

[37] Treas. Reg. § 1.501(c)(4)-l(a)(l)(ii) (1990).

38. Treas. Reg. § 1.501 (c)(4)-l(a)(2Ki) (1990).

[39] H.R. REP. NO. 101, 105th Cong., 1st Sess. at 13 (1997) (from the House Committee on the Judiciary); 42 U.S.C.A. § 14505(4)(B) (1997).

40.Treas. Reg. § 1.501(c)(6) (1958).

501(c)(6) do not operate primarily for charitable, civic, educational, religious, welfare or health purposes. Section 501(c)(6) organizations are not operated for charitable purposes; rather, they focus on their members' needs. Section 501(c)(6) organizations are not formed to benefit the general public in a charitable way.[41] This lack of a public benefit conflicts with the statutory language of the VPA, and with the explanation contained in the legislative history.[42]

C. STATUTORY EXCLUSIONS

Other interpretational or jurisdictional disputes can arise under the VPA. The VPA preempts state laws that are inconsistent with the Act, but allows a state to provide additional liability protection for volunteers.[43] In addition, the VPA allows other state law exceptions which could lead to disputes. A state can elect to enact legislation which denies liability protection to volunteers in civil actions in which all parties are citizens of that state.[44] Under the VPA opt-out provision a state may declare the VPA does not apply to civil actions in which all parties are citizens of that state. The state law must also cite the authority of subsection b.

> The bill. .. permits a State to opt out of the bill's coverage in any civil action against a volunteer, nonprofit organization, or government entity in State court in which all parties are citizens of the State. This permits States to elect to apply their own legal rules in cases involving more purely State interests.[45]

There is no other legislative history to indicate the Congressional intent of the opt-out provision. The VPA allows states to give volunteers additional protection from liability. Both the preemption provision and the single-state opt-out provisions are aimed at reducing Constitutional challenges.[46] Beyond these exceptions, the following state laws will not be interpreted as inconsistent with the Volunteer Protection Act and therefore could exist in different states in different forms:

> (1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.
> (2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

41.Id.

42. H R REP NO- *01, 105th Cong., 1st Sess. at 13 (1997) (from the House Committee on the Judiciary).

[43] 42 U.S.C.A. § 14502(a) (1997).

[44] 42 U.S.C.A. § 14502(b) (1997).

45. H.R. REP- No. 101, 105th Cong.. 1st Sess. at 12 (1997) (from the House Committee on the Judiciary).

[46] *See infra* text accompanying notes 108-132.

> (3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local Government pursuant to state or local law.
> (4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity."[47]

This long list of exceptions to federal preemption of state law by the VPA adds to the tangle of state and federal rules governing volunteer liability. For example, the VPA provides immunity from liability for the volunteer for ordinary negligence. But, on one hand, a state may enact a law which gives the volunteer additional liability protection, or on the other hand may opt-out of the federal statute and impose tort liability on the volunteer when all the parties are citizens of that state.[48] In the latter case, the volunteer continues to be liable for negligence based on the citizenship of the parties. The volunteer might also be liable if the plaintiff is a state or local officer.

This patchwork of state and federal tort volunteer liability laws is made more difficult by the varying state laws about the liability of the nonprofit entity itself for its own negligence in supervising and selecting volunteers and its potential liability under *respondeat superior* for the volunteers' actions. While the mechanism and focus of the VPA is volunteer liability protection, not organizational protection, its main purpose is to help sustain the whole nonprofit sector as indicated by the House Judiciary Committee Report:

> The Volunteer Protection Act promotes the interests of social service program beneficiaries and taxpayers, and sustains the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions. The Act accomplishes this by providing volunteers serving nonprofit organizations and governmental entities reasonable protections from liability.
> H.R. 911 ... immunizes a volunteer from liability for harm caused by ordinary negligence, and prohibits the recovery of punitive damages unless the volunteer's conduct was willful, criminal, or in conscious flagrant indifference to the rights or safety of the claimant. It also provides that a volunteer's liability for noneconomic damages will be limited to the proportion of harm for which that volunteer is found liable. These modest limitations are intended to remove a significant barrier - the fear of unreasonable legal liability - to inducing individuals to volunteer their time to charitable endeavors.[49]

[47] 42 U.S.C.A. § 14505(4)(d) (1997)
[48] 42 U.S.C.A. § 14502(b) (1997).
[49] H.R. REP. No. 101, 105th Cong., 1st Sess. at 6 (1997) (report from House Committee on the Judiciary).

The VPA contains no direct provision protecting charitable organizations from liability for harm caused by volunteers.[50]

III. HISTORY OF LIABILITY PROTECTION

The doctrine of charitable immunity was widely accepted after it was first adopted in the United States by the Massachusetts Supreme Court in 1876.[51] The doctrine provided the nonprofit organizations themselves with liability immunity for tortious conduct committed by employees and volunteers and was intended to preserve charitable assets for charitable purposes.[52] By the 1940s and 1950s the charitable immunity doctrine was being abrogated in part because of growth of the nonprofit sector and in part by the increased availability of insurance.[3] Charitable immunity gave way to *respondeat superior* which placed liability on organizations

[50] *See infra* text accompanying notes 64 - 85. Daniel L. Kurtz, *Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices,* Not-for-Profit Organizations: The Challenge of Governance in an Era of Retrenchment Cosponsored by California Continuing Education of the Bar, C726 ALI-ABA 263 (1992).

[51] McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876).

[52] Forty states followed suit, until the doctrine began to break down in the 1940s. Today, Georgia is one of the few states that continues to apply the doctrine in limited circumstances. Charitable immunity from tort damages originated in the dicta of two early English cases, neither of which involved tortious conduct on the part of the charity. Daniel A. Barfield. Note, *Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages,?* 29 VAL. U.L. REV. 1193, 1194 n.3 (1995). Feeofees of Heriot's Hosp. v. Ross, 8 Eng. Rep. 1508 (1846), introduced the *trust fund theory* to justify charitable immunity, reasoning that "to give damages out of a trust fund would not be to apply it to those objects whom the author of fund had in view, but would be to divert it to a completely different purpose." Daniel A. Barfield, Note, *Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages.?* 29 VAL. U.L. REV. 1193 n.3 (1995). American Courts later relied on this *dicta* to craft the doctrine of charitable immunity. Relying on this trust fund theory established by *Feeofees,* Massachusetts was the first state to announce the doctrine of charitable immunity in *McDonald* v. *Massachusetts Gen. Hosp.,* 120 Mass. 432 (1876). Daniel A. Barfield, Note, *Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages, ?* 29 VAL. U.L. REV. 1193 n.4 (1995). The other case often relied upon by American courts was *The Vestry of the Parish of St. Leonard,* 142 Eng. Rep. 769 (1861). In 1885, Maryland was the second state to adopt the doctrine, seven states adopted the doctrine by 1900, 25 had by 1920 and 40 had by 1938. Bradley C. Canon & Dean Jaros, Note, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity,* 13 LAW & SOC'Y REV. 969,971 (1979).

State courts adopted various theories to justify charitable immunity. *See* Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942). Under the trust fund theory charities were immune from paying damages because charitable donations were thought to be held in trust for the beneficiaries of the charity and paying tort judgments would frustrate the intent of donors. Barfield, *supra* note 52, at 1194 n. 6. The *respondeat superior* theory holds that charities were not bound under the doctrine of *respondeat superior* because they did not pay their employees. *See, e.g.,* Fordyce & McKee v. Woman's Christian Nat'l Library Ass n, 96 S.W. 155 (Ark. 1906). Edith L. Fisch. Note, *Charitable Liability for Tort,* 10 VILL. L. REV. 71, 88 (1964). Under the *implied waiver theory* courts held that beneficiaries of charitable organizations impliedly waived liability or assumed the risk by accepting the charities' contributions. *Id.* at 89. This theory could only pertain to the beneficiary of a charity and would not pertain to a stranger or employee of a charity. Several courts also based their opinions on the public policy that the exemption from liability protects charitable assets from use for any purpose than for which the charity was organized. *Id.* at 88. Another common public policy justification holds that exemption from liability acts as a stimulus to charitable activity. *See* Parks v. Northwestern Univ., 75 N.E. 991 (111. 1905).

[53] Barfield, *supra* note 52, at 1195.

for acts of volunteers within the scope of their duties. This happened in part because many nonprofit organizations had transformed into substantial corporate powers and had the assets and ability to purchase liability insurance. Some courts repudiated the doctrine for being inconsistent with the principle that a tortfeasor should bear responsibility for the harm caused.[54] The leading opinion on the abrogation of the doctrine, *Georgetown College* v. *Hughes*,[55] criticized the analytical underpinnings of the doctrine:

> No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states, which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both, with little apparent heed to whether they are liable for torts or difference in survival capacity. Further, if there is a danger of dissipation, insurance is now available to guard against it and prudent management will provide protection.[56]

> The remnants of the charitable immunity doctrine make state laws an inconsistent patchwork of organization and volunteer immunity.[57]

[54] *See, e.g.,* Adkins v. St. Francis Hosp., 143 S.E.2d 154 (W.Va. 1965); Foster v. Roman Catholic Dioceses of Vermont, 70 A.2d 230 (Vt. 1950). Canon & Jaros, *supra* note 52, at 972. *See* Paul T. O'Neill, *Charitable Immunity: The Time to End Laissez-Faire Health Care in Massachusetts Has Conte,* 82 MASS. L. REV. 223, 230 (1997), *See also* Note, *The Quality of Mercy: "Charitable Torts " and their Continuing Immunity,* 100 HARV. L. REV. 1382 (1987).

55 130 F.2d 810 (D.C. Cir. 1942).

56.Georgetown College v. Hughes, 130 F.2d 810, 823 (D C. Cir 1942).

[57] Yet, many of the decisions to abandon the doctrine were often accompanied by lengthy dissents. *See, e.g.,* Flagiello v. Pennsylvania Hosp., 208 A.2d 193 (Pa. 1965); Collopy v. Newark Eye and Ear Infirmary, 141 A.2d 276 (N.J. 1958); Canon & Jaros, *supra* note 52, at 974. Several state courts explicitly retained the doctrine during the trend. *See, e.g.,* Decker v. Bishop of Charleston, 147 S.E.2d 264 (S.C.
1996); Rhonda v. Aroostock Gen. Hosp., 226 A.2d 530 (Me. 1967). Several state legislatures, like New Jersey and Kansas, even passed laws reinstating charitable immunity following state supreme court decisions that abandoned the doctrine. Canon & Jaros, *supra* note 52, at 974. Nonetheless, by 1985 many jurisdictions repudiated or limited the doctrine of charitable immunity. *See, e.g.,* Albritton v. Neighborhood Centers Ass'n for Child Dev., 466 N.E.2d 867, 871 (Ohio 1984); Nolan v. Tifereth Israel Synagogue. 227 A.2d 675, 765-766 (Pa. 1967); Sullivan v. First Presbyterian Church, 152 N.W.2d 628, 633 (Iowa 1967); CAL. Civ. CODE § 1714 (West 1985); Jeffrey D. Kahn, Comment *Organizations' Liability for Torts of Volunteers,* 133 U. Pa. L. REV. 1443, 1437 n.22 (1985).

Thirty-five states have no limit on liability for charities: Alaska, Arizona, California, Connecticut, Delaware, Washington D.C., Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia. Wisconsin. Eight states have partial immunity; Alabama, Colorado, Georgia, Maine, Maryland, New Jersey, Virginia, Wyoming. In New Mexico and South Dakota there is no clear authority as the cases are divided. Arkansas has general immunity only for strictly defined charitable organizations. Nine states limit liability damage awards to a specific dollar

amount: Colorado, Georgia, Maine. Maryland, Massachusetts, South Carolina, Tennessee, Texas, Utah. NONPROFIT RISK MANAGEMENT CENTER, STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS (3d ed. 1996).

A. **A** State Law Example

Following the trust fund theory, Georgia common law, for example, holds that a charitable institution or corporation is not liable for the negligence of its officers and employees, except for "administrative negligence," for failing to exercise ordinary care in their selection of employees or for failing to exercise such care in retaining them.[58] It has also been specifically established that an incorporated hospital, primarily maintained as a charitable institution, is not liable for the negligence of its officers and employees, unless it fails to exercise ordinary care in selection of competent officers and servants, or fails to exercise ordinary care in retaining such officers and employees.[59] Georgia law limits recovery for administrative negligence to income derived from non-charitable sources.[60] Because a liability insurance policy is considered a non-charitable asset, under Georgia common law, a charitable institution waives charitable immunity to the extent of any liability insurance which it carries.[61] The court determined that "the doctrine of charitable immunity . . . does not extend to the corporate or original negligence of the charitable entity in the employment or retention of incompetent employees."[62] Because the failure to exercise ordinary care to provide a sufficient number of employees and adequately instruct employees and the failure to exercise ordinary care in selecting or retaining competent employees cannot be distinguished, the doctrine of charitable immunity does not extend to a hospital which fails to provide a sufficient number of competent and adequately instructed employees on its staff.[63] It is not clear whether the doctrine of *respondeat superior* is always applicable to volunteers for nonprofits in Georgia. It is unlikely, however, that the doctrine of *respondeat superior* would apply to volunteers and not employees. If a nonprofit is liable for actions of volunteers, the Volunteer Protection Act does not preempt Georgia law because it specifically provides that state laws that hold nonprofit organizations or charities liable for the torts of volunteers, to the same extent that employers are liable for the torts of employees, shall not be preempted.

B. RESPONDEAT SUPERIOR

Respondeat superior has increasingly been applied against nonprofit organizations in jurisdictions that do not enforce charitable immunity in order to

58. Burgess v. James, 38 S.E.2d 639 (Ga. Ct. App. 1946); Morehouse College v. Russell. 136 S E 2d 179 (Ga. Ct. App. 1964).

59. Harrell v. Louis Smith Memorial Hosp., 397 S.E.2d 746, 748 (Ga. Ct. App. 1990) (citing Ponder v. Fulton-Dekalb Hosp. Auth., 353 S.E.2d 515 (Ga. 1987)); Wynn v. Fulton-Dekalb Hosp. Auth 395 S.E.2d 343 (Ga. Ct. App. 1990)).

60. Ponder v. Fulton-Dekalb Hosp. Auth., 353 S.E 2d 515 (Ga. 1987) (citing Morton v. Savannah Hospital. % S.E. 887 (Ga. 1918)).

61. Ponder v. Fulton-Dekalb Hosp. Auth., 353 S.E 2d 515 (Ga. 1987); Morehouse College v. Russell. 135 S.E.2d 432 (Ga. Ct. App. 1964); Y.M.C.A. v. Bailey, 130 S.E.2d 242 (Ga. Ct. App. 1963)' Cox v DeJamete, 123 S.E.2d 16 (Ga. Ct. App. 1961).

62 Y.M.C.A. v. Bailey, 130 S.E.2d 242,244 (Ga. Ct. App. 1963).

63 Harrell v. Louis Smith Memorial Hosp.. 397 S.E.2d 746, 748 (Ga. Ct. App. 1990). *See also* Big Brother/Big Sister of Metro Atlanta v. Terrell, 359 S.E.2d 241 (Ga. Ct. App. 1987) (no administrative negligence in case where the organization did not know criminal propensities).

compensate victims for negligent and intentional acts or omissions.[64] Issues involving charitable organizations and *respondeat superior* center around the general principles of master-servant or principal-agent law. Nonprofit organizations can be held liable for the torts of their volunteers based on acts or omissions committed within the scope of the volunteers' duties and responsibilities.[65] The basis for this liability is the negligence of the volunteer who was acting foi [1] ie benefit of the organization, within the scope of his or her duties, at the time the tort occurred. *Respondeat superior* establishes liability for nonprofit organizations in the same manner in which employers are vicariously liable for negligent acts and omissions of their employees.[66] The courts in the nonimmunity jurisdictions have generally followed Section 225 of the Restatement (Second) of Agency which states that, "one who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services."[67] Thus, when faced with a suit against a nonprofit organization for the tort of a volunteer, those jurisdictions have applied the traditional doctrine of vicarious liability.[68]

For a master to be found liable for the tort of a servant three requirements must be met: (1) there must be an injury caused by the negligence of the servant; (2) there must be a master-servant relationship; and (3) the servant must have been acting within the scope of his employment.[9] Much of the controversy in volunteer cases centers on the existence of a master-servant relationship. In order for a relationship to be designated a master-servant relationship, the common law requires that three conditions be satisfied: (1) the master must have the right to control the physical conduct of the servant; (2) the master must consent to the receipt of the service; and (3) the master must expect to receive some benefit from the service.[70] The limited number of states that have addressed this issue have generally concluded that the right to control exists in a volunteer-organization relationship.[71] To determine this right of control, courts generally look to the presence of specific

[64] Kahn, *supra* note 57, at 1438 n.29 (1985) (citing jurisdictions where courts have applied *respondeat superior*).

[65] Scottsdale Jaycees v. Superior Court, 499 P.2d 185, 188 (Ariz. Ct. App. 1972), Kahn, *supra* note 57, at 1442.

[66] Brenda Kimery, Comment, *Tori Liability of Nonprofit Corporations and their Volunteers, Directors, and Officers: Focus on Oklahoma,* 33 TULSA L. J. 683, 686 (1997).

[67] Allan Manley, Annotation, *Liability of Charitable Organization Under Respondeat Superior Doctrine for Tort of Unpaid Volunteer,* 82 A.L.R. 3d 1213 (1978).

[68] *See, e.g., Scottsdale Jaycees,* 499 P.2d 185 (Ariz. App. 1972) (volunteer caused accident on way to organization meeting); Sokolow v. City of Hope, 262 P.2d 841 (Cal. 1953) (volunteer for hospital auxiliary caused injury at fundraising fair); Vind v. Asamblea Apostolica de la Fe en Christo, Jesus, 307 P.2d 85 (Cal. Ct. App. 1957) (volunteer minister in auto accident on way to meeting); Malloy v. Fong, 232 P.2d 241 (Cal. 1951) (volunteer divinity student caused auto accident); Leno v. YMCA, 95 Cal. Rptr. 96 (1971) (volunteer scuba instructor's negligent supervision led to student drowning); Trinity Lutheran Church v. Miller. 451 N.E.2d 1099 (Ind. Ct. App. 1983) (volunteer driving to deliver holiday gifts injured motorcycle driver); Garcia v. Herald Tribune Fresh Air Fund, 380 N.Y.S.2d 676 (1976) (local boy scout council held not liable for scoutmaster's alleged failure to supervise properly a boy scout who fell out of a tree); Riker v. Boy Scouts of America, 183 N.Y.S.2d 484 (1959) (scoutmaster caused injury hanging flag at scouting event); Kahn, *supra* note 57, at 1433 n. 29.

[69] Restatement (Second) of Agency § 219 (1959).

[70] Kahn, *supra* note 57, at 1440.

[71] *See* Trinity Lutheran Church v. Miller, 451 N.E.2d 1099 (Ind. Ct. App. 1983); Baxter v. Momingside, Inc., 521 P.2d 946 (1974). *But see* Davis v. Shelton, 304 N.Y.S.2d 722 (1969) (right of control did not exist between boy scout council and volunteer scoutmaster).

instructions to volunteers and the nature of the agreement between the two. The extent to which a charity orders or benefits from a specific action and the degree of contact between the charity and the volunteer is often cited as evidence of control.[72]

The agency relationship is established only when the master has a right to control the actions of the servant, the master consents to the service and the master expects to benefit from it.[73] As long as an agency relationship can be established, and the jurisdiction applies the doctrine of *respondeat superior* against charitable organizations, a nonprofit may be held liable for the torts of its volunteers.[74]

> [WJhere one volunteers or agrees to assist another, to do something for the other's benefit, or to submit himself to the control of the other, even without an agreement for or expectation of reward, if the one for whom the service is rendered consents to its being performed under his direction and control, then the service may be rendered within the scope of a master-servant relationship.[75]

Volunteers are considered servants under the law of agency. "One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services."[76] The organization's liability, however, is limited to the acts committed within the scope of the volunteer's duties.[77] In order establish consent by the organization, the volunteer must be acting within the scope of his or her duties.[78]

Potential vicarious and potential direct liability creates an economic interest on the part of the nonprofit entity. In addition, organizations have their own duty of care in selecting, training and supervising those who carry out their charitable missions.[79] Under Section 219 of the Restatement (Second) of Agency, a master is only liable for the torts of servants acting outside the scope of employment if:

(a) the master intended the conduct or the consequences,
(b) the master was negligent or reckless,
(c) the conduct violated a non-delegable duty of the master, or

[72] *See* Garcia v. Herald Tribune Fresh Air Fund, Inc., 380 N.Y.S.2d 676 (1976); Baxter v. Momingside, Inc.. 521 P.2d 946 (1974).

73 RESTATEMENT (SECOND) OF AGENCY § 225 (1959).

74 Baxter v. Momingside, Inc., 521 P.2d 946 (Wash. Ct. App. 1974).

[75] *Id.*at 948 (citing RESTATEMENT (SECOND) OF AGENCY §§ 225, 221); Scottsdale Jaycees v. Superior Court of Maricopa County, 499 P.2d 185 (Ariz. Ct. App. 1972)).

[76] RESTATEMENT (SECOND) OF AGENCY § 225 (1959).

77 Scottsdale Jaycees v. Superior Court of Maricopa County. 499 P.2d 185, 188 (Ariz. Ct. App.

78.Kimeiy, *supra* note 66, at 686.

79. Applying the doctrine of *respondeat superior* against hospitals is a means of making the hospital liable for negligence committed by servants, employees, and agents. John Dwight Ingram. *Liability of Medical Institutions for the Negligence of Independent Contractors Practicing on their Premises,* 10 J. CONTEMP. HEALTH L. & POL Y 221, 222 (1993). Another means used to impose liability against hospitals is the doctrine of corporate negligence. "The corporate negligence basis for liability is that the hospital owes a duty of care to its patients in the selection and supervision of both employees and

independent contractors who provide medical treatment in the hospital." *Id.* Corporate negligence, as a result, places a duty of care on the hospital, while *respondeat superior* makes the hospital liable for acts or omissions of servants.

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[80]

Big Brother/Big Sister of Metro Atlanta v. *Terrell* involved the liability of a charitable organization when a volunteer committed acts of criminal sexual molestation. The court held that the organization must have knowledge of criminal propensities to be held liable for the volunteer's acts.[82] And the organization can avoid liability if it exercised ordinary care in the selection of its volunteers.[8j] The court found that the organization should not be held liable because criminal activity in question was clearly outside the scope of the volunteer's duties. By engaging in criminal acts, the volunteer was no longer acting on behalf of the organization because it was not acting to further the organization's goals.[84] What constitutes ordinary care varies on a case-by-case basis. In *Terrell* the organization reviewed an application, checked references, conducted an interview, and completed a family history prior to accepting the volunteer into their program. The Georgia Court of Appeals found these steps to be sufficient to qualify as ordinary care.[85]

IV. STATE LAWS AFFECTING VOLUNTEER LIABILITY: GEORGIA'S EXPERIENCE

At least forty-four states have some form of volunteer immunity protections[86] and every state has enacted some sort of protection for either volunteers or nonprofit organizations. In each state, a determination has to be made whether the state law provides additional protection for volunteers or is in conflict with and is preempted by federal law.[87] Thirty-eight states limit liability for simple negligence for at least some types of volunteers and 20 provide additional protection for wanton or reckless conduct and gross negligence.[88] Because board members often faced difficulty in procuring insurance, most of the state protection volunteer statutes protects only directors and officers.[89] Only half of the states protect volunteers other than officers or directors.[90]

[80] Restatement (Second) of Agency § 219 (1959).

81. 359 S.E.2d 241 (Ga. Ct App. 1987).

[82] *Id.* at 242.

[83.] *Id.* at 243.

84.Id.

[85] *Id.* at 242. A similar result occurred in Watkins v. Salvation Army, 470 S.E. 2d 477, 478 (Ga. Ct. App. 1996) which reiterates the standard set forth in *Terrell.* The dissent in that case argued that the issue of whether the organization had or should have had the requisite knowledge is a question for the jury to decide. *Id.* In *Watkins,* the organization had knowledge of the prior criminal record of the volunteer, possibly calling for a deeper inquiry into his past, as opposed to the lack of any such knowledge in *Terrell.*

86 143 CONG. Rec. 3763-04, 3765 (1997).

87.H.R. Rep. No. 101, 105th Cong., 1st Sess. pt. 1, at 7 (1997).

[88] *Id.* at 14.

[89] *Volunteer Liability Before the Judiciary Committee of the United States House of Representatives.* 105* Cong. 2 (1997) (statement of Charles Tremper, J.D., Ph.D., Senior Vice President, American Association of Homes and Services for the Aging and Founder, Nonprofit Risk Management Center).

90. Id.

Georgia statutory law has evolved over the years into a patchwork of tort immunity only to several well-delineated groups of volunteers. For example, in 1962 Georgia enacted a Good Samaritan Clause in order to protect an individual who "gratuitously and in good faith renders assistance at the scene of an accident as long as they act in a reasonably prudent manner." [91] There have been no cases on the statute since its passage. It seems to merely provide that a person will not be liable unless they are negligent.

Georgia also provides limited liability protection for licensed physicians who render emergency aid at accident scenes. Georgia passed section 51-1-29 which provides that:

> any person including any person licensed to practice medicine and surgery .. . who in good faith renders emergency care at the scene of an accident or emergency to the victim or victim thereof without making any charge therefore shall not be liable for any civil damages as a result of any act or omission by such person in rendering emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person.

Georgia case law since determined that individuals who are not licensed medical practitioners, but render emergency care in good faith, are exempt from civil liability.[9]' Doctors who by chance are called upon to render emergency care are protected by this section; however, occurrence of an emergency will not invoke the immunity afforded by this section if it was the doctor's duty to respond to the emergency.'' Georgia case law also determined that the burden of proof is on the physician to establish a prima facie case in support of this *Good Samaritan* liability defense.[94]

In 1969, Georgia passed section 51-1-20 providing a nonprofit hospital volunteer board member with limited liability. Subsection (a) provides that:

> a person serving without compensation as a member, director, or trustee, or as an officer of a board without compensation of any nonprofit hospital or association . . . shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.

Subsection (b) specifies that the term "compensation" shall not include reimbursement for reasonable expenses. Subsection (c) provides that the code section shall be supplemental to any existing immunity. The 1987 amendment

91. Ga. Code Ann. § 52-7-14 (1988).
[92] Wallace v. Hall. 244 S.E.2d 129 (1978).
[93] Clayton v. Kelly, 357 S.E.2d 865
[94] Heniy v. Barfield. 367 S.E.2d 289

inserted the phrase "of the board" and "or association" in subsection (a) and added subsections (b) and (c). Prior to the 1987 amendments, case law had expanded the coverage of the act to include public, charitable, or nonprofit institutions or organizations generally.[95]

In 1979 Georgia enacted one of its *Good Samaritan* statutes. This statute provides that "any person who renders emergency aid in good faith to persons who are choking, without any charge for his services, shall not be liable for any civil damages for any act or omission in rendering such emergency aid or as a result of any act or failure to act to provide or arrange for further treatment or care for such persons."[96] Like other Georgia volunteer statutes, it requires that the volunteer act in good faith to invoke protection from tort liability.

Section 51-1-30, passed in 1980, provides that the "officers, members, agents or employees of any fire department.. . shall not be liable at law for any act or acts done while actually fighting a fire or performing duties at the scene of an emergency, except for willful negligence or malfeasance." The term *fire department* includes volunteer fire departments established pursuant to local act, ordinance, or resolution or established as nonprofit corporations. The statute was amended to include nonprofit corporations in 1982.

That same year, Georgia passed section 51-1-31 which provides that a good faith donor or gleaner of any canned or perishable food apparently fit for human consumption, who donates food to a bona fide charitable or nonprofit organization, for use or distribution, shall not be subject to criminal penalty or civil damages arising from the condition of the food, unless an injury is caused by the recklessness or intentional misconduct of the donor or gleaner. The Act provides charitable and nonprofit organizations with the same protection, provided that an injury is not caused by the recklessness or intentional misconduct of the charitable or nonprofit organization.

In 1987, Georgia enacted section 51-1-29.1 which provides that:

> unless it is established that injuries or death were caused by gross negligence or willful or wanton misconduct ... (1) no health care provider licensed . . . who voluntarily and without expectation or receipt of compensation provides professional services, within the scope of such health care provider's licensure, for and at the request of a hospital, public school, nonprofit organization, or an agency of the state or one of its political subdivisions or provides such professional services to a person at the request of such an organization, which organization does not expect or receive compensation with respect to such services from the recipient of

[95] In Bunkley v. Hendrix, 296 S.E.2d 223 (Ga. Ct. App. 1982), the Georgia Court of Appeals determined that a member of a board of governors of an organization was immunized from liability for simple negligence when an exhibit stand fell the plaintiff, and that Georgia does not limit volunteer protection to those serving hospitals. *Id.* at 224. The Court noted that prior to the passage of the statute, under common law, members and directors of nonprofit or charitable organizations could be held responsible for the negligence of the organization of its employees. *Id.* The Georgia Court of Appeals also determined that the statute renders volunteers immune from liability for mere negligence. Dyches v. McCorkle, 441 S.E.2d 518 (Ga. Ct App. 1994).

[96] GA. CODE ANN. § 26-2-374 (1998).

> such services; (2) or no licensed hospital, public school, or nonprofit organization which requests, sponsors, or participates in the providing of the services under the circumstances provided in paragraph (1) of this subsection shall be liable for damages or injuries alleged to have been sustained by the persons ----------

The Georgia code also provides immunity for volunteers conducting or sponsoring sports or safety programs unless they are acting outside the scope of their duties, are guilty of willful misconduct or gross negligence or are transporting participants.[97]

In 1991 the Georgia legislature limited volunteer liability for the transportation of senior citizens. Section 51-1-42 provides that any person who provides volunteer transportation for senior citizens shall not be liable for any civil damages for any injury to such senior citizens arising out of or resulting from such transportation, if such person was acting in good faith, within the scope of his or her official actions and duties, and unless the conduct of such person amounts to willful and wanton misconduct. There is no case law on this statute.

In 1993 Georgia enacted section 51-1-30.3 providing public and private school volunteers with immunity from tort liability, unless it is established that injuries or death were caused by gross negligence or willful or wanton misconduct. A volunteer is defined as one who provides services for schools without compensation at the request of the school. This immunity exists for acts and omissions that occur either on school property or at a school-sponsored function. The Act provides immunity from liability for public or private schools that request or participate in providing volunteer services, provided the school also does not receive compensation. The Act was designed to protect Parent Teacher Associations and their volunteers.'[18] The legislation was enacted because parents had become reluctant to volunteer due to potential legal liability for functions such as sitting with students during lunch hours or escorting children on field trips.

In that same year the Georgia legislature passed section 51-1-45. This provision immunizes licensed physicians from civil liability for acts or omissions

97. Enacted in 1988, GA. CODE ANN. § 51-1-20.1 provides that:

> [N]o person who is a volunteer for a sports program or safety program of a nonprofit association, or any employee or officer of such nonprofit association conducting or sponsoring such sports or safety program, shall be liable to any person as a result of any acts or omissions in rendering such services or in conducting or sponsoring such sports or safety programs if such person was acting in good faith within the scope of his or her assigned duties and unless the conduct of such person amounts to willful wanton misconduct or gross negligence; provided, however, the defense of immunity is waived as to those actions for the recovery of damages against such persons for which liability insurance protection for such claims has been provided, but such waiver shall only apply to the extent of any liability insurance so provided.

Id. Subsection (c) states that:

> [N]othing in this code section shall be construed as affecting or modifying the liability of such volunteers, employees, officers, or a nonprofit association for acts or omissions relating to other transportation of participants in a sports program or safety program to or from a game, training session, event, or practice, or relating to the care and maintenance of real estate unrelated to the practice, training, or playing areas which such volunteers, employees, officers, or a nonprofit association owns, possesses, or controls.

Id. There is no case law on this statute.

98. Laura Jones French, *General Provisions: Provide Immunity From Liability for School Volunteers* 11 GA. ST. U.L. REV. 267 (1997).

committed while providing physical examinations or serving as a team doctor on a voluntary basis to amateur or nonprofessional athletes. Again, those physicians guilty of willful or wanton acts or omissions do not receive immunity. This immunity applies to services rendered as the team doctor, either during practices and contests, or during preseason physical examinations. Immunity also extends to acts or omissions in arranging for subsequent treatment." Because of an increase in malpractice litigation against physicians, fewer physicians had been donating their time to perform free physical examinations on athletes.[1]" The legislature passed the Act because many schools could no longer afford the additional cost of paying for team doctors.[101] The original version of the bill was applicable to services provided to the *student athlete.* The House Committee on Special Judiciary changed the language to *amateur or nonprofessional athlete* due to concern of some Committee members that the Act may be construed to include professional athletes.[102]

In 1995 Representative Johnny Floyd proposed what would become section 51-1-29.2 to specifically address situations like the 1994 floods in south Georgia.[103] The Act provides persons with limited immunity from tort liability when they voluntarily render services that benefit any individual's property during the time of and in the place of an emergency declared by the governor. This immunity applies only to individuals who act in good faith and neither expect nor receive compensation. An individual loses his immunity if he or she causes injury or damage because of willful or wanton negligence or misconduct.

Like the Volunteer Protection Act, Georgia law generally limits volunteer immunity to ordinary negligence. Therefore, under both schemes, volunteers remain liable for gross negligence, or wanton and reckless behavior. There are, however, several differences between Georgia law and the VPA. First, Georgia law only protects specific types of volunteers. Because Georgia only provides protection for certain types of volunteers, the Volunteer Protection Act will offer more uniform and comprehensive volunteer protection.

Second, under section 51-1-42, Georgia law provides limited immunity to those who provide volunteer transportation for senior citizens. The Volunteer Protection Act would not apply to transportation because it specifically excepts suits involving a volunteer who was operating a motor vehicle. However, the Volunteer Protection Act does not preempt section 51-1-42 because it provides additional protection to volunteers.

Third, the Volunteer Protection Act limits punitive damages, while Georgia law does not. Because this provision provides additional protection to volunteers, Georgia law will probably be preempted. Fourth, the federal law also limits joint and several liability for non-economic damages. Again, Georgia law will be preempted because the Volunteer Protection Act provides additional protection to volunteers. Lastly, the Volunteer Protection Act excludes protection for hate crimes, those under the influence of alcohol, those who have violated a civil rights law, and

[99] James R. Westbury, Jr., *General Provisions: Provide Immunity to Physicians Rendering Uncompensated Services to Nonprofessional Athletes,* 10 Ga. St. U.L Rev. 230,231 (1993).

100. Id.

[101] *Id.*

[102] *Id.*

[103] Mary F. Sharp, *General Provisions: Provide Volunteers with Limited Tort Immunity During Declared Emergency.* 12 Ga. ST. U.L. REV. 368, 368 (1995).

for conduct for which the volunteer has been convicted of a sexual offense. Georgia law is silent on this matter and the federal law preempts it.

Supporters of the federal legislation contend that this hodgepodge of state legislation has hindered national organizations from accurately advising their local chapters on volunteer liability and risk management guidelines.[104] Most charitable organizations maintain some form of liability insurance in case there is a lawsuit alleging organizational liability.[105] Nonprofit organizations face a problem in obtaining liability insurance, however, because insurance companies view volunteers as a risk, and therefore place organizations that use volunteers in a high-risk category.[106]

Further, many small charities do not have resources to determine the differences in the state laws affecting them. Most importantly, the patchwork of volunteer liability laws has also had a negative effect on the cost of insurance. Because of the small size of the market for volunteer liability insurance, insurers do not perform statistical analysis to support price differences among states. Thus, the price for liability insurance remains unaffected in those states that offer volunteer immunity.[107]

V. CONSTITUTIONAL CHALLENGES

Tort law has traditionally been viewed as within the scope of states' regulatory authority, and outside federal jurisdiction.[108] However, there has been a recent trend toward federalizing several areas of tort law, with a focus on products liability because of the national scope of product distribution. Some commentators argue that state law is inadequate because most products liability cases involve parties from multiple states.[109] For example, a product is manufactured in State A, by a company based out of State B, and ultimately sold in State C to a resident of State C. Because every state has different products liability laws, and there is a

[104] *Volunteer Liability Before the Judiciary Committee of the United States House of Representatives*, lOS[0]* Cong. 2 (1997) (statement of Charles Tremper, J.D., Ph.D., Senior Vice President, American Association of Homes and Services for the Aging and Founder. Nonprofit Risk Management Center).

[105] *See generally* Kahn, *supra* note 57, at 1446-1452 (discussing the insurance problem for nonprofits utilizing volunteers). *See also* Kimery, *supra* note 66, at 689-690 (discussing liability insurance).

106 Kahn, *supra* note 57, at 1446-1447. As a result, liability insurance becomes very expensive, and organizations limit the services they offer as a means of lowering the insurance rates. Volunteers are viewed as such a high risk because insurance companies believe that organizations minimally supervise and train their volunteers, thereby increasing the likelihood of a negligent act or omission. Insurance companies therefore do not view nonprofit organizations as a good investment, rather nonprofits are seen as unprofitable, regardless of whether statistics indicate the actual existence of these liability risks. Insurance companies are failing to take into account the lack of shareholders that must be answered to, and the fact that nonprofits have no potential for derivative suits. Also, the nonprofit's insurance policy should not be responsible for potential liabilities of its directors. Rather, there are special insurance policies that cover directors and officers. David W. Barrett, *A Call for More Lenient Director Liability Standards for Small. Charitable Nonprofit Corporations,* 71 IND. L.J. 967 (1996).

[107] *See aupra* note 104.

108 Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 918 (1996), Jerry J. Phillips, *Hoist By Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform.* 64 TENN. L. REV. 647, 659 (1997).

[109] Schwartz, *supra* note 108. at 924-932.

choice of law issue involved in these cases, there is a demand for nationalized products liability legislation to relieve companies of the complex question of which state's law will apply and what that law requires.

The arguments that favor federalizing products liability laws are analogous to those that favor federalizing volunteer protection laws. In both situations, each state has instituted its own law as a means of dealing with the relevant tort liability problem, and these laws can be different in each state. In each situation, the parties can be citizens of different states and in each, the organization (corporation) can have a multi-state presence. A choice of law issue can be created in a volunteer liability situation just as easily as in a products liability case. For example, a national organization, the American Red Cross, could send Florida residents to Georgia to provide assistance after floods. If a Georgia victim becomes disgruntled with something the Florida volunteer did while acting within the scope of the Red Cross duties, Georgia victim could then sue the Florida volunteer personally, as well as suing the Red Cross. Both volunteer and national organization face dealing with the state by state differences which can and do exist. Opponents of federal tort reform and of volunteer protection legislation minimize this problem. They argue that in the volunteer liability example, the situation involves locally volunteered services, rather than a nationally distributed product. In addition, many volunteer services are not likely to involve more than one state's law.

Federal tort reform came to the fore when the Republicans gained control of Congress in 1994.'[10] One of the first tort reform bills proposed limits on punitive damages in products liability cases. However, President Clinton vetoed this bill."[1] Congress's failure to significantly scale back more wide-ranging tort laws made the Volunteer Protection Act a Republican priority.[112] The original volunteer protection proposals received strident criticism from the Association of Trial Lawyers of America ("ATLA").[113] The powerful trial lawyers lobby specifically opposed the ban on joint and several liability. ATLA's president contended that the legislation was misdirected. "If volunteer organizations in this country have high insurance premiums, it's because insurers are gouging them."[114] Despite this opposition, the bill received overwhelming bipartisan support. The recent focus on volunteerism sparked by the Volunteer Summit in Philadelphia also provided the measure with a much-needed high profile boost.[115]

While some state legislatures have enacted damage caps, they vary greatly from state to state. Critics point out the difficulty of federalizing part of tort law. Areas of tort law are interrelated, and it is difficult to separate out part of damages alone. "Unless Congress is to write a code of tort law, it remains far too removed from the synthetic character of judge-made tort law that has evolved over decades in

[110] Robert L. Rabin, *Federalism and the Tort System,* 50 Rutgers L. Rev. 1, 4 (1997).

[111] *Id.*

[112] Mike Doming, *GOP Would Curb Lawsuits on Community Volunteers: Illinois Lawmaker 's Bill Moves to Fore,* CHI. TRIB., April 24, 1997, at 12.

[113] *Id.*

[114] *Id*

[115] *Id. See also* Jacoby, *supra* note 3, at 13. Porter testified before the House that 124 separate charitable organizations support the legislation veto strongly. The measure was endorsed by United Way, National Easter Seal Society, Little League, Big Brother/Big Sister, Girl Scout National USA, The Association of American College Trustees, and the American Council on Education, among others. 143 CONG. REC. H3096-01, 3097 (1997).

response to perceived state interests."[116] In addition, if a few areas of tort law are governed by federal law, and other areas are governed by state law there will be a complex mix of federal and state law applied in many cases, causing much confusion and questions as to the extent that the federal law preempts the state laws.[117]

Critics also charge that Congress is isolated when it comes to monitoring the effectiveness of the reforms implemented. State legislatures are more locally concerned about whether the tort reforms are sufficient, and more ready to adjust these laws should the need arise. The many different needs that arise in every state cannot be adequately represented by a national law, and it is very difficult for Congress to account for these different demands. Some of this state law complexity can also be seen in the history of volunteer protection legislation.

Prior to 1997, proponents favored a volunteer protection bill that called for states to enact uniform state laws. There was some room in the earlier versions of the federal statute for the states to adapt the federal mandate to their particular needs.[118] However, in 1997 the legislation changed from a state-adopted uniform law model to a federal law governing volunteer protection. The argument emerged that a federal statute would protect national organizations, such as the American Red Cross, that recruit volunteers from neighboring states to come in and assist in a disaster, such as a flood, tornado, hurricane, or wild fires. While the Red Cross is large enough to have the financial means to offer liability protection to its volunteers through the Red Cross' insurance policy, most charitable organizations are unable to do so, and therefore unable to get the necessary volunteer help.[119] When volunteers travel to other states they should not have to worry about what the particular laws of that state are. Rather, there should be a federal standard in place for the benefit of these nationwide volunteers.

The Volunteer Protection Act of 1997, as it was passed, is substantially different than the original uniform state law version of the bill introduced in the mid- 1980s. Because the VPA imposes federal regulation on tort law and state legislative powers, there is a substantial question regarding the constitutionality. It is unclear whether the current Supreme Court will hold the VPA Constitutional after *United States* v. *Lopez*.[120] Congress was careful to explicitly state its findings in order to link the VPA to the Commerce Clause powers in order for Congress to assert it has the authority to pass the law. There is still a question as to whether the Supreme Court will uphold those findings. In its findings, Congress declared that:

116 Rabin, *supra* note 110. at 11.

117 Patrick Hoopes, Note, *Tori Reform in the Wake of United Stales* v. *Lopez*, 24 HASTINGS CONST L. Q. 785, 799-800 (1997).

118 There were several amendments to H.R. 911. The original version of the Bill stated that nothing in this act shall be construed to preempt the laws of any state governing tort liability actions. 143 CONG. Rec. 3096-01, 3097 (1997). The original Bill also provided that in cases where a State certifies that it has enacted this type of bill, then there would be an increase in the social services block grant program under Title 20 of the Social Security Act. *Id.* Thus, a state could opt into the federal law, and if the state did nothing, state law would apply. *Id.* at 3097. 3099. The original bill merely encouraged state action while the Volunteer Protection Act of 1997 provides a national standard for all volunteers.

119 House of Representatives Committee on the Judiciary. 1996 WL 90810 (February 28, 1996) (testimony of Christine G. Franklin).

120 514 U.S. 549 (1995) (federal regulation of handguns in local schools exceeds Commerce Clause authority).

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost- effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because—

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D) (i) liability reform for volunteers will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and

> (ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

Most of these findings emphasize the interstate commerce aspect of the volunteer/nonprofit sector. These are strong assertions and are necessary in light of the Supreme Court's holding in *Lopez*, in order for the court to uphold federal tort reform in areas like tort liability.[121] Under Article I, section 8 of the United States Constitution, power is divided between the state and federal governments in order to insure a healthy balance of power between the States and the federal government.[122] And while Congress has very broad power to regulate interstate commerce, that power is not unlimited. Congress can regulate local and state matters when they affect the channels of commerce or instrumentalities of commerce or when they have an effect on interstate commerce.[123] The Court in *United Slates* v. *Lopez* elaborated the relationship and held that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[124]

In *Lopez* the court struck down a federal law which criminalized the possession of a gun in a school zone because the law exceeded the Congress' Commerce Clause authority. The Court was reluctant to accept the government's broad view that Congress can regulate any matter that affects "national productivity" including family law, criminal law and education, areas in which the States "historically have been sovereign."[125] "The possession of a gun in a local school
zone is in no sense an economic activity that might..... substantially affect any sort of interstate commerce".[1"6] The Court acknowledged that there is imprecision about the boundary between state and federal powers and that Congress can regulate local matters when they substantially impact interstate commerce. But the court declined to extend the Commerce Clause to this particular case. The dissent makes the argument that in considering the significant effect on interstate commerce, it is necessary to consider more than a single act of gun possession and instead to look at the "cumulative effect of all similar instances."[127]

[121] *See* Hoopes. *supra* note 117, at 802 ("Although Lopez does signal a slight retreat from the expansive Commerce Clause jurisprudence of the last fifty years, it is not apparent that the Court will

further limit congressional commerce power"); Mike C. Carroll & Paul R. Dehmel, Comment, *United States* v. *Lopez: Reevaluating Congressional Authority Under the Commerce Clause,* 69 ST. John's L. Rev. 579, 606-608 (1995) (noting that lower federal courts have declined to extend the holding in *Lopez.* However, commentators assert the other side of the argument); Phillips, *supra* note 108, at 663-664 (1997) (the Lopez case strongly suggests that a substantial impact of the regulated activity on commerce is not enough if the activity itself is not commercial in nature."); Margaret Lupkes, Comment, *Constitutional*

Law — Federal Commerce Power: Striking Down the Gun Free School Zones Act as Beyond Congressional Power; United States v, *Lopez. 115 S. Ct. 1624 (1995),* 72 N.D.L. Rev. 1081, 1098 (1996) (the Lopez decision may be seen as an effort by the Court to reinforce to Congress the federalism principle and the need to exercise restraint when legislating in areas of traditional state concern and expertise").

[122] *See* Gregory v. Ashcroft, 501 U.S. 452,458 (1991).

123 *See* Wickard v. Filbum, 317 U.S. 111 (1942).

124.United States v. Lopez, 514 U.S. 549, 557 (1995)

[125] *Id.* at 564.

[126] *Id.* at 557.

[127] *Id.* at 616.

Another possible constitutional challenge involves equal protection. In the Illinois case *Best* v. *Taylor Machine Works*,[128] the Illinois health care tort reform statute was declared unconstitutional. The statute imposed damage caps on noneconomic injury and eliminated joint and several liability, among other things, and was challenged under the Illinois Constitution.[129] The Illinois Supreme Court upheld the trial court decision which found these provisions unconstitutional. The Illinois constitutional challenges were similar to U.S. Constitutional provisions including equal protection and due process, separation of powers and the right to a jury trial. Other more specific Illinois constitutional guarantees were also discussed by the court.[130]

The court was not persuaded that the Illinois legislature had justified its findings that the legislation was necessary to increase the availability of health care, to reduce litigation threats and to restore confidence in the judicial system. The legislature had used anecdotal and unsystematic accounts of tort and litigation abuses. One scholar quoted by the court asserted: "the facts which form the stated intention or goals of Public Act 89-7 are not substantiated by empirical data and critical analysis."[131]

The Illinois Supreme Court held the damages limitations denied the victims equal protection because tortfeasors are treated differently without justification. In addition, arbitrary distinctions are made between injured individuals with identical injuries depending on which tortfeasor injured them. The court rejected defendant's reliance on decisions from other jurisdictions which upheld limitations on noneconomic damages.[132] The VPA contains limits on noneconomic injury and eliminates joint and several liability for volunteers as did the unconstitutional Illinois tort reform statute. It is an open question whether the Congress has been more convincing in showing both the national (interstate) scope of the volunteer liability problem needed under *Lopez* and whether the distinctions made between volunteer tortfeasors and other tortfeasors will violate the equal protection clause.

VI. Conclusion

The Volunteer Protection Act will probably not affect the liability of organizations for the torts of volunteers because it specifically provides that the Act does not affect the liability of nonprofit organizations in cases involving third parties. Thus, nonprofit organizations in those jurisdictions without charitable immunity will not be affected. The statute also specifically provides that state laws that hold organizations liable for the torts of volunteers to the same extent as employees, will not be preempted. Giving volunteers a defense in a potential tort liability action will undoubtedly make it easier and more desirable for some individuals to volunteer their services, and the exempt organizations will directly benefit from increased

[128] 179 Ill.2d 367, 689 N. E. 2d 1057 (111. 1997) (citing the Civil Justice Reform Act of 1995).

[129] *Id.* at 377.

[130] *Id.*

[131] *Id.* at 358.

[132] *See, e.g.,* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665 (1985). For California, Kansas. Maryland. Missouri, Oregon. Virginia, Indiana, Louisiana and Nebraska cases cited by the Illinois Supreme Court, along with contrary authority from Alabama, North Dakota, Texas and Washington, see Best v. Taylor Machine Works, 179 111. 2d 367,409 (111. 1997).

volunteer participation. But under VPA the liability of organizations for torts committed by volunteers is not affected, and one has to question whether the organization has additional financial exposure for volunteer liability because no other person is liable. In other words, if the volunteer has limited or no liability to the injured party for negligence and the volunteer is relieved from joint and several liability in limited circumstances, the most solvent defendant is likely to be the exempt organization.[133] In addition the VPA does not prohibit the exempt organization itself from seeking indemnification from the volunteer when the organization is held liable for the volunteers' activities. One has to ask whether this makes volunteer immunity illusory.

Because most states already provide volunteers with limited tort immunity, the legal affect of the Volunteer Protection Act will most likely be minimal. However, the legislation might have an impact on insurance premiums. The uniform law will allow insurers to perform statistical analyses which will lower the insurance rates and allow nonprofits and charitable institutions to reinstate and expand volunteer programs. Further, assuming volunteers are made aware of the new legislation, volunteers who previously feared being sued for negligence may also now be more willing to offer their services. While the VPA does not prevent the litigation, it does provide a defense to paying damages in simple negligence cases.

Unfortunately, the legislation also renders beneficiaries of charitable organizations vulnerable to the negligence of volunteers who are no longer held to a reasonable standard of care. Because the legislation does not affect the liability of an organization, a victim of negligent behavior may still sue the nonprofit organization. However, in states like Georgia, this option may prove difficult for the injured party who must not only prove the volunteer's negligence, but must also prove that the organization was negligent in hiring that volunteer.[134] Thus, an unintended consequence of the legislation may hurt those disadvantaged individuals who purportedly reap the benefit of increased volunteerism.

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[133] One commentator writing before the passage of VPA argues for limitations on punitive damages for charities in order to preserve their assets for public benefit. *See generally* Barfield, *supra* note 52.

[134] *See supra* notes 58-63 and accompanying text.