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## Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy

**Catharine Pierce Wells**  
Professor, Boston College Law School



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# CHURCHES, CHARITIES, AND CORRECTIVE JUSTICE: MAKING CHURCHES PAY FOR THE SINS OF THEIR CLERGY

CATHARINE PIERCE WELLS\*

**Abstract:** The Catholic Archdiocese of Boston faced the threat of large tort judgments as a result of acts of sexual abuse committed by its priests. Because the Archdiocese is a public charity, it has been suggested that the Archdiocese could invoke the Massachusetts charitable immunity statute, which in certain circumstances places a \$20,000 cap on the tort liability of a charitable organization. This Article explores the role of charitable organizations in our culture, and the distinctive type of state oversight to which they are subject. It then discusses various rationales for the doctrine of charitable immunity. The Article determines that charitable immunity is best understood as a limitation on vicarious liability. Finally, the Article examines these competing policy objectives as applied to the particular facts of the Archdiocese sexual abuse scandal. Although many of the cases involved have recently been settled, the legal and moral propriety of invoking the charitable immunity statute in such a situation is still an open question.

## INTRODUCTION

Sexual abuse is a newly opened topic for discussion. Long hidden from public view, the problem appears to be widespread, arising in all areas of American life.<sup>1</sup> Tragically, sexual predators are usually not strangers. They can be found in the family, on the job, among one's

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\* Professor of Law, Boston College Law School. B.A. 1968, Wellesley College; M.A. 1973, Ph.D. 1981, University of California, Berkeley; J.D. 1976, Harvard Law School. I am especially grateful to Marion Fremont-Smith, my friend and predecessor at the Public Charities Division in the Massachusetts Office of the Attorney General, for many fruitful discussions of charities issues. Thanks also to Dean John Garvey and the Boston College Law School Summer Research Fund for their support of this research, and finally to my research assistant, Nate Soucy.

<sup>1</sup> For background statistical information on the scope and nature of child abuse and neglect nationwide, see generally U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 2000, <http://www.acf.hhs.gov/programs/cb/publications/cm00/> (2002).

social relations, and now, of course, in the church. Abuse in these familiar circumstances is widely acknowledged to be more injurious than abuse at the hands of a stranger.<sup>2</sup> Among family and friends, coerced sexual relations not only violate the body and spirit of the victim; they also raise deep issues of trust and betrayal. A child or family member who is violated in the home has no one to trust and no place to be safe. Similarly, sexual predation in the church violates the deepest reaches of the soul. It is hard to experience the love of God when you are the victim of those who are chosen to serve Him. One case of child abuse by a priest is a tragedy; hundreds of cases must be considered a spiritual calamity.

The year 2002 brought such a calamity to the Catholic Archdiocese of Boston (the “Church” or “Archdiocese”).<sup>3</sup> Rightly, the public—Catholic and non-Catholic alike—has been outraged by disclosures of hundreds of cases of sexual abuse within the Church. Even the most restrained voices have demanded that the victims be compensated and the offenders be punished. At a minimum, they demand that secular courts do the work of corrective justice.<sup>4</sup> The offenses have been serious; the injuries are great; and thus, these voices argue, justice should mean long jail terms and large civil judgments. Indeed, many are so outraged that they assert that the Church must pay these judgments even if it means closing every school and parish. This response, however, deserves careful examination. What does it mean for a church to go bankrupt?<sup>5</sup> Could the Church “reorganize”? Could it sell its assets and go “out of business”? What would be the effects of doing these things? Who would be harmed? What would be lost? Certainly this would be a just punishment for those Church leaders who allowed the abuse to occur. But unfortunately, it also harms those who are served by the church—families who have made it the center of their spiritual lives; children who are educated in its schools; and the poor who are served by its programs. To bankrupt the

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<sup>2</sup> See JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* 28–34 (1981).

<sup>3</sup> In addition to the human costs, the Church’s economic loss will stretch into tens of millions of dollars. See Ralph Ranalli & Stephen Kurkjian, *O’Malley Offers \$55m Settlement*, *BOSTON GLOBE*, Aug. 9, 2003, at A1.

<sup>4</sup> The concept of corrective justice is widely attributed to Aristotle, who articulated it by saying: “[When] one has committed and the other suffered an injustice... the judge tries to equalize them with the help of the penalty . . . . The mean between them is, as we have said, the equal, which we assert to be the just.” ARISTOTLE, *THE ETHICS OF ARISTOTLE* 180 (J.A.K. Thomson trans., Penguin Books rev. ed. 1976).

<sup>5</sup> As a nonprofit organization, the Church is not subject to being forced into an involuntary bankruptcy. See 11 U.S.C. § 303 (2000).

Church might mean vindication for some, but it would also be a source of sorrow and injury for others.

The conflict between the claims of victims and the needs of an ongoing spiritual community is not easy to resolve. This conflict can be examined in two separate contexts. Many of the Articles in this Symposium address the first by asking: In view of the First Amendment, what difference does it make that the defendant is a church rather than a secular organization? In this Article, I will consider the second. The Church, after all, is not only a church; it is also a public charity. Therefore I will ask: What difference does it make that, under state law, the defendant is a public charity rather than a commercial enterprise? These two questions sound similar but they represent two very different approaches to the problem.

The first approach begins with the restrictions that the First Amendment imposes on the government. The courts have generally understood these constraints as a limitation on their jurisdiction to deal with religious questions. They will not, for example, exercise their jurisdiction if doing so requires them to rule on interpretations of religious doctrine.<sup>6</sup> Thus, the First Amendment leads in the direction of a “hands-off” approach. Then again, the First Amendment does not entirely shield religious organizations from civil suits. Courts may, for example, apply neutral principles to adjudicate claims involving the legal status of church property.<sup>7</sup> This doctrine allows jurisdiction for actions with respect to trust property held by a church.<sup>8</sup> This is an important point because most religious organizations are, in fact, public charities. As such, they hold their funds in trust and must apply them to the public purposes for which they were received. A public charity is formed to benefit the indefinite public.<sup>9</sup> For this reason, the courts have traditionally denied standing to all private parties and left it to the Attorney General to enforce the terms of the trust. Through suits by the Attorney General, the civil courts have retained a special jurisdiction to supervise charitable funds and to see to their “due application.” Thus, charities law leads in the direction of a protective and “hands-on” approach.

The “hands-on” approach reflects the fact that charitable organizations play an important and valuable role in American life. In this

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<sup>6</sup> See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

<sup>7</sup> *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *Blue Hull*, 393 U.S. at 449.

<sup>8</sup> See *Jones*, 443 U.S. at 603–04.

<sup>9</sup> See MASS. GEN. LAWS ch. 68, § 18 (2002).

Article, I first explore this role and the distinctive form of government regulation that results.<sup>10</sup> Next, I discuss the difficult issue that arises when charitable organizations behave in a bad or risky way.<sup>11</sup> Specifically, how do we weigh the value of charitable activity against the demands of corrective justice? The doctrine of charitable immunity, which fully or partially exempts charities from suits by tort plaintiffs, has traditionally been used to strike the balance. Because there are many forms of charitable immunity, evaluating the doctrine requires us to understand the various theories that have been used to support it. Exploring these theories will lead me to the conclusion that a certain form of charitable immunity is justified. Finally, I apply this analysis to some of the specific issues raised by the negligent supervision cases in the Archdiocese.<sup>12</sup>

## I. CHURCHES AS CHARITIES

### A. *The Role of Charities in American Life*

Charities represent a unique blend of public and private purposes. Like commercial businesses, they are a forum for private action and decision making. But unlike businesses, they are not driven by a profit motive. In fact, charities are *sui generis* in that they represent a flexible form that can accommodate a wide range of purposes and interests. To understand charities, it is necessary to understand both their commercial and civic aspects. It is also necessary to think seriously about the role they play in a democratic form of limited government.

#### I. Commercial Aspects

There are two different ways to look at the commercial aspects of charitable organizations. One approach treats altruism itself as a valuable commodity that can be bought and sold in the marketplace. Thus, a donation to a charity that aids the poor is not just a windfall for the poor but also a commercial sale whereby the donor/buyers obtain units of altruism that provide a benefit to them by easing their conscience or enhancing their self-image.<sup>13</sup> The second approach

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<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 574.

treats charities as business ventures that have been rendered unprofitable by some form of market failure.<sup>14</sup> Henry Hansmann, for example, has suggested that charities address the freeloader problems associated with public goods.<sup>15</sup>

This kind of commercial analysis has its limits. Although we can certainly speak of altruism and compassion as marketable commodities, this way of talking seems to miss the point. From the donors' point of view, altruism may represent something more than a concern with their own feelings;<sup>16</sup> indeed, their donations may not make them feel good at all. Most charitable activities have elements of expressiveness, morality, and compassion that cannot easily be quantified.<sup>17</sup> Nevertheless, it makes sense to use economic analysis as a tool for understanding some aspects of charitable activity. For example, hospitals and universities may get a large percentage of their revenue from fees paid for the services they offer. In addition, there are some charities that do, in fact, sell emotional benefits to their donors. For such charities, economic analysis can be useful because, whether one pays for services or sends \$20 per month to "adopt" a child, there is an undeniably commercial element to these transactions.

## 2. Civic Aspects

To understand the complexity of charitable activity, it is necessary to recognize that human beings are more than just isolated actors defined by autonomous choices about wealth and consumption. Whereas the economist may trace value formation to efficiency considerations,<sup>18</sup> the political scientist is more likely to think that values are formed through human interaction. Individuals maintain deeply personal views about the meaning of life, the existence of God, and

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<sup>14</sup> See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 879–80 (1980).

<sup>15</sup> See *id.* at 848–49. "Public goods" is an economic term that refers to commodities that can be provided to one or to many consumers at the same cost, and that once provided to a single consumer, access to the commodity cannot be denied to all consumers. See *id.* For example, Hansmann argues that public radio needs a charitable subsidy precisely because easy access by freeloaders prevents its services from being sold for their true market value. See *id.* at 849–51, 854.

<sup>16</sup> See THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 80 (1970) (suggesting that self-interest is not an essential component of altruism).

<sup>17</sup> Although it might be possible to assign a monetary value to these feelings, the desirability of doing so is open to question. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

<sup>18</sup> See, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7–10 (2d ed. 1989).

the nature of reality, but these views are not formed in isolation. Rather, they develop in a context that is heavily dominated by the presence of others. We may think of ourselves as autonomous individuals but, in fact, our individuality is largely defined by our relations with family and friends, our affiliations with various social groups, as well as our standing in various vocational and religious groups. In such environments, human perception may transcend the bounds of individual self-interest, compassion may balance greed, and culture may deepen instinctive preferences. Charities frequently provide a platform for these developments and thereby foster a wider array of human experiences. They also facilitate concrete forms of self-expression by providing opportunities to help others, to develop our interests, to participate in our communities, and to engage in spiritual practices.

### 3. The Role of Charities in Political Culture

Once we recognize the civic aspect of charitable activity, it becomes apparent that charitable organizations play an important role in our political culture. Society is not just a clearing house for individual needs; it provides a platform for group activities that expand the human horizon. In the American system, with its emphasis on democracy and liberty, this function is not supposed to be performed entirely by the government and this fact results in an important emphasis on the nonprofit sector. Thus, for example, Cass Sunstein writes:

Citizenship, understood in republican fashion, does not occur solely through official organs. Many organizations—including labor unions, religious associations, women's groups of various sorts, civil rights organizations, volunteer and charitable groups, and others, sometimes marking themselves outside of and in opposition to conventional society—serve as outlets for some of the principal functions of republican systems. These functions include the achievement of critical scrutiny of existing practices, the provision of an opportunity for deliberation within collectivities, the chance to exercise citizenship and to obtain a sense of community, and the exercise of civic virtue, understood as the

pursuit of goals other than self-interest, narrowly conceived.<sup>19</sup>

From this point of view, the important point about charitable organizations is not that they address market failure, but that they facilitate a diverse array of group activities—activities that add meaning to human life. Indeed, one can go further in this direction by celebrating diversity for its own sake. Kathleen Sullivan, for example, argues that diversity is such a good thing that we should surrender the idea that honest deliberation will produce conformity and agreement:

[N]ormative pluralism . . . acknowledges that persons and values are forged in social interaction. . . . [N]ormative pluralism rejects any quest for agreement upon a single common good, and locates social interaction and value formation principally in settings other than citizenship. Normative pluralism thus envisions an ongoing and desirable role for groups that are social but not public—groups intermediate between individuals and the state.<sup>20</sup>

It is therefore desirable, she argues, that our civic lives be composed of “groups that are more than simple aggregations of individual preferences, but less than components of a single common good.”<sup>21</sup> Most, but not all, of these groups are found in the charitable sector.<sup>22</sup>

As a matter of practical fact, normative pluralism has always been the foundation of American political life. To see this, one need only examine the vast array of charitable groups. In Massachusetts, for example, by the end of the eighteenth century there were numerous voluntary organizations that helped to provide relief for the poor.<sup>23</sup> By the end of the nineteenth century hundreds more had been added

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<sup>19</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1573 (1988). This view of the nonprofit sector is not universally held by civic republicans. As Sunstein notes, “[t]he problem with at least some forms of republicanism is that they tend to ignore or devalue groups of this sort.” *Id.*

<sup>20</sup> Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988).

<sup>21</sup> *Id.*

<sup>22</sup> There are many nonprofit organizations that are not charitable in nature, including labor unions, political advocacy groups, and social clubs. See 26 U.S.C. § 501 (2000) (listing types of organizations eligible for tax-exempt status).

<sup>23</sup> Such groups included the Scots’ Charitable Society (1657), the Stoughton Poor Fund (1701), the Poor Widow’s Fund (1759), and the Massachusetts Humane Society (1786). 3 METROPOLITAN BOSTON: A MODERN HISTORY 979–80 (Albert P. Langtry ed., 1929) [hereinafter METROPOLITAN BOSTON].

including the Boston Athenæum,<sup>24</sup> the Boston Symphony Orchestra,<sup>25</sup> and the Massachusetts General Hospital.<sup>26</sup> By the end of the twentieth century, there were tens of thousands more, representing many different conceptions of human betterment. The variations are staggering. Consider the following:

- Variations in Size—There are thousands of small charities such as individual scouting troops and funds created to perform a specific function such as buying books for a particular public library. At the same time, there are billion-dollar charities such as Harvard University<sup>27</sup> and the American Red Cross.<sup>28</sup>
- Variations in Approach—There are thousands of charities that support western medicine in one form or another, but these co-exist with charities that promote homeopathy, health foods, acupuncture, faith healing, Christian Scientism, and many types of New Age remedies.
- Variations in Belief—There are charities based upon every conceivable form of religious belief. These include not only Judaism and the many forms of Christianity but also the Bahá'í Faith, Mormonism, Quakerism, Buddhism, Hinduism, and Islam—not to mention witchcraft and paganism.
- Future Developments—Charities hold the key for responding to the unexpected problems that arise from changing circumstances. Indeed, in the next two hundred years, we may well have charities that relate to the problems of living past age 250 or to the unique concerns of extraterrestrial aliens.

The point is that charitable organizations can field creative and flexible approaches to many of society's problems. They need not wait for public awareness and concern. They can take constructive steps even in the absence of consensus about how a particular problem should be handled. They can help one person and not another. Most importantly, however, they provide an opportunity for individual citizens to pursue their own vision of the public good outside the bounds

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<sup>24</sup> Founded in 1808. THOMAS H. O'CONNOR, *THE HUB: BOSTON PAST AND PRESENT* 101 (2001).

<sup>25</sup> Founded in 1881. *Id.* at 177.

<sup>26</sup> Founded in 1811. METROPOLITAN BOSTON, *supra* note 23, at 980.

<sup>27</sup> See HARVARD UNIV., FISCAL 2002 ANNUAL FINANCIAL REPORT 32, available at <http://vpf-web.harvard.edu/annualfinancial/pdfs/2002full.pdf> (reporting total net assets of \$21,276,398,000).

<sup>28</sup> See AM. RED CROSS, 2002 CORPORATE ANNUAL REPORT 19, available at <http://www.redcross.org/pubs/car02/02financials.pdf> (reporting total assets of \$3,525,626,000).

of consensus and orthodoxy. In so doing, they free our feelings of compassion and fellowship from the requirements of the larger political process.

In summary, there are at least three reasons why society should encourage the formation of charitable organizations. First, they strengthen our communities by providing opportunities for shared activity. Second, they facilitate limited government by providing services and opportunities that might otherwise have to be provided by the government. Finally, they insure diversity in public life.<sup>29</sup>

### B. *Government Oversight with Respect to Charitable Funds*

In Part I.A, we saw that charitable organizations are important to the maintenance of a free, diverse, and prosperous democracy. In this Section, we shall see that the value of charitable activity has not gone unrecognized in the legal system. As we explore the development of the legal relationship between government and charity, we shall see that the government does not regulate charities in the same way that it regulates used car dealers. Instead, the model for government action has been oversight rather than regulation; empowerment rather than constraint.

#### 1. The Origins of Government Oversight

The state's interest in public charities has evolved from its longstanding responsibilities with respect to charitable trusts. Trust law during the Middle Ages permitted the beneficiary of a trust to bring an action to enforce the terms of the trust or to surcharge the trustee for breaches of fiduciary duty.<sup>30</sup> The exception to this rule was the charitable trust. By definition, charitable trusts were formed to benefit the indefinite public and therefore, courts reasoned, might become subject to duplicative or conflicting claims of enforcement.<sup>31</sup>

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<sup>29</sup> They not only provide diversity; they make it possible for us to enjoy the notion of limited government. The separation between church and state could not be maintained if there were no privately organized churches. Nor would we enjoy as many alternatives to government health care or government education without the existence of public charities.

<sup>30</sup> See GRAHAM MOFFAT & MICHAEL CHESTERMAN, *TRUSTS LAW: TEXT AND MATERIALS* 28–29 (1988).

<sup>31</sup> Imagine, for example, that a trust was formed to pay the educational expenses of a worthy student from the city of Boston. Presumably, there would be hundreds, if not thousands, of eligible beneficiaries. If each were allowed to make a claim, the goose would be

Thus, it became the rule that no private party could sue to enforce the terms of a charitable trust—a rule that left charities particularly vulnerable to negligent and dishonest fiduciaries. For this reason, beginning in 1601, Parliament passed a series of laws that specifically regulated charities by creating a commission to investigate fraud and abuse.<sup>32</sup> This commission, together with court-fashioned remedies, provided the model for charities regulation in the United States.

From the beginning, American courts fashioned their law of charitable trusts from the British precedents. Courts generally adopted the notion of a charitable trust as one that was established to benefit the indefinite public. Furthermore, they denied standing to potential beneficiaries and granted standing to state attorneys general to enforce such trusts. The attorney general could seek an accounting and, on a suitable showing, invoke the court's jurisdiction to instruct, surcharge, or remove the trustee.<sup>33</sup> In addition, he was an indispensable party to any proceeding that sought to amend the trust by invoking the doctrine of *cy pres*. But these court-fashioned remedies did not go far enough.

## 2. State Oversight

State charities regulation began with the traditional powers of the state attorney general to see to the due application of charitable funds. Over the years, however, this limited form of regulation has proved inadequate. A charitable corporation may be formed with or without members. It may seek funding from a few wealthy benefac-

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consumed long before it had had a chance to lay a single golden egg. See MARION R. FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT* 200 (1965).

<sup>32</sup> The Commission was appointed to address the misuse of contributions:

[F]or releife of aged, impotent and poore people . . . for maintenance of sicke & maymed Souldiers & Mariners, Schooles of learning, free Schooles, & Schollers in Universities . . . for repaire of Bridges, Ports, Havens, Causwayes, Churches, Seabanks, and high wayes . . . for education and preferment of Orphans . . . for or towards releife, Stocke or maintenance for houses of correction . . . for Marriages of poore mayds . . . for supportation, Ayde, and helpe of young trades men, handy crafts men and persons decayed, and others for reliefe or redemption of prisoners or captives, and for ayde or ease of any poore inhabitants . . .

An Acte to Redresse the Misimployment of Lands, Goods, and Stocks of Money Heretofore Given to Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.), available at <http://www.lib.umi.com/eebo/image/20842/12>.

<sup>33</sup> See FREMONT-SMITH, *supra* note 31, at 233.

tors<sup>34</sup> or it may raise millions in small contributions.<sup>35</sup> The bulk of its revenue might stem from fees paid for the services it performs<sup>36</sup> or even from government coffers.<sup>37</sup> As the forms of charitable activity have proliferated, the issue of accountability has become more challenging. Probate courts are experienced in handling trustee accounts, but are hardly the place to superintend the tens of thousands of charities operating in today's society. Further, there may be no one watching an organization which has no members. Similarly, when large numbers of small donors support an organization, they may not be interested in oversight. As a result, such an organization may become inefficient, ineffective, or even corrupt in its operations. Indeed, recent scandals involving the United Way<sup>38</sup> and the American Red Cross<sup>39</sup> indicate the kinds of problems that arise even in the largest and most venerable institutions. For these reasons, both state and federal governments have created additional layers of accountability. On the state level, legislatures have enacted laws that require registration and financial disclosure for charitable organizations,<sup>40</sup> that prohibit fraudulent conduct in the course of charitable solicitations,<sup>41</sup> that grant jurisdiction to state officials to investigate charitable organizations,<sup>42</sup> and that hold individual officers and directors accountable for their use of charitable funds.<sup>43</sup>

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<sup>34</sup> See 26 U.S.C. §§ 507–509 (2000) (listing requirements for charitable private foundations to maintain tax-exempt status).

<sup>35</sup> For example, the United Way of America claims support from over seventeen million Americans. United Way of Am., *2001-2002 United Way Resources Backgrounder*, <http://national.unitedway.org/aboutuwa/2001results.cfm> (Aug. 2002).

<sup>36</sup> See, e.g., HARVARD PILGRIM HEALTH CARE, ANNUAL REPORT 2002, at 32, *available at* [http://www.harvardpilgrim.org/hpimages/slideshows/annual\\_02/2002report.pdf](http://www.harvardpilgrim.org/hpimages/slideshows/annual_02/2002report.pdf) (reporting nearly \$1.8 billion in annual premium income).

<sup>37</sup> Sometimes these payments are in the form of grants; sometimes in the form of services rendered either to the government or for third parties for whom the government has assumed financial responsibility.

<sup>38</sup> See Deborah Sontag, *Affiliates Feeling Pinch of United Way Scandal*, N.Y. TIMES, Apr. 22, 1992, at A1.

<sup>39</sup> See David Barstow, *In Congress, Harsh Words for Red Cross*, N.Y. TIMES, Nov. 7, 2001, at B1 (reporting criticism of the Red Cross by members of Congress for not distributing relief funds to 9/11 victims).

<sup>40</sup> E.g., CAL. GOV'T CODE § 12584 (West 1992 & Supp. 2003); MASS. GEN. LAWS ch. 68, § 19 (2002); N.Y. EXEC. LAW § 172 (McKinney Supp. 2003).

<sup>41</sup> E.g., CAL. GOV'T CODE § 12591.1 (West Supp. 2003); MASS. GEN. LAWS ch. 68, § 28 (2002); N.Y. EXEC. LAW § 172-d (McKinney Supp. 2003).

<sup>42</sup> E.g., CAL. GOV'T CODE § 12591 (West 1992); MASS. GEN. LAWS ch. 68, § 30 (2002); N.Y. EXEC. LAW § 175 (McKinney Supp. 2003).

<sup>43</sup> E.g., CAL. GOV'T CODE §§ 12591.1, 12598 (West 1992 & Supp. 2003); MASS. GEN. LAWS ch. 68, § 32 (2002); N.Y. EXEC. LAW § 175.

### 3. Federal Oversight

On the federal level, the situation has been complicated by the special tax treatment given to charitable organizations. Charitable organizations and other nonprofits are eligible to apply for tax exempt status under section 501(c) of the Internal Revenue Code (the "Code").<sup>44</sup> In addition, charitable organizations, as distinct from other forms of nonprofits, are given the benefit (sometimes called a "tax subsidy")<sup>45</sup> that private donations are generally tax deductible.<sup>46</sup> Thus, for example, a donor in the 25% bracket will be able to make a \$400 donation at a post-tax cost of only \$300.<sup>47</sup>

Because of this tax treatment, the federal government has an interest in ensuring that charitable organizations do not become tax shelters. Congress has pursued this interest by enacting a number of provisions in the Code that give the IRS regulatory oversight of public charities.<sup>48</sup> In addition, Congress has enacted provisions to prevent private foundations from being used as instruments for accumulating wealth exempt from taxation.<sup>49</sup> The IRS has enacted rules that exclude organizations from tax-exempt status if earnings benefit private shareholders or individuals.<sup>50</sup> The key to all of this regulation is empowerment; federal regulation ultimately aids the charitable sector by safeguarding both the tax system and individual donors from fraudulent and corrupt organizations.

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<sup>44</sup> The need for tax exemption often surprises people because "nonprofit" organizations would seem by definition to have no profits or income on which taxes should be paid. This analysis, however, is mistaken. An organization is considered nonprofit if it has no shareholders, and no outside party has a claim to a share of its profits. Such an organization might well in any fiscal year have income that would otherwise be taxable. The IRS generally considers any excess of income over expenses to constitute taxable income. *See* 26 U.S.C. § 63(a) (2000).

<sup>45</sup> For an examination of the wisdom of subsidizing public policy through tax deductions, see William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972).

<sup>46</sup> 26 U.S.C. § 170 (providing for deductibility of charitable donations).

<sup>47</sup> At a tax rate of 25%, the donor will pay \$100 in federal income tax on every \$400 of taxable income, leaving \$300 in after-tax income. This \$300 is therefore the true cost to the donor of a tax deductible \$400 donation. *But see* 26 U.S.C. §§ 55-59 (alternative minimum tax provisions).

<sup>48</sup> *See* Treas. Reg. § 1.501(a)-3 (as amended in 1982) (requiring charities to include detailed statement describing proposed activities when filing application for tax-exempt status).

<sup>49</sup> *See* 26 U.S.C. §§ 508(e), 4942.

<sup>50</sup> *See* Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 1990).

## II. CHARITIES AND CORRECTIVE JUSTICE

Part I considered many of the ways in which charities benefit society. Part II considers the detriments—specifically, the liability of a charity for the tortious conduct of its employees. When a tort occurs, the state's concern for corrective justice conflicts with the state's interest in promoting and preserving charitable activities. How do we reconcile these policies? How do we weigh the claims of victims against the value of charitable works? To address these questions, I examine the doctrine of charitable immunity.

At first glance, the doctrine seems simple enough. Given that charities were formed for beneficent purposes, some courts have reasoned that a charity's funds should not be diverted for the claims of tort litigants.<sup>51</sup> On closer inspection, however, we find that the doctrine is controversial and complex.<sup>52</sup> It is complex because courts have offered a confusing array of rationales for the doctrine, and these rationales have generated a corresponding multiplicity of distinctions and exceptions. Thus, for example, courts have defined the issue in terms of whether the plaintiff is a beneficiary of the charity,<sup>53</sup> whether the charity had purchased liability insurance,<sup>54</sup> whether the tort occurred in the course of charitable duties,<sup>55</sup> and whether the charity was a hospital.<sup>56</sup> In this Part, I propose a path through this maze of controversy, conflicting rationales, and too numerous exceptions. To do this, I first evaluate the strength of the various rationales that have been used to justify the doctrine. Then, in light of this analysis, I consider which of the various distinctions and exceptions should be relevant to determining tort liability.

### A. *The Rationales for Charitable Immunity*

Courts have justified the doctrine of charitable immunity by appealing to four separate, but related, rationales:<sup>57</sup>

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<sup>51</sup> See Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R. 4th 517, 522–23 (1983).

<sup>52</sup> See RESTATEMENT (SECOND) OF TORTS § 895E (1979) (recommending abrogation of the doctrine of charitable immunity); RESTATEMENT (SECOND) OF TRUSTS § 402 cmt. d (1959).

<sup>53</sup> See Fairchild, *supra* note 51, at 554–56.

<sup>54</sup> See *id.* at 523, 530, 534, 539, 542, 544, 553.

<sup>55</sup> See *id.* at 559–60.

<sup>56</sup> See *id.* at 525–46.

<sup>57</sup> See *id.* at 522.

(1) *Public Policy*—This argument restates many of the considerations set forth in Part I. It reflects a fear that the possibility of large liability judgments will discourage charitable activity.

(2) *The Unavailability of Trust Funds*—This argument presupposes that some or all of the funds held by a charitable organization are subject to a charitable trust and are therefore unavailable for tort liability judgments.<sup>58</sup>

(3) *Assumption of the Risk*—This argument rests upon the assertion that anyone who deals with a charity thereby waives his or her right to hold it liable for any torts it may commit.<sup>59</sup>

(4) *The Inapplicability of Vicarious Liability*—This argument suggests that the doctrine of vicarious liability should not be applied to employers in the charitable sector.<sup>60</sup>

In this Section, I examine each of these arguments separately and conclude that the soundest rationale for charitable immunity is the fourth.

### 1. The Public Policy Argument

We have seen that charities play an important role in American life and that the government properly tries to facilitate their activities wherever possible. It does not follow, however, that charities should be exempt from tort liability. We can free charities from liability costs only by transferring them to injured parties. Suppose, for example, that a pedestrian is run over by a school bus operated by a private school. The pedestrian sues and the school argues that liability costs will erode its ability to carry on a charitable program. In effect, the school is asking the court to force the victim to make a contribution to their cause. This does not seem fair. Although charities benefit the indefinite public, they do not necessarily benefit all members of the public equally.<sup>61</sup> The pedestrian, for example, may be so poor that he will never be able to utilize the services of a private school. Why, then, should he or she be deprived of a remedy? Or, we could equally suppose that a victim is harmed by a charity whose program he or she

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<sup>58</sup> See Fairchild, *supra* note 51, at 522.

<sup>59</sup> See *id.* at 523.

<sup>60</sup> See *id.* at 522–23.

<sup>61</sup> I will soon consider the special case where the victim is a beneficiary of the charity in the Subsection on assumption of the risk. See *infra* Part II.A.3.

dislikes. A forced contribution in such circumstances would only seem to add insult to injury.

## 2. The Trust Fund Argument

The trust fund argument holds that all charitable funds are subject to a trust and unavailable to pay tort judgments.<sup>62</sup> Massachusetts courts long adhered to this theory, reasoning that “if the property of the charity was depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charitable gifts discouraged.”<sup>63</sup> If taken literally, the notion that all charitable funds are subject to a trust cannot bear close scrutiny. What kind of a trust is it and where did it come from? If it is imposed by the donor, what are its terms and how were they expressed?<sup>64</sup> Surely, it would seem unlikely that every donor has stipulated that his or her gift cannot be used for liability costs. If, on the other hand, it is imposed by the court, upon what grounds? Only a rare case would entail the kind of fraud that is necessary to justify the imposition of a constructive trust. And, failing that, it is difficult to see what reason might be used except the kind of public policy grounds rejected above.

## 3. Assumption of the Risk

There are two different doctrines described by the term “assumption of the risk.” The first involves a before-the-fact “waiver” of tort claims against the defendant. The second is often described as a “no duty” argument.<sup>65</sup> Neither of these is adequate to support a general notion of charitable immunity.

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<sup>62</sup> See *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432, 436 (1876) (“[The hospital] has no funds which can be charged with any judgment which [the plaintiff] might recover, except those which are held subject to the trust of maintaining the hospital.”). *But see* *Colby v. Carney Hosp.*, 254 N.E.2d 407, 408 (Mass. 1969) (prospectively overruling *McDonald v. Massachusetts General Hospital*).

<sup>63</sup> *Farrigan v. Pevear*, 78 N.E. 855, 855 (Mass. 1906).

<sup>64</sup> It is certainly true that some charitable contributions are subject to an express trust. For example, a private school might seek donations for a restricted fund that will be used to build a new library. Donations to this fund cannot be expended for other purposes without violating a trust to uphold the terms of the restricted fund. Thus, the fund could not be used to pay teacher salaries or, for that matter, to pay a plaintiff who was struck by one of its buses. Conversely, if the only restriction was that it be used for the building, then the funds would be available to pay for accidents that occur in the course of construction.

<sup>65</sup> See, e.g., *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959).

The waiver argument requires two things: first, that the waiver is voluntary; and second, that it is given with full knowledge of the risk. It follows that the waiver argument is especially difficult to make in cases where the plaintiff is a stranger to the charitable defendant. It can hardly be supposed that one who is struck by a charitable blood-mobile has made a knowing and voluntary waiver of his rights. Conversely, there might be more reason to infer a waiver with plaintiffs who are injured in the course of receiving services from the charity. Suppose, for example, that the plaintiff enters a soup kitchen and is injured by negligent preparation of the food. Can we say that he accepted the food subject to a waiver of his rights? There was a time when courts found many implicit waivers. For example, if you accepted employment knowing of the dangers on the job, then courts were willing to hold the employer harmless if you were injured by those dangers.<sup>66</sup> Modern courts, however, are less likely to find that such waivers are voluntary because they recognize that many workers have no alternative but to submit to dangerous conditions.<sup>67</sup> Similarly, one might argue that those who are poor and hungry may have little choice but to eat in a soup kitchen. More importantly, however, even if the case seems voluntary, there is seldom a real basis for claiming that the waiver was granted with full knowledge of the risk. A person standing at the soup kitchen has no way of knowing that the food is tainted. A patient who remains on the operating table while his surgeon makes a trip to the ATM has no reason to expect that this might occur.<sup>68</sup>

The “no duty” form is an even less convincing rationale for charitable immunity. The theory behind the no duty approach is that there are activities—generally recreational or sporting activities—that include a certain element of risk. Because the risk cannot easily be eliminated without making the activity less desirable,<sup>69</sup> the courts have

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<sup>66</sup> See, e.g., *Lamson v. Am. Axe & Tool Co.*, 58 N.E. 585, 585 (Mass. 1900).

<sup>67</sup> In the past, courts addressed concerns about whether employees' decisions to subject themselves to a workplace danger were in fact voluntary by drawing a distinction between assumptions of risk made when the employment “contract” was formed, which was a valid defense for an employer, and situations where the risk was assumed when the dangerous situation arose during the course of the employment, which was not a valid defense. See, e.g., *Demaris v. Van Leeuwen*, 186 N.E. 69, 70 (Mass. 1933). With today's workers' compensation laws, these issues of assumption of risk in the course of employment are unlikely to arise.

<sup>68</sup> See Anne Barnard, *Lawyer: Patient's Problem Missed*, BOSTON GLOBE, Oct. 3, 2002, at B7.

<sup>69</sup> See Robin Young, *Circus Performer Must Walk Tightrope in Hard Hat, Says Brussels*, TIMES (London), July 23, 2003, at 11.

said that those who sponsor those activities have no duty to eliminate the risk.<sup>70</sup> But, although this may be the case with some charitable services—sports, for example—it would hardly apply to all. After all, the risk of food poisoning is not part of the pleasure of eating in a soup kitchen.

#### 4. Vicarious Liability

A basic principle of tort law is that those who engage in wrongful conduct should pay for any injuries that result. Under this principle, if a cook in a soup kitchen mishandles the food, then he should pay for the resulting harm. Similarly, if the cook's supervisor turns a blind eye to the cook's mistakes, then he too is negligent and should be liable. The more difficult question is: What should happen to the soup kitchen that employs them both? The liability of an employer for the torts of its employees is not automatic. In the business context, the doctrine of vicarious liability provides that a victim may hold an employer liable for torts committed by its employee while the employee was (1) on the job, and (2) acting within the scope of employment.<sup>71</sup> Thus, if the soup kitchen were a commercial enterprise, the doctrine of vicarious liability would provide a basis for the plaintiff to recover from it, as well as from the cook and his supervisor. The question for this Subsection is whether we should treat the soup kitchen like a commercial enterprise, and therefore apply the doctrine of vicarious liability.

This question has not been clearly addressed in the literature. Despite its importance, the doctrine of vicarious liability has become so pervasive that its operation has been rendered almost invisible. Gary Schwartz, for example, has written:

[T]he vicarious liability doctrine . . . is often hidden or obscured. It is hidden by torts coursebooks as they present their materials, and by courts as they discuss a range of liability issues. It is obscured by academic commentary on tort problems, which frequently fails to deal with the problems' vicarious liability dimensions; and it is neglected by the cur-

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<sup>70</sup> See, e.g., *Shaw v. Boston Am. League Baseball Co.*, 90 N.E.2d 840, 842 (Mass. 1950) (spectator familiar with the game of baseball assumes the risk of being struck by a foul ball). In some cases the principle has been codified. E.g., MASS. GEN. LAWS ch. 143, § 710 (2002) (stating that skier, not ski area operator, has duty to prevent collisions).

<sup>71</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 501–02 (5th ed. 1984).

rent political debate, which has declined to focus attention on the vicarious liability issue.<sup>72</sup>

Nevertheless, it is important to consider whether the arguments that justify the imposition of vicarious liability in the commercial context also justify vicarious liability in the charitable sector.

It is generally understood that tort law serves three purposes—corrective justice, deterrence, and compensation. Whether the tortious conduct is intentional or negligent, the basis of liability is that the defendant should have behaved differently and thereby avoided the accident. Thus, a judgment against the defendant does three things: first, it serves corrective justice by holding the defendant accountable for wrongful conduct; second, it deters others by suggesting that similar conduct will prove costly; and third, it provides victims with compensation for their injuries. It is less clear what is accomplished by a judgment against an employer. Vicarious liability is imposed without regard to whether the employer was at fault. It is therefore a form of strict liability. With strict liability, there is no wrong that must be brought to account and there is no voluntary conduct to deter. As a result, strict liability challenges us to think more seriously about the three functions of tort law.

a. *Corrective Justice*

Because corrective justice requires compensation for injuries caused by wrongful conduct, recoveries based on intentional or negligent conduct are easily justified.<sup>73</sup> When the liability is strict, however, we need to think more carefully about the requirements of corrective justice. One theory about corrective justice comes from George Fletcher, who links it to the concept of fairness.<sup>74</sup> What is fair, he argues, is that there should be reciprocity in risk-bearing behavior. With respect to automobiles, for example, we all share equally in imposing and bearing the risks associated with normal, non-negligent driving. We do not, however, share equally in the special risks associated with negligent driving. It makes sense, therefore, that those who pose these special risks pay for any injuries they cause. Because Fletcher's argument is tied to reciprocity rather than wrongdoing, it can also account

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<sup>72</sup> Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1740 (1996).

<sup>73</sup> See ARISTOTLE, *supra* note 4, at 180.

<sup>74</sup> See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538–39 (1972).

for those instances where the law imposes strict liability. If I am struck by an airplane falling out of the sky, the liability is strict because the pilot has imposed an unreciprocated risk on me.<sup>75</sup> A similar result follows in the case of ultra-hazardous activities because, by definition, they impose risks greater than those imposed by normal activities.<sup>76</sup> We can justify vicarious liability in these terms as well. For example, the United Parcel Service imposes a higher risk of negligent driving because of the large number of vehicles it owns.

When we turn to charitable organizations, however, the question of reciprocity is more ambiguous. Charities are not profit-making enterprises; they are not owned for economic advantage. Rather, they are groups of individuals who band together to express compassion, celebrate culture, and practice religion. Such activities are not uncommon and unreciprocated. Indeed, whether it is membership in a church, a trip to the museum, or treatment in a hospital, most people enjoy participation in some charitable activity on a fairly regular basis. Therefore, the reciprocity analysis does not justify the imposition of vicarious liability on charitable organizations.

Another theory of corrective justice is the pragmatic account that I offered in *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*.<sup>77</sup> My theory understands corrective justice not in abstract conceptions of wrongful conduct or non-reciprocal risk, but in evolving community standards of fairness and responsibility. Under this theory, the imposition of vicarious liability is justified because it accords with deeply held community norms. For example, few would have disagreed with Judge Friendly when he wrote that “*respondeat superior* . . . rests not so much on policy grounds . . . as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”<sup>78</sup> In addition, it is hard to see how the doctrine could remain invisible<sup>79</sup> unless it represents a fundamental consensus about

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<sup>75</sup> See *id.* at 542.

<sup>76</sup> See RESTATEMENT (SECOND) OF TORTS § 520 (1977) (setting forth factors that determine whether an activity is abnormally dangerous, including the “extent to which the activity is not a matter of common usage” and the “inappropriateness of the activity to the place where it is carried on”).

<sup>77</sup> Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990); see also Catharine Pierce Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. CAL. L. REV. 1769 (1996); Catharine Pierce Wells, *A Pragmatic Approach to Improving Tort Law*, 54 VAND. L. REV. 1447 (2001).

<sup>78</sup> *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

<sup>79</sup> See Schwartz, *supra* note 72, at 1740.

fairness and responsibility. With respect to charitable liability, however, the consensus is less clear. Although some of the more outrageous cases raise an outcry against the charity involved, there have been similar outcries whenever the threat of liability judgments forces charitable organizations to curtail their activities.<sup>80</sup> This lack of consensus is not surprising. In the commercial context, an absence of vicarious liability seems to result in unjust enrichment as the defendant business is allowed to impose some of its risks on others. The non-profitability of the charitable sector, however, undercuts the argument of unjust enrichment.

b. *Deterrence and the Regulatory Effect*

Another fundamental justification for fault-based tort recoveries is their regulatory effect. When we impose liability for the harms caused by a certain kind of negligent conduct, we encourage people to avoid that conduct. With strict liability, however, the defendant is not at fault and, therefore, has no way of controlling the conduct in question. Whether or not an employer tells employees to obey the speed limit, some of them will end up breaking the law. The surest way for an employer to limit the risk is to limit the amount of driving done by his employees, and this, in turn, may reduce the output of his firm. Indeed, vicarious liability has just this result—employers will reduce a firm's activity until they maximize their profit net of liability costs. The question is whether we want this optimization to occur in the case of charitable organizations. If we look solely at the commercial aspects of the charity, then there might be a good case for internalizing accident costs. Without it, donors—which the commercial view treats as consumers—are getting too much bang for their buck; they are not paying enough for their feelings of altruism. But we must remember that charities also play an important civic role and that there is no public benefit in deterring their activities.

c. *Compensation and Cost Spreading*

Another reason to impose liability is that the defendant is often a good cost spreader. Suppose, for example, we can predict that one of every one-million cans of soda will explode, causing injuries to the person holding it. Suppose also that these accidents cannot be elimi-

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<sup>80</sup> See, e.g., Walter V. Robinson & Thomas Farragher, *Deep Cuts Loom in Spending by Church*, BOSTON GLOBE, Mar. 5, 2003, at A1.

nated by the use of due care. If we do not impose liability on the manufacturer, then the victim of this accident, in effect, becomes the loser of a personal injury lottery—while all drinkers of soda have benefited from the risk, only the victim actually pays the price. If, conversely, we do impose liability, then we can expect that the manufacturer will raise the price of the soda to cover the resulting liability costs. In this way, we no longer subject the victim to a lottery, but instead spread the injury costs equally among all who use the product.

The case for vicarious liability is somewhat more complex because, with vicarious liability, there is already a primary actor whose own negligence makes him liable to the victim. Indeed, in a world where no actor is judgment proof, there would be no need for the doctrine of vicarious liability—each primary actor would be responsible for compensating the victim. In the real world, however, many actors—especially employee actors—have few assets available for liability costs. Thus, if we are to compensate victims, there must be additional layers of financial responsibility. In short, the doctrine of vicarious liability serves an insurance function by adding a deeper pocket that can cover and spread injury costs to a relevant population.<sup>81</sup> Note, though, that this cost-spreading function cannot be well served by a charitable organization. In most cases, we cannot spread costs to a charity's beneficiaries because they are often indigent and in need themselves. Nor can they be easily spread to donors. Donor payments are voluntary and likely to disappear if donors know that their donations will be used to fund preexisting tort judgments.

#### B. *Charitable Immunity: Exceptions and Distinctions*

In this Part, I have examined the various arguments that support charitable immunity. I have concluded that, standing alone, the public policy argument is insufficient to justify the doctrine. I have also concluded that when the trust fund argument and the assumption of the risk arguments are separated from public policy considerations, they too have little plausibility. In contrast, the argument about vicarious liability does seem to justify charitable immunity because the arguments that favor vicarious liability in commercial contexts are not persuasive in the charitable context.

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<sup>81</sup> It is sometimes suggested that the reason for vicarious liability is that it enables victims to reach the “deep pockets” of American business. Certainly, the relative wealth of business defendants can make tort law more effective from a compensation standpoint.

If we understand charitable immunity as a bar against vicarious liability, then the many exemptions begin to sort themselves out. Some of them will not apply. For example, the distinction between suits by a charitable beneficiary and suits by a stranger will not be relevant once we dismiss the assumption of the risk rationale for charitable immunity. Others will be clarified. Indeed, I think that three issues remain relevant: (1) whether the charity raises a substantial amount from fees charged for its services, (2) the size of amount in controversy, and (3) the question of institutional negligence. The first two issues matter because of the cost-spreading function. A charity that derives a substantial portion of its revenue from fees for service is in a position to pay liability costs and spread them to its customers. For example, a nonprofit hospital can raise its patient care rates in the same way that a for-profit hospital can. Similarly, with respect to size, a large charity can absorb small and routine judgments without interrupting its fundraising functions. For example, fundraising at Harvard University would not come to a standstill because of a \$20,000 judgment against it. The third issue is more complex. The question is whether the negligent conduct is really attributable to employees or whether it represents the conscious policy of the institution. Indeed this exception is extremely important in the sexual abuse cases because some have alleged that it was official Church policy to suppress allegations of sexual abuse, and that it was this suppression that made it possible for others to be victimized. In Part III, I consider this and other questions as I apply the foregoing analysis to the situation that has arisen in the Boston Archdiocese.

### III. THE LEGAL FRAMEWORK FOR CLAIMS AGAINST THE BOSTON ARCHDIOCESE

In the first two Parts, we have looked at the policies that support the various provisions of state and federal law that relate to public charities. In this Part, I refer to these policies in applying the charities law of Massachusetts to the sexual abuse cases in the Catholic Archdiocese of Boston. As we begin this process, three things are readily apparent. It is clear, first, that the Archdiocese is a public charity; second, that, as a public charity, it is eligible for the benefits of the Massachusetts charitable immunity statute; and third, that its charitable status creates an oversight role for the Massachusetts Attorney General. I develop each of these themes separately in the remainder of this Part.

### A. *The Archdiocese Is a Public Charity*

Although there is no question that churches are entitled to charitable status under state and federal law, there are some puzzling aspects to this designation. We generally understand religion as a deeply personal matter. Organized religions provide an opportunity for individuals to share their personal beliefs among a community of like-minded congregants. In this respect, there is an aspect to church life that is similar to the operation of a private club. Churches and clubs both function as mechanisms for individuals to share their particular interest in a given subject matter. Private clubs, however, are not eligible for the public charity designation. Consider hypothetical Club X, a nonprofit club that operates a golf course in a fashionable suburb. The course is open only to members who have been approved by a vote of the existing membership and who pay an annual fee of \$10,000. Each year, the club holds a dinner, the proceeds of which are used to fund cancer research. In addition, it holds a yearly event where members are organized to provide a meal for the local homeless shelter. Under state and federal law, Club X will be treated as a nonprofit organization, but not as a public charity.<sup>82</sup> It therefore will not be eligible for charitable immunity, nor will it be subject to the superintendency of the state's attorney general.

We should keep Club X in mind when we consider the charitable status of certain churches. Consider, for example, a hypothetical Church Y, which is closed to everyone except those who have applied for membership and been approved by a vote of the elders. In addition, Church Y does no fundraising. It raises money for its expenses through an annual fee that is imposed on its members and neither the church nor the members consider the fee to be deductible for federal tax purposes. In addition, Church Y performs no services for non-members. Indeed, its religious doctrine preaches outright hostility to anyone who is not associated with the church. Is there any reason why Church Y should be treated differently from Club X? Certainly one answer is that religion is more important than golf, wine tasting, or stamp collecting. But there is another answer that is particularly decisive in the operation of modern charities law. Under modern charities law, charitable status is determined not just by the organization's purpose, but also by the intent of the group's founders

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<sup>82</sup> The charitable events may be separately incorporated and thereby receive charitable status, but this will not affect the non-charitable status of the private club.

and members.<sup>83</sup> Is it their wish that the organization should remain outside the public sphere? Do they mean to trade the benefit and protections given to charities for the privacy that attends a non-charitable club?

With respect to the Archdiocese of Boston, the choice was clear. In 1897, the Archdiocese first asked the Massachusetts Legislature to incorporate it as a public charity.<sup>84</sup> Despite this, however, the clamor over the sexual abuse cases has revealed that many members of the public are discontented with that designation. There are some who think of the Archdiocese as a private organization that should be closed to public scrutiny. There are also those who think that, as a center of private power and authority, it should not be entitled to any special treatment. Neither of these attitudes, however, can be sustained. By becoming a public charity, the Archdiocese made itself eligible for the benefits of that status—benefits that include application of the doctrine of charitable immunity.<sup>85</sup> At the same time, it committed itself to fulfilling public as well as private purposes and to the public accountability that this role requires.

B. *The Archdiocese Should Receive the Benefits of the Massachusetts Charitable Immunity Statute*

In Massachusetts, the doctrine of charitable immunity has had a long history. It began in 1876, when the state became the first American jurisdiction to rule that charitable organizations were exempt from tort liability. For many years thereafter, the Supreme Judicial Court consistently reiterated its support for the doctrine.<sup>86</sup> In 1928, however, the court began to express some doubts about the wisdom of the rule, and, in case after case, it broadly hinted that abolition of the doctrine should be a legislative matter.<sup>87</sup> Finally, in 1969, the court tired of waiting for the Legislature and ruled prospectively that the

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<sup>83</sup> Most organizations become charities by incorporating as not-for-profit corporations and applying to the IRS for charitable status. It is rare for an organization to be considered a charity if it does not explicitly choose this status.

<sup>84</sup> This request resulted in special legislation incorporating the Archdiocese as a religious and charitable organization. *See* An Act to Incorporate the Roman Catholic Archbishop of Boston and His Successors a Corporation Sole, to Hold and Manage Certain Property for Religious and Charitable Purposes, 1897 Mass. Acts 506.

<sup>85</sup> *See* *Glaser v. Congregation Kehillath Isr.*, 161 N.E. 619, 620 (Mass. 1928).

<sup>86</sup> *See, e.g., Glaser*, 161 N.E. at 629; *Foley v. Wesson Mem'l Hosp.*, 141 N.E. 113, 113 (Mass. 1923); *Roosen v. Peter Bent Brigham Hosp.*, 126 N.E. 392, 395 (Mass. 1920).

<sup>87</sup> *See, e.g., Simpson v. Truesdale Hosp., Inc.*, 154 N.E.2d 357, 358 (Mass. 1958); *Comeau v. Harrington*, 130 N.E.2d 554, 555 (Mass. 1955).

doctrine would no longer be available to Massachusetts charities.<sup>88</sup> Ironically, it was this ruling that forced the hand of the Massachusetts Legislature when, in 1971, it ratified the court's decision but, at the same time, enacted a \$20,000 cap on damages for torts that were "committed in the course of any activity carried on to accomplish directly the charitable purposes" of a public charity.<sup>89</sup> In 1989, the Supreme Judicial Court upheld this statute in the face of various constitutional attacks.<sup>90</sup> Thus, Massachusetts charities are free of tort liability beyond the first \$20,000 of each claim, provided that the tort arose in the course of its charitable program.<sup>91</sup> How then does this grant of limited immunity affect the sexual abuse claims filed against the Archdiocese?

In Part II, I argued that many of the reasons given for charitable immunity were not very salient.<sup>92</sup> Nevertheless, I suggested, charitable immunity has some justification if it is understood in terms of the inapplicability of the doctrine of vicarious liability.<sup>93</sup> Thus, it might be reasonable to treat the Massachusetts cap on charitable damages as a partial repeal of the doctrine of vicarious liability as applied to charitable organizations. Under this interpretation, the cap does not extend to the direct liability of the wrongdoers; it merely limits the additional layer of liability that might have otherwise been available from the Archdiocese. Thus, while the abusing priests and their negligent supervisors remain fully liable, the Church itself is protected by the charitable cap. But this result may not seem fully satisfactory. What about the allegations that the Church consciously covered up reports of abuse to avoid embarrassment and scandal? Should there not be some point at which the liability of the Church is direct rather than vicarious? These questions have become particularly relevant because Cardinal Law himself has been so deeply implicated in the scandal. Under the laws of Massachusetts, the Archdiocese is considered a

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<sup>88</sup> See *Colby v. Carney Hosp.*, 254 N.E.2d 407, 408 (Mass. 1969).

<sup>89</sup> MASS. GEN. LAWS ch. 231, § 85K (2002).

<sup>90</sup> See *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 334 (Mass. 1989).

<sup>91</sup> The defendant does not face a high burden of showing that the tortious injury was directly caused by an act that furthered the charitable program. As the remainder of the statute makes clear, such torts stand in contrast to torts "committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes." See ch. 231, § 85K.

<sup>92</sup> See *supra* Part II.A.1–3.

<sup>93</sup> See *supra* Part II.A.4, Part II.B.

“corporation sole.”<sup>94</sup> This means that the Archbishop functions not only as its CEO but also as the entirety of its board of directors.<sup>95</sup> Thus, one is often tempted to view the acts of the Cardinal as the acts of the Church itself. Nevertheless, under secular law, there is a clear distinction between them. As the CEO, the Cardinal is but a servant of the Archdiocese. As a board of one, he is more than a servant but less than the entire corporation. In either case, his negligent acts will result in personal liability, but the Church will only be liable for them to the extent of the charitable cap.<sup>96</sup>

*C. The Defendant Archdiocese Is Subject to the Superintendency of the Massachusetts Attorney General*

Although the Archbishop may be the ultimate authority with respect to the Boston Archdiocese, this does not mean that he is accountable to no one but himself. Under Church law, he is subject to the supervision of the Vatican; under secular law, he is accountable to the general public through its representative, the Attorney General. The role of the Attorney General is not one of direct supervision. Under state law, the Attorney General is empowered to take legal action whenever there is reason to believe that a violation of law or a breach of trust has occurred.<sup>97</sup> This means that he must wait until after the fact to determine whether remedial action is appropriate. If he decides that it is, he must seek orders from the appropriate court. In this case there are several actions that the Attorney General might consider. First, there is the issue of breach of trust. Did Cardinal Law violate his fiduciary responsibilities while he was the Archbishop of Boston? If so, the Attorney General could ask the court to order reimbursement to the Church for its losses. Second, to the extent that the Archdiocese failed to discharge its legal responsibilities, the Attorney General could seek injunctive relief. If successful, an injunc-

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<sup>94</sup> An Act to Incorporate the Roman Catholic Archbishop of Boston and His Successors a Corporation Sole, to Hold and Manage Certain Property for Religious and Charitable Purposes, 1897 Mass. Acts 506.

<sup>95</sup> MASS. OFFICE OF THE ATTORNEY GEN., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON: A REPORT BY THE ATTORNEY GENERAL I (2003), available at <http://www.ago.state.ma.us/archdiocese.pdf>.

<sup>96</sup> If we look at the Massachusetts charitable immunity statute, it does not seem to make any exception for conscious wrongdoing on the part of Church officials. See ch. 231, § 85K. Nor have the courts been willing to read in an exception for gross negligence or reckless conduct. See *St. Clair v. Trs. of Boston Univ.*, 521 N.E.2d 1044, 1048 (Mass. App. Ct. 1988).

<sup>97</sup> MASS. GEN. LAWS ch. 12, § 8 (2002).

tion could help in two ways: first, by making the Church subject to contempt charges for continuing violations and, second, by providing a more substantive remedy to future victims.

#### CONCLUSION

The sexual abuse scandal in the Boston Archdiocese has had a profound effect on the surrounding community. It is possible that it will be a case that breaks all the rules. In the abstract, outrage makes it tempting to disregard long standing legal rules as “mere” technicalities. Once the litigation proceeds, however, the realities of tort law come into play. What happened to this particular victim? Who should have prevented it and how? Once these questions are asked on a case by case basis, the terrain looks different. Some plaintiffs will have no claim on the Church. Many others will have their claims limited to \$20,000. But, although the legal situation is complex, the moral situation is less so. The Church may find that its legal obligations amount to less than what the victim must have in order to get on with his life. This means that the Church ought to consider some kind of non-legal response to the victims—one that is particularized to the injury in each individual case.

Much has been written about what the sexual abuse scandal means for the future of the Church. Some have argued that the crisis means that there should be changes in the priesthood; others have argued for changes in governance. However these discussions turn out, it should be clear to everyone that the first step is real and genuine concern for the victims. Although the Church’s failures in this regard have been front-page news, little has been said about the inadequacy of the legal system as a way of addressing these claims. Experts on sexual abuse agree that the process of healing requires victims to take charge of their own recoveries.<sup>98</sup> Given this, we must acknowledge how unfair it is to keep so many victims waiting for the slow process of legal justice. Under these circumstances, we must applaud the Church’s recent efforts to settle the cases.

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<sup>98</sup> See ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL* 66–71 (3d ed. 1994).