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# The Multiple Common Law Roots of Charitable Immunity: An Essay in Honor of Richard Epstein's Contributions to Tort Law Scholarship\*

Jill R. Horwitz

## Abstract

Professor Epstein has long promoted replacing tort-based malpractice law with a new regime based on contracts. In *Mortal Peril*, he grounded his normative arguments in favor of such a shift in the positive, doctrinal history of charitable immunity law. In this essay, in three parts, I critique Professor Epstein's suggestion that a faulty set of interpretations in charitable immunity law led to our current reliance on tort for malpractice claims. First, I offer an alternative interpretation to Professor Epstein's claim that one group of 19<sup>th</sup> and early 20<sup>th</sup> century cases demonstrates a misguided effort to protect donor wishes. Rather, I maintain that these cases make more sense when understood in the context of trust law. Second, I argue that another group of cases — cases based on indigent patients' implied waivers of tort rights in exchange for charitable services — is not best understood as being based on implied contracts, as Professor Epstein claims. Rather, these cases are better understood as enforcing tort privileges that arise from the charitable status of the defendant. Finally, I critique Professor Epstein's contention that a charity's ability to waive immunity for some or all plaintiffs reveals that immunity doctrine more comfortably fits with contract theories than tort theories.

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## I. INTRODUCTION

I was delighted when Professor Goldberg asked me to contribute to this volume, and initially assumed that I would write about Professor Epstein's long-standing and influential ideas about medical malpractice. To a large extent Professor Epstein's claims are normative. Over many years and several publications, he has claimed that contract, rather than tort law, ought to define doctors' legal obligations to their patients. Among other reasons, he endorsed this view because contract law better allows parties to identify the optimal level of damages than the one-size-fits-all expectations damages assigned by tort law.<sup>1</sup>

More recently, Professor Epstein has both situated his thoughts regarding medical malpractice within his more general theories about liability standards and taken an analytical turn toward descriptive, historical explanations for his normative views.<sup>2</sup> In *Mortal Peril*, for example, he explains that contractual solutions are preferable because doctors and patients are not strangers, as in the typical accident situation, but instead are best understood as trading partners.<sup>3</sup> As such, patients would be better off limiting their risk of loss by choosing the right health care provider and negotiating terms rather than relying on the blunt instruments that tort law provides for assigning liability among strangers.<sup>4</sup> He concludes that despite "historical ambiguity" in medical injury law, "the legal response of medical injuries should be resolved decisively in favor of the contractual solutions that are routinely frowned on in modern debates over liability and that are accordingly excluded by operation of law."<sup>5</sup> He draws this conclusion because embracing contract in malpractice law not only makes sense but also because doing so would rectify earlier mistakes in charitable immunity doctrine that led to contemporary doctrine.

Writing about these ideas was appealing, not only for the obvious intellectual reasons, but also for personal reasons. As a masters' student in public policy, before law school, I was assigned to write mock testimony on one of the subjects

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<sup>1</sup> Richard A. Epstein, *Medical Malpractice, Imperfect Information, and the Contractual Foundation for Medical Services*, 49 L. & CONTEMP. PROBS. 201, 208-09 (1986).

<sup>2</sup> For example, he writes, "[M]edical malpractice . . . cases have been the source of intense controversy and acrimony over the past thirty years. The root intellectual cause of this difficulty is the widespread judicial determination to carry over many of the same rules that apply in stranger cases to the different context of consensual arrangements. But the objectives of the parties in the two contexts are too different to allow for this simple amalgamation of cases." Richard A. Epstein, *Contractual Principle Versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice*, 54 DEPAUL L. REV. 503, 507 (2005). See also, e.g., RICHARD A. EPSTEIN, TORTS § 4.1 *et seq.* (1999).

<sup>3</sup> RICHARD A. EPSTEIN, MORTAL PERIL 359-67 (1997).

<sup>4</sup> *Id.* at 363-64.

<sup>5</sup> *Id.* at 359-60.

we had studied in health economics. I wrote about replacing tort liability with contract. Professor Epstein's 1986 article in *Law and Contemporary Problems, Medical Malpractice, Imperfect Information, and the Contractual Foundations of Medical Services*,<sup>6</sup> introduced me to legal scholarship. The arguments in that paper provided me so much to grapple with that I wrote and rewrote that assignment for days. It caught the professor's attention, and he recruited me to his doctoral program. Now I finally have the opportunity to thank Professor Epstein.

Nonetheless, although I would have liked to have offered my own comments on the desirability of contracting over malpractice—it seems to be, after all, a rite of passage among health and tort law professors—I decided, for several reasons, to engage his positive claims on the origins of tort-based malpractice law in the history of charitable immunity law. First, although scholars will doubtless continue to debate the appropriate treatment of malpractice law, there is already a small industry of rigorous research on the issue.<sup>7</sup> Second—and I know that Professor Epstein disagrees vociferously<sup>8</sup>—I do not think that medical malpractice is a critical policy matter today. This is not to say that people don't care about it. They do. In fact, the President proposed to experiment with malpractice reform in an effort to pull doctors and Republicans on board health reform.<sup>9</sup> But because it represents such a small contribution to the issues that are central to health reform—including cost, access, and even quality of care—I prefer to focus elsewhere. Finally, as far as I know and unbelievable as it may seem, no one has yet commented on Professor Epstein's related observations regarding the connections between charitable immunity and current malpractice doctrine.

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<sup>6</sup> Epstein, *supra* note 1.

<sup>7</sup> Most recently, for example, see Jennifer Arlen, *Contracting Out of Malpractice Liability: Medical Malpractice and the Cost of Choice*, U. PA. L. REV. (forthcoming). See also, e.g., P.S. Atiyah, *Medical Malpractice and the Contract/Tort Boundary*, 49 LAW & CONTEMP. PROBS. 287 (1986); Tom Baker & Timothy Lytton, Essay, *Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein*, 104 NW. U. L. REV. (forthcoming 2010) (arguing against a related proposal); Clark C. Havighurst, *Private Reform of Tort-Law Dogma: Market Opportunities and Legal Obstacles*, 49 LAW & CONTEMP. PROBS. 143 (1986); Eleanor D. Kinney, *Tapping and Resolving Consumer Concerns About Healthcare*, 26 AM. J.L. & MED. 335, 385-86 (2000); Gary T. Schwartz, *Medical Malpractice, Tort, Contract, and Managed Care*, 1998 U. ILL. L. REV. 885.

<sup>8</sup> Professor Epstein has recently claimed that malpractice reform is of central importance to health reform. Video: Richard Epstein and Judy Feder Debate Healthcare Reform, at Inaugural NYU Forum (NYU School of Law 2009), available at [http://www.law.nyu.edu/news/EPSTEIN\\_FEDER\\_HEALTHCARE\\_FORUM](http://www.law.nyu.edu/news/EPSTEIN_FEDER_HEALTHCARE_FORUM).

<sup>9</sup> Cf. Ceci Connelly, *Obama to Speed Up Tort Reform Tests, but Doctors Want More*, WASH. POST, Sept. 18, 2009, at A4.

Therefore, instead of offering my two cents on the appropriateness of contracting between patients and providers, I thought I'd be the first to engage Professor Epstein's positive, historical arguments about the connections among charitable immunity, contract law, and malpractice doctrine. In *Mortal Peril*, Professor Epstein contends that a wrong turn in charitable immunity doctrine contributed to what he characterizes as a regrettable use of tort rather than contract principles to resolve malpractice claims.<sup>10</sup>

Like so much of Professor Epstein's work, his thoughts on how charitable immunity doctrine led courts to forbid patients and providers from contracting out of professional duties are filled with powerful analytical insights into the common law and its role in preserving individual autonomy. Employing his free-market perspective, one he has traditionally rooted in libertarian and natural law arguments but that now tends toward economic efficiency,<sup>11</sup> he finds that the soundest line of argument in nineteenth and early twentieth century cases regarding charitable immunity comes from contract law. According to Professor Epstein, this contract structure ensures the free choice of charities and their beneficiaries, which, both for reasons of justice and efficiency, is as it ought to be.

More specifically, Professor Epstein finds two doctrinal strands used to justify charitable immunity in the common law. He claims that the first, which had to do with vindicating donors' preferences (sometimes he refers to them as trustees' preferences), is misguided.<sup>12</sup> The second he argues is not truly a status-based theory, but instead rests on implied agreements between defendant-charities and their plaintiff-beneficiaries.<sup>13</sup> Although Professor Epstein finds the second strand both preferable and a better explanation for charitable immunity, some courts either misunderstood or mistakenly rejected it as a basis for immunity. From this key error, courts eventually assumed that "medical malpractice liabilities sound in tort," rather than in contract. They then eliminated immunity—even immunity by waiver, a doctrine that would allow charities the desirable power to "have total institutional freedom to decide where and how to allocate their resources."<sup>14</sup>

In honor of Professor Epstein's vast contribution to tort scholarship, this essay re-examines these early charitable immunity cases. It is a shame that charitable immunity has received so little scholarly attention over the past century. The doctrinal history is both fascinating and puzzling, as the cases are rife with mistaken interpretation, confused reasoning, and conflicting claims. In fact, charitable immunity arguably found its way into American law by mistake. The Massachusetts case widely credited with being America's first charitable

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<sup>10</sup> EPSTEIN, *supra* note 3, at 359-76.

<sup>11</sup> Other scholars have noted this trend. See, e.g., Schwartz, *supra* note 7.

<sup>12</sup> EPSTEIN, *supra* note 3, at 369.

<sup>13</sup> *Id.* at 370-71.

<sup>14</sup> *Id.* at 372, 371.

immunity case centrally relied on an English law that had already been rejected.<sup>15</sup> My goals today, however, are less ambitious than producing a history of charitable immunity or even making sense of the tangled doctrine.

With an eye sympathetic to the common law's multiple goals—goals that include recognizing harms caused to victims by tortfeasors outside of any agreement between the parties—I hope to demonstrate that some of the charitable immunity doctrines Professor Epstein finds objectionable make sense when understood in the contexts of trust law and tort law. Moreover, the doctrinal development of charitable immunity does not represent a lost opportunity for an orderly march toward replacing tort with contract. While I agree with Professor Epstein that judges made some wrong turns and that the logic of contract law appears in some of these cases, I don't think the cases show that status-based immunity arguments polluted the unsoiled world of contract law. I conclude that contract law principles neither best describe the structures of early charitable immunity law nor advance the goals embraced by the common law of torts.

Although I find more than two distinct justifications for charitable immunity in the case law—in fact, courts routinely filled multiple pages summarizing the variants of charitable immunity and their justifications, including policy justifications related to protecting beneficiaries and various glosses on vicarious immunity—I will remain within Professor Epstein's framework. First, I comment on the theory Epstein implies is the true status theory, the protection theory, for charitable immunity. Contrary to Professor Epstein's description, I argue that the cases he characterizes as applying a nonsensical "protection theory" do not necessarily represent inappropriate deference to the wishes of settlors or donors regarding the use of charitable assets.<sup>16</sup> Rather, the British cases that found their way into the American common law and the early American cases can also be interpreted as cases based on the straightforward application of trust law principles. Understood as examples of the application of trust doctrine, these cases make sense.

In fact, the issues I find in the first set of cases echo contemporary issues in both private and charitable trust law. For example, when are the acts of agents properly attributed to the charity? That is, when are they acts in the pursuit of charitable goals that happened to have been performed negligently and when are they akin to *ultra vires* acts? And, centrally at issue in the earliest British immunity cases, when are the acts of a trustee appropriately characterized as acts

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<sup>15</sup> See, e.g., *President of Georgetown Coll. v. Hughes*, 130 F.2d 810, 816 (D.C. Cir. 1941). *Georgetown*, a watershed case eliminating immunity in the United States, noted that American courts received the doctrine of charitable immunity "in ignorance of the English reversal." *Id.*

<sup>16</sup> Professor Epstein uses both the terms donor and trustee in the book. EPSTEIN, *supra* note 3, at 370. The British cases he discusses mainly concern trusts, so the appropriate term is settlor. Trustees' preferences should be irrelevant to the analysis.

of the charity—in which case the charity should indemnify the trustee—and when are they simply violations of the trustee’s duties to the charity? The answer to these questions is not tantamount to figuring out when a trustee (or a donor or a settlor) would prefer to externalize the costs of charitable negligence, as Professor Epstein suggests, but rather when a tortfeasor’s actions are within the scope of the charitable activity.

Second, I argue that the implied contract theory Professor Epstein finds in the charitable immunity cases is not a contract theory of charitable immunity at all. Rather, unlike the first strand in the cases, *this second theory* is best understood as primarily based on tort rights that arise from the status of the defendant. As Professor Epstein demonstrates, there are many interesting things to say about whether the relationships between plaintiff-patients and defendant-hospitals—the parties are almost all patients and hospitals in the early American cases—are contractual. Similarly, whether indigent patients assume the risk of bad care when they accept treatment for free is worth debating. But focusing on the relationship between injured patients and negligent hospitals, contractual or otherwise, is misleading in this context. It might tempt one, as it tempts Professor Epstein, to believe that the roots of charitable immunity are more in contract than in torts.

The key to these cases, however, is not a contractual relationship between the parties, but rather the status of the defendant. Only defendants who were charities benefited from the protective doctrine; only plaintiffs who were patients of defendant-charities fell victim to the doctrine. Moreover, the fact that charities, like sovereigns, retained the right to waive immunity for some or all plaintiffs merely describes the extent of the right. The right to waive immunity does not convert immunity into a contract principle.

Like Professor Epstein’s claims about the history of malpractice law, my critique of those claims does not resolve the debate regarding whether we ought to reform our malpractice law and policy today. However, because I think that Professor Epstein’s reliance on historical argument in drawing his normative conclusions makes a great deal of sense, I have proceeded in the same vein. First, as a practical matter, lawyers (and others, such as policymakers) draw on the historical development of legal doctrine (and policy) as a matter of professional practice. They do this for good reasons, not the least of which is that doing otherwise would wreak havoc on both our conception of the rule of law and its equitable administration. We need predictability. So the mere fact that “we’ve traditionally had these thoughts and we’ve done it this way before” must hold some weight.

One can carry this too far. As Oliver Wendell Holmes famously warned, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was

laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>17</sup> Still, Holmes wrote this in the context of explaining that “if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition....The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know.”<sup>18</sup>

The resolution of legal puzzles by previous lawyers, judges, and commentators should give us some food for thought and maybe even some direction. We may decide that previous generations got it wrong, or that they got it right for their time but not for ours.<sup>19</sup> Regardless of the outcome, it is worth a hard look. I hope that my analysis at least lessens the concern that, as Professor Epstein believes, today’s tort-based system resulted from no more than fundamental mistakes by a few judges a century ago.

By tracing a straight line from the early common law doctrine to contemporary policy needs, Professor Epstein’s technique has some of the advantages of formal modeling. Stripping down complex relationships to a few key variables helps prevent researchers from getting lost in forests of details. It helps identify the essentials in an issue. Professor Epstein’s ideas help us see where contracts are at play and can usefully supplant torts. Professor Epstein’s laser-like method also calls on critics to state clearly what variables are missing where contract ideas fall short of a full explanation. Here I propose that both trust law and traditional tort doctrine, with its focus on status-based rights, offer the better explanations for charitable immunity law.

## II. THE PROTECTION THEORY: TRUST LAW VS. DONOR PREFERENCE OR STATUS

Professor Epstein identifies two competing justifications for the charitable immunity doctrine in the common law. He finds the first explanation for why “charitable organizations enjoyed immunity from suit by virtue of their status alone” in three early cases, two British and one American.<sup>20</sup> According to this theory, which Professor Epstein calls the “protection theory,” immunity serves “to prevent an improper diversion of the assets of charitable organizations to the

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<sup>17</sup> Oliver Wendell Holmes, Jr., *The Path of The Law* 10 Harvard L. Rev. 457, 469 (1897).

<sup>18</sup> *Id.*

<sup>19</sup> For an exploration of the practice of using history in political theory see DON HERZOG, *HAPPY SLAVES* 5 (1989).

<sup>20</sup> EPSTEIN, *supra* note 3, at 369 (citing *Feoffees of Heriot’s Hosp. v. Ross*, (1846) 8 Eng. Rep. 1508 (H.L.); *Mersey Docks Trs. v. Gibbs*, (1866) 11 Eng. Rep. 1501 (H.L.); and, *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876)).

payment of tort judgments,”<sup>21</sup> where improper means a diversion that violates the donor’s preferences.

Not surprisingly, Professor Epstein finds this first justification wanting. While he agrees that donors<sup>22</sup> would prefer their money not be used as damages to pay plaintiffs who are strangers to the charity, he concludes that “those wishes should not be respected because the correct legal rule never allows actions of private benevolence to extract a subsidy from unwilling outsiders.”<sup>23</sup> Moreover, he believes not only that immunity was wrongly based on donor preferences, but in practice it worked contrary to those preferences. He claims that donors would prefer that if any damages must be paid out, they be paid to intended beneficiaries (whom he assumes are not strangers) rather than strangers since doing so would internalize some of the costs of providing charity; charitable immunity does just the opposite.<sup>24</sup> Marshalling support for his contemporary views on malpractice reform, he implies that nineteenth century judges worried about the same externality that troubles him in contemporary law: allowing a charity to externalize a cost of providing medical care on its stranger-victims. This worry, he explains, is why judges actually undermined donor preferences in the early immunity cases in refusing “to extend the immunity from suits by patients to stranger situations.”<sup>25</sup>

Although there is evidence for Professor Epstein’s view, I find a different and compelling story in the case law. The cases that Professor Epstein cites as being primarily about granting inappropriate deference to donor preferences regarding the distribution of funds to tort victims make more sense when understood as involving two other legal subjects. First, they apply trust law doctrines regarding the appropriate use of restricted charitable trust assets. Although these doctrines have sometimes been applied not only to trusts but also to the general assets of charitable corporations, the doctrine does not grant immunity to charities based on their status as charities *per se*. Because these charities take the form of trusts, the law limits the use of the assets to charitable purposes (which, as I explain below, may include indemnifying trustees for tort judgments incurred in the course of administering charitable assets). Second, the cases also concern the appropriate use of vicarious liability in the charitable context. The vicarious liability cases raise the same agency questions as other tort cases, questions that are not specific

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<sup>21</sup> EPSTEIN, *supra* note 3, at 369.

<sup>22</sup> Since the British cases mainly concern trusts, the relevant parties are “settlers” rather than “donors.” Some American cases concern trusts and others do not. These differences are not merely semantic since, at least under some interpretations of the law, donors and settlers held different powers regarding the control of charitable assets.

<sup>23</sup> EPSTEIN, *supra* note 3, at 370.

<sup>24</sup> *Id.* (“Surely the trustee would rather see the money paid out to the intended beneficiaries, the patients victimized by physician malpractice, if it had to be paid out at all.”).

<sup>25</sup> *Id.*

to defendants with charitable status. I don't claim that the courts reached the right outcomes, either in the application of the law or in their effects on social welfare, but re-described as cases about trust and tort doctrine, they should not be dismissed as mistakes.

*A. Charitable Immunity in England and its Trust Law Roots*

Charitable immunity had a short life in England. It is widely believed to have arrived in the common law with *Feoffees of Heriot's Hospital v. Ross*<sup>26</sup> in 1846, and departed only twenty years later with *Mersey Docks Trustees v. Gibbs*.<sup>27</sup> The structure of the cases suggests that charitable immunity was not based on donors' rights stemming from the charitable status of the defendants. These cases neither prohibit plaintiffs from bringing tort suits against charities nor provide a complete defense for charities because of the defendant's charitable status, as would a status-based doctrine. (In fact, *Heriot's Hospital* is not even a tort action.) Rather, the cases concern the question of whether particular charitable trust assets would be available for satisfying judgments.

One might think that describing the legal question in the cases this way (as a question about the appropriate use of trust assets and their availability to satisfy tort judgments) makes no more sense than the justification of immunity that Professor Epstein finds both obvious and irrelevant (as a question about whether trustees would prefer not to use assets to satisfy judgments). But there is a world of difference in the two formulations. Professor Epstein is right that trustee preferences should be irrelevant in determining the use of assets for tort judgments. Whatever preferences trustees may have, they were, and still are, irrelevant to the satisfaction of tort judgments with charitable trust assets. Twentieth century courts understood this, but not for the reasons Professor Epstein suggests.

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<sup>26</sup> *Feoffees of Heriot's Hosp. v. Ross*, (1846) 8 Eng. Rep. 1508 (H.L.). See also RESTATEMENT (SECOND) OF TORTS § 895E cmt. b (1979) ("This immunity had its origin in England in 1846, in *Feoffees of Heriot's Hospital v. Ross* . . . where it was held that trust funds in the hands of a charity could not be subjected to the payment of tort claims, since they would thus be diverted from the purpose for which they were intended by the donor.") In an earlier case, not as frequently cited, the House of Lords arrived at a similar decision. David Wingfield helpfully summarizes the case:

*Duncan v. Findlater* rests on two propositions. The first proposition is that a plaintiff cannot sue a defendant at law if equity will not permit the plaintiff to attach the defendant's property in satisfaction of the judgment. The second is that equity will not permit a plaintiff to attach trust funds to pay legal damages unless the trustees were personally at fault in the administration of the property.

David R. Wingfield, *The Short Life and Long After Life of Charitable Immunity in the Common Law*, 82 CAN. B. REV. 315, 321 (2003).

<sup>27</sup> *Mersey Docks Trs. v. Gibbs*, (1866) 11 Eng. Rep. 1501 (H.L.).

The preferences of trustees after the establishment of the trust do not determine the use of trust assets. Settlor's intentions regarding the charitable purpose *at the time a trust is established* generally control charitable purposes and the use of assets.<sup>28</sup> Moreover, and one of the central points of this group of cases, trustees do not own charitable assets. This is why, until the 1960s, all legal actions had to be brought against the trustees personally, even if the trustee was not personally at fault but at fault from acting in his capacity as trustee.<sup>29</sup> The trustee was not necessarily financially responsible for all wrongdoing since, “[i]f

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<sup>28</sup> There has been considerable debate regarding loosening standing requirements for settlors of charitable trusts. For example, under particular circumstances and in controversial decisions, courts have sometimes granted settlors or their representatives standing in modification proceedings. *Smiths v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127 (NY App. Div. 2001) (granting administratrix of an estate the right to enforce the donative intent of the decedent's gift; the initial gift instrument included terms for ongoing review by the settlor). But generally, settlors or donors who give gifts for particular purposes outright have no standing sue to recover the gift, enforce restrictions on the gift, or begin proceedings to change gift purposes without these rights reserved in the gift documents or other compelling reasons. Moreover, where settlors have been given more extensive rights, those rights typically have been to enforce the purpose as determined at the time of the gift or modified through a *cy pres* proceeding. The Uniform Prudent Management of Institutional Funds Act allows donors to release charities from certain restrictions: “If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.” UNIF. PRUDENT MGMT. INSTITUTIONAL FUNDS ACT § 6a (2006). Although the RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) rejected settlor standing to enforce trust terms, the RESTATEMENT (THIRD) OF TRUST § 94 (Tentative Draft No. 5, DATE) and RESTATEMENT (THIRD) OF TRUST § 94 cmt. g(3) (2009) grant standing to settlors to enforce charitable trust terms, subject to certain restrictions. The Uniform Trust Code grants that “[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce a trust.” UNIF. TRUST CODE §405(c) (2004).

<sup>29</sup> According to Marion Fremont-Smith, “It is not unusual to read that the chief disadvantage of forming a charitable organization as a trust is that the trustee is personally liable for all actions taken by him as trustee and legal actions may be brought against him personally.” MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 148 (2004). However, even in the early twentieth century, there is some evidence that some courts allowed cases against trustees to be paid out of trust funds if the trustee “free from willful misconduct in the tort.” *Basabo v. Salvation Army, Inc.*, 85 A. 120, 122 (R.I. 1912). The *Basabo* court stated:

It is true that an action does not lie against a trustee under a will, or the like, as such for his torts or those of his servants in the affairs or administration of a trust. He has to be sued individually; but the reason is purely technical; and the courts allow the judgment against him individually for damages to be paid out of the trust funds, if he was free from willful misconduct in the tort. No rule, therefore, that trust funds may not be used to pay damages for torts in the administration of the trust exists even in the case of ordinary express trusts, let alone in the general trusts of charitable corporations.

*Id.*

the trustee was not personally at fault, he was entitled to repayment, or indemnity, from the trust estate, but the legal action had to be brought against the trustee.”<sup>30</sup>

However, trust funds could never, and still may not, be used to satisfy judgments against trustees for their personal negligence that harms the trust. (Even today there are significant limits to trustees’ ability to contract out of liability,<sup>31</sup> with some states declaring void efforts to relieve trustees of certain fiduciary duties.<sup>32</sup>)

To rule that the assets cannot be used to satisfy judgments in this context, therefore, is not to inappropriately externalize costs on tort victims. It is to say that the charity did no wrong. This is because the charity’s agent was not acting

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<sup>30</sup> FREMONT-SMITH, *supra* note 29, at 148. In their critique of two recent vicarious liability cases against Canadian charities, Jason Neyers and David Stevens explain the tort implications of adopting the trust form and, in doing so, offer helpful background for why a plaintiff cannot attach trust funds absent trustee liability:

The only persons with civil capacity in the trust context are the trustees and the beneficiaries. Typically, the complaint in a trust dispute is against some action of the trustee, since it is the trustee who plays the most active role in the trust. Any contract entered into by the trustee in the performance of her responsibilities can only be entered into by the trustee either directly or personally . . . . The only mechanism available to the trustee to “limit” her personal responsibility on such a contract is to obtain an indemnity out of the trust assets *and* to have the other party agree to limit his or her recourse on the contract to those trust assets. This indemnity is available under the default trust regime: the trustee is entitled at law to be indemnified for acts of administration.

Jason W. Neyers & David Stevens, *Vicarious Liability in the Charity Sector: An Examination of Bazley v. Curry and Re Christian Brothers of Ireland in Canada*, 42 CAN. BUS. L.J. 371, 405-06 (2005).

<sup>31</sup> According to the Uniform Trust Code, “A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property . . . only if the trustee is personally at fault.” UNIF. TRUST CODE § 1010(b) (amended 2005). Therefore, absent contracts to the contrary, trust assets are *not* available to satisfy judgments against trustees. In fact, even in the case of private trusts, settlors may not fully indemnify trustees, even by contract. “A provision in the trust instrument is not effective to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary, or of liability for any profit which the trustee derived from a breach of trust.” RESTATEMENT (SECOND) OF TRUSTS § 222(b) (1959). The Uniform Trust Code, for example, forbids exculpation of trustees in a trust instrument “for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. UNIF. TRUST CODE § 1008(a)(1) (amended 2005); *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT THE LAW OF TRUSTS AND TRUSTEES § 542 (3d ed. 2000).

<sup>32</sup> “New York has gone further and by statute has declared that an attempted grant . . . of exoneration of his fiduciary liability for failure to execute reasonable care, diligence, and prudence shall be deemed contrary to public policy and is void.” FREMONT-SMITH, *supra* note 29, at 148 (citing N.Y. Est. Powers & Trust Law § 11-1.7).

on behalf of the charity when he harmed the plaintiff through an improper administration of a trust.

A closer look at *Heriot's Hospital* illustrates the point. There, the plaintiff claimed that he was harmed when the trustees of an orphan's hospital inappropriately failed to admit him. Since he was too old to be admitted at the time of the decision, he argued for money damages. (Incidentally, it is unlikely that he would have been able to sue today since potential beneficiaries of charitable trusts are typically denied standing). Lord Cottenham identified the main legal issue in the case as whether:

[A] person who claims damages from those who are managers of a trust fund, in respect of their management of that fund, can make it liable in payment. It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust fund that provided for payment out of it of damages to be recovered from those who had the management of the fund. . . .<sup>33</sup>

Lord Cottenham may have simply thought that the managers' negligence involved harm to the charity, not by the charity. He was also likely stating the rule that claims for damages must be made against trustees personally. However, the decision does not stand for the proposition that charitable trust assets must never *eventually* be used to satisfy tort claims against trustees or agents of the charity. In fact, *Heriot's Hospital* specifically notes that, in cases where the trustee is not at fault, it may be appropriate to indemnify him for costs related to suits improperly filed against him.<sup>34</sup> In other words, trust assets should not be used to indemnify trustees for poor administration of a trust.

People might disagree about whether the acts of a trustee who inappropriately denies admission to a hospital amount to (1) negligence committed *by* the charity or (2) negligent charitable administration of the charity and, therefore, a harm *to* the trust. Regardless of the appropriate characterization, *Heriot's Hospital*, the case that has stood for the introduction of charitable immunity into the common law, can reasonably be viewed as a case about whether trust law permits assets to be used to satisfy a judgment against a trustee who has done something wrong, something outside the scope of his responsibilities to the trust.<sup>35</sup>

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<sup>33</sup> *Heriot's Hosp.*, 8 Eng. Rep. at 1510.

<sup>34</sup> *Id.* at 1511. *See also* Hordern v. Salvation Army, 92 N.E. 626, 628 (N.Y. 1910) (stating the rule that judgments and execution run against trustees, but may be reimbursed from a trust unless the trustee is individually at fault).

<sup>35</sup> In finding for the defendant, Lord Brougham stated it clearly; "The charge is, that the Governors of the Hospital have illegally and improperly done the act in question; and therefore

The 1866 case that purported to abolish charitable immunity, *Mersey Docks Trustees v. Gibbs*, offers some support for this interpretation of *Heriot's Hospital*.<sup>36</sup> In *Mersey Docks* the defendants, the trustees of the Liverpool Docks, operated docks in the Port of Liverpool and collected revenues, all of which were to be used for maintenance, paying debts and, finally, lowering prices.<sup>37</sup> The trustees failed, through their agents, to maintain a dock, and their negligence caused damage to a ship and the bird guano it was carrying.

On one reading of *Mersey Docks*, adopted by many courts and presumably Professor Epstein, *Mersey Docks* overrules *Heriot's Hospital* because the later justices rejected the status-based claims for charitable immunity regarding vindicating donors' preferences. This characterization has merit. After all, Lord Chancellor Cranworth noted that the only difference between previous cases, where the defendants were found liable for harm caused by negligent dock maintenance, and the present case "is, that here the Appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public."<sup>38</sup> He rejected charitable status as a justification for immunity because, since ship-owners don't care whether the service is provided by a charity or a for-profit company, it would be unfair to treat claims differently based on the status of the defendant.<sup>39</sup> The ship-owner "pays the rates for the

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because the trustees have violated the statute, therefore—what? not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct." *Heriot's Hosp.*, 8 Eng. Rep. at 1512. In a similar interpretation of the case, contrasting the defendant corporation's powers, the Colorado Supreme Court stated, "In the case of a corporation trustee such as Heriot's Hospital in the English case, *supra*, which seems to have had no powers except to administer the trust fund, it is right to say that no judgment can be rendered against it for negligence." *Saint Mary's Acad. of Sisters of Loretto v. Solomon*, 238 P. 22, 24 (Colo. 1925). *But see* *President of Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1941). There the court interprets the trust doctrine considerably more broadly:

Whatever its form, the doctrine of ultra vires, so strong in the nineteenth century, has shrunk constantly both in the law of private corporations and in that of trusts. This is true especially concerning responsibility for tort. From authority as a controlling premise, no corporation and no trust could possibly be guilty of tort. Corporate charters and trust indentures do not authorize corporate representatives or trustees to commit assaults, libel, slander, and negligent torts.

*Id.* at 823. The court then goes on to distinguish modern respondeat superior doctrine and its reliance on "course of employment" tests from the trust doctrine. I think this interpretation goes too far. There may very well have been a loosening of the law as well as an increased tendency towards characterizing a tortfeasor's behavior as within the course of employment but it is too strong to say that nineteenth century trust law would always prevent trust assets from being used to satisfy judgments against trustees for their negligent acts.

<sup>36</sup> *Mersey Docks Trs. v. Gibbs*, (1866) 11 Eng. Rep. 1501, 1505 (H.L.).

<sup>37</sup> *Id.* at 1508.

<sup>38</sup> *Id.* at 1516.

<sup>39</sup> According to Cranworth, "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence

dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid.”<sup>40</sup>

But I don’t think that is all that is going on. There is another reading of the cases that is consistent with trust law.<sup>41</sup> The two major cases regarding immunity, *Heriot’s Hospital* and *Mersey Docks*, may very well rest on conflicting interpretations of the facts in *Heriot’s Hospital* rather than about doctrinal conflict.<sup>42</sup> Perhaps the underlying conflict is about whether the Heriot’s trustees were negligent on behalf of the trust or to it. Perhaps the law lords in *Mersey Docks*, unlike Lord Chancellor Cottenham in *Heriot’s Hospital*, believed that the actions of the Heriot’s trustee were faulty actions in furtherance of the trust’s goals rather than personal torts of the trustee.

The *Mersey Docks* Lords seemed not to have noticed the difference, and may have misstated Cottenham’s views. In *Mersey Docks*, Lord Westbury attempts to explain Cottenham’s reasoning in concluding that Cottenham must have thought that if charitable trustees “by order of the corporation,” caused an actionable tort, “a Court of Equity would not permit an execution to issue, on any judgment that might be recovered, against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and *that the corporators as trustees have no interest therein.*”<sup>43</sup> He goes on to say that this is both mistaken and would lead to the terrible consequence that victims would not have remedies for acts done “in the name of the corporation,” such as sales of property conducted by trustees in the name of the corporation.<sup>44</sup>

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of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by which the docks are managed.” *Id.*

<sup>40</sup> *Id.* at 1508.

<sup>41</sup> However, *Mersey Docks* does overrule one English case that seems to be based centrally on the status of the defendant. *Holliday v. Vestry of the Parish of Saint Leonard*, (1861) 142 Eng. Rep. 769 (C.B.) (holding the parish vestry immune from tort liability).

<sup>42</sup> I am not the first to claim that *Mersey Docks* does not overrule *Heriot’s Hospital*. According to the Colorado Supreme Court, the latter case does not overrule the former:

*Mersey Docks* does not involve the question of a charitable trust, but of a public board, and, we think, does not overrule *Heriot’s Hospital v. Ross*, but questions the universality of the rule there laid down by Lord Cottenham, and declares the proposition that the liability of an administrator of a public trust depends on the terms of the act establishing it, and the inferences to be drawn therefrom.

*Saint Mary’s Acad. of Sisters of Loretto*, 238 P. 22, 23 (Colo. 1925).

<sup>43</sup> *Mersey Docks*, 11 Eng. Rep. at 1518 (emphasis added).

<sup>44</sup> According to the court,

It is by no means true that a Court of Equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate property for

Lord Westbury restricts the *Mersey Docks* holding to torts cases—“to the case of a remedy sought for a wrongful act”—because the law is clear that parties may not recover in contract where the contract is made by a corporation *ultra vires*.<sup>45</sup> Perhaps he did this because he believed that the Heriot’s Hospitals trustees were not engaging in acts outside their authority but, rather, were acting negligently in the use of their authority as trustees. Lord Westbury’s interpretation of the facts strikes me as reasonable, but his (and my) interpretation is beside the point since it was not Lord Cottenham’s interpretation of the facts.

There isn’t enough detail in these cases to make a complete argument. I simply want to suggest that the British cases may raise additional issues from those that Professor Epstein claims. The cases are not about the policy question of whether donors would prefer that their donations be exempt from satisfying tort judgments. Rather, the cases are about straightforward applications of trust law: they deal with whether (1) as was typical under trust law, all claims had to be brought against trustees in their individual capacity, (2) assets were subject to restricted uses by virtue of their status as trust assets impressed with delimited purposes, (3) these purposes included indemnification of trustees acting wrongfully, and (4) the wrongful act occurred in furtherance of the charitable goals.

### *B. Charitable Immunity in America*

Charitable immunity had a longer life in America than it did in England. It was adopted in almost every state starting in the 1870s and lasted for nearly a century. Even today there are remnants of charitable immunity in a few states.<sup>46</sup>

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valuable consideration to a person who pays that consideration, without notice of the trust, the interest of the beneficiaries suffers from that act; and it would be a very unreasonable and a very mischievous thing if, in the case of a corporation dealing with the public or with individuals, such corporation, should by any conduct of their in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting, for a remedy, against the body doing or authorizing those acts, and should be driven to seek a remedy against the individual corporators whose decision or order, *in the name of the corporation*, may have led to the mischief complained of. It is much more reasonable, in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint, and his title to relief against the individual corporators who have wrongfully used the name of the corporation.

*Id.* (emphasis added).

<sup>45</sup> *Id.* at 1518-19.

<sup>46</sup> For example, in Arkansas there is a common law rule against executing an order against financial assets of nonprofits as well as a statute that restricts liability for negligence to a charity’s insurance limits. ARK. CODE ANN. § 23-79-210 (2009). See Kathryn A. Sampson, *Nonprofit*

As with the British cases, Professor Epstein’s status-based donor “protection theory” explains only one of many arguments found in the American cases. There are several other theories to be found in the cases. Some of them echo the application of trust law I found in the British cases, law that cannot be reduced easily to unreasonable deference to charitable donors’ preferences regarding the use of their donations. But, in other cases, it is unclear whether the grounds for the decision come from deference to the defendant’s charitable status, an extension of trust doctrine to all charitable assets, or confusion about whether the negligent acts of the defendant charity’s agents were within the scope of employment. Moreover, to the extent that these cases suggest that the negligent acts at issue did not fall within the trustee’s administrative authority and, therefore, were not attributable to the institution, the decisions may simply mean that the defendant named by the plaintiff is the wrong defendant. They might not represent, as Professor Epstein suggests, an inappropriate externalization of harm caused by the charity.

In the most prominent early American case to reject charitable immunity, albeit one that was later rejected by American courts and the Rhode Island legislature, the court in *Glavin v. Rhode Island Hospital*<sup>47</sup> addressed some of the same trust law issues I highlighted in the British cases. Relying on *Mersey Docks*, for example, the *Glavin* court rejected the idea that charities cannot be vicariously liable for the actions of their servants or employees—they can be, “provided they have funds or are in receipt of an income out of which a judgment against them can be satisfied.”<sup>48</sup> Whether funds were available to satisfy judgments depended on whether the damages stemmed from negligence in carrying out the charity’s purpose or rather from a personal act of the trustee. The *Glavin* court explained, “We also understand that the doctrine is that the corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred *in carrying out the trusts and is incident to them.*”<sup>49</sup>

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*Risk; Nonprofit Insurance*, 2008 ARK. L. NOTES 83 (2008), for a discussion of immunity in Arkansas. Although Massachusetts no longer follows the doctrine in its purest form, the state limits recovery in tort to \$20,000, excluding interest and costs. MASS. GEN. LAWS ch. 231, § 85K (2000). New Hampshire has a similar law with higher caps (\$250,000 per person with a one million dollar cap overall). N.H. REV. STAT. ANN. § 508:17 (2010).

<sup>47</sup> 12 R.I. 411 (1879).

<sup>48</sup> *Id.* at 423; *see also id.* at 415 (argument for plaintiff) (“It may, however, be claimed upon the authority of *Holliday v. St. Leonard*, a case decided in 1861 by the Court of Common Pleas of England . . . that the defendant corporation is not liable for the negligence of its servants. These cases are in conflict with every principle of law, and entirely without previous authority.”).

<sup>49</sup> *Id.* at 428 (opinion of the court) (emphasis added). It acknowledged, however, that some funds would never be available to satisfy judgments: “We do not understand, however, that the corporate property is all equally applicable. . . . [I]t may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages.” *Id.* at 428-29. Shortly thereafter, however, the Rhode Island

Other American cases gestured towards trust law, but the cases often contradict each other or are incomplete and conclusory. Consider the case widely believed to introduce charitable immunity into American law, *McDonald v. Massachusetts General Hospital*.<sup>50</sup> Part of the case is consistent with my explanation of the British cases. The court makes clear that nonprofit assets must be used for nonprofit purposes, as if they are impressed by a trust: “The corporation has no capital stock . . . and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public. . . .”<sup>51</sup> But then the court refused to extend vicarious liability to the trustees, asserting that the trustees had fulfilled their direct duties to the plaintiff in selecting agents and that “even if injury has occurred by the negligence of [their] agents, [the trust] cannot be made responsible.”<sup>52</sup> Maybe the court failed to consider that the performance of medical care was arguably part of the trust purposes.<sup>53</sup>

Over the subsequent seventy years, courts struggled to explain charitable immunity in the cases where they prohibited the application of respondeat superior to charitable organizations and, occasionally, denied direct liability claims. Sometimes courts seemed to rely on trust principles in denying liability. At other times, courts announced broad rules immunizing charities based on their status alone. They often relied on general principles of tort law that had nothing to do with the status of the defendant at all. Too often the cases raised several justifications for immunity at once, making it hard to tell why the courts decided as they did.

In 1914, for example, after canvassing various justifications for immunity,<sup>54</sup> the South Carolina Supreme Court echoed some of the trust reasoning found in

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legislature re-introduced immunity. *See* R.I. Gen. Laws 1896 c. 177, § 38. *Hodge v. Osteopathic Gen. Hosp. of R.I.*, 265 A.2d 733, 739 (R.I. 1970) (“Following the decision in *Glavin v. Rhode Island Hospital*, *supra*, rejecting the doctrine of charitable immunity, the legislature in 1896 enacted what was s 7-1-22, granting hospitals immunity from liability for negligence in certain cases and under the conditions therein prescribed.”); *Fournier v. Miriam Hosp.*, 175 A.2d 298 (R.I. 1961).

<sup>50</sup> *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876); *see also, e.g.*, *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 291 (Me. 2009) (one of many sources identifying *McDonald* as the first American case adopting charitable immunity).

<sup>51</sup> *McDonald*, 120 Mass. at 435.

<sup>52</sup> *Id.* at 436.

<sup>53</sup> The court did, however, suggest that any implied contracts between the patient and the charity only assigned a duty to select competent agents. *Id.* at 436

<sup>54</sup> “Some courts hold that the funds of a charitable corporation cannot be appropriated to payment for an injury arising from the neglect or wrongdoing of the servants; others exempt charitable corporations from liability, on the ground of public policy; still others hold that one who accepts the benefits of a charity assumes the risk of negligence.” *Lindler v. Columbia Hosp.*, 81 S.E. 512, 512-13 (S.C. 1914).

the British cases. It first offered a policy justification for denying liability related to preserving the charitable purpose—“if this liability were admitted, the trust fund might be wholly destroyed, and diverted from the purpose for which it was given, thus thwarting the donor’s intent”—but then articulated an argument that is more consistent with trust law: “since the trustees cannot divert funds by their direct act, from the purpose for which they were donated, such funds cannot be indirectly diverted, by the tortious or negligent acts of the [managers] of the funds or their agents or employes.”<sup>55</sup>

Often and with little explanation, however, a typical decision would simply report that charitable assets need to be protected for charitable purposes. Charitable purposes seemed not to include negligence caused by implementation of the charitable purpose. For example, in a 1912 case rejecting vicarious liability for a charitable defendant, the Nebraska Supreme court declared that “trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants.”<sup>56</sup>

Untethered public policy claims run through the cases. Sometimes these efforts at protecting charitable assets were aimed at protecting the public, rather than the donor’s interest in protecting the public, such as where “public policy encourages the support and maintenance of charitable institutions and protects their funds from the maw of litigation.”<sup>57</sup> In a typical decision, the Ohio Superior Court in 1900 ruled:

It is enough that a charitable corporation like the defendant—whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty—is not liable on grounds of public policy for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant alone is responsible for his own wrong.<sup>58</sup>

It offered two possible explanations for its ruling—that public policy doesn’t justify the extension of respondeat superior to masters who do not obtain private benefit from their servants (a question about the standard for respondeat superior, fully internal to tort law and having nothing to do with charitable status) or because public policy requires encouragement of charitable enterprise (a brute

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<sup>55</sup> *Lindler*, 81 S.E. at 513 (misquoting 5 AM. & ENG. ENCY. OF LAW (2d ed.) 923, replacing the word “managers” with “strangers”); *see also* *Parks v. Nw. Univ.*, 75 N.E. 991, 993 (Ill. 1905) (quoting the same text).

<sup>56</sup> *Duncan v. Neb. Sanitarium Benevolent Ass’n*, 137 N.W. 1120, 1120 (Neb. 1912).

<sup>57</sup> *Id.*

<sup>58</sup> *Conner v. Sisters of the Poor of Saint Francis*, 7 Ohio N.P. 514, 515 (Ohio Super. 1900).

policy justification, based on charitable status, but having nothing to do with donor preferences).<sup>59</sup>

I don't wish to offer any single explanation for this sample of cases, much less claim that the trust concepts I found in the British cases carried over cleanly into American law. In fact, the American courts often did puzzling things with trust law. For example, American courts expanded the trust doctrine to treat the *general* assets of charities as the British courts treated the restricted assets of trusts, often without explanation. Because of this, Professor Lester Feezer wondered whether trust theory offered a good justification for charitable immunity in his 1928 article on immunity: "[I]f the charity has in hand income derived from other sources, as, for example, from fees collected from paying patients, then this theory should not prevent recovery even by a plaintiff who is a beneficiary of the charity, so long as his judgment is satisfied from such funds."<sup>60</sup> But it often did.

Perhaps courts assumed that all charitable assets, not only trust assets, are impressed with a constructive trust.<sup>61</sup> (Whether such constructive trusts exist occupies scholars and courts today.)<sup>62</sup> Still, if the general assets were impressed with a charitable trust, they should not have been available only to satisfy judgments for strangers to the defendant.<sup>63</sup> Yet they often were; "[t]he great weight of authority is that the doctrine is not applicable in the case of liability to a stranger."<sup>64</sup> Nor should they have been available to satisfy direct claims against

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<sup>59</sup> *Id.* at 515.

<sup>60</sup> Lester W. Feezer, *The Tort Liability of Charities*, 77 U. PA. L. REV. 191, 199 (1928).

<sup>61</sup> *See, e.g.*, *Cook v. John N. Norton Mem'l Infirmary*, 202 S.W. 874, 875 (Ky. App. 1918) (listing "that the assets or funds of the institution are impressed with a trust for charitable purposes" as one reason for immunity).

<sup>62</sup> The view that all charitable assets are impressed with a constructive charitable trust is controversial. It remains an open question in contemporary charities law. For example, the recent Reporter's Comments on the Working Draft of the Uniform Oversight of Charitable Assets Act states, "The term 'charitable trust' can have a meaning not limited to an entity created for charitable purposes by a trust declaration or agreement. It is sometimes said by courts and others that property held by anyone for charitable purposes is 'impressed with a charitable trust' or is 'held in charitable trust.'" UNIFORM (OR MODEL) OVERSIGHT OF CHARITABLE ASSETS ACT (Reporter's Comments on Working Draft, at 1 (2009)), *available at* [http://www.law.upenn.edu/bll/archives/ulc/ocaa/2009oct6\\_memo.pdf](http://www.law.upenn.edu/bll/archives/ulc/ocaa/2009oct6_memo.pdf). *But see* Catherine Pierce Wells, *Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of their Clergy*, 44 B.C. L. REV. 1201, 1215 (2003) ("If taken literally, the notion that all charitable funds are subject to a trust cannot bear close scrutiny.").

<sup>63</sup> *President of Georgetown Coll. v. Hughes*, 130 F.2d 810, 825 (D.C. Cir. 1941) ("If immunity is founded on some form of ultra vires premise, there is no room for treating strangers and beneficiaries differently.").

<sup>64</sup> *Love v. Nashville Agr. & Normal Inst.*, 243 S.W. 304, 310 (Tenn. 1922) ("Nearly all of the cases in which the trust fund doctrine has been applied in other jurisdictions, and all of them in this state, were cases in which the damages resulted to beneficiaries of the fund, some of the cases

charities for negligent selection of agents.<sup>65</sup> In addition, American courts commonly neglected to distinguish between negligent acts of trustees and agents that were outside the scope of the charitable purposes and acts in furtherance of the purpose done negligently. Perhaps some judges believed that a negligent act could never be in furtherance of a charitable purpose.<sup>66</sup>

So, it may be that in many American cases the decisions rested on the corporate status of the defendant (if not, as Professor Epstein suggests, the donors' preferences), even when the putative reasoning sounded in trust. In a case against Northwestern University, for example, the court concluded that the private corporate assets could not be reached:

An institution of this character, doing charitable work of great benefit to the public without profit . . . is not to be hampered in the acquisition of property and funds from those wishing to contribute . . . by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed *to carry the beneficent purpose into execution.*<sup>67</sup>

But Professor Epstein's story isn't the only explanation for the cases. Deference to donors' preferences alone cannot explain them. As suggested by *Glavin*, traditional trust doctrines explain at least some of reasoning behind charitable immunity. Other cases suggest that confusion about whether the negligent acts of employees were within the scope of employment, public policy interests in protecting charitable purposes, and tort doctrine regarding respondeat superior were also in the mix.

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placing the decision upon the ground of waiver, others of public policy, others upon the performance of public functions, others that the doctrine of respondeat superior did not apply. The great weight of authority is that the doctrine is not applicable in the case of liability to a stranger. A recent case applying the rule to strangers without reference to whether the damages resulted from the negligence of some servant or in the selection of servants is the case of *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 126 N. E. 392, 14 A. L. R. 563. Also *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E. 649.”).

<sup>65</sup> *Hordern v. Salvation Army*, 92 N.E. 626, 627 (N.Y. 1910) (“Certainly liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants, though of course not so frequently.”).

<sup>66</sup> However, as Professor Feezer notes, “The weakness of the trust-fund theory has become apparent by reason of the refusal of the courts to apply it, in the majority of jurisdictions, against persons other than the beneficiaries of the charity.” Feezer, *supra* note 60, at 199.

<sup>67</sup> *Parks v. Nw. Univ.*, 75 N.E. 991, 993 (Ill. 1905) (emphasis added).

Viewed as trust cases, these cases should not be interpreted as a common law failure to protect the freedom of parties to contract. Rather, they are about the state interest in allowing private actors to establish private organizations to advance the public interest. They are also about the freedom of settlors to create trusts with limited purposes, which may exclude indemnifying wrongdoing by trustees to the trust.

### III. PROFESSOR EPSTEIN'S CONTRACT THEORY OF IMMUNITY AND A STATUS-BASED RETORT

Unlike the cases I discussed above, there is a set of charitable immunity cases that I think rest firmly on the status of the defendant. These cases offer the most popular justification for charitable immunity in the early twentieth century American cases: waiver.<sup>68</sup> The idea was that the patient-beneficiary, by accepting free or subsidized medical care, impliedly waived his right to legal recourse for negligently inflicted harm.<sup>69</sup> The waiver theory appears even today; “[i]t is well settled in Virginia that charitable organizations are immune from liability arising from tort claims asserted by persons who accept the organizations’ charitable benefits.”<sup>70</sup> The doctrine boils down to the admonition that charitable beneficiaries should not “look a gift horse in the mouth.”<sup>71</sup>

It is at the heart of the cases offering the waiver justification for charitable immunity where Professor Epstein finds an amenable historical basis for his views on charitable immunity and, ultimately, the roots of contemporary malpractice doctrine. Because the beneficiary’s implied waiver of his tort right is supposedly best understood as a contractual agreement by the patient not to sue the hospital, the implied waiver cases mark “the critical conversion of charitable immunity from a defense based on status to one based on contract.”<sup>72</sup> That’s why, at this point, Professor Epstein thinks that the law was finally on to something.

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<sup>68</sup> In 1928, Professor Feezer identified the waiver theory as “the favorite one in what is probably the majority of the jurisdictions denying liability to beneficiaries.” Feezer, *supra* note 60, at 202. A 1925 comment in the Yale Law Journal identifies the theory as one of the three major justifications for charitable immunity and cites a long list of cases that employ it. Comment, *Tort Responsibility of Charitable Corporations*, 34 YALE L. J. 316, 318 & n. 6 (1925).

<sup>69</sup> *Powers v. Mass. Homoeopathic Hosp.*, 101 F. 896, 898 (C.C.D. Mass. 1899), *aff’d*, 109 F. 294 (1st Cir. 1901).

<sup>70</sup> Barbara Ann Williams, *Charitable Immunity: What Price Hath Charity?*, 28 U. RICH. L. REV. 953, 953 (1994). However, courts have narrowed the definition of who counts as a beneficiary of charity and which institutions count as charities. *Id.* at 955.

<sup>71</sup> *Powers*, 101 F. at 898 (“This brings me back to the proposition that no person who accepts the bounty of a charitable corporation, or accepts the bounty of any charity, can maintain a suit on account of the method of the administration of the bounty which is accepted. This is putting into the law the homely, but expressive, phrase: ‘You must not look a gift horse in the mouth.’”).

<sup>72</sup> EPSTEIN, *supra* note 3, at 370-71.

But what does the beneficiary-patient's implied waiver have to do with charitable immunity? It takes a few steps to make the case. After reassuring the reader that implied waivers of this sort are both workable and fair—we need not worry about the competence of patient-beneficiaries who waive their legal rights because they will have plenty of information to make informed decisions as will the guardians of children or the legally incompetent<sup>73</sup>—Professor Epstein explains that a beneficiary's waiver turns charitable immunity from a status-based defense into a contract-based defense. Although he is not explicit about how waivers execute the transformation, it seems that he interprets the waiver as an implied contract that creates immunity. Moreover, according to Professor Epstein, not only do these cases explain how charitable immunity is really a contract doctrine, but these cases are more sensible than the trust cases. The contract theory offers the better account of the charitable immunity doctrine because it “better accounts for the distinction between patient beneficiaries and strangers . . . which in principle could apply to both paying and nonpaying patients.”<sup>74</sup> The idea here is that because patients are not strangers to the defendant-hospital, their relationship with the hospital is contractual. The implied waiver theory of charitable immunity reflects the nature of the relationship and, therefore, is more defensible than other theories of immunity.

More specifically, and more to Professor Epstein's point, “[t]he law never *required* the charitable institution to claim its institutional immunity, but allowed it (if it so chose) to waive that immunity, even selectively, for charitable cases but not for paying patients.”<sup>75</sup> It is this characteristic of immunity, the fact that “[n]o longer did charitable immunity function as an iron barrier against individual recovery, but rather as a *default* rule that the benefited institution could waive,” that matters most for Professor Epstein's argument.<sup>76</sup> He concludes that “so long as immunity is waivable in whole or in part, it is at bottom a doctrine of contract, not status.”<sup>77</sup>

There are at least two responses to Professor Epstein's claims. First, the relationship that gives rise to a patient's waiver of his tort rights is not contractual.

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<sup>73</sup> In addition, Professor Epstein claims that, in practice, patients rely on informed employers to faithfully negotiate their interests with informed insurers who, in turn, presumably faithfully represent the preferences of the doctors. *Id.* at 374. For rejection of the implied waiver justification by a court, see *President of Georgetown Coll. v. Hughes*, 130 F.2d 810, 826 (D.C. Cir. 1941) (“The notion that there is any such agreement or waiver is entirely fictional. . . . The idea of waiver, therefore, as implied from the reception of benefit amounts merely to imposing immunity as a rule of law in the guise of assumed contract or renunciation of right, when all other reasons are found insufficient to support the distinction [between patients and strangers].”).

<sup>74</sup> EPSTEIN, *supra* note 3, at 370.

<sup>75</sup> *Id.* at 371.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Second, it does not follow that charitable immunity is a contract doctrine from either the fact that a charity might not claim its immunity or that similar outcomes might have, in theory, been constructed out of a system of contracts.

*A. Implied Waiver as a Torts Concept*

Let me turn to my first response. The fact that some courts found implied waivers based on patients' free or subsidized treatment at charitable hospitals does not mean that those waivers were contractual, either literally or otherwise. It is hard to find the basic requirements of a contractual exchange—"a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"<sup>78</sup>—in the waiver. Surely the implied waiver isn't technically a contract. Where is the consideration? It might be tempting to find consideration in the provision of free or subsidized medical treatment, and this could explain why some courts permit liability for paying patients and deny liability for patients who receive free care.<sup>79</sup> But this description does not capture the relationship between indigent patients and hospitals. Hospitals provide free care to patients because patients cannot afford the care, not in exchange for waivers not to sue.<sup>80</sup> Moreover, although some courts distinguished between paying and nonpaying patients,<sup>81</sup> there was no sliding recovery scale for patients whose care was

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<sup>78</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981). Thanks to Bruce Frier for discussions regarding the requirements of contracting and their application in this context.

<sup>79</sup> This explanation is also consistent with the logic of some cases which regard paying patients as charity cases because "when they enter a hospital with a charitable foundation, [they] are really charity patients, and the weekly sums they are required to pay are not payments at all, but contributions to the charity funds." *Tucker v. Mobile Infirmary Ass'n*, 68 So. 4, 12 (Ala. 1915) (quoting Justice Fraser's skeptical report of this argument in *Lindler v. Columbia Hosp.*, 81 S.E. 512, 516 (S.C. 1914) (Fraser, J., dissenting)).

<sup>80</sup> Some courts were resistant to characterizing the patient-physician relationship as "one altogether between commercially engaged and profit earning individuals. It reduces the relation of the parties to a cold proposition of business and to the level of demanding of each other 'an eye for an eye and a tooth for a tooth,' and considers not the charitable and public service features of the institution." *Cook v. John N. Norton Mem'l Infirmary*, 202 S.W. 874, 877 (Ky. App. 1918). The patient-physician relationship has not generally been regarded as contractual. See *infra* Section III.B for a discussion of the relationship between contract principles in medical malpractice law.

<sup>81</sup> In 1918, the Court of Appeals of Kentucky only found two cases that distinguished between paying and nonpaying patients, denying charitable immunity in the cases involving the latter type of plaintiff. *Cook*, 202 S.W. 874, 876. In one of those cases, after expressing skepticism regarding the implied waiver theory for charity patients, the court then stated, "We are unable to conceive upon what principle the theory of 'implied assent' could be applied to one who pays full price and without regard to the nature of the institution from which she receives her service. There can be no valid reason why such a patient, dealing as she does at arm's length with the hospital, should not stand in as favorable position as the stranger, and yet many of the cases grant relief to the latter and deny it to the former." *Tucker*, 68 So. at 11.

partially subsidized.<sup>82</sup> Finally, many courts refused to distinguish among paying, partially subsidized, and indigent patients at all.<sup>83</sup>

But even if Professor Epstein isn't suggesting that implied waivers are literally binding contracts, but rather exhibit the indicia of relationships governed by contract law rather than tort law (such as the existence of an agreement), the description doesn't seem to hold. It is hard to find anything like an agreement in these waivers. It seems strained to say that charitable hospitals, in offering charitable care, are really bargaining for promises by the patients not to sue.

Although courts will occasionally construct contracts for the parties, they do so based on widely shared social premises, not on a presumption about one party's intent. A hospital cannot argue that since it would not have given the patient the service unless he waived his right to sue, the patient waives such rights by accepting the service. The patient must be reasonably supposed to accept this basis. In hospital situations, it's possible that many patients might have been willing to accept express waivers in exchange for treatment. (Although the exchange might not have been a good one for patients given the fact that, as 19<sup>th</sup> century donors were reminded in fundraising campaigns, patients not only benefited from treatment but also offered physicians an opportunity to study disease and train on them.)<sup>84</sup> Other than the hypothetical exchange of treatment for a promise not to sue, consent to treatment hardly seems to be a valid, tacit construction of intent.<sup>85</sup>

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<sup>82</sup> In *Tucker*, the court noted that sometimes patients who paid a small fee were treated like nonpaying patients and were denied liability. 68 So. at 10-11.

<sup>83</sup> *E.g.*, *Schau v. Morgan*, 6 N.W.2d 212, 216 (Wis. 1942) ("The fact that the plaintiff was a paid patient at defendant's hospital does not alter the rule of charitable immunity."); *see also Morrison v. Henke*, 160 N.W. 173, 175 (Wis. 1916) ("Since the hospital derives no profit from its work, and since it is founded for the sole purpose of conserving the health and life of all who may need its aid, and since it ministers to those who cannot pay as well as those who can, thus acting as a Good Samaritan, justice and sound public policy alike dictate that it should be exempt from the liability attaching to masters whose only aim is to engage in enterprises of profit or of self-interest. The patient who accepts the services of such an institution . . . must be content to look for redress to such [a negligent] employe' alone. . . . All the cases holding charitable hospitals immune that have spoken upon the subject agree that the exemption from liability applies to pay as well as to free patients.").

<sup>84</sup> Morris J. Vogel, *Patrons, Practitioners, and Patients: The Voluntary Hospital in Mid-Victorian Boston*, in *SICKNESS & HEALTH IN AMERICA* 3d, 323, 324 (Judith Walzer Leavitt & Ronald L. Numbers eds., 1997).

<sup>85</sup> It is harder to know how an analogous situation between individual doctors and patients would play out. It is easier to imagine the physician-patient relationship generating such an implied contract. Some doctors refuse to carry liability insurance, called "going bare," and prominently advertise their uninsured status on their office walls. If a patient were aware of the physician's uninsured status, a court might characterize the patient's consent to treatment as a waiver of rights. But it might also characterize the consent as an implied contract. Of course, this

Still, there is reason for finding a contractual basis for charitable immunity. As Professor Epstein suggests, the strongest evidence for this view lies in those cases that distinguish between patients and strangers. In these cases, courts sometimes characterized the patient's waiver as an agreement or exchange. For example, in *Basabo v. Salvation Army*, a 1912 Rhode Island case against the Salvation Army by a plaintiff who was not a beneficiary of the charity, the court distinguishes between patients and strangers. It rejects blanket immunity for the Salvation Army based on its charitable trust status, concluding:

It may justly be said that the benefit of the trust is extended to [the beneficiaries] and accepted by them upon the implied condition that they shall recognize [the founder's will regarding the trust purposes]. By becoming beneficiaries, they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder.<sup>86</sup>

Furthermore, the court stated that the immunity cases based on implied waiver "rest upon the principle, correctly stated in *Powers v. Homeopathic Hospital* . . . that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts."<sup>87</sup> This language suggests that, at least in some cases, an implied contract may indeed lie beneath immunity.<sup>88</sup>

There is, however, stronger evidence that these immunity cases are not founded in contract but, instead, center on the status of the defendant. Only organizations with the legal status of a charity could raise the charitable immunity defense. Whether that immunity applies in cases against indigent patients, paying patients, employees, or strangers is merely a question about the extent of the immunity. It also may be that the defendant is a charity in relation to patients, but not in relation to other victims.

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implied contract would have nothing to do with charitable immunity, since there is no such thing as a nonprofit doctor.

<sup>86</sup> *Basabo v. Salvation Army, Inc.*, 85 A. 120, 127 (R.I. 1912).

<sup>87</sup> *Id.* at 128 (quoting *Bruce v. Cent. Methodist Episcopal Church*, 110 N.W 951, 954 (Mich. 1907)).

<sup>88</sup> In another plaintiff-stranger case where the court rejects a charity's immunity claim, the court reported that the *Powers* court correctly characterized immunity as an implied contract principle. *Hosp. of Saint Vincent of Paul in City of Norfolk v. Thompson*, 81 S.E. 13, 18 (Va. 1914) (finding no immunity for invitee).

Charities alone held the legal entitlement, waivable or not, because they were charities. There is no evidence that turn of the century, proprietary hospitals<sup>89</sup> that provided subsidized care for indigent patients<sup>90</sup> benefited from charitable immunity. This is presumably one explanation for why the hundreds of immunity cases during the rise of immunity in America almost always begin with long descriptions of the legal status of the charitable defendant.<sup>91</sup> So it would seem that Professor Epstein's contract argument focuses on the wrong relationship. To understand immunity one should not focus on the implied contract between the patient and the hospital, assuming it is a contract at all. To understand immunity, one should focus on the relationship between the charity and the state.<sup>92</sup> This is what makes a charity a charity—its legal status. Only then should one consider the extent of the rights that follow, including under which circumstances the defendant can use the defense.

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<sup>89</sup> As the number of middle and upper class patients treated in hospitals rather than in their homes increased during the very early 20<sup>th</sup> century, the number of small proprietary hospitals “run by nonprofessionals, mainly businesswomen, to profit on payments for room and board, and those owned by physicians, either as individuals or in groups” also grew. MORRIS J. VOGEL, *THE INVENTION OF THE MODERN HOSPITAL: BOSTON 1870-1930*, 101 (1980). Historian Rosemary Stevens estimates that “There may have been as many as 1,500 to 2,000 proprietary hospitals in 1910 out of a total of over 4,000 hospitals of all kinds.” Rosemary Stevens, *IN SICKNESS AND IN WEALTH: AMERICAN HOSPITALS IN THE TWENTIETH CENTURY 20* (1999).

<sup>90</sup> Although historians do not discuss charitable activity at for-profits explicitly, Morris notes in passing that six of the forty-three private hospitals that existed in Boston, Brookline, and Cambridge in 1911 “mixed charity and private patients.” VOGEL, *supra* note 89, at 101. Modern nonprofit and for-profit hospitals, which are more comparable today than they were in the early 20<sup>th</sup> century, both provide free care for indigent patients; only nonprofit organizations benefit from charitable immunity where it still exists. I was unable to find any reported charitable immunity case involving a proprietary or modern for-profit hospital.

<sup>91</sup> Courts repeatedly reject claims that defendants are not protected by immunity since they charge some beneficiaries and, therefore, are not charitable organizations. These discussions appear in cases using various justifications for immunity, including implied waiver justifications, as well as cases finding no immunity. *See, e.g.,* *Cook v. John N. Norton Mem'l Infirmary*, 202 S.W. 874, 875 (Ky. App. 1918) (concluding that charities are immune from tort liability despite charging fees to some patients and despite duties arising out of express or implied contracts); *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432, 435 (1876); *Lindler v. Columbia Hosp.*, 81 S.E. 512, 513 (S.C. 1914); *Hosp. of Saint Vincent of Paul in City of Norfolk v. Thompson*, 81 S.E. 13, 14 (Va. 1914) (finding no immunity for invitee).

<sup>92</sup> One could reinterpret all of law as based on implied contracts that fully informed parties would have made if they had the opportunity. But this would prove too much. And, a seminal nonprofit corporations case suggests the legal designation of an organization as a charity is based on an implied contract between the state and the organization. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (finding the New Hampshire legislature could not authorize the Governor to appoint trustees without violating the contracts clause). But, again, this fact just goes to the powers held by the nonprofit and not to the basis of charitable immunity.

Professor Epstein's final claim is that because defendant charities could choose to forgo immunity, charitable immunity "is at bottom a doctrine of contract, not status."<sup>93</sup> This is not convincing, for reasons I explain in detail in Section III.B below. But for the time being, I'll note that the fact that immunity is waivable does not make it a contract. We don't say that sovereign immunity has its roots in contract because the King might grant all or some his subjects the right to allege his wrongdoing. We say the King has sovereign immunity because he is the King.

Regardless, even in cases that best support the contract view, there is also strong evidence that the status of the defendant rather than any agreement—implied or otherwise—guides the result. The *Basabo* court itself quotes extensive passages from *Powers* suggesting that what matters about any agreement between a beneficiary and a charity is the charitable nature of the defendant. It analogizes the justification for Good Samaritan immunity, immunity that bars strangers from suing, to the immunity of nonprofit hospitals:

[I]t would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men.<sup>94</sup>

Moreover, the rules that allow suits by nonpatients apply equally to employees, who are presumably not strangers to the charity at all.<sup>95</sup> The distinction, therefore, seems to be about charities providing services in accordance with their missions rather than the closeness of the relationship between the plaintiff and the defendant.

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<sup>93</sup> EPSTEIN, *supra* note 3, at 371.

<sup>94</sup> *Basabo*, 85 A. at 122 (quoting *Powers v. Mass. Homeopathic Hosp.*, 109 F. 294, 303 (1st Cir. 1901)).

<sup>95</sup> The *Basabo* court relies on a case where a hospital superintendent fails to inform a nurse that her patient was suffering from diphtheria, and the defendant was denied charitable immunity. The court notes that since an employee of an individual would have had a claim, an employee of a corporation should have the same claim. It notes that the duty stems from "the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by, men in general in the prosecution of their legitimate business." *Id.* at 126 (quoting *Hewett v. Women's Hosp. Aid Ass'n*, 64 A. 190, 193 (N.H. 1906)).

Even if a patient impliedly waives her right to sue a hospital, this does not mean her relationship with the defendant is based on a quasi-contractual implied agreement. Although waiver is a concept found in the law of contracts, it is not only a contracts concept. It exists as a fully robust idea in tort law. A victim can assume a risk, unilaterally waiving her right to sue, without any implied agreement with the defendant. The actions of the plaintiff can be interpreted as releasing the defendant from a tort duty, again without any implied agreement with the defendant. And the fact that a defendant might raise an implied assumption of the risk defense does not turn the relationship between a plaintiff and a defendant into a contractual relationship. Implied assumption of the risk involves the unilateral forfeiture of a right, not a contract to forgo a right.

This may be why the early immunity cases characterize implied waivers as assumption of the risk rather than contractual agreements. For example, in 1914, the Supreme Court of South Carolina catalogued the various justifications for refusing to extend vicarious liability to charitable entities, and reported that some courts “hold that one who accepts the benefits of a charity assumes the risk of negligence.”<sup>96</sup> Similarly, in 1910, a New York court explained immunity as follows: “The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risk of malpractice, if their charitable agents have been carefully selected.”<sup>97</sup>

Courts even sometimes derived the patient’s waiver from the patient’s status according to premises liability designations. In an 1899 suit for damages to compensate for injury caused by a negligent nurse, for example, Judge Putnam said, “In my view the true rule is that there is no liability on the part of charitable corporations, arising out of the administration of the charity, to those who accept their bounty.”<sup>98</sup> This is *not* because the hospital contracts with the patient to pay the patient to renounce his right to sue, but rather because “[t]he person who enters is a mere licensee, like a guest who enters one’s house, and who must take the service as he finds it.”<sup>99</sup> The status of the patient as a licensee under tort law—and not any implied contract between the hospital and its patients—drives the result.

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<sup>96</sup> Lindler v. Columbia Hosp., 81 S.E. 512, 512 (S.C. 1914).

<sup>97</sup> Hordern v. Salvation Army, 92 N.E. 626, 628 (N.Y. 1910) (quoting Powers v. Mass. Homeopathic Hosp., 109 F. at 304).

<sup>98</sup> Powers v. Mass. Homeopathic Hosp., 101 F. 896, 897-98 (C.C.D. Mass. 1899), *aff’d*, 109 F. 294 (1st Cir. 1901).

<sup>99</sup> *Id.* at 898.

*B. The Defendant Charity's Right to Forgo Immunity (and a Digression Regarding Malpractice Law as Tort Law)*

What makes a right contractual? According to Professor Epstein, a charity's ability to forgo immunity makes immunity contractual. This would have been easy for us to see, but for the foolhardiness of the California Supreme Court. Charities would not have needed presumptive immunity at all had the law not made the mistake it did in *Tunkl v. Regents of the University of California*,<sup>100</sup> when the court invalidated a properly executed covenant not to sue between a patient and a hospital on public policy grounds. Without *Tunkl*, "[t]he law could easily dispense with presumptive immunity so long as it allowed charitable institutions to re-create that immunity by contract."<sup>101</sup>

But now we are talking about imaginary worlds. There are brute facts to contend with here. Common law judges, mistaken or not, granted immunity to one type of organization and not another. It's unlikely they believed that private contracts could have just as easily substituted for the entitlement. If they had not believed that the entitlement was valuable, why would they have created and defended it? Why would parties sue to clarify the rights? Rather than to construct an edifice of theoretical contracts, a more satisfying interpretation of these cases is that charitable status affords charities certain rights in their relationships with beneficiaries.

The potential for private parties to recreate the content of a waivable right with a contract does not necessarily transform that right into a contract right. Consider other waivable tort rights, such as the right in tort to bodily integrity. If someone punches you in the nose, you may claim that the right has been violated and the tortfeasor must compensate you for harm he has done to your face (in a battery action) and, sometimes, your feelings (in an emotional distress action). And if for some reason you decide to consent to being punched in the nose, the common law permits you to waive some of your right to bodily integrity. Not all such rights are waivable. You cannot consent to your own murder, for example.

In theory, we might have a regime without a right to bodily integrity. Instead we might leave it to private parties to contract for such rights and obligations. Imagine contracting with others *not* to hit you in the nose. It's possible. But it

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<sup>100</sup> *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963).

<sup>101</sup> EPSTEIN, *supra* note 3, at 371. Professor Epstein also claims that "[t]he ability to set terms goes hand in hand with the ability to refuse to extend charitable care—a clear part of the original immunity design that has been effectively curtailed today." *Id.* But this is not so. A charity may be able to refuse care or agree to provide certain types of care, but it cannot set all the terms of its relationship with patients. It cannot violate the rights of the patients it agrees to treat.

would not put the parties in the same positions as if the legal regime assigned the rights.<sup>102</sup>

Readers who favor contract over tort solutions might think that battery does not provide an apt analogy. One might, for example, think that a cause of action in battery protects an extant right—the right to be free from intentional, harmful or offensive contacts<sup>103</sup>—whereas negligence does not. But this view misstates negligence law. Like battery claims, negligence claims protect extant rights, such as the right to be free from negligently caused injury to one’s body or property. The difference between negligence and battery is not that the latter protects extant rights while the former does not. The only relevant difference is that it happens to be difficult to imagine how one might waive the right to bodily integrity protected by a negligence claim before the negligent act is committed.

What about the validity of the analogy between battery cases and the subset of negligence cases involving medical malpractice?<sup>104</sup> As Professor Gary Schwartz has noted, a malpractice claim also involves “a traditional negative right to be free of doctor-initiated harm.”<sup>105</sup> Still, one might doubt the analogy because unlike cases involving canonical accident claims, like car accidents, negligence claims by patients against doctors require that there be some kind of existing agreement between the patient and the doctor. In some sense contract undergirds tort rights in this subset of cases. Therefore, the reasoning would go, while it might be true that the legal assignment of the right to be free from battery is not the equivalent of contracts between parties that they won’t hit each other, the legal assignment of rights in malpractice cases could easily be reproduced in contract and could be reproduced without changing the value of those rights. Contracting parties would be in the same positions as if the legal regime assigned the rights.

This view, like the view that battery claims protect extant rights whereas negligence claims do not, would also be mistaken for several reasons. These same reasons also highlight the limited role contract law has played in the development of malpractice law. Because Professor Epstein sets out to demonstrate both that malpractice law had its roots in contract law and that medical malpractice should be governed by contract, I’ll provide some detail.

First, medical law has not treated even that aspect of the physician-patient relationship that would most naturally be understood as contractual—the payment of a fee for medical services—as contractual. Under “English common law, the

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<sup>102</sup> Atiyah has suggested that the dominance of tort law over contracting in malpractice can be explained by an egalitarian impulse, “the notion that a person is, as a matter of natural equity, entitled to due care from his fellow citizens without having to pay for it does not seem to be confined to egalitarian-minded Britain.” Atiyah, *supra* note 7, at 293.

<sup>103</sup> RESTATEMENT (SECOND) OF TORTS § 13 (1965).

<sup>104</sup> I thank Ben Zipursky for raising this question.

<sup>105</sup> Schwartz, *supra* note 7, at 886.

services of lawyers and physicians were considered gratuitous,”<sup>106</sup> and fees were characterized as honorariums for service.<sup>107</sup> This meant that doctors could not sue for fees because there was no promise of payment, implied or otherwise.

However, the practice of treating payments as honorariums was not adopted by American courts. That physicians did, indeed, successfully sue their patients for fees has been characterized as part of a temporary “move from status to contract in malpractice law . . . [which] was subtle, complex, slow, and ultimately incomplete.”<sup>108</sup> Despite the shift from honorariums to contracts for fees, “[d]octors generally resisted the notion of contractual relationships with patients because it conflicted with the image of the physician as a public servant with a distinct social status.”<sup>109</sup> This reluctance to portray medicine as a mere commodity can be seen in *Powers v. Massachusetts Homeopathic Hospital*, where Judge Putnam insisted on describing fees as donations rather than payments for service:

I need only refer again to the fact that the reception—the frequent reception—of money from patients does not change the nature of the institution; and the following out of that proposition necessarily leads to the conclusion that the reception of money from any particular patient does not change the nature of the service rendered that patient, so far as anything which we have here is concerned. What is received is . . . as a proper contribution to a charity on the part of the person who makes the payment and obtains the benefit of the charity. It is not received as compensation. It is not compensation in the sense of the law.<sup>110</sup>

Second, one should not reject the battery analogy I raised above as inapt simply because some aspects of a medical malpractice claim rely on establishing a quasi-contractual relationship between the physician and patient. It is true that a successful medical malpractice case depends on establishing the existence of something like a contract between a patient and a physician. Because patients

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<sup>106</sup> KENNETH ALLEN DE VILLE, *MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA: ORIGINS AND LEGACY* 161 (1990).

<sup>107</sup> Hubert Winston Smith, *Legal Responsibility for Medical Malpractice: V. Further Information about Duty and Dereliction*, 116 *JAMA* 2755, 2755 (1941).

<sup>108</sup> DE VILLE, *supra* note 106, at 163.

<sup>109</sup> *Id.* at 181.

<sup>110</sup> *Powers v. Mass. Homoeopathic Hosp.*, 101 F. 896, 899 (C.C.D. Mass. 1899), *aff'd*, 109 F. 294 (1st Cir. 1901); *see also* *Gooch v. Ass'n for Relief of Aged Indigent Females*, 109 Mass. 558 (1872) (noting that, just as some charitable hospitals and schools require some amount of payment, a home for indigent women can require a small payment that falls far short of the value of services rendered and still be considered a charity).

have never had the right to be treated by any particular doctor, plaintiffs must demonstrate that a patient-physician relationship existed to establish the duty element of the prima facie case. And it is reasonable to cast the establishment of that relationship as contractual. Any such agreement, however, is irrelevant to the battery analogy I raised earlier. Although the quasi-contractual agreement to treat a patient may determine the scope of treatment owed to the patient, it does not determine the content of patient's rights to be free from negligently-caused harm for any treatment provided.

This distinction between the quasi-contractual basis for the establishing the physician-patient relationship and the tort-based right to be free from harm caused by malpractice has been understood for some time. In 1941, Hubert Winston Smith published a comprehensive review of malpractice law in the *Journal of the American Medical Association* in which he surveys the history of malpractice, the laws of other states, the development of the common law, and an astonishing variety of related subjects.<sup>111</sup> These articles make clear that when a contract is at issue in a malpractice case, it is only relevant in determining whether a patient-physician relationship existed and, if so, the scope of the relationship in terms of the types of treatments promised.<sup>112</sup> In a part of the series in which he reviews the similarities in malpractice law among Germany, France, England, and America, he shows that malpractice law does not rest on guarantees based on contract. Any contract between the patient and the doctor is merely a contract to perform the operation, show up for the appointment, or pursue a particular means of treatment.<sup>113</sup> Beyond that, “[t]aking from the English common law the premise that a physician may not be held a guarantor but is answerable only for fault, the

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<sup>111</sup> Hubert Winston Smith, *Legal Responsibility for Medical Malpractice* (pts. 1-6), 116 JAMA 942 (1941), 116 JAMA 2149 (1941), 116 JAMA 2490 (1941), 116 JAMA 2670 (1941), 116 JAMA 2755 (1941), 117 JAMA 23 (1941). Smith held degrees in law, medicine, and business. He was Chancellor of the Law Science Academy of America and spent his career teaching law and medicine on the faculties of several law schools. Charles Alan Wright, *Memorials: Hubert Winston Smith*, 1971 ASS'N OF AM. L. SCH. PROC. 177.

<sup>112</sup> In describing the application of the law to questions of medical responsibility, Smith described contract law as follows: “It affects the creation of the physician-patient relationship and modifies the scope of duty which automatically arises under the law of torts.” Hubert Winston Smith, *Legal Responsibility for Medical Malpractice: II. Malpractice: Something of the Anatomy of the Law*, 116 JAMA 2149, 2153 (1941).

<sup>113</sup> According to the German Civil Code of 1900, “Where a performance is based on a contract, the general success of which is uncertain, as for instance in the case of a dangerous operation, then we have to assume in a case of doubt that only the first success, namely, only the operation as such, but not its successful outcome, is contained in the contractual promise.” Hubert Winston Smith, *Legal Responsibility for Medical Malpractice, I: The Legal Matrix of Medical Malpractice*, 116 JAMA 942, 945 (1941) (quoting 1 LUDWIG ENNECCERUS ET AL., *LEHRBUCH DES BÜRGERLICHEN RECHTS* 44 (20th ed. 1923)). In France, “the doctor enters into a contractual obligation concerning means but not the final result.” *Id.* at 946 (citing 6 RENÉ DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GENERAL* 184 (1931)).

courts have introduced many special doctrines,” such as schools of practice, lessened duties in an emergency, and others.<sup>114</sup>

Once the relationship has been established, and has not been terminated, *then* the patient has a right to be free from negligently caused harm. That right does not come from an agreement between a patient and a doctor; rather, it is the right to be free from negligently-caused bodily injury protected by tort law.

It is true that there have been historical moments when some patients successfully brought contract claims for malpractice.<sup>115</sup> Patrick Atiyah claims that “nineteenth-century lawyers would surely have seen the [doctor-patient] relationship as primarily contractual.”<sup>116</sup> But what practicing lawyers believed at the time may not be dispositive since few of them were thinking very much about malpractice at that time. According to historian James Mohr, malpractice was not a particularly important legal concept until the mid-nineteenth century.<sup>117</sup> In fact, until the 1850s “[t]he vast majority of US lawyers would not have known how to draft an action for medical malpractice.”<sup>118</sup> (And, earlier, Blackstone conceived of malpractice as fully about tort. He placed his text on “Injuries, affecting a man’s health,” including those caused “by the neglect or unskilful management of his physician, surgeon, or apothecary,” not in the section on contracts but rather in a chapter on private wrongs entitled “of Wrongs, and their Remedies, respecting the Rights of Persons.”)<sup>119</sup> However, to the extent that contract dominated tort in malpractice law it appears to have been short-lived. Medical-legal historian Kenneth De Ville describes the rise of contract law in medical malpractice as merely a “midcentury flirtation” and notes the fact that the distinctions between tort and contract were less clear then.<sup>120</sup> Although Professor Epstein would not

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<sup>114</sup> *Id.* at 946.

<sup>115</sup> For example, early nineteenth century patients could bring claims either through writs of assumpsit or under trespass on the case. DE VILLE, *supra* note 106, at 165. De Ville also traces the enforcement of contracts for fees, contracts for services of a given quality, and contractual waivers of liability. *Id.* at 156-81. According to James Mohr, “Throughout the second half of the 19th century, courts wavered between continuing to treat malpractice as a tort action and recasting it as a contract action (as an implied contract between physician and patient). James C. Mohr, *American Medical Malpractice Litigation in Historical Perspective*, 283 JAMA 1731, 1736 (2000).

<sup>116</sup> Atiyah, *supra* note 7, at 292. However, he makes these claims in an article that largely discusses how the narrow, theoretical conception of contract law as protecting promises misses the extra-contractual reach of contract law.

<sup>117</sup> Mohr, *supra* note 115, at 1731.

<sup>118</sup> *Id.* at 1731.

<sup>119</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 (1768). De Ville explains that this is because malpractice was properly pleaded as trespass on the case “as the result of breach of duty, negligence, or carelessness.” DE VILLE, *supra* note 106, at 6.

<sup>120</sup> DE VILLE, *supra* note 106, at 157. De Ville traces the development of malpractice law as a tort doctrine in a detailed chapter, entitled “The Road Not Taken,” about the ways that malpractice claims were framed as contract claims in the mid-nineteenth century. The chapter begins by

doubt approve of rekindling that flirtation, it was over by the time charitable immunity appeared. So, for these two reasons, I think that the battery analogy is a good one.

Finally, to get back to where we started, it matters a great deal whether a charity enjoys a status-based right that it can waive or whether the law permits it to contract into immunity. Others have written extensively on the differences between contract and tort rights, but consider the following two ideas for why the regimes differ. First, take Coase's observation that where you place the entitlement matters in terms of the ultimate allocation of resources only if there are transaction costs. There are always transaction costs. (Here, in the example of patients and hospitals, there are not only information and negotiation costs, but plenty of social dislocation costs.) Imagining a world without transaction costs and then imagining the consequences of such a world is akin to imagining "a world in which pigs fly . . . we need to know, for example, whether some form of porcine air traffic control exists or not."<sup>121</sup>

Second, the assignment of a legal right sends a message about social values that a private contract does not. In the battery context it says, among other things, that we think bodily integrity is so important that we don't want it violated absent some quite restrictive conditions. If someone allows another person to punch them in the nose, we ask for all kinds of signals that there was valid consent. The law puts the burden on the wrongdoer to demonstrate that the consent was real or reasonably apprehended. The ability to waive immunity from a tort claim does not mean that an immunity right based on status and the possibility of paying others for their promise not to sue do the same work, for the entity, the plaintiff, or the public.

Professor Epstein's claim that charitable immunity cases based on implied waivers were contract cases offers him a clear path from the nineteenth century common law to his preferred malpractice policy. But following this path is overly restrictive. By looking only at the relationship between indigent patient and hospital, and characterizing the relationship primarily in contract terms, one might see a legal world where contract swallows torts. But by widening the focus a bit, one sees far more. One sees a common law right to immunity against patient claims, sometimes only claims by indigent patients, assigned only to nonprofits and not to other hospitals. Viewed this way, the cases are appropriately characterized as torts cases, firmly grounded in the status of the defendant.

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noting that "[j]udges and legal theorists had not yet molded the notions of tort and contract into discrete categories, and there was no need or basis upon which to classify malpractice under one abstract heading or the other." *Id.* at 156.

<sup>121</sup> A.W. Brian Simpson, *The Story of Sturges v. Bridgman: The Resolution of Land Use Disputes Between Neighbors*, in *PROPERTY STORIES* 11, 18 (Gerald Korngold & Andrew P. Morriss, eds., 2d ed. 2009).

#### IV. CONCLUSION: IMMUNITY RIGHTS AND SOCIAL COSTS

Typically tort law concerns itself with allocating blame and costs between the two parties in a case.<sup>122</sup> Charitable immunity, however, is one of several examples in modern tort law where a party's status determines his duties. It is not the odd status-based exception to a contract-based tort doctrine, but is one example of a fairly common feature of tort law. Like charities, volunteers, sovereigns, spouses, and parents sometimes benefit from tort immunity because of the nature of their relationship to the plaintiff. Heightened duties, such as the duties of jailors, teachers, parents, and common carriers, are also status-based. These cases also reach beyond the litigating parties in that they concern themselves with consequences to organizations and individuals outside the cases. They are filled with worries about what would happen to charities, charitable purposes, beneficiaries, and donors themselves without immunity.

The role of factors that are external to the parties in cases before the court is implicit in some cases. Some courts simply state the rule that charitable corporations have charitable immunity for all their torts, or at least for those of their agents, because they are charities.<sup>123</sup> Other courts justify immunity with policy reasoning. Maybe charitable donors won't open their purses if charitable assets are used to satisfy tort judgments.<sup>124</sup> Or maybe funds meant for doing good should not be destroyed.<sup>125</sup> Or maybe it is unseemly "to allow these good people to be annoyed by damage suits."<sup>126</sup>

Early twentieth century courts weighed the competing interests of justice for plaintiffs harmed by negligence and the interests to society in protecting

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<sup>122</sup> "That the matter should be conceived in this way was, and is, part of the conventional ideology of the common law, and of the function of courts within the system." A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 58 (1996).

<sup>123</sup> *See, e.g.,* *Siidekum v. Animal Rescue League of Pittsburgh*, 45 A.2d 59, 62 (Pa.1946) ("[A]s far as Pennsylvania is concerned, the law on this subject is perfectly clear . . . that the rule of respondeat superior does not apply in the case of injuries occasioned by the negligence of the agents or servants of a charitable organization.").

<sup>124</sup> Some courts draw different conclusions. *E.g.,* *Glavin v. R.I. Hosp.*, 12 R.I. 411, 425-26 (1879) ("The public is doubtless interested in the maintenance of a great public charity...but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully . . .").

<sup>125</sup> For example the South Carolina Supreme Court worried "that to allow recoveries for damages would be to assist in the destruction of a trust fund, and no court can permit a destruction of a trust fund . . . [and] here is a trust fund intended for good, and it must be preserved at all hazards." *Lindler*, 81 S.E. at 515 (noting, and disagreeing with this justification for charitable immunity).

<sup>126</sup> *Lindler v. Columbia Hosp.*, 81 S.E. 512, 516 (S.C. 1914) (Fraser, J., dissenting) (noting, and disagreeing with, this justification for charitable immunity).

charities.<sup>127</sup> Some concluded that protecting charitable activity, charities, and donors was more important than satisfying judgments. In 1922, according to the Tennessee Supreme Court, “The fundamental reason upon which the doctrine is bottomed is that of public policy which looks to the encouragement of charities established for the benefit of the whole public, and that the rights of the individual in such instances must be subordinated to the public good.”<sup>128</sup> Similarly, in 1925, the Supreme Court of Colorado explained:

The fundamental question is one of expediency or of public policy—whether the preservation of charitable trust funds is more desirable than a right to compensation from such funds for an injury. We think it is. Few things are more desirable or more beneficial to the public than charitable foundations, and certainly the right of someone to recover damages from a particular source is not one.<sup>129</sup>

Ironically, these cases make the very same tradeoff that Professor Epstein suggests present-day hospitals would make if they had the freedom to do so by contracting with their patients to avoid liability. In his final step linking charitable immunity to contracting for malpractice liability, Professor Epstein argues that if courts had acted appropriately and recognized charitable immunity as contractual, they would have allowed patients and hospitals to contract over tort rights. Absent *Tunkl*,<sup>130</sup> hospitals could require patients to release hospitals from liability before accepting treatment, leaving hospitals liberated to maximize

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<sup>127</sup> The early twentieth century impulse to protect charities, even at the expense of victims’ rights, is with us today. After the recent bankruptcies of several U.S. Catholic dioceses in the wake of the sexual abuse scandals, these courts seem prescient. By late October, 2009, seven dioceses filed for bankruptcy. Jacqueline L. Salmon, *Diocese of Wilmington Files for Bankruptcy*, WASH. POST, Oct. 20, 2009, at B3. Catherine Wells makes the tradeoffs in this context concrete:

What does it mean for a church to go bankrupt? 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 Church might mean vindication for some, but it would also be a source of sorrow and injury for others.

Wells, *supra* note 62, at 1202-03.

<sup>128</sup> *Love v. Nashville Agr. & Normal Inst.*, 243 S.W. 304, 311 (Tenn. 1922)

<sup>129</sup> *Saint Mary’s Acad. of Sisters of Loretto*, 238 P. 22, 23 (Colo. 1925).

<sup>130</sup> *Tunkl v. Regents of Univ. of Cal.*, 383 P. 2d 441 (Cal. 1963).

utility. Turn tort into contract and then health care charities can do just what they are organized to do:

give away medical care,<sup>131</sup> and they should not be ordered to defend medical malpractice actions when that same money might be better spent on expanding facilities for the care of others. Does it really make sense to compensate one person huge sums of money for *admitted* medical negligence if it impairs the ability to provide life-saving services to a dozen others who lose, not because of negligence, but because there was no room at the inn?<sup>132</sup>

Introducing consideration of these externalities into the equation raises the same question for the common law judges and Professor Epstein. Where should the tradeoffs among goods begin and end? Why only consider malpractice damages as against free care for the indigent?<sup>133</sup> Legislatures may be better suited than either courts or defendant-charities for making these tradeoffs.<sup>134</sup> Congress has recently done so<sup>135</sup> in deciding that “[a]ssets donated for specific charitable

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<sup>131</sup> I could not disagree more with Professor Epstein’s claim that “charities are organized to give away medical care.” Some are, some aren’t. And neither the law nor good policy requires that they do so. For detailed accounts of why, see Jill R. Horwitz, *Does Corporate Ownership Matter*, 24 YALE J. ON REG. 139 (2007); Jill R. Horwitz, *Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-for-Profit Hospitals*, 50 UCLA L. REV. 1345 (2003).

<sup>132</sup> EPSTEIN, *supra* note 3, at 372.

<sup>133</sup> Brian Simpson raised this same question in his critique of Coase’s interpretation of the common law. “Why just medicine and cakes? Should we not take into account a very wide and perhaps limitless range of alternative courses of action?” Simpson, *supra* note 122, at 62.

<sup>134</sup> However, having created the doctrine, some courts took matters into their own hands in renouncing it. In 1969, the Supreme Judicial Court of Massachusetts, exhibiting some impatience with the legislature for failing to abrogate immunity by statute, announced, “It seems likely that no legislative action in this Commonwealth is probable in the near future. Accordingly, we take this occasion to give adequate warning that the next time we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it.” *Colby v. Carney Hosp.*, 254 N.E.2d 407, 408 (Mass. 1969).

<sup>135</sup> The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which mainly affected personal bankruptcy, grants state attorneys general the right to appear in bankruptcy proceedings against charities. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 108-9, 119 Stat. 23 (codified as amended at 11 U.S.C.A. § 541(f) (2005)) (“Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.”). The statute adds, “[t]he parties who may appear and be heard in a proceeding under this section include the attorney general of the State in which the debtor is incorporated, was formed, or does business.” Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past*,

purposes are generally preserved from distribution to a bankrupt debtor's creditors."<sup>136</sup>

Professor Epstein may not only be concerned with the effectiveness of charities. He may, like Henry Sumner Maine one hundred and fifty years before him, believe "that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."<sup>137</sup> Freeing nonprofits from restrictions, letting them "set the terms of their engagements," would rectify that "shift to social control [which] marks a serious erosion of their independence and their effectiveness."<sup>138</sup> Regardless of its wisdom, however, common law courts preserved charitable immunity through finding that charities were more important than plaintiffs. Basing their reasoning on the status of the defendants, early twentieth century courts granted charities just the freedom that Professor Epstein prescribes.

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*Present, and Future*, 29 SETON HALL LEGIS. J. 471, 475 (2005) (quoting Pub. L. No. 109-8, § 1221(d), 119 Stat. 196 (2005)). Although scholars have not much noticed these restrictions, members of the bankruptcy and health law bars have raised several concerns about protecting charitable assets from satisfying nonprofit hospitals' creditors. *E.g.*, Gus Kallergis, *The §363 Miracle Drug? Potential Restrictions and Challenges of Selling Hospitals in Bankruptcy*, AM. BANKR. INST. J., Nov. 2009, at 14.

<sup>136</sup> Brody, *supra* note 135, at 528. Brody explains that preserving the assets "can be a tedious, and not always a successful process" because of the passage of time, number of charitable donations, and poor record keeping. *Id.* at 472 n.2 (citing *In re Parkview Hosp.*, 211 B.R. 619, 622 (Bankr. N.D. Ohio 1997)).

<sup>137</sup> SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 165 (3d American from the 5th London ed. New York (1873)).

<sup>138</sup> EPSTEIN, *supra* note 3, at 371.