

Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to “Nerf®,” Tiddlywinks*

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Let not young souls be smothered out before
They do quaint deeds and fully flaunt their pride.
It is the world's one crime its babes grow dull,
Its poor are oxlike, limp and leaden-eyed.
Not that they starve, but starve so dreamlessly;
Not that they sow, but that they seldom reap;
Not that they serve, but have no gods to serve;
Not that they die, but that they die like sheep.

“The Leaden-Eyed”
Vachel Lindsay

I. INTRODUCTION

Many activities for young people are made possible only by the willingness of volunteers to give freely of their time and energy. The pool of volunteers is jeopardized by the threat, both actual and perceived, of tort liability. One effort to assuage this threat has been to use exculpatory agreements. Exculpatory agreements, also called “releases” or “waivers,” are basically written documents in which one party agrees to release, or “exculpate,” another from potential tort liability for future conduct covered in the agreement. Although exculpatory agreements are contracts in form, they are also sometimes categorized and addressed in torts terms as expressions of express assumption

* See *infra* note 2.

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of risk.¹ Indeed, the multifaceted analytical personality of exculpatory agreements may help to explain the hostile reception they have received in the courts when asserted in defense of tort claims based on injuries to minors. I believe the time has come to reevaluate the question of the validity of such exculpatory agreements in the setting of volunteer liability in youth activities.

Although courts, as a general matter, recognize the validity of exculpatory agreements, they have significantly retreated from that general rule by creating an array of exceptions. Several of these exceptions have been relevant, or even outcome determinative, in the context of exculpatory agreements executed on behalf of minors participating in youth activities. A majority of courts that have addressed the question have held not only that minors lack the capacity to enter into valid exculpatory agreements, but also that parents may not bind their minor children by executing such agreements on their behalf. Moreover, even when an exculpatory agreement is otherwise generally valid, as when an adult executes one on his or her own behalf, most courts have held that such agreements may not preclude liability for more extreme forms of negligence such as recklessness or gross negligence. The thesis of my article is that exculpatory agreements executed by a parent or guardian on behalf of minors (and with the concurrence of mature minors) should be valid when releasing volunteers and sponsoring entities providing youth services on a nonprofit basis, and should preclude their tort liability for all unintentional injuries. Ideally, this result should be achieved by state statutes. In the absence of such legislation, however, I urge the courts to uphold the validity of these agreements.

My concern here is the well-being of America's young people. This may strike one as an oxymoron. How, one might ask, will removal of the minors' right to recover in tort, by upholding the validity of exculpatory agreements, advance the interests of minors? The answer is twofold. First, the choice is really not between youth activities with a right to sue and youth activities without such a right. Rather, the choice for many may be between youth activities without a right to sue and no organized youth activities at all. Second, the right to sue in tort not only may not advance the interests tort law is supposed to serve, it may in fact undercut those interests.

If trends are not reversed, the alternative for many young people will be no supervised youth activities and greatly reduced opportunities for meaningful contact with caring adults. What organized activities remain will become so unspontaneous and entombed with illusory, defense-motivated "safeguards" that they will end up simply frustrating young participants. Impounded day-care

¹ See RESTATEMENT (SECOND) OF TORTS § 496B & cmt. a (1965) (contracts by which one expressly agrees to accept a risk classified as "express assumption of risk" and "noncontractual consent"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 482-84 (5th ed. 1984) (defense addressed in context of assumption of risk).

and latchkey children will be largely confined to a passive world of vicarious experiences. "Nerf[®]" tiddlywinks² will become the guiding paradigm.

I believe that there are compelling reasons for permitting parents or guardians to enter into valid exculpatory agreements on behalf of minors. In any broadly conceived balancing of costs and benefits, the full effects of the threat of liability, especially under the present unpredictable tort system, must be weighed against the potential benefits. Because the willingness of volunteers to participate in organized youth activities is clearly affected by the threat of liability, both actual and perceived, one enormous cost of tort liability is to place in jeopardy the legion of volunteers that run most organized youth activities. Moreover, the quality of the relationships between the participants, their families, and the volunteers in these activities is undermined by the threat of tort claims. For volunteers, when the willingness to participate is so elastic, the choice is not between careful and careless volunteers. It is between protected volunteers and no volunteers at all.

In addition to the danger of driving most volunteers out of youth activities by the threat of tort litigation and liability, there are other convincing arguments for upholding the validity of exculpatory agreements. When evaluated objectively, I believe that the supposed benefits of tort liability are outweighed by the costs, and that such liability is counterproductive when imposed on volunteers in organized youth activities. All too frequently the analysis of this question has been conceptually myopic. Too often the costs and benefits of tort liability have focused narrowly and exclusively on the interests of the immediate victim—what it would have taken or cost in retrospect for *this volunteer* to have prevented *this injury* to *this victim*, or what would it take to compensate *this victim*. Should we not inquire more broadly? Does the "deterrence" of tort liability, when applied to the entire class of these participants, really reduce accidents any more than would be true if the autonomy of the parties were respected by upholding exculpatory clauses? For example, might the effective presence of such agreements encourage more active and continuing parental involvement in the activity, with concomitant reduction of accidents? Might not members of the legal profession better serve our children by spending more time with them—not at depositions and reviewing files, but on the playing field, at the parks, and in the wilderness areas?

Furthermore, are the goals of "compensation" and loss allocation best served by a system that returns such a small percentage of each insurance dollar spent to the victim, that overcompensates some and undercompensates others, that rewards fraud, fabrication, and malingering, and that compensates only those victims whose injury can be traced to tortious conduct by an insured or

² The metaphor of the "nerf[®]" tiddlywinks comes from one of my former students, Patricia F. Nicely.

wealthy actor, ignoring the plight of the rest? Would not first-party health and disability insurance offer a manifestly better return? Do the erratic outcomes under the tort system really allocate losses in a way that sends the desired signal about the true costs of various competing activities? Or, is the message one of desultory and unpredictable litigation horror stories that do little more than terrorize potential volunteers into flight?

What of fairness? It is only by sheer coincidence that the amount of liability imposed in a particular case accurately reflects the amount needed to compensate (assuming that money can ever compensate), deter, and punish appropriately. Do volunteers who may be found by a jury in retrospect to have unintentionally contributed to a youth's injury really deserve the harsh badgering and financial bloodletting of the torts system?

I have the following objectives in this article. First, I will examine the need for volunteers in organized activities for our young people. Second, I will discuss the potential for negligence liability of such volunteers in the absence of a valid exculpatory agreement. Third, I will survey the judicial attitudes toward exculpatory agreements in this setting. And finally, I will set forth my proposal calling for a statutory authorization of such agreements.

II. NEED FOR VOLUNTEERS

The United States is burdened by an unimaginable debt.³ It is unthinkable that we could afford to pay for the services currently provided by volunteers.⁴ More than 85 million Americans engage in volunteer activities.⁵ These volunteers spend an average of 5 hours a week on volunteer projects, and provide 16.5 billion hours of volunteer services each year.⁶ It is clear from

³ Even under the optimistic estimates for a booming economic recovery, the 1992 deficit is still projected to be \$315 billion. Dan Morgan & Walter Pincus, *You Think the Budget Is Solved?*, WASHINGTON POST, Nov. 18, 1990, at C5. The interest payment on the debt for fiscal 1990 alone was \$184 billion. Jonathan Marshall, *Bush's Rosy Outlook on Budget Draws Skeptics*, S.F. CHRON., Feb. 26, 1991, at C1.

⁴ At last estimate two years ago, the services to the Nation provided by volunteers each year were valued in excess of \$110 billion. 136 CONG. REC. H7521-02 (daily ed. Sept. 13, 1990) (statement of Rep. Porter).

⁵ *Id.*; see also, Ann Devroy, *National Volunteer Week Celebrates a Bush Administration Centerpiece*, WASHINGTON POST, Apr. 12, 1989, at A21. Other estimates are that 48% of Americans engage in some sort of volunteer activity. Olive Evans, *Coping with Volunteering*, N.Y. TIMES, Aug. 13, 1988, at 52. On the demographics of the volunteer population, see Linda Spear, *The Changing Role of Volunteers*, N.Y. TIMES, Aug. 1, 1982, at 8.

⁶ 136 CONG. REC. H7521-02 (daily ed. Sept. 13, 1990) (statement of Rep. Porter). In 1987, volunteers devoted 20 billion hours to volunteer activities. Devroy, *supra* note 5, at A21.

President Bush's "thousand points of light" theme,⁷ that volunteer efforts represent a high national priority. One wonders how our present way of life could continue without such volunteer efforts. Considering that these services are conservatively valued at \$110 billion a year,⁸ it is clear that the government could not afford to finance such services with current government revenues.

Nowhere is the need for volunteers more crucial than in programs and activities for young people. I will not repaint here the Hogarthian picture of today's American youth immersed in a troubled sea of child abuse,⁹ drugs, teen pregnancies,¹⁰ suicide,¹¹ sexually-transmitted diseases, crime,¹² and violence.¹³ Nor will I argue that volunteers constitute a universal solvent to these problems. Volunteers cannot alone reconstitute disintegrating families in America,¹⁴ eliminate poverty,¹⁵ sweep the streets of drugs¹⁶ and crime, or

⁷ Gregg Petersmeyer, the presidential assistant who heads the national service operation, stated in an interview during National Volunteer Week that "[t]here are certain problems that totally overwhelm the government's ability to deal with them: literacy, child poverty, drugs, gangs, teen-age pregnancy." Devroy, *supra* note 5, at A21. He added that these areas are "virtually out of control" and beyond the federal government's ability to overcome even if its resources were multiplied several fold. *Id.*

⁸ 136 CONG. REC. H7521-02 (daily ed. Sept. 13, 1990) (statement of Rep. Porter).

⁹ The incidence of child abuse and neglect has increased markedly over the past two decades. See Michael S. Jellinek et al., *Protecting Severely Abused and Neglected Children—An Unkept Promise*, 323 NEW ENG. J. MED. 1628 (1990). There were 2.4 million reported cases of child abuse in 1989. Linda L. Creighton, *The New Orphanages*, U.S. NEWS AND WORLD REP., Oct. 8, 1990, at 37. There are currently no estimates for how many other children suffer such abuse anonymously. *Id.* Abuse and neglect of children increased 74% in the last decade. J. Gans et al., *America's Adolescents: How Healthy Are They?*, (Vol. 1, AMA Profiles of Adolescent Health Services, 1990, at xi).

¹⁰ Every 67 seconds a teenager gives birth to a child. Nancy Gibbs, *Shameful Requests to the Next Generation*, TIME, Oct. 8, 1990, at 42.

¹¹ The suicide rate almost tripled for 10-14 year olds between 1968-85 (and doubled for 15-19 year olds). Gans et al., *supra* note 9, at xi.

¹² See Anastasia Toufexis, *Our Violent Kids*, TIME, June 12, 1989, at 52.

¹³ *Id.* Between 1968-85, the homicide rate among 10-14 year olds almost doubled. Gans et al., *supra* note 9, at 39.

¹⁴ Today, single parents head 24% of families with children. Toufexis, *supra* note 12, at 54. It has been estimated that by age 17, 70% of white children born in 1980 and 94% of black children will have lived some part of their lives in one-parent homes. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2938 n.24 (1990) (citing *amicus curiae* brief for American Psychological Association, at 12-13 (1990) (citing Sandra L. Hofferth, *Updating Children's Life Course*, 47 J. MARRIAGE AND FAM. 93 (1985))).

¹⁵ It has been estimated that one out of every five children in the United States lives in poverty. Toufexis, *supra* note 12, at 54.

¹⁶ Although the teenage population declined by two percent in a recent five year period (1983-87), arrests of juveniles for drug abuse violations increased by five percent. *Id.*

become the primary educators of our youth¹⁷ and inculcators of moral values.¹⁸ I am convinced, however, that they do help. A root cause of violent youths (and by extension, violent adults) is abuse by parents and the lack of parental nurturing, guidance, and supervision.¹⁹ Youth recreational activities can begin to fill the growing void in the lives of many young people. Positive habits can be developed and reinforced, self-esteem enhanced, and emulation of suitable role models encouraged.

Organized youth athletics and other activities offer a respite from television and various sources of media violence that have been tied to youth violence²⁰ as well as to other adverse behavioral and psychological effects.²¹ Television is often the substitute for other activities. One leading expert observed that television, by revealing the secrets of adulthood so early and intensively, has destroyed the phenomenon of childhood as a discrete and bountiful period of innocence.²²

By all accounts, the physical health of American children is also declining. Health columnist Jane Brody recently commented that "the youth of America are going to seed."²³ In the last decade, performance by youngsters in recognized components of fitness declined dramatically.²⁴ Even among 5 and 6-year-olds, significant variations in blood pressure were found to be a function of differences in aerobic fitness and body fatness,²⁵ both of which have a

¹⁷ It is estimated that more than 25% of teenagers drop out of high school. *Id.*

¹⁸ In one recent survey, 25% of those participating would abandon their family and 7 percent would kill a stranger for \$10 million. *See Morality in America—7% of Make-Own-Rules Americans Would Kill for \$10 Million*, KNOXVILLE NEWS-SENTINEL, April 29, 1991, at A1. The article was based on findings of a recent book. *See* James Patterson & Peter Kim, *THE DAY AMERICA TOLD THE TRUTH* (1991).

¹⁹ *See* Toufexis, *supra* note 12, at 55, 57. In one recent survey, more people (72% of those polled) identified lack of parental supervision as one of the main factors than they did any other factor. *Id.* Harvard psychiatrist Robert Coles warns that "[c]hildren who go unheeded . . . are children who are going to turn on the world that neglected them." Gibbs, *supra* note 10, at 43.

²⁰ *See* Toufexis, *supra* note 12, at 55, 57. By the age of 16, it is estimated that a typical child has witnessed 200,000 acts of violence in the entertainment and other media. *Id.* at 55.

²¹ *Id.* at 55, 57. Richard Zoglin, *Is TV Ruining Our Children?*, TIME, Oct. 15, 1990, at 76.

²² *Id.* at 76 (based on interview with Professor Neil Postman).

²³ Jane Brody, *How to Keep Children Physically Fit*, KNOXVILLE NEWS-SENTINEL, May 28, 1990, at B1.

²⁴ *Id.* Youngsters able to complete tasks measuring strength, flexibility, and endurance capabilities declined from 43 to 32%. *Id.*

²⁵ *See* Bernard Gartin et al., *Blood Pressure, Fitness, and Fatness in 5- and 6-Year-Old Children*, 264 J.A.M.A. 1123, 1126 (1990).

substantial impact on current and future cardiovascular health.²⁶ The connection between sedentary lifestyle and coronary heart disease is well established.²⁷ And coronary heart disease accounts for more than a quarter of all deaths each year in the United States.²⁸ Another recent study has pointed to a strong correlation between television watching²⁹ and an alarming rise in childhood and adolescent obesity.³⁰ Various factors influencing children's participation in physical activity include not only the level of parental involvement and access to television, but also the availability of stimulating physical activities.³¹

Assuming that there is a growing need for volunteers, one must consider the effects of potential tort liability on the availability and quality of volunteer services. The most obvious effect has been to discourage many volunteers from undertaking or continuing volunteer services.³² A majority of 8,000 executives of volunteer associations surveyed recently indicated that fear of liability exposure and of litigation in general is damaging their efforts at volunteer recruitment.³³ Although the number of lawsuits against volunteers is difficult to quantify, the publicity of such cases has nevertheless had a significant impact.³⁴ To compound matters, the cost of liability insurance for volunteers has been prohibitive, and is often simply not obtainable.³⁵

²⁶ *Id.* at 1127.

²⁷ See *Perspective in Disease Prevention and Health Promotion, Coronary Heart Disease Attributable to Sedentary Lifestyle—Selected States, 1988*, 39 MORBIDITY & MORTALITY WKLY. REP. 541 (1990). Sedentary lifestyle is the most prevalent (58%), modifiable risk factor for coronary heart disease. *Id.* Coronary heart disease could be significantly reduced if the United States population became more physically active. *Id.* The estimated number of deaths attributable to coronary heart disease that could have been prevented had this risk factor not been present were 22,225 in New York in 1988 alone. *Id.* at 542-43.

²⁸ *Id.* at 541.

²⁹ By some accounts, the average child will have watched 5,000 hours of television by the time he enters first grade and 19,000 hours by the time he finishes high school. Zoglin, *supra* note 21, at 75.

³⁰ See *In Brief*, KNOXVILLE NEWS-SENTINEL, Sept. 10, 1990, at B1.

³¹ *Id.* at B1, B2.

³² See Lisa Green Markoff, *A Volunteer's Thankless Task*, NAT'L L.J., Sept. 19, 1988, at 1, 40; *End the Liability of Volunteering*, CHI. TRIB., Aug. 24, 1986, (Perspective), at 2. About half of the nonprofit organizations participating in a 1988 Gallup poll reported a drop in their volunteer rosters in the past few years. Sixteen percent of the officers reported curtailing their own activities because of liability fears. Markoff, *supra* at 40.

³³ See 136 CONG. REC. H7521-02 (daily ed. Sept. 13, 1990) (statement of Rep. Porter, reporting on the results of a 1986 survey).

³⁴ See Markoff, *supra* note 32, at 40.

³⁵ See *End the Liability of Volunteering*, CHI. TRIB., Aug. 24, 1986, (Perspective), at 2.

The threat of liability has also affected the availability of services in other ways.³⁶ The threat of liability of volunteers has greatly increased the costs of participating in various youth activities even though they are often sponsored by nonprofit organizations. Recent reports have indicated that liability insurance costs for primary sponsoring organizations have increased dramatically in recent years,³⁷ forcing the cessation³⁸ or curtailment of services in many instances.³⁹ If liability insurance is provided to cover the individual liability of volunteers, the costs often reach the prohibitive stage. Conversely, the failure to offer such individual insurance coverage to volunteers may further inhibit their willingness to serve,⁴⁰ thus exacerbating the effects of the threat of

³⁶ See Marcia Chambers, *Whatever Happened to the Sandlot?*, NAT'L L.J., Apr. 22, 1991, at 15 ("Youth sports activities are slowly becoming extinct—from fear of lawsuits.").

³⁷ See Letter to the Editor by James K. Coyne, President of American Tort Reform Association, WASHINGTON POST, Aug. 11, 1986, at A14. The liability insurance premium for the Boy Scouts increased from \$2 million to \$10 million in 1986. *Id.* Little League teams have also experienced increases in insurance premiums. One team, for example, reported an increase from \$75 to \$795 in the last eight years. Editorial, *Little League Bill Is Irresistible But Shortsighted*, NEWSDAY, May 6, 1989, at 18.

³⁸ See, e.g., Robert Hanley, *Insurance Costs Imperil Recreation Industry*, N.Y. TIMES, May 12, 1986, at A1. For example, Little League baseball for 900 youths was stopped because the local Little League could not obtain the \$25 million in insurance coverage required by the lessor of the playing field. *Id.*

³⁹ It is not clear from reports of insurance exactly who is covered by liability insurance maintained by sponsors of these activities. It is unclear whether the insurance covers only the primary sponsoring entity itself for its potential direct and vicarious liability, or whether it also covers its employees and its volunteers with respect to their potential individual liability. Nor is it clear whether it covers entities and individuals at the local as well as national level of such primary sponsoring organizations. A question also exists whether there is liability insurance coverage for secondary sponsors and its employees and volunteers. Apparently the national Boy Scout organization has provided some liability insurance for secondary scouting sponsors. See Veronica T. Jennings, *PTA's Wary of Scout Sponsorships; Area Groups Fear Liability in Wake of Molestation Verdict*, WASHINGTON POST, Apr. 2, 1989, at B1. It is unclear whether this coverage covers individual employees and volunteers of such secondary sponsors.

⁴⁰ It would appear that few primary sponsors of youth activities adequately inform their volunteers of their status with respect to liability insurance. Thus, vague references by word of mouth that there is "insurance" should not be very reassuring. Insurance covering whom? The fact that an organization is itself covered does not, of course, afford any protection for individual volunteers. Even if "employees" are also covered, any insurance protection of volunteers would depend on whether such volunteers were deemed "employees" or were otherwise covered under the terms of the insurance policy.

The Nonprofit Sector Risk Management Task Force recommends that nonprofit organizations either agree to indemnify their volunteers for liability or provide liability insurance protection for their volunteers. See Kari Berman, *Risk Management Tips Pitched to Nonprofits*, BUSINESS INSURANCE, July 10, 1989, at 44. Many organizations have

liability. In any event, the cumulative effect of the threat of liability on recreation is "devastating."⁴¹ As one writer notes, we have not simply reached the point where it is more expensive to enjoy life, "but where activities bearing any risk are being removed from the market."⁴² For those individuals and organizations not completely discouraged from participating in youth activities, the threat of liability often inhibits the range of experiences offered. Thus, for example, organizations report reducing the kind of activities for children from horseback riding to book fairs.⁴³

The threat of liability not only discourages volunteers and primary sponsoring organizations from undertaking direct involvement with youth activities, but it may also discourage organizations and individuals from indirect involvement, such as serving as secondary sponsors⁴⁴ of youth activities. For example, at one time it was common practice for local organizations, such as schools, PTA's, churches, and civic clubs to screen, select, and approve local Boy Scout leaders.⁴⁵ However, concern over potential liability for such screening activities has apparently discouraged many of these organizations and individuals from undertaking such activities.⁴⁶

apparently had difficulty not merely in affording liability insurance for their volunteers, but in obtaining coverage for them at any cost. *See End the Liability of Volunteering*, CHI. TRIB., Aug. 24, 1986, (Perspective), at 2.

⁴¹ Chambers, *supra* note 36, at 16.

⁴² *Id.*

⁴³ Markoff, *supra* note 32, at 40.

⁴⁴ For the purpose of this article, primary sponsors refers to entities directly associated with the activity. Examples include the Boy Scouts of America and the Little League. Primary sponsors often will have two or more levels of involvement, such as a national organization and local entities. Secondary sponsors consist of organizations that provide some form of support to the primary entities. Examples include the role of PTA's and schools in sponsoring local Boy Scout troops. *See infra* notes 45-46.

⁴⁵ *See* Jennings, *supra* note 39, at B1. There were, at least until recently, 1.4 million boys in scout troops sponsored by local PTA's and schools. Churches and community groups sponsored 2.3 million other scouts in 100,000 troops nationwide. *Id.*

⁴⁶ *See* Jennifer Kerr, *National PTA, Scouts Feud Over Picking Troop Leaders*, L.A. TIMES, Dec. 17, 1989, at A3; Jennings, *supra* note 39, at B1. In a recent case, a VFW post and a volunteer fire department were, along with others, named as defendants in a case involving the alleged sexual molestation of two boys by a person who served as assistant scoutmaster and scoutmaster of a Boy Scout troop in which the boys were members. The VFW and fire department were the local secondary sponsors of the troops. *See* L.P. v. Oubre, 547 So. 2d 1320 (La. Ct. App.) (addressing the trial court's resolution of motions to strike made by some defendants), *writ denied*, 550 So. 2d 634 (La. 1989). Apparently the allegations of negligence against these latter defendants related to a failure to take reasonable steps to assure that the scoutmaster in question was not a threat to the young troop members.

III. POTENTIAL TORT LIABILITY OF VOLUNTEERS

A. *Negligence Liability and the Standard of Care*

The first reaction of a volunteer upon being sued is often incredulity: "I can't be sued—I'm only a volunteer." The mere fact, however, that a person is acting in a volunteer capacity does not preclude the imposition of tort liability. A duty of care does not require a compensated relationship. Merely undertaking to perform services, even if they are gratuitous, is sufficient to support the creation of a duty of care.⁴⁷ As one court noted, a defendant "cannot escape a duty of ordinary care simply because he is a volunteer, particularly where the welfare of children is entrusted to him."⁴⁸

The standard of care for volunteer services is usually stated in terms of a duty to exercise reasonable care under the circumstances.⁴⁹ Although conceptually the standard of care remains one of reasonable conduct even though the services are gratuitous, a number of courts have elaborated somewhat on the standard for gratuitous services. Thus, some courts have held that the scope of the duty owed in a voluntary undertaking may be affected by the extent of the undertaking.⁵⁰ Other courts have noted that a person caring for a child is not an insurer of the child's safety,⁵¹ and thus is expected to be reasonable but not expected to be prescient and foresee and guard against every possible hazard.⁵² Despite these ostensible reassurances that volunteers may

⁴⁷ See, e.g., *Castro v. Chicago Park Dist.*, 533 N.E.2d 504, 508 (Ill. App. Ct. 1988); *L.P. v. Oubre*, 547 So. 2d 1320, 1324 (La. Ct. App. 1989); *McGarr v. Baltimore Area Council, Boy Scouts of Am., Inc.*, 536 A.2d 728, 734 (Md. App.), cert. denied, 542 A.2d 844 (Md. 1988); *Curran v. City of Marysville*, 766 P.2d 1141, 1145 (Wash. App. 1989); RESTATEMENT (SECOND) OF TORTS § 323 (1965).

⁴⁸ *Castro*, 533 N.E.2d at 508.

⁴⁹ *Id.*; *McGarr*, 536 A.2d at 734; *Curran*, 766 P.2d at 1145; RESTATEMENT (SECOND) OF TORTS § 323 (1965).

⁵⁰ *Castro*, 533 N.E.2d at 508; cf. *Loosier v. Youth Baseball and Softball, Inc.*, 491 N.E.2d 933, 937 (Ill. Ct. App. 1986) (explaining that although volunteers involved in youth baseball owed a duty to supervise players actively participating in the activity, there was no duty "to supervise those same players at any hour of the day or night when they might decide to sell a raffle ticket").

⁵¹ *Castro*, 533 N.E.2d at 508; *Curran*, 766 P.2d at 1145.

⁵² *Curran*, 766 P.2d at 1145. In *Curran*, the court of appeals upheld a summary judgment for a grandfather who was alleged to have been negligent in briefly leaving unattended his 10-year-old (nearly 11-year-old) granddaughter at a playground. Apparently the child was injured when she attempted to hurdle a T-bar device. The device was intended to be used for stretching leg muscles. The defendant-grandfather had allowed the plaintiff to go to the exercise court while he and some others visited a garden approximately 25 yards away. The court specifically held as a matter of law that there was insufficient evidence to

only be held liable when they really are negligent and that, accordingly, perfection is not required, the possibility of liability is still very real. A few recent decisions from baseball and scouting provide useful illustrations.

In *Castro v. Chicago Park Dist.*,⁵³ a child participating in Little League baseball was injured by a foul ball. He was seated on the player's bench during a game. He sued the Park District, where the games were played, alleging that it negligently designed the baseball diamond because a large opening existed between the end of the backstop fence and the beginning of another fence in front of the player's bench. The Park District filed a third-party complaint seeking contribution from the president of the local Little League and the team manager. After settlement by the district and the team manager, the contribution claim against the president went to trial. The trial court directed a verdict for the president.

On appeal, the directed verdict in favor of the president was reversed.⁵⁴ The appellate court held that the claim should have been presented to the jury—in other words, at the very least, reasonable minds could differ on the question of whether the president was negligent. Thus, a jury question was presented whether the president acted reasonably in promulgating rules, organizing the league, selecting the playing field, supervising the operation of the league,⁵⁵ and in failing to warn the players and coaches of the danger.⁵⁶ The court gave

reach the jury that defendant knew or should have known that the exercise court was somehow dangerous.

⁵³ 533 N.E.2d 504 (Ill. App. Ct. 1988).

⁵⁴ *Id.* at 509.

⁵⁵ *Id.* at 508.

⁵⁶ *Id.* Although the court did not specifically state that the failure to warn was one of the negligence issues for the jury to decide, it clearly implied as much by stating that the failure to warn was a finding upon which reasonable minds could differ. According to testimony at trial, the president had taken it upon himself to rejuvenate the league after it had been dormant for two years. He was not paid for his services. He apparently played a dominant role formulating local rules for the league. None of the written rules directed where on the bench the players were to sit. The president testified that he had instructed the coaches to have the players sit away from the gap in the fence, but that he could not remember whether this was before or after the accident. *Id.* at 506. One manager for one of the teams testified that he did not recall the safety of the players being discussed during the season meetings, and he did not remember all the safety rules in place then. *Id.* The president apparently did know of the opening in the fence prior to the accident but did not complain. He was not, however, at the field when the boy was injured. There was evidence that the president controlled most of the league's administrative operations.

The plaintiff had no previous experience with organized baseball and had played in five or six games. He testified that he had received no safety instructions and could not remember if league rules were given to him. He did not remember anyone telling him to sit back away from the open space. A teammate testified that he had received a set of written safety instructions. He also said that the equipment for the game was usually kept in the opening between the fences. *Id.*

short shrift to the argument that the president was only a volunteer and that liability might discourage people from volunteering. The court admonished: "When children are entrusted to the care of an organization, it must act with due care and caution for the safety of its participants. It cannot matter that the persons running the organization are volunteers."⁵⁷

In *McGarr v. Baltimore Area Council, Boy Scouts of America*,⁵⁸ an eleven-year-old Boy Scout was injured when he fell over a small tree-shrouded precipice during a camping excursion. He sued his troop scoutmaster.⁵⁹ According to plaintiff's testimony, he fell while searching for firewood which his scoutmaster had allegedly instructed him to gather.⁶⁰ Apparently, he and another scout had decided to explore the source of the sound of some running water.⁶¹ He alleged that the scoutmaster was negligent because the area of the accident was dangerous, and the defendant negligently failed to familiarize himself with the area, warn plaintiff of the danger, or properly supervise him. A directed verdict for the defendant-scoutmaster was reversed on appeal. In finding sufficient facts to entitle the plaintiff to present his case to the jury, the court emphasized that the defendant did not survey the area, had no topographical map, and had not consulted anyone knowledgeable about the immediate area. The court also emphasized the evidence that plaintiff was untrained in outdoor scouting activities and had, according to plaintiff's evidence, been instructed to gather firewood without any warnings.⁶²

The potential sources of injury to baseball players⁶³ and other young athletes, as well as to scouts and other participants in a wide range of youth activities is nearly limitless. When the conduct of coaches and others directly involved in the activity is evaluated in retrospect, it will often be only too easy to imagine how the accident could have been averted. In *Castro*, all someone had to do was to make the boy move behind the fence. What could be simpler? Of course, the same could be said for virtually any injury. Could one argue, for example, that youth baseball players should not have been permitted to get

⁵⁷ *Id.* at 508.

⁵⁸ 536 A.2d 728 (Md. Ct. Spec. App.), *cert. denied*, 542 A.2d 844 (Md. 1988).

⁵⁹ He also sued the area council of Boy Scouts, which owned the property on which the accident occurred. *Id.* at 729.

⁶⁰ *Id.* at 731. Testimony by another scout contradicted these facts. *Id.* at 731 n.1.

⁶¹ The slope of the terrain gradually grew more steep until it reached the "cliff," estimated to be 15 to 40 feet above a creek. *Id.* at 731.

⁶² *Id.* at 734-35.

⁶³ Another case in New Jersey involved a Little League outfielder who suffered an eye injury when he was struck in the face by a fly ball. He alleged that four of his volunteer coaches were negligent in switching him from second base to the outfield without teaching him how to shield his eyes from the sun. *See Sports People; Little League Suit*, N.Y. TIMES, May 9, 1985, at B18. Apparently the case was settled for \$25,000. *See Markoff, supra* note 32, at 40.

dust in their eyes; that the bats should have been checked for splinter hazards; that an accident to a Boy Scout at camp would have been avoided if only he had been told to tie his shoe, step over the broken glass, duck below the low branch, or not kneel where poison ivy might be lurking?⁶⁴ Recent opinions suggest a willingness of judges to allow the juries to indulge in this kind of visionary second-guessing. The threat of liability, or at least the unpredictable nature of the liability landscape, could have a devastating effect on the highly elastic supply of potential volunteers.⁶⁵

B. Factors Increasing Exposure of Volunteers

1. Litigiousness in General

A number of factors have contributed to an increase in the exposure of volunteers to potential tort liability. One is the increase in tort litigation generally. For a variety of reasons,⁶⁶ the last several decades have witnessed a dramatic increase in tort claims.⁶⁷ Many individuals and entities that have borne the brunt of the avalanche of tort claims have had no choice but to press on, trying to weather the storm. Doctors, motivated by a sense of professional

⁶⁴ See, e.g., *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971) (alleged negligence of camp employees in failing to adequately supervise campers in order to prevent camper from being struck in eye by fishing hook; opinion addressed only the issue of charitable immunity).

⁶⁵ For example, the *McGarr* court offered a number of possible steps that the landowner might have taken to have prevented the plaintiff's fall over the precipice. "[T]o post no warning signs, to omit any mention of the danger to the scouts or even to the scoutmaster, and to leave the precipice without a guardrail of some kind," were all possibilities of negligence that the jury could find. 536 A.2d at 734. Although these remarks related to the potential liability of the area council (as the land owner of the campsite) rather than to the individual scoutmaster, they nevertheless illustrate the typical judicial attitude toward the negligence issue in these cases. Must volunteers now assure that their hikers only venture into "wilderness" areas equipped with guardrails? It is no wonder, then, that potential volunteers might well consider this kind of volunteer work a legal mine field.

⁶⁶ It is difficult to quantify the various factors contributing to the increase in tort claims, especially because the increase is probably a result of the combined, perhaps synergistic, effects of these factors. Those factors probably influencing the increase include changes in the law, increases in the number of attorneys, and changes in public attitudes toward death, disease, and entitlement generally.

⁶⁷ See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 9-10 (1988). The increase has been manifested in the number of tort claims asserted, the number in which the plaintiff prevailed, and in the size of the awards. *Id.* at 10. While the direct costs of the American tort system were about \$68 billion in 1984, less than five years later they were estimated at over \$100 billion. See STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* xvii (1989).

dedication, economic interests, and no doubt some "functionlust,"⁶⁸ usually continue to practice despite the threat of liability. Product manufacturers are not driven from the market until they are overwhelmed by liability or, perhaps, until the threat of liability makes continuation of a product economically unwarranted. Volunteers, while often dedicated, have more flexibility and thus are potentially more readily inhibited by the threat of liability than those engaged in business activities.

2. Limitations on Traditional Defenses

a. Consent and Intentional Torts

Developments involving a variety of legal concepts facilitate tort claims against volunteers participating in youth activities. A number of traditional defenses or limitations on liability have more limited effect when invoked against claims by minor plaintiffs. The concept of consent that normally precludes liability for intentional torts has a more limited application because minors, at least immature minors,⁶⁹ are held legally incapable of consenting to at least some types of potentially harmful or offensive contacts.⁷⁰ Although parents may give valid consent to some conduct affecting their children, there are limits. The conduct in question must have been within the scope of the parental consent. And parental consent may in some circumstances violate public policy and be ineffective. Thus, parents could probably not give valid consent for a child to undergo contacts deemed (even with parental acquiescence) impermissible.⁷¹

Admittedly, not all contacts with minors that turn out to be harmful or offensive will be actionable if the courts, as they should, also require that in order for such contacts to be actionable they not only be nonconsensual but also be of an impermissible nature. Nevertheless, limitations on the validity of consent by minors renders one hurdle that plaintiffs must leap less imposing.

The present proposal would not sanction exculpatory agreements for intentional tortious injuries. Thus, potential liability for such torts would

⁶⁸ This term, originating with Konrad Lorenz, means the "love of doing a thing," and has been applied to the self-perpetuating nature of medical procedures and techniques. See George Crile, Jr., *The Surgeon's Dilemma*, HARPERS, May 1975, at 38.

⁶⁹ Minors capable of appreciating the nature, extent, and probable consequences of the contemplated conduct have sometimes been held legally competent to give effective consent, at least to some types of conduct. See RESTATEMENT (SECOND) OF TORTS § 892A, cmt. b (1979). This rule is sometimes referred to as the mature minor rule. See *Cardwell v. Bechtel*, 724 S.W.2d 739 (Tenn. 1987).

⁷⁰ See KEETON ET AL., *supra* note 1, § 18, at 114-15.

⁷¹ Thus, for example, parental consent to sexual abuse of a minor child would obviously be ineffective.

remain notwithstanding attempts at exculpation. But, it is therefore important to identify those truly intentional *tortious* injuries for which valid parental consent would be invalid because the contacts in question were impermissible irrespective of parental acquiescence.⁷²

b. *Assumption of Risk, and Contributory and Comparative Negligence*

Traditional defenses to negligence claims such as implied assumption of risk⁷³ and contributory negligence have undergone continuing erosion, often

⁷² See *infra* part VI.D.1.

⁷³ A limitation on liability somewhat similar to implied assumption of risk is based on a rationale that because of the nature of the activity, the parties' roles and relationships and the participants' assumed or supposed knowledge of the activity (although a few courts seem to require proof of some actual knowledge of the risks), the defendant is sometimes held to owe no duty or a decreased duty to afford plaintiff greater protection, and thus was not even negligent. See generally *Knight v. Jewett*, No. S019021, 1992 WL 203943 (Cal. Aug. 24, 1992); *KEETON ET AL.*, *supra* note 1, § 68, at 481, 496-97. Although implied assumption of risk is frequently incorporated into a comparative negligence scheme, most courts would probably hold that a finding that a defendant violated *no duty* owed to a plaintiff precludes liability completely even in a comparative negligence jurisdiction. See *id.* at 496-97.

Some courts apply a variation of the no-duty or limited-duty idea in connection with some aspects of some recreational activities. Such courts sometimes hold, especially for professional or experienced adult athletes or participants, that with respect to the risks normally associated with the activity, the defendant (especially if a co-participant) owes no duty to plaintiff other than to avoid intentionally or recklessly injuring him. See, e.g., *Knight*, *supra*; *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986) (applying rule to co-participant professional athletes); *Wertheim v. United States Tennis Ass'n, Inc.*, 540 N.Y.S.2d 443 (App. Div.), *leave to appeal denied*, 547 N.E.2d 101 (N.Y. 1989); *JEFFREY K. RIFFER, SPORTS AND RECREATIONAL INJURIES* § 9.03 at 114 (1984 & Supp. 1990). This limited-duty principle would also, like assumption of risk, have less application with respect to injuries to minors. Minors, especially immature ones, are less capable of understanding and evaluating the risks of an activity than are adult participants (especially professional athletes). When children are involved, a defendant supervising them would not be justified in expecting as much responsibility for self-preservation as would be true for adult-plaintiffs, and thus would owe the children a level of care commensurate with the foreseeable risks. Thus, the duty owed has to be assessed in light of the role of each defendant, as well as the background and experience of the participants. See *Benítez v. New York City Bd. of Educ.*, 541 N.E.2d 29, 33 (N.Y. 1989) (holding that even a nineteen-year-old star high school football player was at least owed a duty of reasonable care to protect him from "unassumed, concealed or unreasonable risks," but finding the duty satisfied in the instant case); see also *Parsi v. Harpursville Cent. Sch. Dist.*, 553 N.Y.S.2d 566 (App. Div. 1990) (jury question whether, under *Benítez* rule, defendant coaches were negligent in supervising thirteen-year-old player struck by ball during girls' softball practice, and in failing to provide protective equipment); *supra* part III.A.

being subsumed into a general comparative negligence scheme.⁷⁴ Moreover, these defenses have been subject to important conceptual limitations in cases involving minor plaintiffs. Implied assumption of risk requires subjective knowledge and appreciation of the risks to be assumed.⁷⁵ Because minors often have more limited capacity for comprehending the gravity of risks, the defense of implied assumption of risk, even if retained as an independent defense, would have much more limited effect in claims by minor plaintiffs.⁷⁶ Contributory and comparative negligence, ordinarily governed by an objective reasonable adult standard, is modified in the case of minors, whose conduct is (unless an exception applies) evaluated in terms of the care expected of a person of like age, intelligence, and experience.⁷⁷ Thus, these defenses would also have a more limited effect on claims by minors.

c. Statutes of Limitations

The statute of limitations is another defense that is often less outcome determinative in cases by or on behalf of minor plaintiffs. Many state statutes provide that the statute of limitations for various tort claims is suspended during minority or at least until a specified minimum age, or may not expire for minors before a specified age or period.⁷⁸

⁷⁴ See Carol A. Mutter, *Moving to Comparative Negligence in An Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 228, 284-94 (1990).

⁷⁵ See KEETON ET AL., *supra* note 1, § 68, at 487. Age has been recognized by the courts as a factor that may affect one's ability to know the risks. *Id.* § 68, at 487 & n.70. The requirement that the plaintiff have assumed the risk voluntarily may also be more difficult to establish in the case of a child. See *Rutter v. Northeastern Beaver County Sch. Dist.*, 437 A.2d 1198, 1205 (Pa. 1981) (questioning voluntariness of one's participation in "jungle football" practice drill if such participation was expected of one wishing to play football and one otherwise had a right to play on the high school football team).

⁷⁶ Nor is it likely that parental action would be imputed to their minor children to support a defense of implied assumption of risk. As noted, most courts have been reluctant to allow parents to expressly assume (by exculpatory agreement) a risk for their children. See *infra* notes 132-36. The courts have also held that contributory negligence cannot be imputed from parents to children. See KEETON ET AL., *supra* note 1, §74 at 531-32. Courts would likely follow a similar rule for implied assumption of risk, especially because the trend has been to merge both defenses into a comparative negligence scheme.

⁷⁷ See, e.g., *McGarr v. Baltimore Area Council, Boy Scouts of Am., Inc.*, 536 A.2d 728, 732 (Md. Ct. Spec. App.) *cert. denied*, 542 A.2d 844 (Md. 1988); KEETON ET AL., *supra* note 1, at 179-82 (discussing rule for minors and the adult-activity exception).

⁷⁸ See generally 51 AM. JUR. 2D, *Limitations of Actions* § 182 (1970); Jean E. Maess, Annotation, *Tolling of State Statute of Limitations in Favor of One Commencing Action Despite Existing Disability*, 30 A.L.R.4TH 1092 (1984 & Supp. 1990).

Most courts, however, do not apply such tolling provisions to parents' claims, including claims for loss of the child's services and for the child's medical expenses, in

3. *Obstacles to Claims Against Other Defendants*

Claims against volunteers engaged in youth activities may also sometimes be inspired by the fact that claims against others whose negligence may also have contributed to plaintiff's injury are sometimes precluded or complicated by various rules. The availability of other potential defendants does not, of course, preclude a claim against an individual volunteer whose negligence may also have been a contributing cause⁷⁹ of the injury and who may therefore be subject to liability. But, the opportunity or lack of opportunity to recover from other potential defendants may, as a practical matter, affect the potential liability of individual volunteers. The availability of another potential defendant, especially an insured or solvent "deep pocket," may prompt a plaintiff to forego a claim against the volunteer. Or, the amounts paid by another defendant may completely satisfy a judgment or claim,⁸⁰ or at least reduce the amount of possible recovery from the individual volunteer.⁸¹ Thus, to the extent that various rules preclude or limit claims against other potential tortfeasors, plaintiffs' attention would be expected to shift accordingly to individual volunteers.

A number of doctrines could narrow the potential liability of some other tortfeasors involved in injuries to minors. Claims against a child's parents may

connection with the child's injury, although there is a split of authority. See John H. Derrick, Annotation, *Tolling of Statute of Limitations, on Account of Minority of Injured Child, As Applicable to Parent's or Guardian's Right of Action Arising Out of Same Injury*, 49 A.L.R.4TH 216 (1986 & Supp. 1990).

⁷⁹ It is black letter law that an injury may have more than one tortious liability-producing cause. See RESTATEMENT (SECOND) OF TORTS § 430 & cmt. d (1965).

⁸⁰ See generally KEETON ET AL., *supra* note 1, § 48, at 331. In such circumstances, however, the defendant-volunteer may be subject to a claim from the other defendant for contribution (if joint and several liability is applicable in the jurisdiction in question) or, under some circumstances, indemnity. See generally KEETON ET AL., *supra* note 1, § 50, at 336-45; Mutter, *supra* note 74, at 303-19.

⁸¹ This reduction may occur in most of the states retaining joint and several liability where one joint tortfeasor has or is deemed to have paid a part of a plaintiff's loss, and in states that have modified or abandoned joint and several liability where a defendant's liability may be limited (often based on relative fault) to a share of the total loss (or by some variation of this rule). See generally 2 ARTHUR BEST, *COMPARITIVE NEGLIGENCE* §§ 13.00-13.90 (1992); KEETON ET AL., *supra* note 1, §§ 48, 49, 67, at 331-36, 475. The effect of immunities of some tortfeasors (see *infra* notes 82-84) on the liability of remaining tortfeasors (defendants) may depend on whether the immune conduct is considered in calculating the remaining tortfeasor's liability. See BEST, *supra* § 13.20.

Furthermore, one tortfeasor may have a claim for contribution (usually pursuant to statute) against another where joint and several liability is retained, or perhaps indemnity. See *supra* note 80.

be precluded by the doctrine of parental immunity in those jurisdictions that have retained the immunity.⁸² Even if such claims are technically not foreclosed, the absence of liability insurance or its exclusion from coverage under some insurance policies⁸³ may, as a practical matter, discourage claims by children against their parents.

Tort claims against institutional sponsors of the activity may sometimes be precluded by the doctrine of charitable immunity, although this defense has been abrogated or significantly limited in many states.⁸⁴ The fact that an institutional sponsor may be protected from vicarious liability by some form of charitable immunity does not in and of itself protect individual employees or volunteers who may have caused the injury in question.⁸⁵

Many injuries to minors are caused in part by dangerous conditions on the land where the activity was taking place. The owner of the land is sometimes protected from tort liability to varying degrees by recreational use statutes.⁸⁶

⁸² See generally Kevin Fularczyk, Comment, *Parent-Child Immunity After Carey v. Meijer, Inc.*, 35 WAYNE L. REV. 153 (1988). There is a marked division of authority on the issue of parental immunity. See Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4TH 1066 (1981 & Supp. 1990); see also Andrea G. Nadel, *Right of Tortfeasor to Contribution from Joint Tortfeasor Who is Spouse or Otherwise in Close Familial Relationship to Injured Party*, 25 A.L.R.4TH 1120, §§ 5-6 (1983 & Supp. 1991).

⁸³ Some automobile liability insurance policies and liability provisions of homeowners policies contain exclusions from coverage for claims made by various classes of persons, such as other insureds under the policy and family members, for example. See generally ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 382-85 (1988); Jonathan M. Purver, Annotation, *Validity, Construction and Application of Provision of Automobile Liability Policy of Insured Excluding From Coverage Injury or Death of Member of Family or Household*, 46 A.L.R.3D 1024 (1972 & Supp. 1990).

⁸⁴ See generally Note, *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382 (1987); Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R.4TH 517 (1983 & Supp. 1990).

⁸⁵ See David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 U. BRIDGEPORT L. REV. 63, 64 (1989).

⁸⁶ The terms of these statutes tend to vary considerably from state to state and generalization is difficult. See generally Michael S. Buskus, Comment, *Tort Liability and Recreational Use of Land*, 28 BUFF. L. REV. 767 (1979); Dean P. Laing, Comment, *Wisconsin's Recreational Use Statute: A Critical Analysis*, 66 MARQ. L. REV. 312 (1983). These statutes commonly preclude or limit some types of liability of landowners who permit use of their land for certain types of recreational activities. The protection afforded by such statutes frequently requires that no consideration have been received by the landowner. They also frequently do not apply to some of the more aggravated forms of tortious conduct, such as intentional torts, recklessness (willful or wanton conduct), or in a few states even gross negligence. For other limitations on the scope of such statutes, see *Bauer v. Minidoka Sch. Dist.* No. 331, 778 P.2d 336 (Idaho 1989) (refusing to apply the recreational use statute to the public school student injured on school football field in

Finally, although the decisions reach divergent results, some cases have precluded the vicarious liability of sponsoring organizations for the tortious conduct of volunteers.⁸⁷ When vicarious liability for the conduct of volunteers is rejected, the sponsoring organization is only subject to vicarious liability for the conduct of their actual employees and perhaps subject to direct liability based on a corporate negligence theory.

morning before classes). There is some disagreement in some states on the extent to which such statutes apply to or limit claims by children. See *Jacobsen v. City of Rathdrum*, 766 P.2d 736 (Idaho 1988); *Stanley v. Tilcon Maine, Inc.*, 541 A.2d 951 (Me. 1988); *Buskus, supra* at 785-88.

For a recent example of a case in which a recreational use statute operated to preclude a claim against the landowner, see *Curran v. City of Marysville*, 766 P.2d 1141, 1142-44 (Wash. Ct. App. 1989). In *Curran*, the decision to sue the victim's grandfather, who had undertaken gratuitously to supervise the child, was no doubt influenced to some extent by the anticipated effect of the recreational use statute on the liability of the owner of the park where the accident occurred.

⁸⁷ There are basically two requirements for a person or entity ("A") to be held vicariously liable for the conduct of another ("B"). First, there must be a relationship between A and B that is legally sufficient to support vicarious liability. And, second, the tortious conduct of B must have occurred within the scope of that relationship. The cases have disagreed on whether unpaid volunteers have a sufficient relationship with the sponsoring organization to support the imposition of vicarious liability. The majority of cases that have addressed the question have approved the application of vicarious liability with respect to the conduct of volunteers. See Allan Manley, Annotation, *Liability of Charitable Organization Under Respondeat Superior Doctrine for Tort of Unpaid Volunteer*, 82 A.L.R.3d 1213, 1219 (1978 & Supp. 1990). A number of cases, especially more recent decisions, however, have been reluctant to hold a sponsoring organization vicariously liable for the conduct of volunteers. See *McGarr v. Baltimore Area Council, Boy Scouts of Am. Inc.*, 536 A.2d 728, 735 (Md. Ct. Spec. App.) (Boy Scout area council, characterized as an "umbrella organization," not vicariously liable for the actions of scoutmaster of one of its troops), *cert. denied*, 542 A.2d 844 (Md. 1988); *Mauch v. Kissling*, 783 P.2d 601 (Wash. Ct. App. 1989). In *Mauch*, plaintiff contended that even if the actual relationship involved would not support vicarious liability, it could be imposed when the sponsoring organization (national scouting organization and area council) had "ostensible or apparent authority" over the individual in question. The court rejected the "ostensible-apparent authority" argument because there was no evidence that the scout's mother had relied on statements suggesting apparent authority in deciding to allow her son to engage in the activity that caused the injury. Nor was there evidence of conduct by sponsoring organizations that would lead a reasonable person to believe that the scoutmaster was acting with apparent authority. *Id.* at 605.

Although the relationship requirement is the most formidable hurdle to vicarious liability in the context of volunteer services, the scope of employment requirement may occasionally preclude vicarious liability. See *Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell*, 359 S.E.2d 241 (Ga. Ct. App. 1987) (alleged sexual molestation by volunteer in Big Brother organization not within scope of authority).

4. *Effects of Sensational Publicity*

A volunteer who is sued by a child for actions occurring while the volunteer was trying to teach or help is bad news for the volunteer, but makes a good news story. There will often be interesting facts presenting high drama in the tale of a youth and his family who strike out to "bite the hand" in effect. Not only does such publicity discourage potential volunteers⁸⁸ from undertaking or continuing such services, it also breeds more of this type of litigation.

C. *Statutory Immunities*

1. *Recent Federal Legislative Developments*

A number of statutes have been proposed or enacted at both the federal and state levels that address to varying degrees the potential tort liability of volunteers. These legislative efforts, however, suffer from serious limitations and do not represent a satisfactory answer to the problem.

A recent federal bill, the Volunteer Protection Act of 1991,⁸⁹ essentially proposes model legislation, and offers the states financial incentives to encourage them to adopt legislation that embodies the essential features of the proposed legislation. The proposed model legislation would preclude liability of any volunteer of a nonprofit organization or governmental entity, subject to a number of preconditions⁹⁰ and possible exceptions.⁹¹

For a number of reasons, however, the proposed federal statute is not an effective response to the threat of liability facing volunteers. First, the bill has not yet been enacted.⁹² Second, the bill does not itself create volunteer

⁸⁸ See Hartmann, *supra* note 85, at 64.

⁸⁹ H.R. 911, 102d Cong., 1st Sess. (introduced by Rep. Porter, Feb. 6, 1991) [hereinafter Volunteer Act]. See generally Hartmann, *supra* note 85. The bill (also designated H.R. 911) was originally introduced in 1989. A modified version of the act was then introduced as an amendment to the National Service Act of 1990. See 136 CONG. REC. H7521-22 (daily ed. Sept. 13, 1990) (remarks of Rep. Porter). This abbreviated form of the act apparently passed the House but was deleted in a Conference Committee. See 137 CONG. REC. H1791 (daily ed. March 19, 1991) (statement by Rep. Porter). The full version (similar to the 1989 bill) of the bill was again introduced in 1991. See H.R. 911, 102d Cong., 1st Sess. (1991). A similar bill has been introduced in the Senate. See S. 1341, 102d Cong., 1st Sess. (1991). The discussion in the text refers to the current 1991 version of the House Bill, H.R. 911.

⁹⁰ Volunteer Act, *supra* note 89, § 4(a).

⁹¹ See *id.* § 4(d).

⁹² See *supra* note 89.

immunity,⁹³ but rather seeks to encourage states to enact some form of volunteer immunity by increasing by a mere 1 percent the fiscal year allotment that would otherwise be made to such state under the Social Services Block Grant program.⁹⁴ Third, the bill's recommended volunteer immunity requires not only that the volunteer have been acting in good faith within the scope of his duties with the organization or entity, but also that his conduct not have been willful and wanton.⁹⁵ As will be discussed more fully later,⁹⁶ the concept of willful or wanton conduct, representing in some ill-defined way a form of more extreme negligence, may not afford volunteers sufficient predictability or protection. Fourth, the states may, if they choose, condition immunity on adherence by the organization or entity to risk management procedures, including the mandatory training of volunteers.⁹⁷ It is unclear what procedures and training would be required to satisfy this requirement. Thus, the proposed immunity accorded to volunteers could be subject to another set of imponderables, undercutting the reassurance the statute was designed to foster. Fifth, the states may also create an exception to immunity for injuries arising out of the operation of motor vehicles and other vehicles.⁹⁸ Sixth, the states may require as a condition for conferring volunteer immunity that the organization or entity provide a financially secure source of recovery against it,⁹⁹ because under the bill, the organization or entity remains potentially liable for injuries it causes.¹⁰⁰ This would, of course, greatly increase the cost of the

⁹³ The bill states that "[n]othing in this Act shall be construed to preempt the laws of any State governing tort liability actions." Volunteer Act, *supra* note 89, § 3. The expressed purpose of the Act is to promote its objectives of fostering volunteer work by "encouraging" reform of state laws. *Id.* § 2(b).

⁹⁴ See *id.* § 5(a). The Block Grants are awarded under title XX of the Social Security Act. See 42 U.S.C.A. § 1397 (West 1992) (setting forth the purpose of these grants). The amounts of potential awards to the states are, however, apparently small. Thus, in 1987, a one percent increase in New Hampshire's grant would have meant an increase of only \$400,000, and only \$3 million for California. See Hartmann, *supra* note 85, at 70.

⁹⁵ Volunteer Act, *supra* note 89, § 4(a)(2).

⁹⁶ See *infra* part IV.A.2.g.

⁹⁷ Volunteer Act, *supra* note 89, § 4(d)(1).

⁹⁸ *Id.* § 4(d)(3).

⁹⁹ *Id.* § 4(d)(5).

¹⁰⁰ *Id.* § 4(c), 4(d)(2). The act states in general terms that it does not affect the liability of the nonprofit organization. *Id.* § 4(c). It also provides that the states may render the organization or entity subject to liability for the conduct of its volunteers "to the same extent as an employee is liable, under the laws of that State." *Id.* § 4(d)(2). It is unclear what § 4(d)(2) adds to § 4(c), unless it is somehow designed to invite states to broaden potential vicarious liability of entities for the conduct of volunteers. Thus, it would also have to be decided whether the act would actually create such vicarious liability, or rather would allow such liability only when otherwise applied by the state. See generally *supra* note 87 and accompanying text.

activity and ultimately price many activities out of existence. Seventh, the bill does not limit the right of the organization or entity to sue the volunteer, presumably for contribution or indemnity.¹⁰¹

2. State Legislation

a. Overview of Recent State Legislation

Quite a few states have enacted legislation, much of it recent, that to varying degrees¹⁰² purports to limit the potential tort liability of uncompensated (under most statutes) volunteers for conduct within the scope of their volunteer work. These statutes differ widely and address many different types of volunteers. It is conceivable that almost any volunteer could at some time be engaged, in at least some limited way, in youth activities. I have, however, tried to focus on those statutes that seem to cover, by encompassing either a sufficiently broad class of volunteers in general or those specific types of volunteers who are most directly engaged in organized youth activities, volunteers most commonly and intensively connected with youth activities. A number of these statutes deal with potential liability of volunteers of one or more types of organizations (or corporate entities), including nonprofit, community, homeowners, governmental, and various other types of organizations.¹⁰³ Some statutes apply to such volunteers in general,¹⁰⁴ whereas

¹⁰¹ *Id.* § 4(b). If a person is immune from liability, he would generally not be subject to a claim for contribution from a joint tortfeasor. See KEETON ET AL., *supra* note 1, § 50, at 339-40. Whether the provision of the act preserving the right of the sponsoring organization or entity to sue the volunteer represents an exception to this rule, and thus an exception to the immunity of the volunteer conferred by the act, is unclear. It is possible that a person who is otherwise immune from claims by one class of persons might still be subject to claims for indemnity (by a third person who is rendered liable because of the conduct of the immune person) if such claims are not precluded by the immunity and if otherwise available. Perhaps this possibility is what was contemplated by the drafters of § 4(b), but the statute is far from clear on this point.

¹⁰² Owing to the complexity and diversity of these statutes, many of their details, qualifications, and limitations must necessarily be omitted as beyond the scope of this article. Nor was any attempt made here to offer an exhaustive analysis of the law of any particular state.

¹⁰³ Some statutes apply to volunteers of only one type of organization, such as nonprofit organizations, whereas other statutes include several types of entities. The most common form of statute applies to volunteers of nonprofit or charitable organizations. The types of organizations covered seem to be the kinds that depend on volunteer services.

¹⁰⁴ See, e.g., ARK. CODE ANN. § 16-6-103(1) (Michie Supp. 1991); 1992 Colo. Legis. Serv. H.B. 92-1047 (West) (to be codified at COLO. REV. STAT. § 13-21-115.5) (with some exclusions); COLO. REV. STAT. § 13-21-116(2)(a) (1987); DEL. CODE ANN. tit. 10, § 8133(a)(1) (Supp. 1990); IOWA CODE ANN. § 613.19 (West Supp. 1990); KY. REV.

other statutes or provisions apply to certain types of volunteers,¹⁰⁵ such as coaches, managers, and game officials. Some statutes affect only claims by

STAT. ANN. § 411.200 (Michie/Bobbs-Merrill Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. §§ 5-312(b), 5-314(a)(4) (1989); MONT. CODE ANN. § 27-1-732(1) (1989); N.J. STAT. ANN. § 2A:53A-7.1(b) (West Supp. 1991); N.C. GEN. STAT. § 1-539.10(a) (Supp. 1991); OHIO REV. CODE ANN. § 2305.38 (Anderson 1991).

Many states also have separate statutes or statutory provisions specifically addressing and limiting to varying degrees the liability of persons holding certain leadership positions, such as directors, officers, or trustees, of some types of organizations, especially nonprofit organizations. Some of these do not mention a requirement that the officer, director, or trustee have performed his services gratuitously. *See, e.g.*, COLO. REV. STAT. § 13-21-116(2)(b) (1987), *as amended by* 1992 Colo. Legis. Serv. H.B. 92-1144 § 1 (West); IOWA CODE ANN. § 613.19 (West Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. § 5-312(a)(7)(i) (1989); MONT. CODE ANN. § 27-1-732(1) (1989); 42 PA. CONS. STAT. ANN. § 8332.1(a) (Supp. 1991) (officer or employee of nonprofit association conducting or sponsoring a sports program). Others do expressly require that the services have been rendered without compensation. *See* 1992 Colo. Legis. Serv. H.B. 92-1144, § 2 (West) (to be codified as COLO. REV. STAT. § 13-21-115.7); DEL. CODE ANN. tit. 10 § 8133(a)(1) (Supp. 1990); KY. REV. STAT. ANN. § 411.200 (Michie/Bobbs-Merrill Supp. 1990); MASS. GEN. LAWS ANN. ch. 231, § 85W (West Supp. 1991); N.J. STAT. ANN. § 2A:53A-7.1 (West Supp. 1991); N.C. GEN. STAT. § 55A-28.1A(a) (1990); N.D. CENT. CODE § 32-03-44 (Supp. 1991); OHIO REV. CODE ANN. § 2305.38 (Anderson 1991); 42 PA. CONS. STAT. ANN. §§ 8332.2 (Supp. 1991). The overview of volunteer statutes that follows generally will not address the officer-director types of statutes. Although such statutes may not be identical to the volunteer statute in the same state, the same diversity found in the volunteer statutes generally will also be found in the officer-director statutes.

¹⁰⁵ *See, e.g.*, COLO. REV. STAT. § 13-21-116 (2.5)(a) (1987) (volunteers serving "as a leader, assistant, teacher, coach, or trainer for any program, organization, association, service group, educational, social, or recreational group, or nonprofit corporation serving young persons or providing sporting programs or activities for young persons"); MASS. GEN. LAWS ANN. ch. 231, § 85V (West Supp. 1991) (volunteer "manager, coach, umpire or referee or . . . an assistant to a manager or coach in a sports program of a nonprofit association . . . and . . . officer, director, trustee, or member thereof serving without compensation"); MD. CODE ANN. CTS. & JUD. PROC. § 5-313(a)(3) (1989) (volunteer "athletic coach, manager, official, program leader, or assistant for a community recreation program"); N.J. STAT. ANN. §§ 2A:62A-6(a), 2A:62A-6.2 (West Supp. 1991) (volunteer coaches, managers, or officials, other than those addressed by specified other statutes, or sponsors for a nonprofit sports team or team affiliated with a county or municipal recreation department); 42 PA. CONS. STAT. ANN. § 8332.1 (Supp. 1991) (volunteer manager, coach, instructor, umpire, referee, or their assistant in a sports program of a nonprofit association); *cf.* TENN. CODE ANN. § 62-50-201 (1990) ("registered" sports officials, presumably including but not limited to volunteer officials).

Many states also have "Good Samaritan" statutes limiting liability of persons, or categories of persons (like health care providers), who gratuitously (under most statutes) render assistance at an accident or emergency. These statutes vary widely. *See generally* 2

specified classes of potential claimants, such as participants in the activity in which the volunteer is providing services,¹⁰⁶ while others at least arguably appear broader in their reach.¹⁰⁷

For a number of reasons, the protection afforded volunteers by this patchwork of state statutes is more apparent than real.¹⁰⁸ First, many states have not enacted this type of legislation, or at least have not passed legislation that would cover most potential volunteers in youth activities. Given the opposition by some groups in the legal profession to tort law reform or at least to restrictions on tort liability, as well as political lethargy in general, the prospects for either more universal adoption of such statutes or the broadening of their scope are dim.

Second, the protection provided by these statutes is subject to a variety of limitations and exceptions. Not only are intentionally inflicted injuries often excluded,¹⁰⁹ but under many statutes, volunteers remain subject to potential

DAVID W. LOUISELL ET AL., MEDICAL MALPRACTICE §§ 21.01-21.60 (1991 & Supp. 1992).

¹⁰⁶ See, e.g., ARK. CODE ANN. § 16-6-105 (Michie Supp. 1991) ("participant in, or a recipient, consumer, or user of, the services or benefits of a volunteer"); COLO. REV. STAT. § 13-21-116(2.5)(a) (1987) (applicable to various activities serving young persons, but not to harm "third persons"); N.J. STAT. ANN. § 2A:62A-6(2) (West Supp. 1991) (applicable to claims by a "player or participant"); N.D. CENT. CODE § 32-03-46 (Supp. 1991) (applicable to claims by a "player or participant"); TENN. CODE ANN. § 62-50-202 (1990) (injury of player, participant, or spectator). But see N.D. CENT. CODE § 32-03-45 (Supp. 1991).

¹⁰⁷ See, e.g., 1992 Colo. Legis. Serv. H.B. 92-1047, 92-1177 § 2 (West) (to be codified as COLO. REV. STAT. §§ 13-21-115.5(4)(a), 13-21-115.7(2); COLO. REV. STAT. § 13-21-116(a), (b) (1987), as amended 1992 Colo. Legis. Serv. H.B. 92-1177 § 1 (West); DEL. CODE ANN. tit. 10, § 8133 (Supp. 1990); IOWA CODE ANN. § 613.19 (West Supp. 1990); KY. REV. STAT. ANN. § 411.200 (Michie/Bobbs-Merrill Supp. 1990); MASS. GEN. LAWS ANN. ch. 231 § 85V (West Supp. 1991) (protection afforded by act applicable "to any person"); MONT. CODE ANN. § 27-1-732 (1989); OHIO REV. CODE ANN. § 2305.38 (Anderson 1991).

¹⁰⁸ One commentator describes these make shift statutes as "clumsy solutions, . . . born of nothing more than desperation." HUBER, *supra* note 67, at 218.

¹⁰⁹ These statutes either expressly exclude intentional injuries from the protection they provide, or do essentially the same thing by making persons subject to liability who did not act in good faith. See, e.g., ARK. CODE ANN. § 16-6-105(2) (Michie Supp. 1991); 1992 Colo. Legis. Serv. H.B. 92-1047 (West) (to be codified at COLO. REV. STAT. § 13-21-115.5(4)(a)(I)); COLO. REV. STAT. § 13-21-116(2)(a) (1987); KY. REV. STAT. ANN. § 411.200 (Michie/Bobbs-Merrill Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. § 5-312(d) (Supp. 1991) (liability for malicious conduct to the extent liability exceeds liability insurance limits of association or organization), § 5-314(c) ("intentionally tortious conduct"); MASS. GEN. LAWS ANN. ch. 231 §§ 85V, 85W (West Supp. 1991); N.C. GEN. STAT. § 1-539.10(a)(1), (2) (Supp. 1991); N.D. CENT. CODE §§ 32-03-44(1), 32-03-45(1), 32-03-46(1)(a) (Supp. 1991); OHIO REV. CODE ANN. § 2305.38(C)(2), (D)(2) (Anderson

liability for various forms of unintentional conduct, such as reckless, willful or wanton conduct,¹¹⁰ and sometimes even gross negligence.¹¹¹ Neither the concept of willful (or reckless) conduct nor gross negligence has been clearly defined, at least not with sufficient discreteness to separate it with any predictable consistency from "ordinary" negligence.¹¹² Definitions of willfulness and recklessness have varied. Although some authorities have said that reckless conduct differs in the quality of the fault—being characterized by a conscious disregard of the rights of others¹¹³—other definitions of recklessness seem to distinguish it from ordinary negligence mostly (although perhaps not exclusively) in the degree of risk involved.¹¹⁴ The line separating gross negligence from ordinary negligence is even less discernible.¹¹⁵ Indeed, it is so much a matter of degree as to raise a serious doubt whether separate concepts are administrable at all. In any event, issues of recklessness (and willfulness)

1991); TENN. CODE ANN. § 62-50-203 (1990). The Iowa statute, speaking in terms of "intentional misconduct," rather than an intentional injury, may arguably adopt a broader exception. *See, e.g.*, IOWA CODE ANN. § 613.19 (West Supp. 1990).

¹¹⁰ *See, e.g.*, 1992 Colo. Legis. Serv. H.B. 92-1047 (West) (to be codified at COLO. REV. STAT. § 13-21-115.5(4)(a)(II)); COLO. REV. STAT. § 13-21-116(2)(a), (b), (2.5)(a) (1987) *as amended by* 1992 Colo. Legis. Serv. H.B. 92-1177 § 1 (West); DEL. CODE ANN. tit. 10, § 8133(d) (Supp. 1990); KY. REV. STAT. ANN. § 411.200 (Michie/Bobbs-Merrill Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. §§ 5-313(c)(2), (d)(2), 5-314(c) (1989); MONT. CODE ANN. § 27-1-732(1) (1989); N.J. STAT. ANN. §§ 2A:62A-6(c), -6.1, -6.2, 2A:53A-7.1(b) (West Supp. 1991); N.C. GEN. STAT. § 1-539.14(a)(2) (Supp. 1991); N.D. CENT. CODE §§ 32-03-42, 32-03-44(2), 32-03-45(2) (Supp. 1991); OHIO REV. CODE ANN. § 2305.38(C)(2), (D)(2) (Anderson 1991).

¹¹¹ *See, e.g.*, ARK. CODE ANN. § 16-6-105(2) (Michie Supp. 1991); DEL. CODE ANN. tit. 10, § 8133(d) (Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. § 5-312(d) (to extent judgment for such gross negligence exceeds limits of liability insurance of the organization), § 5-313(d)(2) (1989); MASS. GEN. LAWS ANN. ch. 231, §§ 85V, 85W (West Supp. 1991); N.J. STAT. ANN. §§ 2A:62A-6(c), -6.1, -6.2, 2A:53A-7.1(b) (West Supp. 1991); N.C. GEN. STAT. § 1-539.10(a)(2) (Supp. 1991); N.D. CENT. CODE §§ 32-03-42, 32-03-45(2), 32-03-46(1)(b) (Supp. 1991); TENN. CODE ANN. § 62-50-203 (1990).

¹¹² *See infra* part IV.A.2.g.

¹¹³ *See* KEETON ET AL., *supra* note 1, § 34, at 213.

¹¹⁴ *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965). The *Restatement* requires creation of a substantially greater risk than would be necessary to make defendant's conduct negligent. To this extent, then, recklessness differs in degree from negligence. The *Restatement*, in some circular reasoning, states that the difference in degree of risk contemplated by recklessness "is so marked as to amount substantially to a difference in kind." *Id.* cmt. g. In another respect the *Restatement* does, however, seem to require, in a very ill-defined way, that the quality of the defendant's conduct be more culpable than necessary for ordinary negligence. Thus, the *Restatement* requires that defendant have known or have had reason to know of the risk, rather than he merely should have known. *Id.*

¹¹⁵ *See* KEETON ET AL., *supra* note 1, § 34, at 212.

and gross negligence, whatever they mean, would usually have to be decided by a jury. Such prospects hardly seem likely to reassure prospective volunteers.

Furthermore, some states have incorporated more specific exceptions that limit even further the nature of the conduct potentially shielded from liability.¹¹⁶ Many statutes also contain a variety of other exceptions and exclusions that further erode the protection accorded volunteers.¹¹⁷

¹¹⁶ One statute essentially destroys any real limitation on negligence liability by requiring that "the services rendered were reasonable under the circumstances." N.C. GEN. STAT. § 1-539.10(a)(1) (Supp. 1991); *see also* MD. CODE ANN. CTS. & JUD. PROC. § 5-314(b) (1989) (volunteer not protected from liability beyond the limits of personal liability insurance for conduct of employees or volunteers of charitable organization if he knew or should have known of the action or omission of the employee or volunteer and approves or ratifies it, or participates in it); N.D. CENT. CODE §§ 32-03-45(1), 32-03-46(1)(a) (Supp. 1991); OHIO REV. CODE ANN. § 2305.38(B) (Anderson 1991) (volunteer not protected from liability for conduct of employees or other volunteers of charitable organization if he authorized, approved, ratified, or otherwise participated in act or omission). Another statute excludes conduct "permitting unsupervised competition, practice, or activity." *See* MD. CODE ANN. CTS. & JUD. PROC. § 5-313(c)(3) (1989); *see also* N.J. STAT. ANN. § 2A:62A-6(e) (West Supp. 1991); N.D. CENT. CODE § 32-03-46(2)(b) (Supp. 1991). One statute is not applicable to any coach, manager, or official who has not participated in a safety orientation and training skills program that includes injury prevention, first aid, and general coaching concepts. *See* N.J. STAT. ANN. § 2A:62A-6(c)(1), (2) (West Supp. 1991); N.D. CENT. CODE § 32-03-46(1)(c) (Supp. 1991) (league or team orientation and training program). A Pennsylvania statute excludes conduct that "falls substantially below the standards generally practiced and accepted in like circumstances by similar persons or similar nonprofit associations . . . [if the person or association was under a recognized duty and knew or had reason to know] that such act or omission created a substantial risk of actual harm to the person or property of another." PA. CONS. STAT. ANN. § 8332.1(a) (Supp. 1991). The Pennsylvania statute then adds, reassuringly, that "[i]t shall be insufficient to impose liability to establish only that the conduct . . . fell below ordinary standards of care." *Id.* An Ohio statute excludes negligence for volunteers in connection with nonsupervisory or noncorporate services. *See* OHIO REV. CODE ANN. § 2305.38(D)(2) (Anderson 1991). An Iowa statute does not apply to "knowing violation of the law." IOWA CODE ANN. § 613.19 (West Supp. 1990).

¹¹⁷ These additional exceptions vary widely from state to state (and sometimes even between statutes within the same state). For example, some statutes do not apply to injuries caused by certain types of activities, such as the operation of various motor vehicles, or to transportation of participants. *See* ARK. CODE ANN. § 16-6-105(3) (Michie Supp. 1991) (to extent covered by liability insurance); 1992 Colo. Legis. Serv. H.B. 92-1047, 92-1177 § 2 (West) (to be codified as COLO. REV. STAT. §§ 13-21-115.5(5) (to the extent of liability insurance or uninsured or underinsured motorist insurance), 13-21-115.7(5)); DEL. CODE ANN. tit. 10, § 8133(c) (Supp. 1990) (to extent covered by liability insurance); MASS. GEN. LAWS ANN. ch. 231, §§ 85V(ii), 85W (West Supp. 1991); N.J. STAT. ANN. §§ 2A:62A-6(d), 2A:62A-6.2, 2A:53A-7.2(b) (West Supp. 1991); N.D. CENT. CODE § 32-03-46(2)(a) (Supp. 1991); PA. CONS. STAT. ANN. §§ 8332.1(b)(1)(i), 8332.4(b)(1) (Supp. 1991). A number of statutes do not apply to the extent a defendant has liability insurance. *See, e.g.,*

Third, a number of statutes expressly¹¹⁸ allow (or at least do not preclude) vicarious liability of the organization for the negligence of its volunteers.¹¹⁹ Thus, while the volunteers may enjoy some individual protection from some statutes, the potential imposition of vicarious liability on the organization may so inflate the costs of the services that they simply cannot be offered. Therefore, the imposition of vicarious liability may produce (by a somewhat different route) the same adverse effect that these statutes were designed to mitigate—the unavailability of important services rendered by volunteers.

Fourth, unlike exculpatory agreements (which inform the signatory by requiring acquiescence when the agreement is executed), the immunity statutes do not contain any mechanism to directly inform participants of the limitations on liability until they are confronted with a defense after litigation is commenced. As will be discussed more fully later,¹²⁰ securing acquiescence to limitations on volunteer liability not only more fully vindicates the autonomy interests of the participants, it encourages from the outset more active involvement by the participants and their families in promoting the overall quality and safety of the activity.

For all of these reasons, legislative efforts to address the problem of potential volunteer liability has been bromidic. In the next section, I will examine how the courts have reacted to efforts by participants and providers of volunteer services to limit volunteer liability by use of exculpatory agreements.

ARK. CODE ANN. § 16-6-105 (Michie Supp. 1991); MD. CODE ANN. CTS. & JUD. PROC. § 514(c) (1989); N.C. GEN. STAT. § 1-539.1(b) (Supp. 1991). A number of statutes do not apply to commercial activities. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 231, §§ 85V(i), 85W (West Supp. 1991). Some exclude professional services. *See* ARK. CODE ANN. § 16-6-105(4) (Michie Supp. 1991).

¹¹⁸ As previously noted, whether an organization may be held vicariously liable under common-law principles for the negligent conduct of its volunteers is subject to divergent views. *See supra* note 87 and accompanying text.

¹¹⁹ *See, e.g.*, 1992 Colo. Legis. Serv. H.B. 92-1047 (West) (to be codified as COLO. REV. STAT. § 13-21-115.5(4)(b)); DEL. CODE ANN. tit. 10, § 8133(e) (Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. § 5-312(c) (Supp. 1991) (up to limits of liability insurance when organization has insurance in conformity to statutory provisions); MONT. CODE ANN. § 27-1-732(1) (1989); OHIO REV. CODE ANN. § 2305.38(E)(2) (Anderson 1991) (stating that limitations on liability of volunteers not intended to affect liability of charitable organization).

¹²⁰ *See infra* part V.

IV. AN EVALUATION OF JUDICIAL ATTITUDES TOWARD EXCULPATORY AGREEMENTS

A. *In General*

1. *General Rules*

Judicial attitudes toward exculpatory agreements have often been characterized by ambiguity and unpredictability. This has seriously undercut one of the primary objectives of such agreements—to lend a degree of certainty to the liability risks one may encounter when undertaking a specific activity. Notwithstanding this unpredictability, most courts at least seem to agree on several general principles. It is usually held that exculpatory agreements may in appropriate circumstances be enforceable and are thus not invariably invalid.¹²¹ Because, however, such agreements are not favored by the courts, they are usually strictly construed.¹²² Moreover, a number of important exceptions and

¹²¹ See, e.g., *Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572, 575 (8th Cir. 1989) (applying Mo. law); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989); *Lee v. Sun Valley Co.*, 695 P.2d 361, 363 (Idaho 1985); *Falkner v. Hinckley Parachute Ctr., Inc.*, 533 N.E.2d 941, 944 (Ill. App. Ct. 1989); *Childress v. Madison County*, 777 S.W.2d 1, 3 (Tenn. Ct. App. 1989); *Colgan v. Agway, Inc.*, 553 A.2d 143, 145 (Vt. 1988); RESTATEMENT (SECOND) OF TORTS § 496B, cmt. b (1965); KEETON ET AL., *supra* note 1, § 68, at 482 ("There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself."); Julie A. Springer, Comment, *Releases: An Added Measure of Protection from Liability*, 39 BAYLOR L. REV. 487 (1987); Deborah G. Hander, Casenote, *Shifting Risks: Washington Blocks Student Athlete Releases*, 25 GONZ. L. REV. 359, 364 & n.38 (1990).

As noted, the general rule has been that *negligence* claims may be subject to exculpatory agreements (unless they are invalidated by some exception). Use of exculpatory agreements (especially disclaimers) has, however, commonly been precluded or restricted with respect to strict tort products liability claims for personal injury. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965). Regarding breach of warranty claims, see generally JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 12-1 to 12-12 (1988). The proposals made in this article are applicable to most forms of unintentional conduct and would apply to claims against volunteers (and the institutions providing the volunteer services on a nonprofit basis) even in the unlikely event that a plaintiff's claim was somehow based on a strict tort liability or breach of implied warranty theory of liability. See generally *infra* part VI.C.2.

¹²² See, e.g., *Krazek v. Mountain Rivers Tours, Inc.*, 884 F.2d 163, 165 (4th Cir. 1989) (applying W. Va. law); *Wilson v. American Honda Motor Co., Inc.*, 693 F. Supp. 228, 229 (M.D. Pa. 1988) (applying Pa. law); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 783 (Colo. 1989); *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (en banc); *Falkner v. Hinckley Parachute Ctr., Inc.*, 533 N.E.2d 941, 945 (Ill. App. Ct. 1989);

limitations have been adopted by courts that limit the validity of exculpatory agreements.

The approach taken by most courts when addressing the question of the validity and effect of an exculpatory agreement has been to acknowledge the general rule of validity, and then determine if the agreement fits into one or more limitations or exceptions that would render the agreement inapplicable or invalid.¹²³ These limitations and exceptions have so grown in scope that it is often impossible to determine the validity of a specific exculpatory agreement without litigating the issue in court. And of course once a decision is rendered, it may then be too late because the tortious conduct for which liability was to have been precluded may have already occurred. In the sections that follow, I will examine these potential limitations and exceptions that may render an exculpatory agreement inapplicable or invalid.

2. Limitations and Exceptions to Validity of Agreements

a. Scope and Terms of Agreement

As a starting point in evaluating any exculpatory agreement, one must decide whether the allegedly tortious conduct is within the scope of the agreement. The disfavor with which some courts regard such agreements, along with the rule that such agreements are to be strictly construed, has prompted some courts to closely scrutinize the terms of the agreement when deciding whether the type of conduct in question was included within the language of the instrument. This tendency has been carried to an extreme by a few courts. Some have, for example, held exculpatory agreements ineffective to preclude claims for negligence if the term "negligence" was not expressly used.¹²⁴ Most courts have rejected such an inflexible approach, however, and

Colgan v. Agway, Inc., 553 A.2d 143, 145 (Vt. 1988); RESTATEMENT (SECOND) OF TORTS § 496B, cmt. d (1965); KEETON ET AL., *supra* note 1, § 68, at 484; Springer, *supra* note 121, at 489.

¹²³ See, e.g., Childress v. Madison County, 777 S.W.2d 1, 3-4 (Tenn. Ct. App. 1989).

¹²⁴ Only a few courts have apparently required that the term "negligence" invariably be employed. See Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291 (Ariz. Ct. App. 1990) (by implication); Springer, *supra* note 121, at 489-91. Some courts seem to take an intermediate position. Thus, in one recent decision, although the court rejected a rule that would make the presence or absence of the words "negligence" or "bodily injury" automatically dispositive, the court reversed a summary judgment granted in favor of the defendant. The court reasoned that the exculpatory agreement that did not employ such terms was ambiguous and required a trial on the merits to determine if it was the intent of the parties to preclude negligence liability. See Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647 (Ct. App. 1990). Some courts state that while the term "negligence" need not necessarily be used, words conveying a similar meaning must appear in order for the

do not require specific words such as negligence. They have instead attempted to determine the intention of the parties from all of the language used.¹²⁵

A question also may arise whether the agreement sufficiently identified the activity from which the injury arose. An agreement lacking language sufficient to identify the activity might be held inapplicable to the injury in question, or perhaps even unenforceable because it was so "unclear and ambiguous."¹²⁶ Here again, it seems best to respect the intention of the parties which seldom contemplates that the agreement will specifically identify each potential risk, which would be impossible. As one court noted in a case involving a death in parachute jumping, "[i]t is not necessary that the parties anticipate the precise circumstances which resulted in the decedent's accident, where, as here, the broad language in the exculpatory clause contemplated a wide range of risks

agreement to preclude negligence liability. See *Colgan v. Agway Inc.*, 553 A.2d 143, 146 (Vt. 1988); see also *Dobratz v. Thomson*, 468 N.W.2d 654, 663 (Wis. 1991) (while not creating a "magic words" rule, court noted that it nevertheless would be "very helpful" if agreement stated that party was releasing others from negligence).

¹²⁵ These courts frequently hold that the term "negligence" need not be used if the intent of the parties to preclude such liability otherwise appears. See, e.g. *Krazek v. Mountain Rivers Tours, Inc.*, 884 F.2d 163, 166 (4th Cir. 1989) (applying W. Va. law); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 785 (Colo. 1989); *Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1068 (Wyo. 1988).

¹²⁶ *Dobratz v. Thomson*, 468 N.W.2d 654, 663 (Wis. 1991). One recent decision has carried these requirements of identifying the activity to such an unobtainable extreme that one wonders whether an exculpatory agreement could ever be drafted with the level of particularity that would satisfy that court. In *Dobratz*, decedent was killed in a waterski show sponsored by a club when he was struck by a boat towing other skiers. His widow sued some club officers and members and the driver of the second boat. Decedent had signed an agreement that released *inter alia* "all liability . . . [and] claims . . . arising in connection with this event . . . whether arising while engaged in competition or in practice or preparation therefore, or while upon entering or departing from said premises, from any cause whatsoever." *Id.* at 657 n.1. The court held that although the agreement was not invalid on public policy grounds, it was unenforceable as a matter of law because it failed to contain a sufficient description of the activity in question. *Id.* at 663. The court emphasized that the agreement did not specify the nature of the activity, what particular sorts of skiing stunts were to be performed, their level of difficulty and dangerousness, or the locations covered and that it did not specifically mention "ski shows" (as opposed to "competition," "practice" or "preparation"). *Id.* at 661-63. In a holding reminiscent of *Bleak House*, the *Dobratz* court casts such a pall over the question of the required level of specificity to pass muster that the option of using exculpatory agreements simply becomes illusory. See generally CHARLES DICKENS, *BLEAK HOUSE* (1853). To obfuscate matters further, the court adds a parting shot that "most if not all of the information" the court described as lacking should have been included. *Dobratz*, 468 N.W.2d at 663.

which could be expected by a participant to occur when jumping out of an aircraft.”¹²⁷

In the area of youth activities, animated by the ingenuity and curiosity of children and teenagers, the sources of injury are virtually limitless. It is essential that a general description of the types of conduct and activity be sufficient.

b. *Incapacity of Victim*

Most courts that have addressed the question have held that the fact that the injured person was a minor justifies invalidation of an exculpatory agreement.¹²⁸ Usually such agreements are held to be voidable by the minor, who usually is given the power to disaffirm the agreement during minority and within a reasonable or specified period after reaching majority.¹²⁹ Such

¹²⁷ *Falkner v. Hinckley Parachute Ctr., Inc.*, 533 N.E.2d 941, 945 (Ill. App. Ct. 1989); *see also* *Madison v. Superior Ct.*, 250 Cal. Rptr. 299, 306 (Ct. App. 1988) (no requirement that parties have specified (or had specific knowledge) “of the particular risk which resulted in death”).

¹²⁸ *See* *Del Santo v. Bristol County Stadium, Inc.*, 273 F.2d 605, 607 (1st Cir. 1960) (applying Mass. law); *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987); *Apicella v. Valley Forge Military Academy & Junior College*, 630 F. Supp. 20, 24 (E.D. Pa. 1985); *Jones v. Dressel*, 623 P.2d 370, 372 n.1, (Colo. 1981) (en banc); *Fedor v. Mauwehu Council, Boy Scouts of Am., Inc.*, 143 A.2d 466, 468 (Conn. Super. Ct. 1958); *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208 n.3 (Me. 1979); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970); *Santangelo v. City of New York*, 411 N.Y.S.2d 666, 667 (App. Div. 1978); *Kotary v. Spencer Speedway, Inc.*, 365 N.Y.S.2d 87, 90 (App. Div. 1975); *Kaufman v. American Youth Hostels, Inc.*, 177 N.Y.S.2d 587, 593 (App. Div. 1958) (exculpatory agreement signed by father and minor decedent voidable with respect to survival-type claim by administrator of estate; effect of agreement on wrongful-death-type claim by father would depend on whether father agreed in his own right to release claim), *modified*, 158 N.E.2d 128 (N.Y. 1959) (also striking exculpatory-agreement defense with respect to the wrongful death-type claim by father, perhaps because agreement was equivocal); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 245-46 (Tenn. Ct. App. 1990); *Childress v. Madison County*, 777 S.W.2d 1, 6-7 (Tenn. Ct. App. 1989) (dicta); RIFFER, *supra* note 73, at 523; JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* 966 (1979); Springer, *supra* note 121, at 496. *See generally* E. ALLAN FARNSWORTH, *CONTRACTS* § 4.3-4.4 (2d ed. 1990); JOHN E. MURRAY, *MURRAY ON CONTRACTS* § 23 (3d ed. 1990); *RESTATEMENT (SECOND) OF CONTRACTS* §§ 7, 12(2)(b), 14 (1979).

¹²⁹ *See generally* FARNSWORTH, *supra* note 128, § 4.4; MURRAY, *supra* note 128, § 23.

exculpatory agreements releasing future tort claims of minors¹³⁰ have usually been held invalid or voidable whether signed by the minor¹³¹ or by someone with authority to act on the minor's behalf, such as a parent.¹³² One recent

¹³⁰ A number of courts have held that the parents, however, may release their own claims growing out of the injury to their minor children. See note 148 *infra* and accompanying text.

¹³¹ See *Del Santo v. Bristol County Stadium, Inc.*, 273 F.2d 605, 607 (1st Cir. 1960) (applying Mass. law) (invalid even though minor misrepresented his age; signed by minor); *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987) (signed by both child and parent); *Jones v. Dressel*, 623 P.2d 370, 372 n.1, 373 (Colo. 1981) (en banc) (signed by both victim and mother); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970) (signed by both child and parent); *Kaufman v. American Youth Hostels, Inc.*, 177 N.Y.S.2d 587, 593 (App. Div. 1958) (exculpatory agreement signed by father and minor decedent voidable with respect to survival-type claim by administrator of estate; effect of agreement on wrongful death-type claim by father would depend on whether father agreed in his own right to release claim), *modified*, 158 N.E.2d 128 (N.Y. 1959) (also striking exculpatory-agreement defense with respect to the wrongful-death-type claim by father, perhaps because agreement was equivocal); *Springer*, *supra* note 121, at 496. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 7, 12(2)(b), 14 (1979). On the effects of a minor's misrepresentation of age, see generally A.D. Kaufman, Annotation, *Infant's Misrepresentation as to His Age As Estopping Him from Disaffirming His Voidable Transaction*, 29 A.L.R.3d 1270 (1970 & Supp. 1991) (division of authority).

¹³² See *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987) (exculpatory release signed by both child and parent); *Apicella v. Valley Forge Military Academy & Junior College*, 630 F. Supp. 20, 24 (E.D. Pa. 1985); *Jones v. Dressel*, 623 P.2d 370, 372 n.1, 373 (Colo. 1981) (en banc) (signed contracts by minors voidable; approving in principle the rule that "approval by a parent does not necessarily validate an infant child's contract" signed by both victim and mother); *Fedor v. Mauwehu Council, Boy Scouts of Am., Inc.*, 143 A.2d 466, 468 (Conn. Super. Ct. 1958) (release signed by father); *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208 n.3 (Me. 1979) (executed by parents, dicta or alternate ground, because the court held that the document was not a release); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970) (signed by father and minor); *Santangelo v. City of New York*, 411 N.Y.S.2d 666, 667 (App. Div. 1978) (signed by father); *Kotary v. Spencer Speedway, Inc.*, 365 N.Y.S.2d 87, 90 (App. Div. 1975); *Kaufman v. American Youth Hostels, Inc.*, 177 N.Y.S.2d 587, 593 (App. Div. 1958) (exculpatory agreement signed by both father and decedent-minor, voidable with respect to survival-type claim by administrator of estate; effect of agreement on wrongful-death-type claim would depend on whether agreement interpreted to indicate that father agreed in his own right to release claim), *modified* 158 N.E.2d 128 (N.Y. 1959) (also striking exculpatory-agreement defense with respect to the wrongful-death-type claim by father, perhaps because agreement was equivocal); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 245-46 (Tenn. Ct. App. 1990) (exculpatory agreement signed by minor's mother; invalid in wrongful death claim); *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (dicta; release signed by mother); *Scott v. Pacific W. Mountain Resort*, 834 P.2d 6 (Wash. 1992) (en banc) (This

decision, however, representing a distinct minority view, has held that a parent can enter into a binding exculpatory agreement on behalf of a minor child.¹³³

Judicial opinions invalidating exculpatory agreements executed by or on behalf of minors are often conclusory and lacking in analysis.¹³⁴ Courts articulating their reasons usually argue that invalidating such agreements is necessary to protect minors from their own improvidence and imprudence,¹³⁵ and from the overbearance of unscrupulous adults.¹³⁶

The weight of judicial authority appears at first blush to represent a rather uncompromising attitude toward exculpatory agreements for minors. Nevertheless, I believe that there are good reasons to question that position, especially when the person ostensibly protected by the exculpatory agreement is an unpaid volunteer.

First, although exculpatory agreements for minors are often invalidated even when also signed by their parents, a number of doctrines approved by the courts display a willingness to respect the integrity of a wide range of decisions made by adults on behalf of minors. Although most courts that have addressed the question have refused to allow parents to bind their minor children to exculpatory agreements, cases and statutes¹³⁷ have accorded parents broad

case was reported as this Article was going to press and has not been fully incorporated.). But see *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647, 649-50 (Ct. App. 1990). Agreements by parents to indemnify or hold harmless persons with respect to future claims by the parents' minor children have also usually been invalid with respect to the minors' claims, although there is little law on point. See, e.g., *Childress*, 777 S.W.2d at 7 (dicta); Springer, *supra* note 121, at 497-98.

¹³³ See *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Ct. App. 1990). In *Hohe*, the court of appeals recognized in principle that a parent could validly agree on behalf of his fifteen-year-old child to release defendant's school district and parent-teacher association from liability for future negligence in connection with the minor's participation in a hypnotism show sponsored by the PTA as a fund-raising event. The court expressly held that the minor could not disaffirm the release based on her minority. *Id.* at 649-50. A summary judgment granted in favor of the above-named defendants was, however, reversed on other grounds. Specifically, the court held that the agreement was ambiguous in its scope and therefore that a trial on the merits was necessary to address the question of whether the parties intended to release claims for personal injury based on negligence.

¹³⁴ See, e.g., *Doyle v. Bowdoin College*, 403 A.2d 1206 (Me. 1979); *Santangelo v. City of New York*, 411 N.Y.S.2d 666, 667 (App. Div. 1978).

¹³⁵ See *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987); *Jones v. Dressel*, 623 P.2d 370, 373 n.1, 373 (Colo. 1981) (en banc); *Fedor v. Mauwehu Council, Boy Scouts of Am., Inc.*, 143 A.2d 466, 468 (Conn. Super. Ct. 1958).

¹³⁶ See *Simmons v. Parkette Nat'l. Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987).

¹³⁷ See generally 59 AM. JUR. 2D, *Parent & Child*, §§ 10-16, 48 (1987 & Supp. 1992). The interest of parents in making decisions affecting their children has been

discretion to make other decisions greatly affecting their minor children. These include the power, subject to state intervention, to select their children's doctors and consent to (and make other decisions regarding)¹³⁸ medical treatment, to discipline their children, to choose their school, to allocate the family's resources in a way that can profoundly affect their children's health and future prospects, and to consent to their induction into the armed forces.¹³⁹ Indeed, the courts have generally not questioned the power of parents to consent to their child's participation in a specific activity, only their power to give up the child's right to sue. Parental consent to medical treatment precludes a claim for battery based on the consented-to treatment.¹⁴⁰ Presumably, parental consent, if sufficiently specific, would also preclude an intentional tort claim based on consented-to contacts that are a normal part of recreational activities. Parental consent has also operated, for all intents and purposes, to foreclose certain other types of tort claims. Thus, for example, one court even held that a parent may validly agree to the publication of nude photographs of the parent's minor children.¹⁴¹ In short, judicial attitudes toward exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices.

Second, courts have recognized that the benefits of enforcing agreements by or on behalf of minors may sometimes outweigh the potential costs. This

statutorily recognized in at least one state. *See* TEX. FAM. CODE ANN. § 12.04(7) (West 1990).

¹³⁸ *See* JOSEPH H. KING JR., *THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL* 134-36, 144-46 (2d ed. 1986); *supra* note 69. Although many living will statutes do not provide for execution of such instruments on behalf of minors, a number of states expressly do allow parents to execute living wills for their minor children. *See* ARK. CODE ANN. § 20-17-214 (Michie Supp. 1989); LA. REV. STAT. ANN. § 40:1299.58.6 (West 1990); N.M. STAT. ANN. § 24-7-4 (Michie 1986); TEX. HEALTH & SAFETY CODE ANN. § 672.006 (West 1990). *See generally* John M. Scheb, *Termination of Life Support Systems for Minor Children: Evolving Legal Responses*, 54 TENN. L. REV. 1, 2 (1986).

¹³⁹ *See* 50 U.S.C. app. § 454(c)(4) (1982) (seventeen-year-olds may volunteer for induction into the Armed Forces with consent of parents or guardian). The effect of this parental consent is not only to subject the minor to military control, but also to the judicial decisions and statutes that have precluded or at least limited tort claims by military members against either the Federal Government, fellow servicemen, or other federal employees for injuries arising incident to service. *See generally* *United States v. Johnson*, 481 U.S. 681 (1987); Byard Q. Clemmons, *Personal Liability of the Military Official*, 7 GA. ST. U. L. REV. 417 (1991).

¹⁴⁰ *See generally* KING, *supra* note 138, at 134.

¹⁴¹ *See* *Faloon v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1005 (5th Cir. 1986) (applying Cal. law; addressing photographs that do not fall within the Supreme Court's definition of child pornography), *aff'g*, 607 F. Supp. 1341, 1354-55 (N.D. Tex. 1985) (applying Tex. law; dicta applying Cal. law); *see also* *Shields v. Gross*, 448 N.E.2d 108 (N.Y.1983) (nonpornographic nude photographs of ten-year-old).

realization has inspired several limitations on the doctrine that invalidates agreements by minors. Agreements by minors for so-called "necessaries" may at least support a claim against the infant for the value of the necessities in many jurisdictions.¹⁴² Courts have also upheld agreements executed by parents on behalf of minors to arbitrate future malpractice claims¹⁴³ and to give a medical insurer a subrogation interest for medical conditions tortiously caused by third parties.¹⁴⁴ These doctrines all seem inspired by a common premise—that sometimes the interests of minors are better served by respecting agreements made during their minority. Sometimes services of extreme importance to minors may simply not be available in the absence of an agreement binding the minor recipient of those services. Thus, recognizing the power of a parent subscribing to a Blue Cross hospitalization plan to bind a minor son to a subrogation clause giving insurer a subrogation claim against any recovery from a tortfeasor to the extent of benefits provided by insurer, was necessary to assure that parents could provide medical insurance protection for their children.¹⁴⁵

As a practical matter, the availability and quality of recreational and extracurricular educational activities surely depend on the willingness of volunteers to provide such services. I think a convincing argument can be made that the importance of such activities justifies giving parents authority to enter into binding agreements necessary to secure these services.

Third, when the person released is a volunteer, there is less reason to fear that overbearance will adversely affect the interests of the minor. Volunteers are not driven by the kinds of economic incentives that can inspire pressure tactics inconsistent with the interests of the minor. It is significant that the majority of cases refusing to uphold exculpatory agreements by or on behalf of minors in connection with recreational activities have involved injuries

¹⁴² See generally FARNSWORTH, *supra* note 128, § 4.5; MURRAY, *supra* note 128, § 24.

¹⁴³ See, e.g., *Doyle v. Giuliani*, 401 P.2d 1 (Cal. 1965); *Wilson v. Kaiser Found. Hosp.*, 190 Cal. Rptr. 649 (Cal. Ct. App. 1983); *Leong v. Kaiser Found. Hosp.*, 788 P.2d 164, 169 (Haw. 1990); cf. *McKinsky v. Valley Ob-Gyn Clinic, P.C.*, 405 N.W.2d 88 (Mich. 1987) (applying statute authorizing parental consent for arbitration of minor's claims based on non-emergency care).

¹⁴⁴ See *Hamrick v. Hospital Serv. Corp.*, 296 A.2d 15 (R.I. 1972).

¹⁴⁵ See *id.* at 17. The court held that the legal principles governing contracts of infants was simply not germane. It noted that the parents were obligated to provide for the "care, nurture, welfare and education" of minor children, and that the availability of medical insurance for minors depended on whether parents could contract to so provide for their children. *Id.* The court suggested that the primary inquiry should be whether the contract was reasonable. *Id.* See also *Doyle v. Giuliani*, 401 P.2d 1, 3 (Cal. 1965).

allegedly caused by persons who were probably compensated by someone for those services.¹⁴⁶

Fourth, although parents have usually not been permitted to bind their minor children to exculpatory agreements, some courts have held that the parents' own cause of action for their child's medical expenses and loss of services¹⁴⁷ attributable to the child's injury may be subject to an exculpatory agreement by the parents.¹⁴⁸

¹⁴⁶ In most of these cases it was either stated explicitly or was a reasonable assumption that the sponsor or persons whose alleged negligence caused the injuries were compensated for the services. *See Del Santo v. Bristol County Stadium, Inc.*, 273 F.2d 605, 607 (1st Cir. 1960) (applying Mass. law); *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987) (applying Pa. law); *Apicella v. Valley Forge Military Academy & Junior College*, 630 F. Supp. 20, 24 (E.D. Pa. 1985) (applying Pa. law); *Jones v. Dressel*, 623 P.2d 370, 372 n.1, 373 (Colo. 1981) (en banc); *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208 n.3 (Me. 1979) (dicta or alternate ground, because the court held that the document was not an exculpatory release-agreement); *Santangelo v. City of New York*, 411 N.Y.S.2d 666, 667 (N.Y. App. Div. 1978) (admission fee charged by defendant-city); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 558 (N.J. Super Ct. Law Div. 1970) (activity earned as prize by newsboy from defendant-newspaper); *Kaufman v. American Youth Hostels, Inc.*, 174 N.Y.S.2d 580, 584 (Sup. Ct. 1957), *modified*, 177 N.Y.S.2d 587 (App. Div. 1958), *modified*, 158 N.E.2d 128 (N.Y. 1959); *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (exculpatory agreement signed by mother on behalf of mentally incompetent person not binding on him; dicta that parent or guardian may not bind minors to exculpatory agreement).

Cases addressing the validity of exculpatory agreements on behalf of minors in connection with recreational activity in which at least some of the services were provided by unpaid volunteers are more divided. *Compare Fedor v. Mauwehu Council, Boy Scouts of Am., Inc.*, 143 A.2d 466 (Conn. Super. Ct. 1958) (invalid); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 245-46 (Tenn. Ct. App. 1990) (invalid), *with Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Ct. App. 1990) (may be valid; defendants were school district and Parent, Teacher, and Student Association, thus suggesting that at least some of the individuals allegedly responsible for the injury were unpaid PTSA volunteers). In *Fedor*, the court held that a minor's claim against the Boy Scouts for injuries allegedly suffered at scout camp was not precluded by an exculpatory agreement executed on his behalf by his father. However, the precedential weight of the opinion is undermined in several respects. First, the primary reason the court invalidated the release seemed to be based on a general public policy/public interest analysis. *See generally infra* part IV.A.2.d. Second, when the court does shift its attention to the effect of the minority on such agreements, its holding is equivocal and conclusory. After noting the policy of attempting to protect infants, the court states that it is "doubtful" whether either parent could waive the infant's rights to recover for negligence. *See id.* at 468.

¹⁴⁷ *See generally* Steven W. Feldman, *Parent's Cause of Action in Tennessee for Injured Child's Lost Earnings and Services, Expenses, and Lost Society: A Comparative Analysis*, 51 TENN. L. REV. 83 (1983).

¹⁴⁸ *See Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 142 (E.D. Pa. 1987) (applying Pa. law); *Apicella v. Valley Forge Military Academy & Junior*

Fifth, minors have been accorded greater control over their own lives in recent years, including matters bearing on potential tort recovery. For example, mature minors have, in some jurisdictions, been held capable of giving valid consent to medical treatment.¹⁴⁹ And such consent may operate to preclude a tort claim for battery. Some states recognize that some minors may possess the

College, 630 F. Supp. 20, 24 (E.D. Pa. 1985) (applying Pa. law); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 247 (Tenn. Ct. App. 1990) (dicta); *Childress v. Madison County*, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989) (mother's exculpatory and indemnity agreement for mentally impaired adult son; dicta as to minors). *But see Santangelo v. City of New York*, 411 N.Y.S.2d 666, 667 (App. Div. 1978) (father's cause of action for loss of services not precluded by exculpatory agreement he signed; this is, however, dicta or at most an alternative holding because the father's claim for loss of services was held not to be covered by the agreement); *cf. Kotary v. Spencer Speedway*, 365 N.Y.S.2d 87 (App. Div. 1975) (father's derivative claim based on injury to child not precluded because the language of the agreement signed by the father did not encompass that claim). One would also expect that if the parents signed an exculpatory agreement that covered the parents' claims arising from injuries to their minor children, such agreements might also bar the parents' claims for emotional distress suffered as a result of the minor's injury even if otherwise available. *Cf. Portee v. Jaffee*, 417 A.2d 521, 528 (N.J. 1980). *See generally* P.G. Guthrie, Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337, 1363 (1970 & Supp. 1990) (contributory negligence of a parent may either bar claim, or under comparative negligence reduce damages, in parent's claim for mental distress based on observing injury to child). It should be noted that even if a court holds that a parent may in principle agree to release their own claims based on injuries to their child, a question may remain whether the agreement must specifically embrace such parental claims, or whether the parents' release of the minor's claims automatically includes the parents' derivative claims for loss of services and medicals. If it is required that specific language have released the parents' claims, then it must also be determined whether the language in the agreement in fact did so.

The potential effect of parental execution of an exculpatory agreement on wrongful death claims (and perhaps survival claims when a survival statute is applicable to cases involving tortiously caused death) would depend on the resolution of two issues: first, whether the agreement was construed to cover such claims; and, second, whether such agreements were valid as applied to the parents' claim based on the death of the child. *See generally Kaufman v. American Youth Hostels, Inc.*, 177 N.Y.S.2d 587 (App. Div. 1958) (exculpatory agreement, signed by father and minor-decedent voidable with respect to survival-type claim by administrator of estate; effect of agreement on wrongful-death-type claim by father would depend on whether agreement was interpreted to indicate that father had agreed in his own right to release claim), *modified*, 158 N.E.2d 128 (N.Y. 1959) (also striking exculpatory-agreement defense with respect to wrongful-death-type claim by father, perhaps because agreement was equivocal); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 245-46 (Tenn. Ct. App. 1990) (exculpatory agreement signed by mother invalid in wrongful death claim for death of minor-daughter); *KEETON ET AL.*, *supra* note 1, § 127, at 958-59.

¹⁴⁹ *See supra* note 69; *see generally* KING, *supra* note 138, at 134-36.

capacity to validly consent to be a guest under a guest statute limiting the guest's right to sue certain persons.¹⁵⁰ Also, persons who executed exculpatory agreements as minors, may, for example, ratify such agreements upon reaching majority.¹⁵¹ Moreover, such ratification may, at least with respect to accidents occurring after majority, take the form of continuing to participate in the subject activity.¹⁵² One might ask whether a youth who has just reached majority is really in any better position to evaluate and adjust his priorities than were he and his devoted parents a few days earlier.

And finally, as will be discussed more fully later, I doubt whether invalidating exculpatory agreements really promotes the interests tort liability ostensibly serves.¹⁵³ And what about the larger interest of all the children for whom youth activities would simply not be available or affordable if the millions of unpaid volunteers who provide them are terrorized out of such activities?

c. *Contracts of Adhesion and Unacceptable Disparity in Bargaining Power*

Some courts have approved the rule that exculpatory agreements may be invalid based on extreme disparity in bargaining power between the parties.¹⁵⁴ It is often difficult to know in advance, however, precisely which relationships involve sufficiently disparate bargaining power to justify invalidating exculpatory agreements. Courts sometimes state that such disparity may be characterized by the lack of opportunity for negotiation or by the fact that the services in question could not be obtained elsewhere.¹⁵⁵ On the other hand, a number of courts hold that the mere fact that a contract is offered on a "take it or leave it" basis does not alone make it an invalid contract of adhesion.¹⁵⁶ Frequently, the fact of disparity in bargaining power is integrated as a relevant

¹⁵⁰ See, e.g., *Fox v. Hollar Company, Inc.*, 576 So. 2d 223, 227 (Ala. 1991).

¹⁵¹ See, e.g., *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (en banc). See generally FARNSWORTH, *supra* note 128, § 4.4; MURRAY, *supra* note 128, § 23.

¹⁵² See *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (en banc.).

¹⁵³ See *infra* part V.B.1.b.

¹⁵⁴ See, e.g., *Dressel*, 623 P.2d at 374; *Fedor v. Mauwehu Council, Boy Scouts of Am.*, 143 A.2d 466, 467 (Conn. Super. Ct. 1958); *Schlobohm v. SPA Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

¹⁵⁵ See *Dressel*, 623 P.2d at 374. Some courts imply that it must appear that the parties possessed greatly disparate bargaining power, that no opportunity for negotiation existed, and that the services could not be obtained elsewhere. *Schlobohm*, 326 N.W.2d at 923.

¹⁵⁶ *Dressel*, 623 P.2d at 375.

consideration into a broader public policy inquiry.¹⁵⁷ The significance of a disparity in bargaining power ultimately depends on the importance of the services in question.

Irrespective of how the court elaborates on the disparity-of-bargaining-power idea, the great majority of cases have found the rule inapplicable to exculpatory agreements covering recreational activities.¹⁵⁸ With respect to any particular recreational activity, it usually cannot be said that the participant has no choice. He can always choose not to participate in that activity. Thus, in the case of youth activities, were it not for the fact that the participants were minors, the exculpatory agreements would generally not be invalidated based on disparity of bargaining power.

d. *Public Policy Grounds*

Exculpatory agreements are frequently subjected to a more general public policy analysis. This analysis will often overlap or at least encompass the disparity in bargaining power inquiry (which may depend on the necessity for the services in question). Probably the most widely-cited formulation of the public policy analysis comes from the California case of *Tunkl v. The Regents of the University of California*.¹⁵⁹ The court held that exculpatory agreements could only be enforced if they did not involve the "public interest."¹⁶⁰ Elaborating, the court identified the following set of criteria, *some or all* of which are present in transactions in which exculpatory agreements may not be enforced:

It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is

¹⁵⁷ See *infra* part IV.A.2.d; see also *infra* note 161 and accompanying text (*Tunkl* quote).

¹⁵⁸ See cases cited *infra* note 165.

¹⁵⁹ 383 P.2d 441 (Cal. 1963).

¹⁶⁰ *Id.* at 443.

placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.¹⁶¹

Other courts employ somewhat different variations on the public policy theme. For example, a Colorado court used a four-part inquiry concentrating on "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language."¹⁶² The underlying conflict has been identified as autonomy to contract versus vindication of the policies underlying tort liability.¹⁶³ As will be discussed more fully later, however, upholding exculpatory agreements will sometimes do more to promote the avowed goals of tort law than would the threat or imposition of tort liability. In other words, protection of autonomy and promotion of the goals of tort law may not be incompatible here.

Regardless of the precise terminology used, courts addressing the public policy issue in recreational activities cases usually focus on the importance of the services in question to the public and on their availability.¹⁶⁴ The decided weight of authority has held that recreational activities do not fall within the category of activities with respect to which exculpatory clauses would violate public policy.¹⁶⁵ The courts have usually emphasized that the plaintiff was free

¹⁶¹ *Id.* at 445-46 (footnotes omitted). The court applied the accompanying factors to invalidate an exculpatory agreement executed by a patient in connection with medical services received at defendant's hospital. The *Tunkl* formulation was clouded somewhat by the existence of a general statute that invalidated some exculpatory agreements. Its relevance and importance in the court's decision was unclear from the opinion. In any event, and whatever its underpinnings, the *Tunkl* formulation has been approved by many subsequent cases. See *Hander, supra* note 121, at 364 n.38 (citing cases).

¹⁶² *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (en banc).

¹⁶³ See, e.g., *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989) ("They stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts."); *Springer, supra* note 121, at 488.

¹⁶⁴ See, e.g., *Schlubohm v. SPA Petite, Inc.*, 326 N.W.2d 920, 925 (Minn. 1982); Recent Cases, *Negligence—Exculpatory Clauses—School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics*, 102 HARV. L. REV. 729, 733 (1989).

¹⁶⁵ See, e.g., *Barnes v. Birmingham Int'l Raceway, Inc.*, 551 So. 2d 929 (Ala. 1989) (stock car racing event); *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Ct. App. 1990) (hypnotism demonstration); *Madison v. Superior Ct.*, 250 Cal. Rptr. 299 (Ct. App. 1988) (scuba diving course); *Williams v. Cox Enterprises, Inc.*, 283 S.E.2d 367 (Ga. Ct. App. 1981) (marathon race); *Boucher v. Riner*, 514 A.2d 485, 491 (Md. Ct. Spec. App. 1986) (parachute jumps); *Barnes v. New Hampshire Karting Ass'n*, 509 A.2d 151 (N.H. 1986) (kart racing); *Mann v. Wetter*, 785 P.2d 1064 (Or. Ct. App.) (en banc) (scuba diving school), *petition for review denied*, 789 P.2d 1387 (Or. 1990); *Buckner v. Varner*, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990) (horseback riding); *Hays v. Ernesto's Inc.*, 1987 WL 11119 (Tenn. Ct. App. 1987) (mechanical bull); *Dobratz v. Thomson*, 468

to choose not to participate in the activity¹⁶⁶—thus indicating that there was no unacceptable imbalance in bargaining power nor unavailability of truly essential services.

The *Tunkl* court also held that if an exculpatory agreement is otherwise invalid on public policy grounds, the mere fact that the services were gratuitous would not alone render it valid.¹⁶⁷ Even if one accepts *arguendo* this argument, however, it must be remembered that not all exculpatory agreements are invalid on public policy grounds, and thus the need to attempt to sustain them with a “gratuitous services” argument is unnecessary. Thus, although the mere fact that the services in question were gratuitous may not validate an otherwise invalid exculpatory agreement, the gratuitous nature of the services should

N.W.2d 654, 660 (Wis. 1991) (water ski show; but holding agreement unenforceable on other grounds); *Trainor v. Aztalan Cycle Club, Inc.*, 432 N.W.2d 626 (Wis. Ct. App. 1988) (“motocross” race); *Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1067 (Wyo. 1988) (skiing during “Ironman” contest); *Boehm v. Cody County Chamber of Commerce*, 748 P.2d 704, 711 (Wyo. 1987) (mock gunfights). *But cf.* N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1989) (agreements exempting owners or operators of recreational establishments charging fees for use of facilities and their agents, servants, or employees, from negligence liability to users are void); *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968 (Wash. 1988) (en banc) (exculpatory agreement invalid when required for participation by school students in interscholastic athletics).

¹⁶⁶ See, e.g., *Barnes v. Birmingham Int’l Raceway, Inc.*, 551 So. 2d 929 (Ala. 1989) (plaintiff voluntarily participated in stock car racing event); *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Ct. App. 1990) (hypnotism demonstration at PTA fund raising activity not an essential service); *Madison v. Superior Ct.*, 250 Cal. Rptr. 299, 305 (Ct. App. 1988) (there was no practical necessity that decedent take scuba diving course); *Williams v. Cox Enterprises, Inc.*, 283 S.E.2d 367 (Ga. Ct. App. 1981); *Boucher v. Riner*, 514 A.2d 485, 491 (Md. Ct. Spec. App. 1986) (plaintiff under no compulsion to make parachute jumps, and could have bypassed exculpatory agreement upon payment of additional fee); *Barnes v. New Hampshire Karting Ass’n, Inc.*, 509 A.2d 151 (N.H. 1986) (kart racing); *Mann v. Wetter*, 785 P.2d 1064 (Or. Ct. App. 1990) (en banc) (participant in scuba diving school free to not continue in the diving program); *Hays v. Ernesto’s Inc.*, 1987 WL 11119 (Tenn. Ct. App. 1987) (mechanical bull); *Trainor v. Aztalan Cycle Club, Inc.*, 432 N.W.2d 626 (Wis. Ct. App. 1988) (“motocross” race); *Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1067 (Wyo. 1988) (skiing during “Ironman” contest “not a matter of practical necessity for the public” nor an essential service); *Boehm v. Cody County Chamber of Commerce*, 748 P.2d 704, 711 (Wyo. 1987) (mock gunfights “can hardly be characterized as essential to some members of the public”). For example, in *Williams v. Cox Enterprises, Inc.*, 283 S.E.2d 367 (Ga. Ct. App. 1981), plaintiff, a law student at the University of Chicago, had argued that because running and jogging had become such popular sports and because the Peachtree Road Race was the only race of its kind in the Atlanta area, he lacked sufficient freedom of bargaining power when he signed an exculpatory agreement in connection with his participation in the marathon race. The court dismissed this argument as “ludicrous.” *Id.* at 369.

¹⁶⁷ 383 P.2d 447, 448 (Cal. 1963).

certainly strengthen already compelling arguments that recreational activities do not fall within the class of activities for which exculpation normally violates public policy.

Reservations about exculpatory agreements also stem from a concern about a possible asymmetry of information shared by the parties.¹⁶⁸ This concern, however, has probably been exaggerated. Even in exculpatory agreements between patients and health care providers—the ones most frequently declared unenforceable on public policy grounds—the true level of disparity in risk awareness has been questioned.¹⁶⁹ Due to the “availability heuristic,” which causes people “to weigh disproportionately information with high salience, memorability, or currency,”¹⁷⁰ people may actually tend to overestimate rather than underestimate the risks of a familiar activity.¹⁷¹ In the context of youth activities, parents will often possess at least as much basic information as volunteers. Moreover, they will commonly overestimate the extent of the risk to their own children, thus if anything making them more cautious in their willingness to agree to exculpation.

A general public policy analysis has seldom been reached in connection with exculpatory agreements relating to youth recreational activities because these cases have usually been decided on the threshold basis of the minor status of the participants.¹⁷² If we were to put aside for the moment the problem of minority, and focus exclusively on the public policy question, the issue would likely boil down to the questions of the importance of providing youth activities and the availability of alternatives to them. Any one such activity would probably not be deemed essential—there will usually be alternatives even in small communities. On the other hand, it could be argued convincingly that youth activities taken together are essential to the health and welfare of society. Accordingly, one might therefore be tempted to reason that proliferation of exculpatory agreements could adversely affect the availability of most youth activities, if they discouraged children from participating. Therefore, the argument might go, these agreements should be deemed invalid as violative of public policy. This argument may seem plausible enough as far as it goes. There is, however, a fallacy lurking here. If such activities are truly of great importance to the public, and if they will not be available without volunteers,

¹⁶⁸ See Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks Between Patients and Providers*, 49 LAW & CONTEMP. PROBS. 173, 188 (1986).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 189, citing Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 267 (1973).

¹⁷¹ Thus, in another context, Robinson comments that the availability heuristic may lead people to avoid risks rather than to assume them “because bad outcomes will be more vividly reported and remembered than favorable outcomes (‘bad news travels fast,’ that is [sic] it has greater salience or availability).” Robinson, *supra* note 168, at 190.

¹⁷² See *supra* part IV.A.2.b.

then invalidating exculpatory agreements may well mean that the activities would not be available at all. Thus, the real choice may be between the disappearance of such activities altogether (at least those available at affordable cost) or having those activities available but subject to valid exculpatory agreements for the volunteers (and sponsors) who provide the activities. In other words, in applying the public policy analysis, the courts should remember that the ultimate effect of invalidating exculpatory agreements for volunteers may well be to destroy the very activity that ostensibly was to be protected by invalidating the exculpatory agreements in the first place.

Another potential problem with public policy tests is that they are inherently unpredictable. First, under the commonly followed *Tunkl* formulation, a party challenging the validity of an exculpatory agreement need not necessarily prove the presence of all factors enumerated by the court as evidencing contracts affecting the public interest, only "some" of them.¹⁷³ Second, such public policy questions are analyzed on an *ad hoc* basis,¹⁷⁴ making the outcome of any particular exculpatory agreement practically impossible to predict with confidence. As one court candidly admitted, "it has been much easier for courts to simply declare releases violative of public policy in a given situation than to state a principled basis for so holding."¹⁷⁵

e. Express or Implied Statutory Invalidity

Occasionally a state statute will operate to invalidate an exculpatory agreement. A statute may expressly prohibit exculpatory agreements, or at least exculpatory agreements in certain types of situations.¹⁷⁶ Or, a statute may accomplish essentially the same result by implication, as when it creates duties that are construed to be not subject to waiver.¹⁷⁷ In *Lee v. Sun Valley Co.*,¹⁷⁸

¹⁷³ See *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 445 (Cal. 1963).

¹⁷⁴ *Schlobohm v. SPA Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

¹⁷⁵ *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968, 971 (Wash. 1988).

¹⁷⁶ See LA. CIV. CODE ANN. art. 2004 (West 1987) (exculpatory agreements for physical injury are void); *Ramirez v. Fair Grounds Corp.*, 575 So. 2d 811 (La. 1991); *Meier v. Ma-Do Bars, Inc.*, 484 N.Y.S.2d 719, 720 (App. Div. 1985); *Anita Cava & Don Wiesner, Rationalizing A Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 625, 631-32 (1988).

¹⁷⁷ See *Lee v. Sun Valley Co.*, 695 P.2d 361, 364 (Idaho 1984); *Cava & Wiesner, supra* note 176, at 632-33; 57A AM. JUR. 2D *Negligence* § 25 (1989); cf. *Rollins, Inc. v. Heller*, 454 So. 2d 580, 583-84 (Fla. Dist. Ct. App. 1984) (limitations of damages clause), *petition for rev. denied*, 461 So. 2d 114 (Fla. 1985). See generally KEETON ET AL., *supra* note 1, § 68, at 492-93. One statute declares, *inter alia*, that exculpatory agreements for violations of "law" (presumably statutory law) "whether willful or negligent" are contrary to public policy. See CAL. CIV. CODE § 1668 (West 1985). The relevance of Section 1668 to negligence claims not involving statutory violations is unclear. See *supra* note 164.

for example, plaintiff was injured during a horseback trail ride conducted by defendant outfitter and guide. The accident was apparently caused by a saddle that loosened during the ride. The court upheld the validity of an exculpatory agreement with respect to the defendant's purely common law theories of liability. It held, however, that a statute requiring guides to "conform to the standard of care expected of members of his profession,"¹⁷⁹ created statutorily imposed duties that were not subject to waiver by exculpatory agreement.

The *Lee* case illustrates the way in which exculpatory agreements (and the intent of the parties) may be subverted indirectly by statute. The statute in *Lee* did not expressly preclude such agreements. It merely adopted a broad open-ended duty of care. When, as in *Lee*, such general statutes are allowed to impliedly invalidate exculpatory agreements, one wonders whether an exculpatory agreement could have any effect at all in the type of activity in question. Thus, there seems to be a danger that a variety of statutes that perhaps do little more than, as in *Lee*, codify common-law duties of care will be construed to adopt a duty that is not subject to contractual exculpation. The threat of implied statutory invalidation adds a further degree of uncertainty to exculpatory agreements.

If volunteers are to be effectively protected by exculpatory agreements, such agreements should not be invalidated by statutes unless the statutory provisions expressly preclude such agreements. Or, at a minimum, it should be made clear under precisely what circumstances creation of a duty by statute will impliedly invalidate otherwise valid exculpatory agreements.

f. *Fraud and Misrepresentation*

Some courts have invalidated exculpatory agreements when the defendants made material misrepresentations that induced the plaintiffs to enter into such agreements.¹⁸⁰ Thus, one case held that misstatements in the agreement that the defendant did not have liability insurance covering equestrian activities when it

¹⁷⁸ 695 P.2d 361 (Idaho 1984).

¹⁷⁹ *Id.* at 364.

¹⁸⁰ See generally *Merten v. Nathan*, 321 N.W.2d 173 (Wis. 1982); *Dobratz v. Thomson*, 468 N.W.2d 654, 659-60 (Wis. 1991) (approving rule in principle, but finding it inapplicable under facts of case); *Springer*, *supra* note 121, at 496. Courts disagree on whether actual reliance by the plaintiff must be shown. Compare *Merten* (misstatements relevant to a reasonable person's decision sufficient; no requirement of proof of actual reliance) with *Barnes v. Birmingham Int'l Raceway*, 551 So. 2d 929 (Ala. 1989) (reliance required). The exception based on misrepresentation inducing the plaintiff to agree to exculpation is a somewhat different ground from cases in which plaintiff's theory of recovery is fraud. In the latter cases, courts have held that such claims, being intentional torts, are not subject to exculpatory agreements. See *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521 (Fla. Dist. Ct. App. 1984); *infra* part IV.A.2.f.

in fact did carry such insurance rendered the exculpatory clause unenforceable.¹⁸¹

To protect the intent of the parties, the courts should require clear and convincing evidence of an intentional and material misrepresentation and proof of plaintiff's detrimental reliance on it before invalidating an exculpatory agreement for that reason.

g. More Serious Tortious Conduct

Even if an exculpatory agreement is otherwise valid, many courts have held that such agreements will not preclude tort liability for various forms of more serious tortious conduct. Exculpatory agreements may be invalidated under either of two analytical routes.¹⁸² First, a court may construe the scope of the agreement as not embracing various forms of serious misconduct.¹⁸³ Second, and more common, courts may hold that agreements purporting to preclude liability for some types of serious misconduct are, as a matter of public policy, simply unenforceable. Most courts have held that exculpatory agreements cannot preclude claims for intentional torts¹⁸⁴ nor for more extreme forms of negligence characterized by willful, wanton, or reckless conduct.¹⁸⁵

¹⁸¹ See *Merten v. Nathan*, 321 N.W.2d 173 (Wis. 1982); see also *Dobratz*, 468 N.W.2d at 659–60 (approving rule in principle, but finding it inapplicable under facts of case).

¹⁸² See *Boucher v. Riner*, 514 A.2d 485, 488 (Md. Ct. App. 1986).

¹⁸³ See RESTATEMENT (SECOND) OF TORTS § 496B cmt. d (1965) (agreement exempting defendant from liability for negligence will not be construed to preclude liability for intentional or reckless misconduct or extreme kinds of negligence, “unless such intention clearly appears”).

¹⁸⁴ See, e.g., *Reece v. Finch*, 562 So. 2d 195 (Ala. 1990); *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521 (Fla. Dist. Ct. App. 1984); RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1979); KEETON ET AL., *supra* note 1, § 68, at 480–84.

Presumably, however, if plaintiff effectively acquiesced to the specific conduct of the defendant under circumstances that constituted a valid *consent*, it is possible that there would be no liability for intentional torts. The question of the effect of the exculpatory agreement would not even be reached. Rather, liability would be foreclosed because one of the elements for intentional torts—that the defendant's conduct be nonconsensual—would be missing. Consent, to be effective, would probably have to sufficiently identify the conduct involved. See RESTATEMENT (SECOND) OF TORTS § 892A & cmt. c (1979). Other prerequisites for consent would also have to be satisfied, including capacity to consent or legally sufficient substituted consent. See generally *id.* § 892A. Presumably, parental consent on behalf of minor children would not be valid if violative of public policy, such as consent to some criminal or other type of contact with a child that would be deemed impermissible even with parental acquiescence.

¹⁸⁵ See, e.g., *Barnes v. Birmingham Int'l Raceway, Inc.*, 551 So. 2d 929, 933 (Ala. 1989); *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (en banc) (dicta); *Falkner v.*

Although there is a greater split of authority, a majority of courts also hold that exculpatory agreements are unenforceable if defendant's conduct constituted gross negligence.¹⁸⁶

An exculpatory agreement should probably not be enforceable to the extent that the defendant's conduct constituted an intentional tort.¹⁸⁷ Of course, if the plaintiff, by agreement or otherwise, had validly¹⁸⁸ consented to the specific intentional invasion in question, there would be no liability because the invasion was (even independent of the exculpatory effects of the agreement) not actionable.

On the other hand, the wisdom of invalidating exculpatory agreements merely because the defendant's conduct constituted recklessness or gross negligence is questionable. These concepts lack clear parameters. With respect to recklessness, common definitions seem to place the concept somewhere between objective and subjective criteria. To varying degrees, the authorities often consider either or both of the factors of conscious disregard of the rights

Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 946 (Ill. Ct. App. 1989); Tessler & Son, Inc. v. Sonitrol Sec. Sys., 497 A.2d 530, 533 (N.J. Super. Ct. App. Div. 1985) (approving rule in principle, but finding it inapplicable to facts); Milligan v. Big Valley Corp., 754 P.2d 1063, 1069 (Wyo. 1988) (approving rule in principle, but finding it inapplicable to facts); Boehm v. Cody County Chamber of Commerce, 748 P.2d 704, 712 (Wyo. 1987) (approving rule in principle, but finding it inapplicable to facts); KEETON ET AL., *supra* note 1, § 68, at 480-84. *But see* RESTATEMENT (SECOND) OF TORTS § 496B (1965) (recognizing a right to enter into a valid exculpatory agreement that precludes liability for both negligent *and* reckless conduct).

¹⁸⁶ Springer, *supra* note 121, at 502; *see, e.g.*, Durrell v. Parachutes Are Fun, Inc., 1987 WL 18117 (Del. Super. Ct. 1987) (applying Md. law); Boucher v. Riner, 514 A.2d 485, 488 (Md. Ct. App. 1986) (in principle, but inapplicable to facts); Childress v. Madison County, 777 S.W.2d 1, 5 (Tenn. Ct. App. 1989) (dicta); Liberty Furniture, Inc. v. Sonitrol of Spokane, Inc., 770 P.2d 1086 (Wash. Ct. App.), *review denied*, 777 P.2d 1050 (Wash. 1989). *But see* Barnes v. New Hampshire Karting Ass'n, Inc., 509 A.2d 151 (N.H. 1986) (rejecting alleged gross negligence as basis for invalidation); Tessler & Son, Inc. v. Sonitrol Sec. Sys., 497 A.2d 530, 534 (N.J. Super. Ct. App. Div. 1985) (rejecting alleged gross negligence as a basis for invalidation); Valeo v. Pocono Int'l Raceway, Inc., 500 A.2d 492, 493 (Pa. Super. Ct. 1985) (rejecting alleged gross negligence as basis for invalidation); Trainor v. Aztalan Cycle Club, Inc., 432 N.W.2d 626, 630 (Wis. 1988) (rejecting alleged gross negligence as basis for invalidation).

¹⁸⁷ *See generally supra* part III.B.2.a.

¹⁸⁸ Consent may be invalidated by a number of factors including incapacity, misrepresentation, mistake known to the defendant, duress, and (in some states with respect to some statutes) the fact that the contemplated conduct violated a statutory prohibition or consent was expressly invalidated by statute. *See* KEETON ET AL., *supra* note 1, § 18, at 115-24. Courts would also invalidate consent when against public policy. Thus, parental consent for a child to undergo a type of contact or invasion deemed criminal or impermissible by society, even with parental acquiescence, would likely be invalid.

of others,¹⁸⁹ and more objective factors such as the gravity of risk.¹⁹⁰ A fairly typical definition contains both subjective and objective dimensions—embracing conduct taken in reckless conscious disregard of the consequences (subjective) under circumstances that a reasonable person would have reason to know would create a “high degree of probability” of harm to another (objective).¹⁹¹ To further confuse matters, some courts seem to equate recklessness with the supposedly less extreme gross negligence.¹⁹²

A recent case involving the death of a participant in a recreational parachute jump illustrates the apparent ease by which some courts have allowed plaintiffs to circumvent an exculpatory agreement by invoking the recklessness (or willfulness) exception.¹⁹³ The decedent—who had been a pilot, received parachute training, and jumped during the Second World War—was killed when his parachute became entangled and did not adequately slow his fall. Allegations of negligence included inadequate instruction and warnings in connection with the type of parachute equipment in question and providing the decedent with a parachute containing a bridle cord too long for a novice of decedent’s size and experience.¹⁹⁴ Apparently, plaintiff also alleged willful misconduct based on defendant’s disregard of the circumstances at the time, although the court did not elaborate on precisely what such allegation added to the general allegations of negligence. The court held that the plaintiff had

¹⁸⁹ See, e.g., *Barnes v. Birmingham Int’l Raceway, Inc.*, 551 So. 2d 929, 932 (Ala. 1989) (involves “premeditation or knowledge and consciousness that the injury is likely to result”); *Tessler & Son, Inc. v. Sonitrol Sec. Sys.*, 497 A.2d 530, 533 (N.J. 1985).

¹⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 500 (1965). The *Restatement* requires creation of a substantially greater risk than would be necessary to make the defendant’s conduct negligent. To this extent, recklessness differs mainly in degree from negligence. The *Restatement*, in some circular reasoning, however, also states that the difference in degree of risk contemplated by recklessness “is so marked as to amount substantially to a difference in kind.” *Id.* cmt. g. In another respect, the *Restatement* seems to require, in a very ill-defined way, that the quality of the defendant’s conduct be more culpable than required for ordinary negligence. It requires that defendant have known or have had reason to know of the risk, rather than that he merely should have known. *Id.* Thus, the *Restatement* seems to vacillate between objective and subjective criteria for recklessness.

¹⁹¹ *Boehm v. Cody County Chamber of Commerce*, 748 P.2d 704, 712 (Wyo. 1987).

¹⁹² See, e.g., *Durrell v. Parachutes Are Fun, Inc.*, 1987 WL 18117 (Del. Super. Ct. 1987) (applying Md. law); *Buckner v. Varner*, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990). Perhaps this tendency to commingle the concepts is understandable because, despite some attempts to articulate a meaningful demarcation, in practice “there is often no clear distinction at all between [them] . . . and the two have tended to merge and take on the same meaning.” KEETON ET AL., *supra* note 1, § 34, at 214.

¹⁹³ See *Falkner v. Hinckley Parachute Ctr., Inc.*, 533 N.E.2d 941 (Ill. Ct. App. 1989).

¹⁹⁴ *Id.* at 943.

asserted sufficient allegations (whatever they were) of conscious disregard to avoid a summary judgment based on the exculpatory agreement.¹⁹⁵

Matters are even more uncertain when gross negligence is recognized as a ground for invalidating an exculpatory agreement. Gross negligence is usually defined quantitatively, as negligence "substantially and appreciably greater than ordinary negligence."¹⁹⁶ It depends on whether the risk created by defendant's conduct exceeded some imaginary line separating ordinary negligence from gross negligence.¹⁹⁷ Where that point is located is something upon which the courts have never satisfactorily answered.¹⁹⁸ Indeed, it is probably impossible to formulate a functional demarcation separating ordinary from gross negligence that would offer meaningful guidance to a jury.

Another case involving an injury during a recreational parachute jump illustrates the ease with which a plaintiff can sometimes reach the jury on the gross negligence issue, and thus on the issue of the validity of the exculpatory agreement.¹⁹⁹ In denying defendant's motion for summary judgment based on the exculpatory agreement, the court held that allegations that defendant allowed plaintiff to parachute in winds that were a few miles per hour faster than the maximum for a novice parachutist would (if proven) support a finding of gross negligence.²⁰⁰ Not only did the court allow something as ephemeral as a slight excess of wind speed to support its decision, but it also relied on a very weak factual record to justify its denial of summary judgment.²⁰¹

The problem with invalidating exculpatory agreements for more serious kinds of unintentional conduct is that it assumes we can know what

¹⁹⁵ *Id.* at 946.

¹⁹⁶ *Liberty Furniture v. Sonitrol of Spokane*, 770 P.2d 1086, 1087 (Wash. Ct. App. 1989) (citation omitted).

¹⁹⁷ *Id.* at 1088.

¹⁹⁸ See Sheldon D. Elliott, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 121-22 (1933).

¹⁹⁹ See *Durrell v. Parachutes Are Fun, Inc.*, 1987 WL 18117 (Del. Super. Ct. Oct. 8, 1987) (applying Md. law).

²⁰⁰ *Id.* at *4.

²⁰¹ The maximum wind velocity for novice parachutist was apparently established at 10 miles per hour. *Id.* at *3. The entry in the defendant's log indicated that the wind was 5 miles per hour. Nevertheless, the court reasoned that because the plaintiff, a novice parachutist, had estimated that the wind speed during his first jump was 2-4 miles per hour, and that the wind speed for his second jump was three or four times that of his first jump, by extrapolation one might find that the wind speed during the second jump was a minimum of 6-12 miles per hour and a maximum of 8-16 miles per hour. *Id.* Even if one accepts plaintiff's estimates, it is at best only *possible* that the wind speed exceeded the maximum for novice parachutists. Even apart from the very questionable probative force of plaintiff's proof, if the disregard of a sudden increase in wind velocity of as little as 1 mile per hour constitutes gross negligence, is there any degree of negligence that could not arguably be deemed gross?

recklessness and gross negligence are and how they differ from ordinary negligence. The truth is that it is impossible to know for sure when conduct crosses such illusory boundaries. Nor is it clear why such conduct should be singled out for deterrence beyond that contemplated by the parties, and not conduct that constitutes ordinary negligence. These amorphous forms of heightened negligence should be subject to exculpation. This is especially so in situations involving volunteers, when the danger of risky behavior motivated by greed is absent.

B. Noncontractual Express Assumption of Risk

The Restatement has recognized a "noncontractual" dimension of exculpatory agreements which it conceptualizes as express assumption of risk.²⁰² Apart from eliminating a possible contractual requirement for consideration, it is unclear how "noncontractual" express assumption of risk differs from a "contractual" exculpatory agreement. Although both would require that the risks waived be included within the scope of the express assumption of risk or exculpatory agreement, neither would apparently require the kind or at least level of subjective appreciation of the risks that traditionally had been required for implied assumption of risk.²⁰³

When an exculpatory agreement is held to be inapplicable, invalid, or voidable, defendant may attempt to assert, alternatively, that the agreement nevertheless constitutes noncontractual express assumptions of risk. It is unlikely, however, that such a defense would prevail when the exculpatory agreement was deemed inapplicable, invalid, or unenforceable.²⁰⁴ Although there is little law on point, courts refusing to enforce exculpatory agreements against minors would probably also be reluctant to allow parents expressly to assume on behalf of their children the risks of negligent conduct. Furthermore, if defendant relied on implied assumption of risk, subjective appreciation of the risks in question would have to be shown or the requirements of contributory negligence satisfied when implied assumption of risk has been incorporated into the contributory or comparative negligence defense.

²⁰² See RESTATEMENT (SECOND) OF TORTS § 496B, cmt. a (1965).

²⁰³ See *id.* § 496D & cmt. a (distinguishing express assumption of risk or agreements to assume risks from implied assumption of risk). The plaintiff's perception of the risks may, however, sometimes be factored into the analysis of the scope and public policy aspects of exculpatory agreements (and express assumption of risks). See generally *supra* parts IV.A.2.a, c, and d.

²⁰⁴ See *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968, 974 (Wash. 1988) (en banc) ("If the release is against public policy . . . it is also against public policy to say that the plaintiff has assumed that particular risk.").

V. PROPOSAL FOR LEGISLATIVE APPROVAL OF EXCULPATORY AGREEMENTS

A. *Proposal*

I propose the following approach to exculpatory agreements for volunteers and nonprofit entities providing services in youth activities. First, I recommend that such agreements, including standardized agreements, be held valid when executed by a parent or guardian on behalf of a minor-participant in such activities (with the concurrence of the minor if mature), subject only to an exception for intentionally caused injuries. Second, such a rule should be approved by state statutes.

B. *Justifications for Proposal*

1. *Need for Exculpation*

a. *Benefits of Exculpatory Agreements*

In order to determine whether exculpatory agreements for volunteers are needed, one must compare the benefits of such agreements to the costs. A bedrock principle in tort law is that "[a] loss should lie where it has happened to fall unless some affirmative public good will result from shifting it."²⁰⁵ I believe the benefits of such agreements overwhelmingly outweigh their putative costs. In analyzing this question, we must bear in mind that we do not have here simply a choice between immunized versus non-immunized volunteers. Rather, it is between immunized volunteers and no volunteers at all.

i. *Need for Volunteers*

The most compelling justification for the preceding proposal is the need for volunteers in organized activities for young people. This justification really depends on three premises. The first premise is that there is a continuing need for recreational activities for America's youth. This proposition is indisputable and has been addressed elsewhere.²⁰⁶

The second is that volunteers fulfill an essential role in such activities. The numbers speak for themselves.²⁰⁷ It is inconceivable how anywhere near the current magnitude of youth activities could be sustained (let alone increased)

²⁰⁵ CLARENCE MORRIS, MORRIS ON TORTS 9 (1st ed. 1953).

²⁰⁶ See *supra* part II and accompanying text.

²⁰⁷ See *supra* part II and accompanying text.

without the efforts of unpaid volunteers. Admittedly, there are some activities for youth that are financed by essentially hiring people to provide the activities. Nevertheless, paid individual providers comprise a distinct minority of persons providing such services. For example, the American Youth Soccer Organization is largely staffed by unpaid volunteers,²⁰⁸ as is the Little League.²⁰⁹ It is doubtful that many of the families of these youths could afford to or at least would be willing to allocate the funds required to support such programs if all current volunteers had to be hired and fairly compensated. Even in the case of paid coaches or instructors, the activities are often supported by volunteer assistants who are not paid. Moreover, it is at the very least important, if not preferred, that adults managing youth activities be primarily motivated to serve young people rather than to receive economic rewards.

The final premise is that in the long-term the continued willingness of volunteers to serve in youth activities as well as their effectiveness will depend on the availability of valid exculpatory agreements. Although there is little empirical data, many knowledgeable sources believe that the threat of tort liability has begun to seriously erode the pool of active and potential volunteers.²¹⁰ Tort claims against everyone, including volunteers, are increasing.²¹¹ Moreover, the outcome of tort litigation is often unpredictable, based more on "luck and emotion than on need and reason."²¹² Tort law increasingly "makes systematic, affirmative choice impossible [because] [n]o positive safety judgment is ever really final in the courts; there is no such thing as a definitive bill of health."²¹³ It has been said that the outcome of tort cases

²⁰⁸ This organization, with over 400,000 members, apparently has only about 19 paid staff members who are presumably based at the national headquarters and who perform ongoing administrative functions. 1 *ENCYCLOPEDIA OF ASSOCIATIONS* 20743 (25th ed. Gale Res. Inc. 1991).

²⁰⁹ The Little League has over 2.5 million members, but a paid staff of only 70. *See id.* at 20180.

²¹⁰ *See supra* notes 32-34 and accompanying text; SUGARMAN, *supra* note 67, at 18 ("The fear of lawsuits can cause well-trained and qualified people to avoid or flee the work they otherwise would prefer to do, or at least to resist innovation and reasonable risk taking on the job.").

²¹¹ *See, e.g.,* Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice*, 48 OHIO ST. L.J. 479, 481-82, 489 (1987) (reporting increases in non-auto personal injury cases); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1532 (1987); Jeffrey O'Connell, *Less Torturous Torts*, 89 BEST'S REVIEW 35, 38 (April 1989). *But see generally* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983) (questioning the proof of a litigation explosion).

²¹² JEFFREY O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* 54 (1975).

²¹³ HUBER, *supra* note 67, at 209.

has the predictability of the route of a "bus steered by a fractious committee of its passengers."²¹⁴ In tort cases decided by juries, we have the equivalent of a brand new fractious committee with each new claim.

Irrespective of the statistical likelihood of a volunteer actually being sued, the perception of the threat remains and may be more important than the reality. It is not hard to guess why. The supply of volunteers is very elastic. Volunteers do not have to serve in order to feed and house themselves and their families. There is no mandatory "draft" of volunteers into public service, at least not yet. The main ingredient of a volunteer's contribution is time, and there are always other demands on a person's time that vigorously compete with volunteer activities. It is little wonder then that a decision to devote time and energy to a volunteer activity is a precarious one. The perceived threat of having one's financial security arbitrarily obliterated by tort litigation²¹⁵ may often be the factor that tips the delicate balance in the calculus against service. These considerations may weigh most heavily on those volunteers most in tune with such trends. "[T]he best and the brightest recognize this more quickly than the rest, and being more mobile in any event, they get out of the way soonest . . . [and] [t]he world is a more dangerous place as a result."²¹⁶ The alternative is that youth activities will not be offered, will not be affordable by most youth, or will have to be offered primarily by the government—"the most common provider of last resort."²¹⁷

The insinuation of the threat of tort liability into the volunteer activity may also affect the quality of those services. We have seen the insidious effects of the threat of liability in other fields. The practice of "defensive medicine"²¹⁸ inspired by the threat of malpractice claims is one obvious example. Not only have defensive practices in response to a fear of claims greatly increased the costs of medical services, they have also sometimes increased the risks to patients and frequently so poisoned the professional relationship that the overall effectiveness of the treatment was compromised. The threat of liability may similarly subvert the relationships between volunteers (those who have not been discouraged from participating at all) and the young people they serve.

²¹⁴ *Id.*

²¹⁵ It is important to remember that even if a defendant ultimately prevails in a lawsuit, the costs of attorney fees may alone prove financially ruinous.

²¹⁶ HUBER, *supra* note 67, at 164. Huber has also observed that "[w]hen it comes to liability problems, the bold innovators are the most fleet-footed of potential defendants. More often than not, they adjusted to the threat of liability by doing less." *Id.* at 155.

²¹⁷ *Id.* at 165.

²¹⁸ See KING, *supra* note 138, at 320.

ii. Autonomy and Freedom of Contract

In addition to encouraging volunteers, the validation of exculpatory agreements protects individual autonomy and the freedom to contract. Admittedly, there may and perhaps should be some limits on market-alienability.²¹⁹ But the question for present purposes is not whether there should be some limits on alienability in general, but what those limits are. One commentator suggests that things that are important to personhood should be market-inalienable²²⁰ and that whether something should be market-inalienable ultimately rests on our best conception of "human flourishing" and what will best promote it.²²¹ The same author concedes, however, that there is no "magic formula" that will delineate with certainty when something is market-inalienable.²²²

There are compelling reasons for holding that prospective tort remedies against volunteers should be "alienable" to the extent of allowing them to be amenable to exculpatory agreements. First, it is probably more accurate to view an exculpatory agreement, especially in this context, not as a manifestation of a thing being "sold," but as a redefinition of a prospective consensual relationship. This is too often overlooked by the courts, whose attitudes toward exculpatory agreements are emblematic of a more general tendency to treat consumer contracts as flypaper,²²³ with the consumer possessing no free will at all.

Second, the thing relinquished—the possibility of bringing a tort claim against a volunteer for unintentional injuries—is simply less crucial to personhood than the interest in having available the activities and relationships that depend on volunteers. The importance of these activities and relationships to development of individual freedom, identity, and relation to the "environment of things and other people"²²⁴—to human flourishing in other words—patently outweighs the interest in the enervating²²⁵ and indefinite prospects of tort claims against volunteers. There are, after all, risks to our children in inaction—"[i]t may well be the things you don't do that defeat

²¹⁹ See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). The author states that "[s]omething that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market." *Id.* at 1850.

²²⁰ See *id.* at 1903.

²²¹ See *id.* at 1903, 1937.

²²² *Id.* at 1937.

²²³ HUBER, *supra* note 67, at 30.

²²⁴ Radin, *supra* note 219, at 1904.

²²⁵ On the emotional, financial, and social costs of suing, see generally Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 451-52 (1989).

you."²²⁶ Nor is it accurate to equate the preservation of the "right" to sue with enhanced autonomy. It is specious to assume that litigants are masters of their fate when it comes to tort litigation. The tort system may exploit and alienate tort victims.²²⁷ One need only reflect on the assault on personhood that may occur as the pressures mount on litigants to sign contingent fee agreements; to settle those claims that are costly to litigate; to recollect and testify in ways that facilitate recovery; and, to submit to medical examination and procedures calculated to inflate damages.

Third, validating exculpatory agreements executed by parents on behalf of their children is consistent with the role accorded parents regarding the whole spectrum of fundamental decisions affecting their children. As one commentator asked rhetorically, "Why should one element of that set of choices—the terms of compensation if matters go awry—be immune from parental choice?"²²⁸

Fourth, exculpatory agreements represent a small step in the direction of returning control of relationships to the parties to those relationships. They may also help to bridle the monstrously inefficient "safety tax"²²⁹ imposed on virtually all activity by the tort-litigation system. Exculpatory agreements may also begin to assuage the "pernicious moral effect of America's growing fear of risk . . . [with its] commensurate diminution of the notion of individual responsibility for one's actions."²³⁰ As Peter Huber observed, "The common sense of an earlier jurisprudence suggested that the contingency of an accident should be addressed ahead of time, when tempers are cool and minds clear."²³¹

Fifth, possible concerns about the inadequacy of information possessed by parties to exculpatory agreements—and thus about how truly informed the agreement was—are largely groundless in the context of youth activities. Given common understanding of the inherent risks of such activities, parents will often possess information comparable to that possessed by volunteers. Moreover, risks may be affected by factors peculiar to individual participants, such as the fact that a youth suffers from hemophilia, allergies, diabetes, rheumatic heart disease, or epilepsy, for example. In addition, various psychological dynamics may actually cause people to overestimate risks. An

²²⁶ MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* 27 (1982).

²²⁷ See Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 789 (1990).

²²⁸ Richard A. Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, MED. PROF. LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 115, 121 (Victoria P. Rostow & Roger J. Bulger, eds. 1989).

²²⁹ See Peter W. Huber, *The Risky Business of Liability Law*, REASON, Apr. 1989, at 20; see also Henry Fairlie, *Fear of Living*, THE NEW REPUBLIC, Jan. 23, 1989, at 16 ("tort tax").

²³⁰ Fairlie, *supra* note 229, at 16.

²³¹ Huber, *supra* note 229, at 20–21.

"availability heuristic"²³² may cause people "to weigh disproportionately information with high salience, memorability, or currency."²³³

Sixth, concerns about the level of freedom of those entering into standardized contracts is probably exaggerated. There is always the option of declining to participate in a specific activity. Moreover, the risks of injury attributable to negligence by volunteers in such activities constitutes a relatively small part of the overall calculus of risks that threaten our youth today.²³⁴ Furthermore, the efficiency of standardized contracts in the tight budgetary world of nonprofit activities for youth is certainly a factor to be considered.²³⁵ It would be unrealistic to expect a volunteer to engage in atomistic negotiations and contract formation with each family of a child participating in a youth activity.

Finally, and fundamentally, even if the threat of tort liability might make most *individual* volunteers more careful (which I seriously doubt), exculpatory agreements would nevertheless enhance *overall* safety by assuring the continued service of volunteers, and would promote human freedom and flourishing. As Chaffee observed, "Freedom is not safety, but opportunity."²³⁶ Without volunteers, the opportunities of our children and youth will be irrevocably narrowed.

b. *Effects of Exculpation on Goals of Tort Law*

Once the more important benefits of exculpatory agreements have been identified, the next question becomes whether these benefits outweigh the costs. In order to assess those costs, the goals of tort law²³⁷ and the effect of valid exculpatory agreements upon them have to be examined. Professor Stewart has, in a thoughtful essay, criticized torts critics essentially for taking an overly systemic, one-dimensional view of the appropriate "cure" for the failings of the torts system.²³⁸ Stewart urges a more particularized approach, based on a comparative analysis of the potential performance of different institutions in advancing the goals of the torts system.²³⁹ My proposal falls within the spirit

²³² Robinson, *supra* note 168, at 189.

²³³ *Id.* See *supra* note 171.

²³⁴ See *infra* notes 255-59 and accompanying text.

²³⁵ See generally Robinson, *supra* note 168, at 185.

²³⁶ HUBER, *supra* note 67, at 219 (quoting Zechariah Chafee, Jr., *The Press Under Pressure*, NIEMAN REP., Apr. 1948, at 19).

²³⁷ For a summary and critical evaluation of the ostensible goals of tort law, see SUGARMAN, *supra* note 67; Stephen D. Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 558 (1985).

²³⁸ See Richard B. Stewart, *Crisis in Tort? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 185 (1987).

²³⁹ See *id.* at 186.

of Stewart's thesis. More specifically, I think that in the context of relationships between individual volunteers and minors participating in organized youth activities, the allocation of losses attributable to unintentional conduct should be largely subject to antecedent agreements by the parents, volunteers, and sponsoring institutions. I believe that even if tort law is a compensation system worth preserving in its present form for some other contexts, the importance of volunteers to youth activities and the roles of exculpatory agreements in sustaining those volunteers outweigh the perceived benefits of the imposition of unbridled potential tort liability in this setting.

i. *Deterrence and Reduction of Accidents*

Because the tort system of compensation is notoriously inefficient,²⁴⁰ especially when compared to other systems for compensating persons in need of disability and medical benefits, apologists for tort law often fall back on the goal of deterrence to defend the system. Essentially, the argument goes, tort law is useful because the threat of liability—that “benign shadow of the law”²⁴¹—deters unacceptable conduct.²⁴² The value of tort liability based deterrence, especially in the context of volunteer liability, is however doubtful for a number of reasons.

First, it is impossible conceptually to reconcile the deterrence and compensation objectives of tort law. Simply put, the level of liability that it takes to deter will seldom coincide with what is necessary to compensate. Torts scholars are inexorably coming to realize that “attempts to pursue deterrence objectives and compensation . . . objectives simultaneously through a single legal instrument . . . entail unresolvable contradictions.”²⁴³

Second, as a general proposition, one can question the effectiveness of tort law as a deterrent.²⁴⁴ In personal injury tort cases today the outcomes are so unpredictable that a person is afforded no real guidance on how some future

²⁴⁰ See *infra* part V.B.1.b.ii.

²⁴¹ Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 32 (1986) (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)).

²⁴² See *id.* at 14. Some defenders of the deterrence goals of tort law appear most concerned with controlling “remote” and “overwhelming” actors, such as corporations. *Id.* at 14. Presumably, then, there would be less need for deterrence (even if it worked) for actors engaged in more direct relationships with the persons injured.

²⁴³ Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Crisis*, 24 SAN DIEGO L. REV. 929, 929 (1987).

²⁴⁴ SUGARMAN, *supra* note 67, at 3–20.

jury will choose to characterize one's conduct.²⁴⁵ People are often ignorant of the few relevant legal principles regarding potential tort liability. Many people such as volunteers will often have a relatively short-term involvement with the activity in question and will seldom be in a position to systematically evaluate and react²⁴⁶ to the risks of liability. Furthermore, to the extent the threat of liability elicits any response at all, it is frequently action aimed not so much at reducing the risk of injury as the risk of being sued.²⁴⁷

Third, the threat of liability can often produce undesirable results. It may over-deter,²⁴⁸ with the obvious effect of discouraging unpaid volunteers from participating at all. When deterrence operates to eliminate committed volunteers, the void may be filled by the phenomenon of the "do-it-yourselfer."²⁴⁹ This phenomenon has been illustrated in a number of other contexts, perhaps most strikingly in the products liability setting. The threat of liability might induce ladder manufacturers, for example, to stop manufacturing ladders. This in turn may force people to use the more dangerous kitchen chair instead of a ladder when they replace a bulb.²⁵⁰

In the volunteer context, the scout master may be sued for letting a scout singe his fingers by getting too close to a campfire. Perhaps liability would reduce the incidence of campfire-related injuries. The reason, however, would not be because tort law engendered greater care around campfires (which it probably would not), but because we would have fewer campfires because there would be fewer volunteers willing to work with scouts. More

²⁴⁵ See *supra* note 212 and accompanying text. Moreover, many collateral factors may influence the outcome of personal injury litigation. For example, a recent account of a trial attributed the fact that a verdict was several million dollars under a pretrial estimate to the fact that the jurors observed plaintiff's attorney arrive at the courthouse in a red Porsche. See David Margolick, *At the Bar*, N.Y. TIMES, Apr. 5, 1991, at B18. There have also been recent reports of alleged manufacturing of evidence, falsifying of documents, and bribing of witnesses in personal injury cases. See, e.g., Edward Frost, *Top P.I. Lawyer Convicted*, A.B.A.J., May 1991, at 28. See generally "Recovered" Litigant Faces Fraud Charges, KNOXVILLE NEWS-SENTINEL, Apr. 30, 1991, at A10 (news reports of fraud charges brought against a patient who had recovered a \$2.25 million award in a malpractice case). The "standards" of tort law have been criticized as morally incoherent and inconsistent. See Abel, *supra* note 227, at 793. About the only conclusion that can confidently be made about jury decisions is that we know very little about how juries make their determinations. See Edith Greene, *On Juries and Damage Awards: The Process of Decision Making*, 52 LAW & CONTEMP. PROBS. 225 (1989).

²⁴⁶ Even when people are aware of the potential "sting" of liability, most will "find that, from time to time, they simply cannot make their way safely through the [liability] maze." Sugarman, *supra* note 237, at 568.

²⁴⁷ HUBER, *supra* note 67, at 164.

²⁴⁸ Sugarman, *supra* note 237, at 581.

²⁴⁹ See generally HUBER, *supra* note 67, at 166; Huber, *supra* note 229, at 24.

²⁵⁰ Huber, *supra* note 229, at 24.

importantly, you may then find more of our youth solitudinous and alienated. Moreover, we may find a variation of the do-it-yourselfer, as other outlets fill the void in young lives. While a young person may not be exposed to the sparks of a campfire, he may be incinerated attempting to freebase cocaine. The net effect of the threat of tort liability hardly reduces accidents unless the only accidents we, in our selective myopia, are worried about are those induced by campfires. Given the proliferation of single-parent families and apparent dearth of available time for parental involvement in many activities, other activities may be substituted for organized youth activities. These frequently would, as experience demonstrates daily, often involve violence, crime, and substance abuse.

Fourth, on a more diffuse level, deterrence as a manifestation of our search for a risk-free society, may have a more pernicious effect in its "commensurate diminution of the notion of individual responsibility for one's actions."²⁵¹

Fifth, if the safety and well-being of minors is our concern, it is specious to believe that those interests can be most effectively advanced by the blunt instrument of tort-mediated deterrence directed at volunteers. Not only is deterrence in such a context largely illusory, it may be counterproductive. Not only is there the risk of over-deterrence (discussed above), but the "monopoly of force"²⁵² represented by the tort system will often undermine collective action in other forms that would be more effective in enhancing the health and well-being of our youth. Injuries constitute one of the leading causes of mortality among American children under 19 years of age,²⁵³ but the conduct of volunteers is not in any meaningful way implicated as a leading cause of such injuries.²⁵⁴ If we are committed to reduction of the toll of injuries to our children, we should address the fact that 15-30 percent of motor vehicle crashes and 40-50 percent of drownings—the first and fourth leading causes of fatal injuries to children—are associated with alcohol use.²⁵⁵ Rule changes in some

²⁵¹ Fairlie, *supra* note 229, at 16.

²⁵² Abel, *supra* note 227, at 790.

²⁵³ *Fatal Injuries to Children—United States, 1986*, 39 MORBIDITY & MORTALITY WKLY. REP. 442 (1990), reprinted in 264 J.A.M.A. 952 (1990) (hereinafter cited as *Fatal Injuries*, subsequent citations will be to the J.A.M.A.).

²⁵⁴ These leading causes include: motor vehicle crashes, homicides, suicides, drownings, and fire-related injuries. *Id.* at 952.

²⁵⁵ *Id.* Motor vehicle-related deaths of our youth could also be significantly reduced by taking steps to assure that motorcycle operators and riders wear helmets. Twelve percent of the motor vehicle deaths on public highways each year involve people riding motorcycles. See Daniel M. Sosin, M.D., et al., *Head Injury—Associated Deaths from Motorcycle Crashes*, 264 J.A.M.A. 2395 (1990). Safety helmets are effective in reducing the incidence and severity of such motorcycle-related head injuries. *Id.* Suing or threatening to sue volunteers will have no impact on motorcycle injuries, but helmets will.

sports could, as has been demonstrated in high school football,²⁵⁶ reduce the incidence of serious injuries to participants. We might also consider that most homicides²⁵⁷ and suicides²⁵⁸ (the second and third leading causes of fatal injuries) involved firearms.²⁵⁹ Driving away our volunteers will not take the place of concerted action to address such injury-promoting problems as alcohol abuse and the proliferation of handguns in our society.

The process of exculpation may also operate to reduce accidents to children in other ways. For example, it may galvanize parents into more active roles in their children's activities. This may include not only direct participation, but also more thoughtful evaluation of the quality of volunteer activity and the overall value of the recreational experience. The supposed deterrent effects of tort law are much less effective in controlling injurious behavior in the volunteer context than other potential forces such as a person's sense of self-preservation, consumer demand forces, personal morality, and thoughtful government regulation.²⁶⁰ The continued presence of public-spirited volunteers contributes to the flourishing of these forces.

Sixth, the perceived threat of liability may also produce other deleterious effects, such as inducing concealment of injury-causing events because of a perceived risk of liability.²⁶¹ Such reactions to potential liability could be especially damaging in the case of young persons who are less able to promptly evaluate and mitigate serious conditions than are adults.

And finally, even if the threat of tort liability were to somehow be conveyed to volunteers in a comprehensible form, it is doubtful that most accidents involving participants in youth activities would be avoided by the exercise of "reasonable" care by volunteers unless the concept of reasonableness has been elevated beyond any realistic human paradigm.

²⁵⁶ See *Current Trends, Football-Related Spinal Cord Injuries Among High School Players—Louisiana, 1989*, 39 MORBIDITY AND MORTALITY WKLY. REP. 586 (1990).

²⁵⁷ Homicide is the second leading cause of injury among young people. See *Fatal Injuries*, *supra* note 253, at 952.

²⁵⁸ Suicide is the third leading cause of fatal injuries among children. *Fatal Injuries*, *supra* note 253, at 952; see also Susan J. Blumenthal, M.D., *Youth Suicide: The Physician's Role in Suicide Prevention*, 264 J.A.M.A. 3194 (1990). In targeting suicide for intervention, special attention must be paid to the child's environment and support system. See *id.* at 3196. The problem of youth suicide demands a broad based effort addressing the family, the schools, primary care physicians, as well as the socio-economic conditions that have fostered a sense of hopelessness among our youth. Volunteers may play a role in this collective effort, but those efforts will not be enhanced at all by injecting tort litigation here. In fact, it would simply remove volunteers as one potential support system for our young people.

²⁵⁹ *Fatal Injuries*, *supra* note 253, at 952.

²⁶⁰ See generally SUGARMAN, *supra* note 67, at 4–7.

²⁶¹ See Abel, *supra* note 227, at 814; SUGARMAN, *supra* note 67, at 19.

ii. *Compensation and Loss Spreading*

Two important goals of tort law are compensation and loss spreading. By requiring tortious actors to compensate their victims, tort law is supposed to avoid or at least mitigate the potentially devastating effects of an accidental injury on its victim. An accidental loss can be borne with less rending of the social fabric when the loss is distributed in small portions throughout a large group rather than borne entirely by the individual victim and his family.

There are several problems with these goals, especially in the context of volunteer liability. First, tort law, as a compensation system, is beset by extravagant administrative costs.²⁶² Less than one-half of the money devoted to tort liability actually reaches the victim, the rest goes to the attorneys, insurance administrators, expert witnesses, and others involved in the loss-shifting process.²⁶³ Moreover, what money does reach the plaintiffs will often go to pay inflated pain and suffering and sometimes punitive damages claims of some victims, sometimes leaving the rest of the injured persons without remedy. Only 10-15 percent of such funds compensate for loss of earnings, medical expenses, and other economic losses.²⁶⁴ In a world of limited resources, this level of compensatory inefficiency is incompatible with any honest concern for the welfare of the class of persons tort law professes to serve.²⁶⁵

Second, tort liability fails to help many persons who suffer accidental injuries. Often, despite imaginative lawyering, there will be no credible tortfeasor to sue,²⁶⁶ at least not one sufficiently wealthy or insured to satisfy most tort judgments,²⁶⁷ especially under such a profligate system.

Third, individualized damages in tort law reflecting each victim's pre-accident earning potential have been criticized as sustaining existing levels of wealth and income by insulating them from the leavening effects of accidents.²⁶⁸ Individualized damages in effect legitimize existing income distribution and the "intergenerational reproduction of inequality."²⁶⁹ Thus, there is a question of the fairness of a system that distributes losses throughout

²⁶² See SUGARMAN, *supra* note 67, at 40.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ One commentator observed: "If I were a cynic, I would say that if this is a social insurance system, it is being run primarily to benefit the trial bar." See Sugarman, *supra* note 237, at 596 n.184 (quoting J. Henderson).

²⁶⁶ Sugarman, *supra* note 237, at 593.

²⁶⁷ Abel, *supra* note 227, at 796.

²⁶⁸ *Id.* at 799, 803.

²⁶⁹ *Id.* at 803.

a broad class of people, but defines those losses in a way that favors the more economically fortunate members of the society.²⁷⁰

Fourth, even if one were to accept in principle the compensatory goals of tort law, the class of defendants consisting of individual volunteers is an inappropriate one through which to redistribute and spread losses. Volunteers are, by definition, not engaged in a business whereby they can readily impose charges and adjust prices to reflect anticipated losses.

Nor is liability insurance the answer. Liability insurance may simply not be available, at least not at affordable prices, or a defendant's liability may exceed the limits of his insurance coverage, especially given the unpredictability of pain and suffering and punitive damages. Moreover, even if available, the charges for liability insurance may be prohibitive. High insurance premiums are an inevitable consequence of the inherent unpredictability of damages in personal injury litigation. Justice O'Connor recently commented that punitive damages, for example, "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint."²⁷¹ Sooner or later Americans must pay for these zeros, although that reality seems sadly to have eluded a majority of the Court.

One might contend that the solution is simply to have the organization sponsoring the youth activities obtain liability insurance for its volunteers, but someone has to pay for the insurance premiums. Many youth activities would be unable to continue, at least if required to obtain liability insurance at a level that provided meaningful protection for its volunteers. In essence, youth activities would become available only to the affluent, and even for affluent young people the experience would be commercialized and adulterated. The absence of volunteers would reinforce the impression in our young people that for them, adult time, attention, and caring must be purchased.

²⁷⁰ Critics of the tort system have argued (with merit) that the much more efficient first-party insurance should be used in place of the tort (third-party insurance) loss spreading system. HUBER, *supra* note 67, at 225. Defenders of the tort system might argue that more universal first-party insurance would operate to spread losses over an even broader population than tort law does, and therefore would suffer even more from one of the same criticisms that the tort system does—that it would preserve economic stratifications at the expense of a large group. There are, however, two reasons why first-party insurance would be more fair than the tort system. First, it presumably would be paid for by the victim. And second, most first-party insurance, if affordable, would not replace all of an accident victim's future economic loss, and thus would not sustain individual economic stratification as does the tort system. Moreover, the extent that it replaced such losses would depend on the level of insurance purchased.

²⁷¹ *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1066 (1991) (O'Connor, J., dissenting) (*quoting* *OKI Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)).

A typical rejoinder to many of these criticisms is that without tort liability, the costs of maintaining and treating the accident victims will have to be paid by the taxpayers. This facile argument ignores the crucial fact that even under the tort system the cost will also end up being distributed beyond the immediate defendant. If the defendant is insured, at least part of the loss will be spread throughout the class of insureds through insurance premiums and the increased costs for the services that defray them. If a defendant is not insured or not otherwise sufficiently affluent to pay a judgment, taxpayers may still have to help support victims of accidents who are unable to support themselves. We live in a world of finite resources. Victims as a class will receive much less help under a tort system that returns such a small percentage of each dollar of insurance premium (or dollar payout) than would be true under a more efficient system, such as first-party insurance. About 13 million American children have neither health insurance nor coverage under Medicaid.²⁷² For about \$10 to \$12 billion, adequate health insurance could be provided for these children.²⁷³

Tort liability directed at volunteers may divert precious resources away from the goal of helping our young victims of accidents. If tort liability in this context helps anyone, it is primarily the members of the legal profession.

iii. *Loss Allocation*

Tort law also supposedly performs a loss allocative function by forcing up the costs for goods and services that engendered the losses, thereby informing consumers of the "true costs" of those goods and services. There are several problems with this ostensible justification for tort law. First, in a fault-based system of liability, many losses attributable to an activity would not result in liability because there would be no negligence or intentional injury. Second, even when there is liability, it is doubtful that insurance premiums are or even could be sufficiently experience-rated, especially for individual volunteers, to accurately reflect the recurring risks of those activities.²⁷⁴ Finally, volunteer activities are not ordinarily sufficiently integrated into an economic enterprise to internalize losses and systematically reflect them in the prices for the services rendered. To the extent that we moved in the direction of an economic pricing structure for youth activities, we would defeat the whole idea of a volunteer-driven activity.

²⁷² B.D. Colen, *Our 13 Million Uninsured Children*, *NEWSDAY*, May 2, 1989, at 13.

²⁷³ *Id.*

²⁷⁴ Sugarman, *supra* note 237, at 616 n.267.

iv. *Signaling*

The deterrence-educating role of loss allocation is sometimes conceptualized in terms of a "signaling" function.²⁷⁵ Tort liability supposedly sends a signal, informing members of society of expected levels of conduct. Unfortunately, the fault-based component of tort law seldom transmits useful signals apart from a general admonition to act "reasonably." Those cases not settled, are usually decided by juries, whose decisions are "secretly reached, unexplained, and inconsistent in result."²⁷⁶ The only clear signal a volunteer is likely to receive from news of a tort claim against one of his peers is that the best way—perhaps the only way—to avoid liability is to opt out of volunteer activities and stay home.

v. *Fairness and Corrective Justice*

Another goal of tort liability is to promote fairness and corrective justice.²⁷⁷ Tort law is supposed to reallocate a loss between the victim and tortfeasor when it is fair and morally just to do so. Professor Stewart refers to this as redressing the moral disequilibrium caused by a defendant's tortious conduct.²⁷⁸ This justification for tort liability is specious for unintentional injuries, especially in the context of volunteers. It is seldom fair to subject a person's financial security to the arbitrariness of the tort system, with its surreal "reasonableness" standards and ephemeral juries, for unintentional injuries. A person may, in retrospect, be deemed to have engaged in unreasonable conduct, yet hardly be morally at fault or, as a matter of fairness, even the party who should bear a loss. Moreover, the amount of damages often produces moral incoherence²⁷⁹ because only rarely will the amount of compensatory damages reflect the "fault" or true blameworthiness of the defendant (even if we could agree on a comprehensible definition of fault). Should the scoutmaster, exhausted from long hours at work earlier in the day, who momentarily is distracted, be liable when one youth is burned because another youth decides to make a campfire spew sparks? Might a jury find, in evaluating selective recollections after the event, that the scoutmaster failed to adequately instruct or supervise his scouts? Is it indeed fair to subject this volunteer to years of haunting self-reproach and fear of financial ruin engendered by litigation, and ultimately perhaps to the loss of his financial

²⁷⁵ See generally Sugarman, *supra* note 237, at 611–13; Abel, *supra* note 227, at 803–06.

²⁷⁶ Sugarman, *supra* note 237, at 612.

²⁷⁷ See generally *id.* at 603–09.

²⁷⁸ Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 186 (1987).

²⁷⁹ Abel, *supra* note 227, at 791; see Trebilcock, *supra* note 243.

security? Why is it not fair instead to allow the scoutmaster and the parents of the scouts to agree in advance on how to allocate responsibility for these unintentional injuries?²⁸⁰

Once one passes beyond the level of almost meaningless generality of "reasonableness," there is no comprehensible objective litmus to guide a fairness-based imposition of liability. Many accidents arising in youth activities in which volunteers are present will have little to do with the volunteers. Often accidents are the result of individual thrill seeking²⁸¹ or the materialization of unavoidable risks inherent in an activity. We cannot avoid some baseball players being hit by balls, some soccer players being kicked in the shins, some scouts tumbling down a hill, without so changing the essential nature of the activity so much that it would be diluted into oblivion.

vi. *Justiciability—Feasibility and Appropriateness of Tort Remedies*

One should also consider the feasibility and appropriateness of imposing tort liability in this setting. Activities involving young persons are inherently unpredictable. Attempts to fix blame or even to establish causation for injuries arising out of such activities is difficult at best. Professor Henderson has characterized issues in at least some types of tort claims as polycentric because of "the nonlinear way in which the issues in such problems are interrelated."²⁸² One of the most polycentric sets of negligence issues, according to Henderson, involves accidents arising in the context of certain types of close personal relationships, such as that shared by family members.²⁸³ He finds accidents arising in such settings sufficiently polycentric to "frustrate honest attempts to submit [them] to adjudication."²⁸⁴ The relationship between youths and supervising adult volunteers in recreational activities is similar in its polycentricity. Consider, for example, the case of an "extremely hyperactive,

²⁸⁰ Professor Robinson has commented: "The flaws of the tort system as a moral arbiter would seem clear enough that private parties should not be bound to submit to it." Robinson, *supra* note 168, at 195.

²⁸¹ Cava & Wiesner, *supra* note 176, at 644.

²⁸² James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 468, 475 (1976).

²⁸³ *Id.* at 481, 502-05. Some courts have explicitly analogized the duty owed by volunteers supervising youth activities to the duties and responsibilities of parents. *Castro v. Chicago Park Dist.*, 533 N.E.2d 504, 507 (Ill. App. Ct. 1988). One could argue that the duties of parents and the duty of reasonable care are essentially the same. When, however, a parental duty is perceived as more demanding than a duty of reasonable care, some courts reject the parental analogy. *Cf. Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 33 (N.Y. 1989) (duty to participants in interscholastic high school athletic program is reasonable care to protect participant from unassumed, concealed, or unreasonable risks).

²⁸⁴ Henderson, *supra* note 282, at 502.

compulsively adventuresome" Boy Scout who fell off a precipice at Columbia Gorge while trying to lower himself without permission.²⁸⁵ Or, what about a Little League baseball player who is struck by an errant ball while he was sitting in the grass to tie his shoe?²⁸⁶ In retrospect, the steps that could have been taken to have averted the accident are limited only by the bounds of the imagination of the attorneys. Were there rules against shoe tying at this location? Was the field chosen or designed with reasonable care? Should all movement of balls have been suspended anytime anyone sat on the ground? Should there have been warning signs? Where? Saying what? This complexity and lack of certainty in the milieu of youth activities militates against application of traditional tort liability principles and is a justification for validating exculpatory agreements.²⁸⁷

In general, society seems to be growing less tolerant of risk, at least those risks that another person has had a hand in creating or for which the victim can rationalize away his own responsibility.²⁸⁸ Unfortunately, this too often results in a blurring of the line that separates bad luck attributable to someone's negligence from bad luck not attributable to negligence.

2. *Need for Statutory Enabling Legislation*

If exculpatory agreements applicable to minors participating in youth activities are to protect and reassure volunteers, such agreements should be authorized by statute. There are several reasons for this. First, judicial attitudes toward exculpatory agreements for minors have often been either negative²⁸⁹ or too unpredictable to be confidently relied upon. Exculpatory agreements in general have also been subject to scrutiny under a public policy analysis.²⁹⁰ While agreements in the context of recreational activities have, with respect to adult claimants, usually been held not to violate public policy, the standards for making the public policy analysis are so vague that one can never be sure how such agreements will fare until one is actually sued and forced to rely upon one. The famous *Tunkl* case admitted as much, conceding that "[n]o definition of the concept of public interest [that would determine when an agreement violated public policy] can be contained within the four corners of a

²⁸⁵ Coffey v. Hilands, 600 P.2d 466, 468 (Or. 1979).

²⁸⁶ Cf. Castro v. Chicago Park Dist., 533 N.E.2d 504 (Ill. App. Ct. 1988) (discussed in text accompanying notes 53-57).

²⁸⁷ See generally Cava & Wiesner, *supra* note 176, at 639.

²⁸⁸ See, e.g., Fairlie, *supra* note 229, at 14.

²⁸⁹ See *supra* part IV.A.2.b.

²⁹⁰ See *supra* part IV.A.2.d.

formula."²⁹¹ Thus, even if courts were to decide not to automatically invalidate all exculpatory agreements by or on behalf of minors, the question of whether the exculpatory agreement in the particular factual setting violated public policy would remain. Matters are further obscured by other potential threats to the validity of exculpatory agreements, especially the rules allowing avoidance of such agreements when the injury arises out of certain types of tortious conduct. This is especially true when mere gross negligence, in all its ill-defined splendor, has been held sufficient to avoid an exculpatory agreement.²⁹² As much as possible, the statutes should eliminate ambiguities and uncertainties about the validity and scope of exculpatory agreements.²⁹³

The proposal I make here is admittedly one limited in scope. It does not address the shortcomings of tort liability with a systemic solution. Therefore, perhaps one otherwise sympathetic to my objectives might nevertheless be tempted to criticize the proposal as another "bandaid"²⁹⁴ on the "crazy quilt"²⁹⁵ of selective law reform. The concern is that a whole series of uncoordinated arrangements may emerge, thereby making comprehensive reform more difficult²⁹⁶ or at least weakening the impetus for it. I think, however, that this selective proposal can be defended on several grounds. First, it will serve an important goal that transcends the general benefits of efficiency one expects from limiting the scope of the tort system. It will help to assure the continued willingness of volunteers to serve our young people at a time when there is a crying need for such attention. Second, to the extent that more systemic tort reform is warranted, my proposal may actually contribute to more generalized law reform efforts. Selective limitations, such as the one proposed here, incrementally reduce the net stake of those who are inclined to oppose virtually all retrenchment of tort liability. Thus, these selective resections may ultimately decompress opposition to meaningful tort reform so that reform on a broader scale becomes politically feasible. Finally, a more particularized approach to tort reform may represent the appropriate course. The nature of the settings for human injuries varies greatly. This variousness may call for

²⁹¹ *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444 (Cal. 1963). Other courts have admitted that the policy considerations are approached on an ad hoc, case-by-case basis. See *Schlobohm v. SPA Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

²⁹² See *supra* part IV.A.2.g.

²⁹³ The effects of ambiguities and uncertainties on statutory limitations of liability have been marked in other types of activities that society has attempted to promote by limiting liability. Thus, recreational use statutes have failed to accomplish their intended goal of providing the assurances needed to overcome landowner reluctance to open their lands. N. Linda Goldstein et al., *Recreational Use Statutes—Time for Reform*, PROBATE & PROPERTY, July/Aug. 1989, at 6, 8.

²⁹⁴ Sugarman, *supra* note 237, at 618.

²⁹⁵ *Id.* at 626.

²⁹⁶ *Id.* at 627.

particularized responses.²⁹⁷ I believe that unintentional injuries arising in the context of the volunteer-youth participant context are more appropriately addressed by the prior allocative arrangements of the parents, participants, volunteers, and institutional sponsors than by naked intervention of tort liability. To the extent that injuries to young persons call for additional responses, other institutions, such as first party health insurance and government-supported medical care should be considered rather than inefficient, haphazard, and counterproductive tort remedies.

It is not unusual for there to be legislative approval of agreements that might otherwise have been invalidated or at least challenged by the parties.²⁹⁸ Some states have enacted statutes allowing a parent or guardian to make decisions on behalf of a child in certain legal matters.²⁹⁹ Statutes have also approved agreements on behalf of minors to submit some types of claims to arbitration.³⁰⁰ A number of recent decisions that have invalidated exculpatory agreements on various grounds, including the fact that the victim was a minor³⁰¹ or under a public policy analysis,³⁰² have expressly alluded to the appropriateness of a legislative solution to the question.

A legislative approach has several advantages. It offers more immediate, detailed, and resilient guidance than would be possible if one were forced to await the confluence of the right case, procedural posture, and judicial sensitivity to produce the desired rule.

Statutory modifications of the tort system inexorably seem to spawn constitutional challenges. This will probably occur in response to these proposals. The question of the constitutionality of such proposals is beyond the scope of this article. It is hoped, nonetheless, that the courts will respect the autonomy of children and their parents and uphold the validity of statutes approving exculpatory agreements as proposed.

²⁹⁷ Stewart, *supra* note 278, at 195-96.

²⁹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. b (1979).

²⁹⁹ See, e.g., TEX. FAM. CODE ANN. § 12.04 (West 1990) ("[T]he parent of a child has the following rights, privileges, duties, and powers: . . . (7) the power to represent the child in legal action and to make other decisions of substantial significance concerning the child . . ."). The applicability of this statute to exculpatory agreements is unclear.

³⁰⁰ See *McKinstry v. Valley Ob-Gyn Clinic, P.C.*, 405 N.W.2d 88, 99 (Mich. 1987). ("A child can be bound by a parent's act when a statute grants that authority to a parent."). Some courts have approved such agreements even in the absence of statutory authorization. See *supra* note 143 and accompanying text.

³⁰¹ In *Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140, 144 n.4 (E.D. Pa. 1987) (applying Pa. law), while the court allowed a minor to disavow an exculpatory agreement signed by the minor and her mother, it also recognized that the "quagmire" created by the courts could be avoided by providing by statute that parental consent would bind the child.

³⁰² See *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968, 975 (Wash. 1988).

VI. WORKING OUT THE DETAILS

A. *Who Must Sign?*

An enabling statute should make it clear that, subject to the concurrence of the minor if mature, it is sufficient if one custodial parent (or a guardian) executes the exculpatory agreement. The Supreme Court recently held that a two-parent notification requirement that must be satisfied in order for a minor female to obtain an abortion was not reasonably related to a legitimate state interest and was unconstitutional (at least in the absence of a judicial bypass option).³⁰³ The Court emphasized, among other facts, that one out of every two marriages ends in divorce, and that the vast majority of children will spend some time with only one parent.³⁰⁴ The realities of one-parent and dysfunctional families, and the need to assure some certainty and reliability in exculpatory agreements, militate in favor of making the consent of one parent sufficient. The statute should specify the age of those minors from whom concurrence would have to be obtained for the releases to be valid.

B. *Consideration*

The volunteer's services or the granting of permission to the minor to participate in the activity in question should be sufficient consideration to satisfy a contractual requirement for consideration.³⁰⁵ However, to avoid overly technical challenges to exculpatory agreements, the statute should expressly provide that consideration is not required to render these agreements enforceable.³⁰⁶

C. *Scope of the Release*

1. *Language Describing Scope of Exculpation*

One of the hurdles for persons drafting exculpatory agreements has been to employ language that is deemed sufficient to inform the other party of the

³⁰³ *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (Stevens, J., parts IV, VII).

³⁰⁴ *Id.* at 2945.

³⁰⁵ See *Wilson v. American Honda Motor Co., Inc.*, 693 F. Supp. 228, 231 n.5 (M.D. Pa. 1988) (applying Pa. law); Springer, *supra* note 121, at 495.

³⁰⁶ Elimination of any consideration requirement is consistent with a noncontractual rationale for the defense based on an exculpatory agreement—one that is animated by an extended tort concept of consent rather than contract. See RESTATEMENT (SECOND) OF TORTS § 496B cmt. a (1965).

nature and scope of the prospective interests he is about to waive.³⁰⁷ Ideally the statute should suggest language that the parties to the agreement could rely on with confidence. But the suggested language should not be deemed exclusive. In other words, the parties could, if they wished, draft language of their own. The advantage of including suggested language, however, would be that it would afford parties choosing to rely on it an added measure of predictability and certainty not currently found in the case-by-case meanderings of the courts.

The statute should also state that terms that generally identify the activity in question in a way that would inform an average person of the identity of that activity are sufficient. There should be no requirement, at least with respect to commonplace activities, to attempt the impossible task of detailing every risk, location, and other permutation that a participant might encounter.

The statute should also state that the intention of the parties, as ascertained from all of the language of the agreement, should control. There should be no hard and fast requirement that every tort theory of liability or that certain terms, such as "negligence," be used if the intention of the parties was to free the defendant from liability for unintentional tortious conduct such as negligence.

2. *Types of Conduct Subject to Exculpation*

A statute should authorize the release of prospective liability for all negligent and other unintentional injuries. As previously noted, courts have frequently invalidated exculpatory agreements not only for intentional injuries, but also for at least some of the more severe forms of unintentional tortious conduct.³⁰⁸ Some courts have disallowed exculpation not only for reckless conduct, but also for gross negligence as well. There may sometimes be a temptation for juries to stretch things to find that higher level of fault, whatever it is, if the alternative is to deny tort recovery to a young accident victim. To make matters worse, a finding of recklessness may support an additional award of punitive damages.³⁰⁹ Thus, the same findings inspired by pressures to avoid the bar of an exculpatory agreement may concomitantly support an award of punitive damages. To award such damages for unintentional injuries caused by public-spirited volunteers is palpably unjust. The *in terrorem* threat of such damages (which by definition are added on to compensatory damages) may be the final straw leading to the dissolution of the precariously elastic supply of potential volunteers. Under my proposal, all forms of unintentional conduct,

³⁰⁷ See generally *supra* part IV.A.2.a.

³⁰⁸ See *supra* part IV.A.2.g.

³⁰⁹ KEETON ET AL., *supra* note 1, § 2, at 9–10. A few jurisdictions may even allow punitive damages for gross negligence, at least when equated with recklessness. Most courts, however, require more than gross negligence. *Id.*

including both recklessness (willful or wanton conduct) and gross negligence, would be subject to exculpatory agreements. There is no really predictable or comprehensible line separating ordinary negligence from the other more serious forms of negligent conduct. Moreover, it would often be a question for the jury whether defendant's conduct amounted to recklessness or gross negligence, thereby further adding to the uncertainty.

Intentional injuries are a special concern. Traditionally, courts have held that exculpatory agreements could not validly bar tort claims for intentionally inflicted injuries.³¹⁰ Even if, as I have proposed, parents are empowered to enter into binding exculpatory agreements on behalf of their minor children, no one, volunteers or otherwise, should be free to intentionally injure a child, notwithstanding anything a parent signs. The problem is to separate intentional *injuries* that should appropriately remain subject to liability (irrespective of any exculpatory agreement) from other merely intentional *conduct* that should not. It is important to remember that intentional *injuries* require more than intentional *acts*.

According to traditional tort doctrine, a battery may occur when one intentionally³¹¹ causes nonconsensual impermissible contact with another that is harmful or offensive. There is no requirement that defendant have intended to actually harm the victim or that defendant have acted with ill-will. My concern is that this broad definition of battery might be stretched to avoid the bar of an exculpatory agreement. What if a coach who demonstrates a swimming stroke by vigorously (perhaps even too vigorously) moving a young swimmer's arms causes a sprain or some other injury? Assuming that a negligence claim was foreclosed under my proposal by an exculpatory agreement, the coach might still be confronted with a two-pronged argument in an intentional tort claim. First, the plaintiff would argue that there was a battery because this intentional contact that turned out to be harmful was nonconsensual. Were the swimmer an adult, his consent would probably preclude liability for battery even independent of any exculpatory agreement, but the problem is that the swimmer was not an adult. The plaintiff might contend that the parents did not consent to this specific type of contact—moving the swimmer's arms—and that the general parental consent to the swimming instruction did not embrace this contact. Second, plaintiff would attack the exculpatory agreement by arguing that this contact was intentional and was harmful, and therefore the agreement was ineffective. If taken to this kind of extreme, these types of arguments could vitiate much of the protection that is, under my proposal, supposed to be accorded to volunteers by exculpatory agreements.

³¹⁰ See *supra* part IV.A.2.g.

³¹¹ Intent may be established by proving either that the defendant's purpose was to cause the actionable contact (in the case of battery) or other liability-producing consequence, or that defendant knew to a substantial certainty that it would occur. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

Liability of the volunteer coach for battery in the preceding situation should be precluded for two reasons. First, it could be argued that even independent of the exculpatory effects of the agreement, parental consent (manifested by the exculpatory agreement or by the parents' conduct in presenting their child for swimming activities) constituted sufficient consent by them to cover all the usual contacts that might be expected between the coach and the swimmer. One might further reason that even if, *arguendo*, parental consent to the activity was not specific enough to make the contact in question consensual, it was at least sufficient to make the usual contacts inherent in an activity *permissible* and therefore for that reason not actionable as a battery. Thus, even if the contact here was intentional (thereby satisfying one of the elements of battery), two other elements—that the contact be nonconsensual and impermissible—were not satisfied. Second, the exculpatory agreement itself covering unintentional injuries should include some intentional contacts when the prerequisites for intentional torts were not satisfied. Thus, the mere fact that some contact with a person was intended should not *ipso facto* make that contact an intentional tort. Rather, all of the other required elements of that intentional tort must also be established. Accordingly, intentionally moving a swimmer's arms, but in a way not calculated to hurt him, should probably not constitute an intentional tort because two required elements—that the contact also be nonconsensual and impermissible—were not satisfied. Therefore, we do not have an intentional tort or, for that reason, a basis for invalidating an exculpatory agreement.

A potential soft spot in exculpatory agreements may be the tort of intentional infliction of emotional distress (sometimes called the tort of outrageous conduct). This tort has been recognized as within the rule invalidating exculpatory agreements for intentional torts.³¹² This amorphous tort should not be allowed to unduly subvert the efficacy of exculpatory agreements. Under the traditional rule, either intentionally or recklessly inflicted mental distress has been held actionable under the so-called tort of outrageous conduct if the other required elements were satisfied.³¹³ Because, under my proposed statute, allegedly reckless conduct would be subject to exculpation, reckless infliction of emotional distress should likewise be subject to the bar of an exculpatory agreement. Moreover, if the essence of a plaintiff's claim is for physical injury that was not itself intended, plaintiff should ordinarily not be permitted to circumvent the bar of an exculpatory agreement by the simple expedient of characterizing his claim as one for intentional infliction of emotional distress absent truly outrageous conduct. Thus, a Little League coach might negligently continue a practice session despite the presence of bees on the field, and a player might be stung. The coach should not lose the

³¹² See *Reece v. Finch*, 562 So. 2d 195, 200 (Ala. 1990).

³¹³ See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

protection of an otherwise valid exculpatory agreement merely because the plaintiff argues that it was intentional infliction of mental distress to conduct practice on a field where bees were known to be lurking. Rather, allegations of intentional infliction of emotional distress should not be sufficient to avoid exculpation except in extreme cases of intentionally outrageous conduct.

Some courts have held that an exculpatory agreement may be ineffective to bar tort claims when the conduct in question violated a statute.³¹⁴ Given the proliferation of statutes as well as the broad general scope of many of them, invalidating agreements on this basis seems unwise. Under my proposal, the mere fact that the defendant's conduct violated some statute should not for that reason invalidate an exculpatory agreement unless the statute in question expressly precluded exculpatory agreements in that situation.

Strict liability theories of recovery should also be subject to exculpation. Thus, in the unlikely event that a volunteer's alleged conduct could somehow be characterized as otherwise falling within the sphere of strict liability, it should be subject to exculpation. This should be true whether plaintiff attempted to rely on strict tort liability or upon some implied warranty theory. Express contractual guarantees or express warranties should probably also be subject to exculpation if that was the intent of the parties based on the language of the exculpatory agreement. Thus, a statement in the document that no guarantees or promises were made (except as expressly stated in writing) with respect to the activity in question should ordinarily be effective to preclude a claim based upon some contract-type of warranty theory.³¹⁵ Ideally, the enabling statute should prohibit reliance on alleged express guarantees or warranties by a volunteer unless such promises were in writing.

Most courts have held that express assumption of risk, at least in the form of an exculpatory agreement, is a complete bar if otherwise valid.³¹⁶ The enabling statute should reaffirm that an exculpatory agreement, if applicable, constitutes a complete bar to a claim. In other words, the defense would not be subject to dilution by application of any comparative negligence statute.

³¹⁴ See *supra* part IV.A.2.e.

³¹⁵ The paradigm for cases brought under this theory for services has been in the area of medical services. Here patients sometimes have sought to circumvent the requirements of proof of malpractice by alleging that the health care provider had essentially guaranteed a cure or other specific outcome of the treatment. Some states have reacted to the threat of such claims by enacting legislation requiring that such guarantees be in writing. See generally KING, *supra* note 138, at 254-59.

³¹⁶ See KEETON ET AL., *supra* note 1, § 68, at 496.

3. *Persons and Entities Covered—Scope of the Waiver*

a. *Individual Volunteers*

Individual volunteers serving in youth activities would be covered by the statute. The term “volunteer” should be broadly defined. Thus, for example, more than a modest gift or honorarium for a coach or other volunteer at the end of the year or season should be required in order to nullify that person’s volunteer status. The activity or enterprise in question should not necessarily have to be one devoted exclusively to youth activities. The focus should be on whether the activity was at least in part provided for the victim’s benefit. Moreover, if an individual provided volunteer youth activities, he should be able to avail himself of exculpatory agreements notwithstanding the fact that the sponsoring organization charged for the services or was a profit-making enterprise.

A question may arise whether the fact that a person has liability insurance should affect the validity of or limit the scope of the protection otherwise afforded by an exculpatory agreement. I suggest that it should not. First, permitting a claim would probably affect the premiums an insured would be required to pay in the future. Second, recognition of an insurance exception would add another element of fortuity to the whole matter of how these types of injuries should be addressed. Third, such a rule would invite litigation on the matter of the scope of insurance coverage. Such litigation carries inherent costs. Time and legal energy would have to be expended on these threshold issues. Even if an insured defendant were protected by insurance, he would still be subjected to the time-consuming haunting ordeal of litigation, and even if an uninsured volunteer were protected by an exculpatory agreement, he might still have to pay substantial attorney fees before the question of his uninsured status was clarified. Finally, this kind of “deep pocket” exception would serve to perpetuate a system that, as I have explained, is often indefensibly inefficient, arbitrary, and counter productive.³¹⁷

b. *Sponsoring Entities*

I think that exculpatory agreements should also be available to the sponsoring organization providing youth activities if the organization’s involvement in the activity was essentially on a nonprofit basis.³¹⁸ Nor should

³¹⁷ See *supra* part V.B.1.b.ii.

³¹⁸ Organizations and entities qualifying under the proposed statute should include both governmental organizations and private nonprofit organizations, as well as any other organization providing youth services gratuitously or at cost. The statute should apply to any organization *or course of operations* of an organization conducted to support youth

it matter, for the purposes of the rule I propose, that a charge was made for the youth services or for the right to participate in the activity, if those charges were essentially limited to defraying the costs of the activity. Moreover, I would allow the exculpatory agreements to bar claims against the sponsoring organization for both vicarious and direct liability.³¹⁹

To bar claims against individual volunteers, but permit vicarious liability of the sponsoring entity would perpetuate many of the problems with liability in this area. It would not take long for the effects of actual and threatened liability to put many sponsors of youth activities out of operation, or to set in motion a series of defense-motivated reactions that would so dilute and distort the activities in question as to make them worthless. Even if volunteers were not subject to personal liability, the stifling effects that the specter of liability would have on the organization would be felt by the volunteers.

Some might contend that protecting the sponsoring organization would be tantamount to resurrecting charitable immunity. I would rejoin that when the services are recreational in nature, are free or at least provided at cost, and the exculpatory agreement was willingly signed, the "immunity" is self-imposed and just.³²⁰

c. *Liability Insurers*

The general rule is that, unless subject to a special insurance exception, an immunity that protects an insured against tort liability also protects that

activities on a nonprofit basis. Thus, even a for-profit organization could avail itself of the statute for operations or projects designed to benefit youth participants and conducted on a nonprofit basis.

³¹⁹ Theories of direct liability against the sponsoring organization would be similar to the theory of corporate negligence asserted against hospitals. See generally KING, *supra* note 138, at 304-18. Allegations of direct negligence by the organization that contributed to an injury of a youthful participant might involve failure to select volunteers properly, failure to promulgate and disseminate accident-prevention rules, and failure to provide suitable training and education for its volunteers. The problem here, of course, is that virtually any injury to a participant can, in retrospect, be perceived as a failure of the sponsoring organization. In most cases, any real control by a national organization over activities at the local level is simply illusory. And to demand any such control is unrealistic.

³²⁰ See *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963). Reliance on the *Tunkl* case is misplaced. The *Tunkl* case held that an exculpatory agreement that otherwise violated public policy was not rendered valid merely because the services in question were free. *Tunkl* is distinguishable because it was decided solely on public policy grounds applicable to the nature of the services—therapeutic medical services. The court rejected the argument that an otherwise invalid exculpatory agreement could be rendered valid merely because the services were free. Here, we do not have an agreement that was, due to the essential nature of the services, otherwise invalid on public policy grounds.

person's liability insurer.³²¹ Of course, if a court or statute held that one's immunity were abrogated to the extent that one carried liability insurance, then the insurance company would not be protected from suit. The reason would not be that there was insurance, but that the underlying immunity had to that extent been abrogated. In the case of valid exculpatory agreements in favor of volunteers (and not-for-profit sponsoring entities), the mere fact that a volunteer had some personal insurance (or even was provided liability insurance by an institutional sponsor of the activity) should not alone, under my proposal, forfeit protection provided by the exculpatory agreement.³²² And therefore, any liability insurer that insured a volunteer or the sponsoring nonprofit organization should be entitled to the same defenses available to the insured, including any protection afforded by a valid exculpatory agreement.

4. *Claims of Third Parties*

An exculpatory agreement that barred a claim by the victim should also bar derivative claims. Because the courts have not always agreed on the effect that various defenses applicable to a victim may have on claims by others arising from the fact of the tortious injury to the victim, this rule should be expressly adopted by statute. Thus, if a young person participating in an activity was precluded from pursuing a negligence claim against a volunteer and sponsoring organization, his parents³²³ should likewise be precluded from asserting claims for loss of services, medical expenses, and any other claims related to the fact of the original injury.³²⁴ Claims under wrongful death or survival acts should also be subject to preclusion under an exculpatory agreement.³²⁵ Claims for

³²¹ KEETON & WIDISS, *supra* note 83, at 385; *see, e.g.*, Trainor v. Azlatan Cycle Club, Inc., 432 N.W.2d 626, 632-33 (Wis. Ct. App. 1988) (valid exculpatory agreement also precluded claim against protected defendants' liability insurers).

³²² *See, e.g.*, Trainor, 432 N.W.2d at 632-33.

³²³ *See generally* KEETON ET AL., *supra* note 1, § 125, at 937. These claims may themselves be subject to the express language of the exculpatory agreement to the extent that a parent-claimant signed the agreement. Under my proposal, however, the derivative claims of parents would be barred irrespective of whether or not the particular parent in question signed the agreement if the agreement otherwise barred the claim by the accident victim himself. Thus, if one parent signed the agreement, it would be effective against the derivative claims of the other parent.

³²⁴ Claims for loss of consortium should also be precluded. *See generally* KEETON ET AL., *supra* note 1, § 125, at 937-39. Some cases have held that such claims were not precluded by an exculpatory agreement signed by the injured person. *See* Dobratz v. Thompson, 455 N.W.2d 639, 645 (Wis. Ct. App. 1990), *rev'd on other grounds*, 468 N.W.2d 654 (Wis. 1991). Therefore, the application of the agreement to consortium claims should be expressly addressed by statute.

³²⁵ *See generally* Winkler v. Kirkwood Atrium Office Park, 816 S.W.2d 111 (Tex. Ct. App. 1991) (wrongful death and survival actions barred); Dobratz v. Thompson, 455

negligent infliction of mental distress based on a person's observation or perception of the injury to the victim³²⁶ should also be barred by a valid exculpatory agreement barring the victim himself. Moreover, all derivative claims and other claims of third parties, including claims for loss of services, medical expenses, loss of consortium, wrongful death, and survival claims should be barred by an otherwise valid exculpatory agreement even if the claimant, such as a parent, did not explicitly release his or her own claim.

Claims for contribution or indemnity against persons protected by an exculpatory agreement should also be precluded.³²⁷ Thus, if a child is injured by a defectively designed piece of sporting equipment and sues the product manufacturer, that manufacturer should have no claim for contribution or indemnity against the coach based on allegations of negligent inspection of the equipment, if the child's tort claim against the coach was precluded by a valid exculpatory agreement. The only possible exception should arise when the party otherwise protected by an exculpatory agreement had expressly agreed to indemnify the third party indemnitee.

5. Duration of Coverage of the Agreement

An exculpatory agreement that covers conduct should bar a claim no matter when that claim is asserted. The question is during what period of time will the agreement cover conduct so as to bar future claims based on that conduct that occurs during that covered period. In other words, what is the duration of the coverage of the agreement? Ideally, the parties should spell out the period of time during which the conduct contemplated by the agreement will be covered by the agreement. A question may arise, however, when the document is silent as to its duration of coverage. The preferable approach would be to hold that when the agreement specifies no definite period of coverage, it is terminable at the will of either party as to future injurious conduct, but otherwise should continue to apply to future conduct until either party expressly terminates it.³²⁸

N.W.2d 639 (Wis. Ct. App. 1990) (wrongful death claim barred) *rev'd on other grounds*, 468 N.W.2d 654 (Wis. 1991); KEETON ET AL., *supra* note 1, § 127, at 954-55; *supra* note 148; *see also* Madison v. Sup. Ct., 250 Cal. Rptr. 299, 306 (Cal. Ct. App. 1988) (wrongful death claim not barred by decedent's release of such claim, but was barred by effect of exculpatory agreement relieving defendants of duty).

³²⁶ See generally P.G. Guthrie, Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970). There is little law on exculpatory agreements in this context.

³²⁷ See *Wilson v. American Honda Motor Co., Inc.*, 693 F. Supp. 228, 232 (M.D. Pa. 1988) (applying Pa. law) (explaining that otherwise such claims "would subvert the purpose of exculpatory provisions").

³²⁸ See generally *Bien v. Fox Meadow Farms, Ltd.*, 574 N.E.2d 1311 (Ill. App. Ct. 1991).

VII. CONCLUSION

Volunteers are essential to our national vitality and well-being. The importance of volunteers in youth activities looms especially large today. Sponsors of various recreational activities have frequently required participants to execute exculpatory agreements prior to engaging in the activities. Such agreements typically purport to release prospectively such sponsors, their employees, and often their volunteer helpers, from tort liability for negligence. Following an injury, however, participants injured in the activities, or their survivors, are often quick to challenge the validity of these releases, relying on a host of legal arguments. The time has come for state legislatures to approve the use of exculpatory agreements executed on behalf of minor participants in youth activities which bar tort claims against volunteers and nonprofit organizations that provide such services. Unless the growing threat to volunteers of tort liability, both real and perceived, is effectively extinguished, we face the prospects of an inexorable flight of volunteers from the domain of youth activities. The consequences for a society of fractured families, alienated young people, rabid materialism, and intractable budget deficits are incalculable.

