

# Answering the “Call to Service”: Encouraging Volunteerism by Protecting Doctors as We Protect Ourselves<sup>\*</sup>

## Introduction

In 2015, President Barack Obama appeared for the last time on the *Daily Show with Jon Stewart* to call for Americans to volunteer and to discuss, among other pressing issues of the day, the President’s expansion of AmeriCorps, a federal volunteer service group of over 75,000 Americans.<sup>1</sup> Twenty-five years earlier, President George H.W. Bush founded Points of Light to promote volunteerism in America and signed the National and Community Service Act of 1990.<sup>2</sup> In this epoch of seemingly unrelenting political intransigence, the importance of volunteerism to American society has transcended both time and partisan politics. And with good reason.

Volunteers alone manage and operate 85% of charitable nonprofits recognized by the Internal Revenue Service.<sup>3</sup> Without volunteers, charitable nonprofits could not achieve their missions. In 2014, the 7.97 billion hours of total volunteer labor in the United States added \$197 billion of value to communities throughout the country.<sup>4</sup> Specialist volunteerism by medical and legal practitioners especially warrants attention, as only a limited number of licensed professionals can provide those much-needed services for people who cannot afford to pay. However, volunteers worry about personal legal liability, and in both medicine and law, fear of malpractice claims can create an ominous specter, chasing off would-be volunteers.<sup>5</sup> Fortunately, a civic-minded attorney can usually find a

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1. Sam Sanders, *Obama and Stewart Have One Last Dance on ‘The Daily Show,’* NPR (July 22, 2015, 3:22 AM), <http://www.npr.org/sections/itsallpolitics/2015/07/22/425183531/obama-and-stewart-have-one-last-dance-on-the-daily-show> [https://perma.cc/4WXY-ARW3]; AmeriCorps, CORP. FOR NAT’L & COMMUNITY SERV., <http://www.nationalservice.gov/programs/ameri-corps> [https://perma.cc/UL2J-VQCL].

2. *President George H.W. Bush*, POINTS OF LIGHT, <http://www.pointsoflight.org/people/board-members/president-george-h-w-bush> [https://perma.cc/G97F-TZPX].

3. *Volunteers*, NAT’L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/print/640> [https://perma.cc/6D23-PX6M].

4. *Dollar Value of Volunteering for States*, CORP. FOR NAT’L & COMMUNITY SERV., [http://www.volunteeringinamerica.gov/pressroom/value\\_states.cfm](http://www.volunteeringinamerica.gov/pressroom/value_states.cfm) [https://perma.cc/32T4-ERK5].

5. *See, e.g.,* Ilona Bray, *Should Nonprofit Directors Worry About Personal Liability?*, NOLO, <http://www.nolo.com/legal-encyclopedia/nonprofit-directors-personal-liability-32357.html>

straightforward answer to the questions “When am I liable?” and “How do I protect myself?” For doctors, however, the only honest answer to those central questions is one typically favored only by lawyers: “It depends.”

Providing volunteer medical practitioners with liability protection has become a confusing, overcomplicated, and duplicative web of federal and state law, individual entity policy, and personal malpractice insurance. By contrast, volunteer legal services providers need not navigate this baffling interplay of law and private insurance.<sup>6</sup> With malpractice insurance as an industry standard, lawyers can provide vital volunteer services in an unencumbered system. Although the two areas differ, the provision of medical services to the indigent could be increased and improved by moving toward a similar unambiguous and predictable malpractice liability regime.

First, I will dissect the current volunteer healthcare liability regime to illustrate that the current patchwork system has created unpredictability. I will look to the current state of federal protection since the passage of the Patient Protection and Affordable Care Act, as well as at examples of different state-level protection regimes. Second, I will discuss how the legal community protects volunteers from liability through a uniform professional standard of malpractice insurance. This comparison serves to highlight the complexity and confusion of the current state of volunteer liability for healthcare and the relative simplicity of the regime for volunteer legal services liability protection. And lastly, I will argue that three factors justify a simplification of the volunteer healthcare liability regime: (1) the infrequency of actual suits against medical volunteers; (2) the worthy public policy of encouraging volunteerism; and (3) reducing confusion and fear among nonprofits, volunteers, and insurers alike. Streamlining volunteer healthcare liability to imitate the simplified, insurance-based model used to provide protection for volunteer legal services will allow governments flexibility to incentivize volunteerism among healthcare providers, while giving practitioners and organizations the predictability and protection necessary to meet the public’s need.

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[<https://perma.cc/WV94-Q4SG>] (explaining how fear of personal liability can stop people from joining the board of directors of a nonprofit organization).

6. *See infra* Part III.

## II. Sources of Liability Protection for Volunteer Health Professionals

### A. *Federal Law*

In 2009, President Barack Obama marked the close of the first one hundred days of his administration with a “call to service,” asking citizens to commit to volunteering in their communities.<sup>7</sup> The President commended volunteers as expressing the “most American of ideas, that people who love their country can change it.”<sup>8</sup> With an eye to increasing volunteerism rates, President Obama signed the Edward M. Kennedy Serve America Act, which expanded the Corporation for National and Community Service’s (CNCS’s) programming capabilities.<sup>9</sup> This federal push for volunteerism is but the most recent iteration of a longstanding federal recognition of the value of volunteering to culture and the economy. However, in the realm of volunteer liability protection, each new layer of legislation provides more protection, but also more complexity and confusion.

The clearest source of volunteer protection comes from the Volunteer Protection Act of 1997 (VPA).<sup>10</sup> Fear that the uncertainty of liability provided a significant deterrent to volunteerism contributed to passage of the Act. The congressional findings introducing the legislation articulate the major concerns driving the necessity of liability protection for volunteers. Congress found that “the willingness of volunteers to offer their services is deterred by the potential for liability actions against them” and the contribution of nonprofit public and private organizations and governmental entities’ programs to their communities “is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating.”<sup>11</sup> The VPA provides minimum protections for volunteers by establishing a federal floor for volunteer liability.<sup>12</sup> The legislation preempts any state law falling below the protections established, while allowing states freedom to enact additional

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7. Jesse Lee, *A Call to Service*, WHITE HOUSE (Apr. 21, 2009, 4:31 PM), <https://www.whitehouse.gov/blog/09/04/21/A-Call-to-Service/> [<https://perma.cc/QE9X-HHCC>].

8. President Barack Obama, Remarks by the President at Signing of the Edward M. Kennedy Serve America Act (Apr. 21, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-signing-edward-m-kennedy-serve-america-act> [<https://perma.cc/2QJH-58P8>].

9. CORP. FOR NAT’L & CMTY. SERV., HELPING ALL AMERICANS SERVE THEIR COUNTRY (2010), [http://www.nationalservice.gov/sites/default/files/documents/10\\_0421\\_wh\\_serviceagenda.pdf](http://www.nationalservice.gov/sites/default/files/documents/10_0421_wh_serviceagenda.pdf) [<https://perma.cc/3VHD-8H97>].

10. 42 U.S.C. §§ 14501–14505 (2012). For an in-depth analysis of the protections and limitations of the VPA and academic responses to its passage, see generally Rebecca Mowrey & Adam Epstein, *The Little Act That Could: The Volunteer Protection Act of 1997*, 13 J. LEGAL ASPECTS SPORT 289 (2003).

11. 42 U.S.C. § 14501(a).

12. See *id.* §§ 14502–14503 (providing some liability protections that preempt state law).

protections.<sup>13</sup> To qualify for protection under the Act, a volunteer must: (1) be acting within the scope of the volunteer's responsibilities for a nonprofit or government entity; (2) be properly licensed if appropriate; (3) not cause harm "by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer;" and (4) not cause the harm by operating a motor vehicle, vessel, or aircraft.<sup>14</sup>

Although at first glance this statute seems like a fix all for volunteers, in practice this statute cannot mollify volunteer health professionals' (VHPs') liability concerns for three main reasons. First, the Act does not preempt states from applying widely varying additional protections or conditions to its applicability.<sup>15</sup> Second, the statute provides only a defense, not a guarantee a suit will not be filed, and should a court believe the VPA does not apply, there is no provision for malpractice defense against potential claims.<sup>16</sup> And third, the realities of the provision of healthcare do not always make it amenable to the requirements of the Act. Doctors in private practice provide a significant percentage of all volunteer medical treatment,<sup>17</sup> but as private practitioners, these doctors would not fall within the purview of the VPA's indemnity.<sup>18</sup> Additionally, the complexity of medical treatment as compared to some other charitable services can leave a doctor apprehensive of claims of gross negligence falling outside the purview of the Act's indemnity, especially because VHPs often act with fewer resources available for diagnostic testing than in for-profit practice.<sup>19</sup> These significant limitations on the VPA's effective and consistent applicability in the healthcare realm mean free clinics, individual practitioners, and other organizations assume indemnity at their peril.

Another source of federal protection comes from the Federal Tort Claims Act (FTCA), which makes the United States liable for many torts of

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13. *Id.* § 14502(a).

14. *Id.* § 14503(a).

15. *Id.* § 14502.

16. See *World Chess Museum, Inc. v. World Chess Fed'n, Inc.*, No. 2:13-CV-00345, 2013 WL 5663091, at \*2 (D. Nev. Oct. 15, 2013) ("The few courts to address the VPA's protections appear to treat it as an affirmative defense akin to immunity.").

17. Stephen L. Isaacs & Paul Jellinek, *Is There a (Volunteer) Doctor in the House? Free Clinics and Volunteer Physician Referral Networks in the United States*, 26 HEALTH AFF. 871, 871 (2007).

18. 42 U.S.C. § 14505(6); see also *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 282 n.4 (D. Conn. 2013) (denying charitable immunity because the complaint alleged that the defendants were paid for their services); Sharon Hoffman et al., *Law, Liability, and Public Health Emergencies*, 3 DISASTER MED. & PUB. HEALTH PREPAREDNESS 117, 122 (2009) (explaining that a healthcare provider whose employer continues to pay their salary while participating in relief efforts in another state is not shielded from liability as a "volunteer").

19. See 42 U.S.C. § 14503(a)(3) (denying liability protection for harms resulting from gross negligence).

federal employees acting within the scope of their employment.<sup>20</sup> Successive statutes extended the applicability of the FTCA, first to “deemed” employees of eligible health centers.<sup>21</sup> Next, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) extended protection to “deemed” free clinic volunteers at qualifying free clinics.<sup>22</sup> Under this program, known as the Free Clinics FTCA Medical Malpractice Program, Congress first appropriated funds for deemed free clinic volunteers in 2004.<sup>23</sup> Thus, the FTCA and HIPAA provide powerful protection, as the statutes subrogate all claims against a deemed free clinic volunteer to the United States, with some exceptions. Recently, the Patient Protection and Affordable Care Act extended this protection to similarly deemed free clinic board members, officers, employees, and contractors.<sup>24</sup>

This legislation ameliorates some of the concerns under the VPA. First, these statutes are particularly crafted for the provision of volunteer medical services, thus providing clearer applicability for VHPs.<sup>25</sup> Also, unlike the VPA, by providing for full subrogation of claims, these statutes give assurance that a volunteer will not have to defend a malpractice claim, so long as she is “deemed” under the statute.<sup>26</sup>

However, the “deeming” requirements leave many volunteers without protection. Importantly, the provider first must qualify as a “free clinic,” defined to require operation by a nonprofit entity; no acceptance of payment from a third-party payor, including any insurance or benefits program; and no imposition of a charge on patients.<sup>27</sup> Therefore coverage will not extend to private physicians providing care or to facilities that provide low-cost services or accept insurance or benefits payments such as Medicaid. Additionally, coverage only applies to deemed individuals, which requires the qualifying free clinic to “sponsor” the individual by an application process operated by the U.S. Department of Health and Human Services that requires, among other things, an attachment “explaining any and all

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20. 28 U.S.C. §§ 2674, 2679 (2012).

21. 28 U.S.C. § 233(g) (1995).

22. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 194, 110 Stat. 1936, 1988 (1996) (codified at 42 U.S.C. § 233(o)).

23. Press Release, U.S. Dep’t of Health & Human Servs., Secretary Thompson Announces Program to Extend Medical Malpractice Coverage to Free Clinic Volunteers (Oct. 14, 2004), <http://archive.hrsa.gov/newsroom/releases/2004/FTCA.htm> [<https://perma.cc/8FTA-J7UB>]; *Free Clinics*, HRSA: HEALTH CENTER PROGRAM, <http://bphc.hrsa.gov/ftca/freeclinics/index.html> [<https://perma.cc/UT4P-8CS6>].

24. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10608, 124 Stat. 119, 1014 (2010) (codified at 42 U.S.C. § 233(o)).

25. See 42 U.S.C. § 233(o) (2012) (explicitly immunizing VHPs at free clinics that meet the statutory qualifications).

26. Compare 42 U.S.C. § 233(b), (o) (providing full personal immunization and a government defense for deemed free clinic healthcare practitioners), with 42 U.S.C. § 14503(a) (allowing some volunteer liability for gross negligence, among other exceptions).

27. 42 U.S.C. § 233(o)(2).

disciplinary actions and medical malpractice claims alleged against the eligible individuals applying for deeming . . . for the past ten . . . years for new applicants and five . . . years for renewal applicants.”<sup>28</sup> The clinic must also renew each individual’s deemed status annually.<sup>29</sup> This process means that a clinic and service provider must know ahead of time that he or she intends to volunteer, that practitioners’ malpractice claims records must be compiled and disclosed, and the clinic must expend at least some time and resources ensuring ongoing compliance.

Therefore, this protection, while helpful for practitioners who consistently and frequently work with the same organization, will not be practical for volunteers who want to give their time infrequently or who associate with a group too small in size or too short in duration to practically comply with these measures. Additionally, these requirements place one more burden on the resources of free clinics and serve as a barrier to entry for potential volunteers. While the requirements serve to limit risk by “ensur[ing] that only providers with a relatively low risk of receiving a malpractice suit receive malpractice coverage,” the effect of this program’s influence on volunteerism remains unknown.<sup>30</sup> Because of the specificity and stringency of its limitations, there is reason to doubt that the FTCA Medical Malpractice Program meets its stated goal of “encourag[ing] health care providers to volunteer at free clinics by eliminating the barrier of costly malpractice coverage.”<sup>31</sup>

Taken together, federal law provides some peace of mind to physician volunteers, especially those who have an ongoing working relationship with a particular nonprofit. However, the VPA acting alone does little to assuage would-be volunteers’ concerns. Individual states condition the Act’s coverage on a variety of factors and its protections are incomplete and unpredictable in the complex arena of medical services, leading to uncertainty of its applicability to individual volunteers’ situations. By contrast, when applicable the FTCA Medical Malpractice Program provides comfortable certainty to volunteers and the organizations they serve. Yet due to its limited applicability and deeming requirements, this program leaves many VHPs outside its protective net. For each physician, nurse, or other health practitioner, determining her coverage and its limits and requirements already poses a challenge. And state law often only darkens the already murky waters.

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28. *Free Clinic Application Process*, HRSA: HEALTH CTR. PROGRAM, <http://bphc.hrsa.gov/ftca/freeclinics/ftcafreeclinicappprocess.html> [<https://perma.cc/6CN9-ARXC>].

29. *Id.*

30. *Program Assessment: Free Clinics Medical Malpractice Coverage*, EXPECTMORE.GOV, <https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/expectmore/summary/10003536.2006.html> [<https://perma.cc/JQ2H-YE3N>].

31. *Id.*

### B. State Law

State volunteer protections take many forms. As a first line of defense, states have Good Samaritan laws.<sup>32</sup> Good Samaritan laws protect physicians from liability resulting from unintended consequences of providing care in emergency situations.<sup>33</sup> Predictably, the prerequisite conditions and extent of these laws vary state by state.<sup>34</sup> In addition to confusion caused by interstate variance and intrastate complexity, Good Samaritan laws only weakly serve the goal of encouraging medical volunteerism for two main reasons. First, the indemnity provided by Good Samaritan laws applies only in limited emergency situations, both temporally and physically.<sup>35</sup> Therefore these laws provide no protection for VHPs providing preventative care or ongoing charitable treatment. The retrospective nature of Good Samaritan laws can also prove problematic because a volunteer will not know at the outset if the protections will apply to her situation.<sup>36</sup> States must therefore expand the web of protection to

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32. See generally D.C. CODE § 7-401 (2012) (providing Good Samaritan protection in the District of Columbia); Victoria Sutton, *Is There a Doctor (and a Lawyer) in the House? Why Our Good Samaritans Laws Are Doing More Harm Than Good for a National Public Health Security Strategy: A Fifty-State Survey*, 6 J. HEALTH & BIOMEDICAL L. 261 (2010) (analyzing the Good Samaritan laws of all fifty states).

33. Sutton, *supra* note 32, at 265–67.

34. For example, California immunizes medical personnel against damages for care given without compensation at the scene of emergency, excluding for care in places usually rendering medical care or for acts amounting to gross negligence or worse. CAL. HEALTH & SAFETY CODE § 1799.102 (West Supp. 2016).

Illinois similarly indemnifies medical personnel for good faith provision of care at the scene of an emergency except in cases of gross negligence or worse. But Illinois does not except care rendered at places where medical personnel usually render care. 745 ILL. COMP. STAT. ANN. 49/25 (West Supp. 2016).

New Jersey immunizes a broader range of caregivers, including any “person licensed to practice any method of treatment of human ailments, disease, pain, injury, deformity, mental or physical condition, or licensed to render services ancillary thereto, or any person who is a volunteer member of a duly incorporated first aid and emergency or volunteer ambulance or rescue squad association” for emergency care at the scene of an emergency or while transporting an emergency victim with only a requirement of “good faith” instead of specific exception for grossly negligent action. N.J. STAT. ANN. § 2A:62A-1 (West 2015). New Jersey case law makes clear the law does not protect care given in hospitals. *Velazquez ex rel. Velazquez v. Jimenez*, 798 A.2d 51, 54 (N.J. 2002).

And lastly, Texas broadly protects all volunteers who give uncompensated care in good faith in an emergency situation, only excepting willfully or wantonly negligent action from indemnity. TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (West Supp. 2015). And Texas case law establishes that Good Samaritan protections can apply even to services rendered in a hospital. *Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008) (per curiam).

35. See Sara Rosenbaum, Mary-Beth Harty & Jennifer Sheer, *State Laws Extending Comprehensive Legal Liability for Professional Health-Care Volunteers During Public Health Emergencies*, 123 PUB. HEALTH REP. 238, 238 (2008) (describing how Good Samaritan statutes apply to certain situations that meet the qualifications of an emergency, but not to others such as postemergency stabilization or preventative care).

36. *Id.* at 239.

provide adequate immunity and certainty to VHPs, or accept only the minimum threshold of protection provided by the federal VPA.

Some states opt to protect VHPs from liability by immunizing them using the same apparatus used to immunize state employees.<sup>37</sup> This allows the state to cap liability recovery under a state employee tort claims regime, as well as specify conditions volunteers and organizations must meet to qualify for governmental immunity.<sup>38</sup> States choosing this approach frequently establish defense funds to cover the costs of defense and damages.<sup>39</sup> This system operates similarly to the federal FTCA Medical Malpractice Program.<sup>40</sup> However, because states are free to define the parameters of their own regime, these programs lack the benefit of predictability and uniformity provided by the federal deeming apparatus.<sup>41</sup>

Similarly to the federal government through the VPA, some states simply immunize volunteers from suit, usually excepting cases of gross negligence or for willful or wanton behavior, but often with particular restrictions that vary state-by-state.<sup>42</sup> Some states restrict certain protections to particular categories of VHPs. For example, Michigan provides for volunteer immunization specifically for retired health practitioners who meet its licensing requirement and other restrictions.<sup>43</sup> Michigan more generally immunizes volunteers and nonprofit facilities that provide medical care to the indigent under a separate statute, but the protection

applies only if the nonemergency health care is provided inside the premises of or as a result of a referral from either of the following:

(a) A health facility organized and operated for the sole purpose of delivering nonemergency health care without receiving compensation.

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37. Paul A. Hattis, *Overcoming Barriers to Physician Volunteerism: Summary of State Laws Providing Reduced Malpractice Liability Exposure for Clinician Volunteers*, 2004 U. ILL. L. REV. 1033, 1038–39; see, e.g., *Oklahoma Volunteer Charitable Healthcare Provider Program Summary*, OK. ST. DEP'T HEALTH, [https://www.ok.gov/health/Organization/Center\\_for\\_Health\\_Innovation\\_and\\_Effectiveness/Office\\_of\\_Primary\\_Care/Oklahoma\\_Volunteer\\_Charitable\\_Healthcare\\_Provider\\_Program/index.html](https://www.ok.gov/health/Organization/Center_for_Health_Innovation_and_Effectiveness/Office_of_Primary_Care/Oklahoma_Volunteer_Charitable_Healthcare_Provider_Program/index.html) [<https://perma.cc/7ZTQ-E57V>] (explaining Oklahoma's Volunteer Charitable Healthcare Provider Program, which provides eligible free clinic health-care providers with immunity under Oklahoma's Tort Claims Act).

38. Hattis, *supra* note 37, at 1038.

39. *Id.* at 1038–39.

40. See *supra* notes 30–34 and accompanying text (describing the FTCA Medical Malpractice Program).

41. Compare 42 U.S.C. § 233(o) (2012) (outlining extensive, well-outlined deeming requirements that a volunteer must meet to qualify for immunity), with Rosenbaum, Harty & Sheer, *supra* note 35, at 238–39 (describing the retrospective nature of many state Good Samaritan laws and accompanying problems).

42. See *supra* note 34 and accompanying text.

43. MICH. COMP. LAWS ANN. §§ 333.16184–.16185 (West 2008 & Supp. 2015).

(b) An entity that is not a health facility and that provides or that coordinates or otherwise arranges for the provision of nonemergency health care to uninsured or underinsured individuals through the voluntary services of or through referrals for the voluntary services of licensees or registrants who receive no compensation for providing the nonemergency health care.<sup>44</sup>

Organizations and volunteers must meet additional disclosure requirements, and protection does not apply to “surgery that customarily requires more than a local anesthetic.”<sup>45</sup> Michigan provides but one example of the difficulty for any physician to ensure she knows if and when liability can attach for her voluntarily given time and effort.<sup>46</sup> The considerable intrastate complexity and interstate variety in such volunteer immunity statutes illustrates the magnitude of uncertainty caused by the VPA’s allowance of state-by-state variance.

Creative states venture beyond simply immunizing volunteers by legislatively providing VHPs a mechanism to purchase malpractice insurance.<sup>47</sup> For example, Virginia immunizes VHPs serving the indigent under certain circumstances so long as the act is not grossly negligent or willful misconduct, and additionally provides medical malpractice insurance with the premiums paid for by the state’s department of health.<sup>48</sup> Connecticut also offers malpractice insurance for VHPs who, among meeting other requirements, serve at least 150 hours of uncompensated primary health care services to low-income patients.<sup>49</sup>

By providing volunteers a vehicle through which they can acquire affordable malpractice insurance, these states do far more to protect their volunteers. Along with the hope of immunity, insured volunteers in these states can take comfort in the knowledge that should a court find that a cognizable claim has been made, the volunteer can defend herself and ultimately pay a judgment if she must. However, because only a few states take this route to volunteer protection, the benefits of a uniform assumption

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44. *Id.* § 333.16277(2).

45. *Id.* § 333.16277(7).

46. For example, Texas also protects VHPs using an indemnification statute, the Charitable Immunity and Liability Act of 1987. TEX. CIV. PRAC. & REM. CODE ANN. § 84.004 (West 2011 & Supp. 2015). Unlike Michigan, Texas immunizes volunteers who offer care for a “charitable organization,” defined using the federal 501(c)(3) tax exemption requirements, and without expectation of compensation. *Id.* § 84.003(1), (5). Acceptance of certain government benefits plans such as Medicaid will not preclude immunity. *Id.* § 84.007(e). Texas also lacks many of the restrictions found in the Michigan statute, but similarly requires certain disclosures to a patient for the immunity to attach. *Id.* § 84.004(c).

47. Hattis, *supra* note 37, at 1039–40.

48. VA. CODE ANN. § 54.1-106 (2013); *see also Free Clinic Volunteer Health Care Practitioners*, DEP’T TREASURY, COMMONWEALTH VA., [https://www.trs.virginia.gov/drm/clinic\\_volunteers.aspx](https://www.trs.virginia.gov/drm/clinic_volunteers.aspx) [<https://perma.cc/4MGH-Y6AF>].

49. CONN. GEN. STAT. ANN. § 19a-17m (West Supp. 2015).

of malpractice insurance cannot be reaped by all would-be volunteers.<sup>50</sup> Under this regime, a would-be volunteer must still attempt to navigate the applicable federal and state immunity and possible insurance options in order to know whether she needs personal liability insurance for any instance of volunteer service rendered.

In discussing the web that current federal and state law creates for a VHP, I have not attempted to be exhaustive.<sup>51</sup> State or national emergencies, for example, can lead to differing standards of volunteer protection.<sup>52</sup> To address these situations, some states have legislated to protect VHPs under certain state-of-emergency conditions by adopting forms of the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA).<sup>53</sup> But the laws already discussed highlight the main sources of federal and state volunteer liability and demonstrate the obfuscating nature of such an unpredictable and legally complex tangle of liability, indemnity, and protection.

Each would-be volunteer likely does not sit down with a stack of state and federal statutes before determining whether to serve. But the findings justifying both federal and state volunteer-protection statutes illustrate that governments want to encourage volunteerism and feel that fears of liability stand in its way.<sup>54</sup> Unfortunately, the very legislative efforts aimed at easing the minds of volunteers and increasing needed service to the public have served to thwart that purpose. With such an intricate and perilous web to navigate, volunteers may not serve or may serve without accurately understanding their exposure to liability. And without a confident assessment of one's exposure to liability, a potential volunteer may not know whether she should thoroughly investigate the sponsoring organization's malpractice policy or seek that last bastion against personal liability: private malpractice insurance.

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50. Hattis, *supra* note 37, at 1039–40.

51. For a concise review of the vast state-by-state variance in indemnification and its numerous exceptions and qualifications, see NONPROFIT RISK MGMT. CTR., STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS (4th ed., rev. vol. 2009), <http://www.nonprofitrisk.org/downloads/state-liability.pdf> [<https://perma.cc/C6K2-NB6G>].

52. Mark A. Rothstein, *Malpractice Immunity for Volunteer Physicians in Public Health Emergencies: Adding Insult to Injury*, 38 J.L. MED. & ETHICS 149, 149 (2010).

53. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT (UNIF. LAW COMM'N 2007), [http://www.uniformlaws.org/shared/docs/emergency%20volunteer%20health%20practitioners/uevhpa\\_final\\_07.pdf](http://www.uniformlaws.org/shared/docs/emergency%20volunteer%20health%20practitioners/uevhpa_final_07.pdf) [<https://perma.cc/2HJP-AGXS>]; Rothstein, *supra* note 52, at 149.

54. 42 U.S.C. § 14501(a) (2012); *see, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 84.002 (2011 & Supp. 2015) (finding that “robust, active, bona fide, and well-supported charitable organizations are needed within Texas to perform essential and needed services” and “the willingness of volunteers to offer their services to these organizations is deterred by the perception of personal liability arising out of the services rendered to these organizations”).

### C. Insurance

The importance of malpractice insurance is nothing new to doctors and other medical practitioners.<sup>55</sup> And in the context of volunteering, the necessity of private malpractice insurance increases as policies provided by employers do not often cover volunteered services. Some organizations have malpractice coverage encompassing claims against volunteers,<sup>56</sup> and a physician concerned about his liability can first look to the parameters of the organization’s coverage before investing personally. However, for smaller firms or for a single instance of volunteering, such as for a particular charitable event, a VHP may need to acquire their own insurance to ensure protection. This holds especially true when applicability of federal or state immunity is unclear.

Even in situations where indemnity will likely attach, malpractice insurance is beneficial from a VHP’s perspective for several reasons. First, a volunteer will know that, should a suit be filed, attorneys with an interest in getting the case dismissed will be there to sort through the law and argue for any possible statutory indemnity.<sup>57</sup> Second, should a court determine—whether correctly or incorrectly—that indemnity does not apply due to the many exceptions and varying standards of care that are required under the different state and federal statutes, a volunteer will appreciate that cost of counsel and any eventual judgment will not leave them bankrupt.<sup>58</sup> Therefore, for many VHPs, malpractice insurance can give peace of mind that the law alone cannot.

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55. For example, in one doctor’s view, “[n]o doctor can afford not to have [a malpractice insurance company]. For the security of having an insurer willing to pay up to \$3 million per incident, [he pays] \$7,000 a year in premiums.” Manoj Jain, *Even with Malpractice Insurance, Doctors Opt for Expensive, Defensive Medicine*, WASH. POST (Aug. 31, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/30/AR2010083003946.html> [<https://perma.cc/N2MP-Y95R>]. The American College of Physicians offers detailed advice to new doctors who need to understand the limits of their employer-based coverage to determine whether they should acquire additional private malpractice insurance. *Malpractice Insurance*, AM. C. PHYSICIANS, [https://www.acponline.org/residents\\_fellows/career\\_counseling/malpractice\\_insurance.htm](https://www.acponline.org/residents_fellows/career_counseling/malpractice_insurance.htm) [<https://perma.cc/A7V2-2MVR>]. And malpractice insurance is not only a concern for physicians. An online resource for nurses also emphasizes the importance of malpractice insurance for registered nurses. Jennifer Olin, *Making a Practice of Malpractice Insurance*, RN CENTRAL (Aug. 9, 2011), <http://www.rncentral.com/blog/2011/making-a-practice-of-malpractice-insurance/> [<https://perma.cc/D29W-UYWJ>].

56. See, e.g., *Volunteer Opportunities*, AM. RED CROSS, <http://www.redcross.org/la/lafayette/volunteer/opportunities> [<https://perma.cc/S7QZ-WSVL>] (stating that volunteer health service works are covered by American Red Cross liability insurance when fully registered and acting within the parameters of Red Cross policies).

57. See D. Bowen Berry, *The Physician’s Guide to Medical Malpractice*, 14 BAYLOR U. MED. CTR. PROCEEDINGS 109, 109 (2001) (explaining that a malpractice carrier has duties to both defend and indemnify).

58. See *id.* (“The duty to indemnify requires the carrier to pay an amount up to the policy limits for a settlement or judgment on any covered claim against the physician.”).

Unfortunately, private medical malpractice insurance is a large burden to carry, and could be prohibitively expensive for some practitioners who would like to volunteer but do not otherwise need to have expansive personal malpractice insurance. The American Medical Association recognized the burden that requiring private medical malpractice insurance places on potential volunteers, “encourage[ing] state medical societies to support development of state assistance with malpractice premiums.”<sup>59</sup> One sector of potential volunteers, retired health practitioners, often finds existing malpractice insurance options unfeasibly expensive.<sup>60</sup> A retired psychiatrist, remarking that California remains one of few states lacking laws protecting VHPs, cited cost of malpractice insurance, especially since many traditional policies do not cover volunteer work, as the singular reason she refrains from offering her much-needed services.<sup>61</sup> The expense of malpractice coverage therefore likely means fewer retired health practitioners and others who do not otherwise need to pay for expansive private malpractice insurance will be willing to offer their beneficial knowledge and service to their communities.

The current private malpractice insurance regime is also highly problematic for volunteers wishing to offer their time to causes other than serving indigent patients in their communities. For example, although medical volunteerism abroad is growing,<sup>62</sup> most traditional policies do not cover international volunteer work, and coverage through specialized policies is expensive and often limited.<sup>63</sup> This gap in volunteerism versus readily available coverage means providers commonly volunteer without any coverage.<sup>64</sup>

Another example of the current malpractice regime working against volunteerism is when medical practitioners wish to volunteer for a community or sporting event. Many events, from small youth sports competitions

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59. AM. MED. ASS'N, POLICY NO. H-160.922, PHYSICIAN AND HEALTH PLAN PROVISION OF UNCOMPENSATED CARE, <https://www.ama-assn.org/ssl3/ecom/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-160.922.HTM> [<https://perma.cc/F5B9-WWWH>].

60. See generally Crystal Conde, *Shield the Volunteers: State, Federal Laws Protect Physicians from Liability*, TEXASMEDICINE, Mar. 2009, at 37 (2009) (summarizing the liability challenges facing retired physicians).

61. Cheryl Clark, *State Looks to Protect Volunteer Docs from Malpractice Suits*, HEALTHLEADERS MEDIA (Apr. 1, 2010), <http://www.healthleadersmedia.com/content/PHY-248903/State-Looks-to-Protect-Volunteer-Docs-from-Malpractice-Suits> [<https://perma.cc/NN77-CKMC>].

62. Sharif Elgafi, *Medical Liability in Humanitarian Missions*, J. HUMANITARIAN ASSISTANCE (Nov. 11, 2014), <https://sites.tufts.edu/jha/archives/2111> [<https://perma.cc/82HE-4PQT>] (reporting that a recent study found 27% of medical school graduates had international experience during school, as compared to only 6% in 1982).

63. *Id.*

64. Tetsu (Butch) Uejima, *Medical Missions and Medical Malpractice: The Current State of Medical Malpractice Overseas*, ASA MONITOR, Feb. 2011, at 22, 24; Elgafi, *supra* note 62.

to even major annual races, do not offer malpractice insurance coverage to their medical volunteers.<sup>65</sup> Therefore volunteers must have expensive malpractice coverage already in place or serve at their peril, a risk which many would-be volunteers find prohibitive. For example, the volunteer medical director for the 2008 Ironman World Championships resigned due to the race’s failure to offer any malpractice coverage to volunteers.<sup>66</sup> And a VHP cannot even assume her personal malpractice insurance will cover any liability arising from the volunteer event and should confirm coverage before volunteering.<sup>67</sup> Should a VHP’s private malpractice not cover the desired volunteer work, the volunteer may be out of luck, as few insurers will issue one-day policy riders for volunteering at sporting events.<sup>68</sup> Therefore, under the current malpractice regime, there are many scenarios in which a volunteer is faced with only these few options: to acquire her own private, specialized malpractice insurance at great personal expense; to restrict her giving to only volunteering through the limited number of organizations who can afford to provide malpractice coverage to all of their volunteers, or to serve without insurance and risk great personal liability.

### III. Sources of Liability Protection for Attorneys’ Pro Bono Work

Like healthcare providers, attorneys who wish to volunteer through pro bono work also must assess their potential liability and sources of protection. However, the legal landscape of liability facing attorneys is, ironically, far less burdensome than that facing doctors. Although the federal Volunteer Protection Act of 1997 and its state counterparts are broad enough to encompass legal volunteers acting within the statutes’ specified limits,<sup>69</sup> research turned up no instance of the federal or a state Volunteer Protection Act being invoked to immunize a legal volunteer. And unlike for VHPs, lawyers wishing to volunteer their time do not have a patchwork of other liability indemnifications. For pro bono legal services,

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65. David S. Ross et al., *Action in the Event Tent! Medical-Legal Issues Facing the Volunteer Event Physician*, 5 *SPORTS HEALTH* 340, 340–41 (2013); see also Erin Beresini, *The Doctor Won’t See You Now*, *OUTSIDE* (Feb. 28, 2012), <http://www.outsideonline.com/1897626/doctor-wont-see-you-now> [<https://perma.cc/P7K3-SQP8>] (discussing the problem of VHP liability in the context of major races).

66. Beresini, *supra* note 65.

67. Ross et al., *supra* note 65, at 341.

68. Beresini, *supra* note 65.

69. See *supra* subparts II(A)–(B). For state-specific examples, see *Malpractice Protection for Pro Bono Attorneys*, OFF. ST. CTS., <https://www.courts.mo.gov/page.jsp?id=40238> [<https://perma.cc/Q435-3Y47>]; and Nancy A. Daniels, Fla. Att’y Gen., Opinion Letter No. 94-16 (Mar. 2, 1994), finding that the Florida Volunteer Protection Act would cover pro bono legal services, so long as the other statutory requirements were met.

malpractice coverage serves as the most common protection by far,<sup>70</sup> and attorneys wishing to volunteer need only worry about what sort of coverage applies to their service.<sup>71</sup>

Luckily for attorneys, having adequate malpractice insurance for pro bono work presents little challenge, and any variance typically stems from what sector of the profession the attorney works in. Midsize and larger firms usually have their own malpractice insurance covering the attorney.<sup>72</sup> To fall under this protection, sometimes an attorney must get preapproval from her office, perform work using the firm name on official documents, or meet other similar requirements.<sup>73</sup> But these are small burdens considering the value of malpractice insurance, especially because firms overwhelmingly seem to encourage pro bono service by their attorneys.<sup>74</sup> Therefore, attorneys in a midsize or larger firm need only confirm their firm's pro bono policies and insurance restrictions before volunteering and, at the same time, often will have access to firm-wide support systems for encouraging pro bono service.<sup>75</sup>

Even for solo practitioners, government employees, in-house attorneys, and any other attorneys who cannot depend on employer-provided broad malpractice insurance, acquiring the proper coverage is not difficult and can often be done for free or at a reduced cost. This is because, unlike in the health arena, many agencies providing volunteer legal services provide malpractice coverage to uncovered attorneys.<sup>76</sup> Although this

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70. See Ann Massie Nelson, *No Good Deed Goes Unpunished: Rewards and Risks of Pro Bono*, GPSOLO, Apr.–May 2003, at 10, 10–11 (noting that insurance is the traditional method of sharing risk for attorneys).

71. See *id.* at 13 (explaining that lawyer's insurance policies generally do not differentiate between pro bono and paid professional services, and thus the sort of coverage that is included in the insurance policy applies to volunteer legal activities).

72. See AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PRO BONO WORK AND MALPRACTICE COVERAGE: A GUIDE FOR THE PRO BONO ATTORNEY 2 (2013), [http://www.americanbar.org/content/dam/aba/administrative/lawyers\\_professional\\_liability/ls\\_lpl\\_pro\\_bono\\_work\\_and\\_malpractice\\_coverage.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/ls_lpl_pro_bono_work_and_malpractice_coverage.authcheckdam.pdf) [<https://perma.cc/TPP5-7S9C>] (finding that eighteen different policies generally available to firms of ten or more attorneys would likely cover most pro bono service).

73. *Id.*

74. See, e.g., *Pro Bono*, VINSON & ELKINS, <http://www.velaw.com/Who-we-are/Pro-Bono/> [<https://perma.cc/24BE-YJYL>] (discussing the firm's commitment to pro bono services); *Pro Bono and Volunteering*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/corporate-responsibility/pro-bono-and-volunteering/> [<https://perma.cc/B846-8K6P>] (listing the many national and international organizations to which the firm's attorneys provide pro bono services).

75. See, e.g., *Pro Bono*, WILLKIE FARR & GALLAGHER LLP, <http://www.willkie.com/pro-bono> [<https://perma.cc/75ZF-PZ4J>] (“Lawyers working on pro bono matters have available to them the full resources of the firm.”).

76. See AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *supra* note 72, at 5 (“Overall, the legal services organizations that offer coverage tend to use that coverage as a selling point in seeking attorneys to provide pro bono services.”); Nelson, *supra* note 70, at 11 (“Legal services agencies that receive federal funding normally provide professional liability insurance to

restricts legal volunteerism to only those organizations offering coverage, there are benefits too, especially because so many organizations provide coverage that any restriction is not overly burdensome. Two advantages of restricting work to organizations providing coverage are that these groups often provide: first, the matching of an attorney to an appropriate client matter given the attorney’s knowledge and limitations; and second, necessary training and assistance to ensure the attorney can competently render services to the client.<sup>77</sup> Additionally, state bars often provide malpractice insurance for pro bono work in order to encourage attorney volunteerism.<sup>78</sup> Thus, an attorney who wishes to perform pro bono work can usually ensure liability protection at little or no cost to herself, other than the time spent to investigate whether her firm, the organization, or her state bar provides insurance.

#### IV. Policy Justifications for Addressing VHP Liability Predominantly Through a Malpractice Insurance Regime

Whenever an entity acts to insulate volunteers from liability, the most prominent stated reason is a societal recognition of both the importance of volunteerism to our communities and the deterrent effect that fear of liability has on potential volunteers.<sup>79</sup> However, the current web of possible

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volunteer lawyers.”); *Utah State Bar Pro Bono Opportunities for Attorneys*, UTAH ST. B., <http://www.utahbar.org/public-services/pro-bono-commission/pro-bono-opportunities/> [<https://perma.cc/X4RG-WHFX>] (listing pro bono opportunities within Utah and noting with most listings that malpractice coverage is offered to volunteers).

77. See James W. Paulsen, *Does No Good Deed Really Go Unpunished? Malpractice Myths and Realities in Pro Bono Representation*, 44 HOUS. LAW. 10, 11 (2007) (explaining that an attorney working with an organization often has the benefit of matching and training sufficient for her to competently render service to the client). *But see, e.g.*, Kelly S. Terry, *Do Not Go Gentle: Using Emeritus Pro Bono Attorneys to Achieve the Promise of Justice*, 19 GEO. J. ON POVERTY L. & POL’Y 75, 90 (2012) (arguing that although there are benefits to requiring volunteer attorneys to associate with established legal services organizations, certain areas of representation are not available due to restrictions on the organization itself).

78. *E.g.*, *Attorney Sign Up – Frequently Asked Questions*, S.C. L. ANSWERS, <http://www.sclawanswers.org/Account/AttorneyFAQ> [<https://perma.cc/M9K6-SCD7>] (explaining that attorneys offering pro bono counsel through the South Carolina Bar pro bono program receive free malpractice coverage); *CARE: Frequently Asked Questions*, ST. B. TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Legal\\_Access\\_Division&Template=/CM/ContentDisplay.cfm&ContentID=23224](https://www.texasbar.com/AM/Template.cfm?Section=Legal_Access_Division&Template=/CM/ContentDisplay.cfm&ContentID=23224) [<https://perma.cc/H7W9-LJLG>] (discussing free malpractice coverage for over fifty-five legal services programs throughout Texas through the State Bar Malpractice Insurance Network); *Pro Bono Directory – Attorney Resources*, MILWAUKEE B. ASS’N, [http://milwbar.org/content.php?page=Pro\\_BonoDirectory\\_\\_\\_Attorney\\_Resources](http://milwbar.org/content.php?page=Pro_BonoDirectory___Attorney_Resources) [<https://perma.cc/7D4E-ABJW>] (advertising free malpractice insurance for pro bono work through partnership with the State Bar of Wisconsin).

79. See, *e.g.*, 42 U.S.C. § 14501(a) (2012) (finding that “the willingness of volunteers to offer their services is deterred by the potential for liability actions against them” and “as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities”); TEX. CIV. PRAC. & REM. CODE ANN. § 84.002 (2011 & Supp. 2015) (supporting the

liability protection and exposure creates more confusion than comfort for a VHP. Shifting to malpractice insurance as an industry standard using the model of pro bono legal service liability protection will best serve the goal of promoting health practitioner volunteerism for three reasons. First, in both healthcare and legal volunteer situations, the incidence of suits against a volunteer is exceedingly low, thus making malpractice insurance an affordable option. Second, the definite and understandable protection provided by malpractice insurance will encourage volunteerism by providing volunteers and organizations with certainty of the risks assumed. And third, a malpractice insurance regime allows the government and entities such as medical associations the flexibility to promote volunteerism through subsidizing insurance costs, while still protecting patients' interest in the pursuit of legitimate claims.

The cost of providing a fund for volunteer healthcare practitioner malpractice coverage would not be prohibitively expensive. In both the legal and medical contexts, the cases of suits filed against volunteers are exceptionally uncommon.<sup>80</sup> The current immunity regime would be far more useful if evidence showed that doctors were constantly being hauled into court and thus needed a quick way to escape a suit.<sup>81</sup> Thankfully, the opposite is true; few nonprofits and fewer volunteers are sued, and the numbers do not appear to be increasing.<sup>82</sup> However, despite the infrequency of actual suits, the perception of risk that is possibly perpetuated by a few publicized cases still acts as a deterrent to would-be volunteers.<sup>83</sup> Thus, providing malpractice insurance via the state, as some states have already done in certain contexts,<sup>84</sup> or through medical

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Texas Charitable Immunity and Liability Act of 1987 with findings that “robust, active, bona fide, and well-supported charitable organizations are needed within Texas to perform essential and needed services;” and “the willingness of volunteers to offer their services to these organizations is deterred by the perception of personal liability arising out of the services rendered to these organizations”).

80. See, e.g., Paulsen, *supra* note 77, at 11 n.3 (positing that an attorney is more likely to be struck by lightning than sued by a pro bono client); Rothstein, *supra* note 52, at 152 (explaining that the frequency of suits from indigent patients against a volunteer medical provider in the emergency context is “quite low”); *Liability Coverage*, FREE CLINICS MICH., <http://www.fcomi.org/liability-coverage.html> [<https://perma.cc/5T48-KYSP>] (noting that incidences of suit against VHPs serving at free clinics are “extremely rare”).

81. Rothstein, *supra* note 52, at 150 (explaining that the current focus on immunizing VHPs for emergency care only makes sense if there is evidence of a likelihood of suits).

82. See J. Michael Martinez, *Liability and Volunteer Organizations: A Survey of the Law*, 14 NONPROFIT MGMT. & LEADERSHIP 151, 165 n.5 (2003) (noting that a 1998 Gallup survey concluded that only one in twenty organizations reported being sued on a directors and officers liability question in the past five years).

83. See Jill R. Horwitz & Joseph Mead, *Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence*, 6 J. EMPIRICAL LEGAL STUD. 585, 593 (2009) (recognizing that legislators often emphasize the perception, rather than the actual risk, of suit against volunteers in support of volunteer protection legislation).

84. See *supra* notes 47–49 and accompanying text.

professional associations akin to state bar associations,<sup>85</sup> would allow the federal government and the states to provide clear, comprehensive protection without great expense.

Associations like the American Medical Association and state associations already exist and could take on a role similar to that of the American Bar Association and state bar associations in providing volunteer malpractice coverage to fill the gaps between organizational and private coverage.<sup>86</sup> Like bar associations, the American Medical Association is funded by member dues,<sup>87</sup> which could be augmented by state or federal contributions to incentivize volunteerism. The American Medical Association also already advertises “special savings on insurance” as one benefit of membership.<sup>88</sup> Although further research is necessary to assess the actual need and cost of malpractice insurance for volunteers, particularly because recommended changes in private and organizational malpractice insurance offerings would lower the demand for such association-provided coverage, the basic structural analogue to bar organizations exists in the medical field and could likely similarly provide much-needed volunteer coverage.

Furthermore, a malpractice liability regime provides the certainty necessary to remove one barrier to volunteerism among healthcare practitioners. In 2014, of the 62.8 million people who volunteered in the United States, 7.7% of volunteering was health related.<sup>89</sup> However, these numbers will likely not be sufficient to meet the needs of nonprofits and communities for volunteer health services.<sup>90</sup> Even after the passage of the Affordable Care Act, physician volunteerism remains incredibly important. Although some free clinics are reevaluating their businesses and may need to rely less on volunteers, Nicole Lamoureux, the Executive Director of the National Association of Free and Charitable Clinics, reminds us that the idea that everyone will soon have insurance and access to healthcare is a

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85. See *supra* note 78 and accompanying text.

86. See AM. MED. ASS’N, *supra* note 59 (encouraging state medical associations to provide malpractice insurance).

87. See *Membership Dues*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/membership/faqs/membership-dues.page?> [<https://perma.cc/4L47-DPSG>] (explaining the membership dues structure).

88. *AMA Membership Benefits*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/membership/membership-benefits.page?> [<https://perma.cc/2DZW-SN7M>].

89. *Volunteering and Civic Engagement in the United States*, CORP. FOR NAT’L & COMMUNITY SERV. (2014), <https://www.volunteeringinamerica.gov/national> [<https://perma.cc/PZ56-QUX3>].

90. See Horwitz & Mead, *supra* note 83, at 624 (noting that scholars predict changing conditions in demographics and that the nonprofit sector will produce heightened competition for volunteers).

“very large misconception.”<sup>91</sup> The problem of uninsured clientele, and thus the absolute necessity of VHPs, will be especially acute in states refusing the Medicaid expansion.<sup>92</sup> As of June 2015, twenty-two states had refused the expansion, leaving an estimated 4.3 million Americans without insurance in those states alone.<sup>93</sup> Although many impediments to volunteerism exist among medical<sup>94</sup> and legal<sup>95</sup> practitioners alike, the long history of legislative and organizational action discussed above illustrates that fear of liability, whether or not warranted by actual statistics, is thought to play a considerable role in discouraging service. Volunteerism rates are in fact contracting.<sup>96</sup> And the most pronounced decline recently has been among people with bachelor’s degrees or higher.<sup>97</sup> Although the decline likely is influenced by many factors, there is strong evidence that, at least for doctors, continuing inadequacy of liability protection will further magnify the decline in service.<sup>98</sup>

Even though immunity is one valuable tool in governments’ toolbox—one estimate puts the value of volunteer tort immunity at approximately \$4.4 billion annually based on finding “7.5 percentage points more volunteering in states with some immunity than in states [with] no

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91. Phil Galewitz, *Life After Obamacare: Free Clinics Fight to Survive*, USA TODAY (Aug. 2, 2014, 7:00 AM), <http://www.usatoday.com/story/news/nation/2014/08/02/free-clinics-obamacare-medicaid-copays/13363349/> [<https://perma.cc/BUD2-3PXQ>].

92. *See 22 States Are Not Expanding Medicaid. Here’s What That Means for Their Residents*, WHITE HOUSE (June 4, 2015), <https://www.whitehouse.gov/share/medicaid-map> [<https://perma.cc/NE27-2YND>] (arguing that almost “half of states are so locked into the politics of Obamacare that they’re willing to leave” many of their citizens uninsured).

93. *See id.* (providing state-by-state ramifications as of June 2015); *Status of State Action on the Medicaid Expansion Decision*, KAISER FAM. FOUND. (Mar. 14, 2016), <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/> [<https://perma.cc/N6CR-Z5M5>] (keeping an updated accounting of states’ status).

94. *See* Rothstein, *supra* note 52, at 149, 151 (elaborating on other barriers to physician volunteerism in the context of emergency health situations such as outbreaks or natural disasters).

95. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS, at viii (2013), [http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lb\\_pb\\_Supporting\\_Justice\\_III\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lb_pb_Supporting_Justice_III_final.authcheckdam.pdf) [<https://perma.cc/MJX6-V4SB>] (finding that lack of time and worries about competency all contribute to inadequate attorney volunteerism).

96. Paul Clolery, *Troubling Numbers in Volunteering Rates*, NONPROFIT TIMES (Feb. 27, 2014), <http://www.thenonprofittimes.com/news-articles/troubling-numbers-in-volunteering-rates/> [<https://perma.cc/TR8F-25Q6>] (analyzing a Bureau of Labor Statistics study showing a ten-year low of volunteerism rates in 2013).

97. Danielle Kurtzleben, *Volunteering Hits Lowest Rate in More Than 10 Years*, U.S. NEWS (Feb. 26, 2014, 12:57 PM), <http://www.usnews.com/news/blogs/data-mine/2014/02/26/volunteering-hits-lowest-rate-in-more-than-10-years> [<https://perma.cc/C98T-LU48>] (“The share of [people with bachelor’s degrees or higher] who volunteered in 2013 was at 39.8 percent, down from 42.2 percent in 2012, a decline of nearly 1 million people.”).

98. For example, physicians in a survey performed by the Lone Star Association of Charitable Clinics indicated that they would cease volunteering at charitable clinics if current liability protections were weakened. Conde, *supra* note 60, at 37.

immunity.”<sup>99</sup> Yet immunity alone is still problematic due to the uncertainty it creates. And that uncertainty extends beyond just VHPs. A clear-cut malpractice regime would also clarify the extent of possible liability faced by organizations that use VHPs to accomplish their mission. Removing the specter of claims against volunteers will also help reduce the perception of heightened risk for volunteer organizations, thus helping to reduce the high liability insurance rates that nonprofit organizations already face.<sup>100</sup> Volunteer organizations previously burdened by trying to provide volunteer malpractice insurance or ensuring strict compliance with “deeming” or other requirements that limit the participation of volunteers will have time and resources freed up to pursue their missions.

Further, adding more layers of complex legal protections riddled with exceptions and qualifiers will provide more immunity, but the onus will still be on a potential volunteer to apply the state of legal indemnification available to her own situation. Under a malpractice regime like the one I have proposed, the federal VPA and other statutes still serve as a backdrop just as they do for attorneys who volunteer. Statutory protection will still give those volunteers who clearly meet their requirements an easy exit from suit. But the primary protection provided by a system of readily accessible malpractice coverage would, in turn, provide clear, concise answers that can more easily be applied to other health practitioners’ individual situations with confidence. As doctors, like lawyers, are no strangers to malpractice insurance, this system would be predictable, easy to communicate, and could provide the peace of mind necessary to remove this barrier to volunteerism.

A malpractice regime will also allow governments and organizations to encourage volunteerism without sacrificing protection for the public. While encouraging volunteerism is generally an admirable goal, immunization can incentivize problematic risk-taking by volunteers and their organizations. Immunization can also create a perception that the recipients of volunteer care, who are often the most vulnerable of patients, cannot expect or demand the same care given to paying patients.<sup>101</sup> Leaving patients with no legal recourse in the case of actual negligent behavior by a volunteer undercuts the purpose of encouraging volunteerism—to create

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99. Horwitz & Mead, *supra* note 83, at 627.

100. See Martinez, *supra* note 82, at 155 (discussing the “greater perception of financial risk for nonprofits” due to the “uncertainty of outcomes” in liability claims).

101. See Rothstein, *supra* note 52, at 152 (“Determining the legal rights of all patients under the same legal principles affirms that the standard of care and the potential remedies in the event of malpractice do not depend on the status of the physician or the patient’s ability to pay for medical care.”).

better communities by giving access to services that the market otherwise could not provide. By contrast, a malpractice regime sends the message that a viable claim by a patient will be valued, heard, and ultimately paid if successful.

Offering malpractice insurance for volunteer work also gives governments and organizations flexibility. The advantages of this flexibility can already be seen in the states that have implemented malpractice coverage for VHPs. Connecticut and Virginia, as discussed above, both offer malpractice insurance to VHPs, but the requirements differ between the two states.<sup>102</sup> Both states encourage volunteerism by providing protection and not just immunity, but the states are still free to encourage volunteerism to the extent feasible and desirable for their jurisdiction. The benefits of flexibility can also be seen in attorney volunteerism, as the malpractice regime in the pro bono context illustrates how organizations like state bars can use free malpractice insurance to incentivize volunteerism for specific projects, geographical locations, and areas of law.<sup>103</sup> Medical associations, too, could adopt this practice and be able to provide the coverage necessary to meet the needs of certain communities.

## V. Conclusion

We need volunteers. The nonprofit sector relies on volunteers to achieve their missions. Our communities rely on volunteers to meet local needs. And in the context of healthcare, the beneficiaries of volunteerism simply cannot go without their vital help. Enough barriers to volunteerism already exist, but governments and medical associations could act to ameliorate the persistent fear barrier that personal liability creates.

In the legal community, malpractice coverage, whether provided through one's employer, a volunteer services organization, or a local bar organization, protects volunteers and the public. Applying this sort of protection in the health services context is both possible and advisable. In both legal and health services volunteering, suits against volunteers are exceedingly rare, thus making this an economical option. Additionally, malpractice coverage is easily understandable by practitioners well-versed in its importance and thus will provide much-needed clarity to a currently befuddling web of immunization and exception. And lastly, malpractice insurance sends the right message. The coverage ensures volunteers feel

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102. CONN. GEN. STAT. ANN. § 19a-17m (West Supp. 2015); VA. CODE ANN. § 54.1-106 (2013).

103. See *supra* notes 76–78 and accompanying text.

that their time is valued, appreciated, and protected. But it also tells recipients of volunteer services that their claims have the same value as paying clients. Instituting a system of malpractice insurance for volunteer health practitioners will help to ensure that those who want to give can answer the call to service, that “most American of ideas, that people who love their country can change it.”<sup>104</sup>

—*Jacy M. Selcoe*

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104. Lee, *supra* note 7.