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Article 13

Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation

Robert A. Katz

TOO MUCH OF A GOOD THING: WHEN CHARITABLE GIFTS AUGMENT VICTIM COMPENSATION

Robert A. Katz *

INTRODUCTION

The horrific events of September 11, 2001 encouraged the creation of two vast funds to make payments to persons who were physically injured in the attacks and to survivors of those who were killed (victims).[1] The first fund consists of voluntary contributions to charities engaged in September 11th relief. These entities distributed more than $800 million to victims.[2] The second is the September 11th Victim Compensation Fund of 2001 (the Fund), which Congress created to provide compensation to the physically injured and bereaved, and which may distribute as much as $3 billion to these persons.[3] The simultaneous operation of these two funds raised fundamental ques-

* Associate Professor of Law and Philanthropic Studies, Indiana University School of Law—Indianapolis. A.B., 1987, Harvard College; J.D., 1992, The University of Chicago School of Law. I am grateful to Professor Stephan Landsman for inviting me to participate in the Clifford Symposium on Tort Law and Social Policy. I have benefited greatly from comments by Professors Dan Cole, Andy Klien, Evelyn Brody, Nicholas Georgakopoulos, Gerard Magliocca, Warren Schwartz, and George Wright, participants at the 2003 Midwestern Law and Economics Association Conference (Indianapolis, October 10-11, 2003), Tim Hurlbut, and Ruth Katz. Miriam Murphy, Associate Director of the Ruth Lilly Law Library, Daniel McAfee, and Faith Long Knotts provided excellent research assistance, and the Indiana University School of Law—Indianapolis supported this research with a Faculty Summer Fellowship.

1. There were of course many persons adversely affected by September 11th, such as those who were physically or economically displaced. For convenience, however, I will use the term "victims" to refer solely to the seriously injured and bereaved, unless indicated otherwise.

2. TOM SEESSEL, RESPONDING TO THE 9/11 TERRORIST ATTACKS: LESSONS FROM RELIEF AND RECOVERY IN NEW YORK CITY 15 (2003), *available at* http://www.fordfound.org/publications/recent_articles/docs/philanthropic_response_ii.doc (last visited Oct. 23, 2003). These charities raised over $2.6 billion as of October 31, 2002. GEN. ACCOUNTING OFFICE, SEPTEMBER 11: MORE EFFECTIVE COLLABORATION COULD ENHANCE CHARITABLE ORGANIZATIONS' CONTRIBUTIONS IN DISASTERS 31 (Report No. GAO-03-259), *available at* http://www.gao.gov/new.items/d03259.pdf (last visited Oct. 23, 2003).

3. *See generally* Air Transportation Safety and System Stabilization Act, tit. IV, Pub. L. No. 107-42 § 403, 115 Stat. 230. The Act was subsequently amended by Pub. L. No. 107-71 § 124, 115 Stat. 631 (2001) and Pub. L. No. 107-134, § 114, 115 Stat. 2435 (2002) [hereinafter Act]; Diana B. Henriques, *Concern Growing As Families Bypass 9/11 Victims' Fund,* N.Y. TIMES, Aug. 31, 2003, at A1. (citing Kenneth Feinberg, Special Master of the Fund) (The Fund may distribute as much as $3 billion.).

tions about the interaction between charitable giving and formal mechanisms for compensating injury victims.

In a critical provision, the statute that created the Fund, the Air Transportation Safety and System Stabilization Act (the Act), required governmental awards to be reduced "by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the [attacks]."[4] This provision was apparently meant to prevent Fund awards from compensating losses that had been, would be, or could be covered by other sources. This offset requirement sparked one of the most controversial debates concerning the Fund:[5] Should charitable organizations be treated like other "collateral sources"? Should Fund awards also be reduced by payments received from charitable organizations (charitable gifts)?[6]

On one level, this debate was about interpreting a statute—whether the Act's plain meaning, its legislative history, canons of construction, and so on, require charitable gifts to be offset against Fund awards (charitable offset).[7] On another level, the debate concerned the proper use of charitable assets in general, and contributions to September 11th charities in particular. Was it appropriate to effectively augment Fund awards with charitable gifts, even when these gifts were not needed to alleviate financial distress? Did September 11th donors want victims to collect both Fund awards and charitable gifts? (Alternatively, would these donors have wanted this result had they considered the matter when they contributed?) To what extent were the donors' intentions even relevant?

In the end, the Fund program's administrators elected to ignore charitable gifts when setting awards.[8] This approach is consistent with tort law's collateral source rule. Under this rule, a prevailing plaintiff's compensation is not reduced by payments and benefits that the plaintiff (P) receives from sources independent of (or collateral to) the de-

4. Act, *supra* note 3, § 405(b)(6).

5. *See, e.g.*, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,291 (Dec. 21, 2001) (to be codified at 28 C.F.R. § 104 (2003)) [hereinafter September 11th Victim Compensation Fund] ("[W]hether to reduce Fund awards by the amount of such contributions was one of the issues given the most attention in the comments" on drafting regulations to implement the Act.); David Barstow & Diana B. Henriques, *A Nation Challenged: The Charities; Debate over Rules for Victims Fund*, N.Y. TIMES, Nov. 6, 2001, at A1 (Whether to offset awards by charity received was an "emotionally charged question.").

6. Charitable organizations provided September 11th victims with both financial and in-kind assistance. This Article focuses exclusively on the financial assistance that charities provided for victims' long-term relief. For convenience, I will use the term "charitable gifts" to refer exclusively to this financial assistance.

7. *See infra* notes 156-160, 165-166 and accompanying text.

8. *See infra* notes 165-168 and accompanying text.

fendant (D).[9] This is true even if these collateral-source benefits cover all or part of the harm for which D is liable,[10] such that P's receipt of both collateral-source benefits and full compensation from D places P in a better economic position than before the tort. Tort law applies the collateral source rule to a variety of benefits, including (in most jurisdictions) charitable gifts.[11]

The Fund controversy called attention to a long-standing, but relatively unnoticed, tension in the interaction between charitable relief and the tort system, our society's original mechanism for compensating injury victims.[12] More specifically, it reflects a tension between: (a) restrictions that charity law imposes on the use of charitable assets to assist injury victims; and (b) tort law's approach to compensating injury victims who have received charitable gifts. This Article explores this tension and its implications for victim compensation schemes.[13] Its main claim is that tort law (and by implication the Fund) facilitates the use of charitable assets in ways that violate key charity law principles.

Charitable relief and tort compensation both alleviate injury-related losses. The tension between these systems ultimately arises from the fact that each uses a different baseline or yardstick for determining how much loss-alleviation is appropriate. Similarly, each system uses a different measure for determining how much loss-alleviation is excessive. When the tort system calculates an injury victim's compensation, it asks: "What would it take to restore P to the position she occupied in the pre-injury world?" When a charity assesses how much relief to provide, it asks: "What will it take to relieve this person's immediate distress in the face of this injury?" From a charity law perspective, there is nothing intrinsically charitable about making cash payments to restore an injury victim to the status quo ante. Loss alleviation ceases to be charitable, moreover, if it disburses more cash than necessary to relieve the victim's financial distress. Lastly, a char-

9. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1965).

10. *Id.*

11. This is the majority common law rule. In a few jurisdictions, common law courts do not permit P to recover the value of gratuitous services. *See infra* notes 100-106 and accompanying text.

12. The Fund program was created to provide September 11th victims with an alternative to tort litigation. September 11th Victim Compensation Fund, *supra* note 5 at 66,274 (Dec.21, 2001).

13. One can also explore this tension's implications for charity law and charitable activities. *See, e.g., infra* notes 85-89, 149 and accompanying text. This Article's focus is more fitting for a symposium on "The September 11th Compensation Fund and the Future of Civil Justice."

ity can excessively benefit a victim from a charity law perspective while undercompensating the victim from a tort law perspective.[14]

While a charity is making payments to relieve financial distress, it is exceedingly difficult to say if and when that charity's aid has become excessive. Each charity's managers set the sums in the first instance, in a highly decentralized manner, according to criteria that reflect a distinct set of values, the exigencies of the situation, and so forth.[15] This Article does not consider whether charitable gifts are excessive when they are being disbursed directly to victims in the immediate aftermath of their injuries.[16] Rather, it focuses on the interaction between these charitable gifts and awards that victims subsequently obtain from a formal compensation scheme. It pays special attention to the collateral source rule, which expressly permits charitable gifts to supplement even make-whole compensation awards.[17] This rule represents the sharpest conflict between charity law and tort law. When charitable assets serve to overcompensate injury victims from a tort law perspective, they are also likely to confer excessive private benefit from a charity law perspective.[18]

In addition to criticizing tort law's approach to charitable gifts, this Article also criticizes certain assertions advanced to justify this approach. Tort law permits gifts from third-party benefactors to overcompensate P for a variety of reasons, including deterrence.[19] Most relevantly, however, this result has been justified on grounds that it effectuates the third-party benefactors' intent and because P deserves the windfall more than D.[20] Tort law's account of donor intent conflicts with charity law's account, which is more nuanced and satisfactory. Charity law presumes that charitable donors intended to help P insofar as P has the relevant charitable characteristics, for example, financial distress. Once P's distress is relieved, the donors pre-

14. For example, P may incur $10,000 in economic losses in a fire, but require only $1,000 to meet immediate needs—say until P's insurer begins making payments under the policy. If the Red Cross gives P $5,000 instead of $1,000, it confers $4,000 in private benefit. This still leaves P undercompensated by $5,000.

15. *See* Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief,* 36 IND. L. REV. 251, 279-81 (2003).

16. I have considered the matter elsewhere. *See generally id.*

17. A damage award can simultaneously undercompensate and confer excessive private benefit. *See supra* note 14 and accompanying text. To sharpen the analysis, however, I focus on cases where the damages are presumed to compensate the victim for economic losses, unless otherwise indicated.

18. This would not be the case, however, if P was in financial distress before the injury, and a make-whole damage award would simply return her to that condition.

19. *See infra* note 91 and accompanying text.

20. The underlying assumption is that public policy favors giving effect to donor intent and that courts can and should advance this policy goal even when awarding tort damages.

sumably intended their gifts' unused balance (the "charitable surplus" or simply "surplus") to finance more charitable activity along the same lines (*cy pres*).[21] Here, such activity might be aiding other injury victims who, unlike P, are presently distressed and uncompensated. Such persons deserve the "windfall" more than either P or D.

Charity law, as should now be clear, has definite normative implications for how the tort system ought to award damages to injury victims who have received charitable gifts for some of the same losses. When setting compensation, tort law should neither ignore prior charitable gifts to P, nor use them to reduce D's liability. Instead, it should attempt to direct the surplus they represent to the same or similar charitable purposes as the original gifts'. In this way, the tort system can simultaneously reduce the use of charitable assets for private enrichment and increase the resources available for charitable activity.

Like tort law, the Fund program applies the collateral source rule to charitable gifts, which is to say, it does not reduce a claimant's entitlement under the Fund by the amount of charity gifts he or she has received. This compensation scheme thus raises the same concern as the tort system: Does it facilitate the use of charitable assets to confer excessive private benefits? Yet, special circumstances affect charity law's analysis of the Fund's approach to charitable gifts. These include the facts that the government, not the tortfeasor, pays Fund awards,[22] and that Congress enacted special legislation to speed up and liberalize the disbursement of charitable gifts to September 11th victims.[23]

This Article proceeds as follows. Part II discusses those elements of charity law most relevant to the Article's analysis and argument. Part III examines tort law's approach to charitable gifts and identifies the difficulties it presents from a charity law perspective, often to society's detriment. It also critiques the theory of donor intent and desert that informs tort law's approach to charitable gifts. It addresses how the tort system might be changed to address these concerns. Part IV recounts the controversy over whether the Fund program would reduce a successful claimant's award by the amount of charitable gifts received. It then applies Part III's framework to the Fund and considers how the special circumstances affect its analysis and prescriptions.

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21. *See infra* notes 66-78 and accompanying text.

22. *See infra* notes 188-193 and accompanying text.

23. *See infra* notes 173-176 and accompanying text.

II. THE LAW OF CHARITABLE ORGANIZATIONS, CHARITABLE GIVING, AND THE USE AND ABUSE OF CHARITABLE ASSETS

This section reviews some general principles of charity law and special rules for alleviating injury victims' losses. These are: (a) the principle that charities must serve a public interest; (b) the prohibition against using charitable assets to confer excessive private benefit; and (c) the idea that once a gift's specific charitable purpose has been fully accomplished, a gift's unused balance can—and generally must—be reapplied to a related charitable purpose. This section also considers how these principles apply to charities formed to provide monetary aid to persons in financial distress due to disaster, crime, accident, or other injury.

A. Charities Must Serve a Public Interest

In order to qualify as "charitable" under state and federal law, and thereby obtain the numerous advantages that accompany such status, an entity must be organized and operated to benefit the public.[24] More specifically, it must be organized on a nonprofit basis[25] and be formed exclusively for one or more legally charitable purposes.[26] These purposes include the relief of poverty and distress, the advancement of education and religion, and lessening the burdens of government.[27]

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24. *See e.g.*, section 501(c)(3) of the Internal Revenue Code (I.R.C.) (as amended in 1990).

25. A nonprofit is not, as its name suggests, barred from generating profits, defined as the "net earnings that remain with the [entity] after it has made all payments to which it is contractually committed, such as wages, interest payments, and prices for supplies." HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 11 (1996). Rather, a nonprofit's defining characteristic "is that the persons who control the organization—including its members, directors, and officers—are forbidden from receiving the organization's net earnings." *Id.* at 17. A nonprofit must devote its net earnings, if any, "to financing [further production] of the services that the organization was formed to provide." *Id.* at 228. This is sometimes referred to as the "nondistribution constraint." *Id.* Although all charities are organized on a nonprofit basis, some nonprofit organizations are not legally charitable, such as trade associations, homeowners associations, social clubs, and other mutual benefit membership organizations. These entities exist primarily to serve the interests of their members.

26. A purpose may qualify as "charitable" under either the state law of charitable trusts and public benefit nonprofit corporations, or federal tax law, or both. An entity is charitable under federal tax law if it is tax-exempt under I.R.C. § 501(c)(3) and is eligible to receive tax-deductible contributions under I.R.C. § 170(c)(2). For convenience, I will use the concepts of "charitable" under state and federal law interchangeably, even though they are not identical, unless indicated otherwise.

27. RESTATEMENT (SECOND) OF TRUSTS § 368 (1957); I.R.C. §§ 501(c)(3), 170(c)(2) (2000); Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1990) ("The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense.").

In operation, a charitable entity must engage primarily in activities that accomplish its charitable purposes.[28] The recipients of its cash, goods, or services (a.k.a., "outputs") must constitute a "charitable class."[29] A charitable class might consist, for example, of poor, sick, or elderly persons,[30] or of disadvantaged artisans in developing societies of the world.[31] The Republican Party and its entities and candidates, by contrast, are *not* a charitable class.[32] One cannot use a charity to earmark gifts for a particular person, and a closed class of pre-selected individuals does not constitute a charitable class.[33]

Although a charity may transfer outputs directly to members of a charitable class, the ultimate beneficiary of its activities is, in theory, the broader public.[34] "[I]f a trust is set up to aid the poor of the city of Yorkville," states the Bogerts' treatise on trusts:

> [T]he community is the beneficiary in that there is a public interest in relieving poverty and distress, and the residents of that city who are from time to time selected to receive food, clothing and the like are not beneficiaries of the charitable trust but are merely the means through which the community receives benefits.[35]

These public benefits have traditionally justified tax exemption for charitable organizations, tax deductions for charitable donors, and other legal advantages extended to charitable activities.[36] This is especially true for poverty and disaster relief organizations, which pro-

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28. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1990) ("An organization will be regarded as *operated exclusively* for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3).") (emphasis added).

29. *See generally* Aid to Artisans, Inc. v. Comm'r, 71 T.C. 202 (1978). These beneficiaries must be "a sufficiently large or indefinite class so that the community is interested in the enforcement of the [charitable] trust." RESTATEMENT (SECOND) OF TRUSTS § 375. Key principles and rules applicable to charitable trusts are generally applicable to charitable corporations. *Id.* § 348 cmt. f.

30. Ruth Rivera Huetter & Marvin Freidlander, *Disaster Relief and Emergency Hardship Programs*, *in* EXEMPT ORGANIZATION CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1999 219-20 (1999).

31. *Aid to Artisans, Inc.*, 71 T.C. at 213.

32. Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1076-78 (1989).

33. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, TRUSTS AND TRUSTEES § 363 (rev. 2d ed. 1977).

34. *Id.*

35. *Id.*

36. Most famously, federal law exempts charities from paying income taxes on their net earnings, I.R.C. § 501(c)(3), and permits their donors to deduct contributions from their income taxes. I.R.C. § 170(c) (2000). JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 330 (2d ed. 2000) (Courts and commentators have traditionally justified this "on the basis of the public benefits conferred by the organizations—benefits which relieve the burdens of government by providing goods or services that society or government is unable or unwilling to provide.").

duce what economists call "mixed goods" or "impure public goods."[37] Food and clothing are private goods in that one recipient's consumption of a meal or a sweater precludes others from consuming the same item.[38] Such goods are also public, however, because their consumption by distressed persons generates significant benefits for the larger community. These positive externalities can include less crime and social disorder and a more productive workforce.[39]

B. Charities Cannot Bestow Excessive Private Benefits

An entity is not organized or operated exclusively for a charitable purpose "unless it serves a public rather than a private interest."[40] An entity serves private interests, most notoriously, when its assets are diverted to directors, officers, or other insiders for their personal profit, unrelated to the advancement of any charitable purpose. This is known as "private inurement."[41] More relevantly, an entity can serve private interests by conferring excessive private benefits on organizational *outsiders*.[42] This is known as the "private benefit," and different authorities have formulated it in somewhat different ways.

The United States Tax Court has focused on whether an entity is purposefully organized to confer excessive private benefit upon certain outsiders, such that conferring these benefits is part of the organi-

37. THE MACMILLAN DICTIONARY OF MODERN ECONOMICS 280-81 (David W. Pearce ed., 4th ed. 1992) (defining "mixed good" as "[g]oods, the benefit of consuming which is neither confined solely to one individual nor available equally to everyone").

38. *Id.* at 379 (A good is "rival" "[w]here one individual's consumption of [the] good reduces the quantity available to others . . . . Rivalness is a characteristic of *private goods* which are thus scarce and require a process of allocation.") (emphasis added).

39. *Id.* at 146 ("A beneficial externality . . . raises the production or utility of the externally-affected party. For example, a beekeeper may benefit neighbouring farmers by incidentally supplying pollination services."). Because some people can enjoy these benefits without paying for their provision, distress relief charities will presumably receive a socially suboptimal amount of contributions. Henry Hansmann, *The Rationale for Exempting Nonprofit Organization from Corporate Income Taxation*, 91 YALE L.J. 54, 72 (1981) (citation omitted). Subsidies for charitable activities help overcome this "free rider" problem. *See, e.g.*, *id* at n.65 ("The charitable deduction induces a substantially more generous flow of contributions to many donative nonprofits than would otherwise be forthcoming.") (citation omitted).

40. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2003).

41. *Id.*

42. *See, e.g.*, Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1069 (1989) ("[A]n organization's conferral of benefits on disinterested persons may cause it to serve 'a private interest' within the meaning of [Treasury Regulation] section 1.501(c)(3)-1(d)(1)(ii)."). Gen. Coun. Memo. 39,862 (Nov. 21, 1991); Priv. Ltr. Rul. 2001-14-040 IRS Letter Rulings No. 1257, LTR. 2001 14040 (Jan 10, 2001) (private foundation confers private benefit by providing an institutional outside researching a commercial book with exclusive and free access to its archives). *See generally* BRUCE R. HOPKINS, THE LAW OF TAX EXEMPT ORGANIZATIONS § 19.10 (8th ed. 2003).

zation's *raison d'être.*[43] The IRS Chief Counsel, by contrast, has formulated the private benefit doctrine in terms of whether an entity's operations have the objective effect of conferring excessive private benefits upon outsiders. The issue is whether "[a]ny private benefit arising from a particular [organizational] activity" is "'incidental' . . . to the overall public benefit achieved by the activity. . . ."[44] The Chief Counsel's view finds support in dictum by Judge Richard Posner in *United Cancer Council, Inc. v. Commissioner.*[45] That case involved the United Cancer Council (UCC), a purported charity that paid $26 million to W&H, an unrelated for-profit fundraising firm, for its services.[46] "Suppose," wrote Judge Posner:

> that UCC was so irresponsibly managed that it paid W & H twice as much for fundraising services as W & H would have been happy to accept for those services, so that of UCC's $26 million in fundraising expense $13 million was the equivalent of a gift to the fundraiser. Then it could be argued that UCC was in fact being operated to a significant degree for the private benefit of W & H, though not because it was the latter's creature.[47]

Defining the private benefit doctrine along these lines, continues Judge Posner, would permit the IRS "to deal with the problem of improvident or extravagant expenditures by a charitable organization that do not, however, inure to the benefit of insiders."[48] Charitable managers who dissipate the entity's assets in this way may also violate their duty of care under state law.[49]

The private benefit doctrine typically involves the flow of benefits to outsiders *other* than the intended recipients of a charity's outputs.[50]

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43. In *Am. Campaign Acad.*, 92 T.C. 1053, the court denied 501(c)(3) status to a school for political campaign professionals on grounds that: (a) it was formed with a substantial purpose to benefit Republican Party organizations and candidates, a noncharitable class; and (b) more than an insubstantial part of its activities furthered this purpose, as evidenced by the fact that Republican entities and candidates employed nearly all of the school's graduates.

44. Gen. Couns. Mem., *supra* note 42, at 39,862. To avoid being excessive, these private benefits must be incidental "in both a qualitative and quantitative sense to the overall public benefit achieved by the activity. . . ." *Id.*

45. 165 F.3d 1173 (7th Cir. 1999).

46. *Id.* This case appealed the United States Tax Court's ruling that the UCC was operated for the private inurement of the fundraising firm, which kept 92% of what it raised on the UCC's behalf. The U.S. Court of Appeals for the Seventh Circuit reversed this ruling on grounds that the firm was run by organizational outsiders who negotiated their contract with the UCC at arm's length. It remanded the case for a determination as to whether the UCC conferred a private benefit upon the fundraising firm. The IRS and UCC settled prior to retrial.

47. *Id.* at 1179.

48. *Id.*

49. *Id.* at 1180.

50. Andrew Megosh et al., *Private Benefit Under IRC 501(c)(3)*, 2001, *at* http:/www.irs.gov/pub/irs-tege/topich01.pdf (last visited Nov. 1, 2003). *See* Heutter & Friedlander, *supra* note 30, at 239. *See also Am. Campaign Acad.*, 92 T.C. at 1066 ("Occasional economic benefits flowing to

A poverty or disaster relief organization, for example, is charitable even though its activities directly benefit persons in financial distress.[51] These private benefits are not only permissible, they are "a necessary concomitant of the activity that benefits the public at large; in other words, the benefit to the public cannot be achieved without necessarily benefiting [these] private individuals."[52] The public benefit consists of the positive externalities generated by the recipients' consumption of the "mixed goods" provided by the charity.[53]

Although it is unusual for a charity to confer excessive benefits on its intended beneficiaries, this nevertheless occurs. Under the IRS's formulation, private benefits are permissible only if *inter alia* "quantitatively" incidental or insubstantial when viewed in relation to the overall public benefit conferred by the activity.[54] A poverty relief organization that turns a handful of paupers into princes, so to speak, might fail this test.[55] At the outset, an indigent person's consumption of the charity's outputs generates sufficient public benefit to justify the special advantages the law accords charities. The magnitude of these benefits diminishes, however, with each additional unit of output the recipient consumes.[56] At some point after the recipient's basic needs have been met, the attendant public benefits are too trivial to justify public subsidy for additional transfers to the individual.

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persons as an incidental consequence of an organization pursuing exempt charitable purposes will not generally constitute prohibited private benefits.") (citations omitted).

51. *See, e.g., Am. Campaign Acad.*, 92 T.C. at 1073 ("[E]xempt educational organizations must inherently confer private benefits on participating individuals . . ." by "instructing or training [them] for the purpose of improving or developing [their] capabilities.") (citation omitted); Aid to Artisans, Inc., v. Comm'r, 71 T.C. 202, 215-16 (1978) (An organization's purchase of handicrafts from disadvantaged artisans did not impermissibly serve the artisans' private interests, where such activity served a charitable purpose and class, i.e., to alleviate the economic hardship of disadvantaged artisans in developing societies where handicrafts are central to the economy.).

52. Gen. Couns. Mem., 39,862 (Nov. 21, 1999). The IRS describes these benefits as "qualitatively incidental" to the organization's charitable activity.

53. *See supra* note 37.

54. Gen. Couns. Mem., 39,862.

55. In this connection, see *In re Ashton's Charity*, 54 Eng. Rep. 45 (1859), an 1859 English case involving a charitable trust to provide six "almswomen" with £6 per annum apiece. After the trust's corpus increased by £6,000, a judge applied some of the increase to other charitable uses, instead of using all of it according to the trust's instructions. "I apprehend that the additions to the increase of almswomen must have some limit. . . . [I]f this money were divided amongst the almswomen, they would thereupon cease to be almswomen," and become "persons from a higher rank [i.e., gentlewomen] receiving a considerable income." *Id.*

56. This is due to the phenomenon of diminishing marginal utility, "whereby it is assumed that the additional utility attached to an extra unit of any good diminishes as more and more of that good is purchased." *See* THE MACMILLAN DICTIONARY OF MODERN ECONOMICS, *supra* note 37, at 106.

C. Charity Law Encourages Charitable Giving and Retaining Charitable Surplus

Charity law encourages people to make charitable gifts in a variety of ways.[57] The most famous of these—the charitable contribution deduction—is relatively recent. Long before the deduction's debut in 1917,[58] charity law encouraged giving by recognizing "that a donor who attaches conditions to his gift has a right to have his intention enforced,"[59] and by authorizing the attorney general to bring suit to enforce these conditions.[60]

Chief Justice John Marshall recognized the importance of honoring donor intent in *Trustees of Dartmouth College v. Woodward*.[61] Here he observed that "one great inducement to [charitable] gifts is the conviction felt by the giver, that the disposition he makes of them is immutable .... All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it."[62] By nourishing such hopes, charity law can increase the satisfaction that donors derive from making charitable gifts. This in turn increases the likelihood that donors will

57. Various state and federal laws also encourage people to volunteer for charitable organizations. *See, e.g., Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1685-86 (1992) (survey of state statutes limiting director's liability); Volunteer Protection Act of 1997, Pub. L. 105-19, 111 Stat. 218 (codified at 42 U.S.C. § 14501 (2000)) (limiting the liability of volunteers for harm negligently caused to others when acting in the scope of their responsibilities).

58. *See* FISHMAN & SCHWARZ, *supra* note 36, at 849 ("The first charitable income tax deduction was enacted in 1917 as part of a tax bill that raised federal income tax rates to help finance the costs of entering World War I.").

59. Lefkowitz v. Lebensfeld, 68 A.D.2d 488, 495-96 (N.Y. App. Div. 1979) (explaining "[t]he theory underlying the power of the [a]ttorney [g]eneral to enforce [charitable] gifts for a stated purpose").

60. RESTATEMENT (SECOND) OF TRUSTS §391 (1959). *Id.* § 348 cmt. f (The directors of a charitable corporation have a duty, enforceable at the suit of the attorney general, to apply unrestricted gifts to one or more of the charitable purposes for which the corporation is organized, and to use restricted gifts according to the restrictions.). Such suits may also be brought by co-directors or co-trustees, and parties with a "special interest." *Id.* § 391 cmts. b, c. Donors themselves generally lack standing to maintain such actions. *See* Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 997 (Conn. 1997). Although the settlor or his heirs or personal representatives cannot sue to compel compliance with the charitable trust's terms, they can maintain a suit to recover the trust property by reverter or resulting trust on the theory that the charitable trust has failed. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. f.

61. 17 U.S. 518, 647 (1819).

62. *Id.* In this decision, the Supreme Court invalidated an attempt by the State of New Hampshire to wrest control over the corporation of Dartmouth College from its board of directors (a.k.a., "trustees"), who were the duly selected successors of the College's founders. This decision restored the trustees' control back to the College and its assets, including gifts that donors had entrusted with these trustees.

devote some of their wealth to charitable gifts as opposed to, say, intra-family gifts or personal consumption.[63]

Charity law not only favors the entry of assets into charitable channels, but it also disfavors the exit of unused or "surplus" charitable assets.[64] Federal tax law, for example, requires entities applying for 501(c)(3) status to guarantee that upon their dissolution, their assets will continue to be used for charitable or public purposes.[65] In a similar vein, common law courts developed a special doctrine for retaining assets placed into charitable trusts. If a private trust's purposes can no longer be pursued, courts may be obliged to let the trust fail and distribute its unused assets to the settlor or the settlor's successors in interest.[66] By contrast, if a charitable trust's specific purpose becomes "impossible, impracticable, or illegal to carry out," courts are obliged to sustain the trust if the donor "manifested a more general intention to devote the property to charitable purposes."[67] In that case, the gift's unused balance will be retained and reapplied to another charitable purpose–one "which falls within the [donor's] general charitable intention,"[68] or that "reasonably approximates" the gift's specific charitable purpose.[69] This is the doctrine known as *cy pres*, or "as near (as possible)."[70]

The "impossible-impracticable-or-illegal" language suggests that *cy pres* is only available when something prevents a specific charitable purpose from being realized. This is not true. The doctrine may also apply where a charitable gift's specific purpose has been fully accom-

63. *See* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 297 (1988). A strict policy of honoring donor intent also promotes economic efficiency, Professor Macey argues, because the ability to "influenc[e] events and individuals after one's death [by dictating how ones wealth is to be used] may provide a primary motivation for accumulating wealth during one's life." *Id.*

64. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003) ("[T]rust law . . . favors an interpretation that would sustain a charitable trust and avoid the return of trust property to the settler or successors in interest.).

65. *See* Treas. Reg. § 1.501(c)(3)-1(b)(4) (as amended in 1990).

66. *See* RESTATEMENT (THIRD) OF TRUSTS § 8.

67. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). This donor is said to give with a general charitable intent. Alternatively, the donor may have wished to aid the specific charitable project designated by his gift and nothing else, in other words, give with specific charitable intent. If so, then the gift fails and any unused balance is refunded to the settlor or donors. *Id.* § 413.

68. RESTATEMENT (SECOND) OF TRUSTS § 399.

69. RESTATEMENT (THIRD) OF TRUSTS § 67.

70. *See* RESTATEMENT (SECOND) OF TRUSTS § 399. *Cy pres* derives from the Norman French term "*cy pres comme possible*," which means "as near as possible" or "so nearly as may be." *In re* Pierce, 136 A.2d 510, 515 (Me. 1957); 15 AM. JUR. 2D *Charities* § 149 (2000).

plished[71] or where the gift's purpose has ceased to be charitable.[72] In these situations, the gift's unused balance is known as charitable "surplus."[73]

In theory, courts invoke the *cy pres* doctrine in order to implement the donor's intentions.[74] Yet, if the donors did not convey what they wanted to happen in this contingency, courts may engage in "imaginative reconstruction."[75] In the case of testamentary bequests, for example, courts ostensibly ask "whether, had the testator known that it would be impossible to follow the express terms of the charitable bequest, she would prefer to bequeath the funds to a similar charitable purpose or have her largess be treated like all other ineffective bequests."[76] As a matter of policy and practice, however, charity law favors keeping the surplus in charitable channels.[77] For this reason, courts generally presume that donors give with general charitable intent or purpose, and require the party opposing the application of *cy pres* to negate the existence of such intent.[78] As one commentator

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71. Here too, the unusued balance can be applied to another charitable purpose if the donor "manifested a more general intention to devote the whole of the trust property to charitable purposes . . . ." RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. k. *See also Id.* § 400.

72. RESTATEMENT (THIRD) OF TRUSTS § 8 cmt. g.

73. RESTATEMENT (SECOND) OF TRUSTS § 400.

74. BOGERT & BOGERT, *supra* note 33, § 436. The authors stated:

> The reason given for the requirement of general charitable intent is that cy pres is theoretically based on the enforcement by the court of an actually formed and expressed intent of the settlor, and that the selection of a secondary charitable objective is not because the court thinks such a result desirable but rather because the donor desired it.

Id.; 9 AM. JUR. 2D § 1 ("In applying the principle of cy pres, the court does not arbitrarily substitute its own judgment for the desire of the settlor, or supply a fictional intent, but rather seeks to ascertain and carry out as nearly as possible the settlor's true intention.").

75. Under the "imaginative reconstruction" approach to statutory interpretation,

> the interpreter tries to discover 'what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.

WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 218-19 (2000) (quoting Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907)).

76. 15 AM. JUR. 2D *Charities* § 154 (2000). This same approach readily applies to non-testamentary gifts.

77. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b ("[T]rust law . . . favors an interpretation that would sustain a charitable trust and avoid the return of the trust property to the settlor or successors in interest.").

78. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. c

> If property is given in trust to be applied to a particular charitable purpose, and it is provided by the terms of the trust that if the purpose should fail the trust should terminate, the property will not be applied cy pres on the failure of the particular purpose, since the terms of the trust *negative* the existence of a general charitable intention.

(emphasis added); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b ("[W]hen the particular purpose of a charitable trust fails, in whole or in part, the rule of this Section makes the cy pres

observed several decades ago, "[t]he constant and ever increasing efforts of courts and legislatures . . . to sustain and support charitable gifts has [sic] propelled the law of charities well along the path towards establishment of a principle that property once given to charity is forever dedicated to charity."[79]

D. Charity Law and Charitable Relief for Injury Victims

In a 1999 text, the IRS explained how the private benefit doctrine applies to the activities of 501(c)(3) organizations that provide relief to disaster victims and "needy individuals who have encountered financial hardship for reasons beyond their control."[80] These programs typically supply recipients with financial or in-kind aid to meet their basic needs for food, clothing, housing, transportation, medical or psychological assistance, and the like.[81] In a crucial passage, the IRS text stated that:

> [m]aking an individual whole on account of a disaster or emergency hardship does not, necessarily, further charitable purposes. The amount needed to relieve the distress should be based on all the facts and circumstances of the individual's situation and the charity's resources. An outright transfer of funds based solely on an individual's involvement in a disaster or without regard to meeting the individual's particular distress or financial needs would result in private benefit. For example, if an individual's uninsured vacation residence is destroyed in a disaster, that person would have undergone a loss. But, it does not follow that the person is therefore distressed and needy. Maintaining a person's standard of living at a level satisfactory to that person rather than at a level to satisfy basic needs could also serve private interests. For example, rebuilding an individual's luxury estate would serve a private rather than a public interest where meeting the individual's basic needs may be limited solely to providing temporary housing. Similarly, grants to replace lost income rather than to meet basic living needs would generally be viewed as serving personal and private interests.[82]

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power applicable (*thus presuming the existence of what is often called a general charitable purpose*) unless the terms of the trust . . . express a contrary intention.") (emphasis added); *see* Macey, *supra* note 63 at 314 ("[C]y pres power appears to be a device for permitting judges, through a finding that the settlor had a "general charitable purpose" when he created the trust, to keep private funds in the public domain, even when the settlor's intent might have been to have the assets revert back to the settlor's estate.").

79. Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L .Q. 382, 382 (1959).

80. *See* Huetter & Freidlander, *supra* note 30 at 220. The IRS published this article in the annual Continuing Professional Education (CPE) course book that it provides to its agents. These books are publicly available and well known to tax practitioners as a source of guidance.

81. *Id.*

82. *Id.* at 227.

It is instructive to compare how charity law and tort law approach the task of alleviating a disaster victim's losses. From a charitable perspective, victims are generally ineligible for long-term cash assistance unless they are financially distressed. If the charity provides aid, it focuses on what it will take to ensure that the victims' basic living needs are met. In tort, by contrast, injury victims are entitled to compensation if they suffer loss due to others' negligence; it does not matter whether the loss threatens P's financial well-being. D should generally pay P a monetary sum (damages) "that leaves[s] her in the same position that she would have enjoyed if she had not been made a victim of D's wrong."[83] For charity law, on the other hand, there is nothing intrinsically charitable about restoring the status quo ante. A charity can confer excessive benefit, moreover, by making a victim whole where less aid would suffice to meet P's basic needs.

The differences between charitable relief and tort compensation are also reflected in how each approaches pain and suffering and other forms of noneconomic harm.[84] Assume that an electrical fire caused by D burned P, but left no permanent scars. In a tort action against D, P seeks and ultimately receives $500,000 in damages for the mental distress and embarrassment P experienced due to the burn. This may be entirely appropriate from a tort law perspective. No charity, by contrast, would presently transfer funds to P, based solely on the mental distress P suffered from her now healed burns. Rather, a charity would focus on alleviating the current manifestations, if any, of past harm. For P, this may entail counseling and other forms of therapy.

A charity can prevent some private benefit by considering the benefits an injury victim has or can receive from collateral sources. For example, a family whose home was damaged by a natural disaster "may not have the need for a low interest loan for home repair because its home is covered by insurance or it can reasonably obtain and repay a commercial loan."[85] The charity that ignores these collateral sources favors victims better able to help themselves to the detriment of those who need help more urgently. This seems perverse and contrary to charitable principles.[86]

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83. RICHARD A. EPSTEIN, TORTS 436 (1999).

84. *See* Act, *supra* note 3, § 402(7). The Act defines the term "noneconomic losses" to mean "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature." *Id.*

85. Huetter & Freidlander, *supra* note 30 at 220.

86. *See* Katz, *supra* note 15, at 271-72.

As compared to the all-purpose or general charity, the charity formed in response to a specific calamity is more likely to confer excessive benefit.[87] Such a charity's purposes may be fully accomplished once the basic needs of a specific set of victims have been met. At this point, any unexpended funds in the entity's coffers may constitute a surplus. Under federal tax law and common law *cy pres*, this surplus should generally be redeployed to a related charitable purpose. As stated by the IRS's 1999 text:

> An organization formed for a particular disaster or for a limited duration should have a plan for distribution of excess funds at the termination of the organization's existence in a manner consistent with the dissolution requirements under IRC 501(c)(3). For example, once the basic necessities have been met, excess funds must be distributed to qualified charities or to the federal, state or local government for a public purpose. Excess funds can not be prorated among the victims.[88]

As the foregoing suggests, charity law curtails the donor who seeks to enrich (as opposed to relieve) a specific group of injury victims. Gifts cannot be used to confer excessive private benefit, even if some donors actually intended this result. In any event, charity law presumes that charitable donors do not intend to confer excessive private benefit. If donors do not clearly state their supra-charitable or noncharitable preference for distributing their gifts' surplus, then any such surplus will most likely be applied according to the principles of *cy pres*.[89] Note that such donors can still use noncharitable (and nondeductible) vehicles to provide surpra-charitable sums to a specific group of victims, for example, by making direct gifts or by creating private trusts.

The next two sections explore the consequences of the foregoing charity law principles and practices for tort law and the Fund, respectively.

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87. *See e.g.*, BOGERT & BOGERT, *supra* note 33 § 363 ("If the beneficiaries consist of a definite group and are not to receive additions to their number, a private trust may serve them as well as a charitable trust.")

88. *See* Huetter & Friedlander, *supra* note 30 at 226 ("Plan for Distribution of Excess Funds").

89. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 432 cmt. b (1957) (If the settlor of an initially charitable trust wants any surplus transferred to a private trust for noncharitable purposes, the settlor must properly manifest this intention.). *Cf.* Katz, *supra* note 15 at 274-75 (discussing Doyle v. Whalen, 32 A. 1022 (Me. 1895)) (ordering surplus charitable funds raised for the relief of victims of Eastport, Maine, fire of 1886, to be distributed as a private trust for the benefit of the sufferers of the fire, for example, by indemnifying their uninsured losses, after determining that the donors would likely have wanted the surplus to be distributed this way).

III. CHARITY LAW AND ITS CONSEQUENCES FOR TORT LAW OF DAMAGES

This section examines tort law's approach to charitable gifts and criticizes it from a charity law perspective. It first explains how the tort system compensates the injury victim (P) whose losses have been partly alleviated by charitable gifts. It focuses on the collateral source rule, which permits the prevailing P to retain the benefits of charitable gifts and collect damages, including make-whole damages, from the tortfeaser (D). The second part criticizes tort law, especially the collateral source rule, for facilitating the use of charitable assets to confer excessive private benefit on P. The third part critiques the theories of donor intent and moral desert sometimes advanced to justify tort law's approach to charitable gifts. It compares these to charity law's more nuanced and satisfactory account of donor intent. The final part explores charity law's normative implications for tort law. It argues that the tort system should, where feasible, seek to recover the value of charitable gifts from the compensated P and reapply it to charitable purposes.

A. The Collateral Source Rule

When P suffers harm due to D's negligence, D must pay P damages "that leave [P] in the same position that she would have enjoyed if she had not been made a victim of D's wrong."[90] Ideally, making D pay this sum not only compensates P; it also deters D and other would-be tortfeasors from engaging in socially excessive amounts of risky behavior.[91] These damages can also be understood in moral terms as "restor[ing] the pre-existing relationship between the two parties, a relationship that was unjustly disturbed by one party's misconduct and the resulting injury to the other."[92] In the ideal case, therefore, tort

90. EPSTEIN, *supra* note 83, at 436. *See also* RESTATEMENT (SECOND) OF TORTS, § 903 cmt. a (1965) (damages calculated to leave "in a position substantially equivalent in a pecuniary way to that which [s]he would have occupied had no tort been committed").

91. *See, e.g.*, Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962) (The collateral source rule serves, *inter alia*, "to deter negligence and encourage due care."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 219 (5th ed. 1998); 2 A.L.I., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 161-62 (1991). Some question whether the rule has a significant impact on deterrence. *See, e.g.*, 4 FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 25.22, at 658 (2d ed. 1986) ("Altogether it seems unlikely indeed that [a defendant's] anticipation of . . . an abatement from the flexible and indeterminate damages in a tort action [to account for plaintiff's collateral-source benefits] will materially dilute whatever admonitory value there is in civil liability" to take care.).

92. 1 A.L.I., *supra* note 91, at 25.

law achieves three goals simultaneously: it makes P whole; it optimally deters D; and it settles moral accounts between the two parties.

Collateral source benefits can interfere with the tort system's ability to balance its competing objectives. Assume P suffers $10,000 in losses in a fire caused by D, and receives a charitable gift of $1,000 to meet immediate needs. How, if at all, should the $1,000 gift affect P's damages in any tort action that P later brings against D? On one hand, P only needs $9,000 from D to be made whole. Yet, if the $1,000 gift reduces D's liability from $10,000 to $9,000, then D pays less than the full social costs of his conduct and is underdeterred. Additionally, moral reconciliation between P and D will not be fully achieved. On the other hand, if the court sets damages at $10,000, it effectively permits P to collect a total of $11,000 in injury-related payments from all sources. This result seems to violate the principle that damages should compensate P for her losses but no more,[93] even as it optimally deters D and more fully reconciles D and P.

Tort law errs on the side of overcompensating P. Under the collateral source rule, D must pay damages to P without regard to any payments or benefits that P receives from collateral sources for the same losses.[94] There are several responses to the overcompensation concern.[95] In some cases, no overcompensation occurs because P is contractually obliged to reimburse the collateral source out of any damages or settlement obtained from D.[96] In other cases, P receives a double recovery but it is not a windfall, defined as "economic gains independent of work, planning, or other productive activities that so-

93. *See* 22 AM. JUR. 2D *Damages* § 566 (1988) ("[I]f the basic goal of tort law is only that of compensating plaintiff for his losses, evidence of these benefits [from collateral sources] should be admitted to reduce the total damages assessed against the defendant."); RESTATEMENT (SECOND) OF TORTS, § 920A cmt. b (1965) ("[T]he injured party's net loss may have been reduced correspondingly [by her receipt of collateral benefits], and to the extent that the defendant is required to pay the total amount [of her losses] there may be a double compensation for a part of the plaintiff's injury"); 2 A.L.I., *supra* note 91, at 162 & n.2 (citing sources that criticize the collateral source rule as unjust).

94. RESTATEMENT (SECOND) OF TORTS, § 920A(2); *see supra* note 91.

95. I do not address the argument that the collateral source rule is a more or less appropriate (albeit indirect) way of counterbalancing the effects of the "American Rule" that each party in a civil action must pay its own attorney's fees. If the successful plaintiff must pay a sizable portion of her recovery to her attorney, then the plaintiff whose damage awards equals her losses will be undercompensated. *See, e.g.*, Helfend v. Cal. Rapid Transit Dist., 465 P.2d 61, 68-69 (Cal. 1970) (The collateral source rule serves the desirable function of helping to overcome the disadvantage to P resulting from the usual attorney's contingent fee contract.).

96. *See, e.g.*, *Helfend*, 465 P.2d at 65 (The fact that a portion of plaintiff's medical bills had been paid through a medical insurance plan "does not present a danger of double recovery" because plan requires plaintiff to refund benefits from tort recoveries.); 2 A.L.I. *supra* note 91, at 163-64 (citation omitted). This arrangement is known as "conventional subrogation." RICHARD H. JERRY, II, UNDERSTANDING INSURANCE LAW 708-09 (3d ed. 2002).

ciety wishes to reward."[97] For example, P may have paid a higher insurance premium in exchange for not having to reimburse the insurer out of any tort recovery.[98] More broadly, P is seen as entitled to collateral benefits for which she gave consideration. Even if the collateral benefit is very large relative to P's consideration, courts apply the collateral source rule in order to reward P for her thrift and foresight in arranging for the benefit in advance, and to encourage others to do the same.[99]

Most courts also apply the collateral source rule to benefits that were rendered gratuitously to P, rather than pursuant to a contract.[100] Where P suffers $10,000 in economic losses due to D and receives a $1,000 charitable gift, P can still collect the full $10,000 in damages from D. Similarly, if P receives $1,000 in free medical care from a nonprofit hospital, P can recover the value of the free care she received, in addition to the $10,000 losses she suffered directly.[101]

At least four jurisdictions, however, would apply the collateral source rule *only* to benefits that P has earned in some way.[102] In *Peterson v. Lou Bachrodt Chevrolet Co.*,[103] the Illinois Supreme Court held that the plaintiff could not recover the value of medical services necessitated by the defendant's negligence when such services had been rendered at no charge by a charitable hospital. "[T]he policy behind the collateral-source rule," the court declared, "simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation."[104] The purpose of tort damages, it continued, is to compensate plaintiffs for their losses—not to confer a windfall upon them nor to punish (a.k.a.,

97. Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1491 (1999).

98. *See* POSNER, *supra* note 91, at 201.

99. *Helfend*, 465 P.2d at 66 ("The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.").

100. RESTATATEMENT (SECOND) OF TORTS, § 920A cmt. c(3) (1965).

101. In the conclusion, I note that a charitable organization can provide its benefits as a conditional gift that requires reimbursement only if P later obtains compensation for the same losses from another source.

102. *See, e.g.*, Fla. Physician's Ins. Reciprocal v. Stanley, 452 So.2d 514, 515 (Fla. 1984); Peterson v. Lou Bachrodt Chevrolet Co., 392 N.E.2d 1 (Ill. 1979); Evans v. Pa. R.R. Co., 255 F.2d 205, 210 (3d Cir. 1958) (Under Delaware law, a plaintiff cannot recover amount "representing a reduction by his doctors in the size of their bill rendered him due to his impecunious circumstances."); Coyne v. Campbell, 183 N.E.2d 891 (N.Y. 1962). After September 11th, New York amended its collateral source statute to prohibit tortfeasors from introducing evidence of charitable gifts received by the injured party. N.Y. C.P.L.R. 4545(d) (McKinney 1993).

103. 392 N.E.2d 1.

104. *Peterson*, 392 N.E.2d at 11-15 (denying recovery for value of services provided free by Shriner's Hospital).

"deter") defendants.[105] Similarly, the Supreme Court of Florida asserted that "the common-law collateral source rule should be limited to those benefits earned in some way by the plaintiff," and should not be used to give "an undeserved and unnecessary windfall to the plaintiff."[106] To avoid a windfall to P, these courts use P's third-party gratuities to reduce D's liability. (They generally do not address whether this approach confers a windfall on D.)

B. The Collateral Source Rule Is Problematic as Applied to Charitable Gifts

Although both charitable organizations and the tort system disburse cash to injury victims to alleviate their losses, this activity looks very different from the perspective of charity law as opposed to tort law. Charity law governs the use of charitable assets, primarily by charitable organizations, to relieve an injury victim's financial distress in her hour of need. Tort law provides P with a process (often protracted) for obtaining compensation for her losses from the responsible party, whether she objectively needs the compensation or not. On first blush, each domain might appear to operate independently of the other. They overlap, however, when P seeks damages for losses already alleviated by payments from charitable organizations. Tort law's approach to charitable gifts for the same losses permits recipients to use these gifts to increase their long-term wealth regardless of financial need. Stated differently, this licenses the use of charitable assets to confer an excessive private benefit.

Consider Gifts for the Injured and Financially Troubled (GIFTS), a hypothetical charity formed to disburse one-time gifts of $1,000 to injury victims in financial distress. Although most of its victims are simply unlucky, some have injuries caused by another person's negligence. Assume that two economically self-sufficient persons, P and Q, each suffer a $10,000 injury due to D's and E's negligence, respectively. Each victim promptly files suit against his or her tortfeasor. With unprecedented swiftness, Q obtains a make-whole judgment of $10,000 from E. If Q then applies to GIFTS for a $1,000 grant, the charity cannot assist him without conferring excessive pri-

105. *Id.* at 13-14.

106. *Stanley*, 452 So.2d at 515 (When a plaintiff seeks to recover the costs of future services necessitated by the defendants' negligence, the collateral source rule does not prevent the jury from considering the availability of such services at little or no cost from charitable or public entities.).

vate benefit.[107] P's lawsuit, by contrast, languishes in motions and discovery, while P has difficulty meeting her basic needs. It is perfectly appropriate for GIFTS to give P a $1,000 grant.

After three years, a jury determines that D caused P's $10,000 injury and a court must set damages. Here, it may help to see the $1,000 grant as being distributed in two stages. The first stage occurs after P receives the grant and before she collects damages. GIFTS lets P use the $1,000 during this stage, when it helps to alleviate her financial distress. P's usage of the $1,000 during this stage provides P with a real economic benefit, as P is not indifferent between: (a) receiving the entire $1,000 during stage one as Q did; and (b) receiving the $1,000 plus three years' accrued interest at stage two.[108] The second distribution occurs when the court awards damages. In the second stage the court decides how GIFTS' prior grant will affect P's damages. This decision effectively determines the ultimate recipient of the balance of GIFTS' prior grant to P, which consists of $1,000 discounted by, say, the interest it would have earned while the lawsuit was pending.[109] Even if P is not its ultimate recipient in stage two, P retains the benefits the gift produced during stage one.

If the court follows the minority rule, it will reduce D's liability (and P's recovery) from $10,000 to $9,000, which effectively gives D the $1,000 grant (as discounted). From a charity law perspective, this is unacceptable because enriching D serves no charitable purpose.[110] The majority rule—to confer the grant's long-term benefits on P—is more complicated because the charitableness of helping P has changed over time. GIFTS' initial distribution to P during stage one was undeniably charitable. Yet, if the damages that P collects through litigation suffice to alleviate P's distress, then P is no longer a charity case. As was true of Q, if P were now to approach GIFTS for the first time, the organization could not give her a $1,000 grant without conferring excessive private benefit. The majority rule effectively achieves this same result by awarding P $10,000 in damages while leaving the $1,000 grant where it lies.

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107. Q may be an inappropriate recipient of GIFTS' aid even if he or she collects less than $10,000 from D, so long as the compensation alone (that is, after being reduced by the $1,000 gift) suffices to relieve Q's financial distress.

108. In economic terms, we would say that P had a positive rate of time preference—she valued units of consumption during her financial hardship more highly than the same number of units consumed after the hardship had passed. Perhaps she feared that she might not survive in order to enjoy future benefits. *See* THE MACMILLAN DICTIONARY OF MODERN ECONOMICS, *supra* note 37, at 428-29. (defining "time preference").

109. *Id.* at 108 (defining "discount rate").

110. Nor was it likely the intention of GIFTS' donors. but more on that below. *See infra* note 118 and accompanying text.

C. *Tort Law's Problematic Account of Donor Intent and Moral Desert*

The collateral source rule is not only problematic from a charity law perspective, it also runs counter to the tort law principle that "[c]ompensation does not mean overcompensation."[111] On this view, damages should make P whole but not more so. Some courts have been especially reluctant to apply the collateral source rule to "gratuitous" collateral benefits, as opposed to those that P has "earned" through her work, planning, or other productive activities that society wishes to reward.[112]

Courts and commentators defend applying the collateral source rule to gratuities—even if this makes P more than whole—on two main grounds: (a) this result effectuates the intent of the donors of P's gift;[113] and (b) if there must be a windfall, P deserves it more than D.[114] This section examines tort law's account of donor intent and suggests that it may be accurate and appropriate, or both, for donors who transfer sums directly to another definite and specifically-identified individual. Charity law, however, offers a more compelling account of the intentions of persons who contribute to charitable organizations.

1. Tort Law's Account of Donor Intent

In our hypothetical, P incurs $10,000 in losses caused by D, which prompts a collateral source to give $1,000 in cash to P. In the short-term, the donor undoubtedly intended to help relieve P's immediate suffering.[115] But how did this donor intend his gift to affect P—or the world at large—in the long-term? More specifically, how did this donor intend his gift to affect the damages awarded in any tort action that P might bring against D? In most cases, one suspects, the donor helped P without giving much thought to the possibility that she might recover from a tortfeasor. The donor may, thus, not have formu-

111. TONY WEIR, TORT LAW 188 (2002).

112. These earned benefits are the opposite of what Professor Kades defines as windfalls. *See* Kades, *supra* note 97, at 1491.

113. The underlying assumption is that public policy favors giving effect to donor intent, and that courts can and should advance this policy goal even when awarding tort damages.

114. *See, e.g.*, 22 AM. JUR. 2D *Damages* § 566 (1988) ("If there must be a windfall, it is usually considered more just that the injured person should profit, rather than let the wrongdoer be relieved of full responsibility for his wrongdoing.").

115. I am using the term "donor" to refer to both (a) persons who contribute to a charitable organization, which in turn distributes sums to recipients; and (b) persons who transfer sums directly to recipients, unmediated by an organized charity. I discuss those donors separately below. *See infra* notes 135-138

lated—or at least did not express—an intention as to his gift's effect on P's recovery.[116]

If the donor did not formulate or express a long-term intent, then the court must attempt to deduce how he *would have wanted* his gift to affect P's recovery from D, had he considered the scenario. Consider three possibilities: (1) the donor intended to be repaid out of any damages;[117] (2) the donor intended the gift to augment whatever recovery P might collect from D—thereby authorizing P to use his gift to increase her long-term wealth; or (3) the donor intended his gift to reduce D's liability to P. We can reject the third option out of hand: it is safe to assume that the donor did not want (or would not have wanted) his gift to benefit D at any point.[118] The issue then becomes: whom did the donor want to enjoy the long-term benefits of his initial emergency outlay of $1,000—P or himself? The collateral source rule is consistent with the view that the donor intended (or would have intended) P to enjoy his gift's long-term benefits.

In *Arambula v. Wells*,[119] a California appellate court invoked donor intent to support its award of lost earnings to an injury victim (P), even though P's employer (who was also his brother) paid his salary during his alleged period of disability, and P had no legal duty to repay his employer out of his damage award. The court held that the collateral source rule applies to "gratuitous payments (including moneys to cover lost wages) by family or friends to assist tort victims through difficult times."[120] "Charitable contributions,"[121] said the *Arambula* court, "are primarily motivated by the intended use to which donations are put. Under these circumstances, we logically turn to the intent of the donors. Whom did they intend to help when they gratuitously agreed to cover lost wages? The person who caused the accident? Or the victim?"[122] By honoring the intent of P's benefactors in setting damages, the court was "adher[ing] to the rule to promote policy concerns favoring private charitable assistance."[123] The

116. *See* HARPER ET AL., *supra* note 91, at 663. *Accord* Richard Lewis, *Deducting Collateral Benefits from Damages: Principle and Policy*, LEGAL STUDIES, Mar. 1998, at 15, 28.

117. Cf. Arambula v. Wells, 85 Cal. Rptr. 2d 584, 585 (Ct. App. 1999) (Holding no setoff for gratuitous wages paid to plaintiff by his brother, where "brother 'wished' to be reimbursed, but [plaintiff] had not promised to do so.").

118. *See* Lewis, *supra* note 116, at 15, 28 (No charitable donor "intends to subsidise the tortfeasor" who injured the beneficiary with the donor's largesse.).

119. 85 Cal. Rptr. 2d 584.

120. *Id.* at 585.

121. Note that the court uses the term "charitable contributions" to refer to, *inter alia*, private gifts from one's family members, employers or both. *See infra* note 136 and accompanying text.

122. *Arambula*, 85 Cal. Rptr. 2d at 588.

123. *Id.*

court would impede this policy, by contrast, by using the gratuitous benefits received by P to reduce D's liability. Donors would feel as though their largesse had been "hijacked by the tortfeasor,"[124] and they would be less willing to help others in need. "We doubt such gifts would continue," the *Arambula* court concluded, "if, notwithstanding a donor's desire to aid the injured, the person who caused the injury ultimately stood to gain a windfall."[125] A British judge has expressed the same fear with more flair:

> [i]t would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer.[126]

If a court must either leave a gift's long-term benefits with P or shift these to D, there may be good reasons to prefer P. But what if the long-term benefits must either stay with P or return to the donor? Should tort law assume that (1) the donor intended to be repaid out of P's recovery, such that D would recapture the gift's long-term benefits, or (2) the donor intended his gift to augment P's recovery from D? The latter assumption may make sense, I believe, for private gifts one receives directly from relatives,[127] friends,[128] fellow members of an association,[129] a for-profit employer,[130] and the like, as opposed to gifts received from a charitable organization. The view is based on the observation that people typically make private gifts to specific persons with whom they have an established relationship, and that these relationships may embody or express moral commitments, emotional attachments, kindred ties, and such. "In these cases of private generosity," a leading treatise sagely concludes, "the best solution

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124. *Id.* at 589; *see supra* note 118.

125. *Id.* at 588-89.

126. Parry v. Cleaver, 1 ALL E.R. 555, 558 (H.L. 1969).

127. *See. e.g., Arambula*, 85 Cal. Rptr. 2d 584 (Where plaintiff worked in company owned by his brother, collateral source rule permitted plaintiff to recover for lost wages voluntarily paid by brother during period of his disability.).

128. 22 AM. JUR. 2D *Damages* § 570 (1988) (citation omitted).

129. *See. e.g.*, Local 1140, International Union of Electrical, Radio & Machine Workers v. Mass. Mut. Life Ins. Co., 165 N.W.2d 234 (Minn. 1969) (Plaintiffs were entitled to monetary reimbursement from medical insurer for value of blood they received without financial expense from blood donors club to which plaintiffs belonged, where plaintiffs gave up blood bank credits in "payment" for the blood received.).

130. RESTATEMENT (SECOND) OF TORTS, § 920A cmt. c(2) (1965) (P can recover for lost wages during period of incapacity, even though P's "employer, although not legally required to do so, continues to pay the employee's wages during his incapacity"); Bachelder v. Morgan, 60 So. 815 (Ala. 1912) (Where P received a donation from employer during period of disability, the amount of such donation could not be used to reduce the damages for which D was liable.).

seems to be a rule of thumb that would give greatest scope to the donor's generosity and to the adjustment of moral obligations within the more or less intimate relationships that usually bring such generosity into play. The private gift should be disregarded in assessing damages."[131] Even if the donor did expect repayment out of P's recovery, he or she is better off if P rather than D receives the long term benefits. By overcompensating P, the court places P "in possession of the means to enable him to return the money [to the donor] voluntarily, if in conscience he should see proper to do so."[132]

Alternatively, a private gift may occur within the context of a long-term cooperative relationship between the donor and P for their mutual advantage. According to Professor Eric Posner, the partners in such relationships sometimes make transfers that look "gift-like" insofar as they do "not explicitly call for a reciprocal transfer . . . ."[133] In the broader scheme, however, these transfers "occur as part of the loose quid pro quo in a trust relationship" and, thus, "are not really gifts at all."[134] If this account is sound, then courts should not presume that the transferor expected an immediate and enforceable repayment out of P's damages. Rather, these parties have yoked themselves together for the long-haul and rely mainly on nonlegal mechanisms to make their interactions mutually advantageous. The "gift" should stay with P.

2. *Charity Law's Account of Donor Intent*

As applied to gratuities, the collateral source rule implicitly assumes that donors either intend or do not mind enriching the P who receives their gift. This assumption, I argue, is more applicable to the donors of private gifts than charitable gifts. This is not surprising given that tort law tends to lump private gifts and charitable gifts into a single category—"gratuities" or "gratuitous" benefits.[135] One even sees the

131. *See* HARPER ET AL., *supra* note 91, at 663.

132. Klein v. Thompson, 19 Ohio St. 569, 571 (1869) (permitting plaintiff to recover medical expenses covered by town trustees, even though "the trustees may have no right to recover the amount paid from the plaintiff"). *See also Arambula*, 85 Cal. Rptr. 2d at 589 ("Even without an ironclad requirement of reimbursement, the plaintiff may be motivated to repay the donor from any tort recovery. . . .").

133. ERIC A. POSNER, LAW AND SOCIAL NORMS 54 (2000).

134. *Id.*

135. *See, e.g.*, Dahlin v. Kron, 45 N.W.2d 833, 838 (Minn. 1950) ("[T]he defendant cannot take advantage of the fact that the doctor's bill and expenses were paid for the plaintiff by a beneficial society, by members of his family, by his employer, or by other persons"); HARPER ET AL., *supra* note 91, at 661-63 (in discussion of tort law of damages' treatment of "gifts," there is no reference in the text to aid from charitable organizations); Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 687-88 (1962); 22 AM. JUR. 2D

terms "charity" and "charitable" used to refer to private gifts.[136] Tort law's undifferentiated approach to "gratuitous" collateral benefits is reflected in its account of donor intent: it has no special account of how charitable donors, as opposed to private donors, likely intended (or would have intended) their donations to affect P's tort action against D.

Charity law prohibits a donor from earmarking his or her gift for a specific or pre-selected person. Instead, the donor's contribution must be dedicated to benefiting a large or significant class of persons who share a certain characteristic, for example, the poor, elderly, or students. These strictures make it more difficult for a charitable donor to use gifts to a charitable entity to cultivate or strengthen an ongoing personal relationship with any particular recipient. As a result, the charitable donor is more inclined (as compared to the private donor) to see the gift's recipients as fungible. There is less reason for this donor to seek to enrich any particular class member to the detriment of other members.

As a doctrinal matter, charity law offers a more sophisticated, and ultimately more satisfying, account of the typical charitable donor's likely intentions. This account applies most directly to a charitable organization's use of charitable assets. Under the doctrine of *cy pres*, charity law effectively presumes that: (a) the donor intended his gift to be used, in the first instance, for the specific purpose he designated; but (b) if and when that purpose is fully accomplished or has ceased to be charitable, the donor presumably wanted the gift's unused balance (a.k.a., the "surplus") to be reapplied to a related charitable purpose.[137] Charity law generally does not presume, by contrast, that these donors wanted the surplus distributed to P for her private benefit, unrelated to her financial needs, or returned to the donors themselves.

This account of donor intent readily carries over to the tort damages context. When GIFTS gave P a $1,000 grant, its short-term goal (and, by implication, its donors' goal) was to relieve P's financial distress due to the $10,000 injury caused by D. By the time P receives

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Damages § 570 (1988) (discussing collateral source rule's applicability to "gratuities" without specifically mentioning gifts from charitable organizations).

136. *See, e.g.*, Maxwell, *supra* note 135, at 687 & n.73 (citing Ostmo v. Tennyson, 296 N.W. 541 (N.D. 1941)) ("Charity" was used to refer to a transaction in which a car dealership took back a damaged truck without any deduction for the damage.); Arambula v. Wells, 85 Cal. Rptr. 2d 584 (Ct. App. 1999) ("charity" used to refer to wages paid to victim during period of disability).

137. Stated differently, charity law effectively (if quietly) presumes that people who make charitable gifts do so with "general charitable intent." *See supra* notes 74-79 and accompanying text.

her $10,000 damage award, the prior grant's specific charitable purpose—to relieve P's financial distress—has been fully accomplished. Although P has likely spent the specific dollars, the grant is still "on the books," so to speak. P's damage award for $10,000—$1,000 more than P needs to be made whole—creates a $1,000 surplus that corresponds to GIFTS' prior grant. To ascertain how GIFTS' donors would have wanted this surplus distributed, we surmise their response to the following question: "Now that P's losses have been fully compensated from another source, do you want your gift to continue to benefit P, or would you prefer your gift to benefit persons who have suffered similar injuries but, unlike P, have not been compensated by others?"[138] Tort law assumes that the donors would want the former, while charity law assumes that they would want the latter.

From a charity law perspective, the extra $1,000 in P's damage award looks very much like a surplus ready to be reapplied, à la *cy pres*, to a related charitable purpose. The *cy pres* doctrine (as applied) almost irrebutably presumes that GIFTS' donors desired such reapplication in these circumstances. Here, the most obvious substitute purpose would be to relieve other injury victims who, unlike P, still suffer from financial distress. As a moral matter, charity law—unlike tort law—does not see charitable gifts as a windfall to be distributed to either P or D. Rather, it recognizes a third party more deserving than either—the still-needy intended recipients of assistance from GIFTS and its donors.

D. What Is To Be Done?

Charity law has unmistakable normative implications for how the tort system should compensate injury victims who have already received charitable gifts to alleviate some of the same losses. Tort law should neither ignore these gifts nor use them to reduce D's liability. Instead, it should attempt to recover the value of these gifts and reapply it to charitable purposes related to the gifts' original purposes. Precisely when and how such recoupment should be attempted is another matter, one that I cannot comprehensively resolve here. I can, however, discuss a few possibilities.[139]

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138. *See* Lewis, *supra* note 116, at 28.

139. Note that some states have enacted legislation allocating a portion of any punitive damages awarded in civil actions to other public uses. *See, e.g.*, IND. CODE § 34-51-3-6 (West 1999) (75% of any punitive damage award entered in a civil action must be deposited in a compensation fund for the victims of violent crime). Their experiences with such statutes must be considered before embarking on any major initiative along the lines discussed here.

The court might direct D to pay the full costs of P's injury (e.g., D pays $10,000 for the electrical fire), but reduce P's award by the amount of charitable gifts received (e.g., P gets $10,000 minus the prior grant of $1,000 from GIFTS), with the balance paid to GIFTS. Alternatively, the court might award P the full costs of her injury (i.e., $10,000, but subject to an undertaking and direction to return $1,000 to the charity).[140] From a charity law perspective, this approach prevents P's enrichment with virtual charitable assets—the $1,000 surplus in P's damage award, which corresponds to the prior grant from GIFTS. As a policy matter, it increases the efficacy of charitable dollars by recycling them, that is, by transferring them from past recipients who no longer need them to persons who currently do need them. One drawback to this approach is that it creates a gap between P's incentives to sue (P will only recover $9,000) and the sum we want D to pay ($10,000). As a result, plaintiffs may have insufficient incentive to bring the socially optimal amount of negligence actions. There is also the practical concern that the parties may simply contract around a court's attempt to recover a charity's prior outlays to the plaintiff. In our hypothetical, for example, D and P may settle the case for $9,500; this saves each litigant $500 but eliminates the $1,000 that might have been returned to GIFTS.

How actively should a court try to recover prior charitable gifts? The answer depends on a variety of factors, including P's financial stability (no recoupment if it leads to P's financial distress) and the size of the charity's gift. A larger gift makes recoupment more worthwhile, naturally, relative to the transaction costs.[141] If P is presently unable to repay the charity, the gift is small, or the relative transaction costs are high, then the court might consider simply exhorting P to repay the charity when able and obtain a promise from P to do so, or both.[142]

This project's success cannot be measured solely by the amount of dollars recouped. Tort law can do more than simply help individual charities reclaim some dollars that compensated plaintiffs might have otherwise used for self-enrichment. Ideally, the tort system can promote the practice and spirit of what has been called "serial reciproc-

140. *See, e.g.*, Coderre v. Ethier, 19 O.R.(2d) 503, § 34 (Ont. Sup. Ct. 1978) (where P's medical expenses voluntarily paid by a third party, court awarded P damages for such expenses "subject to an undertaking and a direction by the plaintiff . . . to return them to the gratuitous donors").

141. *See, e.g., id.* ("In view of the *magnitude* of the nursing aid services" donated to P by her religious order, court awards damages to P for the value of such services subject to an undertaking and a direction by P to repay the donors) (emphasis added).

142. *See* KEN COOPER-STEPHENSON, *New Solutions for the Collateral Benefits Problem, in* RECENT DEVELOPMENTS IN THE LAW OF DAMAGES 81, 99 (1991).

ity."[143] This concept involves a series of transfers in which the current recipients of charitable assistance later becomes donors, motivated in part by a sense of duty toward their benefactors, which they express by emulating their charitable activity. This response is often in keeping with the spirit of the original gift.[144] A movie from a few years ago expressed the same idea with the phrase "pay it forward."

Tort law's approach to charitable gifts in setting damages is uncongenial if not inimical to serial reciprocity. Tort law implicitly teaches recipients that their donors wanted them to use their gifts to enrich themselves, unrelated to need, and that they deserve such enrichment. Such recipients, one expects, are less likely to "pay forward" the benevolence they received. This need not be the case. If nothing else, courts can exhort prevailing plaintiffs to repay the charities that assisted them while their suits were pending. Courts can use their moral authority to encourage these recipients to become donors.

IV. CHARITY LAW AND THE FUND

Charitable organizations distributed more than $800 million directly to the injured and survivors[145]—more than $ 266,800 on average[146] for each person killed on September 11th. Congress created the Fund to provide compensation awards to roughly the same persons[147]—an average of $1.67 million per claimant.[148] The simultaneous operation of these two systems of alleviating September 11th losses raised a very practical question about their interaction: Would the Fund program reduce claimants' awards by the amount of charitable gifts they had received?[149] Because of the unprecedented charitable response to

143. *See generally* Michael P. Moody, *Pass It On: Serial Reciprocity as a Principle of Philanthropy*, *in* ESSAYS ON PHILANTHROPY, No. 13, Indiana University Center on Philanthropy (1998).

144. *See id.* at 10-11.

145. SEESSEL, *supra* note 2, at 15.

146. The September 11th attacks claimed the lives of 2, 976 victims: 2,752 at the World Trade Center; 184 at the Pentagon; and 40 on Flight 92 in Pennsylvania. *See* Dan Barry, *About New York: A New Account of Sept. 11 Loss, with 40 Fewer Souls To Mourn*, N.Y. TIMES, Oct. 29, 2003 at A1, *see also* http://www.washingtonpost.com/wp-srv/metro/specials/attacked/victims/viclist.html (last visited Nov. 5, 2003); http://www.washingtonpost.com/wp-srv/nation/specials/attacked/remebrance/vic_list.html#pa (last visited Nov. 5, 2003).

147. Act, *supra* note 3, § 403.

148. As of November 4, 2003, the Special Master had issued 1,102 awards. The average award was $1,666,281 per decedent, after mandatory offsets for life insurance, pensions, and other contractual or statutory entitlements—but not charitable gifts. The median award after offsets was $1,308,413. *See* http://www.usdoj.gov/victimcompensation/payments_deceased.html (last visited Nov. 5, 2003).

149. One can also consider the same matter from the charities' perspective: To what extent should the prospect of Fund awards have affected the activities of September 11th charitable

September 11th, the financial stakes were very large. Offsetting awards by charitable gifts could have cut the Fund's cost by approximately $800 million. For families of September 11th victims, such offsets could reduce the average award by hundreds of thousands of dollars. For some, the symbolic and emotional stakes were also significant.

From a charity law perspective, the coexistence of the Fund and charitable relief raised more pointed questions: How could the Fund program be arranged so as to prevent successful claimants (awardees) from retaining the benefits of prior charitable gifts for their private enrichment? What were the intentions of donors to September 11th charities—actual or presumed—and to what extent could or should the Fund program effectuate them? After introducing the Fund, this section considers several ways the Fund program might have handled charitable gifts: (a) calculated Fund awards without regard to charitable gifts; (b) offset charitable gifts against awards and used the savings for general governmental purposes; or (c) offset charitable gifts against awards and reimbursed the charities for their outlays.[150] After identifying charity law's objections to each approach, I suggest a more fitting (but still difficult) approach to the Fund's charitable gift dilemma.

A. The Fund Program

Congress enacted the Fund shortly after the September 11th attacks as part of the Air Transportation Safety and System Stabilization Act of 2001 (the Act).[151] The Act authorizes the Attorney General to ap-

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organizations? As compared to tort damages, it was much easier to identify early on which applicants for a charity's assistance would or could receive Fund awards. In ordinary circumstances, charities would have been more obliged to consider making loans instead of outright gifts to future awardees of Fund awards, and shift some resources to distressed persons who were not entitled to Fund awards. *See supra* notes 85-86 and accompanying text; As one charity worker noted:

> I work for a charity (New York City Rescue Mission) which is trying to find appropriate families to provide with monetary contributions, as designated by those who made donations to us. It is challenging for us to find families who we feel will warrant this money, knowing that they may receive much from the governmental and other funds.

See http://www.usdoj.gov/victimcompensation/W000072.html (last visited Nov. 1, 2003).

150. *See supra* note 140 and accompanying text.

151. *See* Act, *supra* note 3. According to its caption, the Act was designed "[t]o preserve the continued viability of the United States air transportation system." *Id.* The Act provides airlines with loans, insurance guarantees, tax relief, and other assistance. The Act's Title IV, which creates the Fund, is designed (among other things) to reduce lawsuits against the airlines for their alleged failure to take due care to prevent or reduce the harm resulting from terrorist acts. Section 405(c)(3)(B)(i) of the Act requires Fund claimants to waive the right to sue most parties for September 11th related damages. *Id.* § 405(c)(3)(B)(i).

point a "special master" to promulgate regulations, administer the program, and determine claims.[152] The Attorney General appointed Kenneth R. Feinberg, a prominent attorney, to this post.[153]

To calculate a claimant's entitlement under the Fund, the Act directs the Special Master to consider, inter alia, a claimant's economic and noneconomic losses[154] and other "individual circumstances."[155] The Act then declares that the Special Master "shall reduce [the entitlement] by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the" attacks.[156] (I refer to this as the "offset requirement.") The Act defines "collateral source" to mean "*all* collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the" September 11th attacks.[157]

On November 5, 2001, the Department of Justice (Department or DOJ) commenced the process of implementing the Fund program by publishing a "Notice of Inquiry and Advance Notice of Rulemaking" (Notice) in the Federal Register.[158] This Notice solicited comments on "how to determine what constitutes a 'collateral source' for purposes of [the offset requirement]."[159] In this connection, the Department stated that it "appreciates the strong policy reasons for excluding charitable contributions from the definition of 'collateral sources' and invites comment regarding whether the Act indeed *permits* the Department to exclude such contributions from the definition."[160] In other words, did the Act's plain language require charitable gifts to be offset against Fund awards? The Notice did not identify the "strong policy reasons" for avoiding this result.

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152. *Id.* § 404(a).

153. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,275. For a biography of Mr. Feinberg, see http://www.feinberggroup.com/biosFeinberg.htm (last visited Nov. 10, 2003).

154. Act, *supra* note 3, § 405(b)(1)(B)(i). *See also id.* § 402(5) ("The term 'economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law."). *Id.* § 402(7). For the Act's definition of "noneconomic losses," see *supra* note 84.

155. *Id.* § 405(b)(1)(B)(ii).

156. *Id.* § 405(b)(6).

157. *Id.* § 402(4) (emphasis added).

158. *See generally* September 11th Victim Compensation Fund, 66 Fed. Reg. at 55,901; Administrative Procedure Act, 5 U.S.C. § 553 (2000).

159. *Id* at 66 Fed. Reg. 55,904.

160. *Id.* The notice also invited comments "on whether 'in kind' and/or material contributions could or should be considered collateral sources." *Id.* (emphasis added).

The Department ultimately received more than 800 written comments in response to the Notice,[161] and the Special Master met with many interested persons.[162] At one key meeting, Mr. Feinberg reportedly told representatives of fifty or so charities that he was considering the possibility of offsetting charitable gifts against Fund awards.[163] The representatives strongly opposed this idea—so much so that they "threatened to withhold their payments [to September 11th victims] until *after* the Victim Compensation Fund made its awards, so as to prevent [their payments from causing] reductions in the federal amounts."[164]

This threat achieved the desired result: the Special Master ultimately decided against charitable offsets. The regulations implementing the offset requirement define the term "collateral source compensation" to exclude "[c]haritable donations distributed to the beneficiaries of the decedent, to the injured claimant, or to the beneficiaries of the injured claimant by private charitable entities . . . ."[165] In a written statement on these regulations, Mr. Feinberg explained that "we did find ambiguity in the statute as to gifts provided to victims and their families by private charities."[166] "Moreover," he said:

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161. *Id.* at 66,275.

162. Telephone Interview with Special Master Feinberg (July 29, 2003); September 11th Victim Compensation Fund, 66 Fed. Reg. at 55,902. See also Judy Woodruff, "Attorney General John Ashcroft Gives Press Briefing" CNN Live Event/Special 14:10, Transcript # 11260403.V54 (Nov. 26, 2001). ("I will personally see and visit with as many claimants as I can visit with, either directly with them, with their representatives, with organizations that represent them").

163. SEESSEL, *supra* note 2, at 10 E-mail from Tom Seessel, non-profit consultant, to author (Aug. 30, 2003) (on file with author) (regarding Mr. Seessel's interview with Mr. Feinberg in Washington, D.C. on June 28, 2002). This group included the American Red Cross, the Salvation Army, the September 11th Fund, and the Twin Towers Fund, among others. *Id.*

164. Seessel, *supra* note 2, at 10 (emphasis added).

165. September 11th Victim Compensation Fund, 66 Fed. Reg. at 66,287, 28 C.F.R. § 104.47(b)(2) (2002). Although the rule excluded bona fide charitable gifts, it authorized the Special Master to "determine that funds provided to victims or their families through a privately funded charitable entity constitute, in substance," life insurance, pension funds, death benefit programs, or other collateral source compensation within the meaning of the Act. *Id.* This caveat was included as a warning to employers of September 11th victims not to package employment benefits as charity. Special Master Kenneth Feinberg, Address at Clifford Symposium on Tort Law and Social Policy (Apr. 24, 2003). The Rules also excluded "[t]he value of services or in-kind charitable gifts such as provision of emergency housing, food, or clothing" from the definition of collateral sources. 28 C.F.R. § 104.47(b)(1). These "interim final rules" had the force and effect of law immediately upon publication. On March 7, 2002, the interim final rule was replaced by a final rule that differed only slightly from the interim final rules, and in no way relative to our analysis. *See* 67 Fed. Reg. 11,233 (Mar. 13, 2002) (to be codified at 28 C.F.R. 104). I will quote only the final rules.

166. September 11th Victim Compensation Fund, 66 Fed. Reg. at 66,274. The Special Master observed that while the Act expressly includes "certain items within the definition of 'collateral sources'—life insurance, pension funds, death benefit programs, and payments by federal, state, or local governments related to the" September 11th attacks—it "does not address whether cer-

> because the collateral offset only applies to collateral source compensation that the claimant has received or is entitled to receive, deducting charitable awards from the amount of compensation would have the perverse effect of encouraging potential donors to withhold their giving until after claimants have received their awards from the Fund.[167]

At a press conference on the regulations, Mr. Feinberg explained this provision on somewhat different grounds. He did not mention the Act's alleged ambiguity as to whether charitable gifts were a collateral source. He again discussed how the Fund's treatment of charitable gifts might affect charitable activity. This time, however, he focused on the activity of September 11th charities and their managers, as opposed to these organizations' actual and potential donors:

> [T]he reason that we're not offsetting charitable contributions is a very practical reason. When we meet with the charities and tell the charities that we're thinking about offsetting charitable deductions, even considering it—no decision was made—they made it very clear to me that if we decided to offset charitable contributions, *they'd delay further the distribution of their money until we cut our checks*, so that that money has not yet been distributed and offset. Well, what's the point? What's the point? We're trying to coordinate with the charities, and if the charities are determined not to distribute

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tain other types of payments"—most notably charitable gifts—fall within its purview. *Id.* at 66,279. Additionally, "such charitable contributions are different in kind from the collateral sources listed in the Act." *Id.* The Special Master overstated the case for ambiguity in the Act's offset provision regarding charitable gifts. Most common law jurisdictions, as we have seen, define charitable gifts as a collateral source benefit, even though these are "different in kind" from benefits that the plaintiff has earned or was otherwise entitled to. See *supra* note 100 and accompanying text. To be sure, the Act does not expressly state that charitable gifts are a collateral source, but this is true of every other kind of collateral source not enumerated in the Act; yet the regulations expressly exclude only charitable gifts from the definition. Why require Congress to make a clear statement that charitable gifts are a collateral source before defining them as such? The answer must come from a source other than the Act, which capaciously defines the term "collateral source" as "*all* collateral source[s], *including life insurance and other enumerated item.*" 28 C.F.R. §104.47(a) (emphasis added). Life insurance and other enumerated items—appear to be illustrations of collateral sources, rather as a limitation on the term's scope. This statutory language is *not* an occasion for invoking *enjusdem generis* ("of the same kind"), a canon of statutory construction which presumes that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland, Statutes and Statutory Construction § 48.17 at 188 (Norman Singer ed., 5th ed. 1992) (citations omitted). Here, we have the opposite case—specific words ("life insurance", etc.) following a general word ("all collateral sources") in a statutory enumeration.

167. September 11th Victim Compensation Fund, 66 Fed. Reg. at 66,279 (Statement by the Special Master). Some commentators predicted this same result. *See, e.g.*, ("Including such items [charity] in the definition of collateral sources will either reduce the interest of various persons in helping the victims and their families or will cause such persons to wait until claims have been awarded under the Victims Compensation Fund before making such gifts."), *available at* http://www.usdoj.gov/victimcompensation/W000413.html (last visited Nov. 1, 2003).

money efficiently, it made very little sense to keep them in this formula. And accordingly, it made a lot of sense simply to remove charities from our equation.[168]

B. Using Charitable Gifts to Augment Fund Awards Confers Private Benefit

In calculating a claimant's award, the Fund program treats charitable gifts the way most tort jurisdictions treat all collateral source benefits—it ignores them. Stated differently, it applies the collateral source rule to charitable gifts. (The Fund program offsets all other "collateral source compensation" against awards.) This approach to charitable gifts would seem to raise the same "excessive private benefit" problem as in tort,[169] but on a much larger scale. Compared to a similarly situated tort victim, a Fund claimant will likely receive more compensation at less cost in less time and with greater certainty.[170] (Those whom the Fund is most likely to undercompensate—survivors of the highest wage-earners—are unlikely to experience financial distress as a result.)[171] The claimants' Fund awards, in turn, are augmented by an unprecedented amount of cash assistance from charitable organizations.

To illustrate, consider a hypothetical September 11th survivor (C) who receives $250,000 from a charity formed to make cash gifts to September 11th victims in financial distress. C also collects $250,000

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168. *Justice Department News Conference With Kenneth Feinberg, Special Master For The September 11th Victim Compensation Fund*, FEDERAL NEWS SERVICE (Dec. 20, 2001) (Mr. Fienberg responding to a question on how the Fund will work with charities) (emphasis added).

169. *See supra* notes 109-110 and accompanying text.

170. *See, e.g., Meet the Press with Tim Russert* (NBC News broadcast Mar. 10, 2002) (guest: Kenneth Feinberg) *available at* http://tampabaycoalition.homestead.com/files/311TransFeinberg MeetThePress.htm (last visited Nov. 10, 2003) (Families of September 11th victims should use the Fund rather than sue because, "they will get paid, and they will get paid much quicker . . . and they will not have any uncertainty about whether they're going to get their money or not. They will not have to pay lawyers . . . to me, it's not even a close call."). (September 11th victims who use the Fund "very likely will receive relief that they would not recover if they choose to go to court as per the normal course. This is because the fund was created to compensate without requiring proof of fault or liability—which relieves the victims of the normal legal burden they will have difficulty overcoming in court with regard to this particular tragedy."). Comments of Senator Orrin G. Hatch (R-UT), *available* at http://www.usdoj.gov/victimcompensation/W0004 53.html (last visited Nov. 1, 2003).

171. 28 C.F.R. § 104.43(a) (2002) ("The Special Master's methodology . . . shall yield presumed determinations of loss of earnings or other benefits related to employment for annual incomes up to but not beyond the ninety-eigth percentile of individual income in the United States for the year 2000"); 66 Fed. Reg. 66,274, 66,278("[T]he individual circumstances of the wealthiest and highest-income claimants will often indicate that multi-million dollar awards out of the public coffers are not necessary to provide them with a strong economic foundation from which to rebuild their lives.").

in life insurance. When C later applies to the Fund, the Special Master determines that she is entitled to $1.5 million in compensation from all sources. The Fund then reduces this $1.5 million figure by the $250,000 she collected from insurance, and sends her a check for $1.25 million. By ignoring the charitable gift, the Fund program permits C to collect a total of $1.75 million in September 11th-related payments from all sources—the $1.25 million Fund award, the $250,000 in insurance, and the $250,000 charitable gift. This is almost certain to be $250,000 more than C needs to relieve any lingering financial distress.

Even so, one hesitates to apply a straightforward private benefit analysis to the Fund, for at least two reasons. The first has to do with special legislation designed to facilitate September 11th charitable activity. An estimated two-thirds of American households contributed to September 11th-related charitable funds and organizations,[172] which raised as much as $2.7 billion.[173] To enable all these dollars to pass through charitable conduits at a faster pace, Congress enacted a special law declaring that a charity's payments to September 11th victims are deemed to serve the organization's 501(c)(3)-exempt purposes.[174] This provision permits 501(c)(3) entities to disburse cash to September 11th victims without making "a specific assessment of [a recipient's] need for the payments . . . ."[175] Most relevantly, this provision means that these payments are deemed *not* to confer excessive private benefit—at least under federal tax law.[176]

Secondly, at least some September 11th donors gave with the specific and exclusive intent of assisting September 11th victims without

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172. Ctr. on Philanthropy at Ind. Univ., *AMERICA GIVES: Survey of Americans' Generosity After September 11*, *available at* http://www.philanthropy.iupui.edu/AmericaGivesReport.htm (last visited Nov. 1, 2003).

173. *See* GEN. ACCOUNTING OFFICE, SEPTEMBER 11: MORE EFFECTIVE COLLABORATION COULD ENHANCE CHARITABLE ORGANIZATIONS' CONTRIBUTIONS IN DISASTERS, *supra* note 2 at 7-8.

174. *See* Katz *supra* note 15, at 292-95; Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 104, 115 Stat 2427, 2431 (codified at 26 U.S.C. § 501(2002)) It states,

> payments made by a[501(c)(3)] organization . . . by reason of the death, injury, wounding, or illness of an individual incurred as the result of the terrorist attacks against the United States on September 11, 2001 . . . shall be treated as related to the purpose or function constituting the basis for such organization's exemption under section 501 of [the Internal Revenue] Code if such payments are made in good faith using a reasonable and objective formula which is consistently applied.

Id.

175. JOINT COMM. ON TAXATION, 107th Cong., TECHNICAL EXPLANATION OF THE "VICTIMS OF TERRORISM TAX RELIEF ACT OF 2001" at 11 (Comm. Print 2001).

176. The federal law presumably does not abrogate restrictions on excessive private benefit imposed by the state law of charitable corporations and trusts.

limit and with no strings attached.[177] Such intent can be inferred from the "collection bowl" nature of some leading September 11th charities:[178] their sole purpose was to raise and disburse as much cash as possible to the victims.[179] When donors contributed to such entities, they likely did not think about how their contributions would or should affect any subsequent formal compensation for the victims. When the Fund program requested their input,[180] however, many donors strongly opposed offsetting charitable gifts against awards.[181] Some argued that charitable offsets were unnecessary to prevent overcompensation because the victims' pain and suffering was immeasurably large.[182] Some believed that the victims should be overcompensated.[183] Others saw their donations as a way of expres-

177. *See, e.g.*, http://www.usdoj.gov/victimcompensation/W000066.html (last visited Nov. 1, 2003)("[M]y donation was a gift to firemen's widows and children, with no strings attached,"); http://www.usdoj.gov/victimcompensation/W000024.html (last visited Nov. 1, 2003) ("I gave money for the victims regardless of other monies they received. . . ."); http://www.usdoj.gov/victimcompensation/W000037.html (last visited Nov. 1, 2003) ("Whenever I, members of my family, or friends have donated to a relief entity for the victims families we have never done so with stipulations or restrictions in mind, the sole factor being that the aid should go directly to support of these individuals.").

178. *See* 15 AM. JUR. 2D *Charities* § 154 n. 53 (1988) (The nature of the donor's intention—general or specific—"sometimes has been inferred from the character of the organization to which the gift is made and its publicly avowed purposes or commonly known activities") (citations omitted).

179. The New York Firefighters 9-11 Disaster Relief Fund, for example, is essentially a collection bowl for families of the 347 firefighters and EMS personnel killed at the World Trade Center. As of June 30, 2002, it had disbursed approximately $143 million in equal shares to these families—more than $412,000 per decedent. *See* Katz, *supra* note 15, at 295. *See also* http://www.oag.state.ny.us/charities/september11_charitiable_report/sept11_report.html. (last visited Nov. 10, 2003).

180. *See supra* notes 159-160 and accompanying text.

181. 66 Fed. Reg. at 66,274, 66,291 (Dec. 21, 2001). *See, e.g., supra*, note 177 *Cf.* 66 Fed. Reg. at 66,290, 66,291; (donor favors charitable offsets because "it was not my intent that direct victims should become richer as a result of this tragedy"). Available at http://www.usdoj.gov/victimcompensation/W000052.html (last visited Nov. 1, 2003).

182. "The people who were most directly injured by the September 11th attack experienced a double injury, both the physical injury or emotional loss from the physical impact of the attack itself and the terrorizing impact of being the direct victim of an act of intense hatred. Their injury is far greater than the amount of compensation that they could obtain either in court or from this Fund, so there is no issue of unfair "enrichment" in this case." *See* http://www.usdoj.gov/victimcompensation/W000764.html (last visited Nov. 1, 2003) (comments by the New York State Trial Lawyers Association).

183. See, e.g., Diana B. Henriques & David Barstow, A Nation Challenged: The Charities; Victims' Funds May Violate U.S. Tax Law, N.Y. TIMES, Nov. 12, 2001, at B1 (The attitude of many donors to a fund for families of slain New York City police officers was that "if it makes [the recipients millionaires], then so be it"). Professor George Wright suggests that the overcompensation of September 11th victims expressed a collective sentiment "to exalt what evil has attempted to *annihilate*—not to merely restore a lost previous level of economic well-being, but to do something like *raise* the victims, or their families, as far above their prior economic status as the enemy sought to diminish them," and thereby "to symbolically provide an ultimate eco-

sing solidarity with the victims and national resolve to our adversaries; more money for victims amplified these expressions.[184] Charitable offset, by contrast, would diminish the symbolic or moral value of these gifts.[185] The leading September 11th charities acted as though all of their donors opposed offset, as evidenced by their remarkable threat to delay relief to September 11th victims unless the Special Master agreed to ignore gifts in setting awards.[186]

By legislative fiat, Congress authorized charities to confer upon September 11th victims what would ordinarily constitute excessive private benefit. Some September 11th donors believed that it was appropriate to use charitable gifts to compensate victims for their losses, including noneconomic losses, as opposed to simply relieve their distress.[187] These actual donors, who stated their desire to provide seemingly limitless benefits to September 11th victims, contradicted and ultimately drowned out charity law's hypothetical donor. These and other special circumstances surrounding September 11th temper somewhat charity law's critique of the Fund program's approach to charitable gifts. These anomalies notwithstanding, however, the basic analysis remains the same.

C. *Using Charitable Surplus for General Governmental Purposes Violates the Cy Pres Principle*

Instead of ignoring charitable gifts, the Special Master could have offset them against Fund awards. In our hypothetical, this means the

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nomic outcome 'opposite' that intended by the attackers." E-mail from Professor George Wright to author (Oct. 23, 2003) (on file with author).

184. "The public-spirited Americans across the country who gave to these families did so not only out of compassion for the people who were injured but out of anger at the perpetrators and out of a need to communicate solidarity with the victims, who were the brunt of an attack that actually was directed against all Americans." *See* http://www.usdoj.gov/victimcompensation/W000764.html (last visited Nov. 1, 2003) (comments by the New York State Trial Lawyers Association).

185. "[T]o have the government attempt to belittle the gesture of its own people even further [through charitable offsets] is as horrific as the tragedy itself." *See* http://www.usdoj.gov/victimcompensation/A000273.html (last visited Nov. 1, 2003). In other words, charitable offset is equivalent on some level to terroristic mass murder! See also "This October, I asked for all my birthday presents to be donations to a victim's fund. If these donations are deducted from the victim's families total compensation, I will feel duped, humiliated, and outraged." *See* http://www.usdoj.gov/victimcompensation/W000066.html (last visited Nov. 1, 2003).

186. *See supra* notes 162-163, 168. The charities were undoubtedly bluffing to some extent: they were apparently threatening to do something that *none* of their donors wanted—deny short-term relief to September 11th victims, including those in distress—in order to achieve something *some* of their donors wanted—use gifts to augment Fund awards, even if this enriched some victims. It would have been scandalous for the charities to do what they threatened to do, but the threat itself achieved the desired outcome.

187. *See supra* notes 83-84 and accompanying text.

Fund would subtract both insurance ($250,000) and charitable gifts ($250,000) from C's entitlement amount ($1.5 million), and send a check for $1 million. As a matter of statutory interpretation, this approach does the least violence to the language of the Act's offset requirement.[188] It would also have advanced two of the Act's goals for the Fund: (a) that September 11th victims receive the compensation to which the Special Master determines they are entitled;[189] but that (b) non-Fund sources be used to pay these amounts wherever possible.[190] How do charitable offsets look from a charity law perspective?

In one respect, charitable offsets are more acceptable in the Fund context than in tort. Under the Fund program, the Federal government rather than the tortfeasor (D) compensates the victim. This fact alters the charitableness of using charitable gifts to reduce the payor's liability.[191] In tort, offsetting charitable gifts against D's liability merely enriches D—a non-charitable purpose. In the Fund context, by contrast, the use of charitable gifts to reduce the Federal government's liability under the Fund does advance a legally charitable purpose—in this case, a "governmental" purpose.[192] Such purposes can include supplying outputs that would ordinarily be supplied at the taxpayers' expense, thereby lowering taxes and lessening the government's burdens.[193]

Reducing the government's Fund liability may be a legally charitable purpose, but it bears little connection to what most September 11th donors had in mind. Herein lies the problem. "Although the

188. *See supra* notes 156-157, 166 and accompanying text.

189. *See supra* notes 154-155 and accompanying text.

190. The Act seeks non-Fund sources to finance awards in various ways: (1) the general offset requirement under discussion (Act, *supra* note 3, § 405(b)(6)); (2) it authorizes claimants to bring civil actions to recover collateral source obligations (*id.* § 405(c)(3)(B)(i)); (3) it authorizes the Attorney General to accept donations to the Fund, directing him to use these donations "prior to using appropriated amounts" (*id.* § 406(c)(1)-(2)); and (4) it subrogates the United States to any claim paid by the Fund. *Id.* § 409.

191. Note that making government the payor also changes how the matter looks from a tort law perspective. A key rationale for the collateral source rule (including its application to charitable gifts) is efficiency: to achieve optimal deterrence, tortfeasors must bear the full costs of their risky behavior, even if this overcompensates the occasional tort victim. *See supra* note 91 and accompanying text. Yet relatively few people justified the Fund as compensation for the government's failure to prevent the September 11th attacks, or defended it as a way to spur the government to fight terrorism more vigorously. *Cf.* http://www.usdoj.gov/victimcompensation/W000024.html (last visited Nov. 1, 2003) ("[T]he government," including the FBI and CIA "let these people [September 11th victims] down by not doing their jobs correctly. Consequently, the government, and that means us the people, owe those who were affected by the tragedy compensation. Just as we require other government to compensate victims, i.e. holocaust victims, we should expect the same from ourselves").

192. *See supra* note 27.

193. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. k.

public in general may benefit from any number of charitable purposes, charitable contributions must be used for the purpose for which they were received in trust . . . ."[194] More precisely, a charitable gift must be used for its designated or specific charitable purpose *in the first instance.* If this purpose is fully accomplished without exhausting the gift, charity law directs the unused balance or "surplus" to be applied to a related charitable purpose.[195] This is the doctrine of *cy pres*, or "as nearly (as possible)."[196] In our hypothetical, C received $250,000 from a charity formed to relieve the financial distress of September 11th victims. When C collects a Fund award, the gift's specific charitable purpose has been fully accomplished—C's financial distress has been relieved—and an amount corresponding to the gift constitutues charitable surplus. From a charity law perspective, applying C's $250,000 surplus to general governmental purposes violates the *cy pres* principle by ignoring donor intent.[197]

D. Reimbursing September 11th Charities Might Recreate the Private Benefit

As in tort, a Fund award creates a surplus that corresponds to the charitable gifts the claimant received, and this surplus should neither augment the claimant's award nor reduce the payor's liability. Rather, this surplus should be applied "to a related (*cy pres*) purpose within the general scope of the donor's intent."[198] In the tort context, as suggested above, a court could accomplish this by reimbursing the charity that helped P when the lawsuit against D was pending.[199] In the Fund context, by contrast, this approach is less likely to stop excessive private benefit.

Charity law favors reimbursement insofar as the charity uses these sums in ways that advance the donors' *charitable* intentions—specific

194. Holt v. Coll. of Osteopathic Physicians & Surgeons, 394 P.2d 932, 935 (Cal. 1964) (The attorney general applied wrong standard in deciding whether to bring legal action against directors of charitable corporation; the standard is whether its assets were being used for the purposes for which they were received, not whether they were being used in a manner conducive to the public interest.).

195. *See supra* notes 66-73 and accompanying text.

196. *See supra* note 70.

197. This result, whereby charitable gifts to September 11th victims are used to fund general governmental purposes, resembles the English doctrine of *prerogative cy pres*. In certain situations, this doctrine authorizes the Crown to direct funds to some charitable purpose without regard to the donor's intentions. *See* RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. h (1957). According to the Restatement "[T]he prerogative power does not exist in the United States," and "cannot be exercised *even by the legislature* . . . ." *Id.* (emphasis added).

198. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 510 (4th ed. 1992).

199. *See supra* notes 139-140 and accompanying text.

or general, actual or imputed. We can be fairly confident of this, for example, if the organization was formed to relieve the financial distress of current and future victims of recurring disasters.[200] This entity will undoubtedly use any reimbursed sums to help other disaster victims more distressed than Fund awardees. Its donors presumably understand and intend this.[201] Conversely, charity law disfavors reimbursing organizations intent on augmenting Fund awards with charitable gifts, as was apparently the case for many leading September 11th charities.[202] In our hypothetical, consider what would happen if C had received the $250,000 from a "collection bowl" entity formed solely for September 11th victims. If the Fund program reduced C's award by $250,000 and sent this amount to the "collection bowl," the entity might have simply handed the $250,000 back to C.[203] This exercise would have been pointless (but not costless).

E. A Possible Solution: The Government Applies the Charitable Surplus to Related Charitable Purposes

We seem to have reached an impasse. Ideally, the Fund program would treat charitable gifts in a way that both avoids private benefit and respects donor intent. Yet each approach we have considered falls short on one or both accounts. The first approach, which sets C's award without regard to charitable gifts, lets C retain the gifts' surplus for her private benefit. The second approach avoids private benefit by offsetting C's gifts against her award. Although this applies the surplus to a legally charitable purpose—lessening the burdens of government—this purpose is unrelated to donor intent. In the third approach, the reimbursed charity might simply recreate the private benefit.

Modifying the second approach might defuse the dilemma. As before, the Fund program would offset C's charitable gifts against her awards. Instead of improving the government's balance sheet, however, the savings or surplus would be dedicated to another charitable purpose within the general scope of September 11th donors' intentions. This approach, of course, is not without its own difficulties.

200. *See* Katz, *supra* note 15, at 266-67 (discussing general disaster relief organizations).

201. This is not always the case. The American Red Cross was famously criticized for its initial plan to save some post-September 11th contributions for future terrorist attacks and other projects. *Id.* at 312-14. The Red Cross has taken steps to clarify this for its donors. *Id.* at 315-16.

202. *See supra* notes 163-164, 168 and accompanying text.

203. This would only be permitted in an organization making payments to September 11th victims. *See supra* notes 174-176 and accompanying text. Ordinarily, an organization created for a particular disaster would have to distribute the balance of its funds once the basic needs of all the disaster's victims are met. *See supra* note 88 and accompanying text.

How would this alternative purpose be selected, by whom, and using what criteria? The *cy pres* doctrine and case law provide some general guidance for selecting a substitute purpose but cannot resolve the matter. The process of deciding how to distribute the surplus invites rent-seeking behavior.[204] Different charities, for example, will argue that their purposes are closer to the donors' intention and expend resources to obtain some of the surplus.

I have no ready answers to these questions and concerns. I nevertheless note that Senator Richard Lugar (R-IN) has sponsored a bill "[t]o establish a comprehensive federal program to provide benefits to U.S. victims of international terrorism . . . ."[205] It calls for the creation of a "Victims of International Terrorism Benefits Fund" to finance cash payments for American nationals killed, injured, or held hostage due to acts of international terrorism.[206] The proposed payments would be the same for all victims, with no offsets for charitable gifts or insurance.[207] Had this option been available, some September 11th donors might have preferred their gifts' surplus to go to this Fund, which would help victims of future terrorist attacks, instead of providing more aid to Fund awardees.[208]

V. CONCLUSION

The controversy over the Fund's approach to charitable gifts drew attention to a long-standing but little-noticed tension between the operations of two systems for alleviating injury-related losses: charitable relief and formal compensation schemes. This tension originates in the divergent legal principles that govern the use of charitable assets as compared to those for awarding compensation. This tension is demonstrated most starkly by the collateral source rule, which both the Fund and tort law apply to charitable gifts. Under this rule, compensation is calculated without regard to the prior charitable gifts a victim (P) has received to alleviate the same losses. This approach, as we have seen, is true even if the compensation alone would make P

204. *See* THE MACMILLAN DICTIONARY OF MODERN ECONOMICS, *supra* note 37, at 372 (defining "rent seeking" as "[t]he use of real resources in an attempt to appropriate a surplus in the form of a rent").

205. S. 1275, 108th Cong. (1st Sess. 2003).

206. *Id.* §§ 6(b), 10.

207. *Id.* at § 7(a). The proposed benefits track those made by the Public Safety Officers' Benefits Program, subpart 1 of part L of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3796).

208. *See, e.g.*, http://www.usdoj.gov/victimcompensation/W000003.html (last visited Nov. 1, 2003) ("In regard to dispersing the Victims funds verses [sic] what charity gives it's important to remember that there may be more victims in the future that will have needs and not to give all the funds away too soon.")

whole.[209] A compensation scheme that applies the collateral source rule to charitable gifts facilitates the use of charitable assets for private enrichment. Tort law confounds matters further by asserting or assuming that the charitable donors intended to enrich P. It is more plausible and socially beneficial to presume, as charity law does, that charitable donors intended to help P insofar as P belonged to the donee charity's charitable class, or insofar as such help served to relieve P's distress.

The alternative to conferring excessive benefits on P is *not* to reduce the payor's liability. In the tort context, this simply shifts the private enrichment to the tortfeasor. Even when reducing the payor's liability serves a legally charitable end, as in the Fund context, this end may bear little or no relation to the charitable donors' intentions. When compensation converts charitable gifts into a surplus, this surplus should be applied to a charitable purpose related to the donors' original intentions.

Charities distributed an unprecedented $ 268,800 on average for each person killed on September 11th.[210] By applying the collateral source rule to these gifts, the Fund program facilitated the use of charitable assets for private benefit on an unprecedented scale. As a practical matter, there was little the Special Master could have done to prevent this. The Fund debate asked donors and the public to choose between two possible destinations for September 11th's charitable surplus: the victims or the federal government. Because of the uniquely charged conditions surrounding the Fund and the attacks, the most vocal donors and charities overwhelmingly chose the victims, as was probably appropriate. In retrospect, however, the better solution would have been to direct the surplus to a program such as Senator Lugar's "Victims of International Terrorism Benefits Fund." This would have curtailed the Fund's role in facilitating excessive private benefit by the most recent victims of terrorism and better served the public interest in the dreaded event of future attacks. It would also have approximated more closely the aims of September 11th donors, who wanted to help terrorist victims (as opposed to general governmental purposes), express solidarity with them, and convey national resolve.

Compared to the Special Master, civil courts have more opportunities and authority to curtail private benefit by compensated plaintiffs,

209. Even if P's compensation award (after being reduced by the amount of charitable gifts P received) does not fully compensate P's losses, it may nonetheless suffice to relieve P's financial distress. Letting P retain the gift's benefits also results in excessive private benefit.

210. *See supra* note 146.

recover charitable resources they no longer need, and reapply these resources to purposes related to their donors' intentions. The next steps are to identify if, when, and how courts should undertake to do so. When would it be worthwhile? How would this affect serial reciprocity as a social norm? Should courts simply exhort prevailing plaintiffs to "pay it forward," that is, help others as they were helped to the extent possible? In any event, courts need not do all the work on their own initiative and after the fact. A charitable organization can, if it wishes, provide its benefits as conditional gifts instead of outright gifts: a recipient would not be obliged to reimburse the charity unless he or she later receives damages for the same losses. Do many charities do this? If not, should more consider doing so? I leave these and other questions to another day.