

# Legislation Meets Tradition: Interpretations and Implications of the Volunteer Protection Act for Nonprofit Organizations as viewed through the Lens of Hermeneutics

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*Volunteers enable nonprofit organizations to reach more clients and more effectively fulfill their missions. However, the good done by these volunteers may be offset by their careless behavior. Rising fears that resulting lawsuits and monetary damages would deter potential volunteers from volunteering caused Congress to enact the Volunteer Protection Act. This research studies court decisions to ascertain whether the law fulfills its purpose and considers the implications of these interpretations for nonprofit managers. It also tests the usefulness of the hermeneutical approach to legal interpretation and to determine how the Act has changed as a result of these court decisions.*

**A**merica has a deep history of volunteerism that goes back to colonial days. Early colonists brought along the principles of Great Britain's Elizabethan Poor Law, which included local responsibility for the care of the needy. The informal arrangement of families voluntarily caring for the poor evolved into almshouses, which then developed into more organized charitable societies (Powell and Wrightson, 2006). Benjamin Franklin led this effort through his Junto Club, a gathering of friends and acquaintances to discuss current events and scholarly topics. It was the starting point for many of his community-focused organizations, such as fire brigades and lending libraries, that were designed to provide services that the government could not, much like modern nonprofit organizations (Brand, 2010). The 19<sup>th</sup> century saw an increase in charitable enterprises, as labor organizations, mutual aid societies, and settlement houses sprung up to meet the needs of an increasing population (Powell and Wrightson, 2006; Ellis and Campbell, 2005). This expansion migrated into government as modern-day presidents understood and acted on the need for volunteerism. The second half of the 20<sup>th</sup> century saw the establishment of such programs as

the Peace Corps, Volunteers in Service to America (VISTA), and the Thousand Points of Light Foundation (Light, 2002; Brudney, 1990). The 21<sup>st</sup> century saw the passage of the largest increase in spending in the history of Americorps/National Service programs in the 2009 Serve America Act (Public Law 111-13, April 21, 2009; Nesbit and Brudney, 2010).

This history creates a tradition of volunteerism that permeates the fabric of our culture. Four out of five charitable organizations utilize volunteers in some way (Urban Institute 2004). The use of volunteers is so extensive that it has been called the “third sector” of the American economy (Hartmann 1989). The Bureau of Labor Statistics reports that as of September 2013, over 62.6 million (25.4 %) Americans volunteered for some type of organization (BLS 2014). Volunteers can be found across a wide segment of society, from the informal (helping a neighbor) to the formal (working through the auspices of an organization) and in private non-profits or governmental agencies (Brudney, 1999).

But what happens when things go wrong? Accidents happen--people get hurt, or property is damaged. Sometimes the injuries result in lawsuits, which can lead to charities and/or their volunteers owing large amounts of money in damages. This, in turn, can exacerbate the organization’s financial well-being or scare off potential volunteers.

One response to this problem was the enactment of the federal Volunteer Protection Act (the Act). The Act’s stated purpose is to protect volunteers from liability due to harm caused by their actions while volunteering (42 USC §14501). This legislation was first proposed in the 1980s, when there was concern over large jury awards and public pressure on government to enact limits on them (House Report No. 105-101 (Part I); House Judiciary Committee Hearing, Feb. 27, 1996). The House Judiciary Committee in its report to the full House cited this context as evidence for the need for legislation (House Report No. 105-101 (Part I)). The Committee noted the increase in lawsuits against volunteers, the ensuing negative publicity, and the claims that these lawsuits dampened people’s willingness to volunteer their time (House Report No. 105-101 (Part I)). The Committee also cited the impact of increased insurance premiums on nonprofit organizations, often accounting for the largest item in nonprofits’ budgets (House Report No. 105-101 (Part I)).

Approval of the Act was not unanimous. From the start, there were conflicting opinions regarding its application. Critics questioned whether the Act in fact accomplished its intended purpose, since its immunity protections are limited only to volunteers (Powell & Wrightson 2006). President Clinton, who ultimately signed the bill into law, was concerned that some of its provisions would make it harder for innocent persons to receive compensation for their injuries (Martinez 2003).

When new legislation is enacted, the law is simply a set of words. It is only when they are applied to facts that laws become real. The process of applying law to facts involves statutory construction (interpretation of the words of the law) and an examination of the facts (context) (Wright & Miller 2014). With each case brought under the same law, the process is the same, but the results may differ slightly, leading to a variation of earlier interpretations and changing the state of the law ever so slightly. This process has a hermeneutical aspect to it, and, in fact, scholars have taken the hermeneutical approach to legal interpretation (Spaic 2012). Legal interpretation has been labeled the “clearest manifestation of the hermeneutical reality that allows texts to speak to the present in a meaningful way” (Mootz, 1988, p. 540).

## Research Questions

Our purposes here are two-fold. First, by analyzing how courts have construed the text of the Act, we offer a fuller understanding of the immunity actually provided by the Act. We want to know if the outcomes of these cases resulted in the Act providing the same levels of

immunity as its proponents intended. These judicial constructions of the Act have significant implications for both volunteers and nonprofit organizations. Second, we use the Act as a case study to test the usefulness of the hermeneutical perspective as applied to the law. In doing so, we seek to discover how the “tradition” of the Act has changed over the last 17 years.

To answer these questions, we conducted a search of legal databases for cases in which the Volunteer Protection Act played a part. In the 17 years since the Act’s passage, judges issued written opinions referencing the Act in 50 cases that made their way into the court system. This paper looks at how the court decisions in those cases changed the perception and meaning of the Act in relation to its original purposes and goals, and thus constitutes an example of legal hermeneutics. We first summarize the history and provisions of the Act and discuss its relationship with hermeneutics. We briefly review hermeneutics and legal theory. We then describe our data, methodology, and findings, and summarize our conclusions.

### **Volunteer Protection Act**

The core of the Act is Section Four, which provides that a volunteer will not be liable for harm caused by the volunteer if the injury occurred during the course of volunteering, if the conduct of the volunteer was not reckless or criminal, and the volunteer was not operating a motor vehicle at the time (42 USC 14503(a)). Other exceptions include hate crimes, violations of Federal or State civil rights laws, and actions taken while under the influence of alcohol or drugs (42 USC 14503(f)).

A volunteer is defined as an individual who performs a service for a nonprofit organization or government entity and does not receive compensation. It includes board members, trustees, and even officers, as long as they serve without pay (42 USC 14505(6)). The intent of the legislation is to protect volunteers of nonprofit organizations and government agencies from liabilities due to ordinary negligence when the volunteers are acting for the organization (Mowrey 2002, 2003) in order to promote the interests and sustainability of social service programs (42 USC 14501(b)).

An examination of the literature should provide an interpretive baseline, but little literature discusses how the courts have applied the Volunteer Protection Act and what that means for future litigation. Research involving coverage of the Act generally falls into two genres. One genre consists of informational pieces geared towards practitioners (see for example, Johanson (1998) and Nonprofit Risk Management Center (2001)). The other type is found in law journal articles. These may come closest to describing the hermeneutical evolution of law, as they frequently offer histories of the development and applications of a particular law. However, legal scholars have not studied how the Act has been interpreted and applied by courts in the years since its passage. There is one exception. Brudney and Groble (2014) looked at the outcomes of cases involving the Act to determine its impact on the protection of volunteers and found that it only partly fulfilled its goal.

Criticism can also be interpretive. Many opponents of the Act cite its language as the basis for their opposition. They argue that it should include stronger language defining “volunteer” and should eliminate the ability of organizations to sue volunteers (Powell and Wrightson ,2006). These discussions, and others like them, offer a sense of the expectations associated with its enactment, and provide a kind of “baseline” interpretation from which to start our hermeneutical journey.

## **Hermeneutics and Legal Theory**

Hermeneutics can be understood as a way to reach understanding through dialogue and various forms of discourse. The concept accepts that understanding comes from engaging in an ongoing conversation in which multiple perspectives reach a merging of the parts into a whole, which Hans Gadamer (2006) referred to as a fusion of horizons. The individual's perspective, or view of the world, makes up his or her horizon of understanding. The history of hermeneutics is rich but can be thought about as transitioning through several phases, beginning with Schleiermacher's analysis of text (context hermeneutics) to Dilthey's approach of suggesting a process of placing oneself in the position of another (Lawn 2006). Heidegger focused on the self as absorbed into everyday tasks (absorbed hermeneutics), but also spoke of fore-having, fore-sight, or fore conception. In other words, the individual brings past experiences into present day activity while projecting into the future when fully absorbed in a task (Lawn 2006). Gadamer's (2006) work on philosophical hermeneutics builds on these rich interpretations of hermeneutics by suggesting a promise of something shared or fused between people embedded in tradition with different horizons of understanding.

To Gadamer, reasoning is possible by tradition intertwined with prejudice, as pre-judgments to help make sense of history as applied to the present. Tradition can be thought of as the cultural concepts in which the horizons of understanding are not only contained and make sense, but are also continuously challenged and changed through experience. For example, the tradition of thought that supernatural beings are responsible for natural occurring events allow a horizon of understanding to be created around the concepts of the gods and their role in the natural world. Within this tradition, individuals are capable of rational engagement between each other in a common discourse in which an understanding of these events can fuse through hermeneutic discourse. To Gadamer, individuals are constantly seeking a better or more complete understanding of situations and experiences and do so when approaching a fusion of horizons between others through hermeneutic discourse. He is careful to note that complete fusion is nothing more than an aspiration than can never be reached and that individuals can get close to a fusion through dialogue (Lawn, 2006).

A more extensive discussion of philosophical hermeneutics is beyond the scope of this paper. However, we can apply some of these concepts to focus this discussion on how the hermeneutical point of view is reflected in the interpretation of legal principles.

There is some literature on hermeneutical legal theories. Spaic (2012) describes legal hermeneutics as the idea that a certain conception of interpretation can lead us to the determination of key concepts of law. Mootz (1988) recognizes that using the hermeneutical approach on conventional legal decision-making results in "appropriate attitudes towards the text" (p. 542) and that a theory of interpretation is needed when dealing with legal documents, whether it is a statute, constitution, or judicial opinion, in order to provide a satisfactory account of the legal system.

Even without the authority of prior scholarship on the topic, it is easy to see how a hermeneutical approach to legal study can be applied. The construction of laws consists of a whole series of hermeneutical interpretations. For example, the litigation process begins with the filing of a lawsuit, with one party alleging that he or she has claim against another. These claims arise within the context of specific fact situations and usually involve the application of a law or the interpretation of a written document, such as a contract. If the dispute is settled (at any point in the process), that is the end of the process. But if the case is not settled, the trial judge must look at the evidence and the relevant law and decide what the facts underlying the dispute are and whether the facts fall within the language of the law. In doing so, the judge must not only look to the present facts, but also previous cases with similar facts. The horizons

that are core to Gadamer’s hermeneutical reality are multi-faceted in the legal system. They include the perceptions and views of the trial judge, each of the parties, and the attorneys. During each stage, the dialogue that is central to a hermeneutical way of thinking takes place as each side tries to convince the court that their version should prevail.

The process itself involves an examination of the facts through both oral presentations and physical evidence (documents). The hermeneutical approach looks at the words in the document as they relate to the present facts. The judge then issues a decision, often in a written opinion. Hermeneutically, the decision creates a new interpretation and understanding of the law. According to Mootz (1988), the legal interpretation represents the clearest manifestation of hermeneutical reality (p.540). There is no room for the process to degenerate into pure methodology. The result must, and always will, be a decision.

Interpretation and understanding do not stop there. If one of the parties does not like the decision of the judge, that party can file an appeal. Once again, documents and oral arguments make up the process. In the appellate process, the facts of the case are presented to the court in the form of numerous texts: briefs (arguments in favor of each side), the documents presented in the trial, transcripts of testimony, and the written opinion of the trial judge, if there is one. The appellate court then issues a written opinion based on these documents. Thus, the interpretation (decision) at the trial court level has created one level of understanding, and the appellate review creates another. The interpretative process continues. Every time the law is litigated, another interpretation is produced. Rules of precedent prescribe varying levels of weight to prior judicial opinions on relevant issues, creating complex webs of prior legal construction. Even the simple application of a law to the specific facts in a particular case can be said to result in an interpretation, because those facts are part of the “context” of the case, which is important in hermeneutical interpretation (Patton, 2002). Each set of facts will be different, thus each context will be different.

## **Data and Methodology**

We began our consideration of the hermeneutical aspect of the legal interpretation of the Volunteer Protection Act by looking at the Act through the lens of the court system. The data set consists of all judicial decisions that discussed the Act that could be found between 1997 and 2013. Fifty cases were identified by searching the case law databases on Westlaw and Google Scholar using the search query “Volunteer Protection Act.” The lists overlapped to a large extent, but the Westlaw search resulted in 28 more cases than the Google Scholar search (which netted 36 opinions). Only two cases appeared in Google Scholar and not Westlaw. Altogether, there were 65 different court opinions, which included instances where a single case resulted in multiple judicial opinions. Only the opinion of the highest court in each case was considered. Cases were eliminated if the focus was the state volunteer immunity law instead of the federal Act, as those cases interpreted different texts and are outside the scope of this research.

The study looked at the process in which the courts determine what the Act means, and if it applies to the case before it. This was completed by analyzing whether the court imposes its own meaning on the Act, or if it takes the language of the law at face value when making its ruling. For purposes of this research, an “outcome” is an ultimate decision of the court for one party or another. The outcomes of the selected cases were reviewed in terms of the following variables: type of defendant, alleged level of culpability, jurisdiction, level (trial or appellate) of the court rendering the decision, and whether the court decided the case on the basis of the immunity question or decided it on other grounds.

Defendants were separated into two categories: board members and all other volunteers. Volunteers included all individuals providing some service to the organization without expectation of compensation, regardless of title, except for board members. Board members were placed in a separate category because they are responsible for the overall governance of the organization, and thus have different responsibilities from service level volunteers, who work for the organization at the operational level (Hazen and Hazen, 2012). Since some labels may not have reflected the volunteer status of a party, descriptions of the defendants in the court opinions were relied upon to assign cases to appropriate categories. For example, the president of an organization may be a paid or unpaid position. Where the court describes any position as “volunteer” or “unpaid,” the party was classified as a volunteer.

Four categories of culpability were discerned from this set of cases: negligence, statutory violations (either federal or state), intentional acts, and civil rights violations. Negligence is generally defined as the failure to act as a reasonably prudent person would act under similar conditions (Garner and Black, 2004). Cases involving statutory violations include any situation in which a law has been broken. An intentional act is one that is performed with the purpose of carrying out that act (Garner and Black, 2004). Civil rights violations include gender or racial discrimination. While these actions can be, and usually are, also violations of statutes, the Act specifically mentions them as an exception to its immunity protections. As a result, they are classified in a separate category.

**Findings**

Table 1 illustrates a general breakdown of our case set. The cases were closely divided between state (27) and federal courts (23). Twenty-one states plus the District of Columbia were represented in the set of cases. Most of the cases involved complicated fact situations, resulting in multiple claims and multiple parties on both sides. In 34 cases, at least one defendant was a non-board volunteer. A board member or members was named as defendants in 16. Interestingly, no case named both board and non-board volunteers as defendants. More than half (26) of the cases alleged at least one count of negligence. The next most frequently alleged claims were violations of statutes (13). Seven cases alleged civil rights violations, and four cases involved intentional acts.

**Table 1 Breakdown of Cases by Courts and Types of Volunteer**

	Court		Volunteer		Total Cases
	State	Federal	Service volunteers	Board members	
Negligence	18	8	24	2	26
Statutory Violations	6	6	4	8	12
Intentional Acts	3	1	3	1	4
Civil Rights	0	8	3	5	8
<b>TOTAL</b>	<b>27</b>	<b>23</b>	<b>34</b>	<b>16</b>	<b>50</b>

The cases were grouped according to four attributes. Two are procedural and two are substantive in nature.

*Court system:* Was the case brought in federal or state court?

*Source of issue:* This category looks at who raised the issue of immunity under the Act--one of the parties or the court.

*Basis for judicial determination:* The source or basis for the court's ruling. This was broken down into three subcategories: application of the Act, interpretation of the Act, and other grounds or reasons apart from the Act.

*Type of claim:* This category looks at the actions that formed the basis for the lawsuit.

## **Court System**

The number of cases brought in federal court (23) was slightly less than those brought in state courts (27). The types of claims fell into predictable patterns. The civil rights cases were brought under federal law in federal court. Negligence claims and those based on intentional acts were more likely to be filed in state courts (18) than federal courts (8). Cases based on violations of non-civil rights statutes were split almost equally between state and federal courts (6 and 7 respectively). This indicates that immunity offered by the Act is not restricted to a narrow category of cases, but is being used in diverse situations. As a result, volunteers may find themselves subject to lawsuits based on activities not generally thought of as risky.

## **Source of Issue**

In all but two cases, the issue of whether the defendant was entitled to immunity under the Volunteer Protection Act was raised by the defense, as one might expect. In the remaining two cases, the court raised the issue of immunity under the Act on its own accord, but did not issue a decision on that point (*City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 161 P.3d 1095, 62 Cal.Rptr.3d 527 (2007); *Gelinas v. Boisselle*, 2011 WL 5041497 (D.Mass. October 17, 2011)).

## **Basis of Judicial Determination**

In order to better understand the actions of the court when using the Act as the basis of its holding, the outcomes were broken down into three categories: (1) cases in which the court applied the language of the Act with minimal interpretative analysis when deciding whether immunity should be granted under the Act (application); (2) cases in which the court took a more in-depth look at the meaning of the statutory language before deciding whether to grant the Act's immunity (interpretative); and (3) cases in which the court based its decision on grounds entirely outside the provisions of the Act (decided on other grounds). Table 2 provides a breakdown of the cases according to the basis for disposition of the cases. The following paragraphs discuss these results.

## **Application**

In 19 cases, the court addresses the question of whether the Act applies, but does not inquire as to the meaning of the specific language in the statute. The court generally recited the conditions required for immunity and described how the defendants met or did not meet those conditions. In these cases, more than half (11) resulted in the granting of immunity.

**Table 2 Basis for Disposition of Case**

Application	19
Immunity granted	11
Immunity denied	8
Interpretative	8
Immunity granted	2
Immunity denied	1
Alternate statute	5
Decided on other grounds	23
Alternate statute	13
Disputed facts	4
No factual liability	6
Total	50

**Interpretative**

Differences in interpretation of the Act appear in several cases. The issue of whether the Act excluded immunity from acts that violated a statute was raised in three cases, resulting in three different interpretations. One stated that the Act did not apply to federal laws (*American Produce LLC v. Harvest Sharing LLC*, 2013 WL 1164403 (D.Colo. March 20, 2013)), meaning that a volunteer was immune from liability if the volunteer’s action constituted a violation of a state law, but not if the volunteer violated a federal law. Another held that the Act was intended to apply not only to state laws but to federal laws as well (*Armendarez v. Glendale Youth Center, Inc.*, 265 F.Supp.2d 1136 (D.Ariz. 2003)). A third case held the Act did not apply to violations of either state or federal laws (*Davis v. American Society of Civil Engineers*, 330 F.Supp.2d 647 (E.D.Va. 2004)). The *Armendarez* court also pointed out that the Act’s inclusion of specific exemptions from immunity implied that there were no other exemptions (*Armendarez*). If this tendency is taken to the extreme and all courts put their own spin on the same law, the effect would be differing levels of liability (or no liability at all) for actions based on the same facts, depending on where the lawsuit was filed. This result departs from a basic reason behind the Act: to provide a consistent standard across jurisdictions. Conflicting holdings from the courts create inconsistencies that a multi-state organization may face in volunteer management.

Some courts took an interpretive approach when looking at the key terms defined in the Act (see 42 USC 14505(6)). One case separated the concept of volunteer as used in the Act from how that term was applied in other circumstances, such as an insurance policy (*Atlanta Cas. Ins. Co., Inc. v. River Hills Antique Tractor Club, Inc.*, 2012 WL 40467 (E.D.Mo. January 09, 2012)). In defining “applicable organization,” the Act includes organizations organized as a tax-exempt entity pursuant to the tax code or any organization operated for charitable, civic, educational, religious, or other social purpose (42 USC 14505(4)). Based on this definition, the court in *Elliot vs. LaQuinta* (*Elliot v. La Quinta Corporation*, 2007 WL 757891 (N.D.Miss. 2007)) reasoned that nothing in the Act required a 501(c)(3) status. As a result, a group informally organized for the sole purpose of attending and competing in an athletic competition was an organization for purposes of the Act. The



result was that a chaperone was immune from liability resulting from the drowning death of a team member. Under this ruling, volunteers working with groups that are not formally organized may be entitled to immunity under the Volunteer Protection Act and, as a result, their organizations may end up as the sole defendant. The fact that these organizations are more informal in nature may indicate a less economically stable structure. Exposure to liability for their volunteers' acts (which the Act does not preclude) may threaten their economic well-being.

These nuanced differences in interpretation could have far-reaching effects in how volunteers and nonprofit managers utilize the Act in their management policies and practices. Organizations whose activities cross jurisdictions may need to create a tiered set of practices depending on how different courts treat the issue.

### **Decided on Other Grounds**

Lawsuits often arise out of complex fact situations, resulting in multiple claims based on a many different legal theories or statutes. In many cases, it is not necessary for the court to decide every issue to dispose of the case. In our set of cases, more than half (28) of the decisions were based on statutes or legal theories other than the Volunteer Protection Act (see Table 2). Alternate grounds include the existence of another type of immunity (qualified immunity for government officials: *Gelinas* (cited earlier); *Collier v. Clayton County Community Service Bd.*, 236 F.Supp.2d 1345 (N.D.Ga. 2002)), deciding that a statute other than the Act is a more appropriate basis for a ruling (*Grant v. Phillips*, 2013 WL 4585661(Cal App. 1st Dist., August 28, 2013); *Johnson v. Black Equity Alliance, Inc.*, 26 Misc.3d 1219(A), 907 N.Y.S.2d 100 (2010); *Lomando v. US*, 667 F.3d 363, 2011 WL 6849063 (3d Cir. 2011)), and other defenses raised by the defendant (*Spiteri v. Bisson*, 2013 NY Slip Op 31023(U) (N.Y. Sup. Ct. April 29, 2013)). In the civil rights cases where the Act was brought up either by a party or by the court itself, all but one case failed to address the issue of immunity under the Act, perhaps because civil rights violations are not immunized under the Act.

### **Type of Claim**

An analysis of the results by type of claim was interesting because the Act has some specific exclusions, including for intentional acts, violations of civil rights laws, and alcohol-related misdeeds (42 USC §14503(a)(3),(4) and (d)). Table 3 shows the breakdown of case results by type of claim. In nineteen cases (19), the court ruled directly on the issue of immunity under the Volunteer Protection Act as part of its decision. Negligence cases formed the largest segment of this group.

Cases in which defendants were held to be volunteers, and thus covered under the Act, involved negligence claims, with four exceptions. Two cases involved statutory violations, and one case each involved civil rights and intentional acts. The last two are notable because they are expressly excluded from the Act's immunity.

The case involving intentional acts was a complex litigation involving six individual claims arising out of the unauthorized clear cutting of forested land owned by a land trust by owners of the neighboring airport. In a subsequent counterclaim by the airport against the land trust for intentional interference with business relations, individual members of the land trust asserted immunity under the Volunteer Protections Act. In a footnote to its holding in

**Table 3 Disposition of Cases Based on Type of Claims**

Disposition of Case	Applicability of VPA		
	Immunity Granted	Immunity Denied	Other Grounds
Types of Claims:			
Negligence	9	5	13
Statutory Violations	2	2	7
Intentional Acts	1	2	1
Civil Rights	1	0	7
TOTAL	13	9	28

favor of the land trust (and the other plaintiffs), the court noted that members of the land trust raised the issue of immunity under the Volunteer Protection Act; that they were volunteers within the definition of the Volunteer Protection Act, and, therefore, were entitled to immunity (*Ventres v. Goodspeed Airport, LLC*, 2008 WL 2426790 (Conn.Super. May 27, 2008)). This seems to indicate that allegations of intentional acts may not on their face eliminate the immunity granted by the Act.

The courts in nine cases ruled that the defendants were not immune under the Act. Instances include where evidence indicated that the defendant acted outside the scope of his or her duties (*Owen*); where the defendant received compensation (*Shanta v. United States*, No. Civ 03-0537 RB/RHS (D. New Mexico January 29, 2004)), where the acts were shown to be intentional (*Momans v. St. John's NW Military Academy*, 2000 WL 33976543 (N.D. Ill. April 20, 2000); *Maisano v. Congregation Or Shalom*, 2009 WL 4852207 (Conn.Super. November 19, 2009)), where there was contradictory evidence that the defendants' acts fell within the scope of the Act (*Levy v. Clayton Downey Worthington*, 2011 WL 5240442 (D.Colo. October 31, 2011)), and where it was shown that the lawsuit itself fell outside the scope of the Act, as it was a derivative action brought on behalf of the nonprofit organization against the volunteer board members (*Memphis Health Center, Inc. v. Grant*, 2006 WL 2088407 (Tenn.Ct.App. July, 28, 2006)), lawsuits specifically excluded from the Act's immunity.

Despite the fact that civil rights violations are expressly excluded from immunity protection under the Act, eight such cases were found in our dataset. In one case, the court held that the individual defendant, the president of a prison accreditation organization, was entitled to immunity under the Act in an action alleging bad prison conditions as a violations of prisoners' civil rights (*Nunez v. Duncan*, 2004 WL 1274402 (D.Or. June 09, 2004)).

The other civil rights violations cases were disposed without the court holding on the availability of immunity under the Act. One case involved another lawsuit against the prison accreditation organization, alleging violations of the Americans with Disabilities Act (ADA) (*Morgan v. Mississippi*, 2008 WL 449861 (S.D.Miss. February 14, 2008)). The court noted the claim of Volunteer Protection Act immunity, but decided the case on the "public accommodation" requirement of the ADA. In other cases, the court based its rulings on other reasoning, for example, the defendant having immunity under another statute (*Collier v.*

Clayton County Community Service Bd., 236 F.Supp.2d 1345 (N.D.Ga. 2002)), and did not address the issue of whether immunity could be had under the Volunteer Protection Act.

## Analysis

Our first research question asks whether these court decisions changed in any way the immunity for volunteers intended by its drafters and proponents. The Act provides for immunity for any unintentional actions occurring during the course of one's volunteer activities. Before this law was enacted, there was a possibility that the volunteer would be held accountable and owe monetary damages. The Act changed that principle. Now, if the court finds that the injuring party fits within the Act's definition of volunteer, immunity can be granted, and no liability on the part of the volunteer would ensue, unless the case fell into one of the Act's exclusions. The court decisions we examined were consistent with that reasoning. Those cases where the volunteer was denied immunity involved fact situations which fell within the exceptions stated in the Act itself, disputed fact situations, or facts taking the lawsuit outside the coverage of the Act. These specific outcomes did little to alter the availability of immunity to volunteers originally conferred by the Act.

There may be some negative implications for organizations. One criticism is that the Act imposes ultimate responsibility for volunteers' misconduct on the organization, although it does allow the organization to sue the volunteer (42 USC §14503(b) and (c)). Proponents of the Act took the position that increasing lawsuits were scaring away volunteers, and that this legislation would alleviate those fears and encourage volunteerism (House Judiciary Hearing, 1996). This implies an intent to protect the tradition of American volunteerism by the law's proponents.

Using the Act as a case study of the hermeneutical aspect of law, we asked if the outcomes of the court decisions which involved the Act changed the Act's original tradition or horizon of understanding. The debate during the legislative hearing process created the Act's tradition, and it included the intent to protect. Both criticism and advocacy are linked to and become part of its tradition. Hermeneutics informs us that the meaning or interpretation of the Act should have changed as a result of court decisions over the 17 years since its enactment. The question is, has it? There are two ways to gauge whether this has occurred. One is by looking at the cases in terms of the four attributes we defined above: whether the case was brought in federal or state court, who raised the issue of immunity, the basis for the court's decision, and the type of claim filed. The second is to look at the overall impact of these cases.

An examination of the two procedural attributes, whether a case was filed in federal or state court and who raised the applicability of the Volunteer Protection Act, shows that there was no shift in how the Act was being interpreted. We have observed that cases were filed in the court system where one would expect them. For example, violations of state statutes were filed in state courts, civil rights cases were filed in federal courts. Cases alleging negligence, which is generally subject to state jurisdiction, were filed in federal only if they also raised a federal issue (see, for example, *Elliot v. LaQuinta Corporation*, cited earlier). In all but two cases, the issue was raised by the volunteer/defendant. This too was expected. Procedural rules govern these aspects of a case, and there is nothing to indicate any shift away from that pattern by the terms of the Act or its interpretation.

The substantive attributes, that is, the types of claims and the basis for court decisions, provide some sense of change in interpretation of the Act. In 19 cases, the court undertook to apply the provisions of the Act at face value, simply by listing the Act's qualifications to be considered a volunteer, and determining if the defendant met those terms.

There was very little, if any, discussion of what those terms meant. These cases alone make it difficult to see any shift in the meaning of the Act. But a shift begins to take place in the cases we categorized as interpretative. In those instances, there were either conflicting interpretations among two or more court cases, or the court actively engaged in construing the language of the Act. Conflicts arose in the context of whether the Act excludes violations of federal law (American Produce, LLC; Amerandez; and Davis; all cited earlier); whether the Act could apply in a case filed on behalf of an organization (Melucci v. Sackman, 37 Misc.3d 1212(A), 961 N.Y.S.2d 359 (2012)); and when considering the definition of an organization (Elliott, cited earlier) and of a volunteer (Atlanta Casualty Ins. Co., cited earlier). These conflicting interpretations create an uncertain landscape, especially for large, multi-state organizations. Local nonprofit organizations adhere to their own state’s court rulings and may be unaffected by what happens across the state line. But larger institutions will find themselves having to consider more than one interpretation of volunteer immunity, which contradicts one of the purposes of the Volunteer Protection Act. These findings indicate little, if any, shift in the understanding of the Volunteer Protection Act. A majority of the cases didn’t consider the implications or application of the Act and used other statutes or legal theories to decide the case. Approximately half of the cases that did consider the terms of the Act did so by determining eligibility for immunity on the basis of the facts with minimal effort to interpret the statutory language. And the few that did go deeper often ended up limiting the application of the Act to its terms.

In more than half the cases, the court discussed the Volunteer Protection Act, but based its decision on grounds other than the Act. Why would the court choose to resolve cases on bases without considering how the Act applied? Judges bring their own horizons to each case; each law has its own horizon (Mootz 1988). Judges often resolve cases by looking to the legislative history or past decisions; when they do so, a “fusion of horizons” occurs – the legal precedents becoming fused with the present case (Mootz 1988). It may be that interpreting the Act would be more difficult than resolving some other dispositive point of law. Perhaps in those cases it was easier to reconcile the horizon of the case with another law. There is some evidence of this in the ambiguity over whether the Act grants immunities to volunteers who violate other statutes. Courts reached different decisions on this question. Two cases specifically held that the Act did not apply (Neighborhood Assistance Corporation of America v. First One Lending Corporation (2012 WL 1698368 (C.D.Cal. May 15, 2012)); Hall v. Bean (2013 WL 3086820 (D38Tex.App.-Hous. (14 Dist.). June 20, 2013)), and one case which held that it did (Ventres, cited earlier).

Our findings raise the additional question of why the Volunteer Protection Act has not been utilized more frequently. In the almost two decades since the Act took effect, less than 50 cases have judicial opinions noting its provisions. Of those, only 20 actually applied the Act to the facts. The courts in the remaining cases chose to base their rulings on other bases. Why have there been so few decisions?

One possibility is that the Act has not been raised simply because volunteers are at low risk of suit. Researchers have questioned whether volunteers have actually been the target of lawsuits as frequently as the proponents of this legislation proclaimed (Horwitz and Mead, 2009). Given that scenario, perhaps the Act’s enactment was more symbolic than substantive. It may be a “legal placebo,” a measure to offer the appearance of a solution where the only problem is perception (Brandt, 1983).

Or perhaps volunteers are being sued, but they are not raising the Act’s defense because they do not know about it or believe that it does not apply to them. Our data do not include cases where volunteers are sued but choose not to raise the Act’s defense. However,

we think it is unlikely that there are many cases that fit this situation, for several reasons. First, the Act was reasonably well publicized and is communicated to nonprofit organizations through numerous practitioner pieces and blog posts (see, for example, Johansen 1998). Second, attorneys who represent the volunteers have a duty to find and advance reasonable arguments on their clients' behalf and have every incentive to find and assert volunteer immunity. A third explanation is that volunteers are being sued, but are invoking immunity under state volunteer immunity laws instead of the federal Act. This, too, is unlikely, as we think most volunteers would choose the safer alternative and assert the protections of both state and federal volunteer protection laws, as there is little added cost to asserting both. In fact, this occurred in several cases. Finally, perhaps the Act is deterring lawsuits from being brought against volunteers in the first place, or, if a lawsuit is brought, it is withdrawn early in the process before the expense of having to litigate to judicial resolution is incurred by the volunteer. If true, then the Act would be fulfilling its stated purpose.

This final explanation would mean that the Act is primarily being interpreted outside of the courts, instead of within, contrary to the traditional legal perspective that law is interpreted by the courts. There are other instances where parties outside of the courts are the primary arbiters of law. For example, separation of power disputes between branches of government are often not susceptible to judicial resolution due to jurisdictional and political issues, and instead are resolved through repeated interactions between the branches and precedent set by behavior over time. An illustration of this is the nature of the Senate's "advise and consent" role and the debate over the extent to which the Senate should confirm the President's well-qualified nominees. However, there are no jurisdictional problems with the Act being brought to the courts, making it curious that it would primarily be interpreted by institutions outside of the courts.

It is noteworthy that the Act was considered almost equally in both state and federal courts. These courts have different rules governing their procedures and different institutional characteristics. For example, federal judges are appointed for life, while state judges are often elected. Interestingly, we found that federal and state decisions did not differ significantly from one another.

## Conclusion

The expectations created by the proponents of the Act during the legislative process created its own horizon of understanding. The clash between this horizon and the horizon of the present in each case created another, new, tradition or horizon. Our examination of this set of cases showed a complex pattern of interpretations that runs the spectrum from a straightforward application of the law to the facts, to an examination of the language of the statute, and, finally, to a decision not to rule on the applicability of the law at all.

Courts that actively considered the question of whether to apply the immunity protections of the Act generally did so by examining the meaning of the language in the statute. Either the defendant met the criteria of volunteer according to the definition set forth in the Act or he did not. The majority of the cases were decided without recourse to the Act. Decisions regarding the need for a structured organization or the diverse opinions on the applicability of the Act to violations of state and/or federal statutes have changed the meaning of the Act somewhat. But most cases did not result in any significant change in meaning. As a result, the overall impact of these cases is that the Act's horizon of understanding has not changed much since its enactment.

There is another hermeneutical aspect that resides outside the courtroom. The collective findings in these cases create yet another horizon when read by those outside the

judicial system. Volunteers and nonprofit managers may take these findings and interpret them to fit their own situations. For volunteers, their understanding of what the cases say might go so far as to impact the basic decision of whether to volunteer at all. Nonprofit managers may use their interpretation as a guide to formulate volunteer policies and practices. If courts are finding resolution on the merits to be easy but deciding immunity difficult, then the proponents of the Act were correct that some volunteers are being subject to meritless litigation, but they were incorrect in their view that the Act would be an effective shield (since the court is resolving the case in volunteers' favor for reasons other than the Act).

These cases are decided by different judges reviewing different and unique situations, each with their personal world view, or horizon. In addition, hermeneutics holds that the text itself, in this case, the Act, has its own tradition. Hermeneutical change results from the confrontation between a person's traditional horizon and the hermeneutical demands of the present. Mootz (1988) notes that legal change occurs when the meaning of the text no longer coincides with past interpretations and thus opens up new possibilities of interpretation. If this conflict is significant enough, the interpreter's sense of tradition will also change.

The tradition of volunteering has been around for a very long time. The Volunteer Protection Act and discourse surrounding the meaning of this legislation has been in existence for only 17 years. An argument can be made that the tradition of volunteering remains unchanged even in the midst of an evolving understanding regarding the liability of volunteers. One read into our findings is that the Volunteer Protection Act has done what was intended to help preserve our Nation's rich tradition of volunteerism. At the same time, this project finds that the horizon of understanding of volunteer protection within this tradition is continuously at play, and that the Volunteer Protection Act appears to be a part of the discourse, but not to the degree that we might have expected within the courts. This project falls short of providing a substantive explanation for this finding, other than to suggest that the Act provides a context that has not changed much nor produced a robust legal hermeneutical interpretation of the Act within the courts. Perhaps this is because the American tradition of volunteering is substantially anchored beyond that of the Volunteer Protection Act, suggesting that even when "...the fusion of the horizons of interpretation changes constantly, just as our visual horizon also varies with every step that we take" (Gadamer 2006, p. 474), the interconnection with past meanings of the volunteering tradition, that extend beyond liability and legal interpretation, remains essential and ubiquitous.

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### **Appendix: Court Cases Analyzed**

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- Armendarez v. Glendale Youth Center, Inc., 265 F.Supp.2d 1136 (D.Ariz. 2003).
- Atlanta Cas. Ins. Co., Inc. v. River Hills Antique Tractor Club, Inc., 2012 WL 40467 (E.D.Mo. January 09, 2012).
- Ayala v. Birecki, 2003 WL 23147174 (Mass.Super. December 22, 2003).
- Bisby v. Garza, 2008 WL 2403714 (S.D.Tex. June 10, 2008).
- Campbell v. Kessler, 848 So.2d 369 (Fla.App. 2003)
- Caron v. Waterford Sports Center, Inc., 2002 WL 31898081 (Conn.Super. December 13, 2002).
- Churchill Downs v. Thoroughbred Horsemen's Group, 605 F.Supp.2d 870 (W.D.Ky. 2009).
- City of Postville v. Upper Explorerland Regional Planning Commission, 834 N.W.2d 1 (Iowa. 2013).
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- Collier v. Clayton County Community Service Bd., 236 F.Supp.2d 1345 (N.D.Ga. 2002).
- Curley v. Philo and Bd. of Ed. Of the South Glens Falls School District, 2009 WL 2152323 (N.D.N.Y. July 14, 2009).
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- Doe v. Corporation of President of Church Of Jesus Christ of Latter Day Saints, 81 Mass.App.Ct. 1126, 964 N.E.2d 370 (2012).
- Elliot v. La Quinta Corporation, 2007 WL 757891 (N.D.Miss. 2007).
- Entler v. Koch, 85 A.D.3d 1098, 928 N.Y.S.2d 297 (2011).
- Estate of Brennan v. Church of Scientology Flag Service Organization, Inc., 832 F.Supp.2d 1370 (2011).
- Foss v. Nadeau, 2003 WL 22853695 (Conn.Super. November 14, 2003).
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- Gelinas v. Boisselle, 2011 WL 5041497 (D.Mass. October 17, 2011).
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- Grant v. Phillips, 2013 WL 4585661 (Cal App. 1st Dist., August 28, 2013).
- Hall v. Bean, 2013 WL 3086820 (D38Tex.App.-Hous. (14 Dist. June 20, 2013).
- Howeth Investments, Inc. v. City of Hedwig Vill., 259 S.W.3d 877 (Tex.App. 2008).
- Howeth Investments, Inc. v. White, 227 S.W.3d 205 (Tex.App. 2007).
- Jean-Charles v. Perlitz, 2013 WL 1335657 (D.Conn. March 31, 2013).
- Johnson v. Black Equity Alliance, Inc., 26 Misc.3d 1219(A), 907 N.Y.S.2d 100 (2010).
- Kashani v. Rochman, 2013 WL 635962 (Cal.App. 2 Dist. February 21, 2013).
- Koenig v. USA Hockey, Inc., 2010 WL 4642923 (S.D.Ohio. November 09, 2010).
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- Lomando v. US, 667 F.3d 363, 2011 WL 6849063 (3d Cir. 2011).
- Maisano v. Congregation Or Shalom, 2009 WL 4852207 (Conn.Super. November 19, 2009).
- McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876).
- McGeorge v. Town of Hamden, 2012 WL 1434904 (Conn.Super. March 29, 2012).
- Melucci v. Sackman, 37 Misc.3d 1212(A), 961 N.Y.S.2d 359 (2012).
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