

VOLITION AND VOLTAIRE: A RESPONSE TO PROFESSOR BAGENSTOS

By Tom Lininger*

My hat is off to Professor Sam Bagenstos. Not only has he made a number of incisive points in his reply to my essay, but his record as a civil rights attorney provides a superlative model of public-spirited lawyering. Unfortunately, most attorneys lack Professor Bagenstos's motivation to advocate for the public good. Given this reluctance, a system that relies primarily on lawyers' voluntary choices will continue to underserve the legal needs of the poor. The status quo simply isn't working.

I'm no expert on civil rights law. In fact, I only handled one civil rights suit in my career. As a lawyer for Skadden, Arps in the 1990s, I spent hundreds of hours one year handling a civil rights lawsuit against prison officials in Northern California. I worked on a pro bono basis in this case. In the following comments, I draw from my own brief experience as a civil rights advocate, which I concede is nowhere near as extensive as Professor Bagenstos's experience.

Civil rights suits are complicated. There is virtually no chance that a lawyer can conclude his or her representation of a civil rights claimant within 40 or 50 hours in one year.¹ For that reason, I believe that a mandatory pro bono regime would not drive lawyers to do more civil rights work. The new pro bono practitioners—i.e., those who are disinclined to perform pro bono work in the absence of a mandatory rule—would prefer to fulfill their pro bono duties with a minimal commitment. These lawyers would naturally favor simple, discrete pro bono matters such as eviction defense, claims for government benefits, applications for restraining orders to protect battered women, and family law matters.²

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¹ Rule 6.1 of the ABA's Model Rules of Professional Conduct presently urges lawyers to perform 50 hours of pro bono service per year. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006) (link). My proposal for mandatory pro bono service would require a total of 120 hours over a three-year period (an average of 40 hours per year). Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers' Monopoly*, 101 NW. U. L. REV. (forthcoming 2007), 101 NW. U. L. REV. COLLOQUY 155, 172–73 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/12/> (citations *infra* refer to the *Colloquy*) (link).

² See Ronald J. Taback, *How Firms Can Act to Increase the Pro Bono Representation of the Poor*, 1989 ANN. SURV. AM. L. 87, 94 (discussing strategies for increasing pro bono work by attorneys at pri-

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Firms would probably attempt to steer attorneys to simple cases as a means of meeting the new pro bono requirement. A complicated, long-term case such as a civil rights suit would tie up attorneys and make them unavailable for the firm's work on behalf of paying clients. Firms might worry about the political implications of civil rights suits, which could alienate certain prospective clients. Further, firms might prefer matters that are more likely to give young associates quick experience with advocacy before courts or agencies. Thus, firms would share the motivation of individual attorneys to discharge pro bono obligations by taking on fairly straightforward matters that could be completed in a short amount of time.³

If the new pro bono requirement did not increase the number of pro bono attorneys handling civil rights suits, then the requirement would not cause the harm that Professor Bagenstos foretells: a decrease in attorney's fees for private attorneys general in civil rights cases.⁴ Professor Bagenstos himself seems to think that this deleterious effect will only result to the extent that new pro bono attorneys enter the field of civil rights law.

It is important to emphasize that the Supreme Court has already significantly constrained the ability of plaintiffs' lawyers to recover fees for successful civil rights suits. Under the rule of *Evans v. Jeff D.*,⁵ a defendant can lure a plaintiff into settlement by offering the full relief sought in the lawsuit, minus attorney's fees; the plaintiff's lawyer has an ethical duty to report such an offer to the client and to accept the client's decision whether to take the offer. Similarly, when defendants make eleventh-hour concessions to change their practices (avoiding the necessity for further litigation), fee-shifting is difficult even though the litigation may very well have provided the impetus for the reform.⁶ I believe, and I expect Professor Bagenstos would agree, that these misguided rulings skew the financial incentives for civil rights litigation. When my proposals are considered against the backdrop of recent Supreme Court jurisprudence, it is hard to say that man-

vate firms, and suggesting that pro bono coordinators should present attorneys with opportunities to "take on small projects").

³ I do not deny that some firms find civil rights work attractive as a pro bono opportunity. I expect that firms with such an orientation are probably already involved in pro bono work, so my proposal should not be faulted for adding these firms to the mix of pro bono providers.

⁴ Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. (forthcoming 2007), 101 NW. U. L. REV. COLLOQUY 182, 187-89 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/13/> (citations *infra* refer to the *Colloquy*) (link).

⁵ 475 U.S. 717, 754 (1986) (Brennan, J., dissenting) (link) ("It seems obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases.").

⁶ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05 (2001) (link) (holding that if a defendant voluntarily grants relief before entry of judgment, the plaintiff is not entitled to attorney's fees under fee-shifting statutes, even though the lawsuit may have provided the catalyst for the reform).

datory pro bono would spoil an otherwise enticing set of incentives for civil rights litigation.

I completely agree with Professor Bagenstos that a preferable approach would be to provide subsidies for lawyers who represent the indigent, and to relax UPL statutes⁷ in order to allow a larger number of potential practitioners to handle such cases. In fact, I supported both proposals in my essay.⁸ I do think, however, that these two proposals lie farther down the spectrum of political viability than a strict pro bono requirement. That's why I advocate mandatory pro bono work in addition to the other initiatives.

Ideally, lawyers would elect to do pro bono work without more prodding. But in formulating policy, we cannot assume that the bar will suddenly develop the sense of altruism that it has heretofore lacked. We should not daydream about a perfect world in which lawyers would shoulder greater pro bono responsibilities voluntarily. Under the present incentive structure, an insufficient number of lawyers are choosing to work for the poor. We should accept the realities of human nature in order to come up with solutions that actually improve legal services to the indigent, even if compulsion is not ideal. Hoping for a surge in voluntary pro bono work (which I'll admit would be the perfect solution) could delay the improvement that a mandatory regime could bring. As Voltaire once cautioned, "The perfect is the enemy of the good."⁹

Frankly, I'm most concerned about unmet legal needs in simple cases.¹⁰ Battered women suffer continuing violence because no advocates are available to assist them with restraining orders. Other poor people endure significant harm because they lack legal assistance in connection with such basic needs as housing and medical care. Lawyers could make a significant difference in ameliorating these problems if they volunteered the 50 hours per year that they're supposed to give under Model Rule 6.1. But they don't. So exhortation should give way to mandate.

⁷ These statutes prohibit the unauthorized practice of law. See Lininger, *supra* note 1, at 156.

⁸ See *id.* at 180–81.

⁹ "Le mieux est ennemi du bien." Voltaire, *La Begueule*, in 3 RECUEIL DES MEILLEURS CONTES EN VERS 77, 77 (1778).

¹⁰ My focus on basic legal aid cases would not necessarily undermine civil rights enforcement. Remember that as more pro bono lawyers rub elbows with poor people, more civil rights violations will come to light. Pro bono lawyers might advise prospective claimants to consult with the civil rights specialists discussed in Professor Bagenstos's essay.