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Colloquy Essays

MANDATORY PRO BONO AND PRIVATE ATTORNEYS GENERAL[†]

*Samuel R. Bagenstos**

Not to put too fine a point on it: Professor Lininger¹ thinks Professor Rhode² wimps out. Her “heart is in the right place,” but she too readily draws back from proposing mandatory pro bono service.³ In this brief response, I want to up the ante. If Professor Lininger thinks Professor Rhode is a wimp, I think they’re *both* hopeless goo-gos.⁴ We currently have a system of civil rights enforcement that harnesses the profit motive of plaintiffs’ attorneys to encourage the prosecution of violations of civil rights laws. That system may seem crass and disreputable to those who believe that lawyers should bring civil rights actions out of the goodness of their hearts (perhaps while singing “Kumbaya” or, for those of a more lefty persuasion, “If I Had a Hammer”). But it’s the best system of civil rights enforcement we’ve found.

Unfortunately—and this is a point to which neither Professor Lininger nor Professor Rhode give any real attention—a system of mandatory pro bono may undermine that system. It may do so, moreover, without providing significant countervailing benefits for civil rights enforcement. The implications of this analysis extend beyond the narrow context of civil rights litigation. The lessons one can draw from that context suggest that pro bono—mandatory or otherwise—ought not to be the major focus of any effort to improve legal services for disadvantaged people.

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* Professor of Law, Washington University School of Law. Thanks to the Northwestern University Law Review for inviting me to submit this essay, and to my colleagues at Washington University with whom I’ve had so many productive conversations about these issues, especially Susan Appleton, Rebecca Hollander-Blumoff, Pauline Kim, Kent Syverud, and (as always) Margo Schlanger.

¹ Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers’ Monopoly*, 101 NW. U. L. REV. 1343 (2007).

² DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2005).

³ Lininger, *supra* note 1, at 1360–61.

⁴ A reader has suggested that I define “goo-goo.” I trust the term needs no explanation for readers of a law journal based in Chicago. For those who need further enlightenment, see the collected columns of Mike Royko.

I. THE PRIVATE ATTORNEY GENERAL SYSTEM AND CIVIL RIGHTS ENFORCEMENT

Civil rights laws don't enforce themselves.⁵ Although some discriminatory acts occur because of the simple inertia of longstanding and unquestioned practices, most people who discriminate do so either because they want to, because of cognitive bias, or because it is rational for them to do so.⁶ Without a meaningful threat of enforcement, those discriminators are unlikely to comply with a law that bans discrimination. The threat of enforcement encourages individuals to cease discriminating and organizations to root out and counteract the (perhaps unconscious) discrimination that occurs within their ranks.

But finding an effective means of enforcement is difficult. Individuals whose rights are violated are unlikely to reliably carry the enforcement load on their own. For one thing, enforcement of civil rights laws is in significant respects a public good. Because civil rights laws tend to protect against class-based discrimination, a single civil rights claimant necessarily vindicates not just her own interests but also the interests of others in her class.⁷ Any given successful civil rights claimant cannot appropriate all of the benefits of her success, so she will have an insufficient incentive to pursue the level of enforcement that most benefits her class.

Moreover, civil rights enforcement is expensive, time consuming, and technical.⁸ Even in cases that are relatively easy on the merits, civil rights claimants often must present expert testimony, which they and their lawyers may have difficulty locating and paying for.⁹ And—whether because of statutory limitations or because of the Eleventh Amendment—many civil rights laws authorize only injunctive relief and thereby make it impossible for civil rights claimants to entice attorneys with the prospect of a contingent fee.

One might think that public interest groups, or private attorneys working pro bono, take up the slack for the profit-making plaintiff's bar. But they do not. “[M]ost civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity,” but by individual

⁵ My discussion focuses on civil rights laws that prohibit discrimination, but the point applies, with minor modifications, to broader civil rights laws, such as 42 U.S.C. § 1983.

⁶ On cognitive bias, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–10 (2006). On rational discrimination, see generally Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003).

⁷ For the now-classic statement of the point, see *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401–02 (1968).

⁸ On the technical aspects of civil rights litigation, with a focus on the disability rights context, see Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1 (2006).

⁹ See, e.g., Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 2000 n.98 (2004).

lawyers who are trying to make a living.¹⁰ Public interest organizations tend to focus on the few large-scale law reform cases at the expense of the important day-to-day enforcement work of individual cases.¹¹ And pro bono is very rarely deployed for civil rights cases—particularly civil rights cases against businesses.¹²

Market-based private enforcement of civil rights therefore seems like it will be insufficient to serve the public interest reflected in civil rights statutes. Because they create a public good, and indeed are the prototypical location for “public interest” law, perhaps civil rights laws should be enforced by the government. And indeed, our civil rights laws authorize government enforcement in a couple of ways: government-initiated litigation and administrative enforcement bureaucracies. But public enforcement has significant limitations as well.

Most important, public enforcement is constrained by politics. An incumbent administration may have no room on its agenda for—and indeed may be downright hostile to—vigorous enforcement of civil rights laws (or some subset of those laws).¹³ Even if an administration is committed to civil rights, it will be unlikely to pursue legally sound but politically touchy enforcement actions. And in every case an administration must weigh the cost of expending political capital against the value of reserving that capital for use on other projects of importance to it.

In response to these limitations of purely private and purely public enforcement, Congress has developed a hybrid model of civil rights law enforcement—public enforcement, supplemented by “private attorneys general.” The private attorney general is an individual whose rights have been violated and who, based on that violation, initiates a suit that benefits not just her but the broader public interest in compliance with the law.¹⁴ And “the fuel that drives the private attorney general engine” is fee shift-

¹⁰ Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768 (1988).

¹¹ See, e.g., Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 162–64 (Richard B. Freeman et al. eds., 2005).

¹² See, e.g., Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 116–23 (2004) (showing that “[d]ecisions about pro bono are . . . always filtered through the lens of how they will affect the interests of commercial clients”); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1414 (1998) (listing “environmental law, labor and employment law, and landlord/tenant law” as areas in which private firms often refuse to do pro bono); Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79, 80 (2007) (arguing that the American pro bono system puts legal assistance for poor people at the mercy of market forces).

¹³ See, e.g., William R. Yeomans, *An Uncivil Division*, LEGAL AFF., Sept./Oct. 2005, at 20.

¹⁴ For a discussion of the many things we mean when we talk about “private attorneys general,” see William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

ing.¹⁵ To give private lawyers an incentive to take private attorney general suits, Congress has provided that prevailing plaintiffs are entitled to recover attorneys' fees from the defendants they defeat. Litigation under civil rights statutes serves as the paradigmatic example of a private attorney general action.

This system has its flaws. Private attorneys general lack the resources that the government could bring to bear in civil rights litigation. Moreover, over the past 20 years the Supreme Court has cut back on defendants' responsibility to pay plaintiffs' attorneys' fees. The Court has, for example, held in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* that a plaintiff is not a "prevailing party," and therefore cannot recover fees, if her lawsuit merely spurs the defendant to abandon the challenged practice voluntarily, without a judgment, consent decree, or similar judicial order.¹⁶ If a would-be customer with a disability sues an inaccessible restaurant under the ADA, for example, and the lawsuit spurs the restaurant to build a ramp to its front door before the court can issue a final judgment, the plaintiff will recover no attorneys' fees. The *Buckhannon* rule, in other words, deprives plaintiffs' counsel of fees if she wins too easily. The Court has also held that the "reasonable" attorneys' fee the defendant must pay should be based on the hourly rate of lawyers who represent fee-paying clients in comparable cases, with no enhancement for the risk of loss.¹⁷ Because plaintiffs' counsel in fee-shifting cases get paid only if they win, paying them the same hourly rate as lawyers who get paid whether they win or lose creates a disincentive to take these cases. And the Court has also permitted defendants to offer settlements that are conditioned on the plaintiff's counsel not receiving fees.¹⁸ That rule may be thought, from an *ex post* perspective, to encourage settlement in the cases that actually get brought, but it does so at the cost of discouraging lawyers from taking these cases in the first place.

These legal rules do limit the effectiveness of the private attorney general system. But even with those limitations, private attorneys general remain essential to assuring that civil rights laws are at all meaningfully enforced. To the extent that mandatory pro bono would undermine the private attorney general system, that should be marked down as a significant cost.

¹⁵ Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205.

¹⁶ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). For an initial empirical investigation into the limitations *Buckhannon* has placed on civil rights litigation, see Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. (forthcoming 2007). Albiston and Nielsen discuss a number of scenarios in which defendants can, by strategic capitulation, use *Buckhannon* to deny plaintiffs attorneys' fees. *Id.* at 17–29.

¹⁷ See *City of Burlington v. Dague*, 505 U.S. 557 (1992).

¹⁸ See *Evans v. Jeff D.*, 475 U.S. 717, 741–43 (1986).

II. WHY MANDATORY PRO BONO WOULD LIKELY UNDERMINE THE PRIVATE ATTORNEY GENERAL SYSTEM

One might think that adopting a mandatory pro bono policy would necessarily increase the resources available for civil rights enforcement. Although he does not focus on civil rights work, Professor Lininger certainly seems to assume that a mandatory pro bono regime will have significant benefits for disadvantaged people. Mandatory pro bono, the optimistic story goes, will open up a whole new pool of lawyers who will aid people of limited means. If even some of the lawyers in that pool do civil rights work, that *has* to enhance civil rights enforcement, no?

No. There are two significant problems with the optimistic story. First, there is no reason to think that significant numbers of new lawyers will do civil rights work if pro bono is made mandatory—and there are lots of reasons to think they will not. As numerous commentators have noted—and Professor Lininger doesn't really deny—civil rights work is a comparatively small part of private-firm pro bono practice. Little pro bono work goes to social-change-oriented lawyering in any event.¹⁹ There are a number of reasons for this state of affairs. For one thing, civil rights work often challenges powerful institutions—institutions that are often the clients of private law firms. (That is why when private firms do bring pro bono civil rights cases, they tend to bring them against state and local governments—who have their own in-house attorneys—rather than against private corporations for whose business they might compete.²⁰) For another thing, civil rights laws are complex and technical; it is impossible to master the relevant specialized knowledge in 50 hours per year (or even in the 120 hours per three years that Professor Lininger suggests²¹).

So long as other pro bono options remain—and they certainly will²²—there is no reason to think that mandating pro bono will overcome these obstacles that prevent more lawyers from performing civil rights work. Civil rights cases will continue to threaten established interests, and they will continue to raise highly technical issues. Some new lawyers will surely

¹⁹ See *supra* note 12. This has been true for decades. See, e.g., JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 94 (1978).

²⁰ When private (particularly large-firm) pro bono counsel do bring civil rights cases against governments, they can raise courts' expectations about the scale and sophistication of litigation in ways that do not necessarily make it easier for the civil rights bar to litigate successfully. See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 616–21 (2006). But following that point would take me far beyond my project here.

²¹ See Lininger, *supra* note 1, at 1361.

²² See RHODE, *supra* note 2, at 172 (“[W]henver bar discussions turn to pro bono requirements, ‘two things happen; the definition expands and the number of hours decline[s].’”) (citation omitted); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 100 (1990) (“Experience demonstrates that the political compromises involved in securing approval of such a program will result in a definition of pro bono service so broad that it encompasses activities already undertaken by virtually all lawyers.”).

take on civil rights work, but there is no reason to believe that very many will. And if mandatory pro bono generates new work for civil rights plaintiffs, it will also generate new work for organizations that oppose civil rights remedies²³—whether because lawyers who do not currently perform pro bono work have more conservative views or because the new mandate provokes a backlash.

Still, even a minor increase in civil rights litigation might be a good thing. If even *some* new lawyers take on civil rights pro bono, and any backlash effects can be contained, mandatory pro bono could be a net plus for civil rights enforcement. But that is only until we get to the second problem: A mandatory pro bono regime is likely to encourage courts to make rulings that undermine the private attorney general system.

Because the private attorney general system is essential to civil rights enforcement, and fee shifting is the engine that drives the system, judicial rulings regarding the availability of statutory attorneys' fees are likely to have extremely significant effects on the vindication of civil rights in practice. The biggest obstacle to that system is the view, widespread among federal judges, that civil rights litigation "is not part and parcel of ordinary practice, but is more in the nature of charity or volunteer work."²⁴ Thus, when the Court barred recovery of attorneys' fees for optional administrative proceedings, it brushed aside any concern that its ruling would deprive civil rights plaintiffs of representation in a forum that may afford effective relief without litigation: "[C]ompetent counsel will be motivated by the interests of the client to pursue . . . administrative remedies when they are available and counsel believes that they may prove successful."²⁵ An interpretation of § 1988 cannot be based on the assumption that "an attorney would advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees"²⁶

Similarly, in *Evans v. Jeff D.*, the Court stated that plaintiffs' counsel would face no "ethical dilemma" when presented with a settlement offer that denied them attorneys' fees, because a lawyer's "ethical duty [is] to serve his clients loyally and competently."²⁷ And in *Marek v. Chesny*,²⁸ the Court also disregarded any concern with conflicts of interest when it adopted a rule that might give plaintiffs' lawyers an incentive to accept a settlement offer rather than risk their attorneys' fees. As Dean Brand has argued, these rulings rest on "a deeply held view that public interest lawyers

²³ See generally Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223 (2005).

²⁴ Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 373 (1990).

²⁵ N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 14–15 (1986) (quoting *Webb v. County Bd. of Educ.*, 471 U.S. 234, 241 n.15 (1985)).

²⁶ *Id.*

²⁷ 475 U.S. 717, 727–28 (1986).

²⁸ 473 U.S. 1 (1985).

... should not be subject to the same economic pressures as other practicing lawyers.”²⁹ Because the Justices believe that civil rights lawyers should not worry about collecting their fees, these decisions approve regimes in which serving their clients’ interests often requires those lawyers to forego compensation. *Buckhannon*, which assumes that lawyers will bring civil rights cases even if defendants can deny them fees simply by giving the plaintiffs everything they want, rests on a similar assumption.³⁰

This view of civil rights litigation as charity is not limited to the Supreme Court. As I have shown, lower federal courts have frequently exhibited that view when considering cases brought under the public accommodations provisions of the Americans with Disabilities Act. Judges in those cases have routinely criticized plaintiffs’ lawyers for seeking the “reasonable” attorneys’ fees the law authorizes—even though it is typically clear that the defendant business has been violating the law for years, and that the plaintiff’s suit was a necessary spur to compliance. For these courts, the concern that civil rights lawyers unduly care about earning their fees seems to take precedence over any concern with preventing and deterring violations of the civil rights laws.³¹

Unfortunately, adopting a mandatory pro bono rule would likely exacerbate these problems. Such a rule would further entrench the sharp line lawyers and judges draw between “public interest” representation—which is understood to be provided at below-market compensation—and ordinary practice. As Professor Pearce has shown, the rise of public interest law practice and voluntary pro bono practice undertaken by private attorneys has already had such an effect.³² But the countervailing benefits of the rise of the public interest bar have been enormous. Without public interest lawyers, the legal needs of people without means or power would be immensely underserved. The existence of voluntary pro bono may have had a similarly positive effect—though I am not aware of any study weighing the costs and benefits—but there is, as I have suggested, especially little reason to believe that *mandatory* pro bono would have such an effect.

To the extent that a new mandatory pro bono duty is justified—as Professor Lininger justifies it³³—as enforcing an ethical obligation for lawyers to help the needy, imposing such a duty can only exacerbate the judicial

²⁹ Brand, *supra* note 24, at 373.

³⁰ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 608–09 (2001). The initial empirical work of Professors Albiston and Nielsen suggests, not surprisingly, that the Court’s assumption was erroneous. See Albiston & Nielsen, *supra* note 16.

³¹ For a more extensive discussion of the issues addressed in this paragraph, see generally Bagenstos, *supra* note 8.

³² See Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 417–20 (2001); see also Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2116–17 (2004).

³³ See Lininger, *supra* note 1, at 1367.

stinginess in awarding attorneys' fees.³⁴ (That large firms from time to time use pro bono hours for fee-shifting cases *and* seek fees themselves³⁵ will not help things.) Federal judges, who are inclined to think of for-profit civil rights litigation as a necessary evil, will not find it so necessary to protect the fee-shifting mechanism when every lawyer is required to perform charitable work. Although there is no reason to believe that lawyers will move to pro bono civil rights work in significant numbers, judges already have the view that civil rights work should be performed as a charitable service. The new mandate will only encourage them in the belief that lawyering for the public interest is a form of charity, and it may lead them to tighten the rules for statutory attorneys' fees even further. The result, on net, could be a major loss for civil rights litigation.

III. LESSONS

My argument in this essay has been based on intuition and experience (my own and others'). It has not been based on any rigorous model or empirical investigation. My goal has been simply to suggest one possible consequence of mandatory pro bono to which Professor Lininger does not attend—the prospect that mandatory pro bono may actually hurt civil rights plaintiffs by encouraging federal courts to be even stingier in their attorneys' fee awards. Like any perverse-effects argument, this one requires careful empirical examination before being endorsed or rejected.³⁶ But the argument can hardly be dismissed outright; the view that civil rights litigation should be provided as a form of charity is too entrenched, and the fee-recovery limitations imposed by courts in the service of that vision are too well documented. The proposal for mandatory pro bono is no doubt well intended, but it appears likely to impose significant costs on potential civil rights plaintiffs without much countervailing benefit to them.

A supporter of mandatory pro bono might respond in the nature of confession and avoidance. The goal of mandatory pro bono is not to expand civil rights litigation, one might say; the goal is to expand access to lawyers for people without the means to pay for them. In particular, the goal is to give people of limited means access to the kind of mundane, day-to-day le-

³⁴ It is notable in this regard that one of the Reagan Administration's proposals for restricting attorneys' fees would have denied statutory fees "in cases handled by private attorneys representing indigent clients or public interest organizations on a *pro bono* basis." Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 *LAW & CONTEMP. PROBS.*, Winter 1984, at 233, 242.

³⁵ See William A. Bradford, Jr., *Private Enforcement of Public Rights: The Role of Fee-Shifting Statutes in Pro Bono Lawyering*, in *THE LAW FIRM AND THE PUBLIC GOOD* 126, 130–31 (Robert A. Katzmann ed., 1995) (encouraging firms with institutionalized pro bono programs to take cases and donate any fee awards to the referring public interest organization).

³⁶ Cf. Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 *BERKELEY J. EMP. & LAB. L.* 527, 559 (2004) (making this point about perverse-effects arguments generally).

gal services (estate planning, living wills, divorces, landlord-tenant, etc.) that are essential to ordinary life in our advanced capitalist system. If *that* is the goal, and mandatory pro bono does increase the number of hours in which lawyers provide those sorts of legal services to the poor, advocates may regard the likely effects on civil rights litigation as a regrettable cost, but one worth paying.

But my discussion should have troubling implications even for mandatory pro bono supporters who simply do not care about civil rights litigation. Adopting a mandatory pro bono rule is likely to relieve the political pressure to make meaningful changes to poor people's access to legal services, but it will not materially improve access to justice. This is particularly true given that lawyers will *inevitably* be permitted to spend pro bono hours on work that promises no direct benefit to poor people—and that private lawyers will in any event shy away from cases that challenge fundamental institutional structures of oppression and disempowerment. Basically nobody—certainly not Professor Rhode or Professor Lininger, judging from their writings—thinks that mandatory pro bono can even come close to meeting the legal service needs of people with limited means.³⁷ Those needs can probably only be met by taking a couple of steps: making a significant financial investment (paid for through taxes or other government revenues, as well as expanded fee shifting) and relaxing the unauthorized-practice-of-law bar that prevents nonlawyers from performing many routine services that can be competently performed without legal training.³⁸ Mandatory pro bono will likely make it harder to obtain political support for these steps.

In short, I might say the same thing about Professor Lininger that he says about Professor Rhode. His heart is in the right place. But the mandatory pro bono policy he supports is just another typical “good government” intervention: By enlisting the noblesse oblige of lawyers and encouraging them to provide charity to the “unfortunate,” it lets them believe that they are doing something about the disadvantages that attach to poverty in this country. But in the end, the policy is likely to do little to change or remove those disadvantages; to the contrary, there is strong reason to believe that it will exacerbate them.

³⁷ See Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U. J. GENDER SOC. POL'Y & L. 129, 146 n.68 (2001) (“As a practical matter, no mandatory pro bono program offers any real hope of actually coming anywhere close to meeting the legal needs of the poor.”).

³⁸ For a similar argument, see *id.* Professors Silver and Cross oppose mandatory pro bono on the dual grounds that fee-paid lawyers do a public service and poor people need legal services far less than they need money. See Charles Silver & Frank B. Cross, *What's Not To Like About Being A Lawyer?*, 109 YALE L.J. 1443, 1477–93 (2000). Like them, I am uncomfortable with treating legal services for poor people as charity; unlike them, I think legal services are an important need for many poor people.

