Comments on the Sixth Annual Wiley A. Branton/ *Howard Law Journal* Symposium

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Participants in the 2009 Wiley A. Branton Symposium repeatedly voiced a certain set of questions. What should black lawyers do with the skills and privileges that attend their positions as members of the bar? What should be their professional priorities? What does it mean for a black lawyer to fulfill his or her racial responsibilities in the *Age of Obama*? These questions vex the black bar.

Bitter debate, for instance, surrounds the country's most highly-placed black jurist—Justice Clarence Thomas. Although some African Americans defend Justice Thomas, many others consider him a "race traitor." Indeed, in some quarters, his name has become synonymous with "selling out."[1] Commentators have debated whether it is possible for a black person to serve as a federal or state prosecutor without betraying his or her racial responsibilities.[2] The keynote speaker for the Branton Symposium, Professor David B. Wilkins, has explored these questions time and again, descriptively and normatively, in a series of illuminating articles including *Social Engineers or Corporate Tools?* Brown v. Board of Education *and the Conscience of*

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1. *See* RANDALL KENNEDY, SELLOUT: THE POLITICS OF BETRAYAL 87-88, 143 (2009).

2. *See generally* Lenese C. Herbert, *Et in Arcadia Ego: A Perspective on Black Prosecutors' Loyalty Within the American Criminal Justice System*, 49 HOW. L.J. 495 (2006) (examining what role loyalty should play in the performance of a black prosecutor's role within the American criminal justice system); THE DARDEN DILEMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES (Ellis Cose ed., 1997); *see also* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (The New Press 2009).

the Black Corporate Bar,[3] and *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*[4]

One remark that evidences this concern with racial responsibility was cited by Dean Schmoke at the outset of the Symposium and referred to subsequently throughout. It is a phrase attributed to Charles Hamilton Houston: "A lawyer's either a social engineer or he's a parasite on society."[5]

I urge that this slogan, with its dramatic dichotomy, be used with utmost caution, if at all. Currently, it is deployed too frequently to distinguish between heroes and villains in a simplistic fashion. One thing that makes me uncomfortable about the construction of the category "social parasites" is the widespread unwillingness to give particularity to it by "naming names." In no instance did persons using this phrase during the Branton Symposium identify a "social parasite" by name. The same is true among the people who have used the phrase in law review commentary.

While the social parasitic villains go unnamed, celebration envelopes the names of those admiringly labeled social engineers—people such as Wiley Branton, Thurgood Marshall, Oliver Hill, Samuel Tucker, Spottswood Robinson, Robert Carter, and Constance Baker Motley. Perhaps, the absence of specificity regarding putative social parasites has to do with a desire to avoid stigmatizing individuals, as opposed to stigmatizing an objectionable type of attorney. But perhaps the absence of naming names also signals that those who deploy the notion of the lawyer as a social parasite are unclear about its parameters.[6]

3. *See* RACE, LAW & CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* (Austin Sarat ed., Oxford Univ. Press 1997).

4. David B. Wilkins, *Race, Ethics and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995).

5. *See, e.g.*, GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON & THE STRUGGLE FOR CIVIL RIGHTS 84 (Univ. of Pa. Press 1983); Julian Bond, *Under Color of Law*, 47 HOW. L.J. 125, 129 (2003); Charles Ogletree, *Commentary, All Deliberate Speed: Reflections on the First Half-Century of* Brown v. Board of Education, 66 MONT. L. REV. 283, 285 (2005).

6. For examples of commentators who do push beyond the simplified villain-hero dichotomy, see David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education *& the Conscience of the Black Corporate Bar*, *in* RACE, LAW AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION, *supra* note 3; H. Timothy Lovelace, Jr., *Revisiting "The Need for Negro Lawyers": Are Today's Black Corporate Lawyers Houstonian Social Engineers?*, 9 J. GENDER RACE & JUST. 637, 661-62 (2006); and Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997).

When efforts have been made to give content to the idea of the lawyer as a social parasite, the results have been disturbing. The term "corporate lawyer" is sometimes referred to disparagingly as a telltale marker that an attorney is probably a social parasite unless the attorney in question has immunized himself or herself by exceeding minimal levels of pro bono practice or participating avidly in racial uplift organizations. The audience at the Symposium heard from or heard about such immunized attorneys. They are certainly admirable. I do not think, however, that the way they conduct their professional lives is the only respectable avenue available to black corporate lawyers.

Imagine the following black attorney: she is thirty years old and is seeking to become a litigation partner in a large New York firm. She works hard and continuously, seven days a week. She is an excellent attorney, enthusiastically praised by her clients, which are mainly for-profit companies. She neither tutors disadvantaged children nor sits on the board of the local chapter of the NAACP. She neither contributes financially to the NAACP Legal Defense Fund, nor to the National Negro College Fund, nor to any other such organization. She is single-minded in her ambition to attain partnership. For her, all other concerns, public and private, are marginal.

I do not recommend the hypothetical attorney's choice of lifestyle.[7] But I do defend her choice against the charge that it makes her a social parasite. What about the claim that she is failing to "give back" to the black collective and thus betraying those who struggled to open up the professional opportunities that she enjoys? First, I question the legitimacy of the concept of a racial obligation. I would like to be convinced anew that such an obligation ought to be recognized.[8] Second, assuming that such an obligation ought to exist, I believe that the means of fulfilling it ought to be so minimal that, absent a self-consciously destructive attack on black people, virtually any lifestyle ought to suffice, including the conduct of the hypothetical attorney.

Did Wiley A. Branton, Charles Hamilton Houston, Thurgood Marshall, and others struggle in order for that hypothetical attorney to chart the course she seems determined to pursue? Yes, they did. At the heart of their struggle was an ambition to uproot pigmentocracy so

7. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 904 (1999).

8. *See* Randall Kennedy, *My Race Problems – And Ours*, THE ATLANTIC MONTHLY, May 1997, http://www.theatlantic.com/past/docs/issues/97may/kennedy.htm.

that black people could choose to do any and all of the things that other Americans do without racial impediment, including pursuing goals that some may view as trivial or even anti-social (so long as the goal is not illegal). They sought to break down racial barriers to choice; and now that freedom to choose ought be respected.

In terms of judging how lawyers spend their time and direct their talents, I urge a course of ecumenical restraint. I join with Charles Fried in affirming

> [T]he moral liberty of a lawyer to make his [or her] life out of what personal scraps and shards of motivation his [or her] inclinations and character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose; only so long as these lead him [or her] to give wise and faithful counsel.[9]

With respect to social engineers, I, too, applaud lawyers for a (good) cause. But contrary to many observers, I do not see them as martyrs.[10] Rather, I see them as attorneys who chose to focus their talents in a fashion that will hopefully generate personal benefit as well as public betterment. As attorneys for the NAACP, Houston and Marshall earned a paycheck for doing legal work exclusively—an opportunity denied to many black lawyers who, because of racial barriers, were forced to supplement legal fees with money earned as cabbies or waiters.[11]

Houston, Marshall, Branton, Hill, Carter, Motley, and countless others worked on the most exciting and successful campaign of reform litigation in world history. Yes, in pursuing their mission they encountered difficulty and frustration and even, at times, danger. But they also enjoyed exhilaration, gratification, fun, and recognition. Spottswood Robinson became the Chief Judge of the United States Court of Appeals for the District of Columbia. Robert Carter became the Chief Judge of the United States District Court for the Southern District of New York, as did Constance Baker Motley. Thurgood Marshall became a judge on the United States Court of Appeals for the Second Circuit, Solicitor General, and later a Justice of the Supreme Court. I suspect that there are many people who became partners at the most celebrated firms in the country who, as lawyers, would have

9. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088-89 (1976).

10. *See, e.g.*, Schiltz, *supra* note 7, at 922 (describing Houston and Marshall as "lawyers who sacrificed much personal gain to do much public good.").

11. *See* Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AM. HIST. 37, 40 (2006).

gladly traded places with Marshall and company. The same is true of "lawyers for a cause" today. There is no reason to see them as martyrs. Presumably, they are doing what makes them happy.

Although vague, nameless denunciations of "social parasites" were voiced throughout the Branton Symposium, the overall tenor of the proceedings suggested a disposition to honor the broad array of ways in which attorneys find fulfillment and produce social value, broadly conceived, through the practice of law. Some of the speakers were attorneys who have dedicated considerable amounts of time and energy to collective modes of racial uplift—e.g., mentoring and volunteer work for black organizations. Others were attorneys who followed a different, more individualistic path, one that seems to have included relatively little in the way of conventional "giving back." The remarks of all were considered with respect by an attentive, critical, lively audience that appeared to resonate to the advice offered by Judge Anna Blackburne-Rigsby, of the District of Columbia Court of Appeals. That advice, the best that I heard, was simply to "shine where you are," to choose a suitable niche and do the best you can with what you have. That capacious attitude, which is deferential to the diversity of individual wants and needs, warrants our support.