

WAY TO REPRESENT: THE ROLE OF BLACK LAWYERS IN CONTEMPORARY AMERICAN DEMOCRACY

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INTRODUCTION

It is an axiomatic principle of constitutional law that our nation was founded as a race-conscious liberal democracy.¹ The U.S. Constitution, as originally drafted and adopted, recognized as citizens only those persons who could be considered racially white. The U.S. Supreme Court, in its infamous *Dred Scott v. Sandford* decision, held that persons of African descent were not citizens of our national political community and therefore were not entitled to bring suit in federal court.² Likewise, Native Americans were not recognized as citizens in our democratic project when our Constitution was first adopted.³ Instead, they were viewed by the Founding Fathers as citizens of conquered “domestic dependent nations.”⁴ Moreover, in our early republic, immigration and naturalization into our democracy was restricted only to those satisfying the definition of whiteness.⁵

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1. This essay embraces a participatory model of democracy wherein all citizens have equal opportunity for full and active participation in not only government institutions, but also nongovernmental institutions such as corporations, schools, and unions. Under this broad view of democracy, equality means not just political equality for citizens, but social equality as well. For a discussion of the participatory model of democracy, see WILLIAM E. HUDSON, *AMERICAN DEMOCRACY IN PERIL* 15 (2001).

2. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

3. It was not until 1924 that Congress passed the Indian Citizenship Act, which afforded Native Americans who were citizens of their tribe dual citizenship in the United States. See Snyder Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401 (2006)).

4. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

5. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 139–40 (10th ed. 2006) (referencing the federal courts’ interpretation of the federal naturalization statute, which required candidates for naturalization to be white); VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 3–4 (2005) (referencing a 1924 federal statute restricting immigration from southern and

Given this historical context, it is only logical to ask whether race continues to matter in contemporary American democracy where the Reconstruction amendments and subsequent civil rights laws have extended legal citizenship to racial minorities who were previously excluded from the polity. Some critical race scholars have argued that race does continue to matter, and that it always will.⁶ If race continues to have political and social significance in America, what role, if any, does the black⁷ lawyer⁸ play in the maintenance of contemporary American democracy? Stated differently, does the racial status of black lawyers equip them to serve any unique functions in our democracy? An inquiry into whether the black lawyer has a unique role in the American democratic project invokes the literature on the relationship between a lawyer's personal identity and professional role. This essay examines that literature to articulate the benefits that flow from the race-conscious model of lawyering that black lawyers overwhelmingly deploy. Through the practice of a race-conscious model of lawyering, black lawyers serve unique functions in contemporary American democracy by bringing their racial identity to the work that they do. It is in the black lawyer's rejection of an exclusively "bleached out"⁹ or colorblind professional identity that the democratic functions of the black lawyer become evident.

This essay argues that black lawyers enhance the participatory dimension of citizenship for black citizens.¹⁰ While our democratic project has enacted laws aimed at extending legal citizenship to racial minorities from the perspective of citizenship as rights, it has not been as effective at extending citizenship as public participation to racial minorities,

Eastern Europe because at the time, under the narrow Anglocentric view of whiteness, such persons were not considered white).

6. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

7. I use the term "black" rather than African American to be more, rather than less inclusive and in recognition of the fact that many individuals who consider themselves part of the black community do not embrace an African American identity. I use the term "black" to refer to all persons in the United States who acknowledge African ancestry and embrace the notion of community forming around that identity.

8. I use the term "lawyer" broadly to encompass all persons with legal training through the formal education of law school, whether practicing law or representing clients or not, because being trained as a lawyer affords such individuals an advantage over lay citizens in navigating democratic institutions and processes.

9. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1571 (1998) (arguing that black lawyers need not privilege the legal profession's moral considerations over the considerations of racial solidarity and personal morals, but can successfully integrate all moral domains into their professional lives); see also Bruce A. Green, *The Religious Lawyering Critique*, 21 J.L. & RELIGION 283 (2005–2006) (critiquing the religious lawyering movement's explicit challenge to legal professionalism and arguing that a lawyer can bring her religious values to the practice of law).

10. See Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2821–26 (2008). In exploring marriage as a dimension of citizenship, Professor Angela Harris discusses two perspectives of citizenship: citizenship as rights and citizenship as public participation. This essay examines the latter perspective.

particularly blacks. Nonetheless, the integration of black lawyers into the bar has had—and continues to have—an impact on extending the participatory dimension of citizenship to black citizens.

The essay attempts to highlight the veiled role of black lawyers in contemporary American democracy. It argues that black lawyers serve three functions in contemporary American democracy that improve and enhance citizenship as participation for blacks. First, that black lawyers serve a representative function in our democracy by serving as ambassadors to democratic institutions such as our courts, legislatures, and executive agencies, thereby ensuring that there is representation of black experiences and commitment to the interests of the black community¹¹ in the deliberative processes that precede democratic decision making. Black lawyers also serve a legitimizing function through descriptive representation because their mere physical presence in government tends to promote public confidence, particularly the confidence of black and other nonwhite citizens, in our democratic institutions. When blacks see individuals from their racial group represented in democratic institutions, such corporal representation lends legitimacy to those institutions.

Second, black lawyers serve an interpretive function by speaking the language of democracy and being able to translate that language into language that is meaningful and helpful to the black community. Black lawyers also serve an interpretive function by being able to communicate the concerns of the black community to democratic institutions in the discourse that those institutions understand and value.

Third, black lawyers serve a connective function by acting as a conduit that affords both black and nonblack citizens of lesser economic means access to the democratic institutions we call courts. Through both direct and indirect pro bono work, black lawyers enhance the access of many citizens, particularly black citizens, to our courts.

I. THE INIMITABILITY OF BLACK LAWYERS

A. *The Situational Uniqueness of Black Lawyers*

The assertion that there is something about black lawyers that distinguishes them from other lawyers understandably arouses suspicion that essentialist conceptions of black racial identity are about to be deployed. However, a claim that black lawyers make a unique contribution to democracy need not be grounded in the idea that there is some core

11. Many authors have written of “the black community.” Regina Austin describes it as an “idea” rather than a place. Nonetheless, Austin says that she thinks of it as “home.” Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1769–70 (1992). I view the black community as a multilevel sociopolitical group comprised of individuals with a shared racial identity and a shared racial history, with institutions aimed at preserving black culture and promoting black interests. I also consider it “home.”

essence of blackness that operates to define black identity. Nor need the claim be grounded in an assertion that all blacks do, in fact, or should think alike.¹² Rather, the modest claim asserted here is that black lawyers make a unique contribution to democracy because they are uniquely situated between the legal profession, with its democratic institutions, and the lay citizens of the black community, with their democratic needs.

It is black lawyers' dual membership in both the legal profession and the black community that creates opportunities for black lawyers to leverage their status as lawyers to benefit both individuals and institutions in the black community. The presence of these opportunities necessarily raises the question of whether black lawyers act on these opportunities. Stated differently, do black lawyers use their status as lawyers to aid black citizens? This essay attempts to highlight some of the ways that black lawyers perform their dual citizenship in both their professional and racial communities to advance the democratic interests of black citizens.

B. *Black Lawyer Retention of a Race-Conscious Identity*

A dominant value of the legal profession is a commitment to colorblindness in lawyers' conduct so that "professional socialization 'bleaches out' racial differences among lawyers."¹³ In this "bleached out" view of professional identity, the race of the lawyer is irrelevant; race plays no role in how the lawyer approaches her work.¹⁴ Professors David Wilkins and Russell Pearce have challenged this dominant conception of the lawyer's professional identity. Professor Wilkins argues that it is morally acceptable for black lawyers to bring their racial identity to lawyering.¹⁵ Likewise, Professor Pearce has used intergroup theory to argue that the legal profession should discard the bleached out professionalism model in favor of an "integration-and-learning perspective" model. This model acknowledges the influence of identity group affiliations on lawyers' work and leverages the diversity of thought derived

12. Cornel West eloquently asserts this proposition when he speaks of black responses to American racism. He states that

[t]hese responses assume neither a black essence that all black people share nor one black perspective to which all black people should adhere. Rather, a prophetic framework encourages *moral* assessment of the variety of perspectives held by black people Instead, blackness is understood to be either the perennial possibility of white supremacist abuse or the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse—yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups).

CORNEL WEST, RACE MATTERS 28 (2001).

13. Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089 (2005) (citing Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578–79 (1993)).

14. *Id.*

15. Wilkins, *supra* note 9, at 1588–89.

from that identity group affiliation to achieve organizational goals.¹⁶ Despite the professional socialization that encourages adoption of the bleached out, colorblind norm of lawyer identity, black lawyers seem overwhelmingly to reject this norm by retaining a race-conscious, black professional identity.

Black lawyers remain emotionally connected to the black community through their extended families and their shared cultural identity. They share cultural experiences with the lay members of the black community through music, food, worship, charity, and family. In other words, for most blacks, becoming a lawyer does not cause an abandonment of black cultural identity. Black lawyers generally do not feel a need to separate their professional identity from their racial identity.

Assuming that most blacks who become lawyers retain a race-conscious identity while performing the role of lawyer, the question becomes, what is the relevance of the black lawyer's retention of a black racial and cultural identity? The consequence of the black lawyer's retention of her racial identity, even after adopting the professional identity of lawyer, is that the lawyer typically engages in race-conscious lawyering. This means that the lawyer is simultaneously navigating both her professional and racial identities and is therefore cognizant of her duties to both the profession and her racial community. Stated differently, because black lawyers tend not to shed their racial identity when they assume the professional identity of lawyer, black lawyers remain race conscious in their lawyering and in their lawyer-related activities. Moreover, because of socialization processes within the black community, which teach racial cohesion and a duty to help other members of the black community, black lawyers—unlike their white counterparts¹⁷—feel a sense of obligation to use their status as lawyers for the collective benefit of their racial community.¹⁸ Thus, black lawyers perform their professional identity in a state of Du Boisian “double consciousness.”¹⁹ In this state, they are cognizant of their professional role

16. Pearce, *supra* note 13, at 2093.

17. Indeed, most observers would probably deem it improper racism for white lawyers to use their status as lawyer to advance the interests of the “white community.” Because blacks as a class still suffer from the vestiges of slavery and Jim Crow, their subordinated social status makes race-conscious lawyering a morally acceptable practice for black lawyers. The same could also be said for Latina/o lawyers or lawyers from other racial groups that occupy a subordinated social and/or economic status in relation to whites in our democracy.

18. Clearly the claim cannot be made that every black lawyer uses his or her status as a lawyer to help advance the interests of black people in our democracy. While there is no empirical data to prove that a majority of black lawyers leverage their professional status to aid individual black citizens or the black community in general, there is significant anecdotal evidence of a pervasive practice of black lawyers doing just that.

19. W. E. B. DU BOIS, *THE ILLUSTRATED SOULS OF BLACK FOLK* 2–3 (Eugene F. Provenzo, Jr. ed., 1993). W. E. B. Du Bois described his idea of double consciousness in the following words:

The Negro is a sort of seventh son, born with a veil and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar

in a predominately white profession and of the power and privilege that accompanies their status as lawyer. Simultaneously, black lawyers are aware of their racial identity and the fact that some whites perceive them as intellectually inferior affirmative action beneficiaries. They are also aware of their black predecessors' struggles that enabled them to become lawyers, as well as the black community's historically induced perception of law as a tool of oppression rather than a mechanism for achieving equality and justice. Hence, the black lawyer traverses the line that separates the predominately white legal profession from the black community, seeking acceptance from and pledging loyalty to both.²⁰

II. THE REPRESENTATIVE FUNCTION OF BLACK LAWYERS

One key principle of American democracy is the expectation—and indeed constitutional mandate—that government be representative of the people.²¹ Admittedly, “the people” excluded many groups of people at the time of our nation’s founding. But our nation began to realize that “critical to democracy’s improvement over time was consideration of the interests of a broader range of citizens.”²² Accordingly, it is often argued that the more participatory democracy becomes, the stronger it becomes.²³ Participation in democracy occurs on many levels. Voting is perhaps the most obvious form of democratic participation by individual citizens. However, in a representative democracy such as ours, individual citizens also participate in government through representatives. Hence, the identity of these representatives becomes important in assessing whether certain segments of the American citizenry are represented in government. Representation is frequently characterized as either substantive or descriptive. Substantive representation occurs where the interests of political groups are made known to government and are negotiated by a person from that group who serves as a representative of that group in a democratic institution. Descriptive representation, on the other hand, refers to the mere presence of a person from a particular group in a democratic institution.

Black lawyers strengthen democracy by providing both substantive and descriptive representation of the black polity to various democratic institutions. Because lawyers have a pervasive presence in the democratic

sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity.

Id. at 12–14.

20. For a consistent interpretation of Du Bois’s theory of double consciousness through the lens of Malcolm X, see WEST, *supra* note 12, at 37–40.

21. Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 165 (2006).

22. *Id.* at 210.

23. See HUDSON, *supra* note 1, at 15–18, 267–69.

institutions that comprise the American democracy,²⁴ lawyers are uniquely positioned to make substantial contributions to the democratic enterprise.²⁵

Black lawyers provide substantive representation by giving voice to black experiences in the deliberative processes of democratic institutions. Black lawyers also provide substantive representation by advocating for institutional policies that advance the interests of the black community, thereby ensuring that the black community's interests are represented in the democratic dialogue. This claim is not a claim that the black community is a homogenous community that speaks with one voice. To the contrary, the black community is a heterogeneous group. But despite this diversity, the group often has political interests that are collective in nature and different from the interests of whites.²⁶ The phenomenon of policy opinions varying with the racial identification of a particular group has been referred to as "group-centric" public opinion.²⁷ For example, 80% of black American respondents in one study believed that the policy of race-conscious affirmative action was necessary to prevent discriminatory practices.²⁸ Conversely, a majority of white Americans disagreed with this proposition.²⁹ Moreover, 71% of black Americans believe that nonwhites are more likely to face the death penalty than whites, while only 34% of whites believed so.³⁰ Finally, blacks are more likely than whites to believe that racially biased policing exists in the United States.³¹ Because perspective frequently correlates with race, black lawyers provide important substantive representation of black citizens' viewpoints by articulating these viewpoints to legislators, judicial decision makers, and executive administrators.

24. See Carrie Menkel-Meadow, Commentary, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 350–51 (2005) (explicating how lawyers are uniquely positioned to facilitate participatory democracy); Jeffrey W. Stempel, Response, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 NEV. L.J. 479, 479–80 (2005) (arguing that there has been a decline in the democratic role of lawyers, but acknowledging nonetheless that lawyers are still very present in democratic institutions).

25. Menkel-Meadow, *supra* note 24, at 350–51 (underscoring the idea that lawyers are equipped to undertake a broad array of tasks outside the traditional advocate role, and arguing that lawyers are in a unique position to help citizens think through and resolve problems); Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 67–70 (2006).

26. For a thorough discussion of the differing perspectives of whites and blacks, see Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 424–31 (2000).

27. Rosalee A. Clawson et al., *Supreme Court Legitimacy and Group-Centric Forces: Black Support for Capital Punishment and Affirmative Action*, 25 POL. BEHAV. 289, 292 (2003).

28. *Id.* at 293.

29. *Id.*

30. *Id.*

31. Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1024 (2005).

In addition to substantive representation, black lawyers strengthen democracy by providing descriptive representation, which tacitly operates to legitimize our democratic institutions by making them appear more inclusive and impartial rather than as bastions of racial hegemony. Given the representative nature of American democracy and our nation's history of making race a political identity, it should be no surprise that black citizens expect to see themselves represented in our democratic institutions through the corporal representation of black citizens. When black citizens see other blacks in government, their trust in government is increased³² and, as a consequence, they view government as more legitimate.³³ Moreover, when black citizens see blacks represented in government, they feel that their interests are being represented in government.³⁴

Our courts are the democratic institutions where the presence of lawyers is most pervasive. Courts as democratic institutions derive their institutional legitimacy from the citizens. When citizens turn to our courts,

they do so on the basis of an implied agreement between them and their government. . . . It is dependent on both the perception and the reality that each citizen can trust the fairness, efficiency, and competency of the system to execute its responsibilities in every case. From the time of the founding of this country, it was recognized that confidence on the part of all citizens in the administration of justice is essential to good governance.³⁵

Black lawyers play an important role in ensuring the confidence of black citizens in the administration of justice.

Beginning in the 1980s, several states commissioned studies on bias in the courts.³⁶ From these studies we have learned that racial minorities, including blacks, still experience bias in our court system. In a study of racial and gender bias in Pennsylvania, citizens shared the view that the

32. Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 382–83 (1990) (finding that in cities where blacks hold political power in government, black citizens are more engaged than whites who are socioeconomically similarly situated and that black citizens have increased trust in government); see also Susan A. Banducci, Todd Donovan & Jeffrey A. Karp, *Minority Representation, Empowerment and Participation*, 66 J. POL. 534, 538–39 (2004) (suggesting that blacks hold a more favorable view of government when they are represented by other blacks).

33. See Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent Yes*, 61 J. POL. 628, 650–52 (1999) (concluding that blacks being represented by blacks in government has a legitimizing effect on government and makes blacks feel included in the democratic process).

34. See Katherine Tate, *The Political Representation of Blacks in Congress: Does Race Matter?*, 26 LEGIS. STUD. Q. 623, 635 (2001) (finding that blacks express greater levels of satisfaction with their congressional representative when that representative is also black because they feel that “black representatives will better represent their interests”).

35. Marilyn Kelly et al., *The Role of the Michigan Open Justice Commission in Improving Public Trust*, 79 MICH. B.J. 1200, 1200 (2000).

36. See, e.g., William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 HAMLINE L. REV. 235, 236–240 (2002) (referencing a study of the Minnesota courts, which found that the system contained racial bias).

perception of racial bias is fueled by the conspicuous absence or underrepresentation of racial minorities in official positions in courtrooms.³⁷ Thus, it should be no surprise that black citizens view our courts as more impartial when black lawyers are visibly present in the courtroom as both advocates and judges.

The importance of racial diversity on the bench and the representative nature of our courts are issues that several legal scholars have addressed.³⁸ Professor Sherrilyn Ifill has argued that the Fourteenth Amendment's judicial impartiality mandate requires "*structural* impartiality of the bench as a whole, in addition to the impartiality of individual judges."³⁹ Professor Ifill contends that such structural impartiality is achieved when there is diversity of viewpoint on the courts, and race is one identity factor that is relevant to ensuring diversity of viewpoint in the courts.⁴⁰ Professor Ifill has also argued that the deliberative effect of substantive representation of racial minorities on the bench is more significant than the institutional legitimization function of corporal representation of racial minorities.⁴¹ According to Professor Ifill, racial diversity on the bench improves the democratic process of deliberation by ensuring that people with perspectives differing from white judges have input into the decision-making process, so that decisions that emerge from the courts are not informed only by the dominant experience of being white in America.⁴² Accordingly, not only do black judges provide descriptive or corporal representation of blacks in our courts (thereby lending increased legitimacy to the courts and making them appear less biased), they also provide substantive representation of black citizens in our courts by offering viewpoints, experiences, and values gathered from being socialized in the black community in the process of judicial decision making.⁴³ The presence of views, experiences, and values that emerge from the black community in the process of judging is substantive representation of the lay people in the black community who expect and deserve their views, experiences, and values to be at least a part of the democratic work of the courts.

37. FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 311 (2003) (on file with author).

38. See, e.g., Ifill, *supra* note 26; Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1 (2002); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252 (2006).

39. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 98–99 (1997).

40. Ifill, *supra* note 26, at 495.

41. *Id.*

42. *Id.*

43. *But see* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 606–10 (2003) (concluding that in a majority of cases, the race and gender of the judge likely will not affect outcomes); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997) (noting that the effects of race and gender on judging are unclear).

Likewise, law professor Kevin Johnson has argued that Latina/o judges bring a unique perspective to judging. While arguing in favor of an appointment of a Latina/o to the Supreme Court, Professor Johnson asserts that, although the Latina/o community is heterogeneous, it shares “important common experiences.”⁴⁴ Moreover, argues Johnson, the addition of a Latina/o voice to the Court “holds the promise of improving the decision[-]making process on constitutional law, civil rights, and other matters.”⁴⁵ Johnson illustrates his point by arguing that a Latina/o Justice might approach the reliance on physical appearance in immigration stops in a different way than the Court did in *United States v. Brignoni-Ponce*.⁴⁶ Because of personal experiences, “a Latina/o is more likely than an Anglo to be troubled by the reasoning of *Brignoni-Ponce*.”⁴⁷

From the work of scholars like Johnson and Ifill, we learn that, while not all black judges think alike, black judges do bring a unique and different perspective to the judging process, thereby improving the structural impartiality⁴⁸ of our courts and providing substantive representation of the viewpoints held by members of the black community.

The courts are only one branch of American democracy where black lawyers serve a representative function. We know that black lawyers are also present in the executive and legislative branches of American government, and that they serve at both the federal and state level of government. A significant percentage of black lawyers at some point in their careers will have worked for a local, state, or federal government entity.⁴⁹ Although black lawyers are not the only blacks represented in the executive and legislative branches of government, black lawyers, with their legal training, are in a unique position to secure leadership positions in

44. See Johnson, *supra* note 38, at 2.

45. *Id.*

46. 422 U.S. 873 (1975). In this case, the U.S. Supreme Court stated that border patrol officers could engage in racial profiling by considering the race of the occupant of a motor vehicle as a factor in deciding whether to make an immigration stop. *Id.*

47. Johnson, *supra* note 38, at 10.

48. Ifill, *supra* note 39, at 99.

49. David B. Wilkins, *Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 12–13 (2004). David Wilkins examined the career paths of black lawyers who had careers in large “corporate” law firms and found that nearly forty percent of black corporate lawyers in his sample had worked for government during the course of their careers. *Id.* at 13. Since Wilkins’s study was limited only to black lawyers who had career opportunities in corporate law firms, it is reasonable to deduce that the percentage of black lawyers outside of corporate law firms who have government experience at some point in their careers would be even higher. With respect to recent law school graduates in the class of 2006, the National Association for Law Placement (NALP) reports that, for the first time, nonminority and minority law graduates were equally likely to be employed in public service positions. See NALP, *Employment Patterns—1982–2006* (Aug. 2007), <http://www.nalp.org/2007augemploymentpatterns>. NALP statistics reveal a decline in government employment among minorities, so it is not apparent whether black lawyers will continue to have as significant a presence in government. However, the NALP statistics only capture black lawyers as they begin their careers; it does not tell us what percentage of black lawyers engage in government service after their initial postgraduation job placement. *Id.*

these segments of government. Moreover, once there, black lawyers can leverage their legal training to help government ensure that the interests of black citizens are considered in the deliberative processes of lawmaking and law enforcement. Black lawyers represent the black community in government by serving as role models and sending the tacit message that our government is inclusive of all. But black lawyers serve a more substantive representative role as well. They ensure that the cacophony of black voices and ideas are present in the deliberative processes of government. Black lawyers serve a representative function by ensuring that black experiences are shared with decision makers and considered in the deliberative process prior to a decision being made by government.

An example of black lawyers serving a substantive representative function in the executive branch is that of black prosecutors. Several legal scholars have written about the influence of race in prosecutorial decision making and the need for racial diversity among prosecutors.⁵⁰ While black prosecutors are not free from bias, they bring the experience of being black to the decision-making process, making it less likely that false assumptions and stereotypes about black criminality inform decisions.

The argument that black lawyers bring a unique “voice” or viewpoint to democratic discussions and decision making is not an essentialist claim that all black lawyers do, in fact, or should think alike. Clearly, there is diversity of thought in the black community. One need only contrast Justice Clarence Thomas’ views with the views of the late Justice Thurgood Marshall to see how divergent black thought can be.⁵¹ My claim is not that there is an essential black American and that black lawyers serve to uphold essentialist notions of African American identity; to the contrary, my argument is that black lawyers in government serve a representative role by being intimately familiar with the circumstances of the varied lived experiences of blacks in America.⁵² Admittedly, not all black lawyers have the same exact experiences and they do not all agree on which policies or approaches are best for alleviating the problems of the black community. Nonetheless, they generally have some common experiences as black Americans coupled with shared values regarding race, justice, and equality. That is, black lawyers, despite the diversity of their ideology, generally

50. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 14 (1998).

51. The diversity of black thought is not merely a contemporary reality. Consider, for example, the differing ideologies of W. E. B. Du Bois and Booker T. Washington regarding the best path for advancement of the black race. See Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millennium—Revisiting the Washington-Du Bois Dialectic*, 42 *HOW. L.J.* 391, 394–401 (1999) (explicating the debate between Washington and Du Bois).

52. This idea of distinguishing essentialism from black nationalism is derived from early critical race theory writings. See Gary Peller, *Race Consciousness*, reprinted in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 127, 138 (Kimberle Crenshaw et al. eds., 1996).

share a desire to see the implementation of policies that improve the lot of black citizens.

III. THE INTERPRETIVE FUNCTION OF BLACK LAWYERS

Black lawyers play the role of interpreter in American democracy by interpreting the information and processes of our democratic institutions for black lay citizens who often are not privy to basic knowledge about how to make their government work for them. Moreover, black lawyers serve an interpretive function by listening carefully to black citizens' experiences and needs and by making those needs known to democratic decision makers. My claim is not that black lawyers are literal linguistic interpreters for the black community or that all or most individuals in the black community are wholly incapable of speaking for themselves. To the contrary, my claim is that black lawyers serve an interpretive function in the black community by utilizing their special skills and legal training to engage the black community in dialogue about democratic issues and to empower the black community with some of the tools necessary to effectively access many of our democratic institutions.

Perhaps one of the most extant and apparent examples of a black lawyer who has served this interpretive function is President Barack Obama. Even before he became a lawyer, Obama began to serve an interpretive function for the black community by organizing the citizens of Chicago to help them leverage their local government and make it more responsive to their needs.⁵³ Barack Obama, as community organizer, served an interpretive function for the black community in impoverished neighborhoods of Chicago by first listening to that community and hearing its concerns and its needs. After learning of the community's expressed needs, Obama was able to leverage the credibility, derived from his shared racial identity with many in these impoverished neighborhoods, to articulate to these communities democratic strategies that they could utilize to accomplish some of their goals.⁵⁴ Obama used his understanding of government to help communities prioritize which goals were most important to them and which were worth fighting to achieve. Moreover, he used his understanding of our democracy to help citizens determine the best democratic mechanisms to utilize for the particular change that was sought. In these Chicago neighborhoods there existed a communication barrier between ordinary citizens and their government that had made them feel disconnected from government and powerless to make it accountable to them.

After working as a community organizer in Chicago and experiencing a few false starts at helping poor black communities on the South Side,

53. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 164–248 (2004). It is important to acknowledge here that the claim asserted in this essay is not that black lawyers are the only black professionals who can serve democratic roles in our democracy, but that with their legal training, black lawyers are uniquely situated to serve the democracy-enhancing functions described herein.

54. *Id.*

Obama realized that his efforts at serving the interpretive function would probably be improved by a law degree. After becoming a lawyer with training in democratic institutions, separation of governmental power, and democratic theory, Obama understood that there is power in the people. After becoming a lawyer, Obama continued to serve as an interpreter for the black community by speaking with them about their government and what they could reasonably expect it to do for them as citizens if they made it accountable to them through voting. He used the relationships he had formed as a community organizer to motivate a record number of Chicago citizens, most of whom were black, to register to vote.⁵⁵ Later, Obama's presidential campaign revived the political participation of millions of black Americans and rallied to the polls many black citizens who never before perceived themselves as participants in the democratic process.⁵⁶

While President Obama is perhaps the most apparent and high-profile example of the black lawyer serving an interpretive function in our democracy for the black community, he is not the only example. There are countless black lawyers who serve an interpretive function in our democracy by making law- and government-related information accessible to lay citizens in the black community and beyond. I will highlight a couple of examples to illustrate my point.

A few years ago, black lawyer Evangeline M. Mitchell initiated a conference which she calls the National Black Pre-Law Admissions & Preparation Conference and Law Fair.⁵⁷ This conference has as its mission the goal of sharing "insider" information with black college students who are interested in becoming lawyers. The conference seeks, in part, to educate black college students about the process of law school admission and share information about this process that is not known or readily accessible to persons outside that process.⁵⁸ The conference shares information with college students that is crucial to their potential acceptance to law school and their decision of which law school to attend. For example, one panel explained the importance of the LSAT and how best to prepare for the examination, as well as resources that are available to aid with preparation. Another panel discussed how law schools use the LSAT and the reliance that many law schools place on this score in the admission process. Many students were surprised to learn how much weight is given to a test that reflects one day of performance as compared to their

55. Gretchen Reynolds, *Vote of Confidence*, CHI. MAG., Jan. 1993, at 53, available at <http://www.chicagomag.com/Chicago-Magazine/January-1993/Vote-of-Confidence/>.

56. Susan Saulny, *Obama-Inspired Black Voters Find Politics Is for Them, Too*, N.Y. TIMES, Nov. 2, 2008, at A1.

57. Evangeline Mitchell has also published important works that seek to aid black law students in navigating law school. See, e.g., EVANGELINE M. MITCHELL, *THE AFRICAN AMERICAN LAW SCHOOL SURVIVAL GUIDE* (2006).

58. Although the conference is aimed at assisting black college students with entering law school and succeeding in law school and the legal profession, it is open to all students regardless of their racial identity and there were a number of nonblack students who attended the year that I attended the conference.

undergraduate academic record, which reflects a longer, typically four year, term of performance.

I had the privilege of attending and participating in the National Black Pre-Law Admissions & Preparation Conference a few years ago. Ms. Mitchell charged me with the task of interpreting and explaining the law school admission process from the perspective of a law school faculty member who has served on a law school admissions committee.

One specific topic I recall addressing was the meaning and significance of the 25th percentile and 75th percentile LSAT scores reported by *U.S. News & World Report* for law schools' juris doctorate programs. I really did not see my role as having any significant contribution to the conference because I had become so accustomed to dealing with information related to law school admissions that I assumed all law school applicants would know how the admissions process operates. Much to my surprise, I learned that many of the conference participants mistakenly thought that the LSAT score reported for a law school's 25th percentile was the floor and that a law school was not likely to admit a student with an LSAT score below the published 25th percentile number. In fact, many students reported to me that they did not apply to law schools with a published 25th percentile LSAT score that was higher than their individual LSAT score. This meant that black college students were undervaluing their own ability to be admitted to law schools with a higher *U.S. News* ranking because they were dissuaded from applying based on their misapprehension of the significance of the published 25th percentile LSAT score. When I explained that the 25th percentile number meant that 25% of the entering class had an LSAT score equal to *or lower than* the published 25th percentile number, students at the conference were shocked. They were even more shocked to learn that in some instances there is as much as a thirty-point differential between the highest and the lowest LSAT scores of admitted students in a law school class.

I was only one participant in this conference where black lawyers, primarily black law school faculty and administrators, converged to interpret the law school admissions process for black college students to improve their ability to access the democratic institutions we call law schools.⁵⁹ All of the black lawyers who volunteered their time to attend that conference and share their insight into the law school admissions process were serving an interpretive function. These black lawyers were interpreting the data and processes regarding law school admissions, communicating it to black college students and perhaps enabling them to become lawyers with the skills necessary to assume leadership roles in our American democracy.

Black lawyers also serve an interpretive function through collective action of the black bar at both the local and national levels. The National Bar Association (NBA) is a national organization dedicated to serving the

59. For a discussion of law schools as democratic institutions, see Pratt, *supra* note 25.

professional needs of black lawyers and harnessing the skills of those lawyers to serve the interests of all citizens.⁶⁰ The NBA serves an interpretive function in our democracy by working as an organization to issue position statements on various legal issues that impact the black community. Clearly the NBA does not and cannot speak for all black lawyers or for all black citizens. Nonetheless, through its own internal democratic processes, the NBA is able collectively to formulate a view on various legal issues and share its collective view with various democratic agencies empowered with the ability to make policy that impacts the lives of black citizens. For example, the NBA has submitted comments to the Federal Communications Commission (FCC) regarding agency actions that the NBA viewed as contrary to the interests of racial minorities.⁶¹

Moreover, the NBA has filed amicus curiae briefs in several cases dealing with legal issues of significant importance to black citizens. For example, it submitted a friend of the court brief in a Title VII case arguing that it was constitutionally permissible for an employer to choose a white employee with seniority over a nonwhite employee for lay-off when the nonwhite employee had been hired, in part, to remedy past discrimination.⁶² The NBA has also supported the nomination and confirmation of several black candidates for both executive and judicial appointments in the federal government.⁶³ This involvement by black lawyers in the political and judicial processes of government serves to enhance our democracy by ensuring that the government is not uninformed of the viewpoints and preferences of black lawyers and black citizens when making democratic decisions. It is in speaking to these democratic institutions in a voice that represents at least one collective viewpoint of the black community that the black lawyers of the NBA serve an interpretive function in our democracy.

60. The National Bar Association (NBA) was organized in 1925 when the American Bar Association excluded most black lawyers from membership. *See generally* Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 *GEO. MASON U. CIV. RTS. L.J.* 51, 65–72, 85–86 (2007). The NBA states that its objectives are

to advance the science of jurisprudence; improve the administration of justice; preserve the independence of the judiciary and to uphold the honor and integrity of the legal profession; to promote professional and social intercourse among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammelled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States.

National Bar Association, *History of the National Bar Association*, <http://www.nationalbar.org/about/#history> (last visited Feb. 17, 2009); *see also* ELMER C. JACKSON, JR. & JACOB U. GORDON, *A SEARCH FOR EQUAL JUSTICE BY AFRICAN-AMERICAN LAWYERS: A HISTORY OF THE NATIONAL BAR ASSOCIATION* (1999).

61. National Bar Association, *supra* note 60.

62. *Id.*

63. JACKSON & GORDON, *supra* note 60, at 25–32.

IV. THE CONNECTIVE FUNCTION OF BLACK LAWYERS: EXPANDING ACCESS TO DEMOCRATIC INSTITUTIONS

A. *Black Lawyers' Commitment to Pro Bono*

We learn from our Founding Fathers that the role of the courts in our democracy is the interpretation and fair administration of the law.⁶⁴ Moreover, we know that one fundamental right of citizenship in “all well-ordered systems of jurisprudence” is the right to access the courts for purposes of dispute resolution and the adjudication of rights.⁶⁵

Nonetheless, it is now common knowledge within the legal profession that the average American citizen cannot afford to access our justice system.⁶⁶ This problem is due in part to the complex nature of our justice system, which in most instances requires special training to navigate. The average citizen needs a lawyer to decipher both the procedural and substantive aspects of the legal problem that they seek to have remedied by our justice system.⁶⁷ The problem of access to justice however is further exacerbated by the high cost of lawyers. Justice in our society is becoming a commodity that only the affluent can afford. Add race to this equation and the dire circumstance of inaccessibility becomes even more visible. Because black wealth in America is significantly less than white wealth,⁶⁸ black citizens likely suffer disproportionately to whites when it comes to lack of access to the democratic institutions that administer justice.

Black lawyers however, are serving a key role in expanding the access of black citizens to our justice system by increasing the delivery of legal services to black citizens. Black lawyers increase the delivery of legal services to black citizens through formal and informal as well as direct and indirect pro bono work.

This essay uses the phrase “direct and formal pro bono work” to describe pro bono work that is performed in accordance with the American Bar Association’s (ABA) definition of pro bono work. It is the direct provision of legal services to a person of limited means or to a charitable, religious, or civic organization that serves the needs of persons of limited means.⁶⁹ In

64. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton).

65. *Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876); *see also* *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

66. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 2 (2000).

67. *But see id.* at 135–41. Professor Deborah Rhode argues that many routine legal matters do not require the expertise of a lawyer, but could be performed by a trained nonlawyer specialist. *Id.* at 136. By permitting mediators, paralegals, and other nonlawyer professionals to render routine legal services, citizen access to justice could be improved by “expanding consumer choices among providers of legal services” and lowering the cost of legal services to make them affordable to the average citizen. *Id.* at 135–37.

68. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

69. *See* MODEL RULES OF PROF’L CONDUCT R. 6.1(a)(1)–(2) (2007).

essence, this narrow definition of pro bono work is limited to the legal work performed directly by a particular lawyer for the benefit of a low-income client or an organization serving the needs of low-income persons.

Accepting this narrow definition of pro bono work for now, there is empirical evidence that suggests that black lawyers engage in significant pro bono activities, perhaps more than their white counterparts. A study of University of Michigan Law School graduates found that minority graduates who were in private practice performed an average of 121 hours per year of uncompensated legal service compared to 98 hours performed by white graduates.⁷⁰ Moreover, a study of black Harvard Law School (HLS) graduates conducted by Professor David Wilkins found that black graduates of Harvard Law School who were in private practice spent an average of 133 hours per year doing pro bono work for individuals or organizations.⁷¹ Although Professor Wilkins did not have comparative data for white HLS graduates, the annual hourly average for black HLS graduates was significantly higher than the twenty-five hour nationwide average for all lawyers, perhaps suggesting that black lawyers do more pro bono work than their white peers.⁷² Clearly not all pro bono service performed by black lawyers is rendered to black clients. Black lawyers routinely provide pro bono legal service to nonblack clients who lack the ability to pay a lawyer. But black lawyers' pro bono work may disproportionately benefit black citizens because of the connection that black lawyers have to the black community.

B. *Black Lawyers' Commitment to the Black Community*

It is not readily apparent why black lawyers reach out to citizens through the provision of pro bono services to the extent that they do. It has been argued that black lawyers have a moral responsibility to subscribe to what Professor David Wilkins has called the "obligation thesis."⁷³ The obligation thesis proffers that black lawyers should feel a moral obligation to use their professional legal training to benefit not only themselves, but the black community at large.⁷⁴

Some scholars have challenged the notion of the obligation thesis, arguing that the thesis establishes a paradigm for placing blacks who do not subscribe to the thesis outside the black community and labels such individuals as "sellouts"⁷⁵ or "unauthentically black."⁷⁶ My point is not to

70. Wilkins, *supra* note 49, at 10.

71. *Id.*

72. *Id.*

73. Wilkins, *supra* note 9, at 1506–07; David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1984 (1993).

74. Wilkins, *supra* note 49, at 15.

75. See RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* (2008). Randall Kennedy examines in depth both the historical and contemporary notions of racial solidarity and racial betrayal. While Kennedy stops short of condemning racial solidarity, he cautions blacks to avoid using essentialist notions of black identity to label certain blacks as

debate whether black lawyers who do not subscribe to the obligation thesis are unauthentically black or sellouts. I agree with the antiessentialist critique that there is no essential black identity for blacks generally or black lawyers specifically. Hence, I do not suggest that black lawyers who feel no sense of moral obligation to use their professional status to advance the interests of the black community are not authentically black or are in some way morally deficient. Nonetheless, when I struggle to think of black lawyers who I could “out” as not being “down with the cause” (the cause of advancing the interests of black people as a group), I cannot think of one. I can think of several black lawyers whose viewpoints of *how* to advance the interests of blacks differ radically from my own, but their differing ideology alone does not suffice to deem them race traitors who have abandoned or otherwise have no regard for the collective interests of the black community.

For example, as a black lawyer, I would not elect to use my training and skill as a lawyer to represent the Ku Klux Klan.⁷⁷ However, black lawyer Anthony Griffin chose to do just that. Griffin provided pro bono representation to the Klan in Texas in its efforts to resist turning over its membership list to the Texas Commission on Human Rights.⁷⁸ While I disagree with Griffin’s choice to lend his services to the Klan, I cannot label him a race traitor or accuse him of selling out by exchanging national professional prominence for advancing the interests of the Klan. Denouncing Griffin as a sellout would be unfair because even while representing the Klan, Griffin professed a genuine desire to advance the interests of the black community. Griffin argued that protecting the First Amendment freedoms of one of America’s most contemptuous organizations, such as the Klan, would ultimately advance the black community’s struggle for equality by strengthening the black community’s rights of free speech and association.⁷⁹ Indeed, Griffin claims to have weighed the interests of the black community in making his decision regarding whether to represent the Klan.⁸⁰ I have no place labeling Griffin’s claim as mendacious given the fact that he had dedicated a

“sellouts” and instead encourages them to work to eradicate the deprivations that have caused black individuals to want to “pass” or “sell out” while also working to protect the right of every individual to define and perform their racial identity in ways that they determine appropriate. *Id.* at 75–81.

76. For an analysis of how some blacks are rendered unauthentically black or “de-blackened,” see Kimberly Jade Norwood, *The Virulence of Blackthink™ and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, 93 KY. L.J. 143 (2004–2005).

77. For a brief history of the Ku Klux Klan and a discussion of how First Amendment absolutism actually harms the interests of people of color, see Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857 (2003).

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

79. *Id.* at 1044.

80. *Id.*

substantial part of his career fighting for racial justice prior to representing the Klan.⁸¹

Even the black lawyer most notorious for being labeled a “sellout,” Justice Clarence Thomas, seems to subscribe to Wilkins’s obligation thesis.⁸² In fact, Thomas has publicly acknowledged that he personally feels “a special responsibility to help our [black] people.”⁸³ Admittedly Justice Thomas is against affirmative action, a policy that affords opportunity in education and employment to many blacks. This hostility to a policy that has helped so many blacks, perhaps even himself, seems to inform much of the perception of Justice Thomas as a race traitor.⁸⁴ But his rationale for his anti-affirmative action stance is one that seeks to promote the best interests of blacks. Justice Thomas argues that affirmative action is “racial paternalism” that stigmatizes blacks and renders them suspect as the undeserving, unqualified beneficiaries of racial preference policies.⁸⁵ Thomas made clear that he is concerned that affirmative action stamps blacks with a “badge of inferiority” and advances the stereotype of black incompetence by promoting the fallacy that all blacks are the beneficiaries of affirmative action and that all affirmative action beneficiaries are unqualified and incompetent.⁸⁶ The logical conclusion of Justice Thomas’s argument is that affirmative action undermines black achievement and the ability of blacks to enjoy the presumption of competence.⁸⁷ I disagree with Justice Thomas on this issue because I view the stigma and presumed incompetence problems that Thomas identifies as products of prejudice against blackness itself, not the products of affirmative action policies.⁸⁸ Nonetheless, I do not doubt Thomas’s sincerity in his belief that the end of affirmative action will mean the end of stigma and suspicion surrounding black achievement. Moreover, I acknowledge that Thomas’s ultimate

81. *Id.* at 1059.

82. See KENNEDY, *supra* note 75, at 87–143 (discussing the indictment against Justice Clarence Thomas, which has labeled Thomas a sellout).

83. *Id.* at 128.

84. See Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 987–88 (2005).

85. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

86. *Id.*

87. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).

88. The hypothesis that there is not a strong causal connection between stigma and affirmative action and that stigma is a preexisting phenomenon independent of affirmative action is explored in a recent study. See Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1343 (2008). The study analyzed the results of a web-based survey of law students in the class of 2009 at seven law schools. The study concluded that there is no statistically significant difference in internal stigma between students of color at the law schools that do have affirmative action programs and the law schools that do not have such programs. The study also showed that there are no significant harms resulting from internal stigma at these law schools, regardless of whether or not they used affirmative action in their admission process. Finally, the study concluded that there was no significant impact from external stigma on surveyed students at both types of law schools. *Id.*

objective of ending black stigma and the concomitant suspicion surrounding black achievement is a laudable one that would advance the interests of black citizens.⁸⁹

Accordingly, because Thomas's goal is to achieve a status of racial equality, or at least perceptual racial neutrality for blacks, I cannot fairly indict him as a sellout or as someone who does not subscribe to the obligation thesis. Again, although there may be black lawyers who reject the obligation thesis, I am hard-pressed to identify even one. Despite the absence of empirical data, there is ample anecdotal evidence that black lawyers feel an obligation to use their status as lawyers to give back to or advance the interests of the black community.

Black lawyers' commitment to public service directed to the black community and beyond may not be rooted exclusively in altruism or cultural obligation. Another possible rationale for black lawyers' commitment to public service is self-interest. Professor Wilkins has argued that, because black lawyers often report feeling marginalized in large corporate law firms where they are not adequately mentored and are not assigned to work on the more high profile cases, they may have a special need for the career-related benefits that public service, such as direct pro bono work, provides.⁹⁰ Wilkins points out that by volunteering for pro bono work, black lawyers gain experience and sharpen their legal skills.⁹¹ Moreover, by volunteering in other public service activities such as nonprofit board service, black lawyers increase their visibility and their contact, both of which are essential for client development.⁹² Regardless of what motivates black lawyers to perform traditional direct pro bono work or other service to persons of limited means and the institutions that serve those communities, black lawyers seem to be doing a respectable amount of this type of pro bono work.

C. The Role of Informal Pro Bono in Expanding Access to Justice for Black Citizens

Much of the pro bono work performed by black lawyers is not captured in the statistics of formal pro bono work as defined by the ABA because much of it is informal legal work that is rendered to those who have personal relationships with the lawyer.⁹³ Under this relationship model of pro bono work, the lawyer does not obtain a referral from a formally established pro bono organization or legal services agency, but rather is asked by an individual with whom he or she has a personal relationship to provide legal services. The problem historically (and presently) with this

89. For a thoughtful and in-depth analysis of Justice Clarence Thomas as a black conservative jurist whose ideology is grounded in black conservative thought and how such thought differs from white conservatism, see Onwuachi-Willig, *supra* note 84.

90. Wilkins, *supra* note 49, at 85.

91. *Id.*

92. *Id.* at 35–36.

93. RHODE, *supra* note 66.

type of informal pro bono work is that its beneficiaries tend to be those who are not the most needy of pro bono legal services. But it is precisely through this relationship-based pro bono work that black lawyers operate to improve access to justice, particularly for black citizens. Some who write about the ethical obligation to provide pro bono services to citizens without the ability to pay do not consider uncompensated legal work through informal referrals to be “legitimate” pro bono work because they see this work as fueled by nepotism, where those who are privileged with access to power can negotiate free legal service and those without such access cannot. And while uncompensated legal work performed for individuals with the ability to pay is not the most just allocation of lawyer resources, it should be recognized that many people, particularly black people, who lack the ability to pay a lawyer do get legal services through these informal referrals based on relationships in the black community.

1. Familial Informal Pro Bono

The most obvious beneficiaries of informal pro bono work by black lawyers are their familial networks. While one might presume that the family members of black lawyers can afford to hire a lawyer, such is often not the case. Because of the disparities of wealth in this country and its close correlation to race,⁹⁴ black lawyers frequently occupy a heightened economic status when compared to their extended family. A recent study by sociologist Mary Pattillo reveals that blacks in the middle class are two and a half times as likely to have a low-income sibling as whites in the same socioeconomic bracket and are four times as likely to have been poor as children, suggesting that the rise of many blacks to the middle class is a recent achievement.⁹⁵ Accordingly, black lawyers who provide pro bono services to their extended family members are probably twice as likely as their white counterparts to meet the legal needs of persons of limited economic means when providing those legal services. Moreover, the black lawyer’s definition of extended family is likely broader than that of white lawyers.

In the black community, the term “kinship” has broader meaning than in the white community. My daughter Payton recently confessed that, when she was a small child, she thought that all black people were kin to us. Her statement did not surprise me because there are so many layers of kinship within the black community. Blacks tend to feel a sense of kinship with other blacks they do not even know, based in part on shared racial identity and the shared history of racial oppression. Blacks also engage in informal adoption of other blacks by taking on the role of sister, aunt, uncle, godmother, and “step dad” to other blacks who are not related to them

94. See generally OLIVER & SHAPIRO, *supra* note 68.

95. Colleen M. Heflin & Mary Pattillo, *Poverty in the Family: Race, Siblings, and Socioeconomic Heterogeneity*, 35 SOC. SCI. RES. 804 (2006).

through either ancestry, legal adoption, or marriage.⁹⁶ These fictive kin networks arose out of slavery when families were routinely sold apart and other blacks on the plantation stepped in to replace lost loved ones. For blacks, family or relatedness is merely a question of degree. Blacks with no biological or marriage connection and who are not even known personally to a particular black individual may still be thought of in a familial sense because the black individual often feels a sense of connectedness to and responsibility for other blacks.

2. Nonfamilial Informal Pro Bono: Where Black Lawyers' Duty to Profession and Community Converge

Black lawyers' sense of duty to lend pro bono service extends beyond their familial networks to their social networks. The continuing social separation of the races makes informal pro bono referrals an important mechanism for the delivery of legal services to low-income blacks. Racial homophily is the principle that contact between people of the same race occurs at a higher rate than among people of different races.⁹⁷ Racial homophily and social segregation are key concepts in understanding the unique position of black lawyers and how that relates to their connective function.

Social segregation along racial lines is a legacy that we have inherited from slavery and Jim Crow. Even though we are decades removed from legally enforced racial segregation, our neighborhoods remain racially identifiable.⁹⁸ And despite the fact that many upper- and middle-class blacks have moved away from urban black neighborhoods, they remain socially connected to the black community. African Americans generally have social networks predominated by persons of their respective racial group. In a national study, only eight percent of adults with social networks of two or more people mentioned having a person of another race with whom they discuss important issues.⁹⁹ In addition, racially endogamous marriage is still the norm in both black and white America.¹⁰⁰ It is in part because of this racial stratification that the racial identity of lawyers continues to be important.

Because of social segregation along racial lines, many black citizens of limited economic means do not have the close social relationships with whites that can be leveraged to obtain a referral to a lawyer for reduced-cost or no-cost legal services. Black citizens in need of legal services can frequently count on their relationship with other blacks, and black lawyers

96. BRADFORD SMITH ET AL., PHILANTHROPY IN COMMUNITIES OF COLOR 12–14 (1999).

97. Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415, 416 (2001).

98. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 3–4 (2004).

99. McPherson et al., *supra* note 97, at 420.

100. Randall Kennedy, *How Are We Doing with Loving? Race, Law, and Inter-marriage*, in MIXED RACE AMERICA AND THE LAW: A READER 64, 64–67 (Kevin R. Johnson ed., 2003).

in particular, as the mechanism for obtaining an informal referral to a lawyer willing to provide legal services for low or no cost.

Discussing the interdependence of blacks, Professor David Wilkins writes, “[B]lacks are inextricably linked to each other in a manner that makes it predictable that the actions of individual blacks will affect the fate of the black community as a whole, and that ties the opportunities available to any individual black to the progress of the group.”¹⁰¹ Perhaps it is this interconnectedness and interdependence of blacks that generates the sense of responsibility that blacks have for one another. Blacks often expect other blacks to help African Americans in need simply because of their shared racial identity. There is an expectation among blacks that people within the black community should have a strong commitment to “giving back”¹⁰² to the black community.¹⁰³ Many blacks express a personal need to show gratitude for the past benefits they received from the black community by giving back to the community in some way.¹⁰⁴ Black lawyers are not excepted from this tradition of philanthropy. In fact, because of their success, they feel a heightened responsibility to give back to the black community. One study on philanthropy in the black community quotes a study participant who summed up the duty of black professionals, especially lawyers, to give back:

My parents definitely taught by example, and their teaching was: “You serve the black community.” My father and both grandparents were attorneys and they served the black community where I grew up and I know they took cases *pro bono*. That’s just what you do, and you don’t say no to people ‘cause they don’t have money and you don’t say no to people ‘cause you want to make more money and you give by being leaders in the community and speaking in the community for or against different things that are going on and also if at all possible you put your kids through school. That’s giving back.¹⁰⁵

Black lawyers then, unlike their white counterparts, feel a race-conscious *pro bono* responsibility. In fulfilling this responsibility, black lawyers provide *pro bono* service to individual black citizens who cannot afford to pay a lawyer as well as institutions that serve the needs of black citizens, such as black churches and social and civic organizations that serve the needs of the black community.

While black lawyers as professionals enjoy access to predominately white spaces, such as our democratic institutions, they also participate in social and civic activities aimed at serving and strengthening the black community. Moreover, blacks as a group tend to be more race-conscious

101. Wilkins, *supra* note 78, at 1041.

102. Implicit in the expectation that blacks give back to the black community is an understanding that individual blacks have benefited in some way from the black community. Hence being a member of the black community is a symbiotic relationship wherein individual blacks give to and receive from the community.

103. SMITH ET AL., *supra* note 96, at 16–21.

104. *Id.* at 17.

105. *Id.* at 18.

than class-conscious and therefore are more inclined to interact socially with other blacks without regard to socioeconomic status.¹⁰⁶ It is in this predominately “black space” that black lawyers develop relationships with black citizens who occupy a lower socioeconomic status. In other words, black lawyers are more likely than their white peers to socialize with black persons who occupy a lower socioeconomic status than their own. Even upper-class blacks who join whites in the suburbs and become spatially separated from the majority of blacks who occupy the lower economic class and remain in the inner city feel a shared identity with other blacks regardless of class standing.¹⁰⁷ Although economic class status arguably has divided the black community in its ideologies that explicate the continuing social inequality of blacks, class differences between blacks have not fragmented the black community socially.¹⁰⁸ This is perhaps due in part to the history of segregation that forced black people to associate based on race rather than class. During the period of segregation, blacks formed their own social and philanthropic institutions, many of which are still operable and vibrant in the black community today. Given the disparities in white wealth and black wealth in America,¹⁰⁹ socialization across class lines in the black community may also occur with heightened frequency because enforcing elitist norms in the black community would, in many instances, result in disassociation with one’s own family members or depletion of one’s nonfamilial black social relationships to an undesirably small number.

One of the most obvious examples of black space where blacks of all social and economic ranks come together and where black philanthropy is at its peak is the black church.¹¹⁰ Blacks who are involved in faith-based organizations, such as churches, are more likely to be involved in black churches than multiracial churches.¹¹¹ Black churches date back to the days of slavery when free African Christians found themselves either excluded completely from white churches or relegated to second class status in those churches. Blacks decided to form their own churches where they could worship freely, in the manner they chose, and use the church as a vehicle to support and advance the interests of people of African descent.¹¹² Those churches still survive today and are a strong cornerstone of the black community providing family counseling, daycare, prison ministry, business

106. See Thomas J. Durant, Jr. & Kathleen H. Sparrow, *Race and Class Consciousness Among Lower- and Middle-Class Blacks*, 27 J. BLACK STUD. 334 (1997).

107. Sean-Shong Hwang et al., *Class Differences in Racial Attitudes: A Divided Black America?*, 41 SOC. PERSP. 367, 377 (1998).

108. *Id.* at 367.

109. See generally OLIVER & SHAPIRO, *supra* note 68.

110. SMITH ET AL., *supra* note 96, at 24–25.

111. G. Lawrence Farmer, *African American Males’ Civic Engagement: The Importance of Social Organization Involvement and Friendship Diversity*, 10 J. AFR. AM. STUD. 51, 54 (2006).

112. RICHARD S. NEWMAN, *FREEDOM’S PROPHET: BISHOP RICHARD ALLEN, THE AME CHURCH, AND THE BLACK FOUNDING FATHERS* 158–69 (2008).

incubation, and other social and economic outreach programs to black families and individuals.

“Structural reflexivity” refers to the role that institutions such as churches play in promoting civic engagement.¹¹³ The structural reflexivity of the black church is very strong. “Black churches have historically placed a strong emphasis on the association between religious commitment and social action.”¹¹⁴ The black church plays an important role in connecting the black lawyer to the black community and encouraging the black lawyer, as part of her Christian responsibility, to use her skills to aid low-income black citizens with legal problems.

I have a proud and long affiliation with the African Methodist Episcopal Church, and there have been several occasions when the pastor or another member of my church has referred a church member of limited financial means to me for legal advice. Sometimes I have been able to aid black citizens referred to me informally by providing direct legal advice or representation. But often, I am not skilled in the area of law that relates to their legal problem, or I am simply unable to take on another project, so I personally cannot provide the legal services that the black citizen requires. Nonetheless, as a black lawyer, I have something that the average black citizen does not have. I have relationships with other lawyers through the bar associations, my former law practice, my law school alma mater, the legal education clinics at the law school where I teach, and at other law schools where I have relationships with other law professors. With this vast network of relationships, I have the privilege of having access to many lawyers. And I can usually find someone who is a lawyer within that network of relationships who is willing to help me help someone in need.

It is important to note that, many times, the lawyer who ends up actually providing the direct legal representation to the black citizen is not black. Hence, my argument is not that black lawyers do all or even most of the pro bono work for low-income black citizens, but rather that black lawyers serve an important role as the conduit that low-income black citizens often require to obtain access to the legal services that they need.

I am not the first to observe this connective role that lawyers play in our democracy. Indeed, French observer Alexis de Tocqueville, in his study of American democracy in the early nineteenth century recognized lawyers as belonging to the aristocracy and as operating as the connecting link between that class and the American people.¹¹⁵ But at the time of Tocqueville’s study of American democracy, our democracy was racially exclusive, so race was not part of his assessment of lawyers, as there were no black citizens and black lawyers in the democracy he observed. In our contemporary democracy, the integration of black citizens and black lawyers has added a dimension to our democracy where black lawyers serve

113. Farmer, *supra* note 111, at 54.

114. *Id.*

115. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 254 (Harvey C. Mansfield & Delva Winthrop eds. & trans., 2002) (1835).

as the connective link not simply between the wealthy and the poor but between predominately white democratic institutions and black citizens. Black lawyers are often the connective link that black citizens need to obtain the legal services necessary to access our courts.

CONCLUSION

Because black lawyers have unique experiences as a result of their racial identity, they bring unique perspectives to the various deliberative processes of American governmental and nongovernmental institutions. In this way, they represent the cacophony of voices in the black community in the interpretation of law, the creation of law, and the execution of law. Moreover, because black lawyers are positioned at the space between predominately white democratic institutions and the historically marginalized black community, they serve an important interpretive function by ensuring that the black community is aware of the activities and debates of democratic institutions and that those institutions are aware of the viewpoints of the black community. Finally, because of their access to the courts and to networks of lawyers, black lawyers are able to connect low income black citizens with the legal services necessary to make the courts accessible to them. In these ways, black lawyers are strengthening our democracy and making it a little more accessible and meaningful for the average black citizen.