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Elite Privilege and Public Interest Lawyering [comments]

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I was delighted to receive David Wilkins's kind comments about my article.[1] Wilkins provides a cogent and pithy analysis of the relationship between the public interest and elite corporate bars. In so doing, he uses my article as a springboard for proposing a thesis more ambitious and general than mine, involving several propositions concerning what he terms the "odd alliance" and "enduring relationship" between elite corporate and public interest lawyers. Wilkins states that this alliance is related to: (1) the similar class origins of these two kinds of lawyers; (2) public interest lawyers' tendency to target defendants who do not threaten the interests of corporate lawyers' powerful clients; and (3) the class interests of the elite bar in bolstering an image of the legal profession as devoted to the pursuit of justice. On all of these topics, I have many points of agreement with Wilkins. I do, however, perceive some differences, which I will very briefly sketch in the limited space allotted me here.

I think Wilkins's general points about the alliance between the public interest and elite corporate bars are important, but I would emphasize that the history of the public interest law movement is not, of course, only about elite corporate lawyers' endorsement of causes politically acceptable to them. As I tried to show in this article, and as perhaps emerges more clearly in its second part,[2] key players in developing the NAACP's legal strategies always included African-American civil rights lawyers and activists in the field. Obviously Wilkins is fully aware of this, but I think it is hard to talk about public interest law movements without considering the complexities of the relationships of activists of different classes within such movements. Put another way, what Wilkins is envisioning when he describes a "public

1. See David B. Wilkins, "Class Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bedfellows," *Law and History Review* 20 (2002): 147–51.

2. Susan D. Carle, "From *Buchanan* to *Button:* Legal Ethics and the NAACP (Part II)," *University of Chicago Law School Roundtable* 8 (2001): 281–311.

Law and History Review Spring 2002, Vol. 20, No. 1

interest bar" may in fact be only a certain sector of public interest legal activity—the very sector made most visible by virtue of the interest and involvement of elite practitioners.[3]

I further agree with Wilkins that the phenomenon I describe, through which elite lawyers are able to ignore or reinterpret rules that are inconvenient to their agendas, is common (though not without limit, I think). I could, if space permitted, cite other examples of legal ethics rulemakers reasoning that ethics codes cannot require what a literal application of them would compel because the "best"—most elite—law firms do not adhere to the practices required by these rules. What is most interesting to me is not that this phenomenon occurs—it seems to me sensible in many circumstances to interpret ethics rules according to a standard of reason as measured against existing practice—but that non-elite lawyers lack access to the mechanisms through which the rules are informally adjusted and transformed. It is troubling, for example, that scholars interpret Jerome E. Carlin's classic empirical work on legal ethics compliance, *Lawyers on Their Own,* as showing that solo and small firm practitioners commit the most ethics violations.[4] This view ignores the fact that what behavior ends up being defined as a serious ethics violation often depends on what class of lawyers is doing the violating. Here I think Wilkins's reference to elite lawyers' solicitation practices at private clubs is exactly on target.

That said, I disagree somewhat with scholars such as Jerold Auerbach, on whom Wilkins relies, who argue that the 1908 legal ethics rules were solely about promoting class privilege.[5] Wilkins suggests that similar "materialist" explanations related to elite lawyers' desires to perpetuate their class privilege can account for their involvement in public interest causes—and, he gently hints, have the important advantage of requiring far fewer pages than I devote to explaining the motivations of the figures in my story. I largely share Wilkins's view about the contemporary scene, in which the timid and paltry pro bono efforts of elite law firms are lauded despite the massive corporate harms these same firms often defend. But I

3. I also hasten to add that during the era that was my focus, I do not think there was, by the longest shot, any general professional alliance between the elite bar and the NAACP. As I hope I emphasized sufficiently, only a small band of elite lawyers was involved in the NAACP. The mood of the profession nationally is reflected in the American Bar Association's vote in 1912 to exclude African-Americans from membership, a position that institution did not reverse until the 1940s.

4. Jerome E. Carlin, *Lawyers on Their Own* (1962; reprint, San Francisco: Austin and Winfield Publishers, 1994).

5. For my somewhat different take on the 1908 canons, see Susan Carle, "Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons," *Law & Social Inquiry* 24 (1999): 1, 6–9.

have far more interest in achieving an endogenous understanding of the world view of the characters in my article. Perhaps my sympathy comes from too many rendezvous with these characters in dark and dusty archives. In any event, I am not convinced that it is fair or useful to apply a "vulgar" or "materialist" explanation to, for instance, Arthur Spingarn's dedication to the NAACP's early legal affairs. Spingarn worked extremely hard and effectively, for very little personal reward—a high school in Washington, D.C., was named in his honor but he received few awards, not even the biography he well deserves.[6] To say that his work for the NAACP is best explained as related to his class interest (quite precarious itself, due to his outsider status as an early twentieth-century Jew) does not direct lawyers to more effective means of public interest activism.

Put another way, it seems to me generally true that activists, whatever their class, are driven by what they value in their social circumstances to try to change what they find abhorrent in those circumstances. The Spingarns, for example, had no interest in changing the economic system, thus frustrating the more radical goals of figures such as Du Bois and, later, Charles Hamilton Houston. But to say that activists' visions are often limited by their class identifications captures only part of what we need to understand. Equally important, to my mind, is to explore how elite power operates within and around reform movements to affect their direction. Thus, Wilkins correctly understands, my main interest in this article was to understand the "mechanisms" through which "elite privilege become[s] instantiated."

In sum, it seems to me that Wilkins and I agree, though from somewhat different perspectives, that there are reasons to be wary of the baggage that can accompany the exercise of elite privilege in the context of public interest lawyering movements. Thus, I agree completely with Wilkins's general point—that the involvement of elite lawyers in public interest lawyering needs far more searching examination, rather than the kind of uncritical praise one often hears. And I am very grateful for all his comments, especially his willingness to sharpen and extend my points in that direction.

6. I particularly want to clarify my normative perspective after having had a member of one audience to which I delivered this paper tell me, to my consternation, that he liked my paper because it confirmed for him "everything he hated about the NAACP." Several other readers have had similar reactions that my argument is that the NAACP was doing something "wrong" by "violating" legal ethics rules. That absolutely is *not* my intended point.