America’s Enduring Legacy:
Segregated Housing and Segregated Schools
BY JONATHAN K. STUBBS

Recently, the global human rights community experienced the loss of Oliver W. Hill. During his 100 years, Mr. Hill received many well-deserved awards including the NAACP’s Spingarn Medal, the Presidential Medal of Freedom, and the highest awards of the ABA. He was perhaps best known for his inspiring role as co-lead counsel in the Prince Edward County, Virginia, school desegregation case, Davis v. County Board of Education,1 which the Supreme Court consolidated with three other cases in Brown v. Board of Education.2 For 80 of his 100 years, first as an activist and later as a lawyer, Mr. Hill fought to create a more civilized society based upon a “renaissance in human relations.”3 For 15 years, I was blessed to know him and came to call him mentor and, most importantly, friend. In his memory, and hopefully in his spirit, I offer these thoughts regarding some ways to achieve justice for all.

The best proof that we needed and still need affirmative action was that the segregationists were and still are resisting desegregation. If there were no authoritative pressure segregationists would never change their discriminatory practices.7

In Brown, the United States Supreme Court ruled that when a state segregates children in public schools solely on the basis of race, the state unconstitutionally deprives them of equal educational opportunities.1 For over 50 years, America has wrestled with how to desegrate public schools as a means to achieve equal educational opportunity. Segregated schools reflect a larger American dilemma: for many decades (often using American tax dollars), America’s political, business, religious, educational, and professional leaders have planned and implemented segregation. This article focuses only upon one aspect of America’s segregation problem: the conjoined twins of education and housing segregation.

A prime example of the federal government’s national segregation policy involves the Federal Housing Administration (FHA). Created during the Great Depression, the FHA insured residential housing loans for private lenders so that the lenders could provide financing for borrowers. Because the Depression shoved private lenders into financially precarious positions, for all practical purposes, the FHA’s lending policies dictated the

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Navigating the Maze:
A Primer on Civil Jurisdiction in Indian Country
BY ELIZABETH ANN KRONK

Federal Indian law is a complex field that has befuddled many judges, attorneys, and policy-makers since the formation of the United States. Jurisdiction in cases involving individual Indians2 and tribes3 can be particularly confusing because it does not follow the traditional rules of state or federal jurisdiction. This article provides broad guidance on how to determine whether the tribal, state, or federal courts have adjudicative civil jurisdiction in matters involving Indians.4 Included is a brief overview of why tribes and individual Indians have a unique status within the United States and a short overview of general civil jurisdiction in Indian country.5 This article also provides a brief description of the factors involved in determining tribal, state, and federal civil jurisdiction in matters involving tribes, individual Indians, or cases arising in Indian country.

The Unique Status of Tribes and Individual Indians

There are three sovereign governments within the United States: the federal government, state governments, and tribal governments. Tribal sovereignty, however, is somewhat unique. Because tribal governments existed before the formation of

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The Path to a Better Practice

BY PAUL L. MCDONALD, TIMOTHY L. BETSCHY, AND RAYMOND B. KIM
COCHAIRS OF THE MINORITY TRIAL LAWYER COMMITTEE

The articles in this edition of Minority Trial Lawyer may seem unconnected, but they are in fact bound together in the recognition that our practices rely on a vast combination of history, principles, best practices, and continued education.

Coming on the heels of this past year’s Supreme Court decisions in the Louisville and Seattle school cases, Jonathan K. Stubbs’ article honoring the late Oliver W. Hill highlights the “the conjoined twins of education and housing segregation.” He revisits explicit federal government policies of the early and mid-1900s that resulted in segregated housing nationwide. His analysis highlights that today’s segregated housing and schools are not accidental, but rather the result of long-existing governmental policies.

The article by Elizabeth Ann Kronk provides a succinct introduction to a challenging area of law. Because tribal governments existed before the formation of the United States, tribes are extra-constitutional, “domestic dependent nations.” But when does tribal sovereignty give way to federal government authority? States have no force within Indian country (a term of art explained in the article), but can they assert jurisdiction in respect to solely Indian parties or a tribe itself outside of Indian country? Ms. Kronk addresses these questions and provides a framework for understanding this complex area of law.

Pamela M. Johnson wisely observes in her article that the lawyer who avoids media in a high-profile case should anticipate negative coverage for the client. Thus, when the media calls, a lawyer must respond. However, this takes preparation. Ms. Johnson’s article runs through a series of tips to use in preparation and facing the media that no lawyer should be without.

This quarter’s “Ask a Mentor” column poses two questions. In one, Raymond B. Kim describes how to get support from your firm to attend out-of-state bar activities. In the other, Anthony N. Upshaw provides some sage suggestions for dealing with a troubled mentor-mentee working relationship.

Finally, Diane C. Yu presents a firsthand account of the opportunities that exist for any lawyer—and especially for lawyers of color—working as corporate counsel. Ms. Yu worked in-house as general counsel for the State Bar of California and as managing counsel and associate general counsel at Monsanto Company. These positions provided her with varied practice and professional growth. Here, she presents six strong arguments for in-house practice, ranging from the collaborative atmosphere and a longer experience with employing diverse lawyers to a better work/life balance and the chance to gain management skills.

We hope you will find this issue helpful in creating the best path for your practice and professional life. Please also keep on your schedule the ABA Section of Litigation Annual Conference, April 16–18, 2008, in Washington, D.C. This year’s conference offers timely and impressive CLE programs and a chance to network with litigators from across the country. Information is available at www.abanet.org/litigation/sectionannual.
**Taking the Lead: Tips for Defending Your Client in Interviews or Press Conferences**

**BY PAMELA M. JOHNSON**

Media outlets across the country are reporting on an increasing number of legal matters. With the popularity of legal-oriented shows and programming and greater public interest, the spotlight on lawyers and their clients has become only brighter. Furthermore, as a result of the rise of the Digital Age, Internet users can more easily find numerous stories about the latest trials. Clearly, media reports can have a great impact on everything from the outcome of a case to the work of the lawyers in properly representing the clients.

The lawyer is often required to play the role of the publicist. In this capacity, he or she is attempting to influence the attitude of the public about an issue or a person, and to bring balance to negative reporting. The goal is to keep the client’s public image favorable and make sure that the client is understood along the way. When a client’s reputation is on the line and unfavorable news coverage is prevalent, the lawyer must respond with an insightful, strong message that will counter any negative reporting.

One of the worst things an attorney can do is allow his or her client to not respond to media inquiries or to not provide the client’s perspective. A response can be given in many different forms (phone call, press release, interview, press conference, or combination), but not providing the client’s perspective can result in unfavorable press—and either way, the story is going to be reported. Generally, you should respond to a news story about your client within 48 hours (preferably within 24 hours). If you wait any longer, you will begin to lose credibility. Remember, just because a crisis exists does not mean that your client is doomed. The way in which such situations are handled—and the way in which you communicate with journalists and reporters—will be crucial to your success.

Not surprisingly, in the course of a case or in responding to media inquiries, a lawyer may encounter adversarial journalists and reporters. Media professionals often work from the premise that “the public has a right to know.” This is important to bear in mind when dealing with the media. That said, here are 12 tips for dealing effectively with the media during an interview or press conference:

- Know your interviewer’s style and his or her personality (probing, confrontational, witty, etc.) so that you will know what you’re up against.
- Know the points you want to make before going into the interview, and be sure to make them.
- When in a room full of reporters and journalists who are shouting questions at you and/or your client, listen carefully and respond to the question(s) of your choosing.
- Remember to never yell or scream at the interviewer. Even if the interviewer has an abrasive tone, remain positive and graceful, otherwise you risk losing credibility. Grace under fire counts for much in the public eye. You can even smile at the tough questions if appropriate.
- Don’t be fooled into saying anything other than what you have planned to say.
- Anticipate the dreaded questions, and come up with a response for them, because they will most certainly be asked.
- Do not expect mercy from the media. Remember, they are working from the stance that the public has a right to know especially during a crisis. But remember, the harder the pitch, the further the baseball can be smacked, so stand up to those fastballs.
- Do a mock interview. Record it with a digital camera so that you see how you will look on camera and come across to your public. Analyze it and see where you need to improve.
- Do not speculate. If you do not know the answer to the interviewer’s question, sincerely respond that you do not know. Remind him or her of what you do know. You may have to repeat yourself. Use transitional phrases (e.g., “I don’t know,” “I can’t tell you that, but I can tell you this . . .”). Importantly, learn to recognize when the same question is recycled, given a fresh coat of paint, and tossed back at you.
- If you are working on a matter with others in your firm or on your client’s crisis management team, and one of them becomes stuck, it is important that you immediately recognize this and save him or her. Step in right away and interject the answer. One who appears stuck will come across negatively to the public.
- Dead air is not your friend. To save your client or coworker, lean forward in your chair, or if standing, step forward, hold up one finger, say something to the effect of “Excuse me, but I’d like to answer that question.”
- Acknowledge the issue at hand. Don’t deny the facts, but rather, explain. Be honest if you made a mistake, and tell the ways in which you are correcting it and/or proactively addressing it. Then move on.
- It is critical that you hold your head high during times of crisis. Tell your story positively. Your client is not the first to be accused of such things—and definitely will not be the last.

Pamela M. Johnson is the CEO of the Johnson Agency, a public relations company. She can be reached at pamela@thejohnsonagency.net.
**ASK A MENTOR**

### Associate Bridge Building and Burning

**Dear Mentor:**
I am a junior associate at a large firm in New York. I’m looking to network more and am interested in attending bar association events/conferences that relate to my practice area. Unfortunately, many of these conferences occur out of state, and my firm generally limits attendance for such events to senior associates and/or partners. How do I make my case to obtain the firm’s permission to attend one or two of these conferences?

_J.S., New York City_

**Dear J.S.,**
The key to getting support from your firm to attend out-of-state bar conferences and programs is to make your attendance part of a sincere and ongoing effort to get actively involved in leadership opportunities with the bar organizations hosting those events.

Because of the expenses associated with attending out-of-state bar conferences and programs, law firms tend to be wary of requests to attend those events unless you provide a sufficient justification for your attendance. Active involvement in sponsoring bar associations is the best way to persuade skeptics in your firm that your request is a part of a genuine effort to meaningfully participate in those conferences. Through your efforts, you increase not only your own visibility, but also that of your firm. As a result, your participation becomes viewed as a prudent investment, not a lavish cost.

Getting involved in leadership opportunities with bar associations is easier than you think. Usually, all you need to do is ask. Be proactive. Seek out and contact current leaders of bar organizations and offer your services for upcoming conferences or projects. Offer to help with conference logistics, like lining up speakers or obtaining materials. Volunteer to write or edit articles. Build from those efforts. Do not let your status as a junior associate dissuade you from seeking an active role. Contrary to popular belief, the main qualification for leadership positions in many organizations is not experience, but enthusiasm.

Those efforts may require you to put in time and effort, but this will pay off in the long run, both professionally and personally. Through your work, you will be able to build meaningful professional relationships with other like-minded lawyers. As a result, your ongoing efforts actually help you achieve the networking goals of attending bar conferences in the first place.

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**Raymond B. Kim**

Raymond B. Kim is a shareholder of Greenberg Traurig, LLP in Los Angeles and serves as cochair of the Minority Trial Lawyer Committee.

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**Dear Mentor:**
I am a mid-level associate at a firm in New York. For the past four years I’ve worked closely with a partner that I consider to be my mentor. We recently began working on a large case that is very important to the firm and has required a great deal of work by everyone. However, my hours have been much worse than fellow associates on the case, and after comparing notes with my fellow associates, it appears this is due more to my partner-mentor than the case itself. The working relationship between me and my partner-mentor has deteriorated because I believe that he has become so focused on the work that he does not realize he is working his people to death. I would like to address the situation because I don’t believe I can continue to work at this pace much longer, and my job satisfaction is near zero. However, he has made comments recently to the effect that he’s tired of complaining associates, and I do not believe that he would be receptive to my concerns. I do not want to discuss this with other partners for fear that it will get back to my partner-mentor. Do you have any advice on how to address the situation without burning bridges?

_L.C., New York City_

**Dear L.C.,**
Put down the torch. You can do this without burning any bridges while still getting back on track with your partner-mentor. It sounds like he is also under great pressure with this case. If the matter is as important as you imply, his own status in the firm is riding on the outcome. So, how do you start mending the relationship? First, don’t whine . . . to anybody. Don’t be perceived as the roadblock. Next, become the solution (as painful as that might be), not the problem. Work on getting your partner-mentor to see you as an ally. (That may mean volunteering at the most inopportune time.) All cases come to an end. In the long run, you will be better served and hopefully recognized and rewarded for going the extra mile. Hang in there!

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**Anthony N. Upshaw**

Anthony N. Upshaw is a partner in the Miami office of Adorno & Yoss LLP and a member of the Tort and Insurance Department. He also heads the firm’s Mass and Toxic Tort Practice Group and is a member of the Board of Governors of the American Bar Association.
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www.abanet.org/litigation/teleconferences
BY DIANE C. YU

The opportunities that in-house counsel practice offers to minority lawyers are considerable. Notwithstanding the pay, power, tradition, and independence that attract many to private practice, I have found that the in-house lawyer’s life—in both corporate and public sector incarnations—has a number of advantages and pathways for success for attorneys of color. Furthermore, the prestige and visibility of general counsel as leaders in the profession have increased sharply over the past two decades, which inures to the benefit of the lawyers working under them. I thoroughly enjoyed my years as General Counsel for the State Bar of California, the nation’s largest bar, and as Managing Counsel and Associate General Counsel at Monsanto Company. Though the settings and clients I had in these two positions superficially would seem quite different (i.e., a mandatory bar organization that represents and regulates 160,000 attorneys versus a large, multinational corporation), both positions afforded me unique and extraordinary legal experiences that undeniably helped me grow and develop as a lawyer.

First, for in-house counsel, the nature of the fundamental work experience, while focused clearly on the client entity, is sufficiently varied so as to give one exposure to a variety of practice fields. In a world of ambiguity and constant change, achieving depth and breadth in one’s practice is both a plus and a great comfort. In-house lawyers are constantly advising their clients on legal, compliance, risk assessment, business, and, often, strategic matters. There also may be special work assignments that only those employers can offer. While general counsel for the State Bar of California, I argued over 30 lawyer discipline and admission cases in the California Supreme Court, and one in the U.S. Supreme Court—the latter, of course, a rare event for any lawyer. Coupled with regular and direct contact with one’s client, this combination of work duties meets both quality and quantity needs of ambitious and talented lawyers. It’s never boring when one is in-house, because things are continually in flux and lawyers are often at the pulse of the action.

Second, with an in-house client, lawyers no longer need to concentrate their energies and efforts on generating business. Virtually every study of minority lawyers in private firms indicates that the relentless and increasing demands of rain-making are especially daunting for minorities, creating disadvantages vis-à-vis their white counterparts. Law school does not teach students how to generate business, and a great many lawyers of color lack access to those in wealth or power positions who could become prized clients, and lack the mentoring and informal networking benefits that reportedly flow more frequently to their nonminority colleagues. In this vein, one of the heralded joys of being in-house is that lawyers have more time available for developing their legal knowledge and expertise, without the stress and frustration of also competing in the marketplace for clients.

Third, in-house practice depends heavily on teamwork and collaboration. All members of the in-house law department have common goals, and that unity and the way in which companies or public sector agencies themselves are governed put a premium on the ability to work together to get the job done. Such departments are typically “lean and mean,” and the emphasis on efficient lawyering—on making the numbers in the corporate setting, or staying within publicly set budget parameters in the public sector world—is everywhere evident. There also may be more emphasis on continuity, rather than rapid turnover. For many lawyers of color, this is a preferred work environment because it fosters a more collaborative style that rewards productivity and results, rather than face time in the office, hours billed, and the names in one’s Rolodex.

Fourth, it is no secret that many large corporations and public agencies are far more diverse in their workforces than major law firms, and have progressed further in terms of realizing and promoting the importance of having a truly diverse employee base. The woeful statistics on the number of minorities who have risen to positions of power and leadership within law firms even to this day reinforce this reality. Within corporations and public entities, there are likely to be more people of color already there (creating the desired critical mass) and a longer-standing policy in favor of diversity (typically articulated by the CEO or public agency head). These organizations have come to this policy position largely in response to expectations that they reflect the global or multicultural customers or populations they serve. Thus, there may already be in existence a commitment from the highest levels to ensure diversity and the success of all their employees. They are delighted to acquire from the ranks of law firms top minority lawyers who may find the corporate environment more to their liking.

In contrast, law firms have been slower to see and make diversity a priority. As Tenth Circuit Judge Robert Henry once said, “On [diversity], the law is in the rear and limping badly.” For two decades, the “moral imperative” argument (“it’s the right thing to do”) has been invoked often, but has led to little measurable change in the composition of firms or the advancement of minority lawyers within them. Then, in the 1990s, the “business case for diversity” began to be promoted—along the lines of “it’s smart to take advantage of
all available legal talent” and “our clients have started to ask us about our firm demographics and given us some aspirational goals on diversity.” However, not until corporate clients in this century began openly and aggressively demanding that law firms present legal teams that are diverse in gender and racial/ethnic composition or face reduction or loss of business has real progress begun to materialize. Examples of such teeth-bared initiatives originating from the client side include the “Call to Action” by Sara Lee’s Rick Palmore and a prominent group of general counsel and well-publicized steps taken by companies such as DuPont and Shell to hold workshops for their outside counsel to encourage compliance with diversity objectives. These efforts have slowly begun to transform the culture of law firms. Bottom line: It’s hard to ignore the need for diversity when clients make such demands. Changes are definitely in the wind.

Fifth, in addition to rendering legal services themselves, an extra function of in-house attorneys is the hiring and management of outside counsel who supply expertise and coverage in certain areas where in-house lawyers cannot economically render service. This dual responsibility keeps the work interesting and dynamic. Moreover, it gives corporate counsel valuable management and administrative experience, which can prove to be extremely useful later in one’s career. I know that was the case for me—I had my first shot at law department management in 1987, which has held me in good stead ever since. Mastering management responsibilities also means that lawyers can envision careers on the business side, which opens up new horizons. It’s always nice to have options.

Sixth, companies and the public sector tend to be more creative and accommodating when it comes to how work gets done. For instance, while 96 percent of law firms have alternative work schedules in place, studies by the American Bar Association’s Commission on Women in the Profession, which I formerly chaired, indicate that a very low percentage (perhaps 4 to 5 percent) of lawyers take advantage of such programs. Why? Because they report they will be stigmatized, will be perceived as less committed, will receive less mentoring and grooming for higher-level opportuni-

ties, and will receive assignments less likely to win them partnership or promotion attention. In short, utilizing balanced-hours programs puts a major speed bump in their career paths.

### Companies tend to be more accommodating when it comes to how work gets done.

On the contrary, most companies and public agencies have been handling alternative schedule requests successfully for years. I continue to be amazed at how difficult it still seems to be for women lawyers in firms to gain comparable favorable treatment to overcome work/life balancing conflicts. A woman’s pregnancy has a set timetable, and that timing allows one to plan—it’s not a totally unforeseen or random act! One innovative technique we used at Monsanto when a female attorney went on maternity leave was to have a senior woman associate from one of our outside counsel firms literally sit at her desk for the several months while she was away. Because that associate had done work for us before, we had high comfort with having her temporarily fill in. It benefited her—she got to know us even better and that enhanced her performance and expertise—and the law firm was pleased to have their employee gain the additional understanding and insight about us that the close contact yielded. For women of color contemplating having a family, it may be prudent to look carefully at corporate in-house jobs and their track record for supporting work/balance flexibility.

I’ll insert here a special note about public agency inside counsel positions. These can be very attractive to lawyers of color for a number of reasons: the tendency to be a hospitable climate; past record of promoting minorities; and commitment to work for justice and for the best interests of the public, which may be consonant with one’s own values or reasons for attending law school. At the federal level, working in the Department of Justice has been a positive experience for many—consider the career trajectory of former assistant Attorney General Deval Patrick, who was thereafter general counsel for two Fortune 500 companies and is now governor of Massachusetts. State and local government roles can produce invaluable insider’s knowledge of how the system works, and trial or management skills. Again, other leadership roles may follow if one handles the public spotlight with effectiveness and sensitivity.

In fairness, there are some minuses in any field or practice, and the in-house life is no exception. It can sometimes be burdensome or risky to have the one-client identification. Business changes rapidly, and all those mergers and acquisitions that lawyers are working on create turmoil and new entities that will frequently be downsized. Moreover, in-house attorneys can never escape from their clients—their offices are just down the hall, and they can drop in on you at any time. It’s also a myth, though persistent, that in-house work is easier on the hours than private practice. In some cases, that may be true, but in many others, expect to work a great many more hours than you thought would be the case. (As mentioned above, however, you’ll likely find more receptivity to telecommuting, flextime, and other innovative work schedules.)

On balance, I strongly recommend that lawyers of color give careful thought to a career as an in-house lawyer. Do your due diligence and choose wisely—not all corporations are alike, so select one with strong and integrity-rich leadership—and search out public agencies that are noted for their accomplishments at advancing their diverse talent pools. Whether you look to corporate in-house or public sector legal counsel positions, you just might find the right mix and a good fit, both personally and professionally.

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America’s Enduring Legacy

Continued from page 1

terms (nationwide) upon which housing loans were premised.6
As early as 1936, the FHA’s underwriters’ manual mandated racial (and class) segregation in housing:

The Valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values. The protection offered against adverse changes should be found adequate before a high rating is given to this feature.7

The 1936 manual also expressly linked housing segregation with school segregation:

The social class of the parents of children at the school will in many instances have a vital bearing. Thus, although physical surrounds of a neighborhood area may be favorable and conducive to enjoyable, pleasant living in its locations, if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist.8

Moreover, the FHA manuals published instructions regarding how local governments, private developers, and financiers could build and secure government funding for segregated housing developments. An example involves the 1938 underwriting manual that mandated racially restrictive covenants to buttress exclusionary zoning ordinances: “[D]eed restrictions, to be effective, must be enforced. In this respect they are like zoning ordinances. If there is a probability of voiding the deed restrictions through inadequate enforcement of their provisions, the restrictions themselves offer little or no protection.”9

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Elements of the government’s segregated housing master plan persist to this day.

The FHA also worked closely with the Home Owners’ Loan Corporation (another Depression-era federal agency seeking to reduce residential mortgage foreclosures by making loans to homeowners)10 to create a national financial risk assessment system that explicitly considered race as a primary factor in determining whether to make a loan.11 In extending loans to prospective borrowers, the FHA directed lenders to use its color-coded residential neighborhood maps (Residential Security Maps).12 Neighborhoods that were in the “A” category were colored green, those in “B” were colored blue, those in “C” yellow, and those in the “D” category were colored red. Upper-class, all white neighborhoods typically received A grades, while communities with blacks, foreign immigrants, and Jews frequently received Cs and Ds.13 This approach, known as “redlining,” persists today in various guises including lenders making low interest fixed loans to whites and higher interest “subprime” loans to people of darker colors who have similar credit histories.14

Mr. Hill referred to the United States government’s master plan for national housing segregation as replete with “gimmicks that were used to maintain and guarantee segregated communities.”15 Even after the Supreme Court struck down racially restrictive covenants in Shelley v. Kramer,16 the FHA knowingly continued lending taxpayer dollars to segregationist landlords who “do not file such covenants, since they are unenforceable in federal courts, but keep them alive as ‘gentlemen’s agreements.’”17 Not only did the FHA reinforce housing segregation by loaning the public’s money to individuals with verbal unrecorded racial covenants, but the FHA also persisted in financing loans to persons who already had recorded restrictive covenants.18 Prominent social scientists have pointed out the pernicious and effective nature of such “gimmicks”:

One infamous housing development of the period—Levittown—provides a classic illustration of the way blacks missed out on this asset accumulating opportunity. Levittown was built on a mass scale, and housing there was eminently affordable, thanks to the FHA’s and VHA’s accessible financing, yet as late as 1960 “not a single one of the Long Island Levittown’s 82,000 residents was black.”19

Segregated suburbs like Levittown are not quite as surprising when one considers the historical backdrop. Not long after the Court’s decision in Brown, the federal government began implementing a national transportation program that featured easy travel for white persons seeking homes in government-funded lily-white suburbs.20

In 1961, Mr. Hill accepted a position in the Kennedy Administration to combat segregationists’ use of government to further housing segregation. He achieved limited success by helping to persuade President Kennedy to issue Executive Order 11063, which, according to Mr. Hill, “face[d] the government in the right direction.”21

Despite the valiant efforts of Mr. Hill and others, elements of the government’s segregated housing master plan persist to this day. For example, in Miller v. Dallas,22 plaintiffs alleged that the City of Dallas practiced race discrimination in the delivery of municipal services. In Miller, the trial court stated:

Plaintiffs have adduced evidence that through the 1940s, while the City of Dallas was still part of a segregated society, the City adopted racial ordinances that prohibited Caucasians and African-Americans from living in areas populated by the other group. . . . [D]uring the 1940s, the City viewed racial segregation as a legitimate policy goal in making the types of decisions
that plaintiffs challenge . . . (memorandum from City Plan Engineer referring to “Negro Subdivision Development,” development of a “real good negro area,” and “a real good subdivision that was sold out to negroes very quickly”). Plaintiffs have cited numerous examples of other evidence, some referring to decisions made by the City and its agents as late as 1993, that a reasonable trier of fact could find indicate a history of racial discrimination in policies toward minority communities. 21

The Miller plaintiffs used geographic mapping and other sophisticated technology to provide compelling proof that current segregated housing patterns were no more a natural sociological phenomenon than an elephant sitting on a flagpole. 24 In Dallas (and nationwide), government financed and mandated segregation. In such circumstances, segregated schools flowing from segregated housing are neither accidental nor natural.

Unfortunately, the current Supreme Court seems to accept the idea that massive housing segregation in the United States is merely an example of “demographic shifts,” and that such shifts are a “natural” social occurrence. In Freeman v. Pitts, 26 the Court upheld a district court’s decision to partially relinquish judicial supervision after the trial court had concluded that the local school system had partially complied with the trial court’s mandate. 26 In Freeman, many whites left the southern part of DeKalb County, Georgia, as blacks moved in. The whites settled in the northern part of the county, leaving a number of schools in southern DeKalb County nearly all black and corresponding schools in northern DeKalb County overwhelmingly white. Writing for the majority, Justice Anthony Kennedy acknowledged:

[T]he potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility. 27

Nevertheless, the Court also stated:

Where resegregation is a product not of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies. 28

Compare the Freeman majority’s comments with those published by an FHA official in 1937 in the FHA’s Insured Mortgage Portfolio:

The tendency of the population of a city to divide itself into a number of subordinate communities has been termed “segregation.” Because the areas in which the group settles are the outgrowth of a natural tendency, rather than any plan or design, the areas are termed “natural areas” . . . Such areas have marked characteristics based upon racial interest, economic status, culture, or other like features . . . From a sociological standpoint, this type of segregation is considered neither undesirable nor unwholesome. As a matter of fact, the tendency to form groups enables a great multitude of people, with different ideas and cultures, harmoniously to make up a single city community. 29

In this historical context, the Freeman majority’s “demographic shifts” language is hauntingly familiar. Seventy years ago, using “gimmicks” including restrictive covenants, exclusionary zoning, and redlining, governments as well as private individuals planned and implemented the “demographic shifts” that resulted in segregated schools and neighborhoods. Today, federal, state, and local governments continue to channel taxpayer money to affluent, nearly all-white neighborhoods and schools created using the FHA’s planning blueprints dating from the 1930s. Where the government sponsors and funds “demographic shifts” resulting in school segregation, the courts have the authority and the responsibility to intervene to ensure equality of opportunity under the Fourteenth Amendment’s Equal Protection Clause (as well as its Privileges and Immunities Clause). 30

Recently, the Court’s limited judicial worldview led it to reach the wrong result in the Seattle School District decision. 31 In holding that the school systems of those two jurisdictions attributed too much weight to race in attempting to voluntarily desegregate, the majority overlooks continuing governmental subsidy of tried, true, and effective housing development schemes designed to maintain racial and class segregation.

Courts have the responsibility to ensure equality of opportunity under the Fourteenth Amendment.

The present challenges are great, but the opportunities are greater. Advocates who wish to further the legacy of Oliver Hill, Thurgood Marshall, Charles Hamilton Houston, and other human rights lawyers and activists need to educate the general public and courts about the government’s role (federal, state, and local) in perpetuating housing segregation and its conjoined twin of segregated education. In tandem with the human rights education campaign, litigation should carefully link government housing segregation with government sponsored segregated education. Painstaking fact investigation can help establish the necessary proximate causal nexus. For example, modern exclusionary zoning ordinances can (in part) be traced to the FHA manuals of the 1930s and 1940s mandating such zoning as a primary defense to exclude “inharmonious racial groups.” 32 Today, without the explicit
racist language, similar ordinances continue to disproportionately exclude persons of color.

The government furnishes substantial financial subsidies to lenders, insures their loans, and licenses them to finance development of neighborhoods with exclusionary zoning ordinances. Frequently, today’s segregated housing reflects state and local government action in implementing the federal blueprint (now over 60 years old) to perpetuate segregation. The government is similarly implicated in its relationships with lenders that make subprime loans to people of color with credit scores that merit conventional loans especially when the subprime loans help keep the borrowers bottled up in segregated communities. How can such sustained, concerted government behavior stretching over decades not constitute state action? The myth that housing segregation is simply the result of “demographic shifts” exemplifies the national denial and blindness plaguing American society regarding issues of race and class. Stated less charitably, government-sponsored “white flight” is a segregationist’s delight.

A final point: Another important facet of a comprehensive human rights agenda involves electing progressive local, state, and national legislators to vindicate equal educational opportunity. Legislators should take more effective legislative measures to eliminate government subsidies (e.g., loans, tax breaks, and insurance) for individuals and entities that use exclusionary zoning and other segregationist planning blueprints to exclude persons of color and economically disadvantaged individuals.

In the Seattle School District case, the Court argued for “narrow tailoring” of remedies for state violation of equal educational opportunities based on race. In light of systematic government-sanctioned segregation, the United States Supreme Court’s focus on narrow tailoring of remedies for race discrimination is like trying to cut down a giant redwood tree with a butter knife. Segregated education and housing are in large part orchestrated by governmental entities. Simply put, Brown recognized that the Court has inherent equitable authority to fashion effective remedies for constitutional violations. Now is the time to use them.

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Endnotes

4. Id. at 338.
5. 347 U.S. at 493.
8. Id. at 471, 490–91.
15. Hill, supra note 3 at 270.
18. Id.
26. Id. at 471, 490–91.
27. Id. at 490.
28. Id. at 495 (emphasis added).
34. Id. at 6.
Navigating the Maze

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the federal Constitution, tribes are extra-constitutional, meaning the Constitution does not apply to tribal actions taken in Indian country. Given that tribes are unique in their extra-constitutional character, courts have attempted to define what law applies in Indian country since the formation of the United States. In 1831, Chief Justice John Marshall issued one of the first U.S. Supreme Court decisions to attempt to define the status of tribal governments. In Cherokee Nation v. Georgia, Chief Justice Marshall explained that tribes are not foreign states because they are “domestic dependent nations” and “their relation to the United States resembles that of a ward to his guardian.”

The extent of tribal sovereignty was again explored by the Supreme Court a year later in Worcester v. Georgia, when the state of Georgia attempted to assert its authority over the Cherokee Nation. In Worcester, Chief Justice Marshall found that the Cherokee Nation occupied a distinct territory where the laws of Georgia had no force. Following Chief Justice Marshall’s decisions in Cherokee Nation and Worcester, tribal sovereignty must give way to the federal government’s authority based on the tribes’ position as wards of the federal government. However, Chief Justice Marshall also made clear that state law has no force within tribal territories. Accordingly, the development of general civil jurisdiction in matters occurring in Indian country can be traced back to these seminal cases, which defined the contours of federal Indian law in the United States.

Civil Jurisdiction in Indian Country

Although civil jurisdiction in Indian country is a complicated area of federal Indian law with many exceptions, a few guidelines provide a starting point for understanding civil jurisdiction in Indian country. Generally, jurisdiction in Indian country turns on the status of the individuals or entities involved, and where the incident occurred. Tribal courts have exclusive jurisdiction where (1) the matter occurs in Indian country and involves both Indian plaintiffs and Indian defendants or (2) the matter occurs in Indian country and the defendant is a member of the tribe. Tribal courts may have concurrent jurisdiction with state courts where (1) the matter occurs outside of Indian country and involves both Indian plaintiffs and Indian defendants; (2) the matter occurs outside of Indian country and involves an Indian defendant; (3) the matter occurs in Indian country and the plaintiff is Indian but the defendant is not; (4) the matter occurs on non-Indian fee land within Indian country and the plaintiff is Indian but the defendant is not; or (5) the matter occurs in Indian country and both the plaintiff and defendant are non-Indians. State courts have exclusive jurisdiction where (1) the matter occurs outside of Indian country and the defendant is a non-Indian or (2) the matter occurs either outside of Indian country or on Indian country fee lands and both the plaintiff and defendant are non-Indians. Furthermore, under certain circumstances, federal courts may have civil jurisdiction over matters occurring in Indian country when either federal statutes or federal common law provides a basis for the cause of action.

Tribal Civil Jurisdiction

As mentioned, the civil jurisdiction of tribal courts turns on the status of the plaintiff and defendant, as well as the location of the incident. One of the first Supreme Court cases to address the question of tribal civil jurisdiction was Williams v. Lee. In Williams, a unanimous Court held that state courts have no jurisdiction over transactions arising on the Navajo reservation and involving an Indian defendant. Because of the status of the defendant and the location of the transaction, the Court reasoned that state court jurisdiction in the matter “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” The Court applied similar reasoning in Fisher v. District Court, where it determined that tribal courts have exclusive jurisdiction over matters involving Indian plaintiffs and Indian defendants when the matter occurs in Indian country. The Fisher Court explained that tribal court subject matter jurisdiction over tribal members is a matter of tribal law, and, therefore, there is no federal limitation on tribal court jurisdiction over tribal members. Following Williams and Fisher, tribal courts have civil jurisdiction over Indian defendants involved in incidents occurring within Indian country. Yet, if the actions of the Indians in Indian country implicate a state interest, the state may have the authority to assert jurisdiction over matters occurring within Indian country.

The civil jurisdiction of tribal courts turns on the status of the plaintiff and defendant and the location of the incident.

Tribal jurisdiction, however, is not as clear when the defendant is a non-Indian. “[W]hen nonmembers have a right to be in Indian country by virtue of land ownership, the usual presumption favoring tribal jurisdiction is reversed.” Accordingly, tribal courts typically do not have civil jurisdiction over non-Indian defendants, even for matters occurring in Indian country. The Supreme Court, however, in Montana v. United States, articulated two exceptions to this general prohibition of tribal court jurisdiction over non-Indians:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
The Court’s decision in Montana is commonly referred to as the “Montana exception.” It allows tribal court civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff allowing for tribal court jurisdiction or when the non-Indians’ activities threaten the health, welfare, economic security, or political integrity of the tribe. In reality, the second Montana exception allowing tribal courts to assert jurisdiction in instances where non-Indian conduct threatens the tribe’s health, welfare, economic security, or political integrity has rarely been applied by courts. As a result, tribal courts will have difficulty asserting jurisdiction over non-Indian defendants, unless the non-Indian has entered into some consensual relationship with the plaintiff granting the tribe civil jurisdiction. Congress, however, has the authority to grant tribal courts jurisdiction over non-Indians.22

**Federal courts may assert jurisdiction in matters where diversity is established.**

Tribal court jurisdiction is not limited to matters that occur solely within Indian country. Tribal courts may have subject-matter jurisdiction over off-reservation treaty rights.23 Additionally, tribal courts may assert jurisdiction over matters occurring outside of Indian country if the matter involves internal concerns of the tribe.24 Despite circumstances that allow for tribal court jurisdiction, it is difficult for tribal courts to assert jurisdiction over non-Indian defendants. Circumstances under which tribes may assert jurisdiction outside of Indian country are further limited by the Supreme Court’s determination that a defendant’s identity is central to the determination of civil jurisdiction.25 Furthermore, after litigating the jurisdictional issue in tribal court, litigants may challenge tribal court jurisdiction in federal court.26

**State Civil Jurisdiction**

Outside of Indian country, Indians are subject to state laws, unless federal law indicates otherwise.27 In general, if there is no threat to tribal interests, there is no tribal jurisdiction.28 Moreover, under Public Law 280, Congress granted some states more extensive civil jurisdiction over Indian country.29 Under Public Law 280:

- Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.30

Although Public Law 280 grants those states affected by the law substantially greater jurisdictional authority in Indian country, “[t]he nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor of the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched.”31 Accordingly, because tribal criminal jurisdictional authority remains untouched by Public Law 280, it is generally agreed that Public Law 280 created a concurrent jurisdictional scheme between the tribes and states affected by the law.

- There are, however, some barriers to state jurisdiction. “First, the exercise of such authority may be pre-empted by federal law. Second, [the application of state law] may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.”32

State court jurisdiction over tribes is, however, unlikely. In contrast to individual Indians, tribes are not subject to suit in state court because of tribal sovereign immunity.33 Federally recognized tribes are immune from suit in state or federal court unless there is an unambiguous waiver of tribal sovereign immunity by either the tribe or Congress.34

**Federal Civil Jurisdiction**

Federal civil jurisdiction over matters involving tribes and individual Indians is based on statute, federal common law, or diversity. A handful of federal statutes grant federal courts jurisdiction over matters involving Indian country. For example, 28 U.S.C. § 1331 grants federal courts jurisdiction over any action “arising under the Constitution, laws or treaties of the United States.” Because many matters arising in Indian country involve federal laws and treaties, federal courts may assert jurisdiction in such matters under 28 U.S.C. § 1331. Moreover, 28 U.S.C. § 1362 provides that federal courts have jurisdiction over “all civil actions, brought by any Indian tribe or band with a governing body recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” Furthermore, the United States may also bring suit on behalf of tribes and individual Indians.35 Because 28 U.S.C. § 1345 grants jurisdiction to federal courts when the United States is a party to the action, federal courts will have jurisdiction where the United States brings suit on behalf of tribes. However, a defense based on a federal statute does not trigger federal jurisdiction.

Additionally, federal courts may have jurisdiction over matters raising questions of federal common law. For example, federal courts had jurisdiction in a case involving a claim based on aboriginal title.36 Federal courts also had jurisdiction over claims based on federal breach of trust.37

Finally, federal courts may assert jurisdiction in matters where diversity is established. However, while this is possible in cases arising in Indian country, the likelihood of federal courts asserting jurisdiction on the basis of diversity is slight. First, courts have held that Indians are not citizens of any state for purposes of diversity, and, therefore, the presence of Indians precludes the federal exercise of jurisdiction under 28 U.S.C. § 1332.38 Second, “because federal courts exercising diversity jurisdiction are mere adjuncts of state courts, and because state courts lack jurisdiction over many claims involving Indians that arise in Indian country, the Ninth Circuit issued a series of rulings holding that federal courts are precluded from exercising diversity jurisdiction.”39

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The question of which court has civil jurisdiction in matters arising in Indian country and involving tribes and individual Indians is a complicated one. Despite the civil jurisdictional maze that applies in Indian country, it is possible, with careful analysis, to actually determine jurisdiction in the absence of a Supreme Court ruling on the question.

The use of the terms “tribe” or “tribes” refers to federally recognized tribes. See 25 C.F.R. Part 83 (2003) (listing federal recognition criteria). This article discusses general civil jurisdiction over matters involving tribes and individual Indians, and is limited to a discussion of federally recognized tribes because federal recognition binds both the federal and state governments. See United States v. Holliday, 70 U.S. (3 Wall) 407, 419 (1865).

This article is limited in several important respects. First, the article is only intended to provide the reader with a basic understanding of civil jurisdiction in Indian country. Readers interested in exploring civil jurisdiction in Indian country in great detail should review Felix Cohen’s Handbook of Federal Indian Law (LexisNexis Matthew Bender 2005). Second, this article is limited to a discussion of adjudicative civil jurisdiction and does not address legislative jurisdiction. However, a tribe’s legislative jurisdiction is usually related to its adjudicative jurisdiction. Id. at 600 (“[i]f a tribal court lacks legislative jurisdiction over non-members in a particular case, it will be presumed not to have adjudicative jurisdiction, including subject matter jurisdiction, absent congressional authorization.”); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (“[A]s to non-members, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”). Finally, this article addresses general civil litigation in Indian country and does not discuss more nuanced areas of tribal civil jurisdiction such as divorce and adoption.

The term “Indian country” is a legal term of art referring to specific types of land. 18 U.S.C. § 1151 defines “Indian country” as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

2. For a variety of reasons, this article uses the term “Indian” to refer to “a person meeting two qualifications: (a) that some of the individual’s ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual’s tribe or community.” Cohen’s Handbook of Federal Indian Law §3.03[1] (Nell Jessup Newton et al. eds., 2005). The term “Indian” is preferable over other terms used to describe such individuals because many Indians chose to describe themselves as Indians, such as the author’s own Tribe—the Sault Ste. Marie Tribe of Chippewa Indians. Additionally, the federal government typically refers to such individuals as Indians. See generally 18 U.S.C. §§ 1152, 1153.

3. This discussion of tribal court jurisdiction focuses on tribal court subject matter jurisdiction. Just as state and federal courts must have personal and subject matter jurisdiction to assert authority over a matter, so too must tribal courts have personal and subject matter to assert jurisdiction over a matter. In the case of federal Indian law, it is likely that if a tribal court has subject matter jurisdiction, it will also likely have personal jurisdiction.

4. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (invoking the Cherokee Nation’s ability to bring an original action to the U.S. Supreme Court based on the tribe’s status as a “foreign state”).
5. 30 U.S. (5 Pet.) at 17.
7. See id. at 561.
8. U.S. v. Sohappy, 770 F.2d 816, 819 (9th Cir. 1985) (finding that the tribe had concurrent jurisdiction with the federal government.
over fish caught outside of the reservation).  
24. See John v. Baker, 982 P.2d 738, 756 (Alaska 1999) (“And tribal courts may also have jurisdiction to ‘resolve civil disputes involving nonmembers, including non-Indians’ when the civil actions involve essential self-governance matters such as membership or other areas where ‘the exercise of tribal authority is vital to the maintenance of tribal integrity and self-governance.’”) (citations omitted).
26. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856–57 (1985); but compare Nevada v. Hicks, 533 U.S. at 369 (finding that a state is not required to exhaust tribal remedies if exhaustion would only delay the proceeding because the tribal court clearly lacks jurisdiction).
29. Under Public Law 280, Congress initially gave five states, later adding a sixth, extensive civil and criminal jurisdiction in Indian country. These states include Alaska (except the Metlakatla Islands), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. Public Law 280 also gives other states not specifically mentioned the ability to opt-in to the Public Law 280 system.
31. Cohen, supra note 4 at 602.
33. Tribal sovereign immunity, where applicable, is a right possessed by tribal governments that must be recognized by both the federal and state governments. See Morgan v. Colorado River Indian Tribe, 443 P.2d 421 (1968) (holding tribes enjoy protection of sovereign immunity and states within the United States of America must recognize this protection even when the states themselves have waived their own sovereign immunity). Additionally, tribal sovereign immunity extends to agencies of the tribes. See Weeks Construction, Inc. v. Ogala Sioux Housing Authority, 797 F.2d 668, 670–71 (8th Cir. 1986). Tribal sovereign immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power. See Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991); Kiowa Tribe v. Mfg. Technologies, Inc., 523 U.S. 751, 754 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
34. See Kiowa Tribe, 523 U.S. at 754.
38. See American Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002); Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993).
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