Native Americans Struggle to Obtain Potable Water

By Katharine H. Kinsman

A 2013 U.S. Environmental Protection Agency (EPA) report regarding public water supply systems nationwide noted that there were approximately 1.3 million consumers reliant on small public water supply systems in Indian Country. The report found that although violations had decreased at a rate of 10 percent between 2009 and 2013, 12 percent of the public water systems in use in Indian Country had health-based violations in 2013, compared to the 7 percent health-based violations reported outside of Indian Country. In 2017, the EPA estimated that tribal water systems average almost 60 percent more water quality violations than other public water supply systems.

In late 2019, Dig Deep and the U.S. Water Alliance published results of a study of water access by African American, Latinx, and Native American communities in the United States. While 0.3 percent of white households nationwide lack plumbing, this holds for 5.8 percent of Native American households. According to a National Public Radio segment of the same date, greater than 2 million Americans live without tap water or flush toilets; with 58 out of 1,000 Native American households lacking plumbing versus 3 out of 1,000 white households.

The Navajo Nation—with tribal membership of over 332,000 and reservation land that spans approximately 27,000 square miles across Utah, New Mexico, and Arizona—is a striking example of the struggles Native Americans face.

Katharine H. Kinsman has practiced law since 1985, concentrating in the areas of corporate and general business law, real estate, environmental, land use planning, construction, affordable housing, Indian, and tobacco law.

Register for Virtual Meetings

We are changing our meeting format to allow you to receive CLE in a safe and convenient manner. Please join our Land Use Institute and State and Local Government Law Spring Conference:

Virtual 34th Annual Land Use Institute
May 12–14, 1–4:15 p.m. ET
ambar.org/lui2020

Virtual SLGL Spring Conference
May 19–21, 1–4:15 p.m. ET
ambar.org/slngspring20
2021 Nominating Committee

Section Chair Martha H. Chumbler announces the formation of the 2021 Nominating Committee:

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Chicago, IL 60606-6448
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mchumbler@carltonfields.com

Free On-Demand CLE Program
Responding to the Global COVID-19 Pandemic: The State and Local Government Perspective
[Closed Captioned]

Moderator: Patricia E. Salkin
Panelists: Erika Danielle Robinson, Ernest B. Abbott, Shannon Kathleen O’Fallon

Federal, state, and local governments are faced with responses to the COVID-19 pandemic that both address the public health and welfare and ensure the continued operation of essential government services. Panelists will address: Navigating new legal territory; advising state public health agencies; and counseling public K–2 schools and institutions of higher learning.

Select your state to learn more about the credit details and status of CLE application.

Duration: 90 minutes
Sponsors: ABA CLE and Government and Public Sector Lawyers Division
Non-Members: $199 • ABA Members: Free • Section Members: Free
For more information and to register: visit ambar.org/lg398761966

State & Local Law PRODUCES PUBLIC BENEFIT

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Any member of the ABA may join the Section by paying its annual dues of $50. Subscriptions to State & Local Law News are available to nonlawyers for $49.95 a year ($54.95 for foreign subscribers).

The views expressed herein are not necessarily those of the American Bar Association or its Section of State and Local Government Law.

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The Editor invites submissions of articles for publication in State & Local Law News. Articles should be no longer than 2,000 words and lightly footnoted.

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Well, best-laid plans . . . .

I am drafting this column on what would have been the first day of the Section’s combined Land Use Institute (LUI) and State & Local Government Law Spring Meeting in Tampa, Florida. COVID-19 obviously made that live meeting an impossibility. So, we pivoted. Instead, the 2020 LUI and State & Local Government Law Spring Conference will be entirely online, covering the same topics and with the same great panelists.

LUI, which is in its 34th year, will be presented over three consecutive days, May 12–14. It will include updates from national experts on a wide range of issues relating to land use, as well as both nuts-and-bolts presentations geared toward those less experienced in land use law and more in-depth sessions focusing on cutting-edge topics. CLE credit is available.

The following week, May 19–21, the CLE programming will continue during the Virtual State & Local Government Law Spring Conference. It will focus on the impacts of social media, electronic communication, and other technology on state and local government operations. Programs will range from cybersecurity to the impacts on privacy of social media monitoring, from the ethical implications of electronic communications to limitations on public employee use of social media and the First Amendment.

More information about the two programs and how to register is provided on pages 4–6 of this issue of the newsletter.

Unfortunately, these online programs cannot replicate the value of the physical gathering that had been planned. But I hope that we will have that opportunity again in the coming months.

In the meantime, the online programs will provide an opportunity for us to include those of you who may not have had the time or resources to travel to Tampa for a live meeting. Indeed, we are currently maximizing online offerings for all of you, including live-streaming programs on elections, COVID-19 related issues, and other topics, as well as providing access to a library of past programs on a wide range of topics.

If there are additional topics you would like to see included, let our CLE director Jessica Bacher (jbacher@law.pace.edu) or me know. For instance, what issues are you currently facing? What do you foresee as the issues you will face when we begin to experience the “downslope” of the pandemic curve?

The Section will again have live meetings, as soon as it is safe to do so. For now, however, we will live-stream; we will videoconference; we will teleconference; we will stay in touch in whatever manner we can.

Feel free to email (mchumbler@carltonfields.com) or call me (850/513-3612) with your input. I look forward to hearing from you.
Local government land use decisions affect economic development and quality of life. They can also create major challenges to efforts by property owners to develop and use their property, as well as to residents as they cope with growth and change.

The annual Land Use Institute program, now in its 34th year, addresses and analyzes the state-of-the-art efforts by government to manage land use and development, but also presents the key issues faced by property owners and developers in obtaining necessary governmental approvals. In addition, the entire approach of the program is to provide practice pointers that give immediate “take-home value” by focusing on topics relevant to the average practice of the attendee.

This year, all sessions will take place virtually over the course of three afternoons (May 12–14). Buy the bundle of all three webinars or check them out individually online. (Your purchase includes both the live webinar and the recorded on-demand product, so join us live or learn at your convenience.)

**Tuesday, May 12**

1:00-2:30 p.m. | **Session 1**
Welcome and Course Overview

Frank Schnidman, Chair, Land Use Institute

Update on Planning, Land Use, and Eminent Domain Decisions

A panel discussion of recent court decisions, providing a common foundation for all registrants to build a better understanding of the current state of land use law. Among the subject areas where cases will be addressed (subject to change) are Drones and Un-manned Aircraft; Eminent Domain; Exactions; Historic Preservation; Impact Fees; Moratoria; Religious Land Use, Short-Term Rentals; Takings; Variances; Vested Rights and Wetlands.

*Speakers:* Amy Brigham Boulris, Gunster, Miami, FL; W. Andrew Gowder, Jr., Austen & Gowder, Charleston, SC; Wendie L. Kellington, Kellington Law Group, Lake Oswego, OR; Deborah Rosenthal, FitzGerald Yap Kreditor, LLP, Irvine, CA

*Moderator:* Patricia E. Salkin, Land Use Institute Co-Chair; Provost for the Graduate and Professional Division, Touro College, New York, NY

2:30-2:45 p.m. | **Break**

2:45-4:15 p.m. | **Session 2**
Federal Laws, Regulations, and Programs Affecting Local Land Use Decision Making

The federal government continues to encroach upon local government decision making through a variety of policies, programs, and executive orders. This session presents major current issues as they relate to environmental protection and real estate development at the local level, including the rollback of regulations in selected programs. Among the topics to be overviewed from a regulatory and policy perspective (subject to change) are Climate Change/Sea Level Rise; Drones and Un-manned Aircraft; Endangered Species; Hazardous Materials; Historic Preservation; Housing; National Flood Insurance Program; NEPA; Religious Land Use; Opportunity Zones; Water and Wetlands.

*Speakers:* Sarah Adams-Schoen, University of Oregon School of Law, Eugene, OR; Wendie L. Kellington, Kellington Law Group, Lake Oswego, OR; Dwight Merriam, Attorney at Law, Hartford, CT; Deborah Rosenthal, FitzGerald Yap Kreditor, LLP, Irvine, CA; Robert H. Thomas, Damon Key Leong Kupckak Hastert, Honolulu, HI

*Moderator:* W. Andrew Gowder, Jr., Austen & Gowder, Charleston, SC

**Wednesday, May 13**

1:00-2:30 p.m. | **Session 1**
Welcome and Course Overview

Frank Schnidman, Chair, Land Use Institute

Annual Richard F. Babcock Faculty Address

Overview of National and International Best Practices to Address Climate Change and Sea Level Rise

*Speaker:* James F. Murley, Chief Resiliency Officer for Miami Dade County (former Chair of the Florida Community Affairs)

*Commentators:* Ronald L. Weaver, Stearns Weaver Miller, Tampa, FL; Deborah Rosenthal, FitzGerald Yap Kreditor, LLP, Irvine, CA

2:30-2:45 p.m. | **Break**
2:45–4:15 p.m. | Session 2
Land Use Practice and COVID-19
Speaker: Michael Allan Wolf, Richard E. Nelson Eminent Scholar Chair in Local Government, Professor of Law, University of Florida, Gainesville, FL

Seeking and Dealing with COVID-19 Based Variance and Rezoning Requests
Speaker: W. Andrew Gowder, Jr., Austen & Gowder, Charleston, SC

Thursday, May 14

1:00–2:30 p.m. | Session 1
Welcome and Course Overview
Patricia E. Salkin, Land Use Institute Co-Chair; Provost for the Graduate and Professional Division, Touro College, New York, NY

HOT TOPICS
Regulating Personal Transportation
Speaker: Dean J. Trantalis, Mayor, City of Fort Lauderdale, FL

Housing the Homeless
Speaker: Wendie L. Kellington, Kellington Law Group, PC, Lake Oswego, OR

Redevelopment/Opportunity Zones
Speaker: Paul Boudreaux, Professor, Stetson University College of Law, Gulfport, FL

2:30–2:45 p.m. | Break

2:45–4:15 p.m. | Session 2
Affordable Housing
Speakers: Hon. Peter Buchsbaum, Judge, New Jersey Superior Court (ret.), Lanza and Lanza, LLP, Of Counsel, Flemington, NJ; Victor M. Marquez, Squire Patton Boggs (U.S.) LLP, San Francisco, CA

Sustainability/Resilience
Speakers: Sarah Adams-Schoen, Professor, University of Oregon School of Law, Eugene, OR; Jessica Ann Bacher, Professor and Executive Director, Land Use Law Center, Elisabeth Haub School of Law at Pace University, White Plains, NY

Eminent Domain and Takings
Speakers: Amy Brigham Boulris, Gunster, Miami, FL; Ronald L. Weaver, Stearns Weaver Miller, Tampa, FL

Concluding Comments
Frank Schnidman, Chair, Land Use Institute

For more information and to register: visit ambar.org/lui2020

Costs for Virtual Land Use Institute (LUI) and State & Local Government Law Section (SLGL) Spring Conference

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This year’s theme is “Government in the Age of Information – Technology and Social Media.” The focal points are the challenges and benefits that the use of social media and advances in information technology present for state, local, and tribal governments, as well as for those whose businesses and personal lives are affected by government use of social media and IT.

This comprehensive program offers legal and practical insights for those who represent state, local, and tribal governments as well as those who represent private parties on matters involving those governments.

Join key industry professionals as they address a breadth of complex issues:

- From the monitoring of student social media posts to address security concerns, to the regulation of government-employee speech through social media;
- From an exploration of advances in technology, to an analysis of steps to address cybersecurity; and
- From the ethical implications of electronic communication, to the implications for advancements in IT on government transparency.

This year, all sessions will take place virtually over the course of three afternoons (May 19–21). Buy the bundle of all three webinars or check them out individually online. (Your purchase includes both the live webinar and the recorded on-demand product, so join us live or learn at your convenience.)

**Tuesday, May 19**

1:00 p.m.–2:30 p.m. | Government Transparency & Open Meetings: Is It a Meeting When No One’s in the Same Room?

*Speakers:* Donna Y. Frazier, Caddo Office of the Parish Attorney, Shreveport, LA; Patricia Gleason, Special Counsel for Open Government, Office of Florida Attorney General, Tallahassee, FL; Diego (“Woody”) Rodriguez, General Counsel, Orlando Expressway Authority, Orlando, FL

*Moderator:* Martha Harrell Chumbler, Carlton Fields PA, Tallahassee, FL

2:30–2:45 p.m. | Break

2:45 p.m.–4:15 p.m. | Electronic Communications: Navigating the Ethical Potholes

*Speakers:* Mark Herron, Messer Caparello PA, Tallahassee, FL; Albert J. Hadeed, Flagler County Attorney, Bunnell, FL; Elizabeth Clark Tarbert, Chief Ethics Counsel, The Florida Bar

*Moderator:* Michael Patrick Donaldson, Carlton Fields PA, Tallahassee, FL

**Wednesday, May 20**

1:00 p.m.–2:30 p.m. | Monitoring Student Social Media: Necessary for School Security or an Invasion of Privacy?

*Speakers:* Walter J. Harvey, General Counsel, Dade County Public Schools, Miami, FL; David A. Koperski, General Counsel, Pinellas County Public Schools, St. Petersburg, FL; Amelia Vance, Special Counsel & Director of Education Privacy, Future of Privacy Forum, Washington, DC

*Moderator:* Erika Danielle Robinson, Shelby County Public Schools, Memphis, TN

2:30–2:45 p.m. | Break

2:45 p.m.–4:15 p.m. | Government Employees and Social Media: Are Posts Protected Speech?

*Speakers:* Gregory Alan Hearing, Gray Robinson PA, Tampa, FL; Daiquiri Steele, Forrester Fellow, Tulane Law School, New Orleans, LA

*Moderator:* Donald David Slesnick II, Slesnick & Casey LP, Coral Gables, FL

**Thursday, May 21**

1:00 p.m.–2:30 p.m. | Grift, Graffiti, and Ransoms: Cybersecurity for State and Local Government

*Speakers:* Serge Jorgensen, The Sylint Group, Sarasota, FL; Hoyt L. Kesterson II, Avertium, Phoenix, AZ; Michael Stephens, General Counsel and Executive Vice-President, Tampa International Airport, Tampa, FL

*Moderator:* John Ernest Clabby, Shareholder, Carlton Fields PA, Tampa, FL

2:30–2:45 p.m. | Break

2:45 p.m.–4:15 p.m. | Emerging Technologies (co-sponsored by the ABA Section of Science & Technology Law)

*Speakers:* Theodore Franklin Claypoole, Womble Bond Dickinson, Atlanta, GA; Dr. Dustin Moody, Mathematician, National Institution for Standards and Technology, College Park, MD; Randy Vito Sabbett, Cooley LLP, Washington, DC

*Moderator:* Hoyt L. Kesterson II, Avertium, Phoenix, AZ

For more information and to register: visit ambar.org/slgspring20
The Trump Administration’s Proposed Rule Change of the 2015 Affirmatively Furthering Fair Housing Rule

By Stephen W. Thorpe

In early January 2020, the U.S. Department of Housing and Urban Development (HUD) released a notice of proposed rulemaking to change the Obama-era Affirmatively Furthering Fair Housing (AFFH) rule. The current AFFH rule was enacted in 2015 to pursue the purposes and policies behind the Fair Housing Act (FHA), as amended. The FHA, with its roots in the aftermath of the Civil War and the era of reconstruction, calls not only for the prohibition of discrimination in housing practices, but also for HUD’s program participants to take active action to combat patterns of historic segregation to allow for integration of living patterns and promotion of fair housing choice.

Tools Used Before the Current Rule

Prior to the 2015 AFFH rule, HUD program participants met their mandate to affirmatively further fair housing by analyzing impediments to fair housing choice in an aptly named Analysis of Impediments (AI). The AI was used to identify impediments to fair housing choice in a participant’s jurisdiction, to plan, and to take action to combat the effects of those impediments. The participant would certify to HUD that it would engage in actions that would affirmatively further fair housing. The participant would be required to keep records of its actions but was not required to submit the analysis or the records for HUD review.

HUD’s review of the AI program overall signaled a need for improvement because patterns of segregation persisted. A 2010 report by the U.S. Government Accountability Office (GAO), titled “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” affirmed that, among other things, HUD neither specified the content nor the scope of the AIs. This resulted in uneven analysis across jurisdictions and decreased the effectiveness of the AI as a planning tool. The report recommended HUD improve the program by providing effective guidance and technical assistance as well as the data already in HUD’s possession to help program participants plan for AFFH.

Current AFFH Rule

In response to the GAO report and its own finding, on July 19, 2013, HUD announced a proposed rule that would replace the AI in assessing fair housing.4 The proposed new assessment would better assist program participants in carrying out their obligation of AFFH by conditioning the receipt of HUD funds on identification of hurdles to fair housing, prioritizing overcoming those hurdles, and setting goals for housing and community development planning. In 2015, after receiving public comment and making changes, the proposed rule became a reality, replacing the AI with a standardized Assessment of Fair Housing (AFH).3

The stated goal of the 2015 AFFH rule was “to empower program participants and to foster the diversity and strength of communities by overcoming historic patterns of segregation, reducing racial or ethnic concentrations of poverty, and responding to identified disproportionate housing needs consistent with the policies and protections of the FHA.”4 The rule sought “to assist program participants in reducing disparities in housing choice, access to housing and opportunity” based on protected class status, thereby expanding economic opportunity and enhancing the quality of life.5

The key features in achieving those goals were:

1. Replace the AI with AFH, which was meant to be a more effective and standardized assessment to assist program participants with identification and evaluation of fair housing issues.

2. Provide nationally uniform data to program participants that would help frame their assessment activities. This was intended to assist program participants in determining goals to address fair housing issues and contributing factors to lack of housing choice.

3. Provide focused directions on the purpose of the AFH and standards, which HUD would evaluate the AFH. This direction, coupled with clear standards, would allow for the use of technical assistance and reinforce the value and importance of planning activities for fair housing.

4. Provide a more direct link between the AFH and subsequent program participant planning documents with the aspiration of tying fair housing planning into the priority setting, commitment of resources, and specific activities to be undertaken.

continued on page 14
Why Government Lawyers Are Appealing Candidates for College and University Presidencies

By Patricia E. Salkin

The profile of college and university presidents is changing, and lawyers are emerging as a new cohort of higher education leaders. There are many pathways to the presidency for lawyers, and one strong commonality in the background of the modern lawyer president is experience in government. This is not surprising, given the shared skill set required for successful government lawyers and successful campus leaders.

Lawyers Emerge as College and University Presidents

With roughly 4,000 institutions of higher education in the United States, there is a robust body of literature on leadership in higher education. Presidents have been studied and critiqued by biographers and scholars, yet scarce attention has been paid to the trend of lawyers assuming the campus leadership position. As the chart below illustrates, the number of lawyer president appointments has more than doubled in each of the last three decades—with a staggering 162 lawyers appointed in the 2010s. At this rate, by 2029, lawyers will account for 300 to 400 presidents, or more than 10 percent of all sitting presidents. Considering that from 1900 to 1989, less than 1 percent of college presidents were lawyers, these numbers are astonishing.

Former Government Lawyers Constitute a Significant Cohort of College Presidents

Even more interesting are the varied backgrounds and career paths that lead from the courtroom to the boardroom. The chart below illustrates that just as the number of lawyer presidents has increased, the number of lawyers with government experience has doubled.

Number of Lawyers Appointed as College and University Presidents (By Decade)

Government experience comes in a variety of forms. Some lawyer presidents have completed military service as Judge Advocate General (JAG) officers and other commissioned appointments, some clerked for a federal or state judge, others were prosecutors, and the majority worked in the executive and legislative branches—including appointments at the U.S. Department of Justice, the U.S. Department of Education, the White House, counsel to legislative committees, the offices of state attorneys general, and as chiefs of staff or advisers to key elected officials.

In some instances, elected officials who are lawyers have been tapped for campus presidencies. For example, Daniel P. Malloy, former governor of Connecticut and mayor of Stamford, began his tenure in 2019 as the chancellor of the University of Maine System. William Bulger, president of the Massachusetts Senate for 18 years, became president of the University of Massachusetts in 1995. Cathy Cox was president of Young Harris College after she served as Georgia secretary of state and ran unsuccessfully for governor. Janet Napolitano, governor of Arizona and head of Homeland Security, became president of the University of California System in 2013. Paul McNulty, who was appointed by President George W. Bush as deputy attorney general, became president of the University of Virginia in 2009.

Patricia E. Salkin is provost for the Graduate and Professional Divisions at Touro College, a past chair of the Section of State and Local Government Law and the Section’s Delegate to the ABA House of Representatives. This article is part of a multi-year study on lawyers and college presidents for her PhD in creativity at the University of the Arts in Philadelphia, Pennsylvania.
Leadership, Government Lawyers, and Campus Presidents

Given the number of necessary skills shared between government lawyers and campus presidents, perhaps it is not so surprising that a growing number of presidents have public service experience.

While lawyers may enter the public service at different times in their careers, as well as at different points of entry and levels of government, successful government lawyers possess basic leadership qualities, traits, and experiences that transfer well into the higher education space. For example, government lawyers must often confront media headlines and crises, which require strategic, thoughtful, and appropriate responses. So, too, the college president must be prepared for the unexpected. Consider recent higher education headlines about admissions scandals, historical ties to slavery, allegations of racism, clashes over free speech and hate speech, allegations of harassment and campus safety, and other improprieties—all of which the campus leader swiftly must address.

“I have a lot of experience managing large public institutions, they all involve politics in some way or another; it’s not as if higher education is divorced from that.” —Janet Napolitano

Additionally, just as government officials must provide answers and information to the public, college presidents must be excellent communicators for their constituents—a body that includes students, faculty, staff, alumni, parents, and donors, as well as the general public. Attorneys are trained in oral advocacy and communication skills from the very start of law school, and they hone those skills throughout their careers. In both government and higher education, the most important communications statements typically are vetted by attorneys who review them for accuracy, truthfulness, and potential unintended consequences. This training and innate awareness on the part of the lawyer president can make all the difference when managing crisis communications, especially ones that can have positive or negative long-term ramifications for the institution.

With a reputation for being creative problem solvers, government lawyers often operate in the space of the unknown. They learn to draw on precedent, consider multi-level potential positive and negative ramifications, and abide by the rule of law when making recommendations and decisions. Here, their analytical skills play a key role. Likewise, campus presidents must be able to view unexpected challenges critically through multiple lenses and to quickly make informed and reasoned decisions based on a full analysis of facts and data.

Effective government lawyers also possess excellent management skills, as they often supervise direct reports and teams. To accomplish tasks within short time frames, they must possess excellent interpersonal skills and be able to motivate their colleagues. Similarly, campus presidents manage direct reports and must handle delicate relationships with faculty and boards, as well as with students, staff, donors, and community leaders.

What’s more, lawyers who work in government must perfect the art of compromise. Rarely is the original draft of a piece of legislation or proposed rulemaking the same as the version that is adopted; thanks to input—both solicited and not—from a wide variety of stakeholders who often disagree. The college president experiences something similar. She must work with various campus and community stakeholders to develop and refine policies and procedures that will appeal to all parts of the campus community. While peaceful protests are expected in halls of statehouses, peaceful protests on campus are more apt to make the national news. Knowing when and how to compromise is an essential leadership skill.

Simply understanding how government works is of great value to campus leaders. After all, they must navigate the world of public funding at all levels of government successfully to deliver needed resources to their schools for capital and programmatic priorities. Equally important is the ability to advocate for the individual campus’s role in the higher education space. Public policy and public budget decisions can have a tremendous impact on the sustainable health of individual institutions and on higher education in general. Presidents with government backgrounds may have an advantage when developing strategies targeted at the policy and public sectors.

Conclusion

Given the similarities in general leadership skills required for both government lawyers and campus presidents, the fact that many of the lawyers appointed to the presidency have government experience is not a surprise—and perhaps is a quality that search committees should more strongly consider when evaluating the leadership abilities of potential candidates.

Endnotes

1. See https://www.washingtonpost.com/education/2020/01/15/lawyers-are-leading-us-colleges-universities-more-than-ever-before-is-that-good-or-bad-higher-education.
2. See https://www.chronicle.com/article/In-Calif-Janet/144745.
Since the incident in Ferguson, Missouri, five and a half years ago, interaction between police and U.S. residents, particularly minority communities, has led to a series of highly publicized incidents nationwide, often resulting in federal civil rights litigation.

On occasion, members of law enforcement have been criminally charged and convicted, such as in cases in North Charleston, South Carolina, and Dallas. But more often the officer is not charged or convicted although plaintiffs have frequently prevailed in civil action or received out-of-court settlements.

A panel of legal experts at the American Bar Association Midyear Meeting in Austin, Texas, on February 15 explored why this is happening while examining how case law has evolved, particularly since Ferguson in summer 2014 when an 18-year-old African American man, Michael Brown, was fatally shot by a 28-year-old white Ferguson police officer, Darren Wilson. The panelists agreed that police accountability is critical; and they also said that for now the law, including court decisions, puts a high burden for civil liability arising out of claims of bad police actions.

“Many times,” observed Paul D. Henderson, executive director of the Department of Police Accountability in San Francisco, “we see behaviors that are lawful but awful.”

The program, “Police Civil Rights Litigation: From Ferguson to Dallas—2020 Vision Today?” explored the legal concept of qualified immunity, which gives law enforcement officers immunity from civil liability when their actions do not violate a clearly established statutory or constitutional right.

Ronald A. Norwood, a defense lawyer with Lewis Rice LLC in St. Louis who has served as counsel to the St. Louis Metropolitan Police Department, said the burden of proving civil liability against police officers is high because the courts have said that qualified immunity exists if the officer can demonstrate “probable cause or arguable probable cause” for his or her actions or where a plaintiff fails to identify clearly established law prohibiting the particular conduct.

“Officials should not be held liable for bad guesses,” Norwood said, explaining liability typically results from transgressions of a bright line. Decisions as to whether an officer acted reasonably in a given instance depend on the “totality of the circumstances,” he added.

Ranjana Natarajan, a professor and director of the Civil Rights Clinic at the University of Texas School of Law in Austin, agreed that the table is tilted in favor of the defense in police misconduct cases. But she said the police and communities share two common goals that both sides embrace in these cases—accountability and truth.

She observed that in the spat of cases where a loved one has been killed or injured, families “are looking for some kind of closure.” She lamented that qualified immunity leads to lengthy litigation both in criminal and civil contexts, and that this “causes a delay in closure.”

“What they want is impartial people to look at the complaint and have closure on it,” she said of victims and families.

Henderson, a former prosecutor in the Bay Area, said his police accountability agency investigates, reviews, and audits. But it can only bring non-criminal complaints against officers. Somewhat uniquely, the agency has a powerful tool to compel a statement from an accused officer. The tool: Under terms of employment, the officer agrees to cooperate with his agency on these civil matters or risk losing his or her job and pension.

While Henderson’s agency dates to 1982, it has gained more teeth under him, he said. Complaints against police, for instance, can be filed electronically and in seven languages. And there is no deadline to file a complaint after an incident.

“This is the cutting edge,” Henderson noted. “When we talk about criminal justice reform, this is criminal justice reform.”

This program, moderated by Dallas area attorney Edwin P. Voss Jr., was sponsored by the ABA Section of State and Local Government Law. For more from the Midyear Meeting, visit ambars.org/lg398121284.
From the ABA Midyear Meeting

CROWN Act: Untangling Implicit Bias, One Strand at a Time

By Betsy M. Adeboyje

Kimberly Norwood, the Henry H. Oberschelp Professor of Law at the Washington University School of Law in St. Louis, remembers getting her hair straightened as a child. Using sound effects to describe the hot metal comb gliding through her strands, she called the process debilitating because children often couldn’t play outside afterward, fearing that humidity, sweat, or water would revert their hair to an afro or natural curl pattern.

Norwood was among a panel of lawyers at the ABA Midyear Meeting in Austin, Texas, who discussed implicit bias within employment, educational, criminal justice, and social structures.

“Implicit Bias: Governmental Complicity” primarily focused on the new CROWN Act, which calls for the end of black hair discrimination. CROWN, which stands for Creating a Respectful and Open World for Natural Hair, is the law in California, New York, and New Jersey. Another 22 states have introduced the legislation.

Norwood was optimistic about states implementing the new law. “Three states down, 47 to go,” she noted.

Norwood said people are being fired, not hired, and suspended and expelled from school because their hair grows out of their scalp in a tightly curled pattern.

She shared examples of African American children who were not allowed to attend school and adults whose jobs were jeopardized because of their hairstyle. Among them is Texas student Deandre Arnold, who was suspended for having locks and told he would have to cut them before being allowed to attend prom or graduate. Recently, he attended the Academy Awards with filmmaker Matthew Cherry, who won an Oscar for his animated short, Hair Love, which sheds light on an African American father learning how to care for his daughter’s hair.

Norwood encouraged attendees to find out the status of the CROWN Act in their state, sign the petition, and write their representatives about it. She said everyone should do what they can to “stop this strand of race discrimination.”

Sharing a picture of how the hair grows out of the scalp of an African American, Norwood noted, “The hair grows out of the scalp, not down,” she said, emphasizing the word out.

“This is important because some policies say you have to wear your hair down. That’s a problem. That means you have to do something to make it lay down,” she explained.

“In order to comply with many of your employer and school policies, a change in hair texture is going to have to occur,” Norwood noted.

Hair biases thrive because they require subjectivity, she said. Norwood provided numerous examples of children around the country who have been suspended or expelled because of hair policy violations, some of which said children would need to straighten their hair before returning to school.

Norwood explained that straightening of African American hair requires using a chemical. “Lye is in Drano,” she said. “Let’s just be real about this.” Hair straightening is also expensive and causes hair loss.

Panelist Sarah E. Redfield, professor emerita at the University of New Hampshire School of Law, surveyed the audience and found most had taken a bias test before. One of the most popular tests is the Harvard Implicit Bias Test. “Everybody is surprised by the results,” Redfield said, adding, “Once you become aware, then it’s time to start thinking about small and large things you can do about it.”

Rhonda Hunter, a trial lawyer in Dallas, shared what she’s experienced in the courts regarding implicit bias.

“Implicit bias manifests itself through those people who are in positions of authority,” she said.

Everyone has unconscious biases that originated from the environments in which they grew up, which includes the influence of marketing and the media, Hunter noted. “We’re bombarded with images that perpetuate lies,” Hunter said. “They’re what I call micro messages that we might not be conscious that we’re internalizing.”

She homed in on this point by sharing headlines and the pictures that accompanied two news stories. She pointed to one on the left about white students, with the headline, “Three University of Iowa Wrestlers Arrested; Burglary Charges Pending.” Another story on the right about four African American young men read, “Coralville Police Arrest Four in Burglary Investigation.”

“Virtually the same headline, but look at the message,” Hunter said. “On the left, you’ve got the school yearbook pictures; on the right, you’ve got their mug shots. The images are completely divergent, and we have these images reflected over and over and over again, and if we’re not conscious of what we’re seeing and the effect it may have on us, then we may not realize that we may be acting unconsciously because of the messaging that we get.”

Betsy M. Adeboyje is senior writer and journalist for the ABA Media Relations and Strategic Communications Division in Washington, D.C.
Disproportionalities exist in the government from the child welfare system to housing to Social Security. "Face it, it’s throughout the government," Hunter said. “So, we presume that decision makers are not malicious in their actions, but they are allowing their unconscious biases to affect their decisions, like an automatic reflex.”

Those who work in government should be aware that they have been receiving messages their whole lives, she warned. “That may be leading to unconscious decisions . . . that perpetuate the disproportionality in the government.”

Hunter encouraged people to work on their biases and not to let them "creep" into their decision making.

"This program, moderated by C. Elisia Frazier, managing deputy city attorney for the City of Atlanta Department of Law, was sponsored by the ABA Section of State and Local Government Law. For more from the Midyear Meeting, visit ambar.org/lg398121598.

ABA Midyear Meeting Wrap-Up

Resolution 118 Adopted
During the ABA Midyear Meeting, the House of Delegates adopted Resolution 118, urging the U.S. Congress to protect the security and integrity of U.S. federal elections by enacting legislation that authorizes and appropriates necessary funding for the National Institute of Standards and Technology. The new resolution is available at ambar.org/2020resolution118.

We’d like to thank our Section leaders for spearheading the successful adoption of Resolution 118:

Lai Sun Yee, Chair
Homeland Security and Emergency Management Committee
New York, New York

David A. Wheeler, Partner
Neal, Gerber & Eisenberg LLP
Chicago, Illinois

CLE Credit Available
In case you missed these programs at the Midyear Meeting, you can still earn CLE credit through these on-demand CLE programs:

- Police Civil Rights Litigation: From Ferguson to Dallas—2020 Vision Today? (1.5 hours) ambar.org/lg398121284
- Implicit Bias: Government Complicity (1.5 hours) ambar.org/lg398121598
- Legally Stolen Lands: Impacts and Remedies for Historically Disadvantaged People (1.5 hours) ambar.org/lg393890966

Voter Webinar

Voter Suppression Tactics: Voter Fraud Claims, Voter ID Restrictions, Voter Purges and Post-Shelby County Electoral Barriers

[Closed Captioned]

June 3, 1–2:30 p.m. ET

Part 2 of the America Votes! Series
Based on their respective chapters in the recently released America Votes! Challenges to Modern Election Law and Voting Rights (4th ed., ABA 2020, edited by Benjamin E. Griffith and John Hardin Young):

- Rachel Provencher with the Political Law Team at Holland & Knight LLP in Washington, D.C., will address Electoral Access and Voter ID Laws and Restrictions
- Kurt Kastorf, Supreme Court and appellate advocate in Washington, D.C., and Atlanta, Georgia, will address the impact of Shelby County on Voting Rights
- Lucy Thomson, Esq., CISSP, founding principal of Livingston PLLC, a Washington, D.C., law firm with her practice focused on cybersecurity, global data privacy, technology issues and compliance and risk management, will address Cybersecurity in the Electoral Process and Best Practices.

Duration: 90 minutes
Format: Web
Panelists: Rachel Provencher, Kurt G. Kastorf, Lucy Thomson
Moderators: Benjamin E. Griffith, John Hardin Young
Sponsors: Section of Civil Rights and Social Justice, Section of State and Local Government Law
CLE Credit: 1.5 hours
Non-Members: $150
ABA Members: $75
Section Members: $40

For more information and to register: visit ambar.org/lg398732810
Native Americans Struggle to Obtain Potable Water
continued from page 1

Americans have obtaining safe drinking water. The groundwater is contaminated by over 500 abandoned uranium mines. Over 30 percent of Nation residents do not have running water and therefore are reliant on wells or other small public water supply systems for their potable water.7

The Goulding Well near Oljato in Monument Valley on the Utah/Azathan border is the main water supply for approximately 900 people, some of whom need to drive more than six miles “off road” to reach it. Most tribal members must travel (some as many as four to five hours) to collect water to haul back to their homes for use—often to numerous locations to collect a sufficient weekly supply.9 During the summer, tribal members may have to wait an hour or more to get water from their collection site(s).9 Many members living on the reservation have less than a 10-gallon supply of potable water on hand and use only 2 to 3 gallons per day in contrast to the 88 gallons of water used per day by the average U.S. consumer. Due to the low density and mountainous terrain on the large reservation, centralized water systems are a poor option.

Public health implications are great. Studies indicate that Navajo tribal members are two to four times more likely to have type 2 diabetes due in part because sugar water is much more accessible than drinking water. Contaminated groundwater, wells, springs, and soil have been identified on the Pine Ridge Reservation in South Dakota, and nitrate-nitrogen and coliform bacteria, which cause blood disorders, were found in the Santee Sioux Nation and the Omaha Tribe of Nebraska’s water sources. Tested wells on the Crow Reservation in Montana show contamination with bacteria that causes pulmonary disease, stomach issues, and even Legionnaires’ disease. American Indians in Arizona drinking water with high levels of inorganic arsenic may also be susceptible to type 2 diabetes.10 America’s Water Infrastructure Act of 2018, 33 U.S.C. 2201, includes at Title II, “Drinking Water System Improvement,” § 2001, “Indian Reservation Drinking Water Program.” This section authorizes the development of 10 water systems in the Upper Missouri River Basin, which runs through Montana, North Dakota, and South Dakota and impacts the Lakota, Dakota, and Nakota Sioux Tribes, as well as 10 water system projects in the Upper Rio Grande Basin providing water to Colorado, New Mexico, Texas, and Mexico, home to 23 tribes and pueblos. The act authorizes the programs to connect, repair, or expand existing water systems in the geographic areas, which are environmentally endangered, but does not appropriate the designated $20 million for each fiscal year from 2019 to 2022.11

In May 2019, a pipe burst on the Warm Springs Indian Reservation in Oregon, causing a significant water infrastructure failure. The reservation’s 4,000 residents were impacted as water hydrants, sprinklers, cooling systems, restrooms, and schools were severely compromised if not totally shut down. An emergency water distribution center assisting over 900 people a day disbursed 3,000 gallons of water daily. The tribe did not have the money to repair the water system failures, and the EPA threatened to fine the tribe $60,000 per day if the repairs were not completed by October 2019. The Oregon legislature then pledged $7.8 million in lottery bonds for reservation water and sewer projects, but the money won’t be payable until 2021. As of mid-November 2019, problems persisted with the water system servicing the largest reservation in Oregon.12

In response to this crisis, Oregon Senators Ron Wyden and Jeff Merkley introduced an amendment to § 2001 of the 2018 act entitled “The Western Tribal Water Infrastructure Act of 2019.”13 The amendment adds 10 water system projects in a segment of the Columbia River Basin. Tribes located in geographic areas incorporated in the amendment include the Chinook Indian Nation, the Confederated Tribes of Grand Ronde, the Cowlitz Indian Tribe, the Confederated Tribes of Warm Springs, the Confederated Tribes of the Umatilla Indian Reservation, the Yakama Nation, the Wanapum, and the Nez Perce Tribe. The amendment also increases the amount allotted to $30 million per fiscal year starting in 2020 (with no ending date) and also appropriates the money. The amendment was referred to the Senate Committee on Indian Affairs at the end of 2019.

Although the amendment to the 2018 act is commendable, the $30 million per year appropriated is clearly insufficient to cover the scope of the potable water problem experienced by the multiple tribes in the Columbia River Basin, the Upper Missouri River Basin, and the Upper Rio Grande Basin. As a point of reference, the Indian Health Service estimates that it would cost more than $200 million,14 or greater than $70,000 per home,15 to provide basic water and sanitation to the Navajo Nation.16 According to the 2013 EPA report cited above, the allotment in the EPA 2013 National Public Water Supply System Program for Indian Country was only $6.5 million. Additionally, only 2 percent, or $17.2 million, of the National Drinking Water State Revolving Fund is set aside for American Indian Communities and Alaska Native Villages. An October 2016 report by the Democratic Staff of the House Committee on Natural Resources noted that Native American tribes consistently receive the lowest funding per dollar of need out of any U.S. jurisdiction: “For example, in Fiscal Year 2012, tribes received $0.75 per every $100 of need under the Drinking Water State Revolving Fund.”17

The 2019 amendment and its predecessor do not address the significant potable water access issues facing Indian Country nationwide. Not only must significantly more money from both the federal and state governments be appropriated to address this public health and basic human right issue, but more comprehensive updates are
required to federal water law. The last update to the drinking water standard in the Safe Drinking Water Act was issued in 1996—24 years ago.\(^\text{18}\) Finally, a more comprehensive approach to water system issues in Indian Country nationwide needs to be developed proactively instead of ad hoc legislation reactive to individual water crisis.

**Endnotes**

2. The report did not include data from Native American Villages in Alaska or 18 public water supply systems used by tribes in Oklahoma.
5. Native Americans Are Group Most Likely Not to Have Running Water at Home, National Public Radio, Ayana Berry (Nov. 18, 2019).
7. 2 Million Americans Lack Clean Water Access, Especially Native Americans, National Public Radio, Jordan Davidson (Nov. 28, 2019).
8. Id.
14. Id.
15. Id.
16. Id. and Water Hole, supra note 9.

**The Trump Administration’s Proposed Rule Change of the 2015 Affirmatively Furthering Fair Housing Rule**

*continued from page 7*

(5) Promote and facilitate collaboration between different jurisdictions and public housing agencies to develop regionally appropriate approaches to address fair housing issues. This would be done in collaboration with the public, with an emphasis on individuals who had been historically excluded because of their protected status under the FHA, by providing them with an opportunity to contribute regarding fair housing issues, goals, and how best to allocate HUD funding. The inclusion of community involvement is required under this rule as an integral part of the AFH.

With the election of President Donald Trump, the AFFH never was fully implemented. The administration determined that, even with the limited roll-out of the 2015 rule, that there was sufficient evidence to suspend the rule in 2018.\(^\text{6}\) As a result, the impacts of the AFH never were fully realized.

**AFFH Proposed Rule Change**

In January 2020, in a proposed rule change, HUD acknowledged that the statutory obligation to AFFH has not changed.\(^\text{7}\) Instead, HUD has determined that the current regulations are overly burdensome to both HUD and program participants. As a result, the program was determined to be ineffective for participants to meet their reporting obligations. This led HUD to propose revisions to both the assessment tool and the codified regulation.

In support of this stance, HUD proffered five justifications. First, the AFH is expensive to complete and its complexity resulted in a high failure rate from first-time submissions of participants during the first year. Second, HUD’s administration of the rule was overburdensome, citing increased expenditures during the first year of implementation. Third, the rule does not allow for HUD to tailor the rule depending on the program participant. HUD pointed to the requirement that every program participant regardless of civil rights record, size, or housing condition had to complete the same AFH process. Fourth, the rule emphasizes planning and process over the program participants evaluating the results of the assessment. Fifth, it was determined that the HUD-provided tools to compile data for future use were too difficult for participants to learn and operate.

On August 16, 2018, HUD published an Advance Notice of Proposed Rulemaking asking for public input regarding possible changes on the 2015 AFFH rule.\(^\text{8}\) The advance notice sought comments about reduction in regulatory burdens, results-oriented analysis instead of a focus on community characteristics, local control and incentives to increase fair housing choice by increasing housing supply, and efficient use of HUD resources.

After receiving over 700 public comments, HUD formulated measures to revise the 2015 rule. HUD is proposing that each program participant determine how it will meet its AFFH by scoring. The score will be determined by compiling data-driven measures that analyze whether each program participant (1) is free of adjudicated fair housing claims; (2) has an adequate supply of affordable housing throughout its jurisdictions; and (3) has an adequate supply of quality affordable housing. Program participants that score high at the outset or achieve improvement over a five-year cycle would be eligible for incentives provided by HUD. In contrast, HUD would use remedial resources and regulatory enforcement actions for program participants that score low on the assessment. Regardless of the score, all program participants would determine their own goals, based on their specific circumstance and how best to meet the statutory obligation.
under the FHA. HUD is proposing to make a change in the regulatory requirements for program participant certification of AFFH by making program participants certify their commitment to take steps to address obstacles to fair housing choice.

The proposed rule was open for public comment until March 16, 2020. The debate about whether the 2010 GAO’s criticism of the AI will be overcome by the proposed rule will be interesting and important to track, as local and state governments determine how to meet their AFFH obligations. As Justice Anthony M. Kennedy so aptly put it in Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2725 (2015): “Much progress remains to be made in our Nations’ struggle against racial isolation.”

Endnotes
4. Id.
5. Id.
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