MINORITY Trial Lawyer
Minority Trial Lawyer Committee • Section of Litigation • American Bar Association

Social Justice Lawyering:
The Rule and the Limits of Law

By Charles J. Ogletree Jr.

Charles J. Ogletree Jr.

Forty years ago, in the spring of 1968, Dr. Martin Luther King Jr. preached from the pulpit of the Church of God in Christ in Memphis, Tennessee. On that critically important day, Dr. King challenged the nation to make good on its promises—to live up to its professed ideals of unity, freedom, and equality.

"Let us rise up tonight with a greater readiness," King sermonized in support of striking sanitation workers, most of whom were African American.[1] "Let us stand with a greater determination. And let us move on in these powerful days . . . to make America what it ought to be."[2]

Nearly a decade and a half had passed since a unanimous Supreme Court declared intentional school segregation unconstitutional in *Brown v. Board of Education*.[3] Determined civil rights lawyers had won a monumental victory worth celebrating. Just four years before King's speech, Congress had passed the Civil Rights Act of 1964[4] with the support of President Lyndon Baines Johnson.

Still, though, progress was slow in coming. The struggle for racial equality and social and economic justice, it sometimes seemed, had only just begun. In an urgent yet firm tone, King predicted a long but worthwhile journey ahead. And with an eerie prescience—he'd die from an assassin's bullet a day later, on April 4, 1968—Dr. King reminded churchgoers and civil rights activists that there were values and causes far more important than our individual lives:

> "Like anybody, I would like to live a long life. Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over. And I've seen the Promised Land. I may not get there with you. But I want you to know, tonight, that we, as a people, will get to the Promised Land. And I'm happy tonight. I'm not worried about anything . . ."[5]

Forty years later, American schoolchildren commemorated King's assassination with moments of silence and special readings. News programs ran footage of King's "I've Been to the Mountaintop" speech he delivered in Memphis. But if we wish to honor Dr. King and the lesser-known, like-minded civil rights lawyers who preceded and succeeded him, we will each find a way to restart the too-often interrupted conversation about race, discrimination, segregation, and its twisted, brutal legacies. And then we will each do our part to make real progress by crafting solutions at our places of worship, community centers, school board meetings, dinner tables, college campuses, and workplaces. Those solutions must acknowledge that lingering harm if they are to bring us to a better future. Students of civil rights understand that progress on this front has historically followed retrenchment. The challenge before us now is to break that pattern once and for all.

Indeed, the work of Charles Hamilton Houston, after whom the Harvard-based Institute I founded and direct is named, provides a relevant model and example for addressing contemporary and increasingly complex issues of race whether they be legal, political, personal, or all those things combined. Houston, an African American, was born in 1895 in Washington, D.C., and attended the M Street High School, a segregated public school in Washington.

Students of civil rights understand that progress has historically followed retrenchment.

He went on to be the valedictorian of his class at Amherst College and became the first African American elected to the prestigious *Harvard Law Review* in light of his outstanding classroom performance, before choosing a career as a civil rights litigator and scholar in the 1930s. Houston worked in a law office back in his hometown of Washington, D.C., with his father, also a lawyer, and was appointed as the vice dean of Howard Law School, a course that changed his life. While teaching at Howard Law School, Houston laid the legal and theoretical groundwork that made *Brown* and the civil rights movement that followed possible. He trained and mentored the generation of lawyers—Thurgood Marshall, Oliver Hill, Spotswood Robinson and many others—who set the civil rights movement in motion. The groundwork of building theory, training litigators, and systematically bringing lesser known cases to build a legal record was often not the stuff of public glory and recognition. Often, it was tedious and slow. Sadly, Houston died of heart failure in 1950, four years before his most famous student, Thurgood Marshall, argued and

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Chairs' Column

The Broad Scope of Diversity

By Paul L. McDonald, Timothy L. Bertschy, and Raymond B. Kim
Cochairs of the Minority Trial Lawyer Committee

Paul L. McDonald

Timothy L. Bertschy

Raymond B. Kim

We are pleased to present you with the latest issue of *Minority Trial Lawyer*. As a member of the Minority Trial Lawyer Committee, you have already taken the first step toward becoming an active member of the American Bar Association and this committee. One of the goals of this committee is to build upon that initial step by providing members with opportunities for even greater participation in the ABA in events and activities that will enhance your professional and personal lives.

In April, the Minority Trial Lawyer Committee cosponsored the program "Women of Color in the Legal Profession: Why It Means Success for Everyone," during the ABA Section of Litigation Annual Conference in Washington, D.C. That program built upon the ABA Commission on Women in the Profession's recent report, Visible Invisibility: Women of Color in Law Firms, and comprised a distinguished panel of in-house counsel and private practitioners who discussed the business case for improving hiring, promotion, and retention of women of color, and concrete steps that could be taken to ensure that they succeed.

One upcoming event that we hope that you will be able to attend is the 2008 Annual Meeting in New York City. This year's ABA meeting will take place August 7–12. Over 200 CLE programs will be presented at that meeting, and there will be numerous opportunities to meet old friends, make many new ones, and reach out to fellow lawyers, judges, and legal professionals from throughout the country.

We also welcome your participation in this newsletter. *Minority Trial Lawyer* is published quarterly and features articles by minority lawyers on a wide range of subjects of interest to minority trial lawyers. We are always seeking articles to include in future issues and hope to be a resource for our members in their efforts to get published. If you are interested in volunteering to work on the newsletter or have ideas for articles, please contact *Minority Trial Lawyer*'s editor-in-chief, Jennifer Bechet, at jbechet@stonepigman.com, or any of the cochairs.

This issue of the newsletter focuses on the idea of the rule of law and its place in modern society. We are honored to publish an article by noted Harvard Law School Professor Charles J. Ogletree Jr. on the history and role of social justice lawyering in America. In the fall 2007 issue of *Minority Trial Lawyer*, we featured a remembrance of civil rights pioneer Oliver W. Hill, written by Clarence M. Dunnaville Jr. In his article, "Social Justice Lawyering: The Rule and the Limits of Law," Professor Ogletree discusses the efforts of Mr. Hill and other giants such as Charles Hamilton Houston and Thurgood Marshall and how today's lawyers and leaders must continue to build upon that pioneering legal work.

In "The Rule of Law for Native Americans: Why Increased Funding for Tribal Justice Systems Is Needed," Jerry Gardner and Mary L. Smith provide an overview of the tribal justice system and make the case for why increased funding for tribal courts is necessary if the idea of the rule of law is to have real meaning. Because of chronic underfunding in the past, tribal courts do not have the resources to deal with the challenges facing the Native American community. For

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The Rule of Law for Native Americans: Why Increased Funding for Tribal Justice Systems Is Needed

By Jerry Gardner and Mary L. Smith

Jerry Gardner

Mary L. Smith

American Bar Association President William Neukom has made the rule of law the centerpiece of his initiatives. As President Neukom has stated:

> The rule of law refers to a system in which the government is accountable under the law. This system is based on fair, clear, publicized, and stable laws that protect fundamental rights. These laws are enacted, administered, and enforced by a process that is accessible, fair, and efficient. The laws are upheld by diverse, competent, independent, and ethical law enforcement officials, advocates, and judges. This foundation is essential to foster sustainable communities of opportunity and equity.[1]

We often think of the rule of law in the international context. The crisis in Pakistan during the past few months, for instance, comes to mind. In the United States, however, there is a rule-of-law issue that also has reached the crisis level. The chronic underfunding of tribal justice systems has undermined the rule of law in tribal communities.

The ABA has recognized the need "to support quality and accessible justice" by ensuring "adequate, stable, long-term funding" of justice systems.[2] Although the ABA has on several occasions championed the need for adequate funding of state court and federal court systems, it has not yet done so for tribal justice systems. At the ABA's Annual Meeting in August 2008, the ABA's House of Delegates will consider, for the first time, a resolution to provide adequate, stable, and long-term funding for tribal justice systems.

Today, many believe that American Indians have become a neglected and often forgotten minority. For many, tribal justice systems in the United States are unknown, misunderstood, or ignored. The same is true of the many contributions to our unique democracy made by democratic tribal governments before and during the time of our Founding Fathers.

For tribal courts to provide justice to the communities they serve, they must have adequate funding. Unfortunately, however, tribal justice systems have been underfunded for many years. Tribal courts play an important role in Native American communities, confronting not only issues of self-determination and sovereignty but also many of the same problems as state and federal courts, but with considerably fewer resources. In fact, the federal, state, and tribal court systems are interconnected, and when tribal courts are unable to deal with tribal jurisprudence, some of these matters end up being adjudicated in either the state or federal courts, sometimes with disparate results for Native Americans as compared with other Americans.

The article will discuss the history of tribal courts, the chronic underfunding of tribal justice systems, and the urgent need for adequate, stable, and long-term funding for tribal justice systems.

The Third Sovereign in the American System of Justice: Tribal Justice Systems

American Indian and Alaska Native Nations constitute a third sovereign within the American system of justice—a fact that is overlooked by too many Americans. The status of Indian tribes and tribal justice systems was articulated by Supreme Court Justice Sandra Day O'Connor:

> Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.[3]

Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934.[4] Before the act, tribal judicial systems were based on the Courts of Indian Offenses, which were established in the 1880s by the federal Office of Indian Affairs. The Indian Reorganization Act allowed the tribes to organize their governments, to draft their own constitutions, to adopt their own laws through tribal councils, and to set up their own court systems. By that time, however, previous U.S. policies directed at American Indians—such as forced migration, settlement on the reservations, and the allotment system—had wreaked havoc on customary Native American life. Consequently, in 1934, most tribes were not in a position to re-create historical forms of justice. Therefore, while a few tribes have "traditional courts" based on Indian custom, most modern reservation judicial systems do not trace their roots to traditional Indian forums for dispute resolution. Rather, because the tribes were familiar with the regulations and procedures of the Bureau of Indian Affairs (BIA) under the provisions of the Code of Federal Regulations, that model provided the framework for many tribal courts at the time of the Indian Reorganization Act.[5]

Today, the vast majority of the more than 350 tribal justice systems function in isolated rural communities. These tribal justice systems face many of the same difficulties faced by other isolated rural communities, but the problems are greatly magnified by the many other complex problems that are unique to Indian Country. Tribal justice systems are faced with a lack of jurisdiction over non-Indians, complex jurisdictional relationships with federal and state criminal justice systems, inadequate law enforcement, lack of detention staff and facilities, lack of sentencing or disposition alternatives, lack of access to advanced technology, and lack of substance abuse testing

and treatment options.[6] Tribal courts must work to satisfy the sometimes competing demands of those inside and outside the tribal communities. But while the challenges are enormous, "the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes."[7] As the Supreme Court has recognized, "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."[8]

As one prominent commentator has observed, "Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and sovereignty, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them."[9] Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities.

Tribal courts preside over the very same issues state and federal courts confront in the criminal context, including child sexual abuse, alcohol and substance abuse, gang violence, and violence against women. But in their efforts to address these complex issues with far fewer financial resources than their federal and state counterparts, these courts also must "strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within."[10]

Tribal courts must deal every day with a wide range of difficult criminal and civil justice problems. The scope, size, and complexity of tribal court civil caseloads have been rapidly expanding, but issues related to the tribal court criminal caseloads are even more problematic. It should be noted that, in most tribal justice systems, 80 to 90 percent of the caseload consists of criminal cases, and 90 percent of those cases involve the difficult problems of alcohol and/or substance abuse.[11] Although the crime rate, especially the violent crime rate, has been declining nationally, it has increased substantially in Indian Country. In fact, the rate of violent crime estimated from self-reported victimizations of American Indians is well above that of other U.S. racial or ethnic groups and is more than twice the national average.[12] Tribal justice systems are grossly underfunded to deal with these criminal justice problems.[13]

Consequences of Inadequate Funding of Tribal Justice Systems

There is no question that tribal justice systems historically have been underfunded and continue to be underfunded in most tribal communities. This chronic underfunding of tribal court systems has been repeatedly documented and examined over the years in report after report. Moreover, various governmental agencies and justice organizations have repeatedly called for substantially increased funding for tribal justice systems.

In most tribal justice systems, 80 to 90 percent of the caseload consists of criminal cases, and 90 percent of those cases involve alcohol and/or substance abuse.

Passage of the Indian Tribal Justice Act

In 1991, the United States Civil Rights Commission found that "the failure of the United States Government to provide proper funding for the operation of tribal judicial systems . . . has continued for more than 20 years."[14] The commission also noted that "[f]unding for tribal judicial systems may be further hampered in some instances by the pressures of competing priorities within a tribe."[15] Moreover, the commission pointed out that "[i]f the United States Government is to live up to its trust obligations, it must assist tribal governments in their development. . . ."[16] The commission "strongly support[ed] the pending and proposed congressional initiatives to authorize funding of tribal courts in an amount equal to that of an equivalent State court" and was "hopeful that this increased funding [would] allow for much needed increases in salaries for judges, the retention of law clerks for tribal judges, the funding of public defenders/defense counsel, and increased access to legal authorities."[17]

The critical financial need of tribal courts recognized by the U.S. Civil Rights Commission ultimately led to the passage of the Indian Tribal Justice Act.[18] Congress found that "[t]ribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health, safety and the political integrity of tribal governments."[19] Affirming the findings of the Civil Rights Commission, Congress further found that "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation."[20] To remedy this lack of funding, the act authorized appropriation base funding support for tribal justice systems in the amount of $50 million for each of the fiscal years 1994 through 2000.[21]

To carry out the provisions of the Indian Tribal Justice Act, Congress authorized appropriations of over $58 million annually for each of the fiscal years from 1994 to 1999. Unfortunately, however, a *total* of only $5 million of the authorized amount was actually appropriated through 1999.[22] Since 1993, when Congress enacted the Indian Tribal Justice Act, the needs of tribal court systems have continued to increase, but there has been no corresponding increase in funding for tribal court systems.[23] In fact, the Bureau of Indian Affairs funding for tribal courts has decreased substantially since the Indian Tribal Justice Act was enacted in 1993.[24]

Recognition of the Urgent Need for Increased Funding of Tribal Courts

Also in 1993, a group of tribal, state, and federal leaders issued a report sponsored by the Conference of Chief Justices of the State Supreme Courts, the National Center for State Courts, the National American Indian Court Judges Association, the State Justice Institute, and the Native American Tribal Courts Committee of the National Conference of Special Court Judges of the American Bar Association.[25] The recommendations of the report reflect a philosophy that holds that as the role, legal authority, and necessity of tribal courts become better understood, conflicts will give way to mutual recognition that all courts—tribal, state, or federal—have a legitimate place in the American system of governance. The report also recognizes that the full development of tribal court jurisdiction and competence in matters affecting tribal governance and Indian

Country is a positive step for all parties, including affected non-Indians and adjacent states. To this end, one of the main recommendations of the report was that "Congress should provide resources to enhance and expand tribal court operations concomitant with their increased authority."[26] Specifically, the report recommended that "Congress should increase the level of its funding for tribal courts."[27]

Various federal agencies have also repeatedly recognized both the importance of tribal justice systems and the need for substantially increased funding of these tribal justice systems. For example, in 1997, a joint report by the Departments of Justice and the Interior concluded that:

> Basic law enforcement protection and services are severely inadequate for most of Indian Country. This problem affects more than 1.4 million people who depend on the federal government for these services. Simply put, many American citizens living on Indian reservations do not receive even the minimum level of law enforcement services taken for granted in non-Indian communities.[28]

In 1998, Attorney General Janet Reno testified before the Senate Indian Affairs Committee that it is "crucial" to provide additional funding to "better enable Indian tribal courts, historically under-funded and under-staffed, to meet the demands of burgeoning case loads."[29] The attorney general indicated that the "lack of a system of graduated sanctions through tribal court, that stems from severely inadequate tribal justice support, directly contributes to the escalation of adult and juvenile criminal activity."[30]

Attorney General Reno acknowledged that "[w]ith adequate resources and training, [tribal courts] are most capable of crime prevention and peacekeeping," and noted that "fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian Country, but enhancement of tribal justice systems as well."[31]

"A Quiet Crisis"

More than 10 years after its report on the Indian Civil Rights Act, the U.S. Commission on Civil Rights published a historic report entitled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*.[32] This report put it simply: "Tribal justice systems have been underfunded for decades."[33] Calling the implications of inadequate funding for tribal courts "far-reaching," the report stated bluntly:

> As long as tribal courts are underfunded and unable to deal with tribal jurisprudence, the burden for criminal justice will continue to fall on the federal court system, where sentences are typically harsher, perpetuating a system of dual justice for Native Americans on reservations.[34]

Native Americans are the victims of crimes, particularly violent crimes, at rates far exceeding other groups, and they are overrepresented in the correctional system.

The report noted that Native Americans are the victims of crimes, particularly violent crimes, at rates far exceeding other groups and that they are also overrepresented in the correctional system. Law enforcement officials identified the lack of funding "as the primary factor" for these problems.[35]

The report acknowledged both the failed funding under the act and the "sporadic and insufficient funding in recent years" after the act expired in 1999 as the basis for the weak justice systems often found in Indian Country. The report opined that the federal government is compromising the safety of Native people and their communities:

> Because many of the DOJ's Native American programs are not statutorily required, they are subject to the priorities of appropriators, and as a result, funding fluctuates from year to year. This fractured funding negatively affects program development and delivery. Moreover, the jurisdictional division among tribal, federal, and state law enforcement agencies, as well as that between DOJ and BIA, has resulted in a complex and uncoordinated system.[36]

The commission clearly saw the development and support of tribal law enforcement, tribal courts, and tribal correctional programs as necessary to ensuring order and justice in tribal communities. If justice is to become the norm in Indian communities, the federal government must acknowledge that "federal funding for criminal justice systems in Indian Country remains insufficient to meet the immediate needs of these communities, much less establish a framework for eventual self-sufficiency."[37]

A "Maze of Injustice"

Even the international community has weighed in on the failed funding for tribal justice systems. Most recently, focusing on sexual violence against Native American women in the United States, Amnesty International highlighted how the failure to adequately fund tribal law enforcement and tribal court systems exacerbates these human rights violations.[38] The report noted that Native American and Alaska Native women in the United States suffer disproportionately high levels of rape and sexual violence, yet the federal government has created substantial barriers to accessing justice. The report quoted Justice Department figures that indicate that American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general and that more than one in three Native women will be raped in their lifetimes.

In its press release, Amnesty International stated that "[t]he U.S. Government has undermined the authority of tribal justice systems to respond to crimes of sexual violence by consistent under-funding."[39] The report noted that tribal law enforcement agencies are chronically underfunded and that federal and state governments provide significantly fewer resources for law enforcement on tribal land than are provided for comparable non-Native communities. Amnesty International concluded: "In failing to protect Indigenous women from sexual violence, the USA is violating these women's human rights."[40] One of the specific conclusions of the report was that federal authorities should make available the necessary funding and resources to tribal governments to develop and maintain tribal court and legal systems that comply with international human rights standards.

Conclusion

One of the most critical rule-of-law issues in the United States is the chronic underfunding of tribal justice systems, which often results in an unequal system of justice for Native Americans. Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities. They are the keystone to tribal economic development and self-sufficiency. Any serious attempt to fulfill the federal government's trust responsibility to Indian Nations must include increased funding and enhancement of tribal justice systems. ■

Jerry Gardner is with the Tribal Law & Policy Institute in West Hollywood, California. Mary L. Smith is an attorney in Lansing, Illinois, and is the National Native American Bar Association's delegate to the ABA House of Delegates. Mr. Gardner and Ms. Smith are enrolled members of the Cherokee Nation.

Endnotes

1. Message from the ABA President for Law Day on May 1, 2008.

2. *See* ABA Resolution 107, adopted Aug. 2004.

3. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997).

4. Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (1983)).

5. *See* O'Connor, *supra* note 3, at 1–2.

6. *See generally National American Indian Court Judges Association Testimony on Fiscal Year 2001 Interior Appropriations Before the H. Subcomm. on Interior and Related Agencies, H. Comm. on Appropriations* (Apr. 6, 2000) [hereinafter *NAICJA Testimony*], *available at* www.naicja.org/legislation/house_testimony.asp.

7. *See* O'Connor, *supra* note 3, at 2.

8. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987).

9. Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Law 57 (1995).

10. *See NAICJA Testimony*, *supra* note 6 (citing Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 Judicature 7 (Nov.–Dec. 1995), at 111).

11. *See NAICJA Testimony*, *supra* note 6.

12. U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *A BJS Statistical Profile, 1992–2002, American Indians and Crime*, Dec. 2004, NCJ 203097, *available at* www.ojp.usdoj.gov/bjs/abstract/aic02.htm.

13. The section below sets forth the consequences of this chronic underfunding. Some believe that the most stable funding for tribal justice systems would likely be through tribal percentage set-asides in mainstream funding legislation. *See, e.g.*, Cohen's Handbook of Federal Indian Law 1410 (Neil Jessup Newton ed., LexisNexis 2005).

14. U.S. Comm'n on Civil Rights, The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights 71 (June 1991).

15. *Id.*

16. *Id.*

17. *Id.*

18. Pub. L. No. 103-176 (codified at 25 U.S.C. § 3601 et seq.)

19. 25 U.S.C. § 3601(5).

20. 25 U.S.C. § 3601(8).

21. 25 U.S.C. § 3621(b).

22. U.S. Comm'n on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 79 (2003) [hereinafter A Quiet Crisis].

23. In 2000, Congress reaffirmed the congressional commitment to provide this increased funding for tribal justice systems when it reauthorized the act for seven more years of funding at the same level of more than $58 million per year through the Indian Tribal Justice Technical and Legal Assistance Act. *See* Pub. L. No. 106-559 § 202.

24. *See NAICJA Testimony*, *supra* note 6.

25. *See* Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts (Sept. 1993), *available at* www.tribal-institute.org/articles/common.htm. This group was the precursor to the current Tribal Courts Council of the ABA's Judicial Division.

26. *Id.*

27. *Id.*

28. Dep't of Justice, Report of the Executive Committee for Indian Country Law Enforcement Improvements 1 (1997); *see also* Robert McCarthy, *The Bureau of Indian Affairs and the Trust Obligation to American Indians*, 19 BYU J. Pub. L. 1, 45–57 (2004).

29. *Testimony of Att'y Gen. Janet Reno on the Indian Law Enforcement Initiative Before the S. Comm. On Indian Affairs* (June 3, 1998), *available at* www.justice.gov/archive/otj/Congressional_Testimony/attgensiac.htm.

30. *Id.*

31. *Id.*

32. A Quiet Crisis, *supra* note 22.

33. *Id.* at 79.

34. *Id.*

35. *Id.* at 81.

36. *Id.*

37. *Id.*

38. Amnesty Int'l, Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA (Apr. 2007).

39. Press Release, Amnesty International USA, U.S. Authorities Fail to Protect Native American and Alaska Native Women from Shocking Rates of Rape, Reports Amnesty International (Apr. 24, 2007), *available at* www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070424001.

40. *Id.*

Broad Scope

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that reason, "[a]ny serious attempt to fulfill the federal government's trust responsibility to Indian Nations must include increased funding and enhancement of tribal justice systems," the authors conclude.

In addition to articles relating to the rule of law, this issue also features articles on other timely topics, including Joseph M. Hanna and M. May Afshar's discussion of private law firm diversity initiatives and Harold Pinkley and Charlnette Richard's primer on protecting client information under Rule 26(c). We also have another installment of our regular "Ask a Mentor" column aimed at addressing issues of concern to younger lawyers. We are hopeful that the scope and the types of articles we feature in *Minority Trial Lawyer* reflect the breadth and diversity of our membership and provide interesting reading. ■

ASK A MENTOR

Keeping Busy in a Tough Economy; Transitioning Out of Law

Dear Ask a Mentor:
In light of the slowing economy, with a decrease in work for most lawyers, not to mention well-publicized layoffs at several large firms, what steps do you recommend a junior attorney take to keep busy and, if possible, make himself or herself indispensable to protect against a layoff?

E.M., New York City

Dear E.M.,
No matter the size or location, every firm and every department occasionally sees a relative slowdown in client work. Although these times can be understandably stressful, they also present opportunities for lawyers—young and old—to gain experience in areas in which they do not regularly practice or to garner publicity and exposure for the areas in which they do.

When you find yourself with fewer billable hours than you would like, consider doing one or more of the following:

Talk to the more senior members of your department (especially your mentors and those responsible for assignments). Through these conversations, you can clearly relay your interest in taking on work that will benefit the firm and your department (and keep you busy); you can also seek to get a sense of the type or area of work that the firm or your department expects to be "hot" or busy going forward (so that you can focus on developing experience—or even an expertise—in such areas).

Offer to take on a pro bono assignment. Your firm may work with specific pro bono organizations through which you can learn about available projects; if not, such pro bono opportunities are usually available through your local bar association or groups such as the ABA. Pro bono assignments offer the chance to work on smaller matters that allow increased client contact as well as the chance to hone one's pretrial skills (deposition, brief writing, negotiating, etc.) and/or trial skills—skills that will allow you to take on increased responsibilities in the future. Pro bono matters come with the added bonus of helping someone less fortunate.

Offer to write an article. Writing opportunities likely exist for articles published on your firm's website or hard-copy marketing materials and/or for those published by external legal publications (again, the ABA is a great resource in this regard because it has many online and hard-copy publications that welcome enthusiastic authors or editors). Writing such articles provides a platform to tout a recent legal victory or to become familiar with a recent interesting court decision or legal trend. Showing yourself to be experienced—or, better yet, to have some legal expertise—in a particular area will help you to better market yourself both within your firm and to clients.

Offer to work on a matter outside your department. Perhaps your firm's bankruptcy department is in need of some litigation-related help on a project. Maybe the corporate lawyers could use some assistance researching a legal issue related to a deal. Working on such matters will allow you to work with different attorneys who may provide a resource for future assignments and to gain experience in an area of law with which you might not already be familiar.

Gretchen Werwaiss

Gretchen Werwaiss practices with Chadbourne & Parke LLP, in New York City.

Dear Ask a Mentor:
I'm looking to transition out of the practice of law within the next three years to pursue different interests. Until then, however, I will continue to work as an attorney, but I am not happy with my growth and development at my present firm and, were it not for my desire to leave the practice altogether, I would simply go to a new law firm. My dilemma is that my salary at my present firm will greatly assist me in my ultimate goal of pursuing other interests, and I would have to accept a significant decrease in salary if I choose to go elsewhere. Should I wait it out at my present firm, or do I seek another position where I will grow professionally, even if it means delaying my plan to "retire" from the law?

L.D., New York City

Dear L.D.,
Given your stated goal of leaving the legal profession in the next three years to pursue "different interests," I am not sure why you are concerned about your growth and development within the profession. If these "different interests" would be fostered by the growth and development you seek, then it makes sense to seek a position at a different law firm where you can advance those interests. Otherwise, your priority should be to place yourself in the best position to make the desired transition. Take the salary at your present firm and try to improve your growth and development there by addressing your concerns with someone at the firm.

Kelly Anne Luther

Kelly Anne Luther practices with Clarke Silverglate & Campbell in Miami, Florida.

Strengthening Your Firm's Commitment to Its Diversity Initiative

By Joseph M. Hanna and M. May Afshar

Joseph M. Hanna

M. May Afshar

As "Corporate America" continues to progress toward a more diverse workforce, so too should the legal profession. Cultural diversity is essential to any profession expecting to conduct business and thrive in the future. Attorneys have a unique opportunity to influence the direction of diversity in this day and age, and because of this, our profession can facilitate this change by embracing and encouraging a more diverse workforce.

Law firms have traditionally encouraged the mission of a productive and cohesive workforce. This can be achieved by the contributions made by the entire team, including those with diverse backgrounds. As problem solvers, lawyers are called upon to use their knowledge and experience to guide and counsel their clients daily. In our ever-evolving society, our clients are increasingly faced with problems that are culturally diverse. It naturally follows that their problem solvers should also be able to handle these changing concerns.

A diverse workplace allows for the creation of more ideas, new ways of thinking about issues, and more opportunities for problem solving. Understanding and valuing diversity are the fundamental first steps in achieving diversity in the workplace. A diverse workforce enables the entire organization to better promote, sustain, and take proactive measures to push for equal opportunities for women and minorities in the legal profession. Although diversity initiatives have recently become a strategic priority in law firms, the future success of *all* businesses lies in transforming office culture.

There is a discrepancy between the rhetoric and reality concerning diversity in the legal profession. All too often, diversity initiatives are nothing more than a fleeting idea, a checked box, or a tool to gain a competitive edge. Diversity is a complex issue, and law firms and business alike should resist the temptation to simplify it.

To bring about a successful culture change in any firm, it is imperative that the firm implement a firm-wide diversity initiative. The initiative should begin with the firm's leadership personally committing to the prosperity and success of this plan. Without this, efforts to achieve the stated goals will be fruitless—diversity initiatives will not move beyond the awareness-training stage to address systemic issues and create substantive change.

Firm leaders must be vocal, visible, and vigilant. The message must be clear: There is a meaningful interest in being diverse! Impediments to progress can come from any group and oftentimes will come from people who fear change or find comfort in maintaining the status quo. That is why the firm's leaders must lead by example.[1]

To begin examining the issue, it is important to establish a working definition of "workplace diversity" based upon common interpretations. Diversity has been broadly defined as significant differences among people. This view has been expanded to include variations in all significant human attributes—such as communication, style, education, family status, military experience, organizational role and level, religion, first language, geographic language, income, work experience, and work style—that shape a person's values, opportunities, and perceptions in the workplace. The more narrow interpretation of diversity is the legal model that contemplates the inclusion of groups of persons protected by state and federal civil rights statutes as a result of historical discrimination on the basis of race, color, sex, national origin, and religion. Most interpretations of diversity, including the broad view and the narrow legal model, ultimately encompass the representation of significant human dissimilarities found within society at large. Therefore, we define workplace diversity as a plurality in the workplace that reflects considerable cultural differences existing in American society as a whole, including race, ethnicity, gender, religion, and sexual orientation, among others.

The value of such workplace diversity is often overlooked by legal employers. Diversity can lead to new and innovative means of organizational management and problem solving. It places law firms in a better position both to attract new clients and to understand and meet the needs of current clients.

The changing demographics of American society and the globalization of many law practices require legal businesses to market and advertise to diverse clients. A legal business that effectively recruits and retains a diverse staff will be more appealing to the changing face of its clientele. Diversity is a profitable resource for obtaining and serving clients. The critical link between a diversity initiative and the business aspect of the firm should not be minimized. Linking the business aspect to the diversity initiative encourages a team approach to the issue. Firms must stay competitive in the marketplace by evolving at the same pace as the organizations they represent. The goal is to work with those who also share an appreciation of cultural differences.[2]

Another show of support for a diversity initiative is to establish a diverse managing committee, which must consist of individuals who are traditionally underrepresented in the legal profession. A firm with a diverse team of attorneys will be able to better promote both the firm's mission and the clients' best interests.

The diverse managing committee should serve as the ambassadors for the diversity initiative throughout the firm. This group of individuals should work closely with the firm's leaders to facilitate an internal assessment of diversity in the workplace. Leading minority partners and nonminority senior attorneys who play instrumental roles on the firm's diversity managing committee could implement a wide range of programs to enhance the firm's effectiveness in recruiting, developing, and retaining minority attorneys.

Conducting an internal examination

of the issues facing the firm will help the managing committee to modify the diversity plan to meet the priorities of the firm. A comprehensive assessment should include an analysis of existing policies, systems, and practices, and should identify areas that require change. Some of the areas that should be subject to analysis are the demographics within the firm, recruiting, hiring, promotion, retention, attrition, compensation, benefits programs, career development, leadership and management practices, work-life balance, and the overall purpose and fairness of firm-wide programs. This type of assessment allows the diversity committee to identify issues and concerns that are otherwise accepted or institutionalized. By taking the time to assess the needs of each individual, the managing committee furthers its visibility and commitment to the promotion of the value that diversity adds to the firm.

Although a formal diversity training program should eventually be created, supporting the diversity initiative and conducting informal training can be conducted during the assessment phase of the plan. Priority should be given to dispel the myths associated with the topic of diversity and a firm-wide diversity initiative. One myth is that somehow promoting diversity equates to lowering the bar for traditionally underrepresented attorneys. Law firms can and should stay committed to both high employment standards and diversity outreach efforts. Diversity fosters the development of new ideas that plant the seed for the economic and intellectual growth of a legal business.

Among the problems facing the legal community are the inflexible systems currently in place that were designed to accommodate an inflexible world. The goal is for law firms to remove barriers to open a path for minority and women attorneys that affords them access to the same opportunities for personal and professional growth as their colleagues.

Diversity training is a vital component of the diversity initiative, but it is just that—a component, a single part of a larger plan. Formal diversity training is a time for people to learn about differences, and it creates opportunities for people to express their thoughts about those differences. For diversity training to succeed at the firm, the diversity team should establish a clearly articulated set of goals and objectives, rather than a generic checklist of items to cover.

A crucial step in implementing successful diversity initiatives is clearly positioning the intent and scope of the overall change effort. It is imperative that a rationale for adopting change be provided to all members of the firm to minimize confusion, build a firm-wide understanding, and gain widespread support of the diversity initiatives. Early communications to set the stage for implementation should link the value of diversity to changing workforce demographics.

Diversity training should attempt to create sensitivity to the key issues concerning diversity, promote open communication and skills to discuss those issues, facilitate an understanding of cultural acceptance, and encourage each person's personal commitment to diversity. Ultimately, the goal of diversity training should be to open up a dialogue that may be continued long after the training is complete.

Strategies and Success

Diversity initiatives foster the expansion of a firm's network. Law firms are increasingly being asked to present "diversity reports" to clients. Some of the areas clients are particularly interested in are minority representation in the law firm, partnership and governance committee structure, total billable hours, dollar value assigned to minority attorneys, efforts to establish business relationships with other minorities, referrals to minority attorney and support for minority-driven public service work, and/or support for minority bar associations.

Diversity will continue to increase at law firms for many reasons. It is obvious that we are a diverse society. Diversity is an important part of doing business in the current day and age. In 1999, more than 400 chief legal officers of Fortune 500 companies signed what has become known as the Diversity Statement ("Diversity in the Workplace: A Statement of Principle"), promoting diversity in the workplace.[3] Over the past decade, as companies have become more committed to diversity within their own workforces, they have similarly begun to expect more diversity from their outside counsel.

One of the ways a law firm can push for diversity is to encourage more aggressive minority recruiting. Practice group leaders and managing partners should reach out to faculty members as resources for the recruitment of minority lawyers. Moreover, law firms could use their resources within law schools to communicate with minority law groups to encourage minority applicants.

A law firm should take the proactive approach of contacting a nearby law school to discuss opportunities to have minority law school groups take a tour of the law firm. Practice group leaders can discuss the many different areas of law, explain what is expected of a first-year associate at the firm, and share success strategies for getting hired. At the end of the presentation, the partners can field questions from the students and allow the presentation to become interactive.

The time has come for the legal profession to reach beyond traditional demographic boundaries and to change law firm culture by rethinking diversity as a shared institutional value. Diversity must be integrated into all areas and programs within the legal profession. To be successful, the firm must embrace the diversity initiative as a whole. The leaders of the firm must serve as the voices of diversity. Law firms should share their goals of encouraging diversity and actively strive to hire and maintain attorneys of different backgrounds. As we journey away from the traditional set of boxed criteria, attorneys should personally commit to diversity efforts such as increasing diversity enrollment in law school, retaining diverse attorneys in the firm, and promoting continued cultural growth in our work environments. By encouraging a personal commitment to the firm's diversity initiative, a more productive, cohesive, and vibrant workforce will be created. ■

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Endnotes

1. *See* the report by the Minority Corporate Council Association, *MCCA Flash Survey on the Diversity Manager Position in Large Law Firms* (Jan. 2007).

2. *See* Law Crossing *New Face, New Ideas: Diversity in Law Firms Makes Business Sense*, *available at* www.lawcrossing. com/article/index.php?id=99.

3. *See id.*

Protecting Client Information via Federal Rule 26(c)

By Harold Pinkley and Charlnette Richard

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Businesses dislike litigation. There are a number of reasons for this, such as cost, risk of loss, and disruption of normal business operations. Less often noted, but just as important, is the risk of revealing important confidential or proprietary business information. Such information can include not only trade secrets but also customer lists, pricing, and other business-related information that clients would very much like to keep away from competitors, regardless of whether they are adversaries in litigation. Once protected information is out of the bag, for all practical purposes, it has become public knowledge.

How can trial attorneys help our clients protect sensitive information during both pretrial discovery and the introduction of evidence at trial? As always, it is a good idea to start with the rules. Federal Rule of Civil Procedure 26(c)[1] gives us a way to prevent the release of confidential and privileged information. Whether you are a plaintiffs' attorney in a personal-injury lawsuit trying to limit the release of confidential psychiatric records or a defense attorney in a products-liability case shielding sensitive trade secrets, Federal Rule 26(c) provides effective privacy safeguards.[2]

Advance Preparation

Always take steps to protect confidential information before an emergency arises in a deposition or at trial. The time to take action is during discovery and, preferably, before any sensitive information has been disclosed. For example, suppose you're defending a deponent who happens to be a chief new-product design engineer, and she's being interrogated about potential new products by a lawyer for your client's prime competitor; if you haven't already laid the groundwork for Rule 26(c) protection, you've waited too long. In such an event, you may have to resort to the awkward procedure of Rule 30(d)(3) (formerly 30(d)(4)), which requires that you suspend the deposition and seek a court order limiting the scope of questioning. This procedure is uncertain, time-wasting, and potentially much more costly than addressing the issue ahead of time.

Order of Protection

An order of protection entered in advance is an excellent tool for preventing or remedying unwanted disclosures during depositions and the inappropriate introduction of testimony or exhibits at trial. Under Rule 26(c), the trial court has the authority to seal, limit, or prohibit pretrial discovery to protect a "trade secret or other confidential research, development, or commercial information."[3] A balancing approach is used to reconcile the interests of the party seeking information, the public's right to access information, and the interests of the party desiring to protect information.

Obtaining an order of protection pursuant to Rule 26(c) is a multistep process. The party requesting protection must first make a good-faith effort to resolve the discovery dispute with opposing counsel. If this effort is unsuccessful, the party needing protection should file a motion explaining why good cause exists for obtaining an order, which is subject to a strict standard.[4]

To prove good cause, one must demonstrate actual or potential harm. As one court has stated, "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning," are not sufficient to establish good cause.[5] "[T]he district court should consider whether the case involves issues important to the public. If the matter involves issues or parties of a public nature, and involves matters of legitimate public concern, this should be a factor weighing against entering or maintaining an order of confidentiality."[6] However, if the court finds that the "case involves private litigants, and concerns matters of little legitimate public interest," good cause will likely be found.[7]

If the party seeking the protective order succeeds in showing good cause, the burden then shifts to the requesting party to show that the information is relevant and necessary.[8] Some courts have held that this burden is subject to even stricter scrutiny than the burden for obtaining an order.[9] If the requesting party fails to satisfy its burden, the discovery request is generally denied.[10] However, if the requesting party is able to satisfy its burden, the court must then "weigh the potential injury from disclosure against the moving party's need for the information."[11] Regarding this higher standard, one federal district court has explained:

> [O]nce the privilege is asserted by the owner, the party seeking discovery must make a clear showing that the documents are relevant to the issues involved in the litigation. In doubtful situations, production will not be ordered. The court is aware that this standard is higher than the hurdle for discovery of unprivileged but relevant documents but this court considers such a higher standard necessary in order to guard against the possible use of doubtfully relevant trade secrets by the opposing parties for their own business ends.[12]

If the court determines it can sufficiently protect the trade secret or other confidential information, the court should issue a protective order that incorporates the interests of both parties.[13] If, on the other hand, the court determines that a protective order cannot sufficiently protect the trade secret, the court may deny the request for information.[14] The protective order should remain effective throughout subsequent litigation, including trial, and can be used to object to the attempted introduction of evidence that falls under the scope of the protection.

Protecting trade secrets and other proprietary information is an important and long-standing practice recognized by the highest court of the land.[15] "Federal law and the substantive law in every state recognize the importance of providing strong legal protection for trade secrets."[16] It is important for both sides to put forth their very best arguments and evidence at the trial court level in favor of or against protective orders, for it is difficult to obtain reversal on appeal;[17] the burden falls on the appellant to show the trial court's abuse of discretion.[18]

Modification of Protective Orders

Are protective orders permanent? What happens if someone wants to lift or modify the order down the road? Is this possible? The answer is that orders of protection are not necessarily permanent and are subject to being lifted or modified. Only the trial court, however, has the authority to lift or to modify its previous order.[19] It is paramount for the trial court to provide a detailed explanation of its decision.[20]

The federal Courts of Appeal, however, differ on the standard used for determining whether to modify an existing order.[21] The Second and Sixth circuits typically use a strict approach, which does "not allow modification absent a showing of improvidence in the grant of the initial protective order, or some extraordinary circumstance, or some compelling need."[22]

Most circuits, however, reject this strict standard. Instead, most circuits have adopted the method used by the Third Circuit, which mirrors the balancing test used to determine whether a protective order should be granted in the first instance, while also considering the original parties' reliance on the protective order since it was initially granted. The objective is to determine whether good cause exists for maintaining the order.[23] In making this determination, the court will consider whether allowing access to protected materials can be granted without causing harm to legitimate privacy interests; if so, access should be granted. Unless the motion seeks to modify a blanket protective order, the movant has the burden of establishing that the need for access to the materials outweighs the privacy concerns. When modification of a blanket protective order is sought, the party seeking to maintain the confidentiality must designate the documents alleged to be confidential and then establish that good cause exists with respect to those documents.[24]

Only the trial court has the authority to lift or modify its previous order.

In sum, Rule 26(c) protects the rights of litigants who have a legitimate reason for maintaining privacy both throughout the discovery process and at trial. Its purpose can be summarized in one sentence: "[l]itigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door."[25] ■

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Endnotes

1. As amended December 1, 2007. According to the Advisory Committee Notes for the 2007 Amendment, "the language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

2. Most states have enacted similar rules. See Francis H. Hare, Jr., James L. Gilbert & William H. Remine, Confidentiality Orders (1988) § 7.17, at 238 n.11.

3. All references to Rule 26 are to the Federal Rules of Civil Procedure.

4. Rule 26(c).

5. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986).

6. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3rd Cir. 1994).

7. *Id.*

8. *In re* Remington Arms Co., 952 F.2d 1029, 1032 (8th Cir 1991); see also Am. Standard, Inc. v. Pfizer Inc., 828 F.2d 734, 743 (Fed. Cir. 1987).

9. *See, e.g.*, Duplan Corp. v. Deering Milliken Inc., 397 F. Supp. 1146, 1185 (D.S.C. 1975).

10. Centurion Indus. v. Warren Steurer, 665 F.2d 323, 325 (10th Cir. 1981).

11. Hartman v. Remington Arms Co. Inc., 143 F.R.D. 673, 674 (W.D. Mo. 1992).

12. Duplan Corp., 397 F. Supp. at 1185.

13. Seattle Times v. Rhinehart, 467 U.S. 20, 35-36 (1984).

14. Hartman, 143 F.R.D. at 675.

15. *See, e.g.*, Carpenter v. United States, 484 U.S. 19 (1987); Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984).

16. Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," 105 Harv. L. Rev. 427, 472 (1991).

17. *See* Pansy, supra, at 783; Am. Standard, Inc., supra, at 743; Rachels v. Steele, 633 S.W.2d 473, 475 (Tenn. Ct. App. 1981).

18. Rachels, 633 S.W.2d at 475.

19. Poliquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992); United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

20. Pansy, 23 F.3d at 789.

21. *See* Ballard v. Herzke, 924 S.W.2d 652, 659 (Tenn. 1996).

22. *See, e.g.*, Palmieri v. New York, 779 F.2d 861, 864–66 (2nd Cir. 1985); United States v. Kentucky Utils. Co., 927 F.2d 252, 255 (6th Cir. 1991). *But see* Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159, 163–64 (6th Cir. 1987).

23. Pansy, 23 F.3d at 790.

24. Ballard, 924 S.W.2d at 660 (citing Pansy, 23 F.3d at 790).

25. Miller, 105 Harv. L. Rev. at 466.

Social Justice

Continued from page 1

won the *Brown* case. Nevertheless, the power of his mentorship and intellectually rigorous mind was evident in that every lawyer involved in the transformative *Brown* case had been taught, mentored, or encouraged by Houston in profound ways.

As we look at the challenges before us, it is crucial to remember that the road to *Brown* was long and uphill. A series of cases, strategically crafted at Howard Law School, were the building blocks on which *Brown* would rest. Some of the most ingenious and original cases did not even reach the Supreme Court. Nearly two decades before *Brown*, for example, in the mid-1930s, Charles Hamilton Houston and Thurgood Marshall took on a client named Donald Murray, a black man who had applied for admission to the law school at the University of Maryland. Murray was fully qualified but was denied admission because of his race. In 1936, the Maryland Court of Appeals in *Pearson v. Murray*,[6] affirmed a lower court ruling that, because the state did not have a law school designated for "colored" students, the state must admit Mr. Murray to the white school. The ruling was not binding outside of Maryland and was never appealed to the Supreme Court. But it was a significant case, as it reflected Charles Houston and the NAACP Legal Defense Fund's strategy to chip away at segregation by establishing black students' rights to attend "equal" educational facilities that could not be easily replicated. It was also a decision with symbolic power, as Thurgood Marshall, who argued the case with Charles Hamilton Houston, had been denied admission to the University of Maryland on account of his race only a few years before winning this case. The irony of Marshall being denied the opportunity to attend the University of Maryland to study law, but instead being trained by Houston at Howard Law School and winning the case to integrate Maryland's premier law school, says much about the unique and unmatched skills of the Howard Law School graduates during that critical era in the civil rights movement.

More than a decade later and before the *Brown* case of 1954, Thurgood Marshall won the 1948 case, *Shelley v. Kraemer*,[7] in which the Supreme Court declared it unconstitutional for a lower court to enforce so-called racial covenants prohibiting people of a certain race from owning or occupying a property. The decision applied the Fourteenth Amendment and established that discriminatory "state action" is not constitutional. Although many believe *Brown* was the most important case of the twentieth century, Thurgood Marshall often expressed his view that, as a lawyer, *Shelley* was equally, if not more, important. The *Shelley* decision is important in its own right in that it removed restrictions on the mobility of the African American middle class and opened up important economic venues as well. However, it was also limited. It did not alter the power that states still had, under the "separate but equal" doctrine, to legally segregate. It did not even outlaw privately created racial covenants and only held that enforcement of such covenants by the state was unconstitutional. *Shelley* was, though, a crucial element of something far greater. It was a necessary precursor to *Brown v. Board of Education*'s argument based upon the Fourteenth Amendment.

We moved backward again last June when the Supreme Court severely limited the use of race in school assignment policies.

Brown would not come before the U.S. Supreme Court for another six years after *Shelley*, but Houston, Hill, Marshall, and the other lawyers and students at Howard had held a vision of eradicating "separate but equal" in their minds' eyes for many years before that. *Shelley*, as *Brown* would later, also represented a brilliant combination of legal argument and social science evidence. *Shelley*, in particular, played to Charles Hamilton Houston's strengths in combining knowledge from a variety of academic fields, importing it to legal theories, and using it to change the country. In *Shelley*, for example, Houston went far outside the knowledge base on housing and into the existing literature on public health, mental health, and psychological development.

Brown, in 1954, then, was the artful culmination of many cases. *Brown*'s construction was strategic in that it sued five states so as to ensure that, given the broad reach, the High Court would be forced to take the case.

Oliver Hill, a prominent civil rights lawyer and Houston protégé, was one of the key strategists who helped topple legalized segregation. Hill, who died last August at the age of 100, used the law as a tool to change the country forever and was able to see the country come far—only to then take huge steps backward. The work of Houston, Hill, Marshall, and their contemporaries focused, essentially, on the restoration of the Fourteenth Amendment, which had been constructed to protect freed blacks after the Civil War. The segregationist victory of *Plessy v. Ferguson*[8] had basically nullified the Fourteenth Amendment, redoubling the victimization of blacks, cutting them off from the rest of society, and leaving them no recourse to racism under the law. Hill, Marshall, Houston, and many others brought the country back closer to the ideals for which it stood. Sadly, though, we moved backward again last June when the Supreme Court severely limited the use of race in crafting school assignment policies designed to achieve desegregation.[9] In this case, the purpose and well-established guiding principles of the Fourteenth Amendment were not only ignored but twisted by some members of the Court so as to justify maintenance of a segregated status quo.

As Richard Kluger writes in *Simple Justice*, the magisterial account of the road to the *Brown v. Board of Education* decision, Charles Hamilton Houston set out to teach his protégés "the difference between what the laws said and meant and how they were applied to black Americans. His avowed aim was to eliminate that difference."[10]

Dr. King, one of the greatest moral figures in world history, was, of course, not a lawyer. That is not a minor detail. For we need a modern version of "Houstonian" analysis and King's moral guidance in equal measure if we are ever to reach the Promised Land of Dr. King's American dreams.

Because of people such as Houston, Hill, Thurgood Marshall, Constance Baker Motley, and Martin Luther King, we experienced significant civil rights progress, in the legal and political arenas, from the mid-1950s through the 1960s. Today, Americans celebrate civil rights heroes of this time with an uncommon unanimity. This progress, sadly, was stopped short. Johnson's support for the 1964 Civil Rights Act,[11] the 1965 Voting Rights Act,[12] and the 1968 Public Accommodations Act cost Democrats southern support and future elections.[13]

We lost King in 1968. At the same time, we seemed to lose sight of the path he'd pointed us toward. Just two months after King's murder, civil rights advocate, champion of the poor, and presidential candidate Robert F. Kennedy was assassinated in June of 1968. This ended the historic period during which black Americans made unprecedented gains in achieving legal parity with their fellow white citizens.

Now, here we are in 2008, another period of retrenchment. Poverty and economic inequality are on the rise[14] despite gains made in the 1990s.[15] The nation continues to grow more diverse as Latinos and Asians emerge as the fastest-growing minority groups.[16] But as diversity rises generally, Black and Latino children are increasingly segregated in their schools.[17] The achievement gap is not shrinking, and high school graduation rates for children of color sink well below 50 percent in too many of our urban districts.[18] We must contend, too, with an "opportunity gap" in which disproportionate shares of black and Latino children live in neighborhoods that are not safe and do not have adequate recreational facilities or grocery stores. Their schools do not lead to wider opportunity. Our state and federal budgets suggest we possess more will to incarcerate than to educate children, especially children of color in neighborhoods of concentrated disadvantage.[19]

Blatantly racist laws are off the books, but the lingering effects of old laws and structural arrangements remain and have the same result—unequal opportunity. Personal racism no longer comes in the form of white southern sheriffs and governors blocking black children from schoolhouse doors. Rather, it has moved underground, so vaguely or passively expressed that it is utterly unassailable. As a growing body of academic research shows, personal racism is often wholly unconscious, living inside of each of us, engendered by media stereotypes or a simple lack of exposure to difference.[20]

Our state and federal budgets suggest we possess more will to incarcerate than to educate children.

And so let's return to the beginning, with the basic social analysis from which the work of Charles Hamilton Houston and his protégés and their contemporaries grew. At the root of their work lies the inalterable belief that social forces far beyond the control of individuals limit the opportunities for men, women, and children to reach their full potential. Today, we might translate that to mean that certain conditions—chronic poverty, segregation from opportunity, and a palpable apartness from the mainstream society—are too brutal for people to overcome solely on their own. After illuminating those barriers, we can turn to Dr. King, his words and his living example. And so, lawyers, mothers, elected leaders, doctors, teachers, and parents must talk and act with open hearts, open minds, with recognition of our common humanity, and with the capacity for empathy and forgiveness. If he were alive today, Dr. King might very well return us to his speech in Memphis in 1968 and prescribe a painfully honest comparison between what we preach—equal chances, one nation indivisible—and what we practice—increasing inequality, entrenched segregation. Surely he would stress the outdated black-white paradigm in racial thinking and urge a forging of common interests between whites, African Americans, Latinos, immigrants from all lands, Asians, Native Americans, and others.

The work of the *Brown* lawyers has currency even today. Senator Barack Obama's March 18, 2008, speech on race[21] opened up that modern version of the path again that people such as Charles Hamilton Houston, Thurgood Marshall, and Dr. King had begun to pave more than 50 years ago. In 50 years, will historians assess Obama's words as an eloquent anomaly? Or will they see his oration as something grander—as the beginning of a transformative process that the nation had the strength to continue? Whatever the answer, it is clear that the challenges of racial inequality will not abate and the need to address the problem of race in America will not end soon.

A leader, after all, models good behavior. Elected leaders and lawyers and judges and courts can bring about fairer laws and more enlightened social arrangements that lay the foundation for a better, fairer, more enlightened society. Dr. King knew, though, that personal transformation cannot be legislated. Those possibilities lie in each of us: our friends, our neighbors, and allies we have yet to meet. Together, we will determine whether or not we reach that Promised Land invoked by Dr. King on April 3, 1968, the day before his tragic death.

The nature and form of discrimination may have changed, just as what's possible under the rule of law, and in civil rights litigation, has shifted and will continue to shift over time. But law and morality will always intersect. And it is from that place of promise where a new social justice movement can begin. This time, perhaps we have learned enough to keep us talking and thinking and moving in the right direction.

To be sure, the signature message from the work of Dr. King, Charles Hamilton Houston, Thurgood Marshall, and others, or lawyers today, is that creative arguments and a passion for justice are the key ingredients necessary for litigators to move us closer to a just and equal society. The opportunity to follow the lead of the great visionaries of the twentieth century is staring us in the face in the twenty first. It will require women and men of faith and commitment to lead this effort forward, learning the lessons of the past. ■

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Endnotes

1. Martin Luther King, Jr., I've Been to the Mountaintop, Speech Delivered at the Church

of God in Christ, Memphis, Tenn. (Apr. 3, 1968).

2. *Id.*

3. 347 U.S. 483 (1954).

4. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

5. King, Jr., I've Been to the Mountaintop, *supra* note 1.

6. 169 Md. 478 (1936).

7. 334 U.S. 1 (1948).

8. 163 U.S. 537 (1896).

9. Parents Involved in City. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

10. Elaine E. Thompson, Charles Hamilton Houston and Loudon County, Seminar Held at the Rust Library, Leesburg, Va. (2004), *available at* www.balchfriends.org/Glimpse/CharlesHamiltonHouston.htm.

11. Pub. L. 88-352, 78 Stat. 241 (1964).

12. 42 U.S.C. § 1973 et seq. (1965).

13. *See* Joseph Califano, *Tough Talk for Democrats*, N.Y. Times, Jan. 8, 1989 ("[T]he evening after the signing ceremony, as [President] Johnson scanned the banner headlines and glowing editorials, he remarked to . . . aide [Bill Moyers], 'I think we just delivered the South to the Republican Party for a long time to come'"). *See also* Michael Oreskes, *Civil Rights Act Leaves Deep Mark on the American Landscape*, N.Y. Times, July 2, 1989 ("[Then President] Johnson asked his old friend and mentor, Senator Richard B. Russell of Georgia, to come to the White House to talk about the plan to seek strong civil rights legislation in 1964. . . . Mr. Russell, the patriarch of the Senate . . . looked back at the President and spoke sorrowfully. 'You may do that,' [Russell] said, 'but by God, it's going to cost you the South and cost you the election.' 'If that's the price I've got to pay,' said the President, 'I'll pay it gladly'"); and Dewey Grantham, Life and Death of the Solid South 192 (1994) (noting that "southern whites favorably disposed toward the Republican Party nearly doubled between 1976 and 1984").

14. Robert Pear, *Gap in Life Expectancy Widens for the Nation*, N.Y. Times, Mar. 23, 2008 ("New government research has found 'large and growing' disparities in life expectancy for richer and poorer Americans, paralleling the growth of income equality in the last two decades").

15. Paul A. Jargowsky, Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990s, The Brookings Institution Center on Urban and Metropolitan Policy/Living Cities Census Series, 9–10 (2003) ("In 1990, the share of poor individuals nationwide who lived in high-poverty areas (the concentrated poverty rate) was 15 percent. By 2000, that figure had declined to 10 percent. . . . [I]t is good news indeed that all racial and ethnic groups shared in the deconcentration of poverty of the 1990s . . . The decline was most significant for poor blacks; the percentage living in high-poverty neighborhoods declined from 30.4 percent in 1990 to 18.6 percent in 2000"), *available at* www.brookings.edu/es/urban/publications/jargowskypoverty.pdf.

16. Press Release, U.S. Census, Hispanic and Asian Americans Increasing Faster than Overall Population, June 24, 2004, *available at* www.census.gov/Press-Release/www/releases/archives/race/001839.html.

17. Greg Winter, *Schools Resegregate, Study Finds*, N.Y. Times, Jan. 21, 2003 ("[B]lack students now typically go to schools where fewer than 31 percent of their classmates are white. . . . That is less contact than in 1970, a year before the Supreme Court authorized the busing that became a primary way of integrating schools").

18. Cable News Network, *Report: Many Big City Graduation Rates Below 50%*, Apr. 1, 2008 ("In Detroit's public schools, 24.9 percent of the students graduated from high school, while 30.5 percent graduated in Indianapolis Public Schools and 34.1 percent received diplomas in the Cleveland Municipal City School District"), *available at* www.cnn.com/2008/US/04/01/school.grad.rates.ap/index.html.

19. Jennifer Warren, One in One Hundred: Behind Bars in America in 2008, for the Pew Center for the States (2008) ("[In 2007, f]ive states spent as much or more on corrections than they did on higher education."), *available at* www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf.

20. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

21. The transcript of Senator Obama's March 18, 2008, speech on race is available at www.npr.org/templates/story/story.php?storyId=88478467.

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