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On the Cover

Artist is an inmate with the Idaho Department of Corrections. Born and raised in eastern Idaho, he enjoys art as a way to separate himself from his criminal behavior. He currently has a mural in a local county courthouse as well as the prison he resides in. He is also credited with designing the Lewis and Clark bicentennial license plate for the State of Idaho.

Featured Article

20 What We Have Wrought: Compassionate Release in the Time of Our Plague
Miles Pope

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Thanks for picking up the February issue of The Advocate!

First, our editorial staff would like to apologize for and correct an accidental omission from Diane Minnich’s Executive Director’s Report in the January 2021 issue. The missing paragraphs are included in this issue on page 16.

We are thrilled to bring you another first-time sponsor for this February 2021 issue of The Advocate – the Idaho Association of Criminal Defense Lawyers (IACDL). Matthew Kinghorn begins this issue with a welcome piece, introducing IACDL and inviting participation from practitioners in the criminal defense realm or otherwise. This issue’s featured article is written by Miles Pope and explores the overextension of prison populations in the U.S., specifically as impacted by the COVID-19 pandemic.

Next, co-authors Sally Cooley and Jenny Swinford discuss how dissents and concurrences can provide value to those practicing in the appellate courts. Another co-authoring team, Nicole Gabriel and Elisa Massoth, write about Idaho’s drug trafficking statute and argue for change. Ian Thomson then provides an autopsy of the criminal trial and its importance in fixing our justice system. Finally, Sarah Tompkins writes a tribute to the difficult work of public defenders, praising those who are committed to serving our most vulnerable populations.

We hope you enjoy this issue and are off to a great start in the first few months of this new year!

Best,

Lindsey M. Welfley
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The Gifts We Have Been Given

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“IT was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, ...”

Charles Dickens, A Tale of Two Cities

Well, we made it.

That was a year we would all like to erase from our memories but will never forget.

As we process what 2020 meant—socially, epidemiologically, politically—and as we ease into 2021, the role of the law and lawyers looms large.

We live in a nation where half the citizens advance views the other half cannot comprehend, that were articulated in forums they had never seen, and circulated by people of whom they have not heard. Where instead of common ground we often find quicksand.

We have all heard the old, clichéd saying that law school is all about learning to “think like a lawyer.” As with many clichés, this one has truth embedded in it.

If the legal training takes, us law types realize that even our most principled and fiercely held views on issues can be looked at from a minimum of two sides—often more. This formally trained capacity to see other perspectives makes us different. And frankly, in the eyes of many of our fellow citizens, weird.

It is certainly something that distinguishes us.

James Wells, a Scottish Minister, in his 1884 book The Parables of Jesus. As it has been told, a little girl was trudging along, carrying as best she could a boy younger, but almost as big as she herself. Seeing her struggling, a man asked wasn’t she tired of carrying such a load. With surprise, she replied, “No, he’s not heavy; he’s my brother.”

“With surprise”—that is the key. To this young girl the thing that others saw as her problem was, to her, a gift, a privilege.

For some in this world, any effort to see another viewpoint is viewed as blasphemy or, at a minimum, a burden. Unfettered certainty is the touchstone of this mindset. It is the opposite of the lawyer’s mindset.

The capacity for capacious thought and empathetic understanding of another’s views is a gift our shared education has bestowed upon us. And exercising this
gift is at least as important today as ever. When someone floats to you the idea that the openness of mind in which we are trained is a shortcoming, my hope is that you respond as the little girl did, with surprise.

There is another gift in our training which serves as a compliment to that first gift. The ability to analyze and assess applicable rules alongside facts at hand to find and to reach reasoned conclusions is also unique. To find in the multiplicity of viewpoints rational answers not arising from purely motivated reasoning. To reach results arising not from pure emotional reaction, or preconceived notions, but instead from legitimate, deliberative, and balanced assessments.

In this, our profession acquitted itself mostly well during the long, dark battle following the election.

Many of the judicial officers called to service on the election litigation cases stand out for being able to see beyond their presumed political leanings to reach sound conclusions based on the facts and law before them. Not least among these was Stephanos Bibas of the United States Court of Appeals of the Third Circuit appointed by President Trump. In dismissing one of the election challenge cases, Judge Bibas exercised publicly exactly that second gift. Bibas wrote, “[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”

While many judges and others, most notably partisan election officials, have performed their roles under law, some lawyers have been embarrassing the profession in this period. Lawyers who, for whatever motivations, stood as beacons of misinformation and misdirection. They were lawyers who strayed far from reasonable, factual assessments that led to rulings like that from Judge Bibas.

Ultimately, as we move forward past the post-election period, the attack on the Congress, the second impeachment of a President, and any other unprecedented things that happen between the writing and publication of this column, we lawyers have work to do.

It is always worth remembering that 35 of the 55 delegates at the Constitutional Convention of 1787 were lawyers. Lawyers, like you, gifted the world with this Republic. We have been through many things in this past year. Things related to the lockdowns and battles over executive authority to act on, even the scope of, the public health emergency. Things related to the political wars. These battles once again bring us to a time when Ben Franklin’s perhaps apocryphal “A Republic if you can keep” rings true. Our country needs us lawyers to work on keeping it.

We lawyers have a functional monopoly on assuring that citizens can take advantage of the rule of law. If lawyers do not protect individuals’ access to a properly functioning legal system, no one will. In this setting, the capaciousness of thought should see the legal system as far more than just the courts. It is the whole panoply of process, and officials with the variety of their roles, the applicable rules and regulations, the norms, along with the ceremony that surrounds it all. Lawyers have an important role in making sure the whole of the populace understands that system.

Whether we do that in litigation as advocates, in schools or public forums as teachers of both substance and process, as volunteers for legal initiatives like Law Day or the Street Law clinic, is of less importance than that each of us do something. That we use the gifts we have been given to uphold the foundations of this Republic.

Although maybe seeming dark, we can take the challenges of today and make it the best of times—or at least the spring of hope.

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Bar Actions

JAMES M. MCMILLAN
(Resignation in Lieu of Disciplinary Proceedings)

On December 24, 2020, the Idaho Supreme Court entered an Order accepting the Resignation in Lieu of Disciplinary Proceedings of Wallace attorney James M. McMillan. The Idaho Supreme Court’s Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

Initially, as discussed below, after Mr. McMillan failed to respond to Bar Counsel during the disciplinary investigations, the Idaho Supreme Court entered an August 24, 2020 Order interim suspending Mr. McMillan’s license to practice law. On September 14, 2020, the Idaho State Bar filed a motion for an order finding Mr. McMillan in contempt for violating the Court’s interim suspension Order, alleging that he was practicing law while suspended. Following an October 14, 2020 hearing, the Idaho Supreme Court issued Findings of Fact and Conclusions of Law and entered a Judgment finding Mr. McMillan in contempt of its Order. The Judgment required Mr. McMillan to pay a $5,000 fine, sentenced him to two days in jail on each of five separate contempt violations, suspended the sentence, and placed Mr. McMillan on a 30-day probation. The contempt case was ultimately resolved as part of Mr. McMillan’s stipulation to resign in lieu of disciplinary proceedings.

The Idaho Supreme Court found that Mr. McMillan violated the Idaho Rules of Professional Conduct ("I.R.P.C.") related to 14 different client cases. In the first case, Mr. McMillan failed to engage in discovery, exchange exhibit and witness lists, and file a trial brief on behalf of his client as required by the district court’s pretrial order. The district court dismissed the client’s case as a sanction for that conduct. Mr. McMillan appealed that dismissal, but failed to file the Appellant’s Brief, resulting in the dismissal of the appeal. Despite that dismissal, Mr. McMillan continued to inform his client that the appeal was still pending. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 3.2, 3.4(c), 8.4(c), and 8.4(d).

In the third case, Mr. McMillan filed his client’s appeal of the district court’s adverse decision in a breach of contract case, but failed to file the Appellant’s Brief despite five extensions, resulting in the dismissal of the appeal. Mr. McMillan never informed his client that her appeal was dismissed. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 3.2, 3.4(c), and 8.4(d).

In the fourth case, Mr. McMillan failed to respond to his client’s inquiries regarding the status of a potential lawsuit against a county and failed to respond to Bar Counsel’s inquiry regarding that client’s grievance. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 8.1(b), and Idaho Bar Commission Rule ("I.B.C.R.") 505(e).

In the fifth case, Mr. McMillan failed to file a probate petition for a client, yet continued to inform his client that the petition had been filed and that he was awaiting court action in the probate case. After the Idaho Supreme Court suspended Mr. McMillan’s license on August 24, 2020, he failed to inform his client about that suspension and continued to provide legal advice to the client. Upon termination of the representation, he refused to refund unearned fees and did not promptly return the client’s file documents. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d), 8.4(c), 5.5(a), and I.B.C.R. 516(a) and 517.

In the sixth case, Mr. McMillan failed to timely submit a complete witness list, exhibit list, and pretrial brief in his client’s divorce case and failed to file a proposed Decree as ordered by the magistrate court. He failed to inform his client that he was suspended and that the Decree was never filed. Upon termination of the representation, he failed to return the client’s complete file. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d), 3.2, 8.4(c), 8.4(d), 5.5(a), and I.B.C.R. 516(a) and 517.

In the seventh case, Mr. McMillan failed to promptly file an Affidavit of Service confirming service of his client’s Complaint upon the opposing party and failed to file a motion for a preliminary injunction regarding the client’s property. He failed to inform his client that he was suspended and, after that suspension, agreed to represent the client in a new matter. Upon termination of the representation, he failed to refund unearned fees and promptly return the client’s complete file. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d), 3.2, 8.4(c), 8.4(d), 5.5(a), and I.B.C.R. 516(a) and 517.

In the eighth case, Mr. McMillan failed to file his client’s divorce petition and failed to respond to the client’s inquiries regarding the case status. He also failed to inform his client that he was suspended and advised the client that he was continuing to work on the case after his suspension. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 3.2, 8.4(d), 5.5(a), and I.B.C.R. 516(a) and 517.

In the ninth case, Mr. McMillan failed to promptly inform his client about a plea offer in the client’s misdemeanor criminal case and failed to promptly file the client’s notification of rights form and signed plea agreement. He failed to inform his client that he was suspended, failed to promptly return client funds after that suspension, and attempted to appear for his client’s sentencing hearing one month after his suspension. Mr. McMillan also failed to promptly return the client’s complete case file upon termination. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.15(d), 1.16(d), 8.4(c), 8.4(d), 5.5(a), and I.B.C.R. 516(a) and 517.

In the tenth case, Mr. McMillan failed to file his client’s petition to set aside a trustee appointment, but repeatedly informed the client that he had filed the petition and was waiting for the magistrate court to schedule a hearing. He failed to inform his client that he was suspended and failed to refund unearned fees upon termination. The Idaho Supreme Court found that with respect to that case, Mr.
McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d), 8.4(c), 8.4(d), and I.B.C.R. 516(a) and 517.

In the eleventh case, Mr. McMillan failed to timely serve the client’s complete discovery responses, failed to promptly inform the client about his suspension, failed to inform the client about a hearing on the opposing party’s motion for summary judgment, appeared at that hearing despite his suspension, and failed to promptly return the client’s complete case file upon termination. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d), 3.4(d), 8.4(c), 8.4(d), 5.5(a), and I.B.C.R. 516(a) and 517.

In the twelfth case, Mr. McMillan failed to serve the client’s mandatory disclosures and discovery responses in her divorce case and failed to inform her that he was suspended, despite an upcoming trial in her case. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 3.4(c), 8.4(c), 8.4(d), and I.B.C.R. 516(a) and 517.

In the thirteenth case, Mr. McMillan failed to publish a notice to creditors in a probate case, failed to inform the magistrate court that the personal representative of the estate had died, failed to promptly prepare and file documents to appoint a new personal representative, and failed to respond to his client’s inquiries about the case status. He also failed to inform his client that he was suspended, continued to practice law after that suspension, and failed to promptly return the client’s file upon termination. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d), 3.2, 5.5(a), 8.4(c), 8.4(d), and I.B.C.R. 516(a) and 517.

In the fourteenth case, Mr. McMillan failed to serve his client’s discovery responses in a breach of contract case and failed to keep her informed about the case status. He also failed to inform his client that he was suspended and continued to practice law after that suspension. The Idaho Supreme Court found that with respect to that case, Mr. McMillan violated I.R.P.C. 1.2(a), 1.3, 1.4, 3.4(d), 5.5(a), 8.4(d), and I.B.C.R. 516(a) and 517.

The Idaho Supreme Court accepted Mr. McMillan’s Resignation in Lieu of Disciplinary Proceedings. By the terms of the Order, Mr. McMillan may not make application for admission to the Idaho State Bar sooner than five (5) years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements in Section II of the Idaho Bar Commission Rules and will have the burden of overcoming the rebuttable presumption of the “unfitness to practice law.”

By the terms of the Idaho Supreme Court’s Order, Mr. McMillan’s name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in Idaho was terminated.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

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Executive Director’s Report

Idaho State Bar 2020 Year in Review

Diane K. Minnich
Executive Director, Idaho State Bar

This month’s article features the 2020 statistics and program highlights. As we know, 2020 was not a typical year. The good news is that the statistics are typical, consistent with previous years. Again, my thanks to the Idaho State Bar (ISB) staff and volunteers for continuing to accomplish the goals and responsibilities of the organization under challenging circumstances.

Admission to Practice

Attorneys are admitted to the practice of law in Idaho through reciprocal admission, the Uniform Bar Exam (UBE) score transfer, or sitting for the bar exam. Idaho allows reciprocal admission from 35 jurisdictions. As of December 2020, 38 jurisdictions have adopted the UBE. In 2020, the bar exam was administered three times; two in-person, full UBE exams and one limited, online exam.

<table>
<thead>
<tr>
<th>Admissions</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bar exam applicants</td>
<td>216</td>
<td>221</td>
</tr>
<tr>
<td>Pass Rate</td>
<td>62%</td>
<td>62%</td>
</tr>
<tr>
<td>Reciprocal admittees</td>
<td>82</td>
<td>84</td>
</tr>
<tr>
<td>UBE admittees</td>
<td>45</td>
<td>35</td>
</tr>
<tr>
<td>Total admitted</td>
<td>259</td>
<td>258</td>
</tr>
</tbody>
</table>

Licensing

As of December 2020, the ISB licensed members were:
- 5,361 active members (1,340 out of state)
- 241 judges
- 26 house counsel members
- 752 inactive members
- 455 senior members
- 7 emeritus members

The good news is that the statistics are typical, consistent with previous years.

Special Thanks from January Issue

- The lawyers and judges serving as leaders of the Bar and Foundation since 1985; 62 Bar presidents and 22 Foundation presidents. It has been a pleasure to work with these Bar leaders, many of whom are mentors and good friends. (I was selected as the Executive Director in 1990; since that time I have been supervised by 71 Bar and Foundation presidents.)
- The current staff and leadership for their commitment to ensuring the Bar and Foundation continued their operations and services in 2020.

Bar Counsel

In 2020, nine formal charge cases were opened and six cases were closed. Of the six closed cases, one attorney resigned in lieu of disciplinary proceedings, one attorney was disbarred, two attorneys received suspensions, two attorneys received public sanctions, and one attorney was reinstated to the practice of law.
Client Assistance Fund

There were 19 client assistance fund cases opened in 2020 and 13 claims closed.

<table>
<thead>
<tr>
<th>Year</th>
<th>Claims</th>
<th>Total Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019</td>
<td>8</td>
<td>$21,263</td>
</tr>
<tr>
<td>2020</td>
<td>2</td>
<td>$4,230</td>
</tr>
</tbody>
</table>

Fee Arbitration

There were slightly fewer fee arbitration cases in 2020 – 14 cases were opened in 2020 as compared to 18 cases opened in 2019.

Lawyer Referral Service (LRS) and Modest Means Program

The LRS continues to offer public referrals to lawyers both online and by phone. Those seeking a referral are charged a fee prior to receiving a referral. The fee encourages individuals to keep their appointments and ultimately hire a lawyer. In 2020, 184 attorneys were on the LRS panel, 567 referrals were provided by phone, and 1,464 referrals were provided online.

The Modest Means Program was established in 2020. The Modest Means panels are intended to connect clients who do not qualify for legal aid but cannot afford standard attorneys’ fees with attorneys who are willing to help these clients at a lower rate. In 2020, 27 attorneys joined the Modest Means Program and they handled 200 cases.

Annual Meeting

The 2020 Annual Meeting was moved from Fort Hall to Boise; it consisted of webcast CLE programs and a small event to honor the 2020 Distinguished Lawyers and Jurist. The CLE programs were attended by 253 attorneys and judges.

Member Services and Communications

In addition to its regulatory responsibilities, the Bar continues to offer services designed to enhance the practice and professional growth of lawyers. Services available to bar members can be found on our website at www.isb.idaho.gov. Services include: Casemaker legal research library, The Advocate, CLE programming, mentor program, job announcements, Idaho Academy of Leadership for Lawyers (IALL), publications, weekly E-bulletin, Facebook, LinkedIn, Twitter, and discounts on services.

One Practice Section was established in 2020, the Agricultural Law Section. There are now 22 ISB Practice Sections that offer many opportunities for learning, networking, and service.

Allocation of Resources

License fees average 75% of the Bar’s revenue. The other major sources of revenue include admission fees, The Advocate advertising and subscriptions, Annual Meeting registration fees, MCLE application fees, and LRS registration and referral fees. Over 70% of the Bar’s resources are expended for regulatory functions.

Volunteer Service

In 2020, 132 lawyers and 23 non-lawyers served on Bar and Foundation committees. The 22 Practice Sections have a combined total of 186 governing council members and membership of 4,046 lawyers.

Idaho attorneys and non-attorneys volunteer their time and provide their expertise and resources to support Bar programs and services. In 2020, the Idaho legal community continued its commitment to improving the profession and serving the public. Thank you for your support in 2020!
Idaho Association of Criminal Defense Lawyers Welcome

Matthew L. Kinghorn

I was sitting in the stands at a local high school, trying to watch my daughter play volleyball in a gym that encouraged masks and social distancing. Justice Ruth Bader Ginsburg had died, just 24 hours before. A friend of mine sat several rows below me with a camo-patterned fishing buff that looked infinitely more comfortable than the double-cloth, underwear-looking number I had on. This friend, a non-lawyer, looked up at me and yelled, “So what do you think about Ginsburg dying?” I responded reflexively, without thinking. “It’s a loss, she was a great judge and a great American.”

My friend raised his eyebrows and in a loud voice declared, “I forgot, you’re a defense attorney,” and then turned back to the game. Several around me gave a sideways stare. Our section of bleachers got very quiet. Apparently, everything is divisive right now – even the death of one of the most respected and talented jurists of our time. Or possibly the good people in the stands were reacting to the notion that someone who represented the criminally accused was sitting among them. Either way, it was an uncomfortable moment.

But it didn’t have to be that way. After all, left-leaning Ginsburg carried on a decades-old friendship with one of the most conservative justices in high court history, Antonin Scalia. Their relationship defied stereotypes and even angered some on both ends of the spectrum. In an interview after Scalia’s passing in 2016, Ginsburg told an NPR reporter that Justice Scalia “made her better.” We should all strive to be so kind to those with whom we disagree.

If Scalia and Ginsburg stood together on anything, I think it would be with the idea that good defense attorneys make the criminal justice system work better. The Idaho Association of Criminal Defense Lawyers (IACDL) is committed to improving the practice and ability of its members as they fulfill their role in that system.

IACDL got its start in 1989. Eight lawyers who specialized in criminal defense decided it was time Idaho had its own group that focused solely on defending the accused. They branded themselves the “Idaho Attorneys for Criminal Justice,” drafted articles of incorporation, and began making noise. Tom McCabe was the first president. Under his leadership the small band grew. In 1994, the board of directors created an executive director position and Debi Presher was unanimously chosen to fill the spot. She continues to masterfully run IACDL’s day-to-day operations.

In 1993, Mike Wood, who would later serve as IACDL’s second president, decided to organize a conference in Sun Valley to coincide with the ski season. This inaugural gathering was a huge success. It
soon became the most popular seminar in the state for criminal defense lawyers. Legends in the practice have come from all over the country to share their wisdom and insights with IACDL. The Sun Valley seminar remains our organization's most noteworthy annual event.

In 1995, IACDL achieved another milestone by opening membership to investigators, paralegals, legal secretaries, and others actively involved in criminal defense work. In 1998, the name was officially changed to the Idaho Association of Criminal Defense Lawyers. What began with eight people has now swelled to over 400 members.

The benefits of being a part of IACDL are hard to number. IACDL has various sub-committees doing important work in the state and region. Our Amicus committee has drafted and filed dozens of important briefs over the years that have been persuasive in state and federal appellate courts. IACDL’s legislative committee has provided a leveling voice in the statehouse through the passionate promotion of criminal justice reform. Our CLE committee continues to bring the nation’s finest presenters to regional and state seminars.

And we have a listserv. This forum enables our members to ask questions, exchange forms, and get advice from the best lawyers in the business. If any part of your practice includes the representation of the criminally accused, consider joining IACDL today.

IACDL is pleased to sponsor this issue of The Advocate. In the following pages, you will read articles from several outstanding members of our organization. I encourage everyone in the Bar, no matter your specific area of practice, to consider the pieces that have been written. If the unlikely friendship of Scalia and Ginsburg teaches us anything, it is that we can learn something by listening to those who don’t stand where we do.

Matthew L. Kinghorn is an attorney with the Pocatello branch of the Federal Defenders of Idaho and the current president of IACDL. He holds a degree in English from Idaho State University and attended law school at the University of Idaho College of Law. In his free time, he enjoys skiing, mountain biking, backpacking, and fly fishing in Idaho’s great outdoors.
What We Have Wrought: 
Compassionate Release in the Time of Our Plague

Miles Pope

On January 15, 2020, 29-year-old Andrea Circle Bear was sentenced to 26 months in federal prison for the crime of maintaining a drug involved premises. Ms. Circle Bear was approximately seven months pregnant when she was sentenced. She gave birth at Federal Medical Center Carswell—a federal prison—on April 1, 2020. On April 4, 2020, she was confirmed positive for COVID-19, one of 522 people to get sick with the virus at Carswell. She died on April 28, 2020, orphaning her baby girl.

The DOJ press release, issued when she was first sentenced included the following quote from the U.S. Attorney for the District of South Dakota: “It is a federal crime to knowingly allow a drug dealer to operate out of your home, apartment, or place of business... Don’t let yourself or your property get mixed up in the world of illegal drugs. It ends badly.”

Ms. Circle Bear is one of over 170 federal inmates who have died while in the custody and care of the federal Bureau of Prisons since the COVID-19 pandemic began. This article is about how we got here, what we must do about it, and how the federal criminal justice system’s compassionate-release remedy can help.

Context: Mass incarceration in America

The federal criminal justice system is driven by a deep-seated commitment to putting people in prison for really long periods of time. The United States Sentencing Commission—the agency that, along with mandatory minimums, is largely responsible for this dismal state of affairs—recently publicized some data that reflects this. Overall, 87.6% of everybody sentenced in federal court—and 79.8% of first-time offenders—go to prison. These numbers—along with the state of Louisiana (which imprisons 1% of its total population)—help contribute to the graph of prisoners per capita on the next page.

America’s prison state is a world-historic anomaly. The number of people behind bars in the Land of the Free exceeds the apex prison population of Stalinist Russia. It exceeds the prison population of Communist China. And the same holds for present-day Iran.

Of course, reading the fine print, it’s not freedom the Constitution guarantees us, but “ordered liberty.” Perhaps mass incarceration is simply the cost of basic order in a free society?
History: Mass incarceration blooms while compassionate release withers on the vine

The situation in our prisons wasn’t meant to be this way—and, more and more, it doesn’t have to be this way—but to understand how we’ve gotten to this place requires a little bit of federal sentencing history.

Before 1984, we had indeterminate sentencing in the federal justice system. Put another way, we had parole—a mechanism that, when it works properly, avoids the unseemly sight of helpless old and sick men and women chained to their beds (or locked in an isolation cell) as they die alone.

The Comprehensive Crime Control Act changed all of that. In 1984, driven by panic about crack cocaine (superpredators, see supra, on drugs) and the “truth in sentencing” movement—a movement based on the lie that the federal parole commission lived to release folks willy-nilly—Congress abolished indeterminate sentencing and parole.

The scheme Congress tried to erect in its place—the scheme it wanted to implement—had three central pillars: 1) determine sentencing, 2) mandatory sentencing ranges, and 3) an until-recently unknown provision of modern federal criminal law § 3582(c)(1)(A) sentence-reduction motions.

Determinate sentencing and the mandatory guidelines amounted to a massive transfer of power away from dispassionate actors in the criminal justice system (judges and, in theory, the parole commission) to prosecutors—the criminal justice actor whose role, in America, is to try to put people in prison.20

Section 3582(c)(1)(A)—otherwise known as “compassionate release”—was what Congress itself called the “safety-valve” in all of this.21 Through § 3582(c)(1)(A), Congress sought to authorize judges to reduce sentences when “extraordinary and compelling” circumstances warranted it. And Congress used these sweeping words—“extraordinary and compelling”—advisedly.

As the Second Circuit recently explained, Congress specifically contemplated that a broad range of possible circumstances, including excessively long sentences, could qualify as an extraordinary and compelling basis for a later reduction in sentence.22 The overarching point of § 3582(c)(1)(A), Congress explained, was to “keep[] the sentencing power in the judiciary where it belongs.”23 Even as it created mandatory guidelines and determinate sentencing, Congress wanted to ensure that judges could supervise the federal prison system and ensure that it meted out corrections in a manner both civilized and humane.

In 1984, when it first enacted § 3582(c)(1)(A), Congress made one—literally—fatal mistake: it trusted the Bureau of Prisons (“BOP”) to bring inmates deserving of compassionate release to the sentencing courts’ attention. As originally enacted, § 3582(c)(1)(A) allowed courts to reduce inmates’ sentences only “upon motion of the Director of the Bureau of Prisons.”

The BOP’s role in this scheme was meant to be almost ministerial. Its job was to collect records from inmates who wanted to seek compassionate release, weed out any truly frivolous claims, and then put the remaining possible compassionate release cases before the court for its review. As the Senate Report on the Comprehensive Crime Control Act put it, § 3582(c)(1)(A) was meant to put “the question whether there is justification for reducing a term of imprisonment” up for “court determination.”24

The BOP utterly usurped the process—and proved itself unfit for the statutory task. Between 2013 and 2017, for example, the BOP received 5,400 requests
The BOP ignored—and continued to ignore—all of these criticisms. In 2019, it received 1,735 applications. Just 55—3%—made it before a court. 29

The BOP’s mismanagement of compassionate release flows from its broader indifference to the health and welfare of its inmates. The BOP provides grotesquely inadequate care for the mentally ill.31 It stuffs its prisons to the gills with inmates—overcrowding them and creating conditions ripe for the spread of infectious disease.32 And, though it has embarked on a significant public relations effort since COVID-19 began, its indifference to human life persists in this terrifying era.

For example, earlier last summer, the aptly named Terminal Island federal prison was the site of the worst outbreak of COVID-19 in the federal prison system. About 60% of the entire population became infected and 23 people died.33 After inmates at the facility filed a class action lawsuit, a federal judge appointed a neutral court appointed expert to conduct a site visit—months after the outbreak occurred.

That expert’s verdict? “Huge risks remain,” at the Terminal Island prison. Staff are still coming to work one to six days after symptomatic infection. There is “no significant pattern of social distancing among staff.” For inmates, “[t]he process to provide and replace masks is not functioning adequately.” And even the basic screening questionnaire for those entering the facility is deficient, failing to ask about common symptoms of COVID-19.

The same holds of another hotbed of COVID-19 infection: the federal Lompoc prison complex, which one federal judge has described as the site of a “catastrophic COVID-19 outbreak.”34 In the wake of this outbreak, the Department of Justice’s Office of Inspector General investigated Lompoc. The report it produced is utterly scathing.

Lompoc had “a shortage of medical staff.”35 Screening was ineffective, with staff coming to work symptomatic for COVID-19. The prison ignored an inmate who displayed COVID-19 symptoms, keeping him in the general population to amplify infection.36 And the BOP’s use of available administrative processes for reducing the prison population was “extremely limited.”37

The mismanagement of our federal prison system is itself—in my view—an extraordinary and compelling reason to release the vulnerable people under its thumb.

Compassionate release in the time of plague

Two years ago, fed up with the BOP’s recalcitrance, Congress worked an important change in § 3582(c)(1)(A). On December 31, 2018, as part of the First Step Act, Congress enacted a provision entitled “Increasing the Use and Transparency of Compassionate Release.” This provision expressed Congress’ palpable frustration at the BOP. Whereas, before, compassionate release could be granted only “upon motion of the Director of the Bureau of Prisons,” now it can also be granted “upon motion of [a] defendant.”38 And Congress made it very clear: it was tired of BOP’s dithering on these applications and it wasn’t interested in giving the BOP another shot to prove it was up to the job.

Under the First Step Act, the BOP gets just 30 days to submit a request for compassionate release to the courts. 39
ter that, they have to get out of the way; defendants get to proceed directly to the courthouse doors on their own. And Congress wants the courts to review their applications with an eye toward "boosting grants of compassionate release." 42 The point of the First Step Act's revisions to the compassionate-release process, as the Fourth Circuit just recently explained, is to "expand[] the discretion [of the courts] to consider leniency." 43 Since the COVID-19 pandemic began, the First Step Act's changes to the compassionate-release statute have been crucially important to protecting people trapped in federal prison from the ravages of that disease. Nobody in this country is more vulnerable to COVID-19 than our incarcerated men and women. Pictured above is the last published generalized New York Times list of the leading clusters of COVID-19 in the United States (they have since started breaking clusters down by category).

The top 15 clusters were all prisons and jails. The infection rate within federal prisons is nearly five times that of the nation as a whole, according to data compiled from the BOP's website and visualized by the Federal Defenders in New York on page 24.

The death rate among federal prisoners is triple the nation's. 44 And, as my colleague Colin Prince in the Eastern District of Washington has poignantly articulated, what gets lost in all of this are the real people whose prison terms are converted into death sentences. We've already discussed Andrea Circle Bear, the young woman serving a 26-month sentence for maintaining a drug premises when she died of COVID-19 almost immediately after giving birth.

Two other examples. Tressa Clements, 36 years old, got COVID-19 while serving a 46-month sentence for embezzlement and identity theft. "She was everyone's baby," her mother explained, and she had two young children. Now she's dead. 45 And Marie Neba died, leaving behind 10-year-old twins and a 19-year-old daughter. She died begging a judge for help, writing, "I don't think I will make it here if I continue under such horrible conditions." 46 The government opposed her request for compassionate release every step of the way.

Since the COVID-19 pandemic began, federal defender offices and private attorneys have been using their new ability to file § 3582(c)(1)(A) sentence-reduction motions to try to protect clients trapped in our nation's mismanaged federal prisons. The basic contours of a compassionate release claim are straightforward. Under the statute, you have to show two things:

First, you have to show that your client's case presents extraordinary and compelling reasons for release. 47 This should be easy: it is hard to imagine a more extraordinary and compelling argument for release than being trapped in a prison—what courts and epidemiologists have referred to as "petri dishes" and "breeding grounds" for infectious disease 48—during a once-in-a-century pandemic.

Second, you have to establish that justice does not require your client to be kept in prison. This, too, should be straightforward. If you have established an extraordinary and compelling case for release, then only the most compelling countervailing considerations could even conceivably justify continued imprisonment. This is especially true in the United States, which dramatically over-relies on incarceration as a brutal salve for social ills. 49 But it is true regardless—a civilized society does not roll the dice on its citizens' lives, even if they are poor, forgotten, drug addicted, and mentally ill.

In addition to § 3582(c)(1)(A), there is also a "policy statement" on compassionate release authored by the United States Sentencing Commission—a government agency that promulgates advisory guidelines for federal sentencing that, despite their advisory status, nonetheless continue to play an outsized role in federal sentencing practice. Though this policy statement hasn't been updated since the First Step Act and is therefore—as every appellate court to have considered the issue has ruled—inapplicable to defendant-initiated compassionate-release motions, some courts continue to feel that it can help guide their decision-making in this field. 50

The compassionate release policy statement invents an additional hurdle to clear to obtain compassionate release: it
requires a court to release an individual only if the court is sufficiently assured that he or she will not pose a danger to the community. This standard should not be difficult to overcome. In making this assessment, context is critical. Once the court is considering whether a person can be safely released, the court has already 1) found that there are extraordinary and compelling reasons for release and 2) found that additional imprisonment is excessive punishment—too much punishment—relative to the purposes of federal sentencing.

The compassionate release policy statement recognizes this, as it directs courts to apply a particularly generous standard for release. In deciding whether a defendant otherwise eligible for compassionate release should be detained based solely on dangerousness, courts must apply the same standard that applies to a presumptively innocent person merely accused of a crime. This standard is set forth in the Bail Reform Act—the statute compassionate-release law directs courts to apply in evaluating the possibility of safe release—and it is a generous standard. It requires courts to grant sentence reductions unless the government can persuade the court that no conditions of release could so much as “reasonably assure” community safety.

The U.S. Supreme Court has explained that, for defendants in a pretrial posture, “liberty is the norm.” Under compassionate release law, the same holds for defendants who have been sentenced, but now present with an extraordinary and compelling case for early release. In light of these standards, it should be the very rare case involving significant disciplinary issues in prison in which a court denies a sentence reduction to an otherwise eligible defendant based solely on dangerousness.

The road ahead

Around the country compassionate release motions have met with success. Over 1,600 individuals have been granted compassionate release by the courts since the pandemic began. (To my knowledge, the BOP has not submitted a single one of these motions—each and every one was a defense-initiated motion for compassionate release.) Compassionate release motions have also presented a valuable opportunity to shine a light into the dark, forgotten corners of our prison system, where we have warehoused thousands of people into old age—many of whom have been in prison, exhibiting unblemished good conduct, since the 1990s, without a chance at release.

But there continue to be challenges. Despite the severe backlog of cases deserving compassion, and the harsh realities of the COVID-19 era, some federal judges continue to greet compassionate release motions with a high degree of skepticism. At bottom, this skepticism flows from two related sources: 1) competing conceptions of “foundational facts” and 2) different allocations of trust.

First, different judges come to the world with what law professor Suzanna Sherry calls competing conceptions of “foundational facts.” As Professor Sherry defines them, “foundational facts” are “judges’ generalized and invisible intuitions about how the world works.” They are the “unacknowledged assumptions that underlie legal doctrine.”

The law of compassionate release is riddled with competing conceptions of foundational facts—the unstated drivers of doctrine in this field. Some judges have a deep concern about what COVID-19 can do to a human body whereas others are more sanguine about the risk. Some judges accept that compassion is a judicial virtue while others begrudge mercy for the least of us.

Some judges have been boiled like frogs by mass incarceration and thus see nothing wrong with what a recent public health article in The Lancet describes as our “extremely high rates of incarceration” that combine with COVID-19 to cause “an urgent health crisis in correctional facilities and detention centres,” whereas others understand that, fundamentally, something is rotten in Denmark. Some judges intuitively believe that compassion has a role in the law, whereas others hew more closely to what David Schraub calls a “sadomasochistic” conception of the judicial role (where you aren’t doing your job if your rulings don’t hurt).

Second, and relatedly, judges allocate trust differently. Some judges fundamentally—intuitively—trust the BOP to competently discharge its responsibilities, whereas others understand that it is a poorly functioning institution that requires significant scrutiny. Some judges deeply trust federal prosecutors to guide them to the socially normative and reasonable result, whereas others recognize that prosecutors are just one, hardline voice within the federal civil service – the products of a decades’ old culture that
Miles Pope is an assistant federal public defender with the Federal Defender Services of Idaho, Inc. Before joining the federal defenders, Miles clerked for Justice Deno Himonas on the Utah Supreme Court and Judge Marjorie Allard on the Alaska Court of Appeals, and he served as public defender for the Nez Perce Tribe. Miles is the 2020 recipient of the Fred Turner Award from the National Association of Federal Defenders for his role helping to coordinate the nationwide federal defender response to COVID-19.

Endnotes

1. Even for a small article like this, my debts are large. I owe particular thanks to Colin Prince, Alison Guernsey, Lauren Gorman, and Ben Flick—terrific lawyers with an extraordinary depth of knowledge about this field of practice. I also owe a broader debt of gratitude to the federal criminal defense community. In the current criminal defense environment, it has become almost impossible to trace any ideas back to their original source. Instead, my experience is that everyone working in this field during this era has operated almost as one undifferentiated brain—in constant and seamless communication about the challenges of the day. Like the Borg—but for liberty. I can thus fairly take responsibility for nothing in this article except its mistakes.

4. Id.
6. See ida.ussc.gov
costudies.org/highest-to-lowest/prison-population
rate?field_region_taxonomy_tid=All; also see Prison Policy Initiative, Louisiana profile, available at https://www.prisonpolicy.org/profiles/LA.html (“Louisiana has an incarceration rate of 1508 per 100,000 people.”)
8. See Adam Gopnik, The Caging of America, The New Yorker (Jan. 30, 2012) (“Our government is serving more people under ‘correctional supervision’ in America—more than six million—than were in the Gulag under Stalin at its height.”).
costudies.org/highest-to-lowest/prison-population
total?field_region_taxonomy_tid=All.
10. Id.
12. An organization of the world’s most developed free-market democracies.
14. See Jennifer Bronson, Ph.D. et al., Drug Use, De
pendence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009 (Bureau of Justice Statistics (2017), available at https://www.bjs.gov/content/pub/pdf/dudsap0709.pdf (“More than half (58%) of state prisoners and two-thirds (63%) of sentenced jail inmates met the criteria for drug dependence or abuse.”)).
ness among today’s inmates . . . pervasive, with 64 percent of jail inmates, 54 percent of state prisoners and 45 percent of federal prisoners reporting mental health concerns.”).
edu/research/work-and-opportunity-before-and-
after-incarceration/

Conclusion

I’m Whig enough to believe that we will one day look back in horror at the prison state that we’ve constructed in this country and in shame at how we’ve implemented it. Meanwhile, there is much work to be done. Law firms around the country have taken these matters on and met with considerable success. I encourage you to join the fight.


38. See, e.g., United States v. Saldana, No. 1:16-cr-00116-BLW, 2020 WL 2841779 (D. Idaho June 2, 2020) (Dkt. Nos. 46 & 47) (Government reports at dkt. 46 on May 11 that a BOP attorney and defendant’s case manager “reviewed their records and reported that the BOP had no record of the Defendant filing a request for compassionate release”; defendant at dkt. 47 provides a copy of the TRULINCS message he had sent on April 6, which was 35 days before the report of “no records,” to the Assistant Warden, who is managing compassionate release requests at FCI Tauna) United States v. Courthey, No. 2:15-cr-00019-009, 2020 WL 3196658 (D. Va. June 4, 2020) (Dkt. 1093) (government representing the defendant had never asked the BOP for compassionate release; defense counsel then submitted discovery request for defendant’s “cut in front by asking for compassionate release” motion conceded that the defendant had actually submitted a request).

39. I have seen an email from a BOP lawyer in which he wrote: “P.S. – As an AUSA you don’t need to go through the painful FOIA process. (I mean, defense attorneys need to), just let me know what you need and my office will take care of it.”

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Don’t Stop Believin’: An Appreciation of Recent Idaho Supreme Court Dissents and Concurrences

Sally J. Cooley
Jenevieve “Jenny” C. Swinford

As an appellate public defender, there is nothing more satisfying than a unanimous decision from the Idaho Supreme Court in your favor. It gives a resolute “win” to your client and validates your legal position. But, as criminal defense attorneys, we know that those wins are few and far between. Despite the excitement and renewed determination that comes from a win, they simply don’t come around enough to keep you going for the long-haul. So, how else can we stay motivated when the odds are stacked against us? These authors would like to suggest one perhaps overlooked source of motivation: the dissent.

The purposes of a dissent

On a professional level, a dissent can lessen the blow of a devastating loss. The stakes are high at the appellate court. The Court’s decision is often the end of the road for the client’s challenge to their conviction and sentence. In addition to the impact on the client, the Court’s decision will almost certainly influence future cases. A dissent provides confirmation that your arguments were heard and understood by the Court. To be sure, assuaging appellate counsel’s ego is not why a justice writes or joins a dissent, but it does provide some consolation, nonetheless. As for future cases, a dissent offers a glimmer of hope. It leaves open a small window of opportunity for the next case with a similar issue.

On a broader level, legal scholars have analyzed the many purposes of a dissent. It can “call for law reform by the legislature,” add limits or context to the majority’s opinion, or forecast an open question or upcoming trend. Most significantly, a dissent points out a justice’s perceived flaws in the majority’s legal analysis or its assessment of the facts. Justice Brennan believed that a dissent, by highlighting the majority’s flaws, improved “the final product.” A dissent
could also be a “corrective”—a template if the Court decides to “mend the errors of its ways in a later case.”

**External and internal advantages of a dissent**

In writing on the dissent, Justice Scalia opined that a dissent offers several external and internal advantages. Externally, a dissent shows that these decisions are the product of independent and thoughtful minds, who try to persuade others but that his worst opinions, “not in result but in reasoning,” were the unanimous ones. A dissent “compelled [him] to make the most of [his] case.”

Finally, and “most important of all” to Justice Scalia, writing (and reading) dissents makes judging (and lawyering) “more enjoyable.” A dissent is allowed the “character and flair ordinarily denied to majority opinions.” Justice Brennan agreed with these sentiments. A dissent gets to “straddle the worlds of literature and law.”

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"The practice of dissents also makes the Court the central forum for legal debate and a living commentary on legal philosophy, rather than a ‘mere record of reasoned decisions.’"

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**Dissents in action at the Idaho Supreme Court**

Examining just four recent decisions from the Idaho Supreme Court exemplifies the many purposes of a dissent. These decisions illustrate also the external advantages identified by Justice Scalia.

**State v. Pool:** Legislative reform

First, in *State v. Pool* the majority and the dissent both discussed, yet disagreed on, potential legislative reform. In *Pool*, the Court upheld Idaho’s implied consent law: by driving on Idaho roads, drivers consent to evidentiary testing for blood alcohol concentration, such as a blood draw.

This implied consent statute is a lawful exception to the Fourth Amendment’s warrant requirement. The majority concluded, unless the Idaho Legislature changes the implied consent statute (or the U.S. Supreme Court changes course), implied consent would remain a valid exception.

In contrast, the dissent wrote that the Legislature had not done enough in the implied consent statute. The dissent reasoned that the implied consent statute did not inform drivers of their implicit Fourth Amendment waiver and that blood draw evidence could be used against them in a criminal proceeding. Without such a notice requirement in the statute, the driver could not implicitly consent. The dissent called on the Legislature to “correct[] this fatal omission.”

Since both the majority and the dissent are waiting on the Legislature to do something before changing their views, it seems likely each side may hold their respective positions on a subsequent challenge to this law. *Pool* shows how the dissent can signal action to the Legislature.

**State v. Jones:** Limiting the majority opinion

Second, in *State v. Jones* the concurrence may have limited, and changed, the majority opinion. All five justices held that a defendant’s probationary status was a “prior bad act” under Idaho Rule of Evidence 404(b). As a prior bad act, the defendant’s probationary status would normally be inadmissible, unless relevant for another purpose.

On the question of relevancy, the Court split two to three. Two justices in the majority opinion determined that the evidence of the defendant’s probationary status was relevant to show the propriety of the police’s search (which was quite invasive as it was down the front of the defendant’s pants). The three-justice concurrence, however, believed that the evidence was not relevant for any other purpose. Despite this split, the concurrence ultimately agreed with the outcome, concluding the erroneously admitted evidence was harmless.

*Jones* demonstrates how the concurrence can alter the designated majority opinion. It appears that the concurrence’s proposed holding on relevancy will control in future cases—the concurrence actually had the majority of justices on this issue.

**State v. Chambers:** Open questions

Third, in *State v. Chambers* the
concur and dissent highlight an open question and, potentially, a philosophical disagreement within the Court. In Chambers, the Court evaluated an exception to Idaho’s “rape shield” rule, Idaho Rule of Evidence 412, for a victim’s prior false allegations. The majority adopted a preponderance of the evidence standard for the defendant to establish that the victim’s prior false allegation of a sex crime was false. The majority also set out a three-part test for trial courts to determine the admissibility of this evidence.

**A dissent does not ‘destroy the appearance of unity and solidarity,’ a concern acknowledged, but ultimately rejected, by Justice Scalia.**

The concurrence did not join in the outlining of this test, including the preponderance of the evidence standard. The concurrence wrote that the majority was offering “essentially an advisory opinion” and indicated that the trial court should adjudicate these issues first. And, the dissent disagreed with the majority’s conclusion that the Court’s prior adoption of the “demonstrably false” standard no longer applied to show falsity.

While the majority opinion is the law of the land, the concurrence’s disinclination to decide the matter and the dissent’s opposition suggest that there may be more to be developed with this issue in the future. And, broadly speaking, Chambers raises an interesting discussion on the Court’s view of its role in guiding the lower courts.

**State v. Pylican:**
**A forum for legal debate**

Finally, in *State v. Pylican,* multiple external advantages of the dissent were on display. *Pylican* not only forecasts open questions, but also shows the interaction between the majority and dissent on disputed issues. In *Pylican,* the majority held that an officer’s exit order during a traffic stop, supported by reasonable suspicion, did not unlawfully extend the stop’s duration. The two-justice dissent disagreed with nearly every aspect of the majority’s analysis.

First, the dissent disagreed with the majority’s conclusion of reasonable suspicion for the traffic stop. Second, the defendant’s actions. The majority held the defendant responsible for any time added to the stop by “her own conduct.” However, the dissent thought that the defendant’s actions should not be held against her when she acted in response to the officer’s order.

These diverging views in *Pylican* are an excellent example of the majority and dissent responding to each other’s perspectives and, in turn, clarifying their positions. They also draw attention to future questions on the interaction of *Rodriguez* and *Mimms,* the timing of an officer’s actions, and a defendant’s conduct during a traffic stop.

**Hold on to that feelin’**

As shown by these four cases, the Court’s decisions with dissents and concurrences offer inspiring (and sometimes comforting) reads for criminal defense attorneys. They also confirm, in real-time, the integrity of Idaho’s appellate courts. A dissent does not “destroy the appearance of unity and solidarity,” a concern acknowledged, but ultimately rejected, by Justice Scalia. To the contrary, the dissents “contribute to the integrity of the process.”

Justice Brennan believed that judges in particular felt obligated “to speak up when [they] are convinced that the fundamental law of our Constitution requires a given result.” This obligation comes from one of our founding principles: “[t]he right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.” These authors have fully enjoyed reading the Court’s decisions that exercise this great right. We hope that you do too.

The authors’ views and opinions in this article are their own and do not represent those of the State Appellate Public Defender’s Office.

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Endnotes

2. To borrow Justice Scalia’s definition, the term “dissent” used here also refers to concurrences because both can “disagree with the Court’s reasoning.” Antonin Scalia, The Dissenting Opinion, 1994 J. Sup. Ct. Hist. 33, 33.
5. Fletcher, note 3 at 299.
8. Brennan, note 6 at 430.
9. Id.
10. Id.
11. Scalia, note 2 at 35–42.
12. Id. at 35.
13. Id. at 39–40.
14. Id. at 35.
15. Id. at 41.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 42.
21. Id.
22. Brennan, note 6 at 431.
24. Id. at 894–97, 898.
25. Id. at 898.
26. Id. at 899–900 (Stegner, J., dissenting).
27. Id. at 900.
29. Id. at 1169 (majority opinion).
30. Id. at 1175–76 (Stegner, J., concurring in the result, joined by Brody, J., and Moeller, J.).
31. Id. at 1176.
33. Id. at 1084–85.
34. Id. at 1086 (Brody, J., concurring in part).
35. Id.
36. Id. at 1086–87 (Bevan, J., dissenting).
38. Id. at *10 (Stegner, J., dissenting, joined by Brody, J.).
41. Pylican, 2020 WL 4280191, at *7–9 (majority opinion).
42. Id. at *10–11 (Stegner, J., dissenting).
43. Id. at *7–8 (majority opinion).
44. Id. at *11–12 (Stegner, J., dissenting).
45. Id. at *9 (majority opinion).
46. Id. at *12 (Stegner, J., dissenting).
47. Journey, note 1.
48. Scalia, note 2 at 35.
49. Brennan, note 6 at 435.
50. Id. at 438.
51. Id.
Eating Ourselves Alive: Why Drug Trafficking is the Worst Statute on Idaho’s Books

Nicole R. Gabriel
Elisa G. Massoth

P op quiz: what do cannibalism, human trafficking, and first-degree arson have in common?

If you answered that all three are state offenses over which judges may exercise discretion in sentencing, you are correct. The Idaho Code provisions for each of these offenses provide a statutory maximum sentence a judge may impose on a person convicted of such an offense, but do not provide mandatory minimum sentences. This means that the judge may impose any sentence up to that maximum but is not mandated to impose any prison sentence at all.

Let’s play this out: say you are convicted of cannibalism. You were found, beyond a reasonable doubt, to have “willfully ingest[ed] the flesh or blood of a human being” without having done so “under extreme life-threatening conditions as the only apparent means of survival.” Under state law, you can be sentenced to a maximum of 14 years in prison. But that doesn’t mean you necessarily go to prison for 14 years: a judge could sentence you to one year, two years, three years… anywhere up to that 14-year maximum.

Alternatively, you could even be placed on probation and end up serving no prison time at all for your cannibalism conviction. And if your friend, Bob, was also convicted of cannibalism, it is entirely possible that you both could be sentenced to very different amounts of prison time for the same crime.

How could this possibly be? Simple: judicial discretion. A judge, when imposing your sentence, “specifically tailor[s that sentence] to the individual defendant and take[s] into account the totality of all relevant facts and circumstances.” Those relevant facts and circumstances include, among others, whether you have any criminal history, whether you would be open to seeking treatment, and the likelihood you will commit another crime and harm another person. So, if a judge finds that this is your first offense and you are unlikely to reoffend, you could be given a much lesser sentence than your friend, Bob, if the judge finds him to be a danger to society.

But now let’s add to our hypothetical: say your son, a young adult with an otherwise-clean record, was “knowingly in actual or constructive possession” of two grams of heroin and is convicted of “trafficking in heroin.”


Like cannibalism, trafficking in heroin carries a maximum sentence; only for trafficking, the maximum is life imprisonment rather than 14 years. However, unlike cannibalism, any offense under Idaho's drug trafficking statute also carries a mandatory minimum sentence. In your son's case, regardless of any "relevant facts and circumstances" that may be present, possessing two grams of heroin means a mandatory minimum sentence of three years in prison before even the possibility of parole. So even if your son became addicted to heroin because he was overprescribed narcotics for legitimate medical problems and turned to heroin when the prescriptions ran out, the court has no discretion to impose a sentence below the mandatory minimum.

With a legislative solution available and bi-partisan support, why hasn't Idaho fixed the trafficking statute?

Cannibalism is a fairly obscure statute, but there are only three crimes in the entirety of the Idaho Code that mandate prison time for one year or more: first-degree murder, repeated sexual abuse of a child, and drug trafficking. All other crimes on Idaho's books allow for judicial discretion in sentencing. Even the human trafficking statute—which prohibits engaging in the "recruitment, harboring, transportation, provision, or baiting of a person for labor of services, through the use of force, fraud or coercion, for the purpose of . . . involuntary servitude, peonage, debt bondage, or slavery"—allows for judicial discretion in sentencing. We trust judges to mete out correct sentences to convicted human traffickers, but we do not extend that same trust when the trafficking involves drugs rather than other human beings.

The phrase "drug trafficking statute" is a bit of a misnomer: to be convicted for an offense under Idaho Code § 37-2732B, a person need only be "knowingly in actual or constructive possession" of a prohibited substance. Sure, "knowingly manufactur[ing], deliver[ing], or bring[ing]" that substance into Idaho is also sufficient for a conviction under the statute, but it is not necessary. A person can be convicted for "trafficking" by possession alone.

It wasn't meant to work this way. When first enacted in 1992, the statute was meant to target "middle- to large-scale drug dealers in Idaho. The statute's official Statement of Purpose specifies that "[i]n order to come within the purview of this criminal statute, an individual must possess a sufficient quantity of one of the specified drugs to indicate heavy involvement in the drug trade." However, the quantities listed in the statute do not necessarily indicate heavy involvement in the drug trade.

Two grams of heroin is about the size of a sugar packet. It is an amount an addict would possess for a day's use (depending on habit), not that of a high-level drug dealer. Instead of targeting an Idaho version of El Chapo, the statute ended up targeting many users, addicts, and even uninformed car passengers who never dealt or sold drugs. Over 90% of people convicted for "trafficking" in Idaho and serving mandatory minimum sentences had never been convicted of trafficking before. This "war on drugs" approach has led to vast numbers of our population being eaten alive by the prison system. The United States—which holds less than 5% of the world's total population—incarcerates over 20% of the world's total prisoners. In the past three decades, Idaho's prison population increased by 849%.

Idaho has no room to house all of the incarcerated people within its own borders: it continues to contract with other states to house its own inmates and spend taxpayer money on building more prisons. Worse, the Idaho Department of Corrections is seeking funds to build a new prison—funds that would be provided at taxpayer expense. This is despite the fact that research has established community-based treatment approaches are more effective than incarceration at re-
duc ing recidivism for substance abusers.23

We can do better. Legislative reform is a solution with bi-partisan support, across the nation and within Idaho itself. Throughout the United States, from Vermont to Oregon, legislative reforms have been enacted at the state level, decriminalizing drug use and focusing on treatment rather than incarceration.24 The First Step Act, signed into law in early 2018 by President Donald Trump, provided relief at the federal level by modifying mandatory minimum sentences and expanding what is known as the “safety-valve provision, which allows courts to sentence low-level, nonviolent drug offenders with minor criminal histories to less than the required mandatory minimum for an offense.25

There is bi-partisan support for reform here as well: in 2018, the Idaho Legislature’s Criminal Justice Reinvestment Oversight Committee—a joint committee made up of members of both the state House of Representatives and Senate—recommended judges be given more discretion at sentencing for mandatory minimum cases.26 Then, in both 2018 and 2019, the House of Representatives overwhelmingly passed legislation that would put sentencing discretion back in the hands of judges.27 That legislation would have provided a simple change: allow a judge to impose a sentence below the mandatory minimum when a “manifest injustice” would otherwise occur.28 The Senate has also expressed bi-partisan support for this statutory change, but the legislation passed by the House two years in a row has been denied a hearing by the Senate Judiciary and Rules Committee.29

It is time to fix this

“Power tends to corrupt, and absolute power corrupts absolutely.” – Lord Acton. Let’s return briefly to our hypothetical: as it stands today, prosecutors have the sole authority to decide whether to charge your son’s possession of two grams of heroin under either Idaho’s drug trafficking statute or drug possession statute.30 If the prosecutor charges your son with drug trafficking, he faces a mandatory prison sentence of at least three years—even if it’s his first offense.

Three years in prison won’t help your son beat an addiction. Nor will a lengthy prison sentence help the domestic violence victim who transported drugs for her abusive boyfriend because she knew the consequences of refusing to do so, or the college kid who was driving from California to Colorado (both states in which recreational marijuana is legal) and admitted to having a pound of marijuana in his car when he was pulled over for failing to signal a lane change for five seconds, or the truck drivers who transported hemp (a federally legal substance with no psychoactive properties made from marijuana plants) through Idaho.

Prosecutors in each of these cases decided to charge the crimes as “drug trafficking” and invoke the mandatory minimums, tying the hands of the judges presiding over the cases. Now the domestic violence victim and the college kid are both in prison. The hemp truck drivers were able to strike a deal only after immense public pressure convinced the prosecution to reduce the charges to a misdemeanor.31

The solution to drug use—proven in study after study—is drug and mental health treatment, not incarceration. When prosecutors have this sole authority over sentencing decisions, this solution is ignored. We trust judges to exercise their discretion when sentencing human traffickers and almost every other crime in Idaho. It is time to put drug trafficking sentencing decisions back where they belong: in the hands of judges. Idaho is eating its citizens alive with bad law.

If you are compelled by this article, the Idaho Association of Criminal Defense Lawyers encourages you to call or write to your state legislator. Let them know you want this law fixed.

If you know someone affected by Idaho’s drug trafficking statute, please reach out to the author at emassoth@kmrs.net. IACDL cares. We want to know. We will continue to pursue criminal justice reform until Idaho’s worst criminal statute is changed.

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Endnotes

21. Jacob Scholl, Idaho Soon Will Send Inmates to Private Prison in Arizona Rather than Texas Facility, Idaho Statesman (Aug. 28, 2020, 2:10 PM), https://www.idahostatesman.com/article244961815.html (“In what has become a common refrain from Idaho officials, [Idaho Department of Correction public information officer Jeff] Ray said that it’s not ideal for the state to send inmates to prisons thousands of miles away, but it’s really the only option. Overcrowding has been an ongoing problem for Idaho, and there doesn’t seem to be a solution in sight.”).

22. Id.


The Death of the Criminal Trial: An Autopsy and How its Resurrection May be Required to Revive a Broken System

Ian H. Thomson

Several years ago, I inherited a client who had been arrested a few months prior on a charge of armed robbery and was in jail unable to make bail. Upon investigation, we had a videotape, together with medical records and several witnesses, that would show he was at his son’s birth across town when the robbery occurred. Armed with alibi evidence, I approached the prosecutor with notice, our evidence, and a list of corroborating witnesses.

Unfortunately, now months after arrest, the victim had already identified my client from a photo array the night of the robbery and had also identified him at a preliminary hearing. After reviewing our evidence, the prosecutor indicated they had decided that it was ultimately an issue for a jury to decide and refused to dismiss. I was baffled this injustice was not cleared up during the initial investigation, or before the witness made an in-court identification. My client related to me how he told the detective on the night he was arrested on the warrant that they were mistaken and explained why. The detective’s glib response was, “save it for the judge.”

My client would spend 14 months in jail waiting for his first opportunity to show he had nothing to do with the robbery. Although there was never any offer to plead to a “lesser charge,” that did not stop him from repeatedly asking me whether the prosecution was willing to extend a plea offer in order to get out of jail. The only thing that kept him from accepting a plea was the fact that the consequences of a gunpoint robbery conviction were simply too high. However, to the contrary, most criminal defendants find that the stakes to go to trial are too costly.

The modern American criminal justice system ostensibly promises an adversarial process, with a guaranteed right to representation, and a trial before one’s peers. Unfortunately, our system is no longer one of trials, where one has an opportunity to demonstrate innocence or reduced culpability, or to challenge the state’s evidence. The common narrative that a trial is the best method for determining a person’s guilt or innocence, and that the accused will ultimately get their day in court, is sadly a mere myth for most. Instead, ours has become a system of defendant-processing, pre-trial incarceration, negotiations, pleas, and sentencings.

The United States Supreme Court even
acknowledges “the reality that criminal justice today is for the most part a system of pleas, not a system of trials.” The Court has described it as “horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” Where our current system was originally designed to rely on the jury trial to resolve disputes of fact, what happens when that avenue is either removed entirely or becomes extremely rare?

The attendant cost is the very health and life blood of American criminal justice. If our current system stops trying to uncover and test the facts as they likely happened, case resolution no longer depends on what actually occurred and who was responsible, but instead creates a system that is driven by the coercive effects of potential punishment and pre-trial incarceration. Unless we can address the resulting consequences of the disappearing trial, we risk an erosion of the quality of justice afforded and a corrosion of the confidence in its outcomes.

Is the criminal trial on life support?

The Sixth Amendment establishes that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” But what is a right if it is largely a hollow one? It has been widely reported that nearly every criminal case ends in a guilty plea. Even here in Idaho, this conclusion is no exaggeration. In 2019, Idaho charged 70,903 adult criminal cases. But of that number, only 2,150 cases went to trial. That represents exactly 3% of all cases, or less than one in every 33 defendants. (See Figure 1). Individuals in the federal system don’t fare better, where 2% of criminal defendants in 2018 went to trial. Any system where 97% of cases never go to trial should not be called a “jury trial system.” Where jury trials are such a rarity, they likely represent a very small part of any criminal practice.

The sacrificial lambs in such a system are the innocent, those coerced into pleading to a charge greater than the one they might be guilty of, those desperate to get out of jail and who cannot afford bail, and a criminal justice system that purports to only take away one’s liberty after proving guilt beyond a reasonable doubt.

How did we get here?

To perform an autopsy on how the American criminal trial has suffered such an ignominious death, we should recognize there are a myriad of reasons that have contributed to our current situation. Among others, these include (1) the increase in criminal laws along with the effect of prosecutorial discretion, (2) pre-trial incarceration, (3) the underfunding of indigent defense, and (4) the unspoken penalty imposed after trial.

One of the primary causes of fewer trials can be attributed to the effects of increased criminal charging and prosecutorial discretion. Criminal justice critics have noted that the last few decades have witnessed a deluge of new, easier-to-prove crimes, at both the state and federal levels. With their introduction comes the prosecutor’s ability to bring more charges and create bargaining chips for plea negotiations. The culture in courthouses often maintains that unless the defendant pleads...
guilty, the prosecutor will charge the defendant with the most severe offenses one can prove. In Idaho, that may mean charging a felony-burglary where shoplifting is alleged or charging a felony-possession of drugs rather than a misdemeanor-paraphernalia charge where the minutest amount of a drug can be detected. Such "overcharging" allows the prosecutor to subsequently reduce charges during negotiations to where they should have started.

However, many of the most significant consequences have already occurred long before the charge can ever be reduced. Felony charges carry higher bonds, which means pre-trial incarceration or more onerous release conditions. One of the most insidious and coercive aspects of our system is the effect of pre-trial incarceration on defendants’ willingness to hold out for vindication at trial. Unable to afford bail, defendants plead and accept the collateral consequences of conviction in order to escape further incarceration. That means "time served" actually represents a sentence of punishment executed before any conviction.

Oddly, in many cases, the punishment comes before the determination of guilt. Where jobs are lost, housing is forfeited, families lose the support of the incarcerated, and lives are otherwise interrupted, it is no surprise that defendants often decide to plead as quickly as possible in an attempt to return to their life before arrest. Even if that requires forfeiting valuable Constitutional rights they would have maintained had they been successful at trial.

But a right to a jury trial is largely hollow if you cannot realistically avail yourself of it. Of the $200 billion spent on criminal justice activities by government, it has been estimated that a mere 2% goes to indigent defense. Part of the problem is there simply aren’t enough appointed defense attorneys to take more cases to trial. In the last full year reported in Idaho, 87% of those defendants charged with felonies and 50% charged with misdemeanors were represented by court-appointed counsel. (See Figure 2). Consequently, the nature of case representation is often dictated by institutional public defenders or appointed attorneys who are indisputably underfunded and under-resourced. The unfortunate fact is the small number of trials may be partially attributable to defense attorneys who do not have time to take more cases to trial.

When taking a critical look at the indigent services system, one should be sensitive to the crushing workloads imposed on indigent defense counsel. When a panel of Idaho criminal defense experts estimated the time required to prepare and defend a felony criminal case—without a trial—they recommended an allocation of about 67 hours. However, in a subsequent survey, a group of practicing Idaho attorneys indicated they believed a mere 14 hours would be necessary to adequately represent a typical felony case that did not go to trial.

The Public Defense Commission recently adopted rules that would impose a maximum caseload limit that would allocate an average of only 10 hours per felony case. Yet, when appointed indigent...
practitioners were asked to participate in a time-tracking study in 2017, which calculated the actual time allocated to each case, they reported spending on average less than four hours per felony case.15 (See Figure 3.) Such disparity between the time recommended and time actually spent should lead one to ask how our current justice system could ever produce more trials unless there was a significant investment in providing defendants with attor-

neys who have more time for each case.

Finally, considerable scholarship represents a consensus that defendants suffer greater punishment when a conviction comes by way of trial rather than by plea. Simply put, defense attorneys frequently find themselves in the position of counseling their clients honestly by indicating that they will likely receive a greater sentence if they go to trial and end up being convicted. In line with this understanding, many criminal defendants will plead guilty simply because the judge or the prosecutor threaten the defendant with too great a penalty for going to trial—even where the resulting convictions are to the identical charges in a plea agreement.16

This “trial penalty” is exacerbated as trials become less frequent and are increasingly seen as a burden on the courts and the result of a defendant’s recalcitrance. In Idaho, the effect of plea negotiations with the prosecutor are complicated in the absence of any sentencing guideline matrix providing parties with a baseline and where pleas to specific negotiated sentences are rare and heavily disfavored by both prosecutors and many judges.17

As a result, most defendants plead guilty without any assurance of their ultimate sentence.

A difficult path forward to resurrect the criminal trial

Part of any solution is to restore the prominence of the criminal trial. As Thomas Jefferson wrote, “I consider [the trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.”18 If counsel, prosecutors, and courts were willing to try more cases, it would likely have an effect that would markedly change current dynamics. However, any reforms that place a greater emphasis on trial will require more money and more attorneys. That means considerable public funding increases, particularly in the defense of the indigent.

In addition, a renewed emphasis on criminal trial practice will require significant changes in training. Because trials are so rare, many criminal practitioners simply do not have a tremendous amount of trial experience. Law schools should identify those who are likely to enter criminal practice and emphasize trial advocacy skills in addition to the substantive courses they already offer. New practicing attorneys should be afforded the opportunity to attend trial colleges where they can practice different aspects of trial without a real client sitting next to them.

Organizations like the Idaho State Bar, the Idaho Association of Criminal Defense Lawyers, and the Public Defense Commission, can also invest resources into increased trial practice trainings. Part of the challenge is acknowledging that practical training largely comes with experience. As a result, although our current system would consider it an unnecessary luxury, private practices, institutional public defender offices, and the courts should all encourage newer attorneys to second-chair trials under the guidance of more experienced attorneys.

More trials would reorient a system by establishing greater parity between the parties and requiring the State to prove their charges, leading to greater disclosures in discovery, more careful investigations, and more conscientious assessments of case strength. As a result, more criminal trials would deter the practice of routinely overcharging cases and should curb the effects of prosecutorial overreach and discretion. In the absence of using jury trials to resolve disputed facts, our system must find ways to allow for more meaningful negotiations. That may mean increasing criminal mediation—which fosters a “splitting the baby” approach—or providing for more robust negotiations where defendants are allowed to make protected revelations and proffers.

Furthermore, additional trials would uncover the avoided costs and implications of a system currently designed to largely ignore the invocation of the trial right. As criminal trials no longer represent an aberration, prosecutors and judges would be inured to trial and less likely to impose a “penalty” for invoking one’s right. Finally, more defendants would leave with greater confidence in a system that truly respected the right to contest the State’s version of events and provided an avenue for them to offer a competing view, having availed themselves of the right that Thomas Jefferson called “our only anchor.”

"Because trials are so rare, many criminal practitioners simply do not have a tremendous amount of trial experience."
in 2014 and is currently past President of the Idaho Association of Criminal Defense Lawyers.

Endnotes


4. U.S. CONST. amend. VI.

5. A total of 14,254 felony cases were charged in 2019, along with 56,649 separate misdemeanor cases. 2,150 represents the number of cases that began a first trial in 2019. Email from Renae Bieri, Idaho Administrative Office of the Courts, Information Division (Dec. 4, 2020) (on file with author).


7. Such has not always been the case. William J. Stuntz, an eminent professor of Criminal Justice at Harvard, has noted that before the 1960s between one-fourth and one-third of state felony charges led to a trial. See Yofe, *Innocence is Irrelevant*, The Atlantic (Sept. 2017).


9. A 2018 study in Delaware showed that pretrial detention increased a person’s likelihood of pleading guilty by 46 percent. Emily A. Donnelly and Joh M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 805 (2019). In Harris County, Texas, it was shown that people held pretrial pleaded guilty at a rate 25% higher than people who were released, and 17% of those detained would likely not have been convicted at all had they been released pretrial. Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV 711 (2017).


11. Email from Renae Bieri, Idaho Administrative Office of the Courts, Information Division. Figures are author’s creation from information provided in email (Dec. 4, 2020) (on file with author).


13. Id.

14. The Idaho Public Defense Commission has set a maximum caseload for any given attorney of no more than 210 felony cases in a calendar year. If an attorney worked full-time, every week of the year, accounting for no administrative time (2080 total billable hours), the attorney would have no more than 9.9 hours to dedicate to each felony case, including time spent at trial. See IDAPA § 61.01.02.D06.05(a)(ii).

15. The time-tracking study indicated that participating attorneys only worked on the average misdemeanor case for 2.2 hours. Crossgrove Fry, *Idaho Policy Institute*, p. 23, tbl 4.


17. Specifically referencing negotiated “Rule 11” agreements, where the court is bound to impose an appropriate sentence that has been negotiated by the parties under Idaho Criminal Rule 11(h)(1)(c).

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A Tribute to Public Defenders
Sarah E. Tompkins

This article is about public defenders.¹ The individuals, not the public defense systems or institutions. The latter is an incredibly complicated subject matter; in Idaho, it embraces a diversity of potential issues and organizational structures that deserves more intellectual space than this article would allow, or my own insight could even begin to illuminate. Typically, many perceive public defense systems or institutions as being one and the same as the individual indigent defenders within them. This perception overlooks the quality of work and character that individual public defense practitioners bring to bear for their clients.

Because of this, I wanted, instead, to write an article about the people in Idaho who practice indigent defense. I am blessed to work beside them every day. While I have true joy and pride in being a public defender, there is negative public perception of indigent defenders as less competent or capable than private attorneys. This unfortunate and inaccurate perception of indigent defense in Idaho could not be further from my own experience of the skill and dedication these individuals bring to bear.

A shared calling

When I entered law school, I knew that indigent defense was the only area of law that I was interested in practicing. Very early on, I met a small group of other students who had the same ambition to become public defenders. We became close in a short period of time and this tight-knit cluster of aspiring public defenders gave me my first exposure of what the indigent defense community would be like. My colleagues were smart, tenacious, and brave. They were unafraid to challenge precepts of the law that struck them as unfair or unjust. Even if they were afraid (being the voice of dissent can often be cowing), they pushed through the trepidation and spoke up nevertheless. What I was not aware of at the time, and I did not realize until much later, is that this community of public defenders in Idaho has a lineage older than the State of Idaho itself.

Idaho’s proud legacy of public defense

Even prior to Idaho statehood, as early as the territorial statutes of 1880², the legislature provided a statutory mechanism for the appointment of counsel for indigent defendants in criminal cases. Curiously, the statute providing for this appointment of counsel was placed in the act governing district attorneys. There were prior provi-
sions in the territorial statutes establishing prosecuting agencies within each county. However, the 1880 Act augmented its statute dealing with the compensation for district attorneys with a new mechanism addressing defendants who could not afford their own attorneys to present their case and challenge the State's allegations.

This portion of the 1880 Act provided that a court could appoint trial counsel for an indigent criminal defendant. If the Court determined that a criminal defen-

dant could not afford an attorney, the trial court had the discretion to “appoint counsel to conduct the defense of the accused.” Notably, the 1880 Act directed that such counsel, appointed to an indigent defendant, “shall be paid out of the county treasury, upon the order of the Judge of the Court, the same sum allowed by law to the District Attorney in the same case.”

Not only is this portion of the territorial statutes notable for the provision of counsel to those who cannot afford to hire their own attorney, it embraced a notion that I always thought was a more contemporary consideration: financial parity between prosecutors and indigent defendants.

This was a crucial first step for indigent criminal defense in Idaho. This statute empowered courts with a mechanism through which to provide defendants with an attorney in order to mount a defense against the far greater resources of the State. But this provision was also discretionary in its phrasing. Under its terms, a trial court may appoint counsel; this statute did not go so far as to say the court must do so.

The mandate to appoint counsel to indigent defendants

This eventually changed in Idaho, with the provision of defense counsel to those who cannot afford it becoming a mandate rather than a mere option. The first case I found discussing this shift is State v. Montroy, a decision issued by the Idaho Supreme Court in 1923.8 This case did not deal directly with the right to counsel. In-

“The paths that lead our clients to our doors are often littered with the detritus of the tragedies each client has experienced throughout their lives.”

stead, its primary focus was a challenge to the court imprisoning a defendant for the failure to pay costs ordered as part of their sentence. Specifically, the costs to the county for the putting on of a defense at trial.

In Montroy, the Court held that persons convicted of crimes could not later be imprisoned for failing to pay the costs of their defense. The Montroy Court rested its holding on the general state constitutional guarantees that indigent defendants be provided with a fair and impartial trial, as well as the opportunity to prepare a defense. But the Court went further. The Idaho Supreme Court held that “[i]n the case of indigent persons accused of crime, the court must assign counsel to the defense at public expense.”

The Montroy decision may be fairly said to be the initial starting point in Idaho case law for the recognition of at least the statutory right to counsel for indigent defendants. But this case did not rest its footings solely on the statutory right to counsel and to procure witnesses for the defense.

The right to counsel is spelled out in Article I, § 13 of the Idaho Constitution. However, the Montroy Court invoked a section of the Bill of Rights of the Idaho Constitution entitled “Justice to be freely and speedily administered.” In this portion of our Constitution, the framers set forth that “Courts of Justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and right and justice shall be administered without sale, denial, delay, or prejudice.”

Montroy affixed its moorings to the Idaho constitutional command that justice and right are not a commodity; they cannot be bought or sold. The amount of justice or fairness or right any of our citizens are due is not dependent on what they can afford to spend to secure it. And this provision is not merely aspirational or a platitude within our laws. This guarantee of our constitution “is self-acting, self-executing, and required no legislative provision for its enforcement, and cannot be abridged or modified by any legislative or judicial act.” The idea that justice, fairness, and due process of law are not merchandise or property for which you are only entitled to receive a proportionate share of what you are able to purchase is at the core of why many of us choose this work.

A calling to serve our most vulnerable populations

To be frank, the task of public defense is not easy. Leaving aside the financial constraints that fall on those who choose indigent defense for our careers, our clients disproportionately include some of the most vulnerable people in our communities. Many suffer from mental illness, substance addiction, or are themselves victims of violence. Few have had the type of education, opportunity, or even provisions for basic needs available to them that I suspect nearly all of us reading this article have been lucky enough to enjoy.

The paths that lead our clients to our doors are often littered with the detritus of the tragedies each client has experienced throughout their lives. As advocates, we come to know these tragedies intimately.
as we prepare to mount a defense on our clients’ behalf.

So many of my colleagues feel a tremendous empathetic sense of loss and hurt for our clients. And we carry this loss and hurt with us outside the door from our offices; it often follows as an uninvited guest into our own homes and lives. As with all legal practitioners entrusted with the liberty, property, future, and well-being of our clients, compassion fatigue has been recognized by the American Bar Association as a real danger of such work.\(^{10}\)

Despite the mental and emotional strain, on top of the standard pressures that maintaining a full criminal case load entails, the job of indigent defense in Idaho has its joys. I imagine that there are few areas of practice within the legal profession where a client expresses such genuine gratitude as we sometimes receive from our clients. By the nature of indigent defense, a significant segment of our clients live on the fringes of society.

They are often invisible to the rest of the world. No one listens to their stories or believes them. They may have had few (if any) advocates or protectors, from the earliest stages of their lives to the point where we pick up their case and their cause. For those of our clients who may be homeless or mentally ill, their very presence in society may make some people uncomfortable. Some of our clients have never known a world where they are respected, listened to, and valued.

I have seen relief and gratitude from clients for the simple, small act of listening to what they have to say and taking their story seriously. I have seen greater gratitude still when these clients witness their counsel fighting on their behalf, regardless of the outcome of that fight. Just having a public champion for their cause can be deeply meaningful to our clients, particularly those who have not had strong advocates and mentors in their past.

Unique practical experience and courtroom success

This is not to say that public defenders always lose the legal battles we fight. Many of the most important criminal appellate decisions in Idaho are the product of the work of public defenders, from the trial attorney who initially handled the case to the appellate public defenders who press the issues on appeal. And, I can say from experience, for all the appellate decisions we see regarding criminal defense losses, there are as many that will never be memorialized in the permanent law reports because our clients prevailed at trial. There is no single formula for these successes.

However, the unparalleled depth of experience public defenders gain from spending so much time in the courtrooms of Idaho is a connective tissue between this diverse group of professionals. Although defense styles and strategies are as varied among public defenders as the numbers of defenders themselves, indigent defense attorneys probably spend more time in the courtroom than almost any other type of attorney you can find. If any attorney has a question about a particular judge and how she runs her courtroom, odds are high that the public defender who appears in that court will have insight to share.

As with any other segment of humanity, public defenders are not perfect. We make mistakes sometimes. We may fall down or lose the battles that we fight, often in very public arenas. But all the indigent defenders I know push through the tough losses and the wounds of battle, pick up their weapons, and reenter the fight.

It has been the very great honor of my life to be blessed enough to count myself among these incredible advocates whom we call public defenders. Every day in Idaho, through their actions and skill, these attorneys put the lie to the idea that public defenders are not “real attorneys” or that they are somehow less competent than their private counterparts in the law.

I could not be prouder to be a public defender in Idaho, or of the people who fight beside me in this noble profession every day.

Sarah E. Tompkins is an attorney with the Ada County Public Defender’s Office. She is the third generation of her family to graduate from the University of Idaho and the second generation of her family to become a public defender. Prior to joining the Ada County

“By the nature of indigent defense, a significant segment of our clients live on the fringes of society.”

Public Defender’s Office, Ms. Tompkins was a public defender with the Idaho State Appellate Public Defender’s Office.

Endnotes

1. When I talk about public defenders, I also mean to include the many private attorneys who take on conflict and contract public defense cases at rates often far lower than what they may charge for private clients. These incredibly important attorneys make personal and financial sacrifices to help ensure quality indigent defense in Idaho and are equally deserving of appreciation.

2. The statute creating a mechanism for appointment of public defenders was contained within the 1880 territorial statutes. However, the legislative session for 1880 extended from December 13, 1880 to February 10, 1881. Because of this, technically, this act became effective throughout the territory of Idaho in 1881. I have heard that the establishment of the right to defense counsel at public expense in Idaho may actually predate 1881. However, I have been unable to locate a provision for the appointment of counsel in a criminal case prior to this date. Accordingly, while Idaho has had a statutory mechanism for the appointment of counsel at public expense since the 1880 territorial statutes, this right may have existed even earlier.


4. See id. at 254.

5. 37 Idaho 684, 217 P. 611 (1923).


10. The ABA has defined “compassion fatigue” as “the cumulative physical, emotional and psychological effect of exposure to traumatic stories or events when working in a helping capacity, combined with the stress and strain of everyday life.” See Compassion Fatigue, AM. BAR ASS’N, https://www.americanbar.org/groups/lawyer_assistance/resources/compassion-fatigue/ (last visited Jan. 3, 2021). The struggle with compassion fatigue is not unique to public defenders. It is something that I suspect reaches into nearly every area of the practice of law and extends to even those who do not have individual clients, such as prosecutors and judges. If you or a colleague are struggling with compassion fatigue, I encourage you to reach out to friends and trusted colleagues, or make use of the lawyer assistance resources that the Idaho State Bar provides. See Idaho Lawyers Assistance Program, Idaho State Bar, https://isb.idaho.gov/member-services/programs-resources/lap/ (last visited Jan. 3, 2021).
Serena Buchert is a member of the firm’s Healthcare and Litigation practice groups.

Ms. Buchert received her Juris Doctor from the University of Idaho, College of Law. She was a judicial extern for the Honorable Judge B. Lynn Winmill, U.S. District Court, District of Idaho. After law school, Ms. Buchert was a judicial law clerk at the Fourth Judicial District, State of Idaho for the Honorable Judge Patrick J. Miller.

Hawley Troxell welcomes Kyle Brekke to the firm’s Boise office. Kyle is a senior associate in the firm’s business and real estate practice groups. Kyle is a graduate of Boston University School of Law, where he received his J.D. *cum laude* in 2014. He holds bar admissions in Idaho and Massachusetts.

When your business requires sophisticated legal advice, look to Idaho’s premier, full-service law firm. And, as always, our nationally renowned legal services come with a local address.
# OFFICIAL NOTICE

**SUPREME COURT OF IDAHO**

Chief Justice  
G. Richard Bevan

Justices  
Robyn M. Brody  
Roger S. Burdick  
John R. Stegner  
Gregory W. Moeller

**Regular Spring Term for 2021**  
2nd Amended December 10, 2020

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**Boise via Zoom**  
January 11, 13, 15, 19 and 21

**Boise via Zoom**  
February 17, 19, 22, 24 and 26

**Boise**  
April 12, 14 and 16

**Moscow U of I**  
April 20

**Lewiston**  
April 21

**Boise**  
May 3, 5, 7, 10 and 12

**Boise**  
June 7, 9, 11, 14 and 16

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By Order of the Court  
Melanie Gagnepain, Clerk

**NOTE:** The above is the official notice of the 2021 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

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# OFFICIAL NOTICE

**COURT OF APPEALS OF IDAHO**

Chief Judge  
Molly J. Huskey

Judges  
David W. Gratton  
Jessica M. Lorello  
Amanda K. Brailsford

**Regular Spring Term for 2021**  
10/28/2020

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**Boise**  
April 13, 15, 20, and 22

**Boise**  
May 11, 13, 18, and 20

**Boise**  
June 8, 10, 15, and 17

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By Order of the Court  
Melanie Gagnepain, Clerk

**NOTE:** The above is the official notice of the 2021 Spring Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.
**CIVIL APPEALS**

**Contracts**
1. Whether the district court erroneously relied on Idaho law and public policy to determine whether the forum selection clauses in two agreements governed by California law were unenforceable.
   
   *Salvador v. Transportation Investors*  
   Docket No. 47940  
   Supreme Court

**Post-conviction relief**
1. Whether the district court erred by summarily dismissing the petitioner's claim that he received ineffective assistance of counsel because his attorney failed to file a direct appeal upon the petitioner's request.
   
   *Goullette v. State*  
   Docket No. 47576  
   Court of Appeals

**CRIMINAL APPEALS**

**Due process**
1. Whether the judiciary's failure to establish any written standards governing an offender’s eligibility for and removal from domestic violence court, and the delegation of the eligibility determination solely to the prosecutor, violated the defendant's federal and state constitutional rights to due process.
   
   *State v. Ahmed*  
   Docket No. 47521  
   Supreme Court

2. Whether the prosecutor committed misconduct and deprived the defendant of a fair trial by introducing an audio recording of the defendant and deprived the defendant of a fair trial by introducing an audio recording of the defendant's sex offender probation prohibiting him from having any access to the internet violated his First Amendment rights.
   
   *State v. Martin*  
   Docket No. 47809  
   Court of Appeals

**Evidence**
1. Whether the district court abused its discretion by allowing the state's expert to testify regarding the average price of methamphetamine, despite having ruled prior to trial that such testimony would be inadmissible due to the late disclosure of the scope of the state's expert's testimony.
   
   *State v. Tomas-Velasquez*  
   Docket No. 47451  
   Court of Appeals

2. Whether the district court abused its discretion by admitting the hearsay statements of an unavailable witness under the I.R.E. 804(b)(3) exception for statements against interest with out first expressly identifying any corroborating circumstances that showed the statements were trustworthy.
   
   *State v. Santos-Quintero*  
   Docket No. 47195  
   Court of Appeals

**Procedure**
1. Whether the district court abused its discretion by denying the motion for a continuance and proceeding with the trial in the defendant's absence after finding that the defendant had waived the right to be present by voluntarily absenting himself from the trial.
   
   *State v. Kropp*  
   Docket No. 47713  
   Court of Appeals

**Restitution**
1. Whether the district court abused its discretion by ordering the defendant to pay over $800,000 in restitution for the victims' medical expenses without properly considering his current and foreseeable ability to pay.
   
   *State v. Bolstad*  
   Docket No. 47050  
   Court of Appeals

**Search and seizure – suppression of evidence**
1. Whether the provision of the defendant's parole agreement granting law enforcement officers authority to conduct warrantless searches violated the non-delegation clause of the Idaho Constitution.
   
   *State v. Kaneaster*  
   Docket No. 47475  
   Court of Appeals

2. Whether the district court erred by denying the motion to suppress and ruling that the officer did not unlawfully delay the traffic stop by frisking the defendant while still trying to ascertain his identity.
   
   *State v. Moon*  
   Docket No. 47762  
   Court of Appeals

**Sentence review**
1. Whether the district court erred by finding that the defendant violated the terms of his probation by committing the crimes of petit theft and injury to a child where a jury acquitted the defendant of the petit theft charge and the state did not present any evidence that the defendant willfully endangered children.
   
   *State v. Ross*  
   Docket No. 47771  
   Court of Appeals

2. Whether the district court erred by ruling that, when a judgment of conviction is silent as to whether a driver's license suspension is consecutive to or concurrent with suspensions from prior cases, the new suspension is necessarily consecutive.
   
   *State v. Rodríguez*  
   Docket No. 47748  
   Court of Appeals

**Other**
1. Whether the district court erred by denying the defendant's motion to dismiss and holding that I.C. § 18-1509A, criminalizing the enticement of a child through the use of him from the internet, is not facially overbroad and, therefore, does not violate the First Amendment.
   
   *State v. Cartwright*  
   Docket No. 47440  
   Supreme Court

2. Whether the district court erred by denying the defendant's motion to dismiss and finding that the seventeen-month delay between the filing of the charges and the trial did not violate the defendant's federal and state constitutional rights to a speedy trial.
   
   *State v. Halbert*  
   Docket No. 47718  
   Court of Appeals

3. Whether the district court violated the defendant's constitutional right to confront witnesses when it admitted the out-of-court statements of a confidential informant who did not testify at trial.
   
   *State v. Spencer*  
   Docket No. 47109  
   Supreme Court

**Probation**
1. Whether the condition of the defendant's sex offender probation prohibiting him from having any access to the internet violated his First Amendment rights.
   
   *State v. Ramirez*  
   Docket No. 47770  
   Court of Appeals

Summarized by:  
Lori Fleming  
Supreme Court Staff Attorney  
(208) 334-2246
M. Dean Buffington 1940 – 2020

Dean Buffington was born November 3, 1940 in Custer, South Dakota and passed away on December 21, 2020 at St. Alphonsus Regional Medical Center in Boise, just seven weeks after celebrating his 80th birthday. He was surrounded by his family.

After graduating from the College of Idaho in 1963 with B.As in Accounting and Economics, he enrolled in law school at Willamette University and earned his Doctor of Jurisprudence in 1966. As soon as he graduated from law school, Dean received his draft notice. He joined the United States Marine Corps Reserve in 1966 and served until 1972 which became one of his proudest accomplishments.

In 1967, Dean went to work for First Security Bank of Idaho. Dean passed the bar on the first try and eventually found his first career calling in the Bank’s Trust Department. He retired after 31 years in 1998 as Executive Vice President of First Security Bank of Idaho, Private Client Group. He was a director on the boards of First Security Bank of Idaho and First Security Investor Services, Inc.

In April of 1998, Dean found his second career calling with Bruce Mohr and Carey McNeal. They established the registered investment advisory firm of Buffington Mohr McNeal.

While working at the bank in Boise, Dean met the love of his life, Judy Irving. Dean and Judy had so much in common, they were married a few months after meeting and maintained their union for 53 years. They had two daughters, Julene (Julie) and Denise. Dean cared deeply for Judy and credits her for keeping him on task at home, at work, and in his civic affiliations.

Dean was so proud of his daughters and his two grandchildren, Brooke and Drew Christie. Dean and Judy attended everything the grandchildren participated in from school programs to cross country meets to basketball games.

Dean’s professional activities included membership in the Idaho State Bar, Boise Estate Planning Council, American Bankers Association, Idaho Bankers Association, Boise Metro Chamber of Commerce, and Associated Taxpayers of Idaho, Inc. He chaired or held leadership roles in most of these organizations.

He was especially proud of serving on the Endowment Fund Investment Board for the State of Idaho. He served for 19 years and as the chairman for the last 17 years. Dean enjoyed working closely with the governors, Legislature, Board, and staff and, if he could, would thank all of them for the opportunity to work together and make a positive difference for Idaho.

Dean is survived by his wife, Judy, his daughter, Julie (Scott) Christie, grandchildren, Brooke and Drew Christie, and daughter, Denise (Jon) Maline. He is also survived by one brother, Floyd (Joan) Ayres, as well as many nieces and nephews.

Dean was preceded in death by his parents, Loyd and Gladys Buffington, his sister, Hazel Hardy, and brothers, Ed Ayres and Larry Buffington.

Richard B. Eismann 1924 – 2021

Richard B. “Dick” Eismann, 96, passed away on January 3, 2021. Dick was born in September of 1924, the youngest of four children born to Christian H. and Emilie V. (Callahan) Eismann. At a very young age, Dick aspired to be a lawyer. He had a love for debate and won the State of Oregon debate championship in 1940. After graduating from high school in 1941, he attended the University of Oregon. During WWII, he joined the Naval Reserve attaining the rank of Lt. J.G. Just before he was to ship out to the Pacific Theater, the war ended.

Dick married his high school sweetheart, Joan (Signor) Eismann, in 1945. He graduated from the University of Oregon School of Law in 1949 and passed the bar exam in both Oregon and Idaho. He had two children while attending college, Joan Eismann and Daniel T. Eismann. In December of 1949, Dick opened a law practice in Homedale. Two more children followed, Katherine Eismann and Susan Eismann. His wife, Joan, passed away in 1953. In 1960, Dick met the love of his life and life’s partner, Geraldine (Hale) Martinat. Geri brought her son, Randy Martinat, into the family and soon Dick and Geri had Karen (Eismann) Urbano and Debra (Eismann) Murphy.

Dick loved the practice of law and created a successful solo practice. He embraced technology early on with the IBM Magnetic Card Selectric Typewriter. He always took time to mentor young attorneys. Dick was very involved in the Homedale community, but after a fire above his office in Homedale in 1985, Dick and Geri built a new office on Caldwell Boulevard where it remains today. His daughter, Debra Eismann, and grandson, Ryan Martinat, now own the practice.

Dick enjoyed getting the whole family together to vacation whether it be on their trips to Canada or to Lincoln City, Oregon to share his love of the ocean and deep-sea fishing. Dick enjoyed bird hunting, fishing, dirt bike riding, and camping throughout Idaho.

Dick continued to practice law until November 27, 2020, when he withdrew from his last cases after 71 years as a practicing attorney. He is survived by his wife, Geri, children, Joan Eismann, Daniel T. Eismann (Sheila), Katherine Eismann (Brent Williams), Randy Martinat (Wanda), Karen Urbano (Gilbert), and Debra Murphy (David).

State of Idaho Supreme Court and Court of Appeals Memorial Service

STATEWIDE – Chief Justice G. Richard Bevan announced that the Idaho Supreme Court will hold its annual Memorial Service on Tuesday, March 2, 2021, at 10:00 a.m. As a result of the Novel Coronavirus (COVID-19) Emergency in the State of Idaho, the Memorial Service will be held virtually via Zoom video conferencing and will be streamed on the Idaho Public Television website. The video will be archived and saved to the Idaho Supreme Court website. The judges and members of the Idaho State Bar who passed away during the year 2020 will be remembered at this service.
Our Mediation & Arbitration attorneys are skilled in all forms of alternative dispute resolution, including mediation, arbitration, and hearing officer services. Additionally, we provide case administration as well as conference areas and hearing rooms at no additional costs to our clients.

And, best of all, our nationally renowned legal services come with a local address.
Important announcement regarding CM/ECF NextGen upgrade

STATEWIDE – The U.S. District and Bankruptcy Courts for the District of Idaho will upgrade our CM/ECF system to NextGen CM/ECF on Monday, March 8, 2021 for Bankruptcy matters and Monday, March 15, 2021 for District matters. Attorneys must complete important action items by March 1, 2021 to be able to continue to file in the Court’s ECF system after the upgrade. Please visit https://www.id.uscourts.gov/district/nextGen/PACER.cfm for further instructions.

Raymond E. Patricco, Jr. selected for appointment as new Magistrate Judge for the United States District Court for the District of Idaho

BOISE – Chief District Judge David C. Nye of the United States District and Bankruptcy Courts for the District of Idaho has announced the selection of Raymond E. Patricco, Jr. for appointment as a U.S. Magistrate Judge for the District of Idaho. Mr. Patricco will begin work on June 11, 2021. He succeeds Chief Magistrate Judge Ronald E. Bush, who is retiring from the bench after serving as a federal and state judge for nearly 18 years.

Born in Newark, New Jersey, Mr. Patricco, 51, is a graduate of Harvard University cum laude and received his law degree from the University of Virginia School of Law. He has been admitted to practice law in Idaho, Maryland, Virginia, and the District of Columbia. After his graduation from law school, he worked as a law clerk with the Honorable John P. Wise of the United States Court of Federal Claims.

Presently, Mr. Patricco is the Senior Litigation Counsel in the United States Attorney’s Office for the District of Idaho, where he handles a full caseload and is responsible for the training and development of attorneys in the early years of their careers. He also has served as the acting Criminal Chief in the Idaho office, where he works since 2011. From 2000 until his move to Idaho, Mr. Patricco worked in the United States Attorney’s Office for the Eastern District of Virginia. In that office, Mr. Patricco served as the Chief of the Financial Crimes Unit, as the Deputy Criminal Chief, and as the Chief/Deputy Chief of the Narcotics Unit. He has extensive trial and appellate court experience in complex and high-profile cases. Mr. Patricco has received national awards for superior performance from the U.S. Department of Justice for his work on cases in both the District of Idaho and the District of Eastern Virginia.

Before beginning work as a federal prosecutor, Mr. Patricco worked for four years with the firm of Steptoe & Johnson, LLC, in its Washington, D.C. office, working in both civil litigation and criminal defense.

The process of selecting a federal magistrate judge is prescribed by federal law. It includes an application process, followed by a comprehensive merit review and evaluation process utilizing a panel of persons from around the District of Idaho. After receiving the merit review panel’s recommendations, the new judge is selected by the active district judges. The United States District Court for the District of Idaho has two district judges and two magistrate judges.

Idaho Association of Defense Counsel (IADC) presents its most prestigious award, the Carl P. Burke Award of Excellence in Legal Defense to Boise attorney Andrew Brassey

BOISE – Andrew Brassey of the firm Brassy Crawford, PLLC, a graduate of the University of Idaho College of Law, was recognized by his peers for the utmost in professionalism and courtesy during his 40+ years of practice. He is highly regarded by those he practices with, and against, for his skill in the courtroom and the manner in which he litigates: civilly, professionally, and ethically. Respect for Mr. Brassey runs deep and is well deserved. In addition to being a long-time member of IADC, he is a Fellow in both the American College of Trial Lawyers and Litigation Counsel of America.

As stated by IADC’s past president, Robert Anderson, “It is with great pleasure that the Idaho Association of Defense Counsel announces that Andy Brassey has been selected as this year’s recipient of the Carl Burke Award of Excellence. Andy’s over 40 years of defense practice has been a great example of how good trial attorneys prepare and try complex and difficult cases. His genuinely human approach to presenting cases to jurors and belief that all cases should be handled with the highest ethical standards are attributes all attorneys should strive to have. We believe Carl Burke would have been pleased with this selection.”

The Idaho Association of Defense Counsel’s Carl P. Burke Award of Excellence in Legal Defense was established by unanimous Board action in January 2019. The award honors IADC’s first president, 1964, Carl P. Burke, and his contribution to civil defense practice in Idaho. It celebrates and recognizes his distinguished service and extraordinary accomplishments in the field.

Attorney Kyle Brekke joins Hawley Troxell & attorneys

Mindy Muller, Ben Ritchie, Marvin K. Smith, and Brent R. Wilson named partners

BOISE & IDAHO FALLS – Hawley Troxell is pleased to announce attorney Kyle Brekke has joined the firm effective December 1, 2020. Kyle is a senior associate in the firm’s business and real estate practice groups.

Before joining Hawley Troxell, Kyle served as corporate counsel for a social media start-up in Boise. Prior to that, he spent five years as in-house counsel for a large, publicly traded financial services company in Boston, where his work included advising clients on commercial transactions, launching investment platforms, negotiating securities distribution agreements, and representing the company in regulatory matters with the SEC and FINRA.

Kyle is a cum laude graduate of Bos-
ton University School of Law and while in school was a Paul J. Liacos distinguished scholar and a legal intern for U.S. Magis-
trate Judge Candy W. Dale. Kyle earned his B.A. in English from the University of California, Berkeley.

In his free time, Kyle enjoys hiking in the Boise foothills and backpacking in the Sawtooth mountains. He is an avid trav-
eler and has spent time in many countries including France, Morocco, Thailand, Russia, Iceland, Croatia, and Italy. Kyle is con-
versational in French and has a pro-
gramming background in web develop-
ment languages including HTML, CSS, JavaScript, and PHP.

Additionally, Hawley Troxell is pleased to announce attorneys, Mindy Muller, Ben Ritchie, Marvin K. Smith, and Brent R. Wilson have been elected as equity part-
ners in the firm, effective January 1, 2021.

Mindy Muller is a defense attorney in the Boise office represent-
ing clients against all vari-
eties of negligence claims for personal injury and economic loss, including premise liability, profes-
sional malpractice, and general failure to exercise care. She also represents clients in matters involving contract disputes.

Mindy served on the Launch Minis-
tries, Inc. Board of Directors from 2010-
2015, as well as a volunteer from 2008-
2015 for the First Baptist Church Refugee
Ministry. She is a graduate of the Boise Metro Chamber of Commerce Leadership Boise class of 2013-15. She serves as a vol-
unteer Court Appointed Special Advocate (CASA) attorney representing abused and neglected children.

Mindy received her J.D. from the Uni-
versity of Idaho College of Law and was
B.A. summa cum laude from Biola Uni-
versity.

Ben Ritchie is a litigator in the Idaho Falls office specializing in insurance and liability de-
Fense and employment law. He is experienced in pro-
viding coverage analysis for insurance companies, defending insurance com-
panies against claims of breach of con-
tract and bad faith, defending employers against claims under the ADA, FMLA, other employment laws, defending truck-
ing companies in truck accident litigation, defending product manufacturers for claims relating to asbestos exposure and other product liability claims, and defend-
ing landowners against claims for premises liability. In addition to his litigation experience, Ben also advises employers on various employment matters, including paid time off, workplace harassment, drug policies, and termination issues. He also advises trucking companies on human re-
source issues, regulatory compliance, and freight brokerage issues.

Ben is on the Habitat for Humanity
Idaho Falls Board of Directors and serves
as President of the Idaho Association of
Defense Counsel. He is a volunteer Court
Appointed Special Advocate (CASA) at-
torney in the Seventh District Court re-
presenting abused and neglected children.
Ben is also a pro bono attorney for the
Idaho Suicide Prevention Association and is a youth baseball coach. Ben served on the Idaho State Bar Litigation Section
is a graduate of the Idaho Academy of
Leadership for Lawyers Class of 2011-12, inaugural class.

Ben received his J.D. from the Univer-
sity of Idaho College of Law and his B.A.
from Idaho State University.

Marvin K. Smith is a native of Idaho Falls and concentrates his practice out of the Idaho Falls office in the areas of medical malpractice, hospital law, collections, personal injury, employment law, and wrongful death. He has significant experience defending hospitals and physicians through the pre-litigation and litigation stages of a medical malpract-

Marvin has litigation experience in both federal and state court as well as representing clients before the Idaho Hu-
man Rights Commission and Equal Em-
ployment Opportunity Commission. Mr. Smith has written several appellate briefs to both the Idaho Supreme Court and U.S. Ninth Circuit Court of Appeals and has appeared multiple times before the Idaho Supreme Court where he has argued suc-

Marvin is on the Greater Idaho Falls Chamber of Commerce Board of Direc-
tors and is an Assistant Boy Scout Master for the Boys Scouts of America. He also coaches youth basketball and baseball.

Marvin received his J.D. from the Uni-
versity of Idaho College of Law and was
on the Board of Editors for the Idaho Law Review. He received his B.A. cum laude in English Literature from Boise State Uni-
iversity.

Brent R. Wilson concentrates his prac-
tice out of the Boise office in the areas of bankruptcy and finance. Brent has experi-
ence representing secured and unsecured creditors in all phases of the chapter 7, chapter 11, chapter 12, and chapter 13 processes, in defending credi-
tor proofs of claims, in representing credit-
ors in various adversary proceedings, and in representing creditors in exception to discharge and objection to discharge cases. Brent also represents a chapter 7 trustee in adversary proceedings and other matters.

In addition to creditor and trustee experience, Brent has represented both in-
dividual and business debtors in chapter 7 liquidation proceedings and chapter 11 reorganizations. Among other successes in representing debtors, Brent, as lead counsel, has confirmed two complex, in-
dividual chapter 11 plans over the objection of creditors in the Bankruptcy Court for the Northern District of Illinois.

Brent represents a wide variety of lenders in the documentation and due diligence necessary for securitized lend-
ing, compliance with Idaho’s commercial lending laws and regulations, loan docu-
mation, and collection. In addition, Brent has experience in perfecting security interests pursuant to Article 9 of the Uniform Commercial Code.

Brent received his J.D. from the John
Marshall Law School cum laude and was
on the Editorial Board, Student Publica-
tions Editor for the John Marshall Law Review. He received his B.A. from Indi-
ana University.

Holland & Hart LLP announces
three Boise-based partners

BOISE – Holland & Hart LLP is pleased to announce that three of the firm’s Boise-
based attorneys are among the 15 attor-
neys who have been elected to the firm’s partnership, effective January 1, 2021.

Serving clients in a range of practice areas and industries, the newly elected Boise partners are:
Claire Rosston – Claire represents
Buyers and sellers in asset and equity acquisitions, with significant experience in the animal healthcare industry. She also assists clients with corporate governance, operational contracts, as well as business formation, restructurings, and disputes.

Matt Harvey – Matt focuses his practice on patent prosecution, patent analysis, and IP due diligence matters across electrical engineering and standards-essential technologies. He drafts and prosecutes patent applications to protect the innovations of sophisticated technology companies within the electronics, software, and wireless telecommunications industries.

Teague Donahey – Teague litigates intellectual property matters and other complex business disputes for sophisticated technology companies in federal and state courts and the ITC and TTAB. He also provides pragmatic counsel to emerging businesses seeking strategies to protect and enforce intellectual property rights or navigate disputes.

Boise attorney Susan Beckert Bock among nine new partners at Stoel Rives

BOISE/PORTLAND – Susan Beckert Bock assists clients in planning for the succession of their wealth both during life and at death in a tax-efficient manner. Her practice includes advising clients on income, estate, and gift tax issues, charitable planning, international estate planning, and the administration of estates and trusts. She also works with families and closely held businesses to promote business succession planning and the creation of small family businesses. While based in Portland, Susan spends time in the firm’s Boise office providing estate planning services to Idaho clients.

A graduate of Duke University School of Law, Bock has successfully represented clients before the IRS and U.S. Tax Court regarding valuation of closely held business interests. She also represents numerous tax-exempt organizations. Susan is president of the Bryn Mawr Alumnae Club of Portland, a member of the Duke Portland Alumni Board, and is a Board Member and secretary of both the Oregon Recovery High School Initiative and Harmony Academy. Susan volunteers at elder law clinics through Legal Aid Services of Oregon.

Share your news
Around the Bar

The Advocate is pleased to present your news briefs, announcements of honors, awards, career moves, etc. in the “Around the Bar” column. Please send submissions to Lindsey Welfley at lwelfley@isb.idaho.gov and include a digital photo. Thank you.

In memory of
Moriah Lenhart-Wees

On December 9, 2020, Moriah Lenhart-Wees, the Idaho Volunteer Lawyers Program (IVLP) Case Coordinator passed away after losing her battle with melanoma.

Moriah graduated from Georgetown University in 2013 and prior to joining IVLP she was a program and advising specialist for the University of Idaho Confucius Institute and the College of Letters, Arts and Social Science. She joined IVLP in January of 2019 and made an immediate impact.

In addition to her natural empathy and gift for communicating with clients, she also had a drive to help IVLP serve more low-income Idahoans. Within her first two months on the job, Moriah saw that IVLP struggled to meet the need for family law services in Canyon County. She presented the idea for a clinic in Canyon County and worked with Tony Salazar of the Canyon County Court Assistance Office to develop a new monthly family law clinic based at the Canyon County Administration building. She recruited a group of volunteer attorneys, many of whom served at multiple clinics and in May 2019 launched the service. This clinic has been IVLP’s most successful legal clinic, serving more than 225 clients in the 11 months prior to the pandemic.

Moriah’s personal life was also a testament to her commitment to social justice and equality. She was a long-time volunteer for the refugee community and various groups and organizations committed to gender and racial equality.

She will be missed by all who knew her. Moriah is survived by her husband, Ben, parents, and two siblings.
Registration is now open for both the Lawyer Referral Service and the Modest Means Program. Contact Kyme Graziano at kgraziano@isb.idaho.gov, 208.334.4500 or visit our website for more information at isb.idaho.gov

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## February

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## March

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For more information and to register, visit [www.isb.idaho.gov/CLE](http://www.isb.idaho.gov/CLE).
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