

MONTANA FEBRUARY/MARCH 2021
LAWYER

CRUEL & UNUSUAL

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SENTENCES IN MONTANA
— AND WHERE THINGS
COULD BE HEADING





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CORRECTION

AUTHOR INFORMATION INCLUDED INCORRECT INFORMATION

Due to an editing error, incorrect author information was included in the article titled "Getting Ready for Oral Argument" in the December-January issue of the Montana Lawyer. Matthew Cochenour served as the acting solicitor general for the Montana Attorney General's Office within the Montana Department of Justice under former Attorney General Tim Fox.

FEATURE ARTICLES



CRUEL AND UNUSUAL PUNISHMENT IN MONTANA

A look at how recent rulings have impacted sentences, and how interplay with Montana's constitutional right to dignity could affect things in the future.



COMMUNITY LAND TRUSTS

Creative way of tackling affordable housing crisis that is gaining popularity throughout the United States uses shared equity model and includes provisions to protect affordability into the future.

Signs of hope blooming as spring arrives

Last March, like other organizations around the state, the State Bar of Montana started a long year of working differently due to the COVID-19 pandemic. This issue of the Montana Lawyer arrives with signs of spring and renewed hope that we are starting to turn the corner on the pandemic after our long and challenging year.

In Helena, this time of year also brings the biennial gathering of Montanans, in person and remotely, for the legislative session. This year, the session coincides with a change in administration in the office of the governor, as well as new faces in other state agencies.

Many of those serving are members of the State Bar of Montana and have been involved with our organization over the years, including Lt. Gov. Kristen Juras, Attorney General Austin Knudsen, and the following attorney members of the Montana Legislature: Ellie Boldman, Robert Farris-Olsen, Steve Fitzpatrick, Tom France, Bill Mercer, Shane Morigeau, Andrea Olsen, and Katie Sullivan. Others, such as former United States Attorney Kurt Alme have taken positions in the new administration.

The Preamble to the Rules of Professional Conduct states, "as a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of legal services rendered by the legal profession." We thank our fellow attorneys for their public service, particularly during a very challenging time.

In that same spirit of service, your Trustees and executive leadership at the State

Bar of Montana are beginning to look to the future. While we have met remotely over the last year to continue with the business of the State Bar, we postponed our strategic planning meeting during the pandemic. We are looking forward to meeting in late June to set goals for the next three years in light of the lessons we've learned in the past year.

Planning is underway for the 2021 Annual Meeting which will take place September 9-11 in Missoula. It is our hope and plan that this meeting will be in-person, though we are very likely to have remote options for those who prefer. In fact, we received such positive feedback about last year's online-only event from members around the country that we are looking to find ways to carry a remote option for the annual meeting into the future.

Over the next nine months, I am also happy to report that the State Bar will begin a major project to streamline and update its digital infrastructure. Much of this work will be behind the scenes but stay tuned for a new and improved online lawyer referral service, as well as improvements to the bar's website and member portal.

The past year has been challenging at best and filled with loss for far too many. But as we look to the future, I am optimistic about the spirit of service of our members. I believe that we will come out of this pandemic stronger as an organization and as a bar. As we begin to return to in-person events in the coming months, I look forward to seeing each of you.



KATE McGRATH ELLIS

Kate McGrath Ellis is a staff attorney with the Montana Auditor's Office in Helena.

MONTANA LAWYER

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UPCOMING STATE BAR OF MONTANA CLE

Register for State Bar CLE by going to the calendar at www.montanabar.org. Email salpert@montanabar.org with questions.

Bankruptcy Primer for Non-Bankruptcy Attorneys

Thursday, March 18 | 1.0 CLE credit | Free: No matter the practice area, young lawyers are likely to encounter individuals and businesses in financial distress, whether as a debtor or creditor. Too often, we neglect to identify key bankruptcy issues or overlook bankruptcy as a remedy. This program will decode the mystery of bankruptcy by introducing non-bankruptcy attorneys to the basic features of individual and business bankruptcies.

Trends in Montana Natural Resources, Energy, and Environmental Law CLE

Thursday, April 8 | 5.5 CLE credits (1.0 Ethics): Topics include Perspectives on the Future of Energy Law and Policy in Montana; Changing of the Guard: State and Federal Transitions and Priorities; Developments in State and Federal Natural Resources and Environmental Law; the Lucky Minerals Decision and its broader implications;

Federal Appointment Process, Vacancy Reform Act, and Implications.

Save the Date - Family Law Section CLE

Friday, April 16: Details TBA

Save the Date - Indian Law Section CLE

Friday, April 23: Details TBA

Save the Date - Indian Law Section CLE

Friday, May 7: Details TBA

Save the Date - Bankruptcy Law Section CLE

Thursday-Friday, July 30-31: Details TBA

Save the Date - BETTR Section CLE

Friday, May 7: Details TBA

OTHER UPCOMING CLE PROGRAMMING

Save the Date - Friday, April 2 | 2.0 CLE credits.

Forensic DNA: Miracles And Miscarriages Of Justice With Dr. Greg Hampikian. Presented by the Montana Innocence Project. Check www.mtinnoceproject.org for information and registration.

STATE BAR OF MONTANA IMPORTANT DEADLINES

- **CLE REPORTING:** Wednesday, March 31 (Grace Period Ends May 15)
- **DUES, FEES & ASSESSMENTS:** Thursday, April 1
- **IOLTA COMPLIANCE REPORTING:** Thursday, April 1
- **PRO BONO SURVEY:** Thursday, April 1

Visit WWW.MONTANABAR.ORG, click on the "Member Portal" graphic to complete them all

CAREER MOVES

Cole, Farago, Lofing named partners at Garlington

Garlington, Lohn & Robinson is pleased to announce **Justin Cole, Scott Farago** and **Nicholas Lofing** as the firm's newest partners.

"It is with great pleasure that we announce our newest partners Justin, Scott and Nicholas," Managing Partner Randall Colbert said. "Being made a partner is something that is earned through hard work, dedication to our clients and dedication the highest of ethical standards. These three outstanding attorneys have checked every box and have more than earned this advancement."

Cole has been with the firm for over 10 years as an intern, an associate and now a partner. His practice is concentrated in health law, advising hospitals, clinics, independent practice groups, and individual practitioners on a number of health care legal matters, data privacy, privileging and credentialing, and other compliance issues. He was raised in Missoula and received his Juris Doctorate from the University of Montana School of Law.

Farago has been with the firm for over six years. He advises clients on estate planning, probate, business, tax and real estate transactional matters. Farago was born and raised in Missoula and received his Juris Doctorate from the

University of Montana School of Law. After law school, he went on to obtain his Master's Degree in Tax Law from the University of Washington.

Lofing has over 10 years of experience as a litigation attorney. He maintains a general civil practice with several special interest areas, including insurance defense, health care law and natural resource law. Lofing grew up in Columbus and received his Juris Doctorate from the University of Montana School of Law. He returned to Montana from Washington just over three years ago to join Garlington.

Moore joins Watson Law Office as associate

Watson Law Office has announced that **Megan M. Moore** has joined the firm as an associate attorney.

Moore is a graduate of the University of Montana School of Law. She completed a clinical internship at the Federal Defenders of Montana in the federal and appellate criminal courts. She is a member of the Criminal Justice Act panel for the Billings district, serves as conflict counsel for the Office of the State Public Defender, and Appellate Defender Division.

Moore's areas of practice include criminal defense, family law, civil litigation, and personal injury.

**Newcomer****Zadick****Ugrin firm in Great Falls names Zadick, Newcomer as partners**

Ugrin Alexander Zadick, P.C., is pleased to announce that **Andrew T. Newcomer** and **James R. Zadick** have been named partners of the firm as of January 1, 2021.

Newcomer has served as an associate at the Ugrin firm since 2012. His practice focuses on civil litigation, including insurance defense, consumer protection, civil rights, negligence, property damage, and municipality and governmental defense. He also provides general civil and criminal prosecution services for local governments.

Originally from Butler, Ohio, Newcomer received a Bachelor of Arts degree with highest honors from Baldwin-Wallace College in 2007. He received his Juris Doctorate degree with highest honors from Washburn University School of Law in 2012, where he served as the articles editor of the Washburn Law Journal, was a published author, and received the Order of the Barristers award for advocacy. He was also selected for the United States Department of Justice's Summer Law Intern Program (SLIP) and assigned to the United States Attorney's Office for the District of Wyoming at Yellowstone National Park. Prior to law school,

**Cole****Farago****Lofing****Moore****HAVE NEWS TO SHARE?**

The Montana Lawyer welcomes news about Montana legal professionals including new jobs, honors, and publications. Send member submissions to editor@montanabar.org. Photos should be at least 200 ppi by two inches wide for head and shoulders shots. Email or call 406-447-2200 with questions.

Andrew worked as a television anchor and reporter for the ABC affiliate in Great Falls.

Andrew and his wife are pleased to live in Great Falls along with their two sons. He volunteers as a coach for various youth sports teams and serves on the board of directors for the Boys and Girls Clubs of Cascade County.

Zadick joined the firm in 2015. He concentrates his practice on civil litigation, including insurance defense and coverage litigation, employment and labor law, municipality and governmental defense, representation of regulated entities before the Montana Public Service Commission, product liability and commercial litigation, and construction defect litigation.

A native of Great Falls, Jim received his bachelor's degree with high honors from the University of Montana. He graduated magna cum laude from William and Mary Law School in 2012, where he worked as a graduate research fellow, served as an articles editor of the *Environmental Law and Policy Review*, and was admitted to the Order of the Coif. He previously served as a law clerk to Justice Michael E. Wheat of the Montana Supreme Court and worked as a legal and policy advisor for Sen. Max Baucus and Sen. John Walsh in Washington, D.C.

Zadick and his wife live in Great Falls with their two sons. He serves on

the board of directors of the Montana Credit Union and enjoys fly fishing the Blackfoot River in his spare time.



Dunning



Klanke

Drake Law Firm announces new associate, other changes

The Drake Law Firm in Helena welcomes associate **DarAnne Dunning**, who brings 10 years of experience in the areas of estate planning, real estate, and business law. Dunning represents many ranches across Montana, and offers a wide variety of estate planning and transactional assistance to her clients, with more unique, specialized knowledge in the areas of estate and gift tax planning, Medicaid planning, Special Needs Trusts, and succession planning for farms, ranches, and other businesses.

In addition, **Patricia Klanke** has expanded her practice to include family law services in addition to her existing portfolio of both plaintiffs' and defense litigation. Klanke brings her experience

as a former staff attorney for the Montana Coalition Against Domestic and Sexual Violence to also assist survivors of sexual violence with their civil legal needs.

Sarah Mazanec became an owner of the firm on Jan. 1, joining Curt Drake and Michael Kauffman.

Keogh elected shareholder at Parsons Behle & Latimer

Ross P. Keogh has been elected a shareholder of Parsons Behle & Latimer.

Keogh is a member of Parsons' energy, environmental and natural resources practice group in the firm's Missoula office. His practice areas also include estate planning, tax law, corporate transactions and securities.

Keogh is a 2014 graduate of the University of Montana School of Law.

Parsons Behle & Latimer is headquartered in Salt Lake City with offices in Idaho, Nevada and Montana.

APPOINTMENTS

The Montana Supreme Court has appointed Stuart Segrest to the Access to Justice Commission as a representative of the Office of the Attorney General.

Segrest replaces Melissa Schlichting, who recently left her position at the attorney general's office. He will fill the remainder of the term, which ends Sept. 30, 2021.



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Is pleased to announce the following Partners in the firm:



Pam Garman - Partner

Pam practices in the firm's Billings, MT office. Her practice focuses on natural resource and commercial litigation. Pam received her J.D. from the University of Montana School of Law in 2014. She joined Crowley Fleck in 2016, after clerking for the Honorable Carolyn S. Ostby in the United States District Court for the District of Montana.



Devin Hecht - Partner

Devin practices in the firm's Billings, MT office. His practice focuses on taxation, trusts and estates, business planning, and real estate. Devin received his J.D. from Creighton University School of Law and a LL.M. in taxation from the University of Washington. Devin joined Crowley Fleck in 2015.



Justin Hoskins - Partner

Justin practices in the firm's Billings, MT office. Justin's practice focuses on taxation, trusts, estates and various commercial transactions. Justin received his J.D. from the University of Montana School of Law in 2014 and is licensed in Montana and North Dakota.



Lindy Lauder - Partner

Lindy practices in the firm's Missoula, MT office. Her practice focuses on banking, creditors' rights, and bankruptcy. Lindy received her J.D. from the University of Idaho College of Law in 2014, and joined Crowley Fleck in 2016, after clerking for the Idaho Supreme Court. Lindy is licensed to practice in Montana, Idaho, North Dakota, and Wyoming.



Aaron Nicholson - Partner

Aaron practices in the firm's Billings, MT office. His practice focuses on all types of commercial litigation, and intellectual property law matters. Aaron received his J.D. from the University of North Dakota in 2013 and joined Crowley Fleck in 2014 after clerking for Chief Justice Gerald VandeWalle of the North Dakota Supreme Court.



Adrianna Potts - Partner

Adrianna practices in the firm's Billings, MT office. Her practice focuses on tort and employment litigation with a focus on workers' compensation. Adrianna received her J.D. from the University of Wyoming in 2013 and joined Crowley Fleck in 2016. Adrianna is licensed to practice in Montana.



Dale Schowengerdt - Partner

Dale practices in the firm's Helena, MT office, where he focuses on appellate and complex litigation in a variety of practice areas. Dale joined the firm in May of 2019. Before that he served as the Solicitor General for the Montana Department of Justice. Dale is licensed to practice in Montana, Wyoming, and North Dakota.



John Semmens - Partner

John practices in the firm's office in Helena, MT. His practice areas include employment advice and litigation, commercial litigation, and real property litigation. John graduated from Carroll College in 2008, and received his J.D. from the University of Montana in 2012. John joined Crowley Fleck in 2014, and is licensed to practice law in Montana.



Griffin Stevens - Partner

Griffin practices in the firm's Bozeman, MT office. Griffin's litigation practice focuses on commercial and construction-related disputes. Griffin received his J.D. from Lewis & Clark College Northwestern School of Law. He joined Crowley Fleck in 2015, following a clerkship with the Montana Supreme Court.



Carina Wilmot - Partner

Carina practices in the firm's Helena, MT office. Her practices focuses on employment law (including employment immigration), real estate, due diligence, liquor licensing, business formation and governance, and estate planning administration. Carina received her J.D. from the University of Montana and joined the firm in 2014.

New Partners in North Dakota: Casey Furey (Bismarck), Trevor Hunter (Williston), and Ben Sand (Bismarck)

New Partners in Wyoming: Nick Healey (Cheyenne) and Tim Woznick (Cheyenne)

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ATTORNEYS

We are pleased to welcome Cole Derks as a shareholder in the firm.

We also welcome our new associate Katherine Antonson.



Cole Derks is a fifth generation Montanan. He grew up in Denton and attended Montana State University in Bozeman where he earned a Bachelor of Science in Business with a concentration in Finance. In pursuit of his Minor in Political Science, Cole studied abroad at the University of Otago in Dunedin, New Zealand. Cole graduated cum laude from the University of North Dakota School of Law.

Cole regularly advises clients on an array of transactional matters including business formations and transactions, estate planning, mergers & acquisitions, real estate, natural resources, succession planning for closely held companies, and trust & estate administration.

Cole's approach is simple — he believes in taking a client-focused practical and commercially designed approach to matters facing his clients. Cole is a member of the State Bar of Montana and is licensed to practice in the state and federal courts of Montana, North Dakota, and Wyoming.



Katherine Antonson represents a wide variety of clients in matters involving commercial and business transactions, civil litigation, and contract disputes. Kat is a member of the State Bar of Montana and is licensed to practice in the state and federal courts of Montana, North Dakota, and Minnesota.

Kat is originally from Grafton, North Dakota. She attended the University of North Dakota and graduated with honors, earning her Bachelor of Arts in Psychology. Kat went on to attend the University of North Dakota School of Law. During law school, Kat interned for U.S. Magistrate Judge Alice R. Senechal and for the Office of Grand Forks Regional Child Support. Kat earned her juris doctorate in 2018, graduating Order of the Coif.

Kat enjoys spending time with her husband, Eric, and their dog, Otis. In her free time, Kat enjoys painting, baking, spending time at the lake, and never-ending home improvement projects.

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Parsons Behle & Latimer, a preeminent law firm in the Intermountain West, has welcomed into its shareholder ranks one of the largest groups of new shareholders in the firm's history. New shareholders were elected by existing shareholders in all the states where the firm operates, including Utah, Idaho, Montana and Nevada.



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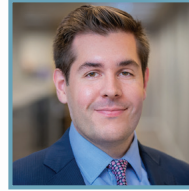
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Carlson named NCBP Fellows Award winner

Robert Carlson, a former president of both the American Bar Association and the State Bar of Montana, was selected the 2021 NCBP Fellows Award winner.

Carlson is the first person from Montana to win the award from the National Conference of Bar Presidents, which cited his various leadership roles, his legal career, and his service to his community. He has been at Butte's Corette Black Carlson & Mickelson, where he is currently a shareholder, since 1986 and has practiced law for 41 years. A graduate of the University of Montana, he earned his JD from the UM School of Law in 1979.

After serving as State Bar of Montana president from 1993 to 1994, Carlson was on the Executive Council of the National Conference of Bar Presidents from 1993 to 1996. After serving his time on the NCBP Council, Carlson continued his leadership capacities within the American Bar Association.

Carlson was chair of the ABA's policymaking House of Delegates; served two terms on the ABA Board of Governors and its Executive Committee; served as chair of the ABA Day in Washington, D.C., planning committee; chair of the Standing Committee on Meetings and Travel; member of the Standing Committee on Bar Activities and Services; Commission on Racial and Ethnic Diversity in the Profession; Council of the ABA Section of International Law; co-chair of the ABA Section of Litigation's ABA Resource Committee; Board of Governors liaison to the ABA Standing Committee for Bar Services; Dispute Resolution Section and Commission on Homelessness and Poverty.

Carlson was sworn in as



president-elect of the ABA in 2017 and became its president in 2018.

In addition to his legal career and his service to the profession, Carlson has served as president and board member for the Butte Exchange Club, member and vice-president of the Butte Uptown Association, and as a member of the University of Montana Alumni Association board, University

of Montana Alumni House of Delegates, Board of Directors for the Butte Chapter of the Grizzly Athletic Association member, and Board of Directors for the Butte Country Club. He also has given his time to the Butte Emergency Food Bank.

He and wife Cindy Lee Carlson have three children, nine grandchildren and a great-granddaughter.



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New Public Utilities Law Section established

The State Bar's Board of Trustees approved the establishment of a new Public Utilities Law Section at its February meeting.

Organizers said no forum currently exists for Montana practitioners regarding legal issues pertaining to the Montana Public Service Commission, and the section will provide a critical resource for bar members, legislators and other professionals.

The section said it plans to regularly present CLEs to provide, and when warranted, it will publish articles on relevant topics of law.

According to the proposal, 24 bar members had expressed interest in joining the section. The following members will serve as the officers and council members for the first year:

- Chair: Shannon Heim, Helena;
- Chair-Elect: Jacqueline Papez, Doney Crowley, Helena;
- Secretary-Treasurer: Anna Kecskes, Uda Law Firm, Helena;
- Member-at-Large: Mike Green, Crowley Fleck, Helena;

Member-at-Large: Zach Rogala, Public Service Commission, Helena.

Nominees for State Bar leadership positions sought

The State Bar of Montana is accepting nomination petitions for 2021 State Bar officer and trustee elections.

Petition forms are available at https://www.montanabar.org/page/State_Bar_Elections

State Bar members this year will elect a President-Elect; a Secretary-Treasurer; and Trustees from the following areas:

- One trustee from Area E (Blaine, Carter, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Hill, Judith Basin, Liberty, McCone, Meagher, Musselshell, Petroleum, Phillips, Prairie, Richland, Rosebud, Sheridan, Treasure, Valley, Wheatland, and Wibaux counties);
- Three trustees from Area F (Broadwater and Lewis and Clark counties);
- Three trustees from Area H

(Big Horn, Carbon, Stillwater, and Yellowstone counties).

Candidates must return completed nomination petitions with the appropriate number of signatures postmarked by April 5, 2021. Online voting will be conducted May 4-24.

Keep tabs on your CLE credits at your MyMTCLE page

With the March 31 deadline for the 2020-2021 MTCLE reporting period fast approaching, remember to log in to your MyMTCLE web page.

The website www.mtcle.org gives you easy access to your transcript so you can keep an eye on how many credits you still need to stay in compliance. There you will find the CLE Credit Reporting Form, under the Lawyer tab.

There is a grace period until March 15, 2021, for those who are still in need of credits for the 2020-2021 reporting year.

JEST IS FOR ALL

David Learns That Techniques Used In IP Business Transactions Do Not Work On First Dates



GLICK

"Before I tell you more about myself, I will have to ask that you sign a Non-Disclosure Agreement."

New cartoon 'Jest is for All' appearing regularly in Montana Lawyer

The Montana Lawyer is pleased to include a new cartoon called "Jest Is For All", which is drawn by Massachusetts attorney Arnie Glick.

Glick, a graduate of Georgetown University Law Center, says that there are similarities between creating an effective cartoon caption and writing a cogent legal argument: "In both you need to carefully focus on the precise message that you want to communicate, so that the reader will react in the way that you've intended."

Of course, adds Glick, "The trick is to make sure that, of the two, it's the cartoon that gets the laugh."

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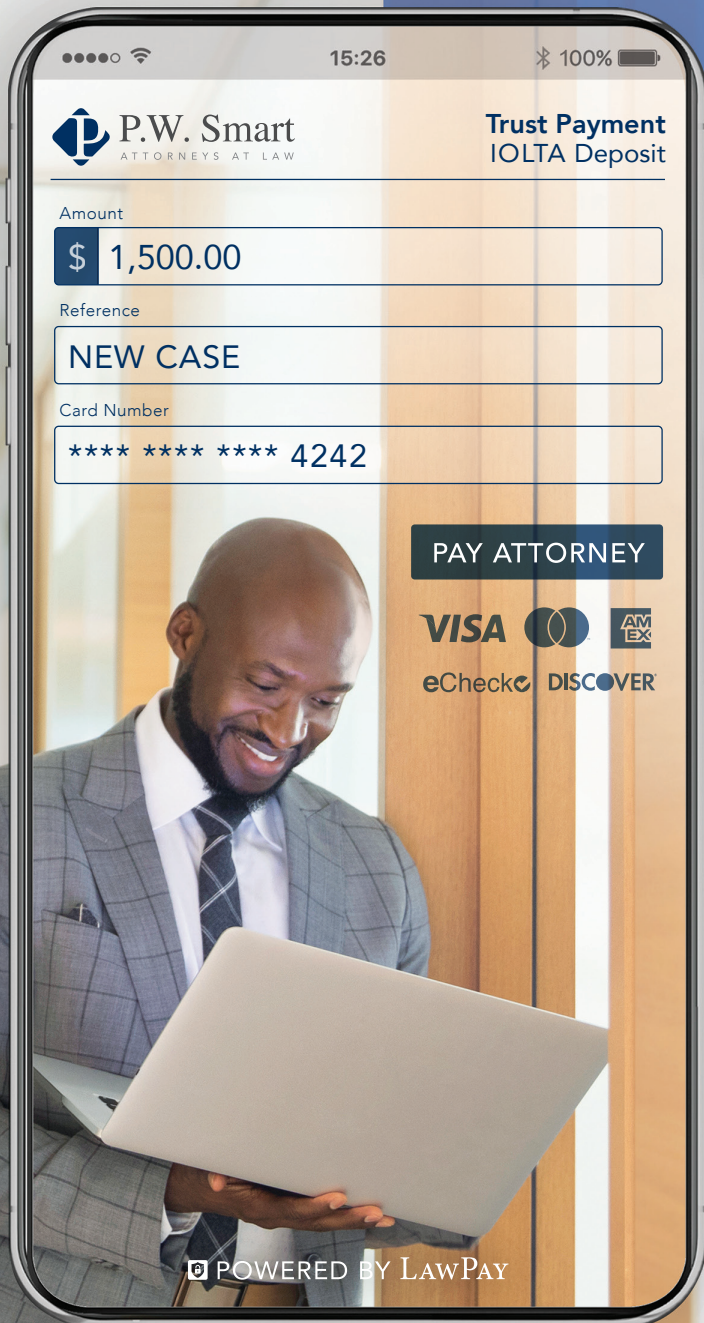
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Creative solution to housing crisis

By Lori Freeman | Trust Montana



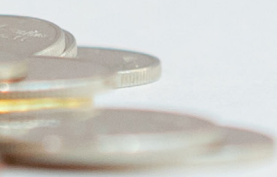
Trusts provide a shared-equity model of property ownership, ensure continued affordability

The lack of available affordable housing is a serious concern throughout Montana communities. As housing prices continue to rise, workers who provide essential services in Montana communities, including teachers, firefighters, grocers, and service providers, find it impossible to purchase a home. Nonprofit community land trusts (“CLTs”) offer a creative solution, making homeownership affordable to low and moderate-income families, allowing for equity growth, and preserving subsidies for the next homebuyer.

CLTs offer a shared-equity model of property ownership. CLTs own the land in fee. The homebuyers then purchase the improvements, including a home, separately and lease the land for a nominal monthly fee. The 75-year ground lease between the CLT and the homebuyer includes essential long-term commitments that make the model successful. The ground lease allows the homebuyer to use the home as a personal residence only. Use of a home to generate income defeats the CLT’s goal of providing affordable housing and increases the risk of degradation to the home. The ground lease also restricts resales to income-qualified buyers only and establishes a resale formula, permitting the homeowner to build limited equity. The resale formula limits equity growth to a fixed percentage per year, usually around 1.5%, on the homeowner’s personal investment. Finally, the CLT reserves a preemptive right of first refusal upon sale of the home or default under the lease or loan obligations secured by the home. These provisions protect the subsidies that make the home affordable in the first place and ensure the continued affordability of the home for future qualified homebuyers. >>

INTERESTED IN GETTING INVOLVED?

Trust Montana, Inc., a statewide community land trust, welcomes help from attorneys interested in pro bono opportunities in real estate law. If interested, email lori@trustmontana.org.





The integral mechanisms that make CLTs work, including the division of land and improvements, the restrictions on use and resale, and the CLTs preemptive option to purchase at the reduced sales price are valid and enforceable in light of the statutory recognition of CLT

The CLT taps into available resources and subsidies to purchase the fee interest in land and reduce the cost of the home. The CLT also acts as steward of the land, supports the homebuyer's success, prevents predatory mortgage financing, requires homeowner education, monitors the care and maintenance of the home, and assists the homeowner with the resale process. To encourage homeowner representation in the organization, leaseholders are invited to become CLT members and serve on its governing Board of Directors. The CLT's partnership and shared equity position with the homebuyer allows the CLT to maintain both the quality and longevity of the affordable housing.

Some attorneys are likely to question the legal basis for the CLT's creative solution to help with the affordable housing dilemma. Specifically, three legal concerns arise: is there legal authority to separate ownership of the land from ownership of the improvements; do the use and resale restrictions in the ground lease violate the prohibition of unreasonable restraints on alienation; and does the CLT's ongoing preemptive right to purchase the home at the limited resale price violate the rule against perpetuities. These questions are addressed briefly in this article. A comprehensive national analysis can be found in the Community Land Trust Technical Manual published by the Grounded Solutions Network.¹

Both federal and state statutory authority recognize CLTs as viable tools to perpetuate affordable housing. In 2009, Congress amended Title II of the Cranston-Gonzalez National Affordable Housing Act, to specifically provide for education and organization support for community land trusts.² The Act defines a community land trust, in part, as a community housing development organization that:

(A) acquires parcels of land, held in perpetuity, primarily for conveyance under long-term ground leases;

(B) transfers ownership of any structural improvements located on such leased parcels to the lessees; and

(C) retains a preemptive option to purchase any such structural improvement at a price determined by formula that is designed to ensure that the improvement remains affordable to low- and moderate-income families in perpetuity.³

Furthermore, the Montana Legislature

recently recognized a community land trust as a nonprofit organization "that holds title to land beneath individually owned housing units for the purpose of preserving affordable housing."⁴

These laws demonstrate government recognition of community land trusts as legitimate housing development organizations to provide affordable housing to qualified buyers in perpetuity.

The integral mechanisms that make CLTs work, including the division of land and improvements, the restrictions on use and resale, and the CLTs preemptive option to purchase at the reduced sales price are valid and enforceable in light of the statutory recognition of CLTs, and case authority lends further support.

The federal and state statutory authority describe the community land trust model as one with separate ownership of the land and the improvements. There is nothing in the law that prohibits a division of property horizontally. The Montana Supreme Court agreed, stating that "[a]n interest may be divided vertically, by splitting land into smaller tracts, each conveyed to a different grantee; or horizontally, by dividing the air space into blocks as contemplated in condominiums or severing surface interests from the mineral interests below."⁵ A third-floor condominium offers an example of a horizontal division of property as does the sale of mineral rights below the surface of the land. There are also those lucky few in Montana with long-term leases on government land for their privately owned recreational cabins. Clearly, a CLT's ownership of land separate from the ownership of the improvements thereon is legally permitted in Montana.

Future property interests are presumed to hinder marketability and thus, the rule prohibiting unreasonable restraints on alienation is codified in Montana. The Montana Code provides that "[c]onditions restraining alienation, when repugnant to the interest created, are void."⁶ The Montana Supreme Court has interpreted this statute to mean that "restraints on alienation, when reasonable, are valid."⁷ The Court has also held that a contracted-for fixed buy-out price will be upheld despite the fact that the price is substantially below market value if the restraint is mutually agreed to by the parties and is an integral part of the parties arrangement.⁸ The resale restrictions are essential to the CLT mission to

preserve subsidies and provide long-term affordable housing. Homebuyers would not be able to purchase a home absent the CLT arrangement. Furthermore, CLT homebuyers enter into the ground lease only after independent and informed advice of legal counsel regarding the terms and restrictions of the lease. When a CLT homeowner decides to sell the home, the homeowner must sell to an income-qualified purchaser and at a price limited by an agreed-upon formula. These restrictions may improve the marketability of the home by including an underserved market of prospective buyers, buyers who are excluded from a traditional home purchase. The resale restrictions negligibly limit transferability, yet advance the worthwhile public policy of providing affordable homes for future generations.

The rule against perpetuities similarly does not invalidate the CLT's preemptive right to purchase at a reduced price. Montana adopted the Uniform Statutory Rule Against Perpetuities in 1989, as amended in 1991, and then relocated in 1993 to Title 72, Chapter 2, The Uniform Probate Code.⁹ The rule states that a property interest must vest within 21 years of a life in being or within 90 years of creation.¹⁰ To address this concern, the CLT model requires the execution of a new, 75-year ground lease upon any transfer, including the transfer to a designee upon death, thereby creating a new, or renewed, property arrangement, and restarting the time period calculation under the rule against perpetuities well within the 90-year limit. Additionally, there exists a specific exclusion from the rule against perpetuities for a non-vested property interest arising out of a non-donative transfer.¹¹ The CLT's preemptive right to purchase arises out of a non-donative transfer at closing when the homebuyer receives the deed to the home and enters into the ground lease with the CLT, all for valuable consideration.¹²

Finally, it should be noted that the rule against perpetuities, now within the probate code, contradicts the law more specific to real property transactions which allows for reasonable restraints on alienation. The CLT's preemptive right to purchase at the limited resale price protects the homeowner from foreclosure and is essential to maintaining long term affordability of the housing. Further, the homebuyer would not

have the opportunity of homeownership without the CLT arrangement and only enters into the ground lease after receiving the advice of counsel. These factors support the reasonableness of the agreement and the restraints in the ground lease, as required by Montana law.

CLTs have been around since the 1960s and are becoming increasingly popular in the United States as a viable mechanism to curb the stress of rising rents and give people a chance to graduate out of the rental market. There are over 250 CLTs in the United States. Switzerland, England, Bolivia, and Ireland also use the CLT model. Montana has a state-wide CLT as well as a handful of local CLTs with approximately 175 homes in their cumulative portfolio and another 75 expected to close within the next year. The Montana CLT homes are primarily located in the Flathead Valley, Missoula, Bozeman, Big Sky, and Red Lodge. Growing CLT home buying opportunities in Montana offer one proven method for tackling the affordable home crisis.

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Endnotes

- 1 National Community Land Trust Network, n/k/a Grounded Solutions Network. (2011). Community Land Trust Technical Manual. https://groundedsolutions.org/sites/default/files/2018-10/Community%20Land%20Trust%20Technical%20Manual_0.pdf#page=7
- 2 42 U.S.C.S. 12773(b)(6).
- 3 42 U.S.C.S. 12773(f).
- 4 M.C.A. 70-23-102(6).
- 5 Libby Placer Mining Co. v. Noranda Minerals Corp., 346 Mont. 436, 444, 197 P.3d 924, 930 (2008), referencing Robert G. Natelson, Modern Law of Deeds to Real Property, Sec. 2.3.1 at 16 (Little, Brown and Company 1992).
- 6 M.C.A. 70-1-405.
- 7 Edgar v. Hunt, 218 Mont. 30, 33, 706 P.2d 120, 122 (1985).
- 8 Baker v. Berger, 265 Mont. 21, 25-26, 873 P.2d 940, 942-43 (1994).
- 9 M.C.A. 72-2-1001 et. al.
- 10 M.C.A. 72-2-1002(1).
- 11 M.C.A. 72-2-1005(1).
- 12 See Scott v. Lee & Donna Metcalf Charitable Trust, 381 Mont. 64, 73, 358 P.3d 879, 884 (2015), Rule against perpetuities did not apply to an easement in gross because the easement arose out of a non-donative transfer when the deed creating the easement was transferred for valuable consideration.



CLTs have been around since the 1960s and are becoming increasingly popular in the United States as a viable mechanism to curb the stress of rising rents and give people a chance to graduate out of the rental market.

The background of the entire cover is a photograph of a person's hands, likely of African descent, gripping vertical metal prison bars. The hands are positioned in the center, with fingers wrapped around the bars. The lighting is dramatic, highlighting the texture of the skin and the metallic surface of the bars against a solid black background.

CRIMINAL LAW

THROUGH A GLASS
DARKLY

CRUEL & UNUSUAL PUNISHMENT
CLAUSE EXAMINED THROUGH
THE LENS OF THE RIGHT TO DIGNITY

By James Park Taylor

Four years ago I had the opportunity to help organize a national pilot project to institute public defenders for the indigent in Myanmar. When we began the project and crafted a training curriculum, the lawyers we worked with were loath to even investigate a case for fear of the reaction of local authorities. Myanmar had suffered through decades of cruel repression by the Tatmadaw.¹ Many of us were concerned that the lawyers would not be able to be effective advocates. When we first conducted training exercises for the lawyers to help them re-envision how their system might be changed they were literally unable to do so. When asked that same question after two years of training and working with them, one lawyer responded tentatively that she had an idea of how things could be changed, but “it was only imaginary.” We offered them encouragement to keep imagining; change for the better won’t happen unless you can first imagine it. Today those same lawyers are fearlessly representing people charged with crimes of civil disobedience in Myanmar. I dedicate this article to the lawyers of Myanmar and for their commitment to change. May we aspire to be as brave and dedicated as they are.

In this article I will provide some brief historical background on the development of the law of cruel and unusual punishment and of the right to dignity in Montana, provide analysis of some of the key U.S. Supreme Court cases on cruel and unusual punishment developments involving juveniles, discuss how those Supreme Court precedents are impacting cases in the Montana courts, some of the unique aspects of the interplay of Montana Constitutional prohibition of cruel and unusual punishment under Article II, Section 22 when combined with the right to dignity under Article II, Section 4, and finally will suggest ways that this area of law can continue to be developed. The interplay of these two rights has begun to be developed by the Montana Supreme Court but there is much that still can be done to advance the intersection of those rights with

what the courts have called our “evolving standards of decency.” The article will discuss how these hybrid rights can be analyzed using a new methodology.² Change can happen if we can only imagine it.

Montana, 1889-1972

The first Montana Constitution was enacted in 1889.³ Article III, Section 20 of the 1889 Constitution entitled “Excessive Sanctions,” provided “Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.”⁴ The language mirrors that of the Eighth Amendment to the United States Constitution.⁵ The language from the Eighth Amendment was itself derived from the 1689 English Bill of Rights.⁶ During the proceedings of the 1889 Montana Constitutional Convention, there was no discussion of the meaning of this text, presumably because it was identical to the Eighth Amendment. Montana’s Excessive Sanctions clause was introduced and sent to committee (originally as Sec. 19 of Article III, then later renumbered as Sec. 20).⁷ The Committee reported it back with a recommendation for adoption, and it was adopted without discussion.⁸ The lack of a legislative history for Sec. 20 of the 1889 Constitution is not surprising. Much of the discussion at that constitutional convention was taken up with discussion of water rights, mineral rights, and other general government matters. There was no reported interest in discussing the meaning of the Excessive Sanctions clause.⁹

From 1889 through the adoption of the 1972 Montana Constitution there was little litigation about the meaning of the Excessive Sanctions provision. *State v. Lagoni*, 30 Mont. 472, 76 P. 1044 (1904) cited to Art. III, Sec. 20 but only for the proposition that excessive bail shall not be required, as did *State v. Harkins*, 85 Mont. 585, 281 P. 551 (1929). *State v. Harris*, 159 Mont. 425, 498 P.2d 1222 (1972) recognized the general rule that a sentence in a criminal case does not violate the Eighth Amendment proscription on cruel and unusual punishment if it is within the

FIRST OF 2-PART SERIES

This is the first installment in James Taylor’s two-part article on the interplay between cruel and unusual punishment and Montana’s constitutional right to dignity.

The second installment, appearing in the next issue of the *Montana Lawyer*, will look at *Walker v. State* -- the most important case to address the hybrid issue -- along with cases that have followed, and mapping the way forward.

parameters allowed by statute. Harris only raised Eighth Amendment claims under the U.S. Constitution and the court did not report any claim under Article III, Sec. 20 of the 1889 Montana Constitution. *Daily v. Marshall*, 47 Mont. 377, 133 P. 681 (1913), held that statutes governing the creation and operation of corporations did not implicate Article III, Sec. 20 of the 1889 Constitution as they were civil, not criminal, in nature. *State ex. Rel Hardy v. Board of Equalization*, 133 Mont. 43, 319 P. 2d 1061 (1958) held that imposition of a tax penalty was similarly civil in nature and therefore did not implicate Article III, Sec. 20 of the 1889 Constitution. *State v. McLeod*, 131 Mont. 478, 490, 311 P.2d 400, 407 (1957) is another case where Article III, Sec. 20 of the 1889 Constitution was discussed briefly, but only as it applies to bail. The court held, “the amount of bail which the judge may fix is within his sound legal discretion, and is always to be a reasonable amount.”

The language from Article III, Section 20 of Montana’s 1889 Constitution was adopted verbatim in the 1972 Constitution, as Article II, Section 22.¹⁰ There were no delegate proposals to amend the section, there was no debate in the Committee, and there was no debate when Section 22 came to the convention floor for a vote.¹¹



The right to dignity was a re-envisioning of the concept of equal protection and was adopted by Montana's 1972 Constitutional Convention based on a provision in the Puerto Rico Constitution.

The 1972 Constitution — the Right to Dignity Arrives

Before 1972 there was no explicit constitutional right to equal protection under the Montana Constitution, although Article III, Section 3 of the 1889 Constitution had somewhat similar language and had been interpreted to include protections similar to those found in the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Similarly, there was no explicit constitutional right to dignity in Montana under the 1889 Constitution. The right to dignity was a re-envisioning of the concept of equal protection and was adopted by the 1972 Constitutional Convention based on a provision in the Puerto Rico Constitution.¹² In interpreting the Puerto Rico Constitution one commentator has argued that it is appropriate to look to both the German Basic Law of 1949¹³ (the first constitutional document to enshrine the right to dignity) as well as to the 1996 Constitution of South Africa¹⁴ which also contains the right to dignity.¹⁵

There was very limited debate in the 1972 Constitutional Convention about the meaning and the role of the right to dignity in constitutional analysis.¹⁶ The right to dignity began as Delegate Proposal 61, Equal Protection, and provided

The dignity of the human being is inviolable. No person shall be denied the equal protection of the law, nor be discriminated against in the exercise of his civil or political rights or in the choice of housing or conditions or employment on account of race, color, sex, birth, social origin or condition, or political or religious ideas, by any person, firm, corporation, or institution; or by the state or agency or subdivision of the state.¹⁷

With one substantive change,¹⁸ and a few stylistic changes, Delegate Proposal

61 was adopted as Article II, Section 4 of the Montana Constitution.

Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The right to individual dignity thus became a fundamental part of the Montana concept of equal protection. The protection against discrimination was designed to provide additional protections to Montana's indigenous citizens. "The word 'culture' was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians." Transcript of the 1972 Constitutional Convention, at 1642 (Delegate Rachell K. Mansfield).

Recent Development of Eighth Amendment Jurisprudence in the Federal Courts

In the past 16 years there have been significant developments in Eighth Amendment jurisprudence centered on juveniles in the criminal justice system. The primary cases that will be discussed are *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016).

Of the four cases, *Roper* represents the largest break with prior Eighth Amendment law. The rule of *Roper* is that the Eighth Amendment prohibits the death penalty for someone who commits a murder while under the age

of 18. The court in *Roper* chose a case with particularly egregious facts involving a murder committed by a juvenile, Christopher Simmons. Prior to the murder Simmons had been telling others he "wanted to murder someone." He discussed it with friends, planned the murder as part of a burglary, and said that he wanted to do it before he turned 18 because he thought his age would let him "get away with it." Simmons and his co-defendants chose a home, broke in, duct taped the eyes and mouth of the victim, Shirley Cook, bound her hands, drove her to a bridge at a state park, bound her hands and feet again with tape and electrical wire, wrapped her face in duct tape, and threw her from the bridge to drown in the waters below. Simmons later told friends he had killed Ms. Clark "because the bitch had seen my face." Simmons was later arrested, and confessed. He was charged with burglary, kidnaping, theft, and first degree murder. He was convicted after a trial and sentenced to death.

The majority opinion in *Roper*, written by Justice Anthony Kennedy, overruled a 1989 opinion, *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), which held that there was no Eighth Amendment prohibition to sentencing someone over 15, but less than 18, to death for the crime of murder. Justice Kennedy was persuaded that our "evolving standards of decency" ¹⁹ under the Eighth Amendment required abolition of the death penalty for juveniles.

What had changed between 1989 and 2005? Several things. The court had developed new Eighth Amendment law prohibiting imposing the death penalty to persons with certain mental disabilities. *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). According to Justice Kennedy significant language in *Atkins* recognized that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question

of the acceptability of the death penalty under the Eighth Amendment.” *Atkins*, 536 U.S. 304, 312. At the time *Atkins* was decided 30 states prohibited execution for persons considered “mentally retarded.” The other 20 states that allowed it rarely imposed it on that class of persons.

Following up on *Atkins*, the other salient factor for the *Roper* court was that by the time *Stanford* was decided in 1989 37 states **permitted** execution for 17-year-olds. When *Roper* was decided 30 states **prohibited** execution for persons under the age of 18, in one fashion or another. In reviewing what were societal “evolving standards of decency,” Justice Kennedy also looked at several factors besides what the states had done with the juvenile death penalty

The court looked to scientific studies that provided new information about brain development in youth, showing that persons under 18 often demonstrate a lack of maturity, an increase in impulsivity, and additional susceptibility to suggestion and peer pressure. The court noted that the character of juveniles is not as well formed as it is for adults. “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that minor’s character deficiencies will be reformed.” *Roper*, 125 S.Ct.1183, 1195-1196. Justice Kennedy opined “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” *Roper* at 1196. The court acknowledged it could be argued that in some cases a juvenile had the “maturity and the depravity” to merit a sentence of death. The court noted that it would be difficult even for an expert to determine if a juvenile suffered from “irreparable corruption.”

Another factor which the *Roper* court looked to as it discussed “evolving standards of decency” was how the juvenile death penalty was imposed globally. The

court noted that Article 37 of the United Nations Convention on the Rights of the Child prohibited the death penalty for juveniles. According to Justice Kennedy at the time of the *Roper* decision every nation in the world had ratified that convention except the United States and Somalia.²⁰ Only seven countries in the world, other than the United States, had executed persons who committed crimes as juveniles between 1990 and 2015: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. And of those seven countries all had either abolished the death penalty for juveniles or “made public disavowal of the practice” by 2015. Justice Kennedy took particular note of the United Kingdom’s practice with regard to the death penalty since it was from the United Kingdom that the text of our Eighth Amendment was derived. He noted that the U.K. had abolished the death penalty entirely but that many decades before abolishing the death penalty for adults it had done so for juveniles (in 1930). He concluded by establishing a bright line rule that the Eighth and 14th amendments prohibit the death penalty for juveniles who commit even the most grievous crimes.

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) was another opinion of Justice Kennedy. In *Graham*, the court ruled that the Eighth Amendment prohibited imposing life without parole for juvenile offenders except in the case of homicide. Graham, 16 years old at the time, and his co-defendants were intent on robbing a barbeque restaurant in Jacksonville, Florida. Graham’s accomplice struck the restaurant manager in the head twice with a metal bar, but both Graham and his accomplice left when the manager yelled at them. Graham received a probationary sentence. At the age of 19 Graham participated in another robbery and his original probationary sentence was revoked. He was sentenced on the original charges to life plus 15 years without parole.

The court in *Graham* said it was engaging in a two-part analysis developed in *Roper*. First it would look to “objective indicia of society’s standards, as expressed in legislative enactments

and state practice to determine whether there is a national consensus against the sentencing practice at issue.” Second, guided by those standards the court would conduct its own analysis about whether the sentence violated the Eighth Amendment. The *Graham* court noted that 37 states allowed for a sentence of life without parole for non-homicide crimes committed by a juvenile.²¹ Justice Kennedy was unpersuaded by this metric. Rather than just looking at what the law permitted, he looked to how the law had been implemented and found that nationwide only 109²² individuals were serving life without parole for non-homicide crimes committed as a juvenile.

The *Graham* court decided that community consensus was not determinative of the Eighth Amendment issue and it was up to the court to make that decision. Justice Kennedy was more persuaded by recent developments in the psychological development of youthful offenders than he was by the legal consensus. He also looked to how other nations have dealt with juvenile offenders who commit non-homicide offenses. He noted that only 11 nations allowed for this punishment and only two, the United States and Israel, actually imposed it. Even Israel had, in certain circumstances, begun allowing consideration of parole for juvenile offenders sentenced to life without parole. The court ruled “The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.” *Graham*, 560 U.S. 48, 82. The court deliberately drew a clear categorical line which the government may not cross.

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) came two years after *Graham*. *Miller* directly addressed the constitutionality of a sentence of mandatory life without parole for a juvenile offender convicted of homicide. *Miller* was actually two consolidated cases, the case of Kuntrell Jackson from Arkansas, and the case of Evan Miller from Alabama. Jackson was

14 when he went with two other boys to rob a video store. One of the boys (not Jackson) brought a shotgun and killed the clerk during the robbery. Evan Miller and a friend assaulted Miller's neighbor and burned down his trailer. The neighbor died. Both Jackson and Miller were sentenced to life without parole. Justice Elena Kagan wrote the opinion in *Miller*. Justice Kagan found the rationale of *Roper* and *Graham* persuasive. She considered and rejected the "objective indicia" analysis begun in *Roper*, and considered but rejected in *Graham*. Applying a mandatory life without parole sentence for a juvenile, even for the offense of homicide, was determined to be a violation of the Eighth Amendment prohibition on cruel and unusual punishment. The *Miller* court required the defendant's youth, maturity, and individual circumstances be taken into consideration in sentencing, and that life without parole could only be imposed if the youth is "irreparably corrupt or permanently incorrigible."

Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016) is another Justice Kennedy Eighth Amendment case about juveniles. In 1963 at age 17 Henry Montgomery murdered Deputy Sheriff Charles Hurt in East Baton Rouge. He was initially convicted and sentenced to death, but that conviction was reversed on appeal. He was convicted again at his retrial but sentenced to life without parole. After 50 years of incarceration, he asked the court to rule that *Miller* applied retroactively to convictions that predate that opinion. The issue was framed as whether *Miller* involved a procedural rule, or if it was a substantive rule requiring retroactive effect under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The court ruled that *Miller* was a substantive rule that must be applied retroactively under *Teague*. Montgomery was allowed to file for parole after almost five decades in prison.²³ Neither *Miller* nor *Montgomery* completely prohibited applying life without parole for a juvenile who commits a homicide. Both allowed for such an exception in the unusual circumstance that a court determines

the juvenile is "irreparably corrupt and permanently incorrigible." Deciding how anyone could make such a determination about a juvenile will be the next focus of this line of Eighth Amendment litigation. The U.S. Supreme Court heard such a case in November 2020, *Jones v. Mississippi*.²⁴ In *Jones* the issue is whether the sentencing court must simply take into consideration the defendant's maturity and youth, or whether the court must go through an additional process and perhaps make a finding that the youth is "permanently incorrigible" before imposing a life without parole sentence.²⁵ A decision is expected during this term of the court.

Montana Cases on Cruel and Unusual Punishment, 1972-Present

No major changes initially occurred in Montana in Eighth Amendment and Article II, Section 22 litigation after adoption of the 1972 Montana Constitution. The Montana Supreme Court continued to review cases primarily to see if the sentence imposed was within the statutory maximum. *State v. Webb*, 2005 MT 5, 325 Mont. 317, 106 P.3d 521. As the court held in *State v. Paulsrud*, 366 Mont. 62, 2012 MT 180, 285 P.3d 505, because Montana allows review of legal sentences by the Sentence Review Division of the Montana Supreme Court on the issue of the propriety of the sentence, the full court reviews proportionality under the Eighth Amendment and Article II, Section 22 of the Montana Constitution "only to determine whether the sentence ... 'shocks the conscience.'" *Rickman*, ¶ 16. The defendant bears the burden of proving by a preponderance of the evidence that a sentence falls within this exception. *Rickman*; *In re Jones*, 176 Mont. 412, 420, 578 P.2d 1150, 1154 (1978).²⁶ *Paulsrud*, 366 Mont. 62, 67, 285 P.3d 505, 508.²⁶

In Montana, the standard of review for an Eighth Amendment claim is *de novo*, *State v. Tam Thanh Le*, 2017 MT 82, 387 Mont. 224, 392 P.3d 607. This standard applies to a determination of whether constitutional rights were violated at sentencing. *State v. Haldane*, 2013 MT 32, 368 Mont. 396, 300 P.3d

657.

Unsurprisingly, the Montana Supreme Court is not inclined to rule that a sentence within the maximum allowed by law "shocks the conscience." See, e.g., *Matter of Jones*, 176 Mont. 412, 578 P.2d 1150 (1978) (forty year sentence for robbery does not shock the conscience); *State v. Bruns*, 213 Mont. 372, 691 P.2d 817 (1984) (10 month sentence for DUI does not shock the conscience); *State v. Brady*, 249 Mont. 290, 816 P.2d 413 (1991) (forty years in prison and designation as a dangerous offender for convictions of aggravated kidnapping, aggravated assault, felony assault, and resisting arrest does not shock the conscience); *State v. Tadewaldt*, 277 Mont. 261, 922 P.2d 463 (1996) (deferred sentence for criminal possession of dangerous drugs does not shock the conscience); *State v. Rickman*, 2008 MT 142, 343 Mont. 120, 183 P.3d 49 (55 years without parole for deliberate homicide does not shock the conscience); *State v. Wardell*, 2005 MT 252, 329 Mont. 9, 122 P.3d 443 (25-year suspended sentence under persistent felony offender designation for failing to register as a sex offender does not shock the conscience); *State v. Thorp*, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096 (sentence of life without parole for a defendant convicted for a second time of sexual intercourse without consent does not shock the conscience). There was a period when the court would review sentences in certain circumstances for an abuse of discretion, but *State v. Herman*, 2008 MT 187, 343 Mont. 494, 188 P.3d 978 clarified that it would no longer perform that review, overruling a number of cases.

The exception to this general rule can be found in death penalty litigation in Montana. In *Vernon Kills On Top v. State*, 279 Mont. 384, 928 P.2d 182 (1996), the Montana Supreme Court did conduct a proportionality review and ruled that the death penalty was disproportionate to the petitioner's personal involvement in victim's death. The defendant in *Kills On Top* was found guilty by a jury of robbery, aggravated kidnapping, and deliberate homicide, in the death of John Martin Etchemendy,

Jr. Vernon Kills On Top was sentenced to 40 years for robbery, and death for the aggravated kidnapping and homicide convictions. Although Vernon Kills On Top had participated in the events leading up to Mr. Etchemendy's death, the court found the testimony established that it was Lester Kills on Top who killed Mr. Etchemendy, and not the defendant. The issue was then presented about whether the death penalty could be imposed under Montana's felony murder rule.

Writing for the majority, Justice Terry Trieweiler made it clear that it conducted an independent analysis under Article II, Section 22 of the Montana Constitution, and not the federal Eighth Amendment standard found in *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) (allowing imposition of the death penalty under felony murder statutes)

Like the Tennessee court, we do not today adopt a rule that the death sentence can never be imposed on someone convicted of felony murder. What we do hold is that, pursuant to statute and the Montana Constitution, each case has to be reviewed on the basis of its unique facts to assure that the death sentence is not disproportionate to the degree of that defendant's culpability for a victim's death...

We conclude that a finding of mere "reckless indifference" is not sufficient for imposition of the death penalty under the proportionality review required pursuant to the Montana Constitution...

Furthermore, we conclude that imposition of the death penalty without a requirement that there have been some intent to kill on the part of the defendant would serve no purpose of deterrence. If a person has no intent to kill from the beginning, then the fact that he might suffer the imposition of a death penalty cannot "enter into the cold calculus that precedes the decision to act." *Enmund*, 458

U.S. at 799, 102 S.Ct. at 3377 (quoting *Gregg*, 428 U.S. at 186, 96 S.Ct. at 2931). Although the deterrent purpose of the death penalty is not its only purpose (see *Enmund* and *Tison*), it is one factor to consider in the course of our individualized review for proportionality.

After thorough review of the record in this case, we conclude, on independent state constitutional grounds, that because Vernon Kills On Top was not present when John Etchemendy was killed, did not inflict the injuries which caused his death, and because there was no reliable evidence that he intended his death—but instead evidence that he sought to avoid it — the imposition of his death sentence was disproportionate to his actual conduct, cannot withstand individualized scrutiny, and must be set aside. To the extent that *State v. Vernon Kills On Top* (1990), 243 Mont. 56, 793 P.2d 1273, is inconsistent with this opinion, it is reversed. *Vernon Kills On Top v. State*, 279 Mont. 384, 423–24, 928 P.2d 182, 206–07 (1996).

Other than the cases reported above in which the Montana Supreme Court upheld sentences within the maximum allowed by law, the court has not conducted serious proportionality review except in death penalty cases.²⁷

Beach v. State, 2015 MT 118, 379 Mont. 74. 348 P.3d 629 (2015) is one of the first Montana cases to raise the *Miller* issue. Barry Beach was convicted of a murder which occurred in Roosevelt County in 1984. At the time of the murder Beach was 17. Having exhausted all other appellate avenues, and after the U.S. Supreme Court decided *Miller*, Beach filed a petition for writ of habeas corpus alleging an Eighth Amendment violation. Beach filed his case after *Miller* was decided, but before *Montgomery* announced that *Miller* was retroactive. In a plurality opinion in May of 2015 the Montana Supreme

Court ultimately concluded that *Miller* was not retroactive and refused to strike the no parole clause in Beach's sentence or to remand for resentencing. Eight months after Beach was decided, the U.S. Supreme Court issued its opinion in *Montgomery v. Louisiana*, 136 S.Ct. 718, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016), ruling that *Miller* was to be applied retroactively. Ultimately the *Montgomery* decision did not apply to the case of Barry Beach as Gov. Steve Bullock commuted his sentence by removing the no parole designation on Nov. 20, 2015.²⁸

Steilman v. Michael, 2017 MT 310, 389 Mont. 512, 407 P.3d 313 is the first Montana case to deal with the issue of life without parole post *Montgomery*. Derrick Earl Steilman murdered Paul Bischke in Butte, Montana on Sept. 18, 1996. At the time Steilman was 17, just six weeks before his 18th birthday. Steilman was not identified immediately as Bischke's murderer. Steilman left Montana and went to Washington, and almost two years later on Sept. 10, 1998 murdered Jack Davis. Steilman then returned to Montana and was arrested. His case was originally filed in youth court due to his age at the time of the Bischke murder, but was transferred to adult court. Steilman was then extradited to Washington where he was convicted of the Davis murder and sentenced in Washington to 23 years and 8 months. Steilman was returned to Montana and he pleaded guilty to the Bischke murder. Judge Purcell sentenced Steilman to 110 years without parole (100 years for deliberate homicide and 10 years consecutive for the use of a weapon). Steilman appealed to the Montana Supreme Court raising challenges to the no parole designation under both the Eighth Amendment and Article II, Section 22 of the Montana Constitution. Justice Shea wrote the opinion. The *Steilman* court ruled that *Miller* and *Montgomery* did not prohibit Steilman's sentence citing several factors. It began by acknowledging that *Miller* and *Montgomery* apply to discretionary sentencing in Montana. The court ruled that a term of years without parole can be the equivalent of life without parole. In Steilman's



January 2021 decision in *State v. Keefe* broke new ground in Montana, holding that courts must take defendant's post-conviction conduct into consideration in a *Miller/Montgomery* resentencing..

case, given the possible sentence reductions still available to him, along with the fact that he had received a concurrent sentence for the murder committed in Washington, the Montana Supreme Court found no violation of the prohibition against cruel and unusual punishment. The most significant factor for the court was the law that applied to Steilman's sentencing.

Under the law at the time Steilman committed Bischke's murder, Montana law allowed for day to day "good time." Good time was a statutory creation that allowed an inmate to earn up to one extra day off his sentence for each day served in prison (or parole), provided the inmate had abided by the rules of the institution. Whether one receives any "good time" credit depends on the law in effect at the time of the commission of a crime. For example, Steilman was sentenced under MCA § 53-30-105 (1995) which provided for allowing an amount of good time, which could be as much as day for day. That statute was repealed and does not apply to crimes committed after Jan. 31, 1997.²⁹ Because his sentence could potentially be reduced as much as half by good time credits the court found no Eighth Amendment violation.

Justice Shea's opinion in *Steilman* was concurred with by Chief Justice Mike McGrath, Justice Beth Baker and Justice James Rice. Justice Mike Wheat, joined by Justice Dirk Sandefur, would have found a *Miller/Montgomery* violation and struck the no parole condition. Justice Laurie McKinnon dissented separately. She would have found a violation, but would have remanded for resentencing rather than simply striking the no parole designation. Finally, the *Steilman* court recognized that its decision in *Beach* was overruled by the U.S. Supreme Court decision in *Montgomery*.

The most recent decision of the Montana Supreme Court in Eighth Amendment and Article II, Section 22 jurisprudence is *State v. Keefe*, 2021 MT

8, 2021 WL 70724, ____ P.3d ____ (decided Jan. 8, 2021).

Stephen Wayne Keefe was convicted of three murders that occurred on Oct. 15, 1985. The victims were David J. McKay, his wife, Constance McKay, and their daughter, Marian McKay Qamar. Keefe was 17 at the time of the murders. The charges were filed in Youth Court and then transferred to District Court. He was convicted after a jury trial and sentenced to three consecutive life terms without the possibility of parole, plus an additional 30 years for the use a weapon in the murders, 10 years for burglary, and another 10 years for the use of a weapon in the burglary, a total of an additional 50 years without parole. In January 2017, Keefe filed a petition for post-conviction relief arguing that his sentencing violated the Eighth Amendment of the U.S. Constitution, Article II, Section 22 of the Montana Constitution, and Article II, Section 4 of the Montana Constitution (the dignity clause).³⁰ After the decision of the Montana Supreme Court in *Steilman*, the District ruled that it would have to consider Keefe's youth and other *Miller/Montgomery* factors to determine if the sentence was appropriate. A resentencing hearing was held on April 19, 2019. At the hearing, extensive testimony was adduced about Keefe's efforts towards rehabilitation in the intervening decades. The issue under *Miller/Montgomery* was whether Keefe was "irreparably corrupt and permanently incorrigible." Keefe initially was a problem inmate but for an extended period he had made progress towards rehabilitation. The District Court ruled that it would not consider Keefe's progress towards rehabilitation in the 34 years between the commission of the murders and his resentencing hearing.³¹ Yet the District Court did look at Keefe's intervening conduct that it perceived to be negative.³² At the conclusion of the resentencing hearing the District Court imposed the same sentence as before,

three consecutive life sentences without parole, plus 50 years without parole, concluding that Keefe was irreparably corrupt and permanently incorrigible.

On appeal, the Montana Supreme Court began by noting its disapproval of the process the District Court used for the resentencing hearing. The court had initially set aside four hours for testimony, but at the start of the hearing it announced that it would only allow three hours of testimony, reserving one hour for the court to read its decision: "While this is not conclusive evidence that the District Court had pre-judged the matter, at a minimum it gives the appearance of impropriety and should be avoided." *Keefe*, 2021 MT 8, ____ P.3d ____ (2021).

Perhaps there was another reason for the action of the District Court, but it is somewhat mysterious what that reason might have been.

The majority opinion in *Keefe* was written by Justice Ingrid Gustafson, and concurred in by Justices Shea and Baker. The majority opinion broke new ground for Montana, holding that in a *Miller/Montgomery* resentencing the district court must take into consideration the defendant's post-conviction conduct, both negative and positive. Justice Gustafson in *Keefe* looked to the Ninth Circuit decision in *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) in reaching its conclusion. The *Keefe* court found that *Briones* was not binding, but was persuasive. The Ninth Circuit in *Briones* held:

Briones was sentenced in 1997; *Miller* was not issued until 2012. Thus, for the first 15 years of Briones's incarceration, his [life without parole] sentence left no hope that he would ever be released, so the only plausible motivation for his spotless prison record was improvement for improvement's sake. This is precisely the sort of evidence of capacity for change that is key to

determining whether a defendant is *permanently* incorrigible, yet the record does not show that the district court considered it. This alone requires remand.

The *Keefe* decision is a natural consequence of *Miller and Montgomery*, which teach that only in the rarest of cases should a juvenile be sentenced to life without parole. When there has been a 30-plus-year gap between sentencing and resentencing it is obvious that the best evidence of whether the defendant can be rehabilitated would be the efforts made or not made towards rehabilitation. The majority opinion then remanded the case back to the district court for resentencing.³³ There was no discussion in *Keefe* of the right to dignity under Article II, Section 4.

In a concurring opinion in *Keefe*, Chief Justice McGrath agreed that the district court erred, but he would have gone even further than Justice Gustafson and would have stricken the no parole restriction rather than sending the case back to the district court for yet another hearing. Chief Justice McGrath looked at the special protections for juveniles in Montana's Constitution under Article II, Section 15, which provides:

Rights of persons not adults. The rights of persons under 17 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

Chief Justice McGrath went on to cite to transcripts of the 1972 Constitutional Convention about the meaning of Article II, Section 15. Chief Justice McGrath opined:

Asking a court, based on professional opinion, to determine whether a teenager is irreparably corrupt or permanently incorrigible seems more like the quest for the Holy Grail than a scientifically based inquiry. Or, given the severe consequences at hand, perhaps medieval methods for determining whether a defendant is a witch are more appropriate analogies to the nature of such an inquiry. *Keefe*, supra at 2021 MT 8, ¶ 50, ____P.3d____.

Chief Justice McGrath would have held that the rules announced by *Miller* and *Montgomery*, when combined with Article II, Section 15, create a

presumption that a juvenile should not be sentenced to life without parole and that the burden should be on the state to rebut that presumption. Justice Sandefur concurred with the Chief Justice McGrath on not sending the case back for resentencing and for establishing a presumption that a juvenile should not be sentenced to life without parole. Justices McKinnon and Rice dissented from the majority opinion and would have let the parole restrictions on *Keefe* stand.

James Taylor is the managing attorney of the Tribal Prosecutors Office for the Confederated Salish and Kootenai Tribes, and the current chair of the Criminal Law Section of the State Bar of Montana. Prior to coming back to work for the CSKT, he was the Country Director for International Bridges to Justice in Myanmar. The views expressed in the article are those of the author's alone, and do not represent the views of the CSKT or of the Criminal Law Section. The author wishes to thank the State Law Research Initiative for their assistance in this project.

Endnotes

1 The military in Myanmar is called the Tatmadaw. In Myanmar the military also controls all law enforcement, including local police.

2 The methodology is described by Prof. Dan T. Coenen in his recent article, *Reconceptualizing Hybrid Rights*, 61 B.C. L. Rev. 2355, 2355 (2020)

3 1889 Constitution of the State of Montana: adopted by Constitutional Convention August 17, 1889; ratified by the electorate of the State; State admitted, November 8, 1889. <https://archive.org/details/constitutionofst00montrich>

4 A prior version of the Montana Constitution was considered in 1884 but was never approved by Congress. The Excessive Sanctions language in that document was found in Article I, Sec. 20, and is identical to the Excessive Sanctions language in Article III, Section 20 of the 1889 Constitution. <https://courts.mt.gov/portals/189/library/docs/1884const.pdf>

5 U.S. Const. amend VIII, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

6 English Bill of Rights, 1689, 1 W. & M., c. 2, Sec. 10, "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." Full text at https://www.law.gmu.edu/assets/files/academics/founders/English_

BillofRights.pdf

7 Proceedings and Debates of Montana Constitutional Convention, 1889, at page 125

8 Proceedings and Debates of Montana Constitutional Convention, 1889, at page 263

9 Many of the hard copies of the 1889 Constitutional Convention are 100 years old, and there not many copies available. Fortunately, there are at least two websites that have digitized those proceedings in an online searchable format. The proceedings are also available in a number of downloadable formats. See <https://catalog.hathitrust.org/Record/010446503>; <https://archive.org/details/proceedingsdebat00montrich/page/n7/mode/2up>

10 Mont. Const. Art. II, §22

11 From the Transcript of the Convention, "Chairman Graybill: It's adopted. Will the clerk read Section 22.

Clerk Smith: 'Section 22, Excessive Sanctions. Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.' Section 22, Mr. Chairman.

Chairman Graybill: Mrs. Sullivan.

Delegate Sullivan: Mr. Chairman. I move that when this committee does rise and report, after having had under consideration Section 22 of Proposal 8, it recommends that the same be adopted. Mr. Chairman.

Chairman Graybill: Mrs. Sullivan.

Delegate Sullivan: The Committee voted unanimously that the section provides the Judiciary and the Legislative adequate flexibility to

Through A Glass Darkly, from previous page

apply the principle that there shall not be excessive bail, excessive fines, or cruel and unusual punishments. No delegate proposals were received on this provision. Mr. Chairman.

Chairman Graybill: Is there discussion of Section 22? Members of the committee, you've heard Mrs. Sullivan's recommendation that Section 22 be adopted. All in favor of that, say Aye.

Delegates: Aye.

Chairman Graybill: Opposed, No. (No response)

Chairman Graybill: It's adopted."

Montana Constitutional Convention Verbatim Transcript, 1771, Vol. V (1981).

12 "The dignity of the human being is inviolable." CONST. PR art. II, § 1.

13 FÜR DIE BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger.), reprinted in BARAK, *supra* note 3, at 225-26, 240, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026.

14 S. AFR. CONST., 1996.

15 Gonzales, *Human Dignity and Proportionate Punishment: The Jurisprudence of Germany and South Africa, and its Implications for Puerto Rico*, 87 Rev. J.P.R. 4, at 1179 (2020).

16 The word dignity appears many times in the Transcript of the Constitutional Convention, but there is very little debate about what the individual dignity language adds to the concept of equal protection. One of the few remarks about the meaning of individual dignity came from Delegate Wade Dahood, "The intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination." Transcript at 1643.

17 Delegate Proposal 61 was introduced January 29, 1972 by Delegates Richard J. Champoux, William A. Burkhardt, Marshall Murray, J. Mason Melvin, and Jerome J. Cate.

18 The additional protection for discrimination on the basis of culture was added in order to provide additional legal protections for members of Montana's Tribal Nations.

19 See *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

20 Somalia later ratified the Convention on the Rights of the Child in 2015. <https://www.unicef.org/child-rights-convention/history-child-rights>

21 This was the same number of states that permitted the death penalty for juveniles in *Stanford v. Kentucky*, *supra*, in which the Court upheld the death penalty for juveniles in 1989.

22 There was some dispute about the actual number. Depending on how it was counted it could have been 124.

23 According to the Sentencing Project, over 450 persons have been released from prison as a result of the *Montgomery* decision. Henry Montgomery is not among them; he has so far been denied parole twice, once in 2018, and again in 2019. He remains in prison. <https://www.sentencingproject.org/news/7186/>

24 US. Supreme Court Docket No. 18-1259. A decision is expected this term.

25 The oral argument in *Jones* is available here: <https://www.oyez.org/cases/2020/18-1259>

26 As Montana criminal practitioners know, the Sentence Review Division of the Montana Supreme Court was established to allow a review of the propriety of any legal sentence. Legal arguments are not addressed to the Sentence Review Division. If an appeal about the fairness of the sentence is made to the Division it has authority to decrease the sentence, increase the sentence up to the maximum allowed by law, or make no change in the sentence. See Montana Code Annotated, Title 46, Chapter 18, Part 9, Appellate Review of Legal Sentences. Information concerning the most recent decisions of the Division are available here: <https://courts.mt.gov/courts/supreme/boards/srd#70333197-membership>

27 Vernon Kills on Top, a member of the Northern Cheyenne Tribe, died in the Montana State Prison on November 23, 2020.

28 <https://www.greatfallsbtribune.com/story/news/2020/11/20/montana-state-prison-barry-beach-remains-free-dateline-clemency-law/3767733001/>

29 See Montana Department Corrections Policy No. DOC 1.5.1, Adult Offender Good Time Allowance, revised 01/25/12, available at <https://cor.mt.gov/Portals/104/ProbationParole/PPDOOperationalProcedures/DOC%201.51%20Adult%20Offender%20Good%20Time%20Allowance.pdf>

30 There is a passing reference to Article II, Section 4 in Keefe's appellate brief but it was not a significant focus of the brief.

31 Keefe presented testimony from an independent psychologist, Dr. Page, that Keefe had matured over his years in prison, that "he has responded to efforts at rehabilitation over a 33 year period of incarceration." And further that Keefe "could succeed outside of prison and was a different person now than when he committed the triple homicide in 1985." *Keefe*, *supra* at 2021 MT 8, ___P.3d___. Keefe also submitted testimony from a Montana State Prison Supervisor Robert Shaw and from former Warden Mike Mahoney that Keefe had "made progress towards rehabilitation and that he could be successful outside of prison." *Id.*

32 The District Court took a dim view of Keefe's disciplinary history during his initial years at the prison, along with certain tattoos Keefe had gotten in prison, and a change in Keefe's testimony about the murders.

33 There were other issues raised in *Keefe* that are not relevant to this article, namely whether the failure to appoint a defense mitigation expert was required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, (1985) (the *Keefe* Court ruled that a defense expert was not required under the facts of the case), and whether the issue of whether Keefe was "irreparably corrupt and permanently incorrigible" was one that had to be decided by a jury under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) (the *Keefe* Court ruled that the determination of that factor was something for the district court, and not for a jury).

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Not sure about reporting a situation to malpractice insurer? This checklist might be helpful



Mark
Bassingthwaite

Everyone who works in claims and risk management at ALPS periodically take calls from lawyers unsure if they need to report a claim. While we view reaching out for help in working through this important decision as a good thing, we also recognize that some lawyers will choose not to if for no other reason than they are afraid that doing so might have negative repercussions.

If you ever find yourself facing a situation of concern, and are hesitant to reach out to your insurer, the following short checklist of things to think about may prove useful. Hopefully, it will help you decide for yourself if a report needs to be made.

What to report - All claims, regardless of the merits of the allegations. A claim is often defined as any demand for money or services to include but not limited to demand letters, being served with a lawsuit, or the institution of an alternative dispute resolution process. **And all potential claims.** Think about any actual or alleged wrongful act, which is typically defined as any error, act or omission in professional services that you know or reasonably should know could be the basis of a claim or suit covered under your policy.

When to report - Malpractice policies, which are claims-made and reported policies, generally require **timely, if not immediate, notice** of all claims and potential claims, and again, regardless of the merits of the allegations. Unlike occurrence-based policies, **notice is what triggers coverage,**

not the underlying act, error or omission that is the basis of the claim. If you are aware of an actual or potential claim, the time to report has arrived.

How to report - Many policies require that notice be **in writing.** Regardless, notice is intended to let the insurer know the basics of what the issues are. Briefly detail the specific misstep that occurred or is being alleged, identify the client and provide the relevant date. Notice can be as short as a paragraph, depending on what the error or the potential error was.

Why report - Failing to timely report a claim in accordance with the contractual obligations set forth in your malpractice policy is similar to trying to hide awareness of a claim while applying for coverage or reapplying for continuous coverage. **The consequences of not doing so,** which include the possible loss of coverage for the claim and/or rescission of your policy, **can be severe.**

Remember that you have a contractual obligation to cooperate with your insurer - While the specific language of cooperation clauses will differ between insurers; all provide that you must cooperate with them in the defense of the claim or suit. Of particular importance is this. **You don't want to make any payments, admit any liability, settle a claim, assume any obligation, or incur any expense absent your insurer's prior consent.** Stated another way, trying to resolve a claim on your own before finally deciding to report it is a bad idea.

ALPS Risk Manager Mark Bassingthwaite, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology.



"Malpractice policies generally require timely, if not immediate, notice of all claims and potential claims, regardless of the merits of the allegations."

Bills the bar is watching in the 2021 session

The 2021 Montana Legislative Session hit its halfway point with the March 3 break following the bill transmittal deadline.

Following is a list of bills introduced in the 2021 Montana Legislature that the State Bar of Montana has taken a position on, noting whether the bar was in support or opposition and the bills' progress as of transmittal (* after status indicates bill is *probably dead*):

House bills

HB 2: General Appropriations Act: Bar position: Support judicial budget. Status: Hearing (House Appropriations) March 12.

HB 325: Elect Supreme Court justices by districts. Bar position: Opposed. Status: Passed House on third reading 63-36 Feb. 19.

HB 342: Providing for partisan elections for Supreme Court justices and District Court judges. Bar position: Opposed. Status: Not passed on second reading (44-56) *

HB 355*: Require partisan elections for state, district, local judges. Bar position: Opposed. Status: Not passed on second reading (44-56) *

HB 380: Revise appointment process for certain members of judicial standards commission. Bar position:



STATE BAR OF MONTANA LEGISLATIVE BILL WATCH

Opposed as amended. Status: Passed House on third reading, 64-34.

Senate Bills

SB1: Revise lobbying laws to update terminology and conform lobbying definition. Bar position: Support. Status: Signed by governor.

SB 140: Provides direct appointment process for the governor to appoint district court judges and supreme court justices to fill judicial vacancies. Bar position: Opposed. Status: Passed House and Senate.

MONTANA LAWYERS IN THE 2021 LEGISLATURE

HOUSE

Robert Farris-Olsen, D-HD 79, Helena

Tom France, D-HD 94, Missoula

Bill Mercer, R-HD 46, Billings

Andrea Olsen, D-HD 100, Missoula

Katie Sullivan, D-HD 89, Missoula

SENATE

Ellie Boldman, D-SD 45, Missoula

Steve Fitzpatrick, R-SD 10, Great Falls

Shane Morigeau, D-SD 48, Missoula

SB252: Revise laws related to judicial impeachment. Bar position: Opposed. Status: Indefinitely postponed*

SB271: Allow judicial candidates to announce endorsements. Bar position: Opposed. Status: Hearing, House State Administration, pending.

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ASSOCIATE ATTORNEY: Griffith & Cummings, PC seeks an associate attorney to join its Big Sky practice. G&C focuses on community association and real estate development including litigation. Candidates must have five or more years of legal experience, including litigation, and must have a sense of humor. Applicants must be self-motivated yet able to work as a team. Experience in real estate development and drafting and litigating Covenants/Contracts is preferred. Must be licensed in Montana. Salary DOE and includes benefits and bonuses. Please email a cover letter, resume, writing sample and references.

ASSOCIATE ATTORNEY: Billings firm focused primarily on personal injury seeks an associate. Please submit a cover letter and resume (no more than one page each), along with a writing sample and list of references to Hughes Law, 3031 Grand Ave. # 151, Billings, MT 59102 or via email to jhughes@hugheslawmt.com

ASSOCIATE ATTORNEY: Well-established, busy Bozeman and Whitehall law firm, E.J. Guza & Associates, seeks associate. Fun, easygoing, fast-paced, hardworking, professional atmosphere. Wide, diverse practice, including civil, criminal, construction, employment, contracts, municipal and personal injury law. Apply by email to ltaylor@ejguzalaw.com

ASSOCIATE ATTORNEY: Parker, Heitz & Cosgrove, PLLC, a Billings litigation firm, seeks an associate attorney for a litigation position. Applicants must demonstrate excellent research, writing and communication skills. Competitive salary and benefits. Please submit your cover letter and resume in confidence to Parker, Heitz & Cosgrove, PLLC, P.O. Box 7212, Billings, MT 59103-7212, or via email to shawn@parker-law.com or deb-bie@parker-law.com

ASSOCIATE TAX ATTORNEY: Goodrich & Reely, PLLC seeks associate attorney in Missoula office. We are a small firm with a busy team of tax lawyers serving a sophisticated client base with varied needs including estate planning, business transactions, complex real estate matters, and liquor/gaming licensing and compliance. Applicants must have an LLM in taxation and 3-5 years of experience, minimum. Compensation is highly competitive and dependent on experience. Please send cover letter, resume, and references, to angie@goodrichreely.com.

ATTORNEY: Silverman Law Office, PLLC (www.mttaxlaw.com) has

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BUSINESS/REAL ESTATE LAWYER: Growing and progressive regional law firm located in Dickinson, N.D., seeks a lawyer for the firm's Business Solutions, Real Estate and Personal Planning practice groups. Ideal applicant will have a minimum of five years' demonstrated experience in these practice areas. Must be licensed to practice, or eligible to become licensed to practice, in North Dakota, and will receive a competitive compensation package. Please submit your letter of application and resume to Ebeltoft . Sickler . Lawyers, Attn: Randall N. Sickler, 2272 8th St West, Dickinson, ND 58601, or to rsickler@ndlaw.com. All applications will be kept confidential.

CITY PROSECUTOR: The City of Great Falls is seeking a prosecutor for its Criminal Division. The City is seeking a professional responsible for providing a wide array of legal services to the city, including witness interviews and preparation, building and investigating cases, drafting pleadings, briefs, motions and proposed court orders, providing legal memoranda and guidance, conducting complex legal research, and prosecution of criminal violations. Applicants must be licensed to practice law

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in Montana and should have prior legal experience. The position has an annual salary range of \$60,257.00 to \$75,321.00 and has City-provided benefits. Interested persons should apply on the following link: <https://www.governmentjobs.com/careers/greatfallsmt>.

DEPUTY COUNTY ATTORNEY:

Yellowstone County Attorney's Office is seeking a Senior Deputy (\$68,054.83 to 102,082.24 DOQ) or a Deputy County Attorney (\$64,000) + longevity and benefits. Duties include routine to complex criminal prosecution. Senior Deputies may act as lead counsel on major felony prosecutions. Related duties as required. See http://www.co.yellowstone.mt.gov/human_resources/ for application requirements. First review of applicants March 18, 2021

DEPUTY COUNTY ATTORNEY: Full-time Deputy County Attorney position with the Beaverhead County Attorney's Office, Dillon. Majority of work will be criminal prosecution related, in Justice and District Court. Requires a Juris Doctor Degree from accredited law school, and a license to practice in Montana. Salary range of \$60,000 - \$73,000 per year. Excellent benefits available. Experience preferred. This is a two attorney office, handling a medium sized county's robust caseload. Position opens April 3, 2021. To apply, please submit a resume and cover letter to: Beaverhead County Attorney's Office, 2 S. Pacific Street, Suite #2, Dillon, MT 59725. Applications accepted until position filled. Direct questions or request accommodation from Beaverhead County Attorney's Office.

ESTATE PLANNING/BUSINESS

ATTORNEY: Great Falls firm looking for a motivated, people-oriented attorney to join growing estate planning and business planning practice. Our practice is built on long-term relationships with our clients and their other advisors. We follow a fresh approach to the practice of law that emphasizes a realistic work-life balance. This is a great opportunity for a recent law graduate or lawyer with excellent communication skills who enjoys being part of a collaborative work environment. For a more detailed description of the position, please review on our website under the Employment Opportunities tab, www.MontanaEstateLawyer.Com Please

send cover letter and resume to Scott, Tokerud & McCarty, P.C., Attn: Jon S. McCarty, 8 3rd Street North, Suite 507, Great Falls, MT 59401, or email to JonM@MontanaEstateLawyer.com.

FAMILY LAW ATTORNEY: The Judnich Law Office seeks a Family Law Associate Attorney with immediate availability in Missoula. The position will have a primary focus on family law and related litigation. Opportunities exist to expand into other areas of law, but family law will be the primary focus. Minimum of 1-2 years in family law practice is required for this position and new graduates need not apply. The candidate should expect support and mentorship from our senior attorneys who have over 40 years of combined experience. Compensation will depend on experience, but is very competitively priced for the Missoula market as well as benefit packages. Please submit Cover Letter, Resume and writing sample with application to marty@judnichlaw.com.

TOWN ATTORNEY: Town of Philipsburg seeks Town Attorney Provide to provide legal services including, but not limited to, negotiation of contracts, preparation and review of documents, attendance of Council meetings, and legal research. This position reports directly to the Mayor and Town Council. This part-time position will have a primary emphasis on civil and administrative matters and may require involvement in criminal prosecution.

LEGAL ASSISTANTS & LEGAL SECRETARIES

PARALEGAL/LEGAL SECRETARY:

Parker, Heitz & Cosgrove, PLLC, a Billings, MT law firm, seeks a full-time legal secretary and/or paralegal with strong communication, organizational and word processing skills. Prior secretarial/legal experience preferred, but not required. Send cover letter and resume to P.O. Box 7212, Billings, MT 59103-7212.

PARALEGAL: Berg, Lilly is hiring a full-time Legal Assistant or Paralegal to provide litigation support to attorneys in our busy downtown Bozeman office. Work will entail research, drafting, document management and production, scheduling of deadlines and Court filings. Strong technical, organizational, detail orientation and communication skills essential. Apply by email at info@berglawfirm.com

[berglawfirm.com](mailto:info@berglawfirm.com)

PARALEGAL: Law firm seeking a full-time legal assistant/paralegal to support attorneys in busy civil litigation practice in Bozeman office. Strong organizational skills, attention to detail, computer and document management skills a plus. Competitive salary and benefits. Please submit cover letter, resume and references by email to: balke@cristlaw.com

LEGAL ASSISTANT: Billings firm focused primarily on personal injury seeks full time legal assistant. Please submit a cover letter and resume (no more than one page each) to Hughes Law, 3031 Grand Ave. # 151, Billings, MT 59102 or via email to jhughes@hugheslawmt.com

OFFICE SPACE



VICTORIAN OFFICE BUILDING

FOR SALE: 213 5th Ave, \$520,000. Beautifully restored 20th century home located near the Lewis & Clark County Courthouse and in the heart of Helena with all the life and vibrancy of downtown right at your fingertips. This property is currently zoned for both residential and commercial, offering a wide range of possibilities for its use, including multifamily. This building is perfect for a law office, but could easily be converted back to a luxury home with 9 bedrooms, 2 bathrooms and large entertaining rooms. Additional living space outback (approximately 500 sq ft) which could be used as an additional conference room or guest suite. Detached single car garage. Tours available through Amie Renshaw at Century 21 at 406-202-1154.

PREMIUM BILLINGS OFFICE SHARE:

Nicely finished office space available in Country Manor Building, 3936 Avenue B, Billings. Three offices available. Space available includes one corner office and one office with built-in furniture. Shared conference room,

restrooms, kitchenette, and reception area. Off-street parking. Rent dependent on number of persons. Photos available. Contact Jim Ragain (406) 672-8212 or jim@mtwylaw.com.

ATTORNEY SUPPORT/ RESEARCH/WRITING

BUSY PRACTICE? I can help. Former MSC law clerk and UM Law honors graduate available for all types of contract work, including legal/factual research, brief writing, court/depo appearances, pre/post trial jury investigations, and document review. For more information, visit www.meguirelaw.com; email robin@meguirelaw.com; or call 406-442-8317.

ENHANCE YOUR PRACTICE with help from an AV-rated attorney with more than 37 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my website at www.denevilegal.com to learn more. mdenevi81@gmail.com, 406-210-1133.

CONSULTANTS & EXPERTS

BANKING EXPERT: 34 years banking experience. Expert banking services including documentation review, workout negotiation assistance, settlement assistance, credit restructure, expert witness, preparation and/or evaluation of borrowers' and lenders' positions. Expert testimony provided for depositions and trials. Attorney references provided upon request. Michael F. Richards, Bozeman MT 406-581-8797; mike@mrichardsconsulting.com.

EXPERIENCED BANKING EXPERT/CONSULTANT – 40+ years of banking experience 30 years of which were in executive management positions in banks ranging in size from community banks to multi-billion-dollar, multi-state banking organizations. Executive responsibility for all phases of lending, lending disciplines and credit assessment. Special expertise in determining borrower creditworthiness and the appropriateness of lender behavior. Outstanding legal references upon request. Please contact Leon Royer by telephone at 406-932-4255 or backcastranch@gmail.com.

FORENSIC DOCUMENT EXAMINER: Trained by the U.S. Secret Service and U.S. Postal Inspection Crime Lab.

Retired from the Eugene, Ore., P.D. Qualified in state and federal courts. Certified by the American Board of forensic Document Examiners. Full-service laboratory for handwriting, ink and paper comparisons. Contact Jim Green, Eugene, Ore.; 888-485-0832. Website at www.documentexaminer.info.

PSYCHOLOGICAL EXAMINATION & EXPERT TESTIMONY: Montana licensed (#236) psychologist with 20+ years of experience in clinical, health, and forensic (civil & criminal) psychology. Services I can provide include case analysis to assess for malingering and pre-existing conditions, rebuttal testimony, independent psychological examination (IME), examination of: psychological damage, fitness to proceed, criminal responsibility, sentencing mitigation, parental capacity, post mortem testamentary capacity, etc. Patrick Davis, Ph.D. pjd@dcpcmt.com. www.dcpcmt.com. 406-899-0522.

ITEMS FOR SALE

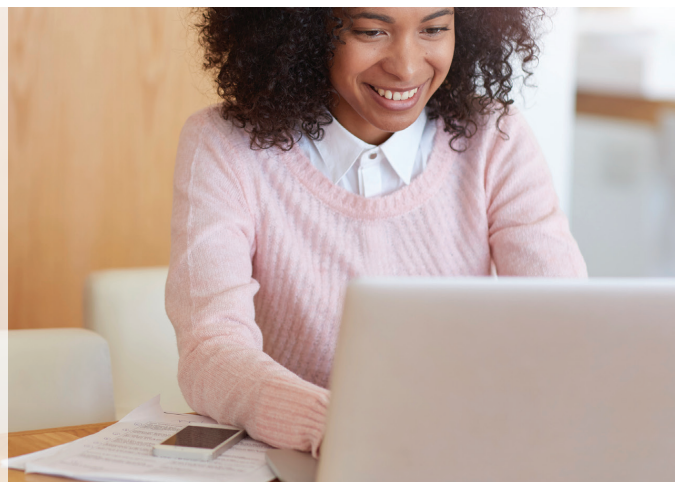
FOR SALE: Law Office, including Desks, Oak Tables, File cabinets. For ambiance, a large Law Library including, but not limited to, Federal ALR, Supplement Reporters, Federal Reporters, Digest 1-4, Procedure, Procedural Forms, Moores Federal

Practice, Benders Forms, Rules Decisions, American Jurisprudence, Forms, Pleading & Practice, Corpus Juris Secundum, ALR 1-4, Proof of Facts, Pacific Reporters, Am Jur Trials, Cyclopedia of Automobile Law, Restatement of Torts 2nd and of Agency 2nd, Trial Lawyers Guide, Proving Medical Diagnosis and Prognosis, Trauma, and Medical Trial Technique Quarterly. The library includes, medical school/hospital quality-Skeleton, Circulatory System, Upper Body Torso, Head, Heart, Knee and Spine. In addition to the Law Office w/3 offices, library and two reception areas, the corner lot has parking and an adjacent 2 story 7 unit Apartment Building. This corner lot is 1/2 block off Main Street, downtown Miles City, Montana, and one block from the Custer County Courthouse. Photographs and further details upon request. TJH, 14 N. 9th St./PO Box 578, Miles City, MT 59301, telephone: 406-232-3074, email: harpatlaw@mcn.net.

EVICCTIONS

EVICCTIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. 406-549-9611, trevor@montanaevictions.com. See website at www.montanaevictions.com

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