2016 Idaho Teachers Institute on Law-Related Education: Connecting the Rule of Law to the Role of an Independent, Impartial Judiciary

Co-Sponsored by the Idaho Federal Courts, the Idaho Supreme Court, and the University of Idaho College of Law

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INSTITUTE MATERIALS
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Outline of Contents

Program Topics and Materials

Topic 2: Public (Mis)Understanding of the Judiciary and the Rule of Law

- Presenters' outline (panelists' remarks)
- Workshop Questions and Writing Exercise
  (Case involving suppression of evidence in criminal prosecution)

Topic 3: Judicial Decisions: Honoring and Implementing the Rule of Law

- Presenters' combined outline
- Workshop discussion question materials -- Fourth Amendment issues
- Background briefing on Fourth Amendment

Topic 4A: The Jury's Role in the Administration of Justice

- Presenters' outline (panelists' remarks)
- Workshop discussion questions and jury selection hypothetical

Topic 4B: Special Issues in the Administration of Criminal Justice

- Presenters' combined outline (panelists' remarks)
- Workshop discussion questions

Topic 5: Summing Up: Best Practices in Teaching Civic Education with a Focus on the Rule of Law and the Role of an Independent, Impartial Judiciary

- Open discussion

Administrative Materials

Process for earning professional development/continuing education credit

Teachers' evaluation of this Institute

INTRODUCTION TO THE JUDICIAL FOCUS OF THIS INSTITUTE

Article for *The Advocate* (Idaho State Bar)
Submitted Dec 2014 (Rev. 1/5/2015)]
[Updated for 2016 Teachers' Institute]

CIVIC EDUCATION, THE RULE OF LAW, AND THE JUDICIARY: "A REPUBLIC … IF YOU CAN KEEP IT"

Don Burnett

This story never grows old. On September 17, 1787, in Philadelphia, citizens gathered outside Independence Hall as word spread that the deliberations of the Constitutional Convention had concluded. Seeing Benjamin Franklin emerge from the building, a woman in the crowd asked him: "[W]hat have we got—a republic or a monarchy?" Without hesitation, Franklin responded, "A republic . . . if you can keep it."[i]

The framers created a distinctive republic—a *constitutional* republic—in which representative government was combined with the constraint of a written charter. In a single document, the framers addressed two historical abuses of power -- the tyranny of the few over the many, and the tyranny of the many over the few. To prevent concentrations of power leading to the tyranny of the few over the many, the charter dispersed power horizontally among three separate (but connected) branches of government, and vertically between the nation and the states. To protect the few from

tyranny by the many, the charter, as amended during the ratification process, set forth fundamental rights that could not be infringed or extinguished by majorities of the moment. The result – the Constitution of the United States -- was, and still is, a stunning achievement.

The Role of the Judiciary

The framers entrusted the task of safeguarding this achievement – of maintaining the dispersion of power and preserving the enumeration of rights – to an independent and impartial judiciary. This was the most innovative and unique feature of the Constitution. Alexander Hamilton declared in the Federalist Papers that the independence of judges was "one of the most valuable of the modern improvements in the practice of government…. [I]n a republic it is a[n] ,,, excellent barrier to the encroachments and oppressions of the representative body."[ii] "[T]he independence of judges," Hamilton continued, "may be an essential safeguard against the effects of occasional ill humors in the society" and against "injury of the private rights of particular classes of citizens, by unjust and partial laws."[iii] Hamilton also explained that the courts would be obliged to treat as void any statutes contrary to the Constitution, thereby laying the foundation of judicial review.[iv] To the question of whether such a judiciary would become too powerful, Hamilton replied that the judges themselves would be subject to the rule of law:

> [A] voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them ….[v]

Thus, judicial independence, as envisioned by Hamilton and the framers of the Constitution, was not a privilege to decide cases according to a judge's personal preferences. It was instead a solemnly conferred duty to decide cases impartially, to avoid an "arbitrary discretion," and to abide by applicable "rules and precedents." Judicial independence in this sense carried an obligation, echoed in today's codes of judicial conduct for Idaho's federal and state judges, to act "without fear or favor. Although judges should be independent, they must comply with the law…."[vi] The independence of judges is predicated upon their impartiality and their adherence to the rule of law. These are the anchors that enable them, in the memorable words of Justice Hugo Black, to "stand against any winds that blow…."[vii]

Impartiality and Public Perception

For more than two centuries, the constitutional imperative of an impartial, independent judiciary has endured, although popular support for it has waxed and waned. After all, the concept is not intuitively grasped by the ordinary citizen who has heard since childhood that "the majority rules." Nor is it easily accepted by the citizen who views our courts as just another political branch of government – shaped by the same

political forces and making the same political decisions that characterize the work of the other two branches.

Exploiting this perception, powerful political and economic interest groups throughout American history have sought to influence the selection of federal and state judges. Today, special interests overtly seek to populate the courts with judges vetted for their viewpoints rather than for their capabilities. The acerbic partisanship of recent federal judicial appointments, coupled with the rising tide of money flowing into the judicial elections of many states, is disturbing evidence that we have entered a waning period of support for judicial impartiality as a core value of our constitutional republic.

If this circumstance were only a phase in a long historical cycle, perhaps we could simply wait for the republican ship to right itself. But there are reasons to doubt that the problem will be self-correcting. Surveys show that many Americans today are ambivalent, even skeptical, about the concept of impartiality. In one illustrative poll, conducted by Syracuse University's Campbell Public Affairs Institute, nearly 70% of respondents said judges should be shielded from outside pressure and allowed to make decisions on their own independent reading of the law; but this leaves a very substantial fraction of respondents who did not agree. Nor did most respondents believe our judicial system is living up to its goal of impartiality. Almost 87% said partisanship has at least some influence on judicial decisions, and 42% said it has "a lot" of influence. One

commentator opined that the Syracuse survey shows "[e]veryone wants to have a neutral and fair system of dispute resolution and everyone also wants to make sure that his or her own side prevails."[viii]

Public perceptions matter to the health of our republic. Theodore Roosevelt famously observed that the long-term durability of a republic depends upon the "average citizenship of the nation."[ix] If today's "average citizen" does not accept, or does not understand, the importance of an impartial judiciary, the perceived legitimacy of American courts – and the respect accorded to the courts' judgments -- will (continue to) erode.

Social science literature shows, unsurprisingly, that the greater a citizen's knowledge of the judicial system (whether acquired through formal education or actual experience such as sitting on a jury), the more favorable is that citizen's opinion of the courts and of the duty to decide cases impartially.[x] Most people, however, have limited experience with the courts, and the knowledge they acquire and retain from formal education is – to use report card terminology – "in need of improvement."

In a survey cited several years ago by the U.S. House of Representatives, more teenagers could name the Three Stooges and the three judges of the "American Idol" television program, than could name the three branches of government.[xi] The National

Assessment of Educational Progress has reported that only 27% of high school seniors – many of whom are old enough to vote – have scored at the proficiency level or better on recent national civics tests.[xii]

A survey conducted by Xavier University's Center for the Study of the American Dream[xiii] has revealed that more than one-third of native-born Americans would fail the basic civic literacy test taken by foreign-born persons seeking to become naturalized citizens of the United States. (97.5% of the immigrants reportedly pass the test; of course, they have studied for it!) Notably, on questions relating to the Constitution and to legal and political structures of the American constitutional republic, the native-born Americans did especially poorly:

- 85% did not know the meaning of the "rule of law."
- 82% could not name "two rights stated in the Declaration of Independence."
- 77% could not identify even one power of the states under the Constitution.
- 75% could not answer correctly the question, "What does the judiciary branch do?"
- 71% were unable to identify the Constitution as the "supreme law of the land."
- 62% could not identify "what happened at the Constitutional Convention."

This, unfortunately, is the current knowledge base of the "average citizen" in our constitutional republic.

Civic Education about the Judiciary and the Rule of Law

As lawyers and judges, we have work to do. We cannot leave law-related civic education entirely up to the public school system. Our profession has a responsibility to advance public understanding of the rule of law. As former American Bar Association President Jerome Shestack has written, "The justice system is our trust and our ministry…. [W]e bear the brunt of public dissatisfaction with the justice system's flaws and deficiencies…." To make that limping legal structure stride upright is the obligation of every lawyer."[xiv]

Fortunately, Idaho has already taken steps in a positive direction. Our state requires high school students to take five credits of civics instruction including government (two credits), U.S. history (two credits), and economics (one credit).[xv] School districts have authority to augment these requirements, and some have done so. The mandated instruction provides a valuable foundation for future citizenship; it does not, however, address in depth the "average citizen's" deficit in understanding the role of the judiciary and the rule of law.

To help address this deficit, the Idaho federal courts, the Idaho Supreme Court, and the University of Idaho College of Law [collaboratively conducted an institute for Idaho secondary schoolteachers in 2015, with a second institute planned for 2016]. The institute, taught with a hands-on, workshop-style pedagogy, [utilizes] as instructors a

number of judges, lawyers, and [master teachers] from Idaho high schools and postsecondary institutions. The institute [covers] the meaning of the rule of law; distinctive features of the United States Constitution, including the independent and impartial judiciary; the judge's role as guardian of the national and state constitutions; the judge's dual tasks of interpreting and following the law; federal and state appellate justice processes; methods for enhancing public understanding of the judiciary; and current challenges in the administration of justice. Participating schoolteachers will develop lesson plans and materials to take back to their classrooms.

If the institute is well received, it may be offered periodically in the future. It may also provide a foundation for other law-related civic education programs developed and presented at the forthcoming Idaho Law & Justice Learning Center, a collaborative undertaking of the Idaho Supreme Court and the University of Idaho. The Center, housed in the historic old Ada County Courthouse on the Capitol Mall in Boise, [began operations in September, 2015] …. The Center will put Idaho "on the map" along with other states where law-related civics education programs are offered.[xvi]

The Role of the Media

The most powerful "teacher" of lessons in civics, however, is mass media. News stories -- whether in print or electronic form – profoundly shape public perceptions of the justice system. Journalists have long shared, at least in spirit, the judiciary's goals of

independence and impartiality. Indeed, the vocabulary used to express these goals is remarkably similar. In 1896, Adolph S. Ochs, founder of the modern *New York Times*, published a declaration of principles including a commitment "to give the news impartially, without fear or favor, regardless of party, sect, or interests involved."[xvii]

Today, it is widely accepted that "[t]he basic responsibility of reporters covering governmental institutions is to inform the public of what officials are doing and about official policies and goals."[xviii] Regrettably, in reporting the work of the courts, the media generally provide sparse and selective coverage of what "officials [judges] are doing" and even more cursory coverage about "official policies and goals [i.e., court rules, sources of law, and the analytical content of judicial decisions]." The problem manifests itself in numerous ways, a few of which will be briefly mentioned here.

First, news stories typically focus on high-profile or unusual cases, leaving the ordinary administration of justice largely unreported. This may be unavoidable. Journalism is a fast-paced business, focusing on the attention-grabbing events of each day (that's presumably why the French term "jour" is rooted in "journalism"). Accordingly, the media do not report the safe landings of airplanes, but they do report air crashes. Consumers of such news reports are well aware, however, that nearly all planes land safely, and that crashes are uncommon. Consumers of news about the courts, on the other hand, are usually not so familiar with the routine workings of justice. What they

learn from the media about the justice system, in story after story, can be characterized as crash … crash … crash!

Second, public perception of the judiciary can be distorted if a high-profile case acquires a theme or "story line" from which the media are reluctant to retreat, even in the face of nonconforming facts. A classic example is trial in the infamous McDonald's "hot coffee" case, *Liebeck v. McDonald's*, widely characterized in the media as an alchemy of a frivolous claim and a runaway jury. The actual facts (third-degree burns, pelvic scarring, substantial hospital and medical costs, hundreds of prior complaints about the scalding temperature at which coffee was handed to drive-in window customers, and the judge's reduction of the jury verdict) were under-reported;[xix] indeed, they were submerged in a sea of sneering commentary. The case was not without genuine controversy, though. It could have provided a civics "teaching moment" on the distinction between compensatory and punitive damages; the legal standards for making each type of award, as set forth in the court's instructions to the jury; and the scope of a judge's authority in modifying a jury verdict. Each of these teaching points would have illustrated the rule of law. Instead, the lesson conveyed to the public by mass media was that the civil justice system resembles a lottery.

Third, the focus of media reporting can be misplaced when, as often occurs in constitutional litigation, the court's task is not to determine who should prevail in a

controversy, but rather to determine who should decide. This task illustrates the judiciary's role in maintaining the horizontal and vertical separation of powers as set forth in the Constitution. In the well-known "medical marijuana" case, Gonzales v. Maich,[xx] the Supreme Court held, pursuant to the Commerce Clause and the Supremacy Clause of the United States Constitution, that federal laws governing marijuana as a controlled substance displaced a conflicting state statute (the California Compassionate Use Act). The Court was not tasked with deciding whether "medical marijuana" ought to be compassionately allowed. That was an issue for Congress to decide -- or would have been an issue for California, and any other state, to decide if Congress had not acted. Congress, however, had chosen to act. The case thus presented a "teaching moment" in federalism and the rule of law; instead, the Supreme Court was characterized in some media reports as unsympathetic to the idea of compassionate use.[xxi]

Fourth, when a court is confronted with a case involving a sensitive public issue, some constituency or advocacy group will almost invariably decry the decision as a product of "judicial activism." The assertion ignores the fact that the judiciary is the one branch of government that usually cannot "decide not to decide." In contrast to the legislative branch which has vast leeway to decide whether and when to address a public issue, and in contrast to the executive branch which possesses considerable discretion in promulgating and enforcing administrative regulations, the judiciary must take cases as

they are presented and usually must render a public, written decision.[xxii] A judge may wish he or she had not been handed this task, and at least one of the litigants might wish he or she had not been forced to appear and argue in court; but the case will be decided. Although activism may lurk in some judicial minds, the courts' inability to "decide not to decide" provides a more cogent reason than activism as to why courts are occasionally thrust into sensitive public issues. In such cases, it is especially important that media reports contain the rule of law identified in the judge's decision. Otherwise, the public may be forgiven for assuming that a judge reached out and took a case in order to advance a personal viewpoint.

This problem is exacerbated by "result and reaction" reporting, which describes the outcome of a case and, rather than identifying the rule of law underlying the decision, constructs a narrative of conflicting reactions by the parties or other persons interested in the case. This type of reporting is consistent with a "story model" of journalism. Unfortunately, the narrative makes it appear that the judge "favored" one litigant over another, and the rule of law is further obscured.

These issues in media coverage of the judiciary highlight the importance of law-related civic education focusing on the judiciary and the rule of law. The issues are not products of ill will by the media against the courts; as noted, the media and the courts share a common heritage of devotion to independence and impartiality. Rather, the

issues reflect structural and mission differences between these two venerable institutions, as well as time and resource constraints preventing journalists from taking time to identify and convey the rule of law in judicial decisions, and preventing judges or lawyers and court staff from assisting reporters in this constitutionally vital task.

A Shared Commitment

Judges, lawyers, teachers, and journalists should search for ways to collaborate on law-related civic education. The great American innovation – the independent and impartial judiciary -- is being tested. Much is at stake. The "average citizen's" understanding of the rule of law, and of the judiciary's distinctive constitutional role, ultimately will determine whether our courts remain standing "against any winds that blow."

This is how we keep our republic.

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[i] 11 AM. HIST. REV. 618 (1906); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, App. A, at 85 (Max Farrand ed. 1937).
[ii] *The Federalist No. 78,* compiled in THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).
[ii] *Id.* at 469.
[iv] *Id.* at 465-466.
[v] *Id.* at 470.
[vi] Commentary to Canon 1, *Code of Conduct for United States Judges,* and the *Idaho Code of Judicial Conduct.*
[vii] Chambers v. Florida, 309 U.S. 227, 241 (1940) (unanimous opinion authored by Justice Black).
[viii] Keith J. Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics,* JURIST ACADEMIC COMMENTARY (April 10, 2011), available online at http://jurist.org/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics.

[ix]Theodore Roosevelt, "Citizenship in a Republic," speech delivered at the Sorbonne, Paris, France, April 23, 1910, available online at http://www.leadershipnow.com/tr-citizenship.html.
[x] *See, e.g.*, Gregory A. Caldeira and Kevin T. McGuire, *What Americans Know about the Courts and Why It Matters,* INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIAL BRANCH 262 (Oxford University Press, 2005).
[xi] H. Res. 686, September 14, 2009 (calling for increased civic education in high schools). The resolution was adopted unanimously. The same resolution recited that only 46% of young adults passed a test of civic literacy and that persons over age 65 passed by the same percentage.
[xii] "Most Students Lack Civics Proficiency on NAEP," *Education Week,* May 4, 2011 (updated March 24, 2012), available online at http://www.edweek.org/ew/articles/2011/05/04/30naep.h30.html.
[xiii]News release, "Civic Illiteracy: A Threat to the American Dream," Xavier University Center for the Study of the American Dream, April 26, 2012, available online at http://xuamericandream.blogspot.com/2012/04/civic-illiteracy-threat-to-American.html.
[xiv] Jerome Shestack, "President's Message: Defining Our Calling," 83 *American Bar Association Journal* 8 (September, 1997).
[xv]IDAPA 08.02.03 107.06; *see generally*, Education Commission of the States, "State Notes: High School Graduation Requirements – Citizenship," available online at http://mb2.ecs.org/reports/Report.aspx?id=115. [In 2015 the Idaho Legislature enacted Senate Bill 1071, adding a civics test requirement for graduation from high school, effective in 2016-17.]
[xvi]*See* "Civics Education Resource Guide," National Center for State Courts, available online at http://ncsc.org/Education-and-Careers;civics-education/Resource-Guide.aspx
[xvii]*New York Times* Archives, "Without Fear or Favor," published August 19, 1996 (the 100th anniversary of Ochs' declaration of principles), available online at http://www.nytimes.com/1996/08/19/opinion/without-fear-or-favor.html
[xviii]Martha Joynt Kumar and Alex Jones, *Government and the Press: Issues and Trends,* AMERICAN INSTITUTIONS OF DEMOCRACY: THE PRESS 226, 231 (Oxford University Press, 2005).
[xix]*See* Gerald N. Rosenberg, *The Impact of Courts on American Life*, INSTITUTIONS OF DEMOCRACY: THE JUDICIAL BRANCH 280, 295-296 (Oxford University Press, 2005).
[xx]545 U.S. 1 (2005).
[xxi]*E.g.*, "Court Snuffs Medicinal Pot," headline story on Page 1 of the *Arizona Republic*, June 7, 2005.
[xxii]There are of course, exceptions to the duty of a court to decide every case presented. Some cases involve issues that are neither ripe nor justiciable, or that involve parties who lack standing. These exceptions are narrow, however, and they provide the judiciary nothing resembling the wide exits available to the other branches of government.

Glossary of Legal Terms

A

Acquittal

A jury verdict that a criminal defendant is not guilty or the finding of a judge that the evidence is insufficient to support a conviction.

Active judge

A judge in the full-time service of the court. Compare to senior judge.

Administrative Office of the United States Courts (AO)

The federal agency responsible for collecting court statistics, administering the federal courts' budget and performing many other administrative and programmatic functions under the direction and supervision of the Judicial Conference of the United States.

Admissible

A term used to describe evidence that may be considered by a jury or judge in civil and criminal cases.

Adversary proceeding

A lawsuit arising in or related to a bankruptcy case that begins by filing a complaint with the court, that is, a "trial" that takes place within the context of a bankruptcy case.

Affidavit

A written or printed statement made under oath.

Affirmed

In the practice of the court of appeals, it means that the court of appeals has concluded that the lower court decision is correct and will stand as rendered by the lower court.

Alternate juror

A juror selected in the same manner as a regular juror who hears all the evidence but does not help decide the case unless called on to replace a regular juror.

Alternative dispute resolution (ADR)

A procedure for settling a dispute outside the courtroom. Most forms of ADR are not binding, and involve referral of the case to a neutral party such as an arbitrator or mediator.

Amicus curiae

Latin for "friend of the court." It is advice formally offered to the court in a brief filed by an entity interested in, but not a party to the case.

Answer

The formal written statement by a defendant in a civil case that responds to a complaint, articulating the grounds for defense.

Appeal

A request made after a trial by a party that has lost on one or more issues that a higher court review the decision to determine if it was correct. To make such a request is 'to appeal' or 'to take an appeal." One who appeals is called the "appellant;" the other party is the 'appellee."

Appellant

The party who appeals a district court's decision, usually seeking reversal of that decision.

Appellate

About appeals; an appellate court has the power to review the judgment of a lower court (trial court) or tribunal. For example, the U.S. circuit courts of appeals review the decisions of the U.S. district courts.

Appellee

The party who opposes an appellant's appeal, and who seeks to persuade the appeals court to affirm the district court's decision.

Arraignment

A proceeding in which a criminal defendant is brought into court, told of the charges in an indictment or information, and asked to plead guilty or not guilty.

Article III judge

A federal judge who is appointed for life, during "good behavior.' under Article III of the Constitution. Article III judges are nominated by the President and confirmed by the Senate.

Assets

Property of all kinds, including real and personal, tangible and intangible.

Assume

An agreement to continue performing duties under a contract or lease.

Automatic stay

An injunction that automatically stops lawsuits, foreclosures, garnishments, and most collection activities against the debtor the moment a bankruptcy petition is filed.

B

Bail

The release, prior to trial, of a person accused of a crime, under specified conditions designed to assure that person's appearance in court when required. Also can refer to the amount of bond money posted as a financial condition of pretrial release.

Bankruptcy

A legal procedure for dealing with debt problems of individuals and businesses; specifically, a case filed under one of the chapters of title 11 of the United States Code {the Bankruptcy Code).

Bankruptcy administrator

An officer of the Judiciary serving in the judicial districts of Alabama and North Carolina who, like the United States trustee, is responsible for supervising the administration of bankruptcy cases, estates, and trustees; monitoring plans and disclosure statements; monitoring creditors' committees; monitoring fee applications; and performing other statutory duties.

Bankruptcy code

The informal name for title 11 of the United States Code (11 U.S.C. §§101-1330), the federal bankruptcy law.

Bankruptcy court

The bankruptcy judges in regular active service in each district; a unit of the district court.

Bankruptcy estate

All interests of the debtor in property at the time of the bankruptcy filing. The estate technically becomes the temporary legal owner of all of the debtor's property.

Bankruptcy judge

A judicial officer of the United States district court who is the court official with decision-making power over federal bankruptcy cases.

Bankruptcy petition

A formal request for the protection of the federal bankruptcy laws. (There is an official form for bankruptcy petitions.)

Bankruptcy trustee

A private individual or corporation appointed in all Chapter 7 and Chapter 13 cases to represent the interests of the bankruptcy estate and the debtor's creditors.

Bench trial

A trial without a jury, in which the judge serves as the fact-finder.

Brief

A written statement submitted in a trial or appellate proceeding that explains one side's legal and factual arguments.

Burden of proof

The duty to prove disputed facts. In civil cases, a plaintiff generally has the burden of proving his or her case. In criminal cases the government has the burden of proving the defendant's guilt. (See standard of proof.)

Business bankruptcy

A bankruptcy case in which the debtor is a business or an individual involved in business and the debts are for business purposes.

C

Capital offense

A crime punishable by death.

Case file

A complete collection of every document filed in court in a case.

Case law

The law as established in previous court decisions. A synonym for legal precedent. Akin to common law, which springs from tradition and judicial decisions.

Caseload

The number of cases handled by a judge or a court.

Cause of action

A legal claim.

Chambers

The offices of a judge and his or her staff.

Chapter 11

Areorganization bankruptcy,usuallyinvolvingacorporation orpartnership. AChapter 11debtor usuallyproposesaplanofreorganizationtokeepits businessalive andpay creditorsovertime. Individualsor peopleinbusinesscan alsoseek reliefin Chapter 11.

Chapter12

ThechapteroftheBankruptcy Codeprovidingforadjustmentofdebtsofa"familyfarmer"or"family fisherman,"asthetermsaredefined in the Bankruptcy Code.

Chapter13

Thechapterof the Bankruptcy Codeprovidingfortheadjustmentof debtsof anindividualwithregularincome,often referredtoasa "wage-earner"plan. Chapter13 allows adebtorto keepproperty anduse his orherdisposableincometopaydebtsovertime,usuallythree to five years.

Chapter 13 trustee

A person appointed to administer a Chapter 13 case. A Chapter 13 trustee's responsibilities are similar to those of a Chapter 7 trustee; however, a Chapter 13 trustee has the additional responsibilitiesof overseeing the debtor's plan,receivingpayments from debtors, and disbursing planpayments to creditors.

Chapter15

The chapter of the Bankruptcy Code dealing with cases of cross-border insolvency.

Chapter7

Thechapter ofthe Bankruptcy Codeprovidingfor"liquidation; thatis,the saleof adebtor'snonexemptpropertyandthedistributionofthe proceedsto creditors. Inordertobeeligibleforchapter7,thedebtormustsatisfya "meanstest."The courtwillevaluatethe debtor's income andexpensestodetermineifthedebtormayproceedunderChapter7.

Chapter 7 trustee

A person appointed in a Chapter 7 case to represent the interests of the bankruptcy estate and the creditors. The trustee's responsibilities include reviewing the debtor's petition and schedules,liquidatingthe propertyofthe estate, and making distributionstocreditors.The trustee may also bring actions against creditors or the debtor to recover property of the bankruptcy estate.

Chapter 9

Thechapterof the Bankruptcy Codeprovidingforreorganizationofmunicipalities{whichincludescitiesandtowns,aswellasvillages, counties, taxing districts, municipal utilities, and school districts).

Chief Judge

Thejudge who has primary responsibility forthe administration of a court; chief judges are determined by seniority

Claim

Acreditor's assertion of a right to payment from a debtor or the debtor's property.

Class action

A lawsuit in which one ormore members ofalarge group, or class,of individuals or other entities sueon behalf of the entire class. The district court must find that the claims of the class members contain questionsof law orfact in common beforethe lawsuit can proceed as a class action.

Clerkofcourt

Thecourt officer who oversees administrative functions,especiallymanagingthe flowofcasesthrough thecourt. Theclerk'soffice is often calleda court's central nervoussystem.

Collateral

Property that is promised assecurityfor the satisfaction of a debt.

Common Law

The legal system that originated in England and is now in use in the United States, which relies on the articulation of legal principles in a historical succession of judicial decisions. Common law principles can be changed by legislation.

Community service

A special condition the court imposes that requires an individual to work - without pay - for a civic or nonprofit organization.

Complaint

A written statement that begins a civil lawsuit, in which the plaintiff details the claims against the defendant.

Concurrent sentence

Prison terms for two or more offenses to be served at the same time, rather than one after the other. Example: Two five-year sentences and one three-year sentence, if served concurrently, result in a maximum of five years behind bars.

Confirmation

Approval of a plan of reorganization by a bankruptcy judge.

Consecutive sentence

Prison terms for two or more offenses to be served one after the other. Example: Two five-year sentences and one three-year sentence, if served consecutively, result in a maximum of 13 years behind bars.

Consumer bankruptcy

A bankruptcy case filed to reduce or eliminate debts that are primarily consumer debts.

Consumer debts

Debts incurred for personal, as opposed to business, needs.

Contingent claim

A claim that may be owed by the debtor under certain circumstances, e.g., where the debtor is a cosigner on another person's loan and that person fails to pay.

Contract

An agreement between two or more people that creates an obligation to do or not to do a particular thing.

Conviction

A judgment of guilt against a criminal defendant.

Counsel

Legal advice; a term also used to refer to the lawyers in a case.

Count

An allegation in an indictment or information, charging a defendant with a crime. An indictment or information may contain allegations that the defendant committed more than one crime. Each allegation is referred to as a count.

Court

Government entity authorized to resolve legal disputes. Judges sometimes use 'court" to refer to themselves in the third person, as in "the court has read the briefs."

Court reporter

A person who makes a word-for-word record of what is said in court, generally by using a stenographic machine, shorthand or audio recording, and then produces a transcript of the proceedings upon request.

Credit

Generallyreferstotwoeventsinindividualbankruptcycases:(1)the"individualorgroupbriefingfromanonprofitbudgetandcredit counselingagencythatindividualdebtorsmustattendpriortofilingunderanychapterofthe BankruptcyCode;and(2)the "instructionalcourseinpersonalfinancialmanagement"inchapters7and13thatanindividualdebtormustcompletebeforea dischargeisentered.Thereareexceptionstobothrequirementsforcertaincategoriesofdebtors,exigentcircumstances,orifthe U.S. trustee or bankruptcy administrator have determined that there are insufficient approved credit counseling agencies available to provide the necessary counseling.

Creditor

A person to whom or business to which the debtor owes money or that claims to be owed money by the debtor.

D

Damages

Moneythatadefendantpaysaplaintiffinacivil caseifthe plaintiffhaswon. Damagesmaybecompensatory{forlossorinjury)or punitive(topunishanddeterfuture misconduct).

Defacto

Latin, meaning“in fact"or"actually."Somethingthatexistsin fact butnot as amatter of law.

De jure

Latin, meaning“in law."Somethingthatexistsbyoperationoflaw.

Denovo

Latin, meaning “anew."Atrialdenovoisacompletelynewtrial. Appellatereviewdenovoimpliesnodeferencetothetrialjudge’sruling.

Debtor

Apersonwhohasfiledapetitionforreliefunderthe BankruptcyCode.

Debtor's plan

Adebtor'sdetaileddescription ofhowthedebtor proposestopaycreditors'claims overafixedperiodof time.

Declaratory judgment

Ajudge'sstatementabout someone'srights.Forexample,aplaintiffmayseekadeclaratoryjudgmentthataparticular statute, as written, violates some constitutional right.

Default judgment

Ajudgment awardingaplaintiff therelief sought inthecomplaint becausethedefendant hasfailed to appear incourtorotherwise respondto the complaint.

Defendant

Anindividual(orbusiness)against whomalawsuitisfiled.

Defendant

In a civil case, the person or organization against whom the plaintiff brings suit; in a criminal case, the person accused of the crime.

Deposition

An oral statement made before an officer authorized by law to administer oaths. Such statements are often taken to examine potential witnesses, to obtain discovery, or to be used later in trial. See discovery.

Discharge

A release of a debtor from personal liability for certain dischargeable debts. Notable exceptions to discharge ability are taxes and student loans. A discharge releases a debtor from personal liability for certain debts known as dischargeable debts and prevents the creditors owed those debts from taking any action against the debtor or the debtor's property to collect the debts. The discharge also prohibits creditors from communicating with the debtor regarding the debt, including through telephone calls, letters, and personal contact.

Dischargeable debt

A debt for which the Bankruptcy Code allows the debtor's personal liability to be eliminated.

Disclosure statement

A written document prepared by the chapter 11 debtor or other plan proponent that is designed to provide 'adequate information' to creditors to enable them to evaluate the chapter 11 plan of reorganization.

Discovery

Procedures used to obtain disclosure of evidence before trial.

Dismissal with prejudice

Court action that prevents an identical lawsuit from being filed later.

Dismissal without prejudice

Court action that allows the later filing.

Disposable income

Income not reasonably necessary for the maintenance or support of the debtor or dependents. If the debtor operates a business, disposable income is defined as those amounts over and above what is necessary for the payment of ordinary operating expenses.

Docket

A log containing the complete history of each case in the form of brief chronological entries summarizing the court proceedings.

Due process

In criminal law, the constitutional guarantee that a defendant will receive a fair and impartial trial. In civil law, the legal rights of someone who confronts an adverse action threatening liberty or property.

E

Enbanc

French, meaning 'on the bench." All judges of an appellate court sitting together to hear a case, as opposed to the routine disposition by panels of three judges. In the Ninth Circuit, an en banc panel consists of 11 randomly selected judges.

Equitable

Pertaining to civil suits in "equity' rather than in 'law." In English legal history, the courts of "law" could order the payment of damages and could afford no other remedy (see damages). A separate court of "equity" could order someone to do something or to cease to do something (e.g., injunction). In American jurisprudence, the federal courts have both legal and equitable power, but the distinction is still an important one. For example, a trial by jury is normally available in "law" cases but not in "equity" cases.

Equity

The value of a debtor's interest in property that remains after liens and other creditors' interests are considered. (Example: If a house valued at $60,000 is subject to a $30,000 mortgage, there is $30,000 of equity.)

Evidence

Information presentedintestimonyorindocuments thatisusedto persuadethefact finder(judgeorjury) todecidethecaseinfavorof one sideorthe other.

Ex parte

A proceedingbroughtbeforeacourtbyonepartyonly, withoutnoticetoor challengebythe otherside.

Exclusionary rule

Doctrinethat saysevidenceobtainedinviolationofacriminal defendant'sconstitutional orstatutoryrightsisnotadmissibleattrial.

Exculpatory evidence

Evidenceindicatingthatadefendantdidnotcommitthecrime.

Executory contracts

Contractsorleasesunder which bothpartiestotheagreementhave dutiesremaining to beperformed. Ifacontract orleaseis executory,a debtormay assumeit(keepthecontract) orrejectit (terminatethecontract).

Exempt assets

Propertythat adebtoris allowedto retain,freefromtheclaims of creditors who do not haveliensontheproperty.

Exemptions, exempt property

Certain property owned by an individual debtorthat the Bankruptcy Code or applicable state law permits the debtor to keep from unsecuredcreditors.Forexample,in somestates the debtor maybe abletoexemptall or aportionoftheequityin thedebtor's primary residence(homestead exemption), or someor all'toolsofthetrade'used bythedebtorto makealiving(i.e., autotools for anauto mechanicordentaltoolsforadentist).Theavailability andamount ofpropertythedebtormay exemptdependsonthestatethedebtor livesin.

F

Facesheetfiling

A bankruptcycasefiled eitherwithoutschedulesor withincompleteschedules listing fewcreditors and debts. (Facesheetfilings areoften made for thepurpose of delayingan evictionor foreclosure

Familyfarmer

An individual,individualandspouse,corporation, orpartnershipengagedinafarmingoperationthatmeetscertain debtlimitsandother statutorycriteriaforfilinga petition under Chapter12.

Federal public defender

Anattorneyemployedbythefederalcourts onafull-timebasistoprovidelegaldefensetodefendants whoareunableto affordcounsel. ThejudiciaryadministersthefederaldefenderprogrampursuanttotheCriminalJusticeAct.

Federal public defender organization

Asprovided forin theCriminal Justice Act,an organizationestablished within afederaljudicial circuit torepresentcriminaldefendants who cannot afford anadequatedefense.Eachorganizationis supervisedbyafederalpublic defenderappointedbythecourtofappeals for thecircuit.

Federal question jurisdiction

Jurisdiction giventofederalcourtsincasesinvolvingtheinterpretationandapplicationofthe U.S.Constitution,actsofCongress, and treaties.

Felony

A seriouscrime, usuallypunishable byat leastoneyearin prison.

File

To place a paper in the official custody of the clerk of court to enter into the files or records of a case.

Fraudulent transfer

A transfer of a debtor's property made with intent to defraud or for which the debtor receives less than the transferred property's value.

Fresh start

The characterization of a debtor's status after bankruptcy, i.e., free of most debts. {Giving debtors a fresh start is one purpose of the Bankruptcy Code.)

G

Grand jury

A body of 16-23 citizens who listen to evidence of criminal allegations, which is presented by the prosecutors, and determine whether there is probable cause to believe an individual committed an offense. See also indictment and U.S. attorney.

H

Habeas corpus

Latin, meaning 'you have the body.” A writ of habeas corpus generally is a judicial order forcing law enforcement authorities to produce a prisoner they are holding, and to justify the prisoner's continued confinement. Federal judges receive petitions for a writ of habeas corpus from state prison inmates who say their state prosecutions violated federally protected rights in some way.

Hearsay

Evidence presented by a witness who did not see or hear the incident in question but heard about it from someone else. With some exceptions, hearsay generally is not admissible as evidence at trial

Home confinement

A special condition the court imposes that requires an individual to remain at home except for certain approved activities such as work and medical appointments. Home confinement may include the use of electronic monitoring equipment- a transmitter attached to the wrist or the ankle - to help ensure that the person stays at home as required.

I

Impeachment

1. The process of calling a witness's testimony into doubt. For example, if the attorney can show that the witness may have fabricated portions of his testimony, the witness is said to be 'impeached;" 2. The constitutional process whereby the House of Representatives may "impeach' (accuse of misconduct) high officers of the federal government, who are then tried by the Senate.

In camera

Latin, meaning in a judge's chambers. Often means outside the presence of a jury and the public. In private.

In forma pauperis

"In the manner of a pauper.' Permission given by the court to a person to file a case without payment of the required court fees because the person cannot pay them.

Inculpatory evidence

Evidence indicating that a defendant did commit the crime.

Indictment

The formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify having a trial; it is used primarily for felonies. See also information.

Information

A formal accusation by a government attorney that the defendant committed a misdemeanor. See also indictment.

Injunction

A court order preventing one or more named parties from taking some action. A preliminary injunction often is issued to allow fact-finding, so a judge can determine whether a permanent injunction is justified.

Insider (of corporate debtor)

A director, officer, or person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer, or person in control of the debtor.

Insider (of individual debtor)

Any relative of the debtor or of a general partner of the debtor; partnership in which the debtor is a general partner; general partner of the debtor; or corporation of which the debtor is a director, officer, or person in control.

Interrogatories

A form of discovery consisting of written questions to be answered in writing and under oath.

Issue

1. The disputed point between parties in a lawsuit; 2. To send out officially, as in a court issuing an order.

J

Joint administration

A court-approved mechanism under which two or more cases can be administered together. (Assuming no conflicts of interest, these separate businesses or individuals can pool their resources, hire the same professionals, etc.)

Joint petition

One bankruptcy petition filed by a husband and wife together.

Judge

An official of the Judicial branch with authority to decide lawsuits brought before courts. Used generically, the term judge may also refer to all judicial officers, including Supreme Court justices.

Judgeship

The position of judge. By statute, Congress authorizes the number of judgeships for each district and appellate court.

Judgment

The official decision of a court finally resolving the dispute between the parties to the lawsuit.

Judicial Conference of the United States

The policy-making entity for the federal court system. A 27-judge body whose presiding officer is the Chief Justice of the United States.

Jurisdiction

The legal authority of a court to hear and decide a certain type of case. It also is used as a synonym for venue, meaning the geographic area over which the court has territorial jurisdiction to decide cases.

Jurisprudence

The study of law and the structure of the legal system

Jury

The group of persons selected to hear the evidence in a trial and render a verdict on matters of fact. See also grand jury.

Jury instructions

A judge's directions to the jury before it begins deliberations regarding the factual questions it must answer and the legal rules that it must apply.

L

Lawsuit

A legal action started by a plaintiff against a defendant based on a complaint that the defendant failed to perform a legal duty which resulted in harm to the plaintiff.

Lien

A charge on specific property that is designed to secure payment of a debtor performance of an obligation. A debtor may still be responsible for a lien after a discharge.

Liquidated claim

A creditor's claim for a fixed amount of money.

Liquidation

The sale of a debtor's property with the proceeds to be used for the benefit of creditors.

Litigation

A case, controversy, or lawsuit. Participants (plaintiffs and defendants) in lawsuits are called litigants.

M

Magistrate judge

A judicial officer of a district court who conducts initial proceedings in criminal cases, decides criminal misdemeanor cases, conducts many pretrial civil and criminal matters on behalf of district judges, and decides civil cases with the consent of the parties.

Means test

Section 707(b)(2) of the Bankruptcy Code applies a "means test" to determine whether an individual debtor's chapter 7 filing is presumed to be an abuse of the Bankruptcy Code requiring dismissal or conversion of the case (generally to chapter 13). Abuse is presumed if the debtor's aggregate current monthly income (see definition above) over 5 years, net of certain statutorily allowed expenses is more than (i) $10,000, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least $6,000. The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

Means test

Section 707(b)(2) of the Bankruptcy Code applies a "means test" to determine whether an individual debtor's chapter 7 filing is presumed to be an abuse of the Bankruptcy Code requiring dismissal or conversion of the case (generally to chapter 13). Abuse is presumed if the debtor's aggregate current monthly income (see definition above) over 5 years, net of certain statutorily allowed expenses is more than (i) $10,000, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least $6,000. The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

Mental health treatment

Special condition the court imposes to require an individual to undergo evaluation and treatment for a mental disorder. Treatment may include psychiatric, psychological, and sex offense-specific evaluations, inpatient or outpatient counseling, and medication.

Misdemeanor

An offense punishable by one year of imprisonment or less. See also felony.

Mistrial

An invalid trial, caused by fundamental error. When a mistrial is declared, the trial must start again with the selection of a new jury.

Moot

Not subject to a court ruling because the controversy has not actually arisen, or has ended

Motion

A request by a litigant to a judge for a decision on an issue relating to the case.

Motion in limine

A pretrial motion requesting the court to prohibit the other side from presenting, or even referring to, evidence on matters said to be so highly prejudicial that no steps taken by the judge can prevent the jury from being unduly influenced.

Motion to lift the automatic stay

A request by a creditor to allow the creditor to take action against the debtor or the debtor's property that would otherwise be prohibited by the automatic stay.

N

No-asset case

A Chapter 7 case in which there are no assets available to satisfy any portion of the creditors' unsecured claims.

Nolo contendere

No contest. A plea of nolo contendere has the same effect as a plea of guilty, as far as the criminal sentence is concerned, but may not be considered as an admission of guilt for any other purpose.

Nondischargeable debt

A debt that cannot be eliminated in bankruptcy. Examples include a home mortgage, debts for alimony or child support, certain taxes, debts for most government funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. Some debts, such as debts for money or property obtained by false pretenses and debts for fraud or defalcation while acting in a fiduciary capacity may be declared nondischargeable only if a creditor timely files and prevails in a nondischargeability action.

Nonexempt assets

Property of a debtor that can be liquidated to satisfy claims of creditors.

O

Objection to dischargeability

A trustee's or creditor's objection to the debtor being released from personal liability for certain dischargeable debts. Common reasons include allegations that the debt to be discharged was incurred by false pretenses or that debt arose because of the debtor's fraud while acting as a fiduciary.

Objection to exemptions

A trustee's or creditor's objection to the debtor's attempt to claim certain property as exempt from liquidation by the trustee to creditors.

Opinion

A judge's written explanation of the decision of the court. Because a case may be heard by three or more judges in the court of appeals, the opinion in appellate decisions can take several forms. If all the judges completely agree on the result, one judge will write the opinion for all. If all the judges do not agree, the formal decision will be based upon the view of the majority, and one member of the majority will write the opinion. The judges who did not agree with the majority may write separately in dissenting or concurring opinions to present their views. A dissenting opinion disagrees with the majority opinion because of the reasoning and/or the principles of law the majority used to decide the case. A concurring opinion agrees with the decision of the majority opinion, but offers further comment or

clarification or even an entirely different reason for reaching the same result. Only the majority opinion can serve as binding precedent in future cases. See also precedent.

Oral argument

An opportunity for lawyers to summarize their position before the court and also to answer the judges' questions.

P

Panel

1. In appellate cases, a group of judges (usually three) assigned to decide the case; 2. In the jury selection process, the group of potential jurors; 3. The list of attorneys who are both available and qualified to serve as court-appointed counsel for criminal defendants who cannot afford their own counsel.

Parole

The release of a prison inmate - granted by the U.S. Parole Commission - after the inmate has completed part of his or her sentence in a federal prison. When the parolee is released to the community, he or she is placed under the supervision of a U.S. probation officer.

The Sentencing Reform Act of 1984 abolished parole in favor of a determinate sentencing system in which the sentence is set by sentencing guidelines. Now, without the option of parole, the term of imprisonment the court imposes is the actual time the person spends in prison.

Party in interest

A party who has standing to be heard by the court in a matter to be decided in the bankruptcy case. The debtor, U.S. trustee or bankruptcy administrator, case trustee, and creditors are parties in interest for most matters.

Per curium

Latin, meaning "for the court." In appellate courts, often refers to an unsigned opinion.

Peremptory challenge

A district court may grant each side in a civil or criminal trial the right to exclude a certain number of prospective jurors without cause or giving a reason.

Petit jury (or trial jury)

A group of citizens who hear the evidence presented by both sides at trial and determine the facts in dispute. Federal criminal juries.

Petition

The document that initiates the filing of a bankruptcy proceeding, setting forth basic information regarding the debtor, including name, address, chapter under which the case is filed, and estimated amount of assets and liabilities.

Petition preparer

A business not authorized to practice law that prepares bankruptcy petitions.

Petty *offense*

A federal misdemeanor punishable by six months or less in prison.

Plaintiff

A person or business that files a formal complaint with the court.

Plan

A debtor's detailed description of how the debtor proposes to pay creditors' claims over a fixed period of time.

Plea

In a criminal case, the defendant's statement pleading "guilty" or "not guilty" in answer to the charges. See also nolo contendere.

Pleadings

Written statements filed with the court that describe a party's legal or factual assertions about the case.

Postpetition transfer

A transfer of the debtor's property made after the commencement of the case.

Prebankruptcy planning

The arrangement (or rearrangement) of a debtor's property to allow the debtor to take maximum advantage of exemptions. (Prebankruptcy planning typically includes converting nonexempt assets into exempt assets.)

Precedent

A court decision in an earlier case with facts and legal issues similar to a dispute currently before a court. Judges will generally "follow precedent"-meaning that they use the principles established in earlier cases to decide new cases that have similar facts and raise similar legal issues. A judge will disregard precedent if a party can show that the earlier case was wrongly decided, or that it differed in some significant way from the current case.

Preferential debt payment

A debt payment made to a creditor in the 90-day period before a debtor files bankruptcy (or within one year if the creditor was an insider) that gives the creditor more than the creditor would receive in the debtor's chapter 7 case.

Presentence report

A report prepared by a court's probation officer, after a person has been convicted of an offense, summarizing for the court the background information needed to determine the appropriate sentence.

Pretrial conference

A meeting of the judge and lawyers to plan the trial, to discuss which matters should be presented to the jury, to review proposed evidence and witnesses, and to set a trial schedule. Typically, the judge and the parties also discuss the possibility of settlement of the case.

Pretrial services

A function of the federal courts that takes place at the very start of the criminal justice process - after a person has been arrested and charged with a federal crime and before he or she goes to trial. Pretrial services officers focus on investigating the backgrounds of these persons to help the court determine whether to release or detain them while they await trial. The decision is based on whether these individuals are likely to flee or pose a threat to the community. If the court orders release, a pretrial services officer supervises the person in the community until he or she returns to court.

Priority

The Bankruptcy Code's statutory ranking of unsecured claims that determines the order in which unsecured claims will be paid if there is

Priority claim

An unsecured claim that is entitled to be paid ahead of other unsecured claims that are not entitled to priority status. Priority refers to the order in which these unsecured claims are to be paid.

Proper

A slang expression sometimes used to refer to a prose litigant. It is a corruption of the Latin phrase 'in propria persona."

Prose

Representing oneself. Serving as one's own lawyer.

Pro tem

Temporary.

Probation

Sentencing option in the federal courts. With probation, instead of sending an individual to prison, the court releases the person to the community and orders him or her to complete a period of supervision monitored by a U.S. probation officer and to abide by certain conditions.

Probation officer

Officers of the probation office of a court. Probation officer duties include conducting presentence investigations, preparing presentence reports on convicted defendants, and supervising released defendants.

Procedure

The rules for conducting a lawsuit; there are rules of civil procedure, criminal procedure, evidence, bankruptcy, and appellate procedure.

Proof of claim

A written statement describing the reason a debtor owes a creditor money, which typically sets forth the amount of money owed. (There is an official form for this purpose.)

Property of the estate

All legal or equitable interests of the debtor in property as of the commencement of the case.

Prosecute

To charge someone with a crime. A prosecutor tries a criminal case on behalf of the government

R

Reaffirmation agreement

An agreement by a debtor to continue paying a dischargeable debt after the bankruptcy, usually for the purpose of keeping collateral or mortgaged property that would otherwise be subject to repossession.

Record

A written account of the proceeding in a case, including all pleadings, evidence, and exhibits submitted in the course of the case.

Redemption

A procedure in a Chapter 7 case whereby a debtor removes a secured creditor's lien on collateral by paying the creditor the value of the property. The debtor may then retain the property.

Remand

Send back.

Reverse

The act of a court setting aside the decision of a lower court. A reversal is often accompanied by a remand to the lower court for further proceedings.

S

Sanction

A penalty or other type of enforcement used to bring about compliance with the law or with rules and regulations.

Schedules

Lists submitted by the debtor along with the petition (or shortly thereafter) showing the debtor's assets, liabilities, and other financial information. (There are official forms a debtor must use.)

Secured creditor

A secured creditor is an individual or business that holds a claim against the debtor that is secured by a lien on property of the estate. The property subject to the lien is the secured creditor's collateral.

Secured debt

Debt backed by a mortgage, pledge of collateral, or other lien; debt for which the creditor has the right to pursue specific pledged property upon default. Examples include home mortgages, auto loans and tax liens.

Senior judge

Afederaljudge who,after attainingthe requisiteageandlengthofjudicialexperience, takessenior status,thus creatingavacancyamong a court's active judges. A senior judge retains the judicial office and maycut back his or her workload by asmuch as 75 percent,but many optto keep a larger caseload.

Sentence

Thepunishment orderedbyacourtforadefendantconvicted ofacrime.

Sentencing guidelines

Asetofrules andprinciplesestablishedbytheUnitedStatesSentencingCommission thattrial judgesuseto determinethesentencefor a convicted defendant.

Sequester

To separate. Sometimes juriesare sequestered fromoutside influences during their deliberations.

Service of process

Thedeliveryof writsor summonsesto theappropriateparty.

Settlement

Partiesto alawsuit resolve theirdisputewithouthavingatrial.Settlements often involvethe paymentofcompensationbyonepartyin at least partial satisfaction of the other party'sclaims,but usuallydonotincludetheadmission of fault.

Small business case

Aspecialtype ofchapter11casein whichthereisnocreditors'committee(orthecreditors'committee isdeemedinactivebythecourt) andin whichthedebtorissubjectto moreoversight bytheU.S. trusteethanotherchapter 11debtors. TheBankruptcyCodecontains certainprovisions designedtoreducethe time asmall business debtor is in bankruptcy.

Standardof proof

Degreeofproof required.Incriminalcases,prosecutorsmustproveadefendant'sguilt "beyond areasonabledoubt"Themajorityofcivil lawsuits requireproof 'bya preponderance of theevidence'(50 percentplus),butin somethe standardis higher andrequires "clearand convincing' proof.

Statementof financialaffairs

Aseriesof questionsthedebtormustanswerin writingconcerningsourcesofincome, transfersofproperty, lawsuitsbycreditors,etc. (There is an official forma debtormust use.)

Statementof intention

Adeclarationmadebya chapter 7debtorconcerning plans for dealingwith consumerdebts thataresecuredbypropertyof theestate.

Statute

A law passed bya legislature.

Statute of limitations

Thetime within which alawsuit must befiledoracriminalprosecutionbegun.The deadlinecan vary, depending onthetype ofcivil caseor the crime charged.

Sua sponte

Latin, meaning'of its ownwill. "Oftenrefers toa court taking anactionin acase without beingasked to dosobyeitherside.

Subordination

The act or process by which a person's rights or claims are ranked below those of others.

Subpoena

Acommand, issuedunderacourt'sauthority, toawitnesstoappear andgivetestimony.

Subpoena duces tecum

A command to a witness to appear and produce documents.

T

Temporary restraining order

A kin to a preliminary injunction, it is a judge's short-term order forbidding certain actions until a full hearing can be conducted. Often referred to as a TRO.

Testimony

Evidence presented orally by witnesses during trials or before grand juries.

Toll

See statute of limitations.

Tort

A civil, not criminal, wrong. A negligent or intentional injury against a person or property, with the exception of breach of contract.

Transcript

A written, word-for-word record of what was said, either in a proceeding such as a trial, or during some other formal conversation, such as a hearing or oral deposition

Transfer

Any mode or means by which a debtor disposes of or parts with his/her property.

Trustee

The representative of the bankruptcy estate who exercises statutory powers, principally for the benefit of the unsecured creditors, under the general supervision of the court and the direct supervision of the U.S. trustee or bankruptcy administrator. The trustee is a private individual or corporation appointed in all chapter 7, chapter 12, and chapter 13 cases and some chapter 11 cases. The trustee's responsibilities include reviewing the debtor's petition and schedules and bringing actions against creditors or the debtor to recover property of the bankruptcy estate. In chapter 7, the trustee liquidates property of the estate, and makes distributions to creditors. Trustees in chapter 12 and 13 have similar duties to a chapter 7 trustee and the additional responsibilities of overseeing the debtor's plan, receiving payments from debtors, and disbursing plan payments to creditors.

Typing service

A business not authorized to practice law that prepares bankruptcy petitions.

U

U.S. attorney

A lawyer appointed by the President in each judicial district to prosecute and defend cases for the federal government. The U.S. Attorney employs a staff of Assistant U.S. Attorneys who appear as the government's attorneys in individual cases.

U.S. trustee

An officer of the U.S. Department of Justice responsible for supervising the administration of bankruptcy cases, estates, and trustees; monitoring plans and disclosure statements; monitoring creditors' committees; monitoring fee applications; and performing other statutory duties.

Undersecured claim

A debt secured by property that is worth less than the amount of the debt.

Undue hardship

The most widely used test for evaluating undue hardship in the dischargeability of a student loan includes three conditions: (1) the debtor cannot maintain - based on current income and expenses - a minimal standard of living if forced to repay the loans; (2) there are indications that the state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor made good faith efforts to repay the loans.

Unlawful detainer action

A lawsuit brought by a landlord against a tenant to evict the tenant from rental property - usually for nonpayment of rent.

Unliquidated claim

A claim for which a specific value has not been determined.

Unscheduled debt

A debt that should have been listed by the debtor in the schedules filed with the court but was not. (Depending on the circumstances, an unscheduled debt may or may not be discharged.)

Unsecured claim

A claim or debt for which a creditor holds no special assurance of payment, such as a mortgage or lien; a debt for which credit was extended based solely upon the creditor's assessment of the debtor's future ability to pay.

Uphold

The appellate court agrees with the lower court decision and allows it to stand. See affirmed.

V

Venue

The geographical area in which a court has jurisdiction. A change of venue is a change or transfer of a case from one judicial district to another.

Verdict

The decision of a trial jury or a judge that determines the guilt or innocence of a criminal defendant, or that determines the final outcome of a civil case.

Voir dire

Jury selection process of questioning prospective jurors, to ascertain their qualifications and determine any basis for challenge.

Voluntary transfer

A transfer of a debtor's property with the debtor's consent.

W

Wage garnishment

A nonbankruptcy legal proceeding whereby a plaintiff or creditor seeks to subject to his or her claim the future wages of a debtor. In other words, the creditor seeks to have part of the debtor's future wages paid to the creditor for a debt owed to the creditor.

Warrant

Court authorization, most often for law enforcement officers, to conduct a search or make an arrest.

Witness

A person called upon by either side in a lawsuit to give testimony before the court or jury.

Writ

A written court order directing a person to take, or refrain from taking, a certain act.

Writ of certiorari

Anorderissued bythe U.S.SupremeCourtdirectingthelowercourtto transmitrecordsfora casewhichit willhearonappeal.

2016 IDAHO TEACHERS' INSTITUTE ON LAW-RELATED CIVIC EDUCATION: CONNECTING THE RULE OF LAW TO THE ROLE OF AN INDEPENDENT, IMPARTIAL JUDICIARY

June 9-10, 2016

Idaho Law & Justice Learning Center, 514 W. Jefferson Street, Third Floor, Boise, Idaho

PROGRAM OUTLINE

(Document Dated 26 May 2016)

Day One – Thursday, June 9, 2016

7:30 a.m. Sign-in and administration (including registration and fee payment by Participating teachers who seek professional development/continuing education credit)

8:00 a.m. Opening Session

- Welcoming remarks:
  - On behalf of the Idaho Supreme Court and state judiciary: Hon. Linda Copple Trout, past Chief Justice and current Interim Director, Administrative Office of the Courts
  - On behalf of Idaho's federal judiciary: Chief Magistrate Judge Ronald Bush
  - On behalf of the University of Idaho College of Law: Dean Mark Adams
  - On behalf of practitioners and lawyer representatives of the U.S. Court of Appeals, Ninth Circuit: Nicole Hancock, Stoel Rives LLP law firm, Boise

- Overview of the Teachers' Institute:
  - Curriculum design, professional development/continuing education credit, etc.: Don Burnett, Professor of Law (Emeritus), University of Idaho
  - Workshop pedagogy and objectives, with introduction of master teachers: Russ Heller, educational services supervisor for K-12 history and social sciences, Boise School District (retired)

- Brief self-introductions by the participating teachers

9:00 – 11:30 a.m.

Topic 1: Distributing Power and Securing Rights: The "Rule of Law," the U.S. Constitution, Federalism, and the "Great American Experiment"

a. Relationships among law, legal procedure, and justice
b. "Vertical" and "horizontal" dispersions of power: preventing tyranny of the few over the many
c. Enumeration of individual rights: preventing tyranny of the many over the few
d. An independent, impartial judiciary: the "great American experiment"

[9:45 – 10:00 a.m. Break]

e. Federalism and distinct characteristics of America's *multiple* court systems: national, state, tribal
f. Jurisdictional and working relationships among the courts

Teacher Q & A dialogue with Topic 1 presenters

Workshop *discussions* (convened and facilitated by master teachers):

1) What do the "independence" and "impartiality" of the judiciary mean to you? (Can you envision one without the other? How can, and should, they reinforce each other?)
2) Some commentators on judicial decisions say the courts have a duty to follow the "will of the people." What does this mean? How can you encourage students to think carefully about this?
3) How do you define "federalism" in your classroom? (How do our multiple court systems reflect federalism? What are the benefits and drawbacks of a judiciary embracing such multiple court systems?)

Core questions to be posed in this workshop discussion and in every workshop discussion during the Institute:

- *What are the main points you plan to develop in your classrooms back home?*
- *What learning outcomes will you seek for your students?*
- *What challenges will you face in achieving those outcomes?*
- *How will you assess the achievement of those outcomes?*

Principal instructors for Topic 1:

Hon. Linda Copple Trout, Past Chief Justice, Idaho Supreme Court
Professor (Emeritus) Don Burnett, University of Idaho College of Law

11:30 a.m. – 12:30 p.m.
Lunch Break

12:30 p.m. – 4:30 p.m.
Topic 2: Public (Mis)Understanding of the Judiciary and the Rule of Law

a) Civic education relating to the judiciary
b) Secondary school coverage of the judicial function
c) Mass media reporting of judicial decisions – state and federal judges' perspectives
d) Challenges facing news reporters, editors, and the courts
e) Coping with electronic and social media

Teacher Q&A with Topic 2 Presenters

[2:00 – 2:15 p.m. Break]

Workshop discussions (convened and facilitated by master teachers) -- Teaching students to be discerning citizen-consumers of news about judicial decisions:

1) In the case found under "Topic 2" tab), what is the law-based reason for the court's decision? If a future case were to present facts more "sympathetic" to the government or to the defendant, how would (or should) those facts affect the court's decision?

2) In the same case identified above, suppose you were a news reporter working under a same-day deadline. How would you outline the key elements of the first 3-5 paragraphs of a story – providing essential facts while also illuminating the rule of law?

Core questions to be posed in every workshop discussion during this Institute (see list under Topic 1 above)

Principal presenters for Topic 2:
Professor Don Burnett (panel convener)
Hon. Ronald Bush, Chief Magistrate Judge, U.S. District Court, District of Idaho
Hon. John Stegner, District Judge, State of Idaho, 2nd Judicial District (Moscow)
Professor Kenton Bird, Past Chair, Univ. of Idaho School of Journalism & Mass Media
Betsy Russell, Reporter, *Spokesman-Review,* and President, Idaho Press Club
Russ Heller and Peter Kavouras (commenting on secondary school curricula)

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Evening of Day One
Banquet at the Grove Hotel
Social at 5:30 p.m. and Dinner at 6:00 p.m. (concluding by 7:30 p.m.)
Keynote Speaker:
Hon. Stephen S. Trott, Senior Circuit Judge, U.S. Court of Appeals for the Ninth Circuit
"A Republic: What Will It Take To Keep It?"

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Day Two – Friday, June 10, 2016

8:00 – 10:30 a.m.
Topic 3: Judicial Decisions: Honoring and Implementing the "Rule of Law"

a. Distinctive roles of trial judges and appellate judges
   1) Standards for deciding issues of law, fact, and discretion
   2) Function and discipline of written decisions

b. A judge's dual responsibility: *interpreting* and *following* the law
   1) Methods of interpreting statutes and administrative regulations
   2) Development and application of case law ("common law")
   3) The role of precedent: static or stable?
   4) Interpreting and applying statutes: Illustrative case(s)
   5) Methods of interpreting constitutional text

[9:15 – 9:30 Break]

c. Examples of judicial decision-making
   1) Common law decisions
   2) State statutory interpretation
   3) State constitutional interpretation
   4) Federal constitutional interpretation
   5) Identifying the "rule of law" in a judicial opinion

6) Truth and fiction about "judicial activism"

Teacher Q&A dialogue with Topic 3 presenters

Workshop discussions (convened and facilitated by master teachers):

1) How do a judge's responsibilities differ from the expectations we have for elected office-holders in the other two branches of government?
2) What do you think are the characteristics of a good judge? Do you (should you) have any "litmus tests?"

Core questions to be posed in every workshop discussion during this Institute (see list under Topic 1 above)

Principal instructors for Topic 3:

Hon. Daniel Eismann, Justice and Past Chief Justice, Idaho Supreme Court
Professor (Emeritus) Don Burnett, University of Idaho College of Law

10:30 a.m. – 12:30 p.m.
Topic 4A: The Jury's Role in the Administration of Justice

a. Distinguishing the grand jury from a trial jury
a. Questions of law for the trial judge, questions of fact for the trial jury
b. Process for selecting impartial jurors (a demonstration)

Teacher Q & A with presenters of Topic 4A

Workshop discussions:

(Hypothetical: Selection of a jury in a hate crime case)

1) Do we know whether jurors, once selected, will actually strive to be impartial?
2) Can the power of juries be squared with the concept of the "rule of law?"

Core questions to be posed in every workshop discussion during this Institute (see list under Topic 1 above)

12:30 p.m. – 1:30 p.m.
Lunch Break

1:30 p.m. – 3:15 p.m.

Topic 4B: Special Issues in the Administration of Criminal Justice

a. Suppression of evidence acquired in violation of the federal or state constitution
b. An accused person's Sixth Amendment right to a "speedy" trial
c. Scope of the Sixth Amendment right to "the assistance of counsel"
d. Avoiding (or remedying) a wrongful conviction

Teacher Q & A with Presenters of Topic 4B

Workshop discussions:

1) The prosecutor as a "minister of justice": Should the public evaluate a prosecutor's job performance by the "batting average" of convictions?
2) The role of defense counsel: Is it simply to "get the client off?"
3) Does our criminal justice system "let people off on technicalities?"

Core questions to be posed in every workshop discussion during this Institute (see list under Topic 1 above)

Principal presenters for Topics 4A and 4B:
Hon. Candy W. Dale, United States Magistrate Judge, U.S. District Court, District of Idaho
Wendy Olson, United States Attorney, District of Idaho
Richard Rubin, Executive Director, Idaho Federal Defender Services
Sara Thomas, Idaho State Appellate Public Defender

3:15 – 3:30 p.m. Break

3:30 p.m. – 4:30 p.m.
Topic 5: Summing up: Best practices in teaching civic education with a focus on the rule of law and the role of an independent, impartial judiciary
Interactive panel-and-audience discussion between the master teachers and the teacher-participants
Convener: Russ Heller

4:30p.m. - 5:00 p.m.
Administration: Process for submitting materials to satisfy requirement for one credit hour of professional development/continuing education
Convener: Professor (Emeritus) Burnett
5:00 p.m. Adjournment

BIOGRAPHIES OF PRESENTERS/PANELISTS

Dean Mark Adams

Professor Mark Adams has served as Dean of the University of Idaho College of Law since 2014. He received his baccalaureate degree from Williams College and his Juris Doctor degree from the University of Chicago. Before coming to Idaho, he served as Associate Dean for Academic Affairs at Valparaiso University School of Law, where he taught Contracts, Labor Law, Employment Law, and Human Rights, among other courses, and served as Director of International Programs. In addition he taught at Indiana University-Indianapolis and Indiana University–Bloomington. Prior to entering academia, he practiced labor and employment law at the Seattle firm of Davis Wright Tremaine.

Professor Kenton Bird

Kenton Bird has been director of the School of Journalism and Mass Media (JAMM) since 2003. In 2015 he became the University of Idaho's director of General Education, coordinating courses common to all UI students, while continuing to serve on the JAMM faculty.

Professor Bird holds a bachelor's degree in journalism from the University of Idaho, where he was editor of the student newspaper, the Argonaut. He attended University College, Cardiff, Wales, on a Rotary fellowship, earning a master's degree in journalism history, and Washington State University, earning a Ph.D. in American Studies. His dissertation was a study of the political career of Thomas Foley, former speaker of the U.S. House of Representatives.

During a 15-year period before entering academia, Professor Bird worked as a reporter and editor for newspapers in Moscow, Lewiston, Sandpoint and Kellogg, Idaho, and spent a summer at the Washington Post. In 1989, he was chosen as a congressional fellow of the American Political Science Association, working as a congressional staff member in Washington, D.C. Professor Bird has also been a faculty member at Colorado State University and a visiting scholar at the University of Waikato in Hamilton, New Zealand.

Professor Emeritus Donald L. Burnett, Jr.

Don Burnett's career has encompassed service as an interim university president, dean of two law schools, appellate judge, state bar president, Army JAG officer, practicing lawyer, and law teacher. A native of Pocatello, Don received his baccalaureate education at Harvard, his J.D. (law) degree at the University of Chicago, and his LL.M. (advanced law) degree from the University of Virginia. He also graduated on the "Commandant's List" of the U.S. Army Command & General Staff College. As a reserve officer in the Army Judge Advocate General's Corps, Don's assignments included service as the reserve deputy commandant and academic director of The Judge Advocate General's School in Charlottesville, Virginia. He retired as a Colonel and received the U.S. Armed Forces Legion of Merit award.

Don's career has included private practice in Pocatello; service as a judge of the Shoshone-Bannock Tribal Court and as executive director of the Idaho Judicial Council; service as a judge of the Idaho Court of Appeals (a gubernatorial appointment followed by statewide election); and a faculty appointment, including a decade of service as the dean, at the Louis D. Brandeis School of Law, University of Louisville. In 2002 Don returned to his native state to join the faculty and serve as dean at the University of Idaho College of Law. In 2013-14 he served as Interim President of the University of Idaho. Since resuming faculty status at the College of Law, Don has taught Professional Responsibility in addition to Civil Procedure & Introduction to Law. He has served as a program coordinator for the Idaho Law & Justice Learning Center, a collaborative undertaking of the Idaho Supreme Court and the University of Idaho. He received emeritus status at the University in May, 2016.

Hon. Ronald E. Bush

Judge Ronald E. Bush began service as a United States Magistrate Judge for the District of Idaho in 2008. He became Chief Magistrate Judge of the District in 2015. So far as is known, he is the first redhead to serve on the federal bench in Idaho. Previously, he served as a state District Judge in Pocatello, and prior to that he was a partner in the law firm of Hawley Troxell Ennis & Hawley, LLP. He is an honors graduate of the University of Idaho, and received his law degree from The George Washington University.

Judge Bush served as a Lawyer Representative to the United States District Court for the District of Idaho and to the Ninth Circuit Court of Appeals. He was an organizer and the first president of American Inn of Court No. 130, in Boise, Idaho. He was a board member of the Federal Public Defender Program for Eastern Washington and Idaho. He received accolades for his legal and

community service from the Idaho State Bar Association, the Idaho Press Club, the Bannock Health Care Foundation, and the Southeastern Idaho United Way.

As a fifth-generation Idahoan, Judge Bush enjoyed his work as a member and chairman of the Idaho State Historical Society Board of Trustees. He was an organizer and first president of the Idaho Legal History Society, and continues on its board. He was a member for many years of the Boise Philharmonic Master Chorale. Today, he mostly sings in the car, to the annoyance of his teenage daughter.

Hon. Candy W. Dale

Judge Candy Wagahoff Dale was appointed United States Magistrate Judge by the United States District Court for the District of Idaho, entering duty in 2008. She served as Chief Magistrate Judge of the District from 2008 to 2015. She also has served as supervisor of the Prisoner Litigation Unit; supervisor of the ADR and Pro Bono Programs; and Chair of the Local Civil Rules Advisory Committee. She also serves on the District's re-entry drug court team, START (Success Through Assisted Recovery and Treatment), in Boise. She is the immediate past Chair of the Magistrate Judges' Executive Board for the Ninth Circuit, a member of the Jury Trial Improvement Committee for the Ninth Circuit, and a member of the Idaho Pro Bono Commission.

Judge Dale also is a member of and the immediate Past Chair of the Board of Trustees of the College of Idaho; an Emeritus member of the American Inn of Court No. 130, where she previously served as President; and an Emeritus member of the Advisory Council for the University of Idaho College of Law. She is a judge liaison of the Governing Board of the Idaho Chapter of the Federal Bar Association and a member of the Executive Board of the Idaho Legal History Society. In 2016 Judge Dale received the Award of Legal Merit from the University of Idaho law faculty. In 2014 she received the Justice for All Award from the Diversity Section of the Idaho State Bar, and in 2010 she received the Kate Feltham Award from the Idaho Women Lawyers.

A native of Boise, Idaho, Judge Dale obtained a Bachelor of Science degree, with honors and as a Gipson Scholar, from the College of Idaho in 1979, and a Juris Doctorate from the University of Idaho College of Law in 1982, where she served as Editor-in-Chief of the Idaho Law Review. Before her appointment to the federal bench, she was a trial lawyer for over 25 years in Idaho and a member of numerous professional and community organizations.

Hon. Daniel T. Eismann

Justice Eismann was raised in Owyhee County and graduated in 1965 from Vallivue High School near Caldwell, Idaho. He enrolled at the University of Idaho, and in 1967 he left the University to enlist in the United States Army. He served two consecutive tours of duty in Vietnam where, as a crew chief/door gunner on a Huey gunship, he was awarded two purple hearts for being wounded in combat and three medals for heroism.

After being honorably discharged from the military, he returned to the University of Idaho where he received his undergraduate degree and then graduated *cum laude* from law school in 1976. After practicing law for ten years, Justice Eismann was appointed as the Magistrate Judge in Owyhee County. As a Magistrate Judge, he was a member of the Region III Council for Children and Youth; he helped create Children's Voices, Inc., an organization to recruit, train and oversee guardians ad litem to represent the interests of neglected and abused children in court proceedings; he organized and served upon a community diversion board to handle outside the judicial system first-time juvenile offenders who committed minor crimes; and he chaired the Canyon County Juvenile Justice Task Force.

In 1995, he was appointed as a District Judge in Ada County. Convinced that there must be a more effective way to deal with the burgeoning drug problem, Justice Eismann began working to set up a drug court in Ada County. In 1998, Ada County was awarded a federal grant, and the drug court began receiving participants in February 1999. Justice Eismann presided over that drug court until just prior to taking office as a Justice of the Idaho Supreme Court. The Ada County Drug Court has proved effective in reducing recidivism and getting addicts off drugs so that they can restore their lives, rebuild their family relationships, and become productive members of the community. In 1998, the other district judges elected Justice Eismann as the Administrative District Judge for the Fourth Judicial District, consisting of Ada, Boise, Elmore, and Valley Counties. While a District Judge, he also served on the Ada County Domestic Violence Task Force.

In 2000, the people of Idaho elected Justice Eismann to the Idaho Supreme Court, where he began serving on January 2, 2001. He also serves as chair of the statewide Drug Court and Mental Health Court Coordinating Committee, and has served on and chaired various other Supreme Court committees. He is a member and past-president of the Boise Chapter of the Inns of Court and has served on the boards of the Idaho State Bar Lawyers Assistance Program, which provides assistance to lawyers with substance abuse or mental health problems, and of the Idaho Law Foundation. He also served as co-chair of Idaho Partners Against Domestic Violence and on the Criminal Justice Commission, and is a member of the Law Advisory Council for the University of Idaho College of Law. Justice Eismann served as the Chief Justice of the Idaho Supreme Court from August 1, 2007, to July 31, 2011, and he also served on the Board of Directors for the Conference of Chief Justices. In 2009, he was inducted into the National Association of Drug Court Professionals Stanley M. Goldstein Hall of Fame, and in 2013 he received the Faith, Family, and Freedom Award from the God & Country Association, Inc.

Nicole Hancock

Nicole Hancock is a trial attorney and managing partner of the Boise office of Stoel Rivers, LLP, a multistate law firm. She received her baccalaureate degree from Western Oregon University and her Juris Doctor degree from Willamette University College of Law, where she earned the distinction of serving as editor-in-chief of the *Law Review.* She is a Lawyer Representative to the Circuit Conference of the United States Court of Appeals for the Ninth Circuit. In 2014 she was named one of Idaho's "Leaders in the Law" by the *Idaho Business Review,* and she is a member of the steering committee of the Idaho State Bar's Academy of Leadership for Lawyers. She is a frequent presenter at continuing education seminars for lawyers and other professionals.

Russ Heller

When he retired in July 2014, Russ Heller was an Educational Services Supervisor with the Boise School District. Before moving to central administration, Mr. Heller taught for 27 years at Boise High School where he chaired the History and Social Sciences Department. A native of New Jersey, Mr. Heller has been a resident of Idaho for over 45 years. He holds degrees in History and in Education Administration from the College of Idaho and Boise State University.

Mr. Heller is Vice Chair of the National Council for History Education and Executive Director of the Idaho Council for History Education and the Idaho Council for the Social Studies. He is Past-President of Phi Delta Kappa and serves on the boards of the Frank Church Institute, City Club of Boise, and the Garden City Library. He has worked as a consultant and editor for the College Board, Prentice Hall, and Scholastic Publishers. Mr. Heller is the recipient of several academic and teaching honors, including two Presidential Scholar awards. He is married to Linda Heller, and has one daughter and two grand-daughters – one of whom is a sixth generation Idahoan.

Peter Kavouras

Peter Kavouras is Coordinator of Social Studies for the Idaho State Department of Education. He is President of the Idaho Council for Social Studies, serves on the board of the Idaho Council on Economic Education, and is a distinguished advisor the Idaho Council for History Education, the Idaho State Historical Society, and the Law-Related Education Committee of the Idaho Law Foundation. He is a co-founder of the Idaho Social Studies Roundtable, a group of colleagues who advocate and coordinate history and social science programs throughout the state. Before assuming his role with the Idaho State Department of Education, Mr. Kavouras had a distinguished teaching career in Ohio.

Wendy J. Olson

Wendy J. Olson was sworn in on June 25, 2010, as United States Attorney for the District of Idaho. She joined the U.S. Attorney's Office in March of 1997, and was serving as its Senior Litigation Counsel at the time of her appointment as U.S. Attorney. As an Assistant United States Attorney for 13 years, Ms. Olson prosecuted white collar crime, crimes involving the sexual exploitation of children and criminal civil rights violations. Prior to joining the U.S. Attorney's Office, Ms. Olson was a trial attorney in the Criminal Section, Civil Rights Division, U.S. Department of Justice in Washington, D.C. for four and one-half years. She also served as assistant to the legal director of the National Church Arson Task Force. Prior to joining the Department of Justice, Ms. Olson served as a law clerk for United States Chief District Court Judge Barbara Rothstein in Seattle from 1990-1992.

In April 2013, Attorney General Eric H. Holder, Jr. appointed Ms. Olson to a two-year term on the Attorney General's Advisory Committee (AGAC). Ms. Olson was inducted as a fellow in the American College of Trial Lawyers in 2012. She was a recipient of the Idaho Women Lawyers Kate Feltham Award in 2013, and the Idaho State Bar's Professionalism Award in 2011.

Ms. Olson was born and raised in Pocatello, Idaho, and graduated from Pocatello High School in 1982. In 2016 she was named one of the school's distinguished alumni. Ms. Olson graduated from Drake University in Des Moines, Iowa, with a B.A. in news/editorial journalism in 1986 and from Stanford Law School in Stanford, California, with a J.D. in 1990. Ms. Olson is married to Craig Kreiser; they have two daughters, Abby, 16, and Olivia, 13, and three Labrador retrievers, Gus, Lola and Rue.

Samuel Richard ("Dick") Rubin

Mr. Rubin is the Executive Director of Federal Defender Services of Idaho, Inc., providing defense to indigent persons accused of federal crimes. He has served as an instructor of trial advocacy at the University of Idaho College of Law and as a lecturer at the Emory University School of Law in Atlanta, Georgia.

Betsy Z. Russell

Betsy Russell is the Boise bureau chief for The Spokesman-Review, where she covers Idaho state government and other news and also writes the "Eye on Boise" blog (and has since 2004). She is the current president of the Idaho Press Club, and is also president and a founding board member of Idahoans for Openness in Government (IDOG); she also serves on the Media/Courts Committee of the Idaho Supreme Court.

She is a graduate of the University of California-Berkeley and holds a master's degree in journalism from Columbia University. She has been with The Spokesman-Review for more than 20 years, and previously worked five years as a reporter and editor for the Idaho Statesman in Boise. She is married with two children, and is an avid skier and windsurfer.

Hon. John R. Stegner

Judge John R. Stegner is a District Judge in Idaho's Second Judicial District. His chambers are in the Latah County Courthouse in Moscow, Idaho. He was appointed to the bench in 1996 by then-Governor Phil Batt. He has been elected to the position at four year intervals since being appointed. Judge Stegner is a recipient of the George G. Granata, Jr., award given by the Idaho Judiciary for his demonstrated professionalism and contributions to the Idaho Judiciary.

Judge Stegner is a graduate of Whitman College (1977) and the University of Idaho College of Law (1982). While in law school he was the Managing Editor of the Idaho Law Review. He clerked for U.S. District Judge Harold L. Ryan following law school and practiced law with the firm of Clements, Brown & McNichols in Lewiston, Idaho before becoming a judge.

Sara B. Thomas

Sara B. Thomas majored in Criminal Justice Administration, receiving her Bachelor of Arts degree from Boise State University in 1994. A year later, she entered the University of Idaho College of Law, graduating *cum laude* with a Juris Doctor degree in 1998. In school, Ms. Thomas began to focus on legal writing and appellate practice, serving as the Executive Editor of the Law Review and making her first appellate argument in front of the 9th Circuit Court of Appeals. Subsequently, she was honored to serve a clerkship with the Honorable Alan Schwartzman of the Idaho Court of Appeals.

In 1999, Ms. Thomas joined the Idaho State Appellate Public Defender's office as a deputy, handling felony and post-conviction appeals. In 2002, she became the Chief of

the SAPD's Appellate Unit. In January of 2012, Governor Otter appointed Ms. Thomas as Idaho's State Appellate Public Defender. She was additionally appointed as Chair of

the Idaho Criminal Justice Commission in June of 2013. Most recently, the Governor appointed Ms. Thomas to the newly formed State Public Defense Commission, tasked with formulating standards and qualifications for the state's public defenders, as well as data reporting requirements for the public defense system.

When not working to improve Idaho's criminal justice system, Ms. Thomas enjoys the benefits of living in the state by hiding out in the beautiful mountain ranges it has to offer and attempting to catch a fish.

Hon. Stephen S. Trott

Judge Stephen S. Trott was nominated to the Ninth Circuit Court of Appeals by President Reagan on August 7, 1987, and confirmed by the Senate on March 24, 1988. He is now on senior status as a Judge of the Ninth Circuit, with resident chambers in Boise,

Judge Trott was the Associate Attorney General of the United States from September 1986 until April 1988. He was the Assistant Attorney General of the Department of Justice Criminal Division from July 1983, until he became the Associate Attorney General. From December 1981 to July 1983, he served as United States Attorney for the Central District of California. From 1966 to 1981, he was a prosecutor for the Office of the District Attorney of Los Angeles County.

Judge Trott holds a baccalaureate degree from Wesleyan University, a law degree from Harvard Law School (1965), and an Honorary Doctor of Laws degree from the University of Idaho. Prior to his legal education, he was a member of "The Highwaymen," a folk music group best remembered for its gold 1960's record hit "Michael Row the Boat Ashore" and "Cottonfields."

Hon. Linda Copple Trout

Justice Trout graduated in 1973 from the University of Idaho with a Bachelor of Arts degree, and in 1977 received a Juris Doctorate degree from the University of Idaho College of Law. In 1999 she received an honorary Doctor of Laws from the College of Idaho. Upon graduation from law school, Justice Trout joined the Lewiston law firm of Blake, Feeney & Clark, where she was engaged in the private practice of law for six years.

In 1983, Justice Trout was appointed to the position of Magistrate Judge in the Second Judicial District. From 1987 through 1991, she assumed additional responsibilities as the Acting Trial Court Administrator for that District. In 1990, she was elected a District Judge, and handled cases in Nez Perce and Clearwater Counties. In August of 1992, she was appointed by Governor

Cecil Andrus to be the first woman justice on the Idaho Supreme Court. She was elected by the Supreme Court to the position of Chief Justice and served two consecutive terms from February 1, 1997 to September, 2004.

Justice Trout retired from the Supreme Court in October, 2007, and is currently serving as a Senior Judge. In addition, since December, 2014, she has served by appointment of the Idaho Supreme Court as the Interim Administrative Director of the Idaho Courts. She has received the Legal Merit Award from the University of Idaho law faculty and has been inducted into the University of Idaho Alumni Association Hall of Fame.

Topic 1 Outline: Distributing Power and Securing Rights: The "Rule of Law," the U.S. Constitution, Federalism, and the "Great American Experiment"

Hon. Linda Copple Trout, Past Chief Justice, Idaho Supreme Court
Don Burnett, Professor of Law (Emeritus), University of Idaho

1. "A republic ... if you can keep it"

a. Sources of law in a constitutionally framed democratic republic

b. "Vertical" and "horizontal" dispersions of power: preventing tyranny of the few over the many

c. Enumeration of rights: preventing tyranny of the many over the few

d. The constitutional guarantee of republican form of government in the states

e. The "rule of law protected by an independent, impartial judiciary: the "great American experiment"

(i) Foundational elements of the "rule of law"

(ii) Constitutional imperatives: due process and equal protection of the laws

(iii) Relationships among law, legal procedure, and justice

(iv) American justice and the "adversary system"

(v) Criminal justice: accusatorial v. inquisitional systems

(vi) Civil justice: legal frameworks (e.g., litigation and mediation) for resolving disputes

(vii) The challenge of making American justice affordable and accessible

(viii) "Against any winds that blow" -- a sampling of judges' ethical duties and constraints under the American Bar Association Model Code of Judicial Conduct
www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

- Performance of duties with diligence and impartiality
- Prohibition against ex parte communications
- Recusal when "impartiality may reasonably be questioned"
- Elected state judges: avoidance of pledges, promises or commitments as a candidate (incumbent or challenger) for election to judicial office

f. Federalism and America's courts

(1) Structure of the National ("Federal") Courts: Article III of the U.S. Constitution establishes the judicial branch of our Government by creating the Supreme Court, and by authorizing Congress to create additional "inferior" courts. Since 1789, Congress has acted on several occasion to establish courts, including the twelve regional courts of appeal as intermediate appellate courts, and a variety of local trial courts, the U.S. district courts, the primary trial courts operating in each of the States, and several specialized trial and appellate courts.

(2) Structure of the State Courts: Like the national court system, Idaho's state judiciary encompasses both appellate and trial courts. Idaho has had a "unified system" since the early 1970s.

(3) Reasons for having both state and federal courts:
- Disputes between States, or between entities in different States (federal courts)
- Matters involving cases that are unique to the laws and practices in a particular state (state courts)
- Development of expertise in particular subject areas of the law (state or federal courts)

(4) Basic Jurisdiction of the Federal Courts: The kinds of cases and appeals that are processed in these federal courts is defined, and limited, by the laws adopted by Congress.

(a) For example, the Supreme Court, as the highest court in the federal system, mostly exercises appellate jurisdiction in reviewing the decisions of the circuit courts of appeal and the highest courts in the States. However, the Supreme Court may also hear certain types of cases in the first instance, such as legal disputes between States.

(b) Appeals from the decisions of the trial courts are usually heard by thirteen, mostly regional, U.S. Courts of Appeal. These courts also review the decisions of federal administrative agencies.

(c) Federal trial courts are empowered to hear and decide a relatively narrow range of cases, primarily in the 94 U.S. District Courts. These include,

(i) Criminal cases where it is alleged that the defendant has violated a federal (as opposed to a state) law, or if the crime occurred on federal property, such as in a national park or military base. Occasionally, a party's criminal conduct may violate both federal and state law, and the respective prosecutors will usually cooperate to decide in which court system the criminal charges will be pursued.

(ii) Civil cases where the U.S. is a party or where a state law is alleged to violate the federal Constitution. They also hear and decide a variety of cases arising under federal statutes, and disputes between citizens of different states (provided there is a significant amount in controversy). Sometimes in a federal action, a party will have claims arising under both federal and state law. Moreover, in some instances, a federal statute will authorize either federal or state courts to adjudicate claims. Parties may then usually choose where the civil case will be prosecuted.

(iii) Congress has created several specialized courts to hear and decide cases arising under certain laws, including the federal bankruptcy and tax laws, to resolves claims for money against the Government, and to resolve issues involving patents and copyrights. Cases involving issues under those statutes may only be litigated in the special federal court.

(5) Basic Jurisdiction of the State Courts:

- Cases involving state statutory laws and state constitution
- Cases unique to the states e.g. family law (divorce, adoptions, custody), probate, traffic, juvenile delinquency, and child protection
- Most states have courts of both limited jurisdiction (magistrates in Idaho) and general jurisdiction (district judges in Idaho)
- In some areas of law state courts are specifically allowed to rule on the issues involving the federal government: e.g., water law (McCarren Amendment)
- Federal courts can "certify a question" to the Idaho Supreme Court when application of state law is at issue

(6) Concurrent jurisdiction of Federal and State Courts:

- Both courts can apply either United States or state constitutional provisions, although state courts give deference to U.S. constitutional interpretation by federal courts, and federal courts can review the state courts' decision
- Similarly, federal courts give deference to state court's interpretation of its own state constitution; appeal is only to the state's highest court
- Both state and federal courts can be called upon to interpret either state or federal laws other than constitutional provisions, although they typically give deference to the court that primarily interprets and applies the law (i.e. state courts re state laws; federal courts re federal laws)

h. Selection and Tenure of Federal and State Judges

(1) Federal Judges: While all federal judges are appointed, not elected, how federal judges are selected, and their terms in office, depends upon the federal courts in which they will serve.

(a) Most judges are appointed under Article III of the Constitution. These include Justices appointed to serve on the Supreme Court, and the judges of the Courts of Appeal and the District Courts. All Article III justices judges are nominated to serve by the President, with the "advice and consent" of the Senate. Once appointed, they have lifetime tenure subject to their "good behavior", and generally, may not be removed from office except through impeachment by Congress. In addition, Congress may not reduce the salaries of Article III justices and judges while in office. These terms of service, provided for in the Constitution, allow the federal judiciary to operate independently from the other branches of the Government.

(b) Judges selected to serve under Article I of the Constitution are usually appointed by other judges, have fixed terms, and may be removed from office for good cause. And, technically, Congress could reduce the salary of these judges while they are in office. For example, Article I judges include magistrate judges, bankruptcy judges, and those appointed for the tax court, military courts, and the District of Columbia's judges.

(2) State Judges:

(a) Systems vary by state In Idaho, vacancies in appellate and district judge positions are filled by gubernatorial appointment, following merit screening and submission of 2-4 qualified candidates by the Idaho Judicial Council; incumbent judges sit for six years (appellate judges) or four years (district judges), and are thereafter subject to contested non-partisan elections

(b) Vacancies in Idaho state magistrate judge positions are filled by district-level magistrates commissions, followed by an 18-month review of performance and subsequent "retention" (yes or no) elections every four years

(3) Pros and cons of election appointment processes (and implications for judicial ethics – see note above re American Bar Association Code of Judicial Conduct)

i. Tribal courts

- Judges typically are appointed by tribal governing authorities (e.g., tribal councils) for terms determined by tribal law

- Tribal courts have limited (but significant) civil and criminal jurisdiction, as provided by federal law; jurisdiction may apply to non-Indians as well as tribal members on reservations ("Indian Country")

- Interplay of tribal courts with federal courts and with state courts

- Public Law 280 and the "Indian Civil Rights Act" of 1968
  (Idaho is an "optional state" – e.g. in criminal cases; motor vehicle cases)

j. Illustrations of jurisdictional relationships

(i) Indian driver stopped by tribal police on the reservation; arrested by Idaho State Police and charged in state court with Driving Under the Influence. Which court has jurisdiction of this case? (State v. Beasley)

(ii) Bank files suit in state court to foreclose on a home mortgage, suing husband and wife who own the property; Wife then files in state court for divorce, child custody and support; Husband files bankruptcy. What court(s) have jurisdiction and over what claims?

(iii) Idaho resident is arrested for importing and possessing a large quantity of cocaine, bringing the drugs in from Mexico via California and selling them in Idaho, together with possession of a firearm – what court or courts have jurisdiction over any possible crimes here?

Workshop Discussion for Topic 1:
The "Rule of Law," the Independent and Impartial Judiciary, and Federalism

- Can you envision law without justice? Provide an example. (Is your example simply a law with which you personally disagree, or is there a more general absence of justice? Can you envision justice without law? (How is justice sustainable if not embodied in law?) If Law + "X" = Justice, what is the "X"?

- What do the "independence" and "impartiality" of the judiciary mean to you? (Can you envision one without the other? How can, and should, they reinforce each other?)

- How do you define "federalism" in your classroom? (How do the multiple court systems reflect federalism? What are the benefits and drawbacks of a judiciary containing such multiple court systems?)

Core questions to be posed in this workshop discussion and in every workshop discussion during the Teachers' Institute:

- *What are the main points you plan to develop in your classroom back home?*
- *What learning outcomes will you seek for your students?*
- *What challenges will you face in achieving those outcomes?*
- *How will you assess the achievement of those outcomes?*

What is the Rule of Law?

Derived from internationally accepted standards, the World Justice Project's definition of the rule of law is a system in which the following four universal principles are upheld:

1 The government and its officials and agents as well as individuals and private entities are accountable under the law.

2 The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.

3 The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

4 Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

These four universal principles are further developed in the following nine factors of the WJP Rule of Law Index, which measures how the rule of law is experienced by ordinary people in 99 countries around the globe. The following is a brief excerpt:

FACTORS

Constraints on Government Powers

In a society governed by the rule of law, the government and its officials and agents are subject to and held accountable under the law. Modern societies have developed systems of checks and balances ….

Absence of Corruption

The absence of corruption -conventionally defined as the use of public power for private gain -is one of the hallmarks of a society governed by the rule of law….

Fundamental Rights

Under the rule of law, fundamental rights must be effectively guaranteed. A system of positive law that fails to respect core human rights established under international law is at best "rule by fiat rather than by law ….

Order and Security

Human security is one of the defining aspects of any rule of law society. Protecting human security, mainly assuring the security of persons and property, is a fundamental function of the state ....

Regulatory Enforcement

Public enforcement of government regulations is pervasive in modern societies as a method to induce conduct. A critical feature of the rule of law is that such rules are upheld and properly applied ….

Civil Justice

In a rule of law society, ordinary people should be able to resolve their grievances and obtain remedies in conformity with fundamental rights through formal institutions of justice in a peaceful manner ....

Criminal Justice

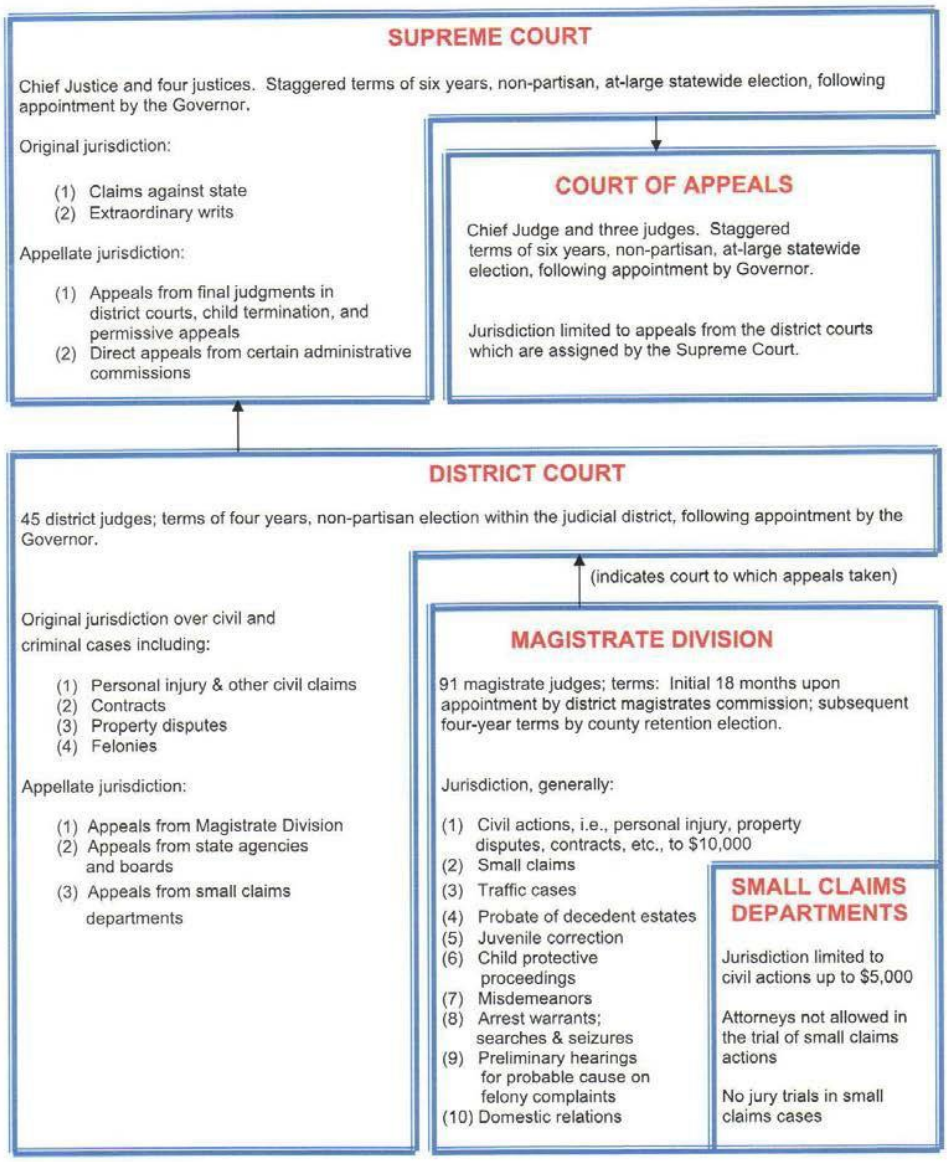
An effective criminal justice system is a key aspect of the rule of law, as it constitutes the natural mechanism to redress grievances and bring action against individuals for offenses .....

InformalMechanisms

For many countries it is important to acknowledge the role played by traditional, or 'informal', systems of law - including traditional, tribal, and religious courts, as well as community-based systems ...

Judicial Branch
Agency Profile

IDAHO'S UNIFIED COURT STRUCTURE



[From the "United States Courts" website]

Comparing Federal & State Courts

The U.S. Constitution is the supreme law of the land in the United States. It creates a federal system of government in which power is shared between the federal [national] government and the state governments. Due to federalism, both the federal government and each of the state governments have their own court systems. Discover the differences in structure, judicial selection, and cases heard in both systems:

Court Structure

The Federal Court System

Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts.

Congress has used this power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, and courts that handle specific legal matters, e.g., probate court (wills the U.S. Court of Claims, and the U.S. Court of and estates); juvenile court; family court; etc. International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters. Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade may appeal to a U.S. Court of Appeals.

A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.

The State Court Systems

The constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts. Some are referred to as Circuit or District Courts. Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals. Parties have the option to ask the highest state court to hear the case. Only certain cases are eligible for review by the U.S. Supreme Court.

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Types of Cases Heard

Federal Courts

- Cases that deal with the constitutionality (under the U.S. Constitution) of a federal or state law
- Cases involving the laws and treaties of the U.S.
- Cases involving ambassadors and public ministers
- Disputes between two or more states
- Admiralty law
- Bankruptcy
- Criminal cases involving alleged violations of federal law
- Habeas corpus issues

State Courts

- Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), wills and estates, etc.
- Criminal cases involving alleged violations of state law

State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.

Topic 2 Outline: Public (Mis)Understanding of the Judiciary and the Rule of Law

Hon. Ronald Bush, Magistrate Judge, U.S. District Court, District of Idaho
Hon. John Stegner, Judge, Second Judicial District, State of Idaho
Professor Kenton Bird, University of Idaho School of Journalism & Mass Media
Betsy Russell, Journalist, *The Spokesman Review* (Boise)
Russ Heller, Educational Services Supervisor for K-12 History and Social Sciences (retired)
Peter Kavouras, Coordinator of Social Studies, Idaho State Department of Education
Professor Emeritus Don Burnett (panel convener and moderator)

1. Opening comments highlighting the essay, "Introduction to the Judicial Focus of This Institute," and posing the following issues (Professor Burnett):

- How well do ordinary citizens understand the judicial function and the rule of law?
- How well are the judicial function and rule of law covered in secondary school curricula?
- How well are court decisions covered by the media?
    - Focus on high-profile or unusual cases
    - "Story model" of journalism (e.g., "result and reaction") with little or no explanation of the legal basis for a court's decision
    - Confusion over what the court really decided – e.g., a case requiring the court to decide what level or branch of government should decide the issue rather than the court deciding the issue itself
    - Politicized characterization of judicial outcomes
- Are there structural and resource-based impediments to enhancing public understanding of the judicial function and the rule of law?

2. Coverage of the judiciary and rule of law in secondary school curricula – some guiding questions (Russ Heller and Peter Kavouras)

- Who determines what content knowledge and skills are to be taught with regard to U.S. Government, politics and political systems, civic behaviors – and specifically, the judiciary?
    - Authority
    - Procedures
- How are State Content Standards different from district-level curriculum, both in scope and purpose (i.e., commonalities and distinctions between state and local guidelines/requirements)?
    - State content standards
    - Graduation requirements
    - Curriculum
    - Evaluation
- How might curricular/instructional initiatives by national organizations affect local curriculum and instructional strategies used in US Government, US History, and other social studies classrooms – specifically with respect to the judiciary (e.g., materials from the American Bar Association, Bill of Rights Foundation, the College Board, CCSS)?
    - Adopted materials
    - Supplementary materials
    - Instructional models
- What internal and external factors affect the delivery of classroom instruction that is content-rich, accurate, stimulating, and effective in promoting student understanding of the judiciary?
    - Resource availability
    - Teacher expertise/decision-making
    - Community interests/values

- Does the role of an independent, impartial judiciary receive sufficient attention in Idaho's State Content Standards, in your district's curriculum, and in your classroom?
    - If so, consider how the Institute's content can best complement/be integrated within existing, well-functioning curriculum
    - If not, consider how and in what ways the Institute's content informs, bolsters, or improves existing standards, curriculum, and instruction.

Links/references:

State Social Studies Standards and "Vocabulary" by grade level (see 9-12):
http://www.sde.idaho.gov/academic/social-studies/

Sample district government curriculum:
http://www.boiseschools.org/parents/secondary_curriculum/secondary_social_studies/

AP US Government/Politics (these teacher resources include the course description and a teacher' guide that offers sample syllabi and reflections by course teachers:
http://apcentral.collegeboard.com/apc/public/courses/teachers_corner/2259.html

3. Media coverage of the judiciary: a federal judge's perspective (Judge Bush)

These remarks are intended to provide a useful illustration of the nature of press coverage (and other information put into the public space) about a court decision on a controversial subject of considerable media interest. The court decided nothing more than that the plaintiffs lacked standing to pursue their constitutional claims. Compare the scope of the decision to the breadth of media coverage and other commentary.

- U.S. District Court decision dismissing a lawsuit alleging civil rights violations by the City of Boise in its enforcement of so-called "camping" ordinances. See Appendix A to Topic 2.
- Coverage of the decision by the *Boise Weekly*.
  http://www.boiseweekly.com/boise/federal-judge-dismisses-boise-homeless-camping-ordinance-lawsuit/Content?oid=3608241
- Coverage of the decision by Boise Public Radio.
  http://boisestatepublicradio.org/post/boise-homeless-case-dismissed-what-happens-next
- Coverage of the decision by the *Idaho Statesman*.
  http://www.idahostatesman.com/news/local/article41571171.html
- Coverage of the decision by the advocacy group House the Homeless, Inc.
  http://www.housethehomeless.org/bell-v-city-of-boise-lives-on-kind-of/
- Press release from the City of Boise on the decision.
  http://mayor.cityofboise.org/news-releases/2015/09/mayor-bieter-statement-on-dismissal-of-bell-v-city-of-boise/
- Press release from Idaho Legal Aid Services on the decision.
  http://www.idaholegalaid.org/node/2497/criminalization-homelessness-still-trial-boise

4. Media coverage of the judiciary: a state judge's perspective (Judge Stegner)

- Looking at court coverage by the media as an experience in "shared governance"
- Both the judiciary and the media are trying to perform their functions within their respective spheres.
- We (judges and reporters) share responsibilities and should not impede others from doing their job.
- Example of institutional tensions: fair trial (Fifth Amendment) v. free press (First Amendment)

5. Media coverage of courts: A journalism educator's perspective (Professor Bird)

- The shrinking press corps: smaller staffs, inexperienced reporters, lack of depth
- Conventions governing news coverage: the 24-hour news cycle, the myth of objectivity

- Bright spots: knowing where to look for accurate reporting of the judicial system

6. Media coverage of the courts: A reporter's perspective (Betsy Russell)

- From timeliness to accuracy, how journalists try to do it right when it comes to covering courts
- Constraints, from deadlines to short staffing to technical challenges, that make it tough to do it right
- How restrictions on media coverage of courts can backfire

Additional resources *State of the News Media 2015* http://www.journalism.org/20 *15/04/29/state-of-the-news -media-20lSI The Media Guide to Idaho Courts* http://www.isc.idaho.goy/resourcesIiSC MediaGuide.pdf

7. Challenges posed by proliferating media sources of information consumed by the public (all panel members)

- Print v. electronic media
- Social media

Teacher Q&A with Topic 2 Presenters

Workshop discussion (convened and facilitated by master teachers)
Teaching students about the judiciary and to become discerning citizen-consumers of news about judicial decisions:

1) In the case synopsized below, what is the law-based reason for the Court of Appeals' decision? If the facts of a future case were more "sympathetic" to the government or to the defendant, how (or should) the court's decision be affected?

2) Consider the challenge facing a reporter: In the same case synopsized below, suppose you were a news reporter working under a same-day deadline. How would you outline the key elements of the first 3-5 paragraphs of a story – providing the essential facts while also illuminating the rule of law? Could you capture such elements in a Twitter feed? What other sources of information, besides the Court of Appeals' written opinion, might you consult?

3) Would this writing assignment be a good exercise to use with students in your classroom? Why or why not? What alternatives would you recommend?

Workshop Discussion – Case Synopsis

[Idaho Court of Appeals decision reversing a magistrate's order suppressing evidence in a DUI prosecution]

This case originated in Latah County in February 2006 when Shawn Patrick DeWitt was injured in a single-car accident and taken to Gritman Medical Center for treatment. A Latah County Sheriff's deputy, sent to check on DeWitt's condition, detected the smell of alcohol in the emergency room. Although De Witt was unconscious, the deputy instructed a hospital staff member to draw blood from DeWitt. Testing later showed that DeWitt's blood alcohol concentration (BAC) was 0.20. [Under Idaho law, a driver with a BAC of 0.08 or higher is deemed to be under the influence of alcohol.] DeWitt was subsequently charged with second-time DUI, a misdemeanor. (He had a previousconviction.)

DeWitt's attorney filed a *motion to suppress* the evidence from the blood test, arguing that because DeWitt was unconscious the blood draw violated his rights under the Fourth Amendment to the U.S. Constitution. The Fourth Amendment prohibits "unreasonable searches and seizures" and generally requires police to obtain a search warrant except in "exigent" circumstances or where consent to the search has been obtained. Magistrate Judge William Hamlett granted the motion to suppress the evidence, and Second District Judge John Stegner affirmed on appeal. The state appealed further to the Idaho Supreme Court, which assigned the case to the Court of Appeals.

In the appeal the state, represented by Deputy Attorney General John McKinney, argued that Idaho's *implied*

consent law meant that the investigating deputy did not need DeWitt's permission to draw blood. (Under this law, "anyone driving on Idaho roads is deemed to have impliedly consented to evidentiary testing for the presence of alcohol or drugs when a police officer has reasonable cause to believe the person was driving under the influence." The presence of beer cans in DeWitt's vehicle after the accident, along with the odor of alcohol in the emergency room, gave the officer reasonable grounds to suspect that DeWitt had been driving under the influence, the state argued.)

In a written opinion filed April 29, 2008, the Idaho Court of Appeals reversed the decisions of Judge Stegner at the District Court level and of Magistrate Judge Hamlett at the Magistrate Division level. The Court of Appeals held that the blood draw had not violated the Fourth Amendment, and the Court of Appeals *remanded* the case back to Latah County for further proceeding -- i.e., for DeWitt to stand trial for DUI. A trial the state would be allowed to present evidence of the blood alcohol test.

[This synopsis was abstracted from the reported opinion in State v. Shawn Patrick DeWitt, Docket No. 33706 (Idaho Court of Appeals 2008). The court's opinion may be found online here:

http://law.justia.com/cases/idaho/court-of-appeals-criminal/2008/dewitt.html]

Key terms:

- *motion to suppress* n. a motion (usually on behalf of a criminal defendant) to disallow certain evidence in an upcoming trial. Example: a confession which the defendant alleges was signed while he was drunk or without the reading of his Miranda rights. Since the motion is made at the threshold of the trial, it is a motion *in limine,* which is Latin for "at the threshold."

- *implied consent* n. consent when surrounding circumstances exist which would lead a reasonable person to believe that this consent had been given, although no direct, express or explicit words of agreement had been uttered

- *remand.* to send back. An appeals court may remand a case to the trial court for further action ifit reverses the judgment of the lower court, or after a preliminary hearing a judge may remand into custody a person accused of a crime if the judge finds that a there is reason to hold the accused for trial.

Source: dictionary.1aw.com

Discussion questions: What standard(s) did the Court of Appeals use in determining that the Latah County Sheriff's Department acted properly in drawing blood from an unconscious victim of an automobile accident? What implications does this decision have for the enforcement of Idaho's laws against driving under the influence of alcohol (DUI)? How could a news reporter succinctly convey the facts of the case and the reasoning behind the appeals court's opinion?

Additional resource: *The Media Guide to the Idaho Courts*
pp. 5-6: Idaho's judicial structure
pp. 11-12: Criminal proceedings, esp. pre-trial motions, p. 19
Appellate process in cases originating before magistrate judges, pp. 22-23

Core questions to be posed in this workshop discussion and in every workshop discussion during the Teachers' Institute:

- *What are the main points you plan to develop in your classroom back home?*
- *What learning outcomes will you seek for your students?*
- *What challenges will you face in achieving those outcomes?*
- *How will you assess the achievement of those outcomes?*

APPENDIX A TO TOPIC 2: U.S. District Court Decision in Martin and Anderson v. City of Boise

UNITED STATES DISTRICT COURT DISTRICT OF IDAHO

ROBERT MARTIN and ROBERT ANDERSON Plaintiffs, vs. CITY OF BOISE, Defendant.	Case No. 1:09-cv-00540-REB **MEMORANDUM DECISION**

I. Background and Summary of Decision

This case, filed in 2009, has a long procedural history that includes multiple dispositive motions, multiple amendments of the Plaintiffs' Complaint, the withdrawal and addition of numerous attorneys representing the various parties, dismissal of several parties, and an appeal of a substantive ruling against the plaintiffs followed by a remand from the Ninth Circuit Court of Appeals. The facts and legal issues are well known to the parties and set forth in more detail in the Court's prior Orders. *See* Dkts. 152, 170, 286.

Pending are Plaintiffs' Motion for Summary Judgment (Dkt. 243) and Defendant's Motion for Dispositive Relief[1] (Dkt. 229), with associated motions to strike particular

[1] The City's Motion is made under Federal Rules of Civil Procedure 12(b)(1) and 56.

evidence filed by both parties (Dkts. 253, 264, 268).[2] The case now includes two remaining Plaintiffs: Robert Martin ("Martin") and Robert Anderson ("Anderson"). The only remaining Defendant is the City of Boise (the "City"). *See* Order (Dkt. 286). The remaining claims seeks prospective relief in (1) a declaration under 28 U.S.C. § 2201 that Boise City Code § 9-10-02 and §6-01-05(A) (collectively the "Ordinances") violate the Eighth Amendment's prohibition against cruel and unusual punishment, and (2) a permanent injunction enjoining the City of Boise from enforcing the Ordinances.[3] *See* Amd. Compl., pp. 22-23 (Dkt. 171).

The City argues that a threshold matter precludes the case from going any further at this point – specifically, that the case should be dismissed because the Plaintiffs lack standing. The City also argues that even if the Plaintiffs have standing to pursue the remaining claim, it has nonetheless been mooted and, regardless, Plaintiffs' claims fails on the merits. (Dkt. 229). Plaintiffs argue they have standing, the case is not moot, and they should be granted summary judgment as a matter of law based upon "undisputed"

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[2] After the hearing on these motions, several additional motions were submitted (Dkts. 283, 287, 288, 289), some of which will be resolved here, and others by separate order.

[3] Plaintiffs seek a declaration that the "Ordinances are unconstitutional under the Eighth Amendment to the extent they apply to and are enforced against individuals for whom shelter beds are unavailable whether because (1) there are fewer emergency shelter beds than there are homeless individuals or (2) mental illness or physical disability." Pls.' Mem. Mot. Summ. Jdgmt., p. 3 (Dkt. 243-2). In making this argument, Plaintiffs primarily rely on cases involving "as applied" challenges to the constitutionality of statutes. *See, e.g., id.*, p. 7. Only nighttime enforcement of the Ordinances is at issue. *See Bell v. City of Boise*, 709 F.3d 890, 896 (9th Cir. 2013).

material facts. *See* Pls.' Resp. (Dkt. 258); Pls.' Mem. Mot. Summ. Jdgmt., p. 17 (Dkt. 243-2).

Martin and Anderson allege that they face a threat of being cited for violating the Boise City Ordinances prohibiting camping and sleeping at night in public places. *See* Boise City Code §§ 6-01-05(A); 9-10-02. Under applicable law, they have a right to bring such a claim only if they have suffered an injury-in-fact sufficient to provide the Plaintiffs legal standing under Article III of the federal Constitution. Any such claim made upon an alleged threatened injury (as argued by Martin and Anderson) must be "certainly impending" or there must be a "substantial risk that the harm will occur." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, n.5 (2013). The injury-in-fact must also be concrete and particularized, and actual or imminent. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

The Court concludes for the reasons described to follow that neither Martin nor Anderson is facing such a concrete, particularized or imminent injury, and therefore neither Martin nor Anderson has standing to bring a constitutional challenge to the Ordinances. Of central importance to that ruling is the fact that the Ordinances, by their very terms, are not to be enforced when a homeless individual "is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05(A); 9-10-02. Thus, the Ordinances are not to be enforced when the shelters are full. Additionally, neither Plaintiff has shown that he cannot or will not stay in one or more of the available shelters, if there is space available, or that he has a disability that prevents him from accessing

shelter space. Thus, there is no actual or imminent threat that either Plaintiff will be cited for violating the Ordinances. In the absence of such a threat, Plaintiffs cannot allege a sufficient injury-in-fact to establish legal standing to bring their claims. Therefore, the Court lacks jurisdiction to consider the merits of the claim that the Ordinances violate certain constitutional protections, and the case must be dismissed.

II. Standing

A. Introduction

The City argues that neither Mr. Martin, nor Mr. Anderson is at risk of any "certainly impending" injury and therefore each lacks the requisite Article III standing to seek prospective relief.

B. Standards of Law

Federal Rule 12(b) permits dismissal of a complaint where the federal court has no jurisdiction to consider the claims raised in the complaint. Under our Constitution federal courts may only consider and decide "[c]ases" and "[c]ontroversies." U.S. Const., Art.

III, § 2. *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). Martin and Anderson have the burden of proving the existence of a case or controversy sufficient to confer Article III standing, at all stages of the litigation. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). To do so, there must be: (1) the existence of an injury-in-fact that is concrete and particularized, and actual or imminent; and (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Bennett v. Spear*, 520 U.S. 154, 167

(1997); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). If Plaintiffs lack standing at this particular stage of the lawsuit, notwithstanding the motion practice and discovery efforts that have transpired along the way, then the Court lacks jurisdiction to consider the merits of their remaining claims.[4]

C. Defining the Alleged Injury

The injury-in-fact requirement ensures a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks omitted). "An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation and internal quotation marks omitted).

The injury Plaintiffs allege is a threat of being cited for violating the Boise City Ordinances prohibiting camping and sleeping at night in public places. Their claims are, therefore, based upon an allegation of a future injury, which can amount to an injury-in- fact but only if the threatened injury is "certainly impending" or there is a "substantial risk that the harm will occur."[5] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, n.5

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[4] There have been a number of additional plaintiffs, in addition to Martin and Anderson, at various times in the pendency of this case. They have been dismissed for various reasons, including reasons related to the very fact of their homeless status – *i.e.*, that they live in a nomadic manner and transient status, and that either by choice or circumstance they have fallen out of contact with their counsel. As a result, such persons were unavailable to participate in the proceedings of the case, such as, by way of example, being available for the taking of their deposition. Whatever have been the circumstances leading to this point, the Court's focus in the context of the City's challenge to the standing of the two remaining Plaintiffs must be only upon those two Plaintiffs.

[5] The Supreme Court has explained that its prior holdings "do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about."

(2013) (citations and internal quotation marks omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending." *Id.* at 1147. An injury-in-fact is sufficiently alleged where there is "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Both Martin and Anderson were cited under prior versions of the Ordinances, which have since been revise[6]d. The current ordinances prohibit enforcement when "the individual is on public property and there is no available overnight shelter."[7] Boise City Code §§ 6-01-05(A); 9-10-02. Neither Martin nor Anderson has been cited under the revised Ordinances.[8] Although "past wrongs are evidence bearing on whether there is a

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Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150, n.5 (2013). Rather, in some instances, the Court has "found standing based on a substantial risk that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* (citations and internal quotation marks omitted).

[6] Plaintiff Anderson was cited in 2007 under the camping ordinance. Jones Declr., Ex. 7 (Dkt. 244–6). Plaintiff Martin was cited in 2009 under the disorderly conduct and camping ordinances. Jones Declr., Ex. 8 (Dkt. 244–7). Mr. Martin also received a camping citation in the fall of 2012. Jones Declr., Ex. 2, p. 143 (Dkt. 259–1). The Ordinances were revised in 2014.

[7] Both ordinances define the term "available overnight shelter" as "a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness at no charge." Boise City Code §§ 6-01-05(A); 9-10-02. But, they go on to state that "[i]f the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available." *Id.*

[8] Other individuals have received citations since the Ordinances were revised in 2014. *See, e.g.*, Jones Declr., Ex. 71 (Dkt. 246-20). However, as discussed earlier, the Court here is

real and immediate threat of repeated injury", *Fortyune v. Am. Multi-Cinema, Inc*., 364 F.3d 1075, 1081 (9th Cir. 2004) (citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)), here the Ordinances have materially changed since Plaintiffs were issued citations.

D. Robert Martin Does Not Have Standing

Martin resided in Boise when Plaintiffs filed this case in 2009, but he has been living in Post Falls or Hayden, Idaho, since November 2013. Jones Declr., Ex. 2, p. 107 (Dkt. 259-1); Martin Aff., ¶ 8 (Dkt. 258–5). His having moved from Boise does not preclude the possibility of standing to pursue the lawsuit's remaining claims, because he made several trips to Boise in 2014 to visit his minor son and he plans to return to Boise in the future for the same purpose. Jones Declr., Ex. 2, pp. 111, 114, 181 ("I come down [to Boise] regularly to be able to see my son and everything, so I know I'll be coming back" to visit Boise)[9]. *See also* Martin Aff., ¶¶ 3–7 (Dkt. 258–5). During his prior return trips to Boise, Martin has stayed at the Budget Inn (with help from his attorneys), Jones Declr., Ex. 2, p. 113 (Dkt. 259-1), has also stayed with friends, *id.*, p. 119, and, on the last four or five trips to Boise, stayed in his car[10], *id.* p. 120, 142. At no time, however, during the

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considering the standing of the two remaining Plaintiffs and not other parties who may have claims similar to Plaintiffs' claims.

[9] Martin says that if his employment and financial situation does not improve he will consider moving back to Boise. Martin Aff., ¶ 9 (Dkt. 258–5). However, this is too tenuous a statement to manifest an intention to move to Boise, nor is there any suggestion beyond supposition that he would move to Boise and camp outside even when there is shelter space available.

[10] Martin no longer has a vehicle.

four or five trips he has made to Boise in the last year, has he "camped outside," *id.*, p. 143, and he has no stated plans to do so on future trips to Boise.

Martin says he is concerned that if he comes to Boise and is unable to find shelter at a friend's home or an emergency shelter, then he may receive a citation for violating the Ordinances. Martin Aff., ¶ 10 (Dkt. 258–5). His concern, however, is entirely speculative because he is willing (and has in the past) stayed at the homeless shelters. Martin testified that he would stay at the Sanctuary and would consider staying at the River of Life [11], if they would let him stay there.[12] Hall Declr., pp.160–61 (Dkt. 230-1) (if River of Life allowed Martin to stay at that shelter, he would "for a day or two, if need be"); *but see id.* at p. 164 (later stating, without explanation as to why, that he might stay at the River of Life and "it's possible [he might] not"). The directors of both the River of Life and Interfaith Sanctuary shelters have said that Martin can stay at their respective

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[11] There are three emergency shelters in Boise - Interfaith Sanctuary (or the "Sanctuary"),which houses both men and women, and the two shelters operated by the Boise Rescue Mission – the River of Life shelter for men and the City Lights shelter for women and children. Pls.' St. Mat'l Facts, ¶ 10.

[12] Martin also testified that whether he would stay at the Sanctuary would depend on if his ex-wife and her new husband were staying there as well, but there is no indication in the record about how often that circumstance might occur. Additionally, it would only impact Martin if the other shelter, River of Life, was full. Hall Declr., pp.160–61 (Dkt. 230-1). Plaintiffs have argued that the River of Life never reports as full because it does not turn people away. *See* Jones Declr., Ex. 69 (Boise Rescue Mission Wepage dated 4/17/15) ("Even in our busiest months, it's our policy to never turn down anyone for food or shelter due to lack of space.") (Dkt. 246-18). However, Martin's decision to not utilize available shelter space due to his personal concerns about being near his ex-wife do not implicate constitutional concerns. The Court has considered the fact that Martin described that when going through his divorce, he was the subject of a no-contact order requiring that he stay away from his wife. There is nothing in the record, however, to suggest that there is any current no-contact order, even though Martin may choose on his own to keep his distance from his ex-wife.

shelters in the future, if necessary. Roscoe Aff., ¶ 7 (Dkt. 239) (testimony of the Boise Rescue Mission's CEO); Sorrels Aff., ¶ 6 (Dkt. 240) (testimony of the Sanctuary's Executive Director that Martin is not barred from staying there).[13] And, Martin confirmed that, in the last four years, he has not been barred from the Sanctuary because of a rule violation. Jones Declr., p. 139 (Dkt 259-1). Thus, Martin can stay at the emergency shelters.

As previously described, the Ordinances are not to be enforced against a particular individual when "the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05(A); 9-10-02. Hence, Martin's concern that he will be cited under the Ordinances if he is unable to stay with a friend or in a shelter is not reasonable given that the Ordinances specifically provide that they shall not be enforced when there is no available overnight shelter. Moreover, evidence in the record suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity. Allen Aff., ¶ 8 (Dkt. 242); *see also* Bailly Aff., ¶ 7 (Dkt. 232); Hall Declr., Ex. 7, pp. 74-75; *id.*, Ex. 5, p. 65. The record also indicates that there has not been a single night when all three shelters in Boise called in to report they

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[13] Martin was not certain that he was placed on a "ban list" at River of Light, but he thought he had been told sometime prior to 2010 that he should not come back to that facility because he "had a problem getting up in the morning". Hall Declr., Ex. 1, pp. 129-30 (Dkt. 230-1). However, Martin currently is not barred from staying at either shelter. Dkts. 239, 240 (Sorrels and Roscoe Affidavits).

were simultaneously full for men, women or families. *Id.*; *see also* Allen Supp. Aff., ¶ 4 (Dkt. 257-5).

Martin's counsel argues though that, even if there is room at a shelter, shelter may be nonetheless unavailable to Martin because the Boise Rescue Mission is a religious organization and Martin has religious objections to staying there. Both Ordinances state that "[i]f the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available." Boise City Code §§ 6-01-05(A); 9-10-02. They do not address whether the Ordinances will be enforced if individuals have other reasons for not seeking shelter, such as an objection to the religious basis of the Boise Rescue Mission or a mental illness or disability that might cause issue s.[14]

Regardless, Martin testified that he finds nothing "objectionable" about the rules at River of Life because the rules are "pretty fair for the most part and everything." Hall Declr., Ex. 1, pp. 130-31 (Dkt. 230-1). Instead, his primary complaint with River of Life is the rule that during "chapel" (a religious service which lasts an hour) he is not able to go outside and have a cigarette. *Id.* That rule does not, however, require that Martin attend chapel at the River of Life (which he acknowledges) and he did not attend chapel

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[14] The Boise Police Department's Special Order also prohibits officers from enforcing the Ordinances when a person is on public property and there is no available overnight shelter. The Special Order states that, "to qualify as 'available', the space must take into account sex, marital and familial status, and disabilities." *Bell v. City of Boise*, 709 F.3d 890, 894–95 (9th Cir. 2013). "The Special Order further provides that, if an individual cannot use available space because of a disability or a shelter's length-of-stay restrictions, the space should not be considered available." *Id.* But, the space will be considered available if the individual cannot use the space "due to voluntary actions such as intoxication, drug use or unruly behavior." *Id.*

at the River of Life when he stayed there previously, even though he had the impression that "people[15] wanted him to attend. Jones Declr., Ex. 5, p. 124 (Dkt. 250-1). *See also* Hall Declr., Ex. 1, p. 129 (Dkt. 230-1) (Martin acknowledged that nobody has ever said he had to go to chapel at River of Life). Additionally, even though Martin has been diagnosed with certain mental health disorders, nothing in the record suggests that mental health issues have prevented him from accessing the shelters. *See* Pls.' St. Facts[16], ¶ 3 (Dkt. 248).

In short, Martin's alleged future injury is too speculative for Article III purposes. He has not alleged that a mental disorder or other disability interferes with his ability to obtain shelter at the Sanctuary or River of Life, or that he will not stay at any of the shelters even if space is available, or that any "objection" he many have to the religious mission of the River of Life will certainly cause him not to seek shelter there if needed. Additionally, although Martin does allege that he may again be homeless on his visits to Boise, there is no allegation that moves beyond supposition built on speculation that he will then remain outdoors on public property, in violation of one or more of the Ordinances, when the shelters are not full.[17]

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[15] Mr. Martin did not specify whether these "people" were other individuals seeking shelter or directors or volunteers at the shelter.

[16] The part of this document referring to Plaintiffs' medical records has been redacted from the public record and, at this time, is filed under seal. Accordingly, the Court has not stated more specifically what the record reflects.

[17] "[F]or purposes of assessing the likelihood that state authorities will reinflict a given injury, [the Supreme Court] generally ha[s] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."

To carry standing, Martin must demonstrate "an intention to engage in a course of conduct arguably affected *with a constitutional interest*," but proscribed by a statute.

Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (emphasis added). Here, camping or sleeping at night in a public place is permitted, *not* proscribed, by the Ordinance *if* there is no shelter space available. Accordingly, the conduct Martin alleges he might have to engage in if he cannot stay at a friend's house or the shelters are full — *i.e.*, camping or sleeping in a public place — is not proscribed by the Ordinance, and there cannot be a credible threat of prosecution under these circumstances. *See Babbitt*, 442 U.S. at 298.

See also Pennell v. City of San Jose, 485 U.S. 1, 8 (1988) (quoting *Babbitt*, 442 U.S. at

298) (internal quotation marks omitted) ("[A] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.")).

Finally, the declaratory relief requested—that the "Ordinances are unconstitutional under the Eighth Amendment to the extent they apply to and are enforced against individuals for whom shelter beds are unavailable whether because (1) there are fewer emergency shelter beds than there are homeless individuals or (2) mental illness or

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Honig v. Doe, 484 U.S. 305, 320 (1988) (alterations added) (citing *Los Angeles v. Lyons*, 461

U.S. 95, 105, 106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); *Murphy v. Hunt*, 455 U.S. at 484 (no reason to believe that party challenging denial of pre-trial bail "will once again be in a position to demand bail"); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws)).

physical disability"— does not align with the inchoate alleged injury. *See* Pls.' Mem. Mot. Summ. Jdgmt., p. 3 (Dkt. 243-2); but compare declaratory relief requested in Rev. 2d Amd. Compl, pp. 22-23 (Dkt. 172). First, there is no evidence that shelter beds are unavailable to Martin because of a mental illness or physical disability, so the declaratory relief in that regard would not redress his particular alleged injury. Second, when there are not enough emergency shelter beds available, regardless of the reason, the Ordinances by their plain terms may not be enforced. The City's evidence is that the Ordinances are not enforced under these circumstances. Thus, it does not matter (but also does not condone nor condemn the sad commentary that flows from the difficulties faced by Boise City, or any community, in sheltering the homeless population) whether there are fewer beds in shelters than there are homeless individuals for purposes of standi ng.[18] If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs who are homeless and do not have a disability or other issue of Constitutional interest that the evidence shows prevents them from accessing the shelters.

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[18] This *is* a permissible consideration in assessing the merits of Plaintiffs' claims. Part of what the Court may consider if it applies the framework from *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) *vacated by* 505 F.3d 1006 (9th Cir. 2007), is whether the homeless Plaintiffs have no choice but to be present in the City's public spaces. *See* Order, p. 8 (Dkt. 115). Plaintiffs also discuss overcrowding at the shelters and the use of overflow mats, but that evidence and arguments relate to the merits of Plaintiffs' claims and not Plaintiffs' ability to demonstrate that they are threatened with injury from the alleged unconstitutional enforcement of the Ordinances at issue that is fairly traceable to the City's conduct. To satisfy the causation requirement, plaintiffs "must show that the injury is causally linked or 'fairly traceable'" to the City's Ordinances, "and not the result of independent choices by a party not before the Court." *Nw. Requirements Utilities v. F.E.R.C.*, No. 13-70391, 2015 WL 4716753, at *5 (9th Cir. Aug. 10, 2015).

E. Robert Anderson Does Not Have Standing

Anderson has not been warned by law enforcement officials regarding conduct that might violate the Ordinances in the four years preceding his most recent deposition. Hall Declr., Ex. 2, p. 101 (Dkt. 230–2). At the time of his most recent deposition, Anderson had housing because he lived with his girlfriend [19]. Hall Declr., Ex. 2, pp. 81, 84–87 (Dkt. 230–2). His most recent Declaration describes that his girlfriend moved in February of 2015, which led to Anderson living with a friend for several months before obtaining shelter at the River of Life for a night and then at the Sanctuary.[20] (Dkt. 296–1).

Unfortunately, Anderson is again homeless and relies on the shelters to provide him a place to sleep [21].

However, as is the case with Martin, Anderson also will seek a place at a shelter instead of sleeping outside, and he has successfully done so.[22] Hall Declr., Ex. 2, p. 103

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[19] Mr. Anderson did not pay rent to his girlfriend and his only "income" was food stamps. He is not eligible for government housing assistance and has been denied a request for social security benefits. Hall Declr., Ex. 2, pp. 81, 84-87 (Dkt. 230-2).

[20] This Declaration provides relevant information for the Court to assess Anderson's standing, and standing must exist throughout every stage of litigation, which means the Court must reassess the facts relevant to standing as they change. Accordingly, the Court has considered the information provided. Plaintiffs' Motion seeking permission to file the Declaration is granted.

[21] The City's mootness argument rests on its assertion that Plaintiffs' claims for prospective relief is moot because Plaintiffs are no longer living unsheltered in Boise. *See* Def.'s Mem., p. 6 (Dkt. 229-2). Because those circumstances have changed with regard to Anderson, the Court has not considered whether this case is now moot based on Plaintiffs' living situations.

[22] Anderson reported that he slept on the streets in 2014 for three nights even though he could have accessed a shelter on those nights, because he was ashamed to return to the shelters. Hall Declr., Ex. 2, p. 70 (Dkt. 230-2). The reason for his reluctance to seek shelter for three nights does not evince an unwillingness to stay at shelters in the future (even if one assumed that

(Dkt. 230–2). There is nothing to prevent Anderson from seeking shelter at the River of Life or the Sanctuary, s*ee* Dkt. 239, ¶ 7; Dkt. 240, ¶ 6, although he does not like the rules at the River of Life that constrain his ability to smoke before he goes to bed, nor does he like the River of Life's "religious policies". Hall Declr., Ex. 2, p. 73 (Dkt. 230–2).

Anderson was not forced to engage in prayer at the River of Life during his March 2014 stay, but says he was forced to attend chapel services. Hall Declr., Ex. 2, p. 76 (Dkt. 230–2). But his statement in that regard was clarified in that he said that to join a particular treatment program that would allow him to stay for an extended period on the upper floors of the River of Life, he was required to attend chapel and other religious services. However, he decided not to participate in that particular program. He was, nonetheless, still permitted to stay overnight on the first floor without joining the program, subject, of course, to the other rules of the shelter. *Id.*, pp. 72–79, 1 11.[23] In other words, he objected to the requirements placed on those who stay longer than 17 days and then choose to enter the program allowing access to treatment program housing in the upstairs portion of the facility. Regardless, Anderson has stayed at the River of Life recently and has stated he will do so in the future. *Id.* at p. 110. Additionally,

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such an emotion, understandable as it may be, is a cognizable basis for avoiding shelter when shelter was available, under a standing analysis), nor has Anderson made any such assertion. Indeed, Anderson has been residing at the Sanctuary shelter since May of 2015. Anderson Declr. (Dkt. 296-1).

[23] Anderson explained that he was required to attend chapel services at a stay in 2007, before the Boise Rescue Mission was "changed . . . over" to River of Life, and before this litigation commenced. Hall Declr., Ex. 2, p. 74 (Dkt. 230-2). He has stayed at the facility since that time.

although he has been diagnosed with certain mental health disorders, nothing suggests that mental health issues have prevented Anderson from utilizing the shelters. *See* Pls.' St. Facts, 3 (Dkt. 248).

As with Martin, Anderson is worried he will receive a camping citation if there is no shelter space available and he has to camp or sleep in a public place. But also as with Martin, the revised Ordinances do not allow Boise City Police Officers to cite Anderson when no shelter space is available. Anderson is willing to stay at either available shelter, even if he prefers the Sanctuary and dislikes some of the policies at the River of Life. In such circumstances, Anderson's worry that he might be cited under the Ordinances does not amount to a substantial risk of imminent harm sufficient to demonstrate the injury-in- fact required for Article III standing.

F. Conclusion on Standing Issues

That these particular Plaintiffs lack standing does not mean, for all purposes, that other putative plaintiffs also would lack standing to pursue similar claims. There may, for instance, be an individual with a mental or physical condition that has interfered with her or her ability to seek access to or stay at shelters, with such difficulties likely to continue in the future.[24] Or, perhaps a homeless individual will refuse to stay at the River of Life

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[24] *See, e.g.*, Jones Declr., Ex. 80 (Dkt. 247-4) (police report describing contact with an apparently homeless individual who advised that he has PTSD and cannot stay at a shelter); *id.*, Ex. 77 (Dkt. 247-1) (list of individuals who are barred from the Interfaith Sanctuary and, if coupled with an objection to the religious practices at River of Life, may be able to demonstrate threatened injury); *id.*, Ex. 78 (Police report noting probable cause for camping violation for homeless person who apparently suffers from a mental illness because he "said he had not tried to get into any shelters because they try to get him onto illegal drugs and steal his medicine"); *id.*, Ex. 72 (Dkt. 246-21) (homeless individual cited when the Sanctuary was full because River

and can support a claim that the facility requires participation in religious practices for homeless individuals to stay in temporary housing there. However, this Court cannot entertain and decide controversies on possibilities, and it is similarly inappropriate for the Court to surmise conclusively whether such circumstances would be sufficient for other persons to establish standing. The Court will not substitute the possibility that another person might have standing to make the claims raised here as a substitute for the shortcomings of the standing claimed for Martin and Anderson. Instead, the Court must do exactly what has been done in this decision – consider the evidence and the allegations of future threatened harm to determine whether such a record rises to the level required for these particular plaintiffs to establish standing in the circumstances of this case. That answer, on this record, is "no." Because the Plaintiffs lack standing to pursue their claims, the Court lacks jurisdiction to consider the merits of those claims and this case will be DISMISSED.

G. Miscellaneous Motions

Before the hearing, Plaintiffs filed a Motion for Leave to File Supplemental Authority related to the standing issue (Dkt. 283). The City acknowledges that the Court has discretion to consider the three cases Plaintiffs brought to the Court's attention, but asks that the Court decline to do so. (Dkt. 293). The Court concludes that it is appropriate to consider the additional case authority, and has done so. The City is not prejudiced in any substantive manner by the presentation of the supplemental authority,

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of Light had capacity, but individual was "barred" from the facility).

and has had the opportunity to try and distinguish these cases from the facts of the present case. *See* Dkt. 293.

After the hearing, Plaintiffs filed a Motion for Leave to Identify Record Citations made at the hearing (Dkt. 289), for the stated purpose of assisting the Court in efficiently reviewing the record. Plaintiffs filed an appendix identifying the pages of the record that support their arguments. The appendix is a useful tool to compile evidence already in the record, it does not add to the record. Accordingly, Court will grant the Motion and has considered the appendix.

Plaintiffs also asked that the Court strike the affidavits of Jayne Sorrels and Jacob Lang, filed in support of the City's opposition to Plaintiffs' Motion for Summary Judgment. *See* Dkts. 257-3; 257-4. Plaintiffs argue that these affidavits contain (1) expert opinion testimony they are unqualified to provide and (2) statements for which they lack personal knowledge and foundation or constitute hearsay. (Dkt. 268-1).

However, the Court did not rely on any of this evidence to find that Plaintiffs lack standing in this case, and the challenged affidavits relate primarily to issues going to the merits of this cas[25]e. Accordingly, Plaintiffs' Motion to Strike (Dkt. 268) is moot.

Additionally, having considered the evidence relevant to the standing issue and having ruled in the City's favor, the Court further finds that the City's Motions to Strike also are moot.

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[25] Although the Court has cited to Sorrels's Affidavit, the citation was not to any evidence objected to as unqualified expert testimony.

III. Order

For the reasons set forth above, IT IS HEREBY ORDERED:

(1) Defendant's Motion for Dispositive Relief (Dkt. 229) is GRANTED;

(2) Plaintiffs' Motion for Summary Judgment (Dkt. 243) is DENIED.

(3) Defendant's Motions to Strike (Dkts. 254 & 263) are DENIED as MOOT.

(4) Plaintiffs' Motion to Strike (Dkt. 268) is DENIED as MOOT.

(5) Plaintiffs Motion for Leave to File Supplemental Authority (Dkt. 283) is GRANTED.

(6) Plaintiffs' Motion for Leave to Identify Record Citations (Dkt. 289) is GRANTED.

(7) Plaintiffs' Motion seeking permission to file the Robert Anderson Declaration (Dkt. 296) is GRANTED.

A separate judgment will be filed contemporaneously with this Order.

DATED: **September 28, 2015**

Honorable Ronald E. Bush

U. S. Magistrate Judge

Topic 3 Outline: Judicial Decisions: Honoring and Implementing the "Rule of Law"

Hon. Daniel Eismann, Justice and Past Chief Justice, Idaho Supreme Court
Professor Emeritus Don Burnett, Past Judge, Idaho Court of Appeals

1. Distinctive roles of trial courts and appellate courts [Burnett]

a. Standards for deciding issues of law, fact, and discretion – see Appendix A to Topic 3 below

b. The function and discipline of written decisions

2. A judge's dual responsibility: *interpreting* and *following* the law [Eismann]

a. Methods of interpreting statutes and administrative regulations

(i) Courts are bound by well-established rules of statutory interpretation that guide their reading of legislation.

(ii) When the language is clear, the Court must not stray beyond the "four corners" of a statute to interpret its terms.

(iii) When the language is ambiguous (more than one *reasonable* interpretation), the Court should consider the relationship of the language to the remainder of a statute or statutory scheme, and may examine outside sources such as legislative history with the goal of ascertaining legislative intent.

(a) What if statutory language seems clear but yields an absurd result?

(iv) The Court will give "deference" to an administrative agency's interpretation of a statute within that agency's area of expertise *(Chevron* deference).

b. Development & application of case law ("common law") [Burnett]

(i) The role of precedent: Should be law be static or stable (trial court and appellate court perspectives)?

(ii) Why does precedent matter? (The law should be not only wise, but also predictable and uniform in its application.)

c. Illustration: Interpretation of "criminal intent" (*James v. City of Boise*) [Eismann]
[See "background information" in Appendix B to Topic 3 below]

(i) Does the phrase "criminal intent" have a single, clear meaning?

(ii) If not, what sources should be examine to define it?

3. Judges as guardians of state and national constitutions (" ... against any winds that blow")

a. What is a Constitution? Must it be written? What about tradition? [Eismann]

b. Contrasting methods of interpreting constitutional text [Eismann/Burnett]

(i) "Originalism" and "textualism"

(ii) "Living" constitution

c. Judicial review of constitutionality of statues and regulations [Eismann]

4. Illustrative, landmark constitutional decisions

a. The U. S. Constitution in the U.S. Supreme Court:

(i) Due process and equal protection: The path from *Strauder* to *Plessy* to *Brown* [Burnett]

(ii) Drawing the line on federal authority over "interstate commerce" [Eismann]

b. The Idaho Constitution in Idaho's appellate courts:

(i) Idaho's version of "search and seizure" (*State v. Thompson)* [Burnett]
Idaho Court of Appeals decision:
http://www.leagle.com/decision/19871832745P2d1087_11822/STATE%20v.%20THOMPSON

Idaho Supreme Court decision:
http://legaliq.com/Case/State_V_Thompson_114_Idaho_746

5. Truth and fiction about "judicial activism" [Eismann]

a. Judges can decide only the cases before them

b. Judges have no authority ability to be "roving legislators"

Q&A dialogue with Topic 3 presenters

Workshop Discussion

What constitutional standard(s) would you apply in the following case(s)? What result(s)?
[See information on the Fourth Amendment in Appendix C below]

- *Kyllo v. U.S.*, 533 US 27 (2001)
  Does the 4th Amendment require the police to obtain a warrant based on probable cause before standing outside a home and scanning it with a thermal imaging device to detect abnormal heat sources consistent with marijuana "grow" operations?

- *U.S. v. Jones*, 132 S.Ct. 945 (2012)
  Does the 4th Amendment require the police to obtain a warrant based on probable cause before

attaching a GPS tracing device to a vehicle and using it to monitor the vehicle's movements for the next 28 days?

- *Morris v. U.S. Army Corps of Engineers*, CV-13-336 (U.S. District Court, Idaho)
  Do the Second and Fourth Amendments allow the Army Corps of Engineers to ban firearms in public parks the Corps maintains adjacent to dams it constructed, including a ban on firearms in the tents of any campers?

Core questions to be posed in this workshop discussion and in every workshop discussion during the Teachers' Institute:

- *What are the main points you plan to develop in your classroom back home?*
- *What learning outcomes will you seek for your students?*
- *What challenges will you face in achieving those outcomes?*
- *How will you assess the achievement of those outcomes?*

Appendix A to Topic 3: Judicial Decisions
Trial and Appellate Functions -- Standards of Appellate Review

Disputes are resolved in courts by application of the law to (often disputed) sets of facts. To reach a resolution, there must first be a determination of what the facts are and then a determination of what the applicable law is. Resolution of some types of conflicts will call for an exercise of the judge's discretion. Thus, there are three broad categories of decisions that must be made in trial courts:

1. Fact-finding (truth-seeking). A jury (or judge acting without a jury) does this by weighing the evidence, which may be physical, documentary, or testimonial – involving assessment of a witness's demeanor, facial expression, body language, reason for bias, plausibility of the story, etc.

2. Law determination, which is done by the judge. The judge has to determine what constitutional provisions or statutes or judicial precedents are applicable to the facts presented, and what they require or prohibit. In a jury trial, the judge must instruct the jury on the law that is to be applied to the facts found by the jury.

3. Discretionary decisions, which are generally done by a judge. Examples:
   - Sentencing a criminal defendant
   - Child custody and visitation
   - Whether and how to sanction a party for failing to timely disclose a witness in advance of trial

   Discretionary decisions often involve balancing competing interests. Where a decision is committed to the trial court's discretion, there generally is a range of permissible results from which the judge may choose.

An appellate court's review differentiates among these categories of decisions. The standard of appellate review depends on the type of decision that is challenged.

1. Findings of fact will be set aside only if the appellate courts determines that they are clearly erroneous (the evidence supporting the decision is so insubstantial that the reviewing court is left with a firm conviction that the finding is erroneous). In the Idaho state system, an appellate court will reverse only if there is no substantial evidence to support verdict.

   a. Appellate courts give great deference to a jury's or trial court's factual findings due to fact-finder's opportunity to view demeanor of witnesses, body language, voice, facial expressions, courtroom conduct, etc.

   b. The constitutional right to jury trial would not be honored if an appellate court could readily overturn a jury verdict.

2. Determinations of law will freely reviewed on appeal; appellate courts consider the trial court's analysis, but are not bound to defer to the trial court's interpretation of the law.

3. Discretionary decisions will be reviewed to determine whether discretion has been "abused" – meaning that the appellate court will consider whether the trial judge correctly understood the issue to be one of discretion, whether the judge exercised discretion within boundaries established by law, and whether the trial judge made his/her discretionary decision through an exercise of reason. If these tests are satisfied, an appellate court will not overturn a discretionary decision merely because the appellate judges would have made a different choice.

Litigants are entitled to a fair trial, not a perfect on. Therefore, even if an appellate court determines that error has occurred in the trial court, the appellate court generally will not overturn the result reached by the trial court if the error was "harmless". In a civil case this means that the error probably had no substantial effect on the outcome. In a criminal case it means that the appellate court is convinced beyond a reasonable doubt that the same outcome would have been reached even in the absence of the error. Example: certain evidence was erroneously admitted, but other evidence overwhelmingly supports the result reached by the trial court.

An appellate court usually announce its decision in a case through the issuance of a written opinion. The written opinion imposes on the appellate court the discipline of careful, explained reasoning. The opinion also serves these purposes:

- Resolving the case
- Explaining the reasons for the appellate decision, preferably in a way that persuades the reader that justice has been accomplished
- Engendering public confidence in the justice system
- Demonstrating the "rule of law
- Establishing precedents for the appellate court and lower courts to follow in the future

Appendix B to Topic 3: Judicial Decisions

Synopsis of "Criminal Intent" Case
James v. City of Boise, Idaho Supreme Court
http://law.justia.com/cases/idaho/supreme-court-civil/2015/42053.html

FACTS

At dusk on a Sunday evening, the police responded to a report of a burglary in progress at a dentist office. A passerby had called the police and reported hearing glass breaking and seeing a woman crawling through a broken basement window when he went to investigate. He said the woman appeared to be under the influence of drugs.

The first officer to arrive spoke with the passerby and then walked to the building, where he saw through a basement window a woman holding a large malt liquor beverage in her left hand and what appeared to be a knife with a 4 to 5 inch blade in her right hand. He observed her briefly, and she then walked out of sight. One of the dentists who owned the building arrived and told the police that there should not be anyone in the building, especially anyone who had to break a window to enter.

About forty minutes after arriving, the police decided to have a police dog search the building. One officer used the public address system in his patrol car to announce to the person in the building that they were police officers, that if the suspect did not surrender they would send in a police dog, and that the person in the building may be bitten. The person inside the building did not respond to that announcement.

The entire upstairs and the majority of the basement were dark, and the police determined that searching with a police dog would be reasonable because the crime of burglary was a felony, there had been other burglaries of dentist offices that month, one suspect appeared to be armed with a knife, and using a police dog would be safer to all involved than having the officers search the building with guns drawn.

Before entering the building, the canine officer announced loudly through the open front door that they were officers, that if the person did not surrender a police dog would be sent, and that the dog would bite the person if it found her. There was no response.

The officers entered the building with the police dog and searched the upstairs, finding nobody. They stopped at the top of the stairs leading down into the basement, and the canine officer again announced loudly that they were officers, that if the person did not surrender a police dog would be sent, and that the dog would bite the person if it found her. Again, there was no response.

The canine officer sent the dog down the stairs, and the dog began barking, indicating that he smelled human odor. The canine officer gave the dog a command to bite, which would cause the dog to use his eyes and ears to find the person. After a few seconds, the officers heard a woman screaming from the basement.

They hurried down the stairs and found the woman on the floor in the bathroom with the dog biting her. They called paramedics, who were waiting nearby, and the paramedics took the woman to the hospital. She had a blood alcohol content of 0.27, over three times the legal limit for driving.

It was later discovered that the dentists were leasing the basement to man who operated a dental laboratory to make crown bridges. He had allowed the woman to use a small part of the basement to make dental appliances for her business. She had gone to the building to repair a neighbor's denture and had locked herself out when she went outside to smoke a cigarette and had accidentally left her keys in the building. She had broken the basement window while trying to open it.

ISSUE

The woman sued the city and police officers for the torts of assault, battery, and wrongful imprisonment. A tort is a civil wrong for which a person can be awarded damages. Pursuant to a state statute (the Idaho Tort Claims Act), the city and its officers would not be liable for those torts unless the officers acted with "criminal intent." The

statute does not define the term "criminal intent," and there is no fixed legal meaning of that term. The issue was what does the term "criminal intent" mean in the statute.

The term "criminal intent" has various meanings, including: (a) the intent to do wrong; (b) the *mens rea* for a particular crime, which may include criminal negligence; and (c) the intent to violate the law, which implies knowledge of the law violated.

The term *mens rea* is Latin for "guilty mind," and is the state of mind that the prosecution must prove a defendant had in order to convict the defendant of a crime. There are two general types of *mens rea*: a general intent or a specific intent. A crime with a general intent only requires that the defendant knowingly perform the prohibited acts and does not require any intent to violate the law (e.g., to be guilty of speeding, there is no requirement that one intend to drive in excess of the speed limit). A crime with a specific intent requires a specific intent in addition to the prohibited act (e.g., theft requires that the defendant have the specific intent to deprive another of property or to appropriate it to himself).

There was a comparable crime for each of the torts alleged by the woman.

The crime of assault is:

> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
>
> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

The crime of battery is:

> (a) Willful and unlawful use of force or violence upon the person of another; or
>
> (b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or
>
> (c) Unlawfully and intentionally causing bodily harm to an individual.

The crime of false imprisonment is:

> [T]he unlawful violation of the personal liberty of another.

How would you have decided this case? (What do you believe the Legislature meant by the phrase "criminal intent" as used in the Idaho Tort Claims Act?)

Appendix C to Topic 3: Judicial Decisions
Background on Workshop Discussion Cases Raising
Fourth Amendment Issues

4th Amendment
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fact Pattern in Thermal Imaging Case

Federal agents suspect a defendant of growing marijuana in his home. Marijuana grown inside usually requires high-intensity lamps, emanating heat. To detect this heat, the agents used a thermal imager to scan the residence from the street. Such thermal imagers detect infrared radiation, which all objects emit but which is invisible to the naked human eye. The scan of the defendant's home revealed that the garage roof and a side wall ofthe defendant's house were relatively hot compared to the rest of the home and substantially warmer than neighboring homes. Agents concluded that the defendant was using high intensity lights to grow marijuana inside his home. Based on this thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of the defendant's home and the agents subsequently found an indoor marijuana growing operation inside the residence. The defendant claims that the agents conducted an illegal search with the thermal imaging device in violation of the 4th Amendment.

Question

Does the 4th Amendment require the police to obtain a warrant based on probable cause *before* standing outside a home and scanning it with a thermal imaging device to detect abnormal heat sources consistent with marijuana "grow" operations?

Related Cases

Without a warrant, does the 4th Amendment allow the police to:

1. Conduct a visual stake-out from across the street for 24 hours?
    a. *(US.* v. *Knotts,* 460 U.S. 276 (1983»
2. Fly over the home in an attempt to visually spot a grow operation?
    a. *(California* v. *Ciraolo,* 476 U.S. 207 (1986)
3. Rummage through the home's garbage sacks left on the curb for public disposal?
    a. *(California* v *Greenwood,* 486 U.S. 35 (1988)
4. Rummage through the home's garbage sacks left on the front porch?
5. Place a GPS location device on a car and monitor its location for 4 weeks? (See *U.S. v. Jones,)*
6. Follow the home's occupants to a park where they are staying in a tent and search that tent without their permission while they are away? See *Morris* v *U.S. Army Corps of Engineers,* CV-13-336 (U.S. District Court, Idaho)

If the goal of the law is to identify a constitutional standard that judges could apply to resolve the foregoing (and future) 4th Amendment issues, what constitutional standard(s) would you announce and apply in your decisions?

Topic 4 Outline:

4A – The Jury's Role in the Administration of Justice

4B – Special Issues in the Administration of Criminal Justice

Hon. Candy W. Dale, U.S. Magistrate Judge, District of Idaho
Wendy Olson, United States Attorney, District of Idaho
Richard Rubin, Executive Director, Idaho Federal Defender Services
Sara Thomas, Idaho State Appellate Public Defender

A. Process and issues concerning selection of an impartial jury

1. Impartial jury is one of the Sixth Amendment's guarantees in a criminal case

(a) Brief history of the jury trial

(b) Scope of the right to a jury trial:

(i) The Sixth Amendment provides right to speedy and public trial before an impartial jury of the state and district where the crime was committed.

(ii) No right to jury trial for a "petty offense". If maximum punishment for a crime is incarceration for 6 months or less, strong presumption that the offense is petty.

(iii) Defendant can waive right to jury trial, but waiver must be knowing, voluntary, in writing, consented to by the government and approved by the court

(c) The Seventh Amendment provides for the right to a jury trial in "suits at common law" (civil cases) where the value in controversy exceeds $20 (civil cases). Jury trial is also available in civil actions to enforce statutory rights when the statute provides for a jury trial or when the statutory right is analogous to a common law cause of action.

(i) Where the remedy sought monetary, jury trial is typically available; but where the remedy is not monetary – such as an injunction – a jury trial typically is not available.

(ii) There is no constitutional right to jury trial where a party sues the United States, unless specified in a statute waiving the government's sovereign immunity (United States has to waive sovereign immunity to be sued); but there is a constitutional right to a jury trial in an action brought by the United States to recover a civil penalty

2. Obtaining a jury pool

a. 28 U.S.C. section 1865{b) establishes qualifications to serve as a member of a grand jury or trial jury

- Person must be: citizen of U.S. who has resided one year or more in judicial district; at least 18; able to read, write and understand the English language with sufficient proficiency to fill out juror qualification form; able to speak English; mentally and physically capable of rendering satisfactory jury service; does not have felony charges pending; hasn't been convicted of a felony, unless rights were restored.

b. District jury selection plan incorporates statutory requirements as set forth in the Jury Act (28 USC Section 1861), to ensure all litigants have the right to grand and petit juries selected at random from a fair cross section of the community.

- Source lists for jurors' names include registered voters and, in the District of Idaho, individuals with Idaho driver's licenses or identification cards issued by the Idaho Department of motor vehicles.
- Exemptions and excuses, along with length of service, are included in the Jury Plan

3. Selection process

a. Number of jurors:

- Between 6 and 12 in civil case (no alternates)
- Twelve in criminal cases; however, at any time before a verdict, the parties may stipulate, with the court's approval to proceed with fewer than 12 (no more than 6 alternates)

b. Pre-selection questionnaire

- In every case prospective jurors complete a qualification questionnaire and a supplemental questionnaire which is used to save time with jury selection.
- Also may be used when lengthy trial anticipated} certain biases may be at issue or there has been a great deal of pretrial publicity
    - After review of pre-selection questionnaire} court may excuse prospective jurors whose responses show hardship or prejudice
    - Usually court will consult with counsel before excusing jurors
    - Confidentiality of answers cannot be guaranteed (Press has been held constitutionally entitled to have access to at least some of the information contained in questionnaires.)
    - Court may redact certain information in high profile cases, such as juror names, at least while trial is pending

c. Voir dire

- Developed under the common law as a natural component of the Sixth Amendment's impartial jury guarantee
- Importance of voir dire in a criminal trial:
    - Marks the beginning of the trial
    - "Tolls" the running of the Speedy Trial Act's time limits
    - Once panel is selected and sworn, jeopardy attaches in criminal cases
    - Examination of prospective jurors by Court and/or attorneys to help select an impartial jury; accordingly, a defendant is entitled to a voir dire that fairly and adequately probes a juror}s qualifications -including questions calculated to uncover actual and likely sources of prejudice
    - Voir dire in civil cases addresses many of same concerns, such as juror veracity and bias

d. Judge's role

- Requests proposed questions for voir dire by the judge, which occurs before attorneys have their opportunity
- Exercises control over attorney voir dire; rules on hardship excuses and challenges for cause; and supervises the exercise of peremptory challenges.

e. Attorneys' role

- May help draft pre-selection questionnaire, if one is used
- May play some role in voir dire (participation is discretionary with the court under both criminal and civil federal rules of procedure)
- May make challenges for cause and peremptory challenges, in order to strike prospective jurors

    - Challenges for cause are based on juror partiality/bias/inability to put biases aside; must convince court that juror cannot be fair in the case before the court. The number of challenges for cause is unlimited.

    - Peremptory challenges seek to strike a prospective juror without cause. There is no constitutional right to peremptory challenges; the right is created by statute.
        - In civil cases, each side is entitled to 3 peremptory challenges. Court may grant additionally peremptories where there are multiple parties, i.e., multiple defendants or plaintiffs.
        - In felony criminal cases, a defendant entitled to 10 peremptory challenges (more if
        - multiple defendants); the government is entitled to 6. In capital cases, however, each side is allowed 20 peremptory challenges. In misdemeanor cases, each side is allowed 3 such challenges.
        - Additional peremptory challenges are allowed alternates are to be impaneled; these additional challenges are available only as to the alternate pool

    - *Batson* challenges to peremptory challenges:
        - In 1986 the U.S. Supreme Court held that racially discriminatory exercise of peremptory challenges by a prosecutor violated equal protection rights of criminal defendant and challenged juror (*Batson v. Kentucky)*
        - In 1991, Supreme Court held *Batson* also applied to civil cases
        - In 1992, Supreme Court held that peremptory challenges by criminal defendants can also be subjected to a Batson challenge
        - In 1994, Supreme Court held that peremptory challenges based on gender violate the Equal Protection Clause
        - Exercising Batson challenges is difficult, must do so before juror is released. Three-step procedure:
            i. Prima facie case that peremptory challenge discriminatory
            ii. Once established, opposing party must offer facially nondiscriminatory reasons for the peremptory challenge
            iii. Moving party must prove purposeful discrimination

Q & A with Presenters of Topic 4A

Workshop Discussion for Topic 4A:
ISSUES RELATING TO JURY SELECTION IN A HATE CRIME CASE

A woman wearing a hijab (veil) over her head and chest had just finished shopping for groceries at the Walmart on State Street when she was confronted in the parking lot by two men, one of whom was wearing a baseball cap with an American flag and the word "Idaho Patriot" on it. The second man wore a t-shirt with an American flag, a cross and writing that said "God and Country". The men had just finished eating at the McDonalds inside the Walmart. The man with the baseball hat yelled at the woman that she should "dress like an American" or "go back to your own country." As she tried to move away, the two men followed her and one of them yelled, "When I was in Desert Storm, we trained our guns on people like you." She turned her shopping cart toward the men. The man with the baseball cap struck her once with his hand, knocking her to the ground. He then took off his hat, held it in her face and said, "This is what Americans cover their hair with." The woman suffered cuts and bruises. Two other shoppers who had overheard the exchange intervened and called the police.

The two men were charged with violating 18 U.S.C. sec. 245 and 18 U.S.C. 241. Section 245, which makes it unlawful to use force or the threat of force to willfully intimidate and interfere with a person's right to enjoy a place of public accommodation because of the person's race, color, or national origin. Section 241 is a civil rights conspiracy statute. The man with the t-shirt pleaded guilty to a misdemeanor violation of 18 U.S.C. 245, admitting that he made the comment about Desert Storm. The man with the baseball cap is set for trial in federal court in Boise three weeks before another criminal trial in which two Muslim women originally from Somalia are charged with wire fraud for executing a credit card scheme in various Southern Idaho cities. The wire fraud case has received considerable publicity because it was investigated by the Joint Terrorism Task Force, although no terrorism charges were filed.

A group called the "Idaho Patriots" has received considerable attention for its opposition to a BLM decision to close several campgrounds for the summer season due to lack of BLM personnel to maintain the campgrounds. The "Idaho Patriots," on their facebook page, describe themselves as "true Americans who defend the Constitution and liberty of all against the overreaching federal government."

The defendant going to trial, a fifty-five year-old U.S. Army Veteran, is not a member of the Idaho Patriots. When questioned by police in the parking lot, he said that he first approached the woman because she made a rude remark as they both exited the Walmart. He said that he hit her in self-defense because she was trying to ram him with the shopping cart.

The alleged victim is an Idaho native. She converted to Islam in 2009, when she married a Boise State graduate student from Saudi Arabia.

Discussion Questions:

- How should the judge conduct jury selection? What method is best for gathering initial information about potential jurors? What potential biases should the court, the prosecutor and the defense attorney be concerned about? What is the best way to learn about those biases? What kinds of responses from jurors would be sufficient for a challenge for cause? What concerns should the judge have during the exercise of peremptory challenges?

- Do we know whether jurors, once selected, will actually strive to be impartial?

- Can the power of juries be squared with the concept of the "rule of law?"

Core questions to be posed in this workshop discussion and in every workshop discussion during the Teachers' Institute:

- *What are the main points you plan to develop in your classroom back home?*
- *What learning outcomes will you seek for your students?*
- *What challenges will you face in achieving those outcomes?*
- *How will you assess the achievement of those outcomes?*

B. Special issues in the administration of criminal justice

1) Indictment under Fifth Amendment

(a) In federal system, Constitution provides right to indictment by grand jury for all capital or "infamous crimes" (those in which the maximum term of imprisonment is more than one year -- i.e., felonies)

2) Speedy trial

(a) The Sixth Amendment guarantees the right to a speedy and public trial in all criminal prosecutions. Sixth Amendment generally includes due process and substantive guarantees for trial in criminal cases. (It also includes right to confront adverse witnesses and the right to assistance of counsel.)

(b) Speedy trial right is implemented federally through the Speedy Trial Act of 1974, 18 U.S.C. section 3161, which imposes time limits within which criminal defendants must be brought to trial.

(c) The Act provides that trial must begin within 70 days after the later of the date of indictment/information and the date of the defendant's initial appearance before a judicial officer in the district in which charges were brought.

(d) There are several possible exclusions that cause the time to stop running, including the need to prepare for trial in a complex case, the unavailability of an essential witness, the continuity of counsel pending pretrial motions, and the fugitive status of the defendant.

(e) The right to a speedy trial belongs to the public, as well as to the defendant, so it is not sufficient for defendant to waive speedy trial; any delay must also fit into one of the statutory exclusions.

(f) The court's calendar congestion is not a basis to exclude time under the Speedy Trial Act; thus, courts generally must be aware of the amount of "speedy trial" time left in a given case and bring those criminal cases to trial, even if civil trials are thereby delayed.

(g) The usual remedy for violation of the speedy trial right is dismissal of the case, although not necessarily with prejudice,

3) Sixth Amendment right to counsel

(a) U.S. Supreme Court held in *Gideon v. Wainwright* that person accused of a serious crime has a right to the assistance of counsel – to be furnished by the government if the individual cannot afford to retain an attorney.

(b) Stages of proceedings at which right to counsel attaches

(c) Right of self-representation

4) Post-conviction proceedings: See Appendix

Q & A with Presenters of Topic 4B

Workshop Discussion:

- The prosecutor as a "minister of justice": Should the public evaluate a prosecutor's job performance by the "batting average" of convictions?

- The role of defense counsel: Is it simply to "get the client off?"

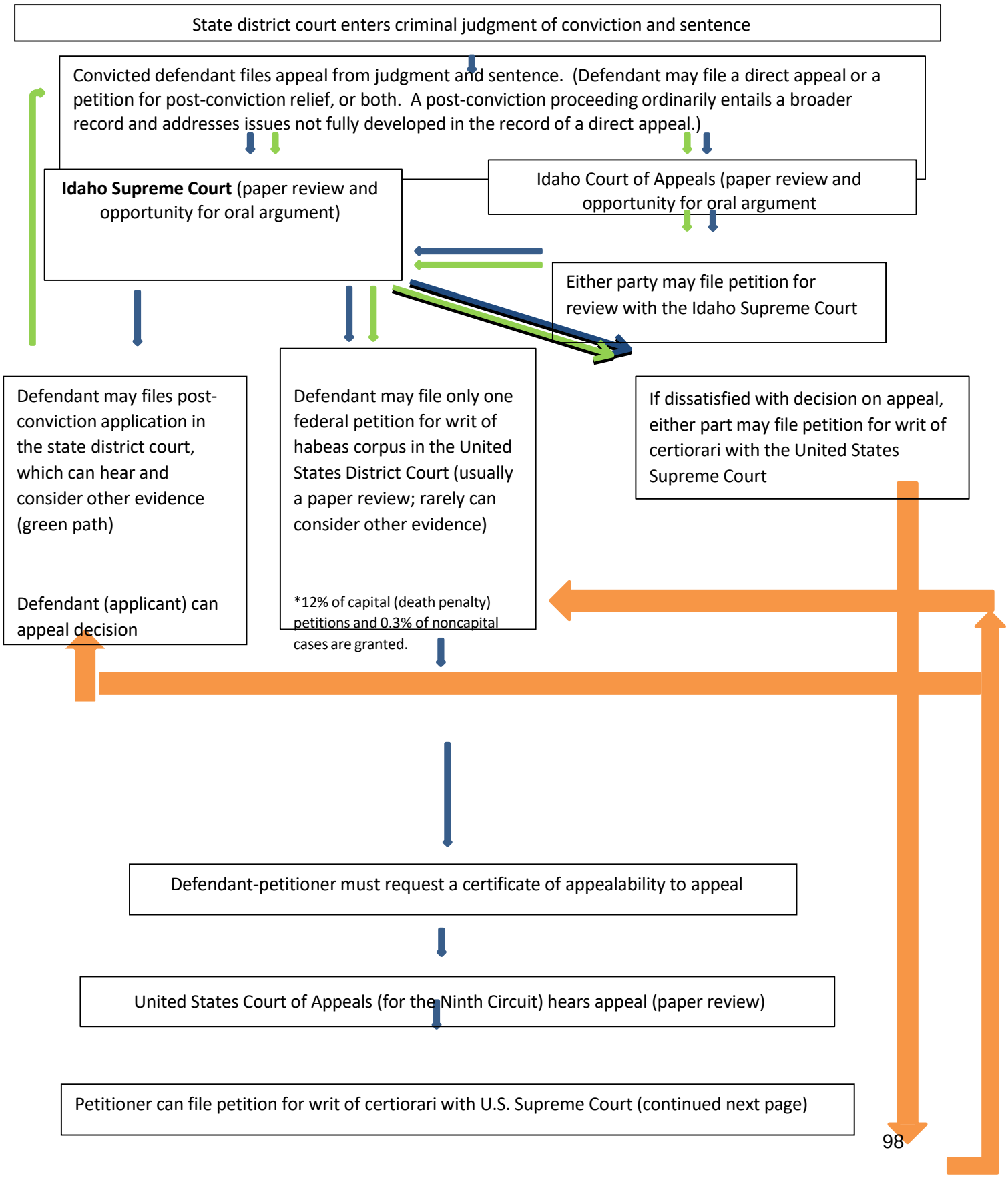
- Does our criminal justice system "let people off on technicalities?"

What pre-conceptions on these questions do your students bring into the classroom? How can those preconceptions best be addressed?

Core questions to be posed in this workshop discussion and in every workshop discussion during the Teachers' Institute:

- *What are the main points you plan to develop in your classroom back home?*
- *What learning outcomes will you seek for your students?*
- *What challenges will you face in achieving those outcomes?*
- *How will you assess the achievement of those outcomes?*

Appendix to Topic 4B: Special Issues in the Administration of Criminal Justice
FLOW CHART OF POST-CONVICTION PROCESSES



United States Supreme Court either decides to take the case (paper review with opportunity for oral argument) or denies a petition for writ of certiorari. The case is completed (blue path). *About 8,000 total petitions are filed each year, and about 80 of those are heard.

If the petitioner has not yet filed a state post-conviction application or a federal petition for writ of habeas corpus, he can do so now (orange path).

3:15 – 4:30 p.m.

<u>TOPIC 5</u>: Summing up: Best practices in teaching civic education with a focus on the rule of law and the role of an independent, impartial judiciary

Interactive panel-and-audience discussion between the master teachers and the teacher-participants

Convener: Russ Heller

(This page left blank for your notes.)

4:30 – 5:00 p.m.
Administration:

a.. Discussion of process for submitting materials to satisfy requirement for award of one credit hour of professional development/continuing education. See booklet tab.

b. Distribution and collection of teachers' evaluations of the Institute. See booklet tab (please remove and submit).

c. Distribution of certificates of teachers' participation in the Institute

Convener: Professor (Emeritus) Don Burnett, with Russ Heller

Adjournment

2016 IDAHO TEACHERS' INSTITUTE ON LAW-RELATED CIVIC EDUCATION: CONNECTING THE RULE OF LAW TO THE ROLE OF AN INDEPENDENT, IMPARTIAL JUDICIARY

Idaho Law & Justice Learning Center
Boise, Idaho, June 9-10, 2016

PROCESS FOR OBTAINING CONTINUING EDUCATION/PROFESSIONAL DEVELOPMENT CREDIT

The professional development credit will be awarded on a pass-fail basis by the University of Idaho and entered on the record of the University Registrar.

The pass-fail determination will be made by the "instructor of record" for this Institute:

Don Burnett, Professor of Law (Emeritus), University of Idaho
Postal Address: 875 Perimeter Drive, MS 2321
Moscow, ID 83844-2321
E-Mail: dburnett@uidaho.edu
Direct Dial: (208) 885-6305

Please submit *one* of the following, preferably by email attachment, to Professor Burnett no later than June 24, 2016:

- Template lesson plan on one of the Institute topics, that you intend to use and develop in your classroom(s), or

- 1-2 page reflection essay on the content of one of the Institute topics, including a statement of your vision on how to enhance your students' understanding of the rule of law, and the role of an independent, impartial judiciary, in relation to that topic.

- NOTE: Teachers who participated in the 2015 Institute must submit a lesson plan or reflective essay different from their 2015 submission.

TEACHERS INSTITUTE ON LAW-RELATED CIVIC EDUCATION:
CONNECTING THE RULE OF LAW
TO THE ROLE OF AN INDEPENDENT, IMPARTIAL JUDICIARY

Idaho Law & Justice Learning Center
Boise, Idaho, June 9-10, 2016
Sponsored by the Idaho Federal Courts, Idaho Supreme Court, and University of Idaho

Teachers' Evaluation of the Institute

Please return your completed evaluation form to the registration table.

Please rate the following and comment:

1. The Institute was well organized.
Strongly Agree Agree Disagree Strongly Disagree

2. The Institute offered a variety of workshops that were interesting and/or will help me in my teaching/professional development.
Strongly Agree Agree Disagree Strongly Disagree

3. The facility provided a good learning environment.
Strongly Agree Agree Disagree Strongly Disagree

4. The pre-Institute communication was adequate.
Strongly Agree Agree Disagree Strongly Disagree

a. Do you have suggestion(s) for improving Institute communications?

_____

Survey Information:

5. What did you like best about the Institute?

_____

_____

6. What about the Institute would you like to see improved or changed?

_____

_____

7. What topics/content areas would you like to see addressed at another Institute?

_____

_____

8. How did you hear about the Institute?

_____

We welcome any general comments and your evaluation of specific workshops and presentations. Please use the reverse side of this form for your remarks, and check here_____if you have done so. Thank you!