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A TRIBUTE TO JUSTICE COTTER ON THE OCCASION OF HER RETIREMENT FROM THE MONTANA SUPREME COURT

Caitlin Boland Aarab*

Justice Patricia O'Brien Cotter retired from the Montana Supreme Court in December 2016, after serving sixteen years on the bench. The people of Montana elected her twice,¹ and their initial and continued faith in her was amply rewarded. She authored many prescient opinions and dissents during her tenure, on subjects ranging from mortgage fraud and the asbestos dangers in the Libby mine, to freedom of speech when that speech is directed against police officers and criminal defendants' rights to exculpatory evidence.² But by all accounts her most enduring contributions to the law and the people of Montana are the spirit of consensus that animated all of her decisions and the independence with which she approached every case.

Justice Cotter was born and raised in South Bend, Indiana. She graduated from Western Michigan University in 1972 and went to work as a paralegal for Sonnenschein, Carlin, Nath and Rosenthal, a Chicago law firm that specialized in real estate law. After two years as a paralegal, she enrolled in law school at the University of Notre Dame. There she met her husband, Michael Cotter, who is now the former United States Attorney for the District of Montana. Justice Cotter graduated from law school in 1977 and practiced law in South Bend for six years. In 1984, she and Michael moved to Great Falls to practice law with veteran trial lawyer John Hoyt. And so she became a Montanan.

In August of 1985, she and Michael started their own firm, Cotter & Cotter, with bookshelves, some law books, a copier, a couple of chairs, two card tables, and a one-line rotary phone. Soon they added professional help, decent furnishings, and a baby—in that order.

In those days, Justice Cotter was among few women who were trial lawyers, even fewer who were married to trial lawyers, and fewer still who practiced with their husbands. Another attorney (now judge) of that description, Elizabeth Best, also practiced law with her husband Mike in Great

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1. *2000 Statewide General Canvass*, MONT. SEC'Y OF STATE (NOV. 7, 2000), available at <https://perma.cc/BR9F-VLW8>; *2008 Statewide General Canvass*, MONT. SEC'Y OF STATE (NOV. 4, 2008), available at <https://perma.cc/363N-W6JG>.

2. See, respectively, *McCulley v. American Land Title Co.*, 300 P.3d 679 (Mont. 2013); *Orr v. State*, 106 P.3d 100 (Mont. 2004); *State v. Robinson*, 82 P.3d 27, 31–32 (Mont. 2003) (Cotter, J., dissenting); *State v. Root*, 359 P.3d 1088, 1094–95 (Mont. 2015) (Cotter, J., dissenting).

Falls. Judge Best recounts a story that illustrates just how uncommon this arrangement was:

One morning, I arrived at the office to open the mail. There was a letter from a defense lawyer from Kalispell offering to settle a case. I knew it was early, but I could not remember having a client by that name. So, I picked up the phone and called the lawyer in Kalispell. I told him I didn't have a client by that name. His response: "Oh. I knew it was a female lawyer from Great Falls who practiced with her husband, named Mike. I thought it was you." I did call Pat and offer to negotiate the case for her, but she took it from there.³

In private practice, Justice Cotter handled mostly plaintiffs' cases, often personal injury. This kind of work required travel all over the state for depositions, court appearances, and the like. One hot summer day, Justice Cotter was taking a deposition in the basement of a law firm in Sidney. During a recess in the deposition, all but one of the other lawyers left the room, and Justice Cotter was left alone with the opposing lawyer. To break the silence, opposing counsel leaned in and said, "I hear you are the heiress to the O'Brien Paint Company fortune. Any truth to the rumor?" In her signature firm and friendly way, Justice Cotter replied, "If I were the heiress to the O'Brien Paint Company fortune, I wouldn't be sitting here in this basement with you right now." Among those who know her, Justice Cotter's wit is legendary.

Justice Cotter also developed a reputation as a talented brief writer. She joined the Montana Trial Lawyers Association's Amicus Committee to assist with the preparation of amicus curiae briefs to be filed before the Montana Supreme Court. She became Chair of the Committee in 1993 and served in that role until she resigned in 1999 to run for the Court. In 1992 and again in 1998 she received MTLA's Public Service Award for her contributions to the amicus committee and, by extension, the citizens of Montana. At an annual convention, MTLA presented her with a plaque to commemorate the award. It thanked Pat Cotter for "his" service to the people of Montana. When the error was discovered, MTLA asked Justice Cotter to return the plaque so it could be replaced. Her response was, "He will not be returning the plaque."

In 1999, Justice Cotter decided to run for the seat on the Montana Supreme Court being vacated by retiring Justice Bill Hunt. It was a four-way race initially,⁴ and the statewide campaign required a dedication bordering on devotion from Justice Cotter and her family. During the campaign, she put 50,000 miles on the family Suburban and ran through a new set of tires. Justice Cotter's 11-year-old daughter, Kathleen, was her almost

3. Interview with Judge Beth Best (Mar. 17, 2017).

4. 2000 *Statewide Primary Canvass*, MONT. SEC'Y OF STATE (June 6, 2000), available at <https://perma.cc/G7BS-ABGV>.

constant traveling companion. Kathleen's company came at a price, however. In order to secure Kathleen's company, Justice Cotter was required to book a hotel that had a pool and order pizza for dinner. Beanie Babies were also acceptable currency. The pair attended many parades, public events, and private gatherings, including several Republican Lincoln dinners and Democratic Jefferson Jackson dinners. One night at a Lincoln dinner, an attendee inquired of Kathleen whether she was having a good time. Kathleen shrugged and said, "The Democrats have better food." She still takes after her mother.

Although Justice Cotter had supported Democratic candidates for office and had represented mostly plaintiffs in her practice, she excelled at winning votes in a non-partisan race. One campaign advisor said of Justice Cotter, "She defied the labels opponents tried to put on her. She could walk into a room full of people who were not expected to vote for her and leave with many commitments of support. Voters liked her personality, but they also liked that she didn't pander and she didn't make any promises other than to take each case as it came to the Court and decide it upon the facts and the law as she saw it." When she was interviewed by the Great Falls Tribune about her campaign, Justice Cotter said, "The hardest thing to gain is the vote of confidence of people you typically oppose."⁵ She worked hard to do just that, and her success in the campaign foreshadowed her similar successes on the Court.

In the June 6, 2000 primary election, Justice Cotter won more votes than her next two opponents combined.⁶ She and Chris Tweeten advanced to the November 7, 2000 general election, which she won with 55% of the vote.⁷ On January 1, 2001, Justice Cotter became Montana's third female Supreme Court Justice.⁸

A few weeks after her swearing in, Justice Cotter was adjusting to the routine and rigors of being the newest Supreme Court Justice. Her chambers were decorated with memorable items like a basketball hoop on her bathroom door and a pillow embroidered with "If the shoe fits, buy it in every color," and she felt that she had made an acceptable transition. One Tuesday afternoon, Justice Cotter walked into the conference room for the Justices' weekly conference on pending cases, and she found a sticky note sitting atop a proposed opinion that was placed on the table in front of her chair. In the unmistakable handwriting of Chief Justice Karla Gray, the note

5. Sanjay Talwani, *Cotter 'running for the court, not against it'*, GREAT FALLS TRIBUNE, March 24, 2000, at 3M.

6. 2000 Statewide Primary Canvass, *supra* note 4.

7. 2000 Statewide General Canvass, *supra* note 1.

8. Justice Patricia O'Brien Cotter, MONT. SUPREME COURT, <https://perma.cc/P63E-TALQ> (last visited June 7, 2017).

said, “Please resign.” Justice Cotter was stunned and horrified. It took her a few minutes to realize that Justice Gray meant “please re-sign the opinion.” Apparently it had been amended.

Small misunderstandings aside, Justice Cotter quickly settled into her new role. Justice Jim Regnier, with whom she served from 2001 to 2004, recalls walking into her chambers on spring afternoons to find her working on opinions and consistently checking the score of the Cubs game. Justice Regnier said of her, “In retrospect, after Mike and the kids, that is what she likes the most: the Cubs and the law.”⁹ (It is worth noting that Justice Cotter was a Cubs fan decades before they won the 2016 World Series.) Justice Jim Nelson, who served with her until 2012, admires her for being “progressive in the application of Montana’s Constitution, yet always mindful of the requirements of procedure and the law in the calculus of our deliberations and opinion writing.”¹⁰ In Justice Nelson’s view, Justice Cotter’s work was incalculably aided by her years of experience in the practice of law.

In 2008, Justice Cotter ran for reelection. This time, she was unopposed,¹¹ and she was reelected to a second eight-year term. By then Justice Cotter had earned a reputation for being the Court’s consensus builder. Justice Baker described Justice Cotter’s influence this way:

At conferences, Pat commanded respect. Every member of the Court listened to her, and she often guided the Court’s discussion and disposition of an issue. But Pat was not dogmatic or unwilling to change her mind. To the contrary, she commanded respect because she also listened to everyone else and worked with her colleagues to puzzle through the law and get the right answer. She got along with all of her colleagues and brought a wit and humor to the Court that helped everyone work together better. She was the epitome of an appellate judge. Pat and I had frequent disagreements in cases; when we did, we sat down and talked about them, pinpointing our areas of disagreement and where we might work to a consensus. Often we were able to reason through and craft a solution; she steered many opinions to a course that resulted in a more accurate and thorough analysis of the law and a stronger decision from the Court.¹²

Justice Baker’s description of Justice Cotter’s influence on the Court is borne out by the Court’s internal data. Since 2006, when such records first were kept electronically, Justice Cotter has served with eleven other Justices. From 2006 through the end of her second term in 2016, she was tasked with authoring the Court’s majority opinion more often than any other Justice but Chief Justice McGrath.¹³ There could be a simple explana-

9. Interview with Justice Jim Regnier (Mar. 30, 2017).

10. Interview with Justice Jim Nelson (Mar. 17, 2017).

11. 2008 Statewide General Canvass, *supra* note 1.

12. Interview with Justice Beth Baker (Mar. 11, 2017).

13. Justice Cotter authored over 21% of the majority opinions in which she joined.

tion for this fact: it could be that Justice Cotter was more efficient than her colleagues and so was assigned more opinions by the Chief Justice. Or it could be that Justice Cotter truly was a consensus builder and for that reason she was chosen most often to speak for the Court's majority. Those who know Justice Cotter would be surprised by neither explanation.

In addition to consensus, Justice Cotter brought a singular wit to the Court and to her opinions. Although she treated each case with the seriousness due to a legal dispute in the state's highest court, occasionally her orders and opinions would dwell on the humor presented by a set of facts. Those who had the privilege of clerking for Justice Cotter know that for every published opinion involving humorous facts, there was a private opinion Justice Cotter only wished she could publish. Her opinion in *State v. Ellis-Peterson*,¹⁴ for instance, was the sort that had both a published and an unpublished version. Here are the facts that occasioned the two versions.

Two Billings police officers were dispatched to investigate a report of a woman riding a horse down a city street at 7:15 in the morning. The officers noticed immediately that the woman was intoxicated because she was having extreme difficulty remounting her horse. They discovered she had a suspended driver's license, but they told her to go home and sober up. A little while later, an unidentified woman called 911 to complain to the dispatcher that she should be able to ride her horse without being questioned by police. The dispatcher asked the same officers to perform a welfare check on the caller, and when they arrived to the caller's house they recognized the defendant. She told the officers to leave her alone because she was "just drunk." The officers did so, but only after warning her not to drive anywhere. Before leaving, the officers asked a neighbor to call 911 if she saw the defendant leave in a vehicle. As the officers were leaving, the defendant appeared naked in her doorway and screamed at them. Not twenty minutes later, the defendant got in her car, and the neighbor called 911. The same officers responded to the call about a drunk driver. They followed the defendant and signaled for her to pull over, but she drove by many safe stopping places before pulling into a parking lot and parking incorrectly. The officers smelled alcohol on the defendant and they arrested her for driving under the influence, but they did not have her perform any field sobriety tests. They were "extremely comfortable" that the information they had about her was sufficient to justify her arrest.¹⁵

The defendant argued below and on appeal that the officers did not have probable cause to arrest her.¹⁶ In the published version of the Supreme Court's opinion, Justice Cotter analyzed the requirements for an arrest

14. 2016 MT 159N, 384 Mont. 554 (unpublished).

15. *Ellis-Peterson*, ¶¶ 2–6.

16. *Id.* ¶ 7.

under § 46–6–311(1), MCA, and concluded that the officers did indeed have probable cause to arrest the defendant.¹⁷ The unpublished version of the opinion consisted of two sentences: “If these officers did not have probable cause to arrest Ellis-Peterson, no arrest in history has ever been legal. Affirmed.” Those two lines probably would have done the trick.

Although she enjoyed the humor that cases often presented, Justice Cotter remembers a different kind of case as being significant—the kind of case in which she and the Court had the power and privilege to right a wrong. Justice Cotter particularly recalls two cases that made her feel pride in her work.

The first is *McCulley v. American Land Title Co.*¹⁸ In 2006, Mary McCulley bought a condominium in Bozeman and applied for a 30-year residential property loan from US Bank to complete the purchase.¹⁹ She made regular payments on the loan for eighteen months until she received a letter notifying her that a balloon payment on her 18-month commercial loan was due in December of 2007.²⁰ McCulley did not know until receiving that letter that her loan was not the 30-year residential mortgage for which she had applied.²¹ After attempting unsuccessfully to modify the loan, McCulley sold the condo and paid off the note.²² Proceeding *pro se*, she sued U.S. Bank for fraud, but the district court granted the bank’s motion for summary judgment.²³ McCulley appealed,²⁴ and Justice Cotter was assigned the opinion.

Writing for the majority, Justice Cotter reversed the district court, holding that “[a]lthough inartfully, McCulley has set forth sufficient facts to raise a genuine issue of whether a false and material representation may have been made to her, that she acted upon it in ignorance of the true facts, and that the Bank intended her to do so, resulting in damages.”²⁵ Justice Cotter recounted each fact McCulley had proffered in support of her contention that she had been misled, and by doing so, Justice Cotter elevated substance over form. On remand, a jury awarded McCulley \$1,000,000 in compensatory damages and \$5,000,000 in punitive damages, a verdict that was firmly upheld by the district court and affirmed on appeal.²⁶ Justice Cotter is proud of her work on this case not because the legal issues were

17. *Id.* ¶ 10.

18. 300 P.3d 679 (2013).

19. *Id.* at 681.

20. *Id.* at 682.

21. *Id.*

22. *Id.*

23. *Id.*

24. *McCulley*, 300 P.3d at 682.

25. *Id.* at 686.

26. *McCulley v. U.S. Bank of Montana*, 347 P.3d 247 (Mont. 2015).

momentous, but because she and the Court helped a *pro se* plaintiff get her day in court and emerge victorious.

The other case is *Orr v. State*.²⁷ *Orr* was brought by Libby miners who suffered from asbestosis as a result of working in a vermiculite mine.²⁸ The miners alleged that the State knew of the asbestos danger in the Libby mine but negligently failed to warn them.²⁹ The district court granted the State's motion to dismiss on the grounds that the State owed no duty to the miners to warn them of the dangers of asbestos.³⁰ The miners appealed. Writing for the majority and in opposition to a vigorous dissent, Justice Cotter reversed the district court and held that the State decided "to withhold from the workers at the Libby Mine investigation reports that revealed that they were being exposed to deadly toxins on a daily basis,"³¹ and that this decision was a breach of the State's duty to the miners because Montana law "bound the State to do something to correct or prevent workplace conditions known to be hazardous to health."³² Justice Cotter remembers her work on this case with pride and a conviction that justice was done.

It was in cases like *Orr* and *McCulley* that Montanans most benefitted from the trust they placed in Justice Cotter. Her independence of thought and ability to build consensus on the Court made a difference in the outcome for the individual litigants, but also for all Montanans whose future cases would be decided on the precedents she set. Throughout her tenure, Justice Cotter's judicial philosophy was "to protect and defend the Constitution of the United States and the State of Montana, and to decide cases before the Court premised upon the facts and the law without bias or favor and with the benefit of collaboration with the other members of the Court." She modeled this philosophy in every way, which is why her friends and colleagues admire her and her occasional opponents respect her. Although the aphorism that in a democracy, the people elect the leaders they deserve usually is meant as a chastisement, in the case of Justice Cotter, it reflects well on the people of Montana that we twice elected her to our highest court.

27. 106 P.3d 100.

28. *Id.* at 102.

29. *Id.*

30. *Id.*

31. *Id.* at 108–09.

32. *Id.* at 110.

