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The Gutting of the Right of Trial by Jury

One of the most sacred sections of the Bill of Rights of the United States Constitution preserves the right of every citizen to a trial by jury of their peers. This was considered to be one of the most important safeguards against tyranny. The 7th Amendment of the U.S. Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of **trial by jury** shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

When Washington became a state the same safeguard was written into the Washington Constitution. Our Constitution, article 1 section 21 provides:

> "The right of **trial by jury** shall remain inviolate, but the legislature may provide for a **jury** of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the **jury** in civil cases where the consent of the parties interested is given thereto."

This right has been severely curtailed throughout the United States, including Washington. This has been accomplished by business interests pushing for the binding application of arbitration clauses in various contracts. At the federal level this has been accomplished through the expansion of the Federal Arbitration Act. This law was enacted in 1925 and was designed to allow businesses to interact with each other by signing a contract agreeing that disputes would be resolved by private arbitration rather than through the courts. The law originally assumed equal bargaining power by both sides and that the arbitration clause would be negotiable. Thanks to Republican appointments to the U.S. Supreme Court, especially Justice John G. Roberts, the courts have consistently been ruling that arbitration clauses between businesses and individuals are absolutely enforceable under the Act. Since the mid-80s these rulings have resulted in arbitration clauses being inserted in most consumer contracts. They do not have to be specifically negotiated and can be hidden in the fine print. Our courts have ignored the Constitution and have upheld these arbitration clauses. Perhaps one of the reasons is sheer laziness by the courts in wanting to "privatize" lawsuits.

If you have a credit card you cannot bring a dispute in court because of the presence of an arbitration clause. If you have a cell phone, same result. The same is true with your cable company, your bank, your Internet service, your private school, your obstetrician, when you shop on line, when you apply for a job, when you rent a car, or when you go into a nursing home.

Until a few years ago, if your bank or telephone company, or any other large corporation decided to cheat you out of small amounts of money, for example by having unsupportable charges on your phone bill, the only way that a person affected could effectively fight the practice was to band together in a class action. Class actions were extremely effective in correcting corporate misbehavior even though, in most of the cases, the individual consumer got little or nothing back from joining in a class action. At least the dishonest corporations were forced to pay damages and to reform their practices for the benefit of all of us. Recently, The U.S. Chamber of Commerce and other business entities, especially the credit card companies, have figured a way to eliminate class actions. The new arbitration clauses now read that the company "may elect to resolve any claim by individual arbitration." By including the word "individual" the only way a person can recover in a dispute with a corporation is by filing an individual arbitration. Obviously individuals do not have the financial ability to fight big corporations over small amounts of money. For example, Verizon has over 125 million subscribers. For anyone like you or me who have dealt with Verizon, you know how they can nickel and dime you over unwarranted charges. How many arbitrations were filed since this new clause prohibiting class actions went into effect? Out of those millions of subscribers there

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were 65 arbitrations in 5 years. The cable company, Time Warner, has over 15 million subscribers. In that same period of time they only had 7 arbitrations filed. Plaintiff's lawyers like me, and even some judges, have called these arbitration clauses banning class actions a "get out of jail free card" because it is impossible to practically to correct corporate misconduct.

The problem is even worse because corporations can choose the arbitrator. So even of the cases that go to arbitration most are all are won by the companies.

Jury trials are public. What this means is that the records and proceedings are fully available. So are the rulings by the juries. What this means is that in a court of law a finding of liability has repercussions for other cases brought against the same company. Arbitrations are completely private. There is no record made of them. There is no record of the results. The decisions drop into a black hole thereby allowing a corporation, even if it loses arbitration, to keep it secretso it has no precedential value. Furthermore, the grounds for appealing an arbitration award to the courts are so restrictive that it is almost never done.

The corporations argued that government regulation can accomplish the same results as class actions. But even here the corporations have outsmarted us. They have supported right-wing politicians who have essentially gutted the laws protecting consumers by narrowing the scope of the laws and by underfunding the policing agencies.

Ignorant Voting

There are many crucial issues facing our society at all levels, local, state and federal. This is not to mention the many issues facing the entire world, both scientifically speaking as well as political. Having an educated body of voters is crucial to a well-functioning democracy. Without knowledge it is easy to manipulate emotions and get away with grotesque lies. Without knowledge it is difficult for the voter to separate fact from fiction, between news and "fake news," and between information and propaganda. Poll after poll over several decades has shown how ignorant Americans are of the facts surrounding the most fundamental issues facing us today. One of the areas of deficient knowledge is in the area of history. Without a knowledge of history it is difficult, if not impossible, to see patterns of behavior from our elected "leaders" that lead us into unknown waters, unwinnable wars, dictatorships, and collapsing economies. A recent survey hit home to me. The survey sought information on American knowledge of World War II and the Holocaust. Hitler was originally an elected leader but 52% of Americans believe he came to power through a coup. Almost 40% of Americans believe that 2 million Jews were killed by the Nazis when the true number is more than 6 million. 66% of millennials cannot even say what Auschwitz was, let alone where it was located. I fear that without a massive turnaround in our attitude towards education at all levels, the United States of America will not be able to compete with other world powers and our own political structure is threatened

Crime and Punishment—Ticket and Fines

No legal system can be completely fair. Obviously laws and rules apply to everybody. Because each of us are unique, these rules affect each person differently. However, this does not mean we should fail to open our eyes and advocate for fairness when the problem is solvable. The way traffic tickets and fines given to criminals as part of their sentencing is a great example of where we can do better. The traffic ticket for failing to have current proof of insurance in your car is $500. These fines are meant to deter misconduct. But is a $500 fine a deterrent to someone like Bill Gates? For the wealthy such a fine does not even rise to the level of an irritant. But what about a single mom struggling with 2 jobs and living hand to mouth to support herself and her children? That same fine can be devastating. In such a case the person might not even be able to pay the fine, resulting in a bench warrant for their arrest and the fine becomes not $500 but a multiple of that. The same is true of people convicted of crimes. A part of most criminal sentencing is the imposition of fines. Obviously, when the person goes to jail he or she cannot pay the fine and so it accumulates with interest. If the criminal is Martha Stewart the fines are laughable. But for a poor person, finding a job when released from jail is difficult enough but the fine becomes an insurmountable obstacle to self-sufficiency. In our courts, as in most courts, the amount of these fines and tickets is set by law, although sometimes the judges have a little wiggle room. We expect that when a person breaks the law, even for parking in the wrong place, there should be punishment. The purpose of punishment is to inflict enough pain on the person to deter that activity. But if you are wealthy such fines are a mockery of that objective. In many jurisdictions, including Seattle, traffic ticket fines are a source of revenue. This treats all individuals, regardless of means, as cash cows. The effect on the poor population is manifestly unfair. It amounts to a tax on the poor. What can be done? A few jurisdictions in the United States and elsewhere around the world have successfully experimented with the concept of a "day fine." In such systems the defendant can show the court what they make by way of income on a daily basis. The fines are then adjusted by a percentage of that amount. Let's say that a fine for parking in the wrong spot should be punished with 10% of a person's daily income. For a very wealthy person that might be several

hundred dollars. For a poor person working part-time and making minimum wage, that fine might be $6. I am not sure that this is the only solution, but if we really want a just society, than the entire system of tickets and fines should be reevaluated.

In Washington we can be proud that our last legislature enacted a law known as the Legal Financial Obligations Law. This law mandates that the financial ability of the person to pay shall be considered in all cases of fines, penalties, assessments, fees, court costs and other such court imposed obligations. No longer can the person be held in contempt of court and sent to jail for failing to pay these penalties, unless the court finds they had the ability to pay and willfully did not do so. It specifically says that homeless people are presumed to be unable to pay. Furthermore, there is no longer any interest accruing on these penalties. Restitution payments to victims are treated a bit differently. Even here there is relief in the sense that the interest rate on such judgments has been reduced from 12% per year to the civil judgment rate which is just above the rate of return on government bonds. The law applies to existing penalties and such penalties can be retroactively reduced or eliminated. In determining ability to pay the defendants can show their income, assets, and living expenses as well as other legal obligations such as child support. Washington seems to be a leader in the country on this basic fairness.

De-Selecting A Lawyer—Advice

Practicing law has become ever more specialized, as have most sectors of our economy. When I started practicing law in 1974 there were a lot of lawyers who considered themselves to be general practitioners. In today's world to be a general practitioner effectively is nearly impossible. Therefore, my first recommendation is that you explore a potential lawyer's background to ensure the attorney has experience in the area of law you need. Review their website. If they have social media accounts, check them out. Do a general Google search. Call me or another lawyer you know to ask about the prospective lawyer. When I passed the bar in 1974 I was the 5881st lawyer licensed in the State of Washington. I used to know, at least by name, a good percentage of the litigators in Western Washington. Today there are over 40,000 lawyers in our state. My second recommendation is to go to the public section of the Washington State Bar Association (WSBA) website and enter the name of the lawyer you are considering hiring. If they have been disciplined in the past, that information will be posted. Look to see if the lawyer has Errors and Omissions insurance (malpractice insurance). If not, do not hire that lawyer. If your case involves litigation make 100% sure that the lawyer actually has trial experience and is willing to go to trial if necessary on your case. It is surprising that there are significant numbers of lawyers working in my field who do not do trials. The insurance companies compile information on lawyers. If the lawyer never goes to trial, the insurance companies know with certainty that the lawyer tends to recommend a settlement below the real value out of fear of trial. Try to comparison shop. Asked specifically about the standard fee structure you will be charged even before you meet with the lawyer. Contingency-fee cases are required to be in writing. Asked specifically what their policy is about keeping clients informed. A good lawyer will commit to providing copies of all outgoing correspondence and pleadings as well as to providing copies of most of the incoming materials. This is especially easy to do in the age of email. Most law cases are public information. Go to the website of the court clerk in your county and see if issues facing our society today at all levels, local, the lawyer has been sued and, if so, how often and for what.

Book Review—Killers of the Flower Moon

Killers of the Flower Moon is subtitled "The Osage Murders and the Birth of the FBI." The author, David Grann, has received awards for his past publications and rights for the New Yorker. The book reads like a mystery novel, but it is the true story of a series of murders of seemingly innocent Native Americans in Oklahoma in the 1920s. The Osage tribe was part of the Trail of Tears, Native Americans evicted from their ancestral homes on the East Coast by Andrew Jackson in the 1830s and 1840s. They were forced to live on a reservation in Oklahoma because the land was considered completely worthless for farming or grazing or anything else. It turns out that oil was discovered and the tribe became the richest community in the world. The series of murders were unsolved and continuing. It was an embarrassment for the new FBI director, Herbert Hoover. He assigned some dedicated agents to the case which was eventually solved, at least as to a few of the specific murders. The FBI learned the motives for the murders, both solved and unsolved. Hoover took full credit and the actual agents remained more or less anonymous to history until now. The well-researched book is valuable, not only for the history of the beginnings of the FBI, but more importantly as a glimpse of the history of the continuing mistreatment of Native Americans by the United States Government. He gives a base for understanding the present situation of Native Americans even today. The individuals of the Osage tribe (and all other tribes) were considered no better than children and so they were not permitted to handle their own money. For the most part they were assigned white "guardians" who were in a position to rob them of everything they had from the oil money. It was these "guardians" who were responsible for the murders to concentrate the mineral rights to themselves or to those they could control.

The end result for the tribe was neglect and poverty.

Gun Deaths

We all agree that there should be limits on access to firearms. No one argues that there is an individual right to own an antiaircraft gun. The ban on machine guns is well accepted. The question is where to draw the line. I don't have the answer, but when I read that more Americans have died from guns just since 1970 (1.4 million) than in all the wars in American history (1.3 million), I think it's time for serious debate, compromise and solutions.

Subrogation—How it Works

A scenario which happens in most personal injury cases: A person is injured by the negligence of another person. Medical bills are incurred and paid by the client's Personal Injury Protection (PIP) coverage under their automobile policy or by their health insurer. The personal injury case settles or a judgment is entered against the wrongdoer and is paid. The insurance company that paid the medical bills demands to be repaid from the proceeds of the personal injury case. My client's common response: "I paid premiums for years and years without making a claim and now my insurance company demands repayment of the medical bills!?" This is called subrogation. I always explain this issue when a client hires me but it is often forgotten by the time the case concludes. The basic concept is that the wrongdoer really should be paying the medical bills for the harm done. They are not required to pay as the bills are incurred, but only as part of a final settlement or payment of a verdict. In the meantime the health insurance company has, so to speak, advanced or loaned the money so that the injured person can get medical care. Therefore, they expect to be repaid by the wrongdoer via the settlement or verdict. Think of it another way. Part of the claim against the wrongdoer is for "reimbursement" of medical bills. If that reimbursement check goes to the injured person even though the victim's medical insurance paid for it that would constitute double payment.

In many cases under Washington law the amount of the subrogation claim is reduced by the same percentage of fees and costs paid by the client. For example, if the fees and costs amounted to 40% of the recovery then the amount repayable to the subrogation interest is reduced by the same percentage. In this way the health insurance company conceptually "pays" for the attorney's fees and costs incurred by the client in making a recovery from the wrongdoer. Generally speaking, in Washington the law is that if the total recovery to the injured person does not make that person whole, then there is no double recovery and the health insurance company gets nothing back. This commonly occurs where the harms and losses are in excess of the wrongdoer's insurance liability limits, and resources. A common scenario is when the damages are huge but the insurance liability of the wrongdoer is limited. For some health insurance plans the insurance industry has convinced Congress that the full amount of their outlay for medical bills is to be repaid without regard to whether the injured party has been "made whole" and without regard to a reduction for attorney's fees and costs. This is where it gets grossly unfair.

Quote of the Month

Too often we enjoy the comfort of opinion without the discomfort of thought--John F. Kennedy, 35th US President (1917-1963)

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