

# BALINT'S BULLETIN

## CLIENT LAW UPDATE

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### Season's Greetings



#### The Absurdity of Washington's Judicial Election System

The absurdity of our Washington State system for selecting judges was illustrated by the November 6, 2018 election. Our system makes it nearly impossible for voters to exercise an intelligent, educated, knowledgeable vote about judges who are up for election. This can be shown by the November 6 result for the open seat on the State Supreme Court. A totally unqualified candidate with very little litigation experience and no judicial experience, Nathan Choi, received almost 520,000 votes! Choi has demonstrated very little knowledge of how courtrooms work and has a history of disrespect for the rule of law. So what was the basis for any person to vote for him? The decision could only have been based on the ethnic last names of the two candidates, Choi and Gonzalez. This kind of decision-making has been manifested ever since I can remember in numerous races for various judicial offices ranging from municipal courts to the State Supreme Court. Judges can and do have profound effects on our society. Individual litigants count on having knowledgeable and fair judges. We can--and must--do better.

#### Report on Court Funding

Washington State ranks 51<sup>st</sup> in the funding allocated to the judicial branch. That's right: 51<sup>st</sup>. How can that be when there are only 50 states? Puerto Rico earmarks a greater percentage of funds for its judiciary than Washington. This is a travesty.

Funding is one of many sources for the problems in the justice system. Low pay for judges hurts citizens of our state in two ways. It is not enough to attract quality lawyers who have the necessary experience to make decent judges. But there is a downside: the pay and benefits are enough to attract marginal lawyers who are struggling financially to consider serving as judges.

#### Death by Drugs

According to the federal Centers for Disease Control (CDC), 72,000 Americans died in 2017 from drug overdoses. This is more than double the number of Americans killed by guns and double those killed in car crashes. Even at its peak, the AIDS epidemic never claimed this many victims in a year. There is much handwringing in the press and by politicians about the "opioid crisis." Yet very little is being done to address it. Here are some suggestions for taking a major bite out of the death rate. There are two principal sources of opioids: doctor prescriptions and mail order. There are two ways to make the doctors prescribing these medications accountable. First, repeat offenders should be harshly prosecuted and punished and their medical licenses revoked. Such doctors violate the principle of medical practice: "first do no harm." They are also defrauding the entities that pay for these prescriptions including Medicare, Medicaid, and health insurance companies. Second, whenever someone suffering a drug overdose arrives at the emergency room or in the morgue, we should require at least a minimal investigation as to the source of the drugs involved. If

traced to a doctor, the doctor and the state regulators should be notified and permanent records kept. In this way, "problem doctors" can be identified. As for the mail order problem, the conveyance of opioids in the mail must be absolutely banned unless the provider has been approved by a competent governmental authority. Violators should be identified and prosecuted. Unauthorized shipment of opioid drugs in the mail should be a violation of interstate commerce regulations. The federal government has done next to nothing to implement legislation that could reduce the cost of drugs. Some drug company practices are downright outrageous especially when they raise prices on drugs that have been around a long time (even if they slightly modify them). I think the United States is unique in the world in allowing drugs to be advertised directly to consumers. Drug commercials pervade our television programs and popular magazines. Most of these drugs are exceedingly expensive. Banning these direct sales would substantially reduce the overall price of drugs in our country. A great deal of criti-

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This newsletter reports on news and developments in the law. It is offered as a service to our clients and readers and is not a substitute for legal advice.

cism can also be leveled at weak-willed doctors who give in to patients asking for a particular drug they heard about in commercials. If the price of drugs were reduced, the incentive to order drugs by mail would also be reduced.

### Fake News

Nobody in their right mind would rely on a survey that consisted only of people willing to respond to the survey or involved just a handful of people. The more important an issue, the more reliable the survey should be. Yet too often we read in the newspapers or hear on TV interviews with random people about important issues such as the midterm elections, immigration, health care, tax reform, voting rights, climate change, etc. Presenting these types of interviews as somehow representative is the very essence of what I would call "fake news." Interviewing small groups of people cannot offer reliable indicators of what significant portions of the population believe. What should any of us care about some restaurant patron in the middle of nowhere giving an opinion as to climate change? News outlets are in the business of "selling" news to boost advertising revenues. But "man in the street" interviews, supposedly designed to measure the "pulse of the people," are nothing but filler.

### Slavery Still Legal In the US

Following the recent midterm elections, several commentators noted that Colorado voters approved an amendment to their Constitution abolishing slavery in any form. Before this vote the Colorado Constitution contained language identical to our United States Constitution. Section 1 of the 13<sup>th</sup> Amendment to the U.S. Constitution provides:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (emphasis added)

Colorado voters amended their Constitution to read: "There shall never be in this state either slavery or involuntary servitude." In the U.S. Constitution and in at least 15 state constitutions slavery is still permitted as punishment for a crime. Based on this language, prisons can legally have chain gangs and hire out their prisoners for private industry. Prison labor unfairly competes with private labor because of course slaves are paid nothing or nearly nothing. Remember the movie (one of my favorites) *The Shawshank Redemption*?



### Pet Care Expenses

There are 89 million dogs and 94 million cats in United States households. Many households have multiple pets. It is estimated that about 36% of households have at least one dog and 30% have at least one cat. Pet owners spent more than \$70 billion on their pets last year. It is estimated that primarily due to the rising cost of veterinary services as well as owners going to more extreme measures to treat pet illnesses, a pet owner can expect to spend between \$9,000-\$13,000 for medical care over the life of their pet. Charles Darwin proposed that living things that can best adapt to environmental changes will produce more offspring. By this measure can there be more successful animals than, say, dogs, cats, cattle and pigs? Dogs and cats have come indoors and have become more docile and more lovable. Pigs and cattle have been domesticated enough that we raise them in huge numbers for food. There are far more of them today than there were of their ancestors in the wild. In one sense, these creatures have manipulated humans to ensure their reproductive success.

### Book Review—Kafka's Last Trial



Neither of my children had the slightest inclination to become lawyers. It thus amuses me that my son's latest book, *Kafka's Last Trial*, which I can highly recommend, reports on a recent legal case that was heard by Israel's Supreme Court. Benjamin is a writer and lecturer living in Jerusalem. His previous book, *Running Commentary*, was an insider's look at the transformation of *Commentary Magazine* from a left-wing magazine in the late 1940s to its present status as a flagship of the neoconservatives on the right. His new book is the product of three years' research, including interviews all over Europe with people who had something to do with Franz Kafka and his legacy. The book reads like a mystery novel. Kafka is one of the most famous modern authors, although he is far more popular in Europe than in the United States. Benjy's book is important for various reasons, not the least of which it introduces us to the life and legacy of Franz Kafka. The book received marquis reviews in the *Wall Street Journal*, the *New York Times*, *Publishers Weekly*, the *Atlantic Monthly*, and various publications in Israel and around the world. In addition to the United States it will be published in Great Britain, Germany, Russia, Israel, Poland, Hungary, Holland and elsewhere. Kafka's most famous book is "The Trial," a novel left unfinished at Kafka's death in 1924. Many considered it a prescient story of brutal dictatorships which soon followed in the 20<sup>th</sup> century, the Soviet Union, China, Cambodia, and Rwanda to name just a few. I read *The Trial* in

high school. It tells a story of a man arrested, imprisoned, tortured, and eventually executed even though at no time was he able to learn what crime he was accused of. Kafka was always unsure of himself and his writings. As he lay dying he asked his best friend, Max Brod, to burn all of his papers including the original handwritten manuscript of *The Trial*, short stories, diaries, and letters. Brod thought so highly of these writings that when Kafka died he could not bring himself to destroy them. Brod spent the rest of his life editing and publishing the works of Kafka. With the Nazis overrunning Europe, Brod escaped on the last train allowed to leave Czechoslovakia and made his way to Tel Aviv. Instead of his personal belongings, Brod brought only a suitcase packed with the papers of his late friend. When he died, Brod bequeathed the papers to his secretary with ambiguous instructions concerning donating them to a proper library or archive. When the secretary died she in turn bequeathed the valuable papers to her daughter. It was only because of the probate filing that the National Library of Israel got notice that these papers existed and were in Israel. There followed a series of trials in Probate Court, then in the trial court and then in the Israel Supreme Court over who had the rights to the papers. Since Kafka wrote in German, the German Literature Archive in Marbach claimed the manuscripts as German heritage and intervened in the Israeli trials. Of course the daughter claimed them after she had already sold one of the transcripts for over \$2 million to the German archive in Marbach. Benjy interviewed most all the players and attended the court hearings and was present when the archives were opened for the first time. Israel prevailed and has promised to organize the papers and make them available online to all researchers. Benjy's book encourages us to read both the novels and short stories of Franz Kafka and also the largely forgotten writings of Max Brod

who was himself a well-known author in his day. The book is not only a fascinating read but educational as well.

#### Sugar in Cigarettes

Very few smokers understand the ingredients in their cigarettes. Sugar is one of those ingredients added. These merchants of death—tobacco companies—add sugar because it reduces the harshness of the inhaled smoke and adds to the addictive qualities of the rest of the ingredients. I couldn't say it better than one university professor who researches the cigarette industry: "Added sugar in cigarettes creates a trifecta of death. It makes cigarettes more appealing, more addictive, and more lethal."



**Making America Great,  
According to George Washington**  
In these disturbing days and in the aftermath of the murder of Jews in Pittsburgh, we and our politicians would do well to learn from President George Washington. Following a visit to a Newport, R.I., synagogue he wrote the following letter (dated August 18, 1790).

*Gentlemen: While I receive, with much satisfaction, your Address replete with expressions of affection and esteem, I rejoice in the opportunity of assuring you that I shall always retain a grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.*

*The reflection on the days of difficulty and danger which are past is rendered the more sweet, from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and a happy people.*

*The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.*

#### Street & Sidewalk Safety (We Can All Help)

We can all make our streets and sidewalks safer and more efficient. It's easy. The Seattle Department of Transportation (SDOT) is inefficient when it comes to discovering and correcting problems on our streets and sidewalks. The city is doing very little, for example, to correct over 90,000 dangerous uplifts on our sidewalks, i.e., those uplifts of ½ inch or more. Pedestrians are getting hurt all over the city, although most of them go unreported because the injuries are often relatively light. The city budget is inadequate to fix potholes and dangerous cracks on our streets. Traffic signals sometimes make absolutely no sense based on the flow of traffic. A personal example: a couple of months ago I was at the stoplight at Beacon Avenue and Graham Street. I was part of a long line of traffic. In front of me and on one side there were similar lines of traffic all facing red lights. The one lane that had no traffic had a green light. We sat there like dummies for couple of minutes with no one moving. I complained to the SDOT and within days they fixed the traffic sensors and thanked me for pointing the problem out to them. Several times over the years friends and clients have complained that the city is not fixing potholes and asking for my help. Al-

most every time I complained (and mentioning that I was an attorney) the problem was fixed quickly. So, if we want to make our sidewalks and streets safer do the following. Complain on line to the SDOT. Putting the complaint in writing is much more efficient than simply making a call. Even better, accompany the complaint with a photograph showing the problem. It also heightens the awareness and response of the SDOT to note that the particular defect is dangerous or has already caused someone to be hurt. If you do complain by email, copy me at the firm email address, [dbalint@balintlaw.com](mailto:dbalint@balintlaw.com). If the city does not respond let me know.

### The Illusion of Appellate Justice

A prominent federal judge for one of the Courts of Appeals recently bragged in the New York Times when he said, "Circuit courts regularly decide appeals unanimously in more than 95% of the cases and affirmed the vast majority of District Court rulings. One hallmark of the federal judiciary is that it proves its devotion to the rule of law by resolving most of the cases without any political disagreement." His boast really proves the opposite of his contention about the integrity of the Courts of Appeal. The courts of appeal were established in all jurisdictions, state and federal, to ensure that trial courts rule fairly and in accordance with es-

tablished law. In other words, appellate courts are the guardians of justice at the trial court level. Trial judges are under immense pressure in a fast-moving environment during a trial. They make errors of law sometimes. They occasionally are ignorant of the proper law to apply. Some of them are inept. The percentage of cases decided unanimously in our appellate courts are probably in the same range, i.e., above 90%.

During my career I have done my own appeals, most recently successfully in the Ninth Circuit Court of Appeals in the federal court system with the unanimous decision of the three judges. Here is the reality of deciding to appeal: The amount of work and the expense is astronomical in most cases. The court reporter at the trial court is paid to produce a written report of all testimony and all court proceedings. This can often be thousands of pages. All of the papers filed in the trial court must be produced and paid for. All this information must be digested and then legal briefs prepared and filed. Every statement of fact and law in the brief must be supported by citation to the trial court record as well as to updated statutes and court decisions. Since the appellate courts rely mostly on the briefing, the oral argument, when allowed, is of secondary impor-

tance. This puts tremendous pressure to draft briefs that are accurate and persuasive. Every word often counts. The bottom line is that no lawyer files an appeal unless they are convinced that the trial court committed error and that justice was not done. Appeals are not prosecuted frivolously. Often both sides have good points in their favor. So what does it mean when these three-judge appellate panels are almost always unanimous? The false message is that there was really no room for debate. What it really means is that these judges are more concerned with getting their cases administered and off their desks than they are in an honest appraisal of the cases and in administering justice fairly. Upholding the rule of law should really mean to the judges to try to do justice rather than make their fellow judges feel good with unanimous opinions. Collegiality should not mean more to the judges on our courts of appeal than justice.

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