

Friday, November 30, 2007

WPFW at thirty.

WPFW (with Von Martin early in the tape). I met Amy Goodman. During the first week at law school in Washington, D.C., an area native described Washington as a small town. The notion that I might have moved to a small town from a huge city (Manhattan after Boston) threw me for a loop. I realized that Washington had a much smaller population than New York City and Boston, but had not stopped to check whether its population is dwarfed by New York's and Boston's, which it is. Plenty of other places have much smaller populations, but as major cities go, this is a small town in many ways. One feature of Washington that made me immediately feel at home was Pacifica Radio station WPFW 89.3 FM. I thrived on the pure jazz and other great music, and took to some of the political programming, although some of it seemed whacked out of the stratosphere. I later learned about ugly infighting that would follow at Pacifica, and I do not know how much Pacifica and its listeners have recovered from that. At the same time, I continue listening; I am not aware of any other radio station that refuses dollars from government and large corporate entities. WPFW has its own homey feel. Five years after relocating to Washington, I was driving nowhere in particular one early Saturday evening, and heard highly-talented Caribbean host Von Martin soliciting a ride for a woman named Gabi to a Curry-out at the station. Von and Gabi accepted my offer to drive her to the station, where I had a blast. Von showed me his cramped studio, where I suppose most of the announcers spoke to listeners. He gave me a cool tape of Caribbean music. I found some tasty vegetarian eats among the meat-laden Caribbean food. The party apparently went very late; I departed much earlier than that. Yesterday, as I often try to do when at the courthouse in Upper Marlboro, Maryland, I had lunch at the vegan Everlasting Life restaurant in Capitol Heights, Maryland. The restaurant apparently is geared more towards health than bottom-line profit, proclaiming, for instance: "Once you get beyond all the studies, the statistics, the hype and the hoopla, it comes down to providing people with the knowledge on how to eat to live, the ability to access the things they need to make it a reality, and the support and dedication to encourage them to do so." The restaurant is surrounded by a sea of fast food joints, and seems always busy. On yesterday's visit to Everlasting Life, I met a uniformed animal control officer, and remarked that as much as I believe strongly in animal welfare, perhaps he and I one day would be on opposite sides of the court if I were to defend in criminal court someone accused by him of animal cruelty, which I would gladly do, just as I gladly defend all criminal defendants. He mentioned being vegetarian for fifty years (he is sixty-two, and looks to be in great health) and mostly or all vegan now. He mentioned Dick Gregory, who is apparently a vegetarian, and has shown himself to be very likeable when I bumped into him at the nearby Whole Foods market and a few years earlier at another store. He said that Mr. Gregory will be at WPFW's December 15 thirtieth anniversary celebration. It looks like quite a celebration -- not an inexpensive one to attend, but charging a little less than what plenty of other non-profit fundraisers charge. I decided to tell you about it. Also in attendance at WPFW's December 15 celebration will be Peace and Justice Award recipients Amy Goodman of Democracy Now, Ron Clark, John Conyers, Sonny Rollins (who presented a smashing Carnegie Hall performance in 1978 that I attended), and Dr. Dorothea Height. I likely will miss the event due to a prior obligation. If you go, please update me. If you are a WPFW listener, please remember to donate to the station, which cannot live on love alone. Jon Katz.

Posted by Jon Katz in Jon's news & views at 01:10

Washingtonian Magazine renews Jon Katz's Top Lawyers ranking.

Washingtonian Magazine has renewed my Top Lawyers ranking in its December 2007 issue at page 145. When Washingtonian last published such a ranking, in 2004, I was included for the first time in that listing. Washingtonian calls the list "800 Top Lawyers" with the following description: "Here are Washington's best -- the top 1 percent -- in 26 legal specialties." Washingtonian further describes the list: "This is the fifth time that The Washingtonian has compiled a list of top lawyers. It is created primarily by peer recommendations. We asked, by telephone and e-mail, some 1,000 attorneys who (excluding themselves and members of their firms) the top practitioners in their fields are and whom they would hire to represent them in a range of areas." Why should I even be speaking of this ranking? The magazine admits it is subjective. On the other hand, I like that a magazine as mainstream and widely-read as the Washingtonian gives exposure to such lawyers as myself who focus on doing good with the law, rather than on pleasing the mainstream. Do I like the publicity that this ranking brings our firm? Certainly, just as I also like putting my AV-rating and media appearances on the back of my business card. The Washington, D.C., area, is an incredibly competitive market for providing legal services. Such free publicity helps us avoid spending much on marketing, and to focus our time on serving our clients and our revenue on quality support staff. Of course, I get a kick from media exposure, always tempering it with the knowledge that silence is sometimes the best substantive response to the media. Jon Katz.

Posted by Jon Katz in Jon Katz in the News at 00:00

Thursday, November 29, 2007

Judge unlawfully detains dozens over cellphone ringer, and then faces the music.

Â Bill of Rights.Â (From the public domain.)Â In such Virginia counties as Arlington and Fairfax, ringing cellphones are confiscated in the courtroom and returned only the next business day. In the federal courthouse in Alexandria, cellphones, blackberries, PDAs and the like are banned. In Robert Restaino's courtroom oneÂ day, however,Â he ordered dozens of people in his courtroom locked up as collective punishment for the ringing of an unknown person's cellphone. Â Two weeks ago, New York's Commission on Judicial Conduct put its foot down, and voted to strip Mr. Restaino of his black robe. Let us count the ways in which Mr. Restaino urinated on the Constitution: He ordered a five-minute recess for courthouse personnel to search for the phone, during which time all courtroom visitors were unlawfully detained by having been barred from leaving. He interrogated courtroom visitors about the cellphone without telling them their right to remain silent, and which put him in the role of prosecutor, judge and jury (granted, a jury trial right may not have been available).Â He overruled the pleas of phone-ringer suspects to avoid lockup to enable a medical visit for possible surgery, and to be home for school for a young child.Â He locked up dozens of people over the cellphone incident without having probable cause to do so (and for what crime? Contempt of court?), and without sufficient grounds to set bail (apparently setting the same bail for everyone, rather than bail individually tailored to assure each person's return to court for a hearing on the matter) rather than permitting the suspects (over a dozen of whom could not afford the bail amount) to be permitted to promise to return to court. Ultimately -- but too late -- he reversed his position after learning that the news media was hot on this story. Â The New York Commission on Judicial Conduct determined thatÂ "Throughout all the proceedings that morning, [Judge Restaino] did not raise his voice; he appeared calm and in control." Too bad he did not have the restraint, then, not to commit the blunder that he committed by detaining, interrogating, and locking up dozens of people obliged to be in his courtroom that day. Â In sum, judges are humans, and, therefore,Â can make mistakes, and even blunders. Collectively, they should not be cloaked in anything more glowing than that.Â Jon Katz.Â ADDENDUM: Articles on this scandal are here, here, here, and here.

Posted by Jon Katz in Constitutional Law at 00:05

Wednesday, November 28, 2007

When children follow in their activist parents' footsteps.

Â Bill of Rights.Â (From the public domain.)Â A few years ago, an ACLU staffer told me that her son -- already a Republican -- surmised aloud that she probably would be pleased if he grew his hair long and wore an earring. She confirmed he was correct; he responded that thisÂ was the reason he did not do it. Â IÂ took to activism whenÂ my family members were not activists (and at least one counseled several timesÂ to "play the game," although I have never thought there was just one game, and have thought the notion strange of being expected toÂ follow the rules of a game I had nothing to do with creating),Â aside from an uncle who talks passionately about justice and a brother whom I joined for two protests against Gulf War I ten years after I became active with Amnesty International.Â For me, making such decisions was about figuring out what was right, rather than reacting against or in favor of any family members. Â When they deviate from their parents' political paths, childrenÂ seem to do soÂ sometimes as a way to feel independent, sometimes for reasons divorced from the parents, and sometimes after having had a chance to observe, experience and dislike the parents' political path. Interestingly, the three children of famous peace activists Elizabeth McAlister and the late Phil Berrigan (a good friend and teacher) all admired their parents' activism very much, and joined in it to a substantial extent. The three children grew up not only to activist parents, but within the Jonah House non-violence resistance community in Baltimore, which I have enjoyed visiting several times. Here is a video of Liz and Phil's eldest daughter, Frida, discussing the activism of her parents, and her own activism. Aside from their overall optimism -- tempered by their deep sorrow over the violence saturating the world -- one thing in particular that inspires me about Frida, her parents, and the Jonah House community members is their absence of fear aboutÂ death, and about achievingÂ financial security,Â let alone their disinterest inÂ accumulating massive wealth. The Jonah House members are singleminded in theÂ pursuit of peace.Â Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, November 27, 2007

People convicted of sex offenses cannot be banished to live under bridges.

Bill of Rights. (From the public domain.) When one of my clients is charged with such offenses as sexual assault, child pornography distribution and soliciting a minor online for sexual activity, inevitably we end up discussing exposure to registering as a sex offender in the event of a conviction. People required to register as sex offenders do not only face being listed on sex offender registry websites, but -- depending on the state -- also face being banished from living in wide swaths of land that are within specified distances from schools, parks, and various other places where minors tend to be found. In one state -- Florida, I believe -- some registered sex offenders find that living under bridges sometimes is their only remaining alternative to satisfy the living distance requirements. Georgia statutory law designates so many locations -- including school bus stops -- from which registered sex offenders may not live within one thousand feet, that registered sex offenders cannot find houses and apartments in which to live. Fortunately, the Georgia Supreme Court on November 21, 2007, struck down such overly broad residence restrictions, leaving the state's legislators to go back to the drawing board. My quick review of the Georgia Supreme Court's opinion does not suggest that the court will prevent all distance limits on where registered sex offenders live, but that the court found the current statutory residency requirements so overbroad as to strike them down wholesale rather than narrowing the statute. However, the Georgia Supreme Court refused to invalidate the statutory provision that create distance limits concerning where registered sex offenders may work. Jon Katz. ADDENDUM: Thanks to Corey Yung for blogging on this case.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, November 26, 2007

When prosecutors pare down civilian witness lists.

Photo from website of U.S. District Court (W.D. Mi.). A recent New York Times article reports that prosecutors in such states as New Jersey are paring down their reliance on civilian witnesses, to reduce obligations to protect witnesses in a climate where the police often are unable to protect witnesses' safety. Nevertheless, if the prosecutor knows that any witnesses have exculpatory information, the prosecutor must disclose the witnesses' identifying information under *Brady v. Md.*, 373 U.S. 83 (1963). Jon Katz. ADDENDUM: Thanks to Scott Greenfield for having posted on this article.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, November 25, 2007

"Prison Nation" broadcasts tonight.

Too many people are unjustly caged in United States prisons. (Image from Bureau of Prisons' website). On a visit today to the National Geographic's wildlife exhibit in Washington, D.C., I happened upon an information card about tonight's airing of Prison Nation on the National Geographic Channel at 8:00 p.m. Eastern time. A National Geographic blogger listed some of the most outrageous facts about the American prison system, as follows: "The U.S. has five percent of the world's population, it has 25% of the world's inmates. California operates the third largest penal system in the world, right after China and the United States. 80,000 inmates are kept in isolation nationwide. A rising suicide rate is linked to the increasing use of solitary confinement. Nearly 70 percent of inmate suicides are in isolation. 25% of all state prison beds are occupied by the mentally ill. Tops in Los Angeles county jail, followed by New York's Rikers Island." "700,000 inmates are released from prison each year - more than two-thirds of them end up back behind bars within three years. Assaults on inmates have risen 65% in the past decade." I do not think we will achieve a fair and just criminal justice system -- including policing, prosecuting, judging, imprisoning, and releasing and supervising on probation and parole -- until people insist on and achieves a radical and positive overhaul of policing and police hiring, training, supervision, and discipline; and of the rest of the criminal justice system, including heavily decriminalizing drugs (and legalizing marijuana), eliminating mandatory minimum sentences, and eliminating criminal penalties for activities as minor as prostitution. That is my modest proposal. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

How to keep a conscience when working within big business?

For a year before law school, from 1985 to 1986, I worked as a financial auditor with the Irving Trust Company in the belly of the Wall Street capitalist beast that loved the money flowing during Reagan's reign. I know by now that enlightened capitalists exist, but on Wall Street I often felt like I was searching for a needle in the haystack, including with the unapologetic and very open racially insensitive comments of too many of my colleagues in the financial auditing department, even when not at happy hour, of which there were many. For personal growth, of great benefit to me at this job was rubbing elbows with a much larger cross section of people than I had ever dealt with before on a daily basis. My job at Irving Trust seemed neither to contribute much to nor detract from society. I essentially was obtaining and reviewing raw data to assure that the bank was following proper accounting, financial, and regulatory controls, in order to protect the bank's profits, to keep shareholders and customers happy, and to keep bank regulators interested in spending most of their time elsewhere. I liked having a chance for the first time in my life to live a full year on the income I earned myself, and ordinarily to be living on bankers' hours with plenty of free time on the weekends and evenings to enjoy Manhattan, except when holed up at hotels on a few assignments in upstate New York. I did not find anything to whistleblow about at Irving Trust -- I made clear in brief words to my colleagues my attachment to the American Civil Liberties Union's agenda -- although I cannot imagine any fears that would prevent me from doing so anywhere. Of course, some people pay a high price for whistleblowing. One of them is Cynthia Fitzgerald, who relocated to a new city and joined a very large health care company, all bright eyed and bushy tailed. Read this article and see this video to see how lonely and costly it can become for such pure-intentioned people as Ms. Fitzgerald to blow whistles from within the capitalist beast's belly, rather than keeping focused on the almighty dollar. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Friday, November 23, 2007

Seventh Circuit limits government's authority to ban alcohol in strip clubs.

Bill of Rights. (From the public domain.) On November 19, 2007, the United States Court of Appeals for the Seventh Circuit limited the government's authority to ban alcohol in strip clubs. The case is , Eric Joelner Fish, Inc. v. Village of Washington Park, ___ F.3d _ (7th Cir. Nov. 19, 2007). Thanks to my friend Marc Randazza for linking to fellow First Amendment Lawyers Association member Cari Wiggins' discussion of this Eric Joelner Fish case. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Thursday, November 22, 2007

Thanksgiving view from a vegetarian.

Regardless of their party affiliation, presidents each year "pardon" a turkey, only to leave 48 millions more for Thanksgiving slaughter. I became a strict vegetarian in 1988 -- and am now 99% vegan, after a three-year process eating up and down the food chain -- after finding no logical basis to being an activist for human rights for many years, while still eating other mammals, birds and fish, and after learning that my health would suffer not at all by making the switch, and would in fact improve and has improved. I usually have not gotten on a vegetarianism soapbox unless asked or taunted. This year I add Thanksgiving to my vegetarian soapbox motivations. Dozens of people wish me happy Thanksgiving. The happiness of the holiday is substantially diminished for me with the holiday's heavily traditional focus on eating slaughtered turkeys. Every Thanksgiving meal I have joined has always had a turkey as a major centerpiece. Many of the same justifications for subjugating animals for food and other human uses have been used in the past to justify subjugating minorities, women, and other subjugated people. Am I merely wearing rose-colored glasses to expect that we would have a much less violent, more peaceful, harmonious, just and caring society if meat consumption plummeted? I do not think so. Fortunately, vegetarian and animal rights activists offer some great alternatives to having a turkey corpse at the Thanksgiving dinner table. For years, the Vegetarian Society of the District of Columbia has hosted a sellout gourmet vegan Thanksgiving celebration. On November 17, Poplar Spring Animal Sanctuary in Poolesville, Maryland, hosted a vegan potluck Thanksgiving With the Turkeys. PETA's website details the horrors that meat turkeys face from birth to slaughter, and provides some delicious vegan recipes together with suggestions for a Thanksgiving table that replaces a real turkey with soy-based Tofurky and Unturkey. Here is a suggestion to help reduce harm to animals produced and caught for the food industry (and to improve the environment, improve health, and reduce hunger in the process), rather than a suggestion for becoming completely vegetarian: Try going meatless and fishless for a day. If you do not now eat meat and fish every day, try adding an additional day that you eat vegetarian. If you end up feeling better spiritually and physically as a result, consider continuing to reduce or eliminate your meat and fish consumption. If even one million people followed this approach, millions of land and water-based animals could be spared annually. That would give me more to be thankful for at Thanksgiving. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Wednesday, November 21, 2007

Students suspended for using crushed Smarties in anti-drug video.

DEA image in the public domain.Â One day in our college French class,Â we were assigned to do a television commercial spoof. A classmate and I came up with the Pepsi challenge, where we emptied out a can of Coca Cola, and filled it with salt as imitation cocaine. Â A couple of high school students found crushed Smarties candies to be a good substitute for cocaine in an anti-drug video they produced. However, school administrators often being the worst of killjoys, the students were suspended for ten days because, according to Jerome Bartley, superintendent of the Central Greene School District: "Although the individuals involved were not using illicit drugs, the district's policy prohibits look-a-like drugs, substances, liquids or devices." Thanks to Drug War Rant for posting this story. Â From time to time, students come to me to defend them against such types of nonsense, aside from the more common disciplinary actions for drug possession and fighting. I try to reach the hearts and minds of school administrators and student tribunals to avert suspensions; sometimes it works, but sometimes I just get Stepford responses or paternalistic justifications about the suspension being a form of tough love. Thanks to the Foundation for Individual Rights in Education for continuing the fight for fair disciplinary treatment of students and faculty and for giving a more far-reaching voice on this issue than I ever could. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, November 20, 2007

The amazing SunWolf presents "Practical Jury Dynamics2"

Courtesy SunWolf: A criminal defense lawyer's criminal defense lawyer, showing lawyers the powerful path to humanizing our clients, through storytelling, kindness to all, summoning our inner magic, and a reminder that "reality is no obstacle." Dr. SunWolf -- the great storytelling lawyer who proclaims that "Reality is no obstacle" -- is one of my six most influential and beneficial trial teachers and inspirers. The others are Stephen Rench, who inspires trial lawyers to "Dare to be great;" Larry Pozner, who teams with Roger Dodd to make effective cross examination less a mystery and more an achievable goal; Don Clarkson, a Radar O'Reilly of sorts who gets right to the heart of the matter in helping lawyers prepare for trial; Josh Karton, an acting teacher par excellence who gets to the heart of the matter as quickly as Don Clarkson; and Gerry Spence, who inspires to win for justice and in life by discovering and cultivating our unique magic, warts and all. I have been hooked on SunWolf ever since she presented an amazing session on motions hearings at the 1994 National Criminal Defense College Trial Practice Institute. SunWolf shows the power of persuading through storytelling. She is a past training director of the Colorado Public Defender's office, and is now an associate professor of communication at Santa Clara University. I have written about SunWolf here and here. SunWolf's jury dynamic books and companion Jury Talk DVD are musts for trial lawyers. Now available is Practical Jury Dynamics2. The book's website states that Practical Jury Dynamics2 "combines Practical Jury Dynamics with the 2005 and 2006 supplements (Jury Thinking and Juror Competency, Juror Compassion) and also includes new, valuable material." SunWolf yesterday sent me the book cover and table of contents to the book. Promoting SunWolf's new Practical Jury Dynamics2 is my opportunity to give back in a small way to SunWolf for all the amazing gifts she has shared with me and countless others. The volume can be ordered at <http://bookstore.lexis.com/bookstore/product/49394.html>. You may wish to ask Lexis about any available discounts as a repeat customer or as a member of any lawyers' associations. Jon Katz.

Posted by Jon Katz in Persuasion at 01:10

Praised be Marc Randazza

Image from Library of Congress's website. One of my favorite people is someone I have not yet met in person. He is Marc Randazza, a First Amendment lawyer in Florida who blogs expletives more often than I, because, like I, he often gets fed up with all the times that other people urinate on others' rights. To not use an expletive at that time is often to be doing gymnastics with a Thesaurus. I do not say these nice things about Marc as a response to his saying nice things about me, or else I would have done so long ago. Marc's writing is often insightful and riveting, and often hilarious. Moreover, when he and I speak by phone or by email, we tend to be very much in sync. Marc and I both are First Amendment Lawyers Association members, and I look forward to seeing him when I finally go to another FALA conference (which takes more planning now that I have a twenty-month old boy) or get to his Florida neck of the woods. Because I tend not to spend more than fifteen to thirty minutes perusing the news and blogosphere daily, I rely on people like Marc to confront me with essential stories that might not make the front page. On the gag factor front, Marc emailed me with his recent blog entry about the Texas man who was executed sooner rather than later (if at all if it had come to that) only because Texas Court of Criminal Appeals presiding judge Sharon Keller refused a lawyer's urging to wait for his twenty to thirty-minute late filing caused by a computer that went on the fritz. Michael Richards was executed as a result of being denied filing his pleading twenty to thirty minutes late, even though it appears some other judges would have opened the courthouse doors for the filing had they been informed of the request in the first place, but they were not so informed. Fortunately, now the court has procedures for electronically filing pleadings, and several judges spoke out publicly against this travesty of justice. However, Michael Richards was executed when he was, because Judge Keller would not open the door. Thanks, Marc Randazza for giving a damn to stand on the mountaintop to express your rage against such travesties of justice, and to insist that they stop. I'm happy to be there with you. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Monday, November 19, 2007

Do not Pringle-ize Moore.

Â Bill of Rights.Â (From the public domain.)Â In early 2006, the clouds parted, and the Virginia Supreme Court blessed criminal suspects with Moore v. Commonwealth, 272 Va. 717Â (2006). Moore provides that the issuance of a criminal summons does not permit a police search. This is a particularly significant holding, when considering that summonsesÂ most commonlyÂ commence misdemeanor prosecutions in Virginia. Â Unfortunately, rather than leaving well enough alone, the United States Supreme Court granted certiorari review in Moore . Hopefully the Supreme Court will leave Moore unharmed, unlike the damage done in Maryland v. Pringle, 540 U.S. 366 (2003), which reversed an excellent Fourth Amendment decision by Maryland's Court of Appeals, as if crushing the Court of Appeals' PringleÂ decision like a potato chip. Stay tuned.Â Jon Katz.Â Â ADDENDUM: Thanks to SCOTUS BlogÂ for posting on this case.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, November 18, 2007

November 19: Flex Your Rights and Jon Katz to speak after Busted screening.

Watch the Busted video before you see another cop. If you live in or near Washington, D.C., come and see a screening of the above-shown Busted video (seen on every page of our blog). The screening will be followed by a talk by me and Steve Silverman of Busted producer Flex Your Rights. This will all take place Monday, November 19, 2007 in the amphitheater of George Washington University's Marvin Center, on the third floor. The screening will start at 7:00 p.m., and the talk will begin at the conclusion of the film, at around 7:45 p.m. It is presented by the George Washington University American Civil Liberties Union chapter. I write more here about Busted and Flex Your Rights' powerhouse team of Steve Silverman and Scott Morgan. Please buy the products presented by Flex Your Rights, and please give generously. If you come to the November 19 event, please let me know. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

"On the Duty of Civil Disobedience"

An image from Library of Congress's website. One of the pleasures of my high school American Studies seminar was reading and studying Transcendentalists Ralph Waldo Emerson and Henry David Thoreau. When in college, a few times I visited Walden Pond down the road, where Thoreau lived in a cabin. Now it is a state reservation where significant effort is needed to retrace Thoreau's steps, thoughts, and actions, particularly when people visit it during the summer as if it were any other pond for sunning and cooling off. Here is Thoreau's famous essay "On the Duty of Civil Disobedience." Notice that Thoreau does not entitle his work "On Civil Disobedience," but "On the Duty of Civil Disobedience." I remember that in the *Plowshares v. Depleted Uranium* trial, Phil Berrigan told the jury that he felt not only the right to disarm (the *Plowshares* describe their actions as disarming weaponry) A-10 warplanes, but a duty to do so. I am due carefully to re-read "On the Duty of Civil Disobedience," including Thoreau's following discussion of his civil disobedience to refuse paying the poll tax (he was happy to pay the highway tax, since he wanted good highways): "I have paid no poll tax for six years. I was put into a jail once on this account, for one night; and, as I stood considering the walls of solid stone, two or three feet thick, the door of wood and iron, a foot thick, and the iron grating which strained the light, I could not help being struck with the foolishness of that institution which treated me as if I were mere flesh and blood and bones, to be locked up. I wondered that it should have concluded at length that this was the best use it could put me to, and had never thought to avail itself of my services in some way. I saw that, if there was a wall of stone between me and my townsmen, there was a still more difficult one to climb or break through before they could get to be as free as I was. I did not for a moment feel confined, and the walls seemed a great waste of stone and mortar." Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Friday, November 16, 2007

Cops: Stop being taser-happy. Tasers can kill.

Â Too many cops use tasers like Lays potato chips, unable to wait to use them, and then continuing the impatience by applying them in rapid-fire order. The latest example comes from the recent Vancouver airport tasing that led to the deathÂ of Robert Dziekanski. Mr. Dziekanski had arrived from his native Poland, and did not speak English, which likely only added to his agitation at arriving at the airport, being delayed for multiple hours for immigration processing, and not finding his mother, who had returned home under the mistaken impression that he had not been on his arriving flight. Â Adding insult to injury, cops seized the above-displayed video footage taken by a civilian, only releasing it days later when the photographer threatened to take action to recover the footage. Everybody, please liberally use your cellphone cameras and video cameras to record police abuse and to release the footage to the press, YouTube and LiveLeak. (The laws in some places put limits on recording without the subjects' permission, but such rules should be ripe for challenge at least when the greater good is served by recording police abuse.) Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:01

Legalize medical marijuana.

Â Thanks to Robert Guest for posting this video of Drew Carey presenting compelling reasons to legalize medical marijuana, including a fascinating visit to a California state-licensed medical marijuana dispensary, and interviews with beneficiaries of medical marijuana. Â Sadly,Â the federal government -- with the U.S. Supreme Court's permission -- continues prosecuting even marijuana sellers who are in compliance with California's medical marijuana law. Â Jon Katz. Â ADDENDUM: On November 16, I added Medical Cannabis to our blogroll. The blog is presented byÂ Americans for Safe Access,Â whose website includesÂ educational booklets about the benefits of marijuana for various medical problems.

Posted by Jon Katz in Drugs at 00:00

Thursday, November 15, 2007

The ongoing fight to give Crawford a full set of teeth.

Bill of Rights. (From the public domain.) Crawford v. Washington, 541 U.S. 36 (2004), bars testimonial evidence from slipping through the hearsay rule. However, some courts do not deem government crime lab reports to be testimonial evidence. On January 29, 2007, I addressed this issue in the context of Thomas v. United States, 914 A.2d 1 (D.C. 2006). On October 26, 2007, Luis Melendez-Diaz filed a petition for writ of certiorari, seeking for the United States Supreme Court to resolve this issue. Stay tuned. Jon Katz. ADDENDUM: Thanks to SCOTUS Blog for covering this story.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, November 14, 2007

Let American farmers grow industrial hemp.

In this World War II-era Hemp for Victory film, the United States Department of Agriculture promotes domestic industrial hemp growing, to serve the war effort. The Agriculture Department already knew at the time about industrial hemp's tremendous benefits, and the government should not backpeddle about that now. A sad result of the federal and state governments' drug war is that domestic industrial hemp-growing is banned, lest a hemp farmer or intruder be so silly as to seek a high from the trace amount of THC found in hemp grown for industrial purposes. Consequently, Canada and China welcome the additional profits from exporting hemp fiber, paper, finished products and sterile seeds for such products as clothing, shoes, vegan lip balm, and food (check out the tasty hemp granola and hemp cheese at natural food stores). The multifaceted beneficial industrial uses of hemp are conceded even on the USDA's website. Plenty of American farmers who have no interest in selling or obtaining marijuana highs want to produce industrial hemp, but the federal government continues saying no. Fortunately, two North Dakota farmers have filed a federal lawsuit to enable domestic industrial hemp production. They are David Monson, a Republican member of the state legislature; and Wayne Hauge, who is a farmer, accountant, and non-smoker. They are represented by the following two establishment-appearing lawyers, with their establishment bona fides making sense, because industrial hemp is not about getting high or even getting medicine: Joseph Sandler, a District of Columbia lawyer who previously worked with the Democratic National Committee and was a partner at one of D.C.'s largest law firms; and Timothy Purdon, who is with a forty-five lawyer North Dakota law firm, which I would guess constitutes a large law firm for as sparsely-populated a state as North Dakota (approximate population of 636,000). This industrial hemp lawsuit is *Monson, et al. v. Drug Enforcement Administration, et al.*, U.S. Dist. Ct. (D. N.D.) Civ. No. 4:07-cv-00042-DLH-CSM. I have downloaded, but not yet read, the following key case document filings: the docket; the Complaint; the government's Motion to Dismiss legal memorandum; and the Plaintiffs' memorandum supporting summary judgment and opposing the government's motion to dismiss. Oral argument is set for November 14, 2007, at 10:00 a.m., in the Bismarck federal court. This litigation battle for the right to grow domestic industrial hemp follows an earlier federal court win by hemp product manufacturer David Bronner to permit industrial hemp imports. Jon Katz. **ADDENDUM:** Thanks to Mark Godsey for blogging on this story. Additional background information on this case is [here](#).

Posted by Jon Katz in Drugs at 00:00

Tuesday, November 13, 2007

November 14 in Washington, D.C.: March supporting Pakistani lawyers.

Image from State Department website. On November 7, 2007, I blogged about the ongoing human rights violations in Pakistan after Musharraf declared a state of emergency. The situation keeps getting worse. United States tax dollars are lining the bank accounts of Musharraf's government. I encourage everyone to raise their voices against the human rights violations in Pakistan. In that regard, the American Bar Association is sponsoring a march in Washington -- in solidarity with Pakistani lawyers -- on Wednesday, November 14, 2007, at 11:30 a.m., as follows: "At 11:30 a.m., lawyers will gather in the plaza in front of the James Madison Building of the Library of Congress before walking around the Supreme Court. Lawyers across the country are participating in similar marches in their communities, and the ABA is encouraging and supporting these local efforts." Jon Katz.

Posted by Jon Katz in Jon's news & views at 19:00

U.S. Sentencing Commission considering retroactive application of reduced crack sentencing guidelines.

DEA image in the public domain. Cocaine base -- often referred to as crack -- is pharmacologically indistinguishable from powder cocaine. However, for many years, the United States sentencing guidelines have provided for a harsh 100:1 sentencing disparity based on weight between the two. In the past, those who have sought to close the 100:1 sentencing gap have met with some in Congress who have proposed narrowing the gap by making powder cocaine sentencing harsher. Finally, the United States Sentencing Commission has seen some light, by considering (1) reducing the sentencing disparity by penalizing cocaine base less harshly, and (2) making the change retroactive. This is detailed further in the November 12, 2007, Los Angeles Times. Thanks to the ABA Journal online for linking to this Los Angeles Times article. Thanks to Sentencing Law and Policy for providing links to its postings on this subject. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Four Justices to join Federalist Society's festivities.

Bill of Rights. (From the public domain.) When I mentioned this Thursday's Federalist Society quarter century celebration to my law partner, Jay Marks, he remarked at the event's overlap with the November 9 Kristallnacht. Mind you, Jay is a past law school Federalist Society chapter co-chair, but times change. Four of the nine Supreme Court justices will be gracing the Federalist Society celebrants with their presence. Their names are easy to guess: Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Unless any Supreme Court vacancies arise beforehand, the next president is likely to be filling at least one Supreme Court vacancy, if not more. As much as I am not generally fond of party politics, I anticipate that, of the current pool of candidates, a Republican president is more likely than a Democratic president to nominate Supreme Court candidates, and lower federal court candidates, who will severely trample on civil liberties. Your vote counts. Jon Katz. ADDENDUM: Thanks to the ABA Journal for posting this information.

Posted by Jon Katz in Constitutional Law at 00:00

Monday, November 12, 2007

Thanks, Norman Mailer, for sharing your literary gifts.

Â Image from Library of Congress's website.Â One of my favorite novels is Saul Bellow's Henderson the Rain King. I read it on the plane back from a business tripÂ overseas -- winding down myÂ year between graduating college and entering law school, when I was a bank auditor/financial examiner with New York's Irving TrustÂ CompanyÂ -- where the assignment was dry, but the visit abroad was fascinating, and living in Manhattan was a daily adventure. What better time to read about a bored man from my natal state who had gained riches in business but wanted to break free of his daily grinding routine, and escaped to Africa in the process -- a man who resorted to working the grounds of his own estate, and, when hit in the eye with a wood splinter while wielding his axe, at the very least was reminded of his being very much alive? Unlike Henderson, I was earning an entry-level salary at the time, and was about to enter law school, thus delaying finally finding my path to self-fulfillment. Â Four years earlier, I finally started picking up novels by Norman Mailer, *Miami and the Siege of Chicago*Â and *Armies of the Night*. Mailer injected his own character into *Armies of the Night*, but I forget if he did the same in *Miami and the Siege of Chicago*. In any event, he wrote both novels so vividly that I felt I was at the events right with him as the stories unfolded. As I pondered the meaning of Mailer and his life -- after he left the planet this past Saturday -- I was reminded of Eugene Henderson's desperate need to break free from living within conventions created by others, with Mailer being a better example of that for me, because he was very much alive. Â Seven years after reading those two Mailer novels -- I wish to read more of them -- I had the television running in a Massachusetts motel the night before my brother's boarding high school graduation, and figured I was delusionally drowsy upon hearing a news report of soldiers moving in on the Tiananmen Square demonstrators, shooting them. I blogged last AprilÂ about my reactions toÂ the Tiananmen massacre. Â The next day, that surreal news turned out to be the reality, as a surreal day proceeded with a hotel breakfast served and tasting like they all do, a graduation ceremony that said not a peep about the massacre, and a brunch at a graduate's nearby home where the only political talk was about Congressman Gerry Studds's continued popularity after the Congressional page scandal. Â As people milled about before the graduation started, I saw Norman Mailer, whose child apparently was graduating that day. I walked up to him, and thanked him for sharing his writing with the world. He seemed to appreciate the thanks, and asked my name. I could have talked to him about the massacre, but felt relief enough that he was there, figuring that he shared my horror over the massacre rather than putting it to the back of his mind. Â Mailer had a particularly checkered past. He co-founded the *Village Voice*, which I tore open each week when living in Manhattan to learn where Ron Carter and other greats would be performing. He stabbed his second of six wives -- she survived and declined to press criminal charges -- under circumstances that I wish to know more about. He said demeaning things about women, and I want to know more about his reasons for doing so. He kept writing. I read Mailer when I was struggling to make sense of life, trying to figure out how I could feel grounded while so much inhumanity surrounded me, trying to find my own writing voice as a new college student, and often finding refuge in reading such writers as Mailer, Joan Didion, John Kennedy Toole, and Tim O'Brien. Mailer had his many struggles, and he kept writing. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Sunday, November 11, 2007

Read your deed.

Bill of Rights. (From the public domain.) In my law school, as perhaps is the case at them all, the mandatory and only first year classes were torts, contracts, criminal, legal research and writing, Constitutional law, property law, civil procedure, and moot court. Property law was not very enjoyable for me. It seemed to be a dry area of the law focused on maintaining the status quo of the privileged (disclaimer: I grew up privileged, and have always remained so); and referring to parcels of real property as blueacre, greenacre (the home of Oliver Wendell Douglas) and boogeracre (okay, that word I made up). After getting beyond my eyes glazing over about property law, I remembered what motivated me to attend law school in the first place, which was to learn how to do something good with the law on the one hand, and to learn the language of those who use the law to oppress, in order to battle them with their own weapons. With property law, for instance, one way to do good is to stand up for low income renters against their landlords who try to squeeze rental payments from them without giving much service, repair nor fairness in return. With contract law, a skilled lawyer sometimes can get a consumer out of an oppressive contract that was signed at the behest of a bubbly salesperson. With criminal law, of course, one can defend the accused. The most interesting part of property class was learning about the deed covenants that excluded property from being held by people from designated racial and religious groups, and the Supreme Courts' Shelley v. Kramer case, 334 U.S. 1 (1948), which invalidated deed covenants excluding people from designated racial and religious groups. Shelley says the Constitution is implicated with restrictive deed covenants as to the state action needed to have such covenants enforced. Consequently, it is critical to read every word of your deed, lease and accompanying documents. If offensive language is contained in the deed or lease, then the buyer or renter can proceed forward to excise the language, refuse to sign the document, or file a lawsuit to remove the language. Fast forward to 2007. A strip club signs a lease to begin its new operation. Then, a neighbor of the club obtains a temporary court order restraining the club from presenting stripping. The case continues being litigated as we speak. How was the temporary restraining order prohibiting stripping ever issued? Because the deed for the strip club has a restrictive covenant prohibiting any product or entertainment appealing to prurient interests. Stripping is First Amendment protected. Moreover, the phrase "appealing to prurient interests" is generally associated with obscenity cases; stripping cannot automatically, if ever, qualify as obscene. May Shelley v. Kramer return in full force, to remind judges, lawyers, and everyone else that unconstitutional deed provisions are not enforceable by the courts. Jon Katz. ADDENDUM: Thanks to a fellow listserv member for bringing this strip club case to my attention.

Posted by Jon Katz in Constitutional Law at 00:00

Friday, November 9, 2007

If women are barred from baring their breasts, why are men permitted to bare theirs?

Bill of Rights. (From the public domain.) Despite all the inroads made over the last few decades for gender equality, I have yet to find a court opinion barring lawmakers from banning women from baring their breasts in public.

Consequently, when defending against prosecutions involving women baring their breasts (whether on the beach, at a bar, in one's home when the window is open, or anywhere else), my argument focus includes: focusing on any equal protection provisions of the applicable state or federal constitutions and statutes; arguments of vagueness and overbreadth in the applicable statute or regulation (e.g., Maryland state law (aside from laws governing adult cabarets) does not say bared breasts are forbidden in public, but only talks of indecent exposure (and breasts -- which, for instance, sustain life through providing mother's milk -- certainly are not indecent); arguments that statutes permitting public breastfeeding confirm that the baring of breasts is not indecent; and arguments about vagueness in the law about how much of a breast is permitted to be exposed (e.g., whether an anti-nudity statute, read to its illogical conclusion, would prohibit the baring of even a half-inch of breast cleavage, which clearly would violate due process rights, equal protection rights, and free expression rights (in that revealing cleavage is a form of expression through fashion, at the very least; imagine, for instance, if women were prohibited from baring cleavage even at the beach)). It is bad enough that men freely are permitted to bare their breasts but women are not. It is even worse, and grossly bizarre at the very least, that in Ohio recently, barebreasted women were arrested for disorderly conduct, and an appellate court affirmed the convictions. Baring breasts certainly is not a disorderly act, particularly in this instance where the purpose of the breast baring was for a "Solidarity Potluck" in a public park, "to raise awareness of sexism and double standards. Fliers announcing the event had been distributed on the campus of Bowling Green State University." The case is *City of Bowling Green v. Lorien D. Bourne* (Ohio Sixth Appellate Dist., Oct. 26, 2007). Quoting from its opinion in *State v. Poirier*, the Ohio Sixth Appellate District in *City of Bowling Green* proclaimed: "We further note that the reason the female breast was explicitly enumerated as an 'erogenous zone' is the fact that female breasts are anatomically distinct and our society has viewed the public display of female breasts far more differently than male breasts. The female breast has traditionally been viewed as an erogenous zone. Because of the anatomical and societal differences, the government has an interest in preservation of the public decorum, decency and morals. See *Buzzetti v. New York* (C.A.2 1998), 140 F.3d 134; *Hang On, Inc. v. Arlington* (C.A.5 1995), 65 F.3d 1248; *United States v. Biocic* (C.A.4 1991), 928 F.2d 112." Id., ¶ 28." If we follow this foregoing court-quoted language to its illogical conclusion, we are back to the question of whether legislatures may even ban the baring of breast cleavage, even if it is at the beach. Moreover, even though clothed people can elicit a sexually excited response from others, that does not permit legislators to mandate the wearing of potato sacks. For the same reason, it is unconstitutional to bar the baring of breasts; now, I just need to convince judges of that. This preoccupation with barring bared breasts seems to be an unfortunate remnant of America's Puritan past. Such European Mediterranean nations as France and Italy are not burdened by Puritan pasts, and are places where women are free to bare their breasts on the beach just as much as men are permitted to do so. I have spent many total days at the beaches in France and Italy, starting at the age of fifteen, and witnessed no commotion caused by such bared breasts on the beach, where women freely make their own choice whether or not to bare their breasts. Jon Katz. ADDENDUM I - Thanks to the First Amendment Profs blog for bringing *City of Bowling Green* to my attention. ADDENDUM II - Thanks to Pete Guither from Drug War Rant, for commenting: "You're familiar with the New York Court of Appeals decision? <http://www.contra.org/lifestyles/naturist/topfree7.html>." I replied "Thanks, Pete, particularly seeing that I thought I had heard about the Santorelli case you list, but apparently used the wrong Lexis search phrases, which left me empty-handed. The citation for the Santorelli case you list is *People v. Santorelli*, 80 N.Y.2d 875, 600 N.E.2d 232 (1992). A Shepard's analysis of the case indicates that no courts outside New York have decided to follow Santorelli." ADDENDUM III - Thanks to Scott Greenfield for commenting as follows: "That was when the New York Court of Appeals, with then Chief Judge Sol Wachtler, was at the height of its independence. Unfortunately, the potential of Santorelli has never been met in New York, much to Herald Price Fahringer's dismay." Particularly since I'm not New York-barred, Scott's perspective on this matter is particularly beneficial for me.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, November 8, 2007

Blood alcohol content test results can be higher than the BAC at the time of driving.

When it comes to drunk driving prosecutions, blood alcohol content test results are subject to attack from all sides, including attacks on the accuracy of the test results in the first place. Moreover, judges and juries need to be educated that it is not a truism that blood alcohol content at the time of testing is no higher than at the time of driving. As alcohol absorbs into the bloodstream, an accurately-taken breathalyzer test will show an increase in blood alcohol content. This point can be best driven home through the testimony of a qualified expert witness (I list some of them here). Perhaps as a relevant example of increased absorption of alcohol in the bloodstream as time passes, perhaps not, one summer evening in my late teens, I joined some friends for many beers downtown in the town I was visiting for a few weeks. My friends wanted to take a taxi back, but I refused to go in the taxicab being driven by the same person who was fishtailing all the way to our original destination. A long distance runner at the time, I ran up a steep and long hill that took me back to my residence over a mile away. As I ran, I moved from feeling buzzed originally to feeling downright drunk. Not only was the alcohol moving through my bloodstream more as time passed, but it went into my bloodstream all the faster from my vigorous run. (As a tangent, were I still a drinker, I would enjoy duplicating this experience, as well as my experience playing one-on-one basketball after drinking several beers). Consequently, state drinking and driving laws may not penalize drivers for their blood alcohol content at the time it is tested, but only for their blood alcohol content at the time of driving, particularly where police arrive after the driving has finished (for instance, in the case of a collision) and see open alcoholic beverage containers in the defendant's car (which can indicate that the defendant drank alcohol after finishing driving and before submitting to a blood alcohol test). Unfortunately, Virginia law talks of a permissible inference that the blood alcohol test result shows the blood alcohol content at the time of driving. Va. Code § 18.-269. Allowing such an inference is particularly problematic when considering that Virginia law imposes a mandatory minimum five-day sentence for driving with a 0.15 BAC or over, and a mandatory minimum of ten days in jail for a BAC over 0.20. In any event, the Virginia Court of Appeals has confirmed that only a permissible inference -- but not a rebuttable presumption -- exists that the blood alcohol test result shows the blood alcohol content at the time of driving. As I blogged on April 25, 2007: Virginia's drunk driving Va. Code § 18.2-266 provides the basis for a permissive inference "that the blood alcohol concentration while driving was the same as indicated by the results of the subsequent test." Davis, 8 Va. App. at 300, 381 S.E.2d at 16. Yap v. Com., 49 Va. App. 622, 631 (April 24, 2007). Yap appears to clarify that the above-quoted language from Davis, 8 Va. App. at 300, refers to a permissive inference, and not a rebuttable presumption. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:01

Wednesday, November 7, 2007

Sixth Circuit strikes down the 18 U.S.C. 2257 anti-child pornography recordkeeping requirements.

First Amendment and the rest of the Bill of Rights. (From the public domain.) Praised be the three-judge panel of the United States Court of Appeals for the Sixth Circuit, which recently struck down the 18 U.S.C. 2257 recordkeeping requirements (to prove that sexually explicit images are of adults only) as unconstitutionally overbroad in violation of the First Amendment, seeing that 2257 even covers material depicting people who clearly are not minors (e.g. material clearly depicting people who are in their thirties and older). The case is *Connection Distributing Co., et al. v. Peter Keisler*, ___ F.3d __ (6th Cir., Oct. 23, 2007). *Connection Distributing* not only strikes down 18 U.S.C. 2257, but also rules that 2257 cannot be saved by judicial severing of any of its language, nor by judicial limitations on the reach of the statute. The case also gives a useful overview of critical aspects of First Amendment law governing adult entertainment, including the well-grounded fact that non-obscene (obscenity is to be determined by a jury in an obscenity lawsuit) sexually explicit photographs and moving images (e.g., films, videos, and online moving images) constitute speech protected by the First Amendment. In any event, it remains important to show judges in adult entertainment litigation that non-obscene sexually explicit material (including the written word, visual images, and live performances) are First Amendment-protected. Such a concept may appear to be counterintuitive to a judge handling such a case for the first time. It is better that judges see that such courts as the Sixth Circuit in *Connection Distributing* confirm as much, rather than merely relying on the say-so of lawyers representing providers of adult entertainment. Jon Katz. ADDENDUM- Thanks to a fellow listserv member for bringing *Connection Distributing* to my attention.

Posted by Jon Katz in Criminal Defense at 01:00

Some statutes are unconstitutional on their face.

First Amendment and the rest of the Bill of Rights. (From the public domain.) Some statutes are unconstitutional on their face. When a facial challenge against a statute is made on First Amendment grounds, one good case to cite is *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). *Watchtower Bible* invalidates ordinances that require people and organizations to register with the government before they may solicit door-to-door. In *Watchtower*, the Supreme Court said that: "The breadth and unprecedented nature of this regulation does not alone render the ordinance invalid. Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village, however, argues that the ordinance is nonetheless valid because it serves the two additional interests of protecting the privacy of the resident and the prevention of crime. "With respect to the former, it seems clear that 107 of the ordinance, which provides for the posting of 'No Solicitation' signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. *Schaumburg*, 444 U.S. at 639 ('[T]he provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs ... suggest[s] the availability of less intrusive and more effective measures to protect privacy'). The annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit. "With respect to the latter, it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyors or census takers. See n. 1, supra. Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials. Moreover, the Village did not assert an interest in crime prevention below, and there is an absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us." The *Watchtower Bible* majority opinion garnered six of nine votes, with Justices Scalia filing a concurring opinion with which Justice Thomas joined, and with the late Chief Justice Rehnquist as the only dissenter. Both due to the language and voting lineup of *Watchtower Bible*, the Supreme Court should not be expected to deviate from the opinion for a long time. Jon Katz.

Posted by Jon Katz in First Amendment at 00:30

"The first thing we do, let's kill all the lawyers"? Musharraf, lawyers and judges.

Video footage uploaded to YouTube on November 5, 2007. What would it take for lawyers in the United States --

including the many who today support maintaining the legal establishment's status quo -- to duplicate Pakistani lawyers' daily demonstrating in the streets (are only a minority throwing stones, which apparently are being thrown at the beginning of the above video?) at the risk of the types of beatings, arrests, and jailings being faced by the anti-Musharraf lawyers (and the detentions of anti-Musharraf judges)? What motivates the demonstrating Pakistani lawyers to do so? I wish to know if my hunch is correct that plenty of them are otherwise very mainstream lawyers and people when government leaders are not stepping on legal rights to such a degree as being seen after Musharraf declared a state of emergency. What motivates Musharraf to so brazenly crack down on dissenters -- all of them, not just lawyers? Does he think he can get away with this and still receive the same amount of aid largesse from the United States and other nations? For how long will the United States government wait before reducing its aid to Musharraf's government during his declared state of emergency? As to the title of this blog entry, it is from Shakespeare's Henry VI, Act IV, Scene II, which is apparently about one of the approaches tyrants can try to take for consolidating power; that is to say, when lawyers exist who are willing to stick their necks out for justice in the first place. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:00

Tuesday, November 6, 2007

Cops: You're prohibited from stopping for an insufficient suspect description and from violating the Fourth Amendment.

Â Bill of Rights.Â (From the public domain.)Â It is sad enough when cops urinate on people's Constitutional rights, and sad even more when judges allow a subsequent conviction grounded on such violations. Julian Madison-Sheppard learned that firsthand,Â after being unlawfully detained by cops on an insufficient description tip about "a suspectÂ with an outstanding warrant for an attempted murder that occurred sometime that week ... 'possibly armed and dangerous' and ... believed to be 'in the Elkton area.' According to the broadcast, the suspect was a black male, approximately six feet tall, 180 pounds, with cornrow-style hair, and the crime, believed to have been committed by the suspect, occurred somewhere in the 'Winding Brook' area, which is located in the Elkton mailing area but is outside the Elkton town limits. Julian Madison-Sheppard v. Maryland, ___ Md. App. __ (Nov. 2, 2007). Â After hearing the above-described police radio broadcast, police approached appellant Sheppard on the street, who ended up not being the person with an open attempted murder warrant. Although the trial judge sustained the police detention of Mr. Sheppard (who was handcuffed "for safety reasons" -- ah, the police state that excessively prevails (see Nov. 20, 2006, Underdog Blog)), Maryland's Court of Appeals said the detention violated the Fourth Amendment, having been based on an insufficient description, an insufficient totality of the circumstances, and insufficient grounds to handcuff Mr. Sheppard for looking nervous, seeing that nervousness is plenty common even when innocent people are encountered by police. Â The Court of Special Appeals provides further details of the seizure, search, and arrest of Mr. Sheppard:Â "When the second officer arrived, both Deputy Roland and the officer approached appellant; as they did so, appellant sat down on the porch steps. When Deputy Roland asked appellant for identification, appellant said that he did not have any. Appellant then became 'very nervous and could not stand.' The officers, 'for safety reasons,' handcuffed appellantâ€™s arms behind his back. After handcuffing appellant, Deputy Roland conducted a pat-down search for weapons. While patting down appellantâ€™s right pant leg, Deputy Roland detected 'blunt objects' in his right front pocket. This caused Deputy Roland to 'squeeze,' 'grab,' and 'grasp' the objects. According to Deputy Roland the objects were 'jagged,' 'hard,' and were 'sliding back and forth' between his fingers. The material felt like it was made of plastic. Deputy Roland then asked appellant if he had any illegal drugs on him. Appellant gave no response. Deputy Roland concluded that the objects he felt were crack cocaine. He then reached into appellantâ€™s right front pocket and removed a Ziploc baggie containing thirteen individual baggies of a white rock-like substance, which, based on Deputy Rolandâ€™s experience, he believed to be cocaine. Appellant was arrested for possession of a controlled dangerous substance ('C.D.S.'). Subsequent testing of the white rock-like substance by the Maryland State Crime Laboratory revealed that it was crack cocaine."Â As we know from *Minnesota v. Dickerson*, 508 U.S. 366, 378Â (1993). during such an allegedÂ TerryÂ frisk, a lump in one's clothing does not give the police a license to conclude that the item isÂ "contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon." *Dickerson*, 508 U.S. at 378; see alsoÂ Feb. 27, 2007, Underdog Blog. Â Too often, cops run roughshod over the Constitution, as illustrated by Mr. Sheppard's foregoing ordeal of being detained for an insufficient description (aÂ "black male, approximately six feet tall, 180 pounds, with cornrow-style hair") and being arrested on an unconstitutional search. Even though Mr. Sheppard's rights ultimately were vindicated in the Maryland Court of Special Appeals, dollars to donuts his sentence was not stayed pending the lengthy time interval between his sentencing (and possibly beforehand, if he was unable to make bond, or if his bond had been revoked after being found guilty and before his sentencing date) and his appellate vindication. The prosecution has a right to seek appellate review in the Maryland Court of Appeals, which is Maryland's highest court. If that happens, I will take strong exception not only for the wrongness of such an appeal, but also as a Maryland resident telling the prosecutors not to do it in my name. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, November 5, 2007

Meeting the Guild.

Â Bill of RightsÂ (From public domain.)Â Numerous times I have blogged about the National Lawyers Guild, including my many points of departure from the organization.Â This past Thursday through Sunday, for the first time I met Guild members from around the nation -- as opposed to only local and Mid-Atlantic members whom I already know Â -- at the Guild's annual convention in Washington, D.C. Â With a competing court and personalÂ calendar, I only got a chance to spend a few hoursÂ at the convention. Fortunately, during that time I met numerous Guild members with whom I had only conversed -- and sometimes sparred -- by listserv, email, and phone. A big problem with email remains the human face that often is absent from such messages, often with people pressing the "send" key too quickly, without pausing to consider being more diplomatic. The Guild has many very likeable members -- even including those with whom I vehemently disagree on some of my most critical points of departure that I discuss here. People become active in the Guild not to burnish their resumes -- seeing in part that the Guild is not perceived as an establishment legal organization -- but to serve justice (as each member defines justice) without any other agenda. Â Among the Guild convention attendees were two fellow attendees at the 1994 Trial Practice Institute of the two-week essentialÂ National Criminal Defense College, which was held in Atlanta pending recovery from the flooding in Macon.Â One fellow NCDC attendee and I spent much free time together during the 1994 program, and later found on the Guild's now-defunct national listserv (which I very much objected to being disbanded -- disbanded for no other reason, apparently, than many strongly-worded messages that the leadership decided would either mean a moderated listserv (which became a reality, over my strong objectionsÂ against a moderated listerv)Â or not posted at all (and the leadership decided it had become too time consuming to do the moderation))Â that we hold very different views about the Guild'sÂ approach to Israel (with me being in the significantÂ minority of members feeling the Guild is too one-sided against Israel). Nevertheless, at the conference, we picked up where we left off in Atlanta, and left our differing views unspoken beyond acknowledging that they still exist. Another fellow NCDC member is a non-practicing lawyer in Chicago who is full of the type of optimism that helps recharge my own batteries; with him, too, we picked up from where we left off in 1994. Â The Guild convention included support for Japanese lawyers working to keep alive Article 9 of the Japanese constitution (which apparently came into being after being positively reviewed by the United States government subsequent to World War II), which provides for a Japan that for the most part does not go to war; Japan is feelingÂ pressure from the United States, at the very least, to modify this approach, apparently to become involved in international peacekeeping forces.Â Two of the Japanese lawyers at the convention estimated that around ten percent of Japanese lawyers might be classified as "progressive", but saidÂ that there is not much of a death penalty abolition movement there, despite ongoing executions. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Friday, November 2, 2007

Hiroshima atomic bomb pilot dies.

The peace symbol went far beyond hippies. Gerald Holtom designed the symbol in 1958, and the Campaign for Nuclear Disarmament adopted the symbol for its logo. The Hiroshima atomic bomb pilot died yesterday. He was Paul Tibbetts, who piloted the Enola Gay bomber that flattened Hiroshima, killed countless people (many of them through slow and excruciating deaths, sometimes months and years later), and left countless survivors permanently scarred physically and psychologically. Certainly, America's atomic bombings of Hiroshima and Nagasaki came in the context of unspeakable and repeated brutality by Japanese soldiers against civilians and opposing soldiers. To this day, Americans debate whether the atomic bombings were justified. I believe they were not, believe that Nagasaki was bombed much too close in time to the bombing of Hiroshima (as opposed to giving the Japanese government more time to decide whether to surrender prior to a second atomic bombing), and wonder whether Hiroshima was targeted to test out the effects of the atomic bomb on a city that had been left mainly untouched by war damage before the atomic bomb was dropped. No matter how much anybody has or has not tried to make Hiroshima a propaganda piece, even stripped of any propaganda, my 1999 visit to the center of the bombing is seared in my memory with deep sadness. In 2002, I got together in Washington, D.C., with some peace walkers who had carried a flame from embers left burning by the atomic bombing, originating their journey in Hiroshima. More on this peace walk is here. Here, I briefly recount my brief time with the Hiroshima Peace Flame walkers. Here is a brief excerpt about the peace walkers' April 22, 2002, evening gathering at the church that was their Washington, DC, home base: "We gathered for a poetry semi-circle around the peace flame, with poet Sayuri Miyazaki. Her first poem left an indelible mark on me- 'Enola Gay'. Read first in the original Japanese, and written about six years ago at the airplane's then site at the Air and Space Museum, Sayuri's Japanese made clear to the speaker of any language her feelings and sadness and pain not just about the Enola Gay, but about war itself. Although not a full pacifist, I've been very influenced by numerous peace activists; my visit three years ago to Hiroshima was very sad. "Today the peace walkers proceeded to visit the Enola Gay that Sayuri introduced us to through poetry, now in pieces -- the symbolism blares out-- at a federal building in or near Suitland, Maryland. Before the drum-beating procession to the Enola Gay, I assisted with the four-car caravan that brought the 30 walkers' belongings from their DC location this morning to their College Park location where they will stay tonight, on their way to Jessup tomorrow, Baltimore Thursday, and ultimately Manhattan." Long after the Hiroshima bombing, Paul Tibbetts confirmed he felt it was the right thing to do; he has the company of many others in this view, just not mine. Jon Katz.

Posted by Jon Katz in Jon's news & views at 01:00

Thursday, November 1, 2007

From here, the Westboro Baptist Church case will be appealed.

First Amendment and the rest of the Bill of Rights. (From the public domain.) From October 22 to October 31, my life was consumed with my defense of the Westboro Baptist Church (WBC) and its pastor before a Maryland federal jury against charges of intentional infliction of emotional distress and intrusion upon seclusion. Each day, I drove to the heart of Baltimore for this trial, not once getting the time to enjoy the city except for the last day, during lunch while the jury deliberated. Only after the jury issued its verdict on October 31 did the court lift its gag order preventing the parties from communicating with the media, whose members daily covered the trial. A general overview of the case is here from the Baltimore Sun. The case arises from the picketing and related activities of WBC members concerning a soldier's funeral. I very much disagree with WBC's views, including its decision to picket soldiers' funerals. Of course, I believe strongly in responding to reviled speech with counterspeech. In addition to the above-listed emotional distress and intrusion upon seclusion charges, the lawsuit filed by the soldier's father alleged defamation, which the court dismissed the week before trial commenced. Committed to robust First Amendment protection, I accepted the role of defending WBC and its pastor in this lawsuit, while departing strongly with their message and actions. Having declined to dismiss the remainder of the lawsuit, the judge sent the case to the jury, which on October 31 returned a total verdict of \$2.9 million in compensatory damages and \$8 million in punitive damages. These are huge numbers, to say the least. This case stirs people's passions. I have heard from people taking issue with my defending WBC and its pastor in this case, and from others agreeing with my standing up for First Amendment rights, which I do again and again for people from across the political spectrum, believing that picking and choosing within the political spectrum is disingenuous to upholding the First Amendment. I went to law school idealistic about using my law degree for civil liberties, learned during law school that First Amendment rights are suppressed all the time, and feel heartened about being able to light a candle rather than to curse the darkness, through my First Amendment defense work. Protecting free expression often requires defending dark and/or controversial views and actions. It includes defending against cross burning statutes, defending the right of neo-nazis to march in Skokie, and defending the rights of the adult entertainment industry, As the American Civil Liberties Union's website proclaims: "It is easy to defend freedom of speech when the message is something many people find at least reasonable. But the defense of freedom of speech is most critical when the message is one most people find repulsive. That was true when the Nazis marched in Skokie. It remains true today." This WBC case will now proceed to the United States Court of Appeals for the Fourth Circuit, where the First Amendment issues will be argued and reviewed. Jon Katz. ADDENDUM II/II - November 7, 2007. A Google search reveals many views supportive of the jury's verdict. The webpages opposing or seriously questioning the verdict on First Amendment grounds are much fewer and take longer to find, so I list some of them here: Herald-Argus, Press-Dakotan, News Journal, News Tribune, Legal Blog Watch, Renew America, Debate Nation, and Daily Irrelevant, ADDENDUM I/II - November 4, 2007. Several people have been emailing me about this case, all disagreeing with the defendants' views and actions, some cheering the verdict, some taking exception (and sometimes strong exception) to my representing Westboro Baptist Church and its pastor, and some supporting my standing up for the defendants' Constitutional rights. My responses to those expressing dissent about my representation include, but are not limited to, the following: "As you apparently recognize, I do not share the Westboro Baptist Church's views. At the same time, I believe strongly in having their speaking, picketing, and preaching activities protected by the First Amendment, lest First Amendment protection not be extended to speech that I hold dear. "I have been very much influenced by the American Civil Liberties Union to represent such clients as the Westboro Baptist Church. The ACLU lost many members when it supported the right of nazis to march down the streets of Skokie, IL, through a neighborhood with many Jewish people, including Holocaust survivors. I was in high school at the time, and it took some time for me to understand and support that position. Ultimately, the ACLU enjoyed a surge in membership, including with the PATRIOT Act-related substantial curbing of civil liberties. "More behind my decision to defend this case is here <http://markskatz.com/justiceblog/archives/821-From-here,-the-Westboro-Baptist-Church-case-will-be-appealed..html> . "As to where the picketers stood, please see the news article here. It was conceded at trial that my clients never entered the funeral building. The testimony of law enforcement and church members was that they were on county-owned property, not on church property. Defense testimony showed that the picketing took place over one thousand feet from the building where the funeral took place."

Posted by Jon Katz in Jon Katz in the News at 01:00