

Tuesday, April 1, 2008

When the spotlight turns to the judge and lawyer who did not foresee a homicide coming.

Bill of Rights (Image from the public domain.) With the help of an attorney, Mark Castillo successfully convinced judges in Montgomery County, Maryland -- where our law firm sits and where I live -- to deny his wife's begging the court to deny unsupervised visits between Mr. Castillo and their three children. Castillo called the police this past weekend to tell them he had killed all three children at the Baltimore Marriott Inner Harbor hotel where he had taken them. In Maryland, as in so many other states, judges do not serve for life, as opposed to their federal court counterparts. District Court judges must be reappointed every ten years. Circuit Court judges -- who generally handle more serious cases than District Court judges -- must stand for reelection every fifteen years. With their positions not being lifetime seats, how could one expect every Maryland judge to avoid taking actions calculated to assure remaining on the bench through re-appointment and re-election? How will this Mark Castillo front page news not affect at least some judges' future rulings about bond and visitation by those alleged to be powderkegs of violence even if such allegations are not backed up with sufficient facts and sufficiently credible testimony? How does Mr. Castillo's lawyer feel for having helped Mr. Castillo avoid having the court issue an order to only have supervised visits with his children? How would I feel if I were in Mr. Castillo's family lawyer's (as opposed to criminal defense lawyer's) shoes? First, I avoid family law like the plague, with two small exceptions that did not involve being called and harangued at all hours of the day and night by divorce court plaintiffs out for venomous blood against their exes, those exception cases being my past representation of divorced veterans fighting to keep their ex-spouses from sharing in their retirement pay (which involved raising critical Constitutional issues), and my representation of an Indian tribe's interests in assuring an underage tribal member's access to the tribe's financial benefits during the course of his custody litigation (whereby this gave me the opportunity to serve Native Americans, whose rights are near and dear to my heart). Second, the closest I could have come to being in the shoes of Mr. Castillo's family lawyer would have been if I defended him in criminal court by advocating letting him out on pretrial bond. On an intellectual level, I can argue for hours how important it is to justice and to an honest criminal justice system for criminal defense lawyers to fight tooth and nail for their clients, even if the lawyer is convinced that the client is guilty as sin. On a gut level, I believe that too many judges run roughshod on the Constitution by keeping criminal defendants locked up pretrial -- while presumed innocent -- in the name of risk averseness without taking the defendant's liberty interests in sufficient account. Nevertheless, how would I feel if I were the lawyer who successfully convinced Mr. Castillo's judges to allow him unsupervised visits with his children? Assuming Mr. Castillo committed the heinous acts that he allegedly admitted to the police, I probably would feel so terrible that I would seriously consider clearing my calendar for a few weeks and flying to as remote an area as possible (for instance, taking a canoe and tent into the Canadian wilderness) to make sense of this situation that cannot yet -- if ever -- be made sense of. Would I end up changing my law practice based on Mr. Castillo's actions? Probably not. On an intellectual level, such heinous acts seem too infrequent, even though harmful acts (including such non-violent harm as verbally abusing the couple's children as pawns in the breakup) on a lesser scale likely are very common in the divorce court scenario. On an emotional scale, I might, at least at first, more carefully screen my clients. How would I feel if I were defending Mr. Castillo in his pending murder prosecution, for which he faces the possibility of a death penalty trial (who knows whether Mr. Castillo turned himself in hoping that he would get executed, to finish the attempted suicide that he botched)? As I wrote last year, it is not enough intellectually to want to represent criminal defendants. If one's heart is not into helping the client, the client suffers. As an early criminal defense teacher-trial practitioner (who, ironically and sadly, committed suicide less than two years later) admonished: "Love your client. Even if your client smells, love your client, and stick close to your client." Who else will? Idealism may help pave the way to successfully defending criminal defendants, but nothing beats connecting with and caring about them, and developing the skills and experience necessary to successfully fight for them. Although it was but a movie, Joe Pesci in the title role in *My Cousin Vinny* exemplifies that caring is more important than idealism when it comes to criminal defense; otherwise, he would not have won his cousin's murder trial. Does this mean that I would have no feelings for the victim of a crime that I know my client has committed (how often does a lawyer know for sure whether the client has committed the alleged crime?), and that I would not understand the motivation of those wanting to take my client off the streets? No. It does mean, though, that I have not yet identified any type of client or type of crime that I would not defend to the hilt, unless the defendant were alleged to have committed a crime against someone close to me, in which case I would be conflicted out of representing the defendant in the first place. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, March 31, 2008

Happy birthday, Cesar Chavez / Some staff out in celebration.

Cesar Chavez: A champion for the empowerment of workers and immigrants. In honor of Cesar Chavez's March 31 birthday, most of our support staff will be out of the office in celebration. Our lawyers -- Jay and myself -- will be working. My assistant will be out, so please be patient while I get calls returned today and tomorrow; I will be in court most of today. When you walk into our office reception area, you will see photo montage tributes to Cesar Chavez and Martin Luther King, Jr., both champions of social justice who insisted on non-violence. We have offered our staff the option of taking off on Cesar Chavez's birthday since our 1998 opening; I just learned recently that his birthday is a state holiday in California. Cesar Chavez also was a fellow vegetarian, which is particularly curious when considering that farm work ordinarily includes animal slaughter, unless the United Farm Workers -- which Chavez founded -- only dealt with non-meat farm work. Happy birthday, Cesar Chavez. Thank you for the personal sacrifices you made for social justice and to better the lives of those who started with little power and influence. Jon Katz.

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

Sunday, March 30, 2008

Return to Forever

As I have said before, jazz is improvisation, spontaneity, feeling, being in the moment, tight interaction, entertainment, pushing the limits of excellence, creativity, expanding into new frontiers, fun, inspiration, and discovery. That also is what my criminal defense work is about, albeit with frustration frequently challenging the fun part. Moreover, my countless live trumpet performances with various bands helped make it more natural for me to perform before audiences in the courtroom. Magic consistently happened with the trailblazing 1970's Return to Forever lineup of Stanley Clark, Chick Corea, Al Dimeola, and Lenny White. Magic comes again with this summer's RTF reunion tour. I already have my tickets for the August 4 concert at Maryland Merriwether Post Pavillion. If you will be at one of their concerts, please let me know about your experience. Jon Katz

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

Friday, March 28. 2008

The ambiguity of silence; the silencing of ambiguity.

Bill of Rights (Image from the public domain.) Undoubtedly, cops have legions of tricks to convince suspects to give up their Miranda right to remain silent, starting with delaying an arrest and detention so as not to need to give such rights yet, proceeding to intimidating body language (including patting the cop's handgun and handcuffs), and proceeding to leaving the suspect the choice between languishing in a depressing, decrepit, smelly, and confining lockup while waiting the weekend to see a judicial officer for a bond review or to be taken on a McDonald's field trip with unlimited Coca Colas and fries in exchange for spilling the beans. Of course, the "persuasion" methods to getting a waiver of Miranda rights can become more sinister, including police lying that Miranda rights were given and waived in the first place, threatening harm or other problems to the suspect or his or her loved ones, alternatively yelling and mollycoddling the suspect (sometimes through good cop/bad cop or a legion of them parading in and out and at times leaving the suspect alone, in suspense over what will happen next, and whether a good cop or back cop will enter next) over a sustained period of time, and proceeding to all sorts of physical discomfort that reveal no visible scars or bruises (including forcing the suspect to sit in underwear on an ice-cold steel chair or to be blindfolded with a urine-soaked cloth); ask the CIA and other interrogators of suspected terrorists for additional methods of such heavy-handed interrogation methods. Cops should have little to no excuse for not using videocameras for interrogations to enable judges and jurors to reach their own conclusions about the extent to which a confession is voluntary. Of course, the videotape only captures what the camera and editing show, still leaving questions about what takes place before and after the camera rolls, outside of the camera's view (e.g., is a cop standing behind the camera pantomiming the slitting of the suspect's throat should s/he not "please" the cops), and in front of the camera, too (sound and picture quality always can be altered through editing or distorted by poor quality of the equipment or use of the equipment, and by dimming of lights and playing loud noise in the background). Last Tuesday, Steve Silverman of FlexYourRights.org and I talked to a bunch of George Washington University law students about their rights with the cops, which revealed how critical are the Busted video and such rights lists as ours. Even for law students who on the intellectual level understand the right to remain silent and to refuse searches, numerous of the students still wondered, for instance, whether refusing to talk with cops or to consent to searches (since when are police "consent searches" consensual in the first place?) will make them harass suspects all the more or even to assault them. As Steve always emphasizes, if a suspect gives up such rights with merely a fear of harassment, being beaten, or other detriment without being able to relate that fear to anything concrete done by the cops, then the suspect has given up much chance of getting evidence suppressed. When a suspect calmly and peacefully says the mantra "no" to all searches and statements, the cop is left with a peacefully annoying person and with more reason to seek out a more pliable crime suspect than to continue to have to deal with a person who incants "no" -- as peacefully as Gandhi, who hated nobody -- as if it were religious gospel. No means no, and saying no or remaining fully silent (possibly even with a Gandhian calm smile (watch out for the cop intoning "What's S/HE smirking about?)) will help prevent the cops from finding ways to push past the no. For instance -- and this is not meant to give cops any ideas, but they probably already know the following approach -- if a suspect refuses to speak to the cops, the bad-playing cop may turn to the good-playing cop, and yell in front of the suspect: "Mr. amateur lawyer wants to play difficult. Fine, then, please write up your report, and say the suspect refused to talk or cooperate. What a stupid move; how the hell can the prosecutor give a fair shake to the suspect if we don't have his version of the story? Maybe there is an innocent explanation for all this, but the suspect's not telling us a damn thing." When suspects deal with cops, it is like an amateur playing against a decorated pro basketball player. Saying no to cops is the only way to start leveling that playing field, which can only be fully leveled by bringing in a qualified criminal defense lawyer. However, do not put it beyond cops to try to deprive a suspect from access to a lawyer for a long time, including during the time a suspect waits to get photographed, fingerprinted, and further "processed" before waiting longer still to appear before a judicial officer to have a bond set. Most people cannot remain silent very long. It might work for a few minutes or one or two hours for those with more fortitude. However, remaining silent becomes harder as the suspect languishes in a police car slowly taking the longest, most uncomfortable roundabout route to the destination; and often in the initial instance deprived of food and water, reading materials, and much or any telephone access. It can be excruciatingly difficult to remain silent in the back of a police car or in the police "processing room" (ostensibly for taking mugshots and fingerprints) while two cops talk in front of the suspect about how some "misguided" do-gooder group has convinced the defendant to remain silent where in the real world "that the do-gooders never see" the suspect would be better served to talk. Even for a suspect to break the silence by talking about things seemingly unrelated to the suspected crime is a bad idea. For one thing, anything a suspect says (and the suspect's demeanor) can be intentionally or unintentionally twisted around by cops to the suspect's detriment. Second, saying anything to the cops leads down a Simon-says path, which gets the suspect's tongue wagging about something (even if it is only about March Madness) and gives the cops an opening to steer the conversation back to the suspected crime (for instance: "Too bad you won't be seeing any more March Madness if you don't get out of the lockup.") What

happens when a suspect asks a cop: "What happens to me if I refuse a search, or if I refuse to talk?" I imagine the cop replying: "We cannot help you if we don't have your version of what happened, or if we cannot independently verify your explanation with a search of you or your car." The cop might also initiate the following to his or her partner in front of the suspect: "What a fool not to talk with us or to let us search. If s/he has nothing to hide, wouldn't s/he cooperate with us? If the suspect's explanation is convincing, we can let him or her go, rather than detaining further. If we find nothing through a consent search, the suspect can go, rather than our waiting a long time for the drug-sniffing dogs ("What's that you say? Our dog handler can't be here for another four hours, in this rain?) or for us to get a search warrant ("How many hours will it take us to get a judge to sign the warrant? They are all asleep now.") Thus, we return to the power of just saying no to the cops. Some suspects might fear keeping silent or refusing a police search, lest the suspect look guilty in front of the jury for having made such a refusal. However, invoking the right to remain silent and to refuse a search is not permissible for the jury's ears. However, the cops do not have to tell suspects that, nor do cops need even to warn suspects that they have a right to refuse a search. What happens when a non-cop (for instance, a loss prevention officer for a bank) investigates a potential crime and the suspect refuses to speak, or does not return phone calls? Silence and non-responsiveness are too ambiguous to be permitted to be used against a criminal defendant, and this point must be driven home fully to deciding judges. *Weitzel v. Maryland*, 384 Md. 451, 863 A.2d 999 (2004). This Weitzel case brings us back to the title of this blog entry: "The ambiguity of silence; the silencing of ambiguity." Weitzel supports keeping out a suspect's silence as being too ambiguous as to both cops and non-cops, let alone as being inadmissible when one refuses to talk with cops. Keeping silent is the best way to eliminate ambiguity in the first place about a suspect's words. People mis-hear and mis-quote others all the time, starting with newspapers. Cops should not be expected to be any more accurate in relating a suspect's words than journalists, the best of whom are more skilled than most cops at accurately conveying what a person has said. The cops might try to trick a suspect into writing down a statement, by saying that "This way, nobody can twist around your words." Oh no? The times must be countless and continuing that a bunch of cops surround a suspect while the suspect writes a statement, nodding to each other in agreement for each phrase with which they approve, and frowning facially and by conversation (and calling the line B.S.) at phrases that do not meet their approval. Furthermore, anything a suspect tells the cops in denying culpability can lead one to Martha Stewart's convicted and jailed fate, should a jury deem that the suspect was lying and obstructing justice. With the cops, no word is more valuable than "no". Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, March 27, 2008

Macon and Dubois

Â Yin Yang.Â Â Practicing life andÂ law as a harmonious whole. Â The best multi-day trial lawyer seminars that I know of are the National Criminal Defense College's Trial Practice Institute (also known as Macon, which I attended in 1994 for two weeks) and the Trial Lawyers College in Dubois, Wyoming, which I attended for four weeks in 1995. NCDC only accepts those practicing criminal defense, and not prosecutors. Except for its judges' seminar, the Trial Lawyers College limits attendance to lawyers mainly representing people, not prosecutors, not corporate lawyers, and not insurance defense lawyers. Â For those not ready to invest so much time into the above-described lengthy seminars, both programs also sponsor long weekend seminars. Here is the 2008 schedule for NCDC programs, and here is the 2008 schedule for the Trial Lawyers College's programs. I understand that some people who even attend a long weekend Trial Lawyers College program often go through a tremendous metamorphosis, so hold onto your seat if you attend. (Suffice it to say that the 1995 Trial Lawyers College, alone,Â was a powerful catalyst that led within a short time to people leaving their legal employment or partnerships to start new practices, reconciliation of shaky relationships, the breakup of shaky relationships, babies conceived, numerous changes on smaller scales, and, eventually, many breakthroughs at trial and before.) If you attend or have attended programs at either place, please let me hear from you. Jon Katz.Â ADDENDUM: Psychodrama is heavily coveredÂ at the Trial Lawyers College. In that regard, thanks to a fellow listserv member for providing the information and linkÂ to The Psychodrama PapersÂ by John Nolte, who is both a psychodrama practitioner and teacher in his own rite, and who is heavily involved with the Trial Lawyers College.

Posted by Jon Katz in Persuasion at 00:00

Wednesday, March 26, 2008

To self-execute or not self-execute, that is the question! Or is it?

Bill of Rights (Image from the public domain.) Yesterday saw five of the most conservative of the Supreme Court justices refusing to require a state court system (in Texas) to let an International Court of Justice ruling cause Texas to deviate from its law that does not permit more than one state-level habeas corpus proceeding. *Medellin v. Texas*, ___ U.S. __ (March 25, 2008). Justice Stevens concurred in the majority opinion, but found much to like, as well, in the dissent of Justice Breyer, who was joined by Justices Souter and Ginsburg. A Criminal defendant Medellin's habeas corpus action reviewed by the Supreme Court in *Medellin* was not a run of the mill habeas corpus action. Mr. Medellin is among the countless occupants of Texas's death row. Although living in the United States since early childhood, he is a Mexican national who was questioned by the police, spilled the beans about his involvement in the gang rape and murder of two teenage girls, and apparently was denied his right under the Vienna Convention -- a treaty passed by the United States Senate, with the Constitution including treaties among the supreme law of the land -- to be advised of his right, as a non-United States citizen, to consult with a consular representative from his country of citizenship (who presumably would have told Mr. Medellin about his right to counsel and the extent to which the Mexican government would help him pay for or find a criminal defense lawyer or give him other advice). Medellin apparently raised the consular consultation issue in his second state habeas corpus petition in the light of the *Avena* decision from the International Court of Justice at the Hague, which directed United States courts to review the cases of several dozen convicts who alleged they were denied advice of their right to consular consultations under the Vienna Convention. The lengthy *Medellin* majority and dissenting opinions cover much ground, and require more than the one quick reading I gave to give a sufficient overview of the ruling, aside from the following key points. Such blogs as *Opinio Juris* and *Scotus* address the opinion further than do I in this blog entry. Nevertheless, this is a very important Supreme Court ruling that has implications beyond criminal proceedings to reach the effect on American courts of the rulings of all international tribunals on both criminal and non-criminal matters (including international tribunals interpreting the application of NAFTA and the World Trade Organization). Before going into some of the key points of *Medellin*, the very noticeable tension between the majority and dissent appears to revolve in large part around a reluctance of the majority to see American court sovereignty handed over so easily to international tribunals without that requirement being made as clear as day in the governing treaty itself or perhaps even in clarifying federal legislation (and not in clarifying presidential orders or other presidential memoranda, because here the Supreme Court gave no effect to such a recent presidential clarification). The dissent, on the other hand, seems to say that such compromises of American court sovereignty are for American treaty makers (the president must approve the treaty, and then the necessary number of senators must approve it) to make or not to make, and that -- at least in this instance -- the treaty and Congress need say nothing more for federal and state courts to be required to give effect to the rulings of such international tribunals, to the extent that the applicable treaty gives such binding effect to the international tribunal. Here are some of the key points of *Medellin*:

1. Apparently still alive and well is the Vienna Convention's requirement that those who are not citizens in the country where arrested be advised of their right to consular consultation. The Supreme Court seems to leave open courts' authority to enforce this provision of the Vienna Convention, but was not about to tell Texas to deviate from its prohibition against subsequent habeas corpus proceedings.
2. If *Medellin* were challenging a federal versus a state prosecution at the habeas corpus level, the Supreme Court may have given effect to the ICJ's *Avena* decision, at least here where president Bush signed a memorandum giving effect to ICJ decisions interpreting the Vienna Convention, and where federal prosecutions are pursued to the president's executive branch.
3. The majority seems very concerned about reaching an opposite result than it did, lest unforeseen and harmful results follow from having American courts bound by international tribunals that are not governed by safeguards of the United States Constitution.
4. Perhaps influencing some of the justices in the majority in *Medellin* is an aversion to giving more review rather than less review to habeas corpus challenges involving capital cases.
5. This case is important for interpreting all treaties, including the extent to which they will be treated by courts as self-executing or not. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, March 25, 2008

Criminal penalties for not reporting a felony that one has concealed.

Bill of Rights (Image from the public domain.) Every once in awhile, the media reports on federal prosecutions for "misprision of felony". This blog entry seeks to debunk any notion that it is a crime merely to fail to report a crime, as opposed to concealing a felony cognizable by a federal court and not reporting it. The federal misprision of felony statute is at 18 U.S.C. § 4, which provides: "Misprision of felony. Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both." *Id.* (emphasis added). Consequently, absent proof beyond a reasonable doubt that the defendant took affirmative steps to conceal a felony, no conviction for misprision of felony is permitted. *U.S. v. Daddano*, 432 F.2d 1119, 1124 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971). How does the federal misprision of felony statute jibe with the Fifth Amendment right against self incrimination? No misprision of felony conviction should be available (except where a guilty plea is entered to misprision of felony, thereby waiving the right to raise the Fifth Amendment defense) where reporting the felony would involve giving up one's Fifth Amendment rights as to the underlying felony (as opposed to the concealment of the felony, which concealment can be committed by a person who had nothing to do with the felony itself and whose reporting the felony would not expose the person to a conviction for the underlying felony (see the next paragraph for more on when the Fifth Amendment may be asserted in a court proceeding by one who is not a party to the criminal prosecution)) and where the defendant has not already waived his or her Fifth Amendment rights (e.g. by denying the alleged crime to investigating FBI agents, rather than asserting the right to remain silent). *U.S. v. Kuh*, 541 F.2d 672 (7th Cir. 1976). In this regard, "It is well settled that the Fifth Amendment privilege against self-incrimination 'must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.' *Hoffman v. United States*, 341 U.S. 479 (1951)." *Id.* at 674. More recently, the Supreme Court spoke further about when a non-party may refuse to testify in a criminal prosecution pursuant to the Fifth Amendment (and, therefore, by reasonable extension, when a person may avoid a misprision of felony conviction lest reporting the felony would violate one's Fifth Amendment rights as to the underlying felony): "The Fifth Amendment privilege against self incrimination 'extends not only 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.' *Hoffman*, 341 U.S. at 486. 'It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' 341 U.S. at 486-87. We have held that the privilege's protection extends only to witnesses who have 'reasonable cause to apprehend danger from a direct answer.' 341 U.S. at 486. That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. *Ibid.* A danger of 'imaginary and unsubstantial character' will not suffice. *Mason v. United States*, 244 U.S. 362, 366 (1917). But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's 'basic functions . . . is to protect innocent men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Grunewald v. United States*, 353 U.S. 391 (1957) (quoting *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551, 557-58 (1956)) (emphasis in original). In *Grunewald*, we recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth. 353 U.S. at 421-422. "Ohio v. Reiner", 532 U.S. 17, 21 (2001). Why must a defendant go through all these mental gymnastics over whether the Fifth Amendment precludes exposure to a misprision of felony conviction, which carries a sentence of up to three years? Court resources and justice (including on Fifth Amendment grounds) will be better served by striking the misprision of felony statute in the first place. Jon Katz

Posted by Jon Katz in Criminal Defense at 06:00

Dealing with fish tales from witnesses and politicians.

For criminal defense lawyers, Hillary Clinton's Pinochiotales featured in the above YouTube video -- thanks to Jonathan Turley for posting it -- are but variations on themes that many clients and opposing witnesses bring our way. Until I last checked around 7:00 p.m March 24, Clinton's campaign tried getting as much mileage as it could from her Tulka trip fantasy, including this promotion here and this slam on Obama here. The Associated Press reports: "Hillary Rodham Clinton's campaign said she 'misspoke' last week when saying she had landed under sniper fire during a trip to Bosnia as first lady in March 1996. She later characterized the episode as a 'misstatement' and a 'minor blip.'" If Clinton wins the election, will she forgive the culture of snitch lying to convict others as minor blips? Or, on the flip side, will she push to minimize the extent and intensity of prosecutions for obstruction of justice and perjury, by forgiving the allegedly

offending statements as a minor blip? I await a better explanation from Clinton on this Pinocchio-gate, but am not holding my breath. Jon Katz's ADDENDUM: Hillary Clinton's campaign has spent more energy focusing on lashing out at Obama than to explain Clinton's Pinocchio-gate described by the video displayed above.

Posted by Jon Katz in Persuasion at 00:00

Monday, March 24, 2008

For the thousandth time, you don't need to consent to searches nor be interviewed by the cops.

Â When I spoke on the March 11 "Know Your Rights" panel at the University of Maryland, I told the audience how often potential clients say "Oh, sh*t" or something to that effect when I play them the Busted video to explain that they gave up rights that they had no obligation to give up. Shortly after that, I told an acquaintance about how often people waive their right to refuse searches; this very intelligent man whom I have known for over a quarter century responded with surprise that nobody needs to consent to a search. Â Consequently, every time I am invited to talk to audiences about their right to remain silent and to refuse searches, I jump at the opportunity when my schedule permits. My next such appearance will once again be alongside Steve Silverman (we did a similar presentation for the undergraduate George Washington ACLU chapter and NORML last November 19), whose Flex Your Rights group produced the Busted video that is presented on every page of our blog. On March 26, 12:15 p.m. (addendum: on March 25, I learned that the announcement flyers say 12:00 p.m., but I will start at 12:15 p.m.), at a George Washington law school room to be announced (addendum: to be held in Stuart 201; enter at 2000 H St., and it's at the G St. side of the quad), we will speak around thirty minutes before Busted is screened by the law school's chapter of the American Civil Liberties Union. Â Everybody must know their Constitutional rights, whether or not they or those around them might become criminal suspects. If you live or work near the George Washington University law school,Â I encourage you to attend this March 26 event. If you do not, I urge that you read our rights page and view the Busted video today. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, March 23, 2008

When the Recording industry sues for copyright infringement.

The Bill of Rights. (From the public domain.)Â Copyright infringement brings the risk of significant money damages and, sometimes, criminal prosecution. The First Amendment fanatic that I am, I feel very comfortable defending people accused of copyright infringement. As much as great music and great musicians are near and dear to my heart, my First Amendment concerns win out in my deciding which side I would represent for such litigation. Â Here are some resources to help sharpen one's teeth in defending against copyright litigation: Â - Nimmer on Copyright - With its price tag over \$1500, I wonder how many people infringe on Nimmer's own copyright. By the way, the author, Melville Nimmer, successfully argued to the Supreme Court to overturn the conviction of a man who walked into a courthouse with a t-shirt proclaiming "F*ck the Draft". Cohen v. California, 403 U.S. 15 (1971). Â - Here is an overview of the fair use doctrine, from the U.S. Copyright Office's website. Â - Here is an apparently standard type of copyright complaint for allegedly unlawfuil Kazaa-type downloading. Â - Recording Industry v. The People blog presents itself as being "[a]bout the RIAA's attempt to monopolize digital music by redefining copyright law, through the commencement of tens of thousands of extortionate lawsuits against ordinary working people."Â - Pike & Fischer publishes Internet Law & Regulation. Most of its articles apparently require a subscription. Â - ArsTechnica.com covers copyright infringement lawsuits. Â - Here is the website of the Recording Industry Association of America.Â Jon Katz.Â

Posted by Jon Katz in First Amendment at 00:00

Friday, March 21. 2008

Justice Alito surprises by strengthening Batson.

Bill of Rights (Image from the public domain.) Once a person becomes a Supreme Court justice, no concern should exist about being pleasing enough to senators and the president to get onto a higher court (and getting elevated to a higher court or retained on the existing court, when it comes to some state courts, should not be a concern with any judge on any court); this is the highest court the United States ever has had. With that backdrop, I applaud the two newest justices -- Justice Alito and Chief Justice Roberts -- who scared me to little end when the Senate approved their nominations, and who still scare me, but who also give hope for doing some real justice from time to time. If only they would do as much justice as Justice Souter, about whom I went into a near-emotional tailspin when I first learned he had replaced my hero Justice William Brennan. Justice Alito penned yesterday's magnificent *Snyder v. Louisiana*, ___ U.S. ___, which requires a judge to take a fully active, observant, and independent role in assessing the demeanor of a prosecutor who contends a race-neutral reason for striking a potential juror, and for observing the demeanor of the stricken juror. The two Supreme Court justices who scare me the most are Justices Thomas and Scalia, who are *Snyder v. Louisiana*'s sole dissenters, by the pen of Justice Thomas. Fortunately, they are in a minority of one in *Snyder*. Here are some of the best passages from Justice Alito's majority opinion in *Snyder v. Louisiana*: Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race: "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El v. Dretke*, supra, at 277 (THOMAS, J., dissenting) (quoting *Miller-El v. Cockrell*, 537 U. S. 322, 328-329 (2003)). The trial court has a pivotal role in evaluating Batson claims. Step three of the Batson inquiry involves an evaluation of the prosecutor's credibility, see 476 U. S., at 98, n. 21, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez*, 500 U. S., at 365 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," *ibid.* (quoting *Wainwright v. Witt*, 469 U. S. 412, 428 (1985)), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." 500 U. S., at 366. In *Miller-El v. Dretke*, the Court made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted. 545 U. S., at 239. Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks. In this case, however, the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was Batson error. When defense counsel made a Batson objection concerning the strike of Mr. Brooks, a college senior who was attempting to fulfill his student-teaching obligation, the prosecution offered two race-neutral reasons for the strike. The prosecutor explained: "I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning [of voir dire] and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." Those are my two reasons. App. 444. Defense counsel disputed both explanations, *id.*, at 444-445, and the trial judge ruled as follows: "All right. I'm going to allow the challenge. I'm going to allow the challenge." *Id.*, at 445. We discuss the prosecution's two proffered grounds for striking Mr. Brooks in turn. -- The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous. -- With many weeks remaining in the term, Mr. Brooks would have needed to make up no more than an hour or two per week in order to compensate for the time that he would have lost due to jury service. When all of these considerations are taken into account, the prosecutor's second proffered justification for striking Mr. Brooks is suspicious. The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that

appear to have been at least as serious as Mr. Brooks's. We recognize that a retrospective comparison of jurors based on a cold appellate record maybe very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. In this case, however, the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause. Congratulations to Appellant Allen Snyder for winning this appeal, after having been convicted of capital murder and sentenced to death. The sweetness of his victory is limited, though, because Mr. Snyder likely will be retried, once again facing the risk of a conviction and death sentence. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, March 20, 2008

Joe Ligotti leaves theguyfromboston.com. He is a price of a robust First Amendment.

A price of a robust First Amendment is protecting Joe Ligotti's rants. (Bill of Rights image from the public domain.) Last December 21, I blogged about xenophobic (at best) Joe Ligotti, who posted his rants every Wednesday on www.theguyfromboston.com. He can be very engaging and entertaining, which makes him all the more scary. Maybe he is not as scary as I first thought, now that he no longer is on [theguyfromboston.com](http://www.theguyfromboston.com), which apparently is a change that happened within only the past one or two weeks. A new character is delivering weekly rants there, and he is rather lackluster when compared to Ligotti. On March 20, I got the following quick reply to my following e-mail about Ligotti's whereabouts: My question to Info@theguyfromboston.com: "I'm asking the same question you probably keep getting: Why isn't Joe Ligotti on this page any longer? Where are his archived videos? Might you consider putting these answers on your website?" Response from Info@theguyfromboston.com: "The actor that previously played 'The Guy from Boston' for us decided to go in another direction. Our web site and its message continues, and as always we hope you enjoy it." The actor? Does that mean that I was not off the mark last December when I wrote "I wish to learn that Ligotti is no more real than Borat, but am not holding my breath"? On the same day that I posted my above-listed inquiry to [theguyfromboston.com](http://www.theguyfromboston.com) website, a story appeared online that Ligotti had signed an exclusive management publicity deal with Balboni Communications Group, LLC. A report on BusinessWire says "YouTube pulled down more than 100 of Ligotti's videos citing 'inappropriate content.' However, not all his videos are YouTube-banned, unless YouTube is currently on a search and destroy mission against them; many are currently on other people's YouTube account pages, including here. Keep in mind that YouTube got taken over by Google.com last year, the same Google that -- along with Yahoo and Microsoft and Cisco-- has kowtowed bigtime, at least in the very recent past, to the Chinese government. Does that help explain how Ligotti's YouTube account got yanked? Or, did Ligotti yank it himself and then claim that YouTube did it to him? On the one hand, the Ligotti YouTube video that I uploaded to my original Guy from Boston post got yanked at some point. On the other hand, I applaud Google for apparently doing less stringent self-censorship of its Chinese site today than it did when this PBS story ran, at least with respect to a Google image search for "Tiananmen Square", which results in Tank Man images for both the English and Chinese Google sites (see here and here), where before that was not the case. For at least several months, if not more, Ligotti has been appearing on local and national television, clearly more toned-down than his F-bomb laden self-produced videos. Does anybody know if Ligotti left [theguyfromboston.com](http://www.theguyfromboston.com) because he sold the site, because he thinks he found bigger fame on television, because YouTube yanked his account, or because his character really was no more real than Borat? I prefer to learn that his fifteen minutes of fame are over. Jon Katz. ADDENDUM: Although I would prefer not to spread Joe Ligotti's name any further, having asked readers in the last paragraph above about Ligotti's status with [theguyfromboston.com](http://www.theguyfromboston.com), and having gotten the following information, I provide it here: - Fred Balboni (fbalboni@balbonicg.co) from Ligotti's promotion company confirmed to me by email and phone last Friday (thanks, Fred, for taking the time to speak with me, no matter the extent to which it was just to help Ligotti) that Joe is the real deal and no actor. Fred emailed me in pertinent part: "I have attached a copy of the Cease and Desist letter [which Underdog omits here, lest I get in the middle of the reliability of the allegations contained therein] that was delivered this day to the person that was operating the .com site for Joe... Please note that Joe's new Web address is: theguyfromboston.net. He will be appearing on FOX & Friends on Monday morning not necessarily on this issue but notice will be given as to the new site. Thank you for your interest counselor! Fred Balboni" - [Theguyfromboston.net](http://www.theguyfromboston.net) is up and running since March 24, but was not running on March 23. The site suggests that a video rant is coming this Wednesday to respond to Ligotti's loss of access to [theguyfromboston.com](http://www.theguyfromboston.com). - As an aside, it is beyond humorous that American Express as of today is promoting itself with an advertising link on the f-bomb-connected [guyfromboston.com](http://www.guyfromboston.com). Is American Express loosening its advertising selectivity in the hunt for the almighty dollar, or are the heads of the company not up to date on the activities of its front-line advertising people?

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

Wednesday, March 19, 2008

Meeting Winter Soldiers, Amy Goodman, and James Yee.

Â Â Â Amy Goodman and James Yee (Photos by Jon Katz, March 18, 2008,)Â Â Â How many people, when asked "What were you doing during [some major historical event]?" can only shrug their shoulders to say they missed it all, during the daily grind of work, the commercial monster, commuting, eating, sleeping, and beer? It is easy to do; my biggest motivator for doing the opposite comes from kicking myself for having chosen law school studies one night over what turned out to be my only life's chance to meet the lateÂ Abbie Hoffman, who spoke just two blocks away.

Â Â America has been at all out bloody war for over five years. The Federal Reserve has bailed out Wall Street with huge corporate welfare when the economy is still in trouble at best. Gasoline prices keep rising not only because oil producers have a big enough demand to get away with it, but also because America's addiction to fossil fuels competes with a heroin addict's cravings for junk. For those who have not woken up yet, it is time to do so. Gone should be the days when those in power smile at a relatively docile population that is complacent enough to get a good enough paycheck biweekly and to be occupied by sports and other non-political diversions during leisure time. Â Â With that backdrop, during the last five days, I have met Winter Soldiers, Amy Goodman, and James Yee. Here is a short rundown. Â Â With the Winter Soldiers, I resume where I left off on March 4, when I blogged about American veterans of the wars in Iraq and Afghanistan taking over from the 1971 tradition of the Vietnam veteran participants in the original Winter Soldier investigation. I volunteered along with numerous other lawyers around the nation -- organized through the National Lawyers Guild -- to be on call to give legal advice to witnesses who might wish consultation about their criminal exposure both for divulging allegedly classified information, and for any admissions of war crimes and other wartime activities subject to court martial proceedings. Â Â I missed the opportunity to advise any of the witnesses, as more lawyers signed up for my March 13 timeslot than witnesses wishing their advice. The next day, morning court finished early enough before afternoon court began that I was able to drive to the Winter Soldier site two miles up the street from our office, at the National Labor College in Silver Spring, Maryland. Near the sidewalk entrance to the college were several dozen pro-war protesters against the Winter Soldier investigation, with signs urging honked horns in support. Further down the entrance, as I was told to expect, unarmed civilian security folks in t-shirts asked my business, and I was waved through after telling them I am a lawyer member of the National Lawyers Guild and showed them my business card. Profoundly influenced by the first Winter Soldier investigation, I was determined to get at least a glimpse of this gathering. My visitor pass is here; the conference took place on the fortieth anniversary of the My Lai massacre.Â Â On my arrival, a panel of veterans were discussing their struggles in getting sufficient healthcare for injuries suffered while in Iraq and Afghanistan.Â For many wounded soldiers, it seems that they struggle with a mountain of bureaucratic paperwork and often a faceless military medical bureaucracy that would make the oppression visited by governmental power on Kafka seem like child's play. Â Â I said hello to a few people who seemed to be Iraq and Afghanistan veterans. I then met some Vietnam war veterans, including two who testified at the original 1971 Winter Soldier. One of the Vietnam Winter Soldier witnesses told me about a presentation by Vietnam veteransÂ in Washington, D.C., apparently near the time of the first Winter Soldier, where one of them talked of seeking an American soldier throw a Vietnamese child down a well, and an animal after the child. Had the child not met such a terrifying fate, he would be over thirty-five today. Later that night, the same speaker went berserk in his hotel room. It turned out that this ordinarily mild-mannered man was the one who threw the young boy and the animal down the well. War dehumanizes. Â Â Another Vietnam Winter Soldier witness told me how he learnedÂ where were theÂ American-placed bouncing Bettys -- landmines that would hurl into the air at waist-height and shoot out deadly shrapnel -- and would dodge them to leave the base to go into town, where he would return with drugs to share. This man knew an 80-pound grandmother whose village ultimately came under attack by American soldiers. Terrified, the woman clung to this soldier who would dodge bouncing Bettys. The late Sgt. ___ -- who I was told drank himself to death many years later over such reprehensible violence -- shot her pretty much in half as she clung to this soldier. Â Â The Vietnam war ended in 1975, which gave the American military propaganda machine a chance to start a new war twenty-eight years later in Iraq, inundated with soldiers and civilians far removed from the horrors of the Vietnam war. Â Â Amy Goodman of Democracy Now! -- awarded yesterday the local American Civil Liberties Union's annual Henry W. Edgerton Civil Liberties Award -- feels that the tide will turn onÂ American public opinion on the current Gulf war, if only news coverage of the war for one week mirrored the intensity and frankness revealed in journalists' films and still photos that helped turn the Vietnam war into a most unpopular war in the United States. She feels that the media are heavily limiting real revelations of what has been happening at the multi-day Winter Soldier. Â Â Amy and fellow awardee Ralph Temple warned of the harmÂ to democracy that comes from a mainstreamÂ news media that is heavily invested in America's for-profit corporations, and that include suchÂ military industrial complex companies as General Electric, which owns NBC television. Ralph further warned that only eleven corporations control the bulk of news coverage in the United States. Â Â Amy has been in town daily covering the Winter Soldier investigation. She emphasized the critical importance of having such independent news outlets as Pacifica bringing their ideas and music to the airwaves without accepting corporate funding. She would

make a great trial lawyer. Also at yesterday's ACLU annual lunch was keynote speaker James Yee, whom Amy Goodman has previously covered. Mr. Yee tumbled from being a decorated Muslim chaplain at Guantanamo several years ago, to being charged, manhandled, and locked up for many days as if he were a terrorist. Countering any notion that any evidence was strong against Mr. Yee, the Defense Department ultimately dismissed the case, and he was honorably discharged after resigning his commission. Yesterday, I met James Yee and Amy Goodman at the end of the ACLU awards gathering. For years I have felt that Amy Goodman is indispensable, no matter how biased or not she may be. For months I have been planning on blogging about Mr. Yee, whose lawyer Gene Fidell is a dynamite local lawyer who previously served with me on the local ACLU board. I recommend obtaining Amy Goodman's and James Lee's latest books. Amy's latest book is *Static: Government Liars, Media Cheerleaders, and the People Who Fight Back* (Hyperion 2006). James's book is *For God and Country: Faith and Patriotism Under Fire*. (Public Affairs 2005). I bought each book, and each writer gave me their inscription. Amy wrote: "Jon- Make Static!" James wrote: "To Jon- Stand firmly for Justice." Both of them urge others to stand up for justice and to watch out about being lulled into a false sense of security and comfort by huge power structures who want nothing more than such a false feeling of security. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, March 18. 2008

Kudos to victorious pro se murder defendant Harold Stewart.

Photo from website of U.S. District Court (W.D. Mi.).
Congratulati ons to pro se first degree murder defendant Harold J. Stewart not only for winning his retrial last month in Prince George's County, Maryland, Circuit Court, but also for doing so with a jury deliberation that lasted less than one hour.
Warning: Do not represent yourself in a jailable case. In fact, Mr. Stewart first went to trial represented by defense counsel. The case mis-tried when the judge determined that one of the jurors did not speak adequate enough English to sufficiently deliberate. Mr. Stewart later replaced his public defender legal counsel with a private lawyer who urged him to accept a second degree murder guilty plea. Mr. Stewart refused, the private lawyer returned Mr. Stewart's payment, and the rest is history, with Mr. Stewart defending himself at trial.
Unknown is the extent to which Mr. Stewart won his trial because of any effective self-representation or despite mistakes on his part. Stewart's is a trial transcript worth obtaining and reviewing to get a non-lawyer's perspective on obtaining a serious felony jury trial victory.
Mr. Stewart vows to sue a litany of people he says wronged him in this prosecution, including his previous legal counsel. I doubt a qualified lawyer will take the civil case for Mr. Stewart, that is if Mr. Stewart even were to attempt to find one rather than to see if he will be successful on his own with another roll of the dice.
Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, March 17, 2008

If your email to us bounced yesterday.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). This follows up on this morning's blog entry about problems for a few hours yesterday afternoon and evening with e-mails to us bouncing back to e-senders. If you received an email that your email to us could not be delivered, it is best to re-send it to us. Our sitehost guru informed me that: "A mailserver standard setup is supposed to keep trying for 5 days when it can't get through. Usually they try once an hour, then 2 hrs, then 4 hrs, etc until 5 days." However, when I sent a test message during this downtime to jon@markskatz.com from my alternative Yahoo address, the bounceback message to my Yahoo account indicated that the Yahoo server gave up on re-trying any re-sending. For that reason, it is best to re-send us any bounced emessages from yesterday. From our sitehost guru today, I learned that recent sitehost server upgrades account for recent downtime reaching our website for an hour one recent morning during primetime, and for a few infrequent instances of delayed email receipt. The upgrades are for faster surfing of our blog and static website. Have you noticed whether you are getting speedier access to our website now than a few months ago? Jon Katz.

Posted by Jon Katz in Jon's news & views at 17:00

Our email is working, after being down a few hours Sunday evening.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). On rare occasions our email gets bottlenecked for one or more hours before we receive the messages, and on even rarer occasions it bounces back to the sender (that apparently has only happened twice in the two years we have had our current sitehost. The latter problem happened on Sunday, March 16, 2008, to all e-mails to our *@markskatz.com e-addresses, from around 3:00 p.m to around 9:30 p.m. Unless I hear otherwise from our website host, through which we receive email, I will assume that any emails that bounced back to the sender as undeliverable during the foregoing hours will never be received by us. Therefore, if you sent us emails that were bounced back to you yesterday, please re-send them. Thanks. Jon Katz.

Posted by Jon Katz in Persuasion at 00:30

Tibet is but one reason to consider not watching the Chinese Olympics.

Image from NASA's website. Every government violates human rights to one extent or another. Consequently, every choice for an Olympics game site involves the political, unless the games are limited to an Olympics-governed parcel of land set aside exclusively for all Olympics games. When the International Olympics Committee chose China for the 2008 summer Olympics, the handwriting clearly was on the wall that plenty of worldwide dissent would arise over such a choice, and that the Chinese government would attempt for the Olympics to be a splendid way to try to whitewash its abysmal human rights situation today (see here, too) and in the recent past, including the Tiananmen Square massacre and the subsequent and ongoing crackdown related thereto. The recent and ongoing protests (where some or many demonstrators have gone beyond peaceful means, at least as to property destruction, and possibly worse) inside and outside of Tibet against Chinese oppression of Tibetans -- including the expectedly harsh response from the Chinese government -- are just one of the reasons to consider not watching the Chinese Olympics live or on television. To do otherwise will be to give up the opportunity to take a clear stand against human-rights-violating business as usual in China, when already few people vote with their wallets against such abuses by boycotting Chinese-made products. I do not advocate having government bans on Olympics participation, as such bans are their own form of government oppression against people's freedom of choice, and take the choice away from Olympic athletes (and some top Olympics athletes are considering boycotting the Olympics) whether or not to go to China. By the same token, those strongly opposed to China's miserable human rights situation (I have blogged about the United States' miserable human rights situation many times, too, although China's is much worse), need not contribute to China's attempted public relations coup through its Olympics; all that is needed is to turn off the Olympics television coverage and to not attend the stadium events. As a result, the Chinese government and the rest of the public will recognize that the Chinese government's Olympics propaganda machine wears no clothes. Also, when people refuse to watch the Chinese Olympics, that will be publicized in the Nielsen ratings, and television advertisers will recognize that they are paying too much money for commercials during Olympics airtime. Before the recent unrest in Tibet, the Associated Press reported that "Members of Congress said [February 27, 2008] they want China held to account for promises to protect human rights, press freedom and the environment that were made when Beijing was awarded the 2008 Olympics... Many lawmakers appeared deeply skeptical that China's pledges were sincere or that changes would last beyond the

Olympics." China continues being a severe censor, even to the point of requiring that any Harry Connick, Jr., concerts cover the songs on the playlist submitted by his promoters, and banning the Rolling Stones from singing "Honky Tonk Woman" and "Let's Spend the Night Together." China has also blocked YouTube, which has included broadcasts (e.g., [here](#) and [here](#)) of the Tibetan unrest. YouTube's owner Google.com says it's trying to get YouTube's access returned in China, and the question remains whether that will be done with or without Google's previous complicity with brutality and whitewashed information from the Chinese regime. If the Chinese government really believes its hands are clean (which they clearly are not) during the current demonstrations, then why are foreign journalists barred from the capital city Lhasa? (See filmmaker Spence Palermo's account of the banishment of foreign reporters.) Will you be watching the Chinese Olympics? Jon Katz. ADDENDUM: Here are some additional newslinks; China's current ban on foreign journalists' access to Tibet makes it hard to have an accurate picture of what is currently happening in Tibet: - The Australian Herald-Sun reports on March 17, 2008: "At least seven Tibetans were killed as police opened fire overnight on an anti-China protest in the south-west of the country, two activist groups said, citing witness reports." - This New York Times March 15 report covers the overall situation in Lhasa and beyond, including allegations that vandalism in Tibet was directed at Chinese-owned property, and allegations by a Chinese resident of Tibet that his family members told him of Tibetans beating Chinese residents. - The International Campaign for Tibet has periodic updates on the situation in Tibet. - This BBC report suggests that many Chinese officials were surprised about the current extent of international outcries over China's human rights situation as the Olympics approach, which apparently included Steven Spielberg's withdrawal from a project to cover the Olympics there. Consequently, this is all the more reason to refuse to attend and watch the Chinese Olympics.

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

Friday, March 14, 2008

Boston College law professors say no to Mukasey.

The Bill of Rights. (From the public domain.) When then-attorney general Dick Thornburgh had been invited as my law school's commencement speaker, I was none too pleased. To me, Thornburgh's Justice Department continued where the Ed Meese Justice Department left off, with rampant disrespect for immigrants' rights, a First Amendment-trampling anti-obscenity campaign, advocating drug-testing of its employees, and, of course, continued assault on women's right to choose abortion. Sadly, regime change did not result in a Clinton Administration that championed civil liberties nearly as much as I hoped it would (and the notion of a drug-testing-free society has become a quaint one for now), although Clinton certainly was pro choice, and his administration withdrew from obscenity prosecutions in favor of child pornography prosecutions. My close law school friend Lou Manuta and I identified and weighed our options: boycott the graduation; tape protest messages to our graduation caps; or proceed with the graduation but leaflet the attendees. We arrived at the third option after concluding that a small-scale boycott would not be a message to anybody, and that there's not much of a persuasive message to put on a graduation cap. Consequently, we put together a simple leaflet saying: "George Washington Law School welcomes Dick Thornburgh as keynote speaker.... But," and continuing on the inner pages to detail our above-listed concerns. With some fellow graduates joining our cause -- which probably had more of a positive impact than the two of us just boycotting the lackluster graduation ceremony -- we called ourselves Law Students for Justice, suggested in the leaflet that people contact Mr. Thornburgh directly with their concerns (we sent a letter and the leaflet to Mr. Thornburgh in advance), and recruited a few people to hand out the leaflets as attendees filed in. More on Thornburgh's lackluster speech and my two meetings with Thornburgh (who emailed me that he believes in disagreeing agreeably, when I emailed him this blog entry about him) and other opponents is here. I had not thought of rallying law professors to this Thornburgh protest. Having assumed (perhaps incorrectly) from our Amnesty International petition tables and other general observations that even most sympathetic professors would prefer not making such waves, I focused on some of our fellow soon-to-be graduates to join our cause. Today, George Washington University students have great faculty supporters of human rights in the form of blogger Jonathan Turley; a human rights pro bono advocate Ralph Steinhardt, who taught while I was there; and probably some of the clinical law professors. How pleased I was to learn that twenty-two Boston College law professors this week sent this letter to attorney general Michael Mukasey requesting that he reconsider his acceptance of an administration invitation to speak at the May 2008 law school graduation. The professors made an excellent point that if he were to speak on campus in a regular speech format, the audience could grill/skewer/question him about waterboarding and other extreme interrogation methods. As a graduation speaker, he will have the final and only word. Thanks to BC law school's Eagle and ABA's website for reporting on this story. Educational institutions should think more closely in selecting graduation speakers, issuing honorary degrees, and putting donors' names on buildings. This is not to say that their selections should be dull or non-controversial. On the other hand, take American University, which for years had the Adnan M. Khashoggi Center on campus -- which at least some students and faculty opposed -- and later removed the man's name after Khashoggi, of Iran-Contra fame, apparently defaulted on his donation promise. In 1989, George Washington University, where I went to law school, conferred an honorary doctor of laws on former Korean president Roh Tae Woo, who was far from a darling of human rights. George Washington University never learned its lesson. In 2006, GW handed out honorary degrees to George Bush I and Barbara Bush. GW bestowed the same honor in 2004 to General John Shalikashvili when opposition to the Iraq war was already high, and justifiably so. Granted, along the way, GW made some good picks with honorary degrees, including late Supreme Court Justice William Brennan, Bishop Desmond Tutu, and musician Billy Taylor. My college, Tufts University, seemed to make many wiser honorary degree decisions once I got there, often calling attention to many deserving of wider attention -- including Eugene Ionesco, Maya Angelou and John Updike -- while still giving honorary degrees to many government officials, although generally avoiding awarding them to the likes of Henry Kissinger and Fidel Castro. However, before I arrived there, Tufts' Fletcher School wrongheadedly made plans to establish a Ferdinand Marcos chair (complete with bondage straps and electric shock torture implements?) but then dropping the chair plans when he fell short \$1 million of his \$1.5 million pledge (it appears the school kept the half million dollars that was paid). The things money can buy. In any event, thanks to the Boston College twenty-two for inviting attorney general Mukasey to be somewhere else on BC law school's graduation day. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Thursday, March 13, 2008

When courts apply 1+1=3 to the Constitution.

The Bill of Rights. (From the public domain.)
When I applied to law school, I was excited about the prospect of overlapping my then-future law career with my obsession with human rights work. I expected that part of my law studies would involve learning the language of the oppressive enemy, so that I could more successfully battle that enemy. That enemy turned out not to be a person or group of persons intending on harming others, but instead was a huge tumor on the body of law often developed by well-meaning people at best, and those wanting to protect their own and some of the worst power, privilege, and prejudices at worst. This dose of healthy cynicism helped me keep my eyes on the prize of learning critical legal skills and information in law school, to get my law degree and to pass the bar, and to land where I could do good with my law license. Nevertheless, before law school, I was largely unprepared to learn how far courts go to trample on basic individual rights. I knew that courts had set up all sorts of legal fictions and distortions of words and sensibility to uphold systems that kept slavery in place, permitted statutory racial segregation, and allowed subjugation of women. In law school, I also learned how even the Supreme Court found ways to uphold laws criminalizing adult consensual oral sex, to give police the green light to search areas within an arrestee's lunge and grasp even after the arrestee is handcuffed and unable to lunge and grasp, and to allow all sorts of censorship to the point that one radio station in the 1980's decided not to air Allen Ginsberg's masterpiece Howl, due to the chill of the risk of litigation costs and fines over any effort by the Federal Communications Commission to seek indecency-related fines for airing the poem. One of the latest sad judicial treatments of the Constitution comes from Maryland's intermediate court in the form of *Hamel v. State*, __ Md. App. __ (March 6, 2008). Hamel says police have the right to search even locked gloveboxes incident to a driver's arrest. In this instance, Hamel was arrested for drunk driving. During a search of his person incident to arrest, a gun holster was found on him. The police searched his car, and found no incriminating items, but then removed his key from the ignition, opened the locked glove box, and found a handgun, for which he was convicted. Hamel points to other courts that have upheld searches of locked gloveboxes incident to arrest, and points out that Maryland's constitutional equivalent of the Fourth Amendment provides no more protection than the federal Fourth Amendment. Last May, I blogged that police need probable cause to search a car trunk, even when a search incident to arrest is allowed of the car's passenger compartment. If Hamel is not overturned by Maryland's highest court (I am skeptical whether the United States Supreme Court would reverse Hamel), I would not be surprised if Maryland trial courts and possibly Maryland's Court of Special Appeals will ultimately use Hamel to justify trunk searches incident to arrest. This runaway train of search incident to arrest must be stopped in its tracks and be limited, at worst, to searches of passenger compartments incident to arrest of drivers, not to include locked gloveboxes and other locked containers. Avoiding judicial shredding of the Constitution must be considered when voting for anyone with the power to nominate and confirm judicial candidates. Not that I expect Hillary Clinton to be a big champion of Constitutional rights (hope springs eternal, though), and Obama seems too much of an unknown in that respect, I expect that McCain will appoint judges who are, on balance, more unfriendly to Constitutional rights than Clinton and Obama. The federal courts have already been packed for seven years by George Bush II with too many judges who are unfriendly to Constitutional rights. For McCain to take over the White House under such circumstances likely will make today's federal judge lineup look like a paradise. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, March 12, 2008

When alleged child victims talk by videotape.

Â Bill of Rights.Â (From the public domain.)Â On March 10, Maryland's highest court addressed how prosecutors can get around *Crawford v. Washington*, 541 U.S. 36 (2004), in trying to present at trial videotaped conversations between alleged child abuse victims and social workers and other government employees. The main thrust of the opinion is to reverse the trial court's refusal for the defense to call the child on cross-examination after theÂ prosecutorÂ played the videotape at trialÂ subsequent to the child's live testimony, where the defense declined to cross examine the child after his live testimony, apparently as a defense effort to prevent the prosecutor from offering the videotape into evidence.Â The case is *Myer v. Maryland*, __ Md. __ (March 10,Â 2008).Â Myer also addresses the extent to which the defense will be permitted to cross examine the child beyond the scope of the child's videotaped words:Â "The trial court could have controlled the scope o f the cross-examination; that, too, is largely discretionary, especially with respect to a child-witness, and there is no need for us to opine as to what a trial court may, in its discretion, allow. A court, in this situation, may be willing to allow, and ordinarily should allow, a broader cross-examination if the alternative, mandated by the concurring opinion, would require that the cross-examination be bifurcated, thereby subjecting the child to being cross-examined, and thus having to relive the incident, twice. There certainly would have been no error and no abuse of discretion had the trial court here chosen to allow a greater range of cross-examination than would be permitted by the concurring opinion." Â *Myer v. Maryland*, __ Md. __. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, March 11, 2008

Appearing tonight at U. Maryland on "Know Your Rights"

Here is more information from my last week's blog entry about my panel participation tonight at the "Know Your Rights" program, March 11, 2008, 7:00 p.m. at the Prince George's Room, Stamp Student Union, University of Maryland. Here is the detailed event flyer. The program is presented by the campus Students for Sensible Drug Policy and the campus National Organization for the Reform of Marijuana Laws. Joining me on the panel will be Dave Guard, Associate Director of the Drug Reform Coordination Network; Steve Silverman, Executive Director of Flex Your Rights, who with Scott Morgan forms a dynamite team that produced the Busted video presented on every page of our blog; and Ray Warren, Director of State Policies, Marijuana Policy Project. Everybody must know their Constitutional rights, whether or not they or those around them might become criminal suspects. If you live near the University of Maryland, I encourage you to attend tonight's event. If not, I urge that you read our rights page and the Busted video today. Jon Katz.

Posted by Jon Katz in Criminal Defense at 11:00

Time to legalize prostitution.

Why is it news that New York Governor Eliot Spitzer may have been a john of high-priced prostitutes? Because that would amount to adultery? Because prostitution is illegal everywhere in the nation except parts of Nevada? Because it raises questions about where he found the funds for such high-priced indulgences? Because it would be hypocritical for this man who crusaded against prostitution to turn around and use their services himself? Like marijuana, prostitution needs to be legalized, along with gambling. Once such activities are legalized and drugs are heavily decriminalized, we will have a smaller, less expensive, more efficient, and more trustworthy criminal justice system. Sex sells. Prostitution is an age-old occupation. Erotic videos are a multi-billion dollar industry. It is time for the rest of the United States to follow suit with the counties of Nevada that allow prostitution. By doing so, the underground prostitution activity in the United States can come above ground, be regulated, and be taxed. Then, police will be able to focus their limited resources on more serious crime. Jon Katz. **ADDENDUM:** Thanks to Scott Greenfield for various links to this story. Here is a detailed rundown from New York magazine.

Posted by Jon Katz in Criminal Defense at 00:00

Have love songs made everyone love one another?

Following are some Frank Zappa quotes relevant to this blog entry: There are more love songs than anything else. If songs could make you do something we'd all love one another. Frank Zappa responding to Tipper Gore's and friends' notion that explicit music lyrics would poison the nation's children. I wrote a song about dental floss but did anyone's teeth get cleaner? - Frank Zappa responding to the same notion about the correlation between music lyrics and individuals' behavior. (See Zappa's timeless Montana/Dennil Floss). The more boring a child is, the more the parents, when showing off the child, receive adulation for being good parents because they have a tame child-creature in their house. I never set out to be weird. It was always other people who called me weird. In 1985, the late Frank Zappa (who passed away from prostate cancer when he was only eight years older than I am now) implored Congress to reject censoring music and pressuring the music industry to impose ratings systems. His live testimony is transcribed here and his submitted written comments start at the bottom of the page here. (I do regret Zappa's emphasis on the gender of Tipper Gore and other Congressional spouses of the Parents Resource Music Center (PCRM) pushing for music ratings; if he wanted to emphasize any impropriety or conflict of interest involved with Congressional spouses pushing for action by the same committee on which Tipper Gore's husband Al Gore sat, for instance, he could have just referred to "spouses" and their names.) Curiously, Zappa's testimony indicates no opposition to a government requirement to reveal music lyrics in printed form, so long as they could be on a separate sheet (e.g., so as not to take away from the album/CD cover art and design) possibly printed at government expense. Curiously, the "Filthy Fifteen" songs list that was apparently trumpeted by PCRM as a prelude to the group's Congressional testimony, included plenty of titles that sound particularly tame today. The above 1986 video of Frank Zappa on Crossfire shows his true dedication to the First Amendment and individual liberties. He does a good job of distilling the whole matter as boiling down to words, and the stupidity and oppressiveness of censoring those words. In the process, he responds to John Lofton's inquiry about why Zappa is not smiling with "Why should I smile when I'm sitting here with you?" The music video shown near the beginning of this Crossfire episode looks and sounds so mild as to not be of much or any strength for those seeking music ratings and more onerous censorship than that. Now,

over two decades later, we find warning labels on music and video games. We find Hillary Clinton just two years ago pushing for a ban on selling minors video games rated mature,Â adults-only, or rating pending, and hiring a company to review the effectiveness of industry efforts to arrive at such ratings. SeeÂ Hillary Clinton'sÂ video plea here, the bill here, and CBS's William Vitka's response here, asking "Where is our Zappa?". Â Fortunately, Hillary Clinton'sÂ proposed video censorship law died, but Clinton now seeks to return to the White House, and who knows what she would do there with the First Amendment? In the 1990's, Bill Clinton -- who undoubtedly will wield substantial influence in a Hillary Clinton administration -- signed into law the censorious Child Online Protection Act (1996) and Children's Internet Protection Act (1999). Â Addressing the remaining presidential candidate front runners,Â John McCain's hands already are dirtied when it comes to the First Amendment. For instance, heÂ introduced the Children's Internet Protection Act, and heÂ was not too concerned about First Amendment rights in pushing for campaign reform. As to Barack Obama, I am still trying to make sense of the harm and good he has done and will do for the First Amendment.Â Â Considering the foregoing efforts to censor music and video games, what comes next? Censoring books? (What am I saying? Books have been banned for decades and long before that.)Â Â Â I miss Frank Zappa.Â Jon Katz.Â

Posted by Jon Katz in First Amendment at 00:00

Monday, March 10, 2008

Think before you drink tap water.

Â Image from Library of Congress's website.Â Â Â I have long been grossed out about drinking tap water, whichÂ includes treated water originating from toilets. Filtering the water does not remove the toilet water. Â Â Spring water is not a perfect solution, notÂ being regulated sufficiently to know the impurities that are there, and often (if not always) being chlorinated, just as tap water is chlorinated. Distilled water may be the safest and cleanest option, but if it is purchased in plastic bottles, the plastic can leach into the water, and the empty bottles create permanent waste pollution if not recycled. Â Â Â In yesterday's news is a revelation thatÂ a whole host of drugs (and not all localities test for presence of drugs -- here isÂ a list of the impurities found in municipalities that have had their water tested), disinfectants, and other impurities are found in tap water, including where I liveÂ (see here, too). Aside from the question of why this story has taken so long to come to the surface, forefront, or both, it is unclear how harmful is the cumulative effect on human health from the otherwise minuscule amounts of such impurities per ounce of tap water. Â Â I suppose that the concentration of drugs in tap water is too small to yield a positive drug test of urine or blood, but who knows, considering all the false positive drug tests that victimize people already? Â Â This latest news about tap water unsafety likely will be a boon for the bottled water industry, at least for the short term. Cheers?Â Jon Katz.Â

Posted by Jon Katz in Drugs at 00:00

Sunday, March 9, 2008

Power through fearlessness.

Â Fearlessness is a critical component of living powerfully as a criminal defense lawyer and as a person. Â To be fearless, I take inspiration from t'ai chi master Cheng Man Ching, whoÂ spoke of overcoming our fears in terms of imagining that we are practicing t'ai chi while balanced atop a narrow pointed cliff. To not eliminate one's fears while atop the cliff is to guarantee certain death. Eliminating fear also calls for keeping and tempering the fearlessness of a child filled with wonder, and living in the moment, as wonderfully detailed in the following story of the man and the two tigers: A man is chased in the wilderness by two tigers, only to be forced off a cliff, hanging for life from a vine. One tiger waits above and the other waits below for a human meal. Two field mice gnaw away at the vine. The man sees a wild strawberry growing from the side of a cliff, reaches for it, tastes it, and -- with his life hanging in the balance -- thinks of how delicious the strawberry tastes.Â I came to t'ai chi and the already-late Cheng Man Ching in 1994Â through my late fellow criminal defense lawyer Victor Crawford, who was ready to show me the path to t'ai chi study once I called him for guidance three years after I first met him and learned about his years of practicing the martial art. By that time, Vic already was facing the challenge of cancer from smoking, which would claim his life only around one and a half years later. I visited Vic around a year after starting my t'ai chi study,Â and told him I was unsure how much time to devote toÂ going toÂ t'ai chi classes when I also wished to continue my more aggressive long distance running regimen.Â He urged me forward with t'ai chi, suggested dieting as an alternative to running for weight loss, and talked about the amazing energy and other benefits that come from practicing t'ai chi, which I started recognizing more and more firsthand as my t'ai chi continued into today. Vic spoke of understanding his body better than didÂ his doctors. I needed a fellow criminal defense lawyer to encourage me to continue with t'ai chi, and it also helped that one of my two main teachers is a lawyer, Len Kennedy. When my other t'ai chi teacher -- Ellen Kennedy, who teams with her husband LenÂ -- told me that Vic's cancer was spreading further through his body, she told me that if I visited him in the hospital and performed t'ai chi in his presence, it could be beneficial; I was too uncertain how I would be received, not having known Vic very well, when if this were today, I would have visited. Â Was Vic fearless about his then-approaching death? I do not know for sure, but imagine that t'ai chi helped him along the route of fearlessness. Now comes inspiration for fearlessness of death from another person who knows he is dying from a disease, pancreatic cancer, taking over his body. He is Randy Pausch, who talks of being here now, the importance of being ready to work hard and to have fun in life, and the importance of chasing our dreams. He is less than three years older than I. Â Above is Randy's talk about his positive approach to his life, focusing on being very much alive day by day as he approaches the death that all of us ultimately will face. His chemotherapy has ended, causing too many harmful side effects. He says that his above talk to students at Carnegie-Mellon University was meant for his three children, I suppose to inspire them to focus on being alive, rather than on the fact that everyone's life ends one day or another.Â Jon Katz.Â ADDENDUM: Thanks to a fellow listserv member for having posted a shorter version of the above YouTube video presentation.Â

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

Friday, March 7, 2008

Yow! I AM having fun.

Image from National Institute of Standards & Technology. Zippy the Pinhead is my favorite comic strip. Zippy spews non sequiturs, repeatedly proclaims "Yow!", and asks "Are we having fun yet?" in this overcommercialized society that tells people they won't be glad til they use Dial. Every four years, he runs for president. Trials often are tribulations for criminal defendants. Earlier this week in criminal traffic court in Maryland, Zippy seemed to be with me and my client in spirit as we proceeded to beat a drunk driving trial. The prosecutor spent significant time preparing the arresting officer in the hallway outside the courtroom. Nevertheless, the prosecutor apparently had not prepared the arresting cop sufficiently to permit his field sobriety testing testimony, and it seems that the prosecutor did not know how to get around the repeated defense objections sustained by the judge. Essentially, the prosecutor asked the cop under whose auspices he was trained, but the cop was unable to recall which organization was involved in his training. He only knows that Bob, another police officer, trained him for investigating violations of the drinking and driving laws. The judge agreed that the prosecutor had not elicited sufficient testimony or evidence to permit the cop to testify about any field sobriety tests and about any arrest and the events that followed it. During the trial, as numerous key evidentiary rulings were decided in our favor, I leaned to my client and said: "I AM having fun." With so many criminal defendants having their rights violated by the powers that be, it is all the more a rush to obtain such victories. Jon Katz.

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

Thursday, March 6, 2008

Bigoted words from clients, politicians, and talk radio.

Â Bill of Rights.Â (From the public domain.)Â In the past, sometimes I would lash out when hearing bigoted words. I learned that such an approach might satisfy me that I had expressed counter-speech, but that my lashed-out words may have barely been heard by the person speaking bigoted words. and those spectators looking as if they enjoy such words. Little by little, I tried avoiding lashing out in tone of voice, and insteadÂ responding in a calmerÂ way that would chip away at (at the very least), reverse, and ultimately eliminateÂ bigoted views. Â I had a recent opportunity at this newer approach when I waited with a client for a court recess to end. Out of nowhere, my client motioned me over, leaned towards me as if about to tell a confidence, but instead said: "These are some pain in the ass n*****s,"Â usingÂ a racial slur for African-Americans. I responded with an incredulous attitude: "You're entitled to your opinions, but I'm entitled to mine, and they differ very much from what you just said." My client seemed to get the point, and the subject did not return between us. Â A few years ago on his popular radio show, Rush Limbaugh said gook. When he seemed to indicate that someone on the radio studio staffÂ looked to be in disagreement with using that word, Rush said it again. Â Now moving to politicians,Â this week I learned that in early 2000 during his competition to win the Republican presidential nomination, as the San Francisco Chronicle reportedÂ on February 18, 2000:Â "Arizona Sen. John McCain refused to apologize yesterday for his use of a racial slur to condemn the North Vietnamese prison guards who tortured and held him captive during the war. 'I hate the gooks,' McCain said yesterday in response to a question from reporters aboard his campaign bus. 'I will hate them as long as I live.'"Â McCain ultimately gave a partial apology not long after using the word gook earlier in the year. The February 24, 2000, edition of Asian Week explains: Â "Less than 24 hours after stories ran about Sen. John McCain's statement to reporters that he would continue to refer to his Vietnamese wartime captors as 'gooks,' his campaign announced Feb. 18 that he would no longer use that term. Three days later McCain issued an official apology.Â "Several stories that ran last Friday quoted McCain as saying 'I hate the gooks. I will hate them as long as I live'! I was referring to my prison guards and I will continue to refer to them in language that might offend.' But after APIs blasted his unabashed use of the highly derogatory term that has historically been used against Asians and Asian Americans, the campaign made an apology after announcing that McCain would no longer use the racial slur. Â "I will continue to condemn those who unfairly mistreated us,' McCain said in a statement released Feb. 21. 'But out of respect to a great number of people for whom I hold in very high regard, I will no longer use the term that has caused such discomfort! I apologize and renounce all language that is bigoted and offensive, which is contrary to all that I represent and believe.'Â The Nation wrote on December 15, 1999, that McCain's use of the word "gook" dates back to his release as a prisoner of war:Â "Perhaps the most striking example of the media's unwillingness to challenge McCain's air of moral authority is when he shocks listeners by casually calling the Vietnamese 'gooks.' The racist and disparaging term, popularized by GIs during the war, occurs repeatedly in a 1973 U.S. News & World Report account penned by McCain after his release from prison. 'The "gooks" were bombarding us with antiwar quotes from people in high places back in Washington,' he wrote, referring to the propaganda that his captors gave him. A quarter of a century later, while speaking with reporters aboard the Straight Talk Express in October, McCain was still calling Vietnamese 'gooks'--and according to a reporter who was there, no one called him on it."Â Although the source is Wikipedia, whose reliability always needs to be checked with care, this Wikipedia article makes a sensible suggestion that the racist word "gook" may have its origins "from the Korean í•œêµ- (Han-guk,Â "Korea"). May also be related to the term goo-goo, of Tagalog derivation, a derogatory slang for the local population which emerged during the Filipino-American War around 1900." Â As to the possibility of the racist word "gook" having Korean origins, American soldiers during the Korean War would hear Korean people saying "Mi-guk" for "American". From my continuing learning of Korean, I know that in Korean, a person of a particular nationality can be referred to as *-guk, as in Mi-guk for American and Han-guk for Korean. PerhapsÂ some of theÂ American soldiers in Korea thoughtÂ theÂ Korean speakers of thisÂ phrase were saying "Me gook"Â as in "I am a gook," leading to the "gook"Â wordÂ finally being applied in a racist way to Asian people.Â However, for whatever it is worth,Â the "guk" sound in "Mi-guk" contains a short "u" sound, as in "book", whereas the pronunciation of the racist "gook" involves a long double-o sound, as in "spook".Â In any event, it is unconvincingÂ that McCain could have believed that his repeated use of the word "gook" would reasonably only apply to his Vietnamese captors, when I understand that this racist word was used repeatedly by countless American soldiers in Vietnam as a way to dehumanize all Vietnamese people. Dehumanizing people makes it easier for many to oppress and for soldiers and others in the violence business to kill them, which is one of the numerous reasons why I lean so strongly towards pacifism. Â So as not to single out McCain as the only presidential candidate that is challenged on racial issues, this Asian Fortune article by Jenny Chen calls Hillary Clinton's campaign to the spotlight. As Ms. Chen tells it: "But on February 23, reporters from Chinese-American news media such as the World Journal and the Sing Tao Daily were denied access to the fundraising luncheon that was held for Clinton, on grounds that the event was not open to 'foreign press.' Later, Howard Wolfson, spokesperson for the Hillary Clinton for President Exploratory Committee, apologized to the World Journal, saying that this was a 'learning

experience' and that they would make sure to include the Chinese American press in the future. 'Certainly you are not the foreign press,' Wolfson told them, according to the World Journal." A similar version of this story ran in the March 16, 2007, Asian Week. As to Barack Obama, Ms. Chen relates the Obama campaign's Punjab-gate (at best), which the June 19, 2007, Washington Post discussed as follows: "Sen. Barack Obama (D-III.) issued a round of apologies yesterday for a memo generated by his campaign staff that referred to Sen. Hillary Rodham Clinton (D-N.Y.) as a senator from the Indian region of Punjab and criticized her record on outsourcing. Pointing the finger at his campaign staff, Obama told the editorial board of the Des Moines Register that he 'thought it was stupid and caustic.' Obama said that the memo 'not only didn't reflect the complicated issue of outsourcing . . . it also didn't reflect the fact that I have long-standing support and friendships within the Indian American community,' according to a story on the paper's Web site." The foregoing stories show McCain using the racist word "gook" for decades, and Clinton's and Obama's campaign handlers respectively barring Asian-American journalists as coming from the "foreign press" and lampooning Hillary Clinton as being a senator from India's Punjab region. McCain did not apologize until the heat was on him. Clinton's and Obama's campaign folks blundered with the foregoing "foreign press" and Punjab-gate scandals. One of these three will be taking over the White House. We do not need a president McCain who sincerely believes in the word "gook" but just does not say it. We do not need an Obama or Clinton White House where staffers are dehumanizing racial minorities (of course, one day white people may be a racial minority in the United States). The time for all three to show they and their staffs have permanently seen and arrived at the light on race relations is now, before any further primary or general presidential elections. Jon Katz. ADDENDUM: Thanks to Jenny Chen for her Asian Fortune article on the foregoing race relations scenarios of the current presidential candidates.

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

Wednesday, March 5, 2008

IRS: Not so fast claiming tax evasion.

Â Bill of Rights.Â (From the public domain.)Â Kudos to the United States Supreme Court for unanimously reversing a conviction for tax evasion and filing a false income tax return, where defendant Michael Boulware claimed his company had no earnings or profits for the tax years in question, and asserted the defense of a return on capital (i.e., a return on his investment of his personal assets into his own company). Â As Justice Souter wrote for a unanimous Supreme Court in *Boulware v. U.S.*, U.S. (March 3, 2008): Â Sections [Internal Revenue Code] Â§§301 and 316(a) govern the tax consequences of constructive distributions made by a corporation to a shareholder with respect to its stock. A defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital before relying on those sections to demonstrate no taxes are owed. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.Â *Boulware v. U.S.*, U.S. . Â In footnote 7 of *Boulware*,Â the Supreme Court recognizes the legitimacy of finding legal ways to avoid paying taxes (which footnote hopefully will be a clear warning to the IRS not to jump the gun in prosecuting for tax evasion): Â Â We have also recognized that "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U. S. 465, 469 (1935). The rule is a two-way street: "while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not," *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U. S. 134, 149 (1974); see also *id.*, at 148 (referring to "the established tax principle that a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred"); *Founders Gen. Corp. v. Hoey*, 300 U. S. 268, 275 (1937) ("To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty"). The question here, of course, is not whether alternative routes may have offered better or worse tax consequences, see generally Isenbergh, *Review: Musings on Form and Substance in Taxation*, 49 U. Chi. L. Rev. 859 (1982); rather, it is "whether what was done . . . was the thing which the statute[, hereÂ§§301 and 316(a),] intended," *Gregory*, *supra*, at 469. Â *Boulware v. U.S.*, U.S. . Â Michael Boulware should not have had to endure all this angst, oppression, and attorneys' fees to go to three courts finally to be vindicated. Considering such hardship he suffered, all the more congratulations go his way on this victory.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:30

Jon Katz appearing on "Know Your Rights" panel.

Â Too many clients come to me after having urinated away too many of their rights with the police. Many say they did not knowÂ the relevant rights listed in our Know Your Rights webpage and demonstrated in the Busted video. I try to minimize such knowledge lapses by linking our Know Your Rights pageÂ to every page on our website. I also enjoy speaking on the topic, so that I can dispel people of such notions that it is better to show the cops where their marijuana is (thus giving up their right to move to suppress the search) rather than diplomatically saying "no", which is a great word to have ready when cops are around.Â Â Fortunately, the gospel of the Bill of Rights continues circulating. Consequently, for each person who gets arrested after waiving their Constitutional rights, it is my hope that there is at least one otherÂ who avoided a prosecution in the first place by refusing to give up their rights. Â The next time I will speak publicly about people's Constitutional rights -- outside of the courthouse, that is -- will be on the "Know Your Rights" panel,Â Tuesday, March 11, 2008, at 7:00 p.m. in the Prince George Room at University of Maryland's Stamp Student Union. The event is sponsored by Students for Sensible Drug Policy; I am checking whether campus NORML is also sponsoring the event. In any event, come on out to this event for a spirited audience-panel discussion about asserting rights against cops and others in the criminal justice system. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:20

"NO TRESPASSING" signs be damned in 4th Amend. challenges?

Â Â Bill of Rights.Â (From the public domain.)Â On February 28, 2008, Maryland's intermediate appellate court proclaimed that so long as the cops are on legitimate business, they can knock (and keep on knocking -- even banging, probably -- for minutes on end) in an effort to talk with suspects. Under those circumstances, what are a bunch of "no trespassing" signs between the cops and the suspect for search and seizure challenges? Nothing, says Maryland's Court of Special Appeals.Â *Jones v. Md.*, Md. App. (Feb. 28, 2008). I hope thisÂ case gets appealed and

reversed.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, March 4, 2008

Bloggers and webmasters: Lend me your ears.

Computer hard drive. (Image from Pacific Northwest Laboratory's website).
To my fellow bloggers and webmasters, and to Internet tekkies: As you know from my earlier post, our entire website and blog were down during primetime this morning when a server was down at our websitehosting company. In a day when all sorts of sitehosts promote cheap sitehosting, we invest in reliable sitehosting. However, even the most reliable sitehost is going to suffer downed servers from time to time. Therefore, please give me your recommendations for sitehosts who use redundant servers or any other technology to have a seamless or near-seamless transition to redundant server access when the main sitehost server is down. When I seek a sitehost, I also keep in mind the following: FrontPage compatibility (tekkies laugh at FrontPage, but hundreds of our webpages already run FrontPage), speed and efficiency in accessing our webpages and email, technical assistance with our blog software, no censorship of content, no cookies (except to the extent cookies are needed to add comments to our blog, which reduces spammed comments), quality email service (including sufficient archive space and software to manage archived emails), good cookie-free site statistics, and good website access to our email and to configuring our email and Internet preferences (including blacklisting unwanted email addresses and e-domain names, and whitelisting wanted email addresses). Our current sitehost is good for all of the foregoing matters; my only problem with our sitehost is when our server goes down (which seems to happen around twice monthly for over five or ten minutes, and also around 3:00 a.m. when our site statistics are being uploaded) and when our email goes down (sometimes for over one-half hour once every month or two). Thanks for any input on my seeking a quality sitehost with redundant servers. Jon Katz.

Posted by Jon Katz in Jon's news & views at 09:59

Our site was down for an hour; now it is back.

Computer hard drive. (Image from Pacific Northwest Laboratory's website).
Our law firm's website hosting company is reliable, to the extent that is possible for shared sitehosting without redundant servers to keep our blog, website, and email (to our *@markskatz.com addresses) running when the main server is down. However, this morning, our website and blog were down during the critical traffic hours of 8:00-9:00 a.m. or so. Our site is back up, and I plan to follow up this blog entry with a brainstorming request to bloggers and Internet tekkies. Jon Katz.

Posted by Jon Katz in Jon's news & views at 09:00

Return of the Winter Soldier Investigation

The vast majority of American soldiers in Iraq, Afghanistan and elsewhere not only do not recall the countless American military atrocities in Vietnam as they happened, but were not even born yet. What a splendid way for the military to have recruited with a cleansed slate on Vietnam, let alone the invasions of Grenada and Panama, and the list goes on. Rambo's asking his father if "we get to win this time" in Vietnam probably is better known by those under forty than the horrors of My Lai and mini My Lais. I started college in 1981 under the impression that the My Lai massacre -- with American Lt. William Calley as a ground leader of the massacre of hundreds of unarmed villagers -- was not typical behavior by American soldiers in Vietnam. I explored this issue further when I took a freshman English seminar called "America in the Sixties," and saw the Winter Soldier Investigation documentary (see a YouTube excerpt here) in which Vietnam veteran after Vietnam veteran testified that mini My Lais were rampant in Vietnam. Regardless of how accurate or inaccurate is the Winter Soldier investigation, I became convinced, and remain convinced, that mini My Lais indeed ran rampant in Vietnam, and that Calley was not the only American soldier with the mindset -- at least as to his obligations in My Lai (which was the subject of the Peers investigative report) -- that the Vietnamese people "were all the enemy, they were all to be destroyed, sir." News coverage of the Vietnam war helped make the war widely unpopular in the United States. The American military propaganda machine learned from that, starting as long back as Gulf War I, when a Willard Scott teddy bearish look-alike in the form of Norman Schwarzkopf daily reported on the war to press members whose movements were strictly limited by the U.S. military. (This photo might dispel doubts that Norm and Willard were separated at birth.) Many -- if not most -- of Schwarzkopf's news briefings looked more like a commander describing video Space Invaders games, than a war in which real people were being killed and maimed daily. Gulf War II continues with embedded journalists, platitudes about supporting the troops as a way to deflect attention away from the realities of the daily violence in the air and on the ground, and a presumptive Republican presidential nominee (McCain) who looks ready to continue more of the same. Now, on March 13-16 comes a new Winter Soldier investigation, from the Iraq Veterans Against the War. The investigation will

take place at the National Labor College, which is located in the same town as our office. The event may be watched online. Here is the schedule for the event. YouTube previews of the Iraq Winter Soldier investigation are here and here, including one or more soldiers saying that liars in the government are mis-portraying the reality of those wars. The IVAW Winter Soldier front page says: "In 1971, a courageous group of veterans exposed the criminal nature of the Vietnam War in an event called Winter Soldier. Once again, we will demand that the voices of veterans are heard. Once again, we are fighting for the soul of our country. We will demonstrate our patriotism by speaking out with honor and integrity instead of blindly following failed policy. Winter Soldier is a difficult but essential service to our country." All this stands in curious contrast to a wounded veteran client who recently responded to my question about his motivation for joining the military a few years ago, by saying that such service is the duty of every citizen. When I pointed out that he had hired a lawyer who did not volunteer for the military, he seemed to acknowledge the expediency of not limiting himself to a lawyer who was a military veteran. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Monday, March 3, 2008

Of Monty Python, Hormel, and unsolicited bulk email.

Â Technical difficulties interfered with my including the following addendum to my blog entry this morning aboutÂ the 4-3 Virginia Supreme Court decision upholding Jeremy Jaynes's nine-year spam sentence:Â In the face of this wrongly-decided Jaynes opinion, I offer the following spam humor. I found the CompuServe court opinion that explains, at footnote 1, how Monty Python's spam skit led to the coinage of the "spam" phrase for unsolicited bulk email. This Wikipedia article discusses the subject further.Â Monty Python's spam skit is as funny today as ever, and is here and above on YouTube. Jon Katz.

Posted by Jon Katz in First Amendment at 12:00

Sunday, March 2, 2008

Four of seven Virginia Supreme Court judges uphold First-Amendment-violative criminal spam law.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). All spammers' eyes should be on Virginia -- where a high percentage of computer crime cases are prosecuted, due to Virginia's housing such major computer servers as America's Online's -- after its Supreme Court wrongfully upheld the state's criminal anti-spam law that prohibits sending out bulk e-mail that hide the identify of the sender. Here is the text of Virginia's criminal spam statute: "Va. Code Ann. § 18.2-152.3:1 (2008)" § 18.2-152.3:1. Transmission of unsolicited bulk electronic mail (spam); penalty "A. Any person who: 1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers; or 2. Knowingly sells, gives, or otherwise distributes or possesses with the intent to sell, give, or distribute software that (i) is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information; (ii) has only limited commercially significant purpose or use other than to facilitate or enable the falsification of electronic mail transmission information or other routing information; or (iii) is marketed by that person acting alone or with another for use in facilitating or enabling the falsification of electronic mail transmission information or other routing information is guilty of a Class 1 misdemeanor." B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and: 1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period; or 2. The revenue generated from a specific UBE transmission exceeded \$ 1,000 or the total revenue generated from all UBE transmitted to any EMSP exceeded \$ 50,000. C. A person is guilty of a Class 6 felony if he knowingly hires, employs, uses, or permits any minor to assist in the transmission of UBE in violation of subdivision B 1 or subdivision B 2." The main dispute between the four judges in the majority and the three dissenters in this court opinion upholding the nine-year three-count (for three incident dates) felony sentence of spammer Jeremy Jaynes is whether the First Amendment applies in his case, whether emailers have a Constitutional right to email anonymously, and whether the statute is unconstitutionally overbroad. The case is *Jeremy Jaynes v. Virginia*, __ Va. __ (Feb. 29, 2008). Sadly, the Jaynes majority refuses even to let defendant Jaynes have standing to argue that Virginia's criminal spam statute violates the First Amendment: "We therefore hold that Jaynes has no standing to raise a First Amendment objection to Code § 18.2-152.3:1. No Virginia standing should be accorded a person to assert an overbreadth challenge when that person's conduct consists of misleading commercial speech that is entitled to no First Amendment protection on its own merits." The Jaynes minority responds in conclusion, after a lengthy analysis: "Because I would continue this Court's prior policy of recognizing the exception to the standing rule, I would allow Jaynes to pursue his First Amendment claim that Code § 18.2-152.3:1 is overbroad." Refusing to give Jaynes standing to argue the anti-spam statute's unconstitutionality, the majority does not reach his claim of a First Amendment right to remain anonymous in emails. The minority replies: "The current use of the Internet as the marketplace for expressing political ideas, views and positions emphasizes the need for insuring that use of this medium not be chilled by the threat of criminal prosecution. Those persons wishing to use this medium should have the same ability to express their views anonymously as did Thomas Paine during the founding of our country." Refusing Jaynes First Amendment standing, the majority gives him no relief on his overbreadth argument. The minority replies: "I would find Code § 18.2-152.3:1 unconstitutionally overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment to the United States Constitution." If United States Supreme Court certiorari review is sought of this case, I anticipate a good chance that such review will be granted. Although the Virginia Supreme Court may be the only court to have reached the foregoing issues, the First Amendment implications are too far-reaching in this day of rampant emailing for the Supremes to reject cert. merely for the lack of a split in the circuit. If cert. is granted, I would hope that the Virginia statute would be overturned at least by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:00

Saturday, March 1. 2008

Meeting Revolutionary Communist Party members

My life in and out of the law practice has brought me in contact with many interesting people, including those with whom I vehemently disagree. The Revolutionary Communist Party is a group with which I very much disagree. Nevertheless, I have had two very interesting interactions with some members of this Maoist communist group. In one instance, in 1986 -- just a week or so before starting law school -- I passed by Manhattan's Revolution Books, which is part of the RCP's propaganda machine, and decided to take a look. The sole worker there asked me to check my backpack with her. She later directed me to the RCP's latest issue of the Revolutionary Worker -- which now possibly is just named Revolution -- which included a front page article about the Maoist communist Sendero Luminoso/Shining Path guerrillas in Peru. She asked me my "take" on the issue, but I did not at the time know much about the Shining Path, other than to know the group was communist, and was using violence to try to overthrow the Peruvian government. From the way Human Rights Watch portrays it, both Shining Path and the Peruvian government are responsible for extensive and very brutal treatment of Peruvians, including the killings or disappearance of over 60,000 people during the guerrilla war from the 1980's to 1990's. A few minutes into my Revolution Books visit, the worker had to go to the backroom or the bathroom, and asked if I would not mind keeping an eye on the store during her five to ten-minute absence. Savoring the irony of being asked to mind the store (and, thus, to mind the property of a communist group that advocates for no personal property) by the same person who had a few minutes earlier asked me to check my bag, I took her up on the request; I think nobody came into the store during that time. She returned and suggested I buy the Revolutionary Worker issue, which I did for a buck, and I left. Twenty years later, I obtained an acquittal for a very active RCP member and leader (by now, I have defended people from all over the political spectrum), who was arrested while exercising his First Amendment-protected right to free speech. Aside from his RCP politics, he was a very likeable and fascinating man. At one point, he mentioned a previous protest effort by RCP members against Deng Xiaoping. I later read RCP chair Bob Avakian's autobiography to see how vehemently RCP members opposed Deng. I found it particularly curious that in a lighter passage in Avakian's book, he says his reaction to happening on a certain musical or sports tidbit was to say "Oh my god." I'm surprised his vetters did not remove this would-be atheist-promoting communist leader's reference to a deity and replace it with, for instance, "Oh my president of the Council for Secular Humanism." Jon Katz.

Posted by Jon Katz in Jon's news & views at 19:10

Wikileaks.org is back.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). Following up on my February 24 blog entry, my closer reading shows that the permanent injunction issued for the Wikileaks case plaintiffs was by consent of one of the defendants, but not by Wikileaks. Also, my closer reading shows that the February 15 permanent injunction led to the disconnection of Wikileaks's domain name, rather than a disconnection of the sitehost used by Wikileaks. Thanks to Windypundit for reviewing this issue and for alerting me to the latter matter. Wisely, on February 29, the trial judge reversed the above-described permanent injunction. Wikileaks.org is back at present. The next court hearing in this case is May 16, 2008. The order reversing the permanent injunction is here. The docket entries through March 2, 2008, are here. Thanks to Reporters Committee for Freedom of the Press for listing an update on this case. Jon Katz.

Posted by Jon Katz in First Amendment at 19:00