

Tuesday, October 31, 2006

Human and legal giant Jim Jeans passes.

Late this morning I learned the sad news that Jim Jeans passed away yesterday. The now-late James W. Jeans, Sr., was on the original faculty of the Trial Lawyers College, where I first and last met him in 1995. I regret that I last spoke with Jim when I called him a few months after that year's Trial Lawyers College session. It was not intentional to let so much time pass by. Jim spent the entire time at the 1995 TLC from beginning to end. He was caring and selfless at every turn. Googling showed that Jim Jeans was most recently a law professor at Liberty University in Lynchburg, VA. (This is not the time for me to opine about Liberty University.) Jim's biography page at Liberty University's website is here. Had I known Jim was there, I would have called him this past June, which was my only time in Lynchburg. Jim was on the original faculty of the National Institute for Trial Advocacy. True to character, this article at pdf page 68 quotes Jim as saying that trial lawyers must yearn for the tooth and nail. For those who knew Jim, here is some information about his memorial service and funeral: - A memorial service will be held at Liberty University's Pate Chapel, Lynchburg, Virginia, Thursday, November 2, at 11:00 a.m. - The funeral will be in Kansas City, Missouri. No date has been set yet. I went too many years not contacting Jim. It is critical to show thanks to people while they are still with us, and a mistake to wonder whether heartfelt words of thanks will mean much; they will. Jon Katz.

Posted by Jon Katz in Jon's news & views at 12:00

When governments cage people / See this powerful video.

On this Halloween day, here is some chilling reality, mixed with hope: Jails and prisons are cages that warehouse and restrain legions of people (1) presumed innocent and awaiting trial, (2) who are innocent but wrongfully convicted, (3) convicted of crimes that should not be crimes in the first place or should be heavily decriminalized, (4) sentenced too harshly (e.g., draconian mandatory minimum sentences for nothing worse than an addict who -- a second time around -- gets caught selling one crack cocaine rocks in exchange for a one-rock commission for every three rocks sold), (6) unfairly thrown back in jail and prison for probation and parole violation findings, often being sent back for too long, (7) dehumanized in the court system and dehumanized in jail, (8) suffering from racism from prison authorities, government authorities and fellow inmates, (9) sitting on death row under a system of legalized government-sponsored murder, and (10) fattening government revenues through prison labor ranging from manufacturing license-plates to providing outsourced telephone customer service from within the prison walls, because prison labor is cheap and captive. The United States has so many prisoners that the prison system -- and court, "criminal justice", prosecutor, and police systems that prosecute and sentence prisoners -- is so economically and socially entrenched that too many prisoners become mere numbers in too many people's eyes. The more that everyone knows each prisoner as an individual human being, and the prisoner's story, the more humanely prisoners and ex-prisoners will be treated by society, by the court system, by the prison system, and by the rest of the overgrown government bureaucracy. This is not to detract whatsoever from the humanity that is due to crime victims and everyone else; everyone must be treated with humanity -- including criminal suspects, defendants, and prisoners -- for us to have a humane society. While I believe that prisons have their places -- but that they have been overused and abused for too long -- my friend Jun Yasuda takes a more radical -- or perhaps more hopeful -- approach than mine. Jun-san -- who has been on many a peace walk for prisoners, and has vigiled and fasted for Mumia Abu Jamal (a days-long fast ingesting nothing but a drink of water at the midpoint) -- says: "All living things are sacred. Punishment is no solution; putting people in cages is no solution; more killing is no solution. These things happen because of fear. We believe in taking care of each other in a human way, with compassion." The time to start taking care of our fellow human beings is from birth, continuing to all stages of life. This can be done without instituting more socialism, and without enforcing social engineering, so long as more people help others from the goodness of their hearts, rather than living isolated lives of going to work, providing for their families, staying wired to the Internet and their home entertainments systems, and doing nothing else to better society. As to racism and the prison system, the more overt racism that previously existed in the prison system was not fully eliminated by the integration of prisons and sensitivity training seminars, just as racism in the rest of society did not go away -- but overall reduced and became less virulent -- merely due to Brown v. Board of Education and other court and government actions. Racism might never go away entirely, but we all must work to eliminate it. A picture tells a thousand words. Here is a documentary of segregated black prison work crews in 1966. Here is a shorter YouTube clip; the full version is here. Thank you to GFB's Scott Henson for blogging about this documentary. From <http://www.folkstreams.net/film,122>: Afro-American Work Songs in a Texas Prison. by Bruce Jackson, Toshi Seeger, Peter Seeger, and Daniel Seeger You can make a difference in providing compassion and more humanity for prisoners. After all, accumulated feathers still sink the boat. Every little bit helps, and every larger step helps all the

more, including getting on the backs of your lawmakers and the other government powers that be; spreading the word of justice for prisoners and criminal defendants to your family, friends and acquaintances; and visiting inmates (and even offering to provide them classes in your areas of strength, be it academic, creative, supportive, or otherwise) and giving them moral support. The Human Kindness Foundation has an excellent webpage about how to easily arrange to visit with inmates and what to do with the visits, and sends the following message through its director: "What can you do?" "First of all., if you become the victim of a crime, insist upon meeting your assailant. Insist upon being involved with the process of his or her restoration. Join or create a VORP (Victim-Offender Reconciliation Program) in your community. Tour your local jail or prison to see firsthand what your taxes pay for. Go in with a church or civic group to meet inmates. Become a pen pal to a prisoner who is seeking to change his/her life. Talk to your friends and colleagues about employing ex-cons (in nationwide surveys, most employers admit they won't hire a person with a criminal record, so where are they supposed to work?). Reclaim your power and your responsibility, because the retributive system you have deferred to is not serving your best interests. Please take the issue of crime and punishment personally, because it is an issue which definitely affects you and your family and your descendants for generations to come. "We have to realize that we are all a part of this problem. If you vote, if you pay taxes, if you are afraid to walk alone at night, you are already involved. And so we have a choice to be involved solely in negative, destructive ways, such as home security systems, car alarms, personal weapons, etc., or in constructive ways which might actually change the problems. We all must make real changes not just political ones, but also in our personal attitudes and lifestyles. America will not thrive, nor will we and our children be happy, by becoming a nation behind bars." (From webpage of the Human Kindness Foundation's Prison Ashram Project, <http://www.humankindness.org/project.html>).
Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 30, 2006

If waterboarding is not torture, what is?

After I recently blogged against waterboarding, vice president Cheney asserted recently that nothing was wrong with dunking a terrorism suspect in water if it saved lives. Your vote counts. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:30

Overseas legal outsourcing on the rise.

More law firms apparently are more often looking overseas to outsource support staff work. The October 27, 2006, New York Times details this trend. A recent trial lawyer listserv posting mentioned one particular company offering such outsourcing: Manthan Services in Bangalore, India. This outsourcing situation goes to the heart of the cost of providing quality legal services, and the higher prices American lawyers are able to charge due to rules against the unauthorized practice of law by non-lawyers. In the United States, quality lawyers can command substantial pay. Quality legal secretaries command salaries that can approach or exceed the pay of recent law graduates at smaller and medium-sized law firms. The more that lower-cost legal staffing -- including for lawyer work -- is offered by outsourcing companies abroad, will lawyers in the United States feel competitive pressures to reduce their prices and also to use such outsourcing companies? The whole issue points to the effect of high-cost legal services in the United States. For instance, corporations pass their huge legal expenses onto consumers; legions of civil litigants scramble around the courthouse pro se without the funds to hire quality lawyers, and many individuals go into deep debt to hire lawyers. How does such overseas outsourcing affect our law firm? Our firm does not use such services; we believe in treating our support staff as family, and need to assure the quality of our support staff and their work. We rely on in-house staff (we have two lawyers and four full-time support staff) supplemented by outside local contractors and consultants for such work as investigation and expert advice for our cases; computers and Internet (for the Internet, we use Daytona Networks in Florida); accounting; and phone systems. When it comes to outsourcing lawyer work overseas, criminal and Constitutional defense lawyers are difficult to outsource, as are immigration lawyers; these areas constitute our law firm's focus, and we would not outsource such work overseas. However, it is conceivable that such lawyer work as the drafting of contracts, wills, and other legal documents will go overseas more often (if law firms and corporate law departments can get around hurdles of the unlicensed practice of law). An important question is the extent to which law firms will use overseas outsourcing more as a way to pass on cost savings to clients, more as a way to make more profit, or more as a way to provide high-quality services. I could imagine many law firms and corporate legal departments wishing to try law clerks, paralegals legal secretaries, and even lawyers from abroad to work for lower cost. All sorts of issues arise from there, including the extent to which American law firms will be required to follow United States labor protection laws (including laws against employment discrimination, and requiring payment of minimum wage and time and one-half for overtime) with the overseas outsourced assistants, the comfort level (or lack thereof) of taking advantage of less expensive labor abroad (on the other hand, companies perhaps have the option of paying significant gratuities to the outsourced staff, to offset their otherwise lower pay), and the comfort level of charging so much to clients to the point of not serving equal access to justice. Of course, overseas outsourcing and overseas manufacturing have been common for legions of other American businesses. I have written further here about the high cost of legal services, and how our law firm addresses it. Jay Marks and I focus on maintaining a moderate number of clients so that we may focus sufficient attention, time and energy on each client; this amounts to our charging significant legal fees. We offset this by providing a variety of pro bono and low bono services both to better achieve equal access to justice, and also to serve people and causes that stir our passions and interests. Jon Katz.

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

Kudos to the Bill of Rights Defense Committee

In the midst of the many government violations of civil liberties comes a five-year-old civil liberties organization called the Bill of Rights Defense Committee. The BORDC's vision follows: "Throughout U.S. history, and especially in times of war and other stress, the U.S. government has curtailed the rights of foreigners and those who dissent. Twentieth Century examples are COINTELPRO, HUAC, the internment of Japanese Americans during World War II, and the Palmer Raids. Lack of public awareness, a climate of fear, and divisive government policies helped preserve COINTELPRO and HUAC for decades. BORDC believes that this cycle can be broken and the targeting of groups ended by: Education to know our rights, Staying vigilant to threats to our rights and to the rights of others, and Organizing using protections guaranteed in the Bill of Rights to defend our rights. Too many civil liberties violations are running

rampant today to stand silent. Please speak out effectively. Please join with like-minded activists. Please donate to and join the ACLU, BORDC and/or other worthy causes. Æ Meanwhile, the attached notice announces the BORDC's open position for East Region Organizer. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Sunday, October 29, 2006

When money talks in criminal court.

Unfortunately, we are far away from a society that provides equal access to justice and the courthouses. The criminal defendant with the most money has more lawyers to choose from and to pay. The defendant with money has a wider and more flexible and immediate choice of expert witnesses. The defendant with money is able to pay restitution for theft and other cases more immediately, so as sometimes to have a stronger negotiating advantage. In Virginia, money sometimes can make a whole host of misdemeanors go away through the satisfaction and discharge process that gives a judge full discretion -- without any power in the prosecutor to do worse for the defendant -- to decide whether to dismiss a criminal prosecution upon written confirmation by the alleged victim that s/he has received satisfaction for the injury (so long as the alleged victim is not a law enforcement officer or, generally, a family or household member; and so long as the alleged offense is not alleged to have been committed riotously or with the intent to commit a felony). What do I do about this lopsided state of power affairs for people with money and people with less or no money? The solution is not for the people with money to be unable to pay for justice, but to overhaul the criminal justice system (including decriminalizing much of it, and increasing resources for indigent defendants and those who barely fail to meet the requirements to obtain indigent defense) so that the people with less money can catch up with this money gap. Jon Katz

Posted by Jon Katz in Criminal Defense at 01:00

Trial outline, persuasion points, and immigration points

For those interested in my trial techniques presentation at the October 23 Maryland Trial Lawyers Association criminal defense continuing legal education seminar, here are my handouts for the presentation: Trial techniques overview, criminal trial outline, and introduction to protecting immigrants in criminal court. Also, check out our website, this blog's archives, and our April-October, 2006, blog archives for additional in-depth legal information and analysis that we have been posting for seven years. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Friday, October 27, 2006

The revolution will not be televised/Gil Scott-Heron jailed for probation violation finding.

Persuasive talk is more than words, but is the very passion, rhythm, and music with which those words are presented. One of my favorite passionate vocal messengers is Gil Scott-Heron, who proclaimed that the revolution will not be televised: "The revolution will not be televised. The revolution will not be brought to you by Xerox in 4 parts without commercial interruptions. The revolution will not show you pictures of Nixon blowing a bugle and leading a charge by John Mitchell, General Abrams and Spiro Agnew to eat hog maws confiscated from a Harlem sanctuary. The revolution will not be televised." Recently, I checked out what Gil Scott-Heron has been up to. I learned that he was jailed for two to four years this year in New York, having been sentenced for a probation violation finding. I have insufficient information to give much of an opinion about this probation violation situation. Perhaps this unfortunate experience will lead Gil to spread all the more of a persuasive message about the dysfunctions of the prison and criminal justice system. Letters of support can be sent to Gil at this address: Collins Correctional Facility Gil Scott-Heron, #06R3165P. O. Box 340 Middle Road Collins, NY 14034 Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, October 26, 2006

The "ghetto" party by UT law students: Some possible future leaders showing their true colors.

The news is so over-saturated, that sometimes I miss such important stories as the "ghetto" party hosted and attended earlier this month, off-campus, by some University of Texas law students. Cox News Service reports that photos from the party "showed the students holding 40-ounce bottles in brown paper bags and wearing Afro wigs, gold teeth and such gang-related attire as bandanas, according to students who saw the images. Some of the party-goers wore name tags with names such as 'Tanika' or 'Jesus' to play on a black or Hispanic stereotype, the students said. The photos are no longer online." The First Amendment fully protects the right to host and attend such a party, and also gives people the right to state their views about such a party, which I do here. Unfortunately, the legal community often has lagged too far behind in becoming more enlightened about race relations. For instance, bar association after bar association (including the American Bar Association, at least into the 1930's) barred black members right into this century. The University of Texas law school (until the Supreme Court forced integration in 1950) and the University of Maryland law school, to name just two, previously barred black law students, to the point that the late Justice Thurgood Marshall was ineligible to attend the University of Maryland law school, which sits in the same city where he grew up. Until Washington's Cosmos Club accepted women members in 1988 when faced with the prospects of discrimination litigation, high-powered male lawyers hob-nobbed there for lunch, with women entering only at a male member's invitation. The Brethren reported that former Chief Justice Earl Warren -- for all he did to benefit individual liberties -- still ate at a lunch club with his law clerks, that barred blacks. The list clearly goes on and on. Notice how party attendee and first-year law student Nick Transier -- who uploaded party photos to the Internet, but then removed them -- asserts "We had no intention by any measure to choose a group or class of people and make fun of them." How many times do we hear such excuses over actions that dehumanize others? Race relations problems are not limited to the legal community, of course. Nevertheless, since lawyers and judges often are at the forefront of racial justice issues, it is particularly troubling to see such attitudes persist by students attending one of the top-rated law schools. Graduates from top-ranked law schools have more professional opportunities -- including federal judicial clerkships and federal judicial positions; it is important to know what members of the legal community are doing or not doing about race relations. I am not one to advocate legal solutions to every social ill. I do very much favor shining the light on social ills, because such light-shining is necessary as part of solving the problems. The National Lawyers Guild and its United People of Color Caucus condemned as weak the UT law school administration's response to this matter, and demanded that the "University take more aggressive steps to educate students and adopt an anti-racist curriculum." Law school dean Larry Sager met with some of the party's attendees, stated his views about the party, and said no disciplinary action was planned. This activity is First Amendment-protected, so disciplinary action at this government-run law school would violate the First Amendment. Where to go from here, then? Minorities and women still continue to be underrepresented at law firms, including in the partnership ranks; the Supreme Court has only one woman justice; and the list goes on. The legal community needs to become color-blind, and this effort becomes all the more a challenge the more that an old boy network culture permeates so much of the legal community. Jon Katz

Posted by Jon Katz in Jon's news & views at 00:15

Wednesday, October 25, 2006

Getting to yes in misdemeanor cases.

Getting to yes is negotiating with an eye towards fulfilling some key goals of each party to the negotiations, rather than negotiating on positions. A recent negotiation further illustrated the benefit of this approach. My client was criminally charged with possessing marijuana and marijuana paraphernalia possession. The prosecutor refused to offer first-time offender diversion, and instead offered for my client to plead guilty to possession of drug paraphernalia, which is not jailable for the first conviction, but which can create problems later on. I countered to the prosecutor my client's willingness to do a diversion program of sorts on his own, through a state-licensed weekly drug education program, together with a substantial number of community service hours. The prosecutor at first would not budge. However, time was on our side. The prosecutor had a huge docket. I had plenty of time to talk with the three police officers in the case. I suggested to the prosecutor that such a case did not justify keeping three police officers waiting to start the trial, nor for the chemist to have to come to court. The prosecutor asked why our client would not "just plead guilty" to drug paraphernalia, since it was not jailable, and I told the prosecutor that a guilty verdict either for marijuana possession or for paraphernalia each could harm my client's job security. She said she would discuss my negotiation offer with the police officers, which often means the prosecutor will accept our counterproposal. That was the situation in this instance; the case was then placed on the inactive/stet docket, conditioned on completing the drug education program and community service. Numerous times, prosecutors do not give me better negotiation offers in misdemeanor cases until I invest the time for negotiations backed up by our readiness to go to trial. The waiting can tax a client's discomfort/"I want to get it over with" factor, and those concerns must skilfully be addressed, while reassuring the client of the wisdom in taking the lawyer's recommended path. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, October 24, 2006

Judges lay some cards on the table at criminal defense seminar; treading carefully with press coverage.

This follows up on my October 22, 2006 blog entry about my speaking on a panel of criminal defense lawyers and judges at the Maryland Trial Lawyers Association's October 23 seminar entitled "Successful Strategies for Circuit Court Criminal Cases." I spoke about trial techniques, opening statements, direct and cross examination, and immigration consequences of criminal convictions and sentences. I focused on using consultants to prepare for trial (my favorites are psychodramatist Don Clarkson and acting consultant Josh Karton); being in the moment at every step of the trial (I start with the lessons of t'ai chi) so that the opening statement, cross and closing often are quite different than the outlined arguments and are seamlessly integrated; persuading through storytelling at every stage of the trial; and protecting non-citizen defendants from the complex of immigration landmines from criminal convictions. Also on the panel were Circuit Court judges from Baltimore City, Baltimore County, and Anne Arundel County; and two additional criminal defense lawyers discussing case preparation through the jury selection stage; and jury instructions, closing arguments and sentencing. One of the panel's criminal defense lawyers talked about dealing with the press and asserted potential publicity benefits to the lawyer from such news coverage. My view is to tread very carefully when discussing one's criminal defense clients with the press. Newspeople have their own agenda (and hopefully that is for the truth) that is separate from the defendant's interests, and are on tight deadlines that can interfere with giving an accurate picture of the defendant's case. While at first blush the lawyer may feel it important to talk with the press to help get the defendant's side across, once the trial is underway, the jury is not supposed to be following news of the case in the first place. Moreover, journalists have plenty of criminal defense lawyer talking heads available who have no involvement in the case. Through Marks & Katz's in-depth experience talking with the press (more often as talking heads, rather than about particular clients), we have developed a sense of when to talk on the record, and when not to. We make ourselves freely available to provide legal analysis and views to the press for cases and issues that we are not directly handling. When the press calls about a client, however, our sole obligation is to our client (and not to get attention to our law firm), which often limits the extent to which we will talk on the record to the press. Just as the pause in a song can be as important as the note that is played, knowing what to say and what not to say to the press can be equally as important. Consequently, when a lawyer is eager to talk to the press about a client with the hope of gaining publicity, that may be all the more reason not to speak with the press much or at all, or to keep the discussion off the record (and to verify that the journalist has agreed to keep the discussion off the record). Moreover, a journalist should not automatically be trusted, as they are humans, fallible, and competing against the 24/7 never-ending churning of news stories online and off. Additionally, beware when journalists try to create a soundbite by a lengthy yes/no question. Such a question is the journalist's soundbite, at best, and not the interviewee's words. Many of the three Circuit Court judges' comments were candid and very relevant to criminal defense lawyers. That was quite a change of pace from a talk earlier this year by a District of Columbia appellate judge who was advertised as bringing an inside view from the court, and instead talked plenty from an inside view of the physical renovation of the court's new digs; that is not the type of insider's view I had in mind when I went downtown to hear this judge. The judges all agreed that they generally limit jury selection to judge-directed voir dire that eliminates proposed questions that address jurors' potential discomfort with such critical concepts as the necessity to acquit absent a unanimous reasonable doubt finding. Jurors should not be permitted to wait until jury instructions to realize they cannot follow such a critical instruction; by that time, they are more likely to remain silent on the matter, and a mistrial will be more possible if jurors do speak out at that stage, unless a sufficient number of alternate jurors remain. The judges expected that more potential jurors will lie to stay off a jury than to stay on a jury. However, I believe that plenty of potential jurors lie to get onto a jury, particularly for trials that seem particularly interesting or high-profile (perhaps sometimes hoping to be able to sell the juror's story to a writer after the trial concludes). One of the judges surmised that potential jurors are no more likely to lie to a judge conducting voir dire than parties' lawyers conducting voir dire. However, I pointed out Dr. Sunwolf's groundbreaking treatises convincingly showing how harmful juror biases are more likely to be revealed through lawyer-directed voir dire. Potential jurors are less likely to admit an inability to follow a judge's instructions when speaking to the authority-figure judge, sitting in an elevated position, than making such admissions to a mere mortal lawyer. I encouraged the judges to permit at least limited lawyer-conducted voir dire (e.g., five-minutes' worth or more) and jury questionnaires to make up for the lack of lawyer-directed voir dire. All three judges expressed concern for potential adverse immigration consequences to non-citizen defendants. One of the judges will sometimes encourage the parties to reach a case disposition that will reduce such adverse consequences. Judicial training conferences include presentations by immigration judges and government immigration lawyers. Immigrant-side lawyers are needed, as well, at such training; I will check out the situation. The Baltimore City judge suggested that lawyers encourage legislators to increase resources in order to have more judges, prosecutors, and public defender lawyers available to handle the staggering backlog of criminal cases in that courthouse, which often leaves criminal defendants waiting well over a year to go to

trial. After the program, I suggested to the judge my preferred alternative of reforming the laws (e.g., drug laws) so that the number of prosecutions will be reduced in the first place. I give the judge -- a former federal prosecutor -- credit for not waving off my comment as merely coming from a radical lawyer. Instead, she spoke of prosecutors' ability to reach such a goal through their criminal charging decisions, and also talked about a gap that often arises between police aggressively arresting and charging crimes on the one hand, and prosecutors finding alternatives to going to the mat on every single case. One of the judges encouraged lawyers, for guilty pleas and not guilty pleas on agreed statements of facts, to keep out factual allegations from the record that would not be admissible at trial. He also encouraged lawyers to seek judicial intervention to edit such allegations out of presentence investigation reports, lest such allegations come back to haunt the defendant during parole consideration time. He also addressed the very important option of not seeking a presentence investigation report for sentencing in the first place; if a defense lawyer wants a sentencing hearing separately from the trial date, this judge is flexible for doing so (e.g. to get sentencing witnesses to court, or if the lawyer is exhausted at the end of trial) without needing to obtain the delay through requesting a presentence investigation report, which often will contain information more harmful than helpful to a defendant. Another judge talked about a lawyer's risk of losing credibility with judges by asking for an unrealistically low sentence. My view is that it is critical to defend one client at a time rather than having such concerns about being seen as seeking an unrealistically low sentence. The same judge said that just as lawyers discuss judges, judges also talk amongst themselves about lawyers who appear before them; this sounds like ex parte judge-judge communications. Speaking of ex parte communications, perhaps even deeper and vaster candor will shine from judges' seminar discussions when the audience is populated both by criminal defense lawyers and prosecutors in the audience, rather than one or the other. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 23, 2006

Rendering praise where praise is due.

Sometimes I blog about some of the cases I handle. Critical to that work is our support staff. This month, we welcome my new primary secretary, Aleida, who comes to us with previous legal secretarial experience, criminal defense experience, and a big heart. We also welcome secretarial assistant Juana, who comes to us with prior receptionist experience, a caring demeanor, and full fluency in Spanish. They both round out two secretaries who primarily assist my law partner Jay Marks. I consider myself very fortunate to have such a strong team to assist my clients. I believe strongly in integrating my support staff into all stages of preparation and execution of my clients' defense, including producing and organizing case documents, brainstorming (non-lawyer assistants can be very beneficial for developing case ideas, as they often can see issues from a juror's point of view better than a lawyer can), working directly with our clients, and going to court from time to time. Jon Katz

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

Trial courts: Often rough and tumble.

At criminal bench trials, some judges seem more willing to overrule objections that they would sustain were a jury present. Sometimes the judges perhaps feel they are better able than jurors to filter out inadmissible evidence. In Maryland and Virginia, District Court judges know that an appeal means a de novo trial rather than an examination of any errors in the judge's evidentiary and procedural rulings. Sometimes criminal bench trials become so informal that judges refuse to entertain defendants' motions to suppress evidence until after the entire prosecution case has been presented. I present my best defense even when a judge contravenes evidentiary and procedural rules, but certainly do not like the situation. Judges are humans, and humans are not able to erase information from their memories. Consequently, it is better that judges sustain objections that should be sustained, and suppress evidence that should be suppressed, on a timely basis. On a related note about criminal bench trials, courts get so busy that they ordinarily would grind to a halt if no defendants entered guilty pleas. Perhaps it was in that context that a former Maryland District Court judge one morning during a particularly busy drug possession trial docket, brought all the lawyers to the hallway behind the bench, and firmly stated that any defendant who did not fold after losing a motion to suppress evidence (other than making a motion for judgment of acquittal and closing argument, I surmise) would be going to jail (but did not say how much jail beyond a few days). This clashed with my ordinary practice of challenging the testimony of drug chemists at drug bench trials. The judge advised that anybody who wanted the dignity of a full trial should demand a jury trial to Circuit Court. Although I very much disagreed with this judge's admonition, he perhaps was echoing what many other judges thought but did not express. This particular judge was more willing to deliver acquittals than plenty of other judges, and handed down some of the most lenient sentences; so he delivered the bitter with the sweet. His rule, though, was to keep the docket moving along. Another judge, now retired, also admitted that he would chase dockets at times. Nobody ever said, of course, that trial courts are elegant battlefields. Lawyers seeking elegant work might wish to think twice before doing trial work. This is where I thrive, because this is where so much justice can be achieved, even when the battle is not fair. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, October 22, 2006

M&K Speaking at Oct. 23 MTLA Crim. Seminar

Marks & Katz's criminal defense partner Jon Katz will be speaking October 23 at the Maryland Trial Lawyers Association's "Successful Strategies for Circuit Court Criminal Cases." Jon's topics will be Trial Techniques, Opening Statements, Direct & Cross Examinations, and Immigration Consequences. The online brochure is here. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00

Friday, October 20, 2006

Marks & Katz files further arguments for dismissing libel lawsuit against Westboro Baptist Church.

Our law firm represents defendants Westboro Baptist Church and Fred W. Phelps, Sr., against a lawsuit alleging defamatory statements on the Internet and at a protest concerning Matthew Snyder -- an American soldier killed in Iraq -- and his funeral. This WJZ TV news story hits it on the head that I am disgusted by the messages that are the basis of this baseless libel action, but that I believe strongly in the defendants' right to express those views. The federal trial court in Baltimore now will decide whether to grant our motion to dismiss the lawsuit. We filed a motion to dismiss last month. Yesterday, we filed a detailed reply to the plaintiff's opposition to our motion to dismiss. The filings of the parties and the court's orders can be found on PACER for Snyder v. Phelps, et al., Civ. No. 1:06-cv-01389-RDB (D. Md.). Our previous blog entries about this case and our philosophy behind representing the defendants, are here and here. Jon Katz

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

Thursday, October 19, 2006

How to find our permalinks' URLs - Problem solved.

UPDATE TO THIS BLOG ENTRY: October 22, 2006. We have solved the matter that prompted the following blog entry, through the help of our Internet consultants at Daytona Networks, which is also our website's sitehost. Thanks to the commenter(s) who offered technical problem-solving suggestions. To our fellow bloggers: After transitioning to real blog software in mid-October 2006, I am now trying to figure out if the new blog software can operate from our original blog URL of markskatz.com/justiceblog.htm. I do not yet know whether the htm suffix will prevent doing that. Right now, the blog shows up at that latter address only as a frameset. Therefore, the easiest way to obtain our trackbacks/permalinks, is to visit our originating blog address at <http://markskatz.com/blog2/serendipity>. Otherwise, at markskatz.com/justiceblog.htm, you can obtain a permalink by rightclicking the trackback or comments or other relevant hyperlink. I welcome your thoughts for resolving this issue, other than the option of changing our blog address to one that erases .htm as the suffix. Jon Katz

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

Wednesday, October 18, 2006

Kenneth Lay's conviction dismissed by abatement doctrine.

On October 17, 2006, a federal trial judge dismissed the late Enron founder Kenneth Lay's entire prosecution, even though he already had been convicted. The judge found that this result was necessitated by the abatement doctrine, which requires dismissing a criminal conviction when the defendant dies pending conclusion of a direct criminal appeal, and treats the matter as having never even been prosecuted. The trial judge found that, pursuant to governing appellate caselaw, the abatement doctrine applies equally here, even though Mr. Lay died before being sentenced. The trial judge confirmed the option of Mr. Lay's alleged victims to sue his estate in civil court. However, the judge found he had no jurisdiction in this criminal case even to freeze the assets of Mr. Lay's estate. Hopefully it is farfetched that some convicted defendants will commit suicide while their direct appeals are pending, just to try to vindicate their names. However, I imagine some convicted defendants will at least entertain the thought. This case is *USA v. Causey, et al.*, Crim. No. 4:04-cr-00025 (S.D. TX). The order dismissing Mr. Lay's case is [here](#). The Washington Post's report is [here](#), including the reaction of people who suffered from the Enron scandal, and a brief discussion of former Enron chief executive Jeffrey Skilling, who is to be sentenced October 23, 2006. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Requiring ID bracelets for students: Perhaps the schools ultimately want to cattle-brand students.

Five years ago, the Washington Post quoted me (correctly) as opposing the District of Columbia government's plan to institute a barcode identification system for youths. Now the wrongheaded idea has seeped up the street to Montgomery County, Maryland's, Montgomery Blair High School, which is just three miles up the street from my office. Students at Blair High School (think Blair Witch Trial, now that the school requires wearing ID badges) must now wear one of eleven color-coded identification badges, including colors to mark students as freshmen, magnet students, and students of limited English proficiency. For a county that seems to pride itself on equal opportunity for all and top-notch education, the school system particularly puts its foot in its mouth by giving a scarlet letter to students speaking English as a second language. The only consolation is that they can request red freshman badges, instead. Curiously -- or perhaps by no mere coincidence -- no ID-wearing (let alone color-coded ID-wearing) mandate exists for any of the county's remaining public schools, including its nine other high schools, including those in the wealthiest and least racially- and ethnically- diverse parts of the county. Leave it to the school system to add insult to injury by penalizing students for leaving a badge at home, including possible detention for a first intentional violation of the rule (how is intent proven?), and possible suspension for a second violation. Jon Katz Technorati Profile

Posted by Jon Katz in Constitutional Law at 00:00

Tuesday, October 17, 2006

When student disciplinary proceedings overlap with criminal charges.

If more prospective students read colleges' disciplinary rules, they might have cause for pause to sign up for a whole host of colleges. However, such considerations perhaps are too lost during the scramble to apply to college, to secure admission to a top-choice school, and to secure scholarship funding. Â My own undergraduate school, Tufts, went into overdrive on censorship not long after I graduated, and perhaps even before. I did not read the disciplinary rules in enough depth to know if such rules existed when I still was there. I do know that Tufts kicked a classmate off campus after he was charged with cocaine offenses on campus very early on in the prosecution, when he was still presumed innocent, at least in court. Â On the other hand, in college, drinking beer under the legal age was easy at campus parties, obviously fake identification cards were accepted at the nearby liquor store, and students smoked marijuana in the dorms without needing to be concerned about intervention by residential staff. Â Times have changed.Â The nearby University of Maryland clamps down on marijuana, even small amounts, with a vengeance, ordinarily, at minimum, kicking students out of campus housing for at least a semester, and imposing withheld suspension forÂ possession of even the smallest amounts of marijuana.Â High schools find all sorts of reasons to suspend students for suchÂ actions asÂ insubordination, passing outÂ a prescription pill,Â and the list goes on, often ready to warehouse students in off-campus alternative educational facilities that make the sweatshop class look likeÂ an advanced placement seminar. Â The disciplinary hearing process at colleges and public schools often amounts to a kangaroo court system with insufficient procedural protections, insufficient appeal rights, and an overly paternalistic educational system at best. Â Some of my student criminal defense clients also face parallel academic disciplinary proceedings, where the right to remain silent is looked at like a concept from another planet, where the refusal to speak can be construed as not cooperating with the truth, and, at the college level, where students serve on the disciplinary panels and as prosecutors, often seeming to feel that the whole disciplinary state of affairs is just fine with them. Â American University leads the Star Chamber model, where students are prohibited even from bringing their lawyer into the hearing room, and where they are told their hearing is not a legal proceeding, even though disciplinary proceedings are spearheaded by the office of Judicial Affairs. The University of Maryland, at least, permits full advocacy from students' lawyers. Â Students cannot always afford lawyers. When that happens, it becomes important for them to find out about advice and advocacy representation they might obtain by a campus students' rights office and by faculty members. On top of that, the Foundation for Individual Rights in Education has online guides available for navigating the often Byzantine campus disciplinary proceedings. Â Unfortunately, by the time a student has hired me for a criminal-related disciplinary matter, the student often has permitted a dormroom search (sometimes university staff claim a right to search without a student's permission) and has given a full statement to university staff. Fortunately, prosecutors will not always seek to obtain and present such student statements nor disciplinary hearing testimony at a student's criminal court proceeding. However, prosecutors should be expected to be most happy to utilize, for the courtÂ prosecution, drugs and other physical evidence seized even under draconian campus housing policies that claim to give students no option to refuse a search. Â Consequently, students should think more carefully before consenting to campus searches and before giving campus staffÂ a statement about their alleged criminal actions. Sometimes it is better to risk losing university housing, and to risk suspension or expulsion from the college rather than to make it easier forÂ the police and prosecutors to obtain a conviction against the student. Ideal is for the student to have legal advice before making such decisions; that ordinarily is an unavailable luxury. Â BecauseÂ student suspects often speak toÂ campus staff and to campus disciplinary panels under duress of adverse consequences to academic status for remaining silent, criminal defense lawyers should be ready to argue that such duress precludes the use of such statements in a criminal court trial.Â Some jurisdictions might have appellate opinions that are fully on all fours with this argument.Â If not, analogies can be made to the inadmissibility in criminal court of statements of police at administrative hearings where the officer is under duress to talk or to lose employment or employment privileges. Â In any event, pressure needs to be put on schools to treat students fairlyÂ by eliminating unfair substantive disciplinary rules, and by assuring fair disciplinary procedures and fair sanctions. The Foundation for Individual Rights in EducationÂ is among the forces fighting for saner and fairer campus disciplinary rules and proceedings. We all should follow a similar path. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 16, 2006

What really happened at the anti-Minuteman protest at Columbia University?

The National Lawyers Guild claims that videotape coverage of the early October 2006 anti-Minuteman protest at Columbia University "shows that the students standing with banners were not responsible for that evening's violence, rather they were attacked and kicked by the Minutemen when they engaged in peaceful protest." The rest of the Guild's information release is [here](#). I disagree with vocally drowning out invited speakers, no matter how abhorrent their message. I continue believing that the wisest response to abhorrent speech is counter-speech. At the same time, I also disagree with universities' disciplining students for drowning out invited speakers. On a related note, the Foundation for Individual Rights in Education's website gives a poor rating to Columbia for academic freedom, as detailed [here](#). Jon Katz.

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

Sunday, October 15, 2006

Underdog undergoes a facelift and technological metamorphosis.

The Underdog blog is now six-months old, fully redesigned, running powerful blog software, and much easier to navigate. Thanks immensely to our sitehosts (and web developers) Daytona Networks for finding, configuring, and uploading our new blog software. The updated Underdog blog accepts readers' comments, which our old software did not accommodate. We welcome feedback both to the comments section and privately to justice@markskatz.com. Archives of Underdog blog entries from before today are available here by category and here by date. For six years before we began blogging, we uploaded extensive information on our law firm's website. Among the many useful features of that site is the in-depth links page that I use daily, a critical introduction for dealing with the police, our published and self-published articles, and in-depth information about protecting your legal rights. Thanks to my law partner, warm friend, and extraordinary human being, Jay Marks, for his support and inspiration for our website and blog. I look forward to seeing his insightful views here, when he gets a chance to pull himself away from serving clients, spending time with his family, and giving twice-weekly legal commentary on CBS-owned Radio Zol, 99.1FM, 8:30 a.m. Wednesdays and 10:00 a.m. Sundays. As always, we welcome your suggestions for improving the Underdog blog, for new blog topics, and for links to other quality blogs. Jon Katz.

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

Friday, October 13, 2006

U.S. military signals its criminal defense lawyers to pretend to defend.

JAG lawyer Charles D. Swift did a spectacular job in convincing the United States Supreme Court to reject the Guantanamo military commission tribunals. (See also here how "The Bush administration's denial of basic trial rights to Guantanamo inmates reveals the government's charade in claiming to fight for freedom" and here about Congress's denial of habeas corpus rights to suspected enemy combatants). Unfortunately, Mr. Swift's summertime premonition that he would be squeezed out of the military came true this week. Ever the gentleman more than necessary, Mr. Swift continues having no negative words about his expulsion from the military, an expulsion that sends the wrong message to the remaining and future military criminal defense lawyers that their jobs can be jeopardized by following their obligation under lawyer's ethical rules to zealously defend their clients. National Institute of Military Justice president Eugene Fidell is quoted as saying that Mr. Swift was "a no-brainer for promotion," and that "it's too bad that [Swift's love of the Navy is] unrequited love." I know and respect Gene Fidell very much, going back to the early nineties, when we both served on the local ACLU board. I doubt he was trying to be polite to the military; perhaps he felt it was unnecessary for him to tell people what was so obvious, which is that the military acted despicably in expelling Mr. Swift, particularly when doing so just four months after the Supreme Court handed Mr. Swift its spectacular Hamdan decision. Kudos to the New York Times for taking the kid gloves off, and confirming: "The Navy gave no reason for refusing Commander Swift's promotion. But there is no denying the chilling message it sends to remaining military lawyers about the potential consequences of taking their job, and justice, seriously." Beware, military members risking your lives as part of your jobs. This is the same military criminal defense system that will represent you in criminal court if you are unable to afford a retained lawyer. Jon Katz. ADDENDUM (October 21, 2006): See and hear this revealing story by Nina Totenberg about the military's termination of Charles Swift, the military's wrongheaded policy of rewarding legal generalists with promotion and penalizing lawyers of Mr. Swift's caliber with expulsion, and Mr. Swift's remaining a gentleman to the end (staying a gentleman does not necessitate being a sycophant nor a weakling, and is in line with successful and powerful t'ai chi practitioners). By the way, Nina Totenberg is a powerhouse of a journalist. I have briefly spoken with her twice over the span of nineteen years. She is thoroughly dedicated to excellent journalism.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, October 9, 2006

Marijuana: Effective medicine for Alzheimer's disease and much more.

Marijuana is very effective medicine for a whole host of physical ailments. NORML provides a rundown of those many benefits here. Unfortunately, the federal government continues to politicize marijuana as medicine by refusing to reschedule marijuana so that it may be prescribed by physicians. Moreover, only a handful of people are permitted to receive federally-provided medical marijuana. Because everyone risks succumbing to Alzheimer's disease, hopefully more lawmakers will support allowing prescription marijuana now that a 2006 Skaggs Institute study shows that marijuana is particularly beneficial to delaying and treating Alzheimer's disease. Now more than ever, it appears demented not to permit physicians to prescribe marijuana as medicine. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Tuesday, October 3, 2006

Twenty-two states that do not ban corporal punishment in schools.

In first grade, I saw the mean-looking wooden paddle hanging on the wall of my kindly-looking Connecticut public school principal. By now, Connecticut and twenty-seven other states ban corporal punishment. Twenty-two do not; that leaves twenty-two states to boycott as residences, including the five worst offenders, which are Texas, Arkansas, Mississippi, Tennessee and Alabama. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00