

Friday, June 1, 2007

### **Thanks to Foonberg**

Law practice management guru Jay Foonberg. A less sexy part of our law practice is managing and promoting our law firm. However, I much prefer managing our law firm and being our own bosses than the opposite. Additionally, I like the quality control that we can deliver by being our firm's chief managers. One benefit of having a solo or small law firm is the ability to streamline and simplify the firm's daily administration more easily than would be the case for a larger law firm. My law partner Jay Marks and I can make quick and even high-dollar decisions in as little as a phone call when larger law firms would need more time just to assemble together all their voting partners. Jay Foonberg (shown on YouTube above) is a great cheerleader for lawyers being their own bosses and making practice management a friend rather than an enemy. Jay's website tells all about his books and appearances on law practice management, and discusses such diversions as marathoning on multiple continents and legal advice for buying co-ownership of jet rights. Since Foonberg first published his classic *How to Start and Build a Law Practice*, technological and practical advancements have made it more economical than ever for lawyers to run solo and small law firms, rather than needing to rely on the more extensive resources of a larger law firm. A lawyer without a staff can even get dictation and transcription done by companies that handle the work by phone. (See here for my blog entry on the legal work outsourcing trend.) Solo and small firm practitioners have many opportunities to bond together with other small firm practitioners. Among them are the ABA-sponsored Solosez group, such regional organizations as Maryland's Civil Justice Network, numerous voluntary lawyer organizations, and a large number of listservs. The legal organizations with which I participate are listed here under the heading **STAYING ON TOP OF LEARNING AND BRAINSTORMING**. Thanks to Jay Foonberg for his boundless optimism and practical advice. Jon Katz.

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

Thursday, May 31, 2007

**Why did the Justice Department install an anti-pornography crusader on the immigration court?**

This is the main Justice Department building with security fencing; the image also is apt for how frequently the Justice Department keeps true justice away from the people. (Image listed here as available for republication without permission). Like the multiple layers of a pungent onion, U.S. Attorney-firing-gate turns out to be just one layer of unseemly hiring and firing practices at the Justice Department, including the over-politicization -- in terms of liberals, conservatives, and those in between -- of hiring of (1) highly-paid (with annual pay exceeding \$100,000) immigration administrative law judges and (2) law students and recent law school graduates. In her immunized testimony last week to Congress, Attorney General Alberto Gonzales's former assistant Monica Goodling said she had "crossed the line" in trying to keep liberals from being hired as prosecutors and immigration administrative law judges. The Boston Globe reports that federal law bars taking "political affiliation into account when hiring career professionals." As much as I decry the rampant injustices inflicted from the Justice Department (the Justice Department's policing activities (e.g. with the Federal Bureau of Investigation), alone, provide enough fodder for such criticism), I learned years ago that many of the department's career lawyers are very decent, capable, and well-meaning people, no matter how much I may disagree with many of the positions they advocate for their employer. Politicizing the department's career lawyer hiring process would change all that. Now, the Justice Department's Inspector General and Professional Responsibility chief have informed those at the Justice Department that "Among the issues that we intend to investigate are allegations regarding Monica Goodling's and others' actions in DOJ hiring and personnel decisions; allegations concerning hiring for the DOJ Honors Program and Summer Law Intern Program; and allegations concerning hiring practices in the DOJ Civil Rights Division." Now for the title of this blog entry: "Why did the Justice Department install an anti-pornography crusader on the immigration court?" It turns out, by the Justice Department's own admission, that from October 2004 to January 2006, at the very least, the overwhelming majority of immigration administrative law judges ("ALJ's") (they are Justice Department employees who are among the ranks of well over one thousand Executive Branch ALJ's) were hired without public competition. By April 2007, according to a Justice Department spokesperson, immigration ALJ vacancies are now publicly announced and the hiring process "places the initial vetting, evaluation, and interviewing function for all candidates in the Office of the Chief Immigration Judge and [the Executive Office for Immigration Review]." During the Justice Department's non-competitive immigration judge hiring season, the department hired plenty of people who were short on immigration law experience and long on Republican connections. The politically-motivated (so it would seem) immigration judge appointee who stands out the most for me is anti-adult entertainment crusader Bruce Taylor (see a description here from Mr. Taylor's opposition, of which I am part). I certainly hope that what I find to have been Mr. Taylor's unjust interpretation of the First Amendment does not translate into unjust rulings from him as an immigration ALJ. The impact of his decisions as an ALJ are too important for that to happen. In any event, immigration law is so complex and in-depth that it takes probably at least one to two full years of full-time immigration law practice to get a good handle on general immigration law issues, let alone on the many more in depth issues. Bypassing the competitive hiring process to appoint loyal Republicans overlooks the need to have immigration law judges who not only sufficiently understand immigration law, but who also have the necessary compassion and demeanor to be making decisions that often will have lasting and deep impacts on the lives of immigrants and their families, including decisions about deportation, setting pretrial bail, and approving or disapproving green cards and other critical visas. To be certain, federal District Court, Circuit Court, and Supreme Court judges ordinarily are nominated by the president with political considerations in mind, but at least those nominations are subject to in-depth Senate scrutiny, hearings, input from the American Bar Association and other organizations, and voting, and at least such judges serve lifetime appointments that give them more courage to follow the law; immigration judges remain employees of the Justice Department. Jon Katz.

Posted by Jon Katz in Jon's news &amp; views at 06:00

Wednesday, May 30, 2007

### **Maryland's highest court tells Nelly a thing or two about indecent exposure in a private home.**

Â Maryland's highest court ruled 5-2 that a house can be a public place for purposes of the indecent exposure law. Perhaps a mischievous law clerk replaced the judges' Webster's dictionary with Orwell's Goodspeak dictionary. Â In 2002, Nelly, Pharrell Williams and Chad Hugo wrote a smash hit song "Hot in Here,"Â which summed up the sexual themes that are so heavily intertwined with hip hop music, with the line "It's gettin' hot in here (so hot), So take off all your clothes." Â LastÂ month, Maryland's highest court let it be known under the indecent exposure common law that Maryland inherited from England through Maryland's constitution (to think the Revolution War did not make Americans as free from England as one might have thought) not to follow the foregoing song's advice unless the exposure is consented to or is in a private place. *Wisnewski v. State*, \_\_ Md. \_\_ (April 18, 2007). However, it is hard to conceive of how many public places are left now that the Maryland Court of Appeals has upheld last year's Court of Special Appeals ruling (which I discuss here) that even a house can be a public place if the exposer is a visitor and the home's occupants do not want to see the expososure. Â Five years ago, I argued to Maryland's highest court that, at the very least, a strip club is not a public place for which anti-public-nudity laws would apply. The court avoided answering the issue by giving us a smashing victory on double jeopardy grounds, alone. Â On a related note,Â Maryland's indecent exposure law does not clarify what is indecent exposure in the first place, and does not appear to prevent arrests for female toplessness.Â To ban female toplessness in public but not male toplessness violates the Fourteenth Amendment's guarantee of equal protection of the laws. Fortunately, various jurisdictions, including Maryland,Â have expressly exempted public breastfeeding from the indecent exposure laws, and I have heard of various courts addressing the Constitutionality of banning topless sunbathing by women. One of them, the Fourth Circuit, disagreed with me in 1991. *U.S. v. Biocic*, 928 F.2d 112 (4th Cir. 1991). However, as concurring judge Murnaghan addressed, times they are a-changing, and governments hopefully will stop wasting their time trying to ban female toplessness. *Id.* at 116 (Murnaghan, J., concurring).Â Â TheÂ failure of Maryland's indecent exposure law to define indecent exposureÂ exposes the law to a challenge that the law is unconstitutionally void for vagueness, particularly as to exposure of anything other than one's genitals. Jon Katz.

Posted by Jon Katz in Criminal Defense at 06:00

Tuesday, May 29, 2007

**Supreme Court likely to review capital punishment for rape of child.**

Â Death penalty: Always unjustÂ Thirty years ago, a 6-3 majority of the United States Supreme Court (Justices White, Blackmun, Stevens, and StewartÂ in the plurality,Â withÂ Justices Brennan and Marshall adding their belief that the death penalty itself is unconstitutional)Â issued a black letter ruling that rape is not a death-penalty-eligible crime. *Coker v. Georgia*,Â 433 U.S. 584 (1977). Â Preferring a shade of gray,Â Justice Powell concurred in part and dissented in part fromÂ Coker'sÂ outcome, finding that the rape by Mr. Coker was not vicious and violent enough to permit a death sentence but that "it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society's 'evolving standards of decency,' particularly legislative enactments and the responses of juries in capital cases." *Coker*,Â 433 U.S. at 604.Â The dissenters were bothÂ Nixon appointees: the lateÂ Chief Justice Burger and the late then-Chief Justice-to-be Rehnquist. The pair voted against the Supreme Court's 1972 effective moratorium on the death penalty pending death states' re-writing of their statutes for legalized murder/capital punishment in *Furman v. Georgia*, 408 U.S. 238 (1972), which was followed by the moratorium's end withÂ *Gregg v. Georgia*, 428 U.S. 153 (1976). To be fair to them, theyÂ were joined byÂ frequent swing voter Justice Powell and Justice Blackmun, who twenty-two years later proclaimed: "From this day forward, I no longer shall tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994). Justice Blackmun retired the same year, by then having long broken away from the 1970's "Minnesota twins" characterization of him and Chief Justice Burger. Â Perhaps seeking a factual distinction from *Coker*, which involved a sixteen-year-old rape victim, Louisiana's legislature made the death penalty availableÂ where the rapeÂ victim is underÂ thirteen years old.Â Â La. R.S. 14:42.Â Â Bowing to the foregoing Louisiana legislation and trying to gray *Coker's*Â black-letter rule against the death penalty for rapeÂ ,Â Louisiana's Supreme CourtÂ recently upheld the death penalty for a child rapist.Â *State v. Patrick Kennedy*, No. 05-KA-1981 (La., May 22, 2007). The victim's physical injuries -- let alone mental damage -- were so horrific that I will just refer readers to page 2 of the Kennedy slip opinion. As an aside, one of my biggest hurdles to becoming a public defender lawyer was the prospect of defending people who actually committed rape and other heinous crimes. I describe here how I finally overcame this hurdle long ago. Â In any event, Louisiana's Supreme Court sounds most disingenuous inÂ trying to explain what part ofÂ no it does not understand inÂ *Coker's* black-letter prohibition of capital punishment for rape. Â Unless the Louisiana Supreme Court reverses itself, this case looks bound for the United States Supreme Court, which only has one member left that voted in *Coker*, that being Justice Stevens. I think the United States Supreme Court will reverse *Patrick Kennedy's* death sentence for child rape with the following voting lineup: Voting toÂ reverse underÂ *Coker*Â as settled law should be the four ordinarily more liberal (often only by comparison to the remaining justices) Justices Stevens, Souter, Ginsburg (who participated in the ACLU's amicus brief against the death penalty in *Coker*), and Breyer. Justice Kennedy, now often the Supreme Court's swing vote on civil liberties and criminal law issues, likely will vote to reverse Mr. Kennedy's death sentence, in recognition of *Coker's* thirty-year precedential status. Perhaps even one or more of the four justices from the conservative wing will recognize the value of following *stare decisis* (giving precedential value to a case even though the Supreme Court is free to overturn or otherwise modify any of its precedents) in this instance. Â As a final aside, winning *Coker*Â at oral argument was Bill Clinton's later lawyer David Kendall, who at the time was just six years out of law school and with the NAACP Legal Defense and Education Fund when his Yale law degree and Rhodes scholarship would have immediately opened the doors to the highest paying law firms, which he delayed doing until seven years out of law school. His law firm biography recounts that Mr. Kendall "was arrested several times (but convicted only once) in Mississippi during the summer of 1964 while attempting to register voters." I hope his thirst for justice has stayed alive and well.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 21:00

Monday, May 28, 2007

### **What does Memorial Day mean?**

Image from website of the White House Commission on the National Moment of Remembrance. Today is Memorial Day, which is a holiday for memorializing America's soldiers who died in wars. However, the bigger focus of the holiday seems to be long weekend vacations, parades, and retail sales. I have said plenty about the military. Mainly, I believe the United States needs an effective military. However, I also believe that the military-industrial-government complex is dangerously overgrown; that the United States has been too trigger-happy with the military and that effective diplomacy needs to be given more opportunity; and that violence begets violence, and, even though I am not a full pacifist, that Gandhi and many other pacifists' messages are important to take to heart and are often very powerful and effective. I also believe that the United States military has been the source of too many severe abuses, atrocities, and imperialist expansion whether originating from the lower ranks, the highest echelons, or somewhere in between; and that the United States government repeatedly has used war -- and by now terrorism, as well -- as an excuse to stymie civil liberties. Using effective diplomacy and hemming in military excess is not impossible. Although I take it that America's military, military budget, and nuclear arsenal continued growing under his watch, Jimmy Carter "was thankful that although my profession was that of a military man - commander in chief of the armed forces, prepared to defend my nation with maximum force if I had to - I was able to go through my entire term in office without firing a bullet, dropping a bomb or launching a missile." (Esquire, January 2005). (Many Americans at the time preferred the cowboy mentality of Ronald Reagan, who defeated Carter in an Electoral College landslide. Carter's full quote is: "The hostage crisis lasted almost a year. Most of my political advisers were urging me to launch an attack against Iran. I could have, in effect, destroyed Iran with one strike. And it would have been politically popular to do so. But in the process, I would have also killed thousands of innocent Iranians. And it would have undoubtedly resulted in the execution of our hostages... My family tied me back to the human element in the most important international, diplomatic and military decisions I had to make. And in the end, I was thankful that although my profession was that of a military man - commander in chief of the armed forces, prepared to defend my nation with maximum force if I had to - I was able to go through my entire term in office without firing a bullet, dropping a bomb or launching a missile."). In short, Memorial Day should not be a day blindly to glorify the military, military service, or soldiers. Instead, it should be a time to humanize soldiers and to recognize the sacrifices they have made while maintaining a realistic and critical assessment of American militarism; recognizing the serious tradeoffs involved in using and threatening military force; and recognizing that soldiers are humans including those who will commit horrid atrocities and others who will try to stop the atrocities. Jon Katz.

Posted by Jon Katz in Jon's news & views at 18:15

Friday, May 25, 2007

**Be back next week II.**

I've been away this week, and will post new blog entries when I return. Meanwhile, feel free to peruse our website and April 2007 blog archives.

Posted by Jon Katz at 00:00

Thursday, May 24, 2007

**Be back next week.**

I've been away this week, and will post new blog entries when I return. Meanwhile, feel free to peruse our website and May 2007 blog archives.

Posted by Jon Katz at 00:00

Wednesday, May 23, 2007

### **Lawrence Welk in surreal-land.**

Image from the public domain. Â Several times, I have discussed how great music and musicians inspire me as a trial lawyer. See hereÂ and here. Â On the opposite end of the scale are musicians -- no matter how talented -- who do their public best to satisfy the elevator music/easy listening/Muzak set who want music that merely superficially soothes and that is music in name only.Â Lawrence Welk firmly served that widespread demandÂ for many years -- where I would see at least a few dancing audience members wearing sport jackets matching the design on their couches --Â or so I thought until I saw this surreal videoÂ (thanks to Last One Speaks for posting the clip of Lawrence Welk's production team on acid), where Mr. Bubbles ultimately reassures everyone that he caters exclusivelyÂ to theÂ elevator music set. Â The great musician and bandleader Sun Ra (great, yes, but what was with his claim to have come from another planet?) cautioned not to dismiss the music of Neil Sedaka, Barry Manilow or the King Family, in that all music has importance if it is important to somebody. Trial lawyers, of course, need to keep in mind that the juror whose year is complete only by a Neil Sedaka or Wayne Newton concert is as important as any other juror. However, does that mean I need to torture myself with a Wayne Newton Vegas extravaganza concert to relate to one particular (and hopefully very narrow, but probably wider than I wish) segment of my jury pool? Â On the big and smaller band theme (Welk, Sun Ra, Dizzy), more to my intrigue is the surreal Happy Kyne andÂ the MirthmakersÂ on Fernwood 2-Night. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:25

Tuesday, May 22, 2007

### **Marks & Katz's blogroll adds two Marks.**

Our blogroll is limited to blogs of true value. The value may be in the content, in the quality of writing, or in revealing something about our opposition. Our blogroll and links page represent years of finding useful Internet sites, including many that are hard to find. Following are two worthwhile blogs that I have recently added to our blogroll:

1. Mark Bennett is a Houston criminal defense lawyer whom I know from the Trial Lawyers College. He and I share a devotion to incorporating powerful life approaches from outside the law profession into our law practices; excellence in representing our clients; and a refusal to paint an unrealistically rosy forecast -- as opposed to presenting an optimistic battle plan -- to potential clients, even though many people will hire lawyers painting unrealistically rosy forecasts.
2. Mark Randazza (addendum and correction: he spells his first name as Marc, not Mark) is a fellow member of the First Amendment Lawyers Association. He loves his law firm work, teaches as an adjunct law school professor, and, like myself, quotes from the Dalai Lama (listing: "Share your knowledge. It is a way to achieve immortality.") Teaching as an adjunct instructor while working full-time as a litigator presents a challenge simultaneously to perform well in class and to perform well in the next day's court battle without having as much time the night before to put the finishing touches on the case. Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:10

Monday, May 21, 2007

**Links from M&K; links from the feds.**

Image from EPA's site. We regularly add to our extensive legal links page. Recently, I linked to the Justice Department's resource on Collateral Consequences of Convictions Under Federal Law. Even though the link comes from the dark side, this is an area of great importance to criminal defendants. We have written on this area in the immigration law context. Of course, the Justice Department's work goes well beyond prosecuting people. In that regard, here is the link to the United States Attorneys' Manual, to know the opposition. What a difference since the pre-Internet days when this manual was only available in a multi-volume looseleaf set. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, May 20, 2007

**Look before you blog.**

Computer hard drive. (Image from Pacific Northwest Laboratory's website).<sup>^</sup> Before launching a blog or website, I recommend reading "12 Important U.S. Laws Every Blogger Needs to Know." Jon Katz.<sup>^</sup>

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

Friday, May 18, 2007

### **Max Cole leaves the planet.**

Dizzy Gillespie continues making my jaw drop. (Photo from Library of Congress's website). By the age of twelve, I was into jazz music with a fury. While most of my peers were listening to Aerosmith, Zep-lite, and Peter Frampton and sometimes giving me strange looks for my jazz fanaticism, I was mesmerized by, and ultimately experienced in live performance, Diz, Chick, McCoy, and dozens more. I played the trumpet for ten years uninterrupted, and ultimately learned to play jazz improvisation. The experience has served me well as a trial lawyer, helping make me more comfortable performing live, thinking and improvising quickly on my feet, and finding creative ways to persuade. When I first started listening to jazz radio on the public and commercial airwaves, I got the only available steady stream of jazz throughout the day and night from New York City's WRVR 106.7 FM, whose history is here of eventually getting changed overnight to a country music format a few years later to earn higher profits for its owners. A brief background of WRVR announcer great Les Davis is here. Here is an online station that focuses on replicating WRVR's music format. Still on the lineup when I started listening to WRVR was announcer Max Cole, who played unadulterated great jazz, and spoke more like he was from a friendly Midwest town than from the rough-and-tumble New York. I just learned that he passed away last July at 91. He influenced me very much during his short time that remained on WRVR when I started listening. The least I can give back is to sing Max's praises here, and to give him a final thanks for helping to add an indispensable dimension to my life. Jon Katz.

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

Thursday, May 17, 2007

**Hurdles and more hurdles to getting a habeas corpus hearing.**

Death penalty: Always unjust. A 5-4 Supreme Court majority is satisfied to give a trial judge carte blanche whether to grant a habeas corpus/post conviction hearing to a death row inmate complaining that his trial lawyer was ineffective for following his instructions not to present mitigating evidence at sentencing. *Schribo v. Landrigan*, \_\_\_ U.S. \_\_ (May 14, 2007). Wisely, speaking for the four-member minority, Justice Stevens retorted: "Significant mitigating evidence" evidence that may well have explained respondent's criminal conduct and unruly behavior at his capital sentencing hearing "was unknown at the time of sentencing. Only years later did respondent learn that he suffers from a serious psychological condition that sheds important light on his earlier actions. The reason why this and other mitigating evidence was unavailable is that respondent's counsel failed to conduct a constitutionally adequate investigation. See *Wiggins v. Smith*, 539 U. S. 510 (2003). In spite of this, the Court holds that respondent is not entitled to an evidentiary hearing to explore the prejudicial impact of his counsel's inadequate representation. It reasons that respondent 'would have' waived his right to introduce any mitigating evidence that counsel might have uncovered, ante, at 10, 13, and that such evidence 'would have' made no difference in the sentencing anyway, ante, at 14. Without the benefit of an evidentiary hearing, this is pure guesswork." Justice Stevens hits the nail on the head that we are talking here about whether to give a death row inmate a habeas corpus/post conviction hearing, and not whether the inmate should necessarily be granted any habeas corpus relief. *Schribo v. Landrigan*, \_\_\_ U.S. \_\_ (May 14, 2007). With this *Schribo* decision, we once again see a common alignment of the Supreme Court's justices on civil liberties issues. We have the four ordinarily more liberal justices, who are Justices Stephens (appointed by the non-liberal president Ford), Souter (appointed by the non-liberal Bush I), Ginsburg (appointed by Clinton, a former litigator for ACLU causes, and much more restrained than my stereotype of an ACLU lawyer), and Breyer (appointed by Clinton, but decidedly deferential to government efforts to carry out the business of administering and regulating). Solidly on the right are Justices Scalia (appointed by Reagan), Thomas (appointed by Bush I), Roberts, C.J. (appointed by Bush II), and Alito (appointed by Bush II). The usual swing vote is Justice Kennedy, who was appointed by Reagan only after he failed to get Bork confirmed (otherwise, the Supreme Court would be even more hostile to civil liberties than now) and then had an aborted nomination of still-current Court of Appeals (D.C. Cir.) Judge Douglas Ginsburg, who later revealed past use of marijuana, which leads me to want to see how that may have informed any decisions he has written on the subject. Left unsaid by the Supreme Court majority in *Schribo* is the extent to which they want to narrow any floodgates to federal court for habeas corpus petitions that might remain after last decade's enactment of the mis-nomored Antiterrorism and Effective Anti-Death Penalty Act (AEDPA), which already urinates too much on habeas corpus rights. The Supreme Court would not have taken this case had it merely intended to rule on the narrow issue of whether to give a habeas corpus hearing to complain about the trial lawyer's following the defendant's demand not to try to save the defendant from death. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:05

Wednesday, May 16, 2007

### **Of Falwell, Flynt, and the First Amendment.**

The First Amendment and Larry Flynt prevailed against Jerry Falwell in *Hustler v. Falwell*, 485 U.S. 46 (1988). (Image from the public domain.) In high school, I'd hear about the Moral Majority, that it was neither, and that some guy named Jerry Falwell was involved with it. I heard he also led Liberty University in Lynchburg, Virginia -- where one of my teachers, Jim Jeans, ultimately taught, at the law school there -- which is about four hours down the road from me, and where Falwell apparently was roundly popular well beyond the campus. Jerry Falwell and other religious conservatives helped sweep Reagan into the White House, and I lived under Reagan's misery for much too long, followed by the misery of George Bush I and now George Bush II. (Then again, if I really wanted to get away from Reagan's misery, I never would have gone to law school in Washington, DC, in the first place, let alone a law school sitting just four blocks from his presidential palace). In the 1980's, the First Amendment prevailed against Falwell in his libel lawsuit against Larry Flynt's *Hustler Magazine*. *Hustler v. Falwell*, 485 U.S. 46 (1988). In setting the lower courts straight by overturning Falwell's lawsuit for libel (the jury found no libel) and emotional distress (the jury awarded him money), late chief justice Rehnquist, never a pal to the First Amendment, still got it right in describing the issue at hand, writing for the majority: "The inside front cover of the November 1983 issue of *Hustler Magazine* featured a 'parody' of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled 'Jerry Falwell talks about his first time.' This parody was modeled after actual Campari ads that included interviews with various celebrities about their 'first times.' Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of 'first times.' Copying the form and layout of these Campari ads, *Hustler's* editors chose respondent as the featured celebrity and drafted an alleged 'interview' with him in which he states that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse. The *Hustler* parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, 'ad parody - not to be taken seriously.' The magazine's table of contents also lists the ad as 'Fiction; Ad and Personality Parody.'" "Never one to mince words, here is a glimpse at the deposition of *Hustler* owner Larry Flynt by Falwell's lawyer, at which "Flynt identified himself as Christopher Columbus Cornwallis I. P. Q. Harvey H. Apache Pugh and testified that the parody was written by rock stars Yoko Ono and Billy Idol." *Hustler v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986), reversed, 485 U.S. 46 (1988) (how many of the Fourth Circuit judges who ruled in Falwell's favor ever listened to Billy Idol?): [FALWELL'S LAWYER]: "Did you want to upset Reverend Falwell?" " " [LARRY FLYNT]: Yes. . . . Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar? A. He's a glutton. Q. How about a liar? A. Yeah. He's a liar, too. Q. How about a hypocrite? A. Yeah. Q. That's what you wanted to convey? A. Yeah. Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession? A. Yes. Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that? A. Yeah. Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could? A. To assassinate it. " As the *Washington Post* reminds us: "In 1999, he told an evangelical conference that the antichrist was a male Jew alive in the world today. He later apologized for his remarks but not for holding the belief. That same year, he warned parents that Tinky Winky, a character on the children's TV show 'Teletubbies,' was a gay role model. On '60 Minutes' in 2002, he labeled Muhammad a terrorist." "Yesterday, Mr. Falwell died. I do not believe in dancing on anybody's grave. Nor do I believe in whitewashing the biography of people who have thrown themselves into the center of public affairs and the eye of the political storm. Falwell was who he was." Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:20

Tuesday, May 15, 2007

### **Videos of real and acting trial lawyers.**

Website of U.S. District Court (W.D. Mi.). Following up on my previous commentary about and video of Gerry Spence, here are some other links to notable performances by trial lawyers and actors playing them. - Here is Atticus Finch's closing argument for acquittal in *To Kill a Mockingbird*. The rabid racism depicted in the film took place only seventy years ago; we still have a long road ahead against racism. - Here is Gerry Spence talking with Charlie Rose about Randy Weaver, government and corporate power, and the choice he made to accept a judge's appointment as a special prosecutor for an extremely gruesome 1979 capital murder trial against Mark Hopkinson even though he opposed the death penalty and still opposes it. More in line with his general outlook on law practice pre-dating the Hopkinson trial, when Gerry started the Trial Lawyers College fifteen years later, full-time prosecutors were told to apply to other trial lawyer programs, save for at least one prosecutor who was on staff. I first learned about Gerry's capital prosecution of Mark Hopkinson nine years after the trial, when he spoke at an over-fancy summer law associates dinner, and urged everyone in the audience to spread out beyond the cities after graduation, and to work for people. Perhaps it was no wonder that two years later, the dinner's organizers presented a conformist speech by Jay Stephens. Two people who are very important to me have supported the death penalty machine -- which I vehemently oppose -- at one time or another. First was Gerry Spence (with his prosecution of Mark Hopkinson), who, with the Trial Lawyers College, has contributed extraordinarily to my growth as an individual and trial lawyer. Next came a good friend from the Maryland Public Defender's Office who relocated and took a prosecution job doing death penalty appeals. I agree to disagree. - I do not watch *Boston Legal* very much, but did find these worthwhile clips of James Shore playing Alan Spader. His character presents some strong trial arguments, but also sometimes unnecessarily goes over the edge of the cliff -- which I suppose is one of the points of his character -- through such actions as advising a defendant to skip bail mid-trial after his green lawyer botches his murder case, intentionally emitting flatus to make a point at the end of cross-examining a man from a religious group that finds value in excretory activity and who claims wrongful termination for his religion, telling an opponent to "stick it", and more than making the point to Texas appellate judges that they do not care about his death row client: -- Here, he effectively argues that the notion that his tax protester client had the alternative to protest on the streets was undercut by the many severe limitations on demonstrators' rights. -- Here, he asks stonewall appellate judges how they can kill his client who was sentenced to death despite grossly ineffective counsel, a lilly-white jury for a black defendant, and repeated evidence of wrongful capital convictions. -- Here, he slams Guantanamo Bay detentions. -- Here he again spars with the judge from his tax protestor trial, while defending Denny Crane at his initial criminal court appearance. Unfortunately, although exaggerated, this judge displays some of the unjust hurdles that many real judges throw in the way of lawyers' legitimate efforts to defend their clients. I have written here about dealing with difficult judges. Of course, nothing beats going to a real courthouse and finding great lawyers in action. Jon Katz

Posted by Jon Katz in Persuasion at 00:35

### **Damn Yankees.**

What do these troops in Kosovo and George Steinbrenner - Just another day of crowd control in Kosovo. - A fellow listserv member posted this *New York Times* article about George Steinbrenner's strict limitations on movement of all stadiumgoers during the national anthem and "God Bless America" to the point of holding up handheld chains to prevent such movement. I have many happy memories of going to Yankee games when in high school, and experiencing the thrill of the many great players. Since then, Giuliani became mayor and over-sanitized New York City (including successful efforts at getting strip clubs out of Times Square, homeless people out of Penn Station, and fun out of New York). Now that Giuliani is no longer at City Hall, Steinbrenner has obliged the void with Star Spangled Banner-gate. They can play it without me. Jon Katz

Posted by Jon Katz in Jon's news & views at 00:20

Monday, May 14, 2007

### **Will the Supreme Court address the Second Amendment head on?**

Image from the Government Printing Office's website. Last March, the United States Court of Appeals for the District of Columbia Circuit overturned the District's blanket handgun ban. (See my further discussion here). On May 8, the Court of Appeals denied a rehearing or reconsideration of the case before the full court. Although the Washington Post's editorial page supports an appeal to the Supreme Court, the same editorial acknowledges that the Supreme Court last ruled on Second Amendment rights over sixty-five years ago, and this piece elsewhere in the Post addresses the significant alignment of Supreme Court justices who might be favorable to those asserting an individual's Second Amendment right to keep guns at home. Moreover, if the Supreme Court accepts this case for review, the President, through the Solicitor General, will get argument time, so it remains to be seen whether any Supreme Court hearing takes place when the White House is still with Bush II, who seems favorable to applying the Second Amendment to individuals, or if a new president is in office by then. With the next inauguration date twenty months off, it is a good bet that Bush II will get to argue if the Supreme Court grants an appeal. If the Supreme Court accepts an appeal in this case, will it address head-on the extent to which the Second Amendment applies to individuals? I expect that if the Supreme Court declares any Second Amendment rights for individuals, that the Court might limit that right to such narrow areas as possessing guns at home, and will leave the remainder of that right for the lower courts to address. By the way, I am far from the only non-NRA member and Bush II loather who interprets the Second Amendment to apply to individuals. Jon Katz

Posted by Jon Katz in Constitutional Law at 00:05

Sunday, May 13, 2007

### **Freedom of Information Act: Know your rights.**

From National Archives website. Â Curiously, the Freedom of Information Act ("FOIA") was not spawned by Watergate, but instead was passed in 1966, eight years before Nixon left the White House for good. Â I started FOIA litigation work seventeen years ago with the first law firm I joined after law school. The work included seeking attorney's fees for successfully litigating an agency's delay in satisfying a FOIA request. By now, I have handled several FOIA requests and have handled various stages of FOIA litigation. Useful resources for making and litigating FOIA requests are [here](#)Â andÂ [here](#) (a well-done FOIA request). When making FOIA requests, it is important to review the target agency's FOIA regulations in the Code of Federal Regulations, and the agency's FOIA section of its website, if any. Â On May 11, 2007,Â we filed a FOIA complaint against the Executive Office of the President, after not receiving a reply to my June 2006 FOIA request on behalf of Wenyi Wang to obtain the identity of the CCTV photographer who restrained her when speaking out on the White House lawn for human rights during Hu Jintao's visit. The video is [here](#). Â My past blogposts on Ms. WangÂ are [here](#), [here](#), and [here](#). Ms. Wang's work includes championing the human rights of practitioners of Falun Gong, who are severely repressed by the Chinese government, which sees Falun Gong -- which I do not follow -- as a threat to the government's dominance over all aspects of Chinese society. Jon Katz.Â ADDENDUM: Here is the FOIA Complaint we filed May 11 for Wenyi Wang. Â

Posted by Jon Katz in Jon's news & views at 00:10

Friday, May 11, 2007

### **The legal proceedings behind the Posada dismissal.**

The Bill of Rights. (From the public domain.)  
On May 8, United States District Court Judge Kathleen Cardone dismissed the immigration fraud prosecution against Luis Posada Carriles, for such Constitutional violations as violations of Mr. Posada's Fifth Amendment right to remain silent and the government's failure to provide sufficient interpretation when he was being interviewed for his naturalization application. Many who brand Mr. Posada a terrorist are upset over the dismissal. (He apparently told the New York Times that the CIA taught him everything he knows about violence; I have only read a little bit about him so far.) However, the Constitution is not permitted to be skewed against a dismissal no matter how unsavory the defendant is claimed to be. For any reason that the Bush II administration and its predecessors have anything to do with protecting, aiding, and conspiring with Mr. Posada, then that action did not come from the courts. The indictment for this case confirms that the dismissed prosecution was exclusively an immigration fraud case. It is not an extradition case, and it is ultimately up to the executive branch, not the judicial branch, whether to seek to extradite him. Not in my name, the leadership of the National Lawyers Guild, to which I belong, last month announced its support of the decision to deny Mr. Posada bail in this now-dismissed immigration fraud case by the Fifth Circuit after the trial court granted home detention. The National Lawyers Guild, which considers itself a progressive organization, best be careful about any harsh orders it seeks from the Fifth Circuit, lest such harshness return to bite Guild members' criminal defense clients in the butts; this is, after all, a court that affirms countless executions. The order dismissing Mr. Posada's immigration fraud prosecution is here. More information on Mr. Posada is here.  
Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:10

Thursday, May 10, 2007

### **Contributing to social justice never goes out of style.**

When frustrated over the slowness in achieving social justice, I remember that accumulated feathers will sink the boat. A Part -- but only a part -- of my whole frustration with the current Bush II wars in Iraq, against terrorism, and against drugs is that such a substantial percentage of people supporting the Bush II wars have little to no memory of the government's countless failures and injustices during Vietnam, and its accompanying suppression of demonstrators while the counterculture pushed to reverse the formica forced-uniformity and complacency that clashed with doing one's own thing. In fact, the vast majority of American soldiers in Iraq were born after the resignation of Nixon less than a year before the United States fully withdrew from Vietnam. For Nixon, democracy was quite the inconvenience, unless it was going to get him and his loyalists elected. Here is how the Vietnam war period and beyond influenced my own views of justice, my career path, and my insistence on finding a way to fight for justice for the long haul. I was born in 1963, and lived through the hippie era when too young to understand it beyond long hair, peace signs, and antiwar demonstrations. Nevertheless, I was heavily influenced by this period and beyond, during which not only the hippies were many, but when racism and sexism were being heavily and widely fought, otherwise conformist and complacent people spoke out against the Vietnam war, Nixon gave cohesion to all who detested his presidency, and Ozzie and Harriet no longer could make big bucks during primetime. Later on, I dreamed of coming of age during the hippie era, but recognized that it was the worst of times sprinkled with some emerging best of times. Ultimately, I naturally gravitated to criminal and Constitutional defense after growing up from 1963 forward, being encouraged to think for myself (but sometimes being simultaneously urged to play the game (I'm still trying to figure out what game that is, who created it, where its boxtop can be found, and whether I like even one of its gamepieces), obsessing over human and civil rights through my activity first with Amnesty International and next the American Civil Liberties Union, and seeing as a public defender lawyer how overcontrolling and dehumanizing is the criminal prosecution and court system, particularly when it comes to poor people and those too poor to pay for a lawyer but too rich to qualify for court-appointed counsel. On the path to my present, I tried to discover how much I could overlap my obsession with social justice, my interest in making a financially comfortable living, and the possibility of not needing to reject the entire establishment. Before I learned how severely atrocious were American injustices in Vietnam, I dabbled briefly in high school about whether to seek admission to West Point (the idea was mine alone) where my father went during Ike's presidency, followed by dabbling more seriously than that in college with emigrating to Israel, which has compulsory military service. Israel's economic and social hardships together with the many Israeli government actions that I felt were too expansionist and hawkish ultimately led me to put emigrating on a backburner; after seeing the Israeli military's disproportionately excessive response to the first intifada, I was relieved that I did not emigrate. For a year before law school, in 1985, I worked with the Irving Trust Company (headquartered at One Wall Street) in the belly of the Wall Street capitalist beast that loved the money flowing during Reagan's reign. I know by now that enlightened capitalists exist, but on Wall Street I often felt like I was searching for a needle in the haystack, including with the unapologetic and very open racially insensitive comments of too many of my colleagues in the financial auditing department of Irving Trust, even when not at happy hour, of which there were many. For personal growth, a great benefit to me at this job was rubbing elbows with a much larger cross section of people than I had ever dealt with before on a daily basis, from people who would never go to college, to a loveable near-retired security guard who once proclaimed at the prospect of overtime pay "I used to eat that up, but if I haven't made it by now, I'm never going to make it," to working people trying to make ends meet each week for their families, to the hundreds and even thousands of people passing daily on the street, to plenty of higher-income people who still had more of an affinity for pizza and beer than for Beef Wellington at the executive dining room. When I saw so many people working just to make ends meet, I asked myself the extent to which it is or is not a luxury to work for social justice; my answer became that it is a necessity, even if working for social justice were part-time or piecemeal, so long as each person focuses on doing no harm to others in daily life. In the end, I identify a lot with the hippies in Easy Rider when confronted by the men who would end up murdering them, where one of the hippies responded to the taunts about their long hair by pointing out that they were not complaining about the pickup truckers' short hair, so why give a hassle about long hair. However, the pickup truckers saw the hippies' very existence as such a threat and a progression to the unknown that they shot them dead in broad daylight on the open road even though they were powerless to keep society in a static condition, let alone to go backwards in a time machine. Today, long hair is widely accepted, the peace sign has been integrated into commercial America without much meaning, and the movement against racism and sexism is much more widely embraced than when the Voting Rights Act was passed. Nevertheless, continuing injustice by the government, including those detailed at the start of this article, feeds on a society that remains largely complacent, with a substantial percentage financially and socially well off enough so as not want to join the activist-rocking boat lest that interfere with their membership in comfortable society. One does not need to reject a capitalist life (at least an enlightened or modified capitalist life) to contribute to social justice. However, one should not

avoid working for social justice out of fear that it will risk one's comfortable lifestyle. It can be successfully done. Jon Katz

Posted by Jon Katz in Jon's news & views at 00:40

Wednesday, May 9, 2007

**Trunk searches and truncated justice.**

Image from National Institute of Standards & Technology. Â Cars are ripe for police stops (e.g., see Maryland's Wilson case, where the police stopped a car merely for driving 62 miles per hour in a 55 MPH zone). After stopping a car, the police look forÂ criminal activity afoot beyond any traffic violation. This entry addresses some court cases addressing searches of car trunks and searches of cars. Â Â The Supreme Court's Carroll doctrine (Carroll v. U.S., 267 U.S. 132 (1925)) narrows (and, under current Supreme Court case law)Â probably eliminates) the circumstances under which a warrant is needed to search a vehicle for probable cause, on the basis that a house does not go anywhere pending obtaining a search warrant, but the car can be driven away. Â Although police are permitted to search a car's passenger compartment pursuant to the lawful arrest of the driver or passenger, Thornton v. U.S.,Â 541 U.S. 615 (2004), the search incident to arrest, by itself,Â is not permitted to extend to the car's trunk. U.S. v. Turner,Â 293 F.3d 541(D.C. Cir. 2002); Dixon v. Maryland, 133 Md. App. 654, cert. denied, 758 A.2d 1063 (2000).Â However, this passenger compartment-trunk dichotomy goes out the window when police have probable cause to believe contraband is in the trunk. U.S. v. Turner,Â 293 F.3d 541 (the strong odor of burnt marijuana in the passenger compartment provided probable cause to search the trunk of a car lawfully stopped for a license plate violation). Â Unfortunately, Maryland's intermediate appellate court last week muddied the distinction between a strong odor of burntÂ marijuana justifying a vehicle search versus a faint odor of burnt marijuana (which makes it more possible that the marijuana was smoked long before, thus providing weaker grounds to believe that marijuana is present in the car) versus the harder-to-distinguish smell (if it can be honestly distinguished at all) of unburnt marijuana. Wilson v. Maryland, \_\_ Md. App. \_\_ (May 2, 2007) (giving cops the green light to search a car's passenger compartment and trunk just about any time they smell what they reasonably believe to be marijuana, apparently even if it is unsmoked or unburnt). Â Finally, even if lacking probable cause to search a car, police are permitted to frisk a car for weapons upon having reasonable articulable suspicion that weapons are present. Glover v. Com., 3 Va. App. 152, 348 S.E.2d 434,Â (1986); aff'd 236 Va. 1; 372 S.E.2d 134 (1988).Â Sometimes walking sounds likeÂ a preferable means of travel. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:05

Tuesday, May 8, 2007

**"I'm Johnny Cash."**

Johnny Cash (Image from Library of Congress). Recently, and late, for the first time I watched Walk the Line, based on Johnny Cash's life. Although I have not checked how faithful is the film to Johnny Cash's real life, I think it is a very good film, and is very relevant to my law practice, in that understanding my clients and persuading judges and jurors requires sensitively understanding and feeling people's trials and tribulations -- mine and theirs -- and Mr. Cash certainly had his share of trials and tribulations, starting with his family's poverty, his brother's early death from an accident while sawing wood, and his father's yelling that the wrong son died, because the dead son was more productive in the fields than Johnny. During my initial years as a jazz fanatic, starting in 1975 at age twelve, I tended to rank music value in terms of great jazz -- preferring music over lyrics -- followed by great rock (with much on the radio not fitting that category), great classical (including Holst's "The Planets" and Beethoven's Seventh Symphony), and everything else, with elevator music being an inhumane torture, including when I worked at a retail store where the co-owner insisted on playing (and humming to) Boston's premier elevator Muzak station. As a result, other than the vital message in "A Boy Named Sue" (written, by the way, by the same Shel Silverstein, whose work also stretched to Playboy cartooning, children's books (first reluctant to do so) and playwriting), Johnny Cash did not register with me for awhile. (Here are some links to some of my current musical passions, interests, and obsessions.) Then, in 1981, I took the ethnomusicology class of Jeff Todd Titon -- whose office sign talked about music not requiring excellence but waiting to be surprised by it -- and I got back to the reality that the value of music does not always necessitate masterful musical writing and playing. Fourteen years later, at the Trial Lawyers College, I paid closer attention to all the country music songs being sung by many of the participants, and belatedly found more meaning in many of the songs that so closely capture what many of my clients and their cases -- and so many other people's lives, including mine -- are about, starting with "Me and Bobby McGee." At the Trial Lawyers College, I first noticed, and learned to sing, Johnny Cash's "Bad News," from my friend Dax Cowart, who has been through his own trials and tribulations. Dax transcended a horrific ordeal that is now commonly taught in medical ethics classes, attended law school later than do most students, and became a persuasive trial lawyer who sometimes gets his argument across by singing part of a song. For me, the most striking scene of Walk the Line was Johnny Cash's performance at San Quentin prison. In the movie at least, Cash fully connected with the inmates in a way that showed this was not a mere publicity stunt, if he were even considering publicity; he felt that the prisoners were important enough to go to for what would become a landmark live recording. Each time someone plays his San Quentin album, the message gets repeated never to forget prisoners, no matter how many people wish them forgotten. The climax of the San Quentin performance came when Cash decried the prison warden for drinking Coke while letting the prisoners drink adulterated water, smashed the water glass on the ground, and simultaneously broke into his next song to the crowd's thunderous eruption of applause, hoots and hollers. The prison authorities never interfered with this rousing of the audience, perhaps fearful of a worse outcry and even backlash from the prisoners had they done so. Here is a YouTube video from the San Quentin concert. Walk the Line only touches on the tremendous musical, national, and regional influence of the family of June Carter, who performed with Johnny Cash as they became intertwined for life. As I have encouraged before, please visit, write to, and support inmates -- both those presumed innocent and awaiting trial, and those already convicted -- and show your moral support. This does not diminish one bit from the need to reduce violent crime; it spreads compassion, gives the inmates hope, and gives them and society a chance for them to progress to positive adjustment inside and outside the jail and prison walls. I have detailed here some ways to do that. Jon Katz.

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

Monday, May 7, 2007

**Going to trial with a flowchart.**

Flowchart image from NASA's website. In 1980, I was introduced to Basic computer programming using a Wang computer that saved one's work on an ordinary cassette tape. Aside from the tape's making unusual blipping and beeping sounds when replayed on my audiocassette player, the class introduced me to flowchart planning and decisionmaking. Flowchart planning and decisionmaking is essential to effective criminal defense litigation, together with an effective trial outline (which incorporates flowchart principles) and an idea book (written, in one's head, or both). The flowchart approach is particularly beneficial for switching gears effortlessly when a judge sustains an opponent's objection, or enters and sustains the judge's own objection. Being human, some judges not only will sustain certain objections that the advocate might anticipate might be sustained, but might even sustain objections that have little or no legal basis to sustain. By having a flowchart with the next logical step to take in the event of a sustained objection to a particular line of questioning or arguing, the jury does not get distracted by a lawyer who seems to be fumbling, keeps its attention on a smoothly-flowing line of direct or cross examination (or jury voir dire, opening argument, or closing argument), and, possibly, gives credibility points to the lawyer for showing the lawyer plays by the rules laid down by the law, the judge, and society, regardless of whether the lawyer agrees with those rules. A simple example of the benefit of using flowcharts came last week, when a drunk driving client received a fifteen-day administrative license suspension rather than the customary forty-five days, before an administrative law judge. Here is what happened. A police officer stopped our client for a moving violation and charged him with drunk driving after claiming to have smelled an odor of alcohol on his breath and after administering some junk science field sobriety tests. At our client's hearing before a Maryland administrative law judge ("ALJ") -- parallel to but separate from his criminal prosecution to drunk driving -- I first argued to dismiss the claim against him. I pointed out, for instance, that the cop had utterly failed to fill in the address and county of the incident in the box provided. I said that the reference to "\_\_\_ Rd, MD Rt. 48" in the separate box for incident description was not satisfactory to show that the matter was actionable as having involved driving in Maryland on an applicable roadway. The ALJ responded that the foregoing description was sufficient for the purposes of the hearing. I also pointed out that the cop had failed in his report seeking a license suspension to specifically state that our client had performed poorly on the field sobriety tests or otherwise presented reasonable grounds to request a blood alcohol test, other than to say "HGN 6 clues; WAT 3 CLUES; OLS 2 CLUES." The ALJ said he had no problem determining that the foregoing acronyms (listing them as horizontal gaze nystagmus, walk and turn, and one leg stand) and numbers represented field sobriety tests with clues to establish reasonable grounds to ask our client to submit to a test to determine his blood alcohol level, which he did. The ALJ denied our motion to dismiss the case. Unfortunately, this left us facing the prospect of a forty-five day suspended driving sanction. My flowchart at this point was to argue first for restricted driving privileges to drive during the course of our client's employment as a stay-at-home parent whose family would face substantial hardship for our client to be out of a car for forty-five days; such restricted privileges may be requested for employment, but the Maryland code does not define employment in the context of such suspension hearings. I argued, in the alternative, that if such relief were denied, for the ALJ to exercise his authority to amend a suspension, by substantially reducing the forty-five-day suspension length. The ALJ, who spoke with full respect the whole hearing, refused to treat stay-at-home parenting as applicable employment, but agreed with our argument that a six-week suspension would be a substantial hardship. As a result, the ALJ reduced the suspension from forty-five days to fifteen days. This victory is not as earth-shattering as many of our criminal victories, although it meant a lot to our client's next six weeks as a stay-at-home parent. Nevertheless, it is a good example of the flowchart approach for moving effortlessly in any adjudicatory proceeding to find another path to victory when the judge or any other factor shuts off the primary road to victory. Not only should lawyers use flowcharts themselves, but they can also offer judges and juries suggested flowchart items to minimize the risk that the judge or jury will rule against the client without sufficient basis in law or fact. Sometimes I preface my flowchart argument with: "That idea certainly starts this analysis, but by no means completes it. Here is why: ..." Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Sunday, May 6, 2007

### **Study shows link to t'ai chi and warding off shingles.**

Lao Tzu, the purported author of the Tao te ching. Taoism is closely connected with t'ai chi principles. (Image from the public domain). Several times I have spoken about the benefits of applying the lessons of t'ai chi to law practice and the rest of life. When I asked him for information about t'ai chi teachers a dozen years ago, late trial lawyer Victor Crawford sent me a note that amazing doors were about to be opened. Little did I realize that I would later learn of a recent study finding possible links between t'ai chi and reducing the risk of contracting shingles. The article is here. This study makes sense. Stress increases the risk of contracting shingles and many other ailments. When I got shingles sixteen years ago (fortunately mild and short-lived, after taking acyclovir for several days), I was experiencing tremendous stress and was still three years away from learning t'ai chi. Practicing t'ai chi regularly with the guidance of an excellent teacher is one of the best ways to reduce stress and to feel balance, harmony and control over oneself and one's surroundings. As my late teacher John Johnson reminded people: "The life of lawyering is filled with noise and turmoil. Peace is hard to find - even in seeking after justice. Modern mankind runs amok in anxious pursuit of an elusive technological happiness." T'ai chi helps balance the noise and turmoil for lawyers and everyone else. Jon Katz. ADDENDUM: After drafting this blog entry, the original link to the shingles article expired, and I found this link here. The original link did not refer to the type of t'ai chi involved in the study. The new link says t'ai chi chih was used, which is different from the t'ai chi chuan that I follow (more specifically, the t'ai chi chuan yang style short form developed by Cheng Man Ching, who condensed the t'ai chi form "into 37 postures, thereby making it both easier to teach, to learn, and to practice"). T'ai chi chih apparently shortens the t'ai chi form to twenty movements. T'ai chi chih is not a martial art, whereas my form of t'ai chi very much is a martial art, which is particularly essential for me, seeing that I apply it to my law practice. Seeing that this shingles study involves a t'ai chi form that seems very different from the form I practice, would that suggest that my form is any less effective in preventing shingles? I doubt it, considering the many mental and physical health benefits that I and many others have derived from t'ai chi chuan yang style short form. Moreover, it seems reliable that Cheng Man Ching studied t'ai chi because he had contracted tuberculosis, and that he overcame the tuberculosis after daily grueling practice, combined with training under the amazing Yang Cheng-fu.

Posted by Jon Katz in Jon's news & views at 00:20

Friday, May 4, 2007

### **A car is subject to a search incident, even when the suspect is stopped as a pedestrian.**

The Bill of Rights. (From the public domain.)  
This entry follows up on my April 24-26 blog entries on searches. Sadly, in 2004, the Supreme Court held that police may search cars incident to arrest even when the suspect has already parked and left the car before police have an opportunity to stop the suspect (in this instance, the defendant was found with drugs after being approached for having had improper license tags). *Thornton v. U.S.*, 541 U.S. 615 (2004).  
The four-justice *Thornton* plurality, joined for the most part by Justice O'Connor as a fifth vote, found it more important to give police a bright-line search rule (to be able to search incident to arrest) rather than to honor the Fourth Amendment. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

### **Have no fear. Underdog will be here.**

The *Underdog* movie will not be a cartoon. (Image from U.S. Genome page.)  
Although we did not name our blog after the pill-popping canine, the references were to be expected. This summer, our blog gets some free promotion -- or demotion, as the case might be -- with *Underdog, the Movie*, due out August 3, 2007. The film is from the Disney G-rated label, which has tended to be long on talent and short on depth for its features that I have seen. (On the other hand, *Bambi* had an animal compassion message to warm my vegetarian heart.)  
If only *Underdog, the Movie* would carry such surprise, dark reinventions of its characters as Jack Nicholson's whacked-out Joker and Danny DeVito's never-loved Penguin in *Batman* films. A crazed and complex *Underdog* addicted to his energy pills would do the trick, but then the G-rating would be lost. However, the G-raters do not seem to mind violence to a point; violence, yes, but drug abuse, no.  
On the one hand, a G-rating means massive self-censorship. On the other hand, the perpetually G-rated *Wizard of Oz* got away with promoting opium's sleep-inducing benefits, spectacular casting -- except that the casting of this and most other films from that time did nothing to overcome race-based prejudice, and the problem still continues today, although it has improved much since 1939 -- that included a wicked witch who later hawked coffee on television, and music that even some jazz greats would later reinterpret. In fact, a talent of the caliber of conceptual artist and juxtaposition master Joseph Kosuth can create an artistic masterpiece that still passes the filter of the G-rating censors. Some of my own moving image interests are linked here.  
As to the *Underdog* label, it well describes what we do, fighting tirelessly for individuals and small entities against overgrown opponents and overgrown laws. Jon Katz.

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

Thursday, May 3, 2007

### **LA police brutalize demonstrators and the press.**

As I have said before, police misconduct will neither stop nor abate enough until everybody insists on and achieves a radical and positive overhaul of policing and police hiring/ training/supervision/discipline; and a radical and positive overhaul of the criminal justice system, including heavily decriminalizing drugs (and legalizing marijuana, at the very least), eliminating mandatory minimum sentences, and eliminating criminal penalties for activities as minor as prostitution. Thanks to the many people who videotape and distribute tapes of police brutality to shine the light of day on such injustice, from the brutalizing of Rodney King, to the brutalizing of a prosecutor's daughter arrested for loud music, to this police beating, to the UCLA police library tasing of a student without an identification, and the list goes on. Sadly, adding to this video library of police brutality are the videos (see here, too) of the May 1, 2007, Los Angeles severe police brutality with rubber bullets and beatings not only of pro-immigration demonstrators, but also of journalists and news camerapeople. It is bad enough when police brutalize people, but all the more pathetic to see the police brutalizing innocent people catching the brutality on tape. As the Los Angeles Times reported: "The use of force on news crews came despite a legal settlement signed in 2002 calling for the Los Angeles police and city officials to recognize journalists' right to cover public protests even if there is a declaration of unlawful assembly and an order to disperse. Under the settlement, the city agreed to assign a press liaison to such events and to set up designated media areas. The pact resolved a lawsuit brought on behalf of seven journalists who said they were assaulted by police officers while covering the 2000 Democratic National Convention in L.A." Jon Katz.

Posted by Jon Katz in Constitutional Law at 06:00

### **People are humans, not aliens.**

Cesar Chavez: A champion for the empowerment of workers and immigrants. NOTE: I recently posted the attached message to a local lawyers listserv. Regarding the title of the recent listserv message asking whether employers are liable for hiring people who the writer refers to as illegal immigrants and illegals, I urge the use of "undocumented person" or "undocumented worker" and the scrapping of "illegals" and "illegal aliens". Insurance defense lawyers constantly try to marginalize non-US citizens, in order to try to scare them and their lawyers into settling for lowball money offers, to try to convince juries to give them less money than U.S. citizens, and sometimes (if not often) as an expression of their own prejudices. The anti-immigrant movement has been very successful in convincing even WTOP news reporters and lawyers on the plaintiffs personal injury side (who advocate for immigrants all the time) to say "illegal alien" and even "illegals". The phrase is not objective at all, and can be downright damning and harmful to immigrants. The fact of the matter is that a huge number of non-citizens who are undocumented (that is to say, without documents showing they're in the United States with visas) are actually on their way to having visas (or are awaiting the results of visa applications) or already have documented status without knowing it (including children of a person who obtained a green card without telling the child). Moreover, both United States law and international law protect political asylees from deportation. Most people who obtain political asylum in the United States are undocumented at the time they have applied for political asylum. Clearly, then, people who qualify for asylum "and the U.S. government routinely denies asylum to people who merit asylum (the factfinding is done at the Executive Branch level, not at the judicial level, unless an Article III court will re-visit such factfinding on appeal), including for cynical political reasons (e.g., often people are more likely to win asylum if they are from a country whose government is at odds with the U.S. government, versus a government that is a U.S. ally) certainly do not merit being called "illegals". The anti-immigrant movement is hot to trot to marginalize undocumented people (and often to lump documented people in with them) as rule-breakers greedily seeking economic benefits in the United States while disrespecting non-citizens patiently waiting abroad sometimes for years for approval of their visa applications. In reality, plenty of immigrants still are escaping non-economic misery, and not just economic misery. Moreover, such economic misery often is created in significant part by the demand of U.S. consumers - backed up by U.S. government support for governments permitting inhumane working conditions -- for overseas goods produced cheaply as a result of underpaid labor often required to work inhumanely long hours in horrid conditions (not least of which might involve severely limiting any breaks, let alone bathroom breaks). Just see what happens when you google "Nike Indonesia". It sounds disingenuous at best to benefit from the misery of such mistreated workers and then to bar them from entering the United States to leave such misery. Anti-immigrant propagandists who try to portray non-documented people as money seekers, want people to forget those fleeing from wartorn zones, brutal governments, brutal courts, brutal jailers, and brutal military members. Refugees from Darfur and Burma - as examples - are fleeing oppression that goes far beyond the economic. Additionally, millions of people who want to obtain visas to permanently live in the United States are barred from doing so, because U.S. immigration law primarily favors white

collar professionals and relatives of citizens and green card holders. Such people who are ineligible for visas are not cutting in front of any line, because no waiting line has been created for them in the first place; they often live in the United States as third-class citizens at best, as they don't automatically receive visas merely because they are in the United States. I've written more recently about defending immigrants here: <http://markskatz.com/blog2/serendipity/archives/479-Non-citizen-criminal-defendants-need-to-know-immigration-consequences..html>. Jon Katz. ADDENDUM: WTOP news is not the only culprit using the far from objective phrase illegal aliens. For instance, here is a FoxNews commentator doing the same thing.

Posted by Jon Katz in Jon's news & views at 00:05

Wednesday, May 2, 2007

### **"Close ah window"**

Image from the Maine government website. Â Where I practice law, plenty of people in the courtroom grew up hundreds and sometimes thousands of miles away, and the accents and dialects change as I move from Baltimore to Washington, DC, to deep inside Virginia. Part of persuading judges and juries involves acknowledging the many different ways that people communicate, dealing with bilingual situations, and preparing one's witnesses for such linguistic situations. Â Never did I realize how intricate were accents and dialects than when I witnessed this cafeteria scenario in 1979 when visiting Biddeford, Maine, High School for an exchange concert: Â Student I: Please close ah window. Â Student II: Dummy, it's not AWAH window. It's the school's window.Â Student I: I didn't say close AWAH window. I said close AH window. Â I ran out of the room before the milk had a chance to eruptÂ from my nose. Â I take it that the following scenario is at least partly fiction: An out of town lawyer visits a local Louisiana courthouse to start the first day of trial. The judge, opposing lawyer, opposing party, and potential jury members are all broadly smiling at each other. Then the judge greets the jurors in the localÂ French dialect, and they respond back in like manner, still all smiles. Jury selection is conducted all in French, as is most of the trial, except that the out of town lawyer understands not a word of French. If I were the out of towners' client, I would have added a French-speaker to my lawyer team pronto. Â Closer to home, in the courts and on the streets in Baltimore City and Baltimore County, a brand of English called BawlmereseÂ is heard all around. For instance: "Watcha doin' this weekend, hon?" "Goin' downy oshin to down some Natty Bo's."Â Having a sensitive earÂ and appreciation (and delight) for regionalisms and dialects is just part of the deep listening process that is critical to persuading judges and juries. Jon Katz.

Posted by Jon Katz in Persuasion at 00:15

Tuesday, May 1, 2007

**Supreme Court gives cops green light to use excessive force.**

Â The Bill of Rights. (From the public domain.)Â On April 30, 2007, the Supreme Court gave courts broad authority to dismiss lawsuits alleging excessive force by police in seizing suspects. *Scott v. Harris*, \_\_\_ U.S. \_\_ (April 30, 2007). Reversing the trial and appellate courts below, *Scott v. Harris* amounts to allowing judicial incursions into the province of jurors' rightful role as factfinders, in this instance by determining that no reasonable juror could conclude that the police violated Victor Harris's Fourth Amendment right against an unreasonable seizure by intentionally rearending his speeding car, thus rendering him a quadriplegic. To back up its decision, the Supreme Court, for the first time, uses and cites to a video attachment, which in this instance is a video of the police chase. The video ends with a very graphic and catastrophic crash of Mr. Harris's car, after police officer Timothy Scott intentionally hits the rear of Mr. Harris's car. In his majority opinion, Justice Scalia places startlingly excessive reliance on the video to require the lawsuit's dismissal on the basis that no reasonable juror would find that excessive force was used to apprehend Mr. Harris. The trial court and Court of Appeals reached the opposite conclusion with the record before them. The Supreme Court treats the video as gospel, even though the video -- from a camera on a pursuing police car -- only presents part of the picture, which is all a car-mounted video camera can do. Logic is stretched beyond the breaking point for the Supreme Court to substitute its judgment for the jury's judgment in this matter, and to excuse itself by saying that the decision is purely a question of law for judges to reach, rather than for a jury to reach. The Court sets forth the following rule for determining whether police use excessive force in apprehending a suspect: "[A] claim of 'excessive force in the course of making [a] . . . seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U. S. 386, 388 (1989). The question we need to answer is whether Scott's actions were objectively reasonable." *Scott v. Harris*, \_\_\_ U.S. \_\_. To what extent did Mr. Harris's speeding pose a public danger purely by his actions, and to what extent was the danger intensified by the relentless pursuit and ultimate rear-ending by the police? This Supreme Court decision will help embolden police to use disproportionately heavy force to apprehend fleeing suspects. Yesterday was not a proud date at the Supreme Court. Jon Katz.Â ADDENDUM: Here is the videoÂ uploaded to the Supreme Court's website, showing the car chase involved in this litigation.

Posted by Jon Katz in Constitutional Law at 06:45

**Throwing the Fourth Amendment to the dogs.**

The Bill of Rights. (From the public domain.)Â This entry continues from my blog entries about searches and seizures from April 24 through 27. In 2005, the Supreme Court decided that: "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).Â Unfortunately, *Caballes* gives police an incentive to exaggerate and prevaricate (1) about the extent to which they have detained a defendant for an unreasonably long period of time to await the arrival of a drug dog, (2) about the qualifications of particular drug dogs (for instance, the extent to which the dogs have previously alerted falsely for drugs), and (3) about drug dog behavior that may have been coached or otherwise unreliable. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:01