

Monday, October 1, 2007

How to deal with hecklers when interviewed?

Â Lowering the BarÂ reports that the above-displayed heckler at O.J. Simpson'sÂ lawyer's news conference is none other thanÂ actor Tony Barbieri, who interlopes into celebrity events, this time with blackened-out teeth. He reminds me of a man I know who inserts himself into family photos in parks and other outdoor venues. Â When people agree to outdoor interviews, they are at risk of such interlopers. O.J.'s lawyer seems to handle it well. What would you do if in his shoes with such an interloper? Jon Katz.Â

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

Sunday, September 30, 2007

"You remind me of a young Richard Nixon."

Engaging a monkey at a Buddhist temple outside Kuala Lumpur (August 1989), not knowing that within twenty-four hours I would be compared to a young Richard Nixon, while eating off a banana leaf. (Photo copyright Jon Katz.) As a trial lawyer and as one enjoying adventure, it is essential for me to know people, hear and share our life stories (make that portions of the key chapters), know how to engage them in meaningful conversations, and know what motivates them and makes them tick. However, just as a car trip to an island paradise can be interrupted by treacherous storms, dangerous car collisions, and disgusting highway food, striking up a conversation with a plane seatmate, a diner at an adjacent restaurant table, and a fellow drinker at a bar can turn up the unpleasant unexpected along the road to meeting fascinating people. My experiences striking up conversations with other people usually are very enriching. For instance, around two years ago, I was taking a return business flight home, and tossed my excellent Ceremony novel (by Leslie Marmon Silko) on my plane seat before storing my carry-on bag. That started a conversation (both about the tossing and the novel) with the woman and man sitting next to me. On the one hand, they live in Orange County, Virginia, which strikes me as a rather conformist place (I should not stereotype regions so much), but they are very interesting people, these two. For instance, they spent several years in the Alaskan wilderness with their child on a homesteading program that I had never heard of, where they would receive their supplies by airplane drops. I regret that I misplaced their phone number; of course, in the Alaskan wilderness, apparently they had no phone. Two weeks ago, I blogged about my parking lot meeting with the fascinating Baba-Kundi Ma`at-Shambhala. Longer before that, on a plane returning from depositions in Cleveland, back to my office, I met Stephanie Tubbs Jones sitting next to me. Before I knew she was (and still is) a member of Congress -- I still carry strong presumptions against politicians, and, to boot, she's a former prosecutor and judge -- I was impressed by how genuinely (as it appeared to me) and effectively she engaged so many of the passengers boarding the plane. They are her constituents. I do not know what pet political issue I raised with her -- possibly opposition to the criminal sentencing guidelines and mandatory minimum sentences, the general overall unfairness of the criminal justice system, marijuana legalization, or drug decriminalization. I recall how apparently genuinely upbeat Stephanie was about life and people. She told me that when she would conduct wedding ceremonies, she would recite the Indian wedding prayer. This prayer means so much to me that I recited it to my wife at our wedding. For that, alone, I very much appreciate Stephanie. At the Trial Lawyers College, much is discussed, covered, and presented about storytelling and engaging people, including engaging our clients and our witnesses, and engaging opposing witnesses in cross examination, engaging the jury, engaging judges, and engaging everyone else who is important to our clients' causes. We have much to learn from children about engaging others, because they have no agenda in doing so, at least not in the beginning. My eighteen month-old son is fearless to approach and engage dogs and people, on the street, in parks, and in restaurants, among other places. Last week at the Edward Hopper exhibit, he made an unsmiling security guard smile so broadly that I said he can even draw a smile from the unsmiling. Engaging new people to get their story sometimes is dangerous. Hunter S. Thompson got beaten badly by Hell's Angels members when spending hours and time on end with them to write his Hell's Angels book. Last week, Burmese military member(s) killed a Japanese news photographer capturing the visual story of the anti-government demonstrations there. In El Salvador in the 1980's, a moving photographer captured the horrifying (yet perhaps all too common) image of Salvadoran (or was it pre-Sandinista Nicaragua in the 1970's?) military members shooting dead a photojournalist point blank. Also, warbeat journalists and photographers place their safety and lives on the line all the time. It is easier and safer to hear a story by reading it than getting it from the source. When the story gets too unpleasant, the reader can close the book, switch to a different website, or throw the newspaper in the trash or fireplace out of exasperation. It took me a few tries to keep my cool and control in choosing whom to engage in such conversation, and what to do when the discussion starts getting too much out of hand -- by better reading the person first, and knowing how to exit the conversation or place or to turn around the discussion, sometimes by just excusing myself to hit the men's room or to feed the meter, and sometimes just smiling and moving to a different topic. Before I got better at that, I once misread a man in front of me at a McDonald's over ten years ago, as a large, unfriendly man, until he turned around to me, and said "This line is slow as molasses." He then asked if I knew if they had any eggnog shakes, to which I replied "no". He then happily regaled me how wonderful are these eggnog shakes, which "taste just like eggnog, only thickuh" (in a New York accent). Whenever I pass by Nyack, New York, where I met this man, I remember him and his entertaining eggnog shake discussion. Further south from Nyack, one snowy Friday evening in early 1986, months before starting law school, I went to a movie, and thereafter decided to check out a recommended bar a few blocks south of my shoebox apartment without a kitchen at the corner of Lexington Avenue and 23rd Street. Drinking a beer at the bar, I saw that the man nearby me seemed to be a regular who knew the bartender and several of the patrons well. Whether or not it was a mistake for me to have started talking to him, I learned from this, after the fact, how to exit a conversation when it gets ugly. This man had much to say, but very little willingness or ability to listen. He talked of having slept in doorways before rather than stealing. Learning that I had recently graduated from college in the

Boston area, he parroted the ugly exclamation that I have heard too many times: "I'm not prejudiced, but the Celtics are the only winning team where every starter is white." Finally, he kept inviting me to "do a line." The man at the bar said numerous unpleasant and unsettling things. When he excused himself to go to the restroom, I bolted out of the bar like a bat out of hell; there was no reason to stay. Of course, even some of my least pleasant interactions with people give me better understanding of people, and sometimes provide a chance to talk with my friends to try to make some sense of my experiences. As the Dalai Lama said, "Everyone is my teacher." Finally, I go to the title of this blog entry: "You remind me of a young Richard Nixon." Around two weeks into my post-bar exam Southeast Asia vacation detailed here (for the Thailand part), I was in Singapore looking for a hole-in-the-wall Indian vegetarian restaurant recommended in the Fodor's guide, which was such a hole in the wall that I passed by it several times before realizing that this simple-looking of simple-looking restaurants was my destination. As I had experienced earlier at an Indian restaurant across the Causeway, in Johor Baru, Malaysia, the server put a banana leaf the size of a large plate in front of me, and started putting rice, delicious curries, and papadum on the banana leaf. Along the wall were a few sinks for handwashing; everyone but me was eating with fingers only. I started asking the man to my left -- probably around sixty-years old -- about the tradition of eating sloppy-looking food with fingers, and I got more than I had bargained for in reply. He was very enthusiastic that I had just completed law school, and thought he was complimenting me by likening me to "a young Richard Nixon," with a bright career ahead of me. (I guess he was overlooking that Nixon left the Bar (I forget if the New York bar accepted his effort to resign rather than being disbarred), among other major problems in Nixon's life). I asked this man -- I'll call him M, as neither of us asked each other's names -- whether this restaurant and other businesses voluntarily or by pressure or law very visibly posted the pictures of then-Prime Minister Lee Kuan Yew and his second in command. In a softer tone, M said "It's better." The conversation improved when we turned to Indian vegetarian food, and the existence of better local Indian vegetarian restaurants with some having better quality banana leaves (little did I realize how much a banana leaf's quality could impart improved flavor in food, possibly akin to a better tobacco leaf in a cigar). Unfortunately, the conversation went south towards nowhere when two women around twenty or so passed the restaurant wearing shorts barely covering their behinds. M vocally advocated caning the women as punishment (punishment for what?). I wonder if he supported Singapore's caning of Michael Fay five years later. Little did I realize when M mentioned caning that it involves not a few raps from a smooth cane, but excruciating pain from the split ends of a bamboo cane. By now, my appetite was going south, too, but at least I had finished most of my meal. I excused myself to visit the restroom, figuring if I stayed there long enough, he'd get the hint and depart, or would realize it was time to get to his day's remaining errands. The bathroom was right next to the kitchen, where I returned after leaving the men's room. I thanked the chefs for the delicious meal, and learned that the restaurant treats them all for a return trip to India each year, which made me feel additional positive karma about the restaurant beyond its vegetarianism. Returning to the eating area of the restaurant, I saw M standing there with a smile, proudly telling me that he had paid for my lunch, it having been an honor for him to see me have a chance to try such cuisine. Fortunately, the bill before tip was only around \$2.50, and instead of suggesting that we spend anymore time together, he suggested that I probably had better things to do that day than to be talking further with an old man. (I didn't mind his age, didn't think of him as old, but was still perturbed by his "young Richard Nixon" comment). He proceeded to go on at length about the several better Indian vegetarian restaurants in town, even though this one was excellent. Not having asked him for the names of the better banana leaf restaurants, the at least equally delicious one I visited the next day served its food on traditional metal dishes. I don't know what was more surreal about my visit to Singapore: being likened to a young Richard Nixon, or seeing almost nobody but machine-gun toting security at the airport's luggage carousel area upon my past-midnight arrival, where, nonetheless, nobody bothered asking to inspect the huge suitcase that I transported for my Singaporean friend and host who had left the suitcase in Washington before returning to Singapore from graduate school, and who overlooked giving me the combination to unlock it in the first place. Of course, the surreal and bizarre are part of the territory in seeking out people's stories and seeking to engage them in meaningful conversation. Jon Katz. ADDENDUM: After posting this blog entry, I remembered that only a few months before meeting the man who likened me to a young Richard Nixon, my parents met him and his wife, Pat, at a Manhattan restaurant. His autograph -- which I have buried somewhere -- says "To Jon- With Best wishes, Richard Nixon." Had I been in the restaurant, I'd have felt inclined to leave or ask for my table to be moved. As much as I try to find the Buddha nature in everyone, it's still tough for me to do with Nixon.

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

Andrew White, Bill Griffith, and Ben Lo live.

On July 8, I blogged about jazz master Andrew White. For those interested, he performs live at Washington, D.C.'s Twins Jazz October 12-13, 2007. Last year, I briefly blogged about Zippy the Pinhead. Zippy's creator, Bill Griffith, will be at the Small Press Expo in Bethesda, Maryland, the same weekend Andrew White performs at Twins Jazz. I hope to catch at least one of them, and plan to report back here. Jon Katz. ADDENDUM: Adding to the foregoing stimulating weekend lineup is t'ai chi supermaster Benjamin Pang Jeng Lo, who will be presenting his annual D.C.-area class October 13-14. Rarely do so many people who inspire me so much appear live locally on the same day.

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

Friday, September 28, 2007

Since when does megaphoning the First Amendment merit an arrest?

“If we don't believe in freedom of expression for people we despise, we don't believe in it at all.” — Noam Chomsky, on The Late Show (1992) When I lived in Manhattan for a year before law school (1985-86), it was still a twenty-four hour paradise of grittiness, adventure, and risk. Then came Rudy Giuliani and his scrubbing away plenty of the city's soul and persona with his cleansing overkill of the city that continues to this day long after he left the mayor's office. Who would have imagined that, in one of the world's loudest cities round-the-clock, the cops would arrest a man for megaphoning and commenting on the First Amendment? If I want to witness such abuses by the criminal justice system, I can visit demonstrations in Washington, D.C., just seven miles from my office. Thanks to my brother lawyer Marc Randazza for blogging on the events surrounding this arrest of Reverend Billy. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Governing by force is no way to govern.

Sadly, the Burmese government is intensifying its violence against peaceful protestors. Burmese soldiers have already killed at least nine people during its demonstration crackdown. Meanwhile, the Internet has been a powerful tool for the demonstrators and their supporters (and the Burmese government responded by cutting off cellphone service and some or all Internet connections). Here is a blog of a Kho Htike, who is a Burmese man in Europe who posts news on the events in Burma, and photos that apparently can get the senders in very dangerous hot water with the Burmese government for sending them. Jon Katz.

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

Obscenity: Miller test v. Canadian list.

Bill of Rights. (From the public domain.) While on the topic of free expression and the censorship thereof, here are the different approaches of the United States and Canada to censoring so-called obscenity. In the United States, a jury must affirmatively answer the following three questions before finding guilt for obscenity: (1) whether the material depicts patently offensive representations or descriptions of "ultimate sexual acts, normal or perverted, actual or simulated" or "masturbation, excretory functions, and lewd exhibition of the genitals;" (2) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15 (1973). In Canada, the federal government maintains a list of admissible and prohibited material for importation, and some provinces provide stickers of approval. Consequently, the United States' approach violates the First Amendment in part by promoting self censorship to minimize the chance that a jury will find material to be obscene. The Canadian approach is undesirable censorship, as well, for giving government bureaucrats the power to decide what material will be banned before it even reaches the sales shelves; however, some businesses may prefer the Canada model, by having assurances that approved material will not later get prosecuted. Here are samples of Canada's quarterly prohibited and admissible imported videos and books. (Caveat emptor: The site depicts a topless woman; I could not find any other site that lists so many quarterly list of Canada's prohibited material.) In addition to listing alleged obscenity, the list also covers permitted and banned material that allegedly are hateful. I wonder what qualifications these Canadian censor-bureaucrats need to get hired. Perhaps McGill University offers an interdisciplinary major on Censorship Studies. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Thursday, September 27, 2007

Burma's tyrannical government reverting to its crackdown ways.

Â On September 26, I wondered about the willingness of Burma's tyrannical government to start firing on its own peacefully demonstrating citizens. On the same day, the shootings, killings, arrests, and beatings began. Countless nonviolent demonstrators resiliently continued their protest. By the time this blog entry gets uploaded to the Internet, further news will have been reported. Â To nonviolent social activists everywhere, I bow to and am inspired by your courage in the face of tyrannical government responses. To governments responding tyrannically to nonviolent social activists, I say STOP NOW.Â Jon Katz.Â Â ADDENDUM: Updates on the Burmese demonstrations and the government's inhumaneÂ crackdown are coming in at a dizzying pace, including: Â - Burmese soldiers intensify violent crackdown, and include raids on monasteries. Â - Very slow pace is likely, at best, for moving Burma to democracy and away from human rights violations, so long as China, Russia and India continue supporting and supplying its government. Â - Unlike Burma's choking of demonstrators' communications in 1988, cellphones transcend such efforts.

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

Maryland's highest court on coram nobis.

Â Photo from website of U.S. District Court (W.D. Mi.).Â Since 1993, I have represented many criminal clients in post conviction proceedings. In one of myÂ more grislyÂ post conviction cases,Â I obtained a reversal of a conviction against my client who was found guilty of raping his grandmother,Â due to faulty jury instructions. I proceeded toÂ defend him to a final resolution of his case, which involved a time-served, no probation disposition after he sat inÂ prison for many years. Â Â In Maryland, when the avenues have been exhausted or no longer exist for pursuing a post conviction petition, some defendants seek similar relief byÂ filing a petition for aÂ writ of error coram nobisÂ Instead of discussing coram nobis law and practice at length, this blog entry is a notification that Maryland's highest court recently issued a 4-3 opinion addressing approaches for determining whether a criminal defendant should be viewed as having waived eligibility forÂ coram nobis relief. The Court's majority view is more crabbed than the minority's, in terms of Defendants'Â waiver of eligibility for coram nobis relief. The case is Holmes v. Maryland, __ Md. __ (Sept. 21, 2007). Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Wednesday, September 26, 2007

Nonviolent opposition in action.

Â Gandhi and Martin Luther King, Jr., among many others, were right. Nonviolence is the way to go to effect social justice. The thousands of non-violent protestors in Burma (many of them in the above video) are a true inspiration. Â Unfortunately, Burma has the same government that killed countless pro-democracy demonstrators in 1988, from soldiers firing into them. I am interested in knowing whether monks constituted many of the demonstrators being shot in 1988. I doubt it, in part because some news reports say that a large percentage of the protesting monks are younger, and that a large percentage of the older ones oppose demonstrating. With monks being so highly revered in Burma, the government may be more reluctant to shoot en masse this time around. However, only time will tell. Jon Katz.Â

Posted by Jon Katz in Persuasion at 00:05

Courts: Don't skimp on interpreter budgets.

Quality court interpretation requires more than referring to a phrasebook. (Image from the public domain.)Â The criminal justice system is so overgrown that it eats up a huge part of federal, state and local budgets. Â If the government is going to sponsor such an overgrown criminal justice system, it must enable criminal defendants to put teeth into their defense, including assuring the availability of justly-compensated indigent defense counsel, and justly-compensated foreign-language and deaf interpreters. Â Regarding interpreters, I understand that one of Virginia's nearby countyÂ District Courts is switching soon (if not already) from using contract Spanish interpreters, to using salaried interpreters paid too little to have attracted enough of the best longtime contract interpreters to apply. Â As a multilingual law firm, we know that important criteria for a quality interpreter include the quality of the person's litigation interpreting experience; the interpreter's human sensitivity that is necessary to convey the speaker's meaning, rather than mechanically to transpose words; and the interpreter's likeability to the listener. In other words, it is not enough that the interpreter merely speak two languages as if each were the interpreter's native language. The interpreter must have mastered the art of communicating the speaker's message as flawlessly as possible.Â The last time I heard of an ill-advised effort by a court to save interpreters'â€™ expenses was a few years ago when another nearby Virginia county District CourtÂ triedÂ using interpreters by phone. Fortunately, I understand that effort was short-lived. How can an unseen interpreter convey sufficiently the meaning of a speaker on the other end of the phone line, and vice versa? It cannot be done. Â Of course, some people reply that people have an obligation to learn English if they are going to live in the United States. However, learning a second language is painstaking, as just about anybody will admit who has been on that path, during which a quality court interpreter is essential. Moreover, not everybody arrested in the United States intends on staying here in the first place (e.g., tourists, students from abroad, and short-term expatriates). Â At least where a client can afford a privately-hired interpreter, sometimes I will recommend that approach if the alternative is not knowing the quality of the interpreter who will be assigned by the court. However, not all criminal defendants have the money for suchÂ private interpretation assistance.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:01

HIPS is Hiring.

Helping Individual Prostitutes Survive ("HIPS") is a great public interest organization in Washington, DC, that focuses on harm reduction for sex workers. Sex workers do not need paternalism, prohibition, or criminal law enforcement; fortunately, HIPS does none of that, and includes a focus on getting HIV/AIDS information where it is needed, together with condom distribution and the HIPS van that brings human support and snacks to sex workers with whom HIPS has become tremendously popular, as well as assistance to sex workers who want to leave such work, by providing help withÂ draftingÂ resumes and interviewing for jobs. HIPS also helps sex workers who are abused by their pimps and customers. Â I am privileged to be a past officer and board member of HIPS (2002-05) and our firm continues to provide financial support to HIPS. Â Because many Underdog readers are public interest-oriented, perhaps some of you will know of suitable candidates for HIPS's current opening for a Program Administration Assistant. Details are hereÂ about this job opening, as well as how you can donate to and volunteer with HIPS. Jon Katz.

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

Tuesday, September 25, 2007

Tasergate in Ohio

Â Before police tasered Andrew MeyerÂ at last week's John Kerry town hall appearance, police repeatedly tasered a woman in Ohio earlier in September 2007, as shown above from a videocamera mounted to the police officer's cruiser. Â A television news story on the tasing of the woman is [here](#). A newspaper article is [here](#). My previous blogposts on tasing are [here](#). Â This tasing madness will not go away by itself. Each of us must speak up fearlessly against it. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, September 24, 2007

Hyperactivity and criminal defense clients.

Image from U.S. government website. Â Criminal defense lawyers frequently inquire whether their clients have a drug or alcohol problem, to assist in defending them at trial and at any sentencing. Â Such an approach makes sense. It also makes sense to encourage clients to open up to their lawyers about any other factor that might have contributed to their alleged criminal behavior, including depression, recent losses, struggles with work (or unemployment) and relationships, ADHD, dyslexia (e.g., to inform about any problems in the client's ability to communicate a "confession" in writing or to read and understand any written advices of rights), hyperactivity, and the list goes on. Â Hyperactivity is relevant, for instance, in defending against assault, disorderly conduct, and claims of stalking, among others.Â Recently the London TimesÂ reported on a Food Standards Agency study finding a direct hyperactivity link between combining specified artificial colors (at least in Britain, found in TicTacs andÂ Jelly Bellies) with the preservative sodium benzoate (at least in Britain, found in Diet Coke, Fanta, Dr Pepper andÂ Sprite).Â More on the study, and its detractors, is here.Â Britain's Prime Minister is urging the European Union to ban the harmful additives. (However, I tend to prefer a caveat emptor approach absent a finding of more dangerousness than hyperactivity from these products.) I wonder how many people would change their eating and overall health lifestyles if they knew how much their behavior is adversely affected by so much of the processed foods they put in their mouths.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Friday, September 21, 2007

Washington, D.C.'s post and forfeit maze.

Photo from website of U.S. District Court (W.D. Mi.). Washington, D.C., gets thousands of demonstrators annually. With the years-long penchant by D.C. police and mayors to unlawfully arrest demonstrators, massive arrests of demonstrators are bound to put a strain on the Superior Court's lockup, where countless defendants -- even for a whole host of alleged petty offenses -- languish overnight (at best) in decrepit group cells, waiting for a bond hearing that may take place in the morning, or maybe the afternoon, or the following Monday for Saturday evening arrests. Welcome to the ugly side of Washington that tourism promoters do not want you to see, even though you could get unlawfully arrested and locked up, just as did plenty of uninvolved people during the September 2002 First Amendment-protected anti-war and anti-globalization demonstrations. Sometimes to reduce courthouse lockup burdens from mass arrests of demonstrators, the Superior Court deputizes police to collect collateral money from arrestees outside of the courthouse's weekday operating hours; here is one such deputizing order. The governing law, which is D.C. Code § 23-1110, permits a penalty of up to 180 days in jail for failing to appear in court after posting such collateral, which apparently usually is an amount under \$100 (with \$100 civil post and forfeit payment apparently having been the settlement over the Karl Rove picketer prosecutions about which I blogged last Wednesday). Sometimes, the police just arrange for the collateral payment to act as a non-criminal payment, so long as the arrestee agrees to forfeit the collateral rather than demanding a trial. When the latter approach is taken, I wonder what is the purpose for the arrest in the first place, other than as a way to get the arrestee off the street (which leads police unlawfully to detain -- and thus censor -- lawful demonstrators) and to line the government treasury with more money. In any event, recently I was hired by a gentleman who was arrested for disorderly conduct in Washington, D.C., and was given the option to post collateral to avoid incarceration followed by a court bond hearing, and was given the option to make the case go away by forfeiting the collateral. (See this report about wrongful disorderly conduct arrests in Washington, D.C.) My client wanted a trial, instead, and hired me to proceed in that direction. When my client paid his collateral, he received a two-page sheet with instructions on how to avoid forfeiting the collateral. The instructions advised to file a motion to that effect within ninety days of posting the collateral, with the Superior Court's criminal clerk's office. However, the instructions did not spell out the Byzantine maze that the clerk's office would tell my client to follow. First, the court's criminal clerk's office refused to accept the motion, as a case number had not been assigned, even though my client's collateral receipt says to file the motion with the criminal clerk's office. Next, the clerk's office said to get a signature from the opposing law office -- the D.C. Attorney General's Office -- and to go to Superior Courtroom 115 to seek a magistrate judge's authorization to have a trial. However, my client's collateral receipt merely instructs to serve a copy of the motion on the attorney general's office, and says nothing about needing to appear in person for anything, as opposed to being able to send the motion by mail to the court, with a mailed copy to the prosecutor's office. Worse, the prosecutor opposed giving my client a trial date, claiming that my client had knowingly and voluntarily posted collateral in his case, and that no changed circumstances had taken place to set aside any forfeiture. Fortunately, the magistrate judge saw right through such a baseless argument, and granted my client the right to have a trial. Had the judge not immediately granted the right to a trial, I would have responded that one changed circumstance is that my client paid the collateral without benefit of a lawyer present and without being before a judicial officer; therefore, his decision to pay the collateral was not an informed decision, and was made under duress between refusing to pay the collateral and to languish in the courthouse lockup, or to pay the collateral so as not to languish in the lockup. I also would have responded that the prosecutor's opposition to holding a trial is akin to Lucy van Pelt offering for Charlie Brown to kick the football, only to pull it away at the last moment. The prosecutor's opposition flies in the face of the absence of any statutory law about forfeiting the right to a trial by paying collateral. The prosecutor's opposition also flies in the face of the collateral receipt, which says, inter alia: "Forfeiture is final unless you (or your attorney) file a 'Motion to Set aside Forfeiture' within 90 days..." We met said ninety-day deadline, and we are proceeding to trial; the only intention of refusing to forfeit collateral should be to hold a trial, and certainly not to plead guilty. The foregoing procedures to obtain the right to a trial after paying collateral are enough of an unnecessary pain for local arrestees. Imagine the problems such a procedure would wreak on an out-of-town resident who sends in a motion to schedule a trial, only to receive a letter back from the court clerk advising to go in person (or through a lawyer) to seek a judge's authorization to schedule a trial. When faced with the relatively small collateral amount and the cost of hiring a lawyer, most out-of-state residents -- let alone local arrestees -- will just opt to forfeit the collateral. However, massive forfeitures of collateral will help encourage cops to continue to unlawfully arrest people for cases that will involve paying and forfeiting collateral. Sometimes I get a sense that plenty of bureaucrats do not recognize how costly it is for plenty of people to be required to come to court merely to ask permission to set a trial date. That is what the mail should be for, particularly for defendants who live hundreds of miles from the courthouse. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Talking calmly to judges.

Â Yin Yang.Â Â Practicing life andÂ law as a harmonious whole. Â This follows up on last year's Underdog blog entry on dealing with difficult judges. Â With difficult judges, trial master Steve Rench applies the basic and effective lesson of the magic mirror. If a judge knows s/he has a poor reputation with lawyers, that presents all the more a reason for the lawyer to empty the mind of any such thoughts, and to give the judge a clean slate that day. Oversimplistically, it is like trying to find the thorn in the lion's sole and to pull it out, rather than trying to slay the lion. T'ai chi master Cheng Man Ching believed conflicts should be addressed by harmonizing the situation, and emptying ourselves of any tension, anger, or fear, which all weaken us in any battle. I have found no better way to do this than the daily practice of t'ai chi -- physically AND mentally -- over the last dozen years.Â Â Atlanta and Smoky Mountain-based Buddhist Monk Denise Laffan -- whom I first met eight years ago -- is very patient and understanding about judges who are unduly harsh. About a judge who handed out particularly harsh sentences to demonstrators at the School of Americas, Sister Denise said: "Judge Faircloth is a patient man because in every single case he has listened while these women and men speak of the moral convictions that led them to 'cross the line.' And in every case I saw, he sought to engage the defendant on some point he or she made in a statement to the court. Honestly, I sometimes found his observations pedantic, sometimes mean-spirited, other times quite logical and fair, even compassionate. Judge Faircloth is a mixed bag. But he is listening."Â Â In the midst of Judge Faircloth's handing down harsh sentences, he sentenced Julia ShidelerÂ to aÂ suspended jail sentence, even though she refused to self-report to a less uncomfortable detention facility at a later date. Sister Denise concluded:Â Â "For me, Juliaâ€™s words and demeanor in the courtroom were a revelation. I have seen nonviolence used and taught in the peace movement as a tactic. But that day in court it was the first time I saw nonviolence as a living force, a beating heart, a light which casts no shadow. I believe that Julia never saw Judge Faircloth as an enemy or as a representative of the system but simply as a human being with as much potential as she has to do the will of God. She believed that even before he passed his sentence. Â "As for Judge Faircloth, some have wondered if the judge, knowing Julia had prepared herself completely for jail time, wanted to punish her in a new way by denying the martyrdom of incarceration. Julia does not believe this and neither do I. If we do not believe a human heart beats in the breast of Judge Faircloth then we might as well pack our bags, go home and never show up at the gates of Fort Benning again. I wonder if we, the so-called faith-base, do not believe in the power of conversion because we never plumbed the depths of our own divine nature. Julia knows her own holiness. And she saw the same in Judge Faircloth. I, for one, am a believer."Â Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thursday, September 20, 2007

Drumming is protected speech.

When Gulf War I started, I more frequently escaped the yellow ribbon atmosphere at my law firm during lunchtime, to experience the ongoing peace protests at Lafayette Park, two blocks from my office and across the street from the White House. Early on, I met my good friend and mentor Jun Yasuda, who drummed and prayed aloud for peace while fasting on green tea for thirty days. On her pre-planned break fast day, Bush I announced the end of the war. Above is my friend and mentor Takako Ichikawa, drumming and praying the same prayer for peace, the Odaimoku, in Lafayette Park. Today's blogpost underlines that my past blogposts about music do indeed have a strong relationship to my criminal and Constitutional defense law practice. In 1992, a three-judge federal panel unanimously ruled that drumming is protected protest speech, and reversed a conviction of an antiwar protester (during Gulf War I) for drumming across the White House at a sound level exceeding the noise limitation applying even to Yellowstone and other parklands that are far from any politicians' offices. The case is *U.S. v. Jane Doe, a/k/a Diane Nomad*, 968 F.2d 86 (D.C. Cir. 1992), and provides an excellent analytical overview of the First Amendment caselaw applying to demonstrating activities. *U.S. v. Jane Doe* holds substantial significance to me both for my law practice and in my non-lawyer capacity. As a lawyer, I defend not only criminal defendants, but also the First Amendment, because government tyranny is not limited to the criminal justice system, and because the First Amendment often is implicated in criminal prosecutions, including prosecutions of protestors, disorderly conduct defendants, obscenity defendants, and child pornography defendants. On a personal level, I experienced deep benefits from the drumming in Lafayette Park across the White House during the days leading up to and into 1991's Gulf War I. One Saturday morning, as the Senate debated whether to authorize Bush I to start Gulf War I, a Capitol police officer threatened me and my co-demonstrator (after I proudly displayed my homemade protest poster) with arrest for demonstrating without a permit. The situation became even more ludicrous when the Capitol police permitting office would only offer a demonstration permit space far to the east of the Capitol building and far away from every Senate member and the national Mall. When I asked why we could not get a permit closer to the peace demonstrators with a premium spot near the Capitol's western steps, the response was that such a closer spot was only available by applying further in advance. I said that our demonstration was spontaneous, in response to a radio news report that same Saturday morning that the debate was in progress, so there was no way for me to know in advance of my desire to demonstrate on that particular day. My argument fell on deaf ears, other than being told we could ask the other demonstrators if we could join them. The other peace demonstrators told us of a more substantial peace demonstration about to start at Lafayette Park across the White House. We went there, where a stronger antiwar message was sent by a few hundred people, and where I started feeling less isolated about my antiwar views and learned that plenty of mainstream people also opposed war at that time. Throughout the demonstration, there was drumming, typically on the bottom of huge plastic drum containers suitable for restaurants to store cooking oil; they were inexpensive converted percussion instruments, made their noisy point, and held good harmony with the other drums. When Gulf War I started, I more frequently escaped the yellow ribbon atmosphere at my then-law firm during lunchtime, to experience the ongoing peace protests at Lafayette Park, two blocks from my office. Early on, I met my good friend and mentor Jun Yasuda, who drummed and chanted the odaimoku (Na Mu Myo Ho Ren Ge Kyo, which is now an acronym on my license plate, and which adorns the wall next to my desk, to help me be more peaceful during potentially tense phone conversations with opponents) peace prayer while fasting on green tea for thirty days. On Jun-san's pre-planned break fast day, Bush I announced the end of the war. I first noticed Jun-san through her drumming and chanting, which are hallmarks of her Nipponzan Myohoji Buddhist order, whose monks carry their drums everywhere. At the time, I was seriously out of harmony with my life in numerous ways, including being very upset about Gulf War I, being very dissatisfied with my job, and seeking greater peace, fulfillment, and enjoyment in life. Jun-san has been one of the very positive influences and catalysts to get me closer to harmony and peacefulness than I have ever been. Six months later, I became a full-time people's lawyer, joining the Maryland Public Defender's Office. Three years after that, I came closer to a harmonious life, by attending the National Criminal Defense College's two-week Trial Practice Institute, followed by taking up t'ai chi practice followed later by a t'ai chi way of life. One year after that, I attended the four-week Trial Lawyers College in the Middle of Nowhere (at least at first blush), Wyoming. One year after that, I returned to private practice, still as a people's lawyer, and two years after that, I finally realized my longtime dream of being my own boss while fighting for justice. The drums' message, then, hit right home with me. I wonder if Bush II hears the drums; at least the White House lawn and driveway cannot be soundproofed. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

Same-sex marriage loses in Maryland by one judge's vote.

Court of Appeals Judge Lynne A. Battaglia issued lengthy dissent against majority's conclusion that Maryland's statutory prohibition against same-sex marriage does not violate Maryland's Equal Rights Amendment. (Image from Maryland State Archives website.) Maryland's highest court, the Court of Appeals, often is a hospitable place for criminal defendants and individual rights, but not always, of course. On September 18, 2007, a 4-3 Court of Appeals majority ruled that Maryland's statutory prohibition against same-sex marriages does not violate Maryland's Equal Rights Amendment. In an in-depth, well-analyzed, and firm dissent, joined by Chief Judge Robert Bell, Judge Lynne A. Battaglia (a past Clinton-era Maryland U.S. Attorney) insisted: "I would remand this case to the Circuit Court for a full evidentiary hearing. Without expressing an ultimate opinion on whether the State could meet its burden, I believe the State's un rebutted contention regarding the broad societal interest in retaining traditional marriage presents an issue of triable fact that requires a remand." The case is *Conaway v. Deane*, ___ Md. __ (September 18, 2007). Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Wednesday, September 19, 2007

When cops overstep their bounds, don't be complacent.

Â The only legitimate purpose of police is to serve the governed, and not to be agents of fear, control, and intimidation. As I discussed yesterday, the police were not exercising legitimate authority on September 17 with Andrew Meyer,Â when he pontificated to and questioned John Kerry.Â InÂ the above video of Andrew Meyer, the police, and John Kerry, we see a mix of audience members expressing discomfort and outrage over the police actions, cheering, and indifference. Â Where does the indifference come from? Fear? Habit? Numbness to all the ugliness in the world that constantly assaults our sensibilities? We are all in this life experience together, and cannot afford to be indifferent to the struggles of those around us, even if that means making real and costly personal sacrifices. Â John Kerry's response on September 18 seemed to include a position that once the police stepped in that the matter was out of his hands and in police hands. Is that so? Fortunately,Â Donald Rumsfeld -- who does not count me as a fan -- in this videoÂ uploaded by my lawyer brother Marc Randazza, shows how easy and essential it is for a government official to put the brakes on police otherwise chomping at the bit to wrongfully arrest a speaker exercising the First Amendment right to dissent.Â If politicians do not want to hear dissent, they should avoid public appearances and find another line of work. Jon Katz.Â ADDENDUM: Of all places, the blog ofÂ USA Today -- which newspaper I long have associated with shamefully oversimplified and overly-superficial McNewsÂ (butÂ with a good sports page, I am told by sports junkies) -- has some of the most comprehensive and useful coverage on this story as compared to the other traditional news outlets.

Posted by Jon Katz in Criminal Defense at 06:00

Giving unpleasant people the benefit of the doubt.

Photo from website of U.S. District Court (W.D. Mi.).Â Recently, a fellow lawyers' listserv member talked about how he detested his opponent so much, that he was concerned how it might affect his performance in trial. He sought out advice, and I replied as follows: Â "Dear _____ - Â "I couldnâ€™t stand a prosecutor in a felony case I defended. This was the first time weâ€™d ever dealt with each other. He seemed cold and heartless and worked in a prosecutorâ€™s office that I still often think requires being an a**hole as a prerequisite to working there as a prosecutor. He seemed like such an a**hole that when I gave him the courtesy of handing him a copy of my two exhibits for a hearing we awaited, he merely grabbed it out of my hand wordlessly.Â "Ever after that, he treated me with as much respect as heâ€™d treat his favorite opponent -â€ though still seeming not to care about justice much if at all. I assumed Iâ€™d earned his respect by showing him I knew what the hell I was doing with our first felony case together, where ultimately I obtained a favorable result under the circumstances. Â "Now a few years later, I learned for the first time that this particular prosecutor has suffered one tragedy after another recently,Â with the tragedies starting before my first interaction with him.Â IÂ spokeÂ before with some colleagues who had frequently dealt with him, but none said anything aboutÂ his tragedies.Â Â "I still do not want to socialize with this prosecutor, but am happy that I found a way for my initial irritation at him not to turn into the both of us hating each other so overtly that it would be obvious to those around us, which has happened before with me.Â Â "In all likelihood, painÂ has driven your opponentÂ to be so unlikable. Itâ€™s hard in the heat of battle to step back and to feel more detachment between the opponentâ€™s offensiveness and how we react. Youâ€™ll find the way, though.Â "On a final note, we all know that we are weaker when we are angry. Consequently, sometimes opponent like nothing better than to learn what gets us angry. IÂ have enjoyed myself at timesÂ to see how easily I can anger opponents, unintentionally, to the opponents' weakness and to my strength, that would not irritateÂ other observers.Â Â "Would we get angry at a wild animal attacking us? No. Do we get angry, then, at our opponents, by their not meeting our minimal expectations of them (e.g., to follow the governing lawyers' rules of ethics, to tell the truth, and not to fight dirty)? Do we get angry at them when they cause harm to us and our clients -- whether intentionally or not -- without showing any caring about the damage they do, and perhaps even relishing it? Do we not get angry at non-human animals because we do not think they have the capacity to cook up evil, but instead think they mainly act on instinct?Â The more we eliminate our fears, the more we will eliminate our anger. T'ai chi master Cheng Man Ching spoke of overcoming our fears in terms of imagining that we are practicing t'ai chi while balanced atop a narrow pointed cliff. To not eliminate one's fears while atop the cliff is to guarantee certain death. Eliminating fear also calls for keeping and tempering the fearlessness of a child filled with wonder, and living in the moment, as wonderfully detailed in the following story of the man and the two tigers: A man is chased in the wilderness by two tigers, only to be forced off a cliff, hanging for life from a vine. One tiger waits above and the other waits below for a human meal. Two field mice gnaw away at the vine. The man sees a wild strawberry growing from the side of a cliff, reaches for it, tastes it, and -- with his life hanging in the balance -- thinks of how delicious the strawberry tastes.Â Jon Katz.

Posted by Jon Katz in Persuasion at 01:00

Virginia Justice Center seeks Managing Attorney.

Bill of Rights. (From the public domain.) Recently on a so-called progressive lawyers' listserv came a job posting as Managing Attorney with the Virginia Justice Center for Farm and Immigrant Workers. For people interested in such work, this looks like a rather attractive job opening, so I share it with you here. Jon Katz.

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

Tuesday, September 18, 2007

ACLU to Craig's rescue.

Bill of Rights. (From the public domain.) On September 17, I blogged about Senator Larry Craig's inexplicable decision to talk to the cops after his arrest, and then to proceed to court without a lawyer. Now, true to its best traditions, the American Civil Liberties Union has filed a friend of the court legal memorandum urging the District Court of Hennepin County, Minnesota, to permit Mr. Craig to withdraw his guilty plea to disorderly conduct. Here and here, the ACLU talks about why such anti-civil libertarians as Craig are as deserving of civil liberties protection as everyone else. The ACLU's legal memorandum is excellent, perhaps to the point of brightening Craig's prospects of reversing his guilty plea. If Craig pulls off getting his guilty plea reversed and stays in the Senate, will he pull an Eddie Haskell and continue to urinate on critical civil liberties issues promoted by the ACLU? Probably, but hope springs eternal. Jon Katz. **ADDENDUM:** Thanks to a fellow listserv member for bringing this ACLU amicus filing to my attention.

Posted by Jon Katz in Criminal Defense at 00:00

Will John Kerry denounce tasing of audience member?

In previous blogposts, I have attacked abusive police use of tasers. The attached video, posted September 17 to the Internet and linked at BoingBoing, shows a John Kerry questioner being tased after pontificating and questioning irritably -- for Kerry, that is, but if politicians open questions to the floor, they should be prepared to tolerate such questions, and not evict the questioner. The video does not answer who decided to evict the questioner in the first place: Kerry (apparently no, but the video seems to show Kerry knew he was being evicted but did nothing to stop or oppose the eviction), his handlers (perhaps, but the video does not say), the police (maybe), or someone else? Do you know? Finally, need we hold our breaths to hear Kerry denounce this tasing? Jon Katz. **ADDENDUM:** Here is some follow-up information on this issue (and additional updates are in italics): - The tased student is Andrew Meyer. He is being prosecuted for disorderly conduct and resisting the police. Neither appear to be justified. The initial seizure of Mr. Meyer by the police was unjustified, so any resistance by him (which looks mild on the video) should not be a crime. Clearly, he did not act disorderly; he may have been excited and upset by the police seizure, but he cannot be faulted criminally or otherwise for that. He seems to have been rather obnoxious from the get-go, but obnoxiousness is not a crime. **Further update:** Andrew Meyer's friends have put up more information and videos and links on his case at theandrewmeyer.com. - The tasing took place at the University of Florida at a town hall with John Kerry, sponsored by the student government. - More videos of and about the tasing are here, here, here, here, and here, as well as at theandrewmeyer.com. This is the most comprehensive video, although it views more as a slideshow than as a video. - As of 7:00 a.m. on September 18, TalkLeft and DailyKos have been silent on this incident. I do not know how political commentators on the left who blog throughout the day can maintain their credibility if they keep silent on this issue. I'll check back to see if the silence continues. By 11:55 a.m. on September 18, TalkLeft covered this story. By 10:00 a.m. on September 18, and later the same morning, DailyKos covered the story here and here (with a YouTube video showing Kerry and Bush II confirming their membership in Skull & Bones by confirming they must keep all secret about Skull & Bones. Elected leaders should not have it both ways; either they reveal what Skull & Bones is all about (seeing how exclusive is the organization and how many of its members hold positions of governmental power), or they should not seek elected leadership in the first place, or else voters should not elect them.) - I e-mailed Senator Kerry on September 18, asking him publicly to denounce the taser use in this incident. Please join me in contacting him. As DailyKos reports here, and as ABC's blog prints here, Kerry responded as follows; I am still waiting for him to take a real stand: "In 37 years of public appearances, through wars, protests and highly emotional events, I have never had a dialogue end this way," Kerry said in a statement. "I believe I could have handled the situation without interruption, but I do not know what warnings or other exchanges transpired between the young man and the police prior to his barging to the front of the line and their intervention. I asked the police to allow me to answer the question and was in the process of responding when he was taken into custody. "I was not aware that a taser was used until after I left the building," he continued. "I hope that neither the student nor any of the police were injured. I regret enormously that a good healthy discussion was interrupted."

Posted by Jon Katz in Criminal Defense at 00:00

Federal prosecutor caught in child sexual solicitation sting.

Image from National Park Service's website. Police routinely pose as children -- and sometimes as their parents -- in an attempt to lure people into soliciting minors for sexual activity. Apparently, police usually arrest before it can be

determined whether the suspect really intends to carry out a sexual liaison, or is just going to the edge of fantasy and nothing more; as a forensic psychologist has testified for one of my clients, sometimes the planning and meeting stage is intended to end right there, with any sexual activity being exclusively in the realm of fantasy. Will prosecutors and police think twice about such over-stinging and over-arresting for sexual solicitation of minors, now that one of their own -- John David R. Atchison -- has recently been stung and arrested? Or, will they claim that the prosecution of Mr. Atchison just goes to show that they do not discriminate about whom they investigate, arrest and prosecute? Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Monday, September 17, 2007

O.J.'s and Craig's tongue-wagging: Silence is golden.

Bill of Rights. (From the public domain.) When someone once was gushing over his favorite celebrities, a killjoy retorted: "Why make such a big deal over celebrities? They defecate and emit flatus, just like everyone else." Of course, he used the grosser words that I favor for such bodily functions. Precisely. Nobody lives or has a fully polished life, let alone living forever in the first place. As attached as people get to their bodies that they inhabit for such a short time and their lives on earth that are equally as short, as the Dalai Lama has pointed out in talking about such attachment, remove the skin of one's body, and revealed are many disgusting and frail things. When a criminal suspect waives the right to remain silent, to refuse searches, and to have an attorney, the suspect is doing something more damaging, disgusting, rancid, and fully preventable than defecating and emitting flatus. So many of my criminal defense clients would never have been prosecuted in the first place -- and many others would have had a much lower risk of conviction -- had they kept their mouths closed, refused searches, and insisted on having an attorney. On our website, I try doing my own share to impress on people how critical is their rights to remain silent, refuse searches, and have an attorney, seeing that such information in films and television either goes in one ear and out the other, or numbs people to the information. Every page of our website has a link to our criminal defense rights page; every page of our Underdog blog has a visual link to the essential Busted video from Flex Your Rights. For t-shirt attire, I frequently don my "Got a Warrant?/Fourth Amendment" t-shirt, which I wore yesterday when talking briefly to a cop I've known for many years, at the Takoma Park folk festival. I know a criminal defense lawyer who drives with a bumper sticker saying "Refuse searches". Around 1984, I saw O.J. Simpson walking down a busy commercial street in Los Angeles. Numerous fans were calling out to him, and he responded very affably. He seemed to be on top of the world. Little did I know at the time how humanly frail this then-big-name celebrity would become, or already was. His once-charmed life came crashing down with his 1994 murder arrest and prosecution, whether or not he did it (and I still have reasonable doubt whether he did). After O.J. spent a royal ransom for his murder trial defense team, I would have expected that, at the very least, he would have learned by now not to waive his rights as a criminal suspect to remain silent and to demand a lawyer. After representing himself in full "cooperation" with the Las Vegas police investigation of robbery allegations against him, O.J. now sits in a Las Vegas jail cell without bond at present and with plenty of time to rethink whether ever again to wag his tongue with police. Senator Larry Craig, once a darling of conservatives, tried to talk himself out of his airport men's room pickle, first with the police, and next in court, without a lawyer. Any senator would be expected to have no illusions about the importance of obtaining legal counsel as a criminal suspect. By not doing so, Craig now has paid the much heftier price of self-banishment from the Senate, a shredded reputation, and infinitely higher attorneys' fees than if he had just hired a lawyer before his trial date. (A review of the applicable criminal statutory provisions shows Craig probably had a good shot at an acquittal had he asserted his Constitutional rights to remain silent, to a lawyer, and to a trial). Hopefully O.J. Simpson's and Larry Craig's tongue-wagging, rights-waiving blunders were not committed in vain. If the proactive and very public admonitions of me and so many other criminal defense lawyers have fallen on so many deaf ears, perhaps the very concrete examples of Simpson and Craig will unclog those ears. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

Meeting Baba-Kundi Ma`at-Shambhala

Kokopelli. (Image from website of Los Alamos National Laboratory.) Last week, in the parking lot of the Whole Foods natural supermarket in my town, I met Baba-Kundi Ma`at-Shambhala. I was drawn to greet him after seeing the following on the back of his car: his name, a kokopelli image (shown above), the Om symbol, mention that he does home improvement work, and a North Carolina license plate. This gentleman was very approachable and optimistic. When I asked about his home improvement services, he gave me a very attractive pamphlet, addressing home improvement as a way to harmonize our surroundings, and including his growing website (here is his home improvement link), which is entitled "Essence of Paradise". Several of his writings are here, most of which I have yet to read. I do not know enough about Baba-Kundi Ma`at-Shambhala to know how much I agree or not with his views and philosophies. I do know that I received very positive vibes from him, that helped recharge my own positive vibes. Just as I believe in becoming a better trial lawyer from repeatedly being and getting on the road, I similarly believe in the importance of meeting and interacting with inspiring, truly optimistic and harmonious people. Baba-Kundi Ma`at-Shambhala seems to be one of them. Jon Katz.

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

Sunday, September 16, 2007

At the September 15 antiwar march pregame.

The peace symbol went far beyond hippies. Gerald Holtom designed the symbol in 1958, and the Campaign for Nuclear Disarmament adopted the symbol for its logo. On September 10 and August 22, I blogged about governmental criminal and civil efforts to curb postering efforts by people promoting the September 15 antiwar march in Washington. I took the opportunity to attend, with my son, the antiwar march preliminary activities at Lafayette Park, across from the White House. My eighteen month-old child was going to fall into naptime had I joined the noontime march, so I missed the march portion of the activities. The Iraq War and George Bush II are highly unpopular in the United States, and the mix of demonstrators reflected that. The crowd covered all generations, including diehard peace demonstrators, mainstream-looking students, and Iraq war veterans against the war. Everyone looked peaceful, despite their passions against the war and against Bush. Most of the picketing posters opposed the Iraq war. Other picketing posters urged the impeachment of Bush and Cheney. Some posters promoted Palestinians' plight. All present were united against the Iraq war. The National Lawyers Guild is frequently invited to send legal observers to such so-called progressive events as this one, and I saw numerous Guild legal observers with their trademark fluorescent green caps. All seemed tame during the 10:30-11:30 a.m. period I was there. A few dozen demonstrators got arrested after climbing a barrier fence near the Capitol building. In the afternoon of the antiwar demonstration, one of my out-of-town relatives called me from the Iwo Jima memorial in Arlington, Virginia, gushing over how positively emotional was the reception of him and his fellow World War II veterans who were in town to visit the World War II memorial. I expected his call, but when he kept dwelling over his WWII remembrance activities, I decided to put it in more perspective by telling him I had attended the morning's anti-Iraq war activities. He did not seem to understand that I told him this to make the point that we must remain ever-vigilant of the use and abuse of military might for the wrong reasons. Instead, he started telling me his ground route did not take him within sight of any demonstration. The demonstration happened, and I was there. Jon Katz.

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

Hippie Lawyer presents Radical Civics.

As I have written here and here, Hippie Lawyer is Alan Graf, who lives on the Farm cooperative community in Tennessee. Alan presents weekly online broadcasts called Third Planet Report, presenting news, interviews, commentary, and homespun music. Now added to his repertoire are weekly YouTube broadcasts of Radical Civics, a high school course he is presenting on the Farm. Alan's YouTube listings are here. I have not reviewed enough of Alan's broadcasts to state an opinion about them. However, Alan seems frequently to be very thought provoking, starting with his web moniker. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00

Friday, September 14, 2007

They pick it up like it's an extension of their body.

As I have written before, music influences me very much as a person and trial lawyer, particularly jazz music, in that great jazz involves being in the moment, improvising (in a team, no less), performing without any sweat other than the sweat of the brow, and seeing no barriers to great performance other than sweat and more sweat. Miles Davis was one of the most influential jazz musicians, and a fellow trumpeter at that. He identified and brought on some of the most amazing talent, later saying in the above YouTube-broadcast interview that talented musicians "pick [their instrument] up like it's an extension of their body." Similarly for trial lawyers, they need to feel at home with clients, before judges and juries, with opponents, in the investigation field, and, for criminal defense lawyers, in the jails, prisons and lockups. As I googled for follow-up information on what led great jazz pianist Ramsey Lewis to co-host on a so-called smooth jazz radio station -- jazz is not about smooth; it is about expressing the musician's deepest emotions and all five senses -- that has too much fluff and non-jazz music, the station's website showed this great quote from Miles: "Do not fear mistakes- there are none." Of course, that does not mean it is okay to live life like a bull in a china shop, but does mean that the well-lived life involves accepting the possibility of failures along the path of working for success. It is a variation on the theme of t'ai chi master Cheng Man Ch'ing's admonition to invest in loss, which did not mean to seek loss, but does mean, once again, that losses are an inevitable part of the path towards success. Similarly, as my friend Trudy Morse says: "Never an accident;" everything happens for a purpose. Miles, himself, suffered numerous losses on his successful path. He battled heroin, and evidently won his battle. He went into several years of retirement in the late 1970's, from a "combination of bad health, cocaine use, and lack of inspiration," which may help explain why I did not much enjoy his performance in 1975 at a jazz festival in Newport, Rhode Island (but at the same time, I had not yet come to appreciate Miles's mastery in Bitches Brew, which ultimately catapulted him even higher as a positively influential musician). Looking askance at some of Miles's pop music from the 1980's, I did not give him a chance right until today to know if I liked any of his other post-retirement music, but still like just about everything I have heard him play from before his 1970's retirement. I saw Miles Davis a second and final time around 1983, sitting nearby me in the audience of a Broadway musical, with a golden cane, walking regally (in a good sense) with his wife Cicely Tyson. Experiencing Miles and Cicely Tyson that evening meant much more to me than anything happening on the stage below. Jon Katz. ADDENDUM: Correcting the last paragraph above, it turns out that June 1986 was the last time I saw Miles live, at the 1986 Amnesty International Conspiracy of Hope concert at New Jersey's Meadowlands. Here is a video clip of his performance, with Santana. Either I did not recognize Miles from the distance of my seat, or, more likely, I just wanted to forget what would have been a forgettable performance for me, both by Miles and Santana. The concert, overall, was amazing, capped off by the Police, back together, and U2 at the end, with both bands giving it their all. Unfortunately for Joni Mitchell, she was put onstage by surprise -- not even having been listed on the concert lineup -- immediately following the Police and when everyone expected U2. Talk about dashed hopes for so many in the audience, to the point that, pathetically, some audience members on the football field in front of the stage hummed water balloons at her. Back to Miles, see these two "I Remember Miles" clips here and here, including Dizzy Gillespie's fascinating talk about Miles. Beyond talking about music, Miles discusses being harassed at various times in ways he perceived as racist. Streetwise, he advises to walk towards the person about to throw a punch, which will cause the assailant to step back. Miles acknowledged the ugliness in life, while transcending it at the same time.

Posted by Jon Katz in Persuasion at 01:00

Drug reformer Arnold Trebach speaking September 26 in Washington, DC.

DEA image in the public domain. Drug Policy Foundation founder Arnold Trebach will be speaking about drug prohibition as follows: September 26, 2007, 12:30 pm, Center for International Policy, Suite 801, 1717 Massachusetts Avenue, NW, Washington, DC. RSVP to Abigail Poe, abigail@ciponline.org or 202-232-3317. Although I very much appreciate Mr. Trebach's work to dismantle the drug war, that does not mean that I agree with all his other views. Thanks to a fellow listserv member for posting on this event. Jon Katz.

Posted by Jon Katz in Drugs at 00:00

Thursday, September 13, 2007

Our office will close all day August 13.

To all who might be calling us on September 13, our office will be closed all day, and reopening September 14. Jay and I will be observing the Jewish New Year; for all our staff, it's a day off. Jon Katz.

Posted by Jon Katz in Jon's news & views at 02:00

Pavarotti found a brand new bag.

The tenor meets the hardest working man in show business. At the Trial Lawyers College -- which has key hallmarks of a cult -- we did a lot of singing. Some of it I liked very much, and some of it assaulted my sensibilities, both for content and execution. My favorites from the TLC/Thunderhead Ranch included Johnny Cash's "Bad News" and "Jambalaya"; even though I did not care too much for the tune, the message hit home in "Cat's in the Cradle". The point of it all was to give full voice to our feelings and arguments through belting out our words in song, rather than merely saying our words. In that spirit, I pay attention to great singers. One of them, Pavarotti, recently passed away. So much had been said about him, that I was about not to blog about him, until I found this amazing YouTube James Brown-Luciano Pavarotti duo of "It's a Man's World" (as much as I dissent from the song's title). In this video, James Brown blows me away more than he ever had before. Thanks to BlogRevolution for the heads up on this video. Also, here is a duo video with Pavarotti and Barry White. To present great music, many great musicians give up much of their personal and professional lives, and financial security. Please support them generously, financially and otherwise, and take the time to experience them live. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Wednesday, September 12, 2007

Karl Rove, fun street theater, and delayed arrest warrants.

Photo from website of U.S. District Court (W.D. Mi.). Although I do not go around advocating breaking the criminal law, this article gave me many chuckles about the street theater surrounding the actions of some American University students to dress as security as if they would be arresting Karl Rove, who came to visit American University's College Republicans last April 2007. Were the shoe on the other foot -- with students doing the same with a politician I support (although I am not enamored of many politicians), I expect I would laugh nearly as hard. Peculiar about this particular protest event is not that some of its participants were arrested (some of them allegedly blocked the entrance to the building, requiring entry through a separate door, and some lied down in front of Rove's vehicle after his talk, which are actions exposing people to arrest) but that the authorities delayed around five months to file criminal charging documents against them. Additionally, this article says the American University administration complied with a subpoena for information, which was apparently to help identify demonstrators to arrest; I would like to know if the university made any effort to fight the subpoena. In any event, thanks to my friend Mark Goldstone for his defense of these students, who apparently settled their case by paying a \$100 civil fine, the payment of which averted a trial and possibility of a guilty finding. Mark is the longtime chairperson of the demonstrations committee of the local National Lawyers Guild chapter. I have had the pleasure of collaborating with him on several political cases, including successfully defending two people arrested and prosecuted for handing out leaflets announcing an anti-Bush demonstration, defending two people over the destruction of a Bush-Cheney campaign sign, and defending a slew of anti-globalization demonstrators. Unlike the Guild, I cover the entire political spectrum of clients in defending individual rights, including my defense of then-American University student and anti-leftist Ben Wetmore, whose rights American University severely abused after he videotaped Tipper Gore's talk on campus, in full compliance with warning that there be no flash photography. Jon Katz. ADDENDUM: Thanks to a listserv member for informing me about this news item.

Posted by Jon Katz in Criminal Defense at 02:00

Judges: The First Amendment protects free exercise, too.

Bill of Rights. (From the public domain.) The custom of requiring the removal of all headcoverings while inside is trumped by the First Amendment right of people to wear religious headwear. Unfortunately, this was either not known or else not agreed with by Texas justice of the peace Albert B. Cercone, who required an adherent of the Sikh religion to remove his turban for traffic court. Praised be the ACLU for filing a lawsuit against Judge Cercone's First Amendment-violative actions. Jon Katz.

Posted by Jon Katz in First Amendment at 00:10

Tampering with the grand jury can get a case dismissal.

Bill of Rights. (From the public domain.) When a prosecutor tries to railroad a grand jury to the train station, the field is ripe for moving to dismiss an indictment. Read all about the Nassau County, New York, situation here. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Tuesday, September 11, 2007

Premature arrest for over-salted McDonald's burger.

Image from National Park Service's website). Â American society is overcriminalized. Sadly, police recently arrested a McDonald's employee for oversalting the burger of a cop who got sick after eating the sandwich. (If the cop were so concerned about his health, why did he order such an unhealthy choice to begin with, let alone risking mad cow disease?)Â You heard it right. Police arrested McDonald'sÂ employee Kendra Bull instead of even analyzing the rest of the burger first (the cop apparently did not finish the sandwich), more calmly and thoroughly investigating the situation, and considering suing in civil court rather than prosecuting. The arrest and prosecution of Ms. Bull are unjustified, whether or not she may have given the police inconsistent or dishonest stories about how the burger got oversalted and served to the cop. What comes next? Arrests for restaurant workers putting too much sugar in iced tea; too much Tabasco in Buffalo chicken wings; tooÂ small a banana in a banana split (lest the customer suffer cardiac arrest from upset over such a small banana)?Â Thanks to Lowering the BarÂ both for reporting on this story and providing arguments on how unlikelyÂ it would be for a person to get significant harm from the oversalting of just one hamburger. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

Federal prisons clearing religious texts from the shelves.

Bill of Rights.Â (From the public domain.)Â CountlessÂ prison inmates thirst for a wide range of reading material. InÂ part due to the many donations from religious organizations,Â prison libraries often include a substantial share ofÂ religious texts. However, in violation of theÂ First Amendment's guarantee of the free exercise of religion, the federal government hasÂ produced a list of approved religious texts, and has provided for the removal of the rest. Â No less than the New York Times confirms the accuracy of this story. Thanks to Blog Revolution for linking to this story. Jon Katz.Â

Posted by Jon Katz in First Amendment at 00:00

Monday, September 10, 2007

Unnecessarily intimidating cops: Get off your high horse.

Â This posting follows up on my August 31 posting about America's overly repressive criminal justice system and August 22 posting about huge civil fines being levied by the D.C. government against the ANSWER Coalition for the wheatpasting of anti-war demonstration posters, rather than merely fining the individual wheatpasters. Â The federal cops -- at whose direction? -- turned the wheatpasting issue up a notch on September 6, 2007, as follows: Some anti-war wheatpasters called a news conference in the Lafayette Park block (the park facing Bush II's presidential palace) to talk about their professed right to paste up the anti-war posters, and to wheatpaste on camera. A cop seized a wheatpaste bucket from one of the activists, who continued wheatpasting anyway. The cops arrested three people; at least two were wheatpasting, and I am trying to figure out if the third was doing the same. Â The case is being prosecuted in the District of Columbia Superior Court, which has an archaic computerized criminal docketing system that only can be accessed at the Superior Court, when one can find a working computer terminal; I am not scheduled to be in Superior Court this week. In any event, the September 7 Washington Post reports that arrestees Tina Richards and Adam Kokesh originally were arrested for allegedly defacing public property. Â However, the D.C. Code's property defacement statute, D.C. Code Â§ 22-3312.01 seems inapplicable, in that it provides as follows: "It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip, or cover, rub with, or otherwise place filth or excrement of any kind; to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon" public property. D.C. Code Â§ 22-3312.01. In this instance, the posters were affixed with wheatpaste, which I understand is fully removable (although with effort) with soap and water. Â I understand that the third arrestee is Ian Thompson, and that he was originally charged with impeding an officer. D.C. Code Â§ 22-22-405(b), which provides: "Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 180 days or fined not more than \$ 1,000, or both." I do not think you will see any impeding on the above-displayed YouTube video. Â Not having heard an update about any further charges against the three demonstrator defendants, I wonder whether the prosecution has added allegations of congregating "with others on a public street and refus[ing] to move on when ordered by the police." D.C. Code Â§ 22-1321. I have already blogged against police overuse and abuse of this and all kinds of disorderly conduct laws. Â Near the end of the above-displayed YouTube video of this incident is a horse-mounted cop repeatedly ordering "Back up!" His actions amount to unnecessary intimidation and over-enforcement, and should be removed from their high horse. If cops are willing to act this way on video, imagine what so many of them do under the cover of darkness with suspects and "crowd control." Â Underlining how police often alter their behavior when news cameras are rolling (when they cannot seize reporters' cameras and tape players in the first place), the Washington Post reports: "When an officer went to speak to [the thirteen-year-old daughter of one of the arrestees], a member of the Park Service's SWAT team advised him to stay away from her. 'Don't feed into that, the cameras are rolling. Let her go,' the officer said." Now remaining to be seen is if the cops and prosecutors will let such arrests go, to leave the matter to non-criminal court actions for wheatpasting, rather than the more intimidating approach of arresting and prosecuting wheatpasters. Jon Katz. Â ADDENDUM I: Thanks to a fellow listserv member for informing me about this September 6 situation, including the YouTube video. Â ADDENDUM II (September 11, 2007): Â To the extent that the police claim that any of the arrestees criminally violated any police order to remove the table being used during the news conference that the police broke up, it appears that limitations on possessing tables at Lafayette Park are governed by 36 CFR Â§ 7.96(g)(5)(x). The foregoing federal regulation allows tables when they are carried, but disallows non-carried tables without a permit. Considering that the table was reasonably needed to conduct the First Amendment-protected news conference, law enforcement would have been without legal basis to interfere with the presence of the table during the news conference. Thanks to a fellow civil libertarian for alerting me to 36 CFR Â§ 7.96.

Posted by Jon Katz in Criminal Defense at 01:00

If Count Basie were a trial lawyer.

Â Â Count Basie. (Image from National Humanities Endowment website.) Â Sometimes I look back at my court arguments, court filings, blog entries, and other communications, and ask "What would Count Basie have done?" Â Count Basie was a great jazz pianist and big band leader. As with most musicians who pour their hearts into concerts, nothing beat experiencing him in person, which I did twenty-four years ago, wowing me at an outdoor performance. Â Basie took his time playing the piano, ordinarily economical with his notes and deliberate with how he played them.

One story went that one day someone challenged him about whether he even had the ability to play fast. Apparently irritated, Basie responded with piano playing so fast, furious and still skilled as to erase any such doubts about his musicianship. Many times, lawyers voice their frustrations over unreasonable time limitations placed by judges on their jury selection, closing argument, and other critical presentations. I imagine that judges will be more liberal on such limitations when they know the lawyer and opponent are as skilled with word economy as Basie was with playing notes. The notes not played and the pauses taken can be as important as the notes played and how they are played. As much as it is important for a trial lawyer to be in the moment in court, that does not equal coming up with words and arguments at the spur of the moment. That work should be done as much as possible in advance, and excess verbiage should be pared down, so as to become a stepping stone to an in-the-moment argument that is tighter, more confident, and more persuasive than just getting up and winging the argument. Our clients and witnesses also are well advised to take a page from Count Basie, and to err on the side of being too brief on the witness stand, as long as each question is fully answered. Too many clients and witnesses overspeak from the witness stand because they get nervous, non-trusting whether the lawyer will ask the right questions and object to the opponents' inadmissible questions, non-trusting whether the judge and jury will remember what the witness said in the first place, caught up in any habit of overspeaking, and sometimes just caught up in verbal diarrhea to make up for any lying testimony. Perhaps they need to listen to Count Basie in their testimony preparation, while also being helped by the trial lawyer to develop a more trusting relationship between both of them and with everyone else (except to have sufficient caution about the opposing counsel). In their essential *Cross-Examination: Science and Techniques*, trial masters Roger Dodd and Larry Pozner talk about the power of silence (sometimes as simple as walking to counsel table, pouring a glass of water, and taking a few sips, which sometimes also provides additional time to ponder a difficult hurdle) as well as the power of looping to lock in witnesses and to help jurors remember essential information. However, the looping should be done with an effective purpose, and not for the purpose of annoying the judge and jury as if the lawyer thinks they are idiots with short attention spans. Hamlet very deliberately and slowly proclaimed: "To be or not to be. That is the question." In so doing, everyone paid attention, and still does. I once read about a man in India who voluntarily went silent many years ago, and writes nothing more than will fit inside the small chalkboard he wears around his neck. If he were Hamlet, would he have merely wrote: "Should I commit suicide?" Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

Sunday, September 9, 2007

Pushing a pickup truck out from the mud.

In a Hmong village in the Golden Triangle, later in the day after repeatedly pushing our pickup truck out of the mud. (July 1989.) In a vacuum, courtrooms and jails -- particularly jails -- can be very cold, gray and depressing places. Consequently, one of the best things a trial lawyer can do to counterbalance such grayness is to get out and about, and to go on the road repeatedly. To those who haven't opened their own law firm yet, I recommend finding the time now for extended excursions, and to enjoy the local scenery when traveling to interesting places for court (e.g., for me, I particularly enjoy spending some extra time in the mountains, on the shore, in the river areas, and in Baltimore). My longest excursion after law school was several weeks in Southeast Asia before starting full-time work after taking the bar exam, with the best time being a three-day trek in Thailand's Golden Triangle. During the trek, some of my co-travelers partook of the freeflowing opium and marijuana, casting to the wind any concern about the prison sentences and conditions in Thai jails. I suppose I could have been swept up, too, in an arrest, seeing that the owner of the first hut where we stayed smoked along with some of my fellow travelers while I was just a few feet away. I had not yet been introduced to the realities of dragnet drug arrests. For those willing, I highly recommend spending some time away from fancy hotels. In Bangkok, I learned about the hotel that I selected when I bumped into a woman working there, on the same bus taking me to the Banglamphu area where many trekkers stay in that city. She apologized that only double rooms were left -- at \$4.80 nightly versus the \$3.20 nightly single rate -- and promised to add another traveler to my room for me to pay less; I opted for the privacy. Each morning, I awoke and walked among the nearby neighbors living in buildings with corrugated metal roofs, something that would not have been possible had I stayed at the equivalent of a Hampton Inn or fancier. The hotel was in my kind of place, seeing that the hotel owner's daughter told me that her friends and acquaintances would not be caught dead in this neighborhood that was hardly respectable enough for them. I learned that a guest at a nearby hotel got bitten by bedbugs, but my hotel -- more like a guest house with cabin-type material and design -- was pristinely new, only furnished with army mattress beds, an oscillating fan, a table for the fan, and a towel-type blanket to soak up the inevitable sweat; in the morning, I had to ask for a bowl of boiling water for shaving, because the running water was room temperature. The hotel was convenient to the main Buddhist temple, and to a long boatbus stop to go north to the residential neighborhoods and south to the morning market, for a ride long enough for me to teach myself to count to ten in Thai (neung, sawng, sam, see, ha, hok, jet, paet, kao, sip). On my third night, I boarded an overnight bus to Cheng Mai, the major northern city, to trek in the hill country. The travel agent for my bus to Cheng Mai, a friend of my hotel owner, arranged for a taxi to the bus station, dozens of rambutans and mangosteens for the ride because the sitdown meal break would not meet my vegetarian lifestyle, and a night in a guest house. My guesthouse room had an obnoxiously loud and unsanitary-seeming leak in the washroom. When the owner would not give me a new room or fix the leak, I went looking for another guest house; all innkeepers said they were fully booked, which sounded fishy. The owner finally relented, gave me another room, and said "No more rooms," so maybe I had hit the height of tourist season. Some other guests at the guesthouse recommended choosing a trek through my innkeeper (the same one who at first resisted giving me a non-leaky room; I should have known), and suggested a tour that has less tourist traffic even if less popular. My innkeeper promised that my selection had little traffic, but at least four other tour groups were at the first two of three overnight village stops. On the third and final full day, our tourguide was too exhausted from opium to take us further than an alternative village on the riverbank to which we traveled by bamboo rafts from the Karen village where we awoke that morning. At the final riverside village, I was entranced by the hut owner's baby monkey; by contrast, the next morning we crossed the very fast river to join traditional mourning for a man accidentally shot dead when trying to stop his friend from committing suicide; his body was laid out on the floor of his family's hut, with his face fully exposed and a monk next to him. The stories from this three-day trek are many more, including joining some pre-wedding revelers over moonshine and song, teaching children to count in English, and bathing in a muddy-brown yet clean river. I will finish with the story of our vehicle ride on day one of the trek, when I was met at my guesthouse by a pickup truck converted and covered in the back for six to eight to fit comfortably. The tour company decided to squeeze in ten, but I was saved by the bell by remarking to the initial four other passengers how I wondered how we were billed only \$48 per tourist. Irate at being stuck with paying the higher rate of \$52, a pair of travelers promptly left the tour. Overloaded as we remained, we got stuck at least three times in the mud during a constant downpour, and all of us got out to push the pickup out of the mud, to the point that I was all muddy from chest to foot, and my white canvas sneakers stayed clay pinkish-brown for many months. A few times, I looked out over the mountain to see a sheer drop too close for comfort for an overloaded pickup on muddy roads. What was I thinking? Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10

Friday, September 7, 2007

First Amendment protects lawyers against vague and overbroad gagging rules.

Bill of Rights. (From the public domain.) Praised be federal trial judge Arthur J. Tarnow for striking down Michigan's ethical rules that limit lawyer criticism of judges and discourteous or disrespectful language to others. Judge Tarnow reached his decision by determining that the ethical provisions are unconstitutionally vague and overbroad, in violation of the First Amendment. *Fieger, et al. v. Michigan Supreme Court, et al.*, _ F.Supp. 2d _ (E.D. Mich. Sept. 4, 2007). [On a point of trivia, plaintiff Fieger is Jack Kervorkian's lawyer; this article talks about his out-of-court scathing words about judges that came back to bite him under the ethics rules.] One of the two ethical rules successfully challenged in this First Amendment litigation bars "undignified or discourteous conduct toward the tribunal." The second provision requires treating other persons with "courtesy" and "respect". Often lawyers will be among the first to know about judicial misconduct, incompetence, and negligence. The light of day must be shined on such actions, which will not happen if lawyers are muzzled. Sometimes, other lawyers and non-lawyers will get so nasty with a lawyer that the lawyer has little choice but to use figurative bows and arrows against the opponent in order to neutralize the barrage. Leaving the courtesy and respect rules in place and in force will help emasculate lawyers from fulfilling their obligation to zealously and competently represent their clients. Treating everyone with dignity is preferable, but litigation sometimes can get unavoidably and downright ugly. I look forward to this Fieger result being contagious throughout the nation. Jon Katz.

Posted by Jon Katz in First Amendment at 01:10

Leonard Weinglass speaks in D.C., September 12.

Photo from website of U.S. District Court (W.D. Mi.). On August 10, I blogged about the Cuban Five, including about Leonard Weinglass, the attorney for Cuban Five defendant Antonio Guerrero. I just learned that Mr. Weinglass will be speaking about the Cuban Five in Washington, DC, as follows: September 12, 2007, 6:00 p.m., Howard University Law School Moot Courtroom, 2900 Van Ness St., NW, Washington, DC 20008. RSVP to Yanet Stable Cárdenas, Second Secretary, Cuban Interests Section, 2630 16th St., NW, Washington DC, 20009, (202) 797 8518, ext 105, yanet@sicuw.org. I received this information from a listserv, and see that it's posted to another blog. Considering the RSVP request, being handled by the Cuban Interests Section no less, I don't know if audience members are being vetted for the "right political pedigree," which could get me barred, for one. Please let me know if you attend or are given a hard time about attending. I regret that I will not be able to attend, as the event falls at the start of the Jewish new year. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

High school bans t-shirts supporting criminal defendants.

Bill of Rights. (From the public domain.) Three students -- and a few others -- go to public high school wearing t-shirts supporting the freedom of their arrested brother and his co-defendants. The school bans the t-shirts, which say "Free the Jena 6". The school's First Amendment violation gives a poor civics lesson to students about the Constitution; it is more a lesson about urinating on the First Amendment. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00

Thursday, September 6, 2007

On the Road taken.

Jack Kerouac. (Image from National Parks Service website.) For the longest time, I have been fascinated with the Sixties (as opposed to just the decade of the 1960's) -- in part because I was too young sufficiently to understand the period as it was happening -- so it was only natural that I signed up for my freshman college English seminar "America in the Sixties," taught by Diane Carmody Wynne. Many times, Professor Wynne would mention Allen Ginsburg and Jack Kerouac, whose *On the Road* approach to life and writings heavily influenced the hippie movement. Not until three years later did I finally read, and devour, *On the Road*. Kerouac refused to be hemmed in by all the McCarthyism and superficial homogeneity of the Fifties, and instead embarked on a life of adventures and writings that put his own vision on what life was and could be. Kerouac hung out with such beat generation leaders as Allen Ginsburg, who once said that while watching Ike deliver a presidential speech, he remarked to his companions that their vocabulary and manner of speaking was strikingly different from Ike's, which was devoid of spice, rhythm, or any hint of the counterculture and social upheaval that would fully reveal themselves in the next decade, including during the watch of Ike's then-vice president. I finished *On the Road* on a train returning me to Montreal from Quebec City. I accidentally left it in the seat pocket in front of me, and hope it got into the right hands of someone else temporarily or permanently on the road. Kerouac's family is French-Canadian; how curious that I finished and left the book in the very province where I suppose many of his ancestors lived. Kerouac and his writings have tremendously influenced me to continue finding adventure in every day; to breathe life, spice and passion into my writing; and to continue to listen to the path my life leads me on, rather than concerning myself too much with what others think about that (other than to consider the impact on my clients of judges' and juries' views of my actions, and to consider my actions' impact on my family). I understand it took Kerouac a few years to get his *On the Road* masterpiece published, which finally happened fifty years ago. Recently, *Slate* interviewed some people who knew Jack. The article is a good read. Curiously, I attended college only about thirty miles from where Kerouac grew up, in Lowell, Massachusetts. On a recent return visit to the area, I exited into Lowell for the first time. The town has some interesting places to visit, but, aside from Kerouac's history there, does not seem to be much out of the ordinary from plenty of other towns in the region. It is a tribute to Kerouac that he transcended the ordinary to live and write the extraordinary. Jon Katz.

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

Wednesday, September 5, 2007

Power of zero: No chasing, competing, or catching up with our opponents.

Â Â Practicing life andÂ law as a harmonious whole.Â Â Â As I inform my clients, our court cases are not about us against our opponents, but are about persuading the judge and jury. Â In that regard, t'ai chi master extraordinaire Benjamin Pang Jeng Lo (pictured here, second from the top) once said: "Normally we think that if [our opponent] has 100 pounds of force or power, I better have 150. But then if I get 150 pounds of force, he may have accumulated more himself. Or thereâ€™ll be somebody else with more. So next time it will be my 150 against his 200. Then lâ€™ll need to go to 250â€™ and still, thereâ€™s always going to be somebody with more than me. So I need to reverse my approach. I need to take my own power down to 0. Then thereâ€™s no chasing or spiraling. Nothing can change. If he has 100, I have 0. If he has 150, I have 0. If he has 200, I still have 0, on and on, whatever he has, lâ€™m always beneath it, it doesnâ€™t change or affect me. lâ€™m not chasing his attributes, or competing, or catching up, or exceeding him. Thatâ€™s Taijiquan.â€•Â In other words, t'ai chi and trials should be about harmonizing our situation, rather than focusing on winning. If winning is needed for us to harmonize our situation, so be it. If unavoidable harm to our opponent is needed to harmonize our situation, so be it again. If harmonization is possible without any loser and without harm to anyone, all the better. Jon Katz.

Posted by Jon Katz in Persuasion at 01:00

Monster hackers; silent PayPal.

Frankenstein monster. (From National Health Institute's website.)Â How much has Monster.com's value and usefulness gone down now that the personal information of over one or two million employee subscribers has been hacked? Â Similarly, how reliable is PayPal after the several-days' delay in accepting payments to subscribers? All this reminds us that Internet security is illusory.Â Thanks to Likelihood of Confusion for the links here and here to these stories. Jon Katz.

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

Tuesday, September 4, 2007

Challenging recovered memory testimony

Photo from website of U.S. District Court (W.D. Mi.).[^] Many prosecutions and convictions take place on the basis of "recovered memory" by adults of sexual abuse from childhood. In that regard, Deception links to this article in Psychological Science which asserts that child sexual abuse memories recalled outside psychological therapy are more likely to be reliable than such memories recalled during psychological therapy. Consequently, the authors of this article might make good expert witnesses for the defense any time an alleged child abuse victim recovers his or her memory during psychological therapy. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00

Why visit Redskins stadium?

National Museum of the American Indian. (Image from the public domain.)[^] When the Washington Bullets basketball team renamed itself[^] the Wizards, I thought that was an unnecessary reaction to all the handgun violence in Washington, when the Bullets' moniker and symbol[^] represented an apt aspiration to having a team that nonviolently was bullet-fast, bullet-accurate, and bullet-powerful. [^] On the other hand, I have stayed away from the Washington football franchise, due to its names -- Redskins and Skins[^] -- that I find so dehumanizing. [^] Bravo to the Spokane Indians minor league baseball team for turning to the Spokane Tribe of Indians to accomplish "a cultural feat that has been lost on the Cleveland Indians, the Washington Redskins and the University of Illinois." "The tribe responded by thanking the team for the respect shown by not doing what other sports teams do with Native Americans caricatures and design. Then, the tribe added they would prefer to create a production hand in hand with the team." [^] Thanks to the Chicago Sun-Times for this article, and to Native Headline News for posting it. Jon Katz.

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

Monday, September 3, 2007

Remember people and their labors every day.

Labor Day parade (from Library of Congress's website). "On Labor Day, sales (handled by labor), vacations (serviced by labor), and the end of summer for too many people eclipse deep thinking and feelings about labor. Every day should be a day to care about working people, to consider them in all our actions, and to take them into account in our purchasing decisions. Millions upon millions of workers worldwide labor and live under unspeakably miserable conditions and pay, including countless factory workers in China, whose communist revolutionaries came to power proclaiming justice for the working masses. Imagine, then, how bad the working conditions are for millions of people in countries whose governments and employers barely pay even lipservice to justice for workers. As always, when we think globally and start by acting locally, miserable treatment of workers often starts with the custodial employees emptying our wastebaskets and cleaning our toilets, the dishwashers and plenty of other kitchen workers in the restaurants we frequent, the seasonal farmworkers picking our fruits and vegetables, and the workers who produce the countless cheap products sold at Wal-Mart and countless other discounters (who often are not giving their own workers good pay, working conditions and careers). Those of us who are employers, managers and bosses owe our employees harmonious and just working conditions, fair pay and benefits, and full respect and dignity. A supervisory manager at a previous legal employer told me that he generally followed the misguided lesson from a more experienced teacher of not smiling to his students (when he was a teacher) nor now his new employees until Thanksgiving. Why? So that the employees do not get lulled into a false sense of security and substandard work? Every worker deserves a thanks for the good work s/he does, every day. Every kindness deserves a thank you every time. For those workers doing work that we do not believe in -- whether it be fighting in Iraq, arresting people for marijuana possession, torturing alleged enemy combatants, or anything else one disagrees with -- it remains essential to understand and see each such person as a human being, not to mistreat such people merely because they are mistreating others, but still to be firm in calling for a change of the system that leads them to do such work, and sometimes to call for them to turn away from such work. We have many options to better the lot of workers, starting with our own wallets. An unfortunate irony of voting with our wallets can be to leave jobless the very workers we wish to help. However, if we are willing to send our money and business where workers and justice are better served -- including a willingness to pay more money as a result -- hopefully the same workers will find jobs with the more just employers. For those in jobs involving mistreating other workers or non-workers, sometimes the only option is to leave such jobs if efforts fail to stop mistreating them. As one particular judge -- not one I looked to for much justice -- once perceptively observed from the bench, most people, including cops, are just looking to get through the day. This situation raises multiple issues, including how to approach persuading people. However, if most people just want to get through the day, how much effort are they investing in justice rather than in just surviving for themselves, their families, and their friends? On the topic of judges -- who also are workers, although often wielding tremendous white collar power backed up by the power of the state -- a colleague who has known many local judges since childhood and through the old boy/girl network recently told me that half the judges he knows in a particular county do the work out of a sense of public service, with the other half dreading the grind of the daily docket. No matter how some judges may not seem to give much of a damn about justice, or not seem to define justice very justly, they remain humans including those toiling much longer than a forty hour workweek. While still on the topic of judges, it is critical to remember the work of their supporting crew, including the courtroom clerks, office staff, clerks' office staff, people cleaning the courts' hallways and bathrooms, and the list goes on. In his book *Working*, writer Studs Terkel has written of the misery so many face working eight hours daily (if they are fortunate enough not to be working longer days than that). Thus, we are left with the importance of balancing each humans' need to work to live -- rather than to live to work -- with the importance that each human put in sufficient effort and ability to justify being hired, kept, and sufficiently paid for the work performed. As I read over this blog entry, I am reminded what I already know, which is how far I need to go myself in following these words daily and over time with my employees and everyone else. Thanks, again, to everyone who now works for me, Jay and our law firm, who has ever worked for us, and who has helped our clients along the way. Jon Katz.

Posted by Jon Katz in Jon's news & views at 07:00

Judges may not give jury instructions that invade the jury's authority.

"Bill of Rights." (From the public domain.) Aside from their oath of office, another reason for judges to follow the Constitution and the rest of the law in conducting trials is to avoid being overturned on appeal, only to have to try the case again. Still, each year we see criminal trial reversal after trial reversal by appellate judges faithfully keeping to their own oaths of office. Thanks to the District of Columbia Court of Appeals for recently reversing a handgun conviction on the basis of the trial judge's invading the jury's province by instructing the jury that "the lack of fingerprint evidence

cannot, as a matter of law, constitute reasonable doubt." The D.C. Court of Appeals ruled that such an instruction "impermissibly invaded the jury's exclusive province to weigh the evidence as a whole against the standard of reasonable doubt, and requires reversal even under the high standard for plain error review. We also agree that the instruction that the police had 'no duty' to collect fingerprint evidence should not have been given in this case." The case is *Wheeler v. U.S.*, ___ A.2d _ (D.C. Aug. 16, 2007). At trial it is tempting for lawyers to focus on putting the finishing touches on their closing arguments while the judge instructs the jury. However, as demonstrated by this *Wheeler* case, it is critical to listen to, and timely object to, the judge's jury instructions like an eagle hawk. Otherwise, a faulty jury instruction will not be preserved for appeal, and the defendant will suffer. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Sunday, September 2, 2007

Free speech treatises.

Bill of Rights. (From the public domain.) Recently on a First Amendment lawyers listserv, some members suggested some useful treatises addressing free speech law in the United States. Some of the following treatises have been around a few decades without being updated with statutory and caselaw changes. Thanks to the listserv members who suggested the following titles. I have not read many of these treatises, and recognize that some of the authors and I may have some deep disagreements:

- A Worthy Tradition, by Harry Kalven.
- Emergence of a Free Press (updated from the author's Legacy of Suppression), by Leonard Levy.
- Free Speech in its Forgotten Years, by David M. Rabban.
- From the Palmer Raids to the Patriot Act, by Christopher M. Finan.
- The First Freedom, by Robert Hargreaves.
- Defending Pornography, by Nadine Strossen.
- The Law of Obscenity, by Frederick F. Schauer.

Also, see the section on First Amendment theory in Laurence Tribe's American Constitutional Law. Also, see Gerald Gunther as a source for analysis on free speech law. As always, I welcome your comments and e-mails for additional ideas to consider for this and all other Underdog blog entries. Jon Katz.

Posted by Jon Katz in First Amendment at 00:00