

Thursday, February 28, 2008

### **The Supremes on legal writing and advocacy.**

Â Â Bill of Rights.Â (From the public domain.)Â Thanks, Scott Greenfield, for posting this link to interviews of eight Supreme Court justices talking about appellate writing and advocacy. Regardless of one's personal opinion about a particular judge, justice or court system, when a lawyer chooses to enter the courtroom arena, the lawyer must know the judge. This link assistas on that path for Supreme Court advocacy. Jon Katz.

Posted by Jon Katz in Constitutional Law at 19:00

### **One percent of adults are behind bars in America.**

Â Â Bill of Rights.Â (From the public domain.)Â One percent of adults are behind bars in the United States (see the 2008 Pew Charitable Trust report hereÂ and a related news article here). Imagine the financial, psychological, and social drainÂ illustrated by such a statistic.Â Â As I have repeatedly said, I do not think we will achieve a fair and just criminal justice system -- including policing, prosecuting, judging, imprisoning, and releasing and supervising on probation and parole -- until people insist on and achieves a radical and positive overhaul of policing andÂ police hiring, training, supervision, and discipline; and of the rest of the criminal justice system, including heavily decriminalizing drugs (and legalizing marijuana), eliminating mandatory minimum sentences, and eliminating criminal penalties for activities as minor as prostitution.Â Certainly, if marijuana were legalized and other drugs heavily decriminalized, much less than one percent of the adult population would be behind bars in this country.Â One obstacle to achieving such needed drug law reform is the expected resistance from so many people who profit very handsomely from the nation's overgrown criminal justice system, including government contractors who build jails, prisons and courthouses; police prosecutors, judges, probation officers, and government-paid indigent defense counsel; and the many companies that operate privately- run jails.Â Meanwhile, talk about the level of hyper-control the United States government and state governments are able to exert by having one percent of the adult population locked up. So much for the land of the free and the home of the brave.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 19:00

Wednesday, February 27, 2008

### **"Chicago 10" on screen.**

Â Among my many influences from the Sixties are the Chicago Seven/Eight trialÂ (the number of trial defendants went to seven after Bobby Seale was separated from the remaining defendants, but not before the trial judge ordered him bound and gagged); Ram Dass and his heavily influentialÂ Be Here Now; Bhagavan Das, who introduced Ram Dass to being here now; and Jack Kerouac, whose 1950's On the Road approach to life and writings heavily influenced the hippie movement. Â Now in movie theaters is the Chicago 10 film from writer-director Brett Morgen, which I look forward to watching. The number ten in the film's titleÂ comes from adding criminal defense lawyers William Kunstler and Leonard Weinglass to the original eight defendants. Posted above is the movie preview. If you see the film, I look forward to seeingÂ your comments posted here.Â Jon Katz

Posted by Jon Katz in Constitutional Law at 19:00

### **The real McCoy**

Jon Katz(l) and the legendary McCoy Tyner (r) (Thanks to my brother Jeff Katz for digitally enhancing this photo from the underexposed cell camera original.)Â Â One thing I love about digital photography is that it reduces the need for usingÂ gelatin (ordinarily from slaughtered animals), which is common in the printing of photographs from film. Â Another thing I love about digital photography is the possibility of salvaging underexposed photos. Above, for instance, is my brother Jeff Katz's success in saving an underexposed cell camera picture of me and McCoy Tuner from February 24 (the extraordinary meeting is blogged here) through extrapolating digital information and making an artistic rendering. Â Of course, this whole topic brings me back to the argument that child pornography possession cannot be proven beyond a reasonable doubt without expert testimony for the prosecution that virtual images are not actually being presented. For an idea of how far virtual digital imagery has come, see this virtual image. Jon Katz

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

Tuesday, February 26, 2008

**May Ruark's prosecution make prosecutors more sensitive about collateral consequences.**

Photo from website of U.S. District Court (W.D. Mi.). Wicomico County, Maryland, chief prosecutor Davis Ruark risks losing his eighteen-year post if convicted for his February 22 arrest for drunk driving and possessing a handgun while under the influence of alcohol. Mr. Ruark hopes he will be forgiven for this incident. Last Saturday he admitted to drinking alcohol in Salisbury -- where Perdue chicken is headquartered -- after working late that Friday night, and then driving to Ocean City in a government-owned vehicle. Ironically, his car had been government-seized through forfeiture from its previous owner after an arrest, with governments nationwide, unfortunately, reaping all sorts of treasures through successfully obtaining court-ordered forfeitures of property allegedly connected to drug crimes and certain other crimes. The distance Ruark drove from the bar to Ocean City was around thirty miles. Were Ruark just any old anonymous person, his prosecution would be rather unremarkable. Even if his breathalyzer test result accurately reflects his blood alcohol level at the time of driving -- breath testing machines obviously can only test for the alcohol level at the time of the test, alcohol levels can increase as time passes (through ongoing absorption of alcohol into the bloodstream), and the tests are ripe for flawed results -- the 0.15 blood alcohol result is a commonly seen BAC level for drunk driving cases, and does not automatically translate into significantly impaired driving. Mr. Ruark also is being charged with the misdemeanor of wearing, carrying, or transporting a handgun while under the influence of alcohol, under Md. Pub. Safety Code Â§ 5-314; he had a handgun carrying permit, apparently after having received death threats related to prosecutions, so cannot be prosecuted for mere possession of the handgun. As sometimes happens in Maryland, the court docket has not yet recorded his drunk driving case online, but has recorded his handgun case here, showing that Mr. Ruark is being defended by Ocean City lawyer Richard Parolski. Unfortunately, even unremarkable prosecutions can have devastating effects on convicted people, starting with the risk of jail, proceeding with suspended driving privileges for drunk driving cases, and going further to collateral risks to one's immigration status (but not for a drunk driving conviction that does not involve a collision), any security clearance, and any employment by the military (even for run-of-the-mill drunk driving convictions, as Mr. Ruark knows full well, in explaining one of the reasons that his son with military aspirations succeeded in getting his drunk driving case dismissed last December in the same Worcester County where State's Attorney Ruark is now being prosecuted). Too often when I try to persuade prosecutors to reach dispositions that avoid such devastating collateral consequences, I receive a rote or flip answer that my client only has himself or herself to blame for doing the act that exposed him or her to such collateral risks. Oh, yeah? What if my client is innocent (too many innocent people get convicted) and is facing such risks? Wicomico County Executive Rick Pollitt said: "It's tragic if a whole career is thrown out the window for a very, very serious lapse in judgment." Similarly, all criminal defendants should be given the same consideration about the collateral consequences of convictions, by receiving more sensitivity about the situation from prosecutors and by changing the laws that put immigrants (and soldiers in the instance of certain petty crimes including unremarkable drunk driving offenses) at risk for a whole host of convictions. This is also a time to re-think unjustly inflexible get-tough approaches to crime, including Mr. Ruark's own Project Exile program against handguns, where he himself now is being prosecuted for a handgun offense. Davis Ruark's prosecution is not a time to gloat; it is a time to achieve more positive reform of the criminal justice system. Jon Katz ADDENDUM: Thanks to the reader who corrected my previous mis-statement about where Mr. Ruark's son was prosecuted for drunk driving. The inaccuracy remained online for a few hours, and has been corrected.

Posted by Jon Katz in Criminal Defense at 19:10

**Thanks and goodbye, Percy Julian.**

When I joined the First Amendment Lawyers Association in 2001, one of the longtime members who stood out as a welcoming figure was Percy L. Julian, Jr. He came across as a skilled lawyer with no big ego. Sadly, Percy died this past Sunday, at 67. Fellow FALA member Jeff Scott Olson and close friend to Percy said: "He was a model for other lawyers in how to be a good lawyer and a kind heart at the same time," and "how to live a full, full life." Jeff further said of Percy: "He was a pioneer in the field of civil rights litigation ... He started out during the time of Martin Luther King Jr. and was one of the people who made the civil rights laws passed in the King era real tools for justice, especially for African-Americans." I feel honored to have known Percy, even though it was through a few brief conversations at the four FALA meetings that I have attended thus far, in addition to hearing him speak at one or more of those meetings. Thanks, Percy, for you. Jon Katz.

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

Monday, February 25, 2008

### **This week in D.C.: "Practicing Human Rights Law in America"**

Â Bill of Rights.Â (From the public domain.)Â Thanks to a listserv member for announcing this week's seminar on "Practicing Human Rights Law in America," which runs February 25-28 at the George Washington University Law SchoolÂ (from where I graduated) in Washington, D.C. The agenda is here. Â The program starts at 4:30 p.m. each day. Today's two panels will cover the death penalty and "Helping Refugees and Victims of Human Trafficking." Included on the death penalty panel is Diane Rust-Tierney, Executive DirectorÂ of theÂ National Coalition to Abolish the Death Penalty. Diane has a special place in my heart; I first met her twenty years ago when she spoke at my law schoolÂ on the death penalty along with Leigh Dingerson (then the NCADP executive director) when Diane was at the ACLUÂ fighting the death penalty. Â Wednesday and Thursday each have three panel discussions, plus a film screening of Rape Is...on Wednesday and a concluding reception on Thursday.Â I did my best during law school toÂ light a candle for justice while reading many distressing poorly-decided Constitutional opinions which often made me wonder whether anybody other than the lateÂ Justices Brennan and Marshall gave enough of a damn about giving true meaning and teeth to the Bill of Rights and the rest of the Constitution.Â In that regard,Â fellow student David Epstein and IÂ started a law school Amnesty International chapter, andÂ I ultimately turnedÂ my obsession over learning how deep and wideÂ run human rights violations in the United States,Â intoÂ heavily positive energy which stays with me to this day.Â Subsequent to my law school graduation, the clinical program there added the International Human Rights Clinic. The clinic has been supporting extraditing former Peruvian leader Alberto Fujimori to Peru. One thing that made me feel more distant from Amnesty International was its repeated calls -- after I finished law school -- for bringing human rights violators to "justice". I pointed out my reservations on this to an Amnesty member involved with one of these calls to "justice", not only because I have not yet found any prosecutorial system that I sufficiently trust, but because it is ironic to seek to have a human rights violator "brought to justice" by the same justice system that spreads injustice. I have similar reservations about the law school human rights clinic's support for extraditing Fujimori. This particular Amnesty member did his best to justify this "bring to justice" approach, and I continue having my reservations. Â In any event, the immigration law clinic was among my favorite parts of law school, especially when I helped obtain political asylum for one of my clients (another asylum-seeking clientÂ was denied at his deportation hearing, when we were unable to overcome the high hurdle of his alleged shopping for a third country before arriving in the United States). It is great to see the human rights message being shouted loud and clear through this week's "Practicing Human Rights Law in America" program.Â Jon Katz.

Posted by Jon Katz in Constitutional Law at 19:45

### **When prosecutors get prosecuted.**

Â TheÂ Bill of Rights.should apply no more nor more less to an arrestedÂ prosecutor than to anyone else.Â (Image from the public domain.)Â Homo sum: humani nil a me alienum puto./I am human: nothing human is alien to me - Publius Terence.Â So many prosecutors and cops so often sneer when I make arguments to them or to sentencing judges in the above vein. Now, the same argument is being presented by the longtimeÂ elected Wicomico County, Maryland, chief prosecutorÂ after his arrest for drunk driving in neighboring Worcester County.Â Wicomico State's Attorney Davis Ruark said of his arrest from last Friday, which involvedÂ an alleged 015 blood alcohol content reading:Â "I am human ... We are all human and we are subject to make mistakes and when you make a mistake you learn from it and you don't do it again. And this will never happen again."Â While Mr. Ruark remains in office, I hope he practices as his above quote preaches, and urge all other prosecutors, police, and judgesÂ to do the same. Jon KatzÂ ADDENDUM: Thanks to my law partner Jay Marks for sending me the listserv posting that carries the newslink on this story.

Posted by Jon Katz in Criminal Defense at 19:30

### **Impeachment with prior inconsistent statements.**

Â Bill of Rights.Â (From the public domain.)Â On February 7, 2008, Maryland's intermediate appellate court issued a lengthy opinion on the rules governing the admission into evidence of a witness's prior inconsistent statements for impeachment purposes. Though I have not yet read the full opinion, of particular note is that the appellate court determined that the trial judge applied the necessary balancing test for admitting such evidence, even though the record does not show the judge articulating any balancing considerations. Steven Jones v. Maryland, \_ Md. App. \_ (Feb. 7, 2008). I hope this case gets picked up by Maryland's highest court, the Court of Appeals. Jon Katz

Posted by Jon Katz in Criminal Defense at 19:00

Sunday, February 24, 2008

**Where's the sleight-of-hand man's third hand?**

Â This 2005 video shows how McCoy Tyner plays as if he had a third hand, including at the 6:45 through 7:40 minute mark. Â My inextricably intertwined connection to jazz and criminal defense practice is explained here. My related deepening fascination with John Coltrane and his music are covered here. Coltrane is such a big influence on me that he has been on my cellphone ringtones for several months, with A Love Supreme having been on there for the last several weeks. Â With that backdrop, yesterday my wife, son and IÂ stopped by a downtown D.C. hotel to check out its award-winning restaurant we want to visit soon. As my boy rode up and down the hotel's elevator and ran in and out of the building, a distinguished-looking man was standing outside talking to one of the staff. Later, my son and I passed him in the lobby, and I asked where he was visiting from. He said he is from New York and is a musician. He was beginning to look familiar, and I asked his name: "McCoy Tyner". To have that happen to me is like having a rock fan bump into Bono or Sting when no other fans are in sight. Â I was overcome with joy and emotion; this is no exaggeration. I have met several jazz greats -- usually in brief passing, aside from my two lengthyÂ meetingsÂ in 1999 with Cecil TaylorÂ (back at his hotel post-concert, along with our closeÂ mutual friend Trudy Morse and numerous others) and 2001 (more briefly, at Trudy's birthday celebration)Â -- but never have felt so overwhelmed in the presence of artistic genius. I suppose my reaction was a mix of McCoy being a true giant whose music nearly wore down my stereo turntableÂ needle (from the days before digital music), his amazing work for several years with John Coltrane (they're both on my cellphone ringer with A Love Supreme), and my deeper-than-ever appreciation of jazz musicians of his ability and sharing. Â Since the late 1970s, I would frequently play McCoy's amazing music while studying from junior high school through college. I was almost convinced that he had a third hand, because I could not believe that a mere ten fingers could accomplish his keyboard range and coverage. I first saw him perform in 1978 at Carnegie Hall during the Newport Jazz Festival, but saw no glimpse of a third hand. In 1985, I saw McCoy perform again at the Village Vanguard, delivering another great performance, but still with no third hand visible. Â At first yesterdayÂ I did not recognize McCoy; he shaved the thin mustache that graces his homepage. He is the real McCoy, of course. When I shook his hand, I saw those long fingers that could play four octaves seemingly without moving his palms. He seemed to take my emotional reaction in elegant stride, and mentioned enjoying seeing me interact with my son, who was stillÂ running everywhere. He agreed to take two cell pictures; the first one was overexposed and the second underexposed. I resisted the urge to ask for his autograph, lest my tribute to the man be spoiled by a focus on his celebrity. I also refrained from asking to see his third hand, but the third hand is still on my mind. Jon Katz.Â ADDENDUM: Here are some more McCoy Tyner links to check out: Â - A review of his 2007 CD McCoy Tyner Quartet, which I bought the night I met McCoy, and which I recommend. - A biography and interview from the Jazz Resource Center.- McCoy's biography on his official website. - McCoy was in town to play at the Kennedy Center on February 24. - Here is "Latino Suite", which was recorded for sale in 1986. - Here is a YouTube-posted interview of McCoy, probably from 2007. - Here, McCoy talks of living and music being the same thing; about being one with his instrument; about music being a "journey of the soul into new, uncharted territory;" He sounds like a t'ai chi musician.Â

Posted by Jon Katz in Persuasion at 19:00

Saturday, February 23, 2008

**To ride or not to ride?**

This video retraces part of Robert Pirsig's route recounted in *Zen and the Art of Motorcycle Maintenance*, on the very R60 ridden by John Sutherland along with Pirsig. NOTE: As is sometimes more common on weekends than the rest of the week, today's blog entry is less law-related, which is the side of my life that helps enrich the law practice side of my life. I never finished reading *Zen and the Art of Motorcycle Maintenance* (apparently reproduced here verbatim), and now cannot find where I last left my copy. What struck me most about this book by Robert Pirsig was the way he opened my eyes about his on-the-road experiences in the way -- but not as powerfully -- that Jack Kerouac did with *On the Road*. Right up to the time I became my own boss in 1998, I often viewed life and the world in much more bleak and gray terms than the much more positive turn I took after shedding myself of bosses, thus removing plenty of obstacles to feeling in much more positive and harmonious control of the rest of my life. Instead of sugar-coating life, Pirsig and Kerouac transcend tremendous chunks of its turmoil, but still do not escape all of it. Of course, Jack's life continued to be problematic enough that he died of alcoholism in 1969, which was an era of the best and worst of times; I was only six years old. Subsequent to Pirsig's inspiring *Zen and the Art* motorcycle journey with his son and friends, his son was shot dead by a robber. Why Pirsig in his afterword to *Zen and the Art* felt a need to make mention that the robbers were black is beyond me and continues disturbing me. Was the comment made from racial insensitivity, from trying to make a social commentary on race relations or for some other reason? As to bigotry, Ann Douglas in 1999 wrote that Kerouac "revert[ed] to the ugly anti-Semitic prejudices of his parents." Douglas continued that Kerouac "never interviewed the musician David Amram or the writer Joyce Johnson, both Jewish, who have stated that they experienced no hint of anti-Semitism in their relationships with Kerouac. Ginsberg saw Kerouac's anti-Semitism at first hand, yet until his own death in 1997, he held to his earliest, excited realization about Kerouac: 'If I actually confessed the secret tenderness of my soul, he would understand nakedly who I was.' Kerouac seldom judged; by all accounts, deliberate malice was foreign to him. In middle age, bitterly disappointed and drunk, he spewed prejudices the way some people use profanity." Reading *On the Road* -- here is a blog entry on one of my own experiences on the road, and here is another about how the best road taken is an internal journey -- can almost make the reader forget that while Kerouac was on the road, much of American pop culture was inundated with bland talk and mannerisms of Ike that were heavily mirrored on television and in television audiences and in the rest of American pop culture, which period covered the time of Communist witchhunts and a virulent time of the Cold War. Clearly, Kerouac was passing I Like Ike-type billboards while on his travels, while *On the Road* presented an alternative take on reality and, as I understand, tremendously influenced the counterculture hippie era that took the Sixties by storm. Reading *Zen and the Art* made me consider learning to ride a motorcycle, and to try out the path of secondary road riding pursued by Pirsig. I went to a Harley store after leaving the Fairfax County courthouse, picked up a pamphlet for a motorcycle driving school at a community college that had motorcycles provided by local vendors, and went into inertia until I bought a new bicycle six years ago, and liked how riding a bicycle provides the exercise that a motorcycle does not, and gives me many miles of paths for biking, walking and running that are off limits to motorized vehicles. If I take up motorcycle riding, it will be crossing over a line of physical risk-taking that I had previously drawn at whitewater rafting. which I have done both with and without a guide sitting in the same raft, and in which I once took a dive into the water at a particularly aggressive rapid. Then again, I do not know how much more dangerous motorcycling can be than the evening in 1985 that I walked from Greenwich Village at 2:00 a.m. back to my shoebox apartment near Gramercy Park, figuring that if a mugger came my way, I would just hail a taxi; when I snapped out of it, I realized that taxidrivers probably would avoid the risk. For now, motorcycling remains for me in the category of bungee jumping and parachuting; I have done none of them, except for riding on the back of a motorcycle for a few blocks at the age of seven, which was tremendously enjoyable. Those motorcycle riders with whom I have checked have told me of the skill needed to avoid wiping out not only from colliding with cars, but from negotiating around dangerous bumps that would be rather harmless to car drivers. Just this past week, a motorcycle-riding police officer escorting Hillary Clinton's campaign was killed after losing control of his bike; I would surmise he had plenty of riding experience, compared to my inexperience. At this point, the only reason I can think of for not learning to ride a motorcycle -- aside from setting aside the time to do so -- is to not cause the attendant risk to my family. I still have the desire, and if my two-year-old son gets the desire after he obtains his driver's license, that may open up a new opportunity. Jon Katz. ADDENDUM: Here is the description attached to the YouTube video shown above and uploaded by tfinlan: "A ride I took to the Black Hills retracing the route taken by Robert Pirsig and his son. The R60 was owned by John Sutherland who rode with Pirsig during the writing of *Zen and the Art of Motorcycle maintenance*. Elderly gentleman showing photos to my friend is John. My friend continued on to California and I headed home to Toronto from the Hills. Just didn't have the time to keep going."

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

**Wikileaks continues at .cx domain.**

Computer hard drive. (Image from Pacific Northwest Laboratory's website).  
On February 15, 2008, a federal trial judge in San Francisco ordered that wikileaks.org be closed. Although wikileaks.org no longer functions -- after its sitehost apparently carried out the judge's order to close down the site -- wikileaks.cx (.cx is the Christmas Island domain) appears to be a mirror of wikileaks.org, operating with full force. After the injunction was ordered, Wikileaks vowed to defy the judge's injunction order. This permanent injunction order against Wikileaks (the case docket is here) apparently came about just nineteen days after a lawsuit was filed against Wikileaks. That sounds like too short a time period to give the defendants a fair chance to receive and review the lawsuit (the injunction motion is here), to hire counsel, and to be heard. Hopefully Wikileaks will obtain an attorney to try to overturn this court order that was issued when the defendants were unrepresented. ADDENDUM: Thanks to Windypundit for correctly pointing out that Wikileaks.org was made inactive not by a sitehost, but by its domain registrar Dynadot. As of March 1, 2008, the site is running again. Jon Katz.

Posted by Jon Katz in First Amendment at 19:00

Thursday, February 21, 2008

**Police abuse in Shreveport.**

Â The only silver lining I know of about this police station beating is that the assaulting police officer was terminated. Thanks to Jonathan Turley for covering this story. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:04

Wednesday, February 20, 2008

### **How many journalists is the U.S. holding?**

Â Bill of Rights.Â (From the public domain.)Â The United States military learned much from theÂ negative Vietnam War news coverage, to make more effective effortsÂ at making people think subsequent wars are more like detached Space Invaders games than the bloody scenes of carnage they really are. Â Where will the U.S. government stop at trying to whitewash news coverage ofÂ its wars in Iraq and Afghanistan? (In her 2004 book *Exception to the Rulers*, Amy Goodman covers such whitewashing,Â and the complicity ofÂ too many journalists and news organizations in the whitewashing.) The Committee to Protect Journalists reports that the U.S. military has held CTV journalist Jawed AhmadÂ (also known as Jojo Yazemi) in detention in Afghanistan since October 2007, without charge or trial. The Washington Post reports: "Maj. Chris Belcher, a U.S. military spokesman, confirmed Tuesday that Ahmad is being held but said that he could not discuss details of the case."Â The Committee to Protect Journalists said on February 18: "Ahmad had only worked in journalism for one year, according to New York Times correspondent Carlotta Gall, who knows both him and [his brother] Siddique from her reporting trips to Kandahar. 'All of the local press corps have numbers of the Taliban and interview them regularly,' she told CPJ. 'Jawed had nothing more than the others in the way of contacts with the Taliban,' she said. Gall said Ahmad had also worked before that as a translator for the U.S. military and later for a security company in Kandahar. 'I have known him for some years from my many reporting trips to Kandahar. Jawed is well known among the local Kandahar press corps, as is Siddique, who worked sometimes as a driver for journalists staying at the Continental Guesthouse in Kandahar,' Gall said in a message to CPJ."Â On the South Asian Journalists Association's webpage, Anup KaphleÂ Â asserts that Mr. Ahmad's situation is not the first time that the United States military has held journalists without charge; I assume he is referring to the current wars in Iraq and Afghanistan; I have e-mailed him this morning asking for details of this assertion, having been unable to find such information on the website of the Committee to Protect Journalists.Â Â It is bad enough that the U.S. government intentionally detains and renditions terror suspects abroad to try to avoid having to provide the Constitutional protections that would be required within United States borders. When the United States detains journalists -- who collectively present about the only non-government-controlled window on the wars in Iraq and Afghanistan -- the U.S. government best immediately give an honest explanation for the detention and for any lack of criminal charges, without repeatedly claiming that security will be compromised to reveal such information. Jawed Ahmad's continued detention by the U.S. military without formal charges -- or even any public claim that he is an enemy combatant -- flies in the face of any claims that the Iraq and Afghanistan wars are about securing people's freedom and chills quality and independent coverage of those wars. Jon Katz.Â ADDENDUM: Thanks to South Asian Journalists Association memberÂ Anup KaphleÂ for responding with the followingÂ links in reply to my request for details about other journalists detained by the American military:Â Â - The February 21, 2008, New York Times reports: "At least two other journalists are known to be in American detention: Bilal Hussein, an Iraqi staff photographer for The Associated Press, has been held in Iraq since April 2006. Sami al-Hajj, a cameraman for Al Jazeera, has been detained since 2001, mostly at GuantÃ¡nomo Bay, Cuba."Â - The Committee to Protect Journalists reports that the United States military has detained dozens of journalists in Iraq, including eight for at least several weeks or more without formal charges against them. Â - Al-Jazeera reporter Sami al-Haj is detained in Guantanamo, Cuba, having been detained in various countries since 2001. Â - For extra measure, here is Democracy Now's coverage of former Guantanamo prison chaplain James Yee, who ultimately was thrown into solitary confinement for several weeks.

Posted by Jon Katz in Constitutional Law at 19:10

### **When an arrest is on an inapplicable roadway.**

Â Â Photo from website of U.S. District Court (W.D. Mi.).Â In driving-related prosecutions, an initial critical question is whether the driving was on a roadway that even applies to the criminal statute involved. The analysis starts with the text of the applicable criminal statute (e.g., driving while suspended statutes on this issue may be more beneficial -- or not -- to defendants than drunk driving statutes) and proceeds to court interpretations of the statute. Even for an offense as relatively minor as suspended driving, this issue is important beyond any risk of a suspended driving conviction, to include the risk of more criminal charges following if, for instance, the police then conduct an inventory search of the car (suspended drivers are not permitted to drive their cars away from the police) and find a stash of drugs. Â For instance, under Virginia law, no suspended driving crime is committed to drive on federal government facility roadway having signs barring entry. *U.S. v. Smith*, 395 F.3d 516 (4th Cir.Â 2005) (interpreting Virginia's suspended driving law). However, the opposite outcome occurs where "signs simply alert drivers that they must register at the gate and produce identification. If they are not on the restricted list, then they will be allowed to continue to travel." *United States v. Spencer*, 422 F. Supp. 2d 589, 592 (E.D. Va. 2005) (distinguishing the foregoing *U.S. v. Smith* decision).Â In Maryland,

suspended driving only takes place on roadways "used by the public." On February 20, 2008, Maryland's highest court reversed intermediate court precedents by deciding that driving while suspended "does not require the unrestricted right of the public to the use of the highway or private property in order to render the highway or private property subject to the requirements" of the suspended driving statute. *U.S. v. Ambrose*, \_\_\_ Md. \_\_ (Feb. 20, 2008) (decided on a question certified from a federal court). The Court determined the need for a factual inquiry "regarding the nature and extent of the use of the thoroughfare, roadway or property by the public. Whether the public's access to or use of the thoroughfare or roadway is restricted in any way by the owner is of no consideration to this inquiry." *Id.* Consequently, were the foregoing *U.S. v. Smith* case decided using Maryland law, signs barring entry would not have been enough, by themselves, to prevent a suspended driving conviction. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:00

Tuesday, February 19, 2008

**Confessions are inadmissible without interpreters' testimony.**

Â Bill of Rights.Â (From the public domain.)Â Foreign language interpretation is an art rather than a precise science (which helps explain why the Chevy Nova sold so poorly in Latin America, seeing that "no va" means "no go"). Consequently, it would seem obvious that suspects' statements made through a foreign language interpreter are inadmissible against the suspect at trial if the interpreter does not testify to said statements. Â However, at least in Texas, it appears that some of the intermediate appellate courts are in conflict over this hearsay issue. Texas's Fifth District Court of Appeals properly recognizes as inadmissible hearsay the testimony of a suspect's interpreted statement if the testimony does not come through the interpreter.Â Jose Carmen Saavedra v. Texas, 2008 Tex. App. LEXIS 25 (Tex. App. Dallas Jan. 3, 2008) (unpublished). Â Certainly, to rule otherwise, would severely harm criminal defendants, who must have the right to cross-examine the interpreter, not only as to the interpreter's recollection and understanding, but also as to the interpreter's qualifications, bias, and attention at the time of the interpretation. As a quadrilingual law firm, we know that many people present themselves as interpreters who have no business interpreting. People whoÂ had to struggle to learn a second language often appear to be moreÂ understanding than monolingual people about the criticalÂ need for an interpreter to be someone more than one who speaks two languages fluently. The interpreter must be able toÂ understand andÂ interpretÂ not only words and phrases, but also cultural cues and non-verbal communication. An interpreter can be the most brilliant person in the world, but if the interpreter does not like or care about the person whose words are being interpreted, the interpreter will not apply the sensitivity and deep listening that is needed to provide an accurate interpretation. Moreover, no two master interpreters will provide an interpretation that is exactly alike, and more mistakes will be made with interpreting (converting spoken words in real time) than with translating (converting words through writing them down and having a chance to review and correct the translation). Consequently, it is essential to have an opportunity to cross-examine the interpreter. Â SaavedraÂ Â cites toÂ Durbin v. Hardin, 775 S.W.2d 798 (Tex. App.--Dallas 1989, writ denied), as holding that "a police officer may not testify as to an interpreter'sÂ translation because it violates the hearsay rule."Â Saavedra v. Texas, 2008 Tex. App. LEXIS 25Â Unfortunately, as SaavedraÂ Â points out, the "Houston and Austin courts of appeals ... have adopted the 'language conduit rule,' which allows an officer to testify to an interpreter's translation if it meets certain requirements." Â Seeing that some courts do not require an interpreter's testimony to get interpreted statements into evidence, I plan to check whether this issue has been decided in the jurisdictions where I practice. To date, this only became an issue in one instance, where the prosecutor dismissed a misdemeanor case on the trial date upon recognizing that the interpreting police officer was not available to come to court that day. More common for me is challenging opponents and judges who question my contention about the unreliability ofÂ a bilingual client's (1) alleged waiver of certain rights and (2) alleged confession, in addition to seeing judges and prosecutors wrongfully being dismissive of defendants' requests for an interpreter in court.Â Â Â Thanks to Linda Friedman Ramirez for blogging on this Saavedra case. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:00

Monday, February 18, 2008

### **Fifth Amendment protects right to withhold computer password.**

Computer hard drive. (Image from Pacific Northwest Laboratory's website). The Fifth Amendment protects one from disclosing his or her computer password. In re Grand Jury Subpoena (Boucher), 2007 U.S. Dist. LEXIS 87951 (D. Vt. Nov. 29, 2007) (Niedermeier, Mag. J.). From reading this Boucher opinion -- which reached the press and blogosphere upon publication, and which I discuss here in part to keep the caselinks conveniently indexed for easy retrieval and monitoring -- one would wonder whether this is the first time this issue has been handled head-on in a written court opinion available on Lexis and Westlaw (Orin Kerr believes the answer is yes). A Shepard's search does not show this November 2007 opinion cited in any subsequent court opinions. A review of the Boucher online docket (the criminal complaint is here) shows that the prosecution filed an appeal from Magistrate Judge Niedermeier's order on January 2, 2008. On February 11, 2008, defendant Boucher filed a surreply in District Court to the prosecutor's appeal; that is the last docket entry in the case thus far. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:30

### **Marijuana myth-smasher John Morgan joins co-conspirator Lynn Zimmer in the hereafter.**

Image from public domain. John P. Morgan, M.D., was a pharmacology professor and advocate for marijuana legalization. With the late Lynn Zimmer, he wrote Marijuana Myths Marijuana Facts: A Review Of The Scientific Evidence (Lindesmith Center), going head on against such myths as the notion that marijuana is a gateway to more harmful drugs. He passed away on February 15, 2008, nearly two years after his co-author and friend Lynn Zimmer died. In this YouTube video posted by the Drug Policy Alliance/Lindesmith Center, Dr. Morgan talks about marijuana's low level of harmfulness in relation to other drugs. As to drivers under the influence of marijuana, he believes they often slow down. Even if marijuana turned out to be very harmful, which he discounts, he would find that to be all the more a good reason to have marijuana -- along with all other drugs -- legalized, regulated, and better controlled through the market place, and removed from the dangers of the current illicit drug market. Jon Katz.

Posted by Jon Katz in Drugs at 19:00

Sunday, February 17, 2008

### **ACP recognizes benefits of medical marijuana.**

Image from public domain. In a recent position paper, the American College of Physicians recognized real benefits of medical marijuana, called for continuing research, and acknowledged the importance of rescheduling marijuana from its Schedule I status. The report's executive summary states: "Marijuana has been smoked for its medicinal properties for centuries. Preclinical, clinical, and anecdotal reports suggest numerous potential medical uses for marijuana. Although the indications for some conditions (e.g., HIV wasting and chemotherapy-induced nausea and vomiting) have been well documented, less information is available about other potential medical uses. Additional research is needed to clarify marijuana's therapeutic properties and determine standard and optimal doses and routes of delivery. Unfortunately, research expansion has been hindered by a complicated federal approval process, limited availability of research-grade marijuana, and the debate over legalization. Marijuana's categorization as a Schedule I controlled substance raises significant concerns for researchers, physicians, and patients. As such, the College's policy positions on marijuana as medicine are as follows: "Position 1: ACP supports programs and funding for rigorous scientific evaluation of the potential therapeutic benefits of medical marijuana and the publication of such findings." "Position 1a: ACP supports increased research for conditions where the efficacy of marijuana has been established to determine optimal dosage and route of delivery." "Position 1b: Medical marijuana research should not only focus on determining drug efficacy and safety but also on determining efficacy in comparison with other available treatments." "Position 2: ACP encourages the use of non-smoked forms of THC that have proven therapeutic value." "Position 3: ACP supports the current process for obtaining federal research-grade cannabis." "Position 4: ACP urges review of marijuana's status as a schedule I controlled substance and its reclassification into a more appropriate schedule, given the scientific evidence regarding marijuana's safety and efficacy in some clinical conditions." "Position 5: ACP strongly supports exemption from federal criminal prosecution; civil liability; or professional sanctioning, such as loss of licensure or credentialing, for physicians who prescribe or dispense medical marijuana in accordance with state law. Similarly, ACP strongly urges protection from criminal or civil penalties for patients whose medical marijuana as permitted under state laws." Thanks to NORML for linking to this ACP report. Jon Katz.

Posted by Jon Katz in Drugs at 19:00

Saturday, February 16, 2008

**Here a scanner, there a scanner, everywhere a scanner scanner.**

Â Bill of Rights.Â (From the public domain.)Â An entire generation of people now as old as their twenties and older grew up with so many intrusions into their privacy that too many of them probably accept such a state of affairs unquestioningly, and thus are more willing to impose the same oppression on others. Â Unlike when I was in high school, today it is common in many high schools to have metal detectors and in even more schools mandatory urine-drug testing for intermural athletes (which makes me all the more unenthusiastic about spectator sports, although I still enjoy watching a good lacrosse game and some of the televised daring non-ball sports (e.g. wild obstacle courses, which I hope do not involve drug testing)). Â No job I have applied for (including several retail jobs while a student) ever involved a drug test, unless the urine sample I supplied during my medical exam atÂ the then-named Irving Trust Company -- where I worked as a commercial bank auditor the year before law school -- included a drug test rather than a test for my health (it was 1985, which makes itÂ possibleÂ that I wasn't being tested for drugs). Today, even to get a job at Pep Boys one must be drug tested, and I have seen that store proudly proclaim the same.Â Â Right through the 1980's, one could walk in the United States Capitol building without going through a metal detector. Today, one must pass through a metal detector just to go to the food court at the Old Post Office Pavillion in Washington, D.C., so I avoid the place. The Capitol building and grounds nowÂ are a fortress in many respects.Â At the otherwise wonderful American Indian museum in Albuquerque, a sign says that visitors are subject to search on exit; I did not notice the sign until leaving.Â One of the managers there -- a very likeable person -- said this measure was to catch people stealing the museum's artworks, and said some of the searched people are found with such items. I have not seen such a sign anywhere else, not even at the Smithsonian Institution, which has all sorts of treasures all over the place; on the other hand, the Smithsonian -- among many other museums -- has armed guards, which dampens the art experience with the violence of handguns at the ready. Â Before the mid-1990's, airline passengers were not required to show photo identification at check-in, and certainly did not need to remove their shoes. Let us not forget those days of less hyper-security. If we do, we are doomed to have even more oppressive privacy intrusions than we already have.Â As a criminal defense lawyer, I have to put up with intrusive security when visiting clients in jails and prisons; when visiting courthouses; and when visiting federal prosecutors' offices and police facilities. Â CONFRONTING FIDOSometimes, all this hyper-security is too much to put up with.Â For instance, my one run-in with jailers came in 1996. I was on my way to be interviewed at the last law firm with which I ended up working before opening our current firm in 1998. On the way, I stopped at the Maryland Correctional Institution in Jessup to meet a client. Seeing an imposing dog by the metal detector, I inquired whether it was a drug dog; it was. Not interested in trading my privacy rights to that level, I said I'd return when the dog was not there.Â Â Tensions were high at this prison at the time, I imagine, coming soon after a then-recent Maryland high court decision reversing the drug felony conviction of a man who had drugs in his trunk, which the prison officials ordered searched when he opted to leave the MCIJ prison grounds rather than submit to a random car search before proceeding to the parking lot. The court rightfully ruled that he had the right to leave, and that there was no lawful basis to search his car.Â Â Â I could have just left without saying anything; I certainly was offended by this invasion of privacy. At the time, I was still with the Maryland Public Defender's Office. A managing prison officer made a big and loud deal of my refusal to be sniffed for drugs. He acted incredulous that I would not agree to be sniffed; cops often act incredulous when they stop a car and the driver refuses to talk (even though such refusal is a Constitutional right). He huffed and he puffed, and he threatened to call my boss, which he did.Â Â The next day, my boss and her deputyÂ wanted to speak with me.Â They surmised the prison might not let me back without taking a drug test first, which would have been clean as a whistle. When I said I wasn't inclined to agree to a drug test, my boss said "This is your career," which it clearly was not, as I had already resolved to return to private practice that year, and did so just a few weeks later. It reminds me of a quote I heard from the great trial lawyer Tony Serra, to which I have long ascribed, that we must follow our consciences at all times.Â Â Â DO THOSE MACHINES SEE MY ANATOMY?Â Â Going through courthouse security can be a royal pain. Some security people are very professional and courteous. That has particularly been my experience with the marshals at the United States District Courthouse in Alexandria, Virginia. However, court rules ban cellphones and PDAs, which becomes a particular pain for those coming to court by subway, because the courthouse no longer provides lockboxes for cellphones. (A nearby carryout keeps it quiet that they will sometimes hold onto the items for a small fee.) Also, this is the courthouse where hyper-security reigned during theÂ Zacarias Moussaoui trial. Â Â At two county courthouses -- one in Maryland and the other in Virginia -- a contracting service handles security.Â On the infrequent days when I forget my bar card to bypass security (yes, that is unfair to those without courthouse passes), the experience can be most unpleasant, including when the security person taps on my pocket when the handheld scanner alerts, rather than just asking me what's in my pocket. Sometimes the security peopleÂ ask visitorsÂ to remove their belts. Â Â At least until last year, the District of Columbia federal courthouse had a futuristic scanner where the person faces the scanner with hands up in front of a third-moon plexiglass structure, and a scanner moves quickly in the direction of the plexiglass. I have yet to find out if this is one of

those machines that has the capability to see intimate anatomy. I put up with this nonsense for my clients. (And if it is not nonsense, why are such machines not at every courthouse, and not at the new entrance to this particular courthouse?)

A PUFF PORTAL IN MANASSASA few days ago, an FBI agent called to tell me that my client's hard drive copy was ready to be mailed to me or our computer forensics expert. I was already not far away, so I decided to pick it up myself, at the FBI's campus-like setting in Manassas, Virginia. I had to park by the guardbooth, where I was directed to a puff portal, which blasts air puffs on the person, apparently to dislodge any explosive particles from one's body. I was not asked to remove my keys from my pockets, so I was not sure if the machine checked for more than that. Not having been familiar before with such a machine, I would have preferred to have been told in advance that strong air puffs were going to hit my face and the rest of my body. I then would have asked what would be blown on my body, in order to decide whether to go through the machine. The security guard -- who worked with a contracting company -- told me to go into the booth and place my feet over the shoeprints on the ground. I did that, the air blasted on me, and the computerized voice said to exit, which I did the way I entered. The security guard came out of his booth and admonished me to listen to the voice in the machine. He started the procedure again, I thought the voice said to exit (without needing airblasts), so I exited forward through the blue bar. He admonished me that I was not following the computer voice's instructions (great, an FBI employee is telling me to do the bidding of a computer); I believe the computer was not communicating very well in the first place. After I finished with the puff portal, I asked the security person whether I had been blasted just with air or chemicals. He answered "chemicals." I figured he was joking. I walked to the building one hundred yards away, where the FBI agent waited and handed me the hard drive copy that I came to get. He told me he did not have to deal with the puff portal -- and apparently did not know what it was -- because he would go through the employee entrance. He escorted me to the gate, and I do not know if that was to assure I did not take out a soccer ball to kick around on the lawn. We passed the puff portal security man, and I asked if he was joking that I was blasted with chemicals, and the joker said he had been joking. I later learned that these machines -- also called explosive trace portals -- were installed in some airports, and have turned out to be clunkers. How sweet is poetic justice. Jon Katz

Posted by Jon Katz in Constitutional Law at 19:00

Thursday, February 14, 2008

### **Tragedy at Northern Illinois University**

Yesterday's tragic shooting at Northern Illinois University has been widely covered in the news. My initial inclination was to limit this blog entry to express my horror over yesterday's violence and to express my sympathy to the shooting victims and their loved ones. However, as with the Virginia Tech tragedy, expecting that this incident will be used for many people to advocate tighter security at academic institutions and tighter gun control, I offer these brief thoughts: - The shooter apparently is dead. Therefore, this is the time to slow the train to judgment and action. There is time for the tragedy to be investigated, and hopefully the investigation will be skillful, professional, accurate, and without bias. - All human life is sacred, and we must act accordingly whether a tragedy victim is caught up in a mass murder or in an event that does not reach the headlines. - The American criminal justice system is overcriminalized. The most powerful way to reduce violence in society is for each person to reach out to others in need. Otherwise, rampant violence will continue, and convicting and jailing people for violent crimes will just be a band-aid that barely covers the wound, and that does little to prevent new wounds. Jon Katz.

Posted by Jon Katz in Jon's news & views at 19:45

### **In Maryland, subsequent offender papers can't be filed for the first time on an appeal to Circuit Court.**

Photo from website of U.S. District Court (W.D. Mi.). In Maryland, District Court prosecutors in the larger counties get inundated with cases, to the point that sometimes they might inadvertently overlook filing timely pretrial subsequent offender notices while the case is in District Court. Md. Rule 4-245(b). If a defendant files a timely appeal from a District Court conviction for a retrial in Circuit Court, is the prosecutor then at liberty to file a subsequent offender notice in Circuit Court where no timely notice had been filed in District Court? Fortunately, the answer is no. Carter v. Maryland, 319 Md. 618, 622-23 (1990). In any event, even when the prosecutor has not lost the opportunity to file a subsequent offender notice, such notices should be reviewed for deficiencies with a fine-tooth comb. See Md. Rule 4-245(b). Jon Katz

Posted by Jon Katz in Criminal Defense at 19:00

### **Scalia and torture.**

Constitutional rights seem to be tortured enough by Justice Scalia's votes and pen. Now -- thanks to Scott Greenfield for posting on this -- we have an audio where he leaves open the possibility of permitting government torture in some instances. Chilling. Jon Katz.

Posted by Jon Katz in Constitutional Law at 19:00

Wednesday, February 13, 2008

### **Keep the light shining on cops.**

On February 12 came the story about the Baltimore cop assaulting a teen in broad daylight at a major tourist attraction. Also on February 12 came the story of the Florida deputy who dumped a quadriplegic from his wheelchair (thanks to Jonathan Turley for blogging on this atrocity). Where will it end? It will not end before people raise their voices against such police brutality, starting with shining bright lights on such abuse. Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:30

### **Something about Valentine's Day, courts, and sexual devices.**

Molly Ivins on the stupidity of Texas's ban on the sale of sexual devices. She did not live to see the Fifth Circuit's ban on this ban. Happy Valentine's day. When we set aside the commercial hype around the holiday, it is a day and state of mind that focuses on the power of loving and caring, and thus -- when practiced daily -- a way to reverse the violence, nastiness and heartlessness that has run rampant in human society since the beginning. Certainly a theme of Valentine's day is sex. Thus the "Get a Heart On" party thrown each year by my college's sole co-ed fraternity. Sexual activity between consenting adults and by those practicing it in solitary fashion should be fully protected. I write more about the necessity for sexual freedom here. In relation to our adult entertainment defense, when branching out in that practice area, one day I visited the large warehouse of an adult video and accessory company. Among the inventory were all sorts of wall-to-wall sexual devices, which are also known as sex toys, among other descriptions. Having seen such products in this warehouse, at adult entertainment conventions, and at retail outlets, it all seemed harmless to me, and remains so. In this age of HIV/AIDS, such devices, when not shared, do not spread disease. Why, then, would they be banned anywhere? Nevertheless, the sale of sexual devices is banned in Virginia, Alabama, Mississippi, and Texas. Did I say Texas? No longer are such sales banned in Texas, at least for the time being. On February 12, 2008, the Fifth Circuit overturned Texas's ban on selling sexual devices. *Reliable Consultants, Inc. v. Earle*, \_\_\_ F.3d \_\_ (5th Cir. Feb. 12, 2008). Reliable Consultants' 2-1 panel decision rested heavily on *Lawrence v. Texas*, 539 U.S. 558 (2003), which overturns the 1986 Supreme Court case that upheld a law criminalizing private sodomy by consenting adults. Of course, I will not be surprised if the case goes for en banc review, which may or may not spell the demise of this great panel decision. Is it a mere coincidence that this Fifth Circuit opinion comes just two days before Valentines' day? If so, how to explain that on Valentine's day 2007, the Eleventh Circuit upheld Alabama's sexual device sale ban as Constitutional? Mischievous judicial law clerks, perhaps? Meanwhile, this Fifth Circuit opinion is cause for celebration. Jon Katz. ADDENDUM: Thanks to the listserv members who brought this Fifth Circuit opinion to my attention.

Posted by Jon Katz in Criminal Defense at 19:00

Tuesday, February 12, 2008

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

Cesar Chavez: A champion for the empowerment of workers and immigrants. In May 2007, I decried the continuing and widespread use of the terms "illegal aliens" and "illegals". After a fellow criminal defense listserv member disagreed with my view against using the term "illegal aliens" (he apparently does not say "illegals"), I decided to see the extent to which statutes and regulations use the phrase "illegal alien," and was saddened to learn how frequently it is used, including in the following instances: - A federal statute provides for reimbursing states for incarcerating "illegal aliens" after conviction for a felony. 8 USCS § 1365(a). - A federal statute requiring the Attorney General to report to the House and Senate Judiciary Committees the numbers of "illegal aliens" convicted of felonies and incarcerated for felonies, and to provide a plan for removing and barring such people from the United States. 8 USCS §1366. - The Labor Department's migrant worker regulations define "illegal alien" as "any person who is not lawfully admitted for permanent residence in the United States or who has not been authorized by the Attorney General to accept employment in the United States." 29 CFR 500.20(n). - Virginia law prohibits "illegal aliens" from working in gun stores. Va. Code § 18.2-308.2:3(B). The phrases "illegal aliens" and "illegals" serve to dehumanize people; I do not want them used in my name by the government nor by government officials and employees. Jon Katz.

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

### **If Mickey Mouse were a criminal court judge.**

Bill of Rights. (From the public domain.) Yesterday, the Lansing State Journal interviewed me about the legitimacy of a disciplinary action against students where not all the disciplinary board members had been legitimately seated in their positions. The article is here <http://www.lansingstatejournal.com/apps/pbcs.dll/article?AID=2008802120324> (I am at a computer that will not enable me to insert links without using HTML language). I said that if any of the disciplinary board members were improperly appointed, "I certainly would use that as one of my defenses to reverse the sanction because if the board is without authority, then its sanction is meaningless." "It's like appointing Mickey Mouse to be a criminal court judge and having Mickey Mouse order someone to go to jail for five years." "The order for five years of jail by Mickey Mouse is null and void." Moving beyond Mickey Mouse to Joseph Stalin, some of the most draconian and unfair tribunals in the United States are student disciplinary bodies, which often act more like star chambers than people who want true fairness. Particularly at private schools -- because at least state-run schools are required to operate in conformity with the due process requirements of the Constitution (which does not automatically mean they do) -- some of the most shocking violations by student disciplinary authorities will be seen, including some places that do not even let an attorney in the hearing room with the student, and others that allow an attorney's presence but do not let the attorney speak to the disciplinary panel. I have been defending students in disciplinary matters for over seven years. It is a rush to stand up for their rights. My first article on the topic is here: <http://markskatz.com/students.htm>. Jon Katz

Posted by Jon Katz in Constitutional Law at 11:30

### **Shine the light on cops throughout the day.**

Here's another example why people should shine the light of day on police abuse with their cameraphones, and why strong legal protections need to be in place for videotaping, photographing, and recording police. This abortion of justice by this now-suspended cop took place in broad daylight near Baltimore's Inner Harbor, which ordinarily is swarming with visitors, working people, and car traffic throughout daylight hours. If this cop was ready to be so abusive in such a public place, I shudder to think what he tried to get away with under the cover of darkness. The Baltimore Sun article is at <http://baltimoresun.com/news/opinion/bal-te.md.officer12feb12,0,2952754.story>. Jon Katz

Posted by Jon Katz in Criminal Defense at 11:00

Monday, February 11, 2008

### **Six September 11 suspects to have military death penalty trials.**

Â Â In a secret military commission tribunal system where military-employed criminal defense lawyers are encouraged to pretend to defend, United States military prosecutors plan to seek the death penalty against six September 11 suspects who are held in Guantanamo, Cuba. Â Some supporters of such a death penalty trial talk in terms of this being the very instance where the death penalty should be sought, if there is to be a death penalty at all in the United States (of course, as of now, such a trial will be outside of the United States, in Guantanamo). A vehement opponent of the death penalty, I look at it differently.Â The death penalty system is so filled with landmines of unfairness that such a trial in Guantanamo -- which, as with all Guantanamo trials until now, most likely will be conducted in secrecy, without a jury, without an Article III judge, and without the other usual Constitutional protections afforded to defendants in civilian criminal courtsÂ --Â will help drag down the civilian death penalty system towards greater depths of unfairness.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 19:15

### **Tom Lantos leaves the planet.**

Â Â Bill of Rights.Â (From the public domain.)Â Â When it comes to politicians, I ordinarily have looked at the glass as more than halfÂ empty than the other way around. Until the age of fourteen or so (born in 1963), I was optimistic that Nixon was an aberration and that the political system could be made better than in Nixon's image. Many years later, I learned that I could no longer blame Nixon for surreptitious White House taping; Johnson did it and revealed it to Nixon apparently on Nixon's inauguration day, and Johnson apparently inherited the taping from Kennedy. So I had to find other ways still to despise Nixon's presidency, from his bag of dirty tricks to his bigotry to his overall ruthlessness;Â it appears he felt like a misfit who so much wanted to be liked,Â and gotÂ carried all the moreÂ away to the extreme when he got vindicated in 1968 over his 1960 debate and electoral defeat by Kennedy. I did not abhor the man enough (at age nine)Â to avoid waving back to him along with the crowd as he entered into a news conference in the Washington Hilton where we had just checked in and waited to see the man who only four months later would resign; I even resisted my thoughts about tearing up the autograph my parents got from him at a Manhattan restaurant nineteen years ago --Â which I have buried somewhere -- saying "To Jon- With Best wishes, Richard Nixon." Â When Jimmy Carter ran against Ford, I saw hope of putting the Nixon nightmare in the past, and entering an era where the president championed human rights and a non-imperial presidency. Carter's human rights messageÂ profoundly influenced me on my own road toÂ decades ofÂ work for human and civil rights. That is not to say, though, that Carter always practiced as he preached, including his targeting of Iranian students for deportation after the shah's overthrow.Â Carter was a rather short-lived intermission sandwiched between Nixon and Ford on the one hand and Reagan and George Bush I on the other. Reagan reigned throughout my college years and until a few months from my law school graduation. I had plenty to get me jaded about politicians and government, after all. After Clinton deposed Bush I, I recognized very clearly that our unjust criminal justice system, for instance, would not be overturned just by having a Democrat in the White House. My jadedness remainedÂ towards all politicians, regardless of party. I remain jaded as I try to figure out whether I will vote for Obama or Clinton in the February 12 primary. Â As I continued considering my February 12 primary choices, I learned that California United States Rep. Tom Lantos (D. Cal.) had passed away on February 11. I never followed him closely to know about his overall record. I know that he was a fighter from early on, who escaped the nazis. I know that Amnesty International sang his praises after his passing. I know he very publicly challenged Yahoo, Google and friends about their complicity with China's hunting of dissenters. Â I will try to learn more about Tom Lantos. Also, I will try better to view each politician as both a human and on the politician's own merits or lack thereof, which is how I wish people to view me and how I ideally wish to treat everyone. Jon Katz

Posted by Jon Katz in Constitutional Law at 19:00

Sunday, February 10, 2008

### **Randazza returns with a vengeance.**

Image from Library of Congress's website. Sometimes I am too spare in praising others. Of course, when I do praise, I clearly mean it. Two or three years ago -- through the First Amendment Lawyers Association's listserv -- I met Marc Randazza, a First Amendment lawyer in Florida who blogs expletives more often than I, because, like I, he often gets fed up with all the times that other people urinate on others' rights. I write more about Marc here and list his among my ten favorite blawgs. In late 2007, Marc's frequent blogging became temporarily more infrequent and sometimes much briefer. No more; the man is churning out great blogposts to compete with the quality and quantity of Jonathan Turley. Here are my favorites of his recent two-week output:

- The insanity of the Virginia Beach police's obscenity charges against an Abercrombie & Fitch manager for the company's skin-focused marketing images. The charges were dropped after a widespread outcry against this nonsensical affront to the First Amendment, due process, and individual liberty.
- The insanity of the \$1.4 million fine for airing the episode of NYPD Blue showing full rear nudity and much of a woman's bare breasts minus the areola.
- Whether cops may search iPhones and Blackberries incident to arrest. A good reason to ditch them?
- The sanctity of the right of people to videotape and photograph cops, and cops' backlash. In the process, Marc introduces us to Carlos Miller (see his Photography Is Not A Crime blog, which seems to be down as of early February 11), who is standing his ground against a prosecution following his refusal to move along after the cops espied him photographing them. Carlos's blog includes a discussion of bloggers who have lost their jobs from their blogs, including Jessica Cutler (who got fired from her Capitol Hill job after the discovery of entries in her sex-soaked blog about sex with one or more government folks) and Ellen Simonetti, who says Delta fired her from her flight attendant job, telling her it was for "inappropriate" photos of herself in uniform on her blog.
- David Lynch putting iPhone movie-watching in its place, including a well-placed f-bomb. Imagine watching Lynch's Eraserhead on an iPhone. Lynch is right.

Thanks, Marc, for focusing your blog entries on justice, and for keeping a sharp and undiluted pen at your side. Jon Katz.

Posted by Jon Katz in Constitutional Law at 19:00

### **Toking photo keeps Amy Winehouse from the Grammys?**

Image from public domain. Tonight will air portions of the fiftieth Grammy awards. I say portions, because the annual awards are notorious for going off-camera and offstage for giving awards for high quality music that draws limited mass appeal. However, being wildly popular does not automatically guarantee a Grammy stage spot for non-United States citizens suspected of committing drug crimes, even if the suspected activity is as minor as smoking marijuana. Amy Winehouse learned that, and I suspect that U.S. immigration authorities may not have sped along her visa denial appeal so quickly had the whole story not been so much in the spotlight. Although her appeal was ultimately granted, that happened too late for her to have had enough time to arrive at the Grammys ready to perform. According to the Associated Press: "Winehouse's original visa application was denied under U.S. immigration rules regarding the 'use and abuse of narcotics,' a senior State Department official said Friday, on condition of anonymity because the U.S. Embassy in London's application deliberations are confidential." What evidence did U.S. immigration officials have of Ms. Winehouse's alleged "narcotics" abuse? The A.P. report also states: "Last month, The Sun newspaper ran still images from a video that it claimed showed Winehouse inhaling fumes from a small pipe. The images were said to have been filmed during a party at her London home. Shortly thereafter, Winehouse entered a London rehabilitation center, and has been questioned by police." Was that the sole basis for the initial denial of a visa for Winehouse to travel to the United States? Since when is marijuana a narcotic, anyway, aside from any 1984-speak description of marijuana in the law books? One is left to wonder whether the United States' Orwellian state of immigration law and enforcement will continue like this even if Clinton or Obama take over the White House. Jon Katz.

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

### **Michael Maggio leaves the planet.**

Photo from website of U.S. District Court (W.D. Mi.). Today, Michael Maggio passed away. The world is all the poorer for it. In 1987 during my second year of law school, I was obsessing over how to overlap my goal of doing good with my law degree while not being relegated too long by my earnings to living in a group house and eating only rice and beans for dinner; of course, many honorable pursuits do not enable living much more luxuriously than with rice and beans. One evening in my immigration law class that year, I walked highly-skilled and optimistic immigration

attorney Michael Maggio (my immigration clinical and law class professor Paul Grussendorf also has been very inspirational), talking to us about determining when immigration matters are ripe for federal court action; his client Margaret Randall, who eventually tried regaining her United States citizenship after having previously renounced it (in 1989, the U.S. Board of Immigration Appeals ruled she never had lost her U.S. citizenship); and circumstances where maids in developing countries have maids. Instead of cursing the darkness in government and the legal system, Michael fought and fought for immigrants' rights in the courthouses, and in the so-called immigration courts that are actually part of the executive branch. My ears pricked up during law school when I learned that Michael had served as the personal court representative for the late Orlando Letelier (who served as an ambassador and defense minister to the Salvador Allende regime), having joined the survivors of Ronni Moffitt in suing the government of Chile for the bombing death of both people. (See Michael's comments here about the 1986 burning murder of young photographer Rodrigo Rojas, apparently by Chilean military members during the Pinochet regime.) Michael's law firm grew and grew, to include substantial business immigration work on top of immigration representation for individuals. Michael's remained a reliable voice in navigating the complex and overgrown area of immigration law analysis. My law partner Jay Marks, being an immigration law practitioner, knows numerous lawyers at Michael's law firm, and gave me the sad news of his passing today. On a website set up to share good wishes during Michael's illness, today I posted the following before knowing he had already passed: "Michael- You have been an inspiration to me ever since I first met you over twenty years ago, when you guest-lectured at my immigration law class taught by Paul Grussendorf. Instead of cursing the darkness, I saw you lighting a blowtorch towards eliminating it. Your name was already big by the time I met you, yet you still would speak with me as if I was one of your equals. Thanks, Michael. Jon Katz." ADDENDUM: Here is Michael's obituary, including information on his memorial services and coverage of his rise from humble beginnings in a one-room office.

Posted by Jon Katz in Jon's news & views at 11:00

Saturday, February 9, 2008

### **Meeting lawyer advocating D.C.'s handgun ban.**

Â Bill of Rights.Â (From the public domain.)Â On February 6, I was leaving one of the main District of Columbia government office buildings. Leaving at the same time was Dan Rezneck, who works with D.C.'s attorney general's office, previously served on the D.C. financial control board, previously was a lawyer at the large Arnold & Porter law firm, and previously prosecuted alleged obscenity (unfortunately) Â and other cases with the District of Columbia United States Attorney's OfficeÂ in the early 1960's. Â Not until I started talking with Rezneck -- as he walked towards the D.C. courthouse -- did I realize that he had argued theÂ Parker v. D.C.Â handgun ban case for the D.C. governmentÂ in the United States District Court, only to have it overturned against the government on appeal. The case now is pending before the Supreme Court under the name D.C. v. Heller. Clearly, Mr. Rezneck and I disagree very much on this issue. Â Mr. Rezneck is a past law clerk to the late Supreme Court Justice William Brennan (before whom I was starstruck when I met him in 1994). It appears that Mr. Rezneck is motivated by altruism (misplaced as to defending D.C.'s blanket handgun ban)Â byÂ working at the D.C. Attorney General's Office, since he likely earned much more in private practice. He has an interesting life story.Â Â Jon Katz

Posted by Jon Katz in Constitutional Law at 19:11

### **Our blogroll is back for good.**

Computer hard drive. (Image from Pacific Northwest Laboratory's website).Â Very infrequently do I discuss the technology of blogging, including my how-to entries here and here. Â Suffice it to say, it has taken me many hours and years of learning, doing, and trial-and-error to have a useful and smoothly functioning website (born 1999) and blog (born 2006). On February 8, I blogged that our blogrolling.com software was down, and that I would find an alternative solution if the problem persisted, which it did.Â Therefore -- when blogrolling.com had been down for many hours; it later came back up --Â I scrapped blogrolling.com and copied and pasted our blogroll directly into our blogging program. Â It will be more of a hassle to maintain the blogroll without blogrolling software to help me avoid needing to deal with HTML code each time I add or remove a blog from our blogroll. However, it is a bigger hassle to use blogrolling software that is not reliable enough. Messy Studio received an insufficiently detailed comment from a person purporting to be Ross Rader (who was running blogrolling at some point, and maybe still is), saying: Â "We've definitely not abandoned Blogrolling.com. How are you trying to get in touch with us? i.e. what address are you emailing to? Let me know if I can help with anything. Posted by: Ross Rader | 06 February 2008 at 08:31 AM"Â Two commenters on Messy Studio recommended Google Reader for blogrolling. A 2005 commenter on Pariah talks about Bloglines. I will check them out. Commenting on my February 8 blog entry on this topic, bloggerÂ ZuDfunck said: "Get ready to make one [a blogroll]Â yourself...It's a pain but I have a few I have made over the years using the OPML that blogrolling use to supply... Looks like you have some blogroll in place so you must have fixed it eh?"Â Now that our blogroll is running again, I can return to focusing harmoniously on the substantive part of blogging. Jon Katz

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

Thursday, February 7, 2008

### **Our blogroll is down temporarily.**

FYI, our blogroll is down, thus showing error messages on our blogroll and wider margins on the right side of our blog. I have rarely experienced problems with blogrolling.com, which currently is showing a fatal error message when visiting its main webpage. Such technical difficulties can happen with all websites, and I hope this is a temporary problem. If it is not, I will upload our blogroll in a different fashion. If you have any alternative blogroll software to recommend, please let me know, at [jon@markskatz.com](mailto:jon@markskatz.com). Jon Katz

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

### **Why is lawyer Ben Kuehne being indicted for money laundering?**

A Bill of Rights. (From the public domain.) Indictments are obtained in such a secret, uneven, unfair and often unjust manner that the day perhaps is around the corner when one day a grand jury will approve the indictment of a lawnmower if a prosecutor requested it. Unfortunately, not enough solace exists by merely responding that the accused is presumed innocent until proven guilty beyond a reasonable doubt. For instance, bond laws at the state and federal level often presume that certain criminal charges give rise to a presumption that no bond will assure the defendant's presence at all court dates. Additionally, an indictment often amounts to a scarlet letter against the defendant in relation to his or her neighbors, friends, employers, and co-workers. An indictment is a sword that only prosecutors are permitted to seek and wield; it is an unfairly lopsided situation. In the news of February 7, the money-laundering federal indictment (here, and the case docket is here) against Miami lawyer Benedict Kuehne was unsealed. His indictment arises from allegations that he intentionally misadvised well-known lawyer Roy Black that multi-million dollar legal payments to Mr. Black were coming from legitimate sources. The indictment alleges that Mr. Kuehne helped cook the books upon which he rested his advice to Mr. Black. These are mere allegations; let us see what proof the prosecution has. Ben Kuehne is solidly a member of the legal establishment, and one whose politics seem to be very much Democratic and in opposition to those of Miami's United States Attorney who is likely a Republican, having been appointed by George Bush II. How much is this prosecution legitimate versus an attempted warning to members of the private bar that nobody is safe from sham indictments if prosecutors are even willing to go after roundly well-respected establishment lawyers? Similarly, in Virginia, why did the elected Commonwealth's Attorney of Albemarle County (voted out of office last November) bring an indictment (ultimately dismissed by the judge, thank goodness) against apparently well-respected lawyer Deborah Wyatt for embracery of a grand jury for the apparently non-existent "crime" of letting some grand jurors know she was available to testify before them (when prosecutors have full access to put any witnesses before the grand jury that s/he chooses, behind closed doors, with no judge nor criminal defense lawyer present)? Why, indeed. As Mr. Kuehne's prosecution unfolds, we will hopefully see the extent to which this prosecution is or is not about disingenuous shenanigans by the prosecution. Jon Katz ADDENDUM: Thanks to a fellow listserv member for bringing this Ben Kuehne case to my attention. The Miami Herald article on the Kuehne case is here.

Posted by Jon Katz in Criminal Defense at 19:00

### **February 11 China human rights rally in Lafayette Park.**

Tiananmen Square massacre. Best viewed on an empty stomach. On June 3, 1989, I was about to go to sleep before going to my younger brother's high school graduation the next morning. The television news reported on the Tiananmen Square massacre that had taken place. The news reports were just coming in, and apparently in the process of being clarified and detailed. Having no Internet for getting more information, I went to bed with a sick feeling in the pit of my stomach. The next morning I watched the news to learn how massive, extreme and brutal had been the massacre. I felt even sicker. I write more about this here. China's human rights situation seems barely improved since the massacre, other than that no such broad-scale massacre has been repeated since. What, then, is China's reward for such brutality? The 2008 summer Olympics, that is what. For those inclined to participate, on February 11 will be a rally in Washington, D.C., demanding a pre-Olympics end to human rights abuses in China. The rally will begin 12:00 p.m. at Lafayette Park (across from the White House), 1608 H Street, NW, Washington, D.C. More information may be obtained from Amnesty International's media office at 202-544-0200, x302. Amnesty International's news release on this rally is here. The mass emailing I received from the International Campaign for Tibet about this rally states, in part: "The Chinese Government has clearly not delivered on its promises to the International Olympic Committee and the global community to improve human rights in China and Tibet in the lead-up to the 2008 Beijing Summer Olympics."

"Human rights groups are coming together to remind the world of China's broken promises. If the 2008 Beijing Games are to avoid shameful historical association with Nazi Germany's 1936 Berlin Games, or the Soviet Union's 1980 Moscow Games, then China must make real progress on human rights before this August. As we mark the six-month countdown to the Olympics, please join the International Campaign for Tibet, Amnesty International, and other organizations in front of the White House for a mid-day rally in support of human rights in China and Tibet. ICT is calling on President Bush to rethink his commitment to attend the Olympic Games because of China's blatant disregard for American human rights diplomacy." One blogger focuses on human rights in China through a blog named Boycott 2008 Communist Olympics. Business as usual should not be tolerated in China, which already dominates a huge portion of the United States' import market, including computer components, toys (many revealed to contain dangerous lead levels), and chinaware. Jon Katz

Posted by Jon Katz in Jon's news & views at 16:00

Wednesday, February 6, 2008

**When a judge reviews another's issuance of a warrant.**

Â Bill of Rights.Â (From the public domain.)Â Charles E. Moylan, Jr., is a retired judge of Maryland's intermediate appellate court who tends to write very long opinions and who -- like many retired Maryland judges (seventy is the mandatory retirement age) -- continues to sit on the bench from time to time byÂ special assignment. Judge Moylan's latest opinion, issued yesterday, is one of those lengthy opinions -- which means I need more time to review and digest it -- and addresses in detail a motions hearing judge's role in reviewing another judge's decision to issue a search warrant, starting with Judge Moylan's talking about the reviewing judge's need to use appellate review principles in doing so. Â The case is Maryland v. Demetrius Jenkins, \_\_ Md. App. \_\_ (Feb. 6, 2008). Maryland's highest court, the Court of Appeals, seems never to hesitate to overturn Court of Special Appeals decisions, so I will check whether this case proceeds to the Court of Appeals by a writ of certiorari. Jon Katz

Posted by Jon Katz in Criminal Defense at 19:00

Tuesday, February 5, 2008

**Why don't you ask your client?**

Photo from website of U.S. District Court (W.D. Mi.). In Virginia District Court, mandatory criminal discovery is practically non-existent, and is limited to defendants' statements to law enforcement that the prosecutor intends to introduce into evidence, the defendant's criminal record, and Brady/exculpatory evidence (except that the prosecutor is ordinarily the sole person to decide what evidence is exculpatory, which is like having the fox guard the henhouse). Va. Sup. Ct. Rule 7C:5. Moreover, the governing court rules require seeking a pretrial discovery order even to be able to obtain Rule 7C:5 discovery, and in some counties, a lawyer must appear for a pretrial hearing just to get a judge's signature on a discovery order that the defendant is entitled to in the first place. Worse, in all Virginia courts, Jencks is non-existent. Welcome to Virginia, where I visit but do not live (I live in the People's Republic of Montgomery, Maryland; my "Close but no cigar" case described here and experience -- while waiting in court for my cigar case to be called -- seeing overpaternalism (at best) by the County Attorney's Office in trying to enforce overpaternalistic county regulations led me to give the county such a moniker). Because of the limited mandatory discovery available in Virginia, interviews of the police in a criminal client's case become all the more important. However, in some counties the cops are very tight-lipped and refer the lawyer to the prosecutor. (Practice pointer: Sometimes I will suggest to a tight-lipped police officer to remove the tight lips, lest I cross-examine the cop at trial about how s/he plays favorites with who s/he tells "the truth".) Except for counties that believe in giving more discovery than mandated by law (Arlington County is one of them), many prosecutors will be stingy about giving any discovery not required -- in their view -- by the discovery rules. As a result, one's stomach often can be turned by hearing cops and prosecutors frequently say (sometimes cheekily): "Why are you asking me that. Your client was there. S/he will know." There you have it. Instead of my getting discovery from the opponent (and to know what the cop knows (or claims or lies about), in helping my client make a calculated decision whether to seek a trial with a jury or without, or to negotiate a resolution of the case (and the best approach to negotiate)), all I need to do is to ask my client. Aside from the preposterousness of such a response, what if my client lies to me (many of my guilty clients lie, and I doubt I am the only criminal defense lawyer with this problem), or is too inarticulate or unintelligent to understand what I want to know, or was -- at the time of the incident -- too inebriated (that sometimes happens) or confused or without a sufficient perspective to know what happened or to know how the cops saw the situation? Sometimes cops ask me: "What did your client tell you? Then I can fill in some of the blanks for you." There you have it, just give up attorney-client confidentiality and the criminal defense client's right to remain silent, and give all the information to the cops. NO. Don't do it. Jon Katz

Posted by Jon Katz in Criminal Defense at 19:00

Monday, February 4, 2008

**And forever in peace may you wave/waive.**

Â Bill of Rights.Â (From the public domain.)Â Even well-meaning judges and lawyers sometimes will unintentionallyÂ put criminal defendants' rights at risk. A late and usually amiably-speaking judge (I said amiably-speaking, but not without substantial faults) repeatedly would ask non-English speakers -- apparently out of concern for their well-being and earning power -- seeking postponements to get lawyers (fortunately he would grant the postponements): "Do you have a green card?" "Why not?" I'll tell you why, judge, because the United States government and its elected officials make a green card harder to obtain for too many "lower-skilled" people than panning for gold.

Â Another judge, in Maryland District Court, known frequently for giving harsh sentences at the front end and for probation violation findings, would tell defendants who appeared without a lawyer for trial that becauseÂ the court commissioner had already advised themÂ at least a fewÂ weeks beforeÂ of the right to counsel (right, on the night or day when the defendant was dealing with the recent trauma of being arrested and locked up, which is hardly an ideal time to focus on and understandÂ the rights being swiftly told by the often assembly-line commissioner, who is not required to have a law school education nor to be a lawyer) that "I assume you waive the right to counsel, waive your right to a jury trial, and freely elect to proceed before this court today. Is that correct?" The Pavlovian response usually was a confused "yes", just like one's leg involuntarily kicks up when the doctor taps the reflex hammer on one's knee. It was apparent to me that the foregoing litany would just go in one ear and out the other of too many of these unrepresented criminal defendants, often scared, risking conviction andÂ the loss of liberty. Â One day, an unrepresented defendant entered a guilty plea before the foregoing judge, but, before being sentenced, told the judge he wanted a lawyer and a trial. The judge told the man it was too late, since he answered affirmatively that he was waiving his right to a lawyer and a trial. The man was scared and adamant to withdraw his guilty plea. I was a public defender lawyer at the time, ordinarily got along fine with the judge when he was off the bench, and volunteered to give my two cents, which he accepted. I suggested that the defendant seemed so confused, that it was questionable whether he thought "waive" (as in to give up rights) actually was "wave" (as in to welcome rights and to wave at them). When lawyers spend more time with real people on an even level, they will learn that a large percentage of people do not know what waive, presumption, and suppress mean in court, among other essential legal words. It would be nice, then, for judges to replace "waive" with "give up". Â Many years later, just this year, I heard one of the more intelligent judges who apparently wants to do the right thing as he defines it, asking a pro se criminal defendant if the judge was correct that the defendant was "waiving" his right to a lawyer, after the defendant had flip-flopped back and forth between saying he wanted to plead guilty, wanted a lawyer, and "yes" to "waiving" his right to a lawyer. He seemed more like a deer caught in the headlights who did not know what to say in front of this black-robed authority figure sitting on a chair/throne elevated higher than everyone else in the courtroom. The judge denied the defendant a continuance to get a lawyer. At least the judge advised the defendant of his right to demand a jury trial, which only would have sent his case to the Circuit Court for a trial the same day; the defendant was confused about that right, too. Â Then there are the judges who sound like downright tyrants before unrepresented criminal defendants. One day a trial judge called an unrepresented criminal defendant front and center and started explaining the defendant's option to be interviewed for a theft diversion program if he did not want to first try to consider the program afterÂ seeking a court-appointed or paid lawyer. The defendant politely looked at the judge. When the judge then asked "What is your pleasure?" the defendant stammered out "No speak English." The judge exasperatedly blurted: "Why didn't you tell me that in the first place?" and told the man to wait for the interpreter. Hello, judge, this unrepresented and likely scared defendant was called before an authority figure sitting up high in robes, not knowing what you were saying in English, and perhaps scared out of his wits of the backlash that might take place if he even dared to stammer to you in mid-sentence that he spoke no English. For all I know, the defendant may have come from one of the countless countries where judges reign terror upon the powerless masses in the service to the wealthy and powerful people who pay their salaries, bribes, or both. (Certainly, even systemically,Â the American judicial system, as well, primarily maintains the status quo in favor of the wealthy and powerful, with some exceptions, of course.) Â As much as I wanted to talk to the foregoingÂ judge about his exasperated response to the unrepresented non-English-speaking gentleman, my case got called soon after this gentleman's case.Â I thenÂ had the choice between leaving the courthouse after handling my quick procedural matter (to thenÂ help my next client) or to wait to see if the judge would even see me one or two hours later in chambers. I could have, and should have, arranged to communicate withÂ the judge another time about this; I do not go to that courthouse often enough to have stored the judge's name in memory. Of course, noÂ guarantee exists that the judge will not take out such talk from a lawyer -- even if couched in diplomatic words and a respectful tone of voice -- against the lawyer and his or her clients. However, if lawyers witnessing such behavior do not speak up -- either directly, anonymously, or through the local bar of state criminal defense lawyers association -- who will?Â Â Recently again, an unrepresented defendant's case recently was called in a Maryland District Court where continuances cannot be obtained by demanding a jury trial (which is not a right to be demanded without careful thought, because a jury trial also can be

obtained by appealing a conviction in District Court to Circuit Court if a probation before judgment is not sought or received), because the jury trial will just take place later that day or the next day, at least for unrepresented defendants unable to seek another date based on calendaring conflicts. This time, the judge was someone who has an apparently well-earned reputation for being fair-minded, kindly-toned, and intelligent. The prosecutor told the judge that he understood the defendant wanted a continuance to obtain a lawyer, and that the prosecutor did not object. The judge then went into a lengthy question and answer session with the defendant to try to find out what the defendant had done to obtain a lawyer. When the defendant said he had recently lost his job well in advance of the trial date to meet the public defender's cutoff date to apply for one, the judge put the defendant under oath (without telling the defendant of his option to refuse to talk, particularly without a lawyer present) to put his reasons on the record why he was present without a lawyer. The judge, nevertheless, denied the postponement, and told the defendant he could speak with the prosecutor at the break (without telling him of his option not to talk with the prosecutor, including under the Fifth Amendment). Perhaps the foregoing judge was exasperated to see the defendant -- after having been advised at least one month before of his right to counsel at a preliminary inquiry, and his risk that he would be deemed to have waived that right by appearing on the trial date without one -- having done little to obtain a lawyer in a huge courtroom awash with unrepresented defendants, with the knowledge that each continuance to obtain counsel makes the courtrooms burst all the more at the seams. (As I have said many times, I urge legalizing prostitution, gambling, and marijuana and to heavily decriminalize other drugs, not only for civil liberties reasons, but also to eliminate an overgrown and overly unjust criminal justice system that runs rampant on the right against unreasonable search and seizure, the right to obtain a just bond, the right to receive a fair sentence, and the list goes on; having a smaller criminal justice system will enable hiring, training, paying and retaining better candidates overall.) I only hope that the foregoing judge, who seems to have many excellent qualities as a judge and as a person, will not put any more unrepresented defendants under oath concerning continuance requests, and if he does so, that it only will be because the judge is likely to grant the continuance, to make clear to all in the courtroom that they best not be fibbing about the reason for seeking a continuance (and this particular unrepresented defendant did not sound like he was fibbing). On the topic of seeking more time to obtain a lawyer, effective private criminal defense lawyers can be very expensive. If the legislators, judges and others setting the guidelines for approving and rejecting candidates for indigent counsel and deciding whether a person has been just plain dilatory in hiring a lawyer (and why should a low-income defendant be deprived of some more time to hire a private lawyer if that is what the defendant wants and if the defendant has a real chance of borrowing or otherwise finding the money to hire a lawyer?) had a better idea of how high are the prices of private lawyers, perhaps they would be more flexible in making them eligible for indigent defense in the first place, as well as more than just four weeks to pay a lawyer. And forever in peace may you wave. (Oops, or was that waive?) Jon Katz

Posted by Jon Katz in Constitutional Law at 19:00

Sunday, February 3, 2008

**Persuading in the moment.**

Â Yin YangÂ From time to time, I blog about persuading and battling in the moment, with fearlessness, calm, absence of anger, and compassion for everyoneÂ includingÂ opponents. Samples of such blogposts areÂ here, here, here, and here.Â Â Â Â When successful with this approach, my opponents are less likely to stiffen up to be ready to defend against an attack by me, and are more likely to be open to my words and off guard to the timing, direction, and form of my attacks. It is part of the ironic power and strength of softness that t'ai chi master Cheng Man Ch'ing repeatedly addressed. Â Following are some inspirations that I have internalized to assist in reaching greater calmness, fearlessness, and non-angerÂ in going to battle, no matter how tough the approaching battle. Â One inspiration is this passage from Zen in Martial Arts: The Present Moment: "A Japanese warrior was captured by his enemies and thrown into prison. That night he was unable to sleep because he feared that the next day he would be interrogated, tortured, and executed. Then the words of his Zen master came to him, 'Tomorrow is not real. It is an illusion. The only reality is now.' Heeding these words, the warrior became peaceful and fell asleep."Â Similarly, Zoketsu Norman Fischer said: "In Buddhist funeral services we always say, in true reality there is no coming no going no increase no decrease no birth and no death. This is a deep expression of our gratitude for existence as it is, our knowing that life in order to be life is always full of death, and death, in order to be death, is always full of life."Â Concerning this concept, Tibetan studies professor Ringu TulkuÂ (see here, too) writes that the concept "that all phenomena are devoid of coming and goingÂ ...Â means that an enlightened bodhisattva sees the truth, the way things are. This is seeing directly without adding any concept or philosophy. Within this clear vision there is not theÂ slightest doubt about anything, so there is no need for clinging or running away. A realized bodhisattva has no dualistic view. Within this sheer and naked seeing, spontaneous compassion arises. Once we no longer feel compelled to cling to ourselves and fixate on our own problems all the time, we can look around and see everything clearly. We can perceive others' lives and understand how and why they experience their problems. Although we see that others are suffering greatly, we know that their suffering is almost needless. They are not doomed to be in pain, because their suffering just comes from a wrong way of seeing and reacting. If they could see how things truly are, they would not suffer anymore. This is the understanding of an enlightened being." Ringu Tulku, *Daring Steps Toward Fearlessness: The Three Vehicles of Buddhism* at 58 (Snow Lion Publications, 2005). Â Being heavily influenced by Buddhism, but not being a Buddhist myself, it is a big concept for me to swallow that we can all transcend suffering by becoming enlightened. One way for me to proceed in this direction is to know that people can harm others physically, but cannot harm their souls. Another way is to move away from my clinging to my body and my obsession with whether my mortal death will bring an eternal void with no awareness or consciousness by me. One way for me to do this is to try to be less self-centered aboutÂ hanging onto my own life. Another approach is to recognize that if I have no awareness or conscience after I die, I will haveÂ no worries about my death at that point. Thich Nhat Hanh puts it well as follows: "Birth and death are only doors through which we pass, Sacred thresholds on our journey, Birth and death are a game of hide and seek" Thich Nhat Hanh, *Chanting and Recitation from Plum Village*. Page 188.Â Finally, another inspiration on this path is less profound, or is it? One day in the Fairfax County Bar Association lawyers'Â lounge, I overheard -- as much as I tried not to hear -- a very calm colleague speakingÂ by phone to a client who was very late to his court date,Â which possibly was a jury trial after an appeal from a District Court bench trial. This lawyer at first sounded wimpy, as he asked his client what he should tell the judge, as the client apparently regaled the lawyer with his tale of being stuck in Washington, D.C., with another obligation; I had visions of my own likely reaction, which was to tell my client that he was cruising for a bruising from the judge if he took such a lax attitude about arriving late to court. However, the lawyer's approach kept personal responsibility in his client's hands, kept the lawyer calm (and, thus, more powerful), and kept open the lawyer's and client's ability to continue working together as a team.Â This lawyer was practicing t'ai chiÂ perhaps without even knowing it. Jon Katz.

Posted by Jon Katz in Persuasion at 19:00

**"I only regret that you didn't do this 10 years ago."**

Â Millions of people have been born in the United States long after lunch counter sit-ins were used as a fundamental part of the movement to end racial segregation. Everybody should know about the sit-ins. Sadly, of course, rampant racism and racial segregation continue in the United States, even though usually in more subtle ways than the in-your-face Jim Crow of the South. Â A sit-in that spawned many others was the February 1, 1960, sit-in at the lunch counter of the Woolworth store in Greensboro, North Carolina. That same year, Robert M. Bell -- who now is theÂ Chief Judge of Maryland's highest court -- was arrested and subsequentlyÂ convicted for trespass in a Baltimore restaurant desegregation sit-in.Â The United States Supreme Court left it up to the Maryland courtsÂ to decide whether the

intervening change in Maryland's sit-in/trespassing laws would dictate a different result. Unfortunately, the Maryland Court of Appeals said no. *Bell v. Maryland*, 236 Md. 356 (1964). On February 1, 2008, National Public Radio ran a very moving story of the Greensboro sit-in, including a current interview with Franklin McCain, who was one of the four sit-in participants. Mr. McCain recounts: "Fifteen seconds after [sitting at the lunch counter] I had the most wonderful feeling. I had a feeling of liberation, restored manhood. I had a natural high. And I truly felt almost invincible. Mind you, [I was] just sitting on a dumb stool and not having asked for service yet." About an older white woman looking at the sit-in participants, Mr. McCain says: "And if you think Greensboro, N.C., 1960, a little old white lady who eyes you with that suspicious look she's not having very good thoughts about you nor what you're doing." He was wrong. After the woman finished her coffee, she walked to McCain and fellow participant Joseph McNeil, and put her hands on their shoulders: "She said in a very calm voice, 'Boys, I am so proud of you. I only regret that you didn't do this 10 years ago.'" "What I learned from that little incident was don't you ever, ever stereotype anybody in this life until you at least experience them and have the opportunity to talk to them. I'm even more cognizant of that today" situations like that and I'm always open to people who speak differently, who look differently, and who come from different places." Smashing stereotypes is critical. Jon Katz. **ADDENDUM:** The transcript of this NPR story is here. The tape of the story is here. The Smithsonian's website discusses this sit-in here.

Posted by Jon Katz in Constitutional Law at 15:10