



The Case of the

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James A. Cuthbert, attorney at law, was reeling. Seated at his teak desk, high in the office tower, he overlooked downtown Brisket, a college town in the underbelly of Michigan. Judge Kline's secretary had phoned that Hizzonner had appointed him to defend George Snethner, a convicted pedophile facing new charges of criminal conduct on the Internet. His first impulse was to send his secretary down to the newsstand to see if the *Brisket Bugler* was covering the case. His second move was to dial MacGregor. He would need some counsel on this case. MacG's line was busy. "Typical," Cuthbert thought. "How can a senior barrister operate a law practice with one phone line?" MacG had told him "I can only talk to one person at a time, why pay for two lines? Why have a back-up answering machine that'll start a round of telephone tag?"

Nelda came in with the *Bugler*. "OhMi-God," Cuthbert thought, as he focused on the front-page story: "Insurance Adjuster Charged with Stalking Teenage Girl on Internet." The story detailed Snethner's arrest at the food court in the Briarwood shopping mall where he scheduled a rendezvous with "Linda," a 13-year-old. He had a teddy bear and held the strings of a bunch of helium balloons. All this was caught by the television camera of Channel 7, tipped by the police. "Geeze," Cuthbert thought, "Kline is doing pay-back for supporting his opponent in last year's election."

The phone rang. "MacGregor's on the line," Nelda called from the outer office. "MacGregor! How did you know I needed to talk to you?" Cuthbert practically shouted into the receiver.

"Hey lad. Chill out. I just had Caller ID installed. It tells me who called when I'm on the line. I'm going 21st Century lad," MacG cheerfully shot back.

"Well MacGregor, I'm going straight to the poorhouse. Didya see the story in the *Bugler* about the computer pedophile?" Cuthbert asked. "The guy was on the TV news last night. Insurance adjuster. Company fired him right after the arraignment this morning. Now he's indigent and Kline says I have to defend him. The notoriety is gonna kill my practice. Who'll wanta hire a lawyer that defended such a slimeball?"

"Hold on Jamie. I haven't seen the paper yet, but he isn't a pedophile until or unless he's convicted. So don't go referring to him as such," MacG instructed.

"Wrong there MacGregor. The guy served a term in prison for child molestation. Now they caught him again. They've got Internet evidence, it's all in writing. They're going to nail him to the wall! What am I going to do?"

"Jamie, Jamie, ya needna get yer knickers in a knot o're this case o' Snethner," MacG chuckled, intentionally turning on his famous Scots vernacular.

Internet Pedophile[®]

By Elmer E. White

“Easy for you to say. I’m the one Kline stuck with the case. How can you laugh about it? I’ve got a loser client and a loser of a case. There’ll be a slew of bad publicity. It won’t help me, being identified defending a child molester.”

“Help you? What’s ‘help you’ got to do with it?” MacG inquired. “If you concern yourself with how a client is going to ‘help you,’ you’ll never become a good lawyer. You’re supposed to help the client; not the other way around.”

“I don’t want the case MacGregor,” Cuthbert replied. “This guy tried to lure a young girl into sex. He did it on the Internet. He was arrested with a teddy bear and balloons for God’s sake! How am I going to defend that?”

“Come over to my office and we’ll talk about it,” MacG suggested. “In the meantime I’ll check with my sources and find out the skinny on this case.”

Immediately upon cradling the receiver, MacG placed a call to Dalton Orringer, a re-

tired Brisket police detective. The call lasted 20 minutes. He was still on the phone when Cuthbert arrived at his walk-up office above Doug’s Place, a restaurant that was actually no more than a glorified tavern. While waiting for MacG, Cuthbert poured himself a single malt Scotch, adding some Arbor Springs from the water cooler. He looked around, found a letter opener, and stirred his drink.

“Thanks Dalton, thanks for the info,” MacG said, as he closed his phone conversation with the retired detective.

“What did ya find out?” Cuthbert wanted to know.

“In good time, lad, in good time. But first we must discuss your attitude about this case. I may have to instruct you upon your role in assuming the defense of an unpopular client . . . but then,” MacGregor said as an aside, placing

the back of his hand to his cheek, “What criminal client is ‘popular’? Hee Hee Hee.”

“Permit me lad,” MacG continued, now in the Scots vernacular, “Tae gie ye a few reasons why ‘tis a noble endeavor upon which ye now embark to defend a man’s liberty interest. That is what it is Jamie. Liberty. That is what your client has at stake in this litigation. His liberty. With his record and the despicable, infamous nature of the crime, he’ll go to prison if convicted. Luring a child to a sexual encounter is about the lowest thing a man can do. Doncha know in the prison population, such an offender is the most despised? The warden takes special precautions to protect prisoners in his category. . .”

“Yes, yes, I know MacGregor, but how does that help me with this case?” Cuthbert interjected.

“Well . . .” MacGregor paused. “You’ve got cold feet because you don’t have a good



understanding of your duty as a criminal lawyer. You're still thinking like a layperson, the how-can-you-defend-a-guilty-person question. A single question with many answers. I'll give them to you shotgun fashion:

"First. Right now the man isn't guilty; that doesn't occur until or unless every member of the jury decides there is no reasonable doubt of guilt. All during the trial he is presumed innocent. You are, truly, representing an 'innocent' person."

"Second. The Fifth Amendment to the Constitution guarantees that no person 'be deprived of life, liberty, or property, without due process of law.' To afford due process to a defendant, it is necessary that he have the assistance of counsel."

"Third. The Sixth Amendment requires that the state provide 'The Assistance of Counsel for his defense.' You have been selected to assist Mr. Snethner. You are discharging a Constitutional obligation. Without the assistance of counsel, it would not be possible to convict Mr. Snethner of anything."

"Fourth. You didn't seek the case. You're an Officer of the Court. The judge appointed you, that is to say, he Ordered you to defend Mr. Snethner. To say that you're 'just doing your job' summons to your side the American admiration for the work ethic."

"Fifth. The case is styled 'People of the State of Michigan vs George Snethner.' There are ten million people in the state. George gets to have one person—that's you—stand up with him in court. This appeals to the American ethic for fairness. Doncha think it's only fair George should have one guy by his side?"

"O.K. MacGregor. I got it. Is there some way you can tell that to the police beat reporter so he'll put it in his page one story..."

"Sixth. You take the client as you find him and you provide your professional services. Does the thoracic surgeon, before cutting into the chest of a man diagnosed with heart disease, stop and ask 'Is this a "good" man whose life I endeavor to save?' Check this out Jamie. If your Mr. Snethner were to go into cardiac arrest and be rushed to the hospital, would the surgeon refuse his services on the grounds the patient is charged with attempted child molesting? I think not..."

"You got me thinking MacGregor. I'm remembering back to Criminal Law 101. The professor said something about it not being the duty of the defense attorney to convict his own client." Cuthbert said.

"That's right. If the law were otherwise, we could do away with juries. All the judge would have to do is direct the defense attorney to visit the client in his jail cell and ask him if he were guilty. Then back to court. The defense attorney informs the judge that the man is guilty and the judge goes ahead and sentences him. A totally preposterous criminal jurisprudence, but that is exactly what would happen if defense attorneys were

to 'trace' a phone call with the assistance of the phone company. It was never held to be a constitutional violation. It's only recently the phone company has sold the service to the public. With the Internet it's extremely easy to trace an e-mail or chatroom posting. Internet Service Providers do it every day for the police. Last year a threat against the President was received on the White House website. It took the Secret Service all of 45 minutes to walk into Saginaw High School and apprehend the 15-year-old who posted it from the computer lab. The trace is that easy. The Secret Service has agents in every city of any size. They're with the Treasury Depart-

The complaining witness is a 41-year-old n

He is not 13 years old.

He is not female.

He is not a member of the statutorily p

required to play the ferret for the prosecution. Such a scheme would, reductio ad absurdum, result in prisoners getting wise to the system and refusing to confer with their counsel. The state could then issue Inquisitor's caps to the judges and we would be back in the Dark Ages." MacGregor declaimed.

"I'm getting the picture now, "Cuthbert said. "You can't be a wimp if you want to be a good criminal lawyer."

"Seventh," MacGregor continued, "There are important First Amendment issues intertwined in this case. The criminal law is just beginning to stick its snout under the Internet tent. The Cybersleuths are on a collision course with Civil Liberties!"

"Wait. Wait," the younger lawyer almost shouted at MacG. "You're suggesting my slimeball client's case be fought on the Constitutional level?"

"Well, think about it," MacG said.

Cuthbert was on his feet, pacing toward the window. "The police conducted an illegal, warrantless, search when they got his identity from the Internet. They had no right to do that. Snethner was entitled to his privacy."

"Won't work," MacGregor said. "To obtain an Internet identity it's not a search that requires a warrant. It's just like Caller ID on my phone. The police have always been able

ment and charged with guarding the credit card system; their 21st Century work will be Internet intensive."

"Do they have any here?" asked Cuthbert.

"Any what, where?" MacG looked up, startled.

"Any Secret Service agents in Brisket?" Cuthbert wanted to know.

"Don't know Jamie. It's a secret," MacG kidded. "And by the way, I forgot to mention Reason Number Eight. Make sure the reporter spells your name right. George must have some friends in insurance adjusting, it could help your injury practice in the years ahead. And don't forget, Brisket has a lot of university types who'll gae ye credit fer stickin' oop fer the underdog, civil liberties, freedom of speech on the Internet and the Constitution!" MacG declared. "Defending George won't hurt your practice one bit if ye'll defend him accordin' tae law!"

Cuthbert sat down, looked out the window and said "Tell me what you found out from your source, the one you were talking with when I came in."

"O.K. Jamie. Here it is. There never was a 13-year-old girl named Linda in that chatroom. Your client never sent or received an e-mail from such a person. It was all made up. Your client was in a chatroom, and later

engaged in e-mail, with an adult male police officer! Go over to the clerk's office in the morning and get a copy of the search warrant they obtained to seize Snethner's computer. The police officer who swore out the affidavit for the warrant is your 'Linda.' I'm sure of it!"

By the next day it was established that Patrolman Robert Merin, working from his home on overtime, was "Linda." At MacG's instruction this information was leaked to the press by "sources familiar with the investigation." MacGregor commented to Cuthbert that there will be some internal department finger-pointing when the afternoon

d male.

y protected class.



edition of the *Bugler* hits the newsstands. "Yes Jamie. There's considerable jealousy within the department about how 'computer crime' funds are spent. The Feds are pumping loads of money into local police agencies to 'combat computer crime.' It's federal policy to develop an Internet policing capability on all levels of law enforcement: federal, state, and local. The impetus for the massive funding is the Oklahoma City bombing as well as the threat of international terrorism."

"Because of the militia, Michigan is getting more than its proportionate share of money. Over in Ypsilanti, the university was funded by a levy on traffic tickets through the conduit of the Michigan Justice Training Commission to establish the School of Cyber-crime Investigation. One of the techniques is to use automatic look-up to identify target words in the text of an e-mail. A police computer can read internet traffic and flag words such as 'bomb,' or 'Second Amendment.'"

"When those words are detected, the Internet sleuth zeros in and reads the entire content. Then they put the individual on a watch list and target the people he's communicating with; they have a scan guide and read all the e-mail traffic. It's labor-intensive work. Thus far they haven't found much of anything. To develop a cadre of computer

cops they needed a training program, which explains the push to search for Snethner types. They've farmed it out to off-duty officers, working out of their homes, logging time in Internet chatrooms, needle-in-the-haystacking, trolling for despicable characters within their jurisdiction, like your Mr. Snethner."

"Are we talking 'Thought Police' here MacGregor?"

"Don't know. Too early to tell. So far only the Michigan Militia seems to be worried about it," MacG said.

Both were silent, then Cuthbert said: "Wait a minute. Are you thinking entrapment? Would that work?"

"It might," the Scottish-American barrister replied. "But probably not. Kline would never toss this case on an entrapment motion. Doesn't fit the textbook definition. He would say there's a fact question and send it to the jury, tell you to argue entrapment to them. You know how far you'd get with a jury... arguing entrapment with such an odious defendant... Hee Hee Hee," MacG broke out in giggles.

"Yep. That's a dead end," Cuthbert agreed.

"Well, Jamie lad. The defense is obvious. Do you get it? Bob Merin is a 41-year-old male. 6-2. 180 lbs. Doesn't look a bit like the fictitious Linda he invented for his cyberspace pedophile patrol."

"So what?" Cuthbert stared at MacG.... The older lawyer slowly swiveled in his ergonomically correct chair, fixing the younger lawyer with the gaze of amused astonishment, so often seen by jurors when one of MacG's opponents presented an exceedingly irrelevant bit of evidence. "Jamie," he chuckled, "You can find the defense. It's as easy as tracking an elephant with a bloody nose in a snowstorm..."

Cuthbert fell off his chair.

MacGregor helped him up. "There, there lad. It's nae sae bad as ye maun ken. Ye really hae ae strong defense in this case. It's all under the Constitution..."

"If you'll find some ice cubes and pour some Arbor Springs, no whisky, I'll listen. But this better be good," Cuthbert said, reclining on MacG's old leather sofa.

"Jamie, I envision a very wee brief. A wee, but powerful brief. I'm reminded of the old Scots saying: 'Guid Gear Gangs in Sma

Buk' (Good gear is found in small bulk, in a small package). But before we can whittle down the brief, permit me to fill ye in. Bear in mind that at all times before the jury decides the case, George Snethner is presumed innocent. Further, under the First Amendment, he is entitled to exercise free speech... and that applies to the Internet. Additionally, the First Amendment guarantees him the right to peaceably assemble with others, such as in an Internet chatroom. Now. Consider these examples:

"The opening of deer season is two weeks away. A hunter shoots what he thinks is a deer. In fact what he shot at is a statue of a deer. Is he guilty of attempting to kill a deer out of season? Clearly the answer is No."

"An abortionist, not a medical doctor, begins an abortion procedure. He discovers that, in fact, the woman is not pregnant. Is he guilty of attempted abortion? Clearly the answer is No."

"A lawyer goes to the courthouse and attempts to bribe a person leaving the jury assembly room. The lawyer thought the person was a juror, but, in fact, the person had been excused from the jury in the blind draw at the conclusion of the presentation of the case. He had been 'Juror Number Thirteen.' Is the lawyer guilty of attempting to bribe a juror? Clearly the answer is No."

"That's brilliant," Cuthbert said, in a voice deep with admiration, "How are you so smart?"

"How am I so dumb," MacG said humbly, his head bowed. "I'm so dumb I thought your client probably guilty until I read the cases. In the hypotheticals I've just given you I am simply guided by the decision of the Court of Appeals in a very similar case."

"A similar case MacGregor? Are you telling me the Court of Appeals considered this matter and let the defendant go free?" Cuthbert asked in an incredulous voice.

"In their wisdom lad. In their wisdom. Ye ask me how I'm so smart. I'm reminded of the comment of Oliver Wendell Homes the Elder when asked if he was a teetotaler. Homes replied: 'I believe in temperance, nay, almost in abstinence. But let me tell you, there are companies of men of genius into which I sometimes go, where the atmosphere of intellect is so much more stimulating than

alcohol, that, if I thought fit to take wine, it would be to keep me sober.' So it was with me lad, when, by reading their reported decisions, I ventured into the company of the men and women that sit upon the benches of our highest courts. Now pass that single malt bottle and I'll explain the answer tae ye..."

"What you have to do Jamie, is to separate in your thinking the bad, unethical behavior of the hunter, the abortionist, the lawyer, and your Mr. Snethner, from what is statutorily defined as a crime. You're defending Snethner on a charge that he committed a crime. You are not attempting in any way to justify his bad and unethical behavior.

The criminal law sets forth the lowest level of permissible behavior. What is called 'ethics' sets a much higher standard. Individual notions of right and wrong fall somewhere between the two. Mr. Snethner is in a law court, not an ethics or good versus bad forum. Presumably none will condone his Internet behavior, but I have demonstrated that the law will not punish him for it. What you must do with Judge Kline is show him that, while he would probably like to punish Snethner, the law will not permit him to do so. He is required to adhere to the ruling of the higher court in *Thousand*."

"Here's what ye dae Jamie," MacGregor said, tossing a yellow legal pad to his student.

"Your brief tae Judge Kline will be short. Very short. Very brief. Here's what it will say... I want this to be a one pager... I want you to center the content right in the middle of the page. Equal margins top and bottom, side and side. It will say this: 'The complaining witness is a 41-year-old male. He is not 13 years old. He is not female. He is not a member of the statutorily protected class. *People v Thousand*, 241 Mich App 102, 614 NW2d 674 (2000).' Close with the standard one-line prayer that the case be dismissed. Kline will have no choice. He will have to dismiss. I think it was Justice Frankfurter who observed that the history of civil liberties was written by the deeds of people whom society would deem as not very nice. In George Snethner you have a man with whom you can write some 21st century civil liberties history," MacGregor said, tipping his glass to Cuthbert.

"Are you making this up MacGregor?" Cuthbert asked, taking a sip of water. "Is there really a case called *People v Thousand*?"

"There's such a case," MacGregor said. "But it's not as clear-cut as I've stated it tae ye. Jamie, I'll level with ye. I took a few wee liberties with *Thousand*. The Court of Appeals threw out two criminal counts on the theory I've stated, but it sustained count three, a 20-year felony. That count punishes *preparing* to engage in any child sexually

abusive activity. This new statute casts a wide net. Snethner is lucky he wasn't charged under it. It reminds me of when the English took over Scotland. They imposed an excise tax on whisky making. If you didn't pay the tax you were guilty of a crime. Some of the Scots quit making whisky but kept their stills. The English then made it a crime to have a still, saying it was 'preparation' tae make whisky. So our Michigan Legislature has an ancient precedent in the auld English law. Of course the English made that law before our Constitution was written..."

"Can't the prosecutor add a new count to the Information?" Cuthbert asked.

"Of course she can. The 'preparation' theory can be the prosecutor's trump card." MacG replied. "It was used to uphold the third count in *Thousand*, but it's based on dubious reasoning. The theory is a stretch because where the specific individual whom the defendant is 'preparing' to involve in sexually abusive activity is, in fact, not a minor, legal impossibility arises. This is especially true where the statute requires the defendant know the child is a child."

"I'll pursue that defense if the prosecutor amends the Information," Cuthbert said.

"This is a problem for society. Let me tell ye Jamie, if ye go o'er to family court, ye'll observe that a great number of divorce cases now involve infidelity that started in an Internet chatroom. The Internet divorce phenomena is sweeping domestic relations law. If you concede that, under the criminal law, it is permissible for a spouse to use the Internet to arrange an extra-marital tryst, then you're gonna have a lot of mistaken identity occur, especially when you have police officers patrolling the Internet in drag, so to speak. The 'preparation' theory could make the conduct criminal. Under the *Thousand* interpretation, this statute actually does create Thought Police!"

"I'm an old man," MacGregor continued, "I've seen a lot of the world. Our Constitution has done us well for more than 200 years during which time hundreds of police states around the world have risen, punished their constituents, then fallen. Yet our Constitutional government remains. I wonder if today the child molester, tomorrow the purveyor of pornography; then, when we have acquiesced

School of Cybercrime Investigation

Eastern Michigan University is taking the "byte" out of cybercrime by teaching police officers, FBI agents and drug enforcement personnel how to gather evidence of crime on the Internet.

At the School of Cybercrime Investigation run by EMU's Law Enforcement, Fire and Emergency Management Program, students cover a variety of topics, including removing and searching hard drives, child pornography, investigative techniques on networks, financial fraud, viruses, worms on the Internet, network intrusions and software for cracking passwords on encrypted files.

As part of the course, students hack two computers at Washtenaw Community College by pre-arrangement with the college. Their own computers will also come under siege, and students will have to trace the network path back to the attacker.

The comprehensive six-week program is funded by a grant from the Michigan Justice Training Commission, using money from traffic ticket violations. A main goal of the school, which is the first of its kind in the country, is to teach investigators to gather evidence of cybercrime by knowing what to ask computer forensics experts. It's also aimed at developing a cadre of police officers who can teach others the specialized skills required for cybercrime sleuthing.

to police surveillance and intrusion, will the time come in America that we begin to self-censor our social and political discourse, lest we be targeted by the police? The equipment, procedures, and trained manpower are in place. The Thought Police will be watching. Jamie, it's yer tax dollars at work!"

"What to do MacGregor?"

"Ae dint ken (I don't know)," MacGregor replied. He handed a paper to Cuthbert. "Read this."

Cuthbert read: "Some day, ways may be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Can it be that the Constitution affords no protection against such invasions of individual security?"

"Interesting thesis, MacGregor. Kind of cutting-edge. Who wrote it?"

"Aye lad. Cutting-edge it is. Written back in 1928. Justice Louis Brandeis. *Olmstead vs. United States*. Volume 277 of United States Reports at page 473. Perhaps you can use it to encourage the court to close the prosecutor's loophole in *Thousand*."

"Anything else?" Cuthbert said, rising from the sofa.

"Jamie. Let me say it's not as easy to get a client off on a technicality as some might believe. Sometimes where there's a miscreant that needs to be taken off the streets, the law can be interpreted, twisted, or bent to do so. This viewpoint is a bit cynical, of course, but I provide it as a contrast to an idealistic view of the criminal law. That is what the interpretation of count three in *Thousand* is all about. Now go off and do the best ye can fer George." ◆



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