

Commentaries

Stand In The Place Where You Live."

April 2007

Letter from the Editor

We'd like to welcome our new members (in alphabetical order) Robert C. James, Elisabeth A. Slater, and Christina S. Terek. Welcome aboard.

The website is just about up and running. Check it out at (www.firststatecapitol.com) for current events, and past issues of the Newsletter, and other "worthy" information.

Barbara will be advising on how to access the Blog Site, and we want to start hearing

from members with any thoughts, suggestions, complaints, AND "literary" submissions to be considered for publication in future issues of the Newsletter.

Hope you enjoy tonight's presentation by Dan Frizzi, on The Bellaire B&O Railroad Bridge, and Wheeling's Fight to Prevent It.

OC of D.

Tullamore Dew Profiles

Kevin Flanagan

Hello, Blackstone members,

My name is Kevin Flanagan, and I have been forced by Barb to tell you a little bit about myself. Born in Wheeling, West Virginia, I grew up in Bellaire, Ohio. My mother stayed at home and tried to raise four uncontrollable children while my father worked at the mill and ran the Varsity Bar.

Being in the bar business, my fondest memories as a child include arguing with drunks, listening to stubborn and opinionated people, and being short-changed on drinks. Come to think of it, but for the booze, it was much like the practice of law.

Being a product of a nun-controlled catholic



Kevin's little Steeler fans:
Ciaran & Rowan

school system, I graduated from St. John's High School and then Ohio State University. I then received my J.D. from the University of Toledo College of Law (I know, you are impressed). Soon after, I went to work for the Belmont County Prosecutor's Office where I handled only the most important

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Blackstone Club Members

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Deborah Hull	Warmuth
John Hull	William E. Watson
Robert C. James	Mary J. Williams
Ronald W. Kasserman	<i>Barbara K. Knutsen, Ex. Dir.</i>

Flanagan con'd from p. 1

lawn mower theft cases. After about six years, I came to work for Cassidy, Myers, Cogan & Voegelin.

After a stint of carrying briefcases and washing cars for various partners, who will remain nameless, I started practicing mainly employment, personal injury and criminal law. My specialty, however, is Cassidy's speeding tickets.

My wife Micki and I have

two children, ages 3 and 1. They have changed our lives immensely, and I am glad, at least at this juncture, that we did not sell either of them on the black market as first intended.

I do appreciate you listening to my story and my sincerest apologies for the boredom I may have caused.

I wish you all well.



The Blackstone Club is not an official bar function, and has no ties to any city, state, federal, professional or political entity or organization; it is solely a project of the Wheeling Academy of Law and Science, Inc., a private corporation.

Remember...

as a dues-paying Blackstone Club member, you may bring a different non-member lawyer, educator or friend to any meeting as your guest, to introduce him or her to the club.

Commentaries

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barbaraknutsen@firststatecapitol.com

The State of Justice

In the face of governments on the federal and state level seemingly unable or unwilling to act on the major environmental issues affecting the welfare of our nation and state (instead, pass me the table gambling ballot, if you please) the fight over mountain top mining is quietly raging in the country's civil justice system, one technical skirmish at a time. As courts in West Virginia have seen some of the major action of the current decade, here's a summary of some of the lead cases, with appropriate citations, for those of you who want to more fully explore the terrain.

Bragg v. Robertson, et al. 72 F.Supp.2d 642 (1999): A decision of the United States District Court for the Southern District of West Virginia, by Chief Judge Charles Haden, citing state and federal regulations, finding that the so-called "buffer zone rule," under the Surface Mining Control and Reclamation Act (SMCRA) required State DEP officials and the Army Corps of Engineers to make findings that "valley fills" within one hundred feet of an intermittent or perennial stream shall not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values or material damage the water quantity or water quality of the stream, and not contribute to violation of applicable state or federal water standards. In addition, Judge Haden found that the Federal Water Pollution Control Act Amendments of 1972, Section 404(b)(1) did permit placement of excess spoil [from surface mining operations] in waters of the United States for constructive purposes, but not if the primary purpose of the fill was for "waste disposal," and accordingly issued an injunction permanently enjoining any

further permits for valley fills in connection with surface mining (including mountaintop removal) operations that would authorize placement of excess spoil in intermittent and perennial streams (valley-fills) for the primary purpose of waste disposal.

Bragg v. West Virginia Coal Association, et al. 248 F.3d 275 (2001) A three judge panel of the Fourth Circuit Court of Appeals, including Judges Niemeyer, Luttig, and Williams, vacated Judge Haden's injunctions in *Bragg*, ruling that the federal district court was barred by the doctrine of sovereign immunity and the Eleventh Amendment from enjoining state officials where the State of West Virginia had agreed under the "cooperative federalism" scheme of the Surface Mining Control and Reclamation Act to take "exclusive regulatory jurisdiction," over the enforcement of the SMCRA, and thus plaintiffs should have brought their claims in state court in that the federal court was not the proper forum to challenge state law enforcement efforts under the SMCRA.

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, et al. 206 F Supp. 2d 782 (2002): A decision of the United States District Court for the Southern District of West Virginia, again by Chief Judge Charles Haden, (this time in a case did not involve an issue of "cooperative federalism") that found that permits granted by the Army Corps of Engineers for valley fills in connection with mountain top removal mining strictly for waste disposal (as opposed to fills allowed by the

law for constructive primary purposes) were *ultra vires*, and illegal under the Section 404 of the Clean Water Act (CWA).

Kentuckians for the Commonwealth, Incorporated, v. Rivenburgh, et al. 317 F.3d 425 (2003): The Fourth Circuit Court of Appeals, in a decision by Judges Niemeyer and Hamilton, with Luttig concurring in part and dissenting in part, again reversed Judge Haden, disagreeing with his interpretation of the law that valley fills could not be permitted for waste disposal only, and "granting deference" to the EPA and Army Corp of Engineers interpretation that such permitting was proper, and finding that Judge Haden's injunction was overbroad, in that it was broader than that "necessary to provide complete relief to the plaintiff" and did not carefully address the circumstances of the case.

Rapanos, et al. v United States, 126 S.Ct. 2208 (2006) In a case with potentially far reaching ramifications for mountain top removal litigation, the Supreme Court of the United States, in a plurality opinion, analyzed the Corps' interpretations of its rules as to what constituted "navigable waters," and "waters of the United States," and determined the Corp's expansive view not entitled to "deference," narrowing their definition under the CWA to include relatively permanent, standing or flowing bodies of water which form geographical features, which did not encompass "transitory puddles or ephemeral flows of water," adding that the terms do "not necessarily exclude" streams, rivers or lakes that might dry up in extraordinary circumstances,

...a summary of some of the lead mountain top mining cases in West Virginia.

such as drought, nor does the term necessarily exclude seasonal rivers, which contain continuous flow during some months, but no flow during dry months.

Ohio Valley Environmental Coalition, et al. v. United States Army Corps of Engineers, et al. Civil Action No. 3:05-0784 (S.D.WV, filed 6/13/07): Judge Robert C. Chambers for the Southern District of West Virginia, (in a case that involved a stream which was apparently not in dispute as a "water of the United States,") followed the *Rapanos'* court's analysis of determining first whether or not the Corp's interpretation of its own rules was entitled to deference (and finding it was not—just as found by the *Rapanos* Court), and then interpreting the provisions of the Clean Water Act to disallow use of Section 404 of the Act (valley fill permits) to allow streams ("waters of the United States,") below valley fills (and before flow into sediment ponds) to be polluted by sediment from the valley fill unless in compliance with CWA Section 402, which requires a separate National Pollutant Discharge Elimination System

La Cerca - Chapter 3

To the casual observer, Naumburg in 1984 was not much different that it had been in 1890, when Nietzsche's mother brought her mentally exhausted son to live in the home where he had lived as a child.

As a child, Nietzsche had attended the cathedral school of St. Peter & Paul, Dom Gymnasium, started as early as 1030—the presently standing cathedral dating back to the 13th century. Its massive walls were spared destruction in the wars of the twentieth century by virtue of the town's location in the German state of Saxony-Anhalt, its distance from any major manufacturing cities, and its relative unimportance as a military target.

Of course, the native population had increased from about nineteen thousand to thirty-two thousand by 1984. Still five years before the fall of the Berlin Wall, Naumburg's population also included a non-native population of an additional thirty thousand, members of the Soviet Air Force who were stationed in Naumburg, making it one of the principal

garrison towns of the U.S.S.R. in East Germany at the time.

By 1984, it was estimated that there was at least one Soviet airman for each of Naumburg's native residents, and you could not avoid the constant reminder of Soviet domination when going about your daily activities. Walking arm and arm up the hill from the train station, past ancient windmills to the town center, the troops were everywhere, usually keeping to themselves, but often unable to resist flirting with the pretty young Naumburger women, cigarettes dangling from lips only partially warmed by the ever present fur lined caps that more than anything else distinguished them from the natives, at least during Naumburg's harsh winters.

Yet it was early in 1984 that Hermann Tanhauser, a school teacher and member of one of the few German singing clubs that had not been extinguished by the Soviets, acquired the Nietzsche family home, which had fallen to an almost irretrievable state of decay over the course of the preceding century, and made his discovery.

Tanhauser had been born in October of 1944, when Germany was on the verge of military and social collapse, and spent his 40 years of life in Naumburg, a child of Germany's post war deprivations, who rarely adventured out of the town except for a short term of study he was able to arrange through his own merit at the University of Leipzig, approximately 40 miles to the southwest.

Although the name of the University of Leipzig had changed under Soviet control to the "Karl Marx University," Tanhauser refused to acknowledge the name change, which he considered an arrogant affront to the history of his occupied country.

Other than infrequent returns to Leipzig after his university studies to visit his friends or mentors, or to purchase books at the many bookshops for which Leipzig had always been famous, he lived a secluded life in Naumburg, a man of simple tastes and pleasures, but one of those rare townsmen who truly appreciated the history of pre-war Germany, and had become somewhat of an expert on Naumburg's contribution to its cultural past.

He even attended a series of lectures offered at the University in the early eighties on schulpforta, the internationally famous Lutheran boarding school (originally a Cistercian abbey) situated about four miles from the town center that had instilled a classical education in some of the great names in German literature, including Nietzsche, Klopstock, Fichte, and Schlegel.

Tanhauser did not like the Soviet military presence in his town, or the fact that the Soviets had turned schulpforta, with its four hundred year tradition as a high school of classical learning, into an agricultural ministry.

Post-war healing, as far as Tanhauser was concerned, had not yet begun. The fact that West Germany had agreed just months before to allow NATO to deploy new Pershing II missiles on its soil despite earlier warning by former Soviet leader Yuri Andropov that such a move would forever change the situation between the East and West was of no interest to Tanhauser. He disdained politics, and went about his daily life ignoring the realities of the "cold-war" in favor of thoughts of what Germany had been,

La Cerca - continued from P.4

and what Germany could again become, freed from the yoke of its Soviet masters.

But Tanhauser's vision of Germany's history did not glorify the German Reich. His love of his country was based on its contribution to classical music, of which he was an enthusiast, great literature, and philosophy. He admired the Germany of the Weimar Republic, not the Germany of National Socialism, which he knew was responsible for the occupation. His was the country of Goethe, not Hitler.

And he was appreciative of Nietzsche's contribution to that culture, despite the fact that Nietzsche was out of favor in East Germany at the time.

Tanhauser and his wife Elisabeth had passed the Nietzsche family home many times during their walks through his town. On those occasions, the couple would always stop and admire the brass inscription on the house, noting the years Nietzsche lived there with his mother, ("in den Jahren zwischen 1890-1897") and marveled that neither the officials of Naumburg nor any one else seemed to pay any attention to the house or its history,

let alone its profound state of disrepair.

Then, one day in late 1983 Tanhauser read in the *Naumburger Times* that the house was for sale, at a price not too expensive for a school teacher who had saved for many years as much as his modest salary had permitted.

He and his wife might just be able to afford it. He thought about it. He dreamt about it. He became obsessed with the idea of owning the house, of preserving it, for the sake of Naumburg, for the sake of Germany's history. Finally, he talked his wife into buying it. "We will be able to work it out," he told her. "To restore it! Preserve it for a future when Germany can shed its guilt and again appreciate its culture!"

At least with his family, Tanhauser was persuasive. His wife agreed, and the couple planned for the acquisition. As far as he was concerned, the Soviets had not yet allowed his city, his country, to redeem its better self. But in buying the Nietzsche home, he decided to take a leap of faith. To ignore what he considered the barbarity of the times.

And as he planned the renovations, he worked right alongside the contractors, personally directing the placement of the scaffolding, supervising every aspect of the repairs. He worked on Nietzsche's old study himself. Up came the old carpet in whiffs of white smoke, the accumulated dust of a near century. He noticed that a few floorboards were loose. He carefully moved them back and forth until he was able to extract one, exposing the underlying rafters, and a manuscript, somewhat moldy on the cover, but internally sound. He looked at the first page. German cursive in small, but legible handwriting: "Die Umgestaltung Aller Werte," "The Transfiguration of All Values," with a subtitle: "Die Macht Der Fernsten Liebe," "The Power of Furthest Love?" "F.N.?" "F.N.!" "Nietzsche!" He thought to himself. "But when was it written?" "Why was it hidden?"

"Is it the ravings of a madman? Perhaps a copy of one of his earlier works, or something never published?" It took only moments for him to guess that the manuscript must have been written by Nietzsche while living with

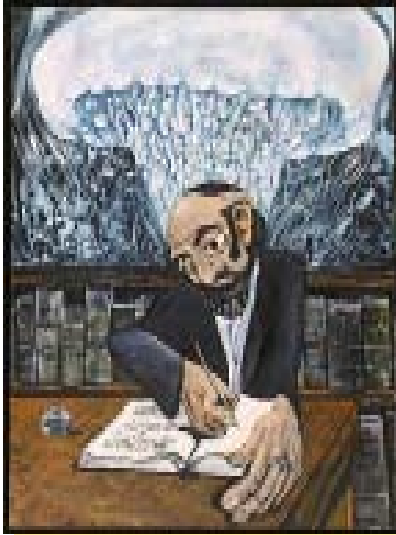
his mother in the home after his mental collapse.

The thoughts came all at once and ran together. Tanhauser was not a philosopher, and though he knew Naumburg's Nietzsche lore, he was not familiar with the corpus of Nietzsche's works. He started to read the Preface:

"It has been only as a simple fool ("irrsinnige einfalt") that I have been able to complete the last three parts of what started as "The Revaluation of All Values," "Die Umwertung Aller Werte," which I now leave in the present form for a posthumous time, when Germany, and other nations, have destroyed their culture through greed, militarism and arrogance, when it will be necessary again to consider what constitutes abiding value, what constitutes the value of a people, the value of an individual, the value—the very goal—of humanity."

"It is in anticipation of that time, which is not yet now, that I have chosen silence, and

Ask Bartleby



Dear Reader,

Kudos to member Ben Stout for receiving the 2007 Environmental Stewardship Award from the North American Benthological Society (NABS), and to Dan Frizzi for his 2003 publication, “*Honoring Our Father—A Bicentennial Salute to Colonel John Hamm Sullivan.*”

In the absence of a query this issue, I leave you with more choice thoughts on the law, this time from the intrepid Oliver Wendell Holmes, Jr. (1841-1935).

“The Life of the law has not been logic, it has been experience.” *The Common Law* (1881); “As life is action and passion, it is required of a man that he should share the passion and action of his time at the peril of being judged not to have lived.” *Memorial Day Address* (1884); “Life is painting a picture, not doing a sum.” *Speeches, Class of '61*, (1913); “Every idea is an incitement.” *Gitlow v. N.Y.* 268 U.S.652, 673 (1925); “The power to tax is not the power to destroy.” *Panhandle Oil Co. v. Knox* 277 U.S. 223 (1928); “For my part, I think it a less evil that some criminals should escape than that the government should play an ignoble part...” *Olmstead v. U.S.* 277 U.S. 438, 470 (1928).

Yours Sincerely,
Bartleby, the Scrivener

La Cerca - continued from p.5

composed these words, waiting until the wind changes, and the bow of Odysseus's ship may again steer home.”

He read the lines in haste, with excitement. Then a nervous thought struck his mind. He knew the “official line” on Nietzsche's philosophy in the U.S.S.R. He considered that the Stassi would no doubt confiscate his newly found treasure before he could even have

a chance to figure out its value, its meaning.

But where could he turn? Without help, he would not be able to gauge the significance of the writing. He thought back to the lectures he attended at The University of Leipzig several years earlier. “Who was the scholar who had instructed the class? With whom he had discussed Nietzsche? What was his name? Scherer? Stein? No, Schmitt. Yes, Schmidt, Georg Schmitt.

I will track down Georg Schmidt. I will share my secret with him. He will advise me what to do with the manuscript. Until I can get some answers. Yes, Georg Schmidt!”

Prior issues of the Newsletter, including prior chapters of La Cerca can be accessed on the WALs website: www.first-statecapitol.com

As we like to say,

*“If those who believe in the Justice System don’t educate the public,
those who don’t will.”*



*Mock Trial Wheeling Catholic
“Judge” Tim Cogan*

The Wheeling Academy of Law and Science (WALS) Foundation completed its fourth year of the mock trial project with about 1,300 students participating. We expanded some and plan on more next school year.

Through a nomination from our Grantor, DHHR, Barb Knutsen, Executive Director of THE WALS Foundation, and Mary Ellen Cassidy, WALS Foundation Board Member & Evaluator, went to MN (see pic) in April to work one-on-one with a hired consultant learning ways to get outcomes from a substance abuse prevention program. We have since then revised and used our teacher evaluation form and plan on implementing a new student questionnaire next school year.

One of the finest elements to the mock trial project is being able to have volunteer lawyers (over 25 each year) come into the classrooms to play “Judge” for the day! (see pic of 4th graders in Charleston “swarming” their “Judge” - Pat Cassidy for an autograph!)



*Post Mock Trial Q & A
AND AUTOGRAPH SIGNING!
Kanawha County*



*CAPT - Seminar in MN
Mary Ellen, April (consultant),
Dr. Griffith (CAPT) and Barb*



*Post Trial Picture Taking
HAD to be with
“Judge” Cassidy’s autograph
Kanawha County*

LIST OF MOCK TRIAL PARTICIPATING LAWYERS (Make sure YOUR name is on this list - Call today)

*Lanny Bonenberger
Patrick Cassidy
Tim Cogan
Jim Companion
Michelle Dougherty
Rob Fisher
Kevin Flanagan
Earl Forman
Bill Gallagher
Bob Gaudio
Chad Groome
Paul Harris
Ron Kasserman
Heidi Kossuth
Elgine McArdle
Shari McPhail
Andy Mendleson*



*Teena Miller
Don Nickerson
JoLynne Nugent
Jim O’Brien
Sharon Potter
Cheryl Riley
Gary Sacco
Kenneth Skeens, II
Holli Massey Smith
Scott Smith
John Stimmel
Brad Thompson

Teresa Toriseva
Rose Humway Warmuth
Mary Williams*

THANKS!

Upcoming Blackstone Club Meetings & CLEs



BLACKSTONE CLUB Tonight: Presentation by Dan Frizzi, Jr.

"B & O RAILROAD BETWEEN BENWOOD AND BELLAIRE :

Wheeling's Fight to Prevent it!"

Upcoming - August 16, 2007 October 18, 2007 Dec. 13, 2006

Black Tie Event

Continuing Legal Education Seminars

Friday, June 22, 2007 - Up to 2.4 credits available

"Morning With the Judges VIII presented by

Honorable James P. Mazzone and Honorable John Preston Bailey

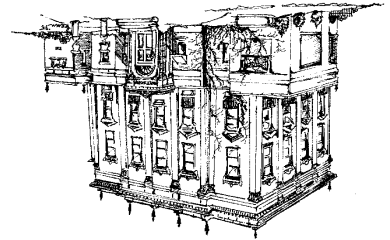
Friday, August 17, 2007- Up to 3.0 credits available

"DECEPTION and the Detection of Deception presented by

Lawrence N. Driscoll, Ph. D, Associate Professor of Criminology (WJU)

Wednesday, September 5, 2007 - NOON SERIES - Up to 1.2 credits available (TBA)

FREE FOR BLACKSTONE CLUB MEMBERS



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