



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) Dan Frizzi, John and Deborah Hull, Tim McKeen, and George N. Sidiropolis! Hope to see all of you at upcoming CLEs and social events.

Just to keep you apprised, we will be working on our website (www.firststatecapitol.com) between now and the next issue of Blackstone Club Commentaries. This will allow for an easier to use format to keep you apprised of current information of upcoming events, access back copies of The Blackstone Club Commentaries (and those juicy prior chapters of La Cerca.) We'll also offer a new "blog site" to facilitate member's communication with us, and for you to offer your opinions, feedback, insights, or your own creative writing submissions for possible inclusion in future issues of the Commentaries.

In the meantime, sit back and enjoy Dr. Ben Stout, who tonight tells you of the exciting plan to extend the Walking/Biking trial of the City of Wheeling, to make it an even greater asset to the city and tri-state community. 

Tullamore Dew Profile: Sherrilyn Farkas VanTassel

In my wildest childhood imagination I could not have dreamed the life that I have had thus far. I could not have imagined the things that I would see or the interesting people that would become the quilt of my life. I am Ohio Valley born and bred, and actually pretty proud of it. I am the second oldest of four children and the first person in my family to attend college. This is quite a feat for a child of a family that put the "dys" in dysfunctional. Interestingly enough, as the years went by I discovered that my family was "more normal" than a lot of families that I saw (and that is a damn scary discovery). A strength that my family had was a belief that you can do anything if you are willing to work at it.

I left home when I was 12 years old for a lot of reasons. (I jokingly tell my therapist that he is my longest running relationship) Throughout the early chapters of my life, I had the opportunity to meet some magnificent people who saw something in me that I often failed to see in myself. I love to learn, I fight to survive, and

I have an insatiable desire to "do something".

My laundry list of employment may seem disjointed to some, but every job was designed to get me to another place.

I have been a cider press operator, veterinarian assistant, nurse's aid, resident activities coordinator, certified dental assistant, school bus driver, truck driver, administrative assistant, office manager, sheltered workshop coordinator, rehabilitation counselor, quality assurance coordinator, and risk manager. How many of your peers can make apple cider, assist in dental restorations and drive an 18-wheeler loaded with hazardous material? My entire college experience was with night school, including law school. I was surprised to find that colleges were actually open during the day!

Attending law school was always my dream. Like many people, I watched Perry Mason and To Kill a Mocking Bird. I wanted to change the world and right the



wrongs.

Where were Law & Order and The Practice when I needed a reality check? Seriously, I wanted to be a small town attorney who helped the people who needed it most. My first legal position was as in-house attorney for Northwood Health Systems (hey, at least I got a discount on therapy!). It was the best of times; it was the worst of times..but I met Lanny Bonenberger and Bill Watson through my experiences at Northwood and these two men became mentors and friends. When I left Northwood I opened a practice on 14th Street in Wheeling and was beginning to build a client base when I received a recruiting call for in-house counsel at Mountaineer Race Track and Gaming Resort. I was sure that there must be another lawyer with the same name. I can remember the reaction of

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Van Tassel - *con'd from p. 1*

my family and mentors. My mother was sure that I was going to appear on an episode of the Sopranos; Bill Watson said make sure they pay you well enough in case you lose your license, and my friend Judge Michael Nunner told me to try it but keep my eyes wide open. Judge Nunner reasoned that the salary and stock options would allow me to pay off my staggering student loans and then I could practice the kind of law that I wanted. This is why you turn to friends during tough decisions.

My experience at Mountaineer paid exceptionally well, allowed me to build an extraordinary network, and gave me the chance to practice law in areas that I would not have imagined. In the end, I think it is difficult for a "social service" mindset to function inside of a lavish "for profit" environment. There also never seemed to be room for my future husband and his daughters. I jokingly say that my penance for my time at Mountaineer was the four years that I had the pleasure of working with Legal Aid of West Virginia. Working with Nan Brown was such an honor and she taught me what it meant to protect the interests of the most vulnerable of society.

Life circumstances changed during my time at Legal Aid and I received a call asking me to consider the position of Executive Director at Russell Nesbitt

Services. I was offered the chance to take my behavioral health experience, management experience, and legal skills and put them to work for a group of consumers that hold a special place in my heart. The timing was right, the money was right and that cause was right; so on September 13, 2004 I started my current position. Now for anyone paying attention, I started just 4 days before the agency got wiped out by the September 17 flood. The one thing that became apparent immediately is that it can only get better from there!

My time with Russell Nesbitt Services has brought great joy to my life. I still have a small private practice that lends balance to my professional life. I am surrounded by wonderful consumers, employees and board members. When my husband was killed in January 2005, everyone gathered around me, and supported my step-daughters and me through the years that have followed. This is home for the current chapter of my life. If you have ever wanted to help change another person's life, you can see it every day here within our walls. It just does not get any better than that. Visitors are always welcome and donors are always cherished, so please be one (or both). 

The State of Justice

All lawyers know that you can't make the "Golden Rule" argument to jurors—you know, any form of "Put yourself in the place of the plaintiff (or the defendant for that matter) when coming to your verdict in this matter."

I always thought the prohibition odd, particularly since the "Golden Rule" has been considered a universal ethical precept for thousands of years, and not just by Westerners, Confucianism, Buddhism, Jainism, Zoroastrianism, Classical Paganism, Hinduism, Judaism, Christianity and Sikhism, with minor difference, all subscribe to a form of "do unto others as you would have them do unto you."

Is our law incompatible with universal ethical precepts? You might think so, given the nature of legal education, and the insistence of modern legal educators to emphasize that they are there to teach "law," not any kind of ethical philosophy. But is not law based on philosophy? Someone or some group's philosophy? Some culture's idea of justice? After all, we also instruct jurors that they need not leave their every day experience and common sense aside in coming to a verdict. Are not rational moral precepts part of their cultural experience, part of their common sense?

Historically, The Golden Rule prohibition has been

explained as a plea to the jurors for sympathy, or a pleas for them to be "partial" (by putting themselves in the shoes of a party), or "subjective" (rather than considering the objective evidence and the law).

See in this connection the WV cases of *Keathley v. Chesapeake & Ohio Railway*, 85 W.Va. 173, 102 S.E. 244, 249 (1919); *State v. Clements*, 175 W.Va. 463, 334 S.E.2d 600 (1985); *Ellison v. Wood & Bush Co.*, 153 W.Va. 506, 513-14, 170 S.E.2d 321, 327 (1969) and *Leathers v. General Motors Corp.*, 546 F.2s 1083 (4th Cir. 1976) (Virginia law); the Ohio cases of *Al McCullough Transfer Co. v. Pizzulo*, 53 Ohio App. 470, 5 N.E.2d 796 (7th Dist. 1936); *Underwood v. Thompson*, 1979 WL 209337 (Ohio Ct. App. 10th Dist. 1979); *Yerrick v. East Ohio Gas Co.*, 119 Ohio App. 220, 198 N.E.2d 472 (9th Dist. 1964); *Boop v. Baltimore & Ohio Railroad*, 118 Ohio App. 171, 193 N.E.2d 714 (3d Dist. 1963); *In re Appropriation of Easement for Highway Purposes*, 8 Ohio App. 2d 252, 221 N.E.2d 476 (3d Dist. 1966); *Lykins v. Miami Valley Hospital*, 157 Ohio App. 3d

291, 811 N.E.2d 124 (2d Dist. 2004); *Dillon v. Bundy*, 72 Ohio App. 3d 767, 596 N.E.2d 500 (10th Dist. 1991); *Sinea v. Denman Tire Corp.*, 135 Ohio App. 3d 44, 732 N.E.2d 1033 (11th Dist. 1999) and the following two annotations: *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Arguments to Jury in Federal Civil Case*, 68 A.L.R. Fed. 333; *Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position*

“Is our law incompatible with universal ethical precepts?”

of Litigant or to Allow Such Recovery as They Would Wish if in the Same Position, 70 A.L.R.2d 935.

Interestingly, the original ethical proposition was not a plea to sympathy, partiality or subjectivity, but considered a very reasonable, logical, ethical norm—that if you wanted to be treated one way, you should reciprocate and treat

your neighbors accordingly. How did it occur that we lost faith in the ability for jurors to distinguish the former from the latter?

Is there some connection between the loss of faith in our civil justice system and the fact, noted by Jonathan Turley, Shapiro Professor of Public Interest Law at George Washington University (USA Today, March 27th, 2007), that legislatures on every level are in a frenzy to criminalize what has heretofore been considered “negligent” acts?

Is this frenzy part of an unarticulated realization that courts and jurors don't appreciate so much a need as they may have in former times to hold others responsible for “negligent” acts in a society where everyone wants to shed, rather than

accept, responsibility, and which has in any event a plentiful share of downright malicious and criminal acts with which to occupy its judicial resources?. And speaking of the plethora of criminal acts - is there some connection between seemingly random acts of violence and the frustrations of at-risk individuals who apparently don't believe
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La Cerca - Chapter 2

I had met Herr Georg Schmidt in September of 1982, while he was a visiting scholar at the small Jesuit College in Wheeling, West Virginia, where I was employed as a Professor of Philosophy. The cultural exchange program, negotiated by our governments and participated in by our college, allowed Schmidt to come to the United States from his teaching position at the Karl Marx University in Leipzig, in the DDR, and allow an American scholar at the college to take his place.

One of my colleagues, a specialist in German history, and a Holocaust scholar, was chosen to take Schmidt's place at Leipzig for the 1982-1983 school year.

Initially, I was disappointed that I did not go in his place. Schmidt, like me, was a professor of philosophy. I too was interested in German culture, particularly German philosophy. Personal reasons, however, made it impossible for me to apply for the position. As it turned out, my staying and getting to know

Schmidt was to lead me to East Germany in 1984, and the course of events which here unfold.

While in our city, Schmidt and I developed a mutual trust and respect for each other. I would call it a personal friendship if it were not for the fact that Schmidt seemed careful to maintain a professional aloofness from everyone, including me, during his stay at the college.

While he would talk freely of his studies, and his views of German culture, he kept a steady formality as to discussions concerning himself or his government. His family he never discussed. The formality was a constant with him, even on the several occasions that he was a guest in my home for dinner, and even after drinking a quantity of liquor that would have loosened the dignity of my most severe colleagues.

Always friendly, he was nevertheless so correct in all his actions that it was as if the East German government had given him permission to come

to the United States only upon the condition that he not let down his guard in the presence of Americans.

There was an exception to his reserve. Schmidt was a consummate teacher. Although socially aloof, he came alive in the classroom, and the students reciprocated with keen interest in everything he said. With his longish, but carefully tended hair, his wire-rimmed glasses, and classic yet understated dress, Schmidt was the modern version of a nineteenth century German Professor—academically serious, yet devoid of stuffiness. Fond of Latin epigrams, he could disarm any “sal Atticus,” as he would say, with a biting retort in the Roman tongue, which to me always seemed odd, coming from a German academic.

He was, above all, a gentleman, and when the occasional class disruption would veer towards chaos, Schmidt would retain a cool demeanor, and articulating each syllable, draw out the words, “Meine Damen and Herren,” or, if that didn't work, the shorter version, “Leute,” “people” which everyone knew meant, “we shall wait, people, until everyone is ready to

proceed.”

While in Wheeling, Schmidt taught a course called “Professor Nietzsche's Seminar,” partly adapted from course materials used by the philosopher himself when he served as a college professor at the University of Basel. It was, for Schmidt, a forbidden treat. In the DDR, Nietzsche was out of favor, considered a proponent of imperialist aggression, and worse, a proponent of the cult of the “individual,” rejected by socialistic ideology. Schmidt was convinced that the official view of Nietzsche was unfair, and he harbored a secret admiration for Nietzsche's poignant insights into human nature as well as his beautiful and incisive prose.

As for the course itself, it was only loosely based on the content of the original Nietzsche course, less oriented to classical philology and more to anthropologic philosophy, which gave Schmidt the flexibility of using the lectures to launch into engaging discussions with students about whatever philosophical subjects he

La Cerca - continued from P.4

deemed appropriate.

Even so, Schmidt could never have taught such a course back home. Certainly not at the Karl Marx University, and probably no where in East Germany. He smiled to think that the reason was because officials of the DDR did not consider Nietzsche “revolutionary” enough. Accordingly, he used his time in the United States to indulge his interest in the nineteenth century philosopher, and welcomed other professors to attend his classes, which I did whenever I was not engaged in my own pedagogic duties.

Directing attention to one of the more academically challenged students in his class, Teddy Dietrich, inexplicably one of his favorites, he would start one of his sessions.

“Mr. Dietrich, can you tell us what freedom is? Do you think it is having the freedom to do whatever you want? to go to—where is that place you go to instead of doing my assigned readings?—oh yes, the Alpha, to go there, anytime you want, and get roaring drunk?” Much laughter from the classmates, as Schmidt walked over to directly

engage the only seemingly contrite student.

“Oh no, Mr. Dietrich, Freedom is the state of being ‘autonomous’—of acting upon your own unique volition, uninfluenced by your peers, uninfluenced by money, ideology, your church, your government, the crowd.” Sartre said it best—he was ‘most free’ when he worked for the “resistance” when France was under the Nazi occupation. Only then did he become autonomous! Free! Despite the ultimate risk to his life!”

“Well, I go to the Alpha because we already live in a free country, and Jean Paul already took care of the Nazis!” ventured Dietrich, proud and not a little surprised that he had remembered the first name of the French philosopher, looking around to encourage more laughter from the class, which this time came tinged with a hint of nervousness.

“Ah, Mr. Dietrich, there will always be Nazis—always someone wanting to take away your autonomy. You see, it’s easier to control people who do not exercise their freedom, who do not say “no.” Tell me, Mr. Dietrich, where would capitalism be if consumers

said no? How could empire stand if soldiers said no? If people stood together and announced a collective no to what was happening to their lives, to their country?”

“If the forefathers of your own country had not said “no” to the British Empire? Oh no, Mr. Dietrich, freedom is not around you, not given to you by the State, it is inside you, and unfortunately, most people go through life without ever calling it forth—in a state of ignorant servitude.”

It was a familiar theme with Schmidt—Capitalism, and an individual’s response to it, but I assumed he emphasized it only because our country was capitalistic. I would have expected him to have raised the same questions of autonomy with respect to the socialist system in East Germany where he usually taught, that is, if his government let him. Even so, Schmidt would also tell the students that although difficult to achieve, there was nothing “of value” in the mere exercise of freedom. He would say that great evil, as well as great good, could come from the exercise of freedom.

“It is not freedom that

gives value to your life, but how you exercise that freedom!” He had a gift, when making these pronouncements, of seeming to speak to each student individually. “Every day has a dawn,” he would say. “Every day has a sunset! Every day is a circle! And the ultimate value of your life will depend on how you—only you—color those circles!” “Remember the words of Goethe’s dying Faust: “Only he deserves freedom and life who conquers them every day!” Almost all of his students would get caught up in Schmidt’s enthusiasm; some sat totally enthralled—with the exception of Dietrich, who was usually causing some small commotion with his immediate neighbor. Yet Schmidt could not bring himself to chastise Teddy, despite his pranks. Teddy had a carefree joy for life that made people like him, and an almost childish innocence which made everyone want to protect him—perhaps even from what Schmidt sought to teach. Then too, Schmidt appreciated that what he was teaching would not to be heard

Con’d on P. 7

Ask Bartleby

Dear Reader,

Kudos to member Judge Patrick Flatley for his excellent work in bringing the C.A.R.E. educational program to West Virginia's young adults. Ask him about it!

In the absence of a query this issue, I leave you with some choice thoughts on the law, lawyers and issues near or dear to them from *Les Misérables*, by Victor Hugo, with which to impress your spouse (or Justice Bullingham) at the appropriate time.

On a gathering of lawyers:

“The sight of these groups of black-robed gentlemen murmuring together on the threshold of a court of law is always a chilling one... they are like clusters of buzzing insects absorbed in the construction of dark edifices of their own.”

On the death penalty:

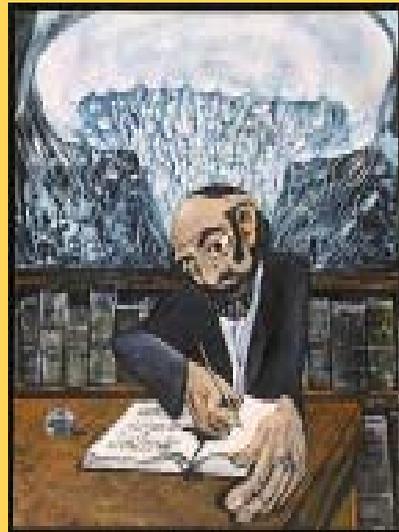
“What right have men to lay hands on a thing so unknown?”

On ignorance and dens of iniquity:

“The real threat to society is darkness... What is needed to exorcize these evil spirits? Light, and still more light. No bat can face the dawn. We must flood the underworld with light.”

On partisans:

“Factions are blind men with true aim.”



Yours Sincerely,
Bartleby, the Scrivener.

The State of Justice - con'd from P.3

there are just and peaceful means (i.e. the civil justice system) for seeking redress for perceived or real harms suffered at the hands of others?

Does our system, in fact, lack social empathy, as opposed to sympathy?

Isn't it about time we did at least re-consider the prohibition? Would it be so hard to instruct a jury that sure they had to follow the law, and sure they had to base their verdict on the evidence, and not on sympathy, but that

they nevertheless could use universal ethical precepts or the Golden Rule to the extent they are NOT in conflict with the law and evidence, and not based on sympathy?

If a juror were told that in distributing justice, whether for the plaintiff or the defendant, that they would want their decision to be an ethical norm applicable to their own future case, would that be so harmful to the civil justice system? Wouldn't it rather make it more empathetic, less impersonal, more worthy of trust? Perhaps give the community more of a vested interest in it?

We know the law can change tomorrow. But “do unto others...” has stood the test of time—more than two thousand years.

So just maybe it's time to let jurors consider “within the confines of the law” to do unto others as they would have done to themselves. Maybe it's a way to return social empathy to their deliberations.

But then again, I could be wrong. I do take the occasional drink, and my thinking may be fuzzy on this

issue. I do humbly submit, however, the issue worthy of discussion, and soon, while some civil trials by jury still remain. 

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.

La Cerca *con'd from p. 5*

by everyone, would not trouble everyone. And in Teddy's case, he sensed that it should not trouble him. That it would make no difference. That his spirit was so fragile, so fleeting, that it was living on borrowed time, and that to infuse it with self analysis might destroy the very childlike innocence that made it so lovable. So when Teddy would act up in class, Schmidt would merely call him to attention, and cheerfully hurl one of his all-purpose Latin quips. "Ah, Mr. Dietrich, sile et philosophus esto." Unfortunately, it was not in Teddy's nature to keep silent. And he never did

In the short time he spent in Wheeling, Schmidt became a favorite teacher to many of the students, despite his almost bashful aloofness out of class. Some students even changed their field of study to philosophy as a result of his lectures. The School's Jesuit Honor Society, Alpha Sigma Nu, recommended Schmidt be named Chairman of the Philosophy Department, not caring how transient Schmidt's sojourn in Wheeling might be. Which turned out to be brief. At the end of his first academic year, at our last dinner together in our home, Schmidt told me, in the presence of my wife

and daughters, that his visit had to be cut short, and that he had been summoned back to the Karl Marx University. He offered no explanation, and so we did not ask, but the good-byes, especially with the children, who had come to enjoy the visits by "Herr Schmidt," were difficult. Without anyone voicing it, everyone was thinking the same thing—that we might never see Schmidt again. That was in May of 1983. I sent him a note that October, after the start of the New School year, to give him the sad news that our former student, Teddy Dietrich, had been accidentally killed in an automobile accident, after

having flunked out of College. I never heard back from him. A few attempts to call were unsuccessful. His phone had been disconnected. Two more letters I sent to him in care of the University were returned, unclaimed. I had all but given up on him when, one evening in January of 1984, my phone rang at home. On the other end was an animated Schmidt, almost too excited to talk. 

As we like to say, "If those who believe in the Civil Justice system don't educate the public, those who don't will."



*Mock Trial Prep
Wheeling Park High School*



The WALS (Wheeling Academy of Law and Science) Foundation is completing its fourth year of presenting mock trials in the fourth and eighth grade classes in Ohio County, along with some parochial/private schools, Laughlin Chapel and WPHS. We also went to Jackson County in March and plan on going back to Kanawha County in May.

After this school year, more than 4,000 students (a few of whom are pictured) will have participated in this educational project that brings to life the American Justice System.

DHHR in Charleston, (grantor) has nominated our Mock Trial Program as one to receive free consulting services in MN in April. Barb will work with them on how to get outcomes from this substance abuse program along with expansion! Mary Ellen Cassidy, WALS Foundation Board Member & Evaluator, will accompany her.

Thank you, lawyers, for your support! -- Barb



*"Closing Arguments"
Kanawha County*



*Post Mock Trial Q & A
Ripley H.S.
Jackson County*

Upcoming Blackstone Club Meetings & CLEs

BLACKSTONE CLUB Tonight: Presentation by Ben Stout

"The Expansion of the Wheeling Heritage Trail"

Upcoming - June 21, 2007

August 16, 2007

October 18, 2007

Dec. 14, 2006 (Black-Tie Event)



Continuing Legal Education Seminars

May (exact date TBA) Morning (3 hr.) - Up to 3.6 credits available

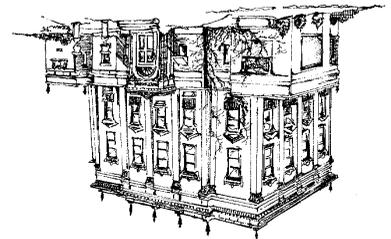
"CARBON IN THE COURTROOM - "Citizen Rights & Remedies in Environmental Matters" - presented by Joe Lovett & Patrick McGinley

Wednesday, May 9, 2007 - Noon Series (1 hr.) - Up to 1.2 credits available

"An Attorney's Role in Fiduciary Responsibilities" presented by Bernadette Smith & Elizabeth Quinlin - Hazlett, Burt & Watson

Friday, June 8, 2006 - Morning (2.5 to 3 hrs.) -Up to 3.6 credits available

"A Morning with the Judges VIII" (Presenters TBA)



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