the Blackstone club

Commentaries

June 2008

We swore we'd always remember- no retreat, baby, no surrender. ~ Bruce Springsteen

Letter from the Editor

Welcome to summer, a dangerous time, to judge from the name of Ron Kasserman's presentation for tonight—"Mastering the Art of Political Correctness."

If you were present for Ron's initial presentation back in October of 2000, entitled "These are a few of my favorite things," you will have been sufficiently warned.

Let us know if you are enjoying the new early Friday "Happy Hour" format for our bi-monthly social meetings, and if you are ready to make, or arrange, a presentation, please let Barbara Knutsen know so you can pick a convenient date.

Cheers!

O'C of D.

Tullamore Dew Profiles

Robert Gaudio

The Adventure Continues - an enigma wrapped in a conundrum wrapped in a warm flour tortilla with guacamole and sour cream

Untold horrors and deep neuroses aside, Bob Gaudio enjoys the bumpy cab ride along this mortal coil. Notwithstanding a measure of derring-do, I have somehow eluded dying young and making a fair-looking corpse. Cliff-diving is next, methinks, or perhaps a run for the Presidency. Now, where did I stow that pair of Speedos©?

A child of the 1950s, I was the fourth of six tamed and reared by Merle and Catharine (née Meyer) Gaudio in Follansbee where I attended St. Anthony Grade School while plying many trades, including altar-boy-for-hire and pop bottle collector. I loved books, sports (especially baseball) and television. Tabula rasa.

Off to St. Joseph Preparatory Seminary, living away from home at age fourteen. Liturgical collars and Latin conversation abounding, I took a giant leap toward maturity while Neil Armstrong was leaping for mankind. Driven from that den of sanctity by rabid heterosexuality, I was a member of Brooke High's first graduating class. Inspired.

Next, West Liberty and a serious run at ars artis, postponing undergrad studies for a stint in the Big Apple as the Master Thespian. I returned home sobered by the experience and intent upon writing and teaching college composition. Financed my undergrad education in the steel mill, in wedding bands and sundry menial jobs. Busy.

Taught Freshman Composition at WVU and was wed to my first wife. The distinct and putrid odor of academia led me to odd jobs preceding an opportunity to enter the United States Peace Corps. Three years in Yemen and surrounding regions brought a new language and culture, not to mention a shrapnel wound and a nasty knife scar. I thrived from the experience, using time off to travel through Europe and parts of Asia Minor. Perspective.

No job and no desire to teach, I turned to restaurant management. I ran

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Barb Knutsen,
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Off the WALS:

News of theWheeling Academy of Law & Science (WALS) Foundation

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

Hats Off to Our Attorney Volunteers

Our mock trial program has been a huge success, thanks in large part to the many attorneys who volunteer their time to give the program "street cred."

The following attorneys have shared their time and knowledge by portraying "the judge" in our courtroom dramas. We owe them a debt of graditude.

- **L**anny Bonenberger
- Patrick Cassidy
- Leah Chappell
- Sean Cook
- Tim Cogan
- Jim Companion
- Michelle Dougherty
- Rob Fisher
- Kevin Flanagan
- Earl Forman
- Bill Gallagher
- Bob Gaudio
- Edward Gillison
- Shawn Gillispie
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- Vince Gurrera
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- Dean Makricostas
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- Teena Miller
- Don Nickerson
- JoLynne Nugent
- Jim O'Brien
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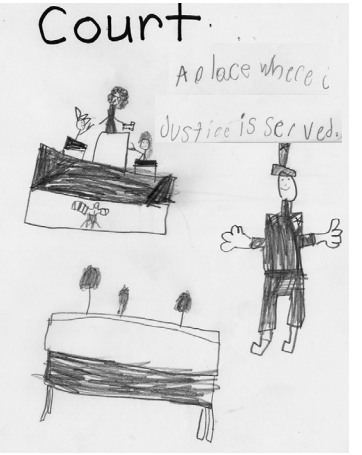
- Arch Riley, Jr.
- Cheryl Riley
- Gary Sacco
- Michelle Schirripa
- Holli Massey Smith
- Scott Smith
- John Stimmel
- Christina Terek
- Brad Thompson
- Teresa Toriseva
- Rose Humway Warmuth
- Mary Williams
- Heather Wood
- Jenna Wood.



Thanks to our mock trials, students understand our justice system a little better.

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Robert Gaudio Profile

kitchens, restaurants and food services throughout Pittsburgh, gaining a chef certificate while losing a marriage. The 1980s afforded me several jobs, two great kids, Nathan and Elizabeth, and a divorce. The restaurant business sucked out my life's blood one drop at a time. Bummed.

Divorce and post-divorce proceedings led me to enter Duquesne Law at age forty. Clearly insane, Clare McDonald married me two months before I entered law school. Working a day job, attending night classes, stealing moments to study, living on three hours of sleep, I graduated and passed the bar exam - a cruel, sadistic joke following four years of pedagogical torture. Accomplished.

"I passed the bar exam - a cruel, sadistic joke following four years of pedagogical torture."

Wanting to try cases and not rot in a law library scribbling others' briefs, I was hired as a public defender in Wheeling in 1997. Clare, an Occupational Therapist, works in the Hand Clinic at Wheeling Hospital, and I now try cases as a private practitioner. In 2000, David was born. A lover of books, sports (especially baseball) and television, he will enter third grade at St. Vincent de Paul School in the Fall. Pleased.

Now, where DID I stow that pair of Speedos©?

The State of Justice:

Education of Children with Disabilities

"Not your father's old Chevrolet, any more."

The Universal Declaration of Human Rights, in Article 26, cites education as a fundamental human right and states that education shall be free, at least in the elementary and fundamental stages, and compulsory, and that education shall be directed to the full development of the human personality.

In 1973, the U.S. Supreme Court ruled in a Texas case that education is not a fundamental right in the U.S. Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973).

Since then, it has been generally accepted that a state must examine its own constitution to determine its educational responsibilities.

In *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979), the Supreme Court of Appeals of the State of West Virginia, interpreting West Virginia constitutional language requiring a "thorough and efficient system of free school," found that Article XII, Section 1 of the West Virginia Constitution made education a fundamental, constitutional right in this state.

It went on to define a thorough and efficient system of schools as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."

The Ohio Supreme Court ruled four times from 1997 to 2002 that the state's funding system is unconstitutional. *DeRolph v. State*, 97 Ohio St. 3d 434, 780 N.E.2d 529 (2002). Unfortunately, it did not take the opportunity to interpret its constitutional language (which is similar to that in West Virginia and requires "a thorough and efficient system of common schools" OConst. Art. VI Section 2) as affording its citizens a fundamental right to quality education.

A 2007 effort to place a proposed Constitutional amendment before the voters in Ohio, "The Ohio Education Amendment," that would provide that it is a fundamental right for every student to have a high quality basic education, regardless of geographical location or financial environment, failed, although renewed efforts are still underway. See www.rightforohio.org

This background is fundamental to understanding federal law governing the education of children with disabilities, which started as the Education for All Handicapped Children Act of 1975 and is now the Individuals with Disabilities Education Improvement Act of 2004. (IDEIA) 20 U.S.C. Section 1400.

Board of Education V. Rowley, 458 U.S.176 (1982), is the lead United States Supreme Court case on what the statutory requirement of "Free Appropriate Public Education" (FAPE) means under the Education for All Handicapped Children Act of 1975 (Act), which was passed in response to Congress' perception that a majority of handicapped individuals in the United States "were either totally excluded from school or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."

The *Rowley* standard, which defined entitlement to FAPE as requiring only an "educational benefit," is often explained as requiring a school district to provide only a "Chevrolet" education instead of a "Cadillac." However, with the law as then constituted, the whole focus of the decision was on "access" to education, not "quality" education.

Unfortunately, many school districts, educators, lawyers, and hearing officers are wrongly holding onto to that premise despite the fact that it is obsolete, because the law has substantially changed focus since *Rowley* was decided in 1982, from

requiring just "access," to requiring "proven methods" of education, i.e.," results."

In particular, the 1997 and 2004 Amendments to IDEIA, provide, in pertinent part, as follows:

Congressional Findings: 20 USCA Section 1400 (c)

Section 1400 (c) (4), implementation of chapter has been impeded by low expectations, and an **insufficient focus on applying replicable research on proven methods of teaching and learning** for children with disabilities.

Section 1400 (c) (5), 30 years of research and experience have demonstrated that the education of children with disabilities can be more effective by having (A):

"High expectations" for disabled children to ensure their access in the general curriculum "to the maximum extent possible."

(i) meeting developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children &

(ii) being prepared to lead productive and independent adult lives, to the maximum extent possible.

(5)(E) supporting high-quality, intensive pre-service preparation and professional development for all personnel who work with children in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disability, **including the use of scientifically based instructional practices too the maximum extent possible.**

The amended legislative "purposes" included in 20 U.S.C. Section 1400 (d) contain the following additional pertinent language:

Purposes.

The purposes of this title are:

(a) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their **unique needs and prepare them for further education, employment, and independent living**.

(b) To ensure that the **rights of children** with disabilities **and parents** of such children **are protected.**

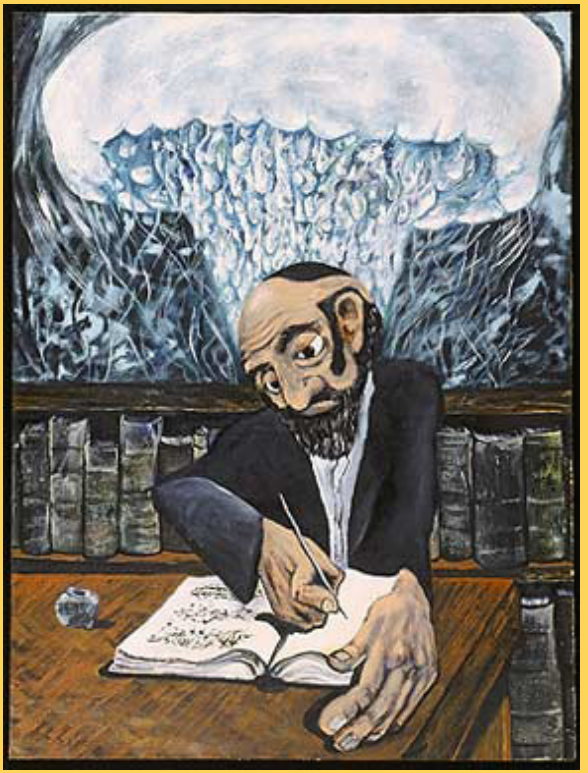
(Emphasis Mine)

The 1997 amendments show Congress' intent to incorporate state educational standards into special educational programming for disabled students. The statue now explicitly mandates that states establish performance goals for children with disabilities that are consistent with the goals and standards set for all children. 20 U.S.C.A. Section 1412 (a) (16) (West 2002), and establish "performance indicators" to assess their progress. (Id.) The definition of FAPE for students with disabilities incorporates, as a matter of law, minimum "state standards" of education. 20 U.S.C.A. Section 1401(8) (B)-(C) (West 2002).

Thus, the amendments change the focus of IDEA from merely providing access to an education as noted in *Rowley*, to requiring improved results and achievement for children with disabilities, and because *Pauley v. Kelly*, has held that an adequate education is not a minimal education, but one that "develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically," this should be the standard utilized in West Virginia in determining the substantive requirements of FAPE in West Virginia Schools.

While *Pauley* did not deal with disabled students specifically, equal protection considerations under the West Virginia State Constitution, discussed in *Pauley*, would not justify unequal treatment to students just because they are disabled.

The continuing notion that our children with disabilities are only entitled to your father's "old Chevrolet" is as obsolete as GM's product mix over the last decade. It's time we get serious about ensuring a Free Appropriate Public Education to all children in West Virginia, including our most vulnerable.



Imprimis: I am a man who, from his youth upwards, has been filled with a profound conviction that the easiest way of life is the best. — *Bartleby, the Scrivener* Herman Melville

Ask Bartleby

Dear Bartleby,

Question: How about a thumbnail sketch of the Wheeling suspension bridge cases in the Untied States Supreme Court?

Answer: In 1852, the State of Pennsylvania brought suit against the Wheeling & Belmont Bridge Co., the owner operator of the Wheeling suspension bridge, alleging that the suspension bridge's low height (less than 111 feet above low-water mark) obstructed river traffic of large river boats to and from Pittsburgh and the Mississippi river. Relying on *Odgen v. Gibbons* , the Supreme Court ordered the bridge demolished or raised to a height of 111 feet, but months later, Congress passed a law overruling the Supreme Court decision, declaring the suspension bridge to be a "post-road" subject to Congress's interstate commerce jurisdiction.

Shortly thereafter, the bridge "blew down" during a storm, and Pennsylvania, being represented by Steubenville born Edwin M. Stanton, returned to the Supreme Court in 1854 seeking an injunction to prevent the rebuilding of the bridge, and citing as authority the Court's initial decision.

Justice Grier at first granted the injunction, incurring the wrath of The Wheeling Intelligencer: "Truly the Judges of the Supreme Court are not what they have been, and this Judge has heretofore presented a mortifying instance showing how poorly small men can support high places." (July 3, 1854)

In 1856, the full court set aside the injunction, ruling that Congress's validation of the suspension bridge was legal:

"It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject."

See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856).

La Cerca - Chapter 9

Tanhauser sang at the top of his lungs, feeling real joy at being back with his singing club after so many months.

It was September of 1994, less than a month before he was to die on October 12, a young man of fifty; yet he had hope – despite the diagnosis of cancer that had been made by his physician not eight months earlier, and the equally ominous prognosis that he had only six months to live.

He had already beaten that prediction. And although he supposed he had gone through all the stages of grief, he had been too busy with his preparations to perceive each clearly. He had never felt his life so particularly important to warrant preservation beyond his fellowmen, and he accepted the news of his impending demise more as a matter of curiosity, and even relief from the pain that had been with him all those months, rather than as a source for tragic alarm.

Yet he hadn't felt like singing for months after the diagnosis. Rather, he had been obsessed with thoughts of preservation of other kinds. First and foremost, preservation of his family. His wife and children were more upset with the diagnosis than he, and so he refused to discuss the particulars of his disease, embracing the philosopher's "holy lie" to spare their feelings. "Really," he would say, "it doesn't hurt at all."

But because one does not make a grand exit without planning or instruction to those he loved, he wrote copious notes to his wife and children, to be opened only after his death. Cheerful notes all, and often on mundane issues: how the family accounts were to be handled after his death; what should be known about the contents of the library he was leaving behind; how to open the "stuck" windows on the second floor; how to unclog the washing machine, which he felt only he knew how to do.

Nietzsche home - Naumburg, 1984

But he worked also on his written history of his life and that of his family, as far back as he could, which he felt every bit as important to impart to his family as his hopes for their future.

The restored Nietzsche home- 1994

And then there was the house in Naumburg, in which he had invested so much. He had not so much been its owner as its steward, always knowing that it would be there long after he was gone, and that he had to leave it better off than when it had come into his possession, for the sake of those who would come after him, those who too might find inspiration in its history, and provenance.

And finally, there was the most secret of all his treasures – the original of which lay still under the floorboard in the old office of the restored home, where he had carefully returned it after making a copy for Schmidt.

It was a secret he had kept even from his own family, believing as he did that they, or their progeny, would have to re-discover "The Values" for themselves; would have to clear away as he did the accumulated dust of the past to make the same discovery, but only if that were meant to be. This was not something he could explain to them in words, or posthumous notes. Not a thing he could do for them. It was the one discovery in life they would have to make for themselves.

He felt the same as to the copy he had provided Schmidt. If it were meant to have been published, Schmidt would have done it. Or more accurately, fate would have allowed Schmidt to do so. And to his knowledge this had not happened– his contact with Schmidt having been broken off without explanation in March of 1984.

And so he sang. Joyously and as sweetly as anyone had ever heard him sing before, looking forward to what he had left of life. "Blessing it, rather than in love with it."

To see earlier chapters of La Cerca visit http://www.firststate-capitol.com/commentaries.shtml.

Upcoming Blackstone Club Meetings & CLEs

BLACKSTONE CLUB Tonight - June 27, 2008 - **Ron Kasserman**
Mastering the Art of "POLITICAL CORRECTNESS"

Aug. 29, 2008 - Debra Hull

Oct. 24, 2008 - Bill Watson

Thursday, Dec. 11, 2008 - WALS Christmas Awards Banquet

Continuing Legal Education Seminars

(Mark your calendars today)

Friday, Dec. 13 2008 Morning with the Judges X

Irene M. Keeley Chief Judge, U.S. District Court, Northern District and one other judge to be announced

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All previous Blackstone Club newsletters are archived on our website: http://www.firststatecapitol.com/commentaries.shtml.

the Blackstone club
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