

A Grateful Student's Farewell To Welsh White

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This *Farewell* to Welsh White is hard to write, not because of sadness—though there has been much of that—but because it is so difficult to find the words that adequately convey the measure of the man. As I have said in public gatherings since his death, having grieved at first, I prefer now to celebrate his life.

I. CELEBRATING MY FIRST YEAR TEACHER

For me, the celebration is a very personal one, covering over two decades. I attended the University of Pennsylvania Law School when it still wisely required its first year students to take *Criminal Procedure I: Police*, seeing the subject as fundamental to understanding public law and the relationship between the state and its citizens. My classmates and I were lucky enough to study that subject under the tutelage of a Visiting Professor from the University of Pittsburgh School of Law, Welsh White.

When I first saw Welsh, he seemed to me an odd fit for a criminal procedure professor. I then thought of criminal lawyers as a rough bunch, loud, aggressive, and street-smart, likely a bit paunchy, wearing ill-fitting suits. Welsh, by contrast, was tall, thin, soft-spoken, and smartly dressed. He conveyed a faintly patrician air that, if it had been coming from others, would have seemed false and condescending. But Welsh somehow managed to pull it off, seeming not so much patrician as princely, a wise young sovereign feeling genuine love for his subjects. Once he began to teach, however, he simultaneously revealed a down-to-earth character, the seeming straightforwardness and passion of my idealized criminal lawyer image. Unlike my image, however, what seemed to be true was true. There was little guile in the man. With Welsh, what you saw was what you got.

Welsh instantly skyrocketed to the top of the class's list of favorite teachers. Several qualities brought him this honor. First, Welsh nicely married theory with practice. For some law professors, this marriage is just for the sake of the kids—to keep them (the students) happy enough to stay in school and off drugs. But Welsh's marriage was a happy one. He reveled in theories of constitutional interpretation, federalism, the nature of privacy, the role of social science in the law, and the nature of individual freedom. Yet, for him, the nitty-gritty of daily policing and lawyering practices both necessarily informed these more airy concepts and provided the real-world context in which sound theories must be applied. Theory that did not learn from, and improve, reality was pointless.

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Second, because of his respect for the “real-world,” Welsh’s teaching always made the abstractions of the law concrete. There were few casebooks in any subject area at the time that embraced the “problem method,” and Welsh had not yet written his own. Yet he regularly used lengthy, complex, and subtle hypotheticals—in short, problems—in class, a novel and challenging experience for his students. These problems required us to think like advocates, judges, and legislators. They pointed out ambiguities in the case law, policy dangers lurking in seemingly neutral rules of law, doctrinal inconsistencies, dissenting wisdom, and *realpolitik*. We felt like lawyers and policymakers, a heady rush of what might be the best in our futures, and that motivated us to careful class preparation and enthusiastic participation. In my own case, I was still overcoming a fear of authority figures that generally led me to hide in the back of the room, sitting behind the tallest student I could find. My quest for invisibility generally failed, my red hair giving me away, indeed seeming to invite my teachers’ probing glare. But in Welsh’s class, I sat in the front row. I raised my hand often. I *wanted* my voice to be heard.

Third, Welsh, who came from an economically privileged background, nevertheless had a sincere empathy for the underdog. He felt the pain of the poor, the oppressed, the vulnerable. His empathy was neither a form of limousine liberalism nor weak-kneed coddling. He wanted a level playing field in which each person was free, by hard work, to develop his talents to their fullest, to seek individual happiness in the context of fulfilling communal responsibilities. Yet never did Welsh create a sense of a “politically correct” perspective. All views were eagerly aired and debated in his class. But what he did do, through stories, recounting case background that was not noted in the casebook, and thought-provoking questions, was to make us understand what it *felt like* to be in the shoes of the “other.” Our emotions were expected to inform our reasoning, an attitude that most of our other professors discouraged. Welsh’s concern for those less privileged than himself had a special resonance for me. I grew up in a lower-middle-class family of a stay-at-home mom and a dad who worked first as a dry cleaner’s delivery person, then as a shirt salesman. My mom had graduated high school, an accomplishment that escaped my dad who, as the eldest of three brothers, had to drop out to help his father support the family. In my pre-teen years, we lived in a neighborhood where I faced occasional muggings and beatings. In seventh-grade, my junior high school brought me more fear than learning. Most of my compatriots at Penn neither knew of, nor cared about, such a world. Welsh did.

Fourth, and finally, Welsh just loved to teach, and he loved his students. He worried about whether we were learning the skills and information that he wanted us to absorb. He was, unlike our other first year professors, approachable. If you needed help, he was there to give it. In my heart, he still is.

II. MY COLLEAGUE: THE ARROGANCE OF YOUTH

I saw little of Welsh after that semester, though my classmates and I talked of him often. The lessons I learned from him stayed with me and ultimately led me to spend a significant portion of my early legal career as a prosecutor in Philadelphia. Eventually, however, I mimicked Welsh in another way: I entered the legal professoriate.

At almost the same moment that I started teaching, I was delighted to find that Welsh and his co-author, James Tomkovicz, had just published a new criminal procedure casebook.¹ Not surprisingly to me, it was the first to make thorough, consistent use of complex problems. I thought that it was then the best book around, and I was moved to include a review of it in an essay on teaching criminal procedure. Here is part of what I had to say about the book:

Most of the problems are lengthy statements of facts, ranging from about half a page to a full page in length. Some of the problems examine ambiguities in the meaning, application, or limits of particular doctrines. Other problems are cumulative, including issues covered in previous sections and providing an effective device for review and a means of developing exam-taking skills. The problems also layer their goals through careful variation of the question posed. Thus, one problem may explore the nature of appellate review and the question of when, if ever, deference must be given trial judges by posing the question: "How Should the Appellate Court Rule?" Another problem shifts emphasis to the trial level by asking: "Should the Motion Be Granted?" Sometimes the focus is narrowed to a single issue, for example: "Were Lindsey's Statements Interrogation [Under the *Miranda* Rule]?" Still other questions focus on the conduct of the police, asking whether the police should have given *Miranda* warnings or should have conducted an automobile search.²

My conclusion: "In short, for professors interested in emphasizing primarily the problem method, there is simply no better single text on the market."³

My ruminations about teaching criminal procedure did not, however, end with this praise. With the arrogance of the neophyte, I stressed how *I* could do better, arguing for more use of materials other than cases, an enhanced interdisciplinary

¹ WELSH S. WHITE & JAMES TOMKOVICZ, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS ON INVESTIGATION AND PROOF* (1990).

² Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 161-62 (1991).

³ *Id.* at 163.

approach, and the use of role-plays. Indeed, though sincere, I offered this somewhat back-handed compliment to Welsh:

What is particularly surprising about this inattention [to interdisciplinary materials] is that Professor White has written one of the best examples of a scholarly study that combines doctrinal analysis with discussion of ethics, social science, and lawyering strategy. See WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1991).⁴

This from a young pup who had just started publishing and was at the start of his second year of teaching!

Welsh, of course, took no offense at my presumptuousness. Indeed, he called me and sent me an e-mail to thank me for the review. He was particularly pleased with my reference to his death penalty book because, despite my snotty tone, he understood that I was indeed in awe of that work. Concerning my suggestions for improving his casebook, he said that he was obviously not in agreement with all that I said but that he found the comments interesting and thought-provoking and mused that they might prompt some changes in his second edition. He praised my writing and urged me to keep doing so and to feel free to rely on him for advice, if needed. To my disappointment, he did not remember me as having been one of his students. But when he learned this fact, his voice brightened noticeably, and this time he urged me more strongly to stay in touch.

I eagerly accepted Welsh's invitation, and we quickly became regular e-mail correspondents. We exchanged ideas, critiqued one another's work, shared interesting stories, and became close electronic friends, a type of relationship newly-spawned by the computer age. I became an increasingly fervent admirer of Welsh's scholarship too, which unsurprisingly reflected the same fusing of theory and practice, passion, and novelty that characterized his teaching. In 2001, he published a book that exemplified all these qualities: *Miranda's Waning Protections: Police Interrogation Practices after Dickerson*. The book marvelously synthesized social science, police and lawyering practice, and legal doctrine to demonstrate that *Miranda* and its progeny did nothing to regulate *how* interrogations were conducted once *Miranda* rights had been waived. Traditional due process doctrine as it had been applied had been too weak to fill this gap. The result was an unacceptably enhanced risk of false confessions. Welsh thus argued for a more muscular due process, one making increased use of clear, *per se* rules informed by the best social science. I summarized what I saw as the essence of this outstanding work in an unabashedly admiring book review in 2002:

⁴ *Id.* at 163 n.97.

[C]urrent due process law . . . , [White argues] already implicitly embraces the following principles: the police may not use interrogation methods that are substantially likely to produce untrue statements. White argues that current application of this general principle has been distorted by the courts' ignoring the teachings of modern social science on the likelihood of certain interrogation techniques' leading to wrongful convictions and on the problem of factfinding accuracy concerning the circumstances under which confessions were taken.⁵

White's book quickly became a classic of the innocence movement, being cited widely, like most of his work, in law reform committee reports, judicial opinions, scholarly books, and law review articles. The trend of law reform in the area of interrogations has been to embrace many of White's teachings.⁶

III. MY TEACHER STILL

About a year after my review of *Miranda's Waning Protections* was published, Welsh invited me to give a talk at Pitt. He asked me to bring my wife and to come early so that we would have a chance to talk. He insisted on picking us up at the airport and, when we arrived, he took us out for a wonderful dinner before driving us back to our hotel. I remember being surprised at Welsh's appearance now that I had set my eyes upon him for the first time since law school. My surprise was at how little he had changed. There was some gray in his hair, maybe a furrow or two on the brow, and he was not the painfully thin stick figure I remembered. Other than that, he seemed much like the man I first met in my Criminal Procedure course. He was amiable, interesting, relaxed, and gracious. He treated me and Patty (my wife) like we were family. He gave me a tour of the law school, introduced me to his colleagues, arranged a dinner with a few of them the night of my presentation, and brought me laughter and cheer. When he drove us back to our hotel after dinner, Welsh told me about his new book project: interviewing the leading capital defense attorneys to explore their tactics as part of a broader examination of the nature of the death penalty as it is actually practiced, not as it pretends to be on paper. He asked if I would mind being his sounding board for ideas on the book, and I agreed. The book was his best effort yet. To my delight, his publisher, the University of Michigan Press, invited me to blurb his book, *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases*. Here is my blurb in its entirety:

⁵ Andrew E. Taslitz, *Welsh White on Miranda's Waning Protections*, CRIM. JUST. MAG., Fall 2002, at 57, 58.

⁶ See, e.g., THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 75-84 (2005).

A unique and profoundly important contribution to the literature on the death penalty. White allows the leading capital defense attorneys to speak in their own voices. His work reveals a new source of arbitrariness in the death system—whether the penalty is imposed turns more on who is your lawyer than how evil was your deed or character. *Litigating in the Shadow of Death* offers concrete guidelines for better lawyering, protection of the innocent, and understanding the artistry of the best capital attorneys. This is vivid, gripping stuff.⁷

I received my copy of the book on the last Saturday of December 2005 and immediately e-mailed him a congratulations. I received no ready response from him, though he had previously quickly and consistently answered my e-mails. A few days later, on January 2, 2006, I discovered the reason for Welsh's non-responsiveness. He was dead. I had known that he was seriously ill, but he always told me that the doctors were encouraging and that he hoped to be back to teaching soon. I embraced his optimism and so was thoroughly surprised and horrified to find that, just this one time, his hopefulness had not been justified.

Welsh was always my teacher, whether in his classroom, his writing, or his friendly embrace. The themes of pragmatism, empathy, kindness, persistence, loyalty, and intellectual rigor pervaded all his life's activities. His lessons live on in his books, his articles, and, most importantly, in the hearts of those who loved him and love him still. Welsh once told me that his year at Penn was the best in his life because that was where he met his wife. But, in a more modest way—a way that I am not sure Welsh fully appreciated—that same year was a turning point in the many Penn students' lives whom he touched. I was one of those whose life's direction Welsh changed. And though he still seems in many ways yet alive to me, I will never again see his smile or hear his counsel. And those things, my friend, I will sorely miss.

⁷ Andrew E. Taslitz, *Back Cover*, WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (2006); see also Andrew E. Taslitz, *Listening to the Best Counsel*, CRIM. JUST. MAG., Summer 2006, at 53 (book review).