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TRIBUTES

WELSH S. WHITE (1940-2005)

**Welsh: Dedicated Scholar, Devoted Colleague,
and Dear Friend**

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Welsh White died of lung cancer at the age of 65 on the last day of 2005. He was a fine athlete who never smoked, stayed in terrific shape, and ran ten-minute miles and played great tennis until his diagnosis in August. The months after August were grueling and discouraging, but Welsh had only one complaint. He missed teaching.

I met Welsh in the green pastures of Harvard University when we were nineteen-year-old sophomores. We did some growing up together, shared some great and goofy friends, and even learned a few things—less in Harvard’s classrooms than in the Kirkland House dining hall and Cronin’s Tavern. Welsh, however, was a more serious student than I and even admitted that he enjoyed studying. This sort of admission was un-cool, but Welsh knew only one way to talk and that was to shoot straight.

After college, Welsh studied law at Penn. His favorite teacher was Anthony Amsterdam, a criminal proceduralist and capital case litigator whom Welsh revered and took as a model. After law school, Welsh remained in Philadelphia to practice law at White and Williams, the firm his grandfather had founded, and, after a year of that, in the District Attorney’s office. On a visit in 1967, I watched him successfully prosecute a purse-snatcher and then accompanied him to one of the end-of-the-day de-briefing sessions that District Attorney Arlen Specter held regularly with his staff. I learned why Specter’s sessions did not endear him to the lawyers in his office.

Welsh began teaching criminal procedure at Pitt at the age of 28, and he remained at Pitt throughout his career apart from visiting professorships at Virginia, Penn, and Berkeley. I taught criminal procedure too, and our relationship became professional as well as personal.

Welsh was always a hopeless addict, and his addiction was scholarship. On several occasions over the years, he reported that he intended to take a two- or three-month break from writing to pursue other interests. If he had done what he said he'd do, his respites would have been well earned, but with one exception, he didn't. During his one hiatus from scholarship, Welsh got John Lesko off death row (temporarily anyway) through a habeas corpus victory in the Third Circuit, and he litigated other capital cases as well. On all the other occasions, a new manuscript appeared within the period that Welsh had said he would set aside. Whether he was contributing to the store of knowledge or working to save a life, Welsh was incapable of putting down his pen even briefly.

Welsh never kicked his addiction. His final book, *Litigating in the Shadow of Death*, appeared in the bookstores five days after he died. Welsh held an advance copy a few days before his death, admired the dust jacket by Phoebe Gloeckner, and heard his wife Linda and a friend read a portion of the text. Welsh's final law review article—a study of the police practice of discouraging a suspect under interrogation from requesting an attorney—appears in this issue of the *University of Pittsburgh Law Review*. Welsh looked forward to writing another capital punishment book for the University of Michigan Press during his sabbatical in the 2006-07 academic year.

Although Welsh wrote on a wide variety of topics, he was known particularly for his work on police interrogation and the death penalty. Unlike critics who see the Supreme Court's ruling in *Miranda v. Arizona* as overly protective of criminal suspects, Welsh argued in a series of articles and in his 2001 book *Miranda's Waning Protections* that *Miranda* permitted abusive police practices.

As Welsh noted, about 80 percent of all criminal suspects under interrogation waive their *Miranda* rights. Once they do, their interrogation proceeds as it would have before *Miranda*. Welsh wrote in fact that *Miranda* might have “had the unintended effect of reducing the extent to which the due process voluntariness test provides protection against [unfair] interrogation practices.” Welsh showed how police interrogators had adapted to *Miranda*. He presented transcripts of interrogations to illustrate their stratagems and considered which police tactics were lawful.

Welsh was particularly concerned about the risk of false confessions. He recognized, “The idea that a suspect who is neither insane nor the victim of physical coercion will confess to a crime he did not commit seems counterintuitive.” Drawing on the work of Richard Leo and Richard Ofshe, however, and offering detailed descriptions of interrogations in which the police had obtained false confessions, Welsh showed that the danger should be taken seriously. He then proposed specific restrictions on interrogation. They included limiting the length of the interrogation, prohibiting some sorts of trickery (particularly misrepresentation of the evidence against a suspect), prohibiting some threats and promises (particularly threats of adverse consequences to friends and loved ones), videotaping interrogations, and restricting the interrogation of especially vulnerable suspects.

Welsh explored in depth and detail every aspect of America’s system of capital punishment. He discussed false confessions in capital cases, the quality of counsel, client interviewing, factual investigation, plea bargaining, jury selection, the issues posed by defendants who tell their lawyers not to oppose death sentences, the persistence of racial discrimination, the role of victims’ families, the role of psychologists and mitigation specialists, jury instructions, penalty trial procedures, closing arguments, appeals, habeas corpus, and the rulings of the Supreme Court.

Welsh’s final book on capital punishment, the one published just after his death, focused on the work of defense attorneys. Like much of Welsh’s other scholarship, it went beyond reported cases, academic writings, and other law library materials to present material from trial transcripts and Welsh’s interviews with practitioners. Among the more than 30 defense attorneys, expert witnesses, and other criminal justice system actors Welsh interviewed were many of the most respected capital defenders in America. The book effectively encapsulated their wisdom.

Welsh did not write this book to be a practice manual, but a practitioner who sought down-to-earth guidance on how to litigate a capital case could not find a better place to start. He did not write this book to be a best seller, but its compelling narratives of cases, ethical dilemmas, and strategic choices are often difficult to put down. He did not write this book as a treatise on the law, but it includes a careful description of how the Supreme Court has restricted the right to the effective assistance of counsel and of how the Court’s narrow construction of this right may be changing. He did not write this book as a brief against the death penalty, but the book reveals how variations in the quality of counsel produce gross inequalities in who lives and who dies.

In this book and in his earlier writing, Welsh examined the effect of plea bargaining on the administration of capital punishment. Welsh, Steve

Schulhofer, and I once applied for a grant to determine how many of the inmates on death row are there only because they turned down a deal that would have saved their lives. How many may be executed not only for the crime of being a murderer but also for the crime of being an optimist?

We did not get the grant, but Welsh did not need the number to know that the strongest candidates for the death penalty often beat the executioner by striking bargains. Consider the Green River killer whose 48 admitted murders make him the most prolific serial killer in American history and the BTK killer whose grisly crimes terrorized Wichita for 30 years. Welsh wrote about the mass murderer Ted Bundy, whose rejection of an agreement that was clearly in his interest posed a painful dilemma for his attorneys. He wrote about Sandra Lockett, the defendant in a prominent Supreme Court case who had been minimally involved in a robbery that ended in an unanticipated killing by a co-felon. Lockett found herself sentenced to death because she had a plausible defense and therefore turned down offers that could have saved her life. Welsh concluded, "Plea bargaining in capital cases makes it less likely that the death penalty will be applied even-handedly or that imposing it will achieve any of the penological goals it was intended to serve."

Welsh was not the first scholar to note the frequency with which sleeping and otherwise incompetent lawyers bring death sentences to their clients, but he was the first to show systematically how exceptional lawyers work their magic and save even the worst of the worst from execution. Again he demonstrated that who is sentenced to death depends more on morally irrelevant circumstances than on differences in defendants or their crimes. The last sentence of Welsh's last book reads as follows: "In the long run, . . . just as a defense attorney's compelling narrative of injustice can produce a favorable result for a particular capital defendant, defense attorneys' compelling narratives of the series of injustices perpetrated by the modern system of capital punishment may lead to a continuing decline in the use of the death penalty, and eventually to its outright abolition."

Welsh's enthusiasm extended even to the mundane aspects of his job. Six weeks before his death, he returned home from the hospital after treatment for a cancer-induced stroke, and his first request was to read applicant files for the admissions committee. In a profession in which a critical attitude toward just about everything is usually a job requirement, Welsh celebrated the positive. He liked, appreciated, and admired his colleagues and was distressed when they did not seem to like, appreciate, and admire each other. Shortly before his death, he noted that Pittsburgh's new dean, Mary Crossley, appeared to be just the person to heal divisions in the faculty.

Welsh was dedicated to his students, and they were dedicated to him. Some posted reminiscences on cyberspace blogs following his death, in one case accompanying the tribute with a favorite snapshot. A student named Emily remarked, "He made me fall in love with the fourth amendment."

Although devoted to his law school, Welsh had time for chess, hiking, tennis, running, vacations in Maine, and especially his family. He bragged about Henry, Robin, Kathy, and Ryan and was terribly proud of them, and he was totally in love with Linda.

In the same quiet, matter-of-fact, un-cool, straight-shooting manner he had when we were sophomores, Welsh put all the parts of a dedicated and virtuous life together. Although there were frustrations and difficult periods, he took things one step at a time and made it all seem simple. On learning of his death, his teacher Tony Amsterdam remarked, "Welsh had a combination of nobility and unpretentiousness that was very rare and very precious. A world too poor in persons blessed with either virtue will be much poorer still for his loss." Traveling through 45 years of professional and personal adventures with Welsh was a constant joy. I will miss those long e-mails combining talk of Ryan's tennis triumphs and Kathy's graduate studies with descriptions of dean search frustrations, kind words about my latest article, expressions of concern about my worries of the moment, and enthusiastic plans for the next writing project. I have never had a more loyal and caring friend.