



1997

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Recommended Citation

Andrew W. McThenia, *You are the Man*, 21 Legal Stud. F. 273 (1997).

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Citation: 21 Legal Stud. F. 273 1997

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YOU ARE THE MAN*

ANDREW W. McTHENIA, JR.**

“You shall know the truth and the truth shall set you free.”

—The Gospel of John

“You shall know the truth and the truth shall make you odd.”

—Flannery O’Conner

I don’t know Seymour Wishman but I believe that when he finished “Accused: That’s the Lawyer” [hereinafter “Accused”], a wonderful story in a larger work entitled *Confessions of a Criminal Lawyer*,¹ he was both free and odd. He was freed of the illusion that one can avoid the pain of being human by cloaking oneself in the mantle of professionalism and the adversary ethic. He was free finally to come to terms with his vocation. He was certainly odd, because few of us would be willing to push beyond the level of personal pain and see that Wishman’s distress revealed “some of the painful and emotional dilemmas of [the legal] profession.” Fewer still would be free enough to face his fear that he might be as broken as he actually was.

Wishman was confronted by the reality of truth, and to his everlasting credit refused to hide from it. Truth is neither sweet nor sentimental. Wishman’s story reads like Flannery O’Conner’s fiction—terse, powerful, and in its own way violent. “Accused” upends our clichés about the system of justice and indicts those old bromides about the adversary ethic being a search for truth. The moment of truth for Wishman, like most encounters with grace, arose unexpectedly in the everydayness of life.

He describes a violent and unexpected encounter between himself and a probable rape victim whose credibility he had destroyed on cross examination, thereby winning an acquittal for his client. Some months

* Following David’s affair with Bathsheba, he had to deal with the unpleasant consequences created by his activity. After trying other ways to cover his tracks he came up with a scheme, subsequently implemented, to murder Uriah, the cuckolded husband. Essentially it was a murder dressed up as a hero’s death. Bathsheba became David’s wife. Nathan confronts David with a parable which disguises David’s activity in order to lead him to pass judgment on himself. When he has cornered himself with his own self righteous conviction, Nathan springs the trap: “You are the man,” he tells David. See 2 Samuel 11:27(b)-12:25.

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¹ Seymour Wishman, *CONFESSIONS OF A CRIMINAL LAWYER* (1982)(1981).

after the trial, when for Wishman the event had faded from memory, the woman, a nurse in a hospital emergency room, saw him. "Get that motherfucker out of here," she shrieked. As others sought to restrain her, she continued, "That's the lawyer, that's the motherfuckin' lawyer."

This brief encounter gave rise to a powerful story of unwinding which is appropriately included in a volume entitled *Confessions...* Wishman's whole world seemed to unravel that evening. One often stated quality of truth is that it has a way of comforting the afflicted and afflicting the comfortable. To the comfortable, and Wishman fit that description well, truth destroys all our preconceived notions and drives us to ask the questions that challenge the safety of our closed intellectual systems.

Wishman, like all of us, had sought some organizing principle to give meaning to his world as a lawyer. He had searched for a consistency in life that "seemed well-considered intellectually and satisfying emotionally." He spoke of the judge for whom he clerked as being a powerful role model: "There was nothing I wanted more than one day to be a man of such integrity and conviction." That judge had figured out how to balance his life between his "religious commitment to love and forgiveness and humility" with his work as a judge. He was a person whose commitment to [the] system of [of justice] required and allowed him to put aside any other personal feelings."

Following his encounter in the emergency room, Wishman thought about the judge again and was both admiring and envious of "his ability to prevent difficult and...harsh decisions from disturbing other parts of his life." He does not say that he had ever found the judge's faith perspective to be compelling. In fact, one gets the sense that Wishman's thinking about moral questions in the practice of law had been pretty superficial.

He had destroyed witnesses before. And sure it had bothered him some, but "my defense of myself had always been that there was nothing personal in what I was doing." He had applied to law school with some high, even noble expectations. And though he had never fully articulated those expectations, he knew he "cared about the poor and the underdog..." For a long time when asked how he could defend people who "had done monstrous things," he had parroted the lawyer's line "that everyone was entitled to the best defense in order to make our system of justice work." But he had "to admit that I was getting more out of what I was doing as a criminal lawyer than money or the intellectual satisfaction of supporting the legal system." He found his work so thrilling because "it had something to do with a need for power and control, respect, and admiration."

By the time he got home following the encounter with the humiliated witness, his world was forever changed. He was frightened that he was in fact as twisted and unlovable as that person who had been called a motherfucker a few hours before.

Although Wishman does not himself identify with the Christian tradition, he introduces it as the faith tradition of his friend and mentor, the judge for whom he clerked shortly after leaving law school. And he thinks the judge's reaction to the encounter would have been radically different than Wishman's. He believes the judge would not have been nearly so distressed as he, Wishman, was. He is probably right about that. However, it is to Wishman's credit that he was so shaken. I find Wishman's reaction powerfully and wonderfully human. And if he is correct in opining that his friend might have been able to intellectualize the confrontation "in the context of the larger issues involved and the obligation of vigorous advocacy in an adversary system," then the judge is not a person I would trust as a worthy mentor.

In many ways Wishman's self-confessed lack of thinking about moral questions was part of his salvation. He had not constructed for himself the diversionary wall of religion that his friend and mentor the judge had erected and which permitted him to keep his life tidy and under control. Now I don't pretend to know a whole lot about religion, but what Wishman ascribes to the judge on that score seems to me to be apostasy at best. The judge had created a system of personal and privatized faith, carefully cabined off from his professional life. Given that Manichean view of life—the personal versus the professional—it seems unlikely that Christ's writ would run to the judge's world of law. Because after all the system of justice demanded that he put aside any "personal" feelings.

That sort of religion supposes that God is yet to be discovered or that only the religious know about God or care about God, and that God cares only for the religious. It is precious and possessive toward God. The folly of the judge's religion is to think that God needs all this protection, this cabining off, in order to be kept safe from the nitty gritty of the daily affairs of life. One is left to wonder who the judge thinks his bailiff is talking to each morning when he intones "God save this honorable court?" Frankly, that notion of religion is offensive to the Word of God. The news of God embodied in Jesus is that God is openly and notoriously active in the world. When one asserts that God is merely private or hidden or confined to the sanctuary, that is an obscenity.²

² Bill Wylie-Kellermann, *A KEEPER OF THE WORD: SELECTED WRITINGS OF WILLIAM STRINGFELLOW 121-122* (1994).

But obscenity is not the worst problem with the judge's view of the world. By assuming that the system of justice demands he put all personal feeling aside, he has displaced God and made an abstraction known as the system of justice into an idol.

On that score I have a good deal of sympathy with the judge, because most of us who are given the privilege of administering the justice system in this country often come to think we dispense it. The entire professional project with its linchpin commitment to lofty detachment sets us up for that. Professionals are to be detached from their clients, untouched by the agonies and joys of their lives. A lawyer is an advocate, not in the biblical sense, but in the sense of being a champion waging battle for that client. Consistent with the spirit of our age, the profession sees client autonomy as the goal of the lawyer client relationship.

Those of us who teach generally urge our students to be value free, problem solving pragmatists. And the profession prides itself in fostering the point of view that lawyers are neutral and point of viewless. The picture of a lawyer most common to the profession "is that of a lone practitioner who must judge for himself what is right while engaged in intense competition.... The controls on his conduct are almost always those of self governance...."³

That picture suggests a relationship between lawyers and clients in which those others are less real live human beings who laugh and cry and make mistakes, and instead are more in the nature of problems to be kept at a distance lest they corrupt the professional. There is little room in the lawyer's self portrait of any moral relationship between a lawyer and her client. Nor is there much thought given to moral agency of the lawyer. It is fair to say that the Model Code of Professional Responsibility seems to have been drafted with this image of a lawyer in mind.

The notion of detached professionalism has long resulted in the profession being at odds with the democratic impulse of American political institutions. But the real danger is not that the profession is inherently anti-democratic. Much more serious is the reality that the profession has taken all too seriously its role as a priestly class and has elevated the law to a place where God ought to be. And that is what talk about the system of justice demanding that one put personal feelings aside is generally all about.

³ The quotation from Thomas L. Shaffer, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 51 (1985) is attributed to Professor Geoffery Hazard, principal draftsman of the American Bar Association's Model Rules of Professional Conduct.

How does it happen that a good-hearted, well-intentioned judge as Judge Barrett in Wishman's story appears to be, makes the law into an idol? How does it happen that all too often most of us make the law an object of worship? It happens quietly and seductively. We are seduced by the very aspects of our craft which we deem to be valuable and desirable: rigorous analytic thinking; a working assumption that even if the law is not fully objective it is nonetheless based on objective values; an ability to distance ourselves from those who present their problems to us for resolution. We cherish and cling to that legacy of the Enlightenment, objectivity (and it was a powerful alternative to the violence of religious tribalism).

It is in the very goodness of concepts like the power of rigorous analysis which we see as liberating that the danger lurks. There is no question that the ability to isolate and subject phenomena to detailed analysis is an important skill. To think of something which is connected to something else without thinking either of the connection or the something else allows us to see important truths about the world. But once we establish new categories of thought it is difficult to see past them, or to see the connections which are disregarded as we were creating the new categories. Most of the time our eyes and minds are captive to a way of seeing and thinking. Our way of seeing and distinguishing an objective knowable truth has led us to restrict our vision to the few things which are demonstrable and label them objective truths about the social order while we relegate matters beyond our knowing and proof as "private and subjective."

These other aspects of lawyering, detachment and point of viewlessness, contribute directly to what we lawyers call the adversary ethic. While professional detachment is valuable in that it offers a lawyer a critical purchase separate and apart from the immediacy of a client's problem, it is also dangerous because it is distancing. It distances the lawyer from the moral life of her client and also from the moral life of the lawyer's own community. The prevailing wisdom is that once a lawyer has assumed responsibility to represent a client, the zealotry of that representation cannot be tempered by the lawyer's moral judgment of the client or the client's causes. The lawyer's loyalty is to his client's autonomy, and to the law, the adversary system, all of which exist to protect the client's autonomy according to Professor Monroe Freedman.⁴ Professional duty requires that one coming to the profession leave behind other allegiances like commitment to faith communities.

⁴ Monroe Freedman, *Personal Responsibility in a Professional System*, 27 *Cath. U. L. Rev.* 191 (1970).

And when the power of professionalism bumps into a religious worldview that assumes it is possible to separate religion from the rest of life, then it is but a small step to replace that already cabined off and anemic god with worship of the justice system. After all one cannot afford to be diverted from the important work of the law by fretting over the occasional and unintended destruction of human lives. The god of professionalism demands small sacrifices on occasion. Reliance on a notion that the highest loyalty one owes is to his client's autonomy calls a person away from real responsibility. It conceals from him the character of his conduct as his own direct responsibility.⁵

The evil of Wishman's conduct is the harm that it did to the innocent witness. The way we come to terms with evil in ourselves is to tell the truth about it, telling the truth to ourselves and in our communities. "And that is the beginning of virtue. The recognition of complicity is the beginning of innocence."⁶

The upside for being willing to worship at the sacrificial altar for the greater good of the law, is that one does not have to look in the mirror and see a person who like all the rest of humanity needs forgiveness to be fully human. The downside, of course, is that when one looks in that mirror it seems as if no one is there.

⁵ Karl Barth, 3 CHURCH DOGMATICS 14 (1960).

⁶ Robert Penn Warren, BROTHER TO DRAGONS: A TALE IN VERSE AND VOICES (1979)(1953).