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LESSONS FROM THE FALL

*Andrea D. Lyon**

AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR. By *Sol Wachtler*. New York: Random House. 1997. Pp. 369. \$24.

This book is both better and worse than one would expect. It is the story of Sol Wachtler, former Chief Judge of New York State Court of Appeals.¹ Wachtler had an extramarital affair with a woman for whom he had been appointed executor, and after the breakup he stalked her with letters, phone calls, and threats. Eventually he was convicted of extortion and sent to prison. His fall from power is what fascinates us, of course, but that is not what is valuable about this book. It answers an outsider's questions about the prison experience, seems to reflect accurately the dehumanizing aspects of prison, and cautions us regarding our wholesale warehousing of so much of our population. Its insights into these problems are tremendous, and many of Wachtler's suggestions for change are brilliant. In many ways, however, the book is disappointing.

The book begins with an enticing description of some of Wachtler's childhood experiences and his rise to preeminence in the New York judicial system. But it feels like a tease; the book really fails to answer many questions about Sol Wachtler the man, about the true nature of his illness — if he indeed had an illness as we understand the term — about his rise to prominence, or even about the real consequences of his fall. This book should have been either a complete autobiography or one with only introductory remarks about Wachtler's adulterous affair and crime. The book would have been better had it stuck to what is wonderful about it — its insights into prison life.

I. WACHTLER'S RISE AND FALL

In order to understand this book, to measure its accuracy and to assess its perspective, I read numerous Court of Appeals decisions

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1. In New York State, the Court of Appeals is the highest court. The position of Chief Judge of that court is one of the most powerful in the state; the Chief Judge is responsible for the administration of the entire court system of the state, not just the Court of Appeals.

authored by the former Judge Wachtler both before and after he became the chief judge,² the federal indictment against Wachtler, many *New York Times* articles about the case and its aftermath,³ and Linda Wolfe's *Double Life*,⁴ which luridly tells the story of the crime and the gossip about the central figures involved. I also spoke with Wachtler's chief federal prosecutor Michael Chertoff.⁵ I did so because I did not feel that Wachtler was telling the whole truth about his life; his sense of entitlement fairly leaps from the pages of his book despite his protestations of guilt and remorse whenever he describes his affair, his extortion scheme, or the prosecution of his case. For instance, he views the prosecution in his case as unduly harsh and politically motivated. He is right, and he is wrong.

Sol Wachtler came from comparatively humble beginnings — his father was a traveling salesman “who made his living auctioning off the estates of the dead or the failed”; his mother was a Russian immigrant.⁶ I learned most of this from Wolfe's book, though Wachtler's does contain a touching (if small in scope) description of an attack on him by childhood bullies in North Carolina for the apparent crime of owning shoes and being from a city (pp. 42-51). Like many of the recollections in Wachtler's book, the story has the feeling of disembodiment, as if Wachtler *observed* rather than experienced the things that happened to him. Indeed, Wachtler's description of his crime suffers from the same malady. Perhaps this is a function of Wachtler's having served so many years as an appellate justice, of having to remove himself from his decisions in order to be objective.

2. *Seelig v. Koehler*, 556 N.E.2d 125 (N.Y. 1990); *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990); *People v. Drain*, 535 N.E.2d 630 (N.Y. 1989); *People v. Robles*, 533 N.E.2d 240 (N.Y. 1988); *People v. Thompson*, 530 N.E.2d 839 (N.Y. 1988); *Doe v. Coughlin*, 518 N.E.2d 536, 545 (N.Y. 1987) (Wachtler, C.J., concurring); *People v. Catten*, 508 N.E.2d 920 (N.Y. 1987); *People v. Wilkins*, 501 N.E.2d 542 (N.Y. 1986); *Konigsberg v. Coughlin*, 501 N.E.2d 1 (N.Y. 1986); *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986); *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984); *People v. Torpey*, 472 N.E.2d 298 (N.Y. 1984); *People v. Krom*, 461 N.E.2d 276 (N.Y. 1984); *People v. Thompson*, 458 N.E.2d 1228 (N.Y. 1983); *People v. Berg*, 451 N.E.2d 450 (N.Y. 1983); *People v. Kates*, 428 N.E.2d 852 (N.Y. 1981); *Curle v. Ward*, 389 N.E.2d 1070, 1071 (N.Y. 1979) (Wachtler, J., dissenting); *People v. Brown*, 399 N.E.2d 51 (N.Y. 1979); *People v. Branch*, 389 N.E.2d 467 (N.Y. 1979); *People v. Mullin*, 362 N.E.2d 571 (N.Y. 1977); *People v. Stewart*, 358 N.E.2d 487 (N.Y. 1976); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569 (N.Y. 1975); *People v. Epps*, 334 N.E.2d 566 (N.Y. 1975); *Wilkinson v. Skinner*, 312 N.E.2d 158 (N.Y. 1974); *People v. Silver*, 310 N.E.2d 520 (N.Y. 1974); *People v. Culhane*, 305 N.E.2d 469 (N.Y. 1973).

3. See, e.g., *Judge Wachtler Heads for Prison*, N.Y. TIMES, Sept. 10, 1993, at A26; Frank J. Prial, *Man in the News: Two Court Appointees from Different Backgrounds: Sol Wachtler*, N.Y. TIMES, Jan. 3, 1985, at B6; Diana Jean Schemo, *A Prison Term of 15 Months for Wachtler*, N.Y. TIMES, Sept. 10, 1993, at B1.

4. LINDA WOLFE, *DOUBLE LIFE* (1994).

5. Telephone Interview with Michael Chertoff, defense attorney (Feb. 18, 1998).

6. See WOLFE, *supra* note 4, at 13.

In any event, Wachtler was selected by his father as the *one* in his family. He was the one accorded special treatment and marked to get the education. He wasn't allowed to work in the family business like his brother Morty. He got into Milford, a prestigious prep school that had a good reputation for getting kids into Yale.⁷ He didn't get into Yale, but he did get into Washington and Lee University in Virginia. He was a good-looking, energetic kid, and he met Joan Wolosoff right after he graduated from Milford. He ultimately married her and the money that came with her. In part that money, and the connections that it brought him, helped him get elected to local office, to run for statewide office, and ultimately to win his position on the Court of Appeals.⁸ Wachtler was considered one of the finest jurists of his time, his writing clear and concise, his insight masterful.⁹

Until the affair with his ward, the fascinating Joy Silverman, Wachtler was a faithful husband, albeit not a passionate one. When Wachtler came into closer contact with Joy Silverman, an affair between them began — and eventually ended. Essentially, Wachtler was upset that Silverman broke off their affair and found another man. He invented a character, "David Purdy," who wrote a series of increasingly frightening letters to Silverman threatening her with exposure, threatening her teenage daughter with kidnapping, and ultimately demanding money not to kidnap her.¹⁰ Wachtler was charged with extortion.¹¹ His letters were mailed interstate, however, and thus what might have been a set of misdemeanor New York state charges¹² became a much more serious federal felony.¹³

Wachtler complains about this choice of prosecution and credits then-Assistant United States Attorney Michael Chertoff's ambition, as well as his own status, as the true reasons why his transgressions were treated as a serious federal offense (pp. 195-97). He also accuses Chertoff of "nurturing" his criminal conduct by waiting to

7. See *id.* at 14.

8. See *id.*

9. See *id.*; N.Y. TIMES articles, *supra* note 3.

10. Pp. 5, 17; see also WOLFE, *supra* note 4, at 1-8; United States District Court, District of New Jersey Indictment 93-58.

11. United States District Court, District of New Jersey Indictment 93-58.

12. Five comparable New York state statutes could apply in a situation such as Wachtler's: (1) Harassment in the first degree: New York Penal Law § 240.25 (McKinney Supp. 1997-98); (2) Harassment in the second degree: New York Penal Law § 240.26 (McKinney Supp. 1997-98); (3) Menacing in the third degree: New York Penal Law § 120.15 (McKinney 1998); (4) Menacing in the second degree: New York Penal Law § 120.14 (McKinney 1998); and one that would not apply in Wachtler's particular case, (5) Menacing in the first degree: New York Penal Law § 120.13 (McKinney 1998). This last statute, a felony, would not apply to Wachtler since it requires a predicate conviction for menacing. All of the rest of the statutes are misdemeanors.

13. See 18 U.S.C. §§ 2, 876, 1001, 1952. These are all felonies that in Wachtler's case would carry a maximum of five years in prison.

take him down until he had built a stronger case for the prosecution (pp. 19, 20, 196). It is this kind of accusation, coupled with blaming his crime on self-medication for his bipolar disorder, that makes Wachtler's protestations of sincere remorse ring hollow (p. 20). Chertoff told me that Wachtler was like many defendants — trying to blame someone else for his misdeeds. Chertoff said that Wachtler seemed to think that the FBI should have just come to see him in his chambers, and that as "one of the boys" they should have told him to cut it out, rather than surrounding his car on the road and arresting him so publicly, a scene Wachtler describes vividly. The reason for the road arrest, Chertoff said, was to avoid a location like the home where it was more likely someone would get hurt.¹⁴ Given the violent nature of the letters, this seems a legitimate concern. However, to say that politics or fame had nothing to do with the prosecutorial decisions in this case would be inaccurate.¹⁵ Wachtler correctly points to an arguably similar circumstance when an Assistant United States Attorney wrote herself threatening notes that authorities originally thought to have come from terrorists. Extraordinary measures were taken for her security, as well as the security of the courthouse and the judge in front of whom she practiced. She claimed to have no memory of having written the notes, and she was never arrested or subjected to any conditions of release, but simply allowed to admit herself voluntarily to a psychiatric facility. Fifty days later, she simply went home (pp. 197, 198). When I spoke with Chertoff, he assured me that her case involved schizophrenia, a much more serious mental illness than bipolar disorder and whatever effects Wachtler suffered from his self-medication.¹⁶ There is no reason not to believe both Chertoff *and* Wachtler about this; undoubtedly the Assistant United States Attorney's mental illness was more serious, but the fact she was "one of their own" surely played into the charging decisions made. Wachtler was charged federally, went to prison, and lost a great deal more than most people charged with similar or worse conduct toward their spouses or lovers after a breakup.¹⁷

14. Telephone interview with Michael Chertoff, *supra* note 5.

15. Wachtler reports a television interview with Chertoff when he left the United States Attorney's Office in which he counted the Wachtler prosecution as a triumph. P. 195.

16. Telephone Interview with Michael Chertoff, *supra* note 5.

17. Embedded in Wachtler's proclamations about his mistreatment by the prosecution is an element of truth. A November 1992 response to an Op-Ed piece in the *New York Times* submitted by Rena K. Uviller (Presiding Judge of the New York State Supreme Court, Criminal Term) touches on this discrepancy:

If Judge Wachtler has received special treatment thus far, it is surely harsher, not more lenient, than someone less prominent would have received. . . . I do not criticize the appropriateness of the security measures imposed by the Federal magistrate. I only suggest that the prominence of the accused played a role in imposing them.

Rena K. Uviller, Letter to the Editor, *Judge Wachtler Hasn't So Far Received Lenient Treatment*, N.Y. TIMES, Nov. 20, 1992, at A30.

The question of whether Wachtler's exalted and powerful position warrants more serious punishment is a thorny one and frankly beyond the scope of this book review. In order to examine Wachtler's claim, however, it is important to look at not only the prosecutorial agency, but also the complaining witness, Joy Silverman. Wachtler is careful in his book never to disparage Silverman — although you can feel him *wanting* to — something Wolfe has no problem with doing. Wachtler is so careful not to disparage Silverman that I didn't learn from his book the extent of Silverman's political connections to the Republican party — both Silverman and Wachtler were Republicans. Silverman's connections and her adept Republican fundraising led President Bush to nominate her, unsuccessfully, to become ambassador to Barbados.¹⁸ When Silverman began to get the threatening letters from Wachtler she called for help directly to the Director of the FBI, William Sessions.¹⁹ Joy Silverman wasn't just somebody's girlfriend who was getting scary letters and hang-up phone calls; she was an important player in the Republican party. To say that her status had nothing to do with the kind of prosecution that Wachtler faced would be foolish.

Similarly, it would be foolish to say that Wachtler's position of power had nothing to do with his transgressions: it facilitated them and gave him the sense that he could do anything. Wachtler describes this grandiosity as a manifestation of his bipolar disorder, and I have no doubt that he is right, but that simply is not the end of the story. Power is, as the saying goes, a powerful aphrodisiac, and Wachtler succumbed to it.

II. A PRISON TERM

The book is most powerful when Wachtler forgets to complain about his situation and simply describes what being in prison does to someone, even someone who has the support of his family and friends, even someone who received a prison visit from United States Supreme Court Justice Blackmun (pp. 181-83). It is in these descriptions that Wachtler is least self-conscious and most persuasive. Wachtler struggles mightily in his present circumstances to

If this is the case, Wachtler's prison memoir may bring even more to the surface than he realizes. For entitlement aside, our criminal system is based, at core, on consistency in application of punishment. Perhaps far more disconcerting than the experience of a single man in prison, even *this* man, is the realization that leniency or severity might go hand in hand with race, wealth, prominence, or stature. And if the decision in one courtroom is slanted in one way, who is to say that in another courtroom, courthouse, or jurisdiction it would not tilt in the other direction.

18. See WOLFE, *supra* note 4, at 131.

19. See *id.* at 194-96.

justify some of his decisions as a judge.²⁰ For example, as a Court of Appeals judge he authored a decision regarding solitary confinement, *Wilkinson v. Skinner*.²¹ In that case, an inmate claimed that being put in solitary confinement for five days was cruel and unusual punishment. Wachtler, writing for the Court, held that it was not, unless the cell was “subhuman.”²² Wachtler ruefully recalls for us a discussion with two fellow justices who had formerly been prosecutors, a conversation in which the three tried to convince the court that solitary confinement is simply a necessary way to keep discipline (pp. 30-32). Wachtler will not go so far as to say his decision was wrong, but goes on to describe his own sojourn in solitary, which is where he was put on his arrival at Butner prison. He movingly describes the inherent cruelty of isolation and suggests that judges should have to understand — that is, to see — the import of their cases, not because they should be sending a message with their decisions, but because they must be aware of the societal and individual costs they impose (pp. 31, 32).

Not long after coming out of solitary and back into the general prison population, Wachtler was stabbed in the back. The weapon was never recovered and his assailant was never found. The prison authorities seemed to think the wound was self-inflicted, something Wachtler vehemently denies (pp. 118-22), and the institution’s response was not to take Wachtler out of Butner prison, or even to take him to a hospital; they simply put him back in solitary confinement. For the general public, this may come as a surprise. To those familiar with the prison system, it is not. Wachtler was stabbed, therefore he might be stabbed again, therefore put him in solitary. It is in his descriptions of solitary that Wachtler’s veneer seems to slip, and despite his objective language, Wachtler’s fears surface, his loneliness and isolation strip away his equilibrium. We see him, human before us. He is smart, he is sophisticated, he is scared:

This morning — very early this morning — I awoke with a start. Since the stabbing, and the infected elbow, my sleep is easily disturbed so that the shuffling noise over my cot, although barely audible, was enough to awaken me. There, not two feet from my head, was the largest, hairiest, and most sinister-looking spider I had ever seen. Although it had the size and characteristics of a tarantula, it had the ominous hourglass marking of the black widow.

20. See *supra* note 4. In reading Wachtler’s opinions I stuck to criminal and prisoner cases. I was struck by the tightrope he seemed to walk. Usually he would vote in favor of the powerful force in the case — to affirm a conviction or confirm a prison’s authority — and yet he often expressed a deep reluctance to step too hard on the “little guy” or to trespass on the constitution. In a word, Wachtler was a moderate — brilliant, erudite, articulate, and politically savvy moderate.

21. 312 N.Y.2d 158 (1974).

22. *Wilkinson*, 312 N.Y.2d at 162.

As a rule, insects do not frighten me. But this one, larger than my fist, caused me to bolt out of my bed in frantic search of a light switch. Remembering that the lights must be turned on from outside my cell, I began shouting through the food slot for the duty officer.

There I was on my hands and knees shouting through the door slot, "Officer! Officer! Officer!" My voice became part of the nocturnal chorus. I was trying to yell louder than any of the others who were shouting, barking, singing, and screaming. I had become one of them. And although I thought the spider was enough of a reason for me to require special attention, I am certain that whatever devil, fiend, or specter had moved in with them was at least as disturbing.

When the officer put on the light, there was no spider. This news came as no surprise to him. He had witnessed the simple turning on of a light put flight to vampires, mummies, devils, and once, the four horsemen of the apocalypse. My spider was no challenge at all. But it frightened me. Not the spider. The fact that I saw the spider. [pp. 140-41]

This passage is the one that convinced me Wachtler's book is worth reading. Worth reading because at this point, in this place, all frustration at Wachtler's inflated sense of entitlement, all frustration at hearing either too much or too little of Wachtler's life, all irritation at the standing-beside-himself voice disappears. What happened to him in prison could happen to me. To you. To anyone.

Because Wachtler's veneer was stripped away, at least for a little while, the important, simple observations began to come through. These simple things tell us so much about the dehumanizing effects of prisons — what it feels like to have no name, what it feels like to shower or urinate in front of guards, what it feels like to visit with your wife and daughter and then to have to "bend and spread 'em," naked, afterwards.

Wachtler also talks movingly, if simplistically, about the foolishness of incarcerating nonviolent offenders — primarily on drug possession charges — for decades, about the need to look seriously at our priorities and policies regarding crime, and about the opportunities we are missing to provide help to those who need it by punishing them instead of treating the causes of their behavior. His suggestions include adopting a public safety philosophy rather than a punitive one, eliminating mandatory drug sentencing, using sentencing alternatives to prison where possible, taking all governmental funding away from prisons that fail to provide treatment facilities for substance abusers, and taking a look at alcohol and drug rehabilitation programs that really work (pp. 267-69). His opinions as a judge were not very much more conservative or punitive than these suggestions — although they were somewhat more conservative. They just lacked the visceral understanding of what incarcerating so many people means.

In our country today, over 1.6 million people are in prison.²³ When you add those in jails and on probation, the numbers jump to 5.1 million — 2.7% of the population of our country.²⁴ Wachtler's suggestions are not just humane, they are necessary. Prisons are one of the largest growth industries today. Small towns fight to get them; they bring employment and new businesses. But at what cost? That we imprison millions of people who might, given help, contribute to our society? That we become so inured to injustice that we refer to wrongful convictions as "another one of those cases" as though it could never happen to anyone who matters? That we are willing to trade human beings and their potential for a feeling, however illusory, of safety? That is one of the important lessons that Wachtler's book teaches us.

The other lesson is less obvious and never directly stated. Wachtler is one of *us* rather than one of *them*. By that I mean he looks like the privileged person who one assumes does not go to prison, not like the street thug of our imaginations. Within the prison system, he was highly visible, yet he was stabbed, left to sicken, and treated like a cipher. It is possible for the privileged to look at Wachtler and imagine that they too could one day be in prison, that they too could suffer in that environment. If it *could* happen to a have, then maybe we will pay more attention to what happens to this population, to a have-not; maybe we can see that there is more than one way to deal with crime and punishment.

If we continue to increase penalties and continue to categorize more offenses as felonies, we will have to build more prisons, and we will continue to believe that the more people in prison, the less crime there is, without distinguishing the violent from the nonviolent offender and without effectively dealing with the drug problem, the real cause of crime.

I read somewhere that when the only tool you have is a hammer, you tend to think of every problem as a nail. [p. 269]

This book answers many questions about the prison experience and tells a fascinating story. Its insights into the big problems of prisons are brilliant. That is why, although Wachtler's book is disappointing in many respects, it is worth reading, worth discussing, and worth teaching.

23. CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEPT. OF JUSTICE, PRISONERS IN 1996, at 1, 2 tbl.1 n.a. The number includes prisoners in custody and persons under the legal authority of a prison system but who are held outside its facilities.

24. U.S. DEPT. OF JUSTICE, FISCAL YEAR 1996: AT A GLANCE 34 (1996).