RESPONSE TO JAMES ELLIS

SAMUEL JAN BRAKEL

Professor James Ellis's review of *The Mentally Disabled and the Law* in last year's book review issue of the *Law & Society Review* deserves some corrective commentary. To the extent that the review praised the book—which it did ("unmatched and indispensable" [p. 1028], "remarkable achievement" [p. 1030])—I will of course leave it alone and indulge in the luxury of assuming that Ellis was both accurate and sincere with his compliments. Certainly, my coauthors deserve the accolades.

Which brings me to the motivation for penning this response—my own not-so-just deserts. Ellis's review sees fit to devote a considerable portion of its precious space to a critique of what he calls my "ill-disguised hostility" (p. 1028) and "animosity" (p. 1029) to the rights of mentally disabled persons. This alleged attitudinal flaw is described as "marr[ing]" (p. 1029) the book and as "at least a distraction" (p. 1029) to readers who, presumably in the absence of a more sympathetic treatment of the rights or harsher condemnations of the wrongs, might be "puzzled" (p. 1029) by the law's development.

First, the accuracy of these charges as they relate to the actual text. Ellis takes it upon himself to sensitize unsuspecting readers[1] by providing a "few examples [that] suggest the scope of the problem" (p. 1029). He writes:

> Noting the phenomenon that many have observed . . . that rights won in court or the legislature may not be implemented in practice, Brakel adopts the view that this demonstrates that the legal protections are impractical and unnecessary. He indicates sympathy with the view that these rights are an "unwieldy, obstructionist mass of procedural 'junk' that only inhibits the effort to protect. . . . (p. 1029)

Two comments here. First, the view is hardly more than a tautology—inoffensive, perhaps even wise, not to say practical. Second, the text presents it not as my own view, let alone the book's, but primarily as the view from the psychiatrists' side. The paragraph immediately preceding the one from which the offending line is

[1] Since Ellis realizes that it is improper to object to my attitudinal or doctrinal heresies *per se*, he has pegged his critique on my failure to disclose where I am coming from, to use the common vernacular. The charge is thus an ethical one: it is sneaky to spring such heresies on unwary, uninitiated readers. They will be "puzzled," if not misled. More on this disclosure obligation and other ethical principles later.

LAW & SOCIETY REVIEW, Volume 23, Number 5 (1989)

taken makes three explicit and verbatim references to the writings of Ralph Slovenko, a lawyer-psychologist teaching at Wayne State University, who has long tried to temper the individual liberty emphasis of the legal model with the patient and community welfare priorities that comprise the medical approach. The paragraph in question cites Slovenko again for his "junk pile theory" of law and concludes with this sentence (whose first part Ellis chose to omit):

> The same intricate legal structure surrounding commitment that is hailed by legal reformers as crowning testimony to the law's concern for the unprotected appears to the psychiatric practitioner and others as an unwieldy, obstructionist mass of procedural junk that only inhibits the effort to protect. (*The Mentally Disabled and the Law*, p. 28.)

Ellis's penchant for finding offense in harmless tautologies (with a little help from selective quotation) surfaces again in the very next sentence in the review. There, he castigates me for deriding as "legal perfectionists" those who "express concern over the fact that most persons admitted under provisions for voluntary patients are actually coerced." Here is the actual text:

> If these findings are accurate, a substantial question about the propriety of using voluntary admission procedures arises. Are those voluntary patients who have been "coerced" in effect involuntary patients who are denied the protections to which they are entitled under the involuntary process?
>
> The answer depends on one's perspective. Legal perfectionists will interpret the above findings as clear evidence of abuse of the voluntary process. To those of more practical bent, the conclusion is likely to be less certain. Purity of process, they may recognize, is not attainable in either the medical or the legal world, and least of all where the two intersect.

I could similarly rebut several other charges against the text,[2] but I take it the reader begins to get an inkling of the scope of the *review's* problem.

The heart of that problem is that Ellis has drawn his notions about my hostility not from the book, but from my other writings

---

[2] Allow me to use a footnote for a couple of other points. Ellis writes that my occasional use of quotation marks around such terms as "rights" and "equal" demonstrates my "disdain" for these concepts. He is wrong. My intention was to indicate that the latest articulations of these concepts are not viewed by everyone as in the best interest of mentally disabled persons. Particularly not by many psychiatrists—half the audience for whom the book was written.

Elsewhere Ellis makes the snide remark that I am "likely to be disappointed" in not seeing my "prediction" fulfilled of a "steep decline in legal activity in the mental disability field." What I said was that such a decline was probable "as we enter an era of decreasing social outlays generally, and, in particular, drastic cutbacks in the support for legal resources . . . for the disabled or the poor"—an accurate factual observation of the political/fiscal climate of the 1980s that carries no value judgment with it whatsoever.

and—I can safely assume without showing signs of commitment-worthy grandiosity or paranoia—from my reputation among "cheerleaders" (Ellis's term) of the latest mental health law "advances" and some other areas of reputed legal "progress" for not always sharing their unbridled enthusiasms.[3]

Which brings me to the second part of my beef with the review. To write about the law and its reform, must one be an indiscriminate cheerleader for the latter, or at least—as Ellis suggests—make contrite disclosures that one is not?[4] What happens to the game if you let the cheerleaders run it, never mind play? As to the disclosure obligation, does Ellis heed it when he teaches young, unformed minds at his *public* university in New Mexico? Each semester? Each class? Does he heed it when he writes his articles or his "model" legislation reports, whose absence from the book seems to have irked him so?

And what is one to disclose, were it to be done? I suppose it was simple enough, not to say inviting, for Ellis in the review. By dwelling on the author's attitudinal shortcomings, he could declare himself, by contrast, to be on the side of God and the angels. But one must be careful with these things. Toward the end of the review, Ellis slips when he writes of the "setback" (p. 1030) of the Supreme Court's decision in *Parham* v. *J. R.*, 442 U.S. 584 (1979)—a case in which the Court had to wrestle with the very difficult question of whether adversarial legal procedures or due deference to parental and medical judgment offered the better protection for minors involved in the commitment process. Does the full-disclosure principle here require Ellis to own up to his hostility to the rights of parents and doctors, not to mention his disdain for the Supreme Court, his disrespect for the law of the land, or his inclination toward legal anarchism?

Academia is a funny place. Working in its groves, I have over the years been variously branded as antipoor, anti-Indian, and antiprisoner for the offense of not always wholeheartedly endorsing the reformers' partyline.[5] This by fellow laborers and an occa-

---

[3] See note 2 on the meaning of the quotation marks. Ellis in a letter written after this response disavows that he gleaned my hostility to progress from anything other than the *M.D.* book. If so, I'm ready for the men in their white coats.

[4] See note 1. On the subject of the ethics of reviewer and reviewee, I feel compelled to disclose that Ellis was a scholar in residence at the American Bar Foundation for a year's stint during the three-plus years it took to do the *Mentally Disabled* project and that he subsequently returned to use, with my permission, the project's statutory charts for his own research purposes. Not a word about my "hostility" at those times. Ellis's reply is that he had not seen the text at that point.

[5] It is not unethical to point out the professional self-interest that mars the reform orientation of many academics in their chosen fields. The necessity to survive academically—to keep the business active, the model legislation flowing, the consulting contracts coming—is at least part-mother to the continual invention of new and larger rights. There is little to stem the flow, as professional myopia contributes to the incapacity to perceive the limits, even if

sional overseer or two—all pious devotees (watch their lips, and only their lips) to "liberal" thought and freedom of expression. Now we can add antidisabled.

SAMUEL JAN BRAKEL teaches at Northern Illinois University College of Law. He was for nineteen years a research attorney at the American Bar Foundation. Lead author of two editions of the foundation's *Mentally Disabled and the Law* treatise, his other interests include corrections and legal aid for low-income persons. His forthcoming book, *Selling the Prisons: In Search of Solutions to the Corrections Crisis*, is on privatizing correctional services.

---

the willingness were there—no one can see the merits of the "other side's" position, whether, as in this instance, it is the lawyer's side or the psychiatrist's. The result is hostility to any interloping fence straddler who dares to argue in favor of the dam or a measured application of the brakes.