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Jim Ellis Tribute

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JIM ELLIS TRIBUTE

ANTHONY AMSTERDAM*

It's a joy to participate in this celebration of Jim Ellis's achievements, both because Jim is a good friend and because he is my ideal of a law teacher who has made a real difference in the quality of justice. Jim is also the truly rare, modest human being who teaches by example not only what a great teacher and humanist can do, but what a great teacher and humanist can be.

Jim is the model of the legal academic who extends the learning and the creativity of the academy into the field of action, working tirelessly to correct the most glaring unfairnesses and deficiencies of the law. This is no easy role to play. It's hard enough for a legal academic to be a first-rate scholar and a caring, devoted teacher. But it's even harder to be both of those things and an effective worker for correction of entrenched injustice in our legal system.

The difficulty is not, I think, the one that legal academics frequently debate, which centers on the notion that activism is inconsistent with objectivity and therefore with rigorous critical analysis. In my experience, objectivity is no less necessary for effective advocacy than for insightful scholarship. If I cannot dispassionately appreciate the force of my opponent's arguments in litigation, I cannot begin to deal with them effectively. Critical dispassion is not the problem that makes it difficult to combine great teaching and scholarship with inspired advocacy, as Jim Ellis does.

The real problem is that exposure to the realities of decision-making in the judicial, legislative, and administrative forums of our time generates a cynicism that erodes one's appreciation for the importance of legal rules, principles, and theories. Arguing before courts, commissions, and committees—and seeing what arguments do and don't work with them and how they bend or ignore indisputable facts in the record and inconvenient elements of doctrine and principle—one almost inescapably succumbs to a nihilistic vision that makes the study and teaching of the law seem futile. One loses one's taste for legal analysis other than as a means of exposing the distortions of reasoning which judges and others in power use to inscribe their personal biases and uncritical beliefs into law and to conceal from themselves and others that they are doing this.

Thus, there is an overwhelming tendency to forget that, in the long run, respect for law is not only possible but indispensable to civilization and to decency and responsibility in government. It is all too easy to lose historical perspective. In the history of this country and of others, there have been long periods in which power and privilege trumped and even co-opted the rule of law. However, the rule of law has shown a surprising resilience and ability to rebound and recapture the faith of nations and the strength to restrain power, privilege, and repression. Because of that capacity, in times of governmental lawlessness like ours, it is all the more crucial to study and to teach the law, and to keep and transmit the faith that the law deserves respect.

That is why I am re-inspired every time I call Jim wanting to talk about rhetorical strategies for winning some case or other and he gently reminds me that there is also

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some such thing as constitutional law which needs to be preserved. Jim always puts me in mind of Victor Hugo's observation in *Ninety-Three* that the only human power that comes close to surpassing the power of despair is the power of hope. Jim's brand of hope is not naive. It enables him to come up with terrific rhetorical strategies for winning cases at the same time that he attempts to preserve some decent constitutional law.

The range of Jim's effective labors to import humanity and fairness into the law is awesome. Teaching, scholarship, advocacy, idea generation, institution building—Jim does them all.

Just a word about his teaching, to begin with: I don't have to tell the folks in this room what an extraordinary teacher Jim is. But I do want to bear witness that he plays that role beyond the law school and is a constant source of ideas and guidance for those of us who work in his fields. Particularly in times like ours, when many of the battles that we need to fight are battles to preserve endangered liberties against erosion, the older generations of aging activists, by which I mean everybody over thirty, has a strong tendency to lock in to the best thinking that we did years ago and simply reiterate it, learning nothing new.

In the law school world, the problem is compounded because the only people who we think are smart enough to teach us anything are, for the most part, so arrogant that we don't want to learn from them. This is the legal academy's flip side of Groucho Marx's classic line that he would never want to join any club which was willing to admit someone like himself as a member.

Jim is the antidote to this poisonous environment: the truly rare person who is always capable of learning, who always has something new to teach, who has the skill and patience to teach it well, and whose personal quality of nobility suffused with humility makes us all eager to learn what he has to teach.

Jim's work as a scholar is no less impressive. He literally created the academic study of the law of developmental disabilities. This is a remarkable feat from a purely scholarly standpoint, but its full significance can be understood only if you consider its real-world implications.

Basic cultural theory tells us that aspects of our social life and institutions become issues, problems we are required to think about and to address, only if and after they are perceived as something that is both troublesome and susceptible to change by human agency. Take pollution of the environment, for example. We no longer accept it. We try to do something about it—because it is no longer viewed simply as a fact of life, inevitable in an industrial society.

In the course of creating the academic study of developmental disability, Jim *problematized* the inattention of the law to developmentally disabled persons and made that inattention an issue with which the law must grapple. Because of Jim's pioneering work, the shapers of law can no longer ignore the special ways in which legal rules and institutions impact persons with developmental disabilities, or ignore the responsibility of the law for inhumane features of that impact. The quickening of consciousness and conscience that Jim has accomplished is far-reaching, radical, and enduring.

Next, Jim has followed through on this basic accomplishment by providing both the intellectual leadership and the personal presence necessary to launch and sustain legislative reform efforts. He has drafted model legislation and specific bills for

numerous state legislatures; he has tirelessly ridden circuit, testifying before the legislatures in support of bills to protect and advance the rights of persons with developmental disabilities; and, he has generated invaluable support for those rights by personally mobilizing and galvanizing professional organizations ranging from the American Association on Mental Retardation to the American Bar Association.

And then, of course, there is his litigation work. An appreciation of Jim's achievements as a litigator naturally begins with *Atkins v. Virginia*, not only because of the importance of that case in constitutional jurisprudence, but because *Atkins* was as much a one-person victory as any major Supreme Court decision effecting a momentous change in the law can ever be. Jim not only succeeded in persuading the Supreme Court that there was a national consensus against inflicting the death penalty upon persons with mental retardation—he was largely responsible for creating that consensus.

Atkins was a very difficult case. It was difficult for all of the reasons that the constitutional law scholars have talked about, but also for a reason that only those familiar with the record and who have had teenage children can appreciate. The defense testimony supporting the conclusion that Daryl Atkins suffered from mental retardation was not all that one might want. In fact, the major basis upon which the defense's expert witness found that Mr. Atkins had limitations in his adaptive skills was that he had never succeeded in learning to do his laundry. When my wife, who is a lawyer, learned about this state of the evidence, she observed caustically that our two daughters had managed to graduate from two highly regarded east coast colleges without ever having learned to do their laundry, though they learned to drive the rental vans in which they brought it home for us to do it at every winter, spring, and summer break.

I should note for the record that at a retrial after the Supreme Court remand, significant additional evidence of Mr. Atkins' limitations was developed. Unfortunately, I have no happy update to give you on my daughters.

In the wake of *Atkins*, Jim did not let up. He immediately went to work, organized a coalition of organizations including the ARC and the ACLU to work for optimal legislative resolution of the issues that *Atkins* had opened for legislative action; led the development of a sophisticated legislative strategy; and wrote the blueprint for this effort—a legislators' and advocates' guidebook, affectionately known in my circles as "the Gospel according to Saint Jim."

Then, there is Jim's amicus litigation. The amazing thing about Jim's amicus work is that as the U.S. Supreme Court has become increasingly hostile to the claims of equality, humanity, and fairness, Jim has continued to work ceaselessly for those ideals and has compiled an awesome record of success. By my count, his record in the last few years stands at five and four-ninths wins out of six amicus submissions, and I confess primary responsibility for losing the one case in which Jim's side got only four votes.

In addition to formal appearances, Jim has served as consultant, advisor, and strategist to counsel for parties and amici in many other cases of importance, both in the U.S. Supreme Court and in other courts.

But the record of Jim's accomplishments would be incomplete without recognition of his talent as a stand-up comic. I cannot refrain from offering you a small sample of classic quips from Jim's letters and e-mails.

Between two drafts of his amicus brief in one case, Jim had a computer accident that blew away a couple of adjacent half-sentences. The result was a passage that inaccurately described where the hippocampus is located in the brain. When Jim and I corresponded about this, he wrote:

As a result of this mistake, I will propose the addition of a new diagnosis to the *Diagnostic and Statistical Manual of Mental Disorders*, with its own reference number, the diagnosis to be called "Boneheadedness." To illustrate it, I would recommend that the Manual include a small thumbnail photo of your humble servant. The symptom of this affliction would be: cannot find his hippocampus with both hands.

Jim's willingness to roast himself is characteristic. After his Supreme Court argument in *Atkins*, we exchanged e-mails speculating about some of the Justices' comments from the bench. One Justice had complimented Jim on the way he'd treated certain issues in his brief, but Jim wrote that this was less an expression of satisfaction with the brief than an expression of disappointment with his oral argument. "The remark," Jim said, "came off sort of like a soap opera fan, upon meeting one of the actors, saying 'you're much better looking on TV.'"

Jim can pour himself completely into his important work without being self-important about it. While he was working up an amicus brief in one case, I sent him an e-mail asking how he was doing on his first draft, and I got a note back from him saying:

My student team has produced a substantial collection of studies of medical literature, and I'm busily endeavoring to string together a ribbon of text, for the top of the page, that is worthy of the footnotes. Sort of like the legendary university president who aspired to create a university worthy of the football team.

Jim is also capable of training his sense of humor on the courts. Witness his capsule book review of the dissenting opinion in a Tennessee case. Largely through Jim's efforts, the Tennessee Legislature had enacted a statute exempting mentally retarded individuals from the death penalty, but the statute was not retroactive. The Tennessee Supreme Court then held that the execution of a mentally retarded person who had been sentenced to death before the statute would be a constitutionally-forbidden cruel and unusual punishment. A dissent argued that this defendant was not really mentally retarded because his flight out of state after being charged with a capital crime showed his presence of mind. Jim found that analysis unconvincing because, as he said, "anyone who fled from a capital charge and sought refuge in Harris County, Texas," demonstrated two-thirds of the then-prevailing definition of mental retardation: significantly sub-average intellectual functioning, and the worst damned adaptive behavior in recorded history.

Here's an item Jim forwarded to me after receiving it from a colleague. I should note that this was *not* a colleague at the University of New Mexico but one who taught Mental Health Law at another school. One of the students in the colleague's class had written the following analysis of *Atkins v. Virginia* on his or her final exam: "The Supreme Court changed their minds about retarded people after Dr. Jim Ellis of New Mexico told them that they were very suggestible." (My response to

that, by the way, was to tell Jim he should thank the Lord he had not argued the juvenile death penalty case, or this commentator would have written: "The Supreme Court changed their minds about children after Dr. Jim Ellis of New Mexico told them they were very naive.")

At times, Jim's sense of humor can come perilously close to prophecy, unveiling basic ironies in the law's efforts to escape the grip of its entrenched prejudices. While he was preparing for the *Atkins* argument, he reviewed the transcript of the Supreme Court argument in the 1989 *Penry v. Lynaugh* case, and discovered an exchange that went as follows:

Justice Blackmun: Do you want a *per se* rule that any kind of mental retardation is disqualifying for the death penalty?

Counsel for Penry: No. That's not what I am arguing.

Considering the implications of this colloquy for his own argument, Jim first suggested that, since Penry's lawyer had obtained four votes for a *per se* rule by refusing to advocate any such rule, maybe Jim could win five votes from an even more contrary Supreme Court fifteen years later by the same disavowal. But after further reflection he concluded that probably neither Penry's lawyer nor the Court had really understood the colloquy. As he put it, Justice Blackmun was to blame for this confusion "by introducing a furrin term like '*per se*' into what should be an American argument." Less than half-a-dozen years later, Jim's private parody of American isolationist attitudes was tragically mirrored in the public domain when, after the Supreme Court's decision in *Lawrence v. Texas*, Representatives Feeney and Goodlatte introduced a sense of Congress resolution censuring the Court for considering any foreign-law sources in interpreting the Constitution of the United States.

And on this tragicomic note I end. Thank God Jim knows how to laugh about the law's foibles. Thank God he knows how to advocate for correction of its failings. Without these two great gifts, the legal life and legacy of our time would be immeasurably poorer.