

CAN YOU HEAR ME NOW?

*Michael Eric Dyson**

Thank you so much, Sister Tristan, for that very gracious introduction and to the dean for his eloquent remarks about the tone and tenor of the debate in this nation around race as well as Brother Carlos's insightful remarks about the struggle over race and jurisprudential rationality to define where we are in the nation. It's just good to be over here at the Law School. It's my first time over here. Lovely for situation, as they say, and I look forward—I'll volunteer to teach a class on critical race theory so I can just have an office up in here. But I'm honored to be here today to think and reflect critically about *Brown v. Board of Education*¹ and the intersection of race and law, and I've got about a half an hour. So I used to tell a few jokes and talk about Janet Jackson and Justin Timberfake—Timberlake, I'm sorry, but I'll get right to the point this morning. Usually a half hour, I'm just announcing my name, so I'm going to get right down to the brass tacks and knuckles, so to speak.

I suppose if I were to give a title to my talk this morning, it would be, "Can You Hear Me Now." Since Cyban Woodward, that august and imposing historian of the South, said a title was a contract between a speaker and her or his audience, I think about Can You Hear Me Now as the governing idea, not only of my talk, but in one sense of the law. There's a lot of auditory language; there are great metaphors about seeing and hearing, but hearing especially—hear ye, hear ye—or having court hearings or voir dices and so on. And what's interesting to me is that this regulative metaphor of hearing, the auditory capacity, in particular, is an interesting one that has shot through legal language and jurisprudential rationality.

In a similar fashion that Richard Rorty points out, that within philosophical discourse the notion of sight is critical to the foundation of western epistemology in forms of knowledge;² so that Rorty suggests this Cartesian notion of the mind being a glassy essence that reflects back the reality objectively of what we comprehend has been governing idea within philosophical discourse for the last several hundred

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¹ 347 U.S. 483 (1954).

² RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 160–63 (1979).

years.³ And of course, along comes Rorty armed with [Ludwig] Wittgenstein, [John] Dewey, and [Martin] Heidegger trying to challenge the hegemony of the ocular centric metaphor, and especially trying to challenge us to believe that philosophy is no longer a tribunal of pure reason before which other disciplines must now genuflect in acknowledgement of its technical superiority and its rational supremacy;⁴ so that philosophy is no longer about the arcane, the underlying structures of reason, and philosophy no longer adjudicates competing claims about what's true or right or beautiful or insightful or good. And in essence, he says what: philosophy is part of the dialogue, it's part of—borrowing from the conservative philosopher, Michael Oakeshott—part of the conversation.

And if philosophy is part of the conversation, it doesn't have this Archimedean objectivity outside which it exists outside of the human experience, outside of human dialogue and language and possibilities of thought, that it is part of the woof and warp of the very thing we're trying to examine. So if that's the case, if philosophy doesn't exist outside but inside, if philosophy is part of the conversation, then it doesn't have a privileged sight from which it begins to make arguments about reality. Well, taking my cue from all of that, you know, arcane philosophical discussion about the differences between the — vision shopping and the natural vision shopping and whether human scientists can generate laws similar to the so-called natural world, even though we deconstruct that kind of mythology as well because those laws themselves have been generated in the context of arguments about history and science, which are themselves products of human capacity to engage in rational reflection.

Having said that, it seems to me that it's important to say the law is the same thing. We kind of mythologize the law. That is, those of us who stand outside of it, oh my God, the law, we need a lawyer to even do simple things like decide where we're going to teach and can we get the contract in, or if somebody hit my car. Now I'm not here to pronounce against an overly litigious society. I'm sure you all do that over here enough. But what's interesting is that the law is an intervening mechanism between human institutions and human beings, and in that sense a mediating role is played by the law that needs to be underscored. That mediating role then, that adjudicative role, to be sure, has to be interrogated relentlessly. Questions must be asked of it. What is the function and purpose of the law?

We hear the law, the law, the governing ideals that regulate discourse and plexus and behavior in human society. And at the same time, we back up and say well, the developments of critical race the-

³ *Id.* at 17–127.

⁴ RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 160–74 (1982).

ory, the developments of legal realism, the developments of, you know, of critical theory forced us to back up and say maybe the law is part and parcel of both the enlightenment that we should encourage and the problems we have to overcome; or maybe part of the enlightenment that we have to overcome is part of the problem. Or the enlightenment reason that uncritically celebrated misses out on other stuff like history and tragedy and misery and tears and suffering, and the way in which the law can both relieve that and reproduce that, the pathology that we both want to examine and the very means by which we examine the pathology. The law is implicated in the very process of trying to examine the things that help and hurt us. So when I want to think about, *Can You Hear Me Now*, I think about those commercials with the cell phones and you get in the right position, *can you hear me now*, and you step over this way, *can you hear me now*, and I go further into this region, *can you hear me now*, can the signal get through?

Part of what the law means to me is to help the hurt and misery of human community be articulated in acceptable and tolerable institutional frameworks that allow the perpetuation of justice. And that means then that we have to take into account the perpetuation of justice. And that means then that we have to take into account human experiences often discounted, that's marginalized, that's overlooked. And not only human experience but ways of thinking about human situations in the law, and this has been brought home to me time and time again, but especially recently in these University of Michigan cases vis-à-vis affirmative action because we see that the folks' political viewpoints ain't exempt from how they think about the law, even though we got nine people sitting up on the Court trying to look at and prognosticate about. And every jot and tiddle, every period, every punctuation mark is scrutinized with deridian facility. What did they mean? Did Justice Sandra Day O'Connor mean that in twenty-five years affirmative action should be totally gone, should be wiped out, should be excluded from the discourse and dialogue about race in America, because in twenty-five years we're going to find something that we ain't found so far, which is the ability to just answer the Rodney King questions and we all get along? Well, it's not simply can we all get along but how do we get along, what are the resources at stake, and could we have more women like Sandra Day O'Connor being explicit about their understanding that affirmative action quantitatively has disproportionately enabled, catalyzed the upward mobility of white brothers and sisters, especially white sisters, white women, given the gender, and some white men and women, given the other — category, the so-called formerly handicapped category.

When we figure all that stuff in, we say where were the white women on the front line of the battle to not simply colorize affirmative action and to not make it the exclusive predicate of those who

unfairly, through discourses of preferential treatment and reverse racism, now attempt to seize authority over those domains from which they should be inherently excluded because we, we being the dominant, we being the majority, the unspoken, the unscrutinized majority, have access to that. Who told you that some black kid or Latino kid sitting next to you in law school took your place? What kind of logic informs that? What presuppositions philosophically construct that consciousness such that the notion of merit and desert are ineluctably tied to your position which is often unconscious, which is often unarticulated? And what critical race theory asks the law to do is to come out of the closet, be it epistemic closet, the sociological closet, the jurisprudential closet, and just own up to the fact that we are human beings trying to make judgments about law and about behavior and about mediating relationships, and in terms of adjudicating these relations between human beings, and it's all implicated in our human finitude limitation and as a result they are limited. Now, what does that mean? That means for me then, fifty years ago *Brown vs. Board of Education*,⁵ asked the law to be serious and explicit about the struggle over race in American society that it had helped perpetuate.

Think about 1896, *Plessy v. Ferguson*.⁶ Think about the fact that black people had no rights that any white person was bound to respect. That's in the law. That's huge, that's big time because that means that that is written into the very fabric of the jurisprudential culture from which we derive principles of behavior for human beings and institutions, and that's big. So now we got to deal with the fact that people's biases and prejudices informed them and of course, we got oh, but of course, but of course we knew it then when the nation was caught up in the dramaturgy of bigotry, and as a result of that, inevitably and unavoidably these people bowed down at the shrine of their own limited perspective. But of course, we now in the twentieth century and into the twenty-first are somehow exempt from those competing passions. Well, that may not be the case. So the reality then is that when we think about the law's role, the law's role in trying to get at some of these principles that we think are so important—fairness and justice and equality and freedom—then we think about the fact that the law has done an enormous good in terms of setting the basis for how even schools operate in American society: *Brown* fifty years ago. Before that, it was separate but equal. Who actually believed that? Who actually understood that to be the case? That you could have separate, especially when you weren't funding those schools equally. Even right now, we got sixty million dollar

⁵ 347 U.S. 483 (1954).

⁶ 163 U.S. 537 (1896).

schools out in the suburbs, mostly white communities, mostly privileged communities, mostly very well-monied, well-heeled Tony communities versus post industrial urban schools that don't even have secondhand copies of see Dick run, see Jane look at Dick run, see Spot look at both of them while Dick and Jane are running. Right? Internet access out in the suburbs: you got super fast, super information highway going down and you know, I don't know how old you are, but back in my day, James Brown, Santa Claus, please come to the ghetto.⁷ Can the super information highway have an off ramp in the barrio or in the hood? Right, we're trying to get some wire, wired, wiring.

And so that means then that there are huge economic gulfs between the have gots and the have nots even today, and there have been phenomenal notions out here that we've seen the resegregation of American education along the lines of *Brown* in '54. Now there are those who are stylishly bleak and hopelessly cynical who suggest that oh, it didn't make a difference, what happened back with the Supreme Court in *Brown* only hurt African American and Latino and other minorities. Oh, I don't think that's the case. We can make an argument, and a legitimate one, that certain forms of integration themselves have been paralyzing to a larger discourse of justice and tolerance and diversity. We could argue that, but to suggest that that wasn't huge, that when [Kenneth] Clark and Mamie Clark, the professor at Columbia University, took those dolls, those black and white dolls, and showed that these little – you little black people, black girls, black children were unalterably drawn to those white dolls.⁸ Not signifying that their preference was for one over the other without respect of color; it was color coding. There was some kind of internal, internalization of a kind of self abnegation that was evidenced in that psychological test. And so, there was something huge.

Black people ought to want to see black dolls, not to be repulsed by them, not to be turned off by them, not to believe that those dolls were not beautiful. And when I joked earlier about Janet Jackson and Justin Timberfake, I can't help but saying this, you know what I'm saying, it's recent, it ain't got nothing to do with the lecture, but I got to throw it in anyway. Well, it does, let me integrate it into the larger fabric of my lecture. Here it is now, we got Janet Jackson, the black breast, the black breast exposed at halftime. Oh my God, it's the heart of American indecency. Now Michael Cow of the FCC—what

⁷ James Brown, *Santa Claus Go Straight to the Ghetto*, on *FUNKY CHRISTMAS* (Polydor Records 1995).

⁸ See Kenneth B. Clark, *Effect of Prejudice and Discrimination on Personality Development* Presented at the Midcentury White House Conference on Children and Youth (1950) (supporting the *Brown* Court's recognition of the detrimental effect of segregation on black children).

does that stand for—fools covering commercials? What does that really stand for? The son, the sons and daughters of conservatives, black conservatives are often much worse than their papas and mamas because at least Colin Powell had some experience in Banana Kelly [Housing Community] up in the Bronx where he was in the hood. Right? He got some memory of that, and trust me, I hung out with Colin Powell and Chris Rock before the Janet Jackson concert at the Madison Square Garden. He ain't had no problem with Janet, trust me. I can't speak on it. He did not have a problem with her breast. That's all I'm saying to you. So now, her breast exposed is the heart of American indecency. Now I can't help but believe – now we're going to create law, now we want to say well, my God, we have to have FCC regulations.

What's indecent is the way in which Clear Channel [Communications, Inc.] is overtaking American waves and commodifying American information.⁹ That's what's indecent. That's what you need to be checking out for us because the billboards you see are from Clear Channel. The venues that the live performance takes place is Clear Channel, and the air waves upon which they speak is Clear Channel, and — by a whole bunch of other right wing conservatives have access because of Clear Channel. So those are the kind of indecency issues we need to be interrogating that have to do with the collusion between corporate capitalism and American public funded expression.

And so now Janet Jackson with that black breast.¹⁰ I called him Justin Timberfake. You want to be black until it costs you something. You want to be a brother until it means that the materiality of your racial identification causes you to suffer. Now what happened to the old days? Maybe Mick Jagger and them, you know, the rock and roll cat: yeah, I did it, wish I would have pulled the other one off. What happened to that kind of transgression and rebellion? Now everybody is genuflecting before the shrine of American corporate capitalism. And that white hand reaching across to grab that black breast is something that's symptomatic of a history and trajectory of dominance in American society. That ain't nothing new. And to exempt yourself from responsibility is nothing new as well. And then Janet Jackson, when that black female breast was used to suckle a white civilization and to feed and nurture white supremacy, it was beautifully

⁹ See Jeanne Anne Naujick, *Clear Channel Starts Airwaves Cleanup*, TENNESSEAN, Feb. 26, 2004, at 1 (“Clear Channel owns more than 1,200 stations across the United States . . . [and] reaches 110 million people through its own stations and millions more through its syndicated programming.”).

¹⁰ See *CBS Apologizes for R-Rated End to Halftime Show*, ST. LOUIS POST-DISPATCH, Feb. 2, 2004, at D5 (“Janet Jackson set off a Super Bowl firestorm on Sunday night when her right breast was bared in their nationally televised halftime show duet with Justin Timberlake.”).

received. When that black female breast was exploited as a symptom of slavocracy and Jim Crow law, that was exploited and that was the deal and that was not harangued; that was not seen as the basis of indecency. But now, if any erotic independence is associated with that black female breast, it becomes problematic. I don't know, that just strikes me as kind of odd and interesting.

Back to my bigger point. So it seems to me then when we looked at America vis-à-vis *Brown* and look at the experiment with those dolls, what strikes me is quite interesting then, is that the internalization of this form of self abnegation suggests that there are elements that the law has to take into consideration and into account. Can you hear me now? So what degree can the law, should the law, the myths, the stories, the identities of the very people that it intends to help, regulate and govern societally? So when I think about *Brown*, I think of how significant that law was and how important the Supreme Court has been when influenced by cultural values that acknowledge the limitation of human reason and acknowledge that human bias has been at the heart of the project of American jurisprudential reality. Then when it acknowledges that, then we know that the law can play a good, noble, ennobling, edifying role to help us deal with the reality. We must hear the least of these. We must hear those who have been historically excluded as a result of the rule of law.

The uncritical celebration of the law is just as dangerous as those who would tend toward anarchy and lawlessness. The uncritical celebration of law which suggests that the law itself without intervening forces and without push or pull, without force from the broader society, would it of itself make decisions that were just and appropriate? I think about the fact that *Brown* took place in the culture where there was a huge civil rights movement just looming. A year later Rosa Parks in Montgomery, Alabama; Martin Luther King, Jr. a few years later; Roy Wilkins already on the scene; A. Philip Randolph already on the scene; Edie Nixon; Ella Baker; Joanne Robinson; and other significant figures on the scene. So it seems to me a social movement, a credible attempt to try to embody the ideals after which the law aims must be a corollary to, and a check and balance of the law. Because without that kind of serious social movement, the law itself ain't done a whole bunch to deal with the realities that we want to see addressed in our culture. And so, Can You Hear Me Now, can we hear the misery and the hurt and the pain? Can we hear the cries for justice that human beings who are American citizens have made in the name of the ideals of democracy, of fairness, of justice and so on.

And so, the intersection of the law in race is critical, and I know that a bunch of critical race theorists and other people who think about these things are somehow suspicious and skeptical as if they're doing something outside of the parameters of what we usually do

when we teach constitutional law or torts and contract or when we deal with civil aspects of the law. But they are part and parcel, woof and warp, they are at the heart of these debates about not only critical race and reason, not only about what the law can do to help folk become better human citizens, or at least allow them to arrange their human relations in such a way that they reflect the ideas of justice to which they adhere. We see that the law ain't that much different from any other level of sophisticated conversation that gets involved in what it means to be an American.

So that now, apart from questions of race, we've got added on top of this stuff questions of nationality with the post-September 11 world. Now we're trying to figure out, can we balance civil liberty with the protection of a certain kind of fabric of democracy that's protected from, you know, these vicious and insidious arbitrary forms of violence that terror represents. And the bottom line is, is that race has been a kind of American terror and that the American terror of race has not always been nobly dispatched with by the law. As a matter of fact, the law at points has perpetuated the terror of American race. And how do we understand our relationship as practitioners of that law, as people who help adjudicate what the law is intended to, as those of us who help interpret what the law is about? Because if that was self evident, we wouldn't need lawyers. If it was self evident, we wouldn't need judges. Folk who disagree with one another, who make bitter arguments against one another, who make bitter arguments against one another in the name of and in defense of competing ideas about how to parse and interpret specific moments of that law. So I'm always heartened to find law schools and lawyers and law professors who are interested in trying to figure this stuff out, untangle it, disentangle it, and help us understand that the law doesn't stand above, but it's from within. And if it's from within, it has all of the virtues and vices of being from within. So let's stop pretending that it has this objective. I know, you all don't do that, but a whole bunch of folk outside of here do, and they tempt you to want to believe that again, to reinvigorate that mythology and that narrative.

So the thing is, we want to deconstruct that, and after deconstructing it, what the law helps us understand, especially in race, is a perfect case that underscores this point, is that we are no better or no less than the ability to arrive at consensus and to deal with our debates in a fundamentally humane fashion that owns up to the role we have played in the hurting of human communities that appeal to the law to justify their claims. And that to me is very important because visiting a whole bunch of prisons where disproportionate numbers of black and brown men and women are locked up. When I see affirmative action working, that's the only place it's really working, is up in

the prison industrial complex.¹¹ We ain't running nothing else. People of color are women, right?

When we look at all of this paranoia that's been developed around affirmative action, my jiminy, what's going on, by jing, what's happening to America. We've just given it over to these radical Marxists and these — and these lesbians and these feminists and these crazy people now, they want to get married and now the blacks want to take—you know, all this paranoia. And I'm telling you, I'm out on the road 150, 200 days a year. I don't see it. Where's it at, where is that place, where is that school? You know, they tell you the schools are running over. I ain't been to one. I have not been to an American institution where the mythology that's been generated by the paranoia of protectionism, racial protectionism of the dominant culture is in effect. And furthermore (and I'll make a couple points and end because I know I'm over my time), furthermore, that when we think about affirmative action, affirmative action is not the ceiling, it's the floor.

But we have so surrendered the social and political battle necessary to be corollary to the legal one and it's moved so far to the right that even conceding the legitimacy of affirmative action has to be ameliorated by terms like let's mend it, don't end it. Even the friends of those who are represented by affirmative action have to find new language to try to defend it because it's such a tough time in America right now. And part of the difficulty of defending affirmative action is the difficulty of making, especially, our good white brothers understand that many of them systemically and historically, not individually but collectively, have benefited from a form of racial preference. Dare I say is too obvious for me to point to. But the cliché begs to be engaged, that our own president, God bless his heart, brother come out on Martin Luther King, Jr.'s birthday against affirmative action, what, wow. Not the day before, not the day after, on the day, right? And for all those who say to us we must appreciate the fact as African Americans that we have Colin Powell and Condoleeza Rice in the White House, what does that mean to us? Right? I'm not saying because they're house negroes, White House negroes, that we shouldn't be proud of them. And what is it about black people whose names with C that have a destructive impact on America? Colin and Condie and Connelly and Clarence. I'm not saying it's a scientific alphabetical kind of relationship, but it's worth considering. So are we supposed to be proud of the fact that they're smart, smart negroes? Like

¹¹ See generally Eric Schlosser, *The Prison-Industrial Complex*, ATL. MONTHLY, Dec. 1998, at 51 (describing the increasing number of prisoners of color incarcerated for non-violent crimes, the decreasing rate of violent crime, and the interplay of private companies in federal prison budgetary allocations).

we ain't never seen no smart negroes before, right? And what good do they do in the White House in the presence of the president who himself has benefited from forms of preference? Here's a guy [who] couldn't even get into his local school, daddy got to call Yale. They called Harvard [to] get him in. He admits on every graduation speech he's a C student. I'm a C student and this is what C students do, so all you cats making A's and B's, step aside, because the C students rule and rank because we got the cash. And so now, here's a guy benefiting from racial preference. By his own admission, he was drunk [un]til he was forty. Then he got a job. What was he, he headed the Texas Rangers and he sold Sammy Sosa to [the] Chicago [Cubs]. That wasn't a great move. Then he was the governor [of Texas], now he's the President. I know some negroes named Willie in Detroit [who've] been drunk since they're forty, can't even get elected as dog catcher. So when we have all this paranoia about affirmative action, please.

When we put it in broader context, we understand that affirmative action is not about giving somebody a shot who doesn't deserve a shot. And those of you who are engaged in the law, applying the law, fixing the law, limiting the law, reconstructing, reconstituting the law, must understand as you do understand the fact that those who are victimized by the law must be defended by that very law. This is where I would argue, quibble with the ingenious formulation of Audre Lorde that the tools of the master can never dismantle the master's house.¹² Got to do it, got to have it, got to master those tools, got to engage in sophisticated forms of theoretical application of the law to their social constructs. Yes, all that. The bottom line is the master's tools got to be involved in dismantling the master's house. But you got to baptize those tools, got to convert those tools. Excuse me for that narrow religious reference, I am a Baptist preacher and Saturday is close to Sunday, watch out. So it seems to me that those tools must be deployed, must be skillfully engaged in dismantling the master's house. That's why people of color and others engaged in reflections upon the law and race ain't got no, ain't got no, ain't got no choice but to engage in all kinds of discourses. Right? I know people say oh, these obscurantists, jargon, written discourses and stuff, we ain't got no choice. We got to master that and the common tongue. We got to be able to say it for five minutes on Bill O'Reilly and we got to be able to say it before the Supreme Court and make some sophisticated arguments, and we got to go in law journals and engage with habber mouths and — and [rappers] Biggie Smalls and Snoop Dogg and whoever else comes to mind.

¹² AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110 (1984).

So for me, finally, I'll say this now for real. For me then, the law in its relationship to race is critical to not only helping us hear more effectively the cause and claims of those who have been victimized by former deployments of interpretations of the law. But in the final analysis, I contend that the law must be part of a larger humane agenda of radical democracy. And sometimes that larger humane agenda of radical democracy means we challenge the hegemony of the law that we practice. Yes we acknowledge its benighted noble status. We acknowledge that it has done grand and great things in the hands of practitioners of a tremendous dexterity and skill. But at the same time it has been used to hurt and harm a whole bunch of folk and shut their voices down. So I come full circle. Can You Hear Me Now? Of course, this dovetails nicely with other stuff I write about when I think about the rapper Biggie Smalls who says, you know, I used to "wonder why Christmas missed us/Birthdays [were] the worst days/Now we sip champagne when we're thirsty/Damn right I like the life I live because I went from negative to positive."¹³ But you don't hear me though. Hearing that experience or a guy like Tupac, I wrote a book on Tupac, *Holler If You Hear Me*,¹⁴ holler if you hear me. He said just the other day "I got lynched by some . . . cops and to this day/[those] same [cops] on the beat get[] major pay/but when I get my check they[re] takin[g] tax out/so we[re] payin[g] the cops] to knock the blacks out."¹⁵

You ain't got to be in Marxism 101 with Antonio Bromchey and cultural interpretation to understand that you're subsidizing your own oppression and that people who have not been heard by the law often hear the pain, the heartache of their fellow brothers and sisters and as a result articulate that; and what the law should do is to pick up on that and embrace that, amplify that, put it through it's own interpretive sieve, but come up with some credible intellectual justifications to expand the larger humane project and agenda of radical democracy. Because if it fails to do that, it ultimately fails to serve us, and if it fails to serve us, we are its servants. And we were not made for the law, the law was made for us, and if that's the case, who is the us being defined by the law and how can we expand the corporate consciousness that informs what that us is so that every person deserving of protection will find it under the cover of law. Thank you very kindly.

¹³ THE NOTORIOUS B.I.G., *Juicy*, on READY TO DIE (Bad Boy Entertainment 1994).

¹⁴ MICHAEL ERIC DYSON, *HOLLER IF YOU HEAR ME: SEARCHING FOR TUPAC SHAKUR* (2001).

¹⁵ 2PAC, *Point the Finga*, on STRICTLY 4 MY N.I.G.G.A.Z. (Amaru/Jive 1998).