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LISTENING AND THE VOICELESS

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To be invited to Mississippi to listen to such fine papers and good conversation is a rare treat. Listening, I am afraid, is not usually part of the daily regimen of the law professor. But listening, talking and reading with care and skill is what most impresses me about the participants in this conference.

I must confess I arrived on my first visit to the "real" South seeking traces of that "barracks filled with stubborn, backlooking ghosts,"[1] which was William Faulkner's description of these parts in *Absalom! Absalom!* But as I tried to listen to the lively papers and illuminating discussions, I was struck instead by the words of another great writer from down here, Eudora Welty. Recently she stressed how essential it is "to read as listeners – and with all writers, to write as listeners."[2] If these two papers have a common theme, it is their exploration of how, again recalling Eudora Welty's words, writers "grow up and learn to listen for the unspoken as well as the spoken – and to know a truth."[3]

I want to comment briefly on just a few of the many themes which flow from these papers, mentioning several thoughts they stir in me. First, the papers touch upon the issue of voicelessness when one confronts external codes such as the law. I also want to comment about how binding the past may be and yet how blind to it legal analysis often seems. Throughout, I will mention a few elements of familiar legal iconography and the overlapping and often conflicting codes suggested in both papers.

My task is made easy because I have two provocative papers to consider; it is rendered difficult, however, by the richness and complexity of the ideas suggested by Professors Davis and Gates. By exploring briefly the intersection of law and the voiceless and the problems inherent in legal perceptions of the past, I will reflect some of what I have learned at this conference and will share some of my own ideas. I present these resonating thoughts in my Yankee version of the English language with the faint hope that I can be understood even by careful listeners.

The Voiceless and the Law

One of the areas in which our current law clearly fails, in my opinion, and where law has generally not done well is in heeding

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1. W. Faulkner, *Absalom! Absalom!* (New York: Random House, 1936), p. 12.
2. Welty, "Listening in the Dark," *New York Times*, 9 October 1983, sec. 7 (Book Review), col. 1, p. 3.
3. *Id.*, p. 20.

those who are silent or inarticulate. Since literature so often concerns "flesh and blood people" in Faulkner's phrase, able to "stand up and cast a shadow,"[4] this may be where law and literature are furthest apart. Literature seems to thrive upon empathetic emanations from the characters portrayed; law's propensity is to reduce people to stock figures, jammed into the narrow confines of a legal classification system too often concerned only with those facts readily containable within pre-existing phrases, articulated by lawyers using a standardized vocabulary.[5] In legal analysis, there is a propensity to presume a reasonable man and to rely almost entirely on words to capture the operation of his presumptively free will. In legal education, reliance on written appellate opinions to the virtual exclusion of all else exaggerates this phenomenon. Intonation and body language are lost in transcripts; yet lawyers have not adopted the technology which is now available, for example, using video tape, to capture much of the appearance and impact of a witness's demeanor. Judicial review remains largely bound to cold, antiseptic records. Efficiency might sometimes explain why appellate judges function in this way, but the methodology can hardly be thought a sufficient means to grasp the truth.

In a few instances, our law does heed and even protect silence, as in the fifth amendment's privilege against self-incrimination. But such protection is extremely narrow – and growing narrower with every term of the United States Supreme Court. Even the small shield provided for silence on rare occasions is far from the cutting edge of wordless communication discussed so well by Professors Davis and Gates and recalled so beautifully by the authors they discuss.

Legal combat is remarkably ill-equipped to begin to capture or even to recognize moments as powerful as the climactic scene in *The Sound And The Fury*, analyzed by Professor Davis in her excellent book, *Faulkner's "Negro": Art and the Southern Context* (1983). Dilsey worships with her fellow black congregants, and "'Their hearts were speaking to one another in chanting measures beyond the need for words.'"[6] This powerful image of community, intermediate between individuals and the source of rules, generally eludes American lawyers, judges and litigants.

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4. T. Davis, *Faulkner's "Negro": Art and the Southern Context* (Baton Rouge: Louisiana State Univ. Press, 1983) (quoting F. Gwynn and J. Blotner, *Faulkner in the University* [Charlottesville: University Press of Virginia, 1959]).

5. J. Noonan, *Persons and Masks of the Law* (New York: Farrar, Straus and Giroux, 1976).

6. Davis, *Faulkner's "Negro,"* p. 123 (quoting W. Faulkner, *The Sound and the Fury* [New York: Random House, 1929], p. 367).

The verbal communication of individuals – preferably written down – is the means and the end in law. By focusing on the isolated words of atomistic individuals, we manufacture a manageable, albeit largely bloodless, legal lifestream.

Professor Gates portrays the imperialism inherent in conformity to linguistic codes. The stark, poignant example he presents of Haitian poet Edmond Laforest committing suicide with a Larousse tied around his neck leaves a lasting impression. Yet Gates's call for liberation from the weight of Western modern languages, which he calls a "relation of indenture," remains a bit unclear to me.

Beyond the obvious paradox of Gates's own clear and elegant use of the English language to convey his call for liberation from it, there is ambiguity about what Gates would use to replace it. Moreover, he appears not to avoid entirely the common danger of romanticizing the pre-indentured past.

Nevertheless, the point about language Gates makes so powerfully surely is significant. In fact, his discussion of the trope of the talking book is too close for comfort to our familiar American claim to be able to comprehend what the constitution says about today's controversies. Moreover, I am afraid that to think in legal terms, which is largely what the boot camp of the first year of law school tries to get students to do, confines many of us for ever after. Still, I am not entirely convinced that liberation from codes such as law is possible or advisable. How can we be sure or even pretend to guess that something natural and noble lies behind them? Language and other codes may actually sometimes help to control the powerful; at times, both language and law may constitute liberating leverage for those otherwise inarticulate and without power. Language, perhaps even legal language, can link people and provide connections for those otherwise distanced from each other.

What does seem clear to me – and it is a point on which both papers are provocative in the best sense – is that the terminology and iconography of law are manipulated to mystify and to exclude by those who do "law-jobs."[7] Historically, one of the most successful exclusions – again made effective today despite a brief and uncharacteristic opening during the 1960s – is achieved when

7. The phrase is by Karl Llewellyn, who apparently was a classmate of Phil Stone's at Yale Law School, class of 1918. Llewellyn explored the implications of his concept of law-jobs often and at great length. See,e.g., K. Llewellyn and E.A. Hoebel, *The Cheyenne Way* (Norman: Univ. of Oklahoma Press, 1941), chaps. 10-11; K. Llewellyn, "The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method," 49 YALE L. J. 1935 (1940).

a nearly impenetrable barrier is constructed, made up of cost and formality, buttressed by proclamations of the neutrality of legal language. Together, such factors almost entirely block the path to the courthouse for society's silent victims.

An even more powerful constraint may be largely self-imposed. In her analysis of *Go Down, Moses,* Professor Davis cogently describes how people are bound by a variety of codes – codes which themselves sometimes conflict. She proceeds to suggest Faulkner's exploration of the apparently inevitable internalization of received custom and usage. Even when we seek liberation, we meet the enemy in ourselves. Therefore we must carefully consider and confront the mystical, mythical and real power of our codes. Like the contracts recorded in plantation ledgers that Ike McCaslin discovers in *Go Down, Moses,* these intangible and interlocking bonds are partially of our own making. Together, we create "threads frail as truth and impalpable as equators yet cable-strong to bind for life."[8]

Blind Justice and The Light of History

Blind justice is, of course, a central icon for legal fairness in our culture. (As a general rule, it may be wise to let icons be icons.) Yet in light of what both papers suggest about the role of the past as it impinges upon today's decisions, a few words about Faulkner and the general problem of history as a source of law seem appropriate.

On many levels, *Go Down, Moses* suggests that "what's past is prologue."[9] The influence and tragedy of the past is inescapable. In fact, this novel could be read as a brilliant distillation of the legal history of Mississippi. Once the vital role of the Indian, Sam Fathers, is recognized, the sins of the white fathers against Fathers's father's fathers may be the clinching irony in a work rich in ironies. In this regard, the famous or infamous decision by the United States Supreme Court in *Fletcher v. Peck*[10] seems strangely relevant.

That case, in which the Court for the first time invoked its power to invalidate a state law as contrary to the Federal Constitution, legitimized an unmistakably corrupt land grab of the entire Yazoo region, including what is today Mississippi. With all but one legislator known to be bribed, the Georgia legislature in 1795

8. W. Faulkner, *Go Down, Moses* (New York: Random House, 1940), pp. 256, 293-94.

9. *The Tempest,* act 2, sc. 1, line 250.

10. 10 U.S. (6 Cranch) 87 (1810). For a fine, lively discussion of the case and its rollicking context, see C.P. McGrath, *Yazoo: Law and Politics in the New Republic - The Case of* Fletcher v. Peck (Hanover: University Press of New England, 1966). Since this book is accessible and reprints the Supreme Court opinion in full, citations from the case will be to the pages where McGrath reprints them.

perpetrated "the greatest real estate deal in history"[11] and sold 25 million acres of western land to speculators for $500,000 of specie currency. Led by U.S. Senator James Jackson, a flamboyant politician who earned his title as "Prince of the Savannah Duelists," the citizens of Georgia demonstrated for once that representative government actually may be capable of throwing out the bastards. The very next year they elected an entirely new crowd to the Georgia legislature. The new legislature quickly repealed and ordered burned the papers permitting the Yazoo land sale.

After prolonged financial and political shenanigans, a collusive suit challenging that repeal reached the Supreme Court 14 years later. The majority opinion was written by Chief Justice John Marshall, himself a prominent legal icon and land speculator, whose life and brilliant use of rhetoric are somewhat recalled in Professor Snell's portrait of Phil Stone and Professor Weisberg's exploration of gentleman-lawyer Gavin Stevens, Esq. Marshall's opinion relied upon the federal constitutional guarantee against impairment of the obligation of contracts, stretched to cover public grants as the Court invalidated Georgia's attempt to void the corrupt initial bargain. As an alternative ground, Marshall claimed that reneging on the sale also violated "general principles which are common to our free institutions"; in a concurring opinion, Justice William Johnson announced that these or similar natural law principles "will impose laws even on the Deity."[12] It was in this way that Mississippi real estate investment began.

What is more interesting for our purposes, however, is Marshall's closing statement. He wrote,

> [t]he majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in free on the part of the State. [13]

This is blatant doubletalk. Indian rights are legitimate and respected, but only somewhat; since Indians do not speak the white man's legal language, whites can go about extinguishing Indian rights and imposing their own code of ownership. Interposition of the nearly absolute common law control of property, expressed in formal, cryptic legal terminology, overrode legitimate Indian claims simply because Marshall so declared. Moreover, past wrongs were to be ignored or considered purged simply by the

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11. McGrath, *Yazoo: Law and Politics in the New Republic*, p. 7 (quoting A. Beveridge, *The Life of John Marshall*, 3 vols. [Boston: Houghton Mifflin Co., 1916] 3:55(1)).

12. *Id.*, pp. 197, 200 (quoting 10 U.S. [6 Cranch] 139, 143).

13. *Id.*, p. 200 (quoting 10 U.S. [6 Cranch] 142-43).

passage of time. After all, as Marshall proclaimed, "The past cannot be recalled by the most absolute power."[14]

This decision validating a phenomenal land grab underscores the centrality, and possible irony, in Faulkner's observation that Old Carothers, the progenitor in *Go Down, Moses,* dominated for a century after his death because it was Old Carothers who first got the land from the Indians and put his slaves to work to chop a flourishing plantation out of the wilderness. Old Carothers:

> saw the opportunity and took it, bought the land, took the land no matter how, held it to bequeath, no matter how, out of the old grant, the first patent, when it was a wilderness of wild beasts and wilder men, and cleared it, translated it into something to bequeath to his children, worthy of bequeathment for his descendants' ease and security and pride and to perpetuate his name and accomplishments.

The legal nicety of Carothers's purchase from a Chickasaw cannot hide how much the legalized seizure of, and forced labor upon, the land structured forever the realm of rights in property and contract. The Jeffersonian yeoman and the equal start in the race of life so dear to the sporting American spirit seem far removed from Faulkner's portrayal of the grip of the past. The codes enforcing the stranglehold imposed by the hands of the dead appear inescapable.

Perhaps it is precisely because there is no logical stopping place that nearly all legal analysis shies away from any inquiry into the sins of our past. The prospect of justifiable demands for reparations is certainly intimidating. Moreover, to look back may be to discern how much our vaunted fidelity to both liberty and equality cannot be sustained. These two basic constitutional claims may be fundamentally in conflict with one another. Reparations for past inequalities may constrict freedom now; yet freedom and formal justice today exacerbate grievous past wrongs.

Had I world enough and time, I would be able to demonstrate, I think, that American constitutional law – and the protection of certain basic individual rights which allegedly accompanies and rests upon the Federal Constitution – has tended simply to ignore the past, while protesting profound faithfulness to the intent of the Framers. But I will be merciful. I will leave you with only the incredible 1883 declaration by the United States Supreme Court in the *Civil Rights Cases.* That decision is still regarded as good law and is, in fact, very much in vogue both as a citation and as a doctrinal mode. Eighteen years after the end of the Civil War, it was thought appropriate to declare that it was high time to mark

14. *Id.*, p. 194 (quoting 10 U.S. [6 Cranch] 135).

the moment when the black man "takes the rank of a mere citizen, and ceases to be the special favorite of the laws." [15]

Justice Bradley, writing for an 8-1 majority, asserted that blacks would be adequately protected by the states; Congress's attempt to protect equal access to public accommodations was unconstitutional. The taint of past wrongs had been purged. The past is past, as Herman Melville has his naive American, Captain Delano, declare after the bloody slave revolt in *Benito Cereno.* New codes can be created, new relationships begun. Another fair start in the race of life starts today; we begin another example of that equal opportunity our legal system presumes. This ahistorical faith lacked any basis in reality when Justice Bradley proclaimed it a century ago; tragically, it remains largely baseless today.

My final point is that Professors Davis and Gates do much to enlighten and to challenge us with their focus on the silent and the inarticulate. They hint at alternative communities of affection, which might provide opportunities for mediation of the stark, binary choice between isolated individual and binding code.

Yet both papers seem to afford law, as well as other codes, the power to shape conduct and belief. In other words, Professors Davis and Gates apparently would accord to law what has come to be called "relative autonomy." [16] But each of them also seems to call for liberation from law. The two apparently assume, correctly in my view, that law generally allows the "haves" to come out ahead. Somewhat paradoxically, both also somehow, somewhere seem to find some basis for hope that the manipulation of power by those who possess it can be delimited and even shaped by law and by other codes. That claim – the idea that law not only reflects but may even significantly control those who have most of the chips – is actually quite controversial. But it hints at a leap of faith which also suggests a vital task: the need to heed those people victimized for so long that their lack of power and their silence often are taken to be encoded inescapably throughout our world. We may never discover a cure for the com-

15. Civil Rights Cases, 109 U.S. 3, 25 (1883). Ironically, nearly a century later Justice Powell repeated Bradley's assertion almost verbatim in University of California Regents v. Bakke, 438 U.S. 265, 295 (1978), to declare again that blacks already had achieved sufficient equality. In what was the deciding opinion, since the other Justices were evenly split, Justice Powell wrote: "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." (emphasis in original).

16. The current debate was touched off by E. P. Thompson's reflections on the theme at the end of his *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), pp. 258-69. See Horwitz, "The Rule of Law: An Unqualified Human Good?" (Book Review), 86 YALE L.J. 561 (1977); Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science," 46 MOD. L. REV. 102 (1983).

mon cold, but we can confront, challenge, and perhaps even reshape our limits.

In closing, I would like to share two quotations from Alice Walker's riveting *The Color Purple.* These brief passages suggest the need for attention to and trust in others beyond the boundaries of codes; they occur in the context of a leap of faith (reminiscent of Dilsey's Easter service) near the end of the book's overwhelming condemnation of discrimination and inhumanity within accepted racial, sexual and national codes.

In discussing whether God is white, and why he doesn't seem to listen to the prayers of black folks, Celie says, "I know white people never listen to colored, period. If they do, they only listen long enough to be able to tell you what to do."[17] Shug then explains, "I think it pisses God off if you walk by the color purple in a field somewhere and don't notice it."[18]

Too often, a person trained in the law is likely not only to miss the color purple, but to talk at great length about who owns the property. These two papers challenge such thinking. With their help – aided and abetted by the unlikely troika of Eudora Welty, William Faulkner and Alice Walker – I think I may have spotted some purple on the horizon.

17. A. Walker, *The Color Purple* (New York: Harcourt Brace Jovanovich, Inc., 1982), p. 166.
18. *Id.*, p. 167.