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Bruce McM. Wright

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## BANGS AND WHIMPERS XXXIX: THE LEGACY OF DRED SCOTT

BRUCE MCM. WRIGHT\*

I read, recently, that children, enraptured by *Sesame Street*, saw the Cookie Monster flicker off their television screens to be replaced by a parade of naked women.<sup>1</sup> I assume that adult moralists were then faced with the problem of how to explain the naked truth to their youngsters, and reconcile the bare profile of Eve in the garden, with the shameless, X-rated display then corrupting the TV screens.

The only reason I recall this electronic version of children in wonderland, is because the *Dred Scott* opinion of Chief Justice Taney, is often described as seminal. It will astonish no one to hear that a great deal of semen can be lost without any love. This is sometimes called the mating of two sewer systems.

The decision vexes history, bleaches the constitution bone-white and paints a sorry portrait of a man, who, his historical clique says, has been unfairly maligned. Let us see.

A year or so ago, a psychoanalytic biography was published in which two authors sought to analyze the psyche of Woodrow Wilson. Clues were numerous. The only thing missing was Wilson himself, to confess his Oedipal dreams, his masturbatory fantasies, and his separate-but-equal yearning to sleep with the Black mammy of his Virginia nursery. In a recently published book, we find that the OSS during World War II, had an analyst analyze Hitler by parsing the syntax of *Mein Kampf* and Der Fuhrer's speeches. Some amateur psychologizing, then, is not entirely novel.

When I was asked to participate in this preceptorial on *The Legacy of Dred Scott*, and how the ghost of the Taney opinion goes marching on, trampling out the grapes of equality, it occurred to me that the Chief Justice may have written his acid opinion while deranged. Such enthusiasm concerning the Negro's lack of rights, is almost unmatched in the annals of racist Americana. It was almost as though the Chief Justice had come home unexpectedly and witnessed his favorite daughter in the arms of his favorite Black slave.

Technically, of course, Taney did not have to take such a crushing

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\* Judge, Criminal Court of the City of New York; Lincoln University (Pennsylvania); quondam Chief Justice Yale Law School Moot Court of Appeals; former general counsel and assistant administrator for legal affairs, Human Resources Administration of the City of New York; supervised drafting of Articles of Incorporation for Community Action Legal Services in New York City; author of *From the Shaken Tower* (poetry); work has appeared in many anthologies.

<sup>1</sup> N.Y. Times, Sep. 13, 1973.

giant step upon Black flesh. The underlying question was quite simple. Invoked for federal jurisdiction was diversity of citizenship. If Dred Scott was not a citizen, that was the end of the matter. The case is still cited for diversity problems.<sup>2</sup> Considered blindly, this is a rather non-ethnic proposition.

A 1973 case<sup>3</sup> invokes for Ohio the shadows of *Scott* in a long, heavily documented opinion by Wade McCree, a Black United States circuit court judge. He must have enjoyed the ironics of his scholarship.

Mr. Justice Frankfurter claims it was over-simplification to reduce the conflict between John Marshall and Taney to a question of states' rights versus a strong central government. However, that we are here today, pressing First Amendment rights without Dred Scott or dread fear, proves that, whether or not Marshall was a "true believer," it is clear that Taney was a "false prophet"<sup>4</sup> in his over-extended denigration of the Black man.

We are told that Taney, who succeeded Marshall as Chief Justice, held, as an article of judicial faith, that the Supreme Court "occupied a somewhat detached position" and acted "as an arbiter of a federal system of dual sovereignties."<sup>5</sup>

This intrusion of competing sovereigns was the "go" signal for the cry of havoc which loosed the dogs of states' rights upon the land.

What manner of man was this Taney, this Chief Justice, who arouses so much emotional ecology, both positive and negative?

The zeal with which he wrote out his Dred Scott fantasies and fears, might be said to represent a passionate and homosexual embrace of a George Fitzhugh remark made in 1854: "A free Negro!" he exclaimed. "Why, the very term seems an absurdity."<sup>6</sup>

Dred Scott, then, simply clarified and formalized the hard facts of America's foundering and, if anything, further diminished even that three-fifths of a fractional man theory which was the grudging endowment of the constitutional convention.<sup>7</sup>

While white South Africans can revel in the freedoms of the country where they were born, Black Americans have never been able to know a parallel richness in the land of their birth.

<sup>2</sup> 60 U.S. (19 How.) 393 (1857).

<sup>3</sup> *Stifel v. Hopkins*, 477 F. 2d 1116, 1125 n.5 (6th Cir. 1973); *Case Load Of The Supreme Court*, 57 FRD 576, 585 (1972).

<sup>4</sup> FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE*, 14 (1937). See also Frankfurter, *John Marshall and The Judicial Function*, 69 HARV. L. REV. 217 (1969).

<sup>5</sup> J. B. Fordham, *The Legal Profession and American Constitutionalism* (The sixteenth Annual Benjamin N. Cardozo Lecture Delivered before The Association of The Bar of The City of New York on October 24, 1957). 12 RECORD OF N.Y.C. B.A. 518, 520-521 (1957).

<sup>6</sup> FITZHUGH, *WHAT SHALL BE DONE WITH THE FREE NEGROES?* (1854). quoted in G. OSOFSKY, *THE BURDEN OF RACE* (1967).

<sup>7</sup> U.S. CONST. Art I, § 2.

In writing his opinion, Taney marshalled evidence from both north and south, to show how Negroes had always been excluded from the solemn fictions of an egalitarian constitution, meant for whites only.

Put bluntly, as Taney did, Negroes were never intended to be citizens for, as his opinion stated, "A stigma of the greatest degradation was fixed upon the whole race."<sup>8</sup>

He seemed to believe, with all of his Christian passion that the Negro's inferiority as a creature, could never be altered.

In this estimate, Taney may have come off looking like a confederate liberal by comparison with those light-skinned house-niggers who, at one time, enlightened our sociology by organizing a blue-vein society.<sup>9</sup>

Frederick Douglass, whose political religion made it necessary for him to beatify the Republican Party as the ship, with all else the sea, said of the Dred Scott decision, that it did not make "the only power in the world" the Supreme Court. Monstrous as the decision was, he continued, it should be accepted in a "cheerful spirit," since it was but "the one necessary link in the chain of events preparatory to the complete overthrow of the whole slave system."<sup>10</sup>

What he doubtless meant by the "necessary link," was John Brown's raid and the Civil War. But, one of the bitter questions which brings us here is: Was the slave system in fact overthrown, or was it simply replaced by another kind of ethno-political repression. Certainly the 13th, 14th and 15th Amendments not to mention the still pending 27th, give proof that our "more perfect union" and that establishment of justice which was promised in the Preamble, awaits the moral rehabilitation of our Congress and our President.

In our anxiety to grapple with Taney and his love for the Constitution, we sometimes tend to forget that Dred Scott was one of the first of our complex predicament to strike a blow for the honour of the Black woman. After all, it was he who sued Sanford for having assaulted Mrs. Scott and his two daughters. Sanford, it was claimed, among other things, had exercised his temper *vi et armis* as the owner of Scott and Scott's family, all of whom he had purchased in due course.

Taney consumed some 61 pages of close print to say what Sanford's answer said in a single paragraph, that is, that Scott had no rights to sue or do anything else, because he was a "Negro of African descent."

Associate Justice Wayne concurred, as he said, "entirely" with Taney's opinion. Justices McLean and Curtis dissented, but not as prospective NAACP members, as we shall see. The majority opinion and its convoy of concurrences, devoured some 136 pages of newsprint, all to affirm the zero status of the Negro.

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<sup>8</sup> *Scott v. Sanford* 60 U.S. (19 How.) 393.

<sup>9</sup> R. OTTLEY, *NEW WORLD A-COMING* (1969).

<sup>10</sup> J. H. FRANKLIN, *FROM SLAVERY TO FREEDOM* (3rd Ed. 1967).

The dissent of Mr. Justice McLean was a modest 35 pages. That of Justice Curtis was 69 pages, the longest of all. The majority waged law with Taney, however, and it was that view which carried the day—even today's day, alas.

But all of us who are students of the Black circumstance, and occasionally its victims, are quite familiar with the melancholia of Dred Scott's autopsy of dead Black hope. A more interesting question might be: What manner of man was Chief Justice Roger Brooke Taney? What equipped him to follow that saint of American jurisprudence, John Marshall?

But, before we leap with love and adoration into the arms of Marshall, it should be remembered that he was a slave-owner.<sup>11</sup>

Taney, of course, preceded in time the nettlesome wisdoms of Dr. Sigmund Freud, but not the Greek myths which the grey eminence of Vienna codified for our age of anxiety. Did Taney wish to sleep with his mother? And if he did, was this bad? Oscar Wilde, in the off-hand sophistry which was his trade mark (and which marked his trade), tells us that the trouble with women is that they are too much like their mothers and the trouble with men is that they are not.<sup>12</sup> But that is another problem.

The religious tribes of Northern Ireland, who may be said to have a screw loose at the moment, have been revealed as a rather incestuous lot. The British Journal of Psychiatry,<sup>13</sup> in a startling example of indecent exposure, says that an amazing number of Ulster's God-struck zealots have had sexual relations with their own brothers, sisters, fathers, daughters and mothers.

There is always the possibility of psychic damage in such intercourse, and some emotional deformity<sup>14</sup> may result.

Let me see if all of this has any relationship to the good Chief Justice.

On December 10, 1872, at Annapolis, Maryland, S. Teackle Wallis delivered a eulogy at the unveiling of a statue of the then late Roger Brooke Taney. He was lauded as a former state senator, former state attorney general for Maryland and as a lawyer, the "ripeness" of whose prowess made him the leader of the Maryland Bar. Mr. Wallis then mentioned that the state legislature had, in 1867, contemplated the removal of Taney's remains to the state capitol. However, "gratification" of public desire was enjoined because Taney had exacted a pledge "from those who loved him, that he should be laid beside his mother" in a common grave, in the town of Frederick, when he died.<sup>15</sup> This had been one of Taney's most

<sup>11</sup> See *The Last Will and Testament of John Marshall "Of the Forest,"* "When John Marshall married Miss Ambler, his father gave him one negro and three horses." A. J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 167 (1916).

<sup>12</sup> O. WILDE, *THE IMPORTANCE OF BEING EARNEST*, Act I (1895).

<sup>13</sup> In *NEW YORK MAGAZINE*, March 19, 1973, at 62.

<sup>14</sup> *Id.*

<sup>15</sup> Pamphlet, 514 *Library of N.Y.C. B.A.* (1872).

passionate wishes and was "too strong" and "too sacred" to be violated.<sup>16</sup>

Nothing, Mr. Wallis continued, exceeds in mournful tenderness and grace Taney's desire to be buried with his mother.<sup>17</sup> How this made his wife feel is not recorded among the books I have researched, quite apart from what a Freudian analyst might suspect.

Taney was called a "high minister of human justice," and one who was "segregated" from his fellow by his functions, "which shut out favor and affection."<sup>18</sup>

"His stormy nature was subdued by duty and religion, to the temperance, humility and patience which we knew." " \* \* \* ingratitude, injustice, persecution, still left his intellect unclouded, his courage unsubdued. \* \* \* " His life, Taney's idolator sang, brooked none "loftier or purer" to "dignify the annals of our country."<sup>19</sup>

He had "plighted his troth to the liberty of the citizen and the supremacy of the law." His life was said to be so "stainless," that "to question his integrity was enough to beggar the resources of falsehood and make even shamelessness ashamed." Despite all these angelic virtues, the hymn of praise concluded, Taney died a man "traded" and "ostracized."<sup>20</sup> Quite obviously, not by everyone.

In 1860, shortly after the *Dred Scott* decision, a Dr. J. H. Van Evrie, published in the *New York Daybook*, his views of the *Dred Scott* opinion by Taney.<sup>21</sup> He rejoiced that "the doctrine of 1776, that all (white) men 'are created free and equal,' is universally accepted and made the basis of our institutions, state and national, \* \* \* " and that, "in short, the status of the dominant race" had been, by the Taney decision "defined and fixed forever."<sup>22</sup>

Thanks to Taney, the article ran on, there would never be any incorporation or amalgamation of Negroes with white citizens and thus, white society would be spared deterioration, undermining and annihilation.<sup>23</sup>

What made Taney proclaim slavery to be a "national concept" and declare that Negroes did not come within the meaning of the Constitution's term the "people of the United States?"<sup>24</sup>

Most lawyers and historians are agreed that it was absolutely unnecessary for Taney to throw into his opinion the dramatic and doom-laden phrase that the Negro "had no rights which the white man was bound to

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 13-14.

<sup>20</sup> *Id.* at 20.

<sup>21</sup> J. H. Van Evrie, *The Dred Scott Decision, Opinion of Chief Justice Taney, THE NEW YORK DAY BOOK* (1860) (containing an essay on *The Natural History of the Prognathous Races of Mankind* by Dr. S. A. Cartwright, of New Orleans).

<sup>22</sup> *Id.* at *i* (Introduction).

<sup>23</sup> *Id.* at *vi*.

<sup>24</sup> C. E. LINCOLN, *THE NEGRO PILGRIMAGE IN AMERICA* (1967).

respect."<sup>25</sup> This gratuitous dictum could only serve to symbolize in the public mind the mood of a bitter bias.

Taney emerges from the archives as a man of competing contrasts and schizophrenic functions.

In 1831, he was the Attorney General of the United States. He delivered himself in that year of a statement which cast before it the ominous shadow of his 1857 *Scott* notions. He referred to Negroes in that statement as a "degraded class," whose existence was at the "sufferance of the white population."<sup>26</sup> The statement:

The African race in the United States even when free are everywhere a degraded class and exercise no political influence. The privileges they are allowed to enjoy are accorded to them as a matter of kindness rather than right. \* \* \* And when they are nominally admitted by law to the privileges of citizenship, they have no effective power to defend them; and (they) are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy.

Despite all of this, we are told that there was a "gap between (the Dred Scott sociology and) the humanity that the Chief Justice displayed in his private life." After all, Taney, himself an owner of slaves, violated some of his own Dred Scott interdictions by manumitting his own Black bondsmen.<sup>27</sup> Just how he caressed this theory of freedom in the massage parlour of his conscience, we shall see shortly.

"Unlike Marshall," we are told, "Taney was a mother's son,"<sup>28</sup> or maybe he was what we call a mother. He enjoyed lovely relations with his wife and children. His kindness even extended to his slaves, "whom he treated with the utmost consideration." He was said to have hated "those reptiles who, he claimed, lived "by trading in human flesh," and who enriched "themselves by tearing the husband from the wife, and the infant from the bosom of the mother."<sup>29</sup> One assumes from this tender expression of sentiment that when he became a purchaser in due course of his slaves, he bought them by the family load, as opposed to singles.

It is indeed a striking and ironic circumstance that a man of such a benevolently despotic, or benignly neglectful temper should be so widely regarded as the monster who precipitated the Civil War because he venerated the institution of slavery as a national concept strewn throughout the several states, as those states might wish to have it.

<sup>25</sup> BLAUSTEIN AND FERGUSON, *DESEGREGATION AND THE LAW* 84-85 (1st ed. 1957).

<sup>26</sup> LITWACK, *THE FEDERAL GOVERNMENT AND THE FREE NEGRO* 274 (1960). Also cited in *THE BLACK MAN AND THE PROMISE OF AMERICA* 80 (L.J. Austin, L.H. Fenderson & S.P. Nelson ed. 1970).

<sup>27</sup> HOFFMANN AND WINARD, *HOFFMAN'S ANTITRUST LAW AND TECHNIQUES*, 488 (1963).

<sup>28</sup> B.H. LEVY, *OUR CONSTITUTION: TOOL OR TESTAMENT*, 71-72 (1941).

<sup>29</sup> *Id.*

It should not be gathered from Taney's domestic habits that he was an abolitionist. He was simply a parochial philosopher on the question of slavery, who thought that the south should be tolerated to settle its slave problems in its own way and, presumably, in its own good time. Such restrictive and provincial views find their latter-day support among those who advocate absolute states' rights.

Taney participated in the movement to colonize freed Negroes in Africa and he served as general counsel to an organization to suppress the kidnapping and imprisonment of free Negroes. In manumitting his own slaves, he did so with the proviso that they must first have some education before winning total freedom.

When a Methodist minister from Pennsylvania named Gruber, preached a sermon in Maryland to a group of Negroes, and severely attacked slavery, he was promptly indicted by a Maryland grand jury and charged with attempting to incite Maryland's slaves to insurrection. Emerging as the Kunstler of that era, Taney, a staunch Catholic, served as Gruber's lawyer and made a stirring speech to the court raising the issue of free speech.

Taney blamed England for imposing upon America the evils of slavery, at a time when the country was still no more than a vassal for the British. The country must, for a time, he said, endure the peculiar institution, even though it was a blot on "our national character," to be gradually removed.<sup>30</sup>

If we, as lawyers, agree that the Dred Scott statement was a mistake, we may then assess the career of Taney with as much non-passion as his ownership of slaves will allow. The animus which prompted so many pages of confession, is a mystery, when you consider that the narrowest of technical issues was presented—the one of jurisdiction. For, at the moment Scott launched his lawsuit, there could be no federal jurisdiction invoked if he was not a citizen. Absent his own citizenship there could not be a diversity issue of any substance.

Most scholars agree that the tour de force which was the Dred Scott opinion was a remarkably unusual and exceptional performance for Taney. His defenders say that the exigencies of daily politics raised the ugly head of that profession and cast a monument of Taney as a monster. Some proof exists to show that it was almost by accident that Taney wrote the majority opinion for the court.

Associate Justice McLean, it seems, was a man who cherished presidential ambitions. To further his chances, as he then believed, he prepared a dissenting opinion and expressed his views *in extenso*: on the power of Congress to prohibit the introduction of slavery into the territories. When it was discovered that he was proposing to do this, the other members of the court, except for Curtis, urged Chief Justice Taney to lend the prestige of his office to quash McLean's advertisements of himself.

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<sup>30</sup> *Id.* at 73.

The remarkable thing, then, about this almost accidental opinion, is that Taney, who was such a strict constructionist, should have written at such great length to declare the Missouri Compromise unconstitutional, when that law had already been repealed by Congress itself. It was in keeping with McLean's whoring after a presidential nomination that he should elect to declare constitutional a law, the same law, which had already been repealed.

To demonstrate the factionalism among the nine old men is not something new. Mr. Justice Curtis, who, along with McLean, had filed a dissenting opinion, released his dissent for publication *before* the majority opinion was known.

Dred Scott has been a fertility pill for the womb of American racism. The New York Day Book article dramatizes how brief was the period of gestation before the racists jumped on Taney's incubator.

There can be little doubt that *Plessy v. Ferguson*<sup>31</sup> was infected by the animus of *Scott*. But *Plessy* was revolutionary radicalism, when compared with *Scott*. The stench of Taney's "no rights" dictum pervades the rhetoric of Justice Henry Billings Brown for the *Plessy* majority. How ironic, that a Justice Brown should flaunt Dred Scott and have a *Brown v. Board of Education* eventually purport to overrule *Plessy*, 58 years later.

It was in the Harlan dissent in *Plessy*, that we were warned that *Plessy* would "prove to be quite as pernicious as" the Dred Scott case.<sup>32</sup>

But these are matters which will be explored by my learned brothers and about which, all of you, in self-defense, are already close students.

Once we learn that Taney manumitted all of his slaves, except two, who he thought were too old for freedom,<sup>33</sup> and that he kept a paternal eye on all of them in their new freedom, we can look a bit more closely at the masks of the man, beneath which the cadence of his Christian conscience kept time with God.

Such piety compels one to wonder how, or if, slavery would have fared under an atheistic society.

Taney has his sincere apologists. They remind us of his masterly *ratio decidendi* in *ex parte Merryman*<sup>34</sup> and *Bronson v. Kinzie*,<sup>35</sup> not to mention other cases. Some even cite *Dred Scott* as only the second time that the Supreme Court had ever declared an act of Congress unconstitutional.<sup>36</sup> Most critics of Taney agree that his philosophy and conduct were both

<sup>31</sup> 163 U.S. 537 (1896).

<sup>32</sup> *Id.* at 559.

<sup>33</sup> C.B. SWISHER, RODGER B. TANEY (1935).

<sup>34</sup> 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

<sup>35</sup> 42 U.S. (1 How.) 311 (1843).

<sup>36</sup> Nearly Seventy years had passed Since *Marbury v. Madison*. *Scott* was only the second case in which the Supreme Court overthrew an act of Congress. Until that time, it almost seemed as though Congress was the most powerful and untouchable of the three branches of Government.

conditioned by his experiences among cotton-planting relatives, his neighbors and his clients. He was undeviatingly loyal to Andrew Jackson, also an old planter, a gambler, lawyer, judge, slaveowner and duelist-murderer.

It is not easy to discover the mechanisms in conflict within the Taney breast. As a Catholic, for example, he was a minority group member. This made him value religious liberty, of course. He married a non-Catholic. Whether this was libertarian integration or simply reflected the scarcity of Catholics in a Protestant society, is difficult to know. Yet, he felt that another minority, America's most troublesome one, the Negroes, would be better off as slaves. He was, then, a humanist oppressor, who could at one and the same time, brood over the conditions of Black freedom, while deploring the same conditions.

He saw nothing immoral in slavery. But, then, neither did Benjamin, a Jew and treasurer of the confederacy. Those who have suffered through Benjamin on sales, may recall slavery of another kind. Jewish scholars seldom mention Benjamin's pro-slavery devotions. He is allowed to be absorbed in the foggy mists of England, to which place he escaped when he saw that the confederacy was lost.

Taney was hailed in 1931, by Charles Evans Hughes as a "great Chief Justice." Perhaps he was.

He wrote the *Scott* opinion when he was eighty, a time when most of us are either retired or long since dead.

He would, it seems, have been a perfect man for President Nixon, for he was the inflexibly rigid strict constructionist. This did not always redound to the deprivation of the Black and slave suitor before his court,<sup>37</sup> as various cases demonstrate.

But, while he could affirm the right to freedom of some litigating slaves, he could, at the same time, strictly construe the Fugitive Slave Act and find that it was constitutional.<sup>38</sup>

Taney "was one of the few, alas!—how few there are—who had the moral courage to do what he believed was right." He led "a life of duty, integrity and Christian devotion, \* \* \* which \* \* \* has secured for him an eternal reward in that blessed state to which he has gone." So spake one eulogy, from New York, marking the occasion of Taney's death.<sup>39</sup>

Shall we say, then, that Taney had no idea what the consequences of

<sup>37</sup> *Williams v. Ash*, 42 U.S. (1 How.) 1 (1843). Taney's majority opinion sustained a slave's petition which asserted the slave's freedom under the terms of a late master's Last Will and Testament. He voted with the majority in *Rhodes v. Bell*, 43 U.S. (2 How.) 397 (1844), sustaining the argument of a slave that he was free. In *Adams v. Roberts*, 43 U.S. (2 How.) 486 (1844), Taney also voted with the majority in sustaining a slave's petition for freedom. In *Miller v. Herbert*, 46 U.S. (5 How.) 82 (1847), he upheld the provisions of a statute which spelled out special conditions before a slave could be held to be free.

<sup>38</sup> *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847).

<sup>39</sup> *The Death of Chief Justice Taney*, 5 BLATCHFORD'S CIR. CT. REPORTS, 2D CIR. 554-555 (1861-1867).

his infamous dictum would be? Horace Greely said that the fact that five of the justices were southerners was enough to give the decision as much 'moral weight' as it would have if it had been "the judgment of a majority in any saloon."<sup>40</sup>

The powerful lesson of *Dred Scott* is that the law *can* and often *does* work great mischief, and it can worsen race relations in our democracy.<sup>41</sup> Certainly, Scott has aroused furious opinions on all sides. Consider, for example this reaction of a Black lawyer in Boston in 1858. "Judge Taney may outlaw us; Caleb Cushing (Attorney General of the United States from 1853 to 1857) may show the depravity of his heart by abusing us; and this wicked government may oppress us; but the black man will live when Judge Taney, Caleb Cushing and this wicked government are no more."<sup>42</sup>

Taney never got around to writing his autobiography. Those writings which tell us about him, tell us why they tell us so little, since Taney was a private man in public life. If he kept a diary of his innermost religious confessions, it has escaped notice of posterity's publishers. If he confessed to his priest, there remains the privilege and confidence of that relationship.

If we determine the greatness of a man by his ability to cast his thoughts and ideas beyond the time he lives in, then Taney was a man of no foresight and a victim of a provincial emotion which defeated the natural law of his Catholic faith. Charles Sumner, much calumniated by many of his senatorial colleagues from both sides of the aisle, and almost beaten to death by South Carolina's Senator Brooks, was, nevertheless, in my view, a much greater personality and human being than Taney. It was Sumner who, over one hundred years before *Brown v. Board of Education* inveighed against segregation in the public schools because, as he put it, of the harmful psychological and sociological consequences upon both white and Black students.<sup>43</sup>

Taney was mired down in the history of the founding fathers, the Constitution's framers, and he wanted no letter of the Constitution changed, altered, or made flexible enough to cover the passage of time or the definition of people to embrace Negroes. He was unable to perceive the future—a gross failing in a man who lived for 88 years.

It is because of *Dred Scott* and the judgment of Taney, that we come here today to autopsy the past for the hopeful benefit of that future which will long be haunted by the Christian taint of Taneyism.

<sup>40</sup> W. MILLER, *A NEW HISTORY OF THE UNITED STATES* 197 (1958).

<sup>41</sup> This is the theme of C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966). As *Brown v. Board of Education* demonstrates, with its reluctant timidity, even that diffident kind of step can begin to change the law. 347 U.S. 483 (1954).

<sup>42</sup> From a speech by Dr. John S. Rock, physician and lawyer, the first black lawyer ever admitted to the bar of the United States Supreme Court (on motion of Charles Sumner). The title of the speech, made in 1858, to commemorate the Boston Massacre, was "Comparing White and Black Americans, 1858." It is printed in F.B. BARBOUR, *THE BLACK POWER REVOLT* (1968).

<sup>43</sup> D. DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 180* (1960).