# FOREWORD

Judge A. Leon Higginbotham, Jr.*

> You should be aware, as indeed I am, that the *road to freedom* is now a highway because lawyers throughout the land, yesterday and today, have helped clear the obstructions, have helped eliminate roadblocks, by their selfless, courageous espousal of difficult and unpopular causes.
>
> —Martin Luther King[1]

> A man may live greatly in the law as elsewhere; . . . .
> [but] no man has earned the right to intellectual ambition until he has learned to lay his course by a star he has never seen, to dig by the divining rod for springs which he may never reach. . . .
>
> —Oliver Wendell Holmes[2]

When appraising the role of lawyers, the insights of Martin Luther King and Oliver Wendell Holmes are instructive. This thoughtful issue is a significant effort to design the "road to freedom" which Martin Luther King dreamt and spoke about and attempted to build. It explores how, as Justice Holmes suggested, men and women "may live greatly in the law" and attempt to lay one's "course by a star he [or she] has never seen" or "springs which he [or she] may never reach."

Some might ask: Why do these eminent scholars and distinguished practitioners engage in a separatist dialogue? Why do they speak of roles for the *black* lawyer? Why do they not adopt an interracial or more global theme by discussing roles for *all* lawyers?

Though many lawyers profess that they pursue liberty and justice for all, sadly the lessons of history teach us that many great lawyers of the past and present have tolerated, sanctioned, and profited from their personal perpetuation of racial injustice. Even while mouthing the concepts of liberty and justice in the abstract, they have profited from the racial injustices which they themselves practiced. Thomas Jefferson and Patrick Henry are perfect examples of this *duality* in approach—both were lawyers. As revolutionaries, philosophers, and purported humanitarians, Jefferson proclaimed that all men are created equal, and Patrick Henry declared, "Give me liberty or give me death!" Yet at the same time, their own slaves were being denied the liberty and dignity which their masters advocated in the abstract. The problem of the insensitivity of lawyers to the injustices suffered by blacks is not merely an historic anachronism limited to the Jeffersonian era. I submit that a similar duality in approach is often reflected in the values of many current leaders of our legal profession. Even today, some scholars seem to be oblivious to the duality of the past: a duality reflected in the harsh cruelty which the legal process unnecessarily imposed upon blacks

---

* Biographical data on Judge Higginbotham appears in *Pennsylvanians on the Bench: Profiles of Black Judges*, 7 BLACK LAW JOURNAL *infra*.

1. M.L. King, Jr., The Civil Rights Struggle in United States, 20 The Record of the Association of the Bar of City of New York 5, 6 (Address delivered before the Association April 21, 1965).

2. *Id.* at 6, citing Oliver Wendell Holmes.

while at the same time it generally protected to a far higher degree the human rights and privileges of whites.

A decade ago, Professors Albert P. Blaustein and Roy M. Mersky surveyed sixty-five prestigious law school deans and professors of law, history and political science to evaluate Supreme Court justices from 1779 to 1964.[3] The scholars were invited to designate the justices as Great; Near Great; Average; Below Average; or Failure. Of the one hundred justices, only twelve got the highest accolade of "Great."[4] Included among the twelve "Greats" named by the scholars was Roger B. Taney, author of the black holocaust, *The Dred Scott Decision*.[5] It was Chief Justice Roger B. Taney who wrote that under the Declaration of Independence and the U.S. Constitution the "[black] man had no rights which a white man was bound to respect."[6] They proclaimed that Taney was one of the truly great justices even though they knew that many reputable scholars have branded his *Dred Scott* opinion as an unjustifiable, unprincipled political decision.[7] Strangely, the dissenters to the *Dred Scott* decision, Justice John McLean and Justice Benjamin Curtis, were not designated as "Great" by our present foremost constitutional law scholars. Does this survey suggest that the most talented contemporary scholars and law professors in America may believe that a judge's unnecessary hostility towards blacks should not be a deterrent in determining whether that justice was truly one of the greatest? Further, does the exclusion of McLean and Curtis as "great" justices suggest that their

3. A. BLAUSTEIN AND R. MERSKY, THE FIRST ONE HUNDRED JUSTICES (1978).

4. *Id.* at 32-52.

5. Dred Scott v. Sandford, 60 U.S. 393 (1857).

6. *Id.* at 407.

7. *See*, L. MILLER, THE PETITIONERS, 62-81 (1966).

> President-elect Buchanan injected himself into the deliberations, and by February 19, 1856, Justice John Catron was writing him a letter: "Will you drop Grier a line saying how necessary it is—and how good the opportunity is, to settle the agitation by an affirmative action of the Superior Court . . . ?" Four days later, Justice Robert Grier wrote to the incoming President: "Your letter came to hand this morning. I have taken the liberty to show it in confidence to our mutual friends Judge Wayne and the Chief Justice. We fully appreciate and concur in your views as to the desirableness at this time of having an expression of the opinion of the Court on this troublesome question. With their concurrence, I will give you in confidence the history of the case before us, with the probable result."
>
> When President Buchanan asked the nation in his inaugural address to cheerfully submit to the decision, he knew what the Court was going to say. The rest of the nation had to wait two days, until March 6, 1857, for Chief Justice Taney to announce the Court's opinion that he had been commissioned to write on February 14. (Footnotes omitted.)

*Id.* at 71.

> Taney's history was bombarded as heavily, and as effectively, as his legal conclusions. Justice Curtis's long and discursive opinion had riddled the Chief Justice's conclusions as to the intentions of the framers. As Lincoln remarked, the "Dred Scott decision was, in part, based on assumed facts which were not really true." As the opinion circulated and the North understood the ramifications of the majority opinion, the attacks grew in intensity and bitterness. Boston Negroes held a meeting to remonstrate against it and were told by Governor John Andrews of Massachusetts that the decision was wrong "because of its injustices to the colored race." The legislatures of Ohio, Vermont, and Maine passed resolutions assailing the decision and saying that it was not the law of the land. The Northern Methodist Conference, meeting in 1857, said that the decision has overwhelmed us with surprise and affords additional assurance that the decisive battle of freedom is yet to be fought." (Footnotes omitted.)

*Id.* at 80. V. HOPKINS, DRED SCOTT'S CASE 56-59 (1967). *See also* D. FEHRENBACHER, THE DRED SCOTT CASE (1978); W. ERLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM (1979).

sensitivity in the *Dred Scott* case to the aspirations and rights of minorities and blacks was not enough to make them great in the eyes of our foremost scholars?

Could it be that even today many scholars empathize with, identify and understand more, the plight of the white masters who profited from slavery than they identify or empathize with the plight of the blacks and slaves who felt the lash on their backs and were denied dignity and freedom? No group of black scholars would have designated Taney as one of the twelve greatest justices to sit on the Supreme Court. These different perspectives, or, as I call it, this duality, by even contemporary scholars, suggests that black lawyers particularly must have an added mission to bring to the American consciousness the disparate burden which blacks have long had to endure and which many still endure.

Since history demonstrates that it is possible for blacks to be left off the scales of justice, perhaps I should not intrude upon the special prerogatives of the thoughtful scholars who have been asked to express their views in this issue. However, I must note that I am impressed that most of the authors are raising the fundamental question which Frederick Douglass asked almost a century ago:

> [Can] American justice, American liberty, American civilization, American law, and American Christianity . . . be made to include and protect alike and forever *all* American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the country.[8]

Frederick Douglass emphasized the protection of *all* American citizens, but sadly, all Americans have not always been protected by the majesty of the law. From the time of slavery through the separate but "unequal" syndrome, "all" in the legal system often meant protecting all citizens except nonwhites. This duality was and is a dangerous course for any nation. As Frederick Douglass replied to President Andrew Johnson on February 7, 1865, "Peace between races is not to be secured by degrading one race and exalting another, by giving power to one race and withholding it from another; but by maintaining a state of equal justice between all classes."[9] I commend the editors for their efforts in this issue to explore the role of lawyers in seeking a state of equal justice between all classes. Equal justice has been the paramount obligation of all black lawyers, who either alone or in association with white lawyers, have engaged in the mutual pursuit of equal justice.

From the day when Robert Morris, one of the first black lawyers in America, was admitted to the Massachusetts bar in 1843,[10] to the time when John S. Rock was the first black to be admitted to the practice of law before the United States Supreme Court on February 1, 1865,[11] to the days of the

8. R. LOGAN, THE BETRAYAL OF THE NEGRO 9-10 (1965) (quoting Frederick Douglass). According to Frederic Holland, Douglass' statement was, "The real question, the all-commanding question, is whether American justice, American liberty, American civilization, American law, and American Christianity can be made to include and protect alike and forever all American citizens." F. HOLLAND, FREDERICK DOUGLASS 375 (1891).

9. Frederick Douglass' reply to President Andrew Johnson, February 7, 1866 as quoted in A. L. HIGGINBOTHAM, IN THE MATTER OF COLOR vi (1978).

10. F. STYLES, NEGROES AND THE LAW 14, 118 (1937).

11. *Id.* at 14.

heroic efforts of such stellar lawyers as John Mercer Langston, Charles Hamilton Houston, William Henry Hastie, Thurgood Marshall and Constance Baker Motley, an extraordinary legacy and model has been provided all American lawyers. These great lawyers should be the professional and personal models of excellence, commitment and action by which we measure our own role and everyone else's accomplishments in building, in the words of Martin Luther King, the "road to freedom."

# ROLES OF THE BLACK LAWYER: A SYMPOSIUM

## Editorial Board Statement

With this issue the *Black Law Journal* returns to a question explored often in its pages: what is and ought to be the role of the black lawyer? That question and its assumptions and implications have recurred for as long as there were black men and women serving as members of the bar and officers of the court.

Despite the possible redundancy and even in view of the likelihood that no definitive answer will emerge, contemporary circumstances require yet another exploration of the role, status obligation and potential of the black lawyer. A less hospitable Supreme Court, a Conservative Congress and a Republican President are only the most visible evidence of changed circumstances.

The nation is undergoing a seemingly radical transformation of its political consciousness. Many of the manifestations of this new consciousness raise serious questions about the survival of programs and policies that contributed to what progress has been made over the past two decades. Within the black community there is a reemergence of the race vs. class debate, with serious scholars asking pointed questions about the motives and methods of the contemporary black leadership many of whom are lawyers. And even within the ranks of the civil rights bar there are those who are voicing profound concern about previously accepted policies and direction.

The ramification and implications of these changes are far-reaching and potentially catastrophic. No less now than a century ago or a half a century ago, how black lawyers respond would affect the course of events and the destiny of black Americans for decades to come. That is why the Board decided to return again to the matter of the black lawyer's role. Cognizant of the primacy of the race vs. class debate the Board invited papers from three young scholars who, in the past, have spoken eloquently to that issue. In addition to Professors Darrity, McDougall and Wilson, the Board solicited the views of a panel of persons currently involved with the making and shaping of public policy and the delivery of legal services. This latter group was asked to respond to the issues raised in a provocative article published eleven years ago by Robert L. Carter, now a judge on the United States