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Lincoln and Justice for All

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Lincoln and Justice for All

Abstract

“Justice and fairness” has become something of a mantra ever since presidential candidate Barack Obama told Joe the plumber that his hope was to “spread the wealth around” so that the economy is “good for everybody.” The plumber, Samuel Wurzelbacher, was less than thrilled by the implications of spreading the wealth, since his fear was that much of the wealth the president-to-be proposed to spread around was the plumber’s. But that has done nothing to give pause to President Obama’s determination to answer the “call to justice and fairness.” In his 2009 Lincoln’s Birthday speech in Abraham Lincoln’s hometown of Springfield, Illinois, the president described justice and fairness—the “sense of shared sacrifice and responsibility for ourselves and one another”—as “the very definition of being American.” [*excerpt*]

Keywords

Abraham Lincoln, Civil War, Hadley Arkes

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Chapter 2:
Lincoln and Justice for All
Allen C. Guelzo

Justice is the concern of everyone, but the property of no one, at least humanly speaking. It is, fundamentally, a relationship – of people to each other, of parts to a whole, of balance between people and parts – in which the two great goals in view are that of *satisfaction* and that of *harmony*. In a putatively just world, people are satisfied with what they have (either by use or possession or both), what they do (in terms of love and work), and where they are (both as physical location and where they perceive themselves in relation to other people's social and economic standing). But satisfaction is not the whole story; it is, after all, possible to be satisfied and at the same time disgruntled, if we feel that our satisfactions are simply compromises with a reality we do not otherwise applaud. Nor is satisfaction permanent – what satisfies at one point in the life of an individual or a society may pale and disintegrate at another. What is required for justice is, alongside satisfaction, *harmony*. It is a kind of universal aesthetic, a species of beauty and complacency whose ultimate location is in the being of God. We must have the sense that the arrangements of justice are not only satisfactory for ourselves, but satisfactory to us in what is granted to, or achieved by, others. Our own satisfactions may mean little if we perceive that others' satisfactions are promoted beyond our own, and we will soon begin to regard as unjust the arrangements which allowed this to happen; at that moment, we will begin to agitate for some kind of redress, and there will go harmony out the window. Or, we will begin to fear that, if others' satisfactions have been discounted to a level lower than our own, these "others" will one day take some action to reverse the situation, such as robbery or revolution. The first victim of this fear, likewise, is harmony.

Unhappily for any political order, both satisfaction and harmony have subjective and objective aspects. The wealthy miser may be tormented by the anxiety for acquiring more wealth, and his perception that his increasing wealth is being threatened by some external force leads him into suspicion and litigation, leaving him with neither satisfaction nor harmony, but an abiding sense of the injustice of things. The operator of the village smithy, on the other hand, whose

. . . brow is wet with honest sweat,
He earns whate'er he can,
And looks the whole world in the face,
For he owes not any man. . . .¹

may be blithely content with his "flaming forge" and his daily routine of "something attempted, something done," and this gives him his "night's repose" – irrespective of the greater engines of finance, acquisition and consumption all around him which have been fleecing the blacksmith (and his kind) of the true value of their labor. The miser looks at his own over-compensated life, and calls it injustice; the blacksmith looks at his under-compensated one, and enjoys both satisfaction and harmony. And above them both floats the philosopher, who tells them, alternately:

- (a) that the world (or the nation, or the society, or the neighborhood) is a conspiracy to defraud which he and the miser have both rightly descried;
- (b) that the world (and so forth) is a conspiracy to defraud whichever one of them is too stupid and blinded by hegemonic false-consciousness to perceive without the epiphany of revolutionary self-consciousness, or
- (c) that the world (yet again) is a conspiracy to defraud about which nothing can really be done, but the denunciation of which the philosopher can use as a means of achieving his own version of satisfaction and harmony, preferably as the occupant of an endowed chair in political or economic theory.

1 Henry Wadsworth Longfellow, "The Village Blacksmith," in *Ballads and Other Poems* (Cambridge, MA: John Owen, 1841), 100.

With such subjectivity standing like a veil between justice and the experience of injustice, we might well consign all hope of recognizing justice to the same category as that other famous item which we can't define, but which we know when we see it.

But only if we ourselves are also philosophers. There are at least two practical ways of cutting the subjective knot and confecting a universal solution to this dilemma of what makes for justice. One is by *power*. We may erect a structural standard of justice, without any particular regard for anything inherently consistent, limiting or painful about its parts or its application, and compel a submission to this standard so overwhelming that there will be no choice but to find in it satisfaction and harmony. This is the justice of the straitjacket, in which dissatisfaction is regarded as a trait of mental illness and dissonance as a crime. It requires endless labor, because it is entirely reactive in nature, but no work, because everyone is satisfied and everything is in harmony. In this environment, injustice eventually becomes impossible because it has been definitionally abolished. Ordinarily, given the fissiparous nature of human behavior, this might not strike us as very "practical," but in fact, modern technology (not to mention pharmacology) is making it more achievable, and our lives less human, day-by-day.

The other method is by *law*: we may create a functional standard of justice which requires only logical adherence, and then walk away, resorting only to power for the deployment and enforcement of the legal code. A society cannot dispense entirely with power in its government; otherwise, law becomes shredded by those who worship *mere* power. Let the law and its officers operate, and in a predictable and routine pattern, and let what results from that operation be deemed *harmony*. In that way, even the worst examples of law-codes produce more harmony than does mere power. The fundamental problem is that law frequently falls far short of granting *satisfaction*. Of course, one out of two ain't bad; and sometimes and in some societies, you do succeed in getting both. Unhappily, law also depends for its application on that same fissiparous human nature, to the point where law can become merely a mask for power. One can get Cincinnatus, using an emergency donation of power to restore law; or one can get Caesar, using an

emergency donation of power to destroy it. At that moment, vexed and righteous souls become convinced that law is a crook, and that they need to invoke power in order to provide satisfaction and harmony. True, there has been more than enough evil done by power; but power, some believe, can be de-fanged if it is exercised on behalf of *fairness*, an even more subjective precept which suggests that power, in the right hands, can work miracles of justice which law cannot.

There is a third way, which is not a solution, but rather an intellectual palliative, and that is *anarchy*, which fears power, and yet also nurses deep suspicions of law. But anarchy (and its milder, libertarian forms) only has the appearance of justice – it secures only the immediate satisfaction of having no restraint, and the immediate harmony of having no one but yourself to enjoy it with. After the first 24 hours, or the first 24 visitors with semi-automatic weapons, either power or law get called into service, simply in the interest of taking a secure breath – or any breath at all.

This, in less than a thousand words, is the history of thought about justice. Thrasymachus (in Plato's *Republic*), Calhoun, Marx and Hobbes believed that justice was the operation of power, and lived entirely within history. They were suspicious. Locke, J.S. Mill and Hayek believed it was the operation of law, based on an overarching natural law which was eternal. They were earnest. As for American thinkers, power has held more attraction than we might imagine, especially when its aim can be designated as "fairness" and its harmony identified with "disinterested benevolence" or "the Beloved Community." But Americans have always been people of two souls, one the soul of the Puritan and the other the soul of the Enlightenment, at once both suspicious and earnest. Speaking for law and the Enlightenment and the containment of power were the Founders of the Republic, and the "second founder" who saved it from self-destruction, Abraham Lincoln.

Abraham Lincoln certainly had more than a little to say about justice. Frequently, he used the word to mean something like a rough-and-ready tit-for-tat. In dealing out political patronage, he promised Lyman Trumbull, his fellow Illinois Republican, that "I will, myself, take care of the question of 'corrupt jobs' and see that justice is done to all, our

friends, of whom you write, as well as others.”² In hailing the Union victory at the battle of Antietam in 1862, he praised how “bravely, skillfully and successfully fought the battle had been,” but because he did not yet “know the particulars,” he wanted to be “sure that in giving praise to particular individuals, we do no injustice to others.”³ And a few weeks later, he had to assure the laggardly Major-General George B. McClellan that “I intend no injustice to any” for sarcastically querying why McClellan’s “cavalry horses were too much fatigued to move.” McClellan’s inertia “presented a very cheerless, almost hopeless, prospect for the future; and it may have forced something of impatience into my despatches.”⁴ Justice, in this *petit* sense, was about decorum, politeness, and giving newsworthy credit to the nation’s servants.

Sometimes, however, the tit-for-tat could rise to something more than the rough-and-ready. Massachusetts Congressman John B. Alley remembered presenting Lincoln with a petition from his district to pardon the master of a “vessel engaged in the slave- trade” who had “served out his term of imprisonment, but could not pay his fine.” The prisoner added his own “urgent and pathetic appeal, . . . acknowledging the crime and the justice of the sentence, and declaring that he must spend his life in prison if the condition of freedom was the payment of that fine, for he had not a cent in the world.” Lincoln read the documents over, and pushed them back at Alley. “I believe I am kindly enough in nature . . . to pardon the perpetrator of almost the worst crime that the mind of man can conceive,” Lincoln said, “but any man . . . who can rob Africa of her children to sell into interminable bondage, I never will pardon, and he may stay and rot in jail before he will get relief from me.”⁵

But justice could also mean a more universal, all-embracing balancing of what was right and what was wrong. The presidential action

- 2 “To Lyman Trumbull” (December 8, 1860), in *Collected Works of Abraham Lincoln*, ed. Roy P. Basler et al (New Brunswick: Rutgers University Press, 1953), 4:148.
- 3 “Reply to Serenade in Honor of Emancipation Proclamation” (September 24, 1862), in *C.W.*, 5:438.
- 4 “To George B. McClellan” (October 27, 1862), in *C.W.*, 5:479.
- 5 John B. Alley, in Rice, *Reminiscences of Abraham Lincoln*, 583.

he deemed “the central act of my administration and the great event of the nineteenth century” – namely, the Emancipation Proclamation of January 1, 1863 – was declared by him to be “an act of justice” on which he confidently invoked “the considerate judgment of mankind, and the gracious favor of Almighty God.”⁶ He aggressively defended the use of military tribunals and suspending the writ of *habeas corpus* as legitimate acts of justice because the ordinary civil courts were unequal to the tasks presented by full-scale insurrection and sedition:

Nothing is better known to history than that courts of justice are utterly incompetent to such cases. Civil courts are organized chiefly for trials of individuals, or, at most, a few individuals acting in concert; and this in quiet times, and on charges of crimes well defined in the law. Even in times of peace, bands of horse-thieves and robbers frequently grow too numerous and powerful for the ordinary courts of justice. But what comparison, in numbers, have such bands ever borne to the insurgent sympathizers even in many of the loyal states?

In time of peace, interference with political dissent would be an injustice; in time of war, not to interfere with political dissent would be treachery. “He who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle. Yet this dissuasion, or inducement, may be so conducted as to be no defined crime of which any civil court would take cognizance.” Lincoln would be obligated under military law to “shoot a simple-minded soldier boy who deserts,” while the civil courts insist “I must not touch a hair of a wily aligator who induces him to desert.” In the time of war, he asked, was this justice?⁷

Questions about the varying levels of justice came readily to Lincoln because he was, after all, a lawyer by profession, so that determining the justice or injustice of human affairs was a daily responsibility. “My way

6 Francis B. Carpenter, *Six Months at the White House with Abraham Lincoln: The Story of a Picture* (New York: Hurd & Houghton, 1867), 90; “Emancipation Proclamation” (January 1, 1863), in *C.W.*, 6:30.

7 “To Erastus Corning and Others” (June 12, 1863), in *C.W.*, 6:264.

of living leads me to be about the courts of justice," he said in 1848, although he admitted that not everything he saw there actually lived up to the name of justice. "There, I have sometimes seen a good lawyer, struggling for his client's neck, in a desperate case, employing every artifice to work round, befog, and cover up, with many words, some point arising in the case, which he dared not admit, and yet could not deny."⁸ Lincoln was also, by avocation, a politician, and there, too, he had more than a few opportunities to see the making of laws fall far short of the glory of justice. In the proceedings of legislatures (and Lincoln sat in the Illinois state legislature from 1834 to 1842, so he spoke with authority), it was too often the case that "the immutable principles of justice are to make way for party interests, and the bonds of social order are to be rent in twain, in order that a desperate faction may be sustained at the expense of the people."⁹

In 1841, Illinois Democrats tried to ram a restructuring of the state judiciary through the state Assembly. Lincoln found the intention of the restructuring so nakedly self-serving (and so little interested in the establishment of justice) that even members of the Democratic caucus rebelled against stacking "the temples of justice and the seats of independent judges" with "the tools of faction." Lincoln saw this for what it was, even on that comparatively small-scale stage – the substitution of power for law. The pursuit of justice was being swept aside to make way for "an arbitrary exercise of power which may soon become the precedent for still more flagrant violations of right and justice." The most "baneful and miserable . . . tendencies of this measure," however, would be the way the taint of power, exercised in one branch of government, would soon infect them all. Politically stacked courts were politically predictable courts, where verdicts were obtained first and evidence mustered later, so that nothing they decided could really be trusted to be just. Without the restraint of the courts, the legislature would feel free to open the floodgates to self-interest, corruption, and a lethal fog of cynicism which would spread over all of the body politic, "since

8 "Speech in United States House of Representatives: The War with Mexico" (January 12, 1848), in *C.W.*, 1:438.

9 "Circular from Whig Committee Against the Judiciary Bill" (February [8?], 1841), in *C.W.*, 1: 246.

our courts, if not corrupt, must be suspected, and the streams of justice tinged, if not by the impurity of the fountain, by the jaundiced vision of the beholder.”¹⁰

But the ultimate threat posed to the health of a democracy by the “jaundice” of power was not merely a lapsing into indifference (although in a democracy, where sovereignty lay in the hands of the people, popular cynicism and indifference certainly promised a slow erosion of the vigor necessary to sustain it). Where power replaced the operation of justice, then the victimized would themselves resort to power in self-defense (or self-justification), and the operation of a democracy would all-too-rapidly degenerate into the violence and anarchy of armed mobs. “I hope I am over wary,” he warned in 1838, after a series of high-profile mob actions in the towns of the upper Mississippi valley, but it was no sign of robust health in a democracy

whenever the vicious portion of population shall be permitted to gather in bands of hundreds and thousands, and burn churches, ravage and rob provision stores, throw printing presses into rivers, shoot editors, and hang and burn obnoxious persons at pleasure, and with impunity.

“Depend on it,” Lincoln predicted: when power supplants law, “this Government cannot last.” When a popular government shows that it is incapable of governing itself by law, and “in lieu of the sober judgement of Courts” allows “worse than savage mobs” to function as “the executive ministers of justice,” then “the feelings of the best citizens will become more or less alienated from it; and thus it will be left without friends, or with too few, and those few too weak, to make their friendship effectual.” It has the effect of a fall of dominoes: let the rulers govern themselves by self-interest rather than law, then do not be surprised when the people in the streets decide to do the same thing, whether as vigilantes or as rioters. And do not be surprised, either, that “the best citizens,” recoiling from the unrestrained tumult in the streets, turn their backs on popular government itself and turn to “men of sufficient talent and ambition” who will be happy to restore order through their own

10 Ibid, 1:236, 247.

exercise of power, “and overturn that fair fabric, which for the last half century, has been the fondest hope, of the lovers of freedom, throughout the world.” Law, in effect, became a religion for Lincoln.

Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap – let it be taught in schools, in seminaries, and in colleges; – let it be written in Primmers, spelling books, and in Almanacs; – let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.¹¹

For all of his anxieties about the allure of power, Lincoln never lost his faith in either law or politics to light the way to justice. John P. Usher, who sat in Lincoln’s cabinet as Secretary of the Interior, believed that “Mr. Lincoln’s greatness was founded upon his devotion to truth, his humanity and his innate sense of justice to all.”¹² He had little in the way of religious faith apart from what looked to most observers like a form of secularized Calvinism; but like many of the Founders, Lincoln made up for this loss with an intensified commitment to natural honor and obligation. Joseph Gillespie, his longtime political ally in Illinois, thought that “Mr. Lincoln’s love of justice & fair play was his predominating trait.” This was especially true inside the courtroom, where it was no legend that Lincoln was nearly incapable of defending a position he was convinced was not just. “It was not in his nature to assume or attempt to bolster up a false position. He would abandon his case first,” Gillespie wrote in 1866; in fact, Gillespie had “often listened to him when I thought he would certainly state his case out of court.” Judge David Davis, who presided over Lincoln’s old 8th Judicial Circuit in Illinois, recalled that Lincoln “thought that his duty to his client Extended to what was honorable and high minded – just and noble – nothing further.” He was no more

11 “Address Before the Young Men’s Lyceum of Springfield, Illinois” (January 27, 1838), in *C.W.*, 1:109.

12 J.P. Usher, “Lincoln and Slavery,” in Rice, *Reminiscences of Abraham Lincoln*, 77.

likely to attempt lawyerly sleights-of-hand on his opponents, either. Judge Davis said that “the meanest man in the bar would always pay great deference & respect to Lincoln” because “he never took advantage of a man’s low character to prejudice the Jury.”¹³

This pursuit of legal rectitude won Lincoln widespread respect, but not necessarily widespread affection, especially among friends and clients who wanted to win in either law or politics – and expected him to resort to any tricks available to do so – rather than merely to be right. Being right, as Gillespie remarked, meant that Lincoln “was by some considered cold hearted or at least indifferent towards his friends” because he “He would rather disoblige a friend than do an act of injustice to a political opponent.”¹⁴ The ordinary lawyer, observed another long-time legal associate on the 8th Circuit, Henry Clay Whitney, would allow “the current of details and exigencies” to “jostle” him one way or the other, but Lincoln “stood upright through all contingencies, and nothing could swerve him from the observance of rigid, exact, unerring justice.” This did not mean that Lincoln believed he possessed some godlike perception of justice in all circumstances and all cases, and “of course,” added Whitney, “if there was a margin for doubt, he used the usual advantages incident to his side as any other lawyer would.”¹⁵ But in what Whitney called “conclusive cases,” Lincoln seemed almost morally unable to make dark appear light. “The main question with Mr. Lincoln was: ‘Is the thing right, is it just?’” remembered Lincoln’s law partner of 14 years, William Henry Herndon.

If a man was the subject of his attention, the question which he put to himself was: “What great truth, what principle, do you represent in this world?” If the thing was just, he approved of it, and if the man was a sham, he said: “Begone.” He was a man of great moral

13 Joseph Gillespie to William H. Herndon (January 31, 1866) and David Davis (September 20, 1866), in *Herndon’s Informants: Letters, Interviews and Statements About Abraham Lincoln*, eds. R.O. Davis and D.L. Wilson (Urbana: University of Illinois Press, 1998), 182, 351.

14 Joseph Gillespie to William H. Herndon (December 8, 1866), in *Herndon’s Informants*, 507.

15 Whitney, *Life on the Circuit with Lincoln*, ed. Paul Angle (Caldwell, ID: Caxton Printers, 1940), 240.

and physical courage and had the valor and bravery of his convictions and dared cautiously to do what he thought was right and just.¹⁶

And when Lincoln was convinced of the justice of a plea or a policy, that conviction animated him as nothing else would. "I will say here that, in such moments, I have never heard his equal," recalled Horace White, who accompanied Lincoln around Illinois during Lincoln's debates with Stephen A. Douglas in 1858 as a cub reporter for the *Chicago Tribune*. "I believe I have listened at times to nearly all the public speakers of considerable reputation in this country," but "I cannot conceive that Patrick Henry, Mirabeau, or Vergniaud ever surpassed him on those occasions when his great soul was inspired with the thought of human rights and Divine justice."¹⁷ Anyone who met Lincoln casually was likely to see only a homely-looking country lawyer whose "flesh was dark, wrinkled, and folded . . . dry and leathery, tough and everlasting," with a "head small and forehead receding." But, interposed Herndon, "when this great man was moved by some great or good feeling – by some idea of liberty or justice or right," then Lincoln was transformed. The eyes brightened, the stature straightened, and the arms were flung energetically upward, and "then he seemed an inspired man."¹⁸

The standard of justice to which Lincoln held the world began with recognizing the existence of a fundamental natural law. Like many of the liberal political theorists of the nineteenth century, Lincoln was tempted to endorse a variety of utilitarian nostrums about law, starting with Jeremy Bentham's dictum that law should be guided by the principle of "the greatest happiness for the greatest number."¹⁹ So, for Lincoln, our "duty to . . . assist in ameliorating mankind" inclined him,

16 Herndon to C. O. Poole (January 5, 1886), in Emmanuel Hertz, ed., *The Hidden Lincoln From the Letters and Papers of William H. Herndon* (New York: Viking, 1938), 121.

17 Horace White to William H. Herndon (May 17, 1865), in *Herndon's Informants*, 4.

18 Herndon (June 24, 1887), in Hertz, *The Hidden Lincoln*, 185.

19 On the "greatest happiness" formula, see Bentham, *Deontology together with A Table of the Springs of Moral Action*, ed. Amnon Goldworth (Oxford, 1983), 60.

“without entering upon the details of the question,” to “simply say, that I am for those means which will give the greatest good to the greatest number.”²⁰ One reason he could not endorse the Bible without reservation was, as he told Isaac Cogdal in 1860, that he “could not believe in the endless punishment of anyone of the human race” because this made justice operate in a retributive fashion, whereas he preferred to think, like Bentham, that “punishment was parental in its object, aim, and design, and intended for the good of the offender; hence it must cease when justice is satisfied.”²¹ Had he wanted to be a consistent Benthamite, he might have joined Bentham in dismissing any connection between statutory law-codes and natural law as “nonsense on stilts.” And Lincoln actually advised one young lawyer to train himself to “listen well to all the evidence” and “Hear the lawyers make their argument as patiently as you can.” But after that,

stripping yourself of all prejudice, if any you have, and throwing away, if you can, all technical law knowledge . . . then stop one moment and ask yourself: what is justice in this case, and let that sense of justice be your decision. Law is nothing else but the best reason of wise men applied for ages to the transactions and business of mankind.²²

But Lincoln was not a theorist or a philosopher, and liberal democrats in the nineteenth century were far from unanimous in embracing Bentham’s rejection of natural law, and when Lincoln came to confront the issue of slavery in both law and politics, he fell back almost at once on an appeal to natural law.

Lincoln described his aversion to slavery as virtually an instinct, a natural moral default. “I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel.”²³ This was not just Romantic sentimentality. There were

20 “Speech to Germans at Cincinnati, Ohio” (February 12, 1861), in *C.W.*, 4:202.

21 Cogdal, in Don and Virginia Fehrenbacher, eds., *Recollected Words of Abraham Lincoln* (Stanford, CA: Stanford University Press, 1996), 110; William Lee Miller, *Lincoln’s Virtues: An Ethical Biography* (New York: Knopf, 2002), 87.

22 Herndon, in Fehrenbacher, *Recollected Words of Abraham Lincoln*, 243.

23 “To Albert G. Hodges” (April 4, 1864), in *C.W.*, 7:281.

certain “immutable principles of justice” grafted onto nature, and among these were the natural rights enumerated by Thomas Jefferson in the Declaration of Independence (to “life, liberty, and the pursuit of happiness”) and found in the universal behavior of all creatures. Slavery clashed inharmoniously with all of them. “All feel and understand it, even down to brutes and creeping insects.” At its root, slavery was nothing more than “the same old serpent that says you work and I eat, you toil and I will enjoy the fruits of it.”²⁴ That much, even the ant recoiled from. An “ant, who has toiled and dragged a crumb to his nest, will furiously defend the fruit of his labor, against whatever robber assails him,” and by the same token, even “the most dumb and stupid slave that ever toiled for a master, does constantly know that he is wronged.”²⁵ Lincoln’s own experience was to feel an automatic revulsion against anyone who tried to steal from others the fruit of their labor. “My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me.” And in their heart of hearts, slaveholders knew that this was a natural axiom of justice: “Your sense of justice, and human sympathy” is “continually telling you, that the poor negro has some natural right to himself – that those who deny it, and make mere merchandise of him, deserve kickings, contempt and death.” What trampled across this inherent sense of the injustice of slavery was nothing but self-interest, which had to be summoned-up in order to “repress all tendencies in the human heart to justice and mercy” on the part of slaveholders.²⁶ “Slavery is founded in the selfishness of man’s nature -- opposition to it, in his love of justice,” and when these are “brought into collision so fiercely, as slavery extension brings them, shocks, and throes, and convulsions must ceaselessly follow.”²⁷

The besetting problem for Lincoln and his generation was that slavery was also founded in statute law. The majority of states in the Union at the time of the Constitution legalized chattel slavery, and even those which subsequently emancipated their slaves still provided for the ren-

24 “Speech at Chicago, Illinois” (July 10, 1858), in *C.W.*, 2:500.

25 “Fragment on Slavery” [July 1, 1854?], in *C.W.*, 2:222.

26 “Speech at Carlinville, Illinois” (August 31, 1858), 3:80.

27 “Speech at Peoria, Illinois” (October 16, 1854), in *C.W.*, 2:265, 271.

dition of fugitive slaves by state law, as well as by the requirement of Article IV, section three of the federal Constitution, and the federal fugitive slave laws of 1793 and 1850. In the face of slavery's protections under federal and state law, the response of slavery's most radical opponents was to dismiss the standing of law as a mere disguise for Southern political power, and to offset "the Slave Power" with the power of non-compliance and even outright law-breaking. Ralph Waldo Emerson saw, like Lincoln, that slavery was based on "the love of power, the voluptuousness of holding a human being in . . . absolute control." But his solution in 1851 was to disobey the Fugitive Slave Law of 1850: "This filthy enactment was made in the nineteenth century, by people who could read and write. I will not obey it by God."²⁸ The abolitionist minister, Owen Lovejoy, who represented one of Illinois' seven Congressional districts, roared his defiance of the Fugitive Slave Law in 1859 on the floor of the House of Representatives: "Owen Lovejoy lives at Princeton, Illinois, three-quarters of a mile east of the village, and he aids every fugitive that comes to his door and asks it. Proclaim it then from the housetops. Write it on every leaf that trembles in the forest, make it blaze from the sun at high noon."²⁹

Emerson, Lovejoy, and every other abolitionist worth reckoning believed that they could appeal directly to divine or natural law, and use that sanction to shoulder aside the inequities and half-truths of human statute. In principle, Lincoln did not disagree that there was a "higher law" than statute law, and that it flatly obliterated any argument in favor of slavery. The Declaration of Independence, and its enunciation of a universal equality based on the natural rights of life, liberty and the pursuit of happiness was a "majestic interpretation of the economy of the Universe," filled with a "lofty, and wise, and noble understanding of the justice of the Creator to His creatures" in "nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and

28 Robert D. Richardson, *Emerson: The Mind on Fire* (Berkeley: University of California Press, 1995), 397, 498.

29 Lovejoy, "Speech on the Fanaticism of the Democratic Party" (February 21, 1859), in *His Brother's Blood: Owen Lovejoy, Speeches and Writings, 1838-1864*, ed. William F. & Jane Ann Moore (Urbana: University of Illinois Press, 2004), 178.

degraded, and imbruted by its fellows.”³⁰ But he also understood that evil, in the process of being humanly institutionalized, wraps up with itself bits and percentages of good, which it would be fool’s wisdom to destroy along with the evil in one righteous smash. “The true rule, in determining to embrace, or reject any thing, is not whether it have any evil in it; but whether it have more of evil, than of good,” Lincoln said in Congress in 1848. “There are few things wholly evil, or wholly good. Almost everything, especially of governmental policy, is an inseparable compound of the two; so that our best judgment of the preponderance between them is continually demanded.”³¹ Lincoln could not believe that there was no pathway around the shortcomings of human institutions but that of anarchy and power. It mortified him that the Taney Court could breeze so cheerfully past both natural law and the will of the people, as it did in *Dred Scott v. Sanford* in 1857. Still, the solution was not defiance, but “obedience to, and respect for, the judicial department of government,” because even a mistaken Court is better than no Court at all:

We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the *Dred Scott* decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no resistance to it.³²

There was no foreshadowing of Gandhian civil disobedience in Lincoln, if only because disobedience of any sort, for whatever noble motive, acted like dry-rot on the rule of law, and eventually persuaded people that the restraints of law are the enemy, rather than the basis of human freedom.

“The injustice of men” is not righted by compensatory displays of

30 “Speech at Lewistown, Illinois” (August 17, 1858), in *C.W.*, 2:246–247.

31 “Speech in United States House of Representatives on Internal Improvements” (June 20, 1848), in *C.W.*, 1:484.

well-intentioned power, judicial, legislative or executive, but by faithful adherence to the rule of law, which included both statutes and the mechanisms for altering statutes. It is only within the framework and expectations of the rule of law that power can be deployed with enough certainty to relax. In his first public protest against slavery, registered in 1837 in the Illinois legislature, Lincoln announced that “the institution of slavery is founded on both injustice and bad policy.” But by challenging the law, “the promulgation of abolition doctrines tends rather to increase than to abate its evils.” When a mob lynched some riverboat gamblers in Vicksburg in 1837, Lincoln thought that “Its direct consequences are, comparatively speaking, but a small evil,” since the community as a whole was going to shed few tears over the reduction of the gaming population. But what it tended toward was the suggestion that power was the only effective antidote to evil. “By instances of the perpetrators of such acts going unpunished, the lawless in spirit, are encouraged to become lawless in practice; and having been used to no restraint, but dread of punishment, they thus become, absolutely unrestrained.” Slavery, likewise, was an evil, but the resort to power to disrupt its operation reduced the moral authority of its opponents to the same level as the slaveholders and, in the case of fugitive slaves, the slave hunters.³³ Much as the abolitionists insisted that they had a mandate which relieved them of any responsibility for the consequences of public disobedience, Lincoln shot back that the claim

that they would “do their duty and leave the consequences to God,” merely gave an excuse for taking a course that they were not able to maintain by a fair and full argument. To make this declaration did not show what their duty was. If it did we should have no use for judgment, we might as well be made without intellect, and when divine or human law does not clearly point out what is our duty, we have no means of finding out what it is by using our most intelligent judgment of the consequences.

32 “Speech at Springfield, Illinois” (June 26, 1857), in *C.W.*, 2:401.

33 “Protest in Illinois Legislature on Slavery,” (March 3, 1837) and “Address Before the Young Men’s Lyceum of Springfield, Illinois” (January 27, 1838) in *C.W.*, 1:75, 109.

He did not dispute, any more than the abolitionists, that “slavery was an evil,” but given the fact that slavery was a state enactment, until those state legislatures where slavery was legal chose to abolish it or to emancipate their slaves in some gradual fashion, “we . . . cannot affect it in States of this Union where we do not live.” That was simply in the nature of a federal Constitution which strictly divided the jurisdictions of the state and the national government. Of course, if the question was not about slavery in the states, but whether slavery should be legalized in the western territories, this would be another matter, because Congress had direct jurisdiction over the organization of the territories and their preparation for statehood, and could take legislative action there concerning slavery which it could not take in the states. “The question of the extension of slavery to new territories of this country, is a part of our responsibility and care, and is under our control.”³⁴

For whatever purpose the abolitionists thought government was intended, Lincoln did not believe that it was intended for the purpose of righting all wrongs, at all times, by all means. “The legitimate object of government is to do for the people what needs to be done, but which they can not, by individual effort, do at all, or do so well, for themselves.” This included matters which had little or nothing to do with justice and “exist independently of the injustice in the world” – for instance, the “Making and maintaining roads, bridges, and the like; providing for the helpless young and afflicted; common schools; and disposing of deceased men’s property.” There were two places the government did have a clear and unambiguous responsibility to address injustice. One was in national self-defense against the outrages and aggressions of warlike powers. “If one people will make war upon another, it is a necessity with that other to unite and cooperate for defense. Hence the military department.” The other situation in which government brought its attention to bear on injustice was when “some men will kill, or beat, or constrain others, or despoil them of property, by force, fraud, or noncompliance with contracts, it is a common object with peaceful and just men to prevent it. Hence the criminal and civil departments.”

34 “Speech at Worcester, Massachusetts” (September 12, 1848), in *C.W.*, 2:2; Miller, *Lincoln’s Virtues*, 192–197.

The bulk of Lincoln's legal practice was civil in nature, and it is useful to remember that this is what he deemed a concern of justice: the largest component of his practice was property disputes, and fully half of the 3,400 cases he and Herndon handled between 1844 and 1861 involved debt collections.³⁵ A debt collector is not often thought of as an agent of justice. But Lincoln was by no means a legal Robin Hood: he wrote opinions for the Illinois Central Railroad on the dispossession of squatter and pre-emption rights to land the railroad claimed, and defended the Illinois Central in tax-exemption suits. Olivier Fraysse, commenting on Lincoln's record as a lawyer and a politician on property-ownership issues, remarked that "the small landowner threatened with seizure, the squatter who sold his clothes to keep his rights of pre-emption from falling into the hands of speculators, had trouble recognizing one of their own kind in Lincoln."³⁶ If anything, Lincoln saw his role as a lawyer less as a progressive crusader than as mediating facilitator who could "resolve disputes peacefully."³⁷

Lincoln was not oblivious to economic or social unfairness. How could he be, having been born poor himself? But "he submitted to adversity and injustice with as much real patience as any Man I Ever knew," wrote Illinois governor Richard J. Oglesby, "because he had an abiding belief that all would yet come out right or that the right would appear and Justice finally be awarded to him."³⁸ What inclined Lincoln to such confidence in the ultimate swing of justice was its claim on human nature and the unobstructed arc it enjoyed in an environment of governmental minimalism and the rule of law, not the mandating of fairness. To create law and to walk away from further intervention in people's lives was to invent a zone of openness and opportunity for self-transformation. Under a government of laws, "it is best for all to leave each man free to acquire property as fast as he can." And the best evidence of how this worked was Lincoln's own history. "Twenty-five

35 Mark E. Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln* (DeKalb, IL: Northern Illinois University Press, 2006), 100.

36 Olivier Fraysse, *Lincoln Land, and Labor, 1809-60*, trans. Sylvia Neely (Urbana: University of Illinois Press, 1994), 78.

37 Brian Dirck, *Lincoln the Lawyer* (Urbana: University of Illinois Press, 2007), 164.

38 R.J. Oglesby (January 5, 1866), in *Herndon's Informants*, 152.

years ago, I was a hired laborer,” he said in 1859. But “the hired laborer of yesterday, labors on his own account today; and will hire others to labor for him tomorrow.” Of course, Lincoln could not (and did not) deny that there were hired men who never became more than hired men. But that was not because some titanic injustice deliberately hand-capped them. “If any continue through life in the condition of the hired laborer, it is not the fault of the system, but because of either a dependent nature which prefers it, or improvidence, folly, or singular misfortune.”³⁹ The role of law – whether in the legislature or the courts – was to ensure that every man would “have the chance – and I believe a black man is entitled to it – in which he can better his condition. . . . That is the true system . . . and so it may go on and on in one ceaseless round so long as man exists on the face of the earth!”⁴⁰ That was why he would, in 1861, describe the Civil War as “a People’s contest” – not a popular uprising of the masses, but a battle to stave off the imposition of a slave-based aristocracy on America and preserve a system that encouraged economic and social mobility, a

struggle for maintaining in the world, that form, and substance of a government, whose leading object is, to elevate the condition of men – to lift artificial weights from all shoulders – to clear the paths of laudable pursuit for all – to afford all, an unfettered start, and a fair chance, in the race of life. . . . This is the leading object of the government for whose existence we contend.⁴¹

In no sense did he imagine that justice was simply a question of who had the power and who could manipulate the laws. Justice had not arrived because the sword had been crossed by the pitchfork, or because monarchy had been replaced by the commune. Justice was what happened when laws were popularly adopted, and the rule of law even-handedly enforced. That will not guarantee the same results for everyone. “Some will get wealthy” and will “accumulate capital,” then

39 “Address before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin” (September 30, 1859), in *C.W.*, 3:478–479; John Channing Briggs, *Lincoln’s Speeches Reconsidered* (Baltimore: Johns Hopkins University Press, 2005), 234.

40 “Speech at New Haven, Connecticut” (March 6, 1860), in *C.W.*, 4:24–25.

41 “Message to Congress in Special Session” (July 4, 1861), in *C.W.*, 4:438.

“to use it to save themselves from actual labor and hire other people to labor for them.”⁴² In the case of those who did not, the solution was not a policy of spread-the-wealth or soak-the-rich by interposing the hand of power. If justice really is a matter of achieving both satisfaction and harmony, it will not come from

a war upon property, or the owners of property. Property is the fruit of labor – property is desirable – is a positive good in the world. That some should be rich, shows that others may become rich, and hence is just encouragement to industry and enterprize. Let not him who is houseless pull down the house of another; but let him labor diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.⁴³

Not every complaint about fairness is really a protest against injustice; and not every complaint about injustice can be satisfied without running some risk that its real motive is the will-to-power. “Inequality is certainly never to be embraced for its own sake,” Lincoln admitted. But that was no sanction for “the pernicious principle . . . that no one shall have any, for fear all shall not have some.” Those who appealed to governmental power as the catch-all source of justice would find that governments can develop a nasty appetite for power, especially if it can be disguised as the dispensing goddess of fairness.⁴⁴ He warned the young Illinois state legislator Shelby Cullom in 1862 that

there is this difference between dealing with the government and dealing between individuals. If you deal with an individual and he doesn't do right you can sue him in court and make him pay damages. But if you are dealing with the government you are helpless.⁴⁵

Even his decision to append the claim that the Emancipation Proclamation was an “act of justice” was a last-minute addition to a

42 “Speech at Cincinnati, Ohio” (September 17, 1859), in *C.W.*, 3:459.

43 “Reply to New York Workingmen’s Democratic Republican Association” (March 21, 1864), in *C.W.*, 7:259–60.

44 “Fragment on Government” [July 1, 1854?], in *C.W.*, 2:221–222.

45 Cullom (March 22, 1908), in Fehrenbacher, *Recollected Words of Abraham Lincoln*, 125.

document whose foundation was otherwise laid in a scrupulous, almost plodding, application of whatever could be construed as a legal exercise of presidential “war powers” under the president’s constitutional rubric of “commander-in-chief of the army and navy in time of war or rebellion.”

Ironically, even after using those governmental “war powers” to hand down “an act of justice” in the Proclamation, Lincoln actually grew *less* confident about the ability of government to achieve justice. He worried that immediate emancipation would prove inferior to “some practical system by which the two races could gradually live themselves out of their old relation to each other, and both come out better prepared for the new.”⁴⁶ And he worried that the federal courts might strike down the Proclamation as unconstitutional. “I think it is valid in law, and will be so held by the courts,” he wrote General Stephen Hurlbut in 1863, but in any case “I think I shall not retract or repudiate it.” Two years later, he was less sure: at the Hampton Roads Conference in February, 1865, he admitted to Alexander H. Stephens that he did not know how “the Courts would decide it . . . and [he] could give no answer.”

His own opinion was that as the proclamation was a war measure and would have effect only from its being an exercise of the war power, as soon as the war ceased, it would be inoperative for the future. It would be held to apply only to such slaves as had come under its operation while it was in active exercise. This was his individual opinion, but the Courts might decide the other way and hold that it effectually emancipated all the slaves in the States to which it applied at the time. So far as he was concerned, he should leave it to the Courts to decide. He never would change or modify the terms of the Proclamation in the slightest particular.⁴⁷

Strikingly, his recourse in that case was not to the accumulation of more power, but a determination to settle the end of slavery by statute – which

46 “To Nathaniel P. Banks” (August 5, 1863), in *C.W.*, 6:365.

47 Stephens, *A Constitutional View of the Late War Between the States* (Philadelphia: National Publishing Co., 1870), 2:610–11.

in this case took the form of the Thirteenth Amendment. And he warned radical Republicans not to be over-confident that Union victory in the war was a sign that justice had become a Northern political property. "If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come," Lincoln said in his Second Inaugural Address, then it has come because no nation, being human, can avoid such offenses. But let it be clear that this particular offense was shared by both North as well as South, since both had colluded historically in fastening the blight of slavery on the republic. Now, through the instrument of "this terrible war," the blight is being removed; but the judgment, like the collusion, comes down on "both North and South . . . as the woe due to those by whom the offence came." This may rasp unpleasantly on the sensibilities of the over-righteous among the anti-slavery radicals; but who can gainsay the justice of the Almighty? "Shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him?" Much as Lincoln hoped that "this mighty scourge of war may speedily pass away," yet there was still justice in the punishment it assessed:

Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."⁴⁸

We yield haltingly to the justice of God, because yielding to it means that we have admitted at last that ultimately justice is not our property, and that we have finally met the perfect balance of law and power. But, whether we wanted to yield or not, Lincoln believed "that He will compel us to do right in order that He may do these things, not so much because we desire them as that they accord with His plans of dealing with this nation, in the midst of which He means to establish justice."⁴⁹

48 "Second Inaugural Address" (March 4, 1865), in *C.W.*, 8:332.

49 James F. Wilson, "Some Memories of Lincoln," *North American Review* 163 (December 1896), 668.

So if, by means of the war, “God now wills the removal of a great wrong, and wills also that we of the North as well as you of the South, shall pay fairly for our complicity in that wrong,” then “impartial history will find therein new cause to attest and revere the justice and goodness of God.”⁵⁰ Justice would indeed concern everyone, whether they liked its shape or not; but no one would own it as their property, to play with as the cat’s-paw of power. Over two hundred years after Lincoln’s birth, it might be well to remind ourselves that the real enemy of both fairness and justice is not the weakness of our satisfactions or an unwillingness to bear shared sacrifice, but the dark temptation of power, luring us to the abyss with our own desires.

50 “To Albert G. Hodges” (April 4, 1864), in *C.W.*, 7:282.