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## Living Dogma

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## LIVING DOGMA

Joseph R. Reisert\*

JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* (2013) Pp. 202. Paperback \$29.99.

DAVID LYONS, *CONFRONTING INJUSTICE: MORAL HISTORY AND POLITICAL THEORY* (2013). Pp. 256. Hardcover \$60.00.

“If slavery is not wrong, nothing is wrong.”<sup>1</sup> When Abraham Lincoln wrote those words in April of 1864 to the editor of a Kentucky newspaper, they were still—literally—fighting words. In that same letter, Lincoln added that he could not remember a time when he did not think slavery an evil.<sup>2</sup> Millions of Americans, however, did not agree with Lincoln’s judgment of slavery and indeed held exactly contrary convictions: many of them could not remember a time when they did not think slavery to be lawful and just. Even as Lincoln wrote to express his personal convictions, slavery continued to enjoy the protection of the Constitution and laws of the United States. So confident were slavery’s defenders in the rightness of their convictions and the wrongness of Lincoln’s that they openly invoked the defense of slavery as among the reasons for their recourse to arms in 1860. South Carolina’s *Declaration of the Immediate Causes Which Induce and Justify the Secession* states explicitly that its subscribers feared that Lincoln would use his office to abolish slavery, and further states that they seceded from the Union to protect, inter alia, “the right of property in slaves.”<sup>3</sup> Those who believed in the justice and constitutionality of slavery fought tenaciously in defense of that right, enduring and inflicting terrible violence over a span of more than four years. In the end, of course, the Union prevailed: slavery was abolished, and we today, who account ourselves the heirs of the Great Emancipator hear in Lincoln’s words not the spirited assertion of a contested truth but the bland statement of a moral truism.

At the sesquicentennial of the Civil War, the debate over the morality of slavery holds at most historical interest for us. We no longer “fully, frequently, and fearlessly” contest the justice of slavery;<sup>4</sup> we take its injustice for granted. But if the wrongfulness of

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1. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 *COLLECTED WORKS OF ABRAHAM LINCOLN* 281 (Roy P. Basler ed., 1953).

2. *Id.*

3. Confederate States of America, *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, AVALON PROJECT (December 24, 1860), [http://avalon.law.yale.edu/19th\\_century/csa\\_scarsec.asp](http://avalon.law.yale.edu/19th_century/csa_scarsec.asp).

4. JOHN STUART MILL, *ON LIBERTY* 35 (David Spitz ed., 1975) (1862).

slavery is not exactly a “dead dogma,” as John Stuart Mill’s account in *On Liberty* suggests, neither can it precisely be accounted a “living truth.”<sup>5</sup> It is, rather, something intermediate between these—a living dogma or perhaps an undead truth. Our conviction that slavery is evil has not died: the Thirteenth Amendment remains binding law, and chattel slavery nowhere exists openly in the United States. But because slavery as such no longer exists here, there is no virtue and no satisfaction in living out that conviction. Nevertheless, or perhaps, in consequence, the specter of slavery continues to haunt our political discourse: unable to combat the real thing, we seek out its analogues and its legacy. As Mark Graber has observed, slavery has become “the canonical constitutional evil in the United States” and President Lincoln, the “canonical political leader and interpreter of the Constitution.”<sup>6</sup> Any contemporary practice akin to slavery must be wrong and unconstitutional; any contemporary policy Lincoln would have endorsed must be constitutional and prudent.

Because everyone agrees that slavery is wrong, the effort to show that some disputed, contemporary conclusion in political morality or constitutional law follows from opposition to slavery may seem at first blush to be a prudent dialectical strategy. But this mode of argument entails certain characteristic dangers or vices as well—vices that ultimately undermine its utility. First, analogies are never precise, and the effort to link some contemporary practice to the historical experience of slavery risks distorting or obscuring what is distinctive about the controversy now at hand. Second, to wrap oneself in the mantle of abolition is to risk being corrupted by an unearned and smug self-righteousness, and it risks alienating at the outset the interlocutors one is attempting to persuade by implicitly accusing those who disagree of being the moral equivalent of slave-owners. Finally, to liken a contemporary phenomenon to slavery is to imply that there is nothing at all to be said on the other side of the question and that, therefore, the countervailing opinions of those who disagree may rightly be disregarded, or even silenced—if necessary, by violent or lawless means.

Justin Buckley Dyer’s monograph, *Slavery, Abortion, and the Politics of Constitutional Meaning*, fits Graber’s template precisely: it aims to show that abortion is akin to slavery and is therefore wrong and that it should be prohibited by law and may in fact be prohibited by the Constitution as well.<sup>7</sup> Lincoln’s arguments against slavery, Dyer argues, also justify barring abortion. The essays collected in David Lyons’s new book, *Confronting Injustice: Moral History and Political Theory*, likewise treat slavery as the paradigmatic American evil, but Lyons does not exactly want to analogize slavery to anything else.<sup>8</sup> Rather, he maintains that we have not yet comprehended the full nature and true magnitude of that evil. Despite the Thirteenth Amendment and Reconstruction, and despite the achievements of the modern Civil Rights Era, Lyons contends that the United States has failed to adequately redress or even to fully eradicate all the evils of slavery. In his view, the terrible legacy of slavery continues into the present and still demands remedial action from the government of the United States. Lincoln, however, is not the hero of Lyons’s book: his heroes, rather, are the practitioners of civil disobedience and political

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5. *Id.*

6. Mark A. Graber, *The Declaration of Independence as Canon Fodder*, 49 TULSA L. REV. 469, 469 (2013).

7. See generally JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* (2013).

8. See generally DAVID LYONS, *CONFRONTING INJUSTICE: MORAL HISTORY AND POLITICAL THEORY* (2013).

resistance, who took direct and individual action against the evils of their times.

Despite their diverging ideological perspectives, both books burn with an intensity of moral passion but also illustrate the limited utility of slavery as a lens through which to focus upon contemporary political problems.

#### SLAVERY AND ABORTION

Dyer takes as his declared starting point “the pervasive feeling among many conscientious citizens that the battle over the institution of slavery” in some way parallels and illuminates the contemporary American conflict over abortion.<sup>9</sup> But Dyer’s book does not thoroughly explore all of the parallels that conscientious citizens have drawn between abortion and slavery. Although he observes in passing that some advocates of abortion rights, including, notably Andrew Koppelman,<sup>10</sup> make their case by likening unwanted pregnancies to involuntary servitude, such pro-abortion invocations of slavery are noted only to be set aside.<sup>11</sup> Dyer addresses himself almost exclusively to, and professes himself “critically supportive of,” the parallels drawn by opponents of abortion between the legal and moral arguments against slavery and those against abortion.<sup>12</sup> Three such parallels stand out as most important.

First among them is the linkage drawn by many prominent conservatives, including Presidents Ronald Reagan and George W. Bush and jurists Robert Bork and Antonin Scalia between the *Dred Scott* case<sup>13</sup> and *Roe v. Wade*.<sup>14</sup> Such conservatives contend that *Roe* is wrong for the same reason that *Dred Scott* was wrong: in each case, the majority employed the doctrine of substantive due process to override the decisions of the political branches by reading their own preferred values into the Constitution.<sup>15</sup> If Chief Justice Taney’s error in *Dred Scott* was to read his own pro-slavery commitments into the Fifth Amendment, overriding the Congressional determination to bar slavery from certain U.S. territories, then Justice Blackmun’s parallel error was to read his pro-abortion commitments into the Fourteenth, overriding the Texas legislature’s judgment barring most abortions.<sup>16</sup> On this view, *Roe* erred “by banishing the issue [of abortion] from the political forum,” where it ought to have been resolved; hence, as Justice Scalia has concluded, the Court ought to “get out of this area, where, [it has] no right to be, and [it does] neither [the Court] nor the country any good by remaining.”<sup>17</sup>

Dyer rejects both the diagnosis and the conclusion. *Dred Scott* did not originate the doctrine of “substantive due process,” as a doctrine of that name gained currency only in the twentieth century and in connection with Progressive Era debates about the appropriate role of the Congress and the Court in regulating the nation’s economy.<sup>18</sup> In any event, the

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9. DYER, *supra* note 7, at ix.

10. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

11. DYER, *supra* note 7, at 4-5.

12. *Id.* at 12.

13. *Scott v. Sandford*, 60 U.S. 393 (1857).

14. *Roe v. Wade*, 410 U.S. 113 (1973); DYER, *supra* note 7, at 14.

15. DYER, *supra* note 7, at 14-16.

16. *See generally Roe*, 410 U.S. 113.

17. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

18. DYER, *supra* note 7, at 18.

idea that “procedural norms had implicit substantive limitations” was already a familiar one in nineteenth century American jurisprudence, although, Dyer insists, those limitations were “bound up with the notion of a natural law that set boundaries to legitimate government authority.”<sup>19</sup> That is why the dissenting opinions of Justices Curtis and McLean in the *Dred Scott* case did not argue that Chief Justice Taney had erred by finding substantive protections in the Due Process Clause of the Fifth Amendment. They argued instead that Taney had invoked the *wrong* substantive protections: the protection of property in slaves could not be implicit in the guarantee of due process because slavery was “contrary to natural right” and thus inconsistent with the natural law foundations of American constitutionalism.<sup>20</sup>

In Dyer’s view, the “true resemblance between *Roe* and *Dred Scott*” is that the *Roe* court repeated the *Dred Scott* court’s substantive moral error: “in each case the Court excluded some natural human beings from the community of constitutional persons.”<sup>21</sup> In effect, Dyer is arguing that contemporary opponents of abortion should not ground their opposition to *Roe* in the logic of Justice Holmes’s *Lochner v. New York* dissent,<sup>22</sup> which would leave the matter of abortion to be decided legislatively, but should instead call for the recognition that all human beings are constitutional persons from the moment of conception—a recognition that, in his view, entails the prohibition of any abortion not necessary to save a pregnant woman’s life.

Dyer perceives a second parallel between slavery and abortion: both license the private use of violence against other human beings, a privilege he sees as profoundly incompatible with the egalitarian moral basis of liberalism. Just as the “violence accompanying the system of slavery” in the end proved inconsistent with the deepest foundational principles of the American republic, so also, Dyer argues, “the violence inherent in abortion cannot ultimately be reconciled with American liberalism.”<sup>23</sup> Dyer’s point is both normative and predictive: because these rights are inconsistent with the moral equality of persons, the effort to enshrine them in the laws of an otherwise liberal order is doomed to failure. The more consistently the law recognizes the rights of some human beings to use, injure, and even kill others (whether they are held as slaves or are human beings not yet born), the more apparent become the terrible consequences of being classed as among those without rights, the more difficult it must become to sustain laws that wholly deprive some persons of all legal protections.

Although the 1787 Constitution compromises with slavery, never speaking of “slaves” but only of “persons,” American law came during the course of the nineteenth century to treat enslaved human beings more consistently as chattels.<sup>24</sup> By way of example, Dyer cites the notorious opinion of Judge Thomas Ruffin in the North Carolina case of *State v. Mann*,<sup>25</sup> which held that a free person who had hired the labor of another person’s slave could not be criminally indicted for an assault upon that slave. Judge Ruffin’s logic is inexorable: because no one could recognize a motive of duty to obey the commands of

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19. *Id.* at 22-23.

20. *Id.* at 25 (citing *Scott v. Sanford*, 60 U.S. 393, 624 (1857) (Curtis, J., dissenting)).

21. *Id.* at 63.

22. *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

23. DYER, *supra* note 7, at 77.

24. U.S. CONST. art. I, §2, cl. 3; art. I, §9 cl. 1; art. IV, §2, cl. 3

25. *State v. Mann*, 13 N.C. 263 (1829).

a master, the slave's obedience had to be the consequence of the master's "uncontrolled authority over the body"; thus "the power of the master must be absolute, to render the submission of the slave perfect."<sup>26</sup> Judge Ruffin acknowledges that "as a principle of moral right, every person in his retirement must repudiate" this conclusion, but, he adds ruefully, "in the actual condition of things, it must be so."<sup>27</sup> The moral logic of slavery itself leads in this profoundly illiberal direction, to the ultimate denial of the slaves' personhood. But the worse the legal condition of slaves became, the more arbitrary the distinctions of race and color on which it historically depended came to appear. In the end, of course, slavery was abolished, and the American nation reaffirmed the principle of liberal equality in the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.

Dyer argues, in parallel fashion, that legal developments in the wake of *Roe* have made increasingly obvious the moral arbitrariness of making a human being's rights depend on "the difference in mere inches between being born and unborn."<sup>28</sup> Judge Clement Haynsworth's decision in *Floyd v. Anders* may be seen as the analogue to the antebellum *State v. Mann*.<sup>29</sup> In *Floyd*, Judge Haynsworth held that a physician could not be prosecuted for murder, or for having performed an illegal abortion, even though his failed efforts to perform an abortion led to the birth of a living baby boy, who survived for three weeks after his birth.<sup>30</sup> Haynsworth's logic was also clear: the Supreme Court had held in *Roe* that human fetuses prior to viability had no rights and that it was left to the judgment of the attending physician to determine viability.<sup>31</sup> The physician in this case had caused to be delivered a fetus whose gestational age he estimated to be twenty-five weeks and which he deemed to be non-viable.<sup>32</sup> Though this child came into the world with a "strong heart-beat" and functioning lungs, the Court held that the logic of *Roe* entailed that the law of South Carolina barring all abortions after the twenty-fourth week did not protect him.<sup>33</sup> In response, abortion opponents have sought and won the passage of the Born-Alive Infants Protection Act<sup>34</sup> and the Partial Birth Abortion Ban Act.<sup>35</sup> Both aim to defend fetal life against being terminated by abortions and to compel abortion's defenders to justify the killing of fetuses that would be legally protected if their circumstances were only slightly different.

Third, Dyer argues that Lincoln's reasons for rejecting Douglas's policy of "popular sovereignty" for the Kansas and Nebraska Territories also demonstrate the hollowness of framing the right to abortion as protecting only a private "right to choose." To regard the choice between a free constitution and a slave constitution with indifference is to assume that there is nothing morally wrong with slavery. Likewise, one can only regard a woman's choice to abort her child with moral indifference if there is nothing morally wrong with abortion.<sup>36</sup>

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26. *Id.* at 266; DYER, *supra* note 7, at 100-01.

27. *Mann*, 13 N.C. at 266.

28. DYER, *supra* note 7, at 90.

29. *Floyd v. Anders* 440 F. Supp. 535 (D.S.C. 1977).

30. *Id.*

31. *See Roe v. Wade*, 410 U.S. 113 (1973).

32. *Floyd*, 440 F. Supp. at 538.

33. *Id.*

34. Born-Alive Infants Protection Act, Pub. L. No. 107-207, 116 Stat. 926 (2002).

35. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003).

36. DYER, *supra* note 7, at 132, 139-40, 162.

Here we arrive at the fundamental question: Is there anything morally wrong with abortion? Dyer argues passionately and forcefully that abortion, the deliberate destruction of early-stage human life, is wrong for precisely the same reasons that the deliberate destruction of human life in its later stages is also—and is uncontroversially acknowledged to be—wrong. His argument is straightforward, and grounded in the principles of the Declaration of Independence: if all human beings are “created equal,” and if all possess “certain unalienable rights,” then whatever fundamental rights any of us possess must be held by all—including human beings at the first moments of life in their mothers’ wombs.<sup>37</sup> Although Dyer notes some of the principal arguments advanced by abortion’s defenders, he deals with them rather summarily, and it is difficult to conceive that anyone strongly persuaded of the rightness of abortion will find his treatment of them satisfactory. Nevertheless, he rightly observes that “[w]hat makes the gulf between the contending sides seem unbridgeable is that in moments of candor all agree that abortion involves the deliberate destruction of a human life” and that the serious moral debates therefore relate to the moral status of human beings in their earliest stages of life, from conception through infancy.<sup>38</sup>

About these serious moral debates, the history of slavery tells us relatively little; neither does that history compel any particular resolution to the constitutional controversy over abortion. Whether *Roe* was rightly decided does not turn on whether *Dred Scott* was rightly decided; the stage in which law ought to protect the lives of unborn human beings does not turn on whether a criminal indictment could lie in the antebellum South against a free person who beat to death someone held by the laws of the time as a chattel slave. Rightly condemning those who profess indifference to the “choice” between freedom and slavery does not mean that those who advocate the right to choose abortion deserve the same condemnation.

If the analogy between slavery and abortion were clear and precise, our society would not now be deeply divided over abortion. But, as Justices O’Connor, Kennedy, and Souter wrote in their joint opinion in *Planned Parenthood v. Casey*, “[a]bortion is a unique act . . . because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.”<sup>39</sup> Only when a woman becomes pregnant does a second human being come to inhabit the body of another human being. Dyer does not seem to think this fact matters very much to the moral argument about abortion, and his book—astonishingly—says almost nothing about the interests of women in the right to bodily integrity and physical self-determination. Evidently he regards it as obvious that this interest cannot trump the right of unborn human beings not to be killed. It is, however, precisely this interest in a pregnant woman’s liberty that the Supreme Court has made the basis of its argument for the recognition of a woman’s right to abort a fetus in the weeks prior to viability. This interest also underpins Judith Jarvis Thomson’s famous argument in support of abortion rights, which invites her readers to imagine that their bodies have—without their consent—been harnessed to support the life of a famous violinist, who would otherwise perish.<sup>40</sup> This interest is also the basis of Koppelman’s argument that, in a perfect

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37. *Id.* at 179 (quoting *The Declaration of Independence*).

38. *Id.* at 178.

39. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

40. DYER, *supra* note 7, at 177 (summarizing Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971)).

reversal of Dyer's, likens a state that would prohibit a woman from ending an unwanted pregnancy with her slave master, and a pregnant woman, thus compelled to bear a child, to a person condemned to an involuntary servitude.

Dyer's final argument for the injustice of abortion does not really depend on the analogy between abortion and slavery at all. It aims to show that to accept a legal right to abortion is to undermine "the underlying principles of democracy and the rule of law." He concedes the seeming extravagance of the claim, writing that, "[t]his may seem hyperbolic, but it is not."<sup>41</sup> Let's see.

Dyer posits the following alternative: We must either hold that all members of the human species, from the earliest moment of development to their deaths, possess the natural rights of persons in virtue of their biological humanity, or identify some attribute the possession of which entitles a human being to attain the moral status of personhood. The latter, he insists, is what we do when we allow our laws to protect some human beings against being intentionally killed while licensing the killing of other human beings, such as fetuses, infants, the mentally infirm, or the severely disabled, on the grounds that they are not moral persons. But if we leave it to the rulers to decide who has rights, we abandon the natural rights foundation of our democracy, because when the rulers "flex their power, in reaching a judgment [about who has rights], that judgment will be tested by no standard of right or wrong *apart from power itself*."<sup>42</sup> Dyer returns to this argument in the subsequent chapter, reformulating slightly his perceived threat to democracy and the rule of law posed by the legal recognition of abortion rights. He contends that we either recognize rights as a natural endowment, inherent in our humanity, or we seek to identify some attribute or performance, in virtue of which some beings acquire rights. He writes:

[T]o distinguish human persons from human non-persons is simply to offer a different variation of the same tautology: persons are those human beings who have moral rights because they have attribute Y, and non-persons are those human beings who do not have moral rights because they lack attribute Y. The relevant attribute, however, is simply posited by people with power.<sup>43</sup>

In short, Dyer holds, either the set of right-holders is specified by nature—in which case rights operate as a constraint on power—or right-holders are identified by convention—in which case the distribution of rights, being the product of choices made by those in power, cannot effectively constrain the powerful.

But the choice Dyer poses is a false alternative, because the endowment theory of rights would itself be tautological if it amounted only to the claim that, "human beings have human rights, because they are human." The endowment theory of rights is itself a special instance of attribute-based theory, and like any such theory, it is valid only if there is a fully adequate set of reasons that can justify it, and in this work at least Dyer has not provided it. That "we hold" some "truths to be self-evident" does not prove that they are

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41. *Id.* at 154.

42. *Id.* at 155 (quoting HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 5 (2002)) (emphasis in original).

43. *Id.* at 176.

true; it proves only that members of the relevant “we” believe them to be so. Nor is the endowment theory proved true by arguing that its denial leads to consequences we would not like.

In any case, the relevant opposition is not between natural rights and nihilism but between a commitment to the rule of reason and its abandonment or repudiation. The legal rights of persons in any political community are, and can only ever be, determined in practice by the judgments of the rulers. As a matter of practical politics, Dyer is of course correct that nothing but power can “test” power, if that means to limit power. When political power is being exercised for evil ends, nothing but a countervailing power can alter its course, if those wielding that power do not themselves steer a nobler and better course. The aim of constitutional and democratic government is to establish institutional constraints that, as far as possible, require the ruled to act on the basis of reasons that the citizen body substantially accepts or will come in short order to accept. The hope animating such government is that, over time, the citizens will demand, and the government will act upon, good reasons instead of bad reasons. That is a hope, not a guarantee. But to profess belief in rights as a gift of God or nature is no guarantee, either, as the legal protection of slavery in the early history of the United States amply demonstrates.

Nor does any particular failure to respect whatever protections are required by a fully adequate, rational account of human rights set us on a slippery slope with a trajectory fatal to democracy and the rule of law. It is true that whenever our laws institutionalize an evil and unreasonable practice, we, to that extent, act inconsistently with the underlying principles of democracy and the rule of law. In addition, there is the danger and even the likelihood that the evil will spread. The laws regulating slavery became harsher as the nineteenth century unfolded. But in the end, even slavery’s brutal affront to reason and nature did not prevent the American republic from ultimately repudiating slavery and enjoying a “new birth of freedom” after the Civil War. Dyer’s own account of the adoption of the Born Alive Infants Protection Act and the Supreme Court’s recent vindication of the Partial Birth Abortion Ban Act—both victories for abortion’s opponents—belies the idea of the slippery slope in the domain of abortion as well. That is not to say that history will necessarily vindicate abortion’s opponents, only that the historical evidence does not support Dyer’s strong thesis about the endowment theory of rights.

Dyer invokes a dialectical argument that Lincoln sketched against slavery to support the endowment theory of rights. Imagining a slave owner who sought to defend the justice of slavery by reference to certain attributes which he imagined the slaves lacked, Lincoln observed how easily any such argument could be turned around against the slave owner:

You say A. is white, and B. is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be the slave of the first man you meet, with a fairer skin than your own.

You do not mean *color* exactly? — You mean the whites are *intellectually* the superior of the blacks, and, therefore, have the right to rule and enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.

But, you say, it is a question of *interest*; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his *interest*, he has the right to enslave you.<sup>44</sup>

Lincoln's argument works, of course, because no one who would claim the right to hold slaves would be prepared to concede that he should himself be enslaved. And everyone must concede that they might come upon someone smarter or paler than they, or someone who might conceivably find it in their interest to enslave them. However, this sort of dialectical argument, which succeeds so admirably against the purported justifications for slavery, does not work with the same force in the case of abortion, because no one will ever again find him or herself in the situation of an embryo or fetus. Thus, to provide further support for the endowment theory of rights, Dyer turns away from the case of slavery to invoke the unacceptable consequences (as he sees them) of embracing the sorts of attribute-based theories of rights that justify abortion. Such theories also justify infanticide. As that conclusion is welcomed by the scholars who make those arguments, it is difficult to see what force they might see in Dyer's reply.

After having devoted the bulk of the volume to demonstrating the ways that abortion resembles slavery, Dyer concludes by seeking to distinguish them. Just as some radical abolitionists, like John Brown, believed that the evil of slavery was sufficiently great to justify the use of private violence to liberate the enslaved, some radical opponents of abortion have turned to violence in their efforts to end abortion. Dyer insists forcefully that private violence against abortion clinics and providers is not justified, but is rather inconsistent with the moral commitment to the protection of human life, which underpins moral opposition to abortion.<sup>45</sup> He adds that such violence is also futile, because "abortion cannot and will not be settled by violence or armed conflict."<sup>46</sup> As a prediction about the likely course of American politics, Dyer is surely correct. But that is so because of contingent facts about the American polity and not in virtue of anything specific to the issue of abortion. That our disagreement over abortion is not about to spark another civil war is something that both advocates of abortion and its opponents ought to agree is welcome and is a state of affairs to be nurtured even as committed citizens on both sides of the debate seek to persuade others of the correctness of their own views.

#### THE LEGACY OF SLAVERY AND CONTEMPORARY POLICY

Like Dyer, Lyons is determined to "take seriously the idea that all persons are equally endowed with rights to life, liberty, and the pursuit of happiness."<sup>47</sup> But if the history of American slavery gives Dyer at least some grounds for hope that "our society" may someday "look back on abortion" as we now look back on slavery, as an evil relegated to the past,<sup>48</sup> Lyons finds no such consolation. To Lyons, American slavery is a metastasized cancer whose evil so pervaded—and whose ongoing consequences still so deeply

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44. Abraham Lincoln, *Fragment on Slavery* (July 1, 1854), in 2 *Collected Works of Abraham Lincoln* 222-23 (Roy P. Basler, ed., 1953) (emphasis in original); DYER, *supra* note 7, at 150.

45. DYER, *supra* note 7, at 182-83.

46. *Id.* at 185.

47. LYONS, *supra* note 8, at 13. Compare DYER, *supra* note 7, at 187.

48. DYER, *supra* note 7, at 186.

pervade—American society, government, and law that he expresses grave doubts about “law’s moral credentials.”<sup>49</sup> As Lyons demonstrates, the American legal system has often failed to protect those to whom it has promised protection, especially Africans and African-Americans. The law’s recurrent failures have led him, paradoxically, to expect very little and yet to demand much of the state. On the one hand, doubting the moral pretensions of the law, he invokes as heroes the practitioners of “political resistance” and civil disobedience, admiring the conscientious efforts to do what is right, regardless of their consequences for the larger polity.<sup>50</sup> Simultaneously, however, he calls upon our national government to remedy the evils its history of racial injustice has caused by embarking upon a comprehensive program of unprecedented ambition to equalize the life-prospects for all our children of every race.<sup>51</sup>

*Confronting Injustice* consists of a set of essays, several of them previously published, relating to the issue of slavery and its consequences. There is some repetition among the essays, but the chapters are also sufficiently dense with carefully crafted argument that even an extended review such as this one will inevitably leave much out. Nevertheless, I wish to focus on three of Lyons’ principal claims relating to the bearing of slavery on Americans’ present attitudes towards our government.

First, Lyons powerfully establishes that American political authorities have repeatedly—and for long stretches of time—failed to enforce, with respect to Africans and African-Americans, laws that commanded respect for the rights of all people. Chattel slavery, he argues, was introduced unlawfully into the Virginia colony. That colony’s charter provided that the English common law would apply, and the common law “made no provision for the enslavement of human beings.”<sup>52</sup> Although slavery in Virginia is conventionally traced to 1619, when a Dutch ship captain bartered a number of Africans in exchange for provisions, the colonial legislature did not explicitly address slavery until 1655. Virginia did not explicitly authorize slavery until 1682, when it provided “that lifetime, inheritable slavery . . . be confined to people of color.”<sup>53</sup> In the interim, Lyons concludes, Africans had been held as slaves or reduced to slavery, with the connivance of local officials, but in contravention of colonial law.

Illegality also features prominently in Lyons’s account of Jim Crow, the practice of which he dubs an example of the “legal entrenchment of illegality”—a condition that can be said to arise in the case of “official practices that are *clearly* unlawful, largely *open* (not hidden) and deeply *entrenched* (tolerated for a long period of time).”<sup>54</sup> After the Supreme Court’s decision in *Plessy v. Ferguson* established the “separate but equal” doctrine, racial segregation as such enjoyed the sanction of law, but only on condition that the separate facilities provided the two races were in fact substantially equal.<sup>55</sup> As Lyons notes, “[s]ystematic and open violation of that legal requirement . . . was a clearly unlawful official practice.”<sup>56</sup> Still more powerfully, Lyons points to the toleration of lynching, which was

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49. LYONS, *supra* note 8, at 112.

50. *Id.* at 178.

51. *Id.* at 83.

52. *Id.* at 18.

53. *Id.* at 55.

54. *Id.* at 29 (emphasis in original).

55. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

56. LYONS, *supra* note 8, at 31 (emphasis in original); see also *id.* at 34.

both obviously illegal—murder being a crime according to the plain terms of the criminal law—yet rarely prosecuted, even when evidence was available. To those who may doubt that lynching was openly tolerated, Lyons points out that “[p]articipants [in lynchings] were openly photographed, *facing* the camera, and prints were widely distributed through the U.S. mail as picture postcards, with incriminating messages. Lacking fear of prosecution, participants posed with impunity.”<sup>57</sup>

Lyons also insists that the nineteenth century Supreme Court was itself complicit in the legally entrenched illegal practices that sustained white supremacy.<sup>58</sup> Looking to such cases as *Dred Scott v. Sandford*,<sup>59</sup> the *Slaughter-House* cases,<sup>60</sup> and the *Civil Rights Cases*,<sup>61</sup> Lyons concludes that “[s]ome assertions made on behalf of the Court in these leading cases are so implausible as to indicate that the majority simply did not believe the positions they endorsed”; thus, he concludes, they “were willing to dissemble in order to permit the re-establishment of racial subjugation.”<sup>62</sup> Lyons is of course correct when he says that Justice Taney’s claim that, at the time of the Constitution’s adoption, the ideology of white supremacy “was . . . ‘fixed and universal in the civilized portion of the white race’” was false.<sup>63</sup> Clearly this was, as Lyons notes in a subsequent chapter, an “exaggeration,”<sup>64</sup> but can we really say that Taney’s claim was so “*plainly* false” as to call into question the sincerity of his effort to form a judgment about what the Constitution required?<sup>65</sup> Likewise, Lyons finds it impossible to credit as sincere Justice Miller’s doubt, in the *Slaughter-House Cases*, that the Fourteenth Amendment in fact aimed to vastly augment federal authority over the states. Lyons also doubts the sincerity of Justice Bradley’s distinction in the *Civil Rights Cases*, between being subject to acts of private discrimination and being treated as other than a free person.<sup>66</sup>

Lyons may be correct that “a majority of justices were willing to dissemble in order to permit the re-establishment of racial subjugation” after the Civil War, but the evidence he provides does not suffice to prove the charge.<sup>67</sup> Every normative argument one finds unpersuasive is, in one’s own judgment, a bad argument. Because no one is infallible, each of us can be assumed to reject as bad and unpersuasive arguments that, in fact, yield true conclusions and to accept as valid and sound arguments that, in fact, are bad. Moreover, there is no clear standard by which to assess how bad or unsound a normative or interpretive argument is and therefore no clear standard by which to demonstrate that any given argument is so unsound that it must therefore have been made or accepted in bad faith. Given the power of Lyons’s other demonstrations of officially tolerated illegality, there would seem to be no reason to accuse the Supreme Court justices of lying on the strength of such dubious evidence. However, he seems to want to extend his critique to encompass the entire American legal system, so that one could not maintain that the illegal and evil

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57. *Id.* at 33 (emphasis in original).

58. *Id.* at 35.

59. *Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by* U.S. CONST. amend. XVI (1868).

60. *Slaughter-House Cases*, 83 U.S. 36 (1873).

61. *The Civil Rights Cases*, 109 U.S. 3 (1883).

62. LYONS, *supra* note 8, at 39.

63. *Id.* at 36 (quoting *Scott*, 60 U.S. at 407).

64. *Id.* at 60.

65. *Id.* at 36.

66. *Id.* at 38.

67. *Id.* at 39.

conduct he decries was the work of political leaders acting at odds with the legal system. Thus Lyons concludes that his account challenges “the assumption (commonly made by Americans), that the U.S. provides a model of respect for the rule of law and exemplifies a system that supports political obligation.”<sup>68</sup>

While Lyons certainly demonstrates repeated failures on behalf of public officials to follow and enforce the law, the fact that our laws have consistently been better than our practice need not undermine citizens’ attachment to the rule of law. To the contrary, that fact ought perhaps to spur citizens concerned about official injustice to do everything in their power to demand that public officials live up to the demands of the law. That the practices Lyons decries remained prohibited by the letter of the law, even as they were officially tolerated, suggests that there must have been some obstacles preventing officials from simply changing the law to endorse their evil projects. That, in turn, suggests the existence of a space for citizens to mobilize to demand that the letter of the law be followed—a demand that would be less persuasively made if the citizens themselves gave evidence of repudiating their own commitment to regard the commands of the law as morally binding.

In chapters four and five, Lyons deepens and carries forward the history of racial injustice in America discussed in the first chapters of his book. Here, he aims to demonstrate empirically both that America has systematically oppressed blacks and that, at the key turning points, there were voices calling for justice, and that, therefore, the unjust policies our country adopted must be seen as having been adopted deliberately. His normative aim is to establish that the “political community as a whole” has an obligation to rectify the injustices it has inflicted upon blacks,<sup>69</sup> in part by making reparations of some kind for the whole ensemble of wrongs it perpetrated against blacks, which Lyons refers to as a “*Racial Subjugation Project*.”<sup>70</sup> To do so, the federal government ought to undertake a “*National Rectification Project*,” which would include a “comprehensive set of public programs” to “extinguish the relevant inequities” between blacks and whites.<sup>71</sup>

Lyons advances two principal lines of argument in support of his *National Rectification Project*, the first of which justifies the project by reference to a duty to remedy past wrongs, the second of which does not. In fact, Lyons considers several lines of argument that might justify the demand for reparation of past wrongs and notes the difficulties inherent in most of them. However, he finds promise in one mode of argument, which he calls “The Institution Model.”<sup>72</sup> The federal government has existed, continuously, as an institution since 1789, and during long stretches of that time, it unjustly deprived blacks of liberty, property, and dignity; because the victims of wrongs generally deserve compensation from the perpetrators of those wrongs, Lyons concludes that the federal government, being the perpetrator of the Racial Subjugation Project, owes its victims compensation. Although Lyons elsewhere distinguishes between governmental injustices perpetrated contrary to law and those conducted under color of law, he does not deploy that distinction here: what he elsewhere calls “the legally entrenched illegalities” are, for the purpose of

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68. *Id.* at 46.

69. *Id.* at 80.

70. *Id.* at 87 (emphasis added).

71. *Id.* at 104 (emphasis added).

72. *Id.* at 94.

this argument, treated as having been part of official policy, consistent with the effectual demands of the law.<sup>73</sup>

That the law should require compensation when one private party commits a legally cognizable wrong against another private party is a familiar principle. It does not, however, follow that when the government, acting according to law, violates the moral rights of some persons, it owes them compensation. The difference is that, within any given political community, the law defines who the citizens are and what rights and duties they have with respect to one another and to non-citizens. Any general principle demanding compensation for actions that were lawful when done but have been made unlawful by new legislation would yield absurd consequences and would fatally undermine the rule of law itself by running afoul of the principle that law must apply prospectively—which is the general principle underlying the constitutional prohibition on *ex post facto* laws. Society's notions of what justice requires change over time. Moreover, in the eyes of their supporters, every new law makes our society more just; some may be understood to end what is seen (by some) as governmentally supported injustice; others simply represent some improvement. Thus, as we strive to make our society better, we are constantly “discovering” that policies enacted in the past, in the belief that they were good and just, in fact are wrongs (or, under the new circumstances of the present, have ceased to be justifiable). The effort to remediate all such wrongs into the indefinite past not only would pose insuperable practical difficulties, but also would be unfair in principle. To hold the government liable today for the present consequences of past lawful actions would make present-day taxpayers foot the bill for actions that were lawful at the time.

That is presumably why our government does not generally pay compensation when we come to see that our law has treated some of our fellow citizens unjustly. Thus, for example, as the law of marriage has changed, gay couples have not generally been compensated: either for estate and other taxes they paid while same-sex marriages were not performed, or for any harm to the sense of dignity as equal citizens they may have suffered when same-sex couples were not permitted to marry.<sup>74</sup> Many supporters of the Affordable Care Act believe that the government has a duty to provide health insurance coverage to all—that the denial of such coverage constituted a serious injustice — but we are not now debating compensation for those who might have received subsidized coverage sooner, but did not.

Lyons offers a second line of argument to support his call for a National Rectification Project, but this one does not depend on any claim for remediating past wrongs. This argument begins from the observation that a commitment to the ideal of “fair competition” is widely shared.<sup>75</sup> But, as an empirical matter, children in this country are born into highly unequal conditions—conditions for which they are not themselves responsible.<sup>76</sup> If, as seems undeniable, “fair competition in . . . ‘the race of life’ requires a substantially equal set of opportunities and resources,” it follows that the government has a duty to make available such a set of opportunities and resources.<sup>77</sup> Hence, Lyons concludes, the far-

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73. *Id.* at 29.

74. *Cf. United States v. Windsor*, 133 S. Ct. 2675 (2013).

75. LYONS, *supra* note 8, at 105.

76. *Id.* at 104.

77. *Id.* at 105.

reaching public policies for which he calls are justified.<sup>78</sup>

That final conclusion, however, does not necessarily follow. The policy ends he articulates—happy and enriching homes and schools for children and the opportunity for all adults to live worthwhile lives, with sufficient access to the various external goods that make for commodious living, and leading to the ultimate emergence of a more broadly equal and inclusive society<sup>79</sup>—are already broadly shared across the American political spectrum. What divides the American political parties are not fundamentally the ends for which government should act, but the means of achieving those ends. Lyons, like others on the left, holds that governmental action to supply direct benefits to citizens can best achieve these goals. Partisans on the American right counter that governmental programs can inadvertently do more harm than good and urge that protecting liberty and spurring economic growth will yield better outcomes for all than will adding new governmental programs. To show that this or that program ought to be implemented today would also require providing good evidence that it is empirically likely to accomplish the desired goals without in the process causing greater problems than those the policy aims to alleviate. Such evidence will necessarily be context-specific, and given the current state of the empirical social sciences, it will often be controversial as well. As it was with the abortion debate, so it is also with the debate over how best to secure equal justice for all in the social, political, and economic spheres: attention to the legacy of slavery may be useful for inflaming partisan passions, but it does little to resolve the choices that citizens and political leaders now confront.

Ultimately, Lyons' commitment to the morality of universal, human rights, combined with his recognition of the terrible wrongs done through the centuries by public officials, leads him to reject the idea of a general moral presumption in favor of obeying the law.<sup>80</sup> Given that history, he writes, "to invoke the idea of a moral obligation to obey the law . . . requires, and promotes, moral myopia."<sup>81</sup> Instead, he celebrates the practitioners of civil disobedience and political resistance, including, most notably, Thoreau, who also rejected an obligation to obey the law and indeed—and, in Lyons's view, rightly—acknowledged "a duty to disobey."<sup>82</sup> Assuming that we have a general obligation to promote just institutions, Lyons concludes that this general obligation can entail a duty to disobey unjust laws, "[w]hen justice or fairness can best be promoted by disobedience."<sup>83</sup> Against those who would interpret Thoreau's justification for civil disobedience as being grounded in a desire simply to disengage himself from the unjust actions of his government, Lyons advances an interpretation of Thoreau that also includes a weighty "duty of reparation"—a duty to right the wrongs in which one has been complicit.<sup>84</sup>

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78. *Id.* at 105-06.

79. *Id.* at 107-08.

80. *Id.* at 46.

81. *Id.*

82. *Id.* at 153.

83. *Id.* at 160.

84. *Id.* at 174. Interestingly, the passage Lyons quotes from Thoreau suggests that the latter had a different view of what the duty of reparation required than does Lyons himself. Thoreau writes: "If I have unjustly wrested a plank from a drowning man, I must restore it to him though I drown myself . . . . This people must cease to own slaves, and to make war on Mexico, though it cost them their existence as a people." Henry David Thoreau, *Resistance to Civil Government*, in *THE WRITINGS OF HENRY DAVID THOREAU: REFORM PAPERS* 68 (Wendell Glick, ed., 1973). Note that Thoreau writes only "cease to own slaves," not something like: "free the slaves and provide additional compensation for their enslavement."

Thoreau, as Lyons notes, was one of the few intellectuals to offer a public defense of John Brown's raid on Harpers Ferry. Of Brown, Thoreau wrote:

He did not value his bodily life in comparison with ideal things. He did not recognize unjust human laws, but resisted them as he was bid . . . . No man in America has ever stood up so persistently and effectively for the dignity of human nature, knowing himself for a man, and the equal of any and all governments.<sup>85</sup>

Recall that on October 16, 1859 Brown and a small band of followers seized the arsenal at Harpers Ferry and attempted to ignite a slave revolt and general rebellion against the governments of the slave states. Though they failed in their aim to bring liberty to the slaves, in their unsuccessful effort to spark an insurrection, they succeeded in killing six civilians, two Marines, and ten of Brown's men. Brown, and most of the survivors, were captured and subsequently tried and executed for treason. Before his execution, Brown communicated his final message, which included the prediction that "the crimes of this *guilty, land: will never be purged away, but with Blood.*"<sup>86</sup>

#### CONCLUSION

Lyons does not say whether he approves of John Brown's raid, and he certainly affords no reason to think he endorses Brown's apocalyptic belief that American injustice could only be redeemed by blood. Nevertheless, he judges American history with the severity of an Old Testament prophet, and he takes care to add that slavery and Jim Crow are not the only wrongs for which contemporaries need atone.<sup>87</sup> And in filling out his bill of indictment against the American polity, he often sees the deliberate choice of evil where others might see error, or only the unfortunate consequences of well-intended decisions gone awry.<sup>88</sup> Dyer took pains to condemn such contemporaries as Scott Roeder, who invoke Brown's example to justify violence against abortion providers.<sup>89</sup> But Brown's example poses a challenge to both theorists, precisely because both insist on the individual's duty to act directly to carry out the demands of a justice that is higher than and antecedent to the laws of the state and both look back to the struggle against slavery as the paradigm for thinking about how to realize political justice in the present. Any doctrine of moral realism already stands in a certain tension with the demands of living in political society, because of the standing possibility that the laws will command what is unjust or forbid what morality deems imperative. That tension is exacerbated the more one trusts the certainty of one's own moral judgment and distrusts the countervailing judgments of others.

The irony and even perversity of looking to the abolition of slavery as an exemplar of political justice is that the United States managed to abolish slavery only in the wake of a terrible civil war, and that war, like every civil war, came about through a failure of

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85. Henry David Thoreau, *A Plea for Captain John Brown*, in 4 THE WRITINGS OF HENRY DAVID THOREAU 424-25 (1906).

86. STEPHEN B. OATES, *TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN* 351 (1970) (emphasis in original).

87. LYONS, *supra* note 8, at 106-07.

88. *But see id.* at 128 (stating that the American polity is "not morally bankrupt").

89. DYER, *supra* note 7, at 179-85.

constitutional government. Disagreement over the justice of slavery and its place in our constitutional order led to a horrific, bloody war and the total suspension of constitutional government in the seceded states and the adoption of measures (such as the military emancipation of the slaves) once held to be unthinkable. The Reconstruction that followed was a kind of military despotism—it was in the cause of justice and aimed to establish a genuinely republican order based on the full participation of blacks as well as whites, but the role of the Union Army in enforcing it meant that it constituted a breakdown of normal politics all the same. Nor need one be as severe a critic of the contemporary United States as is Lyons to conclude that, even so, the aim of achieving full equality for all Americans has yet to be fully realized.

Contemporary politics is sufficiently fractious that we do not need to be looking for ways to raise the temperature of debate or to feel ourselves justified in the unilateral imposition of our judgments about what justice requires on our fellow citizens, though they be unwilling. However wrong-headed we may believe our fellow-citizens to be, we must recall that they are our fellow-citizens, and they are likely to believe us equally in the wrong. And we must always keep somewhere in mind that they may be right: Our moral certainty in the rightness of our judgments does not make them true. Disagreement, of course, does not entail the truth of relativism—and relativism in any case would not entail either liberalism or the virtue of toleration.<sup>90</sup> However, moral disagreement is the ineliminable condition of politics, even in a polity that “holds . . . to be self-evident, that all [persons] are created equal and endowed by their Creator with certain unalienable [r]ights.”<sup>91</sup> If we value the good of living in a substantially peaceful, law-governed society, we must hope and expect that our disagreements with our fellow citizens will be resolved by the ordinary political processes set forth in our Constitution and our law, and unless the overwhelming majority of us follow the law in the overwhelming majority of cases, that good cannot be realized.

To approach the problems our country now faces with the passionate conviction that one is carrying on the work of the victorious abolitionists and conceiving of one’s partisan opponents as oppressors and slave-owners hardly conduces to the preservation of civil government. That is not to call for the abandonment of principles, but for an alteration in the spirit with which we carry on our political combat. If we must think of ourselves as fighting the modern analogues or legacies of slavery, then we should do so in the spirit of Lincoln’s Second Inaugural:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds . . . [and] to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.<sup>92</sup>

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90. Joseph Raz, *Liberalism, Scepticism, and Democracy*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 97-124 (1994).

91. The Declaration of Independence, 1 Stat. 1 (U.S. 1776).

92. Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), in 8 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 332-33 (Roy P. Basler, ed., 1953).