

THE
UNCONSTITUTIONALITY OF SLAVERY.

CHAPTER I.
WHAT IS LAW?

BEFORE examining the language of the Constitution, in regard to Slavery, let us obtain a view of the principles, by virtue of which *law* arises out of those constitutions and compacts, by which people agree to establish government.

To do this it is necessary to define the term *law*. Popular opinions are very loose and indefinite, both as to the true definition of law, and also as to the principle, by virtue of which law results from the compacts or contracts of mankind with each other.

What then is LAW? That law, I mean, which, and which only, judicial tribunals are morally bound, under all circumstances, to declare and sustain?

In answering this question, I shall attempt to show that law is an intelligible principle of right, necessarily resulting from the nature of man; and not an arbitrary rule, that can be established by mere will, numbers or power.

To determine whether this proposition be correct, we must look at the *general* signification of the term *law*.

The true and general meaning of it, is that *natural*, permanent, unalterable principle, which governs any particular thing or class of things. The principle is strictly a *natural* one; and the term applies to every *natural* principle, whether mental, moral or physical. Thus we speak of the laws of mind; meaning thereby those *natural*, universal and necessary principles, according to which mind acts, or by which it is governed. We speak too of the moral law; which is merely an universal principle of moral obligation, that arises out of the nature of men. and their relations to each

other, and to other things—and is consequently as unalterable as the nature of men. And it is solely because it is unalterable in its nature, and universal in its application, that it is denominated law. If it were changeable, partial or arbitrary, it would be no law. Thus we speak of physical laws; of the laws, for instance, that govern the solar system; of the laws of motion, the laws of gravitation, the laws of light, &c., &c.—Also the laws that govern the vegetable and animal kingdoms, in all their various departments: among which laws may be named, for example, the one that like produces like. Unless the operation of this principle were uniform, universal and necessary, it would be no law.

Law, then, applied to any object or thing whatever, signifies a *natural*, unalterable, universal principle, governing such object or thing. Any rule, not existing in the nature of things, or that is not permanent, universal and inflexible in its application, is no law, according to any correct definition of the term law.

What, then, is that *natural*, universal, impartial and inflexible principle, which, under all circumstances, *necessarily* fixes, determines, defines and governs the civil rights of men? Those rights of person, property, &c., which one human being has, as against other human beings?

I shall define it to be simply *the rule, principle, obligation or requirement of natural justice.*

This rule, principle, obligation or requirement of natural justice, has its origin in the natural rights of individuals, results necessarily from them, keeps them ever in view as its end and purpose, secures their enjoyment, and forbids their violation. It also secures all those acquisitions of property, privilege and claim, which men have a *natural* right to make by labor and contract.

Such is the true meaning of the term law, as applied to the civil rights of men. And I doubt if any other definition of law can be given, that will prove correct in every, or necessarily in any possible case. The very idea of law originates in men's natural rights. There is no other standard, than natural rights, by which civil law can be measured. Law has always been the name of that rule or principle of justice, which protects those rights. Thus we speak of *natural law*. Natural law, in fact, constitutes the great body of the law that is *professedly* administered by judicial tribunals: and it always necessarily must be—for it is impossible to anticipate a thousandth part of the cases that arise, so as to enact a special law for them. Wherever the cases have

not been thus anticipated, the natural law prevails. We thus politically and judicially *recognize* the principle of law as originating in the nature and rights of men. By recognizing it as originating in the nature of men, we recognize it as a principle, that is necessarily as immutable, and as indestructible as the nature of man. We also, in the same way, recognize the impartiality and universality of its application.

If, then, law be a natural principle—one necessarily resulting from the very nature of man, and capable of being destroyed or changed only by destroying or changing the nature of man—it necessarily follows that it must be of higher and more inflexible obligation than any other rule of conduct, which the arbitrary will of any man, or combination of men, may attempt to establish. Certainly no rule can be of such high, universal and inflexible obligation, as that, which, if observed, secures the rights, the safety and liberty of all.

Natural law, then, is the paramount law. And, being the paramount law, it is necessarily the only law: for, being applicable to every possible case that can arise touching the rights of men, any other principle or rule, that should arbitrarily be applied to those rights, would necessarily conflict with it. And, as a merely arbitrary, partial and temporary rule must, of necessity, be of less obligation than a natural, permanent, equal and universal one, the arbitrary one becomes, in reality, of no obligation at all, when the two come in collision. Consequently there is, and can be, correctly speaking, *no law but natural law*. There is no other principle or rule, applicable to the rights of men, that is obligatory in comparison with this, in any case whatever. And this natural law is no other than that rule of natural justice, which results either directly from men's natural rights, or from such acquisitions as they have a *natural* right to make, or from such contracts as they have a *natural* right to enter into.

Natural law recognizes the validity of all contracts which men have a *natural* right to make, and which justice requires to be fulfilled: such, for example, as contracts that render equivalent for equivalent, and are at the same time consistent with morality, the natural rights of men, and those rights of property, privilege, &c., which men have a natural right to acquire by labor and contract.

Natural law, therefore, inasmuch as it recognizes the natural right of men to enter into obligatory contracts, permits the formation of government, founded on contract, as all our governments

profess to be. But in order that the contract of government may be valid and lawful, it must purport to authorize nothing inconsistent with natural justice, and men's natural rights. It cannot lawfully authorize government to destroy or take from men their natural rights: for natural rights are inalienable, and can no more be surrendered to government—which is but an association of individuals—than to a single individual. They are a necessary attribute of man's nature; and he can no more part with them—to government or anybody else—than with his nature itself. But the contract of government may lawfully authorize the adoption of means—not inconsistent with natural justice—for the better protection of men's natural rights. And this is the legitimate and true object of government. And rules and statutes, not inconsistent with natural justice and men's natural rights, if enacted by such government, are binding, on the ground of contract, upon those who are parties to the contract, which creates the government, and authorizes it to pass rules and statutes to carry out its objects.*

But natural law tries the contract of government, and declares it lawful or unlawful, obligatory or invalid, by the same rules by which it tries all other contracts between man and man. A contract for the establishment of government, being nothing but a voluntary contract between individuals for their mutual benefit, differs, in nothing that is essential to its validity from any other contract between man and man, or between nation and nation. If two individuals enter into a contract to commit trespass, theft, robbery or murder upon a third, the contract is unlawful and void, simply because it is a contract to violate natural justice, or men's natural rights. If two nations enter into a treaty, that they will unite in plundering, enslaving or destroying a third, the treaty is unlawful, void and of no obligation, simply because it is contrary

* It is obvious that legislation can have, in this country, no higher or other authority, than that which results from natural law, and the obligation of contracts; for our constitutions are but contracts, and the legislation they authorize can of course have no other or higher authority than the constitutions themselves. The stream cannot rise higher than the fountain. The idea, therefore, of any *inherent* authority or sovereignty in our governments, *as governments*, or of any inherent right in the majority to restrain individuals, by arbitrary enactments, from the exercise of any of their natural rights, is as sheer an imposture as the idea of the divine right of kings to reign, or any other of the doctrines on which arbitrary governments have been founded. And the idea of any necessary or inherent authority in legislation, *as such*, is, of course, equally an imposture. If legislation be consistent with natural justice, and the natural or intrinsic obligation of the contract of government, it is obligatory: if *not*, not.

to justice and men's natural rights. On the same principle, if the majority, however large, of the people of a country, enter into a contract of government, called a constitution, by which they agree to aid, abet or accomplish any kind of injustice, or to destroy or invade the natural rights of any person or persons whatsoever, whether such persons be parties to the compact or not, this contract of government is unlawful and void—and for the same reason that a treaty between two nations for a similar purpose, or a contract of the same nature between two individuals, is unlawful and void. Such a contract of government has no moral sanction. It confers no rightful authority upon those appointed to administer it. It confers no legal or moral rights, and imposes no legal or moral obligation upon the people who are parties to it. The only duties, which any one can owe to it, or to the government established under color of its authority, are disobedience, resistance, destruction.

Judicial tribunals, sitting under the authority of this unlawful contract or constitution, are bound, equally with other men, to declare it, and all unjust enactments passed by the government in pursuance of it, unlawful and void. These judicial tribunals cannot, by accepting office under a government, rid themselves of that paramount obligation, that all men are under, to declare, if they declare anything, that justice is law; that government can have no lawful powers, except those with which it has been invested by lawful contract; and that an unlawful contract for the establishment of government, is as unlawful and void as any other contract to do injustice.

No oaths, which judicial or other officers may take, to carry out and support an unlawful contract or constitution of government, are of any moral obligation. It is immoral to take such oaths, and it is criminal to fulfil them. They are, both in morals and law, like the oaths which individual pirates, thieves and bandits give to their confederates, as an assurance of their fidelity to the purposes for which they are associated. No man has any moral right to assume such oaths; they impose no obligation upon those who do assume them; they afford no moral justification for official acts, in themselves unjust, done in pursuance of them.

If these doctrines are correct, then those contracts of government, state and national, which we call constitutions, are void, and unlawful, so far as they purport to authorize, (if any of them do authorize,) anything in violation of natural justice, or the natural

rights of any man or class of men whatsoever. And all judicial tribunals are bound, by the highest obligations that can rest upon them, to declare that these contracts, in all such particulars, (if any such there be,) are void, and not law. And all agents, legislative, executive, judicial and popular, who voluntarily lend their aid to the execution of any of the unlawful purposes of the government, are as much personally guilty, according to all the moral and legal principles, by which crime, in its essential character, is measured, as though they performed the same acts independently, and of their own volition.

Such is the true character and definition of law. Yet, instead of being allowed to signify, as it in reality does, that natural, universal and inflexible principle, which has its origin in the nature of man, keeps pace everywhere with the rights of man, as their shield and protector, binds alike governments and men, weighs by the same standard the acts of communities and individuals, and is paramount in its obligation to any other requirement which can be imposed upon men—instead, I say, of the term law being allowed to signify, as it really does, this immutable and overruling principle of natural justice, it has come to be applied to mere arbitrary rules of conduct, prescribed by individuals, or combinations of individuals, self-styled governments, who have no other title to the prerogative of establishing such rules, than is given them by the possession or command of sufficient physical power to coerce submission to them.

The injustice of these rules, however palpable and atrocious it may be, has not deterred their authors from dignifying them with the name of *law*. And, what is much more to be deplored, such has been the superstition of the people, and such their blind veneration for physical power, that this injustice has not opened their eyes to the distinction between law and force, between the sacred requirements of natural justice, and the criminal exactions of unrestrained selfishness and power. They have thus not only suffered the name of law to be stolen, and applied to crime as a cloak to conceal its true nature, but they have rendered homage and obedience to crime, under the name of law, until the very name of law, instead of signifying, in their minds, an immutable principle of right, has come to signify little more than an arbitrary command of power, without reference to its justice or its injustice, its innocence or its criminality. And now, commands the most criminal, if christened with the name of law, obtain nearly as ready an

obedience, oftentimes a more ready obedience, than law and justice itself. This superstition, on the part of the people, which has thus allowed force and crime to usurp the name and occupy the throne of justice and law, is hardly paralleled in its grossness, even by that superstition, which, in darker ages of the world, has allowed falsehood, absurdity and cruelty to usurp the name and the throne of religion.

But I am aware that other definitions of law, widely different from that I have given, have been attempted—definitions too, which practically obtain, to a great extent, in our judicial tribunals, and in all the departments of government. But these other definitions are nevertheless, all, in themselves, uncertain, indefinite, mutable; and therefore incapable of being standards, by a reference to which the question of law, or no law, can be determined. Law, as defined by them, is capricious, arbitrary, unstable; is based upon no fixed principle; results from no established fact; is susceptible of only a limited, partial and arbitrary application; possesses no intrinsic authority; does not, in itself, recognize any moral principle; does not necessarily confer upon, or even acknowledge in individuals, any moral or civil rights; or impose upon them any moral obligation.

For example. One of these definitions—one that probably embraces the essence of all the rest—is this:

That "law is a rule of civil conduct, prescribed by the supreme power of a state, commanding what its subjects are to do, and prohibiting what they are to forbear."—*Noah Webster*.

In this definition, hardly anything, that is essential to the idea of law, is made certain. Let us see. It says that,

"Law is a rule of civil conduct, prescribed by the *supreme power* of a state."

What is the "supreme power," that is here spoken of, as the fountain of law? Is it the supreme physical power? Or the largest concentration of physical power, whether it exist in one man or in a combination of men? Such is undoubtedly its meaning. And if such be its meaning, then the law is uncertain; for it is oftentimes uncertain where, or in what man, or body of men, in a state, the greatest amount of physical power is concentrated. Whenever a state should be divided into factions, no one having the supremacy of all the rest, law would not merely be inefficient, but the very principle of law itself would be actually extinguished. And men would have no "rule of civil conduct." This result alone is sufficient to condemn this definition.

Again. If physical power be the fountain of law, then law and force are synonymous terms. Or, perhaps, rather, law would be the result of a combination of will and force ; of will, united with a physical power sufficient to compel obedience to it, but not necessarily having any moral character whatever.

Are we prepared to admit the principle, that there is no real distinction between law and force? If not, we must reject this definition.

It is true that law may, in many cases, depend upon force as the means of its practical efficiency. But are law and force therefore identical in their essence ?

According to this definition, too, a command to do injustice, is as much law, as a command to do justice. All that is necessary, according to this definition, to make the command a law, is that it issue from a will that is supported by physical force sufficient to coerce obedience.

Again. If mere will and power are sufficient, of themselves, to establish law—legitimate law—such law as judicial tribunals are morally bound, or even have a moral right to enforce—then it follows that wherever will and power are united, and continue united until they are successful in the accomplishment of any particular object, to which they are directed, they constitute the only legitimate law of that case, and judicial tribunals can take cognizance of no other.

And it makes no difference, on this principle, whether this combination of will and power be found in a single individual, or in a community of an hundred millions of individuals.—The numbers concerned do not alter the rule—otherwise law would be the result of numbers, instead of “supreme power.” It is therefore sufficient to comply with this definition, that the power be equal to the accomplishment of the object. And the will and power of one man are therefore as competent to make the law relative to any acts which he is able to execute, as the will and power of millions of men are to make the law relative to any acts which they are able to accomplish.

On this principle, then—that mere will and power are competent to establish the law that is to govern an act, without reference to the justice or injustice of the act itself, the will and power of any single individual to commit theft, would be sufficient to make theft lawful, as lawful as is any other act of injustice, which the will and power of communities, or large bodies of men, may be

wanted to accomplish. And judicial tribunals are as much bound to recognize, as lawful, any act of injustice or crime, which the will and power of a single individual may have succeeded in accomplishing, as they are to recognize as lawful any act of injustice, which large and organized bodies of men, self-styled governments, may accomplish.

But, perhaps it will be said that the soundness of this definition depends upon the use of the word "state"—and that it therefore makes a distinction between "the supreme power of a state," over a particular act, and the power of an individual over the same act.

But this addition of the word "state," in reality leaves the definition just where it would have been without it. For what is "a state?" It is just what, and only what, the will and power of individuals may arbitrarily establish.

There is nothing *fixed* in the nature, character or boundaries of "a state." Will and power may alter them at pleasure. The will and power of Nicholas, and that will and power which he has concentrated around, or rather within himself, establishes all Russia, both in Europe and Asia, as "a state." By the same rule, the will and power of the owner of an acre of ground, may establish that acre as a state, and make his will and power, for the time being, supreme and lawful within it.

The will and power, also, that established "a state" yesterday, may be overcome to-day by an adverse will and power, that shall abolish that state, and incorporate it into another, over which this latter will and power shall to-day be "supreme." And this latter will and power may also to-morrow be overcome by still another will and power mightier than they.

"A state," then, is nothing fixed, permanent or certain in its nature. It is simply the boundaries, within which any single combination or concentration of will and power are efficient, or irresistible, *for the time being*.

This is the only true definition that can be given of "a state." It is merely an arbitrary name given to the territorial limits of power. And if such be its true character, then it would follow, that the boundaries, though but two feet square, within which the will and power of a single individual are, *for the time being*, supreme, or irresistible, are, for all *legal* purposes, "a state"—and his will and power constitute, for the time being, the law within those limits; and his acts are, therefore, for the time being,

as necessarily lawful, without respect to their intrinsic justice or injustice, as are the acts of larger bodies of men, within those limits where their will and power are supreme and irresistible.

If, then, law really be what this definition would make it, merely "a rule of civil conduct prescribed by the supreme power of a state"—it would follow, as a necessary consequence, that law is synonymous merely with will and force, wherever they are combined and in successful operation, for the present moment.

Under this definition, law offers no permanent guaranty for the safety, liberty, rights or happiness of any one. It licenses all possible crime, violence and wrong, both by governments and individuals. The definition was obviously invented by, and is suited merely to gloss over the purposes of, arbitrary power. We are therefore compelled to reject it, and to seek another, that shall make law less capricious, less uncertain, less arbitrary, more just, more safe to the rights of all, more permanent. And if we seek another, where shall we find it, unless we adopt the one first given, viz., *that law is the rule, principle, obligation or requirement of natural justice?*

Adopt this definition, and law becomes simple, intelligible, scientific; always consistent with itself; always harmonizing with morals, reason and truth. Reject this definition, and law is no longer a science: but a chaos of crude, conflicting and arbitrary edicts, unknown perchance to either morals, justice, reason or truth, and fleeting and capricious as the impulses of will, interest and power.

If, then, law really be nothing other than the rule, principle obligation or requirement of natural justice, it follows that government can have no powers except such as individuals may *rightfully* delegate to it: that no law, inconsistent with men's natural rights, can arise out of any contract or compact of government: *that constitutional law, under any form of government, consists only of those principles of the written constitution, that are consistent with natural law, and man's natural rights;* and that any other principles, that may be expressed by the letter of any constitution, are void and not law, and all judicial tribunals are bound to declare them so.

Though this doctrine may make sad havoc with constitutions and statute books, it is nevertheless law. It fixes and determines the real rights of all men; and its demands are as imperious as any that can exist under the name of law.

It is possible, perhaps, that this doctrine would spare enough of our existing constitutions, to save our governments from the necessity of a new organization. But whatever else it might spare, one thing it would not spare. It would spare no vestige of that system of human slavery, which now claims to exist by authority of law.*

* The mass of men are so much accustomed to regard law as an arbitrary command of those who administer political power, that the idea of its being a *natural*, fixed, and immutable principle, may perhaps want some other support than that of the reasoning already given, to commend it to their adoption. I therefore give them the following corroborations from sources of the highest authority.

"Jurisprudence is the science of what is just and unjust."—*Justinian*.

"The primary and principal objects of the law are rights and wrongs."—*Blackstone*.

"Justice is the constant and perpetual disposition to render to every man his due."—*Justinian*.

"The precepts of the law are to live honestly; to hurt no one; to give to every one his due."—*Justinian & Blackstone*.

"LAW. The rule and bond of men's actions; or it is a rule for the well governing of civil society, to give to every man that which doth belong to him."—*Jacob's Law Dictionary*.

"Laws are arbitrary or positive, and natural; the last of which are essentially just and good, and bind everywhere, and in all places where they are observed. * *

* * Those which are natural laws, are from God; but those which are arbitrary, are properly human and positive institutions."—*Selden on Fortescue, C. 17, also Jacob's Law Dictionary*.

"The law of nature is that which God, at man's creation, infused into him, for his preservation and direction; and this is an eternal law, and may not be changed."—*2 Sæp. Abr. 356, also Jac. Law Dict.*