

Big Enough to Be Inconsistent: Abraham Lincoln Confronts Slavery and Race

By George M. Fredrickson

Harvard University Press, Cambridge, MA, 2008. 156 pages, \$19.95.

REVIEWED BY HENRY COHEN

Views on racism and on slavery are, obviously, logically distinct: one can be a racist without favoring slavery, and one can attempt to justify slavery on a basis other than race. George Fredrickson's *Big Enough to Be Inconsistent: Abraham Lincoln Confronts Slavery and Race* addresses Abraham Lincoln's attitudes toward slavery and race separately. This fine little book, whose author died earlier this year, shows how Lincoln felt about slavery and racism and how he stood up against both. Or, more accurately, it shows the *extent* to which Lincoln stood up against them. Lincoln, as the title of this book suggests, was not consistent on these matters.

Let's start with Lincoln's attitude toward slavery. Fredrickson finds no reason to doubt that Lincoln disapproved of slavery from an early age. Yet Lincoln did not concern himself much about slavery until the Kansas-Nebraska Act of 1854 opened the way for the possible expansion of slavery into the territories, where, since 1820, it had been prohibited by the Missouri Compromise. Lincoln acknowledged that, until 1854, slavery had been "a minor question" for him, as he had "rested in the hope and belief that it was in the course of ultimate extinction." Because the Constitution protected slavery in the states where it existed, Lincoln believed that the federal government was precluded from taking any action against slavery beyond limiting its expansion to the territories and abolishing it in the District of Columbia. Thus, although he opposed slavery, Lincoln continued, well into the Civil War, to favor gradual, compensated emancipation accompanied by voluntary emigration and colonization by freed blacks. He did not become an abolitionist until he supported the Thirteenth Amendment late in the Civil War.

Lincoln distinguished his personal opinions on slavery and racism from his political statements. A politician may be inconsistent in this respect solely out of personal ambition, as when John McCain, who has said that he opposes torture, voted for it in the Military Commissions Act of 2006, presumably in order to improve his chances of winning the Republican nomination for President. But a politician may be inconsistent for better reasons than personal ambition. As President, Lincoln believed that the only way to abolish slavery was to win the Civil War, and, to win the Civil War, Lincoln needed the support of pro-slavery Democrats, of border states that permitted slavery but had not seceded from the Union, and of Union soldiers who were willing to fight to save the Union but not to end slavery. To abolish slavery, therefore, Lincoln had to oppose its immediate abolition. In his famous open letter to Horace Greeley, Lincoln acknowledged his "*personal* wish that all men every where could be free," but wrote, "My paramount object in [the Civil War] is to save the Union, and is *not* either to save or destroy slavery. If I could save the Union without freeing *any* slave I would do so, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that." As he wrote these words, Lincoln was drafting the Emancipation Proclamation, which was to free some of the slaves, and by allowing freed slaves to become Union soldiers, would help win the Civil War and free all the slaves.

As to racism, however, as opposed to slavery, Lincoln does not look as good. He apparently was a racist, or at least pandered to racists out of personal ambition. Fredrickson writes that "the prewar Lincoln was clearly a white supremacist, but of a relatively passive or reactive kind as compared with his Democratic opponents. ... Lincoln's personal attitudes, to the extent that we can determine them, were much closer to racism as conformity than to racism as pathology." It must have been hard not to conform: How many white people in America were not racists in

the 1850s? This fact does not excuse Lincoln's racism, however, as not everyone conformed to society's norms; John Brown, for example, was not a racist (only a murderer).

Fredrickson writes that "Lincoln would not have had a chance in the 1858 election if he had not publicly conformed to the white supremacist consensus among the voters." In that campaign for the U.S. Senate, Stephen Douglas attempted to equate Lincoln's opposition to slavery with support for black equality, and even for intermarriage. Lincoln protested that he did not favor equality, but only a person's "natural right to eat the bread she earns with her own hands," and that it did not follow that "because I do not want a black woman for a slave I must necessarily want her for a wife." Lincoln lost that election in the state legislature because of gerrymandering, even though his party had won the popular vote.

During the war, Lincoln grew to support equality, in part because of the heroism of black soldiers who fought for the Union. Fredrickson writes,

Before blacks actually went into battle, Lincoln was skeptical about their military potential. ... Shortly before he issued the Preliminary Emancipation Proclamation, he expressed ... his fear that "if we were to arm them ... in a few weeks the arms would be in the hands of the rebels," implying that blacks would drop their weapons and run or abjectly surrender at the first sign of combat. But once blacks proved themselves under fire in June and July of 1863, fighting heroically at Port Hudson and Milliken's Bend on the lower Mississippi and at Fort Wagner in South Carolina, Lincoln recognized their enormous potential to the Union cause.

Although the evidence is not conclusive, a case can be made that Lincoln, in Fredrickson's words, "went beyond being an anti-slavery white supremacist to become a true egalitarian—like the abolitionists and Radical Republicans."

Frederick Douglass may have summed up Lincoln's accomplishment best: "Viewed from genuine abolition grounds, Mr. Lincoln seemed tardy, cold, dull, and indifferent; but measuring him by the sentiment of his country, a sentiment he was bound as a statesman to consult, he was swift, zealous, radical, and determined." **TFL**

Henry Cohen is the book review editor of The Federal Lawyer.

Opposing the Crusader State: Alternatives to Global Intervention

Edited by Carl P. Close and Robert Higgins
The Independent Institute, Washington, DC,
2007. 320 pages, \$15.95.

REVIEWED BY GEORGE W. GOWEN

In a casual remark five days after Sept. 11, 2001 (can it really be seven years already?), President George W. Bush said, "This crusade, this war on terrorism, is going to take a while." The word "crusade" may be loosely defined as aggressive action in pursuit of a cause, but the historical reference, of course, is to the endeavors undertaken by Christians during three centuries to liberate Jerusalem from the Mohammedans. Bush's unfortunate word choice brings to mind not only the calamities of the Crusades but also the religious animosities that America has long shunned.

The word "crusade" can be used in a positive or negative sense; as an example of the former, Dwight D. Eisenhower's book on his role in World War II bore the title *Crusade in Europe*. The writers featured in *Opposing the Crusader State*, however, find it difficult to accept that there are crusades—and then there are crusades. The authors of the essays use "crusade" to castigate virtually all overseas interventions by the United States anywhere at any time—even, by implication, Eisenhower's crusade.

The book's publisher, The Independent Institute, is a nonpartisan educational organization that sponsors studies of political, social, and economic issues. In the institute's own words, it "expands the frontiers of knowledge, redefines debate over public issues, and fosters new and effective directions for govern-

ment reform." The institute's founder and president is the eminent David J. Theroux, who was also a founder and officer of the Cato Institute. Some might call him a libertarian—one who champions the individual over the collective. Libertarians are a wonderful breed. They march to the beat of their own drummer, care not a whit for popular opinion, and make the rest of us pause and question our basic assumptions.

Spanning the centuries, the divergent directions of American foreign policy pit adherents of nonintervention, including George Washington, Thomas Jefferson, and John Quincy Adams, against interventionists, such as Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, Ronald Reagan, and of course both Bushes. Washington's farewell warning was echoed by Jefferson's "peace, commerce, and honest friendship with all nations, entangling alliances with none." A century later, Wilson strode into a foreign war to "make the world safe for democracy." A couple of decades after that, FDR sought to secure the four freedoms "everywhere in the world." There is no mention in this volume of Reagan's "Mr. Gorbachev, tear down this wall!" or George W. Bush's statement quoted in the opening of this review.

Opposing the Crusader State contains 14 essays grouped under the headings, "American Noninterventionism," "The Case Against Nation Building," "Debating the Democratic Peace," and "Free Trade as a Peace Strategy." Early in the book, we learn about the negative aspects of the War of 1812, the Monroe Doctrine, the Spanish-American War, and the Civil War, which, according to an essay in the book, "established numerous dangerous and illiberal precedents, including conscription, suppression of dissent, and inflationary war finance." The essay adds that, taken as a whole, Lincoln's actions, which he based on special executive war powers that he invented out of whole cloth, amounted to "presidential dictatorship."

H.L. Mencken's hatred of Franklin Roosevelt and of his war is resurrected in another essay, which views Roosevelt's domestic policies as well as his foreign policy as having been a threat to individual liberties. Other essays in the book

also decry America's entry into World War II, and one essay argues that, when President Truman entered the Korean War without asking Congress for a declaration of war, America had "crossed the boundary that lies between Republic and Empire." Jumping ahead to the present, one essay concludes with the following statement: "It would be correct to say, then, that a high-violence society such as Iraq cannot become a democracy. It probably will become one in the long run. One doubts, however, that those who urged invasion of Iraq in order to establish democracy there had any inkling that the process will likely require the greater part of a century." Even that estimate may be optimistic.

Another essay includes a chart of American and British occupations of other nations from 1850 to 2000. Of the 24 enumerated American occupations, eight are labeled a success: those of Austria, the Dominican Republic, Grenada, Italy, Japan, Panama, the Philippines, and West Germany. Of the 27 British occupations, five make the grade: those in Botswana, Fiji, Malaysia, the Solomon Islands, and Tonga. The same essay also criticizes postwar U.S. policy as punitive rather than as nation building, adding that the record "shows, then, that from a standpoint of promoting democracy, the U.S. occupation of Germany was extraordinarily inept. Yet, despite the miscues, democracy emerged in Germany." The essay asks, "How do we explain this result?" and suggests that the answer is that there is a "cultural dimension to the process." According to the essay, Germany was not a nation "[w]here political leaders are inclined to use violence against each other—violence in the form of political murders, gang attacks, and armed revolts." In such a nation, "democracy cannot survive. It will tend to collapse into civil war or repressive dictatorship."

After a series of further thought-provoking essays, the book addresses the alternatives to global intervention mentioned in the subtitle. In these essays we find libertarianism in full voice: "Capitalism and economic freedom promote peace" and "the pacifying effect of trade might be even stronger than the pacifying effect of democracy." Although nation building may be ineffective, glo-

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balization provides reason for hope. Although protectionism may be politically attractive, it “harms consumers, reduces the speed of wealth-enhancing structural change, and diminishes opportunities for employees to move to better-paid jobs producing for global markets.”

Opposing the Crusader State is a scholarly work that goes behind today's news and delves into history and, more important, into economic and political theories that can have practical application. I remember Robert Frost's commenting at my college, in about 1951, that we have a pretty good looking suit of clothes in America, but we shouldn't expect it to fit everyone in the world. **TFL**

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Deportation Nation: Outsiders in American History

By Daniel Kanstroom

Harvard University Press, Cambridge, MA, 2007. 352 pages, \$45.00.

REVIEWED BY BOB BEER

Daniel Kanstroom's thesis in *Deportation Nation* is simple: This country's immigration system is and has been a means of both governmental border control and post-entry social control. Kanstroom, a professor and the director of the Human Rights Program at Boston College Law School, writes that his book purports to answer a mother's question as to how the United States could impose on her son a lifetime ban from being admitted to this country for violating a minor criminal law.

A secondary purpose of *Deportation Nation* is to demonstrate just how much unbridled discretion the American government has had and continues to have over the expulsion of noncitizens from this nation of immigrants. Kanstroom offers analogies between American deportation policies (now called “removal” policies) and this country's treatment of

Native Americans, African-Americans, and, now, alleged terrorists. In addition, Kanstroom clearly shows how today's debates over immigration are no different from those that took place 100 or 200 years ago. Indeed, the more things change, the more they stay the same.

Kanstroom starts by analyzing pre-1776 British policies regarding immigration to the colonies. After the United States became a nation, debate arose over whether the federal government or the states should control immigration policy, and the debate continued even after Article I, section 8, clause 4 of the U.S. Constitution established that Congress has the power “[t]o establish a uniform Rule of Naturalization.” James Madison said that “it cannot be a true inference, that because the admission of an alien is a favor, the favor may be revoked at pleasure.” Kanstroom also takes us back to the arguments that led to the Alien and Sedition Act of 1798.

Kanstroom devotes much space to the way American immigration policy was, in no small part, formed by the Supreme Court's decisions under the “plenary power” doctrine, which gives Congress alone sweeping authority to regulate all aspects of immigration. Congress' plenary power has been used to justify federal government action ranging from the cases involving the exclusion of Chinese immigrants to the recent decisions regarding “enemy combatants” and their incarceration at Guantanamo Bay.

From the deportation of self-proclaimed anarchist Emma Goldman in 1919, to Attorney General Mitchell Palmer's raids against alleged left-wing subversives in the 1920s, to the use of immigration laws against members of groups involved in organized crime and the Communist Party in later decades, and to the internment of Japanese-Americans during World War II, *Deportation Nation* weaves a fascinating tale of the good, the bad, and the ugly sides of American immigration law. Kanstroom illustrates the government's selective use of immigration law, especially during periods of war and national emergencies.

Finally, Kanstroom assesses the extent to which due process and other legal rights that have and, more importantly, have not been extended to

America's immigrants during the past two centuries. This is a timely book, and I highly recommend it. **TFL**

Bob Beer practices immigration law in Marietta, Ga. This review is a revised version of one that appeared in the Georgia Bar Journal, vol. 13, no. 4 (Dec. 2007). © 2007 State Bar of Georgia. Statements in this article should not be considered endorsements of products or procedures by the State Bar of Georgia.

e-Discovery: Current Trends and Cases

By Ralph C. Losey

American Bar Association, Chicago, IL, 2008. 200 pages, \$99.95.

REVIEWED BY BILL HAMILTON

Discovery burst onto the federal litigation scene in 1938, when the Federal Rules of Civil Procedure were amended to permit “Depositions and Discovery” (today called “Disclosures and Discovery”). Prior to 1938, the civil justice system provided for little or no exchange of information between the litigants. This state of affairs was widely criticized as encouraging sharp practices and ambush at trial. The use of the tools of discovery—interrogatories, requests for production, and depositions—were intended to eliminate surprises at trial as well as unfair advantage. Discovery was intended to encourage transparency; the exchange of “relevant” information after the close of pleadings and before trial was meant to restore integrity to the civil justice system.

Discovery quickly became a major battleground in civil litigation—the stage at which cases were frequently won or lost. Trial attorneys rarely visited the courthouse, except to argue discovery disputes. Ninety-eight percent of federal cases were settled, partly because of financial exhaustion and fatigue after years of discovery. Discovery abuses were common and led to amendments to the Federal Rules of Civil Procedure requiring early disclosures and limitations on the number of depositions and interrogatories. Nevertheless, the civil

justice system worked, in the sense that disputes were resolved. But beneath it all was the nagging question of whether discovery was worth the cost and delay. After all, international arbitration seemed to work quite well with a modicum of information exchange. Nor was any other nation rushing to adopt our model of discovery.

Now comes the 21st century's digital deluge. The amount of data is voluminous; the files are stored in a multitude of locations, transmitted effortlessly, and changed or lost easily. The impact on discovery is harrowing. An ever-expanding universe of devices creates, stores, processes, and transmits data. Data oozes out of every pore of technology. In litigation, what fraction of this data should be gathered, collected, and reviewed? Court opinions grappling with seemingly intractable e-discovery issues appear almost daily. Hundreds of legal blogs endlessly discuss e-discovery and computer forensics. E-discovery vendors offer increasingly sophisticated services. Think tanks, such as The Sedona Conference®, offer recommended best practices and revised best practices. Literally hundreds of books and articles have been published on e-discovery, and law schools offer courses on electronic evidence and e-discovery. Ironically, the deluge of e-discovery information has become an example of the very problem of the proliferation of information that e-discovery was meant to solve.

Amidst this cacophony, Ralph Losey's *e-Discovery: Current Trends and Cases* stands alone as the best introduction to and commentary on the e-discovery epoch. Losey has been writing a pre-eminent blog on e-discovery for the past two years and has recently completed his 100th post. Losey is not merely a litigator, an academic, or a computer specialist; he is all of these—a genuine Renaissance man. In each of his blogs, Losey takes on a discrete theme—be it a case, an article, technology, or an event—and plumbs it for its significance. Losey has now collected and organized many of his blog postings into this wonderful book on e-discovery, which captures the panorama of the landscape. The book is organized by topic and provides immediate answers to pressing problems, such as

whether and when backup tapes must be preserved and when metadata must be produced. Each chapter reflects the work of a dedicated practitioner grappling with e-discovery problems as they have surfaced over the past few years.

Losey's persistent premise is that e-discovery requires a cooperative team composed of retained counsel, company managers, and information technology professionals—all of whom must plan for e-discovery and implement the plan when the inevitable litigation or investigation arrives. Losey states that “[t]he consensus solution to [the e-discovery] problem is the formation of an e-Discovery Team, an interdepartmental group comprised of lawyers, IT and management. It rests on the three pillars of knowledge essential to effective e-discovery: Information Science, Law and Technology.”

E-discovery is difficult work that requires sophisticated thought and planning, but Losey is not a prophet of e-discovery doom, gloom, and demise. For Losey, e-discovery offers a world of opportunity, and it is a far, far better world that we enter. *e-Discovery* is simply effervescent in its enthusiasm.

Discovery used to be the boring part of litigation. Litigators amassed boxes and boxes of paper and then reviewed page after page of mostly worthless documents. This mind-numbing work drove brilliant associates to madness or back to school to become anything but a lawyer. Not any more! Losey shows how the digital deluge has made discovery—now rechristened as e-discovery—intellectually exciting and challenging. E-discovery is for those with imagination and for the courageous, who enjoy ever new challenges. Losey's *e-Discovery* takes us on a ride full of intellectual enjoyment and practical challenges. He is confident that hard work and clear thinking—albeit financed by client dollars—will solve e-discovery problems. Seemingly believing that history presents us only with problems that have answers on the horizon, Losey sees the e-discovery revolution as bubbling with solutions to the problems it has created. For example, Losey forcefully—indeed brilliantly—advocates for the use of hashing as an alternative to the 150-year-old practice of stamping numbers sequentially on paper documents. The hashing algorithm gives each electronic file (docu-

ment) its own fingerprint. And terabytes of data can now be handled by conceptual searching rather than by key words. Why use brute force when new technologies can more quickly and easily focus the search for key documents?

For Losey, all that is needed is trained dedicated professionals who grasp the e-Discovery Team solution. Indeed, Losey has little patience for the bungling lawyering that lies behind most e-discovery disasters—bungling that Losey suspects is often a reflection of compromised motives and gamesmanship. Losey sees e-discovery disasters as morality plays that illustrate the vices of inadequate professionalism; for example, two of his chapters are titled, “Court Disapproves Defendant's ‘Hide the Ball’ Discovery Gamesmanship” and “Nonchalant Review Causes Waiver of Attorney-Client Privilege.”

E-discovery may be an exciting intellectual and practical challenge, but the process also creates new pressure points and opens old wounds. All is not completely rosy. As Losey notes, e-discovery has dramatically changed the relationship between the client and retained counsel. Courts now increasingly hold retained counsel responsible for discovery failures. Thus, retained counsel must increasingly demand to participate in all aspects of the e-discovery process. Long gone are the days when the request to produce information was forwarded to the client by retained counsel, who then received boxes of “responsive” documents. Unfortunately, clients do not always welcome rigorous involvement by retained counsel in the client's data preservation and management practices. To what degree can retained counsel rely on representations made by their clients and in-house counsel without being accused of willful blindness, as occurred in *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008), *vacated and remanded in part*, 2008 WL 638108 (S.D. Cal. 2008)? E-discovery has heightened the tension between retained counsel as a zealous advocate and as an officer of the court, who must make representations as to the quality of the client's e-discovery performance.

E-discovery has also front-loaded the costs of litigation. Data must be preserved

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immediately, and this is a complex and difficult task that requires the prompt and full involvement of Losey's proposed e-Discovery Team. Thus, e-discovery legal and vendor fees arrive quickly with the onset of litigation. Most distressing is that much of the data that must be preserved and reviewed are simply background noise and chatter. Most laptop computers can store 100 gigabytes of data. Stripping out operating software and applications, unnecessary logs, and irrelevant content may reduce the 100-gigabyte drive to a few gigabytes of data for review. But reviewing a single gigabyte of data (equivalent to a pickup truck full of paper) requires a month's work for one associate. And what happens if there are 100 custodians of information "reasonably calculated to lead to the discovery of admissible evidence"? Without pluck, imagination, and a bit of savvy, the costs that accompany e-discovery can quickly become astronomical.

This is where Losey's e-Discovery

Team approach provides ballast: We have the power to shape our new digital reality in a way that solves the old doubts about the value and efficacy of discovery. The digital deluge has brought about civil rule amendments and technological advances that allow us to corral "relevance gone wild." The clarion message of *e-Discovery* is that we will never find every relevant bit of data. Looking for the proverbial needle in the haystack is an invitation to failure. As noted in "Information Inflation: Can the Legal System Adapt?" (13 *Richmond Journal of Law and Technology* 10 (2007)), discovery will likely become a "virtuous cycle" of iterative feedback loops supported by new technologies, competent technology counsel, and a healthy dose of wisdom and skepticism from the bar and the judiciary. E-discovery is not a maniacal demand to preserve, capture, review, and produce every bit of data lurking on the margin of relevance. No,

the task of the e-discovery practitioner is to find the important information quickly and efficiently.

Losey may be right: with the right teamwork, e-discovery may offer solutions to the conundrums it has created. The story is still in the making. Meanwhile, Losey's *e-Discovery* cracks open our oyster minds and shows us how to work and think in our emerging digital legal environment. **TFL**

Bill Hamilton is board-certified in business litigation and intellectual property by the Florida Bar. He currently serves as the co-chair of the Holland & Knight's e-discovery practice group and teaches electronic discovery as an adjunct professor at the University of Florida's Levin College of Law. He is a member of The Sedona Conference®. Hamilton knows the author of the book, Ralph Losey, whose son was a student in the inaugural course on electronic discovery and evidence that Hamilton taught at the University of Florida.

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