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Is Past Prologue?

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MARK E. STEINER,
AN HONEST CALLING, THE LAW PRACTICE OF ABRAHAM LINCOLN,
NORTHERN ILLINOIS UNIVERSITY PRESS, 2006

REVIEWED BY ROBERT FABRIKANT*

This is an important, well-written book on the most important lawyer in American history. Abraham Lincoln's importance was not as a lawyer, of course, but a lawyer he was. Of the few books that have been written on Lincoln as a lawyer and his law practice, this is by far the best one.

Lincoln's law practice has no significance apart from the fact that Lincoln eventually became perhaps our most important president. The enduring value of a book about Lincoln's law practice would be that it sheds light on Lincoln's character and on his presidency. If Lincoln had not become president, his law practice would not warrant scholarly, or other, review. Steiner concedes as much, but he does not link Lincoln's law practice to Lincoln's presidency. In particular, Steiner's excellent review tells us little, if anything, about how Lincoln's law practice might have affected Lincoln's approach to problem-solving and policy-making as president.

Professor Steiner's book comes at an especially important time. First, there has been increasing focus paid in recent years on whether Lincoln deserves to be called "The Great Emancipator." Second, the large collection of surviving documents from Lincoln's law practice has recently been organized in an accessible form, and Steiner is the first legal scholar to analyze the newly organized collection.[2] Steiner's considerable labors have produced much food for thought.

A most welcome feature is Steiner's approach to Lincoln and his manner of practicing law. Steiner does not sugarcoat Lincoln. He places Lincoln in a rich, historical context. According to Steiner, Lincoln was the quintessential "Whig lawyer." By that term, Steiner connotes a lawyer who shared the values of the Whig Party in antebellum America. Principal elements of Whig philosophy were maintenance of law and order,[3] belief in a

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2. The Lincoln Legal Papers Project is housed in Springfield, Illinois.

3. Though Lincoln most certainly was a "law and order" man, on at least one occasion, speaking as a politician, not a lawyer, Lincoln defended the right of a white mob to set on fire a black man thought to have killed a white person. *See* Phillip Shaw Paludan, *Lincoln and Negro*

free market system, and support of internal economic improvements to promote growth. Whig lawyers did not see lawyering or the law as instruments of social change. Rather, they saw the law and the legal system as providing "a neutral means to resolve disputes and maintain order."[4]

Steiner believes that a major failing of the Whig value system was that it was morally rudderless. Whig lawyers practiced law with a view towards making money, and they did not hesitate to represent clients on either side of a dispute. While Lincoln was less money-oriented than many of his peers, it seems that in all other respects he comfortably fit within Steiner's description of a "Whig lawyer."

Lincoln's law practice spanned more than twenty-five years. He was a principal benefactor of the explosive economic growth which overtook the country during the first half of the nineteenth century. Much of this growth was fueled by the onset of the railroads. Lincoln became an important lawyer for railroad interests in Illinois, but he also represented many other types of clients, including individuals in relatively minor disputes.

Lincoln's law practice was what we would consider today to be a "general practice." He did a considerable amount of trial work, but, according to Steiner, Lincoln earned special distinction by arguing cases in front of appellate courts throughout Illinois, including the Illinois Supreme Court.

Lincoln was regarded as an excellent state practitioner, but it is safe to say that he did not rank among the top lawyers in the country. The leading lawyers in Lincoln's time would have included Daniel Webster, Rufus Choate, and Henry Clay. They were archetypical Whig lawyers and would have been considered leading lawyers in the country no matter when they practiced.

Lincoln sought to pattern himself after Henry Clay, a senator from Kentucky, and a dominant member of the Whig Party. In contrast to Clay, Lincoln was self-schooled in the law, and Lincoln became a politician before he became a lawyer. Lincoln was a member of the Whig party from the time he was licensed to practice law in 1837 until the demise of the party in 1855. Lincoln became a leading proponent of the newly formed Republican party, which succeeded the Whig party.

It is probably the case that Lincoln concerned himself more with politics than with law, even when he was in law practice. Law practice was simply a means to an end: financing a career in politics. In contrast to

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Slavery: I Haven't Got Time for the Pain, 27 J. ABRAHAM LINCOLN ASS'N 1, 3 (2006), *available at* http://www.historycooperative.org/journals/jala/27.2/paludan.html.

4. MARK STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 177 (2006).

many other leading lawyers of his day, Lincoln did not use the law as a means of achieving social justice. According to Steiner, Lincoln, like other Whig lawyers, was not a legal instrumentalist.

Assuming Steiner's characterization of "Whig lawyers" is accurate, it is noteworthy that Lincoln markedly changed his stripes when he became president. Lincoln may not have been a legal instrumentalist as a lawyer, but he was as a president and commander-in-chief. A case in point was Lincoln's issuance of the Emancipation Proclamation. Indeed, the Emancipation Proclamation is a prime example of using law as an instrument of war.

Steiner draws an interesting, markedly unfavorable contrast between Lincoln, as an archetype of the Whig tradition, and Salmon P. Chase. Before Lincoln named Chase as Secretary of the Treasury, and then Chief Justice, Chase practiced law in Ohio. Chase often represented abolitionists and fugitive slaves. This was dangerous business in antebellum America, even outside the South. Chase was sufficiently active in this area that he earned the accolade "Attorney General for Fugitive Slaves."[5] Stephen A. Douglas derisively referred to Chase as an "Abolition lawyer."[6]

Lincoln opposed slavery, as did Chase, but unlike Chase he did not represent fugitive slaves or abolitionists. Rather, Lincoln, on at least one occasion, represented a slave owner seeking to recover slaves who had refused to return with him to Kentucky (a slave state) from Illinois. Steiner's treatment of Lincoln's representation in this infamous case is excellent and invaluable. This portion of Steiner's book should be required reading for lawyers and for Lincoln scholars.

Lincoln's representation of the slaveholder has been the subject of much discussion, but Steiner's is the first truly comprehensive treatment. He sheds light upon many previously unknown facts and disabuses many of the arguments commonly relied upon by Lincoln's acolytes to defend Lincoln's conduct. Steiner's presentation also sheds important new light on the depth and quality of Lincoln's opposition to slavery.

The Illinois constitution barred slavery, but the Illinois Supreme Court, along with the highest courts of many free states, had held that slaves voluntarily brought into free states by their owners did not automatically become free.[7] The status of the slave depended on whether the slaveowner

5. *Id*. at 129.

6. *Id*. at 130.

7. Willard v. People, 1843 WL 4112, at *3 (Ill. Dec., 1843). Slaves *escaping* into a free state from a slave state did not become free. They were subject to recapture under the Fugitive Slave Clause and the Fugitive Slave Act of 1850. *See generally* Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress and Lincoln*, 49 HOW. L.J. 313, 328-31, 353-58 (2006).

was merely passing in transit through the state on his way to another state, or whether the slaveowner had changed the domicile of the slave from a slave state to Illinois.[8] In the latter situation the slave would become free by operation of the Illinois constitution. In the former situation, the status of the slave would remain unchanged.[9] Allowing slaveowners to retain their slaves when merely passing through was based on a desire to accommodate the slave states and was not compelled by the federal or state constitution. The Illinois Supreme Court believed that this comity-based exception did not violate Illinois' constitutional prohibition against slavery.

In the fall of 1847, after winning election to Congress, but before taking his seat, Lincoln represented Robert Matson, a slave owner from Kentucky. Matson attempted to retrieve a slave and her four slave children. He had brought the slaves with him from Kentucky (a slave state) to Illinois (a free state). After slaving on Matson's farm in Illinois for two years, Matson's five slaves refused to return with him to Kentucky on the ground that they were free under the law of Illinois, and they left his custody. Matson instituted legal proceedings to repossess the slaves and have them return with him to Kentucky. When Lincoln entered this case, Matson was already represented by Usher Linder, a well-known pro-slavery lawyer who frequently represented slave owners in Illinois.

Linder was unsuccessful in reclaiming Matson's slaves in a county district court proceeding.[10] Matson's principal argument was that he had brought the slaves into Illinois at their "request . . . on a temporary sojourn with the intention of returning to Kentucky."[11] The matter was then heard in the county circuit court, and it is at that level that Lincoln became involved. It is not clear how Lincoln was retained by Matson, but Lincoln acted as co-counsel with Linder in the circuit court.

The only issue in the circuit court was whether Matson had brought the slaves in "transit," or whether they had been domiciled in Illinois. If the latter, the slaves were free. Matson's sole evidence was a declaration that he had brought the slaves into Illinois temporarily. The court found the declaration was self-serving. The court rightly determined that Matson's conduct spoke louder than his words and concluded that Matson had

8. STEINER, *supra* note 4, at 116-18.

9. *Id*. at 118.

10. According to Steiner, six years earlier, Linder's "fiery oratory had helped incite anti-abolitionist sentiment, leading to the murder of newspaper editor Elijah Lovejoy." *Id*. at 109. Linder then "helped prosecute those who had tried to protect Lovejoy's warehouse against the mob and then he helped defend those indicted for Lovejoy's murder." *Id*.

11. *Id*. at 109 (internal citations omitted).

forfeited his claim to the slaves' services by keeping them in Illinois for two years.[12]

Lincoln's unsuccessful representation of Matson is often excused by Lincoln defenders on several grounds, all of which are refuted by Steiner. A standard explanation for Lincoln's decision to represent Matson is that it reflected Lincoln's belief that he, along with other northerners, was duty-bound to assist in enforcing the Fugitive Slave Clause (FSC) and its implementing legislation.[13] This was an outgrowth of Lincoln's view that FSC reflected a compromise necessary for the creation of the country itself. But the FSC was not at issue in the Matson case because the five slaves had not *escaped* from a slave state into a non-slave state. Rather, Matson had voluntarily brought the slaves into Illinois. Their escape was intra-state, not interstate. Accordingly, the slaves' fate was determined by state, not federal, law.

The significance of the fact that the FSC was not implicated in Matson cannot be overstated in terms of evaluating Lincoln's conduct. Reprehensible as it was, lawyers representing slaveowners seeking to recover fugitive slaves could rationalize their conduct on the ground that they were simply acting to protect slavery in states where it was protected under the federal Constitution. They were doing no more than what was necessary to support the Constitution. This followed from the then-accepted notion that the Constitution protected slavery in the states where it already existed, and the FSC and its implementing legislation were necessary incidents to that Constitutional protection. Though slaveholder representations in support of the FSC may be seen as signifying an implicit endorsement of slavery in slave states, they did not signify an attempt to introduce slavery into a free state.

But the Matson case did not involve an attempt to protect slavery in a state where it already existed and was constitutionally protected. Illinois was a free state. The judicially created rule which permitted slaveowners to retain property rights in slaves taken *in transitu,* was a comity-based exception to the Illinois constitution. It was not compelled by the federal or state constitution. One would have thought that a lawyer who believed slavery was immoral (and economically backward) would not have accepted representations which sought to vindicate or expand the *in transitu* exception. To do so would have had the effect of allowing slavery, though

12. *Id*. at 121.

13. U.S. CONST. art. IV, § 2, cl. 3. The two pieces of implementing legislation were the 1793 Fugitive Slave Act, ch. 7, 1 Stat. 302, and the 1850 Fugitive Slave Act, 9 Stat. 462, (repealed by Act of June 28, 1864, ch. 166, 15 Stat. 200).

perhaps in a truncated form, to exist in Illinois. This is plainly the upshot of Matson's position in his attempt to recover the five slaves.

The five slaves Matson sought to recover had indisputably performed slave labor for Matson in Illinois for two or more years. Matson's lawyers[14] were espousing the view that a Kentucky slaveowner had the right not merely to pass through a free state with his slaves, but to engage them in slave labor for at least two years along the way. This was not an indirect endorsement of slavery in Kentucky; it was tantamount to condoning slavery in a free state.

Indeed, Matson's lawyers appear to have sought a pro-slavery expansion of the *in transitu* exception under Illinois law. In 1843, the Illinois Supreme Court held that "a slave does not become free by the Constitution of Illinois by coming into the State for the mere purpose of passage through it."[15] The court did not there lay out the evidentiary framework for establishing the slaveowner's "purpose" in bringing the slave into Illinois. Most assuredly, though, the court did *not* state that the slaveowner's purpose was determined solely by what the slaveowner *said* his purpose was in bringing the slave into the state. If that were the case, a slaveowner could dictate the outcome of the case simply by submitting self-serving declarations.

But this was precisely the position of Matson's lawyers. They argued that Matson's *stated* intent was controlling as to whether the slaves were brought into the state for the mere purpose of passage through it. This was tantamount to asking the court to disregard the fact that Matson had kept the slaves in Illinois for more than two years. The court correctly rejected the argument that Matson's stated intent was controlling and found that his declaration was not credible in light of the more than two years he had kept his slaves in Illinois.

In evaluating Lincoln's representation of Matson it is important to keep in mind that Lincoln had three distinct, though related, objections to slavery. First, he thought it immoral, both for the slaveowners and the slaves themselves. Second, he thought slavery was economically inefficient. Third, it deprived whites of economic opportunity. The Matson case did not involve a situation in which these multifaceted detriments of slavery were being cabined in slave states. Rather, it involved an effort to countenance the presence of slavery, and all of its evils, outside of the area

14. It is not clear whether Linder or Lincoln, or both, advanced these arguments. There are no genuinely contemporaneous accounts of arguments made by the lawyers or transcript of the proceedings. STEINER, *supra* note 4, at 119-20. It seems safe to say that Lincoln either advanced these arguments or knowingly associated himself with these arguments. *Id*. at 120 ("Linder and Lincoln argued that Matson's declaration controlled the question of intent.").

15. *Id*. at 117 (citation omitted).

Lincoln believed had been constitutionally quarantined. It is inexplicable that Lincoln would allow the poison of slavery to seep into his home state any more than was constitutionally necessary to support the FSC.[16]

Lincoln's representation of Matson raises the question of Lincoln's view of the relationship of morals to a lawyer's law practice. Steiner makes the case that Whig lawyers saw no connection between law and morality and that this approach reflected the professional mores of the time. Steiner acknowledges, however, that many lawyers of that era conducted their law practices with a view towards morality as well as to their purse. It is not easy to place Lincoln along that continuum because he at one point stated, "a moral tone ought to be infused into the profession."[17] Lincoln's representation of Matson certainly did not live up to that command.

Lincoln's representation of Matson is often excused on the ground that Lincoln was not endorsing the morality of the result his client was attempting to achieve. Steiner resists this argument, largely by comparing Lincoln to Chase. He understates the matter by concluding that Lincoln's representation of Matson "shows the corrupting influence of a [Whig] legal ethic that minimized moral responsibility."[18]

Lincoln's law practice may have been "an honest calling," but Steiner convincingly demonstrates that honesty is a necessary but not sufficient characteristic for a lawyer. It is also the case that Lincoln's law practice did not provide a basis for predicting how he would discharge his duties as president and commander-in-chief. Steiner's book is nonetheless worth reading because it is the most comprehensive account yet of an important era in the professional life of an exceedingly important president.

16. Lincoln's legal position in *Matson* was, of course, contrary to the criticism he later made of Chief Justice Taney's opinion in the *Dred Scott* case. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). "[W]hat Dred Scott's master might lawfully do with Dred Scott, in the free state of Illinois, every other master may lawfully do with any other *one*, or one *thousand* slaves, in Illinois, or in any other free state." STEINER, *supra* note 4, at 120 (citation omitted). Lincoln's Speech at Springfield, Illinois, (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 464-65 (Roy P. Basler ed., 1953-1990) ("House Divided Speech").

17. STEINER, *supra* note 4, at 135.

18. *Id*. at 136.