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"Profession, A Lawyer": Recent Scholarship Sheds Light on Abraham Lincoln's Law Practice

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"PROFESSION, A LAWYER":¹ RECENT SCHOLARSHIP SHEDS LIGHT ON ABRAHAM LINCOLN'S LAW PRACTICE

BARRY R. VICKREY†

We lawyers like to emphasize the impact of Abraham Lincoln's legal training and experience on his achievements as arguably our greatest president. Why shouldn't we? What profession wouldn't want to claim a person whose extraordinary command of language, uncanny ability to assess others, strategic use of wit, keen analytical powers, inexhaustible intellectual curiosity, along with commitment to principle, willingness to change, appreciation of the necessity of hard work, and unconditional sacrifice of his ego and ultimately his life in the service of his calling, seem unparalleled in the history of our nation or perhaps even humanity.

The problem is that our professional claim on Lincoln's greatness may not be justified. The historical record suggests a disconnect between Lincoln's career as a lawyer and his presidency. In part, this may have resulted from the perceptions of Lincoln and his backers that voters are, at best, ambivalent in their opinions of lawyers.² In part, it may reflect the fact that Lincoln's legal career—though quite accomplished for *his* time and place—was in a time and place that hardly seemed a springboard for greatness on the national stage at our nation's time of greatest crisis.

Although the completion of the Lincoln Legal Papers project³ a decade ago is a scholarly watershed in the evaluation of Lincoln's law practice, it is unlikely that even this event will make it possible to settle the debate about how much of

1. Abraham Lincoln thus described himself in a brief autobiography for the *Dictionary of Congress* in 1848. BRIAN DIRCK, *LINCOLN THE LAWYER* 8 (2007) (citing ABRAHAM LINCOLN, *BRIEF AUTOBIOGRAPHY* (June 1848), reprinted in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 459, 459 (Roy P. Basler, ed., 1955)).

† Professor, University of South Dakota School of Law. The research for this essay was supported in part by a grant from the School of Law. The author is indebted to many others, but two deserve special mention: Professor John Hagemann, who provided wisdom about life and books about Abraham Lincoln for almost two decades; and Mary Green Vickrey, for whom the author has failed repeatedly to find adequate words to express his love and gratitude for more than four decades.

2. Mark Steiner notes that Lincoln's 1860 and 1864 campaign biographies "devoted little space to Lincoln's law practice, and they barely concealed the attempt to combat the negative cultural stereotype about lawyers." Mark E. Steiner, *Does Lawyer Lincoln Matter?*, in ABRAHAM LINCOLN, ESQ.: THE LEGAL CAREER OF AMERICA'S GREATEST PRESIDENT 45, 46 (Roger Billings & Frank J. Williams eds., 2010).

3. Lincoln scholar Michael Burlingame describes this project: "In the year 2000, the Lincoln Legal Papers appeared, reproducing and indexing more than 100,000 documents and illuminating the 5,200 cases that Lincoln handled in two dozen years at the Illinois bar. Only since its appearance can we speak with any authority about Lincoln's career as a lawyer." 1 MICHAEL BURLINGAME, *ABRAHAM LINCOLN: A LIFE* x (2008). At almost 2,000 pages, Burlingame's biography of Lincoln is the most comprehensive yet published. It contains a detailed chapter on Lincoln's law practice. *Id.* at 309-62. In *An Honest Calling: The Law Practice of Abraham Lincoln*, Steiner provides additional information on the project and its implications for Lincoln scholarship. MARK E. STEINER, *AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN* 17-18 (2006).

Lincoln's political greatness is attributable to his legal career. And as important as that debate may be to our professional self-image, even more important is what we can learn from Lincoln's legal career to make us better lawyers. Just as Lincoln famously challenged us as citizens to find the "better angels of our nature,"⁴ we should employ the "better angels" of Lincoln's life in the law as models for our professional behavior.

The Lincoln Legal Papers project has spawned three books in the last six years which add substantially to our knowledge of Lincoln's legal career. *An Honest Calling: The Law Practice of Abraham Lincoln*, authored by South Texas College of Law Professor Mark E. Steiner in 2006, describes Lincoln's law practice in detail and examines the principles that guided him as a lawyer.⁵ In *Lincoln the Lawyer*, published in 2007, Anderson University history Professor Brian Dirck focuses on the historical context of Lincoln's practice, suggesting that Lincoln was a typical lawyer of his time and place.⁶ *Abraham Lincoln, Esq.: The Legal Career of America's Greatest President*, published in 2010, is a collection of essays compiled by former Rhode Island Supreme Court Chief Justice Frank J. Williams and Professor Roger Billings of Northern Kentucky University's Salmon P. Chase College of Law.⁷ This latest book starts with essays that attempt to re-evaluate Lincoln's legal career within the context of the Lincoln Legal Papers project; essays by Steiner and Dirck are included in this overview section. The remaining essays cover a wide range of topics, including the legal language employed by Lincoln, specific subject areas of his practice (debtor-creditor and real estate law), ethical issues he encountered, the geographical context of his practice, and even his insights on constitutional and international law as president. Another valuable product of the Lincoln Legal Papers project is Michael Burlingame's discussion of Lincoln's law practice in his comprehensive 2008 biography.⁸

Perhaps the most surprising insight from these books—and what they glean from the Lincoln Legal Papers—is just how mundane Lincoln's law practice was.⁹ While he was a leading trial and appellate lawyer of his time and place, his practice was dominated by debt-collection matters. This tedious, high-volume, low-pay work consumed three-quarters of his law practice.¹⁰

4. ABRAHAM LINCOLN, FIRST INAUGURAL (Mar. 4, 1861), reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 [hereinafter COLLECTED WORKS] (Roy P. Basler, ed., 1953).

5. STEINER, *supra* note 3.

6. DIRCK, *supra* note 1.

7. ABRAHAM LINCOLN, ESQ., *supra* note 2.

8. 1 BURLINGAME, *supra* note 3.

9. Ohio Representative (and future president) James Garfield considered Lincoln a "second-rate Illinois lawyer." DIRCK, *supra* note 1, at 166 (citation omitted). The *New York Daily News* described Lincoln and his law practice disparagingly: "He is like any other clever, awkward, common place, humdrum lawyer . . . of a small country city." Harold Holzer, *Reassessing Lincoln's Legal Career*, in ABRAHAM LINCOLN, ESQ., *supra* note 2, at 5, 8 (quoting N.Y. DAILY NEWS, Oct. 30, 1860).

10. In *Abraham Lincoln, Esq.*, Dirck notes that the "foundation [of Lincoln's law practice] was debt collection. Of the five thousand cases [Lincoln handled as a lawyer], 2,600 involved some form of debtor-creditor litigation." During the early years of his practice, debt collection constituted upwards of 75-80% of Lincoln's practice. Brian Dirck, *A. Lincoln, Respectable "Prairie Lawyer,"* in ABRAHAM LINCOLN, ESQ., *supra* note 2, at 65, 69. Professor Billings details Lincoln's practice in this area of law.

This raises the question of how a legal practice of such a mundane nature could prepare a person to be one of our greatest presidents. How could someone go from doing debt collection in prairie Illinois to successful governmental leadership during our greatest national crisis? What about Lincoln's mundane law practice prepared him to be remembered as one of the greatest leaders in the history of humanity?

These questions are even more baffling because Lincoln went directly from his law practice to the presidency and, by comparison to other lawyer-presidents, had very limited professional experience other than his law practice. He served one term in Congress¹¹ and four terms as a part-time state legislator in Illinois.¹² As Dirck notes, "the law had never exercised quite so exclusive an influence over a chief executive."¹³ Noted Lincoln scholar Harold Holzer, in an essay in *Abraham Lincoln, Esq.*, asserts that "Lincoln's life as a lawyer informed nearly every aspect of his future, a future that became inseparable from the nation's future."¹⁴

Lincoln's two immediate predecessors, Franklin Pierce and James Buchanan, were both lawyers. Each had significantly more political and governmental experience than Lincoln. Pierce's experience included service as Speaker of the New Hampshire legislature, two terms in the United States House of Representatives, and five years as a United States Senator.¹⁵ Buchanan's experience was even more extensive: one term in the Pennsylvania state legislature; four terms in the United States House of Representatives, where he chaired the Judiciary Committee; ten years in the United States Senate, where he chaired the Foreign Relations Committee; Minister to Russia and to Great Britain; and Secretary of State.¹⁶ Yet both Pierce and Buchanan failed to resolve—and arguably compounded—the national crisis that Lincoln inherited.

During his time in the Illinois legislature, Lincoln achieved a leadership role,¹⁷ but he also suffered an emotional breakdown.¹⁸ Lincoln's lone

Roger Billings, *A. Lincoln, Debtor-Creditor Lawyer*, in *ABRAHAM LINCOLN, ESQ.*, *supra* note 2, at 81, 81-103.

11. Burlingame's biography contains a chapter describing this one term in Congress in detail. 1 BURLINGAME, *supra* note 3, at 257-308.

12. Burlingame devotes parts of two chapters to Lincoln's service in the Illinois legislature. *Id.* at 86-167. He concludes the second chapter with this underwhelming assessment: "By the age of 32, Lincoln had proved himself to be an ambitious, gifted partisan but exhibited few signs of true statesmanship." *Id.* at 167.

13. DIRCK, *supra* note 1, at 171.

14. Holzer, *supra* note 9, at 8.

15. *Pierce, Franklin*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774-PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000333> (last visited Oct. 5, 2012).

16. *Buchanan, James*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774-PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001005> (last visited Oct. 5, 2012).

17. In December 1838, Lincoln lost a bid to become the Speaker of the Illinois House of Representatives, becoming "in effect minority leader of the lower chamber." 1 BURLINGAME, *supra* note 3, at 143.

18. Joshua Wolf Shenk details the personal and professional pressures that brought Lincoln to the verge of suicide during a special session of the Illinois legislature in January 1841. JOSHUA WOLF SHENK, *LINCOLN'S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS* 43-65 (2005). During this time of deep depression, Lincoln wrote to his law partner, John

Congressional term produced little more than one memorable speech that questioned the legality of President Polk's conduct of the Mexican War and a failed attempt to emancipate slaves in the District of Columbia.¹⁹ The speech denouncing President Polk demonstrated both Lincoln's commitment to principle and his facility with language—traits that would be paramount during his presidency—but not the political judgment that would be necessary to be elected president and then to make arguably the most difficult political decisions that have faced any president. At the end of this Congressional term, in the words of Lincoln scholar Michael Burlingame, Lincoln "was an accomplished partisan politician of limited scope . . ."²⁰

On the governmental spectrum, moving from even a leadership position in the Illinois legislature and one term in Congress to the United States presidency, under normal circumstances, would be like jumping from first chair in the Springfield high school orchestra, with a guest performance at Carnegie Hall, to conductor of the New York Philharmonic.²¹ And Lincoln's circumstances as president were far from normal.

The recent scholarship spawned by the Lincoln Legal Papers project cannot explain Lincoln's leap from an ordinary prairie lawyer to an extraordinary national leader. Such a monumental leap is probably inexplicable. But these books and essays provide new insights on some of the skills and values reflected in Lincoln's law practice and how these might have contributed to his success as president. Specifically, they elucidate three skills—interpersonal relations, precision in the use of language, and acquisition of broad knowledge—and two values—enhancing societal order and maintaining personal and professional ethics—from Lincoln's law practice which were important to his presidential leadership.

Thanks to Doris Kearns Goodwin's masterpiece, *Team of Rivals: The Political Genius of Abraham Lincoln*,²² the importance of Lincoln's interpersonal prowess to his success as president is now widely appreciated. By setting aside his own ego and using skills of persuasion that included logic, humor, story-telling, and steadfast persistence, Lincoln co-opted those who opposed or even dismissed him into the great task of saving the Union. Though

Stuart:

I am now the most miserable man living. If what I feel were equally distributed to the whole human family, there would not be one cheerful face on the earth. Whether I shall ever be better I can not tell; I awfully forebode I shall not. To remain as I am is impossible; I must die or be better, it appears to me.

Id. at 62. Shenk provides valuable insight on Lincoln's depression, a disease not uncommon among lawyers.

19. See 1 BURLINGAME, *supra* note 3, at 308.

20. *Id.* at 307.

21. It might be more accurate to use the Chicago Symphony Orchestra as the analogue to the United States presidency, because many consider it the nation's greatest orchestra. But the geographical impact of leaping from Springfield to Chicago is lacking. In addition, the New York Philharmonic existed when Lincoln was elected president, while the Chicago Symphony Orchestra did not.

22. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005).

Lincoln never won over Salmon Chase,²³ he employed Chase's irreplaceable skills as Secretary of the Treasury to win the Civil War²⁴ and then appointed him to lead the Supreme Court that would interpret the fundamental Constitutional revisions Lincoln engineered. Other opponents, most notably Secretary of State Edwin Stanton and Secretary of State William Seward,²⁵ overcame their doubts about Lincoln to become essential members of his Cabinet and ultimately friends and admirers.

Lincoln's relationship with Stanton dated back to his law practice and depicts an evolution that strains credulity. The essay by William T. Ellis and Billie J. Ellis, Jr., in *Abraham Lincoln, Esq.*²⁶ describes a famous episode in which Stanton, a prominent Pittsburgh lawyer, and Lincoln were co-counsel in an 1855 federal patent law case in Cincinnati, Ohio, involving the McCormick reaper.²⁷ Stanton and lead counsel George Harding denied Lincoln any participation in the case and even refused to walk down the street with him.²⁸ "In fact, Stanton regarded Lincoln as a country yokel, a 'long armed baboon' who had no business being involved in such an important, complex case."²⁹

And yet, in January 1862, Lincoln appointed as Secretary of War one Edwin Stanton, "the gruff lawyer who had humiliated him in Cincinnati six years earlier and whose disparaging remarks about his presidency were well known in Washington circles."³⁰ Now Stanton and Lincoln were co-counsel in a much more important matter, the prosecution of the war effort. "Lincoln's partnership with his volatile secretary of war, though not as intimate and leisurely [as the relationship with Seward], was equally effective."³¹ Standing by Lincoln's deathbed following the assassination, Stanton voiced one of the most famous

23. "Indeed, Chase would never cease to underestimate Lincoln, nor to resent the fact that he had lost the presidency to a man he considered his inferior." *Id.* at 365.

24. "Lincoln looked to Chase for guidance on the complex problem of financing a war at a time when the government was heavily in debt." *Id.* "Though irritated by Chase's haughty yet fundamentally insecure nature, Lincoln recognized the superlative accomplishments of his treasury secretary." *Id.* at 518.

25. The evolutionary nature of the relationship between Lincoln and Seward is evident from three chronologically successive quotations: "Seward's mortification at not having received his party's nomination in 1860 never fully abated, but he no longer felt compelled to belittle Lincoln to ease his pain." *Id.* at 365. "Their mutual faith in each other helped sustain both Lincoln and Seward through the continuing attacks of radicals and conservatives." *Id.* at 577. "Lincoln's friendship with Seward had deepened with each passing year." *Id.* at 668. By late 1864, Seward's admiration was apparent:

Though some still considered the talkative New Yorker the 'power behind the throne,' Seward had long since understood that Lincoln was the master . . . Two days after the election, Seward told a crowd of supporters, 'Henceforth all men will come to see him, as you and I have seen him . . . Abraham Lincoln will take his place with Washington and Franklin, and Jefferson, and Adams, and Jackson, among the benefactors of the country and of the human race.

Id. at 669.

26. William T. Ellis & Billie J. Ellis Jr., *Competence, Diligence, and Getting Paid: Lincoln's Lessons for Today's Ethical Lawyer*, in ABRAHAM LINCOLN, ESQ., *supra* note 2, at 133, 133-70.

27. *Id.* at 145-47.

28. See GOODWIN, *supra* note 22, at 174-75.

29. Ellis & Ellis, *supra* note 26, at 145 (citing JOHN J. DUFF, A. LINCOLN: PRAIRIE LAWYER 323 (1960)).

30. GOODWIN, *supra* note 22, at 410.

31. *Id.* at 669.

tributes to Lincoln: "Now he belongs to the ages."³²

Lincoln was almost a foot taller than Stanton, and it is apparent he was a bigger man in more important ways. In his relationship with Stanton, it may have been that he was only—as if this were easy—subordinating his ego to achieve a higher purpose. But this relationship may demonstrate an even greater strength of Lincoln's character'. After the assassination, Lincoln's private secretary, John Hay, wrote to Stanton:

Not everyone knows, as I do, how close you stood to our lost leader, how he loved you and trusted you, and how vain were all the efforts to shake that trust and confidence, not lightly given & never withdrawn. All this will be known some time of course, to his honor and yours.³³

Hay was undoubtedly trying to console Stanton, who could not keep from crying whenever Lincoln's name was mentioned in the days following the assassination, so perhaps he mischaracterized Lincoln's motives. But assuming Hay was reporting accurately, Lincoln had set aside Stanton's earlier snub not just to win a war but also because he could relate to something better in Stanton's character than was apparent from his demeanor. He was able not only to trust but even to love someone who was not only difficult to love but who had gone out of his way to be unloving to Lincoln.

Steiner's and Dirck's detailed accounts of Lincoln's law practice, along with several of the essays in *Abraham Lincoln, Esq.*, demonstrate that Lincoln's interpersonal skills were key to his successful law practice, and also that his practice helped develop those skills. Dirck concludes that "the law schooled him in all the vicissitudes of the human heart"³⁴ and the courtroom taught him "to penetrate all the façades and walls thrown up by the wicked and weak to hide their foibles."³⁵ In the words of poet and Lincoln biographer Carl Sandburg, "Lincoln came to know in whispered consultation and public cross-examination the minds and hearts of a quarreling, chaffering, suspicious, murderous, loving, lavish, paradoxical humanity."³⁶ Burlingame cites a nineteenth-century observer's account of interpersonal skills that approach the mythical, recounting that Lincoln could "compel a witness to tell the truth when he meant to lie. He could make a jury laugh, and, generally, weep, at his pleasure."³⁷

Lincoln's lack of egotism was as valuable to his law practice as it was to his presidency. This trait, Burlingame notes, "won over many juries, colleagues, and judges."³⁸ According to one judge who observed Lincoln: "No lawyer on the circuit was more unassuming than was Mr. Lincoln. He arrogated to himself no superiority over any one—not even the most obscure member of the bar."³⁹

32. DAVID HERBERT DONALD, *LINCOLN* 599 (1995). Donald's is the most popular general biography of Lincoln in the last two decades.

33. GOODWIN, *supra* note 22, at 743.

34. DIRCK, *supra* note 1, at 141.

35. *Id.*

36. 2 CARL SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS* 66 (1926).

37. 1 BURLINGAME, *supra* note 3, at 316 (citation omitted).

38. *Id.* at 317 (citation omitted).

39. *Id.* (citation omitted).

This judge further noted that Lincoln "had the happy and unusual faculty of making the jury believe that *they*—and not *he*—were trying the case."⁴⁰ If lawyers and politicians were to emulate just one of Lincoln's character traits, it should be this one: "Mr. Lincoln kept himself in the background."⁴¹

Another specific interpersonal skill that Lincoln often employed as president was his sense of humor.⁴² He began the Cabinet meeting at which he presented the Emancipation Proclamation by reading a selection from one of his favorite humorists. "[T]he President found [it] very funny, and, except for the irascible Stanton, the other heads of departments also enjoyed it—or pretended to."⁴³ Commenting on another political satirist, Lincoln remarked: "For the genius to write these things I would gladly give up my office."⁴⁴

Justice Williams, in his essay "Lincoln's Lessons for Lawyers," in *Abraham Lincoln, Esq.*,⁴⁵ comments that "Lincoln understood the power of simple language and metaphor, and he often used it humorously to great effect."⁴⁶ Williams includes two examples of Lincoln's use of cutting humor to respond to Generals McClellan and Hooker when he was disappointed by their lack of performance on the battlefield.⁴⁷ Williams notes that Lincoln could also use humor to be self-deprecating.⁴⁸ Historian David Herbert Donald confirms this trait, reporting on Lincoln's comment to Secretary of the Navy Gideon Welles that he enjoyed the attacks of a political humorist when directed at Welles but found them unsuccessful and disgusting when directed at him.⁴⁹

While Lincoln's documented sense of humor, including a fondness for off-color jokes, predates his legal career,⁵⁰ he developed this skill while circuit-riding with lawyers and judges to try cases across central Illinois. As Goodwin describes:

When the court sessions were complete, everyone would gather in the local tavern from dusk to dawn, sharing drinks, stories, and good cheer. In these convivial settings, Lincoln was invariably the center of attention. No one could equal his never-ending stream of stories nor his ability to reproduce them with such contagious mirth.⁵¹

On the circuit, Lincoln's sense of humor included the well-conceived practical joke. Burlingame provides an example:

40. *Id.* (citation omitted).

41. *See id.* (citation omitted).

42. Burlingame notes President Lincoln's use of humor to rebut opposition senators, to relieve his own sadness after military defeats, to respond to pressure from emancipationists, and to deflect protests against military conscription. 2 BURLINGAME, *supra* note 3, at 286, 324, 334, 446-47, 532.

43. DONALD, *supra* note 32, at 374-75.

44. *Id.* at 543 (citation omitted).

45. Frank J. Williams, *Lincoln's Lessons for Lawyers*, in ABRAHAM LINCOLN, ESQ., *supra* note 2, at 19, 19-44.

46. *Id.* at 26.

47. *Id.*

48. *Id.* at 27.

49. DONALD, *supra* note 32, at 439-40.

50. 1 BURLINGAME, *supra* note 3, at 53.

51. GOODWIN, *supra* note 22, at 8.

Once when the caravan of lawyers and judges approached a shallow creek, Lincoln puckishly warned that it was deep and advised his colleagues to strip off their clothes and ride their horses across it. Shivering in the cold air, they complied and rode into the water, which barely reached their mounts' fetlocks.⁵²

The account does not indicate whether Judge David Davis, who regularly presided over the circuit, was among those whom Lincoln "punk'd." The magnitude of the joke is greatly enhanced if it included Judge Davis, who weighed more than 300 pounds.⁵³

A second skill that was key to Lincoln's legal career and presidency was his use of language. His facility with language is legendary. Former United States Senator George McGovern, in a brief Lincoln biography written for the American Presidents Series, summarizes Lincoln's language skills: "Lincoln was the most masterful speechwriter of any president in our national history. Much of his success in the American political arena derived from his superior ability to draft compelling public addresses. Likewise, his high place in history rests heavily on his beautiful prose. He was a literary giant."⁵⁴

There is little about the language of the law that would have contributed to Lincoln's "beautiful prose." That was built undoubtedly on Lincoln's voracious reading of Shakespeare, the King James Bible, *Pilgrim's Progress*, various biographies, and other literature.⁵⁵ Sir William Blackstone's *Commentaries on the Laws of England*, which Lincoln read diligently during his self-education to become a lawyer,⁵⁶ was not "beautiful." Dirck quotes a lawyer of Lincoln's era who describes the *Commentaries* as "pretty dry work and pretty hard work."⁵⁷ He adds this observation from another lawyer-president: "'In studying Blackstone's 'Commentaries,' the object should be twofold—legal information and mental discipline," noted Rutherford B. Hayes, 'and success in the attainment of one of these ends implies success in the other.'"⁵⁸ Modern legal education claims the same objectives as those Hayes proposed for the self-education in the law pursued by those who read Blackstone: obtaining legal

52. 1 BURLINGAME, *supra* note 3, at 325-26.

53. See DONALD, *supra* note 32, at 70. Davis led the team that secured the presidential nomination for Lincoln at the 1860 Republican National Convention in Chicago and was appointed by Lincoln to the United States Supreme Court in 1862. *Id.* at 248-50, 381.

54. GEORGE MCGOVERN, ABRAHAM LINCOLN 91 (2009). As part of the American Presidents Series, McGovern's biography was required to be concise. In just over 150 pages, McGovern met the challenge of writing a short biography that captures the essence of Lincoln and his presidency. McGovern earned a Ph.D. in history at Northwestern University. He taught history and political science at his undergraduate alma mater, Dakota Wesleyan University, where he was, by his own description, "the best historian in a one-historian department." David E. Rosenbaum, *George McGovern Dies at 90, a Liberal Trounced but Never Silenced*, N.Y. TIMES, Oct. 22, 2012, at A1, available at <http://www.nytimes.com/2012/10/22/us/politics/george-mcgovern-a-democratic-presidential-nominee-and-liberal-stalwart-dies-at-90.html?pagewanted=all&r=0>. He died October 21, 2012, at the age of 90.

55. Donald lists some of the works Lincoln read and describes his reading habits: "Once he got the hang of it, he could never get enough." DONALD, *supra* note 32, at 30-31.

56. DIRCK, *supra* note 1, at 16. Steiner provides a detailed discussion of Lincoln's study of Blackstone's *Commentaries*. STEINER, *supra* note 3, at 33-37.

57. DIRCK, *supra* note 1, at 16.

58. *Id.* at 17 (citation omitted).

information and developing mental discipline. Even though today's law students do not typically read Blackstone, they would claim that legal education remains "pretty dry work and pretty hard work."

It seems likely that what the law added to Lincoln's language skills was precision. Dirck indicates that Lincoln signed the Second Confiscation Act passed by Congress in 1862 "but with an attorney's caveats concerning the precise legal status of slaves confiscated and then liberated under its provisions."⁵⁹

Lincoln's precision in the use of language has not always been appreciated. "Lawyerly dryness is also evident in the Emancipation Proclamation. Richard Hofstadter famously likened it to a 'bill of lading' in its boring, uninspiring text"⁶⁰ And yet the complexity of the subject matter—human slavery, on which the nation's founders punted—and the outcomes it produced—freeing slaves and saving the Union—justify Lincoln's choice of lawyerly precision in the language he used.

A third essential skill at which Lincoln excelled was his ability to acquire broad knowledge, a skill often seen in successful trial lawyers.⁶¹ This skill was apparent throughout Lincoln's life and was key to his success both as a trial lawyer and as president.

Lincoln may be history's greatest autodidact. Formal education in prairie Illinois was limited, and the societal attitudes of Lincoln's agricultural community equated reading and thinking with laziness.⁶² And yet Lincoln became not only the best writer to serve as president but also the only one to hold a patent.⁶³

The foundation of this skill was Lincoln's innate intellectual curiosity. "Lincoln was unusually inquisitive, eager to learn about a wide variety of subjects."⁶⁴ While riding circuit, his constant self-education included the study of Euclidean geometry.⁶⁵ Lincoln also had the ability to apply his prior experience to subjects he encountered in the practice of law. For example, in a case involving infringement of a patented waterwheel, Lincoln drew on his knowledge of these devices from his work in a sawmill.⁶⁶

Lincoln's most famous use of science involves his successful defense of William "Duff" Armstrong, who had been charged with murder. This case is

59. *Id.* at 152. Burlingame suggests that Lincoln may have "intended to show Congress that on matters of slavery and reconstruction, he was master." 2 BURLINGAME, *supra* note 3, at 359.

60. DIRCK, *supra* note 1, at 152.

61. As director of the American Bar Association's Division of Professional Education, I had the privilege of working with James J. Brosnahan, one of the nation's leading trial lawyers, on continuing legal education seminars. He had compiled an alphabetical list of the subjects he had tried, with at least one subject beginning with each letter of the alphabet.

62. DIRCK, *supra* note 1, at 15.

63. Owen Edwards, *Inventive Abe*, SMITHSONIAN, Oct. 2006, <http://www.smithsonianmag.com/history-archaeology/object-oct06.html>.

64. 1 BURLINGAME, *supra* note 3, at 334.

65. *Id.* at 333-34.

66. *Id.* at 339.

often referred to as the Almanac Trial, because Lincoln used an almanac to undermine the testimony of an eyewitness who claimed to have seen the crime by moonlight. As John A. Lupton notes in an essay in *Abraham Lincoln, Esq.*,⁶⁷ Lincoln's proposed jury instructions suggest that the key to this case was not the almanac, but rather Lincoln's use of a doctor as an expert witness to establish that the fatal blow to the victim may have come from another assailant.⁶⁸ John Evangelist Walsh, in *Moonlight: Abraham Lincoln and the Almanac Trial*,⁶⁹ recounts Lincoln's scientific mastery:

In his questioning of the physician Lincoln proceeded to display a fairly precise knowledge of cranial anatomy, so much so that it surprised his opponents as well as other legal minds in the courtroom . . . Keeping the skull visible to the jury, he discussed its various parts and their relation to each other, sounding almost as if he were a surgeon about to operate.⁷⁰

The first of Lincoln's values that emerge from recent scholarship is his commitment to order. Steiner, in both his essay in *Abraham Lincoln, Esq.* and in *An Honest Calling*, emphasizes Lincoln's view of law as a means of maintaining societal order.⁷¹ Steiner identifies this as a first principle of the Whig Party in which Lincoln was a foot soldier long before he became the standard bearer for the new Republican Party. Steiner suggests that this commitment to order helps explain why Lincoln would represent a slaveholder whose political views he did not share.⁷²

There is a stock story that seems to exist at every law school: the law professor who marches the first first-year student who mentions the word "justice" outside to read the words "School of Law" and not "School of Justice" on the front of the building. Within a few weeks of my arrival at the University of South Dakota in 1993, an alumnus recounted to me the local version of that story. Fortunately, we don't do that any more, because we sincerely believe that lawyers and the legal system should promote justice. Nevertheless, we realize that justice is elusive and that lawyers serve society by maintaining order.

Maintaining order—by maintaining the Union that the Confederacy claimed

67. John A. Lupton, *The Power of Lincoln's Legal Words*, in ABRAHAM LINCOLN, ESQ., *supra* note 2, at 119, 119-31.

68. *See id.* at 128.

69. JOHN EVANGELIST WALSH, *MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL* (2000).

70. *Id.* at 50. An 1857 case involving the first bridge across the Mississippi River, into which a ship crashed, also gave Lincoln a good chance to use his knowledge of science. A shorthand reporter's notes of Lincoln's closing argument reveal "a formidable command of the details of the case." 1 BURLINGAME, *supra* note 3, at 337-38.

71. Steiner, *supra* note 2, at 50-51.

As a lawyer, Abraham Lincoln developed a distinctive Whiggish attitude toward law and the role of law in American society. Politically, Whigs were modernizing conservatives who favored internal improvements such as railroads to foster economic growth. Whigs also believed that the rule of law provided a neutral means to resolve disputes. Lincoln was a Whig lawyer who embodied the Whig reverence for law and order.

STEINER, *supra* note 3, at 3.

72. "Whig lawyers like Lincoln . . . cared more whether a dispute was settled in an orderly manner through the courts than whether they represented a particular side in the dispute." STEINER, *supra* note 3, at 136.

the right to dissolve—was Lincoln's first principle as president. Rightly or wrongly, he subordinated even the elimination of the abomination of slavery to the goal of saving the Union.⁷³

With rare exceptions, it would be difficult to describe Lincoln's practice as a search for justice.⁷⁴ In most of the matters Lincoln handled, justice was irrelevant or debatable. But order was paramount. It was what allowed an economy without modern lending institutions to operate on the basis of personal notes.⁷⁵ It was what substituted criminal trials for lynchings.⁷⁶ It was what produced law that responded to scientific advancements for which no apt law existed.⁷⁷ Lincoln's law practice was a search for order that prepared him well for the challenges that would face him as president.

The other—and even more important—value that is apparent in Lincoln's law practice was his professional and personal ethics. As the Ellises observe in *Abraham Lincoln, Esq.*, Lincoln's "ethical aspiration provides a powerful model for twenty-first-century lawyers."⁷⁸ Billings concludes that "Lincoln lived up to his reputation for honesty in the practice of law."⁷⁹ Dirck describes Lincoln as a "paragon of lawyerly virtue."⁸⁰

As is the case for most lawyers, there may have been times when Lincoln's professional and personal ethics clashed. Steiner cites Lincoln's representation of slaveholder Robert Matson as an example.⁸¹ He claims that "Lincoln followed a model of professional responsibility that refused to hold a lawyer

73. Lincoln made clear his motives in an 1862 letter to *New York Tribune* editor Horace Greeley: My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, 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. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union.

DONALD, *supra* note 32, at 368 (quoting 5 COLLECTED WORKS, *supra* note 4, 388, 388).

74. Lincoln appeared to have justice on his side in a *pro bono* case for the widow of a Revolutionary War veteran who had been overcharged by an agent who recovered her deceased husband's pension. See 1 BURLINGAME, *supra* note 3, at 349. Lincoln won the case after arousing the emotions of the jury. DIRCK, *supra* note 1, at 103-04. Lincoln's reaction to injustice is suggested by one of the items in his notes for the closing argument in this case: "Skin Def't." See 1 BURLINGAME, *supra* note 3, at 349; DIRCK, *supra* note 1, at 104.

75. Billings, *supra* note 10, at 83. Dirck devotes a chapter to the role of promissory notes in the prairie Illinois economy and in Lincoln's law practice. DIRCK, *supra* note 1, at 54-75.

76. In his 1838 speech to the Young Men's Lyceum in Springfield, Illinois, "Lincoln added his voice to the Illinois Whig chorus denouncing the upsurge in riots and lynching." 1 BURLINGAME, *supra* note 3, at 140.

77. Dirck and Steiner discuss Lincoln's cases involving railroads and the new legal issues related to this new mode of transportation. DIRCK, *supra* note 1, principally at 91-98; STEINER, *supra* note 3, principally at 63-70. Dirck notes that two of Lincoln's railroad cases "were more important than most, establishing precedents for how courts would handle railroad liability issues in the future." DIRCK, *supra* note 1, at 97.

78. Ellis & Ellis, *supra* note 26, at 133.

79. Roger Billings, *Lincoln's Legal Ethics: The Client Correspondence*, in ABRAHAM LINCOLN, ESQ., *supra* note 2, at 171, 181.

80. DIRCK, *supra* note 1, at 141.

81. Steiner provides a detailed discussion, including the political and professional context, of Lincoln's representation of Kentucky slaveholder Robert Matson. STEINER, *supra* note 3, at 103-36.

morally accountable for his choice of clients."⁸² Because "Lincoln had a sincere hatred of slavery,"⁸³ Steiner concludes that "[h]is involvement in the case shows the corrupting influence of a legal ethic that minimized moral responsibility."⁸⁴

What Steiner sees as a conflict between professional and personal ethics might be seen as a clash between Lincoln's views on slavery and his commitment to order, personally and politically, as well as professionally. As Steiner himself points out, "Lincoln, as a Whig lawyer, had a near-religious reverence for law and order. The court system allowed disputes to be peaceably resolved through adjudication or settlement. Through the courts lawlessness and mobocracy would be avoided."⁸⁵ That is not to deny that Lincoln was adhering to the professional ethics of lawyers—then and now—in representing a person with whom he did not personally agree. American Bar Association Model Rule 1.2(b) is clear on this principle: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."⁸⁶

The essay by the Ellises in *Abraham Lincoln, Esq.* correctly points out that there were no standardized rules of professional conduct for lawyers in Lincoln's era.⁸⁷ Within the recent scholarship on Lincoln's practice are a few examples of how Lincoln's actions as a lawyer might, or might not, have squared with modern rules of professional conduct. The Ellises point out, for example, that the factors Lincoln used to set fees "mirror" those of ABA Model Rule 1.5.⁸⁸ The review of Lincoln's client correspondence by Professor Billings⁸⁹ suggests that Lincoln's law-office management might have caused him problems with ABA Model Rule 1.3.⁹⁰ "His stovepipe hat filing system and his love of politics . . . forced him to the brink of neglecting clients' business."⁹¹ Particularly troublesome is Dirck's report of "[a]n overstuffed envelope [that] bore a label in Lincoln's hand: 'When you can't find it anywhere else look in this.'"⁹² These practice-management shortcomings do not distinguish Lincoln from many modern-day lawyers.

The reports of Lincoln's conduct in the courtroom raise no serious questions about whether he would comply with modern rules governing trial practice. His closing argument in the Duff Armstrong case, in which he

82. *Id.* at 136.

83. *Id.*

84. *Id.*

85. *Id.* at 58.

86. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1983).

87. Ellis & Ellis, *supra* note 26, at 133. The Ellises imply that professional responsibility codes are irrelevant or even detrimental to the ethical practice of law. *See id.* As a teacher of professional responsibility for almost three decades, I must take issue with that implication. But that's a topic that far exceeds the scope of this essay.

88. *Id.* at 158.

89. Billings, *supra* note 79, at 171-83.

90. *See id.* at 174, 179; MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

91. Billings, *supra* note 79, at 181.

92. DIRCK, *supra* note 1, at 38.

described the kindnesses the defendant's mother had shown Lincoln as a young man,⁹³ might implicate ABA Model Rule 3.4(e).⁹⁴ But Dirck notes that Lincoln was "unfailingly polite during a trial, his desire to win tempered by a good sense of professional courtesy."⁹⁵ And yet, "[h]e had a reputation as a tenacious litigator, one who knew how to employ a technicality or pitch an argument to get what he needed."⁹⁶

Lincoln's encouragement to avoid or settle lawsuits is well-known: "Discourage litigation. Persuade your neighbors to compromise whenever you can As a peacemaker the lawyer has a superior opportunity of being a good man."⁹⁷ According to Dirck, "[w]hen clients did not pursue what Lincoln thought to be a reasonable settlement, he could grow annoyed."⁹⁸ Lincoln had the good sense to try to "fire" a particularly difficult client who would not settle a case.⁹⁹ Lincoln's initial efforts were unsuccessful, but he ultimately achieved his objective by getting elected president and leaving the difficult client in the hands of his junior partner.¹⁰⁰

An important part of Lincoln's personal and professional ethics was his willingness to work hard. In a chapter entitled "Grease," Dirck comments on the "day-in, day-out grind" of Lincoln's law practice. While Dirck's focus is on the ordinariness of Lincoln's practice, his comment also describes just how hard Lincoln worked as a lawyer. In *Abraham Lincoln, Esq.*, Harold Holzer describes Lincoln's advice in 1860 to a young man who asked how to be a successful lawyer: "Work, work, work, is the main thing."¹⁰¹

Lincoln probably had no idea, when he gave that advice, just how hard he would have to work the next five years. He was about to take on his most challenging—and tragically last—case: saving a nation. Fortunately for us, he had the skills and values to prevail.

93. *Id.* at 118.

94. MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (1983).

A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

Id.

95. DIRCK, *supra* note 1, at 43.

96. *Id.*

97. Steiner, *supra* note 2, at 51 (quoting 2 COLLECTED WORKS, *supra* note 4, 81, 81).

98. DIRCK, *supra* note 1, at 67.

99. *Id.* at 68.

100. *Id.*

101. Holzer, *supra* note 9, at 15 (quoting 4 COLLECTED WORKS, *supra* note 4, 121, 121).