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IN PRAISE OF WHIG LAWYERING: A COMMENTARY ON ABRAHAM LINCOLN AS LAWYER—AND POLITICIAN

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This essay engages an important facet of Professor Mark E. Steiner's valuable look at Abraham Lincoln as a lawyer.[1] This is, specifically, Lincoln's view that "reverence for the laws [needed] to become the 'political religion of the nation,'"[2] even though parts of the law—for example, the law of slavery—were regarded by many as unjust. Steiner characterizes this as a Whiggish view of the law, one that went hand in hand with the view held by Lincoln and his fellow Whigs that collective private and state action was necessary to foster economic growth.[3] Steiner appears to admire Whig lawyering in many respects, but suggests that it came up short in the legal crisis over slavery.[4]

Professor Steiner discusses at length the *Mateson* case,[5] where Abraham Lincoln represented a Kentucky slaveowner making an unsuccessful attempt to hold in bondage Jane, a slave whom the owner had domiciled in the free state of Illinois. Lincoln has been criticized for taking the side of slavery in the case, but Steiner defends (or at least half-defends) Lincoln, by noting that the Whig lawyering ethic allowed Lincoln's action. In the mid-nineteenth century, legal ethics were in an inchoate, formative stage. Jurist Timothy Hoffman and the legal wing of the abolitionist movement, led by Salmon Chase and James Birney and including Lincoln's law partner William Herndon among its

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

2. *Id.* at 58.

3. *Id.* at 3.

4. *Id.* at 103–36.

5. *In re Jane, A Woman of Color*, 5 W.L.J. 202 (1848); STEINER, *supra* note 1, at 103–36. General Mateson's name is spelled variously: "Matson" in STEINER, *supra* note 1; "Mateson" in the case itself, 5 W.L.J. 202; and, in another place, "Mattison," *see* STEINER, *supra* note 1, at 124 (in discussing whether Mateson paid Lincoln for his work, noting that Abraham Lincoln's father sent a letter to his son stating that he had tried to sell a note from "Mattison").

members, contended that lawyers could not ethically take cases in which they would have to work against their personal beliefs. By contrast, Whig lawyers believed that a lawyer's duty to uphold the legal system included an obligation to assist persons in need of legal assistance regardless of the morality of their position.[6] Steiner notes that the Whig view ultimately prevailed and is now a cornerstone of modern legal ethics and that it justified Lincoln's representation of Mateson.[7] But Steiner concludes that Lincoln's decision to represent Mateson "shows the corrupting influence of a legal ethic that minimized moral responsibility."[8]

I respectfully dissent from this view. I will briefly discuss the *Mateson* case and give two other examples from Lincoln's life and times that show that Whig lawyering, far from being an obstacle to the cause of freedom, in fact turned out to be an asset.

I. SLAVE TRANSIT CASES

The *Mateson* case addressed one of two great legal issues that opponents of slavery confronted: namely, under what circumstances does a slave who sets foot on free soil become free? Professor Steiner points out that, at the time *Mateson* was decided, the prevailing rule was that slaves in transit through free territory did not become free, but slaves who remained on free soil for a significant period of time—often expressed in terms of domicile—became free.[9] Paul Finkleman has pointed out that starting in the 1830s, as the South became increasingly militant in its efforts to protect and extend slavery, many Northern courts reacted by liberalizing the concept of domicile in transit cases. Put another way, the early nineteenth-century presumption held by most Northern courts and juries, that in cases of doubt the burden was on black Americans to prove they were free, gave way to a tacit presumption in favor of freedom and a shifting of the burden of proof to the slaveholder.[10]

In the *Mateson* case, Lincoln did the best he could to persuade the court that Jane fell on the "transit" rather than the "domicile" side of

6. STEINER, *supra* note 1, at 136.

7. *Id.*

8. *Id.*

9. *Id.* at 115–18.

10. *See generally* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981); *see also* Kinney v. Cook, 4 Ill. (3 Scam.) 231 (1841); Hone v. Ammons, 14 Ill. 29 (1852); Rodney v. Ill. Cent. R.R. Co., 19 Ill. 42 (1857).

the line between slavery and freedom.[11] It is important to note that *Mateson* is the first published case in which members of the Illinois Supreme Court had an opportunity to limit the scope of the transit rule.[12] Lincoln thus provided a real service to the antislavery cause, even if this was no part of his intent. His thorough presentation of Mateson's position, particularly his lucid exposition of the dichotomy between transit and domicile, forced the Illinois Supreme Court justices who heard the case to craft a decision against slavery that was more carefully reasoned and solid than it might have been if a less able advocate had represented Mateson. Thus, by being true to Whig lawyering, Lincoln indirectly helped forge another tool for the fight against slavery.

II. THE BOOTH CASES

The second great legal issue that opponents of slavery confronted was the validity of federal laws for the return of fugitive slaves to their owners.[13] Antislavery lawyers attacked such laws on a variety of grounds, mainly that the laws could not be enforced because they did not include any enforcement mechanisms, that they unconstitutionally denied fugitives the right to a jury trial, and that they violated equal-protection principles by paying federal magistrates more in cases where they sent fugitives back into slavery than in cases where they ruled for freedom.[14] The Supreme Court rejected such attacks in *Prigg v. Pennsylvania*[15] and *Jones v. Van Zandt*.[16] The movement then tried its luck in Northern state courts, which it hoped would be more sympathetic, but its efforts ran afoul of what we might call judicial Whiggism. In *Sims' Case*, Massachusetts Chief Justice Lemuel Shaw explained that whatever his personal views of the fugitive slave laws' constitutionality might be, he was obligated to defer to the Supreme

11. STEINER, *supra* note 1, at 119.

12. *Cf.* Willard v. People, 5 Ill. (4 Scam.) 461 (1843) (holding that a slave who escaped from her Louisiana master while the two traveled through Illinois did not thereby gain freedom).

13. *See* U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."); Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

14. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 150–54, 161–65 (1975).

15. 41 U.S. (16 Pet.) 539 (1842).

16. 46 U.S. (5 How.) 215 (1847).

Court's decisions in the *Prigg* and *Van Zandt* cases.[17] Other states followed suit.[18]

With one exception: Wisconsin. In 1852, a Missouri slave, Joshua Glover, escaped from his master and made his way to Wisconsin. Two years later, his master found Glover and captured him with help from U.S. marshals. Sherman Booth, an abolitionist leader, thereupon organized a march on the Milwaukee jail where Glover was being held. The mob forcibly freed Glover, who escaped to Canada and permanent freedom. Booth was arrested for violation of the fugitive slave laws and retained a young abolitionist lawyer, Byron Paine, to apply to Wisconsin Supreme Court Justice Abram Smith for a writ of habeas corpus.[19] Paine employed the traditional arguments used against fugitive slave laws but added a new one: that state supreme courts were coequals with the federal Supreme Court and did not have to defer to its decisions.[20] Smith shocked Wisconsin and the nation by agreeing with Paine and ordering Booth's release; his decision was later upheld by his colleagues on the court.[21] The Wisconsin judges clearly were not judicial Whigs, but they sparked an impassioned defense of Whiggism, most notably this comment by future Wisconsin Chief Justice Edward Ryan:

> If the supreme law of the land, the constitution of the United States . . . is to give way to elementary criticisms and decisions of the State authorities, it is not difficult to forsee most grave and disastrous results. . . . And the system which, with all its inherited evils and all its own sins, is still the political hope of all mankind, may be led step by step into dissension, disruption and civil warfare, to gratify the consciences of those who trusting nothing to concession, nothing to time, nothing to Providence, would destroy everything imperfect, in a world in which nothing is perfect.[22]

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17. 61 Mass. (7 Cush.) 285 (1851).

18. *See Ex parte* Bushnell, 9 Ohio St. 77 (1859); *see also* Commonwealth *ex rel.* Wright v. Deacon, 5 Serg. & Rawle 63 (Pa. 1819); COVER, *supra* note 14, at 163, 169.

19. *See* A.J. Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7 (1957); David Atwood & H. Rublee, *Explanation*, WIS. ST. J., Mar. 17, 1854, at 2.

20. Byron Paine, Argument (May 29, 1854), *in* SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM, 1700–1872: FUGITIVE SLAVES AND AMERICAN COURTS 347 (Paul Finkelman ed., 1988).

21. *In re* Booth, 3 Wis. 1, 14, 25, 34, 43–47 (1854), *rev'd sub nom.*, Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

22. E.G. Ryan, *Ableman v. Booth*, WKLY. ARGUS AND DEMOCRAT (Madison, Wis.),

In 1859, newly appointed Chief Justice Luther S. Dixon echoed Ryan's sentiments, warning that states-rights advocates would "place it in the power of any one state, beyond all peaceful remedy, to arrest the execution of the laws of the entire Union, and to break down and destroy at pleasure every barrier created and right given by the constitution."[23] Dixon's statement nearly cost him reelection, but it also caused a number of abolitionists to reconsider whether it was better to work within the political system than to defy it, and Dixon effectively ended Wisconsin's states-rights controversy over slavery.[24] Lincoln expressed similar sentiments in response to the *Dred Scott* decision,[25] although he added a caveat that because the decision was not unanimous, was arguably partisan, and established a new doctrine, it was perhaps not "factious [or] revolutionary, to not acquiesce in it as a precedent."[26] History vindicated Whig lawyering in this case: within a decade, all black Americans were citizens, and it was acknowledged, even in the South, that they had at least minimal rights which whites were bound to respect.[27]

III. LINCOLN AND THE DEMISE OF SLAVERY

Lincoln's Whig lawyering served the cause of freedom well during the Civil War. Lincoln has sometimes been criticized for not freeing all the slaves at the beginning of the war. His decision not to do so was based in part on a close calculation of the political realities of the time: if he had tried to do so, Kentucky and other Union border states very likely would have seceded, and, as Lincoln recognized, to lose those states was effectively to lose the war.[28] But Lincoln's decision seems

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June 29, 1854, at 2.

23. Ableman v. Booth, 11 Wis. 517, 532 (1859).

24. Joseph A. Ranney, *"Suffering the Agonies of Their Righteousness": The Rise and Fall of the States Rights Movement in Wisconsin, 1854–1861*, 75 WIS. MAG. HIST. 83, 104–11 (1992).

25. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

26. Abraham Lincoln, Speech on the *Dred Scott* Decision at Springfield, Illinois (June 26, 1857), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 393 (Don E. Fehrenbacher ed., 1989).

27. U.S. CONST. amend. XIV; *see generally* JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW (2006).

28. DAVID HERBERT DONALD, LINCOLN 299–300 (1995); *see generally* E. MERTON COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY (1926). This reality is discussed in the Klement Lecture that forms part of this symposium. *See* Jerrica A. Giles & Allen C. Guelzo, *Colonel Utley's Emancipation*—Or, *How Lincoln Offered to Buy a Slave*, 93

also partly to have been a product of his Whiggish instincts, which led him to conclude that in order to endure, emancipation must have a solid legal foundation.

The Whiggish seed that germinated into emancipation was planted by Benjamin Butler, a Union general whose legal skills proved to exceed his military skills. Butler, while commanding a Union fort near Norfolk in March 1862, argued that slaves who escaped into the Union lines should be denied as a war resource to the Confederacy by being treated as contraband of war and emancipated. When other Union generals attempted to emancipate slaves directly, Lincoln reprimanded them and rescinded their orders. But, as to Butler, the only one of the generals who framed an emancipation argument within the framework of the law as it was rather than the law as he wished it to be, Lincoln let the order stand.[29]

The Emancipation Proclamation, which some have praised as a mighty blow for racial justice and others have damned as a fainthearted response to justice's call, is in fact a refined product of Whig lawyering. Lincoln went to great pains to portray the proclamation as an act of military necessity, a limited measure that was the furthest he could go under his Article II powers as commander in chief of United States military forces. In order to make this legal foundation as solid as possible, he limited the proclamation's effect to areas still in rebellion and made clear that it did not apply in loyal slave states or areas of the South then under the control of Union forces.[30]

As critics have pointed out, this meant that the proclamation applied only to areas in which it could not be enforced.[31] But legally Lincoln could not do otherwise. He had no power to abolish slavery in loyal areas: that could be done only by a constitutional amendment. It should be remembered that Lincoln actively encouraged enactment of an amendment abolishing slavery as the Civil War approached its end. Most historians believe that he was instrumental in securing

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MARQ. L. REV. 1263 (2010).

29. DONALD, *supra* note 28, at 314–15, 343, 363.

30. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."); 2 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 17–18 (1939).

31. *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 33–34 (2001).

congressional passage of the Thirteenth Amendment in early 1865.[32] A constitutional amendment was a solid, indeed legally unassailable, foundation for emancipation of all slaves. Lincoln's decision to take a Whiggish rather than a radical approach to emancipation in the end ensured that it would be enduring, not a temporary upheaval that might have ended with the war.

32. DONALD, *supra* note 28, at 553–54.