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Frank: Lincoln As A Lawyer

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RECENT BOOKS

LINCOLN AS A LAWYER. By *John P. Frank*. Urbana: University of Illinois Press. 1961. Pp. xi, 190. \$4.75.

In 1960 John J. Duff dealt exhaustively in *A. Lincoln: Prairie Lawyer* with all the information then known about Lincoln's legal career. That book made a good many facts public for the first time. After Duff's exhaustive study little remains to be done in the description of Lincoln's career. In a review of that book¹ I expressed disquiet about the continuing extensive use of first-class talent in the exploration of Lincoln's life—though I was glad to see a somewhat larger emphasis on its legal aspects—and suggested that it would be better if the legal biographers engaged in this enterprise would invest some of their energy in inquiring more generally into mid-nineteenth century frontier law practice in an effort to find out whether there is more than anecdotal value in the incidents Duff and others recount. The Lincoln books would be a good starting point for any such broader study.

John P. Frank, a highly qualified legal historian and constitutional lawyer, has now come forward with an experiment in Lincoln biography which has somewhat broader objectives than Duff's book. Although the author does not express any interest in studying Lincoln's career for purposes other than to learn about Lincoln, he does probe the details of Lincoln's legal experience to ascertain whether they may have some larger significance in the context of Lincoln's life; he does not merely recount in a new format the stories others have told. Mr. Frank has struggled manfully to reveal whatever meaning is hidden in the routine, daily grist-for-the-legal-mill that most legal biographers pass by without even seeing that it contains a challenge to imaginative inquiry. It is in its novel handling of the grubby and undramatic ordinary activities of a busy lawyer's life that this book makes a real contribution to the development of a kind of legal biography having greater utility than the conventional kind for the ultimate syntheses of the legal historian.

The structure of the book is simple. The writer first describes Lincoln's practice, emphasizing its technical aspects. Then he examines the capacity of Lincoln's mind operating in and through the practice, assessing the quality of the legal work Lincoln did. Finally he explores the public life of Lincoln, both before his election as President and during his years in the White House, and asks what contribution the legal career made to the public career.

¹ 7 UTAH L. REV. 285 (1960). The Duff book was a very workmanlike and well-written book, whatever the merits of my expressed reservations about the task it undertook. It may well say the last word on its particular subject, at least for many years.

Lincoln was an extremely successful lawyer for his time and place. It is less clear—perhaps one can even say it is unlikely—that with his particular capacities, experience and training he would have been equally effective in another time or place. The great practitioners of the New York bar who were contemporaries of Lincoln were already beginning to deal with problems much more complex than he faced, or, with his background, could have handled. But in the Illinois frontier milieu he was remarkably successful. Mr. Frank concludes that five qualities contributed to his achievement. The first was a personality that attracted clients and instilled confidence. The second was a capacity to organize factual material and to come to the heart of a case, dealing with it neatly and succinctly. The third quality was restrained and effective verbal expression. This was Lincoln's one quality that Mr. Frank thinks transcended mere competence and approached genius. Fourth was an especially retentive mind, and fifth was a habit of great industry.²

On the other hand, an examination of a number of Lincoln's cases makes it clear to Mr. Frank that Lincoln was not a great legal scholar, and indeed that his knowledge was sometimes seriously deficient. But Mr. Frank thinks that ordinarily Lincoln understood the relatively uncomplicated problems with which he usually dealt, used the necessary legal materials with sufficient skill, and did an adequate job for his clients. On the whole this judgment seems fairly demonstrated.

Perhaps the chapter of the book most interesting to the casual reader is "The Practitioner in Public Life." Here Mr. Frank compares the qualities of mind and character developed by Lincoln's quarter century as a practicing lawyer with those exhibited in his public career. The author examines Lincoln's short congressional career, including his curious attempt to transfer his effective techniques of examining witnesses in a lawsuit to an inappropriate context, the "Spot Resolutions," asking questions of the President about the origins of the war against Mexico. Involvement in this episode earned Lincoln temporarily the derisive sobriquet of "Spotty Lincoln."³ The book also studies the debates with Douglas and other public addresses and activities toward the end of his law practice. The chapter is excellent because it illuminates the importance of his legal experience in shaping the way Lincoln handled public problems. There is here food for thought about how one might explore the careers of other lawyers to acquire general knowledge about the role of lawyer-statesmen in our history.

When the author seeks to do the same thing with Lincoln's presidential career, however, the contribution is less impressive. Mr. Frank greatly

² Pp. 97-98. Frank, Book Review, 63 YALE L.J. 579 (1954) should be read as a supplement to the book here reviewed.

³ Pp. 105-11.

shortens his treatment of this period because so much has already been written, especially by Professor Randall, about the legal (and especially constitutional) problems facing Lincoln in the war years. Perhaps this justifies, or even compels, the shortening of the treatment. However, I would have been glad to see an effort to do somewhat more fully for the presidential career what was done for the earlier public life.

In all this, the focus was upon Lincoln as an individual and Mr. Frank does not seek to suggest hypotheses that, if established as general principles, would guide us in understanding either the nineteenth century practice in the midwest, or the relationship between law practice and public life generally. But it does constitute a starting point from which such a broader study might proceed, for it asks many questions about Lincoln that one would ask more generally in the larger study.

Mr. Frank explores Lincoln's cases not as anecdotes but as data that will show something about the nature of his practice, including the extent to which it was a litigation and not an office practice, the nature of Lincoln's partnership relationships, his methods of office management, the fees that he charged and the income he had. The author inquires also into the kinds of work Lincoln did, its variety, its importance, its difficulty, the level of competence that Lincoln showed, the extent to which he was ready to use technical niceties on behalf of his client in a way that laymen ordinarily regard as frustrating the course of justice. He seeks to ascertain whether Lincoln won as many cases as he should have won, not by counting wins and losses as a layman might, but by evaluating what Lincoln succeeded in doing in relation to what he had to work with. He examines the way in which Lincoln handled witnesses, the way he drafted pleadings, the way he constructed legal arguments, his ability to organize material, his way of presenting facts, his writing style. These things are sometimes looked at in great detail, sometimes sketchily. These are the right kinds of questions to ask, and Mr. Frank has asked them about Lincoln more clearly than anyone else has done.

All this is a useful contribution to the provision of a working model for similar studies of other lawyers. Of course, in the nature of the case, it is not possible to base useful generalizations on data drawn from the career of a single man, except to the extent that the career can first be shown to be representative. What is necessary for the development of useful generalizations is a de-personalized study of the practice of many people who are selected to sample scientifically the practice about which generalizations are sought. The alternative is to show that the single career was representative, but that would seem to require a rather similar inquiry, though for some purposes it might be a less exacting one. Either task would face enormous difficulties in the present state of legal-historical research. The data are relatively inaccessible. There are few interested inquirers. The task

suggested would probably be beyond the capacity, or at least beyond the patience, of any single researcher. It will certainly be many years before a substantial number of scholars engage in the necessary exploration, if indeed that time ever comes. Meantime, to the extent that such an enterprise as Mr. Frank's aims to be something more significant than a ritual exercise in the hagiolatry of Lincoln, it ought to be a self-conscious effort to develop a conceptual model of the kind of inquiry that will eventually provide the data for broader generalization.

If the author is content to produce an interesting and even a fairly novel legal biography, he has succeeded fully. Quite certainly he intended no more. Thus, judged in terms of his own objectives, the product must be regarded as a good one. But one is also entitled to point out the other possibilities open to the writer and to ask how far he succeeded in achieving them, even if they lay beyond his intention. There is some doubt whether Mr. Frank's performance fully satisfies our hopes that he would do the more substantial job, and develop a useful model for other studies. In a book that is merely about Lincoln, it is probably not important that the structure is fairly loose. If he were pioneering in the larger field, the questions should be somewhat more systematically asked, with a fuller explanation of the reasons why it is important or useful to have answers. While it is perhaps asking too much of a model that it provide an analytical survey of the field of inquiry, with full explanation of structure and method, thought must be given to these problems. Certainly a model must remain responsive to the possibilities of the data under examination, and cannot propose questions impossible to answer, but it should also order the data in such a way as to provide as many fruitful hypotheses as possible. Of course it is much easier to say that the study, viewed as a model, does not do all one might hope from it than it is to say exactly what it should have contained. That the author did not fully succeed is rather testimony to the difficulty of the task than to any inadequacy of the laborer. It is early in the day to hope for definitive work. Every job worth doing in legal history is a pioneering job that ventures into unexplored territory.

If one were to inquire more generally into the legal practice on the Eighth Judicial Circuit of Illinois, or in Illinois generally, or in the frontier midwest, a multitude of problems would be interesting to explore, many of which Mr. Frank treats in relation to Lincoln's practice. One additional problem, at least, is suggested by the data. One might learn something about the patterns of legal borrowing by an inquiry into the availability of books of reference in the early period. In the case discussed in Note 3, Lincoln relied exclusively on New York cases, and his opponent used only New York, Massachusetts and English sources. This fact leads one to wonder how accessible other materials were. One could thus ask what role the contents of frontier law libraries played in the patterns of legal growth. There

is considerable evidence that the scarcity of books was a factor of no slight importance in American legal history,⁴ though there exists no study to measure its importance. More than that, there is not even an extensive description.

Hopefully one legal historian or many will one day investigate broadly the mid-nineteenth century Illinois or frontier midwestern practice in order to provide us with a generalized statement of its characteristics. But within the limited framework that Mr. Frank sets for himself, he has done a good job, as did also Mr. Duff with a still more limited purpose. Mr. Duff has shown us the fruits of conscientious fact gathering; Mr. Frank of imaginative question-asking about the data. If this review is a little critical of Mr. Frank's book, it should be made clear that that criticism is tempered with great respect for any legal historian who has the courage and devotion to deal with such intractable and formless materials and seek to give meaning to them. One is not entitled to sit in Olympian detachment and demand a final definitive treatment of these complicated problems at this early stage of legal-historical investigation. Studies like this, done as competently and imaginatively as this one was, are at least useful building blocks. Perhaps such inquiries will someday lead some one to ask, for the practice as a whole, the kinds of questions that Mr. Frank asks about Lincoln, and to use the same reliable scholarship⁵ to acquire the answers. Meantime, for a person

⁴ See, e.g., An Act to Repeal All Acts of the Parliament of England, and of the Parliament of Great Britain, of Sept. 16, 1810, in LAWS OF THE TERRITORY OF MICHIGAN 499 (1827); *Hickman v. Boffman*, 3 Ky. (1 Hardin) 356, 364-65 (1808).

⁵ I have only one adverse comment on Mr. Frank's scholarship. He discusses at some length a conversion case in which Lincoln represented a defendant who was being paid to care for and feed a horse belonging to the plaintiff. The defendant rode the horse fifteen miles without permission. The horse died a few hours later though apparently "not in consequence of the riding." The trial court decided in Lincoln's favor, and the Supreme Court of Illinois affirmed. *Johnson v. Weedman*, 5 Ill. (4 Scammon) 495 (1843). Mr. Frank remarks that "given these facts, this is the only possible result." He then analyzes Lincoln's performance, based on the assumption that the court was obviously right. With respect, not only is this not the only possible result, but it is one that seems contrary to the general tenor of the authorities at the time. On appeal, Lincoln had argued that the riding was no conversion, but that even if it were a conversion, "the injury done by the riding, and not the value of the horse, is the measure of damages." He cited for authority for the second proposition *Murray v. Burling*, 10 Johns. R. 172 (Sup. Ct. N.Y. 1813), a careful reading of which discloses no such principle. Indeed, the asserted principle seems contrary to hornblook law. *STORY, BAILMENTS* 283 (5th ed. 1851), which presumably states the contemporaneous law, says: "By the common law, if the act . . . amounts to a misfeasance and conversion of the property, there the owner is not bound to receive it back, but may recover the full value of it in a suitable action, as, for example, in an action of trover." *Murray v. Burling* deals with the measure of damages where the plaintiff has repossessed himself of the converted chattel, which is quite another problem. Presumably there is some doubt whether the interference in question was sufficient to amount to conversion, though Mr. Frank assumes in his analysis that it was sufficient. There is little doubt that if it was conversion the measure of damages was the value of the horse. In any case it is certain that the court did not reach "the only possible result." See pp. 45-47.

interested in a broader kind of legal history focused on the nineteenth century, this book is at least suggestive and informative. For those persons who are interested in everything about Lincoln, it is indispensable. It is an important addition to the shelves of Lincoln studies.

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