Review Essay

Lawyer Lincoln, Case by Case
MARK E. STEINER


After John J. Duff and John P. Frank published books on Abraham Lincoln's legal career in the early 1960s, more than forty years passed before another book on the subject appeared.¹ This remarkable drought for the fecund soil of Lincolnniana ended, however, when the Lincoln Legal Papers project (LLP) revitalized interest in lawyer Lincoln. Under the leadership of Cullom Davis and Daniel Stowell, the LLP collected, cataloged, and scanned thousands of documents. A complete edition was published in 2000 in DVD format; it has been superseded by an online edition that appeared in 2009.² A four-volume selected edition was published by the University of Virginia Press in 2008.³ Moreover, members of the LLP staff—the late William D. Beard, Davis, Susan Krause, John A. Lupton, Stacy Pratt McDermott, Christopher A. Schnell, and Stowell—also were producing much of

the new scholarship on Lincoln’s law practice or, more generally, law in Lincoln’s Illinois.4

In the antediluvian era, biographers paid little attention to Lincoln’s law practice. Lincoln biographies usually included a couple of chapters that touched on his legal career. Albert J. Beveridge, in his 1928 biography, mentioned a fair number of cases but discussed at length only a handful; those cases have become canonical. Until the onset of the LLP, most biographies only mentioned the same cases that Beveridge had highlighted: *In re Jane Bryant* (the Matson case); *State v. Armstrong* (the Almanac Trial); *Illinois Central Rail Road v. McLean County*; *McCormick v. Talcott* (the Manny Reaper case); and *Hurd v. Rock Island Bridge Company* (the Effie Afton case).5

Biographers had neglected Lincoln’s law practice for a couple of reasons. First, as Herndon once wrote, “a law office is a dull, dry place.”6 Biographers weren’t interested in the legal practice, because they believed the legal practice wasn’t interesting. But there were other reasons as well. J. G. Randall, in 1936, noted how important sources for Lincoln’s law practice “still remain difficult of access.”7 Mark E. Neely, in 1993, concluded that “Lincoln’s professional life remains surprisingly inaccessible to the historian as well, though the problem in this realm is largely archival.”8 Neely also believed that “more specialized studies” of the “arcane legal practices” of Lincoln’s day were needed. Those two problems—accessibility of documents and demystifying specialized studies—have been met by the publication of the legal papers and by the extensive scholarship by the LLP staff and others.

Although David Donald’s 1995 biography was written while the LLP was still collecting and sorting documents, it nonetheless showed


the LLP’s impact on Lincoln scholarship. Donald hailed the LLP as “perhaps the most important archival investigation now under way in the United States.” Donald had been able to examine unpublished documents from the LLP files and thus gave the most complete accounting of Lincoln’s law practice in a biography. The benefits of the LLP were again seen in Michael Burlingame’s magisterial biography, published in 2008. Recent books that have focused on the pre-presidential years also reflect the influence of the LLP in their treatment of the law practice.9

Other writers also have benefited from LLP’s vast riches. At least fourteen books on Lincoln’s law practice have been published since 2000. There have been two general treatments of the law practice, a study of Lincoln’s cases involving the medical profession, an analysis of Lincoln’s murder cases, a collection of articles on different aspects of the law practice, and two books examining Lincoln’s circuit riding.10 Seven books have focused on one particular case handled by Lincoln. Five are on canonical cases: two on the Almanac Trial, two on the Effie Afton case, and one on the Matson case.11 The other two books explore relatively overlooked murder cases.12


Both Dekle and McGinty have taken great advantage of the materials collected by the LLP. McGinty notes that “all modern studies of Lincoln’s legal practice are indebted to the Lincoln Legal Papers project.” After noting the Legal Papers are “indispensable sources of information,” McGinty states, “This book could not have been written, nor could the story of the Effie Afton case have been told—or told as well—without them” (10). Dekle reproduces all the legal documents from the LLP case file on the Almanac Trial as an appendix (151–64). Both cases were included in The Papers of Abraham Lincoln: Legal Documents and Cases.\(^\text{13}\)

Dekle and McGinty have very different goals for their books. Dekle calls the Almanac Trial Lincoln’s “most famous case.” He does not argue that the case was particularly important for Lincoln or that it has any wider significance for American history. He is interested in trying to uncover what actually happened at the trial. McGinty calls the Effie Afton case the “most significant of Lincoln’s career” and “one of the most important ever heard in Illinois.” If anything, McGinty believes that this “strangely neglected” case should be more widely known. His goal is not only to tell the story of the Effie Afton case but to explain Lincoln’s role and to place the case in a broader context of the “epochal clash of the railroads and the steamboats at the river’s edge” (2). Both authors achieve their aims in writing these books. And both books share something else: well-chosen illustrations.

Most of the documents uncovered by the LLP yield little without great effort. Docket entries, pleadings, and subpoenas are all mostly formulaic. The materials available for these two cases are markedly different, and the two authors capitalize on the differences. The Effie Afton case was one of only three cases handled by Lincoln that produced what would now be called a transcript of the trial (102).\(^\text{14}\) Because the Duff Armstrong murder trial was featured in Lincoln campaign biographies, participants and observers left behind many reminiscences.\(^\text{15}\) Dekle’s main task is sorting out these conflicting reminiscences to determine what probably happened at the trial.

Both Dekle and McGinty are lawyers. James G. Randall in his 1936 essay “Has the Lincoln Theme Been Exhausted?” observed that “the hand of the amateur has rested heavily upon Lincoln studies.”


Randall believed that Lincoln scholarship required “further critical development by historically trained scholars.” The hand of lawyers has rested heavily on studies of lawyer Lincoln. The first five books about Lincoln’s law practice were written by lawyers who had no historical training: Frederick Trevor Hill (1906); John T. Richards (1916), Albert A. Woldman (1936), Duff (1960), and Frank (1961). When Neely revisited Randall’s essay in 1979, he noted that “legal history is an area where professionalism has been slow to take command.” In 1979 this was still an area where Randall’s “trained historical specialist is rarely seen.”

Dekle in the preface to his book modestly admits he is “neither a historian nor a Lincoln Scholar” (x). Dekle practiced criminal law for thirty years as an assistant district attorney. He is now the director of the Criminal Prosecution Clinic at the University of Florida Levin College of Law. McGinty left the practice of law to become a professional writer and historian. Like Lincoln the lawyer, McGinty the historian is self-taught. Among his ten previous books are well-received studies of the Supreme Court during the Civil War and the case of Ex parte Merryman.

Both authors believe that their own experiences as lawyers help them understand lawyer Lincoln. This, in fact, is the central conceit of Dekle’s book. Dekle says that he “felt equal to the task of unraveling the Almanac Trial because if I had learned anything during my three decades as a criminal trial lawyer, I learned how to investigate, prosecute, and defend murder cases.” Dekle carries this argument of authority too far, and it sometimes leads him to presentism. He assumes throughout the book that practicing law in Illinois in 1850s is the same as practicing law now. Dekle often makes conclusions based on his own experience, assuming that his time spent in a Florida courtroom in the past thirty years are the same as Lincoln’s experiences in antebellum Illinois. For example, he says, “In my experiences as a

16. Randall, “Has the Lincoln Theme Been Exhausted?,” 270.
trial lawyer, negative character evidence of this type is near worthless” (104).

For example, Dekle points out that Duff Armstrong could have had a lawyer appointed to represent him if he couldn’t afford the services of one but that the lawyer wouldn’t have been paid. Dekle then asserts, “It is an unfortunate fact of life, however, that underpaid lawyers often do not defend their clients with the zeal displayed by well-paid lawyers” (3). But has this “fact of life” always been true? Armstrong’s case was tried when judges and lawyers rode the circuit. Each county of the circuit held two terms of court. Holding court was a form of public entertainment, and members of the community would turn out to see trials. With large crowds in attendance, wouldn’t even an unpaid lawyer have a lot at stake? Effective representation would be an advertisement for future legal services.

This presentist viewpoint permeates the book. One example is the discussion of William Norris, who was charged with murder along with Duff Armstrong. Norris, who had been charged and acquitted of murder a year earlier in Macon County, did not attempt to change venue to another county, a move that might have benefited him. This fact has led to “unjustified criticism” of his lawyer, William Walker, according to Dekle, who explains that this “gross error” wasn’t his lawyer’s fault.

Although some criminal defense lawyers portray themselves as being in charge, the defendant has the authority to make major decisions about the course of the defense. Defense attorneys can advise their clients as to the wisest course of action, but they cannot lawfully command the client to agree with them (64).

The assumption is what is lawful or ethical for lawyers now was lawful or ethical in Illinois in 1857. The law of lawyering was not fully developed in antebellum America; there weren’t any laws or formal bar association rules that are analogous to modern codes of ethics or disciplinary rules.20

Dekle rejects one version of Lincoln’s cross-examination of Charles Allen (which claimed Lincoln didn’t question Allen about the almanac but instead turned to the jurors and asked whom they believed), because it would have been “excellent theater but improper trial

procedure. During the examination of a witness, the lawyers simply ask questions of the witness without making asides to the jury.” Lincoln’s purported behavior would have been a “breach of courtroom protocol” (88). While this behavior would undoubtedly be a breach of courtroom protocol in any modern courtroom, I’m not sure the rule applied in 1857. A complicating factor for Dekle’s assumption about courtroom rules is that in 1857, an Illinois statute said that the jury was to “be judges of the law and the facts.”

Dekle in his penultimate chapter is more careful about not applying twenty-first-century standards to the Almanac Trial. Some writers have characterized Lincoln’s final argument as inflammatory and unethical, as Lincoln assumed facts not in evidence and made emotional appeals based on his relationship with the Armstrong family. While Dekle concedes by “modern standards” Lincoln’s argument was objectionable, he answers this criticism by pointing out, “We have no business using a twenty-first-century yardstick to measure a nineteenth-century speech” (113). Another criticism of Lincoln is that he unethically refused to hear what a witness wanted to tell him about what he saw that fateful evening. Lincoln was planning to call Will Watkins to establish that he was the owner of the possible murder weapon. Watkins, who later said he had seen Armstrong strike Metzker with a wagon hammer, was afraid that once he got on the witness stand he would have to tell what he saw. According to one account, Watkins “began to tell Lincoln what he knew, and Mr. Lincoln would not allow him to tell him anything” (135). Dekle establishes that there would been no duty for a defense lawyer in 1857 to discover what Watkins knew. Finally, Dekle discusses whether the cross-examination of Watkins by the state would have been restricted to matters Watkins had testified about during Lincoln’s direct examination, as some writers have questioned whether that rule existed in antebellum Illinois. While Dekle can’t find a case on point from Illinois before 1929, he cites a U.S. Supreme Court opinion that in 1840 had recognized this rule as “well established” (115–16).

Dekle presents three different versions of the Armstrong murder trial that he has found in the literature about the case. Version one has Lincoln securing acquittal by his masterful cross-examination of a key prosecution witness. Through the use of an almanac, Lincoln proves that the witness would not have been aided by moonlight to have seen what he claimed he saw. This version “has entered the pantheon of great moments in the history of American trial advocacy” (7). The

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urtext for the version was the novel *The Graysons: A Story of Illinois* (1887). Version two (which, chronologically, appeared first) has Lincoln securing acquittal primarily through an emotional appeal in his closing argument that mentioned Lincoln’s relationship in New Salem with Armstrong’s father, who had recently died. This version, which doesn’t mention Lincoln’s cross-examination or use of the almanac, was tied to Lincoln’s campaign for president; it first appeared in the *Cleveland Leader* the day after Lincoln was nominated for president at the Republican national convention. Lincoln’s representation of Duff Armstrong then figured prominently in campaign biographies, which obviously helps explain why it became Lincoln’s “most famous case” (13). Version three also was connected to Lincoln’s presidential campaign; it was the counternarrative advanced by Lincoln’s opponents. This version depicted Lincoln faking the almanac. Instead of the virtuous lawyer, there was “Lincoln the Trickster” (18–19).

Dekle ultimately concludes that “the famous cross-examination” didn’t happen. He looks at the various versions of it. (That Dekle calls these versions “variant transcripts” is like calling a forged Monet painting a “variant Monet,” since none of them is a transcript of the cross-examination [87].) Some of these versions are rightly dismissed out of hand because they are fictional or dramatizations of what the writer believed likely happened. Others are dismissed because they are factually inaccurate. Irving Younger, an expert of the law of evidence, concocted a mixture of earlier versions (94).

Dekle is convinced that Lincoln used an almanac to contradict Allen’s testimony. The dispute, for Dekle, “arises over when Lincoln did his contradicting” (87). Lincoln could have immediately confronted the witness during the cross-examination, or he could have waited to contradict the witness during his final argument. Dekle concludes Lincoln waited. J. W. Donovan, the first to claim


that Lincoln confronted Allen during his cross-examination, did so in 1898 (over forty years later!) and appears to have appropriated the cross-examination from Eggleston’s fictional account.

But what good did the almanac do? Dekle details the “precise nature of the contradiction Lincoln found in the almanac.” Charles Allen, the key witness against Armstrong, testified that he saw the fatal fight by the light of the moon high overhead. Some sources claim that the almanac showed there was no moon in the sky that night, while others claim Lincoln’s almanac showed the moon was near setting. Dekle concludes that the almanac showed the moon was near setting. He rejects those who remember the almanac showing no moon as having embellished their stories as they grew older. Dekle also rejects the “fake almanac” story, which first appeared during the presidential campaign of 1860. “Almanacs for 1857 showed the moon on the horizon” (105). Of course, the “no moon” almanac would have been a forgery, because the almanacs for 1857 showed that the moon had set, not that the night was a moonless one. Dekle deftly destroys the notion that Lincoln used a fake almanac by pointing out that the real ones would have “served him just as well” (108).

While Dekle had a fairly narrow focus, McGinty sets the Effie Afton case on the largest stage possible. The first five chapters provide the background of the lawsuit by the owners of the Effie Afton against the Railroad Bridge Company. McGinty begins with a discussion of the growth of steamboat traffic on the western rivers. He also discusses Lincoln’s involvement with rivers and riverboats and his early support for internal improvements like canals and railroads. McGinty also details the growth of railroad transportation. The third chapter may be the best short summary of Lincoln’s law practice.24

The fourth chapter details the construction of the Rock Island Bridge. In 1852 Congress gave rights of way to public lands to any company authorized by a state to build a railroad. The Illinois legislature incorporated the Railroad Bridge Company, authorizing it to build a railroad bridge near Rock Island so long as it did not “materially obstruct” the free navigation of the Mississippi. McGinty also does a good job of explaining the constitutional issues involved in Congress aiding railroad construction and the similar legal issues faced in earlier cases. One of the more interesting aspects of Lincoln’s prepresidential career is how some individuals who would later figure prominently

during the Civil War crossed his path years before. Jefferson Davis enters the story as secretary of the War Department. Davis tried to block the construction of the bridge, probably because he favored a southern railroad to the Pacific. The U.S. attorney for Illinois attempted to enjoin the construction, but John McLean (who later dissented in *Dred Scott*) denied the relief. McLean did warn that if boats were injured by any “want of attention” by the bridge company, then the bridge company would be liable (63–65, 69).

The fifth chapter does a masterful job of describing the collision itself, which occurred just two weeks after the bridge opened. The *Effie Afton* had 150 passengers, 50 crewmembers, and over 350 tons of cargo. The morning of the collision, the *Effie Afton* collided with a steam ferry before heading for the bridge draw. When it was halfway through the draw, it struck one of the piers, then another, and then a fixed span. Fires started onboard, resulting in the loss of the vessel and its cargo. The bridge was also damaged, with the span on the Illinois side destroyed (72–75).

A lawsuit against the bridge company was inevitable. The next seven chapters are about that lawsuit. The boat owners were underinsured and had suffered significant losses. They were also supported by steamboat interests in St. Louis and other cities who raised money for the litigation. After the suit was filed in federal court in Chicago, Chicago attorney Norman B. Judd answered for the defendants. Joseph Knox of Rock Island soon joined Judd. Lincoln didn’t join the defense team until six months after the suit was filed. (Both books are reminders of how Lincoln often joined with other lawyers to try cases. In the Almanac Trial, Lincoln joined Caleb Dilworth and William Walker in defending Duff Armstrong.) Before Lincoln joined the defense team, many witnesses had been interviewed and many depositions had been taken. What, then, was Lincoln’s role? McGinty plays fair with the evidence and concludes that Judd, the lead attorney, certainly did not believe that Lincoln was indispensable to victory (93).

Just as Dekle’s book is based largely on reminiscences, McGinty relies on comprehensive reporting on the case that appeared in newspapers. Henry Binmore covered the trial for the *St. Louis Missouri Republican*, and Robert R. Hitt, for the *Chicago Press*. (Binmore and Hitt later covered the Lincoln-Douglas debates.) McGinty notes that

regional newspapers recognized the trial “was one of the most consequential that had ever taken place in an American court” (100–102, 130). The trial began in September 1857. Lincoln does not seem to have taken part in the opening statements. The plaintiffs then presented over eighty witnesses. Lincoln does not seem to have made his presence known during the plaintiffs’ case in chief. It was then the defendants’ turn, and they, McGinty explains, were about to present their side “aided by a plainspoken lawyer from Springfield with a remarkable memory and a keen sense of trial strategy” (130). Norman Judd continued as the lead lawyer for the defense. Lincoln apparently made his first appearance in the trial arguing an evidentiary point: whether testimony about the railroad traffic over the bridge was admissible. The plaintiffs objected to this testimony, because it wasn’t relevant to the navigation of the river. Joseph Knox argued first for the defendants, claiming that “the greatest good of the greatest number” should be sought. Lincoln then argued that the obstruction would not be a “material” one in light of the necessity of the bridge. While the plaintiffs argued for an absolute right of free navigation, the courts were, in Lincoln’s words, “conforming, as they should do, to the nature and wants of our country.” Justice McLean allowed the evidence for the limited purpose of showing the necessity of the bridge; the evidence couldn’t be used to refute “the nature of the obstruction” (143–44).

Lincoln’s other significant contribution to the defense was giving one of the closing arguments. Only Robert Hitt remained to cover the closing arguments, and he only gave “abbreviated summaries of what he considered the most important remarks by the lawyers” (145). Nonetheless, McGinty is able to use Hitt’s reporting to create a sense of just how good Lincoln was as a trial lawyer. Lincoln began by telling the jury “he did not purpose to assail anybody, that he expected to grow earnest as he proceeded but not ill-tempered.” Lincoln covered many topics—he used parts of two days. He suggested that the St. Louis Chamber of Commerce fomented the litigation, highlighted the utility of railroads and railroad bridges, and celebrated the technical achievement of the bridge itself. Lincoln also contended that the steamboat was contributorily negligent; if the jury agreed, the plaintiffs would lose. Lincoln argued, “[I]f we are allowed by the legislature to build the bridge, when a pilot comes along it is unreasonable for him to dash on heedless of this structure which has been legally put there” (154).

The trial ended somewhat anticlimactically in a hung jury, a win for the defendants since the plaintiffs had the burden of proof. While the
case wasn’t technically over, Lincoln’s involvement was. Steamboat interests tried their luck with other lawsuits, which didn’t pan out. One of the Effie Afton plaintiffs filed a second suit, which was dismissed in 1875. A bizarre plot to burn down the bridge was thwarted in 1860 (165–71).

McGinty briefly covers Lincoln’s post–Effie Afton career. He tries unconvincingly, in my opinion, to make the Effie Afton case into a sine qua non for Lincoln’s election to the presidency. Because of the trial, Norman Judd’s respect for Lincoln grew, and Judd’s skills at the state convention in 1858 were critical for Lincoln’s candidacy. If Judd hadn’t supported Lincoln in 1858, then Lincoln wouldn’t have been the senatorial candidate, and there wouldn’t have been a Lincoln-Douglas debate, and then Lincoln wouldn’t have been the Republican nominee in 1860 (191–92).

McGinty explains that history rendered two verdicts. First, railroads prevailed over steamboats and played a key role in forging a new America. Second, Lincoln became a “towering figure in an almost mythical American past.” The Effie Afton case shows how lawyer Lincoln “helped to bind the nation together with iron rails, to bridge the mightiest river on the continent, and to turn the nation toward an economic future of strength and vitality” (191).

Both books make substantial contributions to Lincoln studies. McGinty has written the definitive account of the Effie Afton case by not only skillfully explaining the lawsuit but also establishing its wider significance. Dekle provides the best reconstruction of what probably happened at the Almanac Trial: the most famous cross-examination in American history didn’t actually occur. But he hasn’t written the last word on the trial. Building on Dekle’s work, a future student of lawyer Lincoln will need to explain why this trial became Lincoln’s “most famous case.”