Commentary on "Beware the People Weeping"

HAROLD M. HYMAN

Upon learning in 1885 of the appearance of still another sensational, baseless published rush to judgment about the Lincoln murder conspiracy, Supreme Court Justice David Davis responded despairingly: "[W]hat is the use of correcting it?"[1] In the century since the justice's statement about the ineffectiveness of history, or perhaps of historians, the flow of exploitations and pseudohistories about the Lincoln murder conspiracy has not abated. Perhaps the Davis-like disgust felt by professional historians at this venal literature, a disgust reflected in scholars' self-exclusion from relevant research, left the field to unprincipled sensationalists and uneducable misrepresenters.

Professor Turner's paper, his book, *Beware the People Weeping,* and William Hanchett's 1983 book, *The Lincoln Murder Conspiracies,* plus the publications of others, signal an end to this century-long domination of the subject by the shrill voices. If so, a question rises, one to which I wish Professor Turner had attended in greater detail: why this tenacious, dainty attitude among scholars, so belatedly lessening? Tentative approaches to answers exist in Turner's, Hanchett's, and others' publications on the Lincoln assassination. Perhaps the following questions deserve further attention.

First, what connections existed between this scholarly distaste for the Lincoln murder theme and the nineteenth-century rise of modern history Ph.D. and law school curricula, a rise occurring just when Justice Davis expressed his despair at history's uselessness? For complex reasons centering perhaps on their self-images as elite guardians of social values and their alleged dedications to then-new social sciences, leaders of both history and law education effectively excluded legal history, including criminal law history, from their respective curricula. This mistake by early paper-chasers suggests that the poet W. H.

Auden was perhaps wise in warning, "Never . . . commit a social science."

Both the law and history disciplines have, happily, been recently rediscovering legal history, and, in it, criminal law history. Their rediscovery increases the possibilities that there may be additional uses in correcting both the record and the derivative interpretations of the Lincoln murder conspiracy. As example of these possibilities, it is reasonable now to ask a second question of the past that has not been fully asked, much less answered: what standards of federal and state justice, both civilian and military, prevailed in mid-1865?

No one knows the answers, because too little research has been completed. But some responsible if partial conclusions exist. They suggest that Professor Turner is on a sound road.

Significant recent research, by Donald Nieman among others, focuses especially on the condition of federal criminal justice during Lincoln's White House years. In brief, such justice was little developed. For example, no federal prisons existed. This is why most of the 18,000 civilian "prisoners of state" imprisoned by the military under Lincoln's habeas corpus suspensions from 1861 to 1865 spent their usually brief periods of incarceration in contrived detention sites, such as Fort McHenry's stockade, and in state prisons.

Likewise, so far as federal criminal law was concerned, the murder of Lincoln was no special crime but an "ordinary" felony. It was also an unpunishable felony, because the federal District of Columbia then used Virginia's criminal statutes, rules of court procedure, and decisional case law. Justice would have been a sure casualty if Lincoln's murderers had been tried in Virginia's legal atmosphere, where the testimony of blacks and of Unionist white witnesses was either formally or informally inadmissible, and where white-only racial tests and elite-only property qualifications screened jurors, lawyers, judges, and peace officers.

Next, we need to look at Professor Turner's interesting point about the Union public's acceptance of military trials for Lincoln's murderers and accomplices. He suggested that this acceptance derived from the public's familiarity, since 1861, with army arrests of civilian security risks. Perhaps. I am intrigued with a differing possibility, one still wanting basic research. Civil War volunteers and conscripts left what was perhaps the least fettered civilian environment of the western world when they put on their bluecoats. And they accepted the rig-

orous disciplinary and criminal law standards then prevailing for long-service regulars. By 1865, for hundreds of thousands of bluecoats, multiplied by their families and friends nationwide, experience suggested that military trials were rugged, not rigged: coercive, not lawless.

This popular perception was correct. Military and martial law *were law.* Military law resulted from civilian statutes, the periodic Articles of War required by the Constitution. If a military trial was acceptable for a loyal son or husband, it was certainly good enough for Lincoln's killer, Seward's attacker, and their aiders and abettors.

Permit me here to stress a point Professor Turner touched glancingly. The standards of civilian criminal justice were then not only extremely poor but were also slipping badly, according to unhappy lawyer-patricians. This is one reason why, in 1866-67, in the Test Oath cases, the Supreme Court worried so about state and bar association licensing standards for practicing lawyers and other licensed professionals, and why, in 1870-71, Harvard Law School initiated the paper-chasing curricula that still dominates legal education.

In state lower courts, which tried the overwhelming number of accused criminals, unprofessionalism was common. Many judges and lawyers were self-taught, and not all were Lincolns. Judges and lawyers were frequently illiterate, and sometimes browbeat witnesses, defendants, and jurors. Procedural irregularities and doctrinal deviations were scandalous. Exposures of bribery and other corruptions were frequent. Only in tiny Maine could defendants in states' felony trials testify in their own defense.

As noted, even those standards for criminal law were slipping. Demoralizing newer practices were gaining popularity among a despised subcaste of lawyers, especially recent immigrants with strange surnames, who, because the WASP legal establishment largely excluded them from lucrative property cases, by default took on criminal law practices. According to lawyer-patricians of the 1860s and later, these deplorable newer practices included contingency fees, bail bonding even in capital cases, ambulance-chasing, fee-splitting and other referrals, plea-bargaining, and exploitations of the still novel insanity plea—as was done for one of the Lincoln murder conspirators. States' bar association leaders—and the associations were themselves products of the 1860s—accused un-WASPish lawyers (Germans, Irish, and Jews) of creating this deterioration in the profession. In the 1860s,

patricians of the bar began to devise ways of keeping such exotics, plus black men and all women, out of the law schools and practice. Law professors aided this cause by sneering at criminal law, by not teaching it, by not writing criminal law texts or using those in print as textbooks, and by ignoring it in the lists of courses required for a law degree.

Backtracking to 1865, the point is that civilian criminal law was by no means respected, much less revered, even in comparison with military criminal legal procedures and standards. By no means do I extol military justice. I do want to know more about it and all these matters that are part of the context of the Lincoln murder trials.

A last, carping matter. Perhaps Professor Turner has claimed too much in suggesting that in 1865 the public looked on the military court that tried the conspirators as a kind of Warren Commission. My own work suggests that such a role was more likely played by the Congress's joint standing investigating Committee on the Conduct of the War. Since 1861 this committee had helped Lincoln and Congress greatly to maintain civilian controls over the Napoleonic-size Union military establishment that mushroomed after Sumter. To the amazement of America-watchers Karl Marx, Walter Bagehot, and Georges Clemenceau, this huge army disappeared unthreateningly back into civilian life within weeks after Lincoln's death and Appomattox.

Professor Turner is not responsible for coping in his paper with all of my concerns. I know that these are topics for future research and for full examination in a Lincoln bicentennial conference, perhaps on the splendid campus of Gettysburg College. Naturally, I find many reasons for praising Turner's paper, and the derivative questions that it spins off. We are, clearly, chipping away usefully, healthily, if belatedly, at encrusted errors surrounding the Lincoln murder and the trial of the assassins. I thank Professor Turner for his effective chips, and the organizers of the Gettysburg Lincoln conference for making further chipping probable. They have helped us move a step closer to the point that T. S. Eliot described in his last Quartet: "The end of our exploring will be to arrive where we started and see the place for the first time."

NOTES

1. David Davis as quoted in John P. Usher to Ward Hill Lamon, Oct. 13, 1885, Lamon Papers, Huntington Library, San Marino, Calif.