SCREED FOR A FILM AND PILLAR OF CLASSICAL CONTRACT LAW: SHUEY V. UNITED STATES

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INTRODUCTION

Few contract cases could provide a plot for a motion picture. However, Shuey v. United States provides more than enough raw material for an action film. As one commentator has written, “If it had been written as fiction, no one would believe it; the odd twists of fate in John H. Surratt’s escape, capture, subsequent escape, and final recapture are too contrived for even the most gullible of readers. But the events of his sixteen months on the run, as implausible as the plot of a bad thriller, actually happened.”

The novel legal issue in Shuey is simple enough. Edwin Stanton, the Secretary of War, had offered a reward of $25,000 for the arrest of John H. Surratt, described in the posters making the offer as “one of Booth’s Accomplices in the murder of Abraham Lincoln.” Later, President Andrew Johnson issued a proclamation revoking the offer. Henri Beaumont de Sainte Marie, however, claimed the reward. After the revocation notice was published, Sainte Marie found Surratt in the Papal Zouaves in the town of Sezze in the Papal States and reported his presence to the American Minister in Rome. This report resulted in Surratt’s arrest. Surratt escaped, however, and made his way to Egypt. A warship of the U.S. Navy pursued Surratt with Sainte Marie aboard to identify him. Surratt was arrested again.

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1. 92 U.S. 73 (1875).
3. A poster making the offer was widely distributed, and appears infra, Appendix A.
4. Secretary of War Stanton testified before a congressional committee to the effect that the President had given him the discretion to withdraw the offer and that he, Stanton, issued the order. Pursuit, supra note 2, at 65. The order, signed by E.D. Townsend, Assistant Adjutant-General, “[b]y order of the President of the United States,” was published in 13 Stat. 778 app. (1866). It appears infra, Appendix B.
Sainte Marie's claim for the reward was denied by the Court of Claims and the United States Supreme Court affirmed. One of the alternative grounds for the ruling was that the reward offer that had been made by publication had been properly revoked by equal publication. This holding has become a canon in classical contract law theory.

The alternative holding was that because Sainte Marie did not physically make the arrest, he had not performed. This holding contributed to the classical view of unilateral contracts as expressed in the Brooklyn-Bridge hypothetical.

As a prologue to the facts of Shuey, one must review Lincoln's assassination and introduce some of the cast of characters.

I. THE ASSASSINATION OF PRESIDENT LINCOLN

The film opens with Abraham Lincoln's entry into Ford's Theatre on the Good-Friday night of April 14, 1865. He is accompanied by his wife, Mary Todd Lincoln. With the Lincolns are Major Henry R. 

7. Id. at 76. There had been an earlier precedent that was not cited to the court.

In Sears v. Eastern Railroad Co., 96 Mass. (14 Allen) 433 (1867), from August 15 to September 15, defendant published its train schedule in advertisements in the Boston newspapers. The ads indicated that a train would leave Boston at 9:30 p.m., except for Wednesdays and Sundays. Plaintiff bought a ticket prior to the night in question. On September 15, he went to the station and learned that the train had been postponed until 11:15 p.m. Instead of waiting, he hired a buggy and drove to Lynn. It was the habit of defendant to postpone its night train when a special event occurred in Boston. Notice of postponements were posted on defendant's cars and in the station. On this occasion, such notices were posted on September 13. The court held that these notices were inadequate. The ticket, coupled with the terms of the ad, constituted a contract. The railroad could change its schedule, but to do so it had either to (1) indicate in the ad its power to change the schedule or (2) publish a notice of the change in the same newspapers.

8. Because the alleged performance of the contract took place primarily in the Papal States, an argument could be formulated that the law of that territory should have been applied. Although I am not certain what the law of that territory was in 1866, Italian law today would regard an offer to a reward as revocable only for a "just cause, provided that the revocation be made public in the same manner as the promise or in an equivalent form." Italian Civil Code and Complementary Legislation, art. 1990 (Mario Beltramo et al. transl., 2001). However, such a promise lapses if the promisee is not notified of performance within one year from the making of the promise. Id. art. 1989.

The entire framework contrasts with that for offers to contracts; offers for rewards are a separate category, making comparative analysis difficult. For a comparative overview of the equal publication rule, see I Formation of Contracts: A Study of the Common Core of Legal Systems 113 (Rudolf B. Schlesinger ed., 1968). As to Italian Law, see II id. at 1292.

9. Maurice Wormser created this hypothetical. "I will give you $100 if you walk across the Brooklyn Bridge." I. Maurice Wormser, The True Conception of Unilateral Contracts, 26 Yale L.J. 136, 136 (1916). The hypothetical involves the power of the offeror to overtake the offeree to revoke the offer prior to the offeree's arrival at the other side of the bridge. Id.
Rathbone and his fiancée Miss Clara Harris, daughter of Senator Ira Harris of New York. Lincoln tells the usher that General and Mrs. Grant, who had been expected to accompany the Lincolns, had a last minute change of plans. Word had spread around Washington that the Lincolns and the Grants were planning to go to the theatre that night to see the closing performance of the popular play, "Our American Cousin." John Wilkes Booth heard of the plans at about noon, when he visited Ford’s Theatre to pick up his mail.

But the Grants change their plans. They go to Philadelphia instead. Apparently, the Grants would go anywhere to avoid Mrs. Lincoln. Only one bodyguard, John Frederick Parker, of the Metropolitan Police, accompanies Lincoln. After the party are seated in their box, the bodyguard silently departs. The suggestion has been made that he departed for a nearby tavern or bordello. The truth is probably less film worthy; it seems that Parker took a seat in the Theatre to watch the play.

During the second scene of the third act of Our American Cousin, there is a line that always created paroxysms of laughter. Booth

10. The Washington Evening Star announced that the Lincolns were going to Ford’s Theatre with General and Mrs. Grant that night. The announcements are reproduced in Otto Eisenchiml, Why was Lincoln Murdered? 60 (1937).

11. Lincoln was an inveterate theatergoer. On April 13, the day before the assassination, Booth asked his good friend, John Deery, the owner of an elegant saloon, to reserve for him a right hand box at Grover’s Theatre for the following night. Lincoln had been invited to attend the opening of Aladdin, or the Wonderful Lamp, at Grover’s Theatre. Booth gave a plausible excuse why he did not want to make the reservation himself; the owner would insist that Booth accept a complimentary ticket. Theodore Roscoe, The Web of Conspiracy: The Complete Story of the Men Who Murdered Abraham Lincoln 96-97 (1959). It seems likely that Booth had already formulated his theatrical murder plan; only the venue had changed.

12. See Fletcher Pratt, Stanton: Lincoln’s Secretary of War 414 (1953), focusing on General Grant. Mrs. Grant had even greater cause than the General to distance herself from the mentally disturbed Mrs. Lincoln. See Eisenschiml, supra note 10, at 58-59.

13. His whereabouts at the time of the murder is a matter of conjecture. One author suggests a tavern or bordello. Pratt, supra note 12, at 414. Charges were proffered against Parker by Almarin Cooley Richards, Superintendent of the Metropolitan Police Force, but no action was taken. Louis J. Weichmann, A True History of the Assassination of Abraham Lincoln and of the Conspiracy of 1865, at 475 n.4 to ch. XV (Floyd E. Rivoled ed., 1975). Another author writes, Soon after the assassination, this wretched policeman was returned to duty with the White House Guard! Mrs. Lincoln’s maid, Elizabeth Keckley, would recall that Mary Lincoln upbraided [sic] Parker in a stormy scene. But that was all. Incredibly, he was allowed to remain on the police force. Then, in 1868, he was suddenly dismissed. Why? For sleeping in a streetcar while on duty!

Roscoe, supra note 11, at 513. For more detailed information on Parker, see id. at 23-25.

makes this line his cue. When actor Harry Hawk utters the line, "You sockdologizing old man trap," John Wilkes Booth enters the Lincolns’ box, fires his pistol into the back of Lincoln’s head, drops the pistol and pulls out a knife. Major Rathbone seizes him but Booth slashes him with his knife. Booth breaks loose and jumps down to the stage, blurring out the motto of the Commonwealth of Virginia: Sic Semper Tyrannis (Thus Always to Tyrants). The twelve-foot jump is impeded when Booth’s spur encounters the American flag that was draped below the President’s box. This entanglement with the flag turns his leg, resulting in a fracture of the fibula, commonly called the shinbone. Booth departs with the help of a stage-hand, Edward (Ned) Spangler. Booth rushes out the rear door of the Theatre, mounts a waiting horse, which Spangler had arranged to be there for him, and flees. Twenty minutes later, Booth crosses the Navy Yard bridge over Anacostia Creek. Despite orders not to let anyone cross after 9:00 p.m., the sentry is lenient because Booth concocts a story that he lives in Charles County and is unaware of the 9 o’clock rule. David Herold, a fellow conspirator, similarly is allowed to cross the bridge soon thereafter and eventually catches up to Booth, and guides Booth in his escape into Virginia.

Two men from Ford’s Theatre go out in pursuit of Booth—Jacob Ritterspaugh, a carpenter who worked for the theatre, and Joseph B. Stewart, a member of the audience. Booth is on horseback and Stewart runs after the horse and rider, but the horse is too swift. When Ritterspaugh returns to the theatre, Spangler slaps him and says “Don’t say which way he went.” Ritterspaugh asks him what he meant by slapping him. Spangler answers, “For God’s sake, shut up.” Spangler appears to have been crying. Spangler will be

15. See Roscoe, supra note 11, at 99-100.
17. This is the conventional account and an American legend. E.g., Weichmann, supra note 13, at 152. Booth, apparently contradicting press accounts, wrote in his diary “I shouted ‘Sic semper’ before I fired.” Id. at 209.
19. That, at least, is Stewart’s testimony, accepted by Weichmann in his narrative. See Weichmann, supra note 13, at 154-55. A.C. Richards, who was Superintendent of the Washington Metropolitan Police at the time of the assassination, reviewed a draft of Weichmann’s narrative and cast doubt on Stewart’s story. Richards, in a letter to Weichmann, described Stewart as a shady lawyer and alleged that Stewart’s story was “apocryphal and imaginary.” The letter, dated June 10, 1898, is appended by Risvold, the editor of the volume, to Weichmann’s narrative. Id. at 417. The quoted language appears on page 418. According to Richards, Stewart and Richards went out of the Theatre together; Booth and the horse were already out of sight. Weichmann did not change the manuscript to reflect Richards’ comments.
20. Benn Pitman, The Assassination of President Lincoln and the Trial of the Conspirators 97-98 (photo. reprint, Greenwood Press 1974) (1954). This is an edited version of the transcript of Trial of the Conspirators by the Military Commission in 1865. Pitman was one of the court reporters.
convicted by the Military Commission for “having feloniously and
traitorously aided and abetted John Wilkes Booth in making his
escape.” He will ultimately be sentenced to imprisonment at hard
labor for six years and be imprisoned in Fort Jefferson, Dry Tortugas,
Florida, but will be pardoned by Andrew Johnson after about four
years.

II. SARRATTSVILLE

The next scene is a flashback to a rural tavern in Sarrattsville.\(^{22}\)
Prince George’s County, Maryland, where John Surratt, Sr., tavern-
keeper, postmaster, and moderately prosperous farmer, holds court,
discussing the coming election that would bring about the first
inauguration of Lincoln. Surrattsville (today renamed Clinton)\(^{23}\)
was on a main road from Washington to Virginia, about 10 miles from
Washington. Surratt’s personality is much like that of Big Daddy in
Sweet Bird of Youth. He is large, loquacious, not too fond of work
and falling-down drunk at the end of the day.\(^{24}\) His conversation
leaves no doubt that, as a slaveholder, his sympathies are with the
South. Nonetheless, like many Southerners, “Squire Surratt,” as he
was dubbed by his neighbors,\(^{25}\) has qualms about the possible break-
up of the Union.\(^{26}\) His wife’s brother, J. Zaddock Jenkins (Zad), also
a slaveholder,\(^{27}\) staunchly defends the union.\(^{28}\) Quietly listening to

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21. The sentence of the court is reproduced in Weichmann, supra note 13, at 276.
22. The post office name has been changed from Sarrattsville to Clinton.
23. But the name survives. Surrattsville High School is in Clinton. The website
for the school is http://www.pgcps.pg.k12.md.us/~surratts.
(citing “Undated letter from Mary Surratt to Father Finotti found at the New York
Historical Society by Michael W. Kauffman”). Mary “confided that, almost every
day, her husband was in a drunken condition.” Id. at 45; Helen Jones Campbell, The
Case For Mrs. Surratt 41-42 (1943).
26. Guy W. Moore, The Case of Mrs. Surratt: Her Controversial Trial and
Execution for Conspiracy in the Lincoln Assassination 5 (1954) (noting that Surratt,
Sr. was “not looked upon as an open secessionist” and was “inoffensive, good-
tempered, and generally esteemed”) (citing Washington Evening Star, May 12 and
July 7, 1865, and Mary E. Surratt, in National Cyclopaedia of American Biography, IV,
at 347).
27. Maryland was the first southern state to emancipate slaves within its borders.
The Constitution of 1864 contained a Declaration of Rights proclaiming that “all
persons held to service or labor as slaves, are hereby declared free.” See Robert J.
detail on the ending of slavery in Maryland, see generally Charles Lewis Wagandt,
Actually, the institution of slavery had practically crumbled before then. Slavery was
abolished, with compensation, in the District of Columbia in 1862. David L. Lewis,
escaped into the District, or joined the Union Army.

Against this background, we can better understand the following testimony of
Zad Jenkins: “I have suffered from the war in the loss of my negroes; but I never, to
my recollection, made any complaint about that. When the State declared her new
the political talk is John Harrison Surratt, Jr. still called Little Johnny, although he is now 16\textsuperscript{31} and almost as tall as his 6'3" father, John, Sr.\textsuperscript{30} Little Johnny is home on summer vacation from attendance at the College of Saint Charles, a school that was largely for aspirants for the priesthood.\textsuperscript{31} Later, a $25,000 reward will be offered for his capture. Two years later, John, Sr. will die and John, Jr., will for a brief period become postmaster, though would soon be replaced by a Republican. At some point, the Surrattsville "tavern was designated by the Signal Corps of the Confederate Army as an official station on one of the secret lines of communication established between Richmond and Washington."\textsuperscript{32}

Elsewhere some ladies are sewing. Among them is Mary Eugenia Surratt. In a few years she will be the first woman ever executed by the United States, sentenced to death by hanging on flimsy evidence by an unconstitutional Military Commission.\textsuperscript{33}

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\textsuperscript{28} Zad's testimony is corroborated by the testimony of William P. Wood who was the Superintendent of the Old Capitol Prison at the time of his testimony. Pitman, supra note 20, at 130. Also testifying as to Zad's loyalty are J.C. Thompson and J.H. Blandford. Id. Two witnesses state that they had heard that he had developed "secession proclivities," since the loss of his slaves. Id. at 137 (testimony of John T. and William W. Hoxton).

\textsuperscript{29} He was born on April 13, 1844. Pursuit, supra note 2, at 54.

\textsuperscript{30} Campbell, Confederate Courier, supra note 25, at 10.

\textsuperscript{31} Weichmann, who was his school mate for three years, describes him as a divinity student. Weichmann's testimony, in Pitman, supra note 20, at 115, is to the effect that Surratt "was a student of divinity at the same college as myself." According to John's sister, John Surratt was not a divinity student. Testimony of Anna Surratt, in Pitman, supra note 20, at 131. Surratt's biographer states that he majored in French and was an exemplary student. Campbell, Confederate Courier, supra note 25, at 14. Weichmann confirms that he was an exemplary student. Testimony of Weichman, in Pitman, supra note 20, at 116. Weichmann's testimony is to this effect:

His character at St. Charles College, (Catholic,) Maryland, was excellent. On leaving college he shed tears; and the president, approaching him, told him not to weep; that his conduct had been so excellent during the three years he had been there, that he would always be remembered by those who had charge of the institution.

\textit{Id.} Previously Surratt, Jr. had been schooled at St. Ignatius in Washington and St. Mary's Preparatory School outside of Baltimore. Campbell, Confederate Courier, supra note 25, at 14.

\textsuperscript{32} Hanchett, supra note 14, at 48 (citing to "[a] Confederate States document listing it as such . . . in the National Archives").

\textsuperscript{33} On the constitutionality of military commission trials, the Supreme Court said,
III. THE CAST OF CHARACTERS

A. John Surratt, Jr.

When John's father died in August of 1862, John had to drop out of St. Charles College. Although John helped around the property, he also went to Richmond and entered the Confederate Secret Service Bureau. His position was primarily that of courier, but spying was part of his job description.

I walked in and out of the lines of the two armies, entered and left Washington, went from Richmond to New York, to London, returned to Washington, and elbowed the Union Generals, all the while gathering valuable information for the service. I knew every cross road, bypath, and hiding place in Northern Virginia and Southern Maryland.

It was this last talent that drew John Wilkes Booth to seek an introduction to Surratt. From the literature, one forms a picture of John H. Surratt as a cool, mannerly, self-assured young man. He was physically brave and even reckless, but generally cautious in his dealings with strangers.

John was indicted with his mother and others for conspiracy to kill Lincoln. He was not tried with the other conspirators. He was, in fact, out of the country during the trial of the conspirators, but he was tried at a later point. Neither he, nor the other conspirators testified at the trials. This is because until 1878 defendants in criminal cases were incompetent to testify in federal courts.

B. Mrs. Mary Eugenia Surratt

Mary Eugenia Surratt, mother of John Surratt, was born Mary Elizabeth Jenkins. She hailed from an old Maryland family. Before

"Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866). This decision came in the year following Mary Surratt's execution pursuant to a sentence of a military commission. The trial and execution took place in the District of Columbia at a time when the courts were open. Mrs. Surratt's attorneys made essentially the same argument that the Supreme Court accepted in the Milligan case. For a defense of the use of a Military Commission by the then Attorney General, James Speed, see his Opinion, in Pitman, supra note 20, at 403-09.

34. The Washington Post on April 3, 1898, published an interview with John H. Surratt by Hanson Hess, which is reprinted as an appendix to Weichmann, supra note 13, at 441, 443 [hereinafter Hanson Hess Article]. The interview may be a fabrication, see Hanchett, supra note 14, at 117, but many of the facts stated in it are corroborated by other sources.

35. Weichmann, supra note 13, at 444.

36. Id.

37. Defendants in criminal cases were first permitted to testify in federal courts by the Act of March 16, 1878, 20 Stat. 30, Ch. 37.
the District of Columbia was carved out of Maryland and Virginia, Washington's Capitol Hill had been named Jenkins Hill.\textsuperscript{38} She was an educated genteel woman, having attended the Academy for Young Ladies conducted by the Sisters of Charity. Although she was born into a Protestant family, she converted to Catholicism\textsuperscript{39} and reared her three children in that faith. One of her counsel wrote some years after her death that

In the earlier years of her life she had been a \textit{belle} in her county.\ldots
She had married a well-to-do man of the world, who, dying, bequeathed to her charge three children\ldots and a large plantation well stocked, and cultivated by numerous slaves; also, certain property in the city of Washington.\textsuperscript{40}

Despite this picture of prosperity, her fortunes changed. As her counsel described it, "Her estate\ldots very early in the war began to suffer from the depredations of the army and its followers. One by one her slaves disappeared; her crops melted away, and the fences of her farmland were broken up and burned by troops camped upon its broad acres."\textsuperscript{41}

As a means for survival, she decided to move to the house her husband had owned in Washington at 604 H Street and keep it as a boarding house. A tenant, John L. Lloyd, took over possession of the Surrattsville property for an annual rental of $500. She opened her H Street house to boarders on November 1, 1864. On that day, her son, John, and her daughter, Anna, moved in. On the same day, her son's best friend, Louis Weichmann, also moved in as a paying guest at $35 per month.\textsuperscript{42} Weichmann shared a room with one bed with John when John was in the city.\textsuperscript{43}

Louis Weichmann, whose testimony would help lead to Mrs. Surratt's conviction, while imprisoned with the owner of Ford's Theatre, described her as being "as good as a mother to him. She mended his clothing, took him to church, and treated him in every way as a son; that, as a woman, she was the most exemplary he ever knew."\textsuperscript{44}

Five of the nine military officers who convict her sign a recommendation to President Johnson that her sentence be commuted to life imprisonment. For decades, a controversy raged as

\textsuperscript{38} Campbell, Confederate Courier, \textit{supra} note 25, at 11-12.

\textsuperscript{39} \textit{Id.} at 11; Weichmann, \textit{supra} note 13, at 20.


\textsuperscript{41} \textit{Id.} at 225.

\textsuperscript{42} Weichmann, \textit{supra} note 13, at 28.

\textsuperscript{43} \textit{Id.}

to whether Johnson ever saw the recommendation or whether it was concealed from him by Judge Advocate General Holt.45 Even if Johnson saw it (which he denied), it is not at all certain that he would have granted clemency. Others petition the President to be merciful towards her, but they are rebuffed. The President reputedly said that there hadn’t been “women enough hanged in this war.”46 He was also quoted as saying that Mary Surratt “kept the nest that hatched the egg.”47

On the eve of Mrs. Surratt’s scheduled execution, Clampitt and Aiken, two young attorneys who are the two junior members of the defense counsel team, telegraph Maryland Senator Reverdy Johnson, the senior member of the team, for advice. He urges that they apply for a writ of habeas corpus based on the propriety of a military court trying a civilian. At two o’clock in the morning Justice Andrew Wylie signs an order authorizing a writ, addressed to President Andrew Johnson and Major General W.S. Hancock, requiring Mrs. Surratt to be turned over the Criminal Court of the District of Columbia. When signing it, he remarks, “I am about to perform an act which before to-morrow’s sun goes down may consign me to the old Capitol Prison.”48 Such was the climate of fear that reigned under the military rule in Washington.

President Johnson suspended the writ of habeas corpus at 10 a.m., the time at which the writ was returnable.49

C. Louis Weichmann50

Weichmann had been a schoolmate of John’s at St. Charles College. During their college stay, they were good friends. When they became roommates at Mrs. Surratt’s boarding house in Washington, they were, by all appearances, best friends. According to Honora Fitzpatrick, a fellow boarder, “he was treated in Mrs. Surratt’s house more like a son than a friend.”51 Weichmann had to leave college,

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45. The controversy is detailed in a paper read by former Judge Advocate General Burnett on April 5, 1889, and reprinted as Chapter XXVI of Weichmann, supra note 13. Risvold’s notes to that chapter cite further sources.
47. Moore, supra note 26, at 108.
48. Clampitt, supra note 40, at 236.
49. The document suspending the writ is reprinted in Moore, supra note 26, at 58, and in Clampitt, supra note 40, at 237.
50. At his birth, his name was spelled “Wiechmann.” According to him, when he became a celebrity witness, journalists constantly misspelled his name. He adopted the misspelling. Testimony of Weichmann, in I Trial of John H. Surratt in the Criminal Court for the District of Columbia, Hon. George P. Fisher Presiding 369 (Washington, Gov’t Printing Off. 1867) [hereinafter The Trial of John H. Surratt].
however, because he could not afford the tuition. He still entertained the hope of becoming a priest, and, indeed, would have entered a seminary in Baltimore in the fall of 1865, but for the assassination and the trial of the conspirators, in which he was a key witness.\footnote{52}

On leaving college, Weichmann taught at a Catholic school in Little Texas, Maryland, for about two weeks. He left because the school burned down.\footnote{53} He then moved to Washington and took a teaching job at St. Matthew’s Institute where he was paid $35 per month.\footnote{54} John Surratt may have gotten him this job.\footnote{55} In January 1864, he was able to get a job with the War Department, in the Commissary General of Prisoners, at a rate of pay of $80 a month.\footnote{56}

To those with a Southern outlook, he expressed secessionist views.\footnote{57} There is evidence that he gave Surratt copies of government documents and information with respect to Confederate prisoners held by the United States.\footnote{58} Yet he expressed to Captain Gleason, an officer in his department, that the Surratt household was a hotbed of secessionist plotters.\footnote{59} At first, he may well have expressed secessionist views because he wished to ingratiate himself with others

\footnote{52. Weichmann, supra note 13, at 328.}
\footnote{53. Testimony of Weichmann, in I The Trial of John H. Surratt, supra note 50, at 407-08. Little Texas was also known as Ellengowan. Id. at 408.}
\footnote{54. Id. at 369, 408.}
\footnote{55. Surratt in the Hannon Hiss Article, supra note 34, at 451, states, “When he was giving that false testimony against me, he was enjoying a position as teacher which I got him.” This is manifestly incorrect. At the time of the trial, Weichmann was unemployed. See Testimony of Weichmann, in I The Trial of John H. Surratt, supra note 50, at 424. He was residing in Philadelphia, id. at 369, where he had been employed as a clerk in the customs office, a job he lost when Andrew Johnson shifted from the Republican to the Democratic party. See id. at 424. Before that, he had worked in the War Department until the date of the assassination. Surratt may have been thinking of Weichmann’s prior teaching job at St. Matthew’s school in Washington, which Surratt conceivably helped him to get.}
\footnote{56. Id. at 408-09.}
\footnote{57. Testimony of Augustus S. Howell, in Pitman, supra note 20, at 133; The Brophy Affidavit ¶ 12, described in text infra at notes 77-78; see also Statements of Sainte Marie and Surratt, note 205 infra.}
\footnote{58. Testimony of Augustus S. Howell, in Pitman, supra note 20, at 133; Statements of Sainte Marie and Surratt, in note 205 infra.}
\footnote{59. Weichmann, supra note 13, at 108-09, 218, 231. Weichmann did not go into the amount of detail provided by Gleason. Gleason reports that on about February 20, some two weeks before the inauguration, Weichmann asked for a private meeting. “His face wore a look of misery and fear and perspiration ran down his cheeks.” D.H.L. Gleason, Conspiracy Against Lincoln, XIII The Magazine of History 58, 59 (Feb. 1911). At the meeting he divulged the plan to kidnap the President and the cabinet to force a compromise, and failing that, huge ransom. Id. at 60. Gleason states he reported Weichmann’s information. Id. at 60-61. This article, forty-six years after the event, feels false in its details. His statements to investigators in 1865 show that all Weichmann told him was that the Surratt household was a center for blockade runners and others out to make money in mysterious ways. Hanchett, supra note 14, at 197-208.}
by expressing agreement with their views. Later, such expressions may have been a ploy to engage in espionage on behalf of the Union.

According to historian Floyd E. Risvold, "Weichmann has been described by his contemporaries as tall, broad-shouldered, and handsome." A photograph indicates that the description may be accurate. But there is a contrary description: "Louis Weichmann would have been considered far from attractive to the opposite sex. He was paunchy and bespectacled. His head was crowned with curly hair and he spoke with a lisp. . . . He appeared sexless, safe for a daughter to be around." A photo of him seems to prove this, but it shows an older Weichmann.

According to his supervisor in the War Department, Weichmann was of "Pennsylvania German stock, about twenty-eight years old, tall and broad-shouldered, well-educated, speaking several languages. . . . Physically and intellectually he was a giant, but in bravery I should call him a dwarf."

There are also differing views of his veracity. According to Colonel William P. Wood, the superintendent of Old Capitol Prison, Weichmann was "a lying son of a bitch." Major General Lew Wallace, author of *Ben Hur* and a member of the Military Commission that sentenced four people, including Mary Surratt, to death, wrote in his autobiography:

I have never seen anything like his steadfastness. There he stood, a young man only twenty-three years of age, strikingly handsome, self-possessed, under the most searching cross-examination I have ever heard. He had been innocently involved in the schemes of the conspirators, and although the Surratts were his personal friends, he was forced to appear and testify when subpoenaed. He realized deeply the sanctity of the oath he had taken to tell the truth, the whole truth, and nothing but the truth, and his testimony could not be confused or shaken in the slightest detail.

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60. He testified, "O, I have talked seecsh very often in my life for buncombe, especially with such men as Mr. Howell." I The Trial of John H. Surratt, *supra* note 50, at 456. Howell was a Confederate blockade runner.


64. Trindal, *supra* note 24, at 69-70; see also Pratt, *supra* note 12, at 412 ("[A] beefy but pallid War Department clerk named Lewis Weichmann . . . resembled a timid slug. . . .").


67. Trindal, *supra* note 24, at 289 n.70.

68. Quoted on the frontispiece of Weichmann, *supra* note 13, unpaginated.
The General is incorrect on at least one point. Weichmann did not testify under subpoena; he testified as a prisoner.69

Weichmann was one of the two witnesses whose testimony resulted in a death sentence for Mrs. Surratt. There is much evidence that his testimony contained fabrications.70 His motive is easily explained. Secretary of War Stanton and other government officials threatened him with hanging. John T. Ford, owner of Ford's Theatre, was imprisoned without charges for thirty-nine days along with some of the alleged conspirators, including Weichmann and Lloyd, the other principal witness against Mrs. Surratt. Weichmann told Ford that "Secretary Stanton had, in a threatening manner, expressed the opinion 'that his (Weichman's [sic]) hands had as much of the President's blood on them as Booth's.'"71 Weichmann, in the later trial of John H. Surratt, testified that he had no recollection of this conversation with Ford.72

After Mrs. Surratt was sentenced to death, but before she was hanged, Weichmann took a walk with two close friends, John P. Brophy, a teacher at Gonzaga College, and Louis J. Carland, a theatrical costumer whom he had met in prison.73 The destination was St. Aloysius Church where Weichmann planned to go into the confessional to seek absolution.74 He told his friends that he had been threatened with death by Secretary Stanton and Mr. Burnett, assistant judge advocate general, because they maintained he knew all about the assassination plot. He also told Brophy and Carland that he thought Mrs. Surratt was innocent and that he had lied on the witness stand. Further, he said that a written statement for his signature was prepared while he was asleep, and yet he had signed it.75 Carland told him that instead of going to church to confess, he ought to go to a magistrate and swear out an affidavit detailing the falsity of his testimony.76 His reply was that he did not want to be tried as a conspirator or perjurer. Brophy swore out an affidavit detailing the

69. Detective James McDevitt of the Washington Metropolitan Police testified that Weichmann had been arrested when he came to the office on April 17. Pitman, supra note 20, at 140; Testimony of Weichmann, in I The Trial of John H. Surratt, supra note 50, at 447. He was held in prison during the trial before the Military Commission for about thirty days. Testimony of Weichmann, in I The Trial of John H. Surratt, supra note 50, at 444, 446.
70. Moore, supra note 26, at 79-89, itemizes what seem to be Weichmann's fabrications and the evidence for such a conclusion.
71. Ford, supra note 44, at 484.
72. Testimony of Weichmann, in I The Trial of John H. Surratt, supra note 50, at 448-49.
73. Testimony of Carland, in II The Trial of John H. Surratt, supra note 50, at 814, 819. Carland testified also that as a Canadian he had been totally neutral as to the outcome of the Civil War. Id. at 818-19.
74. Id. at 814.
75. Id. at 815.
76. Id.
conversation\textsuperscript{77} and sent it to President Johnson who dismissed it as “wholly without weight.”\textsuperscript{78} Carland testified to the same facts at the later trial of John H. Surratt.\textsuperscript{79} At the trial of John H. Surratt, when asked about his conversations with Brophy and Carland, Weichmann’s typical answer was that he had no recollection, but there was an occasional outright denial.\textsuperscript{80}

At the trial of John H. Surratt after his capture, a defense witness, James J. Gifford testified that Weichmann had said that an officer of the government had told him that unless he testified to more than he had stated they would hang him too. He stated that James Maddox was also present.\textsuperscript{81} The prosecutor objected, but withdrew the objection.\textsuperscript{82} When Weichmann was asked about the same incident, he replied, “I do not remember to have said anything of the kind.”\textsuperscript{83}

His most damning testimony against Mrs. Surratt before the Military Commission was to the effect that Booth called on her at two o’clock and someone called at nine o’clock on the night of the assassination. The second of these visits, if it took place, was one and a quarter hours before Lincoln’s murder. The inference was that the caller was Booth.\textsuperscript{84} In his initial statement to the police he said, “Booth was at Mrs. Surratt’s house at half-past two o’clock on the day of the assassination.”\textsuperscript{85} There was no mention of a nine o’clock visit.

D. Sainte Marie

Sainte Marie was the original plaintiff in the Shuey case. In the Court of Claims reports, the case is captioned, Ste. Marie’s Case.\textsuperscript{86} In the Supreme Court, Shuey, as Sainte Marie’s executor, was substituted as plaintiff. I can find no better way of introducing Sainte Marie’s connection with John H. Surratt than to reproduce here Louis Weichmann’s narration of his and Surratt’s early relations with Sainte Marie.

\textsuperscript{77} The affidavit was first published in the Washington Constitutional Union on July 11, 1865, four days after the hanging. It is reprinted in Moore, supra note 26, at 62-64.

\textsuperscript{78} Id. at 62 (citing Brophy in the Washington Post, July 21, 1901).

\textsuperscript{79} Testimony of Carland, I The Trial of John H. Surratt, supra note 50, at 814-20.

\textsuperscript{80} Weichmann stated at one point in the trial that he could not remember even having the conversation. Testimony of Weichmann, in I The Trial of John H. Surratt, supra note 50, at 456-58.

\textsuperscript{81} Id. at 449.

\textsuperscript{82} Id.

\textsuperscript{83} Id. at 449.

\textsuperscript{84} In his published narrative he identifies the caller as Booth. Id. at 174. In this narrative he discusses the testimony of other boarders at the later trial of Surratt, but ignores the testimony of Olivia Jenkins, who testified that the caller was a naval officer named Scott who had come to deliver some papers for her. II The Trial of John H. Surratt, supra note 50, at 746.


\textsuperscript{86} 9 Ct. Cl. 415 (1873).
Marie. Weichmann and Surratt have, at this point, dropped out of school and have met in Washington. Surratt is eighteen years old, and the postmaster at Surrattsville. He visits Washington to sell the produce of the family farm. On this occasion, he invites Weichmann to Surrattsville for a visit. Weichmann's narrative follows:

During this first visit to Surrattsville it was agreed between John [Surratt] and myself that we would make a visit to our alma mater, St. Charles College, during the coming Holy Week. We arrived there on Thursday, April 2, 1863, and remained two days, leaving on Good Friday. The old students were rejoiced to see us. While here I announced my intention to Surratt to pay a brief visit to my old friend Father Mahoney at Little Texas. This coming to the hearing of Father Denis, one of the professors, the reverend gentleman sought me and said, "Mr. Weichmann, here is an Italian paper" (the Eco d'Italia, I believe it was). "Take and give it to a gentleman whom you will meet there, named Mr. Sainte Marie, and who was one of my pupils when I taught in the college at Montreal. Introduce yourself to him, using my name. You will find him a very agreeable person and educated man."

I made my appearance at Little Texas with Surratt on Good Friday, April 3, 1863, and was kindly greeted by Father Mahoney, who introduced me to Mr. Sainte Marie. Surratt did not remain at Little Texas longer than Saturday and returned to Washington without me. Before leaving I had, however, introduced him to Mr. Sainte Marie.

In consequence of the kind words of Father Denis, I took a great liking to Sainte Marie. As this man, later on, will become a prominent character in this history I will state what I learned of him up to the date of the meeting, as he gave it to me. His full name was Henri Beaumont de Sainte Marie. He was born in Canada near Montreal and was educated in the Catholic institutions of that city. After graduating from college he was employed for some time as a clerk in a bank, and afterwards in a store in Montreal until the beginning of the year 1863. Then he conceived a great desire to join the Confederate Army and fight for its cause. He came to New York and sailed from that point on a vessel that intended to run the blockade. The ship, however, was captured by a United States war steamer and Sainte Marie with his fellow voyagers was thrown into Fort McHenry as a prisoner of war. Thence he was released as a British subject through the intervention of the English consul resident in Baltimore.

Sainte Marie's next move was to secure a cheap boardinghouse in the Monumental City [Baltimore] and endeavor to obtain employment, as his means were nearly exhausted. One day an old farmer living in the country outside of Baltimore came to his place.

87. Weichmann, supra note 13, at 22-25.
To him Sainte Marie narrated his misfortunes and stated his necessities. The farmer had compassion on him and took him to his home. Here Mr. Sainte Marie was compelled to perform menial labor on the farm. It was an occupation for which he was entirely unfitted either by education or by experience, for he was often obliged to feed the cows and pigs. A lady named Miss Maria Padian happened to pay a visit to Sainte Marie’s benefactor to collect money for the church at Little Texas. The young Canadian was presented to Miss Padian. She was captivated with his polished manners, good looks, handsome brown eyes, refined conversation, and general education, and listened eagerly to the recital of his adventures, and, hastening back to Little Texas, soon secured for him from Father Mahoney an appointment as teacher in the Catholic parochial school of the village.

And here it was that I met Sainte Marie on Friday, April 3, 1863, and introduced John H. Suratt to him, this being the first occasion upon which they met on United States soil. He could speak French and Italian fluently, touch the guitar lightly, and was a fine tenor singer. He was charming in conversation and had a considerable fund of anecdote. There was an old Italian in the village named Benvenuti, who possessed an excellent bass voice. Sainte Marie and he would occasionally sing a duet. There [sic] voices blended very harmoniously; it was a genuine treat to hear them.

I became interested in the man to such an extent that I promised to help him secure a different position in life from that which he was holding.

I had returned to my post in Washington but a few weeks when I was surprised one day to see Mr. Sainte Marie walk into my school. “Existence any longer in Little Texas,” he said, “is impossible. I must get other and more remunerative employment.” At that time the post of assistant teacher in St. Matthew’s Institute had become vacant and I was successful in getting the place for him.

But this did not satisfy his wishes any more than the place at Little Texas. Little surprised, therefore, was I when waking up one morning about three weeks or a month after acceptance of the position under me to find my friend had left. He had gone, completely gone, with baggage and all. Four long years elapsed before my eyes rested on him again, and then after the most direful tragedy of modern times. In the meantime, after leaving the school he had enlisted as a substitute in the Third Delaware Regiment, Colonel George P. Fisher commanding. Being sent with his regiment to the front, he seized the earliest opportunity to desert. He was captured by the Confederates, who looked upon him with suspicion and sent him to Castle Thunder as a spy.... It was not long before Sainte Marie discovered the plots of a party of forgers against the Confederate Government and exposed them to the authorities. As a reward for his services he was released from prison.
and sent to Nassau, at which port he took passage on a vessel bound for England. From this latter country, as soon as his circumstances permitted, he returned to Montreal, where he was when President Lincoln was assassinated.

Why did Sainte Marie pack up his bags and leave Weichmann’s lodgings? In a letter some years later, he mentions only “difficulties with Wiechmann.”

In an 1898 interview, Surratt explained his relations with Sainte Marie. He stated that his arrest by order of the Pope was caused by “the contemptible treachery of a friend so called a Canadian. I had shared my bread and butter, my blanket, and even my shirts, with the man.”

Surratt was brought from Alexandria to the United States by the American warship, the Swatara. The ship’s captain, Commander William N. Jeffers, testified before a congressional committee that “Ste.-Marie was asked to go on shore to identify him [Surratt], but he claimed that it hurt his feelings to be brought face to face with him. I have from that time entertained the utmost contempt for Ste.-Marie.” Clearly, Sainte Marie was aware of this feeling of contempt. His petition to the Court of Claims, on file at the National Archives, contained this lamentation:

That your petitioner was treated with so much disrespect and contumely by the officers and crew of the United States War Ship Swatara, and especially by Captian [sic] Jeffers United States Navy commanding the said ship Swatara. And the said John H. Suratt [sic] was treated with such marked courtesy and distinction by the said Captain Jeffers that the position on board of the United States War Ship Swatara was unbearable to your petitioner. That in consequence of the said disrespect and unbearable insults offered by the said Captain Jeffers to your petitioner, when the said War Ship Swatara arrived in at Nice in Italy aforesaid, on the way back from Egypt aforesaid your petitioner asked to be put ashore at said Nice, and your petitioner was put on shore at said Nice.

Weichmann reports that “Sainte Marie, the discoverer of Surratt, died in Philadelphia in 1873 in extreme poverty, and is buried in the Potter’s Field of that city.” Risvold, the editor of Weichmann’s book, appended this comment in a footnote: “Henri Beaumont de St. Marie, also known as Henry Benjamin Sainte Marie, died on September 8, 1874. The New York Times reported on September 12,
1874, that he died ‘suddenly in the street in Philadelphia’ from heart disease at the age of forty-one.” Risvold’s dating is more accurate. This obituary also states that this happened near midnight, after “he took his supper as usual with the family,” indicating that he had settled in Philadelphia. Interestingly, the obituary states that he had won judgment in the Court of Claims, and that the Attorney General had appealed to the Supreme Court. In fact, judgment had been rendered against him in the Court of Claims. Information for an obituary mostly comes from the family of the deceased. Had he deceived his family?

Weichmann continues, “He was awarded $10,000 for his services by special act of Congress, the largest sum, but one, given to any one of those identified with the capture of any one of the conspirators.”

E. John Wilkes Booth

1. His Life

Booth has been described as “[t]he handsomest man in Washington.” At the time he murdered Lincoln he was twenty-six, a highly successful actor, with an earning capacity of more than the then enormous sum of $20,000 a year. His brother, Edwin, was even more of a star performer as had been their sometimes insane father, Junius. Wilkes, as his friends called him, was a staunch supporter of

92. Id. at 491 n.9.
93. Seeinfra text accompanying note 255.
94. Weichmann, supra note 13, at 392. In Sainte Marie’s case, the Court of Claims made this finding: “There has been paid to the claimant by the defendants, under the Act 27th July, 1868, (15 Stat. L., § 3, p. 234,) the sum of $10,000. Such payment was made by a draft on the Treasury, payable to the order of the claimant, which draft was by him duly indorsed.” 9 Ct. Cl. 415, 417 (1873).
95. Campbell, Confederate Courier, supra note 25, at 80-81. Under a photograph of Booth placed between pages 80 and 81, the author writes “‘The handsomest man in Washington,’ the theatre-going public called him.” Id. The phrase is also attributed to theater-owner Harry Ford. Roscoe, supra note 11, at 99; Eleanor Ruggles, Prince of Players: Edwin Booth 178 (W.W. Norton & Co. 1953). Actually, Ford wrote that around noon on the day of the assassination, a group of young men were in front of the Theatre when Booth approached. One said, “Here comes the handsomest man in Washington.” Ford adds that the compliment was “justified.” Ford, supra note 44, at 488.
96. A co-conspirator wrote, “I judged... [he earned] from $25,000.00 to $30,000.00.” Samuel Bland Arnold, Memoirs of a Lincoln Conspirator 23 (Michael W. Kauffman ed., Heritage Books 1995). The memoirs were first published in installments in the Baltimore American in December 1902. Another commentator wrote, “He could make $100 a night for stage appearances. (A brigadier general at the front with the Union Army didn't make that much in a month.)” Roscoe, supra note 11, at 41. A more expert opinion was expressed by theater owner John T. Ford, who said that “he [Booth] could earn... from $500 to $1,000 per week at that time.” Ford, supra note 44, at 488.
97. See Roscoe, supra note 11, at 30-32.
the Confederacy, but not staunch enough to enlist in its military. Above all, he was a racist, and Lincoln's last speech concerning giving the vote to freed slaves was likely the event that triggered Booth's decision to kill. There is evidence, however, that he considered murdering Lincoln at an even earlier date. After hard drinking, a week before the killing, he told fellow-actor Samuel K. Chester, "What a splendid chance I had to kill the president on the 4th of March [Inauguration Day]."

2. His Capture

After the assassination, Booth, as indicated above, manages to convince the military picket at the Navy Yard Bridge to let him pass. Herold is equally successful and meets up with Booth. They make a five minute stop at the Surrattsville tavern to pick up carbines that had been secreted there by Herold and Surratt, field glasses that had been brought there by Mrs. Surratt, and a few swigs of whiskey. Only Herold takes a carbine. Booth declines to take one because of his crippled condition.

They ride to the house of Dr. Samuel A. Mudd, where the doctor crafts a splint while one of his employees whistles a pair of crutches. When Mudd learns of the assassination, he insists that Booth and Herold leave. Although he tells the military men that were hunting for Booth that he did not recognize Booth, this is untrue. He knew Booth well and had introduced Booth to Surratt.

From Mudd's farm, they leave in search of help. They receive much help from the Maryland Confederate underground, until finally they row into Virginia. There they find limited assistance; a Dr. Stuart gives them food, but denies them shelter. Booth angrily tears a page out of his diary, pins some money on it, and writes a sarcastic thank-you note. Ultimately, with the help of others, they make their way to

98. Booth is quoted as saying, "That is the last speech he will ever make." William A. Tidwell et al., Come Retribution: The Confederate Secret Service and the Assassination of Lincoln 421 (Univ. Mississippi Press 1988) (citing Eckert testimony of 30 May 1867, Impeachment Investigation 627); see also Hanchett, supra note 14, at 254-55 n.9 (stating that the ultimate sources for this quotation are statements of Payne and Herold to investigators).
100. See supra text accompanying notes 18-19.
101. See supra text accompanying notes 18-19.
102. Testimony of Lloyd, in Pitman, supra note 20, at 86. Amazingly, in those five minutes they were able to gulp down most of a bottle of whiskey. Id. at 86-87.
103. This and the following paragraph are based on Chapter 19 of Tidwell, supra note 98. Although details of some accounts of Booth's escape and capture vary from source to source, the rough generalizations given here seem to summarize all accounts.
104. Weichmann, supra note 13, at 32-34. Surratt denies this. Hanson Hiss Article, supra note 34, at 444. But it is clear that Mudd was well-acquainted with Booth.
the Garretts’ farm. The Garretts provide food and shelter to these strangers, not knowing their identity. The cavalry, led by Conger, and the head of the Secret Service, Baker, develop information about the whereabouts of the fugitives and at two o’clock in the morning make a dramatic entry into the farmyard. Booth and Herold are in the tobacco barn. Garrett, commanded by the leaders of the group, enters the barn and urges surrender. They refuse, and Booth tells him that if he returns, he will be shot.

Baker unsuccessfully tries to talk them into surrender. Finally, Conger threatens to burn down the barn. Herold surrenders. Conger lights the fire. Booth theatrically asks for a fair fight. A shot is fired. Booth is killed by a single bullet, shot either by himself or Boston Corbett, a sergeant who fired in violation of orders. Booth is interred secretly, although he is disinterred later to be buried in the Booth family plot. Because of the initial secrecy of the burial, rumors reverberate that the corpse was not his. There were probably as many alleged sightings of Booth in the fifty years following his death as there have been sightings of Elvis Presley in the last twenty-five years.

F. Payne

One of the more difficult tasks in understanding the literature about Lincoln’s assassination is the self-styled madman who variously appears on the pages of that historical event as Payne, Paine, Wood, Powell, or Mosby. His attorney at the conspiracy trial before the Military Commission referred to him as Lewis Powell, probably the name given him at birth. The Military Commission sentenced him “to be hanged by the neck until he be dead” under the name of Lewis Payne. Here is the description of the beginning of his relationship with Booth, as stated in the summation of W.E. Doster, Powell’s assigned counsel.

105. See Hanchett, supra note 14, at 241-43; Roscoe, supra note 11, at 516-33.
106. Surratt and others sometimes used pseudonyms on particular clandestine missions, but Payne seemed to adopt different names even when not acting clandestinely. For example, he used the name Kincheloe on a clandestine mission. Trindal, supra note 24, at 110 (citing Michael W. Kauffman, John Wilkes Booth and the Murder of Abraham Lincoln, Blue and Gray Magazine, April 1990, at 24). For the other names, see the index under “Payne” in Weichmann, supra note 13.
107. The sentence of the Military Commission is reprinted in Weichmann, supra note 13, at 274.
108. Pitman, supra note 20, at 313-14. In the passage, Doster describes his client as “illiterate,” but according to Weichmann, Powell kept a scrapbook or diary. Weichmann quotes this passage which he states is in Powell’s handwriting: “In battle, in the fullness of pride and strength, little recks the soldier whether the hissing bullet sings his sudden requiem or the cords of life are severed by the sharp steel.” According to Weichmann, the diary was in the possession of Lilly Bowie, Powell’s former girlfriend. Weichmann, supra note 13, at 82. Weichmann also makes reference to a letter to Surratt under Surratt’s pseudonym of James Sturdey, signed by Powell under the pseudonym of Wood. Weichmann’s testimony, in Pitman, supra note 20, at
At the beginning of the war, Powell, one night, secured a pass and went to the theater at Richmond. It was the first play that Powell ever saw, and he was spellbound with that magical influence wielded by the stage over such, to whom its tinsel is yet reality. But he was chiefly attracted by the voice and manner of one of the actors. He was a young man of about twenty-five, with large, lustrous eyes, a graceful form, features classical and regular as a statue, and a rich voice that lingered in the ears of those who heard him. Although only a private soldier, Powell considered himself the equal of any man, and after the play was over sought and gained an introduction to the actor. Never were two natures thrown together so different, yet so well calculated, the one to rule, the other to be ruled. The soldier was tall, awkwart[d], rough, frank, generous and illiterate. The actor was of delicate mold, polished, graceful, subtle, with a brilliant fancy, and an abundant stock of reading. Each was what the other was not, and each found in the other an admirer of the other's qualities. The actor was pleased to have a follower so powerful in his muscles, and Powell was irresistibly drawn to follow a man so wondrously fascinating and intellectual. They saw enough of one another to form a close intimacy, and confirm the control of the actor over Powell, and parted, not to meet for nearly four years.

G. Atzerodt

Atzerodt was a German-born carriage maker. He resided at Port Tobacco on the Potomac and was nicknamed “Port Tobacco.” He frequently acted as a clandestine ferryman, crossing into Confederate territory in Virginia. He stayed one night at the Surratt boarding house. John's sister, Anna, told her mother that she didn’t want such “sticks” in the house. Apparently, Mrs. Surratt asked her son to tell him he was not welcome to stay. Nonetheless, he frequently visited in the months prior to the assassination. Weichmann testified that he came to visit John Surratt. Other witnesses claim he came primarily to see Weichmann, who even lent him clothing.

Booth assigned Atzerodt the task of killing Vice President Johnson. Atzerodt claims he told Booth that he had agreed to assist in a kidnapping plan but refused to be a murderer. He did nothing to carry out the task, whether because he rejected the assignment as he claimed, or because of cowardice, is unknown. His defense largely consisted of evidence of his reputation for cowardice. Atzerodt’s

118. Testimony of Weichmann, in 1 Trial of John H. Surratt, supra note 50, at 431, 439 (this transcript spells it “Sturdy”); Weichmann, supra note 13, at 120.
109. Testimony of Anna Surratt, in Pitman, supra note 20, at 130 (“He was given to understand that he was not wanted at the house; ma said she did not care about having strangers there.”).
110. Testimony of Weichmann, in 1 Trial of John H. Suratt, supra note 50, at 374.
111. Campbell, Confederate Courier, supra note 25, at 222.
112. Pitman, supra note 20, at 153. Four character witnesses testified as to his cowardice. Id.
claim that he told Booth that he refused to kill is corroborated by the report that Booth, in his escape, told Lloyd in Surrattsville that “I am pretty certain that we have assassinated the President and Secretary Seward.” There was no mention of the vice president. Nonetheless, Atzerodt was hanged.

H. Herold

David E. Herold is sometimes described as a “feeble-minded nineteen year old.” Yet, he had studied pharmacy at Georgetown College from which he graduated and had worked in a pharmacy. Herold had been in the employ of a pharmacy near the White House and may have been involved in a failed attempt to kill Lincoln by poison. Whatever his level of intelligence, it is clear he preferred the life of a hunter and fisherman to gainful employment. He was intimately acquainted with the terrain and byways of Southern Maryland and Northern Virginia and guided Booth in his escape.

Three years earlier, Herold had come to Surrattsville with a component of the Washington Marine Band at the time of Weichmann’s first visit to the village during Holy Week of 1863. Surratt introduced Weichmann to Herold who “seemed to be a kind of hail-fellow-well-met among the whole party.”

Because of Herold’s intimate acquaintance with Southern Maryland, Booth assigned him the task of guiding Payne to Port Tobacco, where Atzerodt was to ferry the conspirators to Virginia. Instead, for reasons described below, Herold fled the scene of Payne’s attempt to kill Secretary of State Seward and met Booth and guided him to Virginia.

I. Samuel Arnold & Michael O’Laughlin

These two alleged conspirators had been Confederate soldiers who had come North and taken the oath of allegiance to the United States. Nonetheless, both retained Southern sympathies.Arnold

\footnotesize

113. Testimony of John Lloyd, in Pitman, supra note 20, at 85-87; see also Testimony of Lloyd, in I The Trial of John H. Surratt, supra note 50, at 276-87.
114. E.g., Dust Jacket for Weichmann, supra note 13. One of Mrs. Surratt’s counsel describes him as “a half-witted youth of nineteen.” Clampitt, supra note 40, at 239. This trial lawyer’s overstatement is likely the origin of the characterization of Herold as feeble minded. Clampitt probably based his assessment on the character witnesses presented by the defense. Each of them described him as boyish, more a boy than a man, trifling, easily led, etc. One of them, Dr. McKim, testified, “I consider him about eleven years of age.” Pitman, supra note 20, at 96-97. The doctor was testifying about his maturity and propensity for pranks rather than his intelligence.
115. Michael W. Kauffman, Introduction to Arnold, supra note 96, at xiv.
116. Trindal, supra note 24, at 70.
117. Weichmann, supra note 13, at 43-44.
118. Id. at 22.
119. Id. at 44.
and O'Laughlin had been Booth's schoolmates at St. Timothy's Hall, an Episcopalian school.

Both were participants in the plot to kidnap Abraham Lincoln. In fact, they were Booth's first recruits, having been enlisted in Baltimore in August or September of 1864. Both had distanced themselves from the plot prior to the assassination. Arnold refused Booth's summons to return to Washington from Baltimore. O'Laughlin was in Washington on the evening of the murder but avoided Booth. Both were sentenced to life imprisonment. O'Laughlin died in prison. Arnold was pardoned about four years after their conviction. His memoirs describe the incredible brutality to which he and others suffered in the military prison at Fort Jefferson in the Dry Tortugas.

IV. BACK TO THE ACTION: THE ATTEMPTED ASSASSINATION OF SECRETARY OF STATE SEWARD

From the assassination and Booth's exit, the scene could shift to the home of Secretary of State William H. Seward. There, a man of many names, but who will be tried and hanged under the name of Lewis Payne, rings the doorbell and seeks admittance. A servant answers the door. Payne says that he has been sent by Dr. Verdi to deliver some medicine to Seward, who recently had been thrown from his carriage and suffered a broken jaw. The servant is suspicious and refuses Payne admission. Payne argues and insists; the servant caves in and leads Payne up the stairs where Seward's son, Assistant-Secretary-of-State Frederick Seward, meets him. Frederick tells Payne to leave the medicine with him, as his father is asleep. Payne starts to descend the staircase, abruptly turns around and hits Frederick with the butt of his pistol, splintering his skull. Payne goes into Seward's chamber where he is confronted by Private George Robinson of the Maine Volunteers, Seward's nurse. Payne strikes him in the forehead with his knife and jumps on the bed and stabs and slashes the Secretary of State three times. Seward's life is saved by a metal splint that had been placed in the area of his jaw which deflects Payne's knife-thrust.

120. The correct spelling is O'Laughlen, but the official documents and transcripts have him as O'Loughlin.
121. Weichmann, supra note 13, at 44.
122. Arnold, supra note 96, at 41–43.
123. Roscoe, supra note 11, at 90. See generally Weichmann, supra note 13, at 117.
124. Arnold, supra note 96, at 65–92. Dr. Mudd, who was imprisoned with him, confirmed Arnold's description of the conditions of their imprisonment. Dr. Mudd's letter, in id. at 8.
125. The narrative of Payne's assault on the Seward household is largely based on the testimony of various witnesses collected in Pitman, supra note 20, at 154-57. See also Weichmann, supra note 13, at 160-62.
Another son of Secretary Seward, Major Augustus Seward, enters the room. A violent battle breaks out between Payne on the one side and Augustus Seward and George Robinson on the other. Payne repeatedly incants “I’m mad!” He breaks away and rushes downstairs. He is met by a State Department aide who had been rushing up the stairs, and Payne slices a deep gash into the aide’s right side. The servant who had opened the door has run to get help. By the time help arrives, Payne has already rushed off on horseback. Payne will eventually be hanged pursuant to the sentence of the Military Commission.

Payne is not in familiar territory. His home is in Florida and he served in the Confederate Army in Virginia. He was wounded and captured at Gettysburg, but because he had taken the oath of allegiance, he was released. Booth had assigned Herold, a Washingtonian, to guide Payne to Seward’s house and then to an escape route through southern Maryland to Virginia. But Herold is scared off by the commotion in the Seward household and bolts. Payne heads for the Navy Yard bridge, but loses his way. He loses his hat and discards his blood-splattered coat. He rides aimlessly until dawn. He dismounts at daybreak, and abandons the horse. He enters the Congressional Cemetery, finds an above-ground vault, creeps inside and there he stays for three days and nights.\(^{126}\)

On the fourth night after his assault on Seward, Payne heads for Mrs. Surratt’s boardinghouse. Payne rips off one of his shirtsleeves and makes a weird kind of hat from it. He is carrying a pick. He knocks and rings the doorbell of Mary Surratt’s house. A military officer opens the door and asks him who he has come to see. A military unit had entered the boardinghouse earlier to carry out an order to arrest everyone there. Payne answers, “Mrs. Surratt.” When asked what he has come for, Payne answers, “To dig a gutter.” This is a rather preposterous answer, given that it is the middle of the night.

Mrs. Surratt is called into the room and Major Smith asks her, “Do you know this man, and did you hire him to come and dig a gutter for you?” She gives an answer that helps send her to the gallows: “Before God, sir, I do not know this man, and have never seen him, and I did not hire him to dig a gutter for me.”\(^{127}\) Because Payne had twice stayed at the house, this cast a deep cloud of suspicion over her. Thus, much of the defense effort at trial was to produce evidence of the

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126. Weichmann, supra note 13, at 182-84. Risvold’s endnote indicates that this account of Payne’s flight is based on George A. Townsend’s *Katy of Catoctin*. Weichmann, supra note 13, at 479 n.7. The note states that “Townsend was a noted newspaper correspondent and columnist.” *Id.* It should be noted however that *Katy of Catoctin* is an historical novel. George A. Townsend, *Katy of Catoctin* 518-21 (New York, D. Appleton & Co. 1886).

127. Pitman, supra note 20, at 121-22.
poverty of Mrs. Surratt's eyesight.\textsuperscript{128} Even with good eyesight, however, here is a strangely attired man, with four days' growth of beard, filthy, with a strange headdress, and carrying a pick. Would one easily recognize him as the well-dressed man who posed as a Baptist preacher when he had stayed at the house for several days?

V. CONSPIRACY THEORIES: WHO WAS THE MASTERMIND BEHIND THE LINCOLN ASSASINATION?

Conspiracy theories abound as to which person or organization concocted the plot to assassinate President Lincoln.\textsuperscript{129} Some see Jefferson Davis at the center of the conspiracy. Indeed, the indictment of the conspirators who were tried by the Military Commission lists Jefferson Davis as one of the conspirators to "kill and murder... Abraham Lincoln."\textsuperscript{131} Others focused on Vice President Andrew Johnson as the probable spinner of the web.\textsuperscript{131} Secretary of War Edward Stanton has been suspected.\textsuperscript{132} Several authors have placed Pope Pius IX at the center of the evil web of conspiracy.\textsuperscript{133} Lafayette Baker, head of the Secret Service, has been

\textsuperscript{128} Rachel Semus, who lived in the Surratt household, first as a slave, then as a servant, testified that on one occasion Mrs. Surratt had mistaken a visitor at the front gate for her son. She also testified that she frequently had to thread the needle for Mrs. Surratt. \textit{Id.} at 137-38. Mrs. Surratt's daughter, Anna, testified to her mother's poor eyesight and to the effect that she was too vain to get spectacles. \textit{Id.} at 131. Miss Honora Fitzpatrick, a lodger at Mrs. Surratt's, testified that "I have known of her passing her friend, Mrs. Kirby, on the same side of the street, and not see her at all." \textit{Id.} at 132. Significantly, Miss Fitzpatrick testified that Mrs. Surratt had not recognized Payne at the house on the night of the assassination, and only recognized him when "the skull-cap was taken off his head." \textit{Id.} Mrs. Eliza Holohan, a resident of the boarding house, also testified about the proprietor's bad eyesight. She additionally testified that Payne had stayed at the boardinghouse for two or three days and that Mrs. Surratt was told that his name was Wood and that he was a Baptist preacher. \textit{Id.} at 132-33.

\textsuperscript{129} For a more complete listing and discussion of conspiracy theories concerning the assassination, visit http://home.att.net/~rnorton/Lincoln74.html. See also Tidwell, \textit{supra} note 98, at 4. Tidwell provides circumstantial evidence that the Confederate Secret Service was behind the abduction plot. See generally Tidwell, \textit{supra} note 98. The weaknesses in all of the theories are exposed by William Hanchett. See Hanchett, \textit{supra} note 14.

\textsuperscript{130} The text of the Charges and Specification is reprinted in Pitman, \textit{supra} note 20, at 18.

\textsuperscript{131} One of Risvold's notes tells us this: "Mary Lincoln died believing the rumor, which originated in the wake of the assassination, that President Johnson had hired Booth and the conspirators to kill her husband so he could become President. Almost a hundred years later, a similar rumor followed in the wake of the Kennedy assassination—that Lyndon Johnson had hired the assassin so he could be President." Weichmann, \textit{supra} note 13, at 492 n.13.

\textsuperscript{132} He is the villain in Eisenschiml, \textit{supra} note 10. What was the motive? According to the author, the motive was Stanton's lust for power. The author claims that Stanton thought that he would become \textit{de facto} president of the United States because Andrew Johnson would be someone he could control.

\textsuperscript{133} A former priest wrote a denunciation of the Roman Catholic Church. Charles Chiniquy, Fifty Years in the Church of Rome (London, Robert Banks & Son 1880).
pointed to as the arch culprit. And, of course, the Rothschilds together with other international bankers have not escaped from being charged. The probability is that the conspiracy was headed by Booth and was not formulated until eight o'clock on the evening of the assassination, two and a quarter hours before the attacks on Lincoln and Seward, although Booth probably made the decision to kill several days before.


General T.M. Harris, one of the Military Commissioners in the Trial of the Conspirators agreed. He wrote Rome’s Responsibility for the Assassination of Abraham Lincoln, (Los Angeles, Heritage Manor, Inc. 1897), largely basing this pamphlet on Chinyquy’s book.

A.C. Richards, former Washington Chief of Police, wrote to Weichmann some thirty years after the trials stating that the Catholic church had nothing to do with the assassination plot. According to him, “The only circumstances that give color to such a charge against Catholics is the course that has been pursed by Father Walters [Walter] and a few other prominent Washington Catholics who take their cue from that priest. . . .” Letter of October 5, 1899, in Weichmann, supra note 13, at 423, 424. Father Walter loudly and vigorously protested the innocence of Mary Surratt.

134. Hanchett, supra note 14, at ch. 8.
135. Id. at 243.
136. See Statement by George A. Atzerodt, in Pitman, supra note 20, at 307. Atzerodt stated that at eight o’clock on the night of the assassination, he met Booth and Payne at the Herndon House. There, for the first time, Booth laid out his plan. Booth would kill Lincoln and Grant, Payne would take Seward. Booth told Atzerodt the he was assigned to kill Vice President Johnson. Atzerodt claims that he told Booth that he would not kill anyone. Booth, he claims, told him that he would hang anyway. Booth was right. There is no evidence that Atzerodt took any action to carry out a plan to kill Andrew Johnson, but Atzerodt was hanged along with Payne, Herold, and Mary Surratt.

Weichmann quotes a statement by Atzerodt in his book as well. The statement, written by Atzerodt on the night before his execution, repeats several times that murder was first mentioned at eight o’clock on the night of the assassination and reiterates that he told Booth he would not participate in a murder. He also places Herold at the eight o’clock meeting. Herold is not mentioned in his earlier statement. The Confession of Atzerodt, in Weichmann, supra note 13, at 385.

137. Historians speculate that Lincoln’s speech of April 11, at a celebration of the surrender of Robert E. Lee, triggered Booth’s intention to kill. The offending thought expressed by Lincoln was the granting of the franchise “to the colored man.” Roscoe, supra note 11, at 94.

Lincoln was an inveterate theater goer. On April 13, the day before the assassination, Booth asked his good friend, John Deery, the owner of an elegant saloon, to reserve for him a right hand box at Grover’s Theatre for the following night. Lincoln had been invited to attend the opening of Aladdin, or the Wonderful Lamp, at Grover’s Theatre. Booth gave a plausible excuse why he did not want to make the reservation himself; the owner would insist that Booth accept a complimentary ticket. Id. at 96. It seems likely that Booth had already formulated his theatrical murder plan, only the venue shifted.
The evidence is solid, however, that there was a conspiracy to kidnap Abraham Lincoln and abduct him to Virginia. The conspirators included at least John Wilkes Booth, John Harrison Surratt, Lewis Thornton Powell (alias Lewis Payne), Michael O'Laughlin, Samuel Arnold, George A. Atzerodt, and David E. Herold. There is no convincing evidence that either John Harrison Surratt, Mary Surratt, Samuel Arnold, or Michael O'Laughlin were involved in the conspiracy to kill the President, the Vice President, the Secretary of State, or General Ulysses S. Grant.

First, let us examine the conspiracy to kidnap Lincoln. What was the proposed ransom? The conspirators proposed to hold the President hostage for the release of Confederate prisoners held in the North, especially in Elmira, New York. The Confederacy had proposed a prisoner exchange, hoping to add to the depleted ranks of the Confederate Army. The United States had refused.

There were two alternate kidnapping plans. One was to overtake and seize Lincoln’s carriage on one of his many trips with only one or no bodyguard throughout the City. His frequent destination was the Soldier’s Home, a structure that he often used as his home as an alternative to the White House. Here is the plan and attempted execution as described by Surratt:

138. There are many sources for this. See, e.g., Ford, supra note 44, at 490.
139. Another version of the motive for the offer of a prison exchange is presented in Trindal, supra note 24, at 100-01. The motive is stated in Trindal as being to release the prisoners from the atrocious conditions of the prison camps maintained in the North.
140. See Trindal, supra note 24, at 168.
141. Weichmann, supra note 13, at 112 (footnote omitted). Some have expressed skepticism about whether this incident ever occurred. Weichmann’s testimony tells of a servant telling him one March day that John Surratt and six or seven others left the Surratt house on horseback at about two-thirty in the afternoon. He named “Massa Booth, . . . John H. Surratt . . . Payne . . .,” then Mr. Port Tobacco (Atzerodt), and Dave Herold. The other two he did not know but they were Arnold and O’Laughlin.” Weichmann, supra note 13, at 101. This seems to be a fabrication. Arnold credibly swore that he did not know where Mrs. Surratt’s house was: “I never saw or heard of her until the day of our trial.” This statement was in connection with a congressional investigation looking to the impeachment of President Johnson. The deposition is reprinted in Arnold, supra note 96, at 31-37.

At about six-thirty, Surratt rushed into their bedroom. Surratt was armed with a pistol and very excited and said to Weichmann “my prospect is gone, my hopes are blighted; I want something to do; can you get me a clerkship?” Soon thereafter Payne entered and said nothing. Booth entered, whip in hand, and paced nervously and did not notice Weichmann’s presence until Weichmann spoke to him. Weichmann’s testimony, in Pitman, supra note 20, at 118.

The attempted abduction is also corroborated by the confessions of Arnold and Atzerodt. Arnold, after describing the plan, writes cryptically, “Next Monday the thing was to be accomplished on the 7th street road and failed.” The Confession of Samuel Arnold, reprinted in Weichmann, supra note 13, at 380, 383; Arnold, supra note 96, at 135. Atzerodt wrote, “[t]he coach was to be taken out Seventh St. Surratt was to jump on the box as he was the best driver, and drive through Old Fields to the Long Bridge. . . . This failed.” The Confession of Atzerodt, reprinted in Weichmann,
One day we received information that the President would visit the Seventh Street Hospital for the purpose of being present at an entertainment to be given for the benefit of the wounded soldiers. . . . It was our intention to seize the carriage, which was drawn by a splendid pair of horses, and to have one of our men [Surratt, because he was the best driver] mount the box and drive direct for southern Maryland, via Benning’s Bridge. We felt confident that all the cavalry in the city would never overhaul us. We were all mounted on swift horses, besides having a thorough knowledge of the country, it being determined to abandon the carriage after passing the city limits. Upon the suddenness of the blow and the celerity of our movements we depended for success. . . . To our great disappointment, however, the President was not there but one of the government officials—Mr. [Chief Justice Salmon P.] Chase, if I mistake not.

At first reading, one gets the impression that the would-be abductors galloped toward the carriage on its way to the hospital, overtook it, saw Chase and abandoned the pursuit. More than one author on the assassination has read it that way, describing “[r]earing horsemen. Rearing team. The coachman lashing out with his whip as the carriage swerves. Then, like frightened highwaymen, the would-be abductors are gone, larruping off up the road.” Definitely a film-worthy scene! A leading author on the assassination states that this picturesque scene is “believed . . . by practically everyone.”

Samuel Arnold, who was one of the would-be abductors, tells a more detailed story that is consistent with Surratt’s version, but far less dramatic. Arnold and O’Laughlin met Booth who led them to a livery stable where Booth hired horses for them. They rode to their lodgings to arm themselves. Then the two of them rode to a restaurant near the hospital. After a delay, Payne and Atzerodt arrived. Later Booth and Surratt appeared and everyone drank together. Booth, apparently alone, went to the place where the entertainment was unfolding and discovered that Lincoln was not there. The parties separated and rode away.

supra note 13, at 385, 386.

Surratt, possibly forgetting what he said in his lecture thirty years earlier, in an 1898 interview, stated that after Booth had proposed the abduction of Lincoln, he had told Booth that the idea was impractical and “I dismissed the matter from my mind, and supposed Booth had done the same.” Hanson Hiss Article, supra note 34, at 445. As stated earlier, the article may have been fabricated. See Hanchett, supra note 14, at 117. Clearly, the story suggested by Surratt’s earlier account would make a more exciting scene in the film than Arnold’s story.

142. Atzerodt’s Confession, reprinted in Weichmann, supra note 13, at 386.

143. Roscoe, supra note 11, at 85. A similar scene is described in Campbell, Confederate Courier, supra note 25, at 86.

144. Hanchett, supra note 14, at 120.

145. Arnold, supra note 96, at 27.
The alternate plan involved seizing Lincoln at Ford's Theatre. Samuel Arnold, in his confession, described the plan. The seven members of the conspiracy to kidnap, named above, met at Gautier's saloon. Arnold outlined the plan as follows:¹⁴⁶

First, I was to rush into the private box and seize the President, whilst Atzerodt, alias Port Tobacco, and J. Wilkes Booth were to handcuff him and lower him on the stage, whilst Mosby [alias Payne, Paine, Powell, Wood] was to catch him and hold him till we got down. Surratt and the unknown [Herold]¹⁴⁷ were to be on the other side of the Eastern Branch Bridge to facilitate escape. It was afterwards changed to Mosby and Booth to catch him in the box and to lower him to me on the stage. O'Laughlin and the unknown [Herold] were to put out the lights, and Surratt and Atzerodt, alias Port Tobacco, to be on the other side of the bridge.

Arnold told Booth at this meeting that the plan was very dangerous and he would not take part in it unless it was executed in a week. They argued, but Arnold left the city after the failed seizure of Lincoln on March 16, as did O'Laughlin. Arnold refused Booth's summons to return.¹⁴⁸ He wrote Booth a letter that probably was responsible for his conviction and sentence to life imprisonment. In this letter, he shows not remorse but concern about the government's suspicions and says, "Why not, for the present, desist."¹⁴⁹

In his memoirs, Arnold notes that Booth ignored many opportunities to carry out the abduction, seeing as Lincoln often traveled as a solitary passenger in his carriage. However, Booth developed a monomania that the deed be done in a theater.¹⁵⁰

A. Evidence of the Conspiracy: Booth's Diary

Booth kept a diary. As he lay dying, it was taken from his body. Lieutenant Colonel Everton Conger took it to Washington and gave it to Lafayette Baker, the head of the Secret Service. He, in turn, gave it to Secretary of War Edwin Stanton. The diary was not presented to the Military Commission and its existence was never made known to defense counsel or the public. Two years later, Baker wrote a history of the Secret Service and mentioned the existence of the diary. Congress and the press clamored for its release. When the War Department made it public, eighteen pages were missing—the pages immediately preceding Booth's recording of his murder and flight,

¹⁴⁶. Weichmann, supra note 13, at 380, 382-83 (first published in the Baltimore American, January 19, 1869); see also Arnold, supra note 96, at 26.
¹⁴⁷. From Arnold's description of "the unknown," Weichmann, who knew him, concludes that the reference is to Herold. Weichmann, supra note 13, at 384.
¹⁴⁸. Hanchett, supra note 14, at 50.
¹⁴⁹. Letter signed "Sam" (March 27, 1865), reprinted in Weichmann, supra note 13, at 124, 125 (emphasis omitted).
¹⁵⁰. Arnold, supra note 96, at 44-46.
possibly a record of the days just prior to the assassination.\footnote{151} Referring to the trial before the Military Commission, one commentator concludes: “Testimony manufactured. Witnesses suborned. Evidence tampered with, forgotten or destroyed. Weighted by these malefactions, the conspiracy trial of 1865 sank into history’s slough.”\footnote{152} Yet, it is quite possible that Booth himself had cut out the pages prior to starting his diary.\footnote{153} Nonetheless, the diary would have proved that Booth’s intentions had shifted from abduction to assassination. Also a letter written to his brother-in-law, known to the government, showed an intent to abduct.\footnote{154}

B. Evidence of the Conspiracy: Matthews’ Letter

Booth had a close friend named John Matthews, an actor who had a role in My American Cousin, the play performed on the night Booth killed Lincoln. Lincoln’s body was carried out of the theatre to the nearby Peterson house. While there, Matthews recalled that earlier in the day Booth had handed him a letter to be delivered for publication to John F. Coyle, an editor of the National Intelligencer. In view of the horrific events of the evening, Matthews decided to read the letter. He read it, burned it, and kept silent about its contents until the trial of John Surratt. His testimony concerning the contents of the letter was proffered by the defense, but an objection to the testimony was sustained.\footnote{155} Matthews proceeded to reveal its contents in print in the National Intelligencer.\footnote{156} He wrote that only the concluding paragraph was relevant to the assassination. He states, “It was to this effect and in these words:

For a long time I have devoted my energies, my time and money, to the accomplishment of a certain end. I have been disappointed. The moment has arrived when I must change my plans. Many will blame me for what I am about to do, butposterity, I am sure, will justify me. Men who love their country better than gold and life.

John W. Booth, Payne, Herold, Atzerodt.

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\footnote{151}{Roscoe, \textit{supra} note 11, at 505-06.}
\footnote{152}{\textit{Id.} at 506.}
\footnote{153}{Hanchett, \textit{supra} note 14, at 85.}
\footnote{154}{See \textit{id.} at 45-46 (quoting the letter at length).}
\footnote{155}{Weichmann states that the objection was sustained under the best evidence rule. Weichmann, \textit{supra} note 13, at 159. A.C. Richards, who commented on a draft of Weichmann’s book, chided Weichmann, stating that the contents of the letter “must have been ruled out on other grounds than those you state.” Letter of Richards to Weichmann, June 10, 1898, in Weichmann, \textit{supra} note 13, at 417, 417-18. Richards was correct. Judge Fisher sustained an objection to Matthews testimony as to the contents of the letter, saying, “It might have been the very object of conspirators to thus screen some of the parties to the conspiracy by getting up this agreement.” If The Trial of John H. Surratt, \textit{supra} note 50, at 824.}
\footnote{156}{Weichmann, \textit{supra} note 13, at 159-60.}
Why did Matthews remain silent for so long, and why did he burn the letter? One can easily conjecture. According to the testimony of Samuel Knapp Chester, a fellow actor, Booth tried earnestly to enlist Chester into a conspiracy to kidnap Abraham Lincoln.\textsuperscript{157} In the course of the attempt to enlist him, Booth told him that he had also sought unsuccessfully to bring Matthews into the planned abduction, saying that "Matthews was a coward and was not fit to live."\textsuperscript{158} Chester testified that Booth warned him against betrayal because, if Chester did so, "he could implicate me in the affair any how."\textsuperscript{159} Presumably, Booth made a similar threat to Matthews. If Matthews delivered the letter for publication as Booth's messenger, it could arouse the suspicion that Matthews was a conspirator in the murder plot.

The letter, if accurately reproduced by Matthews, is strong corroboration of the claims of John Surratt and his mother that they were not part of the conspiracy to kill the President. Similarly, it is strong evidence of the non-participation of Samuel Arnold and Michael O'Laughlin in the assassination plot. There is a vast moral chasm between a plot to kidnap for the ransom of prisoners of war and a plot to kill out of hatred or revenge.

VI. THE PRELUDE TO SHUEY: SURRATT ON THE RUN

On March 25, 1865, John Surratt leaves Washington for Richmond in the company of Mrs. Slater, a courier who evaded the blockades on behalf of the Confederacy. She was to have been escorted by Augustus Howell, but he is in prison. Surratt's evasion of the blockade goes smoothly. Once in Richmond, John is ushered into the office of Secretary of State Judah Benjamin\textsuperscript{160} who gives him dispatches\textsuperscript{161} to be delivered to Confederate officials in Montreal and $200 in gold for traveling expenses. He may have had a brief interview with Jefferson Davis himself. John arrives back home in Washington on April 3rd. The City is wild with celebration of the news of the evacuation of Richmond, an event that comes as a shock to John. A boarder in his mother's house, John Holohan, obligingly gives John greenbacks in exchange for gold.\textsuperscript{162} Surratt spends the

\textsuperscript{157} Pitman, \textit{supra} note 20, at 44.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{161} The dispatches concerned finances. In his Rockville lecture, Surratt stated that the dispatches were "accounts of some money transactions—nothing more or less." \textit{The Rockville Lecture, in Weichmann, supra} note 13, at 434.
\textsuperscript{162} Weichmann, \textit{supra} note 13, at 128. Holohan testified that he was in the stonemasonry business, making tombstones and working with marble. \textit{I The Trial of
night at a hotel; a servant had warned him that detectives have been looking for him. The next morning John heads for Montreal, arriving there on April 6. He registers at the St. Lawrence Hotel as "John Harrison."

John delivers the dispatches to Confederate General Edwin G. Lee, a Confederate officer who is stationed in Montreal. The General asks John if he would be willing to undertake a risky task that might lead to the escape of a large number of Confederate prisoners imprisoned in Elmira, New York. John agrees to go to Elmira to make a sketch of the prison and its surroundings and to develop intelligence as to its defenses. The purpose of the effort is to devise a plan for a mass prison break. Before leaving Montreal, John acquires "an Oxford cut jacket and a round-top hat, peculiar to Canada at that time."

John arrives in Elmira on April 13, the day preceding the assassination. He registers at the Brainard House as John Harrison. Strangely, the hotel registry for that date disappears, although the registry is intact for all other days. On the morning of the 15th, one of the hotel guests tells him the news of the assassination, without mentioning the identity of the known assassin. John goes to the telegraph office to send a telegram to Booth in New York, saying, "[i]f you are in New York, telegraph me." Strangely, the original of this telegram disappears from the telegraph office, although a copy survives.

Surratt explains these disappearances as deliberate government spoliation of evidence, a credible explanation. The government, convinced of his guilt, needed to prove that he was in Washington on the evening of April 14. He had told Dr. McMillan, who turned informer, of his movements in Elmira. Using his information, the government would have been able to confiscate the paperwork showing his presence in Elmira, and likely did so. Fortunately for Surratt, he shopped for clothing while in Elmira, and reliable Union merchants were able to identify his presence on the 13th and 14th of April.

Apparently, Surratt had not told the informer of the fact that on the 15th, he had gone to Canandaigua, New York. This city was on the New York Central Railroad. Canandaigua was a better starting point.

John H. Surratt, supra note 50, at 669. A historian states that "during the war [he] was a bounty broker." Moore, supra note 26, at 7. Presumably this characterization of his employment is based on Weichmann's testimony in The Trial of John H. Surratt, supra note 50, at 456.

163. See The Rockville Lecture, in Weichmann, supra note 13, at 433.
164. Id.
165. Id.
166. Id. at 434.
167. Id. at 438.
168. Id. at 436.
for a trip to New York City and Baltimore than was Elmira.\textsuperscript{169} The hotel registry at Canandaigua did not disappear.\textsuperscript{170}

On the Monday morning following the assassination, John picks up a newspaper that reports that the “assassin of Secretary Seward is said to be John H. Surratt, a notorious secessionist.”\textsuperscript{171} This shocking and inaccurate report impels John to change plans and to head for Montreal.

Of course, detectives carefully screen everyone who leaves the United States at the time. Surratt’s Canadian attire serves him well. He is not stopped at the border post in St. Alban’s, Vermont. In Montreal, he is hosted and supported by John Porterfield, one of his Confederate contacts. John’s mother and others tell the investigators that John is in Montreal.\textsuperscript{172} They are unaware of the interlude in Elmira. Detectives, with Weichmann in tow, and accompanied by fellow-boarder John Holohan, search the streets of Montreal.\textsuperscript{173} Porterfield takes John to Father LaPierre, canon to the Bishop of Montreal,\textsuperscript{174} who makes long-term arrangements for John. Meanwhile, Surratt stays at the home of the tailor who had made his Canadian outfit, who later leads him to a point about eight miles out of the City. There, a canoe with two oarsmen wait to take him across the St. Lawrence River. Once across, a cart awaits Surratt, and about eighteen hours later they arrived at the home of Father Charles Boucher, the parish priest of the small village of St. Liboire. Surratt arrives feverish and very ill.\textsuperscript{175} It takes months for him to recover. He receives few newspapers. His host heavily censors them to remove references to the trial of his mother before the Military Commission.\textsuperscript{176}

During the trial of the conspirators, John sends a messenger to Washington to his mother’s lawyers stating that he is willing to return and face trial if this would help his mother’s case. The lawyers send

\textsuperscript{169} \textit{Id.} Surratt’s explanation makes no sense and seems to be a slip of the tongue or of the pen. His Rockville lecture contains this language: “I concluded to go to Canandaigua, and from there to Baltimore by way of Elmira and New York.” Since he was already in Elmira, why go elsewhere to go “by way of Elmira?” Almost certainly, he meant “by way of Albany.”

\textsuperscript{170} Although it did not disappear, at Surratt’s trial in 1867 it was ruled inadmissible. The jury, however, was well aware of its existence. The trial judge said that he would have admitted the hotel’s cash book, but the hotel owner could not locate it. \textit{II The Trial of John H. Surratt, supra} note 50, at 768-69. It was located prior to Surratt’s second indictment. \textit{The Rockville Lecture, in Weichmann, supra} note 13, at 437. The second indictment did not include a charge of murder and was never prosecuted. Campbell, Confederate Courier, \textit{supra} note 25, at 290.

\textsuperscript{171} \textit{The Rockville Lecture, in Weichmann, supra} note 13, at 437.

\textsuperscript{172} Weichmann, \textit{supra} note 13, at 178.

\textsuperscript{173} \textit{Id.} at 220-21.

\textsuperscript{174} Campbell, Confederate Courier, \textit{supra} note 25, at 107.

\textsuperscript{175} This account of Surratt’s travels from Montreal to St. Liboire is based on that relayed in Campbell, Confederate Courier, \textit{supra} note 25, at 109-11.

\textsuperscript{176} \textit{The Rockville Lecture, in Weichmann, supra} note 13, at 438-39.
word that there is no danger that his mother will be convicted, but if he comes to Washington he would be in grave danger of being tried and convicted.\textsuperscript{177}

Late in June he returns to Montreal, staying at the home of the father of Father LaPierre. His friends keep him away from newspapers. On his way to a hunting trip on July 7, Surratt goes to the railroad station and stops at a nearby newsstand. There, he sees the headline: MRS. SURLATT HANGED TODAY. The fever and illness return.\textsuperscript{178}

On September 16, five months after the assassination, in the company of Fathers LaPierre and Boucher and several ex-officials of the Confederacy, Surratt boards a mail steamer to the city of Quebec. There, Surratt embarks onto the \textit{Peruvian}, using the pseudonym of McCarty. The ship is bound for Liverpool, but also has scheduled a short stop in Londonderry.\textsuperscript{179}

The passengers are all booked for Liverpool, but Surratt makes a last minute decision to debark at Londonderry. Father LaPierre introduces John to Dr. L.J.A. McMillan, the ship’s doctor. Surratt thinks of the doctor as a friend, and he reveals to him his true identity. Instead of making a friend, Surratt creates a bounty hunter.\textsuperscript{180}

On arrival in Liverpool, McMillan visits the United States Consulate and provides information about Surratt’s whereabouts. Vice-Consul Wilding relays this information to Secretary of State Seward and requests instructions and a warrant for Surratt’s arrest. Several days later he sends another letter to Secretary of War Stanton indicating that Surratt is staying at the Oratory of the Roman Catholic Church of the Holy Cross in Liverpool. Impatient, Wilding sends another letter saying that Surratt could easily be taken into custody.\textsuperscript{181}

Vice-Consul Wilding finally receives a reply to the effect that on the advice of Secretary Stanton and Judge Advocate General Holt, no warrant for Surratt’s arrest would be issued.\textsuperscript{182} When, more than a year later, this decision became publicly known, Congress wanted to know why. Stanton testified that there was insufficient evidence that the person in Liverpool was Surratt. Stanton testified, “I did not think it proper at any time to make an arrest until his identity should be clearly established.” Certainly, this is a principled position, but why was no photograph of Surratt, of which the government had several, forwarded to Wilding to confirm McMillan’s identification?

\textsuperscript{177} \textit{Paper of Father John Walter, in} Weichmann, \textit{supra} note 13, at 320; \textit{The Rockville Lecture, in} Weichmann, \textit{supra} note 13, at 439.

\textsuperscript{178} Campbell, Confederate Courier, \textit{supra} note 25, at 116-18.

\textsuperscript{179} Campbell, Confederate Courier, \textit{supra} note 25, at 119; Weichmann, \textit{supra} note 13, at 332-37.

\textsuperscript{180} Weichmann, \textit{supra} note 13, at 332-38.

\textsuperscript{181} All of these messages are reprinted in Pursuit, \textit{supra} note 2, at 1-2.

\textsuperscript{182} \textit{Id.} at 2.
Incidentally, the American Consul in Montreal also communicated to the Secretary of State the fact that Surratt was in Liverpool and that funds for Surratt were being transported by the *Nova Scotian*, sailing “tomorrow,” October 26, 1865.183 The U.S. Government was dragging its feet. Surratt left England, traveled to France, made his way to Rome and enlisted in the Papal Zouaves under the name of Watson.

For the moment, however, let us leave this minor mystery of why no attempt was made to have Surratt arrested in England, and instead follow Surratt to Rome.

What was this Papal army into which John Surratt and Henri Sainte Marie enlisted?184 Until 1859, the Papal States consisted of a swath of the Italian Peninsula from the Ionian to the Adriatic sea. In 1849, a local revolt brought Garibaldi and Mazzini to Rome to lead the creation of a short-lived republic. The Austrian Army restored Papal rule in the outer provinces, and Napoleon III’s French army successfully besieged the City of Rome with 14,000 troops and restored Pius IX to his throne. But one by one, the provinces of the Papal States were abandoned by the Austrians and absorbed into the Kingdom of Italy. Pius IX started an international army to protect his remaining territories. This army had the characteristics of the more famous French Foreign Legion. The Minister of War was a Belgian. The army’s general-in-chief was a Frenchman. One historian describes the troops in the following passage:185

Hundreds of volunteers arrived, among them Austrians, liberated from prison; turbulent and undisciplined Swiss; Spanish beggars, starving Irish, whom it was impossible to persuade to wear decent uniforms or even to carry a sack to hold their belongings. It had been decided to clothe them in a green uniform, consisting of pantaloons with large pockets, which became the repositories for food, clothes, and ammunition. They were incredibly dirty and immoral.

In 1860, Garibaldi led the revolt that ended the Kingdom of Naples and he turned over its territory to Victor Emmanuel II of the new Kingdom of Italy. Napoleon III continued to garrison and protect the city of Rome and Latium, the City’s surrounding region. Thus, when Surratt joined the Papal army, Papal territories had been reduced to Latium. But the Pope’s Army, supported by the presence of troops of Napoleon III’s empire, continued to exist. The French withdrew from Rome on December 31, 1866, pursuant to an agreement with Italy that the Papal States would remain intact. Nonetheless, Garibaldi

183. Id. at 3.
185. Id. at 271.
with an irregular army invaded Papal territory. In this context, John Surratt served and received a promotion to Sergeant.

Rufus King, American Minister to Rome, writes to Secretary of State Seward that on April 21, 1866, Sainte Marie called on him to report the whereabouts of Surratt. Sainte Marie had reported that Surratt was enlisted in the Papal Zouaves under the name of John Watson and was stationed at Sèzze. He further informed King that Surratt had confessed to Sainte Marie complicity in the assassination of Lincoln, and that Surratt had also stated that Jefferson Davis had incited or was privy to the plot.

Washington remains silent as Sainte Marie writes additional impatient letters to General King, a military title which he used in the letters. King forwards the letters to Secretary of State Seward. On May 17, Seward's son, as acting Secretary of State, forwards General King's letter of April 23 to Secretary of War Stanton who, presumably, shares the correspondence with Joseph Holt, Judge Advocate General, and one of the prosecutors in the Military Commission's trial of the conspirators. Holt swiftly writes to the younger Seward to request that General King procure a full statement under oath from Sainte Marie. The Acting Secretary of State promptly forwards a copy of this letter to King.

On May 25, Secretary of State Seward, now returned from vacation, writes two letters to the Chairman of the House Committee on the Judiciary in response to an inquiry the Chairman had made. In the first official letter, he writes that there are no papers in the State Department that implicate any person as complicit in the assassination of President Lincoln. In a separate "unofficial" letter, he states, "[W]e have information . . . in regard to John H. Surratt. It would not

186. The French returned, and Garibaldi was decisively defeated by the French and Pontifical armies on November 3, 1867. Nonetheless, after France was defeated in the Franco-Prussian War of 1870, Louis Napoleon was dethroned, and France's Third Republic was established. The Italian army entered the City of Rome with no opposition from the French and minimal opposition from Papal forces. The Papal States were then absorbed into Italy. See generally id.


188. Letter from Rufus King to William H. Seward (Apr. 23, 1866), in Pursuit, supra note 2, at 4.

189. Letter from Rufus King to William H. Seward (May 11, 1866), in Pursuit, supra note 2, at 4-5; Letters from Henry Ste.-Marie to Rufus King (Apr. 1866 & May 7, 1866), in Pursuit, supra note 2, at 5.

190. Letter from F.W. Seward to E.M. Stanton (May 17, 1866), in Pursuit, supra note 2, at 6.

191. Letter from J. Holt to F.W. Seward (May 19, 1866), in Pursuit, supra note 2, at 6.

192. Letter from F.W. Seward to Rufus King (May 21, 1866), in Pursuit, supra note 2, at 7.

now be advisable to communicate this, as the communication might tend to defeat our wish to arrest Surratt.”\(^{194}\)

Correspondence flows back and forth between Rufus King in Rome and Seward in the United States. King ascertains from the Papal Secretary of State that, despite the absence of an extradition treaty, the Pope would likely be amenable to an extradition request.\(^{195}\)

In a letter, which is—as far as I am aware—unpublished, Sainte Marie writes on September 12, 1866, to T.F. Hooker, an aide to General King, revealing the alleged product of a further conversation with Surratt. The conversation concerned the complicity of Jefferson Davis and the whole Confederate cabinet in the assassination conspiracy.\(^{196}\) Sainte Marie warns that Surratt is planning to leave the Zouaves to travel to the East Indies. Furthermore, Sainte Marie complains of the apparent indifference of the Washington cabinet to the information he has been supplying. He then mentions that newspapers in New York and Philadelphia would force the government to act if they possessed the information that he has provided to the government. One’s impression is that Sainte Marie is fabricating information; however, regardless, the implicit threat to go to the press is clear.

Washington remains silent. Why? After Surratt was returned to the United States, the Judiciary Committee reported that “they [we]re constrained from the testimony to report that, in their opinion, due diligence in the arrest of John H. Surratt was not exercised by the executive department of the government.”\(^{197}\) Stanton testified that “I do not know of anything more that could have been done than was done to accomplish” Surratt’s arrest.\(^{198}\) In later testimony, he said that no action was taken when Surratt was in England because his identity was not certain.\(^{199}\) Judge Advocate General Holt testified that it was his impression that England would not have extradited Surratt when he was there because of England’s position on political offenders.\(^{200}\) Moreover, it was not his job to seek the arrest of Surratt.\(^{201}\)

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\(^{194}\) Id. (Unofficial version).

\(^{195}\) Letter from Rufus King to William H. Seward (Aug. 8, 1866), in Pursuit, supra note 2, at 12; see also Letter from Rufus King to William H. Seward (Nov. 2, 1866), in Pursuit, supra note 2, at 13.

\(^{196}\) Letter from Henry Ste.-Marie to T.F. Hooker (Sept. 12, 1866) (on file in the Court of Claims case file, available at the National Archives, see infra note 240) [hereinafter Ste.-Marie Letter].

\(^{197}\) 39th Congress, 2d Sess., Report No. 33, reprinted in Pursuit, supra note 2, at 64.

\(^{198}\) Stanton’s Testimony, in Pursuit, supra note 2, at 66 (included as part of the congressional report cited supra at note 197).

\(^{199}\) Id. at 78.

\(^{200}\) Testimony of Brigadier General Holt, in Pursuit, supra note 2, at 74 (included as part of the congressional report cited supra at note 197).

\(^{201}\) Id.
William Hunter, Second Assistant Secretary of State, was asked why the State Department did not act on General King’s dispatch that stated that the Papal Secretary of State indicated that Surratt could be arrested and turned over to American authorities despite the lack of an extradition treaty. He replied that it was his impression that the cabinet had decided that such action would create an inconvenient precedent. When asked why the precedent would be inconvenient, Hunter replied, “if a man charged with being the assassin of Francis the First of Naples escaped to this country, would you think we would be apt to give him up?”

There may have been other reasons. The decision not to act on the messages from Rome may have been driven by domestic concerns. Sainte Marie’s seemingly concocted version of his conversations with Surratt that implicated Jefferson Davis, the entire Confederate cabinet, and Louis Weichmann, the prosecution’s principal witness before the Military Commission in the assassination conspiracy trial, if publicly aired, might have roiled many waters that had become still. Moreover, Stanton had read Booth’s diary, possibly before it was mutilated, and may have realized that Surratt was innocent of the conspiracy to assassinate Lincoln.

Despite Washington’s foot-dragging, Rome takes action. On November 6, 1866, the Papal War Department issues an order to Colonel Allet, the commanding officer of Surratt’s Zouave battalion, to arrest Zouave “Waston” and escort him to the military prison at Rome. There is no request from Washington for this arrest. According to Sainte Marie, a letter from General King to him on the

202. Testimony of William Hunter, in Pursuit, supra note 2, at 76 (included as part of the congressional report cited supra at note 197).
203. Id. Francis I was the ultra-reactionary king of the Two Sicilies who reigned from 1825-30. See 4 Encyclopedia Britannica (Micropaedia) 926.
204. See Ste.-Marie Letter, supra note 196.
205. Sainte Marie’s affidavit of July 10, 1866, sworn to in Rome, states that Weichmann (who was a War Department clerk) “used to steal copies of the despatches and forward them to him [Surratt], and thence to Richmond.” Letter from Rufus King to William H. Seward (July 14, 1866), in Pursuit, supra note 2, at 10 (Ste.-Marie’s affidavit is contained within this letter). In his letter of June 21, 1866, to Rufus King, he states that on his return to Canada from England, he went to the U.S. consul at Montreal, “and informed him what I knew about Surratt and Weichmann, [this is the original spelling of Weichmann’s name] and told him that I thought one as guilty as the other.” Letter from Henry Ste.-Marie to Rufus King (June 21, 1866), in Pursuit, supra note 2, at 9. Surratt confirms that Weichmann supplied him with War Department information for the use of the Confederacy and that Weichmann was aware of the kidnapping plot and wanted to participate in it. His participation was rejected, says Surratt, because “he could neither ride a horse nor shoot a pistol.” The Rockville Lecture, in Weichmann, supra note 13, at 435.
206. The embarrassing question of how to deal with Jefferson Davis and other Confederates is discussed in Hanchett, supra note 14, at ch. 3.
207. Roscoe, supra note 11, at 505-06.
208. A copy of the translated order is in Pursuit, supra note 2, at 14-15. The misspelling of Watson as Waston is in the original.
subject of Surratt’s arrest is mistakenly delivered to a soldier named Santa Maria who knows no English. He hands the letter to Surratt for a translation. Surratt thus becomes forewarned of his impending arrest and begins to make plans to leave. Sainte Marie becomes aware that Surratt saw the letter, and contacts General King, who presumably induces the Papal authorities to issue an order for Surratt’s arrest.209 The order is quickly carried out.210

Surratt is locked into a cell of a former monastery. The building is situated so that its rear was flush with the edge of a cliff that rises about one hundred feet above the plain below. A four-foot wall exists at the edge of the cliff not covered by the building. At about 4:00 a.m., he is awakened by six Zouaves to be escorted to a military prison in Rome. He asks for and is granted permission to go to the privy. He heads in that direction and suddenly leaps over the wall, landing on a ledge of the cliff about twenty-three feet below.211 Dodging bullets, he successfully makes his way to the bottom.

He then runs into a detachment of Zouaves, eludes them, and runs for his life toward Italian territory. He runs into an encampment of Garibaldi’s red-shirted irregulars where he is surrounded. He summons up his best Italian and explains that he is an American deserting from the Zouaves.212 Garibaldi’s irregulars treat him with great kindness and help him toward his destination—Naples. He may have been treated at a hospital for injuries suffered in his leap.213

He arrives in Naples seven days after his escape, still attired in his uniform. Although he has a small amount of money, he asks the police to allow him to lodge at the prison, telling them that he is penniless. He goes to the British consulate, claims to be Canadian, and tells them of his lack of funds. Some English gentlemen provide him with some funds to enable him to travel.214 The American Consul in Naples inquires of the police about the possible whereabouts of Surratt. He is informed that Surratt had left on board the British ship

209. Sainte Marie’s Petition to the Court of Claims, title VII, in Court of Claims Case File, infra note 240. I have seen no record that King asked for Surratt’s arrest. If he did, he was exceeding his authority and would not have made the request in writing and would not have made a memorandum for the official files. I have not explored the Vatican archives.


211. Telegram from Lt. Col. Allet to the Minister of War (Nov. 8, 1866), in Pursuit, supra note 2, at 15. The telegram said, in part, that “[a]t the moment he left the prison, surrounded by six men as guards, Watson plunged into the ravine, more than a hundred feet deep.” That the ledge was some twenty-three feet below is stated in a letter from Lt. Col. Allet to the Minister of War, dated November 9, 1866, and reprinted in Pursuit, supra note 2, at 21.

212. Hanson Hiss Article, supra note 34, at 448.

213. See infra text accompanying note 220.

214. Letter from Frank Swan to William H. Seward (Nov. 21, 1866), in Pursuit, supra note 2, at 23.
Tripoli "under the name of Waters or Watson." The ship is bound for Alexandria, but is scheduled for a coaling stop at Malta.

The American Minister in Rome, Rufus King, obviously a determined and capable official, telegraphs the American Minister in Lisbon to inform Admiral Goldsborough that "important matters render the immediate presence of one of our ships-of-war necessary at Civita Vecchia." Because Goldsborough is not in Lisbon, a flurry of other messages results in an order for the warship Swatara to proceed to Civita Vecchia, the deep water port of the Papal domains. King dispatches a messenger to Florence (the then-capital of Italy) to deliver details of Surratt's escape and to request the American Minister to confer with Italian authorities as to Surratt's arrest and extradition should he be found in the Italian Kingdom. The Minister advises Secretary of State Seward that the extradition might be feasible, but likely only on the condition that the death sentence not be inflicted.

King receives word that Surratt is in a hospital in Sora, Italy. He telegraphs this information to George P. Marsh, the American Minister in Florence, who immediately writes to the Italian Minister of Foreign Affairs requesting that Surratt be taken into custody. The next day, he writes again, enclosing Surratt's photograph, but the correspondence is too late. Surratt sails for Alexandria the day the photograph is sent.

At the request of King, Frank Swan, the United States Consul in Naples, telegraphs the American Consul in Malta to have Surratt arrested, and King writes to Seward about this message. The American Consul in Malta is met with bureaucratic delay on the part of the authorities there, and the ship sails from Malta with no action taken. George P. Marsh, who is now in London, makes an interesting observation in a letter to Seward, suggesting that perhaps it is just as well that Surratt has escaped the Italian and Maltese

215. Id.
216. Id.
217. The telegram is reprinted in Pursuit, supra note 2, at 15.
218. The messages are reprinted in Pursuit, supra note 2, at 15-16.
220. Telegraph from Rufus King to George P. Marsh (Nov. 16, 1866), in Pursuit, supra note 2, at 18.
221. Letter from George P. Marsh to Visconti Venosta (Nov. 16, 1866), in Pursuit, supra note 2, at 19.
222. Letter from George P. Marsh to Visconti Venosta (Nov. 17, 1866), in Pursuit, supra note 2, at 19.
223. Communication between these parties is reprinted in Pursuit, supra note 2, at 22.
224. The American Consul in Naples also writes a message to Seward, Id. at 23.
225. Communications from the American Consul and the Maltese authorities are reprinted in Pursuit, supra note 2, at 24-26.
authorities. Alexandria is in the Turkish Empire where the American Consul has the power to arrest.\footnote{225} The American Consul in Malta sends word to the Consul in Alexandria by telegraph via Constantinople and by mail.\footnote{226} When the Tripoli docks, Consul-General Hale places Surratt under arrest and receives the aid of local soldiers to secure him in “a safe place within the quarantine walls.” Hale warns him that anything he says can be used against him and triumphantly details the arrest in a dispatch to Seward.\footnote{227}

On Christmas Eve of 1866, Hale sends this cablegram to Seward: “I DELIVERED SURRATT ABOARD CORVETTE SWATARA TWENTY-FIRST DECEMBER. NO TROUBLE.”\footnote{228}

John H. Surratt is tried in the Criminal Court of the District of Columbia. The trial is a long one. Sainte Marie’s testimony is very brief. He mentions that on about the 18th or 19th of June, 1866, Surratt came to his quarters in the Papal barracks and asked him to take a walk. Two Frenchmen accompanied them, but he and Surratt spoke in English. When asked about disguises, Sainte Marie testifies that Surratt told him that he got out of Washington on the night of the assassination or the morning after, he forgot which, disguised as an Englishman.\footnote{229} This is the end of direct testimony. Surratt’s counsel waives cross-examination. No questions are asked about the complicity of others, such as Jefferson Davis or Louis Weichmann, that Sainte Marie had detailed in his letters to the American legation in Rome.

A hung jury results. Eight jurors vote to acquit, four to convict. Significantly, E.C. Carrington, one of the assistant prosecutors in Surratt’s trial, would later state that midway through the trial he became convinced of Surratt’s innocence.\footnote{230} Henry L. Burnett, one of the prosecutors of the trial of the conspirators, would write years later that he was convinced Surratt was not in Washington on the night of the assassination,\footnote{231} although his team produced nine witnesses who testified that they saw Surratt in Washington that night.

\footnote{225} Letter from George P. Marsh to William H. Seward (Nov. 24, 1866), in Pursuit, supra note 2, at 27. William Winthrop, American Consul in Malta, makes the same point in a letter to Seward, dated November 21, 1866, which is reprinted in Pursuit, supra note 2, at 27-29.

\footnote{226} Communications from the Consul in Malta to the Consul in Alexandria are reprinted in Pursuit, supra note 2, at 28-31. King also sent word from Rome. These communications are found in Pursuit, supra note 2, at 31-32.

\footnote{227} Letter from Charles Hale to William H. Seward (Nov. 27, 1866), in Pursuit, supra note 2, at 34.

\footnote{228} Telegram from Charles Hale to William H. Seward (Dec. 24, 1866), in Pursuit, supra note 2, at 43.

\footnote{229} "The Trial of John H. Surratt, supra note 50, at 492-93. Sainte Marie was sworn in as Henry Benjamin St. Marie. Id. at 492.

\footnote{230} Campbell, Confederate Courier, supra note 25, at 290-91.

\footnote{231} Letter from Henry L. Burnett to Louis J. Weichmann (March 2, 1892) in
A new indictment is handed down. It does not include a count of murder. It is dismissed on grounds of the statute of limitations. The charges against Surratt are dropped.\(^{232}\)

VII. SAINTE MARIE'S CLAIM FOR A REWARD

Prior to bringing his action in the Court of Claims, Sainte Marie addresses a letter from Montreal dated October 11, 1867, to General Grant, in Grant’s then-capacity as interim Secretary of War.\(^ {233}\) Sainte Marie refers to the offer of reward of $25,000, erroneously characterizing it as a reward “for any information that might lead to the capture of J.H. Surratt,”\(^ {234}\) although the offer was for the arrest of Surratt. Sainte Marie refers to the revocation and states that he is certain that General King was too much of a gentleman not to have mentioned the revocation if he had been aware of it.\(^ {235}\) He states that he is “surrounded by numerous enemies, and [is] liable to suffer at any moment from the vengeance of Surratt’s sympathizers.”\(^ {236}\) “[T]here is no place on earth where I can go on my own name.”\(^ {237}\) He asks for the reward or some part of it, “as I am at present depending on my brothers for support.”\(^ {238}\)

Grant forwards the letter to a board of officers and to the Judge Advocate General. The latter notes that a reward of $25,000 had been offered for Surratt’s arrest, but that this had been revoked. However, an offer of a “liberal reward” for information leading to the arrest of Surratt had not been revoked and was in force at the time of Sainte Marie’s revelations to General King in Rome.\(^ {239}\) The board of officers concurs with the Judge Advocate General and recommends the payment of $15,000. Congress appropriates $10,000 and this amount is paid to Sainte Marie.

A. The Court of Claims

In the case of Shuey, Executor v. United States, the claimant in the court of claims is styled Henry B. Ste. Marie. He seeks to recover the amount of the reward promised for the arrest of John H. Surratt. He retains as his attorney Daniel B. Meany, who had been admitted to the bar of the Supreme Court of Pennsylvania on February 6, 1872.

\(^ {232}\) Weichmann, supra note 13, at 372.
\(^ {233}\) II The Trial of John H. Surratt, supra note 50, at 1379.
\(^ {234}\) Letter from Henry B. Ste.-Marie to Gen. U.S. Grant, Sec’y of War ad interim, Oct. 11, 1867, in Pursuit, supra note 2, at 87.
\(^ {235}\) Id.
\(^ {236}\) Id.
\(^ {237}\) Id.
\(^ {238}\) Id.
\(^ {239}\) Letter from J. Holt to General Grant (Oct. 25, 1867), in Pursuit, supra note 2, at 88.
Sainte Marie's petition to the Court of Claims is dated February 12, 1872.\textsuperscript{240} The case file in the National Archives contains an assignment by Sainte Marie to Meany of the sum of $5,000, to be taken from any award that might be made to him.\textsuperscript{241} This amount is one-third of Sainte Marie's claim of $15,000. The amount of the reward offer for the arrest of John H. Surratt was $25,000; however, Sainte Marie had already been paid $10,000.

Sainte Marie also executed a power of attorney to Meany, dated June 11, 1871, and notarized in Philadelphia. A second power of attorney, appointing Meany, C. Brewster, and Valentine Edwards, was dated February 5, 1873; it was notarized and does not indicate where it was executed. Both powers of attorney recite that Sainte Marie is a resident of Montreal, Dominion of Canada.

The petition was signed by Daniel B. Meany on December 5, 1872.\textsuperscript{242} Paragraph I of the petition recited "[t]hat your petitioner has never voluntarily or otherwise given aid or comfort to the Rebellion, or the enemies of the United States, but on the contrary has always been friendly to the Government." This was an unnecessary lie. Although a statute still existed on the books requiring such a recitation for claims against the United States, the Supreme Court previously held that because a general amnesty had been proclaimed by the President, such a statement was no longer required.\textsuperscript{243}

Weichmann's narrative proves that it was a lie.\textsuperscript{244} Although Weichmann's narrative can be questioned as to topics involving his self-interest, there seems no reason to doubt his description of how Sainte Marie happened to be laboring on a farm in Maryland in a job well below the reasonable expectations of someone of his background and education. Sainte Marie had been caught trying to evade the blockade of the South in order to join the Confederate Army.\textsuperscript{245}

\textsuperscript{240} National Archives RG No. 123, General Jurisdiction Case Files, Case # 6415 [hereinafter Court of Claims Case File]. The file is unpaginated and the order of the documents in this rather short file appears almost random.
\textsuperscript{241} \textit{Id}.
\textsuperscript{242} Valentine Edwards filed an undated motion for leave to make three minor amendments. This motion was allowed by the court on May 6, 1873. \textit{See} Handwritten notation on the first page of the printed petition, Court of Claims Case File, \textit{supra} note 240.
\textsuperscript{243} Armstrong v. United States, 80 U.S. 154 (1871) (holding that all courts must uphold the President's unconditional pardon of Confederate sympathizers). Although the case involved the Abandoned and Captured Property Act, enacted March 12, 1863, and did not involve the same statute that governed Sainte Marie's case, it was generally recognized that such a statement in a claimant's petition was not required. The Chief Justice of the Court of Claims wrote that since the \textit{Armstrong} decision, "the practice has been not to require an allegation of loyalty in the petition or proof of it at the trial." William A. Richardson, History Jurisdiction, and Practice of the Court of Claims. (United States.) 29 (Washington, Gov't Printing Off., 2d ed. 1885).
\textsuperscript{244} Weichmann, \textit{supra} note 13, at 23-25.
\textsuperscript{245} \textit{Id} at 23.
Paragraph II of the petition recites that a reward offer had been proclaimed on April 20, 1865. The case file contains a poster, which I estimate—not having a ruler with me—measures thirty inches high and eighteen inches wide, offering a reward. We will return to this fact when we come to the topic of equal publication.

Paragraph III of the petition would delight the heart of all theorists who stress the reliance interest in contract law. Alas, counsel made no effort to prove the allegations of this paragraph or others that depict the petitioner in the role of an Inspector Javert relentlessly pursuing a wrongdoer. The paragraph recites that at the time of publication of the reward offer, petitioner was residing in Montreal, and on learning of the offer, "foregoing all other business and occupations whatsoever, commence[d] the pursuit of the said John H. Suratt [sic]." Surratt’s name is misspelled throughout the petition.

One possible reason for why no proof of these allegations was offered in the petition is that they were untrue. The petition alleges that Sainte Marie learned that Surratt had left Montreal for Europe on June 20, 1865, and that the petitioner left for Europe on June 22, 1865, to pursue Surratt. The evidence shows that Surratt left for England from the City of Quebec on the Peruvian on September 16, 1865, roughly three months after Sainte Marie claims to have left in pursuit.246

Paragraph IV of the petition would delight classical contract theorists such as Samuel Williston.247 It avers that Sainte Marie undertook this course of conduct "solely because of the promise of the United States set forth in said proclamation offering a reward of Twenty-Five Thousand Dollars for the apprehension of the said John H. Suratt."

The petition then swings back to the reliance elements. Paragraphs V and VI aver that Sainte Marie crossed the Atlantic, entered the Empire of France, and took up residence in Paris because Surratt was there. The petition goes on to explain how Sainte Marie pursued Surratt to the Kingdom of Italy when he learned in March of 1866 that his prey was in the "Army of the Pope of Rome." The petition alleges that on April 9, 1866, Sainte Marie enlisted in the Pope’s Army "for the purpose of arresting or effecting or causing the arrest of the said John H. Surratt." No evidence was offered to prove any of the facts alleged thus far; the only proof proffered was that both Sainte Marie and Surratt were simultaneously Zouaves in the Papal Army.248

246. Affidavit of Dr. L.J. McMillan, in Pursuit, supra note 2, at 1. On this point the affidavit is unchallenged.
247. 1 Samuel Williston, The Law of Contracts § 67 (1920); see also Restatement of Contracts § 55 illus. 2 (1932) (stating that a reward claimant who acted under fear or motivated by public duty is not entitled to recover).
248. Zouaves are light infantrymen whose colorful uniforms seem to be of Arab derivation. The uniform included a crimson fez and blue or green pantaloons.
The answer, or traverse, of the United States was a preprinted denial of each and every allegation of the petition.

The facts recited in the balance of the petition were proved by documentary evidence and the deposition of one witness. Sainte Marie did not testify because claimants were not competent witnesses. The sole witness, Rufus King, testified by deposition, taken in New York City on July 14, 1873. The case was overseen by a judge, as the Court of Claims does not adjudicate jury trials. At his deposition, King gave his occupation as “gentleman.” He was questioned by Daniel B. Meany. Sainte Marie was present at the deposition, which took place before Horace W. Fowler, Commissioner of the Court of Claims. The question was put to him: “Is this the Sainte Marie who was identified with the capture of John H. Surratt?” King answered firmly, “It is and the only person.”

The cross examination of General King by Samuel Huntingdon was innocuous. It is clear from the record that Counsel for Sainte Marie participated in creating the deposition, but it is unclear whether Counsel ever appeared in court.

The Court of Claims unanimously dismissed the petition. The opinion was written by Judge Charles C. Nott. Judge Nott served over forty years on the Court of Claims, but probably will be long remembered only for Mrs. Lockwood’s Case. The reporter’s summary of that case starts out with this ringing pronouncement: “Under the constitution and laws of the United States, a court of the

250. “When, therefore, a claimant had filed his petition... he may, at his leisure and convenience, go on taking the depositions of witnesses whenever and wherever he can find them, first giving notice to the Attorney-General that he may... cross-examine them.” Richardson, supra note 243, at 28.
251. The Court in McElrath v. United States stated:
Suits against the government in the Court of Claims, whether reference be had to the claimant’s demand, or to the defence, or to any set-off, or counter-claim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits.
252. I decipher the Commissioner’s signature as Fowler, but I am uncertain.
253. Deposition of Rufus King, in Court of Claims Case File, supra note 240, at 2.
254. Counsel may file “his request for findings of facts, briefs, and argument by forwarding them to the clerk by mail, and thus he may be relieved from going to Washington at all.” Richardson, supra note 243, at 29.
255. Id. at 18. Richardson describes him as follows: “Judge Charles C. Nott, of New York. Appointed February 22, 1865. He had been engaged in the active practice of law in the city of New York, where he was for several years Commissioner of Loans. Author of the standard work on Mechanics’ Liens.” Id. The asserted “standard work” was Charles C. Nott, A Treatise on the Mechanics’ Lien Law of the State of New York (Albany, W.C. Little & Co. 1856).
256. In re Lockwood, 9 Ct. Cl. 346 (1873).
United States is without power to admit a woman to the bar; and a woman is without legal capacity to take the office of attorney.” Incidentally, Judge Nott was also the court reporter.257

Sainte Marie’s claim was not dismissed on the ground that the offered reward had been revoked. The dismissal was premised on the simple ground that Sainte Marie had not performed. The court pointed out that “[t]he proclamation made two offers: the one looking to the arrest of Surratt and his actual capture and delivery to the Government; the other looking to valuable information which would lead to his arrest.” He had delivered valuable information and had been compensated for it. “The claimant’s service came within the second offer. He did not arrest and deliver Surratt, either by himself or through the officers of the Papal government, but he gave to the American minister information which led to the final arrest in Alexandria, by which this Government, for the first time, actually acquired possession of Surratt.”

B. The Supreme Court

Sainte Marie appealed the Court of Claims decision to the Supreme Court of the United States on August 14, 1874. The Supreme Court received a limited record.258 Before the appeal was decided, however, Sainte Marie died. His executor, William Shuey, was substituted as appellant. The Supreme Court affirmed the judgment of the Court of Claims. Justice Strong delivered the opinion of the Court, which agreed with the reasoning of the Court of Claims. The War Department had made two distinct offers, an offer of $25,000 for the arrest of Surratt and a “liberal reward” for information. Sainte Marie had supplied information but did not make the arrest even though “the discovery and arrest were due entirely to the disclosures made by him.”259

The case is best known, however, for its alternative ground of decision. The Court stated that the “offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published.”260 The Court further states that “it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation

258. The record consisted of the petition, the traverse, application of the allowance of an appeal, the order allowing the appeal, the findings of fact, the opinion of the court, the proposed findings by defendants and order of the court thereon, and the certificate. The record is in the National Archives, RG No. 267, Stack Area 17 E 3, Compartment 16, Shelf 1, Case # 6903 [hereinafter Supreme Court Record]. For a discussion of the limited record provided in an appeal from the Court of Claims, see Richardson, supra note 243, at 31.
259. Shuey v. United States, 92 U.S. 73, 76 (1875).
260. Id.
that was given to the offer."261 One of the findings of fact made by the Court of Claims, as stated by the reporter (who also was the judge who wrote the opinion) was this: "On the 20th of April 1865, the Secretary of War issued and caused to be published in the public newspapers and otherwise, a proclamation...." This was the offer. The finding continues, "On the 24th November 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. (13 Stat. L. 778)." Does this revocation meet the Supreme Court's test of "equal notoriety?"

It seems to be an uncontested general rule that an offer takes effect when it is delivered to, or comes to the attention of, the offeree.262 Assuming Sainte Marie knew of the offer, as his petition claimed,263 this knowledge would not have been garnered from its publication in the Statutes at Large. Rather, Sainte Marie would have learned about the reward from the posters as large as window panes that were widely disseminated, measuring about thirty by eighteen inches; from newspaper accounts of the proclamation of the award; by word of mouth from individuals who had seen the poster. It is also a general rule that a revocation of an offer is not effective until it is received. This is standard doctrine today264 and was standard doctrine in 1876.265

It is unlikely that any posters announced the revocation of the offer. It is somewhat likely that newspapers carried the news of the revocation. The Court does not describe or discuss what it means by "equal notoriety." The phrase is a poor one to describe the revocation that took place. A revocation appearing in official gazettes and the Statutes at Large hardly creates "equal notoriety" with posters that scream "$25,000 REWARD."

Perhaps the Court's meaning is best captured by its use of the phrase, "it was withdrawn through the same channel in which it was made." The Court seems to take this reward offer out of the general law of contracts. It views the offer as having been made when it was officially authorized by executive order or statute and it views the revocation as if it were the repeal of an executive order or statute.266

261. Id.
262. Thus, an offer that would be irrevocable, may be withdrawn after it is posted, but before its receipt. See 1 Arthur Linton Corbin, Corbin on Contracts § 2.26 (Joseph M. Perillo ed., rev. ed. 1993).
263. It is probable he knew of the existence of an offer. Why else would he go to the American legation in Rome to report Surratt's whereabouts? That the report was made at the legation is stated in the Deposition of Rufus King, in Court of Claims Case File, supra note 240.
264. See 1 Corbin, supra note 262, § 2.19, at 224 n.8.
266. If this is the actual holding, it is consistent with those few cases that hold that a reward made by a governmental entity can be earned by a person who performs without knowing of the offer. See The Auditor v. Ballard, 72 Ky. (1 Bush) 572 (1873) (holding that a reward offer creates a liability when the Governor signed a
The case entered the common law as a standard doctrine. Apparently, a case involving the revocation of an offer to the public has never arisen in the English courts. Therefore, although English treatises cite few American cases, English text writers treat Shuey as precedent for such a possible case. Professor Murray lauds the holding as “pragmatic” and suggests that “To require communication to each member of the public would be ridiculous.” Murray accepts the qualifications placed on the rule by the Restatement and by case law. That is, if it is practicable to identify and notify individual offerees, personal notification should be required if the number of offerees does not make this prohibitively difficult. Murray also puts forth the suggestion that if the same medium is unavailable, an alternate medium of similar scope may be employed.

But most commentary does not confront the situation that existed in Shuey. The country had been flooded with reward posters that received much secondary publicity. Revocation took place by publication in a little-publicized proclamation. One frequent comment is that, absent such a rule, the reward offer would be irrevocable, at least as to individuals who had not seen the revocation. At least one scholar has said, in essence, So what? Corbin also was skeptical of the result and the revised edition of Corbin's treatise questions its reasoning. Another question that has

proclamation offering a reward, even if not yet published or known to the person who performed; see also Eagle v. Smith, 9 Del. 293 (1871) (deciding that an act performed, even though not induced by reward, entitles one to recover). While most reward cases are analyzed under contract law, some jurisdictions treat certain or all reward offers as non-contractual grants. State v. Malm, 123 A.2d 276 (Conn. 1956) (discussing contract and grant theories).


269. Restatement (Second) of Contracts §§ 46 and Section 43 of the first Restatement are couched in terms of “equal publicity.” Restatement (Second) of Contracts §§ 46 (1981); Restatement of Contracts §§ 43 (1932).


271. Murray, supra note 268, § 42, at 121.


273. Clarence D. Ashley, The Law of Contracts 33-34 (1911). Ashley's concern is that the court was not following "the law" which requires communication of a revocation. accord Carl Helm, A Treatment of the Fundamental Principles of the Law of Contracts XX (1926) (noting that the decision is "unsound").

274. "It might have been held, nevertheless, that no other method of revocation would be effective, and that the difficult position in which the offeree finds himself is one that he has brought upon himself." 1 Arthur Linton Corbin, Corbin on Contracts § 41, at 171 (1963).

275. The revised edition states that

Some of the reasoning of the court is not easy to approve. Consider the following: "True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial
been addressed is whether the revocation should take place immediately upon "equal publication" or, as Allan Farnsworth suggests, after "equal publicity" has had time to have been generated. The Restatement (Second) makes the same suggestion, stating that publication "may not be effective immediately. There must be publicity equivalent to that given the offer, including in appropriate cases a reasonable time for equivalent indirect circulation." The Restatement appears not to go as far as the actual holding in *Shuey*, which used the term "equal notoriety," but relied primarily on the idea of "equal publication" in the official publications of the government, and took no notice of the widespread use of posters and secondary publicity.

The Restatement (Second) uses the facts of *Shuey* in an illustration to support its position. Illustration 2 to Section 46 reads:

The United States Government publishes an offer of reward for the arrest of a named fugitive. Seven months later the President publishes a proclamation revoking the offer, which is given the same publicity as the offer. Five months after the proclamation, A, who has been in Italy continuously and who learned indirectly of the offer but not the revocation, arrests the fugitive in Italy. There is no contract.

Let us ignore the factual variations from the facts of the *Shuey* case. The implication of the statement of facts is that because A is remote

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276. Germany has enacted an equal publication rule. German Civil Code § 658 (Simon L. Goren trans., 1994), provides,

1. The reward may be revoked before the performance of the act. The revocation is effective only if it is made known in the same manner as the reward, or by special notice.
2. The revocability may be waived in the notice of the reward; in case of doubt a waiver is presumed from the fact that a period of time has been fixed for the performance of the act.

277. E. Allan Farnsworth, *Contracts* § 3.17, at 160-61 (3d ed. 1999). Farnsworth points out that "equal publicity" takes time, and suggests that equal publication would not have an immediate effect on someone who has not seen the revocation.

Corbin wrote "[s]urely, an offer that has been posted on a bulletin board for a year and seen by passing thousands cannot be revoked instantly by tacking on the same board a notice of revocation that has been seen by nobody." 1 Corbin, *supra* note 274, § 41, at 172.

An earlier text argued that the revocation should not become effective until "such a time after the beginning of publication as would permit it to become generally known in the community in which the offer was published." Sir William R. Anson, Principles of the Law of Contract 56 n.1 (Arthur L. Corbin ed., 4th Am. ed. 1924).

278. Restatement (Second) of Contracts, *supra* note 269, § 46 cmt. b.
from the source of information about the offer and the revocation, A missed the equal publicity that was given to both the offer and its revocation. In the Shuey case, equal publicity was not given. The American Minister in Rome was unaware of the revocation but was aware of the reward offer, an evidentiary fact that is relevant to the issue of equal publicity.

Of course, restatements can formulate rules and give illustrations that take existing precedents and reformulate them in the interests of justice. Pollock called the decision in Shuey a "strong piece of judicial legislation." Corbin commented on Pollock's statement, stating that, "To the writer it seems no stronger than are many other decisions." The Restatement's reformulation is no less a strong piece of non-judicial legislation.

This aspect of the holding, whether it be termed "equal notoriety," "equal publicity," or "equal publication," is the aspect that has given the case renown sufficient to enshrine its holding into one of the three hundred and eighty-five sections of the Restatement (Second) of Contracts. Nonetheless, the fact pattern that falls under this aspect of the holding has seldom occurred. The case is seldom employed in the courts as authority for a revocation of a contractual offer, outside of a public law context.

279. 4 Frederick Pollock, Principles of Contract *20, at 95 (4th ed. 1888).
280. 1 Corbin, supra note 274, § 44, at 171 n.44.
281. One of the cases cited by the United States in Shuey was Crocker v. New London, Willamantic & Palmer Railroad Co., 24 Conn. 249 (1855). It perhaps was the citation closest to the point. In that case, defendant railroad posted a notice stating that tickets for passage from Norwich to New London were fifty cents if purchased in advance and fifty-five cents if purchased from the conductor on board the train. Plaintiff boarded with no ticket and tendered fifty cents to the conductor, explaining that he went to the ticket office a reasonable time before the train's departure, but that the office was closed. When he refused to pay the fifty-five cent fare, the conductor and another railroad employee seized him and threw him off the train onto the ground while the train was standing still. As the train started up again, plaintiff grabbed onto the rear of the car in an attempt to climb aboard. A railroad employee kicked him in the face, throwing him back on the ground and breaking his kneecap. (This would make a nice movie vignette starring Clint Eastwood as the passenger!) The court held that the offer had been revoked. The court reasoned, in the alternative, that "suppose that published rule was a proffered contract, which might be closed by a mere acceptance; like all other proposals, until accepted, it might be withdrawn at pleasure... Closing the office was... a most effective withdrawal of the proposal to furnish tickets..." Id. at 261-63.
282. In Hoggard v. Dickerson, 165 S.W. 1135 (Mo. Ct. App. 1914), defendant may have made two inconsistent oral offers of reward, about one-half hour apart in different neighborhoods. He claimed that the second offer revoked the first. The court thought the circumstance that the neighborhoods were different precluded the application of the rule in Shuey.

Another such case is Neal v. Commissioner, 26 B.T.A. 551 (1932), where a revenue ruling made in 1920 at the taxpayer's request was allegedly revoked by "court opinions, general rulings and promulgations, no specific notice of revocation being sent to petitioners until 1927." Id. at 556-57. Citing Shuey, the Board held that because the ruling was sent personally to the taxpayers, any revocation had to be
The courts, however, have cited Shuey for several other propositions. Often, the case is cited for the proposition that an offer of a reward must be interpreted in order to determine whether the claimant has performed the requested act. It will be recalled that the Supreme Court agreed with the Court of Claims that Sainte Marie had not performed; he had not arrested Surratt. Other courts have strictly interpreted reward offers in the same vein.\footnote{284} Others have been more open to the idea that a person who provides the information that directly leads to the arrest of the alleged criminal has caused that arrest.\footnote{285}

But let us examine the impact of this aspect of the Court's holding in contexts other than rewards. Consider the case of Audsley v. City of New York.\footnote{286} The State enacted legislation empowering a board of commissioners to erect a building for the City. The commissioners personally delivered. This holding was reversed. 65 F.2d 761 (1st Cir. 1933).

Shuey was also cited for the proposition that ignorance of the withdrawal of an offer is irrelevant. The case held that the cessation of publication of a reward offer operates as a revocation. Lauve v. Balfour, 1 White & W. § 727 (Tex. Ct. App. 1879); contra Carr v. Mahaska County Bankers Ass'n, 269 N.W. 494 (Iowa 1936) (holding that a removal of a reward poster is not a revocation, but that the posting a revocation poster would satisfy the rule in Shuey).

283. One such case is National Education Ass'n, Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System, 890 F.Supp. 1143, 1157 (D.R.I. 1995). The Court does not cite Shuey, but cites the Restatement for the proposition that an offer made by general notification can be revoked by equal notification. Thus, an offer made by statute can be revoked by statute. However, the court noted that the revocable offer had ripened into a contract. The First Circuit reversed, taking the position that the statutory pension plan was non-contractual. 172 F.3d 22 (1st Cir. 1999).

284. E.g., McCloughry v. King, 147 F. 463 (8th Cir. 1906). A sheriff offered a reward of $2750 "for the arrest of each of the parties convicted of such bank robbery and said murder." Id. at 464. Plaintiffs became aware that one West had been arrested in Indiana for vagrancy. Plaintiffs with knowledge of the offer notified the defendant Sheriff who went to Indiana, and transported West back to Arkansas. Plaintiffs claimed the reward. Defendant's demurrer was granted. The Circuit Court affirmed relying heavily on Shuey. The offer called for arrest. Plaintiffs did not make the arrest. Therefore, plaintiff did not perform. The court distinguished apparently contrary cases, pointing out that in each of them the plaintiff had made a police officer his agent. Id. at 465-66.

The dissent intelligently pointed out that Shuey was distinguishable because in Shuey the offer clearly differentiated between arrest and providing information. Id. at 467; see also Amis v. Conner, 43 Ark. 337, 338-39 (1884) (finding a strict interpretation of an offer of reward, citing "Sherry v. United States"); Williams v. Chi. St. R.R. Co., 61 N.E. 456, 457 (Ill. 1901) (finding substantial compliance with terms of offer not met); Lovejoy v. Atchison, Topeka & Santa Fe R.R. Co., 53 Mo. App. 386 (1893).

285. Haskell v. Davidson, 40 A. 330 (Me. 1898); Tobin v. McComb, 156 S.W. 237, 240 (Tex. Civ. App. 1913); cf. Swanton v. Ost, 74 Ill. App. 281, 283 (1897). A reward offer spoke of reward for "arrest," but also indicated that information "may be sent to Chief of Police." Swanton, 74 Ill. App. at 283. It was held that providing information was sufficient to earn the reward. Id. at 285. But note, in addition to providing information, claimants kept the criminal under surveillance. Id.

286. 74 F. 274 (2d Cir. 1896).
advertised that it, assisted by a committee of architects, would award a prize of $2,000 for the second through sixth best designs submitted; the designer of the first best would be awarded a contract for architectural services at given terms. The plaintiff submitted a design, the committee of architects made its recommendations to the commissioners, but before the commissioners were able to deliberate on the choices, the legislature repealed the legislation empowering the commissioners to act. The Second Circuit affirmed the district court’s dismissal of the plaintiffs’ complaint, citing Shuy. The condition precedent to the plaintiff’s case had not been met; the commissioners had not chosen the plaintiffs as the creator of one of the six meritorious designs. Other cases cited by the court were not particularly relevant. This court interpreted Shuy as holding that an offer to a unilateral contract is revocable until full performance. A similar holding was handed down in a Massachusetts stock subscription case, relying on Shuy.287

The cases illustrate the fact that the notion of unilateral contracts grew out of reward cases.288 Thus, a manufacturer’s warranty of performance in the famous smoke ball case was described as a reward.289 An employer’s promise of a bonus for long-term service was characterized as a reward.290 Today, such offers are known as “unilateral contracts” rather than “rewards.”291

Finally, Shuy came to be a centerpiece in unilateral contract analysis. Professor I. Maurice Wormser formulated the notorious Brooklyn Bridge hypothetical: “I will give you $100 if you walk across the Brooklyn Bridge.”292 Taking the hypothetical one step further, Wormser wrote, “suppose . . . B . . . has gone about one-half of the way across. At that moment A overtakes B and says to him, ‘I withdraw my offer.’”293 Wormser concludes that “A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge.”294

Unilateral contract analysis, fed in part by Shuy and in part by Wormser’s analysis, led to the holding in Petterson v. Pattberg,295 an ugly landmark of American law. Pattberg held a mortgage on

292. Wormser, supra note 9, at 136.
293. Id. at 137.
294. Id. But see I. Maurice Wormser, Book Review, 3 J. Leg. Ed. 145, 146 (1950), where he states, “I have repented, so that now, clad in sackcloth, I state frankly, that my point of view has changed.”
295. 161 N.E. 428 (1928).
Petterson’s property. He offered in writing to accept a cash prepayment of the debt secured by the mortgage at a discount of $780. Prior to the expiration of the offer, Petterson came to Pattberg’s house with cash to prepay the mortgage, knocked on the door and stated the reason for his presence. Before opening the door, Pattberg stated that he had sold the mortgage. The court held that the Pattberg’s statement that he had sold the mortgage was a valid revocation of the offer. The court cited Shuey, as well as other cases, Wormser’s article and Williston’s treatise among other authorities for the proposition that an offer to a unilateral contract may be revoked at any time before the requested performance has been rendered.

Shuey’s lawyers argued that Sainte Marie’s reliance on the offer of reward precluded a revocation. The court neither accepted nor rejected the argument; it merely pointed out that there had been no reliance. The petition’s allegations of actions in reliance on the offer were not proved. The first Restatement of Contracts did not accept the argument that reliance on an offer to a unilateral contract precluded revocation. Instead, the first Restatement adopted the rule, apparently first suggested by McGovney, that part performance of the action requested by the offer, or tender of performance, made the offer irrevocable. The Restatement (Second), in different terminology, agrees. Neither formulation would change the outcomes in Shuey or Petterson. Neither case involved part performance or tender of performance prior to revocation. But the Restatement (Second) also has a little noticed Section 87(2), pursuant to which reliance on an offer can have the same effect. Finally, Sainte Marie’s argument has been accepted by an authoritative source. Nonetheless, the attorneys for Sainte Marie failed to prove reliance.

CONCLUSION

This paper is about contract law, but to examine the context of the Shuey case, it was necessary to look at the facts surrounding the assassination of Lincoln, and the work of the Military Commission. The defendants before the Commission were charged with conspiracy to murder. Of those sentenced by the commission only two were clearly guilty of this crime—Payne and Herold. Ned Spangler and Dr. Mudd may have been guilty as accessories after the fact. Arnold and O’Laughlin were clearly not guilty; there was no evidence of their guilt.

The government’s ultimate argument was that these individuals’ service in the Confederate Army was enough to tie them to the conspiracy to murder Lincoln and Seward. There was little evidence

297. Restatement of Contracts, supra note 269, § 45.
298. Restatement (Second) of Contracts, supra note 269, § 45.
of the guilt of Mary Surratt or Atzerodt. Eight other persons had been indicted, but were not tried by the Military Commission because they had not been arrested. These eight included John H. Surratt, Jefferson Davis, and six named Confederate officials who were stationed in Montreal. None of these individuals were ever convicted. It is almost certain, however, that they would have been condemned to death if they had been tried by this unconstitutional court, despite the lack of any credible evidence of their guilt.299 There is, I think, a lesson in this that is valid today.

The contract law points also provide a lesson for today. The equal publication rule has rarely been invoked. No bank would hang a poster that says, "The reward previously offered for the capture of anyone who robs this bank has been withdrawn."300 Consequently, the shape of the doctrine has not been clearly defined. To my surprise, the most interesting lesson was the degree to which the concept of reliance was alive and well in the 1870’s—it had not yet been submerged by Langdell and Wormser. We tend to think of promissory estoppel as a twentieth-century invention; it is not. Counsel pleaded the facts for promissory estoppel in Shuey. The Court merely said that, “It is not to be doubted that the offer was revocable at any time before it was accepted, and before any thing had been done in reliance upon it.”301 Unfortunately for the growth of the law, counsel for Sainte Marie failed to prove their allegation that Sainte Marie went to Europe to hunt down Surratt prior to the revocation of the offer.

299. The main witness against them, Sandford Conover, was later exposed as a perjurer who also suborned perjury from others who testified before the Commission. He was sentenced to prison for suborning witnesses to testify against Jefferson Davis. Hanchett, supra note 14, at 71-81.
301. Shuey v. United States, 92 U.S. 73, 76 (1875).
Notes & Observations
APPENDIX A

“The Reward Offer”

War Department, Washington, April 20, 1865.

$100,000 REWARD!

THE MURDERER

Of our late beloved President, ABRAHAM LINCOLN,
IS STILL AT LARGE.

$50,000 REWARD!

will be paid by this Department for his apprehension, in addition to any reward offered by Municipal Authorities or State Executives.

$25,000 REWARD!

will be paid for the apprehension of JOHN H. SURRETT, one of Booth’s accomplices.

$25,000 REWARD!

will be paid for the apprehension of DANIEL C. HARROLD, another of Booth’s accomplices.

LIBERAL REWARDS will be paid for any information that shall contribute to the arrest of either of the above-named criminals, or their accomplices.

All persons harboring or secreting the said persons, or either of them, or aiding or assisting their concealment or escape, will be treated as accomplices in the murder of the President and the attempted assassination of the Secretary of State, and shall be subject to trial before a Military Commission and the punishment of DEATH.

Let the stain of innocent blood be removed from the land by the arrest and punishment of the murderers.

All good citizens are exhorted to aid public justice on this occasion. Every man should consider his own conscience charged with this solemn duty, and rest neither night nor day until it be accomplished.

EDWIN M. STANTON, Secretary of War.

DESCRIPTION—BOOTH is a man 5 or 6 inches high, slender build, high forehead, black hair, black eyes, and wears a hairy, black mustache.

JOHN H. SURRETT is about 5 feet 8 inches. Hair must be grey, eyes rather short and brown. Would weigh 140 or 150 pounds. Complexion rather pale and sick, with color in his cheeks. Would weigh 140 or 150 pounds. Would have a black, hairy mustache.

DANIEL C. HARROLD is 32 years of age, 5 feet 2 or 3 inches, high color high cheekbones, dark eyes, short hair, black (if any) mustache.

GEO. F. BIRDMAN & CO., Printers and Stationers, 26, Pearl, and Five Streets, N. Y.

Collection of The New-York Historical Society. The original poster measured approximately thirty inches by eighteen inches (30 in. x 18 in.).
APPENDIX B

“The Revocation”

No. 5.

WAR DEPARTMENT, ADJUTANT-GENERAL’S OFFICE,
Washington, November 24, 1865.

General Orders No. 164.

Nov. 24, 1865.

Claims for the reward for the apprehension of Booth and others, to be filed before January 1, 1866. 

Ordered, That —

1. All persons claiming reward for the apprehension of John Wilkes Booth, Lewis Payne, G. A. Atzerodt, and David E. Harold, and Jefferson Davis, or either of them, are notified to file their claims and their proofs with the adjutant-general, for final adjudication by the special commission appointed to award and determine upon the validity of such claims, before the first day of January next, after which time no claims will be received.

2. The rewards offered for the arrest of Jacob Thompson, Beverly Tucker, George N. Saunders, William G. Cleary, and John H. Surratt, are revoked.

By order of the President of the United States:

E. D. TOWNSEND, Assistant Adjutant-General