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Book Review | John Evangelist Walsh, *Moonlight: Abraham Lincoln and the Almanac Trial* (2000)

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MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL, BY JOHN EVANGELIST WALSH

Reviewed by Richard H. Underwood[1]

I. INTRODUCTION

Every trial lawyer probably thinks that he or she knows what happened during Lincoln's defense of "Duff" Armstrong in the "Almanac Trial" in Beardstown, Cass County, Illinois, May 7, 1858. As usual, much of what we think we know is wrong. Historian John Evangelist Walsh[2] has gone to the original (limited) court records, the contemporary accounts of bystanders, and the correspondence of the principal players, to document the truth and to correct at least one lie - the legend that Lincoln used a forged almanac during his cross-examination of a key eyewitness.[3] Walsh also raises some interesting questions about Lincoln's trial tactics, and his ethics. In my opinion, this is a wonderful book for lawyers and Lincoln fans,[4] although Mr. Walsh makes a bit much of his standing as a "professional historian." Even an amateur like me can find a few things to add to his account of the trial. And one wonders if he might have benefited from the input of a lawyer or legal historian. But I do not mean to be critical. On to the fun stuff!

II. VERSIONS OF THE ALMANAC TRIAL - POST 1858

We've all heard the standard, "corny" trial lawyer stories. Some of these stories may be grounded in fact - some, probably not. We've all probably told these stories, and we may have even pretended that the events recounted our own exploits. It has been this way down through the generations.[5] See if you've heard these, or used them.

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[1] Spears-Gilbert Professor of Law, College of Law, University of Kentucky; co-author of WILLIAM FORTUNE, RICHARD UNDERWOOD & EDWARD IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK, (2nd ed. 2001); Former Chairman, Kentucky Bar Association Ethics Committee 1984-1998.

[2] Author of 16 or so works, including THE SHADOWS RISE: ABRAHAM LINCOLN AND THE ANN RUTLEDGE LEGEND (1993). Walsh does justice to Ann Rutledge, whose relationship with Lincoln was discounted first by Mary Todd Lincoln supporters and later by modern historians.

[3] *See* JOHN EVANGELIST WALSH, MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL (2000).

[4] One of the denizens of our local bar, a trial lawyer of considerable cunning, but perhaps with somewhat frontier sensibilities, gives the book his highest rating as "agoodsom'bitch'nbook."

[5] It is reported that in The Highwayman's Case, Everett v. Williams, Court of Exchequer (1725), a highwayman sued another highwayman for a share of the loot the two had separated from rightful owners - no doubt the point was to vindicate sound principles of partnership. Supposedly the solicitors for the plaintiff were fined, and counsel was taxed costs - an early variation on the theme of Rule 11 sanctions. According to Professor Costigan's account, "[t]he plaintiff was executed at

During jury *voir dire*, the judge, famous for his bullying, asked me to name every lawyer in my firm for the benefit of the jurors, to insure that none of them had any forbidden relationship with them. My firm had over 300 lawyers, and his honor reveled in the opportunity to embarrass another young lawyer. Fortunately, I had been warned, and I read off the names from a copy of the firm's letterhead I had brought along for the occasion. The judge never picked on me again.

During jury voir dire all of the jurors swore under oath that they did not know me, and I recognized none of them. But half-way through the trial, an attractive young juror raised her hand, and was called to side bar. "I'm sorry, your honor, but I remember now that I know this lawyer - I just didn't recognize him with his clothes on." ... Only after suffering extreme embarrassment were we able to explain that we had apparently met once at a swimming party.

During the trial of a sex offender, a document was introduced into evidence, and passed from juror to juror. It was a letter from the accused to his victim detailing all of the disgusting acts he wished to perform with her. A young woman on the jury nudged the elderly gent next to her, who had been dozing, and passed the exhibit to him. He read it with interest, and then turned to her nodding his head "yes" enthusiastically.

A woman sued a cosmetics company claiming that she had used their tanning lotion under a sun lamp as directed, and that she had been severely burned when the lotion exploded in flame. The defense lawyer experimented with the lotion and lamp at his firm, to no effect. The confident lawyer repeated the process as a demonstration for the jury. His arm burst into flame. He settled the case on the way to the hospital.

Defense counsel appealed his client's conviction on the ground that the prosecuting attorney had "farted about 100 times" during counsel's closing argument. When asked for a citation of authority, counsel responded with a straight face by alluding to a famous line in *Berger v. United States*, 295 U.S. 78, 88 (1935): "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones."[6]

The almanac trial has been favorite tale of trial lawyers for some time, and they have done considerable violence to accuracy in history over the years. Here are some versions of the almanac trial that are *not* mentioned by Walsh, *for good reason*.

A. Version 1 - Judge Donovan

Tyburn in 1730, the defendant at Maidstone in 1735," and "Wreatcock, one of the solicitors, was convicted of robbery in 1735, but was reprieved and transported" (internal footnote omitted). GEORGE COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 399-400 (1917) [more from COSTIGAN later]. Whenever a story begins with "there was this highwayman," I begin to suspect "jive." My guess is that this is a "made up case."

[6] OK, I've gone over the top with this one. But it is not *entirely* made up. *See* DAVID PANNICK, ADVOCATES 52 (1992).

Francis Wellman's classic text on cross-examination contains some interesting commentary on the Almanac Trial.[7] Included in the material is a version of the trial recited by a Judge Donovan [not the presiding judge in the trial by the way], who apparently included it in a tract he authored styled "Tact in Court." This is a wonderfully crazy version of the trial, and I will correct it as I quote it. It was almost certainly part of the inspiration for the equally wacky film "Young Mr. Lincoln" (1939) staring (aw shucks, and a couple of hecks, too) Henry Fonda.[8]

Grayson was charged [wrong defendant(s) - Norris and Armstrong were charged, and Norris had already been convicted by the time Armstrong was tried, a fact which cut both ways][9] with shooting [wrong m.o. - there were one or more beatings with blunt objects or fists - see *infra*] Lockwood [the victim was Metzger] at a camp meeting ... and with running away from the scene of the killing, which was witnessed by Sovine [the star prosecution witness was Allen, and not Sovine]. ... Grayson came very near being lynched on two occasions soon after his indictment for murder [this is made up, as far as I can tell].

The mother of the accused, after failing to secure older counsel, finally engaged young Abraham Lincoln [wrong - it was one of Lincoln's last cases and not one of his first] ... and the trial came on to an early hearing [Armstong's case was transferred to Cass County and postponed at least once; it came on for trial on May 7, 1858]. No objection was made to the jury [jury selection was slow, taking two days], and no cross-examination of witnesses [actually Lincoln questioned the witnesses, and later called his own witnesses, including an expert medical witness], save the last and only important one [hardly the only important one, as we shall see], who swore that he knew the parties, saw the shot fired by Grayson, saw him run away, and picked up the deceased, who died instantly [wrong - the attack was on August 29, 1857 and Metzger went home to his wife after the attack, lingered in pain, and died September 1, 1857].

Here is what Judge Donovan said happened during the cross-examination of the critical eyewitness:

> Lincoln: 'And you were with Lockwood just before and you saw the shooting?'
> Witness: 'Yes.'
> Lincoln: 'And you stood very near to them?'
> Witness: 'No, about twenty feet away.'
> Lincoln: 'May it not have been *ten* feet?'
> Witness: 'No, it was twenty feet *or more*.'
> Lincoln: 'In the open field?'
> Witness: 'No, in the timber.'
> Lincoln: 'What kind of timber?'

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[7] FRANCIS WELLMAN, THE ART OF CROSS-EXAMINATION: WITH THE CROSS-EXAMINATIONS OF IMPORTANT WITNESSES IN SOME CELEBRATED CASES 55-60 (1931).

[8] As I recall, in the film the Armstrong *brothers* were charged with the murder.

[9] One of Walsh's themes is that Norris got the short end of the stick in all of this. The conviction was bad in the sense that a jury was willing to convict, and the prosecutor had already practiced the case once; but the conviction was good if Lincoln could argue successfully that there had been two attacks, and that Norris's, the first, had caused the death. Enter the expert witness.

Witness: 'Beech timber.'
Lincoln: 'Leaves on it rather thick in August?'
Witness: 'Rather.'
Lincoln: 'And you think *this* pistol was the one used?'
Witness: 'It looks like it.'
Lincoln: 'You could see the defendant shoot - see how the barrel hung, and all about it?'
Witness: 'Yes.'
Lincoln: 'How near was this to the meeting place?'
Witness: 'Three-quarters of a mile away.'
Lincoln: 'Where were the lights?'
Witness: 'Up by the minister's stand.'
Lincoln: 'Three-quarters of a mile away?'
Witness: 'Yes, - I answered ye *twiste*.' [This must have been a gratuitous, nineteenth century insult?]
Lincoln: 'Did you not see a candle there, with Lockwood or Grayson?'
Witness: 'No! what [sic] would we want a candle for?'
Lincoln: 'How, then, did you see the shooting!'
Witness: 'By moonlight!' (defiantly).
Lincoln: 'You saw this shooting at ten at night - in beech timber, three-quarters of a mile from the light - saw the pistol barrel- saw the man fire - saw it twenty feet away - saw it all by moonlight? Saw it nearly a mile from the camp lights?'

Witness: 'Yes, I told you so before.'

Then the lawyer drew out a blue covered almanac from his side coat pocket - opened it slowly - offered it in evidence - showed it to the jury and the court - read from a page with careful deliberation that the moon on that night was unseen [wrong - this is not what the almanac actually showed in the real case] and only arose at *one* the next morning.

Following this climax Mr. Lincoln moved the arrest of the perjured witness as the real murderer ..." [wrong - the real witness in the real case, Allen, had nothing to do with the killing].

Wellman is highly critical of this inaccurate version of the trial, and makes the point that Judge Donovan's storytelling, as if he were an infallible witness to the truth, was illustrative of the "fallibilities of testimony."[10] Wellman

[10] *See* WELLMAN, *supra* note 7, at 59. Lawyers are accustomed to thinking that jurors believe that if it's in writing, it must be true. Compare the view of the long-suffering French infantry in World War I - "anything might be true, except what [i]s printed." PAUL FUSSELL, THE GREAT WAR AND MODERN MEMORY 115 (1975). Perhaps laymen are similarly shell-shocked when it comes to the

goes on to give a fairly accurate account based on the recollections of one of Walsh's sources, Frederick Trevor Hill, mentions that there was a legend that Lincoln faked the almanac, but argues convincingly on the basis of available evidence that the legend was based on falsehood. So Walsh was hardly the first to try and lay the legend of the counterfeit almanac to rest![11]

B. Version 2 - Professor Irving Younger

The late Irving Younger is rightly celebrated for an entertaining lecture on "The Art of Cross-Examination," which he later published as an ABA monograph.[12] The lecture is now used in many law schools as a "classic" on the subject of cross-examination. Younger tells the story of the cross-examination of the critical prosecution eyewitness in the Armstrong case, beginning with the statement "[w]e have Lincoln's Cross-examination in the trial transcript." We must accept this as professorial poetic license, because there was no trial transcript.[13] If I have to guess, Younger is using the Donovan/Wellman version, and editing it to suit his purpose. One purpose was to reinforce three of his "Ten Commandments of Cross-Examination" - that the cross-examiner should not ask a witness to repeat an answer, that the cross-examiner should stop when he gets what he needs and should not ask that "one question too many," and that the cross-examiner should not ask a witness an open-ended question which might give the witness an opportunity to explain or volunteer "bad facts." But according to Younger, the "masters of cross-examination" may break the rules and achieve greatness (but don't you dare) - this seemed to be the point of the exercise. Here is the story that Younger's "transcript" provides:

Question: "Did you actually see the fight?"
Answer: "Yes."
Question: "And you stood near them?"
Answer: "No, it as a hundred and fifty feet or more."
Question: "In the open field?"
Answer: "No, in the timber."
Question: "What kind of timber?"
Answer: "Beech."

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presentations of lawyers. That might explain the ready acceptance of a rumor that "Honest Abe" engaged in almanac tampering. It looks to me like the learned judge swiped his version of the trial (reported in Wellman) from a fictionalized account written by Edward Eggleson and serialized in the periodical THE CENTURY (1887-1888) styled THE GRAYSONS: A STORY OF ILLINOIS. *See* FREDERICK TROVOR HILL, LINCOLN THE LAWYER 229 (1906). For access to THE GRAYSONS, see Cornell Library Digtal Collections (visited April 4, 2000) <http://cdl.library.cornell.edu/cgi-bin/m...-cgi%3Fnotisid%3DABP2287-0036-75&view=50>.

[11] Indeed, I refer the reader to Professor Costigan's pre-Wellman observations circa 1917. *See supra* note 5 and accompanying text.

[12] Irving Younger, *The Art of Cross-Examination*, 1976 A.B.A. SEC. LITIGATION MONOGRAPH SERIES 21. The lecture was given at the A.B.A. Annual Meeting in Montreal, Canada on August 12, 1975.

[13] *See* WELLMAN, *supra* note 7, at 59 ("[T]here were no court stenographers during the twenty-three years that Lincoln practiced at the bar, [and] it is impossible to secure a verbatim report of the questions and answers in Lincoln's cases ...."); *Cf.* WALSH, *supra* note 3, at 131.

Question: "Leaves on it rather thick in August?"
Answer: "Yes."
Question: "What time did all this occur?"
Answer: "Eleven O'clock at night."
Question: "Did you have a candle?"
Answer: "No, what would I want a candle for?"
Question: "How could you see from [a] distance of a hundred and fifty feet or more without a candle at eleven o'clock at night?"
Answer: "The moon was shining real bright."
Question: "A full moon?"
Answer: "Yes, a full moon."

... Lincoln drew a blue covered almanac from his back pocket. ... [He] asked the judge to take judicial notice if it and the judge said, "Yes, I will." ... Lincoln hands the almanac to the witness:

Question: "Does the almanac not say that on August twenty-ninth (the night of the murder), the moon had disappeared, the moon was barely past the first quarter instead of being full?"
Answer: [The imaginary stenographer records the answer as,] "No answer."
Question: "Does not the almanac also say that the moon had disappeared by eleven o'clock?"
Answer: [No answer.]
Question: "Is it not a fact that it was too dark to see anything from fifty feet, let alone one hundred and fifty feet?"
Answer: [No answer].

...Lincoln sat down. He had demolished the witness, and Armstrong was acquitted. ...

[T]here is a legend in Illinois that no almanac published in those years had a blue cover. According to the legend, the almanac was a counterfeit that Lincoln created for the purpose.

The off-hand reference to the legend is racy, but also somewhat gratuitous, given the fact that the story had been thoroughly debunked long before. But a good lawyer story is a good lawyer story - right?

C. Version 3 - Professor Alan Dershowitz

Professor Alan Dershowitz made use of the almanac cross-examination in a case, as he reported in his autobiographical work modestly titled The Best

Defense.[14] Dershowitz was attempting to defend[15] his own cross-examination in a case - it seems that the judge felt that Dershowitz had crossed some ethical line. In any event, Dershowitz cited Judge Donovan's version as it had been reported in Wellman, and then added (notwithstanding Wellman's rejection of it) the rumor that the almanac was a counterfeit. The judge was not impressed.

Walsh does a convincing job of demolishing the notion that Lincoln could, or would, have based his defense on a faked almanac. He then makes plausible arguments that the story of a faked almanac may have originated with certain jurors, as a rationalization for what they may have later felt was a mistaken verdict, or have originated with Lincoln's political opponents, who spread all kinds of slander during Lincoln's unsuccessful Senatorial campaign.

III. BUT A LAWYER'S TALE OF A FAKE ALMANAC PREDATES 1858!

Is it possible that a story of a counterfeit almanac might have predated the Armstrong trial and have inspired Lincoln's cross-examination (even if he used a genuine, unaltered almanac), the false charges against him, or both? Walsh never mentions the possibility. But given the way that "them thar" lawyer stories swell up (like a "poisoned pup"?), and spread (like a "loathsome disease"?), it could be! Are you ready?

Some years ago I was doing some research in my primary field - legal ethics. I was perusing a 1917 casebook on the subject (proof positive that I have no life) when I can across an extensive note[16] on the Almanac Trial. The author, Professor George Costigan, Jr. of Northwestern University Law School in Chicago, Illinois, provided a generally accurate account of the case, and a strong brief for the proposition that the almanac was genuine. He also reported that a secondary authority[17] suggested that the legend of the fake almanac may have been around for some time, and had appeared as early as 1835 in the writings of Robert Southey,[18] a British poet and a prolific generator of alleged prose to boot. Southey wrote a tome called The Doctor. I was able to track down a copy of this book dated 1836, and there it was! Walsh makes no mention of the existence of this pre-existing lawyer lore.

> This brings to my recollection a legal anecdote, that may serve in like manner to exemplify how necessary it is upon any

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[14] *See* ALAN DERSHOWITZ, THE BEST DEFENSE 63-64 (1982).

[15] I have noted elsewhere that Professor Dershowitz may not have needed any defending. *See* Richard Underwood, *The Professional and the Liar*, 87 KY. L.J. 949-950 (1998-99).

[16] GEORGE COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 352-55 (1917). Professor Costigan is a contemporary of Wigmore.

[17] He cites JAMES RAM, A TREATISE ON FACTS 209 (4th Amer. ed.). I can't locate the copy in our library. Perhaps I stole the book and then misplaced it? No one else would have checked it out. I have consulted this book on more than one occasion in my research, and I know it as "Ram On Facts," which has a certain punch to it.

[18] Pronounced "Suhthee" (1774-1843). Southey studied the law and was a buddy of Wordsworth and Coleridge. He was poet laureate in 1813, but he may have been more widely known for his prose works. I gather that he would have been widely read on both sides of the Atlantic. My source is THE CAMBRIDGE BIOGRAPHICAL ENCYCLOPEDIA (1994).

> important occasion to scrutinize the accuracy of a statement before it is taken up on trust. A fellow was tried (at the Old Bailey if I remember rightly) for highway robbery, and the [prosecution witness] swore positively to him, saying he had seen his face distinctly, for it was a bright moonlight night. The counsel for the prisoner cross-questioned the man, so as to make him repeat that assertion, and insist upon it. He then affirmed that this was a most important circumstance, and a most fortunate one for the prisoner at the bar: because the night on which the alleged robbery was said to have been committed was one in which there had been no moon; it was during the last quarter! In proof of this he handed an almanac to the bench - and the prisoner was acquitted accordingly. The [prosecuting witness], however, had stated everything truly; and it was known afterward that the almanac with which the counsel came provided had been prepared and printed for the occasion.[19]

IV. HOW IMPORTANT WAS THE ALMANAC CROSS-EXAMINATION?

Most of the fanciful versions of the Armstrong trial have Lincoln doing nothing, even snoozing, and then awakening to cross-examine a single, critical eyewitness, "demolish" him, and win the case. In fact, Lincoln questioned all of the prosecution witnesses, presented numerous witnesses, including character witnesses, and put on a sophisticated medical case. The trial procedure of the day allowed him to sand-bag the prosecution by waiting until the last minute to subpoena his medical expert, Dr. Charles Parker, who testified that a blow to the back of the victim's head inflicted by Norris could also have caused the damage at the front of his head.[20] Lincoln also called an important witness named Nelson Watkins. Cases are seldom won on cross-examination alone, although some cases have been lost by the cross.[21]

That is not to say that the cross-examination of the chief prosecution Allen was not important. Indeed, after we read Walsh's meticulous reconstruction, we can see that the cross probably had more impact on the jury than it should have had. This is so because the evidence suggests that Lincoln seized upon a discrepancy between the witness's testimony about the position of the moon and judicially noticeable fact to the contrary that was probably of little or no significance. That is, the position of the moon probably made no difference in terms of the actual amount of moonlight at the scene.

And surely of equal importance was the testimony of Nelson Watkins. Remember how Charles Bronson killed the bad guys in "Death Wish" - with the sock full of coins? Well it seems that the prosecution's theory was that

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[19] ROBERT SOUTHEY, THE DOCTOR & CO., Vol. II 141-142 (1836).

[20] The expert medical witness has been an important weapon in the defense arsenal for some time. *See, e.g.*, 17 T.B. HOWELL, STATE TRIALS 1094, 1120-24 (1816), a report of The Trial of James Annesley and Joseph Redding in the Old Bailey in 1742.

[21] *See* Richard Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113 (1997).

Armstong had hit Metzger in the face with a "slung-shot," a sort of 19th century blackjack made out of a copper ball covered with lead, sewn into a leather bag and attached to a strap. One had been found at the scene, and Allen testified that he had seen Armstong swing it and hit Metzger. Watkins would be called to undermine the prosecution's theory by testifying that the slung shot was his, and that there might be an innocent explanation as to why it was found at the scene. Specifically, Watkins testified as to the construction of the slug-shot, which Lincoln corroborated by slitting it open in a clever demonstration. He also testified as to how he had put the shot under the frame of his wagon before falling to sleep that night, and then driven off the next morning without thinking about it. The slung-shot must have fallen to the ground when he pulled away.

V. DID LINCOLN SUBORN PERJURY?

Walsh's most valuable contribution may be his detective work relating to the Watkins testimony. Lincoln only wanted Watkins to testify that he, Watkins had made the slung-shot, and that Duff Armstrong did not have it in his possession. According to Walsh, Watkins had made it and willingly said so, but was less willing to answer the second question candidly. Walsh's theory, which is supported by some ancient correspondence and a 1909 article, is that Watkins saw Duff hit Metzger with a wagon hammer, and that other witnesses (called by Lincoln) had seen the same and lied when they said Duff hit him only with his fists. Apparently Watkins and the others wanted to protect Duff to that extent.[22] Watkins did not want to tell Lincoln certain "bad facts" that he knew, and did not want to testify fearing that the prosecutor would bring out all of the "bad facts." Walsh argues that Lincoln certainly told Watkins he did not want to know anything other than the answers to his very limited questions, thereby preventing himself from "knowing" his client's guilt; and that he may have gone further. He may have been privy to the "bad facts." Furthermore, Walsh speculates that Lincoln affirmatively coached Watkins to come up with the story about losing the slung-shot. The Walsh theory is that Lincoln may have suborned perjury by not demanding a direct answer to his second question and by supplying an answer suggesting, instead, that Duff *couldn't* have had the slung-shot. Of course, this is the old, old, question. What did he know and when did he know it?

Lincoln would not have been the first, and certainly was not the last lawyer who took pains to avoid knowing "bad facts." Many lawyers practice the art of "knowing while not knowing." Indeed, while we are commenting on the passing down of lawyer stories, it is worth noting that many lawyers have lectured on the technique of asking "what the prosecution is likely to say about [the client's] involvement in the crime" rather than asking the client if he did it. The idea is that you don't want to foreclose options - if the client tells you he did it, then you can't put him on the stand to perjure himself to the contrary. Lawyers

[22] One gets the impression that Metzger could not hold his drink, and when he had had too much he would Bully others. He had roughed up Norris and Armstrong that evening, and both were smaller men. It may have been that folks thought that his demise was partly his own fault.

claiming that they "invented" the above technique include "Racehorse" Haynes and Roy Cohn.[23] Again, the lawyer story adopted over and over for fun and profit. But the practice is probably as old as the profession.

Walsh also speculates that Lincoln coached Watkins, and perhaps other witnesses, and crossed the line between legitimate lawyering and subornation of perjury. On the other hand, I am not as sanguine as Walsh about my ability to make out a case against Lincoln, and I am familiar with the relevant case law, as it existed then, and as it exists now.[24] Lawyers often coach, and it is my belief that they frequently cross the line.[25] But the case against Lincoln is not nearly as compelling as Walsh suggests.

On the other hand, there is another, more subtle, charge that we might level at Lincoln, if not at defense lawyers in general, at least if he knew his client was guilty. Even if we believe that he only elicited and presented true, but extremely limited, testimony, did he then knowingly induce the jury to draw a false inference or inferences from it? Can a lawyer do that? Some of us have suggested that there may be moral and ethical problems with this,[26] but judicial opinion seems to give defense counsel considerable leeway.[27]

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[23] For a recent literary application of this lawyer lore, see SCOTT TUROW, PRESUMED INNOCENT 162 (1987). *Compare* PLATO, THE APOLOGY, from F.J. CHURCH, trans., THE TRIAL AND DEATH OF SOCRATES 38 (1908):

> What is the calumny which my enemies have been spreading about me? I must assume that they are formally accusing me, and read their indictment. It would run somewhat in this fashion: "Socrates is an evil-doer, who meddles with inquiries into things beneath the earth, and in heaven, and who 'makes the worse appear the better reason,' and who teaches others these same things. That is what they say ...."

Id.

[24] *See* Richard Underwood, *Perjury! - The Charges and the Defenses*, 36 DUQUESNE L. REV. 715 (1998).

[25] *See* Underwood, *supra* note 15, at 954-961. *See also* Fred Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1998-99). Consider the conduct of Edward Bennett Williams, who is frequently praised as the great trial lawyer of our time, as it is reported in EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS - ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER 405 (1991):

> As a rule, Williams didn't bother to take notes of the initial interview because he knew the client was lying. Slowly he'd probe for the truth .... The fact is, however, that Williams did not always want the truth - at least the whole truth He would – help the client come up with a plausible theory to explain away incriminating facts. This was done subtly, through leading questions and a certain amount of winking and nodding.

Id.

[26] *See* WILLIAM FORTUNE, RICHARD UNDERWOOD & EDWARD IMWINKELREID, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK §13.5.1 (2nd ed. 2001).

[27] *See* United States v. Latimer, 511 F.2d 498, 502-03 (10th Cir. 1975). Defense counsel knew that the bank surveillance camera was not working at the time of the robbery, a true fact, but argued during his summation that the jurors should conclude that the reason that the prosecution did not offer the camera film was that it did not show the defendants on it, a false inference; the conduct of defense counsel was approved by the court (!) and the prosecutor was criticized for responding to the questionable argument.

VI. HOW DID LINCOLN CONTAIN THE CROSS-EXAMINATION?

One thing that really mystifies Walsh is the fact that Lincoln was able to present what he wanted through Watkins without opening the door to a thorough, wide-ranging cross-examination by the experienced prosecutor.

> The strange thing is that nowhere in the existing record, primary or secondary, is the least hint that Fullerton did anything at all about Watkins assertions. How Lincoln managed it remains a mystery, but his promise that Watkins wouldn't be harried or pressed by the prosecution seems to have been fulfilled.[28]

The rule that prevails nowadays,[29] that the subject of cross-examination should be limited to the scope of the direct examination, has a curious history.[30] It seems that the rule in England had been in favor of wide-open cross-examination as to any relevant subject. But in 1827 the Chief Justice of the Pennsylvania Supreme Court (without the citation of any authority) opined to the contrary - that the cross-examiner should not "prove his case by evidence extracted on cross-examination," and that the witness may not be cross-examined to facts which are "wholly foreign to what he has already testified." Wigmore suggests that the learned justice would have repudiated his own comments had he understood them. But before you know it, it seems that Mr. Justice Story of the United States Supreme Court picked up the "scope of the direct rule" "speaking *obiter*, and also without citing a single authority." This became the Federal Rule, which is now reflected in Federal Rule of Evidence 611(b).[31] Could this rule have found its way into Illinois practice, and been accepted as the "better" rule, as early as 1858? I discussed this with my colleagues at the Law School, and all agreed that this probably would not have been the rule in Illinois at that time. We were so confident of our view that I suspected we were wrong and that I had better "look it up." Unfortunately, the earliest reported Illinois opinion on the subject I could locate in our Kentucky library was announced in the 1864 case of *Stafford v. Fargo*:[32]

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[28] *See* WALSH, *supra* note 3, at 49.

[29] This is now the "modern" or "majority rule." *See* JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL: STUDENT EDITION 2-8 (4th Ed. 1999).

[30] For the definitive early treatment of the subject, see JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW VOL.. III, §§ 1885-1887 (1904).

[31] Hint. Evidence law is not rocket science. In my home state of Kentucky a lawyer may engage in wide-open cross-examination, with the caveat that he may not use leading questions when he departs from the scope of the direct. This is "modified wide-open" cross-examination. *See* RICHARD UNDERWOOD & GLEN WEISSENBERGER, KENTUCKY EVIDENCE: 2002 COURTROOM MANUAL 286 (2001).

[32] 35 Ill. 481, 486 (1864).

> Whilst a large discretion is necessary to be exercised by courts, in the manner of disposing of business, still some rules of practice are inflexible. *Long experience* has demonstrated that certain rules of practice are indispensable to the *attainment of justice*, whilst others conduce largely to the attainment of that end. It seems to be the *well recognized rule*, that when a witness is called by one party, the other has *only the right to cross-examine upon the facts to which he testified in chief*. If he can give evidence beneficial to the other party, he should call him at the proper time, and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. (emphasis added).

So *it is possible* that in 1858 the Illinois rule might have limited the subject matter of the cross to the subject matter of the direct. Such an established rule may have been the source of Lincoln's confidence that he could elicit what he needed from Watkins and head off any prosecutorial inquiry into "bad facts." If the prosecutor wanted more he would have had to call Watkins as his own witness, and in the absence of outright hostility from Watkins, he would not have been able to use leading questions. He may have been unwilling to take on the cagey Lincoln's witness without knowing what he was going to say. Of course, given my limited legal/archeological resources I cannot be certain of what happened and why it happened, and I certainly can't be certain of the regularities of practice in Cass County, Illinois, in 1858.[33] However, the possibility that I may

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[33] In the South, 19th century trials could be pretty irregular - and fun. In F. Farmer, *Legal Practice and Ethics in North Carolina, 1820-60*, 30 N.C. HIST. REV. 329, 334 (1953) the author observed

have found a plausible explanation for what Walsh views to be one of the mysteries of the case is tantalizing.

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that, the courthouse being the center of activity, "the spectators not only watched the trials, but often indulged in drinking while at court." Quoting one court watcher of the day:

> I noticed a good deal of drinking going on to day, and the whiskey drinkers have to day, I suppose, been carrying out this very consistent principle of that class. That [sic] to drink in damp and cold weather will warm, and that to drink in hot weather it will cool them. Ah, Consistency [sic], thou art a Jewel!

Id.