WICKED WOMEN AND VEILED LADIES: GENDERED NARRATIVES OF THE McFARLAND-RICHARDSON TRAGEDY

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I. INTRODUCTION

"[F]or the sake of the noble men and women who have stood by me through all revilings . . . and for his [sake] who lost his life in my behalf, I wish to tell the whole story of my life," Abby Sage Richardson wrote in the New York Daily Tribune on May 11, 1870.1 "When I was once advised to do so and hesitated," Abby explained, "a good woman said to me, 'Do not be afraid to tell your story once to all the world. Tell it once exactly as you would tell it to your Maker, and then keep silence forever after.'"2 Abby listened to the woman's advice, penning a statement that spanned more than eight columns in the newspaper, six of which filled the entire front page.3

Abby’s story began with her marriage to Daniel McFarland in 1857.4 Nearly twice her age, McFarland dazzled her with boasts of a flourishing law practice and brilliant political prospects, only to reveal a few weeks into their honeymoon that he had long given up the practice of law in favor of an unsuccessful career speculating in land.5 Less than three months after their wedding, McFarland pawned Abby’s jewelry to pay their bills and sent Abby to live with her father in New Hampshire.6

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1. The Truth At Last: Mrs. Richardson’s Statement, N.Y. TRIB., May 11, 1870, at 1, reprinted in A.R. CAZAURAN, COMP., THE TRIAL OF DANIEL MCFARLAND FOR THE SHOOTING OF ALBERT D. RICHARDSON, THE ALLEGED SEDUCER OF HIS WIFE at app. 226 (New York, W.E. Hilton 1870) [hereinafter TRIAL]; see also THE RICHARDSON-MCFARLAND TRAGEDY CONTAINING ALL THE LETTERS AND OTHER INTERESTING FACTS AND DOCUMENTS NOT BEFORE PUBLISHED, BEING A FULL AND IMPARTIAL HISTORY OF THIS MOST EXTRAORDINARY CASE 97 (Philadelphia, Barclay & Co. 1870) [hereinafter TRAGEDY]. The page numbers in The Trial of Daniel McFarland end at 209. There are, however, an additional 31 pages in the pamphlet. For purposes of citation, I will refer to page numbers 210 through 240, as if they were designated as such in the pamphlet itself.

2. TRIAL, supra note 1, at app. 226.

3. See The Truth At Last: Mrs. Richardson’s Statement, supra note 1, at 1.

4. See TRIAL, supra note 1, at app. 226.

5. See id.

6. See id. at app. 227.

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In the fall of 1858, Abby rejoined McFarland in New York, only to become further disillusioned with her husband. Prior to their wedding, he had “professed to be a man of temperate habits, of the purest morals.” Now, however, she discovered that he had a “very fitful and passionate” temper. His profanity shocked her and his frequent intoxication frightened her. Abby returned to her father’s house in October 1859 and remained there for the next ten months. Yet she never told her father about her troubled life with McFarland. “I could not speak,” she explained in the Tribune. “It was so hard a thing to tell. My ideas of a wife’s duty were most conservative. I believed she should suffer almost unto death rather than resist the laws of marriage.”

In April 1860, while at her father’s house, Abby gave birth to a son. She paid the doctor who attended the birth with money that she earned by giving a public reading. Later that year, Abby and McFarland moved to Wisconsin; however, McFarland quickly ran out of money again and, in June 1861, they returned to New York to have Abby “fitted for the stage in the profession of an actress.” Formerly a teacher of elocution, McFarland began teaching Abby to read stage parts. In addition, he sent her to take lessons from the renowned actor, George Vandenhoff. In the fall of that year, Abby began giving dramatic readings to support the family. “I lived under the protection of a drunken and brutal master,” she bitterly remembered, “and [was] obliged again and again to leave the boarding-houses I called homes to earn the means to pay for their shelter.”

Abby’s relations with McFarland further deteriorated over the next five years. McFarland was “unspeakably cruel” to her. He would break out in uncontrollable attacks of passion, throwing anything he could find that was breakable. On several occasions, he approached Abby with his “hands extended . . . [and his] fingers bent like claws, as if he were about to clutch [her] throat,” crying out that he wanted to strangle her.

In January 1867, they moved to a new boarding house on Amity Street. Just a few weeks later, Albert Richardson—a prominent reporter for the Tribune—moved into the same house. Until that time, Abby’s acquaintance with Albert had been “very slight and formal.” Abby knew Albert because he was a frequent visitor at the homes of two of her most intimate friends, Lucia

7. Id.
8. Id.
9. See id.
10. Id.
11. Id. at app. 227-28.
12. Id. at app. 228.
13. See id.
14. See id.
15. Id. at app. 229.
16. Id. at app. 228-29.
17. See id. at app. 229.
18. Id.
19. See id. at app. 233.
20. See id. at app. 223.
21. Id. at app. 234.
(Lu) Calhoun and Charlotte Sinclair.\(^{22}\) Once Abby and Albert became neighbors, however, they grew friendlier—and McFarland grew jealous. One evening in late February, he came home to find Abby standing by Albert’s door, and promptly flew into a fury.\(^{23}\) He abused and tormented her all night long and all through the next day, taking breaks every little while only to go “to the nearest bar-room to drink, and then [to] com[e] in still more furious.”\(^{24}\) McFarland eventually returned home to seek Abby’s forgiveness. However, she told him that she could live with him no more:

[A]s mildly and firmly as I possibly could, I began to talk with him. I told him decided[ly] that I should leave him forever; that I had borne with patience for many years great outrages from him; that he had made my life miserable, and had often put me in great dread of my life; that I could not endure it any longer; that by his outrageous conduct for the two days past, and by the language he had used when he found me at Mr. Richardson’s door, he had added the last drop to my cup of endurance, and I should go away from him at once.\(^{25}\)

Albert helped Abby prepare for the separation by sending her children to her mother’s house and telegraphing her father to come to New York.\(^{26}\) On February 24, 1867, in the presence of her father, Abby announced her decision to leave McFarland.\(^{27}\)

Several days later, Albert confessed to Abby that he had recently become interested in her, that he admired her prudence and reserve during their acquaintance, and that he wished to marry her if she could ever be free to marry him.\(^{28}\) When Albert spoke, Abby’s “heart went out to him as freely as the river flows toward the sea.”\(^{29}\) He seemed to her “in every respect the opposite of the miserable man who had so long tormented [her].”\(^{30}\) Her separation from McFarland had, in her mind, “the moral effect of a divorce.”\(^{31}\)

Albert sent Abby a passionate love letter shortly thereafter. However, it accidentally fell into McFarland’s possession before it reached Abby.\(^{32}\) McFarland brooded over the letter for several days. On March 13, 1867, he crept up behind Albert and Abby as they walked home from the theater at night, and

\(^{22}\) See id.

\(^{23}\) See id.

\(^{24}\) Id. at app. 233.

\(^{25}\) Id. at app. 234.

\(^{26}\) See id. at app. 235.

\(^{27}\) See id.

\(^{28}\) See id.

\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Id.

\(^{32}\) See id.
shot Albert in the thigh. McFarland then gained access to Abby’s rooms by “poison[ing] the minds of the landlady and the servants against [her].” He broke open her trunks and stole all of her private correspondence. Next, he commenced a habeas corpus proceeding to get custody of their two children. After being “pursued by his revenge, in the form of anonymous letters, by spies set to watch [her] footsteps, by all that can wear out a woman’s courage and heart,” Abby agreed to give McFarland custody of their oldest son, Percy, in exchange for his promise to end the legal proceedings.

When McFarland refused to let Abby see Percy, however, she decided to “take legal steps to get free” from her husband. In the spring of 1868, she moved to Indiana—a state widely known as a divorce mill—and established residence there for sixteen months. Abby returned to her father’s house in late 1869 a “free” woman, having obtained a divorce from McFarland on the grounds of drunkenness and extreme cruelty.

Albert visited Abby that Thanksgiving. It seemed to her as if, “for the first time [she] had a right to talk freely, and unreservedly to him.” Less than a week after Albert returned to New York, however, Abby received word that McFarland had shot Albert once again. This time, McFarland sent a bullet into Albert’s abdomen in the Tribune counting-room. Albert lingered in a second floor room in the neighboring Astor House hotel. Abby rushed to his side, distraught and angry. “[I]f I had had ten thousand lives,” she recollected, “I should have been

33. See id. For a contemporaneous account of the shooting, see Lamentable Tragedy: Attempted Assassination in the Tribune Office, N.Y. Times, Nov. 26, 1869, at 1 (quoting March 15, 1867 New York Times article).
34. TRIAL, supra note 1, at app. 236.
35. See id.
36. See id. For testimony taken in the habeas corpus case, see TRAGEDY, supra note 1, at 36-41.
37. TRIAL, supra note 1, at app. 236.
38. See id.
39. TRIAL, supra note 1, at app. 237.
40. For a summary of American divorce law at mid-century, see JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (Boston, Little, Brown, and Co. 1852). For a discussion of Indiana’s more lenient laws, see NELSON BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 116-21 (1962). Indiana courts granted a total of 1,210 divorces in 1869; 770 of these divorces were granted to wives. A total of 20 divorces were granted on grounds of “cruelty and habitual drunkenness.” See U.S. BUREAU OF LABOR, A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867 TO 1886, at 490-98 (Washington, Government Printing Office rev. ed. 1891). By comparison, New York courts granted a total of 824 divorces in 1869; 485 were granted to wives. New York courts granted a total of two divorces on grounds of “cruelty and habitual drunkenness.” Id. at 552.
41. See TRIAL, supra note 1, at app. 237.
42. See id. The divorce decree was granted on October 20, 1869. See TRAGEDY, supra note 1, at 44. For contemporaneous reports of Abby’s divorce, see The M Farland Divorce: How it Was Obtained in Indiana - The Documents and Evidence Offered in the Case, N.Y. Times, Dec. 12, 1869, at 5; TRAGEDY, supra note 1, at 42-44.
43. TRIAL, supra note 1, at app. 237.
44. See id. at 10, app. 237; TRAGEDY, supra note 1, at 56-57. For contemporaneous accounts of the shooting, see Lamentable Tragedy: Attempted Assassination in the Tribune Office, N.Y. Times, Nov. 26, 1869, at 1; The Richardson Tragedy, N.Y. Times, Nov. 27, 1869, at 7; The Attempted Assassination, N.Y. TRIB., Nov. 27, 1869. McFarland shot Richardson just as Richardson was asking the young counting-room clerk, Daniel Frohman, for his mail. See TRIAL, supra note 1, at 12, 16. The incident left Frohman shaken and furious. See DANIEL FROHMAN, DANIEL FROHMAN PRESENTS: AN AUTOBIOGRAPHY 19-21 (1935).
more than glad to have given them up for him who was dying for the crime of having loved me." On November 30, 1869, the Reverends Henry Ward Beecher and Octavius Frothingham married Albert and Abby. Two days later, Albert died.  

Several weeks before Abby recounted the story of her unhappy marriage to Daniel McFarland in the Tribune, three defense lawyers told a very different story of the McFarland-Richardson tragedy in a packed New York courtroom. McFarland's murder trial absorbed the nation's attention for five weeks in the spring of 1870. Reports of the case appeared on the front pages of local and national newspapers, with the New York Times and the Tribune summarizing the testimony each of the twenty-five days of the trial. Spectators daily besieged the doors of the courtroom, eager to listen to attorneys argue about the culpability of a man charged with murdering one of America's most prominent journalists.

Hovering in the background of the trial was the controversial "unwritten law" that a husband could kill his wife's seducer in the "heat of passion" without being convicted of murder. McFarland's lawyers drew upon and in the process shaped this evolving "privilege of irresponsible killing." They argued that McFarland was neither morally nor legally accountable for Richardson's death because he fired the fatal shot when he was insane. They told a story of "a sensitive man... easily excited, of an extremely nervous, delicate, mental organization," who had become deranged upon reading the intercepted love letter in March of 1867. Defense lawyers described McFarland's mental

45. TRIAL, supra note 1, at app. 237.
46. See id. at app. 237. For other accounts of the "deathbed marriage" and the Reverends' role in it, see TRAGEDY, supra note 1, at 25-26; Mr. Richardson's Case, N.Y. TRIB., Dec. 1, 1869, at 5; The Richardson Tragedy, N.Y. TIMES, Dec. 6, 1869, at 8; The McFarland Case, THE NATION, May 12, 1870, at 300. For Reverend Frothingham's defense of his part in the marriage ceremony, see Sermon of the Rev. O.B. Frothingham—The Richardson Marriage, N.Y. TRIB., Dec. 6, 1869, at 1; The Richardson Tragedy—Comments Upon the Case in the Pulpits Yesterday, N.Y. TIMES, Dec. 6, 1869, at 8.
47. See In Memory, N.Y. TRIB., Dec. 3, 1869, at 4; The Richardson Homicide, N.Y. TRIB., Dec. 3, 1869, at 3; Albert D. Richardson: Obituary, N.Y. TIMES, Dec. 3, 1869, at 1; The Late Albert D. Richardson, FLANK LESLIE'S ILLUSTRATED NEWSPAPER, Dec. 18, 1869, at 239.
49. N.Y. TIMES, Apr. 5, 1870-May 10, 1870; N.Y. TRIB., Apr. 5, 1870-May 10, 1870.
50. On the fourth day of the trial, the New York Times reported: "The excitement continues unabated, and long before the hour of 11 the corridors and steps leading to the General Sessions Court-room were thronged with people anxious to gain admission." The McFarland Trial, N.Y. TIMES, Apr. 8, 1870, at 1. For a history of Richardson's celebrated career as a journalist and author, see A Biographical Sketch of Albert Deane Richardson, in GARNERED SHEAVES FROM THE WRITING OF ALBERT D. RICHARDSON, 17, 43-75 (Abby Sage Richardson, ed., Hartford, Columbian Book Co. 1871).
51. There is some disagreement among scholars as to the scope and definition of the unwritten law. In this Article, I will use the term to denote two related legal traditions, one developed at English common law and one developed in nineteenth-century America. See infra text accompanying notes 76, 78.
52. The Lessons of the McFarland Case, 1 ALB. L.J. 385, 385 (1870).
53. TRIAL, supra note 1, at 110.
condition as one of "partial insanity." They argued that McFarland might have been sane on every subject other than his domestic tragedy and might have dealt rationally with everyone except his wife's seducer. However, when he fired his pistol at Richardson on November 25, 1869, they claimed, he acted under the influence of an "ungovernable impulse, uncontrolled by reason."

Defense lawyers contrasted this image of a delicate husband with a portrait of a powerful wife—a "wicked woman"—who yearned for money, fame, and independence. According to defense lawyers, Abby was part of a free love "conspiracy" that betrayed and humiliated McFarland. In the defense's construct, Abby—not McFarland—was responsible for Richardson's death.

In a society that idealized women's angelic character and lauded men's rationality and self-control, the defense's stories were anything but comforting. Defense lawyers affirmed the importance of wifely dependence, but simultaneously highlighted the vulnerability of marriage, arguing that deceptive, independent wives plotted the subversion of domesticity. They championed the idea of men's and women's "separate spheres," but in the same breath revealed that the line separating the two spheres had become dangerously blurry. Yet, though the defense's stories challenged cultural ideals, the jury nonetheless found them compelling. Twelve men accepted the defense's plot line, complete with alarming gender inversions, and acquitted McFarland after deliberating for less than an hour.

54. Id. at 177, 185.
55. See id.
56. Id. at 26.
57. Id. at 176.
58. Id. at 74, 127.
60. Historians have identified a sharp division between the roles assigned to husbands and wives in nineteenth-century America. The ideology of "separate spheres" placed women in charge of domestic activities, while it assigned men to activities outside the home. See COTT, BONDS OF WOMANHOOD, supra note 59, at 63-100; DEGLER, supra note 59, at 26-51. For a similar account of gender ideology in Victorian England, see MARY POOVEY, UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND 1-50 (1988). As Degler notes, however, the "doctrine of the two spheres ... is an ideological construction, not a description of how real people behaved." DEGLER, supra note 59, at 28.
61. See McFarland Acquitted, supra note 48, at 1. The McFarland-Richardson Trial reported that the jury deliberated for just under two hours. See TRIAL, supra note 1, at 223. According to The Richardson-McFarland Tragedy, the jury deliberated for approximately three hours. See TRAGEDY, supra note 1, at 96.
Not surprisingly, the defense’s stories aroused considerable controversy outside the courtroom, as contemporaries struggled to understand and interpret the verdict.62 Three pamphlets, in particular, focused and fueled the debate. Two of these pamphlets—The Trial of Daniel McFarland for the Shooting of Albert D. Richardson and The Richardson-McFarland Tragedy—contained verbatim speeches and testimony from the trial, commentary on courtroom behavior, private correspondence between Abby and Albert, and sensational pictures of the shooting.63 In addition, an anonymous pamphlet, titled The Veiled Lady; or the Mysterious Witness in the McFarland Trial, featured two fictional stories that explored the issue of women’s exposure to free love, temptation, and deception.64

In this Article, I analyze the stories contained in these three pamphlets. I proceed from the assumption that the criminal trial has been, historically, an important forum for storytelling in America, and that stories within public trials are extraordinary sites for cultural analysis.65 In addition, I draw upon the observation that sensational trials have had an important influence on the American literary imagination.66 I use the legal and fictional stories surrounding

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62. The verdict provoked a flurry of editorials, speeches, and pamphlets. In addition to The Trial of Daniel McFarland and The Richardson-McFarland Tragedy, see Henry James, The Logic of Marriage and Murder, 25 THE ATLANTIC MONTHLY 744 (1870); The Lessons of the McFarland Case, supra note 52, at 385-87; The Lessons of the MacFarland Trial, 2 OLD & NEW 476 (1870).
63. For the importance of the trial transcript in cultural and rhetorical analysis, see Robert A. Ferguson, Becoming American: High Treason and Law Inverte in the Republic of Laws, in THE RHETORIC OF LAW 103, 103-04 (Austin Sarat & Thomas R. Kearns, eds. 1994).
the McFarland-Richardson tragedy as a window onto anxieties and tensions in late nineteenth-century America. Specifically, I explore the ways in which anxieties about women, marriage, and sexuality informed the storytelling process both inside and outside the courtroom.

My analysis proceeds in several parts. In Part II, I examine the courtroom stories of McFarland’s lawyers, focusing on the ways in which they exposed and exploited tensions in late nineteenth-century concepts of gender. I argue that the verdict in the McFarland trial rested upon these tensions. In Part III, I analyze the ways in which The Veiled Lady rewrote the story of the McFarland-Richardson tragedy, transforming the “wicked woman” of the courtroom drama into a virtuous “lady.” In Part IV, I return to Abby’s own narrative—her “Statement and Affidavit”—and explore the ways in which it challenged the constructions of womanhood that figured so prominently in both the legal and fictional stories of the case.

Through the course of this analysis, I make three points. First, I question the claim that the stories embedded in the unwritten law affirmed male honor and suppressed female autonomy. I argue that the “privilege of irresponsible killing” developed in response to—but also validated—men’s deepest fears about women. I show that the logic and rhetoric of the unwritten law ironically affirmed female power and suppressed male autonomy, even as its verdicts sanctioned male violence.

Second, I question the claim that popular trials of the nineteenth century reinforced cultural “norms” and contained cultural threats. I argue that defense

67. For the argument that the unwritten law affirmed male honor and suppressed female autonomy, see Hendrik Hartog, Lawyering, Husbands' Rights, and the Unwritten Law in Nineteenth-Century America, 84 J. AM. HIST. 67, 77-80 (1997).
68. Lawrence Friedman has articulated a widely influential theory of the trial as a “boundary-maintaining device” that “broadcast[s] and reinforces social norms.” Lawrence M. Friedman, Law, Lawyers, and Popular Culture, 98 YALE L.J. 1579, 1594 (1989). He suggests that these norms infuse and determine the outcome of every trial’s “narrative competition.” Id. at 1595. This view has informed a number of studies of nineteenth-century trials—particularly those that have focused on the role of gender in the courtroom. Karen Halttunen speculates that a jury acquitted Lucretia Chapman of murdering her husband in 1831 because its “members were more comfortable accepting the defense’s story of a sentimental woman—domestic, pious, passive, the helpless victim of evil circumstances beyond her control—than the prosecution’s narrative of a ‘household fiend’—licentious, depraved, matriarchal, the aggressive destroyer of her own family circle.” Karen Halttunen, Domestic Differences: Competing Narratives of Womanhood in the Murder Trial of Lucretia Chapman, in THE CULTURE OF SENTIMENT: RACE, GENDER, AND SENTIMENTALITY IN NINETEENTH-CENTURY AMERICA 39, 56 (Shirley Samuels ed., 1992). Cara Robertson offers a similar explanation for the notorious acquittal of Lizzie Borden in 1892. She contends that jurors could never have convicted Borden of murdering her parents because if “Lizzie Borden was guilty of murdering her father (and stepmother), then perhaps any apparently proper middle-class woman might be equally capable of such violence.” Cara W. Robertson, Representing Miss Lizze: Cultural Convictions in the Trial of Lizzie Borden, 8 YALE J.L. & HUMAN. 351, 356 (1996). She argues that each side “operated with the constraints of the prevailing ideology of the period,” and concludes that Lizzie’s conviction was a “cultural impossibility.” Id. For a final example, see ROBERT L. GRISWOLD, ADULTERY AND DIVORCE IN VICTORIAN AMERICA, 1800-1900 (Legal History Working Paper, Institute for Legal Studies, University of Wisconsin, 1986). Griswold argues that the nineteenth-century divorce trial functioned as a “theater for the reaffirmation of basic cultural values.” Id. at 21. He contends that trial judges oversaw a public ceremony that helped “maintain cultural boundaries” and sharpen “the authority of the violated norm.” Id. at 14. Specifically, he contends that successful divorce lawyers told the “sad tale of the
lawyers told stories that were profoundly subversive and that the McFarland trial called into question more ideals than it reaffirmed.

Third, I suggest ways in which fiction responded to and transformed key images and themes of popular criminal trials in the late nineteenth century. Although scholars have carefully examined the connections between sensational trials, crime narratives, and popular fiction in the antebellum period, they have left this topic largely unexplored in the second half of the century. I show that the stories embedded in sensational criminal trials had a profound influence on the popular literary imagination in late nineteenth-century America.

II. COURTROOM STORIES

On Thursday, April 7, 1870, District Attorney Samuel Garvin opened the prosecution’s case in the McFarland murder trial before Recorder John K. Hackett in the New York Court of General Sessions. Garvin insisted that the shooting at the Tribune was “murder, pure and simple, without any extenuating circumstances.” He presented six witnesses who recounted the fatal encounter in the counting-room, the arrest of McFarland, and the tragic death of Richardson at the Astor House hotel. Prosecutors completed their case-in-chief in one day.

McFarland’s lawyers—John Graham, Elbridge Gerry, and Charles Spencer—responded by invoking a legal privilege, developed in nineteenth-century America, which permitted husbands to kill their wives’ lovers without being convicted of any crime. This “privilege of irresponsible killing,” as one contemporary termed it, grew out of an older common law rule that a husband could reduce the crime of murder to manslaughter if he killed his wife’s seducer immediately upon discovering him in an act of adultery with his wife.

virtuous woman wronged by the dishonest man”—“a staple of nineteenth-century fiction, prescriptive literature, and feminist ideology...." Id. at 34.


70. For a notable exception, see DAVID RAY PARKE, FRAMING THE CRIMINAL: CRIME, CULTURAL WORK AND THE LOSS OF CRITICAL PERSPECTIVE, 1830-1900 (1987).

71. See The McFarland Trial: Opening of the Case for the Prosecution, N.Y. TIMES, April 8, 1870, at 1; TRIAL, supra note 1, at 10; TRAGEDY, supra note 1, at 56-57. The judicial official who presided over cases in the Court of General Sessions was known as the “Recorder.” See HENRY LAUREN CLINTON, CELEBRATED TRIALS 292-93 (New York, Harper & Brothers 1897). For a brief biography of Recorder Hackett and a description of his judicial reputation, see id.

72. TRIAL, supra note 1, at 100.

73. See id. at 11-20.

74. See id. at 10-24; TRAGEDY, supra note 1, at 56-57.

75. See The Lessons of the McFarland Case, supra note 52, at 386.

76. See Jeremy D. Weinstein, Note, Adultery Law and the State: A History, 38 HASTINGS L.J. 195, 227-38 (1986); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.10 (2d ed. 1986). For the first articulation of this rule, see Maddy’s Case, 86 Eng. Rep. 158 (1683). This part of the unwritten law emerged from an unwillingness of jurors to convict husbands for the crime of murder. See Weinstein, supra, at 228. However, three American states—Texas, Utah, and New Mexico—later codified this principle of English common law, making it a “written unwritten law.” Id. at 230-32, 235-36. Texas’ “paramour statute” remained on the books until 1973. Id. at 230.
McFarland's lawyers were not able to draw upon this rule because McFarland neither discovered Abby and Richardson in flagrant delicto, nor shot Richardson immediately upon learning that he had been having an affair with his wife. Rather, McFarland learned of Abby's infidelity by reading the intercepted love letter—a full two years before his fatal encounter with Richardson in the Tribune counting-room.\textsuperscript{77}

Defense lawyers, however, did not need to rely on this old common law rule because a series of nineteenth-century American jury verdicts took the rule a step further. Specifically, American juries began completely acquitting husbands who killed their wives' seducers, even though the husbands did not discover the seducers in acts of adultery with their wives, and even though the husbands waited a considerable amount of time before inflicting the fatal wounds.\textsuperscript{78}

\textsuperscript{77} See TRIAL, supra note 1, at 41-43.
\textsuperscript{78} For a discussion of these cases, see Hartog, supra note 67; Robert M. Ireland, The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States, 23 J. SOC. HIST. 27
Mcfarland's lawyers both relied upon and shaped the legal tradition that emerged from these verdicts of acquittal. 

Scholars have identified two distinct themes that resounded in the courtroom stories of lawyers who invoked this tradition. The first theme was revenge. It surfaced in a narrative that affirmed male honor and suppressed female autonomy. In this narrative, a husband who killed his wife's seducer committed an honorable act of "revenge for . . . attacks upon [his] proprietary rights as a married man." This narrative, which was a permutation of the legal notion of coverture, styled the "husband the owner of, and supreme ruler over, the wife; [and] the wife the weaker vessel, whose physical and mental infirmities [were] such that she [was] not calculated to resist temptation. . . ." Lawyers who told this narrative asserted, in short, that a husband killed his wife's lover because it was the right thing to do.

Hendrik Hartog emphasizes this narrative in his analysis of nineteenth-century America's unwritten law. He argues that in the McFarland trial, as in two prior trials involving this legal tradition, defense lawyers told courtroom stories in which wives' seducers deserved to die. According to Hartog, wives were "barely relevant" in these stories; rather, the struggle was one between men.

[hereinafter Ireland, Insanity]; Martha Merrill Umphrey, "Dementia Americana": Narrative Force in the Trials of "Mad" Harry Thaw (unpublished manuscript, on file with author). For a contemporary view of the Cole-Hiscock case, see The Crime of Adultery, VII AM. L. REG. 769 (1868). For a contemporary view of the Sicles-Key case, see The Sickles Tragedy at Washington, HARPER'S WEEKLY, Mar. 12, 1859, at 168. In the words of one contemporary, the precedents "substantially established the rule, that a man may with impunity slay the person whom he suspects of having seduced his wife[.]" The Crime of Adultery, supra, at 771.


99. Graham emphatically told jurors: "This is a case of murder or nothing. There must be no compromise here. . . . There can be no medium verdict here, and so I place this man before this jury. The prosecution are not, by a species of strategy, to fall into a kind of inferior conviction." TRAIL, supra note 1, at 176.

80. The Lessons of the MacFarland Trial, supra note 62, at 478; see also Umphrey, supra note 78, at 16-17.

81. The Lessons of the MacFarland Trial, supra note 62, at 478. William Blackstone formulated the classic statement of the nature and rationale of coverture:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a femme-covert . . . and her condition during her marriage is called her coverture. Upon this principle, of all union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.


82. See Hartog, supra note 67, at 75, 77-78. In addition to the McFarland-Richardson trial, Hartog analyzes the Sicles-Key trial and the Cole-Hiscock trial. See id. at 70-71, 81-84, 90.

83. Id. at 79.
"barely relevant"83 in these stories; rather, the struggle was one between men.84 In all three trials, he argues, defense lawyers mobilized a rhetoric of husbands' rights, urging jurors to create a new right that would legitimize male honor and private vengeance.85 Hartog contends that defense lawyers portrayed McFarland as a hero.86

I argue, however, that McFarland's lawyers emphasized the second theme of the unwritten law—the theme of insanity.87 This theme surfaced in a narrative that reversed the assumptions of the manly "domestic dishonor" story.88 This narrative suppressed male honor, rationality, and autonomy and, instead, highlighted female power and independence. In the words of one contemporary, it embodied a "tendency to assume that any unusual or . . . violent action [was] the result of an abnormal condition of the mind for which the individual [was] not responsible."89 Defense lawyers in the McFarland trial told one such narrative. Rather than claim that McFarland had a right to kill Richardson, they argued that McFarland shot Richardson because his emotions overwhelmed his reason. Instead of affirming McFarland's manliness, defense lawyers threw it

83. Id. at 79.
84. See id. In Hartog's view, women's individual natures were not important in these courtroom stories. Rather, women were significant because they were men's property: "Just as you did not need to characterize the qualities of a farm in order to know that it had been trespassed on or flooded, so defense attorneys worked to minimize the presence and individuality of the wives." Id.
85. See id. at 77, 87-90. Scholars have focused almost exclusive attention on the "domestic dishonor" theme in the unwritten law. Robert Ireland argues that the "unwritten law concerning a husband's honor greatly influenced McFarland's trial and acquittal." Robert M. Ireland, Death to the Libertine: The McFarland-Richardson Case Revisited, 68 N.Y. HIST. 191, 212-13 (1987). He assumes that the unwritten law was "based on notions of honor." Id. Martha Umphrey similarly characterizes the unwritten law as "a tradition of acquittal for those male defendants who killed in defense of sexual honor." Umphrey, supra note 78, at 15 (emphasis added). Although she acknowledges the existence of a second "narrative of sentimentality" in the unwritten law, she emphasizes the manly dishonor narrative: "[B]ecause the unwritten law was not an 'official' defense, it was the usual strategy to enter a plea of insanity, then argue for acquittal not on the grounds that the defendant had lost his reason, but, contradictorily, that his actions had been eminently reasonable and justified." Id.
86. See Hartog, supra note 67, at 91.
87. One contemporary thought that the defense mingled both the revenge and the insanity themes: These two tendencies are so well known, that acute advocates, when called upon to defend a man charged with committing murder, rarely fail to fix upon insanity or domestic dishonor as the basis of the defence [sic] (when the overt act admits of little doubt), and usually manage to mingle the two in such manner, that the character of the verdict, when given, is completely disguised, both to the public which hears it and the jury by which it is rendered. The Lessons of the MacFarland Trial, supra note 62, at 478. The revenge theme admittedly surfaced at several points in the McFarland trial. For example, Spencer told the jury in his opening statement: "[I]f ever I discovered a letter like that to [my wife] from any man, I would shoot him whether it made me mad or not." Trial, supra note 1, at 31. Graham "spoke of Richardson's grave as 'his well-earned tomb.'" Id. at 90. Graham also stated: "I think the man who wrote that letter did more harm than a million Jack Reinoldses, and the man who sent him out of the world did good service." Id. at 135. In his closing speech, Graham returned to this theme. He cited the "law of the Bible"

That man was made for God, and woman for man; and that the woman was the weaker vessel . . . meant to be under the protection of the stronger vessel, man. The forfeiture of that supremacy is as much an infraction of the husband's right as though it was the infliction of violence upon her or him. Id. at 194. I argue, however, that the story embedded in the insanity defense was most important.
88. For a discussion of the role of the insanity defense in the unwritten law, see Weinstein, supra note 76, at 237-38; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 590-92 (1985).
89. The Lessons of the MacFarland Trial, supra note 62, at 478.
into question. At the same time that they explored McFarland’s mental state, however, they inquired into seemingly irrelevant “circumstances attendant upon and surrounding the tragedy.” In the defense’s narrative, all of these circumstances were crucial to understanding the cause and nature of McFarland’s insanity.

A. The Free Love Conspiracy: Theatricality, Deception, and Divorce

The defense’s story of McFarland’s insanity, ironically, proved to be more about Abby than McFarland. In the defense’s view, Abby’s hypocrisy and deception precipitated McFarland’s madness. In this section, I explore the ways in which defense lawyers rhetorically shifted responsibility for the tragedy away from McFarland and onto his wife. I argue that the defense’s sensational story of Abby’s transgressive behavior betrayed anxieties about the institution of marriage and the position of women in the second half of the nineteenth century. Specifically, I examine the ways in which the defense’s sensational courtroom tale conflated two seemingly distinct threats to the stability of the marital relation: the growing popularity of free love and the emergence of women as public performers.

1. “The Terrible Mysteries... of ‘Free Love’”

At the heart of the defense’s story was a profound concern that wives were not behaving as their husbands expected them to be. Nineteenth-century etiquette manuals proclaimed that the middle-class wife was the moral defender of the family—the “guardian angel” of the household. The defense’s story, however, exploited fears that disgruntled wives were secretly plotting the subversion of domesticity, and that organized groups of free lovers were providing them with assistance and encouragement.

In his opening address for the defense, Charles Spencer told jurors that McFarland’s life was filled with “deep sorrow and misfortune.” He attributed the cause of this misfortune to Abby, the “fallen and ruined mother [who]... wrought out all this misery.” According to Spencer, McFarland’s troubles began when, “[i]n an evil hour [Abby] fell into the society of... Fourierites,

90. TRIAL, supra note 1, at 26.
91. Hartog argues, by contrast, that in cases involving the unwritten law, defense attorneys worked “to minimize the presence and individuality of the wives.” Hartog, supra note 67, at 79. He contends that McFarland’s attorneys worked to “suppress Abby’s autonomy.” Id. at 80.
92. Isaac Reed, Jr., The Oneida Community of Free Lovers: The Doctrines of the Community; Concluding Article, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, Apr. 23, 1870, at 86.
94. TRIAL, supra note 1, at 27.
95. Id.
journalists—whom Abby befriended while vacationing in the White Mountains. Mrs. Calhoun immediately began working her harm, Spencer explained, by “instil[ling] into [Abby’s] breast the seeds of a discontent that she hoped would ripen into an alienation from her husband . . .” 97 Spencer denounced Mrs. Calhoun as “a prominent actress . . . in [the] tragedy,” and insisted that she was “a plotter, conspirator, adventurer and procuress, from the beginning to the end.” 98

To Spencer’s horror, Abby eagerly embraced Mrs. Calhoun’s dangerous ideas. “[W]hen she came back from that trip to the White Mountains where she had remained two months,” Spencer explained, “[Abby] was a dissatisfied woman.” 99 Previously a devoted wife, he claimed, Abby returned a zealous member of a free love conspiracy. 100 The conspiracy, in Spencer’s view, perverted fidelity, marriage, and the family; its evil schemes blurred traditional gender roles and ruptured family life. While Abby ran off to free love parties to “me[e]t with people of supposed prominence and distinction,” Spencer explained, “[McFarland] stayed at home, taking care of the children.” 101

Allusions to this free love conspiracy came up repeatedly during the five week trial. Spencer declared that “free lovers had friends in power and in place.” 102 Witnesses insisted that McFarland’s talk was always of a free love conspiracy. 103 According to his friend Mark Pomeroy, McFarland believed that “Mr. Greeley and others of the Tribune were running a free-love establishment.” 104 Defense lawyer John Graham agreed. He claimed that the newspaper’s editor, Horace Greeley, had secretly employed private counsel to assist the District Attorney in prosecuting the McFarland case because Greeley had a vested interest in free love:

97. Id.
98. Id.
99. Id.
101. TRIAL, supra note 1, at 28.
102. Id at 32.
103. See id. at 74, 127.
104. Id. at 124.
All these persons are more or less connected with one newspaper (the Tribune); they are in one sphere; they are in one society; they earn their bread through one channel; they are wedded together by a common pecuniary interest; and we insist that they are united together by a common moral interest.105

This common moral interest, Graham claimed, united prosecution witnesses, supporters, and lawyers in a dangerous free love conspiracy.106

Most distressing to the defense, however, was the eagerness with which Abby participated in the conspiracy—and the ease with which the conspiracy, in turn, fostered her sexual appetite. In the defense’s view, Abby highlighted the paradox that all women posed for men:

We derive from woman, I might say, most of the happiness we enjoy in this life; and yet from the fall of Adam, tempted by Eve, and from the siege of Troy, brought on by the seduction and adultery of Helen, down to the present day, woman has often been the cause of the downfall of individuals and nations.107

Man’s happiness, the defense suggested, depended on woman’s ability to suppress the wicked traits that she inherited from Eve. It required her to be the “angel” that her husband believed her to be.108 And yet, the defense emphasized, not all women behaved like angels. The McFarland case, Spencer reminded jurors, was “not the first instance that history or experience has given us . . . an

105. Id. at 103 (emphasis added). Graham’s claim that the Tribune bore close connections to a free love conspiracy echoed the New York Times’ claim, in the 1850s, that the Tribune had close ties to a “New York Free Love League.” See Hal D. Sears, The Sex Radicals: Free Love in High Victorian America 9-10 (1977). According to a New York Times’ exposé, this secret League was established in 1853, and held regular twice weekly meetings which were attended by about 150 members. See id. The New York Times suggested a link between the League and the Tribune because the League supposedly had strong Fourierist influences and the Tribune’s editor, Horace Greeley, was an open Fourierist. See id.

106. Reporters covering the trial picked up on the free love theme, too, sprinkling daily columns and trial narratives with subheadings such as “The Free-Love Party” and “This Matter of Free Love.” See Trial, supra note 1, at 109, 114. One trial pamphlet introduced Samuel Sinclair’s testimony with the title: “The Fearful Agony of a Tribune Free Love Witness.” Id. at 117. Even before lawyers and reporters invoked the phrase, Recorder Hackett revealed his own concern about the specter of free love in his charge to the grand jury that indicted McFarland:

I think I should be derelict in the discharge of my functions . . . did I now omit reference to some of the incidents following the act which culminated in homicide, just referred to. In vain shall conductors of influential newspapers, and claiming to be moral leaders, beneficially affect the community, if they convert their homes into free-love asylums.

The Lessons of the MacFarland Trial, supra note 62, at 481.

107. Trial, supra note 1, at 27.

108. See id. at 31. For a discussion of nineteenth-century views of women’s sexuality, see Cott, Passionlessness, supra note 59. Cott argues that the “traditionally dominant Anglo-American definition of women as especially sexual . . . was reversed and transformed between the seventeenth and the nineteenth centuries into the view that women . . . were less carnal and lustful than men.” Id. at 221. She contends that didactic writers no longer portrayed women as “the inheritors of Eve’s legacy of moral danger.” Id. at 227.
Abby assumed a place of central importance in the sensational trial pamphlets that reported the McFarland-Richardson case, as the cover of *The Richardson-McFarland Tragedy* makes clear. Like defense lawyers, the anonymous editor of this pamphlet condemned Abby for straying from the path of virtue and for craving money, sex, and public admiration. "[S]carcely if ever do we read of a case of murder, or attempted assassination," the editor lamented, "but what women or money are at the bottom of it."

*The Richardson-McFarland Tragedy Containing All the Letters and Other Interesting Facts and Documents Not Before Published. Being a Full and Impartial History of This Most Extraordinary Case.*

*Courtesy, American Antiquarian Society.*
inconstant woman.”

Abby, in other words, had a long line of unfaithful sisters. In the defense’s sensational courtroom story, the sacred marital relation was thus threatened both from the inside by deceptive wives and from the outside by an organized conspiracy of free lovers. Free lovers only exacerbated the problem of female infidelity, the defense claimed, by preying upon women’s natural weaknesses and encouraging subversion within every household.

This argument played into a deep-seated “fear of internal subversion” that took hold of American society in the middle of the nineteenth century. Americans perceived themselves to be threatened by a wide range of religious and social groups that held seemingly different values and beliefs. According to alarmists, free lovers numbered among the groups that were busily brewing secret conspiracies against them. Alarmists claimed that free lovers were furthering the rebellion of women by providing a means of ready divorce and a social alternative to marriage. They promptly produced a literature of “counter-subversion” that sought to expose the free love threat and unite Americans against it.

Not surprisingly, the Oneida Community of Free Lovers became the target of intense criticism at about the same time that allusions to the Tribune free love conspiracy began to swirl through Recorder Hackett’s courtroom. Two days before the start of the McFarland trial, Isaac Reed, Jr., who later testified on behalf of the defense, published the first of four sensational articles on the

112. See id. at 62. John Ellis’ Free Love and Its Votaries: Or American Socialism Unmasked revealed concerns about women’s eagerness to partake of life in the Oneida Community of Free Lovers. “The women [in the Community] have given themselves over to ... debauchery, rarely making any effort to resist their fate,” he complained. JOHN ELLIS, FREE LOVE AND ITS VOTARIES; OR AMERICAN SOCIALISM UNMASKED 177-78 (New York, AMS Press 1971) (1870). “On the contrary, the most of them, having their appetites whetted by the life they lead, enjoy the variety at their command, and would seriously object to any interruption in the [sexual] rotation system.” Id.
113. See id. The idea of a literature of “counter-subversion” is Davis’. See DAVIS, supra note 110, at 137.
114. The early decades of the nineteenth century witnessed the rise of a number of visionary and millenial communities that called upon their followers to practice free love, feeding the fears of the orthodox. John Humphrey Noyes’ “Perfectionist” Colony attracted the most attention because it survived for thirty years, despite frequent criticism by outsiders. See MILTON RUGOFF, AMERICA’S GILDED AGE: INTIMATE PORTRAITS FROM AN ERA OF EXTRAVAGANCE AND CHANGE, 1850-1890, at 218 (1989). In 1837, Noyes wrote that “[i]n a holy community there is no more reason why sexual intercourse should be restrained by law than why eating and drinking should be.” Id. at 218-19. He founded one such a community in Vermont in 1841, and transferred it to Oneida, New York in 1848. See id. at 219. For discussions of the Oneida Community, see LAWRENCE FOSTER, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 72-122 (1981); FREE LOVE IN AMERICA, supra note 100, at 485-546; SEARS, supra note 105, at 3-4. For a discussion of other free love colonies, including Modern Times and Brook Farm, see STOEHR, supra note 100, at 15-23.
115. See TRIAL, supra note 1, at 167-69.
Oneida Community in *Frank Leslie’s Illustrated Newspaper.* Reed began his first article by lamenting that “so far as the Oneida Community of Free Lovers are concerned, it would seem to be true that ‘by their fruits ye shall not know them.’” Although the practices of the Community “appear to the eye of the general and outside observer to be . . . praiseworthy,” he wrote, “their professed theories are certainly and outrageously terrible.”

This concern over the divergence between an unremarkable outward appearance and a corrupt and destructive reality within the Oneida Community saturated Reed’s articles, the last of which appeared next to a lengthy story on the McFarland trial. In this last article, Reed set out to “unveil . . . the terrible mysteries of depravity which [lay] latent under the vague title of ‘Free Love.’” He condemned the doctrines of the Oneida Community as a “verbal sham” and as “gross licentiousness, with a thin cloak of verbiage.” For Reed, the Oneida Community was dangerously adept in the art of concealment:

[I]t cannot be too carefully or constantly borne in mind, that the writers of the Oneida Community are adepts in the use of words, and are the very apostles of Talleyrand’s gospel: ‘That language was given to us to conceal our ideas.’

According to Reed, the Community used words to conceal all sorts of horrors. In reality:

[H]ome [was] but the mockery of a name; sentiment, a quality that could have no existence; Love—true love—the love of one true heart, an ideal that could never be realized; a wedding, but an outrage; the holy state of wedlock, but a fearful farce; and maternity—sacred maternity—. . . but a sounding brass and tinkling cymbal, amid the damnable discords of ‘Free Love.’

This article fit neatly beside the newspaper’s coverage of the McFarland trial. Reed’s anxieties about the depravities of free love and the corruption of the holy state of wedlock echoed sentiments that defense lawyers daily expressed in the

117. *Id.*
118. *Id.*
119. Also in April 1870, the outspoken free lover Victoria Claflin Woodhull issued her “First Pronunciamento,” declaring her candidacy for President. The first issue of *Woodhull & Claflin’s Weekly* appeared four days after the end of the trial. See Rugoff, *supra* note 114, at 221-22.
120. Reed, *supra* note 92, at 86.
121. *Id.* at 87.
122. *Id.*
123. *Id.*
courtroom. Most important, however, the article echoed defense lawyers’
denunciation of free lovers’ embrace of deception and hypocrisy. According to
both Reed and Spencer, deceit went hand in hand with free love—a frightening
combination in a society steeped in sentimental ideas about marriage, fidelity,
and sincerity. The “sentimental typology of conduct,” according to one historian,
proclaimed that “all aspects of manner and appearance were visible outward
signs of inner moral qualities.”124 Middle-class Americans were instructed to
counter hypocrisy and to cultivate a “perfectly transparent character.”125 Free
lovers were dangerous, Spencer and Reed both emphasized, because they
threatened to undermine these instructions.

Spencer’s attack on free love, however, differed from Reed’s in an important
respect. Reed portrayed domestic life in the Oneida Community as the antithesis
of domestic life in the rest of the country. Like other literature of counter-
subversion, his exposé sought to allay fears about the instability of marriage and
the infidelity of women by projecting Americans’ worst nightmares onto a
seemingly marginalized and deviant community.126 His articles enabled
Americans proudly to hold up the sacred institution of marriage in stark contrast
to the “damnable doctrines” and “peculiar domestic practices”127 of Oneida free
lovers; his exposé enabled Americans smugly to distance themselves from the
spectacle of wives making a mockery of motherhood and marriage.

The defense’s narrative, by contrast, collapsed the distinctions between
domestic life inside and outside Oneida. According to defense lawyers, the
conspiracy that ruined McFarland was based in the offices of the seemingly
reputable Tribune; its key participant was an outwardly devoted wife and mother.
The defense’s narrative inevitably heightened anxieties about the stability of
marriage and the fidelity of women. Defense lawyers highlighted, at the same
time that they denounced, the growing number of free lovers in New York City;

124. KAREN HALTUNNEN, CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS
CULTURE IN AMERICA, 1830-1870, at 40 (1982).
125. Id. at 189.
126. For a discussion of this process in other literature by social opponents of the Oneida Community,
see KERN, supra note 111, at 53. For an analysis of this process in literature by social opponents of
Mormonism, Masonry, and Catholicism, see DAVIS, supra note 110, at 150-53.
Reed quoted one of the “leading women of the Community” as calling for “‘freedom from slavery,
freedom from inequality, ... and freedom from marriage.’” Isaac Reed, Jr., The Oneida Community of Free
Lovers: Second Article, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, Apr. 9, 1870, at 55. This woman’s views
echoed demands that had long been made by women’s rights activists. The analogy between marriage
and slavery was common in the women’s rights literature. In 1837, Sarah Grimké had written: “The various laws
which I have transcribed, leave women very little more liberty, or power, in some respects, than the slave.” Letter of Sarah Grimké (Sept. 6, 1837), in SARAH M. GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN 74, 82 (Boston, Isaac Knapp 1838). In 1852, Elizabeth Cady Stanton queried whether “the wives of all drunkards know that they have no master but God—that they are their own, and not
the property of man—that woman is endowed with the same wants and capacities, and entitled to the same
rights and privileges with him, they would not long wear the yoke of slavery . . . .” Letter of Elizabeth Cady
Stanton (Feb. 1852), quoted in Elizabeth B. Clark, Matrimonial Bonds: Slavery and Divorce in Nineteenth-
127. Reed, supra note 116, at 38.
they called attention to, while at the same time criticized, the secret passions burning beneath the calm face of every husband’s guardian angel.

2. **Stepping Outside the “Family Circle”: The “Temptations... of the Stage”**

Concerns about wifely infidelity were intimately connected to fears of female theatricality in the defense’s courtroom story. According to defense lawyers, the free love conspiracy destroyed McFarland’s marriage by encouraging Abby to pursue an acting career. Defense lawyers claimed that an engagement at the theater not only made Abby financially independent of her husband, but also fostered her vanity, greed, and social ambition. And, most important, they argued, the theater encouraged her to embrace deception and hypocrisy—as well as sensuality and free love. Their argument ultimately exploited anxieties about women’s growing appearances on the public stage.

According to the defense, McFarland perceived the tensions between the world of the theater and that of the home, and opposed Abby’s decision to act in public. “I did not wish [Abby] to leave the sanctity of her family,” he confided to one friend. Yet Mrs. Calhoun encouraged Abby to pursue a dramatic career, even though she knew that McFarland disapproved of the theatrical profession. And Abby eagerly made her debut as Nerissa in Edwin Booth’s 1867 revival of *The Merchant of Venice*, in defiance of McFarland’s clear wishes.

129. See id. at 93.
130. See id. at 29.
131. Ginzberg notes that theater imagery appeared often in critics’ attacks on Fanny Wright. For example, the *Commercial Advertiser* denounced Wright as a “bold blasphemer, and a voluptuous priestess of licentiousness...” who... would break down all the barriers to virtue, and reduce the world to one grand theatre of vice and sensuality in its most loathsome form.” N.Y. COMMERCIAL ADVERTISER, Nov. 7, 1829, quoted in *Ginzberg*, supra note 100, at 204. In 1828, the *Christian Advocate and Journal* wrote of the freethinking Free Press Association’s meetings:

> [The] hearts of your readers will shudder, when they learn that fifty or sixty ladies have so far divested themselves of the fear of God, the respect for their characters, and the jewel which alone adorns their sex, as to attend these lectures, where... members of this club respond by a clap of the hands, stamping with their feet, and a loud laugh such as may be heard at a theatre, and learned at the scenes of drunken profanity, and midnight reveling... 

*CHRISTIAN ADVOCATE AND JOURNAL*, June 16, 1828, quoted in *Ginzberg*, supra note 100, at 213.

132. **TRIAL**, supra note 1, at 169.
133. See **TRIAL**, supra note 1, at 29. For discussions of Abby’s theatrical career, see Madeleine B. Stern, *Trial By Gotham 1870: The Career of Abby Sage Richardson*, 28 N.Y. HIST. 271, 274 (1947); 8 GEORGE C.D. ODELL, ANNALS OF THE NEW YORK STAGE 146-50 (1936). Defense lawyers recounted, in detail, the conspiracy’s efforts to get Abby onto the stage. Elbridge Gerry read aloud seven letters in which Mrs. Calhoun repeatedly urged Abby to take up acting. On June 24, 1866, Mrs. Calhoun wrote that she hoped that Abby would “study toward the stage, if not for the stage, that summer.” **TRIAL**, supra note 1, at 65. Two months later, Mrs. Calhoun reiterated her hope that Abby’s “desire and purpose for the stage [had] not faded or been trampled out by the hard hoof of necessity.” Id. at 66. In September, Mrs. Calhoun wrote again, triumphantly proclaiming that she had gotten Abby an engagement at the Winter Garden Theater to perform with the famous Edwin Booth. See id. at 68. Mrs. Calhoun wrote: “My darling, I could not be happier if I had discovered a gold mine. Maybe we have. Think of playing with Booth. I believe I should die of that rose in aromatic pain if such a privilege were mine.” Id. According to Abby, McFarland obtained these, and many other private letters, when he broke into her trunk in March, 1867, after he shot Albert the first time. See **TRIAL**, supra note 1, at app. 236.
The defense objected to Abby's theatrical career first and foremost because it exposed her to sexual temptation and encouraged her to embrace deception. Spencer explained that Abby's illicit relationship with Albert literally revolved around the theater:

This man Richardson used to go . . . at night to the theatre, and get her. At first Mrs. Calhoun went. Her husband opposed all this, but she had her own way. At first, I say, Mrs. Calhoun used to go for her, but by and by it is discovered that it is Richardson now that comes for her—in a carriage or on foot as the weather permits—and between the leaving of the theatre and the arrival home much time elapses.134

Spencer also suggested that Abby learned about marital infidelity while on stage, playing parts such as that of Marion de L'Orine, the mistress of the Duke of Richelieu.135

The defense ultimately questioned the wisdom of giving women acting lessons. Abby's drama instructor, George Vandenhoff, explained in the preface to his 1845 treatise on elocation, A Plain System of Elocution: Or, Logical Musical Reading and Declaration, that dramatic reading was an "accomplishment . . . peculiarly feminine" and a "distinctive mark of high breeding and good education."136 This type of oratory, he insisted, sharply contrasted with diplomatic speech which, he acknowledged, quoting "the most wily of modern diplomatists," could easily be used "to conceal [one's] thoughts."137 The defense, however, revealed that there was no clear line between the two types of rhetorical skills. Abby's dramatic lessons taught her the art of disguise—taught her to use words to conceal her thoughts, the defense argued, just like the free lovers in Oneida, New York.

Defense lawyers criticized Abby for seeking honors and triumphs in this most dangerous of public spaces. Spencer complained:

[Abby] dreams of triumphs upon the stage and in society, and the world inside of her family circles is not sufficient for her. She moves in circles now to which this Richardson introduced her, among people of prominence. . . . She has placed before her as temptations the honors of the stage and its wealth—the honors of the society of great men.138

134. TRIAL, supra note 1, at 29.
135. See id.
137. VANDENHOFF, supra note 136, at 9.
138. TRIAL, supra note 1, at 29-30.
The defense argued that Abby should have remained loyal to McFarland, even though he might have failed in his duties as a husband. "Woman never better fulfills her office as a guardian angel," Spencer explained, "than when she is watching over an erring and failing husband. It is in that hour, when he first begins to totter, that her influence should be exerted to the uttermost, and her arms be wound round him in a tighter and more affectionate embrace to win him back."\(^{139}\) Abby’s commitment to the stage and lack of commitment to her family, the defense claimed, lay at the heart of the tragedy.\(^{140}\)

The defense’s argument played into profound anxieties about the theater that existed well into the 1860s.\(^{141}\) For if middle-class Americans came to admire theatricality and social performance in the second half of the nineteenth century, their admiration was at best cautious, fraught with fears about the freedoms that the theatrical life afforded women.\(^{142}\) Opponents of the theater had long been asserting that the theater’s boisterous audiences and immoral plays undermined family life.\(^{143}\) The “domestic” and the “theatrical,” in the words of Isaac Reed, were “two elements generally supposed to be irreconcilable.”\(^{144}\) While the ideal home sublimated sensuality, infidelity, and independence, critics claimed, the theater openly displayed these excesses.

The life of the actress, however, worried critics most. According to one alarmed contemporary, “[a]ctresses [were] . . . more exposed to temptation than

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\(^{139}\) Id. at 30.

\(^{140}\) At least one anonymous female editorialist concurred that Abby’s renunciation of her role as guardian angel of the household caused the tragedy: “[S]ince the Lord Almighty has made woman the very keystone of home’s arch, . . . the wider wreck inevitably ensues from her displacement . . . .” A Woman’s Comments on the McFarland Case, THE NATION, Dec. 16, 1869, at 535.

\(^{141}\) See CLAUDIA D. JOHNSON, AMERICAN ACTRESS: PERSPECTIVE ON THE NINETEENTH CENTURY 11 (1984). Ironically, in 1841, Horace Greeley himself explained that the Tribune did not seek advertisements from theaters, because: [W]e consider the Stage, as it is, rather an injury than a benefit to the community—vicious, licentious, degrading, demoralizing . . . . We say nothing of the notorious fact that a large proportion of those connected with the Stage are libertines or courtezans—a proportion much larger . . . than can be found in any other tolerated profession.

\(^{142}\) WILLIAM GROSVENOR BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM 217 (1927).

\(^{143}\) Id. at 153-90.

\(^{144}\) Laura Korobkin notes that lingering concerns over hypocrisy existed late into the nineteenth century, but does not connect them specifically to women. See Korobkin, supra note 65, at 25-26.

\(^{145}\) Berenson, supra note 78, at 92.
any other class of persons." Rather than embrace meekness and modesty, the actress eagerly exhibited herself on the public stage; frequently, she even played male roles. Rather than depend on her husband to provide for all of her needs, the actress earned money to support herself and, sometimes, to support the rest of her household. Critics worried that the theater encouraged the actress to renounce the angelic role that she was supposed to play in the domestic sphere. The defense's portrait of Abby's theatrical career both drew upon and fueled these fears.

3. *Shaking Off the "Shackles" of Marriage: Deception and Divorce*

If the professional actress threatened social order by performing on the public stage, she posed an even greater threat by acting at home. The theater was most dangerous, the defense suggested, because it could not contain women's dramatic talent within its imaginary world; female talent spilled over into private, domestic space. Abby's behavior, in the defense's construct, confirmed this logic of concealment and hypocrisy: while McFarland trusted her assertions of virtue, she masked infidelity, vanity, and greed. Defense lawyers emphasized the contrast between McFarland's image of Abby—his "pure and chaste" idol—and the real "wicked woman" who actively sought her own downfall.

To give the jurors a sense of Abby's secret infidelity, the defense read aloud numerous letters that she exchanged with Lu Calhoun and Charlotte Sinclair during the period leading up to her separation from McFarland. Women's

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146. TRAGEDY, supra note 1, at 19.
148. See JOHNSON, supra note 141, at 59; FAYE E. DUDDEN, WOMEN IN THE AMERICAN THEATRE: ACTRESSES AND AUDENCES, 1790-1870, at 92-93 (1994). The actor George Vandenhoff, who gave Abby "dramatic elocution" lessons, TRIAL, supra note 1, at 127, 136, conveyed great scorn for women who assumed male roles: "A woman in attempting it, 'unsexes' herself to no purpose. . . . She denaturalizes the situations, and sets up a monstrous anomaly. . . . There should be a law against such perversions." GEORGE VANDENHOFF, LEAVES FROM AN ACTOR'S NOTE-BOOK 463 (New York, D. Appleton 1860), quoted in JOHNSON, supra note 141, at 59. Although Abby never played a male role, she did play the role of Nerissa in Shakespeare's *The Merchant of Venice*. See TRIAL, supra note 1, at 29. Nerissa disguises herself as a male law clerk in the famous trial scene at the end of the play. See WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.
149. See JOHNSON, supra note 141, at 52-58.
150. McFarland refused to believe that Abby would have willingly deceived him. See TRIAL, supra note 1, at 126. McFarland blamed the tragedy entirely on the free love conspiracy. According to McFarland's nephew, McFarland believed that Abby would have returned to him if it were not for her advisers; McFarland said that Abby was a "good woman except when she got in the society of bad people." Id. at 83.
151. Id. at 126.
152. Id. at 175, 176, 202.
letter writing was in one sense the essence of private domestic activity. Mastery of the art of letter writing had become one of the polite accomplishments of the elegant female and a central aspect of the “cult of sincerity.” Etiquette manuals offered guidelines for sincere expression in letter writing, even providing pre-packaged samples of statements of sincere and heartfelt sentiment.

The defense’s strategy, however, highlighted the dangerous aspects of private correspondence between women. Instead of shoring up a private, domestic role, the letters helped undermine Abby’s marriage. The letters may have expressed sentimental effusions and displays of emotion, yet they inverted the proper focus of female lettercraft. Rather than write letters that reinforced the family, Abby and her friends plotted her divorce.

The defense was careful to exclude from the record all letters that cast McFarland in a poor light. For example, in a letter dated January 2, 1867, Abby had confided her troubles in Lu. She had described McFarland’s fierce temper and habitual drunkenness, and had anxiously sought her friend’s advice. “I have spent hours and nights in scenes before which tragedy grows pale,” she had mournfully confessed to Lu. “I don’t know what to do—what course to take. I want to be advised.” The prosecution attempted to introduce this letter into evidence to show “why that unhappy, long-suffering, deeply injured woman... reached the culminating point when it was necessary for her own safety to escape from... her husband.”

Defense lawyers swiftly invoked the marital evidentiary privilege, which prevented either spouse from giving testimony against the other in any legal proceeding. Lawyers for the prosecution did not attempt to prove that Abby was no longer McFarland’s wife, as New York was one of four states that refused to recognize out-of-state ex parte divorce decrees. Recorder Hackett ruled in

155. HERBERT ROSS BROWN, THE SENTIMENTAL NOVEL IN AMERICA, 1789-1860, at 52 (1940); see also HALTTUNEN, supra note 124, at 118.
156. See HALTTUNEN, supra note 124, at 118-19.
157. TRIAL, supra note 1, at app. 232.
158. Id.
159. Id. at 131.
160. See id. at 131-32, 149. Simon Greenleaf explained the public policy basis for the privilege in his 1844 evidence treatise: “It is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles, which protect the sanctities of that relation, would be to destroy the best solace of human existence.” SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 334 (1844).
161. See Neal R. Feigenson, Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century, 34 AM. J. LEGAL HIST. 119, 129 (1990). In New York, maintaining the integrity of strict domestic divorce laws required a severe policy of refusing extraterritorial effect to decrees granted elsewhere and for
Public interest in the McFarland-Richardson trial reached a peak when Lu Calhoun took the witness stand. Branded a "procuress" and a "conspirator" by Charles Spencer in his opening address for the defense, Mrs. Calhoun denied having encouraged an improper relationship to develop between Abby and Albert. When questioned on cross-examination about the intercepted letter, she calmly replied that it was "susceptible of different constructions."

*Frank Leslie's Illustrated Newspaper, May 21 1870.*
*Courtesy, American Antiquarian Society.*

favor of the defense, explaining that he could not permit the statement of a wife to be introduced against her husband. The defense was thus able to exclude all of Abby’s letters—and with them, Abby’s side of the story.

The defense focused attention, instead, on Lu’s letters urging Abby to leave her husband:

My precious, you *must* make your decision. It is profanation for you to stay with that man. You *shall* not . . . You cannot work, you cannot advance, you can make certain of no future for yourself and the children while you stay . . . My darling, you will leave him scatheless . . . you can shake off the shackles, and work with free hands . . .

causes not recognized at home. *See id.* at 129-30. The New York Court of Appeals explained that a contrary policy "would [have] allow[ed] any other state substantially to make laws for this State; to regulate not only our domestic relations of husband and wife, but almost every other right." *Id.* at 130 (quoting Hoffman v. Hoffman, 46 N.Y. 30, 34 (1871)).

162. *See Trial,* supra note 1, at 132; *see also id.* at 149 ("The evidence is that this lady was married to Mr. McFarland. I have no knowledge of anything else . . . I have no knowledge further than the presumption that she still continues to be his wife.").

163. *Id.* at 62.
The defense also read a letter from Abby's friend, Charlotte Sinclair, wife of Tribune publisher, Samuel Sinclair. Charlotte's letter echoed Lu's sentiments:

Do not for one moment longer entertain that morbid idea that you are responsible for the life of one who is sure to break you down completely, and ruin perhaps your children if they continue to live with him. It will kill you to live this way, and you must not do it . . . .

The defense claimed that these letters embodied some of the most threatening aspects of the conspiracy: Lu and Charlotte spoke of Abby's marriage as enslavement and encouraged her to break free from her shackles, which interfered with her theatrical career. In short, they placed Abby's ambition above the demands of the marital tie.

According to defense lawyers, however, Lu's and Charlotte's letters were only a prelude to the most shocking epistle of all—the infamous intercepted letter, parts of which Graham strategically read at every opportunity that presented itself during the trial. In this letter, Albert told Abby:

I have not been waiting for you, darling, all these long years to wear haircloth and serve seven years now; I want you always. A hundred times a day my arms seem to stretch out toward you. I never seek my pillow without wanting to fold you to my heart, for a good night kiss and blessing, and the few months before you can openly be mine will be long enough at best . . . . Ours I believe to be no love of a noonday hour, but for all time. . . . My darling, you are all I would have you, exactly what I would have you . . . and my tired heart finds in you infinite rest, and richness, and sweetness. Good night my love, my own, my wife.

Burn this—will you not?

This letter, defense lawyers argued, instantly maddened McFarland. Yet, the free love conspiracy did not stop there. It not only enticed Abby away from McFarland, but also helped her procure a "sham" Indiana divorce—"that blasphemous ceremony," as Graham termed it—and presided over Richardson's deathbed marriage to Abby—another "inhuman blasphemous assembly," according to Graham.

164. Id. at 61.
165. The New York Times editorialized: "When McFarland discovered this batch of letters in his wife's trunk, together with a portrait of Richardson, is it any wonder that the conviction became settled in his mind that a conspiracy against him was actually in existence?" McFarland Acquitted, supra note 48, at 4.
166. TRIAL, supra note 1, at 43; see also id. at 135-36, 152, 153, 204.
167. See id. at 110.
168. Id. at 23.
169. Id. at 205. For other descriptions of the marriage as a "blasphemous" ceremony, see id. at 22, 107. Critics similarly labeled Fanny Wright a blasphemer. See Ginzberg, supra note 100, at 204-09. For a discussion of the conflation of religious and sexual infidelity in nineteenth-century blasphemy law, see Sarah
In a society that trumpeted the marriage contract as “the most important of all human transactions” and “the very basis of the whole fabric of civilized society,” divorce was, by definition, a danger. Antebellum Americans had tolerated few divorces, but by the late 1860s, divorce mills in Ohio, Indiana, Utah, and Nevada challenged the claim that marriage was permanent. Newspaper stories reflected growing anxiety about the stability of the sacred institution of marriage. One journalist wondered whether the startling statistics of divorce in Ohio made it “almost a farce to speak in [that state] of the ‘marriage tie.’” A chorus of critics warned of the slippery slope from divorce to free love. The defense’s story of Abby’s divorce highlighted the inroads that free lovers had already made in their plot to destroy the marital relation.

4. Observing the “Various Actors in This Drama”: The Courtroom as Theater

Although the defense’s portrait of domestic life exploited, and surely heightened, anxieties about the infidelity of women and the instability of marriage, it nonetheless produced great excitement and sensation. The courtroom teemed with drama and sounded with laughter and applause. Defense lawyers, in many ways, made a day spent at court seem like a day spent at the theater.


170. BISHOP, supra note 40, bk. II, ch. III, § 32.


172. See BLAKE, supra note 40, at 116-29; DEGLER, supra note 59, at 144-77; PHILLIPS, supra note 171, at 461-73; RICHARD WIRES, THE DIVORCE ISSUE AND REFORM IN NINETEENTH-CENTURY INDIANA (1967).

173. FRANK LESLIE'S ILLUSTRATED NEWSPAPER, May 14, 1870, at 130.

174. Religious leaders had been articulating this concern for some time. In 1858, Reverend Henry Hutchens had preached:

Some persons have pleaded the law of convenience, saying, 'If a man has been deserted by his wife, or he has had occasion to put her away, it is not convenient for him to remain without a wife.'—Convenience, indeed! Is this to become a law of action in the Church? Then throw wide open the doors and let in heathenism, mormonism and free-loveism. . . . Free-loveism is only another form of supposed convenience. Once admit the doctrine of convenience, and there is no evil that may not find a sanctuary, even in the church . . .

MARRIAGE AND DIVORCE: SERMON BY REV. HENRY HUTCHENS, PREACHED AT THE FIRST CONGREGATIONAL CHURCH, BARABOO, WISCONSIN 12 (Baraboo, Kellogg & Perkins 1858). Ironically, Albert Richardson’s friend and editor, Horace Greeley, had labeled Indiana a “paradise of free-lovers” ten years earlier in an extended debate with Robert Dale Owen published in the Tribune:

The paradise of free-lovers is the State of Indiana, where the lax principles of Robert Dale Owen and the utter want of principle of John Pettit (leading revisers of the laws), combined to establish, some years since, a state of law which enables men or women to get unmarried nearly at pleasure.


175. TRIAL, supra note 1, at 29.

176. See id. at 90, 101, 162.

177. Writing in 1947, Madeleine Stern remarked upon the dramatic nature of the trial: The women seemed prepared for a grand entertainment instead of a solemn trial for murder, and indeed there was much to entertain a dramatically minded audience in the scene that little Percy
Their sensational performances were particularly exciting to the large number of women who sat in the audience.\footnote{178} Ironically, defense lawyers exposed these female spectators to temptation, deception, and theatricality at the same time that they denounced the free love conspiracy for exposing the same to Abby.

Spencer himself called attention to the analogy between the courtroom and the theater. In his opening address, he styled the trial a "drama,"\footnote{179} and referred to Abby and Lu as "actresses" in the "tragedy."\footnote{180} After describing the history of McFarland's enjoyable domestic life, Spencer told the jury: "[T]he curtain must now fall upon the first act in this tragedy. . . . You have seen the happy family circle. It is like one of those dramas where the main actors are happy in the first two or three acts, and then comes ruin and sorrow thereafter."\footnote{181} By encouraging spectators to think of the trial as a drama, defense lawyers undercut their own denunciation of the theater. They invited women to imagine themselves seated in a playhouse, even as they criticized Lu for exposing Abby to the world of the stage.

Defense lawyers, moreover, exposed women to a particularly subversive drama. Their tragedy was filled with deception, hypocrisy, temptation, free love, and divorce. In the public theater of the courtroom, ladies heard Graham read Richardson's bold declaration of love for Abby,\footnote{182} and listened to Spencer's meditations on the inconstancy of women.\footnote{183} They heard Gerry read Lu's letter that described Abby's marriage as enslavement,\footnote{184} and watched Abby's mother proudly testify that she saw "no hurt" in Abby's decision to go to Indiana to

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\footnote{178}{One newspaper reported: The ladies were greatly incommoded, the gentlemen apparently [sic] considering that a Court-room was no place for women . . . resolutely refused to give up their dearly-bought seats to even the dearest of the dear ones who had thrust themselves forward into notoriety at this juncture. Consequently many of the ladies had to stand. During the day's proceedings one of the ladies, a little bolder than her sisters, seemingly resolved to obtain even an apology for a seat, climbed upon the sill of one of the windows, and there maintained an uncomfortable position until a gentleman surrendered his chair. (The McFarland Trial: An Unprecedented Forensic Display, N.Y. TIMES, May 7, 1870, at 1.)}

\footnote{179}{TRIAL, supra note 1, at 28.}
\footnote{180}{Id. at 28, 29.}
\footnote{181}{Id. at 28.}
\footnote{182}{See id. at 43, 135-36, 152, 153, 204.}
\footnote{183}{See id. at 30.}
\footnote{184}{See id. at 61-62.}
procure a divorce. The drama that unfolded within the courtroom, in short, exposed female spectators to ideas that defense lawyers most feared.

Significantly, although defense lawyers criticized Abby and Lu for engaging in transgressive behavior, they did not hold up any other women as models of female virtue. Female spectators never heard stories of women who resisted the free love conspiracy. Defense lawyers, instead, enabled the women in the audience vicariously to experience Abby’s and Lu’s tantalizingly forbidden activities. As a result, some spectators began to perceive that their own domestically defined existence was dull compared to that of the actresses in the McFarland drama. The editor of one trial narrative readily confessed his fear that female spectators would “follow Mrs. McFarland’s example, and leave their husbands” upon the conclusion of the trial. By portraying woman as naturally deceptive and unfaithful, and by creating an atmosphere that excited and emboldened female observers, defense lawyers, in the end, contributed to the subversion of domesticity that they bemoaned.

B. “Tears, Bitter Tears”: Manliness, Madness, and Murder

If defense lawyers filled the courtroom with sensation and excitement, they also filled it with sympathy and tears. The tragedy lay in McFarland’s response to Abby’s infidelity. According to defense lawyers, McFarland became insane with grief at the thought of his wife’s affair with Richardson. McFarland lacked

185. See id. at 142.
186. Spencer even unwittingly revealed the extent to which he had played a part in the drama in his capacity as defense counsel. Shortly after denouncing Lu Calhoun as a “plotter” and “procuress” in his opening address, he published an apology. A journalist for Frank Leslie’s Illustrated Newspaper explained in a front page article:

We have recently had the extraordinary spectacle of a lawyer indulging in the most astounding defamations of a woman, applying to her the vilest of epithets, in the court-house, and yet ingeniously informing us, in a public letter, that, as a man, he did not believe a word of what he said, but that his abuse and dirty insinuations were made professionally, and in the interest of his client!

Professional Duties, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, May 14, 1870, at 130. Spencer’s colleagues were horrified by his acknowledgment of the divergence between his personal and professional identities. They knew that his admission of hypocrisy was fatal to his credibility. Spencer published his retraction “much to the chagrin and astonishment of [Graham and Gerry].” TRIAL, supra note 1, at app. 224-25. On “the strong expression of their personal and professional indignation, he retired from the case.” Id.

187. For a discussion of the ways in which literature of counter-subversion served the purpose of vicariously fulfilling repressed desires, see DAVIS, supra note 110, at 151. For a similar discussion of the sensational and subversive aspects of moral reform literature in antebellum America, see REYNOLDS, supra note 66, at 54-91.
188. See TRAGEDY, supra note 1, at 77.
189. Id. Writers had long been expressing concern that criminal trials were negatively affecting women who observed and read about them. In 1836, Nathaniel Hawthorne wrote, “There is evil in every human heart which may remain latent, through the whole of life; but circumstances may rouse it into activity.” NATHANIEL HAWTHORNE, THE AMERICAN NOTEBOOKS 12 (1932), quoted in REYNOLDS, supra note 66, at 178. To illustrate this idea, Hawthorne depicted a woman who cheated on her husband out of mere whim. See id. “This appetite,” he wrote, “may be traced in the popularity of criminal trials.” Id.
190. In noting the subversive nature of the defense’s courtroom drama, I mean to question Robert Griswold’s claim that the nineteenth-century courtroom was a “theater for the reaffirmation of basic cultural values.” Griswold, supra note 68, at 21.
191. TRIAL, supra note 1, at 49.
the ability to control his actions on that fatal day in the *Tribune* counting-room, the defense argued, and Abby and her co-conspirators were to blame. The more freedom and independence that Abby gained, the defense suggested, the more freedom of mind and action that McFarland lost.

Significantly, the defense's story of McFarland's insanity challenged popular ideas about appropriate behavior for middle-class men in the second half of the nineteenth century. Advice writers urged men to cultivate a strong, manly character by controlling their passions and impulses.192 Fathers taught their sons to restrain their tender feelings.193 Politicians mocked candidates who indulged in gentler virtues—candidates whom they identified with a feminine conception of life.194 Reason, too, was thought to be a male trait.195 Emotions, by contrast, were widely associated with women.196 The idea that sympathetic interaction was woman's natural calling gained credence, in large part, from the outpouring of sentimental literature by female writers.197 Women's sentimental fiction routinely relied on appeals to emotion to evoke pity for the weak and distressed.198

Defense lawyers in the McFarland trial, however, subverted these gender ideals by telling a sentimental story of uncontrollable male emotion. In this section, I explore the ways in which defense lawyers appropriated the tropes and strategies of sentimental literature in order to describe McFarland's insanity and to arouse compassion for him. I argue that the defense's portrait of McFarland's madness ultimately blurred gendered categories in nineteenth-century America.

192. See Bederman, supra note 59, at 11-12; Rotundo supra note 59, at 37-39.
194. See Griffen, supra note 59, at 192.
195. See Ginzberg, supra note 100, at 215. Ginzberg explains that reason "was defined as a male trait by virtue of the fact that women remained largely loyal to religion." Id. For an historical treatment of the maleness of reason in Western philosophical thought, see Genevieve Lloyd, THE MAN OF REASON: 'MALE' AND 'FEMALE' IN WESTERN PHILOSOPHY (1984).

Michael Grossberg argues that the law itself became a "masculine domain." Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in MEANINGS FOR MANHOOD, supra note 59, at 133, 134. Ann Douglas sets forth a similar argument regarding the gendered split between intellect and reason on the one hand, and feeling on the other. See Ann Douglas, The Feminization of American Culture 141-64, 234-37 (1977). She draws a sharp distinction between "men of intellect in their stores, counting-houses, and courtrooms," and women who wrote sentimental fiction. See id. at 204.

196. According to Edward Berenson, the nineteenth-century woman was associated with romantic excess and an overflow of passion. He argues that it was easier for lawyers to use the insanity defense to defend women than to defend men because lawyers could invoke a "romantic discourse... that indulged, even idealized, women ruled by their passions." Berenson, supra note 78, at 17. For a discussion of this strategy in the murder trial of Madame Caillaux, see id. at 89-132. For a discussion of female hysteria and female insanity in the Lizzie Borden murder trial, see Robertson, supra note 68, at 383-90.


1. "The Insane Man Is Overpowered": Sentimental Murder and Male Irresponsibility

In the defense’s story, McFarland did not shoot Richardson in order to avenge his manly honor. Rather, he fired the fatal shot because his emotions overcame his manly reason and restraint. In his opening address, Spencer promised to tell a “story of a humble birth, a struggling youth, a man who had been overtaken by sorrow and calamity brought on by the unholy, reckless, and lawless passion of a bold, bad libertine.” He described McFarland as a “long suffering man” who had assumed a wifely posture in the household, tending to and teaching his children while Abby ran out to the theater day and night.

According to Spencer:

[McFarland] was a sensitive man, with a mind cultivated, with mercurial impulses, easily excited, of an extremely nervous, delicate, mental organization, and far more liable to diseases of the mind than those who live but for the body. So tender and sensitive was his mental organization, that he was in truth incapable of grappling with and bearing the deep sorrows and misfortunes which awaited him.

Spencer carefully distinguished McFarland’s insanity from vengeful passion and manly anger. He repeatedly used language that evoked images of McFarland’s helplessness. For example, he explained in his opening address:

[T]he difference between a man under the influence of uncontrollable impulse originating in anger, and one under the influence of uncontrollable impulse originating in insanity is this; the angry man can bring reason to bear against the impulse, the insane man cannot. The insane man is overpowered.

According to Spencer, McFarland sent Richardson “into eternity . . . in a moment when the angry waves of a great sea, overwhelm[ed] [and] turned away his reason.”

The immediate cause of McFarland’s madness, defense lawyers explained, was the intercepted letter. “Although [McFarland] was bowed in grief before[hand],” Graham stated, “he was not demented until he read that infamous

199. TRIAL, supra note 1, at 32.
200. Id. at 25.
201. See id. at 28.
202. Id.
203. Id.
204. Id. at 25.
The overflow of emotion, triggered by his knowledge of Abby's infidelity, Graham insisted, caused McFarland's insanity. In order to establish that when McFarland shot Richardson—a full two years after he read the letter—he was still acting "under the influence of uncontrollable impulse[s] originating in insanity," the defense called several expert witnesses to the stand. Dr. Reuben Vance, Assistant Professor of Diseases of the Mind and Nervous System at Bellevue Hospital Medical College, testified that he had examined McFarland and had concluded that at the time of the shooting, McFarland was suffering from "congestion of the brain . . . due to long mental and emotional anxiety." Dr. Vance explained that "while not impairing consciousness, [insanity] prevents freedom of mind or action."

The defense also questioned the eminent Dr. William Hammond, former Surgeon-General of the United States Army, who stated "unequivocally that the prisoner was insane." After the trial, Dr. Hammond published his own Synopsis of the General Subject of Insanity—and Especially of Temporary Insanity or Morbid Impulse, As Applicable to the McFarland Case. In his Synopsis, Dr. Hammond explained that emotion could give rise to temporary insanity. He concluded that "from the full and decided evidence [presented at the trial], there [could] be no doubt . . . that for about two weeks prior [to the homicide] [McFarland's] state was such as to render him entirely irresponsible for his act."

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205. Id. at 110.
206. For the very different view that excessive masculinity came to define male insanity in late nineteenth-century America, see John Starrett Hughes, The Madness of Separate Spheres: Insanity and Masculinity in Victorian Alabama, in MEANINGS FOR MANHOOD, supra note 59, at 53, 56. Hughes argues that "Alabama's men . . . lived in peril when they performed to excess precisely what their society expected of them. In a sense, then, there was a risk in being 'too male'. . . . Men more than women . . . inhabited a dangerous sphere that demanded discipline and moderation." Id. He contends that "the quality of masculine derangement resulted not from crossing gender expectations, or from becoming 'feminine,' but from being masculine without discipline." Id at 60.
207. TRIAL, supra note 1, at 32.
208. Id. at 92.
209. Id.
210. Id. at 96. This testimony challenges Hartog's claim that "the insanity defense was posed . . . in . . . the McFarland [trial] . . . intermittently and in a manner that suggested the lawyers' own ambivalence about it." Hartog, supra note 67, at 83.
211. DR. WILLIAM A. HAMMOND, SYNOPSIS OF THE GENERAL SUBJECT OF INSANITY, AND ESPECIALLY OF TEMPORARY INSANITY OR MORBID IMPULSE, AS APPLICABLE TO THE MCFARLAND CASE, in TRIAL, supra note 1, at 6.
212. Id. at 7.
Lay witnesses echoed these experts' claims that McFarland's emotional response to Abby's infidelity triggered his insanity. Like Dr. Vance and Dr. Hammond, they noted that McFarland's madness took the form of quintessentially dangerous sentimental behavior. For, unlike Abby, McFarland manifested the perfectly sincere and transparent character that sentimental discourse demanded. He conveyed his innermost feelings and emotions to both friends and strangers, reciting his pathetic tale to almost anyone who would listen. "How often have I heard him in tones and language that would make a stone heart weep, tell of what [Abby] was, and then seen him bow his head when he spoke of what she became," Spencer mournfully recounted in his opening speech. One friend testified that he had never heard McFarland talk of anything but his wife and children, and that "after talking McFarland would turn his head to the wall and commence crying." Another witness confirmed that McFarland would "get into a monomaniacal state" that would culminate in tears whenever he talked about his family: "as he conversed, he would invariably cry." After learning that Abby had procured a divorce in Indiana, a third witness testified, McFarland acted "wild and distracted." A fourth witness reported that when he told McFarland of Abby's marriage to Albert, McFarland nearly fainted, wept, and flew into a frenzy. Through this testimony, defense lawyers portrayed McFarland as a sentimental victim of the free love conspiracy.

2. "As Sensitive and Emotional as a Girl": Weeping Lawyers and Sentimental Performances in the Late Nineteenth-Century Courtroom

In recounting McFarland's feelings and tears, defense lawyers drew extensively on the strategies of sentimental novelists, whose primary emotional goal was the creation of compassion. They appealed directly to the sympathy of the jurors and spectators, inviting them to identify with McFarland. In the

213. Id. at 34.
214. Id. at 49.
215. Id. at 60.
216. Id. at 84.
217. For a discussion of male crimes of passion in late nineteenth-century France, see Harris, supra note 78, at 285-312. Harris argues that one type of man who committed these crimes was the "romantic hero," who had artistic sensibilities, refined tastes and political sentiments. She emphasizes his tears. See id. at 304-12.
218. Tragedy, supra note 1, at 82.
219. See Fisher, supra note 198, at 105. Fisher explains that "the weak and the helpless within society gain by means of sentimental experience full representation through the central moral category of compassion." Id. at 95. He notes that the politically radical methodology of sentimentality is that it experiments with the extension of full and complete humanity to classes of figures from whom it has been socially withheld, such as the prisoner and the madman. See id. at 99. Sentimentalists valued true feelings over cold logic, sincerity over artful calculation, and feminine traits over masculine ones. According to Cohen, the shedding of tears—the visible manifestation of emotional sensitivity—was the "quintessential sentimental activity." Cohen, supra note 65, at 32; see also Halttunen, supra note 68, at 44.
220. Susan Staves has described similar strategies in eighteenth-century criminal conversation cases:
process, defense lawyers transformed themselves into sentimental victims and imbued the courtroom with displays of unrestrained emotion.

Graham early on invited jurors to identify with McFarland’s misery. He read Albert’s and Lu’s inflammatory letters over and over again, explaining: “We . . . ask the jury to construe them as their minds would construe them if they were brought into the bosom of their own families.”221 In his summation, Graham asked the jury “whether if their bosoms had been stuffed with this perilous stuff, which crowded the bosom of this unfortunate prisoner, they could have been anything else but deranged, if the man who had been the cause of all their trouble, had suddenly appeared before them.”222

McFarland’s lawyers, like sentimental novelists, also testified to their personal involvement in the story they told. As they described McFarland’s tearful frenzy, the defense lawyers became highly emotional. Their courtroom performances were saturated with melodrama. Graham became particularly agitated during his closing address, which lasted eight hours and extended over the course of two days.223 Calling attention to his own physical and emotional labor, he transformed himself into yet another sentimental victim. “I am satisfied the Court is worn out,” he stated, “and I know that I almost begin physically to sink under the ordeals through which I have passed.”224 One reporter noted that Graham’s ‘voice thrilled with irresistible pathos’ as he delivered his summation.225 The same reporter noted that notwithstanding Graham’s physical strength, he was “as sensitive and emotional as a girl.”226 In The Nation, an exasperated E.L. Godkin reflected upon Graham’s sentimental performance in less generous terms. Godkin criticized the trial as one of a growing number of

In these criminal conversation cases, there was often a very specific contest of interpretation, the plaintiff’s counsel trying to assimilate the facts to a tragic narrative and the defendant’s trying to force them into a comic one. [T]he plaintiff’s counsel’s narratives were eighteenth-century sentimental tragedies featuring the plaintiff as an innocent sufferer over whose pangs the spectators and, more important, the jury, were invited to weep. Indeed, according to both pamphlet and newspaper accounts, spectators and juries alike sometimes accepted these invitations. Susan Staves, Money for Honor: Damages for Criminal Conversation, 11 Studies in Eighteenth-Century Culture 279, 282-83 (1982).

221. TRIAL, supra note 1, at 151. Defense lawyers read portions of the intercepted letter at least five times during the trial. See supra note 166.

222. Id. at 180.

223. See SUMMING UP OF JOHN GRAHAM, ESQ. TO THE JURY ON THE PART OF THE DEFENCE, ON THE TRIAL OF DANIEL MACFARLAND, IN THE COURT OF GENERAL SESSIONS, AT THE CITY OF NEW YORK at app. 109 (New York, W.A. Townsend & Adams 1870). The New York Times reported that Graham’s speech drew to the courtroom “a larger audience than ha[d] ever before been packed within its walls”:

Judges of other Courts forsook, for the nonce, their benches, and adjourning, hastened to the trial chamber wherein Mr. Graham was announced to speak. The Bench and the Bar, almost without exception, made a grand holiday in order that they might listen to the eloquent words which were expected to flow from the lips of the ‘greatest criminal counsel of the present age.’ . . . [L]ong before the hour for opening, the Court-room was filled to overflowing. The ladies [too] were out in full force . . .

The McFarland Trial: An Unprecedented Forensic Display, supra note 178, at 1.

224. TRIAL, supra note 1, at 208.

225. Id.

226. Id. at 81.
"sentimental murder cases" in which "weeping lawyers" excited juries so as to get out of the juryman the most of his passions and prejudices.227

Defense lawyers ultimately presented a world in which emotion was no longer women's domain. Their own tears, like those in the story they told, demonstrated the instability of gendered categories; their sentimental performances unseated connections between manliness, reason, and law.228 At the same time that defense lawyers exposed the female spectators to stories of unfaithful and deceptive women, they thus exposed the male jurors and spectators to performances by sensitive and emotional men.


The courtroom scenes and journalistic reports surrounding McFarland's acquittal reveal that the verdict rested upon tensions in late nineteenth-century concepts of gender. These tensions were perhaps most apparent in Graham's closing address. Graham began by reminding the jury that the cause of McFarland's tragic ordeal was Abby's and Lu's rejection of sentimental womanliness:

What is it that makes a woman angelic? It is the tenderness of her heart. It is the readiness with which her eyes suffuses and drops the tear of pity and sympathy at human suffering. Here [Mrs. Calhoun exorcises] from her own bosom that celestial element of woman's character, and asks this wretched, erring woman also to expel it from the limits of her own breast.230

Graham denounced Abby as a "false, wicked, treacherous wife,"231 and reminded the jurors that she actively courted Richardson "because [McFarland]
was a beggar and [Richardson] a comparatively rich man.²³² He condemned her for abandoning a suffering and sensitive husband.

Graham, however, may have sensed the subversive nature of his tale, for he hedged the implication that women were naturally deceptive and unfaithful, and that men were naturally weepy and irrational. The key to the defense's trial strategy had been to emphasize the subversion of gendered categories: the defense evoked pity for McFarland by feminizing him, and aroused contempt for Abby by highlighting her rejection of sentimental domesticity. Despite Graham's emphasis on woman's deceitful and subversive nature throughout the trial, he spoke at the end of her "tender nature"—the "extreme delicacy and sensitiveness of her constitution [which] unfit her for those masculine contacts with the world which are adapted to the sturdier attributes of man."²³³ Graham evoked an image of the sentimental home:

Home is home though ever so lonely. The best home for us is that which receives us with the warmest heart and welcomes us with the most cordial hand . . . . [D]oes not [your] memory revert voluntarily to the abode of our earlier days, where, gathered around the family fireside, in which a correspondence of love and affection—father, mother, brothers, and sisters constituted a little community in themselves. . . . You are to reflect in your action the value you place upon your own hearths and the affection with which you regard your own firesides.²³⁴

Ironically, although Graham had repeatedly denounced women's deception and infidelity, he declared at the end of his speech: "The purity of woman is not to be questioned; her virtue is a tower of strength, it has proved itself able to withstand the strongest and most persistent assaults."²³⁵ He closed by invoking the "Divine edict that jealousy is the rage of a man, and that he will not, cannot, must not spare in the day of his vengeance."²³⁶

Graham's allusions to the purity of woman and the rage of man came upon the heels of his own detailed examination of Abby's deceit and McFarland's sensitivity. These allusions, however, were only the last in a series of ambivalences and contradictions that surfaced throughout the trial. Graham's invocation of his culture's gender and religious ideals, after his emphasis on the subversion of these very ideals, suggests that he felt at least some measure of discomfort with the unconventional stories that he had told over the course of the previous five weeks.

Graham's uneasiness notwithstanding, the sentimental scenes that defense lawyers enacted, and the emotional responses that they induced in judge, jury,

²³² Id. at 176.
²³³ Id. at 174.
²³⁴ Id. at 208-09.
²³⁵ Id. at 209.
²³⁶ Id.
Defense lawyers persuaded the jurors to accept their unsettling story of the McFarland-Richardson tragedy and to acquit Daniel McFarland.

Frank Leslie's Illustrated Newspaper. April 23, 1870.
Courtesy, American Antiquarian Society.

and spectators alike, reveal that nineteenth-century gendered categories were unstable. Reporters, in fact, participated in the blurring of these categories. Like McFarland’s lawyers, newspapers and trial pamphlets appropriated the language and tropes of sentimentalism to describe men’s reactions to the trial. The Trial reported that when the jury concluded its deliberations and returned to the courtroom on May 9, “[defense lawyer Elbridge] Gerry’s face was as pale as the leaf of a white camelia, and down the broad cheeks of the burly Graham tears coursed one another in rapid succession.” The New York Times noted that when the foreman pronounced the words, “Not Guilty,” “strong men [wept] like women.”

The defense ultimately won McFarland’s acquittal by exposing tensions in gender roles and by highlighting cracks in a supposedly sacred marital tie. The verdict itself depended upon the jurors’ recognition that women were capable of deception and infidelity, and that men were liable suddenly to lose control of

237. Trial, supra note 1, at 223.
their manly reason and restraint. The McFarland verdict could thus provide no easy closure.

III. VEILED VIRTUE: THE McFARLAND-RICHARDSON TRAGEDY REWRITTEN

No sooner did the jurors render their verdict than the popular press began rewriting the tragedy. Two fictional narratives, in particular, took up the task of defusing the threat presented by the defense's unsettling portrait of domestic life. These narratives appeared in a sensational trial pamphlet, titled *The Veiled Lady; or the Mysterious Witness in the McFarland Trial*.

The *Veiled Lady* opened with the remarks of Mr. W, a newspaper reporter, who reminded readers of the daily presence of a “Mysterious Veiled Lady” at the McFarland-Richardson trial. “Among the earliest spectators who applied at the court room door for admission on the first day of the trial,” he wrote, “was a lady of about medium height, fine figure, and very polished in her manner. Her dress was of deep mourning cut and arranged neatly but elegantly. The peculiarity about her was that she wore a very heavy veil in such a manner as to completely conceal her face from view.” Mr. W claimed to have secretly met this mysterious lady at an unnamed hotel in Union Square after the trial ended. According to Mr. W, the Veiled Lady asked him to publish two manuscripts, one being the Veiled Lady’s own “confession,” and the other being a narrative of her cousin, “a dear, sweet, good girl, who nearly fell a victim to a disciple of the

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239. An editorial in *Frank Leslie’s Illustrated Newspaper* proclaimed that the jury really issued a verdict of “it served him right.”

The people, higher than the law, say [McFarland] did right; the fellow ought to have been killed; [McFarland] but vindicated his manhood; he ought not to be punished, but, on the contrary, he should be honored for having the pluck to repay the wrong committed against him, by personal retributive justice.

*The Verdict Was, 'It Served Him Right,'* *Frank Leslie’s Illustrated Newspaper*, May 28, 1870, at 162. Yet defense lawyers’ sentimental story evidently bothered this anonymous critic. The editorial urged that the criminal law be amended to recognize the “necessities of our human natures,” so that defense lawyers could state, “My client was foully wronged, and in avenging himself did but justice,” instead of having to say that their client was insane, “thereby detracting from the prisoner all the credit which he deserved.”

240. For the view that a jury’s verdict provides “a significant moment of formal closure” in a trial, see Korobkin, supra note 65, at 28. Korobkin acknowledges, in a footnote, that a jury’s verdict “may well not be the last narrative in the case.” *Id.* at 11 n.31. However, she does not consider the ways in which popular literature interprets and rewrites lawyers’ courtroom narratives; rather, she limits her discussion of subsequent narratives to the “new set of oppositional stories” that will be told on appeal. *Id.* For other analyses suggesting that juries deliver verdicts that conform to cultural ideals, see *supra* note 68.

241. Scholars have noted that popular criminal trials of the nineteenth-century frequently provided the “raw material” for fiction. Lawrence Friedman has written that in the nineteenth century, “[v]iolent crimes were ... the crimes of mystery and drama; the crimes that provided raw material for novels, poems, and plays; the crimes par excellence, in the public conception of crime. Pamphlets, trial transcripts, last words of condemned men, were part of American popular culture.” *Friedman, supra note 68*, at 590. Daniel Cohen has observed that “[n]ewspapers, biographies, and novels borrowed materials from criminal proceedings ...” *Cohen, supra note 65*, at 191. See also *Davis, supra note 66*, at 179-209; Halttunen, *Divine Providence, supra note 65*, at 18; *Reynolds, supra note 66*, at 169-81, 249-58. For a twentieth-century novel based on the McFarland-Richardson case, see *Phyllis Gordon Demarest, The Naked Risk* (1954).

242. *The Veiled Lady, supra note 64*, at 3. For reports of the veiled lady’s presence at the trial, see *George Cooper, Lost Love: A True Story of Passion, Murder, and Justice in Old New York* 150 (1994); Stern, *supra note 133*, at 278.
pervicious social doctrine advocated by prominent literary men in New York and other parts of the Country. Both of these manuscripts appeared in The Veiled Lady.

In addition, The Veiled Lady contained a trial narrative, which briefly summarized the arguments and testimony from the McFarland trial as well as provided commentary on the key characters in the courtroom drama. The trial narrative skimped over the “dry and uninteresting” medical evidence in the case and, instead, highlighted the defense’s sensational story of Abby’s infidelity. It noted that this story was crucial to McFarland’s acquittal:

When McFarland’s Counsel arose to [to give his summation] ... a pin could have been heard in court so still was every thing. He alluded most feelingly to the prisoner’s position and spoke of his progress from childhood up the hill of life till he became wealthy and honored, during which time his wife loved him, or seemed to; then of the down hill path, how the prisoner became poor; how then the tempter Richardson with his great wealth and political influence made his appearance upon the scene; how Mrs. McFarland, forgetting her duty to love and honor her husband in his dark hours as well as when the sunshine of prosperity shone upon him, allowed herself to be led away by Richardson.—This was a powerful part of the address and made a tremendous impression in McFarland’s favor.

The anonymous editor of the trial narrative agreed with Graham’s analysis of the tragedy, insisting that Abby was “the cause of all [of McFarland’s] ... trouble.” The editor described her as “beautiful, in fact a splendid woman; intellectual, with a manner like a queen, and a voice like music itself; yet alas! lacking the stern and most admirable quality of a true hearted woman, the will and power to repulse the insidious advances of the seducer, who had marked her for his prey.”

In its fictional tales, however, The Veiled Lady portrayed two “true hearted” women. In this Part, I explore the ways in which these ostensibly female-authored tales reveled in graphic scenes depicting women’s exposure to deception and free love, but nonetheless sought to restore faith in woman’s

243. THE VEILED LADY, supra note 64, at 5.
244. Id. at 55.
245. Id. at 61. The differences in the ways that The Veiled Lady and The Trial reported the defense’s language are very revealing. For example, The Trial reported Spencer as stating: “[T]he demon that placed before [Abby] all these temptations, for which she has to pay the price of her soul is Richardson. He points out the way and leads her on; and yet with a careful, with a rare dissimulation he conceals all.” TRIAL, supra note 1, at 30 (emphasis added). The Veiled Lady, by contrast, emphasized Abby’s concealment. It reported Spencer as stating: “And yet, with a careful, with rare dissimulation she conceals all.” THE VEILED LADY, supra note 64, at 52 (emphasis added).
246. Id. at 49.
247. Id.
Illustrations of Abby appeared in *The Veiled Lady* just pages away from pictures of its virtuous fictional heroines, revealing the pamphlet's fascination with the wicked woman it so fiercely denounced.

*The Veiled Lady; or, the Mysterious Witness in the McFarland Trial.*
Astor, Lenox and Tilden Foundations.
ability to resist temptation. I argue that, although the pamphlet fed the public’s appetite for stories about wicked women, it also provided an alternative model of womanhood to which its female readers could aspire.

A. “Adherence to Virtue Under Such a Terrible Ordeal”. The History and Confession of the Mysterious Veiled Lady

“The Veiled Lady’s Confession” blended fact with fiction in a sensational narrative that rewrote the story of Abby’s life. Unlike the McFarland defense’s story, this narrative presented a woman’s perspective on the evils of divorce and free love, focusing on woman’s betrayal by man, rather than man’s betrayal by woman. A woman’s fierce denunciation of the hypocrisy and deception destroying New York society, it provided a telling contrast to the portrait of womanhood offered by the defense.

The Veiled Lady began her confession by warning that “[f]ree lovism is one of the most [frightful monsters] to be dreaded. The community at large has had a proof of it in the exposures resulting from the McFarland Trial in New York.” The Veiled Lady then told her own story of betrayal and deception. In this story, the Veiled Lady functioned as Abby’s thinly veiled double. Like Abby, she spent a summer vacationing at the White Mountains, where she encountered some of New York’s literary elite. One of the ladies whom she befriended, Mrs. B, had procured a divorce from her husband. The Veiled Lady warned her readers that Mrs. B—who stood for Lu Calhoun—was “one of those gaudy, fascinating, dangerous people, who, like beautiful but deadly reptiles, do so much damage in the world before their true characters can be discovered.”

While at the White Mountains, the Veiled Lady also became acquainted with Mr. F, a noted writer and journalist. After a short courtship, the Veiled Lady married Mr. F. However, he soon fell in love with another woman. Desiring to

248. There are reasons to doubt that the pamphlet was authored by a “mysterious veiled lady.” It may well have been written by a man. It seems likely that the anonymous author of The Richardson-McFarland Tragedy also wrote The Veiled Lady. The language in the two pamphlets bear striking similarities at several points. For example, The Tragedy writes of “wolves in sheep’s clothing,” TRAGEDY, supra note 1, at 19, and The Veiled Lady labels Hertzler a “wolf in lamb’s clothing.” THE VEILED LADY, supra note 64, at 33. The Tragedy emphasizes Abby’s “thick black veil,” and notes that a number of persons “interested in... a plot to alienate the affections of Mrs. McFarland from her husband... occupy high positions in social life, and [are] well known in the journalistic and literary circles of the city.” TRAGEDY, supra note 1, at 35. The Veiled Lady’s subtitle is “Startling Disclosures of Certain Persons in High Life.” THE VEILED LADY, supra note 64.

249. THE VEILED LADY, supra note 64, at 16.
250. Id. at 5.
251. Id. at 7.
"be rid of" the Veiled Lady, he "removed to the State of Indiana and obtained a full divorce from [her] . . . under the loose laws of that commonwealth." By rewriting the story so that Mr. F obtained the Indiana divorce, rather than his wife, the Veiled Lady demonstrated the ways in which liberal divorce laws worked to the disadvantage, rather than to the benefit, of women.

The Veiled Lady quickly became a victim yet again when Mrs. B induced her to join the Forty Firm Friends, a conspiratorial association of literary and political celebrities who exerted enormous influence and power through their control of the nation's most important journals. Through her membership in this society, the Veiled Lady became acquainted with Albert Richardson as well as with a married couple, Mr. and Mrs. T. After attending several of its meetings, however, the Veiled Lady discovered that the Forty Firm Friends endeavored "to destroy all reverence for virtue" by "set[ting] aside the observance of any [marriage] laws human or divine." Her discovery was made complete one evening, when Mr. T drew her close to him and urged her to "take [his wife's] . . . place for a while." When she recoiled from him in horror, he proudly told her that the Forty Firm Friends dedicated themselves to "throw[ing] off the conventionalities of ordinary hum-drum folks.

By contrast with the defense's sensational tale of Abby's willing participation in New York's free love conspiracy, "The Veiled Lady's Confession" presented a heroine who remained virtuous in the face of temptation. It portrayed the Veiled Lady as a source of hope and inspiration in a society steeped in deception and infidelity. Unlike Abby, the Veiled Lady resisted the free love conspiracy that held her in its grasp. Although she despaired at her ill fortune, she remained "determined never to submit to [her] persecutors." The Veiled Lady turned for guidance to the kindly Mrs. Elton, who admired the Veiled Lady's "adherence to virtue under such a terrible ordeal." Mrs. Elton gave her shelter, money, and support. Her mentorship served as a stark contrast to Lu Calhoun's corruption of Abby. Through their relationship, The Veiled Lady showed that, even in a world lacking in male protectors, women could rely on one another for the support and strength necessary to preserve their virtue in the face of wily libertines.
The Veiled Lady’s narrative was precisely the type of “confession” that the public desperately longed to hear from Abby. Rumors had circulated that the real “Mysterious Veiled Lady” who had daily attended the McFarland trial was either Abby or Lu Calhoun.261 “The Veiled Lady’s Confession,” however, dispelled the myth that either of these deceptive women had been hiding beneath the mysterious veil. The Veiled Lady explained that she had attended the McFarland trial because she had wanted to see whether Mr. or Mrs. T would testify on Richardson’s behalf; if either of them had taken the stand, she would have done so as well in order to show what these individuals were “in their true colors.”262

Significantly, according to Mr. W, the Veiled Lady appeared in the courtroom each day concealed under a heavy veil. “This veil,” Mr. W explained, “she never, during the whole trial, for even an instant removed, although during some days the room was exceedingly hot and uncomfortable."263 The veil—the pamphlet’s central symbol—was a popular metaphor in nineteenth-century sensational literature.264 Scholars have noted that writers frequently used the image of the veil to represent deceit and hypocrisy—to symbolize the divergence between one’s public and private lives.265 According to one scholar, the veil served literally to conceal a woman’s face and figuratively to obscure the “nature of [her] true self."266 Yet in The Veiled Lady, the veil functioned to erase woman’s public identity—to “bound[] her off from public and physical life” even as she entered it.267 The Veiled Lady transformed the veil into a symbol of modesty and chastity. Unlike Lu Calhoun, who boldly testified in open court, and unlike Abby, who eagerly exhibited herself on the public stage, the Veiled Lady entered

261. According to George Cooper, the “veiled lady was the subject of endless speculation, many supposing that she was the infamous femme fatale.” Cooper, supra note 242, at 150. When it became clear that the veiled lady was not Abby, Cooper writes, “it was speculated [that] she was Mrs. Calhoun.” Id. at 218. One trial transcript, in fact, reported that Abby wore a “thick black veil” at Albert’s funeral: “when Mrs. McFarland, leaning on the arm of Mr. Richardson’s brother, passed out of the hotel to take passage in the steamer for Boston, her face was enveloped in a thick black veil, that entirely hid her countenance.” TRAGEDY, supra note 1, at 35.

262. THE VEILED LADY, supra note 64, at 9.

263. Id. at 3.

264. For contemporary writings that used the veil metaphor to criticize the Oneida Community, see HUBBARD EASTMAN, NOYEISM UNVEILED: A HISTORY OF THE SECT SELF-STYLED PERFECTIONISTS (Brattleboro, Hubbard Eastman 1849); ELLIS, supra note 112. Ellis explained in his preface: “If it be true, as the leader of this party asserts . . . that thousands of persons in social life have adopted the principles and practices advocated by him, we can do them no greater service than to strip the veil from their hideous prophet, and show them what a foul blot upon our civilization is the institution over which he presides.” Id. at 12-13. The Trial made use of this veil metaphor, too. It described Abby as “[a] woman covered by the flimsy veil of an illegal divorce, unmindful of her husband’s happiness, of her husband’s reason, and of her own honor . . . .” Trial, supra note 1, at 33.

265. See Kern, supra note 111, at 37; REYNOLDS, supra note 66, at 86, 99-100, 123.

266. Kern, supra note 111, at 37.

The Veiled Lady contained the fictional confession of a mysterious woman who reportedly attended the McFarland-Richardson trial. A striking contrast to Abby’s “Statement and Affidavit,” the Veiled Lady’s confession was a scathing denunciation of deception, divorce, and free love.

*The Veiled Lady; or, the Mysterious Witness in the McFarland Trial.*
the public space of the courtroom hidden and self-effaced. The veil concealed neither deception nor hypocrisy; rather, it served to highlight her virtue.

The Veiled Lady, moreover, remained veiled in name as well as appearance long after the trial ended. When she eventually decided to make her confession public, she hid beneath a cloak of anonymity, yielding to Mr. W responsibility for publishing her narrative. In The Veiled Lady’s fictional account, the “Mysterious Veiled Lady” of the McFarland trial turned out to be a “true” woman.

B. “Ther’s Hardly a Tellin’ Wot a Body Is to B’lieve These Times”: False Friends and Free Love in Oneida, New York

“The Sad History” of the Veiled Lady’s cousin, Ellen Stuart, described even more lurid and sensational events than “The Veiled Lady’s Confession,” linking the free love conspiracy of New York literati in the first story to the organized “debauchery” of the Oneida Community. It presented a world filled with “imposters” and lacking in male protectors, making it all too easy for women to fall into free lovers’ ready traps. The story began with the death of Ellen’s good-natured father, a tragedy that left Ellen in the hands of an evil stepmother who had married Ellen’s father solely for his money. After Mr. Stuart’s death, this wife began to reveal her “real enmity and bitterness” toward Ellen, replacing her previously “assumed kindness and consideration.” Ellen’s stepmother not only convinced Ellen’s fiancé to renounce her, but also turned the family lawyer into her enemy as well, leaving Ellen to “vent . . . [her] anguish in a torrent of tears.” “Oh! how lonely and forsaken I felt,” she cried. “Looking back into years gone by, I saw the happiness I had once enjoyed; looking forward I beheld the misery, the awful misery I was to endure.”

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268. For Lu Calhoun’s testimony in court, see Mrs. Calhoun In Court, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, May 21, 1870, at 156; TRIAL, supra note 1, at 127-36; TRAGEDY, supra note 1, at 77; THE VEILED LADY, supra note 64, at 58-59.

269. On the use of pseudonyms by women writers in the mid-nineteenth century, see Brodhead, supra note 267, at 54, and MARY KELLY, PRIVATE WOMAN, PUBLIC STAGE: LITERARY DOMESTICITY IN NINETEENTH-CENTURY AMERICA 124-37 (1984). The veiled lady’s aversion to the public role of author contrasted sharply with Abby’s willingness to embrace that role. She was a prolific writer before, during, and after her marital troubles. See Miss Abby Sage, The Hamlets of the Stage: Part II, 24 THE ATLANTIC MONTHLY 188 (1869); GARNERED SHEAVES, supra note 50; ABBY SAGE RICHARDSON, STORIES FROM OLD ENGLISH POETRY (New York, H.O. Houghton & Co. 1871); ABBY SAGE RICHARDSON, THE HISTORY OF OUR COUNTRY (Boston, Houghton, Mifflin & Co. 1875); ABBY SAGE RICHARDSON, FAMILIAR TALKS ON ENGLISH LITERATURE: A MANUAL EMBRACING THE GREAT EPOCHS OF ENGLISH LITERATURE FROM THE ENGLISH CONQUEST OF BRITAIN TO THE DEATH OF WALTER SCOTT (Chicago, A.C. McClurg & Co. 1897). In Stories from Old English Poetry, Abby rewrote some of her favorite Shakespearean plays in the form of prose. Her version of The Merchant of Venice, titled The Witty Portia, emphasizes the rebellious woman who disguises herself as a male judge. See ABBY SAGE RICHARDSON, The Witty Portia, in STORIES FROM OLD ENGLISH POETRY, supra, at 189.

270. THE VEILED LADY, supra note 64, at 44.

271. Id. at 45.

272. Id. at 20.

273. Id. at 27.

274. Id.
After twice contemplating suicide, Ellen decided to leave home. Mrs. Tarleton, a “lady-like looking woman, elderly, and nicely dressed,”

found her sobbing on the cold, unfriendly city streets and took her in. However, Ellen quickly discovered that Mrs. Tarleton was not the “true, christian friend”

that she surmised her to be. While Ellen was silently blessing her “protectress,”

the latter was busily conspiring with a Mr. Hertzler to abduct her to his Free Love Institute in Oneida County, where “bad men and worse women of all ages were in the habit of congregating, corrupting each other, and disseminating immorality in its worst forms.”

Through its account of Ellen’s experiences at the Free Love Institute, “The Sad History” reaffirmed woman’s ability to preserve her virtue and to resist free love even under the most extreme pressures. When Ellen arrived at the Free Love Institute, Hertzler told her to rid herself of her “infantile notions about virtue and all that kind of nonsense.”

He explained: “Here we all love each other, and enjoy each other’s society, without the trammels which bigoted religions throw round the intercourse of the sexes.”

Upon learning that Ellen would not sit down beside him, Hertzler “dragged [her] to the sofa, and, dashing [her] down, threatened, if [she] moved, he would knock [her] brains out.”

Later that evening, Hertzler’s “female furies” urged Ellen to follow their sexual practices. When she refused, the women pulled her hair, spit in her face, and beat her with their fists. “The Sad History” contrasted the dignified Ellen with these “wicked women” who savagely flogged her.

After an eight-month long imprisonment in the Institute, Ellen eventually engineered a sensational escape. Just as Hertzler leaned over to receive a kiss from her, she whipped out a little axe, “seized Hertzler by the collar, dashed him to the floor, and struck him again and again.”

Having run away from the Institute, she sought shelter from a farmer, who responded initially with great reluctance, explaining, “Wal al, my purty woman, I dunno ther’s hardly a tellin’ wot a body is to b’live these times. I’ve bin tuk in so tarnally often by trampers I’ve most made up my mind never to help another one.”

The farmer and his wife eventually agreed to help Ellen, but died soon afterwards, leaving her to fend for herself once again. A Mrs. Williams next took her in—only to betray her

275. Id. at 29.
276. Id. at 30.
277. Id.
278. Id. at 36. The Veiled Lady “unveiled” many of the same “terrible mysteries of depravity” in the Oneida Community as did Isaac Reed. See Reed, supra note 92, at 86. The Veiled Lady even echoed Reed’s desire to “swe[ep] [the Oneida Community] out of existence”: “Surely some day must come a reaction which will cause the honest, moral part of the community to wipe out from their midst such immoral and law-defying sinners as these.” THE VEILED LADY, supra note 64, at 16.
279. Id. at 37.
280. Id. at 36.
281. Id.
282. Id. at 39.
283. Id. at 40.
284. Id. at 44.
by giving her counterfeit money, which promptly landed her in prison when she used it to purchase bread. Shortly after being rescued by an English lady of wealth and refinement, Ellen fell ill and died. *The Veiled Lady* applauded Ellen’s fierce resistance and ultimate death defending her virtue.

C. Sensational Scenes and Sentimental Pleas: Narrative Strategies in “The Veiled Lady’s Confession” and “The Sad History”

Two stories about pure, virtuous women supposedly written by the same author, “The Veiled Lady’s Confession” and “The Sad History,” were directed at female readers. Ironically, although the stories fiercely denounced free love, they explored the topic in such minute detail that they enabled readers imaginatively to participate in it.\(^{285}\) They described scenes in which women were brought to the brink of committing illicit sexual activities and presented women who had already committed them. The stories also presented sensational illustrations that were obviously designed to excite and titillate, just as much as they were designed to shock. One picture depicted a woman and a man locked in a passionate embrace. The caption below the illustration made clear that the lovers in the picture were none other than Abby and Richardson. It read: “After the Masquerade. A Terrible sight for a husband.”\(^{286}\) The stories and illustrations ultimately permitted readers to contemplate what it would be like to abrogate marriage laws and to “throw off the conventionalities of ordinary hum-drums.”\(^{287}\)

Unlike the defense’s sensational courtroom tale, however, *The Veiled Lady’s* stories offered women the pleasure of vicariously resisting free love and repudiating temptation and deception.\(^{288}\) Although the stories exposed female readers to portraits of “wicked women,” they ultimately urged them to identify with virtuous ladies. These ladies were a crucial part of the stories’ central project: to defuse the threat presented by the defense’s sensational story. As Nina Baym has argued, fiction in the nineteenth century engaged and channeled the emotions of readers through identification with the heroine.\(^{289}\) Readers found not only an outlet for their angers and frustrations, but also an opportunity to rejoice in the heroine’s triumph; they ultimately accepted the author’s solution to the

\(^{285}\) For a discussion of the ways in which literature of “counter-subversion” and moral reform became a means of exploring forbidden desires, see Davis, supra note 110, at 148-50; Reynolds, supra note 66, at 54-91.

\(^{286}\) THE VEILED LADY, supra note 64, at 25.

\(^{287}\) Id. at 13.

\(^{288}\) For a similar discussion of the ways in which early American murder narratives offered “both the pleasure of vicariously performing forbidden acts and the pleasure of once again repudiating them,” see Haltunen, Birth of Horror, supra note 65, at 94-95.

\(^{289}\) Baym, supra note 228, at 17. For similar arguments regarding the emotional power of sentimental fiction, see Clark, supra note 197, at 484-86; Degler, supra note 59, at 377-79; Fisher, supra note 198, at 87-127; Sarah Barringer Gordon, “Our National Hearthstone”: Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America, 8 Yale J.L. & Human. 295, 310-16 (1996); Tompkins, supra note 197, at 122-46.
heroine’s difficulties as pertinent to their own lives. McFarland’s lawyers invited men to empathize with McFarland, but presented no upright female character with whom women could identify. The Veiled Lady’s stories, by contrast, presented female readers with two exemplary heroines.

The Veiled Lady’s heroines ultimately reappropriated the sentimental strategies of McFarland’s lawyers, transferring the locus of emotion from men (male lawyers appealing to male jurors) back to women (heroine-authors appealing to female readers). Both the Veiled Lady and Ellen told their stories in the first person, directly appealing to the sympathy of their readers. Ellen’s narrative, like the Veiled Lady’s, dripped with emotion, seeking to induce the readers’ own tears: “At [one] portion of her narrative poor Ellen was obliged to stop her recital and burying her face in her hands she sobbed and wept like a child.” The heroines invited readers to identify with their struggles against free love and to resist temptation as they had done. Significantly, these heroines put sentimental strategies to work long before male violence shifted the forum of storytelling to a court of law. Through its sentimental appeals, The Veiled Lady sought to arouse sympathy as well as strength in its female readers in order to prevent lawyers from ever having to retell McFarland’s tragic tale of betrayal and deception at the hands of a woman.

IV. CODA: BEYOND WICKED WOMEN AND VEILED LADIES

McFarland’s lawyers and The Veiled Lady’s narrators all constructed stories that held Abby responsible for the McFarland-Richardson tragedy. McFarland’s lawyers insisted that Abby was a “wicked woman” whose selfish ambition caused McFarland’s madness. The Veiled Lady portrayed Abby’s fictional double as a pure, virtuous lady, but held this lady responsible for “repuls[ing] the insidious advances of the seducer” and thereby preventing scenes like the ones that played out on the stage of the New York courtroom in the spring of 1870.

Abby, however, penned a very different story of the tragedy. Her “Statement and Affidavit”—initially published in the Tribune and later appended to The Trial and The Tragedy—complicated the defense’s account of her relationship with McFarland. She presented herself as a woman with conservative views about marriage, but also as an assertive wife who had rightfully obtained a divorce from her husband. Abby recognized that she had been at the center of the public’s attention throughout the five week long proceeding. “I have been on trial before a New-York Court as much as Daniel McFarland,” she wrote, “and for a

290. See BAYM, supra note 228, at 17.
292. THE VEILED LADY, supra note 64, at 23.
293. Id. at 49.
294. Abby wrote: “My ideas of a wife's duty were most conservative. I believed she should suffer almost unto death rather than resist the laws of marriage.” TRIAL, supra note 1, at app. 227.
crime more heinous and more bitterly punished in a woman than murder committed by a man."295 She expressed indignation at having been “most ungenerously traduced”296 by the defense, concluding:

I have tasted to its dregs the cup of justice which, in the nineteenth century, men born of women mete out to one whose worst crime was the mistake of marrying a man who was half madman from natural inheritance, half brute from natural proclivity. Of the justice I have received let those who read my story be witnesses.297

Contemporaries responded to Abby’s story with great emotion. Theodore Tilton editorialized in the religious newspaper, The Independent. “Not until after the verdict was rendered was the testimony put in. Neither the public nor the court knew the most essential facts until Mrs. Richardson published her remarkable statement.”298 Elizabeth Cady Stanton and Susan B. Anthony were so moved by Abby’s account that they organized a mass meeting of women to protest the verdict.299 At this meeting, Stanton told a packed audience of two thousand women that “[a]s she sat alone late one night and read the simple truthful story of Abby Sage Richardson, the fugitive wife, [she] tried to weigh the mountain of sorrow that rolled over that poor woman’s soul. . . .”300 In Stanton’s reading, Abby’s indignities came to stand for the “hideous insults . . . on the entire womanhood of the nation.”301

Abby’s account of the tragedy ultimately contributed to a deeply contested debate over the stability of marriage and the position of women. Ironically, defense lawyers themselves invited her unsettling response. Throughout the trial, they denounced her as an unfaithful and independent wife who dared to step outside the domestic sphere and onto the public stage. In the end, however, their subversive courtroom story not only prompted the publication of the fictional confession of the Veiled Lady. Their story also sparked the publication of a statement that seemingly confirmed their worst fears about women. In a final irony, of course, Abby insisted that she was a conservative wife at the same time that she stepped out into the public spotlight to justify her unconventional behavior to the world. At the center of the tragedy from the beginning to the end, Abby embodied the tensions that troubled the age.

295. Id. at app. 238.
296. Id. at app. 226.
297. Id.
299. See Blake, supra note 40, at 103.
300. Stanton, supra note 160, at 126.
301. Id.