



HISTORIAN IN THE CELLAR

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*In 1981, Lawrence Friedman and Robert Percival published *The Roots of Justice*, their study of the criminal justice system of Alameda County between 1870 and 1910. Working in the sooty port town of Oakland, they unearthed records of prisons, press, courts, and cops. Then they reconstructed the entire criminal justice system, from curbside police discipline to flash-lit courtroom morality plays.*

In honor of the book's twenty-fifth anniversary, this essay follows a short distance in its trail. It reopens the murder trial of Hugh Cull, mentioned by Friedman and Percival in a brief footnote. Cull killed his wife in front of their seven-year-old daughter, but won acquittal when the trial judge deemed the girl incompetent to testify.

*The case turns out to be much more than another acquittal staked on a legal technicality. Unraveling its elaborate plot requires close attention to Lawrence Friedman's writings—not only *Roots of Justice*, but also his later studies of marriage and divorce in this era.*

I

Get out of the light, Lawrence Friedman has told legions of legal historians, *and go down to the cellar*. Upstairs you'll find only the history of appellate law. There, in floodlit reading rooms, celestial metaphors take flight—those judicial luminaries and penumbral rights, that omnipresence in the sky. But the *law of society*—the law as it's lived—is not the law made by common law judges, or even elected lawmakers, who leave their tracks above ground. It is instead the shadow of that law, cast across the streets and shops and tenements of town.

* Judge John Crown Professor of Law, Stanford University. I am grateful to Kate Wilko and Sonia Moss of Stanford's Crown Law Library for their diligence in hunting down many far-flung sources. Aidan McGlaze added research support and a steady editorial hand, and Bob Percival kindly offered memories and guidance. Bob Gordon and Morty Horwitz supplied the occasion for this essay—a symposium in Lawrence Friedman's honor in 2005. Together with many other papers prepared for this symposium, this essay will appear in a festschrift that Gordon and Horwitz are editing in Friedman's honor.

The stuff of the law, especially criminal law, concerns those dredged up from the bottom of society. And they leave their tracks in the cellar.

So down he went. A quarter-century ago Lawrence Friedman and his student Robert Percival followed those tracks to the basements of Oakland. In that grubby port town, squatting across the Bay from its shimmering big sister, they started to dig. From precinct to courthouse to prison to press, they unearthed the shards of a whole system of criminal justice. Then they rebuilt it in living detail—the entire anatomy of crime detection and punishment in Alameda County between 1870 and 1910. They called their work *The Roots of Justice*, for it was in every sense a history from the bottom.

From the bottom, quite literally, it came. The richest among the authors' many sources were the records of the Alameda Superior Court, which moldered away in a basement storage room two floors beneath stately vaulted courtrooms. The basement room was untended, unkempt, alluring in its disarray. Lining its shelves and cramming its drawers were thousands of case records. Within each was a story—a bundle of folded stock, bound with ribbon, hardened with time. Here Friedman and Percival spent long weeks, sometimes searching systematically, sometimes simply browsing—rooting around for justice's roots.

Of course there's no point in rooting around if you can't smell a truffle. In dreary records of rote proceedings, the authors found the mushrooms amid the mold. They uncovered in one old drawer a group of bail bonds dating from 1898 to 1910. In their hands, the forgettable matter of bail cast light on the entire trial process. Defendants held for trial proved almost four times as likely to plead guilty and almost twice as likely to be convicted after trial as those released on bail, suggesting perhaps that defendants with bail money could hire better lawyers or, once released, could better aid their defense. In another drawer they found a report on a judge's probation statistics for 1909 to 1910. Of forty-two defendants granted probation, forty-one had pled guilty—stark evidence that probation had morphed from a reforming regimen for young offenders into a bargaining chip in plea negotiations. Elsewhere the authors found the trial records of Clara Fallmer, a young woman charged with murdering a man who promised her marriage, but abandoned her pregnant. She killed in public view and had no defense at law. But her lawyers outfitted her in a veil and violet bouquet and then rose in defense of injured womanhood, defining a genre in which the law played a small supporting role to the moral drama onstage.¹

Such flash-lit show trials, in which richly funded lawyers deployed all the stagecraft of justice, defined the third and highest tier of the Alameda County justice system. Yet for every full-dress morality play that drew throngs to one

1. LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870-1910*, at 164-66, 180-81 & n.79, 239-44 (1981).

of the oak-paneled courtrooms of the upper tier, dozens or hundreds of unwatched proceedings clotted the lesser courts below. Friedman and Percival broke custom by lingering longer on these lower levels. In the middle tier, they found the routine felony courts, the scene of hasty trials, humdrum pleas, and harsh punishments, where the business of crime control was done. Still lower, in the first tier of the county's justice system, they uncovered the mechanisms of order and discipline. Here police rustled drunks and brawlers and raided brothels and opium dens.² And here the authors found the figures who interested them most—those who inhabited the nether regions near justice's roots. This then was the second way in which *Roots of Justice* was history from the bottom. For here were society's losers, the luckless and landless, social misfits who held neither jobs nor liquor well, caught in the system's gape.³

And *Roots of Justice* was history from the bottom in a third way. Friedman and Percival disavowed all pretense of grand overview: "Our study deals with what is, after all, one remote corner of civilization, a dot of land in the ocean of history."⁴ They were working at the foundation level of historiography, contributing one brick among hundreds to the structure of an era. Such scholarly humility at the cost of massive effort deserves notice—yet somehow shuns it.

Here then is an effort to honor a rare great work of legal history. But how can one pay tribute to the humility of history from the bottom? Only one answer came to mind.

I went to Oakland.

II

The Alameda County Courthouse sits at the flat edge of a windswept cityscape. Overly broad streets hint that planners expected a bustling business district choked with traffic. But the businesses never came, so the traffic never followed. Waiting on a corner for the light to halt streams of imaginary cars, a visitor senses he's stumbled onto the abandoned set of *War of the Worlds*.

The courthouse has the same sense of Soviet overbreadth. Anticipating the era of truck bombs by some sixty years, its Public Works Administration engineers hoisted the whole structure atop a granite pedestal rising a floor above street level. Massive steps face down visitors on three sides, a solid wall on the fourth. Those who venture further find the main entrance locked, its granite portico deserted. In a genuine concession to terror, all visitors are funneled through a narrow side door into the metal detector beyond.

So the lobby comes as a shock—for if PWA had a grand style, this was it. Suddenly the ceiling flares up, and floor-to-sky windows cast glare onto

2. *See id.* at 311-15.

3. *See id.* at 3, 113, 235, 317-18.

4. *Id.* at 3.

tricolor terrazzo parquetry. Full brass crowns frame the elevators' lapis-blue doors. Their deco exuberance announces that *these* elevators *lead someplace*. On either side of the deserted main entrance rises a wall mural in marble mosaic. One mural depicts the missionary settlement of America, the other its secular settlement by explorers and other Europeans. The murals supply a second reason to bar the front doors: locking them against terrorists spared the county an ideological attack on its art.

Slipping through one of the brass and lapis doorways, I dropped to the basement. Here the grandeur is happily gone. Along an empty concrete hallway haloed in fluorescence, only the stylized wall signs hint at the gaudy brilliance above. This, it seemed, is a place an archival digger could love. But where were the records? I had read and heard of their clammy storage room and knew where to look—but it was gone. A door advertises instead the offices of the courtroom interpreters, who appear some years since to have evicted Friedman and Percival's finds.

The records turned out to be close by. They had been moved a flight higher to the office of the criminal court clerk, which abuts the gleaming lobby. I knew Lawrence would disapprove. Today a visiting historian works not alone, but under the clerk's watchful eye; not in dim basement recesses, but in full natural light; and not with century-old paper that stains hands as proof of an honest day's work, but in a medium Lawrence hates—microfilm.

I had come to Oakland hoping to untie one of Friedman and Percival's old case records—to honor their book by continuing their work. Though I missed the chance to unravel old ribbon, I confess relief at finding the records on film. Technology has its virtues, and there's something to be said for push-button copying.

III

I decided to reopen the murder case of H.C. Cull. Friedman and Percival mentioned the case in a brief footnote when surveying the region's violent crime:

Another alleged wife-killer, Hugh Cull (no. 634, 1885), was found not guilty. The main witness was the defendant's seven-year-old daughter; in Superior Court, on defense motion, the judge excluded her testimony.⁵

The outrage of disqualifying a seven-year-old who no doubt was competent to relate the horror of her mother's murder caught my eye. As an evidence teacher, I hoped to learn something of old competency notions. But in the end, the Cull case's interesting questions had nothing to do with my fields of study and all to do with Lawrence's. Here as in much of his work, a tale from life exposes the tracks of the law.

5. *Id.* at 137 n.1.

The case began in Livermore. There Hugh Cull and his young wife, Jennie, moved with their four children at the beginning of September 1885.⁶ We never learn why. Newspaper reports describe Cull as a farmer or rancher and never explain why, at age thirty-eight, this “ruddy and much tanned” man who “looks every inch a rancher” abandoned his ranch and moved his family to town. Nor do they explain why the Culls moved to the particular district called Laddsville. Cull was reportedly “well to do,” but Laddsville was not a place for the better sort of people.⁷

Nor was the Culls’ new residence an elegant affair. A day after the killing, a prurient news reporter took an unauthorized tour. Aggravating the home’s location, which was “gruesome in the extreme,” were its placement almost flush with the street and abundant signs of penury. The “one-story cottage of four rooms only” was “covered with worm-eaten paint.” Entering the house, the reporter passed into “the sitting-room, so called,” where a washstand stood on a threadbare carpet. In one bedroom the three older boys had slept. In a second, measuring just ten feet by twelve, the Culls had crammed two beds.⁸ One bed slept the parents. The other slept their youngest child, Carrie, who lay awake on the night of September 13 to 14, two weeks after the move, when her father flew in a rage and strangled her mother to death.⁹

Carrie testified twice about her mother’s death—first at the coroner’s inquest on the day of the crime, then at the preliminary hearing almost two weeks later.¹⁰ Surviving sources suggest little variance between these accounts, though it appears Carrie spoke with less reserve and in more detail at the coroner’s inquest. But I begin with the preliminary hearing, for the transcript of this courtroom proceeding supplies the best evidence of the girl’s competency to testify at trial.

6. Reporter’s Transcript at 58-60, *People v. H.C. Cull*, No. 634 (1885) (Alameda County Super. Ct. Aug. 10, 1886) [hereinafter *Cull Trial Transcript*] (testimony of Charles Moore); *id.* at 92 (testimony of Dennis Weymouth).

I will cite to the trial transcript in this way, with the witness’s name in parentheses. One of the mysteries of this case is why there is a trial transcript at all. Because transcripts were expensive to produce, they typically exist only if a case was appealed and never if the defendant was acquitted, as was Hugh Cull. It is also a mystery why the transcript of Cull’s trial ends, mid-page, in the middle of a witness’s testimony on the second day of trial. The trial concluded at the end of the second day, so it appears that the transcript covers about eighty percent of the testimony. It also omits opening statements.

7. *A Livermore Thug*, OAKLAND TRIB., Sept. 14, 1885, at 3 [hereinafter *TRIBUNE*, Sept. 14, 1885]; *The Livermore Horror*, OAKLAND TRIB., Sept. 15, 1885, at 3 [hereinafter *TRIBUNE*, Sept. 15, 1885].

8. *TRIBUNE*, Sept. 15, 1885, *supra* note 7; *Cull Trial Transcript*, *supra* note 6, at 10 (testimony of Samuel Cull).

9. *See* Testimony Taken on Preliminary Examination at 3, *People v. H.C. Cull*, No. 1399 (Murray Township J. Ct. Sept. 26, 1885) [hereinafter *Cull Preliminary Hearing Transcript*] (testimony of Carrie Cull).

10. She testified a third time—though not about the substance of the case—at Cull’s trial in August 1886. I will take up her brief trial appearance shortly.

Her testimony began rockily. To the D.A.'s opening question, "How old are you, little girl?," Carrie answered that she was six, though all other sources—including her own aborted trial testimony the next summer—suggest she was seven at the time of her mother's death.¹¹ Worse, Carrie denied knowing "what it is to take an oath, to swear in Court." But she did not hesitate again. She said she had been in school over six months and could read. And she recounted the horror of that Sunday night with astonishing composure:

Q. . . . What was it that waked you?

A. They commenced to fight and that woke me up

. . . .

Q. Now just tell what happened after you heard them fighting. . . .

A. . . . Mamma got up and ran and sat down on a box of apples; and then Papa jumped up and ran right after her. She jumped on my bed then, and Papa was right on top of her.

Q. Now what did he do to her when she was on your bed?

A. He was choking her.

Q. What did she do?

A. She just went awful. She went like she was choking awful; made an awful noise.

. . . .

Then she went and lay down on her own bed and hollered for me: "Oh Carr[ie], oh Carr[ie];" Kind of sadly, awful.

Q. Was that before he choked her?

A. No, that was after he choked her, and then he got her back on the bed and she never said another word.

. . . .

Q. After your fat[h]er let go your mother, did she speak or say any word after that?

A. No, I told him to "stop, stop" and he said "that is all right, that is all right, that is all right" three times right straight along.

Q. Well, did your mother ever speak or say anything after that?

A. No, not another word.¹²

When Carrie had done, the defense counsel objected to her testimony "on the ground that she . . . did not understand the nature of an oath." The prosecutor's response—"[t]he witness is competent [if] she can note occurrences properly and relate them truly afterwards"—tracked the relevant statute, which excluded witnesses under ten only when they "appear incapable of receiving just impressions of the facts respecting which they are examined,

11. Cull Preliminary Hearing Transcript, *supra* note 9, at 2 (testimony of Carrie Cull); see TRIBUNE, Sept. 14, 1885, *supra* note 7; Cull Trial Transcript, *supra* note 6, at 2 (testimony of Carrie Cull).

12. Cull Preliminary Hearing Transcript, *supra* note 9, at 3-5 (testimony of Carrie Cull).

or of relating them truly.”¹³ The prosecutor could have added that though the leading case required that child witnesses have “sufficient instruction to appreciate the nature and obligation of an oath,” the case suggested that the trial judge could instruct witnesses on the subject.¹⁴ In any event, the magistrate overruled the defendant’s objection without comment. Then, after hearing from Carrie’s oldest brother, who told how their father raced off after the murder, and from a neighbor who described the abrasions he saw on Mrs. Cull’s lifeless neck, the magistrate duly held the defendant to answer for murder.¹⁵

At this juncture, the story of Jennie Cull’s death seemed brutally clear: Hugh Cull had murdered his wife in a rage. He was not merely a murderer but a monster, for he had killed his little girl’s mother before her eyes. Jennie Cull was a tragic victim—young (just twenty-eight), pretty (the papers said), and faultless but for her choice of mate.¹⁶ She deserved better than this brooding tyrant who housed her in squalor and snuffed out her life.

The press eagerly reported this tidy version of events with its clean moral fault lines. Explaining that Cull had killed his wife “in the Presence of a Child,” the *Oakland Tribune* ran the story under large block letters: “A LIVERMORE THUG.” The sobriquet stuck. The next day the paper reported that “crowds assembled to get a look at the ‘Thug.’” A few days later it referred to “the Livermore thug, who strangled his wife to death.”¹⁷ Nor did the *Tribune* shrink from rendering legal judgment. Cull was from the very start “The Murderer,” unhedged by a squeamish “alleged.”¹⁸ Public sentiment readily followed the *Tribune*’s lead. The paper hinted that a Livermore lynch mob had been grouping until the sheriff moved the prisoner to Oakland. Even then, one of the spectators who met Cull’s train after his preliminary hearing “carried a coil of rope, with a suggestive noose dangling from the end of it.”¹⁹

Had the press and public maintained this flat-hued moral outrage throughout the case, they might have responded more indignantly when, almost a year after the crime, the trial judge deemed Carrie Cull incompetent to testify about the killing only she had seen.²⁰ Carrie arrived at trial “a sweet, sad-faced

13. *Id.* at 5; CAL. CIV. PROC. CODE § 1880(2) (1883); *see also* CAL. PEN. CODE § 1321 (1885) (applying to criminal cases the same rules that govern witness competency in civil cases).

14. *People v. Bernal*, 10 Cal. 66, 67 (1858).

15. *See* Cull Preliminary Hearing Transcript, *supra* note 9, at 5-7 (testimony of Sammy Cull); *id.* at 8-9 (testimony of Eugene Allen).

16. *See Strangled to Death*, THE MORNING CALL (S.F.), Sept. 15, 1885, at 1 [hereinafter THE CALL, Sept. 15, 1885]; *A Farmer in Alameda County Murders His Wife*, DAILY EXAMINER (S.F.), Sept. 15, 1885, at 2 [hereinafter DAILY EXAMINER, Sept. 15, 1885].

17. TRIBUNE, Sept. 14, 1885, *supra* note 7; TRIBUNE, Sept. 15, 1885, *supra* note 7; *At the County Jail*, OAKLAND TRIB., Sept. 19, 1885, at 4.

18. TRIBUNE, Sept. 14, 1885, *supra* note 7.

19. TRIBUNE, Sept. 15, 1885, *supra* note 7; *Cull’s Examination*, OAKLAND TRIB., Sept. 28, 1885, at 3.

20. *See* Cull Trial Transcript, *supra* note 6, at 38.

little thing,” the *Tribune* wrote, whose “wee fingers twisted a tiny handkerchief with which she occasionally wiped the tears from her eyes.” She was then eight and had been living since the crime with her father’s brother Curgus.²¹ We never learn whether Carrie’s memory of the fateful night had faded in the intervening year, for the trial judge cut off her testimony before she got that far. Unmistakably there were hints she had slipped. She no longer attended school, she said, and no longer could read. She still could not say “what it is to be sworn,” nor did she know the number of minutes in an hour, hours in a day, or months in a year. Evidently her Uncle Curgus had neglected her education. The *Tribune* may have been right that to Carrie, “all these solemn proceedings are an enigma.”²²

Or perhaps *no* witness could have survived the trial judge’s peculiar test of Carrie’s competency. On learning that Carrie had gone to live with her uncle after her mother’s death, the judge tested her memory of the trip to her new home:

- Q. Who drove the buggy?
 A. My uncle.

 Q. Was anybody else with you?
 A. My aunt Lizzie.
 Q. What did she say to you?
 A. She didn’t say much of anything.
 Q. Do you know what she said?
 A. No sir.
 Q. Don’t you remember what she said?
 A. No sir.
 Q. Do you remember what your uncle said?
 A. No sir. He didn’t say anything.

 Q. Whom did you meet [on the road]?
 A. I don’t know.
 Q. Don’t you remember whom you met?
 A. No sir.²³

This was a cheap lawyer’s trick. It traded on the absurdity of testing a child’s memory of a singularly memorable event by quizzing her about pointless adult blather on the day after the horror.

21. *Cull on Trial*, OAKLAND TRIB., Aug. 10, 1886, at 3 [hereinafter TRIBUNE, Aug. 10, 1886]; see *Cull Trial Transcript*, *supra* note 6, at 2 (testimony of Carrie Cull); *Cull Preliminary Hearing Transcript*, *supra* note 9, at 3 (testimony of Carrie Cull).

22. *Cull Trial Transcript*, *supra* note 6, at 2-5 (testimony of Carrie Cull); TRIBUNE, Aug. 10, 1886, *supra* note 21.

23. *Cull Trial Transcript*, *supra* note 6, at 6-7 (testimony of Carrie Cull).

The upshot of the trial judge's refusal to let Carrie testify was this: the defendant did not merely strangle his wife but did so in front of his young daughter, scarring her mind and abandoning her to her uncle's indifferent care. He won acquittal in part because of the trauma his crime inflicted. Carrie predictably failed to thrive in the year after her mother's death; perhaps she even regressed. So the awful events that tore apart her life denied her a role in bringing her mother's killer to justice.

All this should have spurred outrage. But by the time the Cull case reached trial in August 1886, the press's (and perhaps the public's) moral measure of the matter had changed.

IV

Even early on there were hints that the case was not so simple. First was the question of motive. Regarded within the span of a weekend, the killing appears entirely unforewarned. On Saturday the Culls had gone to a skating rink. On Sunday evening the parents attended church, where Cull, considered "a devout religious man," was a regular attendant and substantial giver. After returning home with his wife, Cull led the family in prayer—reportedly his custom—and they retired.²⁴ Between that moment and the killing several hours later, all is silence. Neither Carrie nor her older brothers could say what drove their father over the edge. Perhaps the parents fell to quarreling. Or perhaps Cull killed without quarreling, being suddenly overcome with resentment at past injuries.

News accounts speculated about the nature of such past injuries. "The cause of the trouble seems to be that Cull has thought for a long time that his wife was untrue to him," the *Tribune* wrote on the day of the crime. Even the defendant's brother called him "unordinarily jealous of his wife." But having vetted these rumors, the *Tribune* demurely withheld judgment: "Whether there was any ground for jealousy is not known here . . ." ²⁵ Again the next day, the paper first teased, then primly retreated: "Rumors thick and fast are flying about Livermore in regard to alleged stories of infidelity upon the part of the woman." Yet from "good authority, . . . it is now understood that the report grew out of" a misunderstanding. A strange man *had* been visiting the old Cull ranch, but he "was visiting a servant girl in the employ of Cull, and not Mrs. Cull."²⁶

Alongside rumors of Jennie Cull's infidelity was speculation about Hugh Cull's deep mental instability. One day after the killing the *Tribune* reported townsmen's opinion "that Cull had for years been insane, owing to a belief that

24. THE CALL, Sept. 15, 1885, *supra* note 16; TRIBUNE, Sept. 15, 1885, *supra* note 7; Cull Trial Transcript, *supra* note 6, at 95 (testimony of E.A. Winning).

25. TRIBUNE, Sept. 14, 1885, *supra* note 7.

26. TRIBUNE, Sept. 15, 1885, *supra* note 7.

his wife was untrue to him.” Indeed Cull seemed to be playing the part in the hours and days after his arrest. “From melancholy he returns to mania,” the paper wrote. “It was during one of his fits of despondency that he made the remark that he did not care to live.” Then there were the slash marks across Cull’s chest, penetrating to his ribs, which some believed he had carved himself.²⁷ If these cuts were part of a suicide attempt, it was not Cull’s last. In jail shortly after his arrest, when the constable left him briefly alone, Cull “tried to beat his brains out by hitting his head against the door.”²⁸

None of this would surprise Lawrence Friedman. Rumors of a wife’s infidelity were common features of mid- and late-nineteenth-century murder cases—as were contrived symptoms of a husband’s insanity. As Friedman explains in a recent book, *Private Lives*, men charged with killing their wives’ paramours often appealed to the “unwritten law” of the age, which deemed a man’s defense of the sexual purity of his home sufficient justification for murder. Jurors, almost invariably male, understood the unwritten law and needed little coaching to apply it. But since defense counsel could not openly invoke this lawless doctrine, they instead claimed insanity—or more precisely, temporary insanity—as the legal “fig leaf covering . . . nakedly biased” appeals to chivalric honor.²⁹ Victorian norms of sexual morality also sometimes forgave women charged with murdering the men who stole their honor. Recall Friedman and Percival’s account of young Clara Fallmer, charged in 1897 with killing her lover. Fallmer’s claim that the man promised her marriage and then left her with child was not a legal excuse for murder. “But the case was tried in front of a jury,” Friedman and Percival wrote, “not the draftsmen of the code.”³⁰

Clara Fallmer’s prosecutor, A.A. Moore, Jr., should not have been surprised at her strategy. Moore’s own father, Albert A. Moore, had represented Hugh Cull eleven years earlier and had appealed to the same Victorian moral code in Cull’s defense.³¹ At that time, as Friedman and Percival reported, the elder Moore was one of the most prominent lawyers in the county. The announcement days after the killing that Cull had hired him was itself news.³² Nor did Albert A. Moore come cheap. One paper grumbled that Cull had paid a huge \$900 retainer (at a time when superior court judges

27. *Id.*; *He Wants to Die*, OAKLAND TRIB., Sept. 18, 1885, at 3 [hereinafter TRIBUNE, Sept. 18, 1885]; Cull Trial Transcript, *supra* note 6, at 42 (testimony of G.S. Fitzgerald).

28. TRIBUNE, Sept. 15, 1885, *supra* note 7.

29. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 31 (2004).

30. FRIEDMAN & PERCIVAL, *supra* note 1, at 240.

31. See FRIEDMAN & PERCIVAL, *supra* note 1, at 243 (identifying Fallmer’s prosecutor as A.A. Moore, Jr.); *Albert A. Moore*, in *HISTORY OF THE BENCH AND BAR OF CALIFORNIA 899-900* (Oscar T. Shuck ed., 1901) (specifying the relationship between the two Moores).

32. See FRIEDMAN & PERCIVAL, *supra* note 1, at 65, 243; TRIBUNE, Sept. 18, 1885, *supra* note 27.

earned \$4000 per year) “for the purpose of giving the people unequal justice in the case of H.C. Cull.”³³

In his opening statement at Cull’s trial, Moore appealed as directly as he could to the unwritten law. As the *Tribune* recalled the scene, he neatly channeled rumors of Jennie Cull’s infidelity—otherwise both irrelevant and hearsay—through Hugh Cull’s claim of insanity:

Mr. Moore earnestly disclaimed all approval of insanity pleas as a general rule, considering them simply cloaks for crime, but in this case the facts were plain and the circumstances so conclusive that he felt no hesitation in presenting the evidence as he found it. . . . As a matter of course, Mrs. Cull’s fidelity or infidelity to her husband did not enter into the question, and it was proper to show if her conduct produced such an effect upon his mind as to cause the commission of the act with which he stands charged. They proposed to show that Cull loved his wife; that rumors of

HER UNFAITHFULNESS

To him were current . . . These things drove him to such a frenzy that he even attempted his own life, and he still bears the wounds on his breast where he tried to kill himself with a knife. It was certainly his intention to end his life with hers.³⁴

Eloquent—and sly—as Moore’s statement may have been, he still had work to do. Cull’s case was not after all a classic application of the unwritten law. For Cull had killed not his wife’s paramour, but his *wife*—a response to adultery that fit less comfortably within Victorian notions of chivalry. On the other hand, Moore had better material than did most lawyers who appealed to the unwritten law. *His* client could claim evidence of insanity from *before* the alleged murder. And his client had unusually good evidence of his wife’s infidelity.

It is not certain how long before the crime Cull first showed signs of instability. Newspaper accounts suggest that a triggering event was Jennie Cull’s departure from the home about three months before her death. For reasons never explained, she and two of her four children traveled to her father’s home in Kentucky, only to return about three weeks before the killing.³⁵ At trial Moore offered a train of witnesses to tell of Cull’s conduct in his wife’s long absence. Almost all described a man obsessed—with either his consuming love for his wife, or his suspicions of her, or his dread of a vaporous “conspiracy.” Cull told one witness that “he was haunted by a mob that was to take his life” and another that “there was a conspiracy on the part of some fifty or a hundred residents of the valley to take his life.” The latter witness added

33. ALAMEDA ARGUS, Oct. 10, 1885, at 2 (citing the *Livermore Review*); see also FRIEDMAN & PERCIVAL, *supra* note 1, at 48.

34. *Crazed by Love*, OAKLAND TRIB., Aug. 11, 1886, at 3 [hereinafter TRIBUNE, Aug. 11, 1886].

35. See TRIBUNE, Sept. 14, 1885, *supra* note 7; THE CALL, Sept. 15, 1885, *supra* note 16; DAILY EXAMINER, Sept. 15, 1885, *supra* note 16.

the telling detail, significant later, that Cull's conspiracy was "headed, as I understood him to say, by this man Donnelly."³⁶

Obsessive jealousy, however, was not insanity, even when mixed with paranoia. But this was not all Attorney Moore had. He proceeded to offer three markers of Cull's insanity that might have moved even hardened skeptics. First there was Cull's brief commitment. Several weeks before the killing, Cull's brother William had brought him to see a physician often called upon for sanity determinations in court proceedings. The doctor testified that on examining Cull, he judged "that it was not safe to allow the man to go by himself. . . . [H]e was of unsound mind, most decidedly so" The doctor recommended a week's confinement at the county jail for treatment and safekeeping. When, at the end of the week's stay, the doctor advised asylum confinement, Cull's family balked. Apparently believing "there was some stigma attached to going to the Asylum," they took Cull home.³⁷

Second was the bizarre evidence offered by Cull's pastor of an overnight visit Cull made to the pastor's home during Jennie Cull's absence. Although the surviving trial transcript unfortunately ends before the minister's testimony, the *Tribune's* report of the trial captures his account vividly:

One night Cull stayed at witness' house and slept in a room with witness' three boys. During the night witness was disturbed by one of the most

HIDEOUS SCREAMS

He ever heard from a human being, and when [the pastor] rushed into the room he found Cull holding one of the boys down in bed and choking him. When he was torn from his victim, he said he thought the conspirators were after him to kill him.

Naturally distressed, the minister wrote Jennie Cull in Kentucky and warned her not to come home. When she returned anyway, he told her "it would be dangerous for her to live with [Cull] alone."³⁸

Finally there was little Carrie Cull's description of her father's actions immediately after he strangled his wife to death. At the preliminary hearing, Carrie testified that her father "tried to hang himself with a rope on the bedstead." At the coroner's inquest, as reported in the *Tribune*, she spoke in more detail: "Papa then tied a rope around his neck and fastened it to the bed-post, and lay down and pulled back. I told him to stop or he would hurt himself. He then got up" ³⁹ True, Carrie offered no such testimony at trial, for Attorney Moore had succeeded in excluding her evidence. Moore nonetheless sought testimony about the rope from at least two other witnesses, one of

36. Cull Trial Transcript, *supra* note 6, at 85, 88 (testimony of Dennis Weymouth); *id.* at 45, 54 (testimony of Dr. B.C. Bellamy).

37. *Id.* at 77-79 (testimony of Dr. E. B. Barber).

38. *TRIBUNE*, Aug. 11, 1886, *supra* note 34.

39. Cull Preliminary Hearing Transcript, *supra* note 9, at 4 (testimony of Carrie Cull); *TRIBUNE*, Sept. 14, 1885, *supra* note 7.

whom—the acting coroner—saw it on the morning of the crime hanging from Cull’s bedpost. “There was a kind of slip-noose in one end,” he said, “and this other end was hung over the bedpost”⁴⁰

The capstone of Moore’s case, however, was not this evidence of Cull’s insanity, but his evidence of Jennie Cull’s infidelity. Moore withheld it almost till last. Under the heading, “THE AFFIDAVITS,” the *Tribune* narrated the dramatic moment:

H.S. Cull, the brother of the prisoner, then took the stand and told how he had read a certain paper to his brother, and from that time on Cull exhibited signs of insanity. The paper was the affidavit of several persons at Brentwood in regard to the infidelity of Mrs. Cull.⁴¹

Although the surviving trial transcript ends before this testimony, the Brentwood affidavits themselves survive full-form in the microfilmed trial record. They bear much study.

All three affidavits are dated June 9, 1885—about three months before Jennie Cull’s death. All were notarized, all written in the same apparently professional hand, all signed in Brentwood, a community about thirty miles north of Pleasanton, where Cull and his family then lived on his ranch. All three bore on the events of April 21 or 22, 1885, when two guests arrived at John Jones’s Brentwood hotel. According to Mary Jones, the visitors “engaged a room for the night—and they occupied together room No 11—and in the morning following they left together”⁴² A Brentwood butcher who boarded in the adjoining room and who had suspiciously eyed the newcomers at supper—for there had seemed “something wrong about them”—was “considerably annoyed” during the night “by their apparently being upon a kind of a Lark”⁴³ And a Brentwood blacksmith who stabled the couple’s horse and buggy for the night complained that the man called in the morning for the horse and buggy “and left town—the Stable Bill unpaid”⁴⁴

Who were these rambunctious scofflaws? Though she didn’t say how she knew, Mary Jones identified them as “Mrs Jennie Cull of Pleasanton” and “a Gentleman.”⁴⁵ The butcher ventured no identification. The blacksmith dealt only with the man, who identified himself as “Mike Donnelly” of Pleasanton. Five days later, the blacksmith saw the couple’s horse and buggy about seven

40. Cull Trial Transcript, *supra* note 6, at 31 (testimony of R.W. Graham); *see also id.* at 23-24 (testimony of Eugene Allen); TRIBUNE, Sept. 15, 1885, *supra* note 7.

41. TRIBUNE, Aug. 11, 1886, *supra* note 34.

42. Affidavit of Mary Jones, June 9, 1885, People v. H.C. Cull, No. 634 (1885) (Alameda County Super. Ct.).

43. Affidavit of A. M. Marble, June 9, 1885, People v. H.C. Cull, No. 634 (1885) (Alameda County Super. Ct.).

44. Affidavit of N. Graber, June 9, 1885, People v. H.C. Cull, No. 634 (1885) (Alameda County Super. Ct.).

45. Affidavit of Mary Jones, *supra* note 42.

miles away at the Odd Fellows Picnic in Stewartville. On inquiry, he learned “it belonged to *Mrs Cull*.”⁴⁶

How these affidavits came to be is hardly clear. The *Tribune*’s summary of Cull’s brother’s testimony reported only that “[t]hese three affidavits were obtained by H.S. Cull, who went [to Brentwood] especially for that purpose.”⁴⁷ Nothing suggests how H.S. Cull learned of the Brentwood events. It is likely, though, that his meddlesome errand explains the *Tribune*’s remark on the day after the killing that “it is hinted that one of the brothers of the strangler gave material aid in fomenting the fatal trouble between the man and his wife.”⁴⁸

Whatever their provenance, the affidavits had the effect Attorney Moore desired. Indeed, so confident was Moore of their force that he sat down without closing argument. After ten minutes’ deliberation, the jury acquitted.⁴⁹ Although at least one newspaper reported that the acquittal was “on the ground that [Cull] was mentally irresponsible,” the actual verdict slip, signed by the jury foreman, reads simply “not guilty.”⁵⁰ The consequence in either event was Cull’s freedom. Even before trial began, he had been discharged as cured by the Stockton Insane Asylum, where he had been committed after killing his wife. Barely two weeks after his acquittal, the Livermore *Herald* noted Cull’s return to town.⁵¹

And so the moral tables of the trial had turned. H.C. Cull, the “Livermore Thug,” who murdered a good and patient wife before their child’s eyes, now was the victim of her infidelities. Here was a man “CRAZED BY LOVE,” declared the *Tribune*’s closing headline on the case. Here were “The Vagaries of a Diseased Mind.”⁵²

V

Yet somehow the pieces of Moore’s morality tale did not quite fit. For starters, consider the Brentwood couple’s stable bill. Here was a woman married to a high-strung and highly possessive man off on an escapade with someone else. Discretion surely was their watchword. Why would such a couple *assure* the blacksmith’s notice by absconding on their stable keep? Had they been traveling in the man’s buggy, they might have taken the chance. But they were traveling in the lady’s, and apparently it was quite recognizable.

46. Affidavit of N. Graber, *supra* note 44.

47. TRIBUNE, Aug. 11, 1886, *supra* note 34.

48. TRIBUNE, Sept. 15, 1885, *supra* note 7.

49. *Acquitted of Murder*, S.F. CHRON., Aug. 12, 1886, at 8; *Oakland Items*, DAILY EXAMINER (S.F.), Aug. 12, 1886, at 2 [hereinafter DAILY EXAMINER, Aug. 12, 1886].

50. DAILY EXAMINER, Aug. 12, 1886, *supra* note 49; Verdict Slip, *People v. H.C. Cull*, No. 634 (1885) (Alameda County Super. Ct. 1886).

51. *Oakland News*, THE MORNING CALL (S.F.), Aug. 12, 1886, at 3; *The County: Livermore*, OAKLAND TRIB., Sept. 3, 1886, at 1 (citing Livermore *Herald*, Aug. 26, 1886).

52. TRIBUNE, Aug. 11, 1886, *supra* note 34.

For that matter, they might have kept it quieter at night. That is, this was a couple *trying* to be noticed. And if that's true, then the whole Brentwood sex frolic was a fraud.

But whose fraud? At first the suspicion arises that Hugh Cull was more deeply evil than first imagined—that one brother took him to a doctor and arranged for his token jail commitment to lay the stonework for an insanity defense, and another brother went to Brentwood to collect affidavits after paying Donnelly and a friend to pass themselves off as Jennie Cull and a beau on a tear.

But that can't be right. Nobody *plots* an insanity defense. First of all, even in Cull's day, there was no guarantee a jury would look kindly on a man who killed his wife, however unhinged he was and however unfaithful she may have been. Then there's the year in custody that Hugh Cull presumably spent waiting to mount his insanity defense—not to mention the small fortune he paid for that defense. And think of the little girl. Even if a man were so deranged as to plan to kill his daughter's mother before her eyes, why would he do it? Carrie was a plucky little girl and would have cut quite a figure as a witness, with her wee fingers twisting her tiny handkerchief and wiping tears from her eyes. What if the trial judge had not so pliantly found, against the evidence, that she could not perceive facts justly or relate them truly? Then the jury might have heard Carrie say how she "told him to 'stop, stop,' and he said 'that is all right, that is all right, that is all right'" and went right on choking her mother to death. A lot of good Cull's insanity defense would have done him then.

No. The sexcapade in Brentwood *was* a fraud. But it was not Hugh Cull's fraud. It was Jennie's.

Only scattered hints of the truth intrude into the trial record. That is not surprising. Albert Moore knew his best trial strategy was to paint Cull as a man driven to distraction by his wife's infidelity. Arguing that Cull was driven to distraction by his wife's *feigned* infidelity would have been a far more complicated matter. Still, here and there a witness's stray remark unsettled Moore's carefully cropped picture of a man betrayed.

Among the many witnesses Moore called to describe Cull's altered behavior in the weeks and months before the killing was G. W. Langon, a Livermore lawyer. According to the *Tribune*, Langon testified that "Cull had acted strangely different during the last few times that [Langon] had seen him." Langon then elaborated: "[I]t seemed that Cull was afraid that his wife was trying to obtain a divorce from him and that she was working with a man named Donnelly and a girl that was working for him."⁵³

Out of nowhere and for the first time came this word *divorce*. The possibility that Jennie Cull may have been planning to sue for divorce could explain why Hugh Cull called on Attorney Langon in the first place. And Hugh Cull's distress about a possible divorce could explain a second stray remark in

53. *Id.* (emphasis added).

the trial record, uttered by Samuel Sellers, a Livermore merchant whom Moore called on the matter of Cull's insanity. The *Tribune* supplied the only surviving record of this testimony:

[Sellers] testified that one day Cull, about three weeks before the killing, came to him and asked to have an attachment issued against him as he wished to pay his honest debts, and that some enemies were going to burn his house that night.⁵⁴

Moore surely hoped the jury would attend to the last part of these remarks, for Cull's fear of a violent conspiracy was one component of his insanity defense. But the former statement was less helpful—and harder to explain. Why would a man who hoped to pay his honest debts not simply pay them? Why would *any* man recommend that a creditor attach his property?

One possibility is that Cull, fearing (and resenting) a divorce action and a claim for community property, aimed to shrink his wife's take by draining the common pool. The same motive may have lain behind Cull's otherwise unexplained move from his ranch to the little house in Laddsville. The family left the ranch about two weeks before the killing. Sellers said he spoke with Cull about three weeks before the killing—about the time Jennie Cull returned home from her long stint in Kentucky.

But how could a woman's feigned adultery help win her a divorce? Surely the law of divorce was not then so liberal as to grant a woman a divorce on evidence of *her own* unfaithfulness. On the contrary, the California Civil Code required the party suing for divorce to show the other spouse's fault—his adultery, extreme cruelty, desertion, neglect, intemperance, or crime.⁵⁵ So what was Jennie Cull up to?

Once again, Lawrence Friedman's writings supply essential clues. Starting with a 1976 collaboration with Robert Percival and extending through his most recent *Private Lives*, Friedman has often explored the use of sham liaisons in divorce actions. His prototypical fraud, in which a hapless bellhop invariably interrupted the red-handed husband and his red-faced date, bore one resemblance to Donnelly's charade in Brentwood: in each case, the participants took pains to assure discovery.⁵⁶ In other ways, however, the imagined case of *Cull v. Cull* would have looked quite unlike the far larger contingent of contrived divorces that Friedman helped expose to the world.

Most importantly, Friedman has told of *collusive* divorces. They worked because one spouse faked sex while the other filed suit—a tactic many used to win amicable divorces in days before no-fault. But one can't collude alone, and there is no evidence that Hugh Cull sought to divorce Jennie. On the contrary,

54. *Id.*

55. See CAL. CIV. CODE §§ 92, 130 (1885).

56. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1512-13 (2000); see also Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 78-80 (1976).

he obsessed about his slipping control over her and perhaps worried about his reputation at church. Even when partners did collude, Friedman reports that it was almost never the woman who shammed the tryst, almost always the man.⁵⁷ For as a Missouri court wrote in 1895, “What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other.”⁵⁸ Even men apparently preferred other accusations to adultery. Friedman writes that although wives often alleged adultery in New York, where adultery was the sole grounds for divorce, they rarely did so in California, where extreme cruelty, desertion, and neglect also sufficed and proved far more popular.⁵⁹

Here Friedman offers a fundamental insight: when seeking to explain the behavior of spouses seeking divorce, look first to the governing law. And indeed the missing link in the Cull case lies in the reporters of the California Supreme Court. Consider first *Powelson v. Powelson*, decided by the court in 1863. Seeking divorce on the grounds of cruel treatment, Mrs. Powelson alleged that her husband “was in the habit of using toward [her] the vilest and most abusive language, *falsely charging her with adulterous intercourse.*”⁶⁰ The lower court rejected her claim on the grounds that only physical violence constituted extreme cruelty. “The better opinion, however, is opposed to this view,” the California Supreme Court wrote, “and we think that any conduct sufficiently aggravated to produce ill-health or bodily pain, though operating primarily upon the mind only, should be regarded as legal cruelty.” As for Mr. Powelson’s specific conduct, the court declared in notably strong terms that “if any treatment short of physical violence can amount to legal cruelty, we regard [this] case as fully made out.”⁶¹ Seven years later, in 1870, the California legislature ratified the high court’s holding by redefining “extreme cruelty” to include infliction of either “grievous bodily *or mental* suffering.”⁶²

Now advance to *Haley v. Haley*, decided by the California Supreme Court on May 14, 1885, just a few weeks after Jennie Cull’s supposed indiscretion in Brentwood and a few weeks before its apparent discovery by her brother-in-law H.S. Cull. The trial court had deemed Mr. Haley guilty of extreme cruelty “in

57. See Friedman, *supra* note 56, at 1528–29.

58. *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895).

59. FRIEDMAN, *supra* note 29, at 36; Friedman, *supra* note 56, at 1518–19.

60. *Powelson v. Powelson*, 22 Cal. 358, 360–61 (1863) (emphasis added).

61. *Id.* at 360. Robert Griswold reports that some lower California courts recognized false accusations of adultery as a species of cruelty in a husband as early as 1857. He describes many divorce actions between 1863 and 1888 in which women sued for divorce on this basis. See ROBERT L. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890*, at 19, 72–74 (1982). On the development of the doctrine nationally, see Robert L. Griswold, *Law, Sex, Cruelty, and Divorce in Victorian America, 1840-1900*, 38 AM. Q. 721, 721, 724–31 (1986); Robert L. Griswold, *The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790-1900*, 20 J. SOC. HIST. 127, 136–38 (1986).

62. An Act to Amend an Act Entitled an Act Concerning Divorces, ch. 188, 1869–70 Cal. Stat. 291 (emphasis added).

that *he had accused [his wife] of having committed adultery*, and that in consequence of such accusations her mental suffering was so great that . . . *she was obliged to leave his home and seek shelter elsewhere.*⁶³ The California Supreme Court reversed this judgment—not, however, because it thought the wife’s allegations insufficient. Rather, the court held that the trial judge had acted on insufficient proof. The only instances in which Mr. Haley had accused his wife of adultery were “conversations of a friendly and confidential character, sought by plaintiff’s attorney with her knowledge, and with a view to settle matters between the parties.” That is, Mrs. Haley’s suit failed because she and her husband were colluding—they were arranging things so that “a divorce could be got with little expense, scandal, and notoriety.” The California Supreme Court complained that there was no evidence that Mr. Haley had spoken “with any wanton or cruel intent” and no evidence other than Mrs. Haley’s own say-so “of any accusations made by defendant before she left his house, nor that she left his house, or underwent any suffering in consequence of any such accusations.”⁶⁴

Mrs. Cull was not so negligent in her proof. Having heard this warning from the California Supreme Court, she (and presumably her lawyer) knew what they needed for proof of extreme cruelty. They had to show that the defendant accused his wife falsely of adultery; that he did so in a conversation that risked public notoriety; and that his accusations so pained Mrs. Cull that she left his house. Let’s take these points in turn.

If indeed Mr. Donnelly “and a girl that was working for him”—mentioned in Attorney Langon’s trial testimony—made the overnight ruckus in Brentwood, then any accusation of adultery based on this episode was false. It is even possible that the young woman in question was Cull’s own employee. Recall the *Tribune*’s report on the day after the killing that despite “thick and fast” rumors of Jennie Cull’s infidelity, it was all a misunderstanding, for the strange man seen visiting the Cull ranch “was visiting a servant girl in the employ of Cull, and not Mrs. Cull.” If Donnelly was working with Cull’s servant, they may have made the trip to Brentwood in Jennie Cull’s buggy—which would explain the Brentwood blacksmith’s claim that when he next saw the buggy he had boarded for the night, he learned “it belonged to *Mrs Cull*.” And the servant’s involvement in the scheme against Cull could also explain why Cull fantasized killing her. For among the witnesses produced by Attorney Moore to prove Cull’s insanity was one who testified that Cull “didn’t dare to go alone” to his ranch after he’d moved out because Cull “had an idea that the hired girl was dead in the house, and if he went alone, if he found her dead, it would be laid to him”⁶⁵

63. *Haley v. Haley*, 67 Cal. 24, 24 (1885) (emphasis added).

64. *Id.* at 25.

65. Cull Trial Transcript, *supra* note 6, at 85-86 (testimony of Dennis Weymouth).

And surely Jennie Cull could prove that her husband had made her alleged affair notorious. *Someone* started those “thick and fast” rumors that the *Tribune* so piously debunked. H.S. Cull said at trial that he had collected the infamous Brentwood affidavits and read them to his brother. The defendant then helped spread the news. His doctor testified that about two months before the killing, he met with Cull and the pastor of the church they both attended. Cull spoke (albeit doubtfully) of the rumors of his wife’s infidelity; then “he exhibited the proof spoken of here, I think, by some—some papers—affidavits, perhaps . . .”⁶⁶ The pastor confirmed that while Jennie Cull was in Kentucky, Cull “appeared to be trying to think his wife was true to him, but . . . named various instances where he believed [her] unfaithful to him . . .”⁶⁷ A handyman who helped the Culls move into their Livermore home weeks before the killing testified that the defendant fretted about his wife’s fidelity: “[H]e said there was lots of talk about her, and so on, and talked about Mike Donnelly and her.”⁶⁸ Cull even told his suspicions to the press. On the day after the killing, a *Tribune* reporter asked Cull about his earlier, week-long stint in jail for psychiatric observation, which had commenced about six weeks before the crime: “‘You know, Cull, when you was in here before you said your wife had gone off with another man.’” Cull, perhaps regretting having spread such tales, now backtracked: “‘If I said she was off with another man before I don’t remember it, and it was a mistake . . .’”⁶⁹

Finally Jennie Cull could prove that she fled her husband’s home shortly after he began smearing her good name. H.S. Cull secured the Brentwood affidavits on June 9, 1885. It seems safe to presume he showed them immediately to his brother and that Hugh Cull raised a prompt (and perhaps violent) accusation against his wife. No source states precisely when Mrs. Cull fled to Kentucky with two of her four children. But on the day of the crime—September 14, 1885—the *Tribune* reported that she had left “[a]bout three months ago.”⁷⁰ A natural conclusion from the evidence is that Jennie Cull left rather swiftly after her husband leveled his accusation and began spreading the slander. Even without knowledge of the affidavits, the San Francisco *Daily Examiner* retold the story of Jennie Cull’s departure in these terms on the day after the killing:

Cull is an excitable, reckless man, given to brooding on alleged wrongs, and he some time since gained an idea that his wife was untrue to him. Despite her protestations he kept constantly abusing her, and about three months ago the woman left him and returned to her father . . . [in] Kentucky.⁷¹

66. *Id.* at 44, 48-49, 51 (testimony of Dr. B.C. Bellamy).

67. *TRIBUNE*, Aug. 11, 1886, *supra* note 34.

68. Cull Trial Transcript, *supra* note 6, at 74 (testimony of Charles Moore).

69. *TRIBUNE*, Sept. 15, 1885, *supra* note 7.

70. *TRIBUNE*, Sept. 14, 1885, *supra* note 7.

71. *DAILY EXAMINER*, Sept. 15, 1885, *supra* note 16.

For a moment, one is tempted to wipe away all evidence of Jennie Cull's scheme and dismiss the all-too-clever notion that she plotted the Brentwood affair. Perhaps Mr. Donnelly really *did* have an affair with the Cull's domestic helper. Maybe they borrowed Jennie Cull's buggy to run an overnight errand and took the chance for a romp. Perhaps H.S. Cull simply happened to hear the rumors from Brentwood and was ready to think the worst. He collected the affidavits, his brother made the accusation, and Jennie, genuinely injured, fled their home, consulted a lawyer, and threatened a divorce under the fortuitous doctrine of *Powelson* and *Haley*. Perhaps so, but there is one decisive reason to think not. The trial witness who delivered the critical evidence of Jennie Cull's plot—"it seemed that Cull was afraid that his wife was trying to obtain a divorce from him and that she was working with a man named Donnelly and a girl that was working for him"—was a lawyer. It is possible that Cull consulted this lawyer seeking an escape from Jennie's trap, but the lawyer knew a good trap when he saw one. After all, Jennie Cull was not the first California woman who wished to divorce a man who wanted to stay married. Given the liberal terms of *Powelson* and *Haley*, other women (and their lawyers) may have lured their husbands into similar traps, prompting them to broadcast false allegations of adultery.

And the kicker was this: armed with what the California Supreme Court had declared in *Powelson* to be virtually a prima facie case of mental cruelty, Jennie Cull was entitled not just to divorce. By taking her bait and spreading false news of her outing to Brentwood, Hugh Cull had made himself the offender for purposes of California divorce law. "Where a divorce is granted for an offence of the husband," the code said, "the court may compel him to provide for the maintenance of the children . . . and to make such suitable allowance to the wife for her support . . . as the court may deem just . . ." ⁷² What is more, Cull was destined to lose more than half the couple's community property. For although courts typically split community property equally between divorcing spouses, when a divorce was on grounds of extreme cruelty, the code provided that "community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." ⁷³ The California Supreme Court had ruled that the natural inference of this provision "is that . . . the injured party is to receive, as a general rule, more than one half of the property, and as much more as the Court shall deem just." ⁷⁴ Still worse, even if Cull's ranch was his "separate property," its status as the family "homestead" could empower a court "to assign it for a limited period to the innocent party." ⁷⁵

72. CAL. CIV. CODE § 139 (1885).

73. *Id.* § 146(1)-(2).

74. *Eslinger v. Eslinger*, 47 Cal. 62, 64 (1873).

75. CAL. CIV. CODE § 146(4) (1885).

Little wonder, then, that Cull asked a local merchant “to have an attachment issued against him as he wished to pay his honest debts”—for Cull preferred to pay money he owed over money the court wrung from him. Little wonder that he quit his ranch in favor of the probably rented shack in Laddsville—for he wished to shield the ranch from homestead status. And little wonder that Cull’s townsmen concluded he was deranged—for Cull, always unstable, had grown delirious with rage at having his jealousy turned against him, at being played for a chump.

VI

And so we have a morality tale in many layers. An obsessive and controlling husband drove his wife to seek divorce; a rigid, uncompassionate law demanded that she first prove his fault; and so she contrived a trap into which his own demons drove him. There followed his brooding and his rage—at his wife for deceiving him and at himself for being so easily deceived—then his crime, her death, and their orphaned daughter’s imposed silence.

Many-layered tales can make good history but bad trials. After telling of Clara Fallmer, whose lawyers dressed her in a veil and violet bouquet but whom prosecutors painted a perjuring harlot, Friedman and Percival wrote that neither side could afford the simple truth—that Clara was neither waif nor wench, “but essentially a woman, with ordinary feelings and passions.”⁷⁶ So here, where the truth was not so simple, neither side could afford it. The prosecutor preferred a helpless Jennie who fled to her father over the true Jennie, however injured, who plotted for her freedom. Attorney Moore preferred a cuckolded Cull crazed by love over the true Cull, however crazed, who killed the wife who duped him. Seizing on the fortuitous affidavits, Moore converted faked adultery into fact and won for Cull his freedom.

And so we have a story, but not a moral. It’s what one finds amid the mold.

76. FRIEDMAN & PERCIVAL, *supra* note 1, at 242.

