

**WRITE TO PRIVACY: LITERATURE, LETTERS, LAW,
AND THE INVIOLE PERSONALITY IN
AMERICA'S LONG NINETEENTH CENTURY**

by

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Abstract: Scholars and jurists recognize Samuel Warren and Louis Brandeis's influential Harvard Law Review article, "The Right to Privacy," as the first articulation of a constitutional right to privacy, but its relatively late date (1890) in the chronology of constitutional law raises a number of questions. Why did the right to privacy become important at that particular moment? How did a concept with roots in property law come to apply to the "inviolable personality," in Warren and Brandeis's memorable phrase, independent of considerations of class (or race or gender)? This dissertation proposes answers to those questions, tracing the genealogy of the right to privacy through literature and law from the end of the eighteenth century to the beginning of the twentieth. The first chapter examines the connection between privacy and the written word, especially in letters and epistolary fiction. Writers like Hector St. John de Crevecoeur and Hannah Webster Foster probe the connection between personal correspondence and national commitments, contemplating the costs and benefits of privacy, and proposing the epistolary form as a vehicle for the self. The second chapter looks closely at representations of women in literature and readings of privacy that connected women with domestic space. Works by Alcott, Hawthorne, and Poe interrogate the limitations of domesticity and conventional gender roles, while proposing the written word as an alternate, more constructive site of privacy. The third chapter considers links between literacy, deprivation, and privacy, using anti-literacy laws and narratives by Frederick Douglass and Harriet Jacobs to examine how the marginalizing

experience of slavery informed discussions of privacy. The final chapter of the dissertation analyzes how societal changes create a perceived need for new rights and protections. Writers like William Dean Howells and Henry James decry newspaper culture and urbanization, warning that scrutiny and publicity endanger the self. This fear that publicity leads to privation informs Warren and Brandeis's "The Right to Privacy," as it urges protections for persons rather than property. The surprising origins of the right to privacy still affect our conflicted views on the uses of this right and the measures that we take to safeguard it.

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PREFACE

Over the past several years, I have had the great good fortune to work with the scholars in the English Department at the University of Pittsburgh. They have shown me what it means to be part of a collegial and professional intellectual community; they have provided consistent and inspiring models for my teaching and research. I am honored to have worked with Don Bialostosky, Jean Ferguson Carr, Marianne Novy, Mark Lynn Anderson, Marah Gubar, and Jennifer Waldron and with a lively, engaged community of graduate students.

I especially want to extend my thanks to the members of my dissertation committee. My advisor, Jonathan Arac, showed unflagging interest and faith in my project. His keen questions and high standards encouraged me to think more deeply, and more broadly, than I would have otherwise. Without Courtney Weikle-Mills, there would have been no dissertation. This project started as a short paper in her course on “Imagining Citizenship.” When I was confounded by the topic, she pushed me to expand that short paper, for which I am grateful. Nancy Glazener stepped in and offered insight and encouragement as well as a profound understanding of ethics (and how that relates to law) at the beginning of the writing process, and she has been a careful and generous reader of my work. And Christopher Castiglia’s ideas are among the most stimulating and challenging notions I encountered when thinking about the American turn from

public to private. I also have to thank Susan Harris Smith whose honesty and intellectual rigor helped me through the earliest stages of this project.

Donald Pease and the Futures of American Studies Institute were instrumental in allowing me to test and develop my ideas; the central analysis of Chapter 2 originated in a conversation with Dr. Pease. I also am grateful to the Newberry Library for a fellowship that allowed me to research letter-writing guides and postal practices in the transatlantic world of the late seventeenth century.

Michael Hendricks endured more conversations about email, the history of the postal service, and the rise of the press than he would care to remember. He also checked page numbers and quotations, asked pertinent questions, and cheered every step of the way. Before this project was even the hint of an idea, he supported my decision to leave legal practice to pursue a doctorate. These words, these ideas, this entire venture would not have happened without him.

For three years now, Eva Hendricks has proudly told her friends, “My mom’s writing a book.” She has turned down her music, foregone sleepovers, and tried to maintain the calm, scholarly atmosphere necessary to make this “book” happen, and she deserves all the thanks I can give her (including an acknowledgement in a book that contains no wizards).

I also want to thank my mother, Clara Davies, who did not get to see the end of this project, and my father, Richard Davies, who did.

1.0 INTRODUCTION

In October 2010, journalist and lawyer Dahlia Lithwick published a short article on the Supreme Court decision to shield corporations from disclosing the beneficiaries of their political contributions.¹ She examined the decision as evidence of a growing gap between corporate privacy rights and individual privacy rights, observing archly that “Once upon a time you had to be a person to assert a right to personal privacy.” Lithwick hints that by redefining “person,” the Supreme Court has redefined privacy as well.² How, after all, can a corporate entity made up of many persons aver that it should enjoy anything like a right to privacy? If the corporate is not in some way synonymous with the public, then exactly what do we mean when we cordon off a space (or an idea, or its expression) as “private”?

The question of who may assert a right to privacy under the law is not new, although the introduction of corporate actors provides a new twist. For more than a century of privacy debates, the conversation has centered on which individuals and which acts are shielded by legal protections; the notion that corporations can be persons and that such persons enjoy a right to

¹ Dahlia Lithwick, “Privacy Rights, Inc.” http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/privacy_rights_inc.htmlhttp://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/privacy_rights_inc.html, October 14 2010.

² In October 2011, SF writer Vonda McIntyre published a short story expanding this possibility, contemplating what would happen if “organic” beings were deemed second-class citizens, with corporations receiving more expansive rights. Vonda N. McIntyre, “SCOTUS Defines Personhood,” <http://blog.bookviewcafe.com/2011/10/12/scotus-defines-personhood/>, October 12, 2011. In McIntyre’s dystopian vision, corporations are given custody of all human individuals and instructed to act in loco parentis and the Supreme Court has a corporate sponsorship.

privacy seems emphatically to sever the connection between privacy and the body that has been at the core of privacy debates for past several decades.³ If a “person” can have many bodies, then privacy seems to have little to do with specific bodily needs. While legal cases like *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Bowers v. Hardwicke*, and *Lawrence v. Texas* address questions of reproduction, contraception, and sexuality, focusing on the body (often in domestic space), *Citizens United* posits a privacy that is either many-bodied or, because of its apparent dissemination and abstraction, entirely disembodied.⁴

However, this decision is only the latest permutation of a longstanding debate. The link between the private and the personal was not always clear or inevitable. Contemporary understandings of the association between privacy and persons dates only to 1890 while the shape and the meaning of the right to privacy have been contested for decades. Academic essays, opinion pieces, journalistic investigations, and legal analyses are all devoted to explore the shrinking (or perhaps merely shifting) parameters of the right to privacy. A glance through the shelves of any university library reveals the ongoing concern with the reach, and nature, of privacy. Within the last decade, scholars have produced works like *Understanding Privacy*, *The*

³ Warren and Brandeis themselves argued that “the object in view [of the proposed right to privacy] is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is likely to be withdrawn.” Samuel Warren and Louis Brandeis, “The Right to Privacy,” *Harvard Law Review*, IV: 5 (December 15, 1890), 193-220, 214. While this touches on issues of privacy and domesticity discussed below, it is worth observing that a business does not seem, by its nature, to have a private life.

⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965) overturned a Connecticut law prohibiting the use of contraceptives on the grounds that the law violated the right to privacy. *Eisenstadt v. Baird*, 405 U.S. 478 (1972) held that the same right applied to unmarried person. *Bowers v. Hardwicke*, 478 U.S. 186 (1986) held that no right to privacy inhered in consensual, homosexual intercourse, and *Lawrence v. Texas*, 539 U.S. 558 (2003) overturned that finding. All of these cases explicitly consider the ways in which the right to privacy applies to bodies and their actions. In contrast, the *Citizens United* decision may represent the furthest logical extension of the disembodiment of privacy I explore in my case study, although it may warrant yet another synonym since a corporation seems to have no interest in domesticity or autonomy. *Citizens United v. Federal Election Commission*, 558 U.S. 08-205 (2010).

Public Life of Privacy, *Inexpressible Privacy*, and *The Secret History of Domesticity: Public, Private and the Division of Knowledge*. Each of these texts (and dozens more) tries to trace the importance of privacy to national life.

Our cultural moment is experiencing something of a backlash against privacy as both a practice and as a theoretical construct. In her assured and intriguing article, “What Privacy is For,” Georgetown law professor Julie Cohen asserts baldly,

Privacy has an image problem. Over and over again, regardless of the forum in which it is debated, it is cast as old-fashioned at best and downright harmful at worst— anti-progressive, overly costly, and inimical to the welfare of the body politic.⁵

Certainly, our acceptance of increased and pervasive surveillance by both the state and corporations suggests that our society has little use for the protections, or the preciousness, of privacy. We readily click through Facebook permissions for the pleasure of sharing vacation photos, without regard for whether Facebook or its advertisers will use those photos to sell us new and better vacations or to gather additional records on us (although as I type this, Senator Rand Paul is enjoying a moment of notoriety for trying to overturn the USA PATRIOT Act and its reach into citizens’ telephone records). Nevertheless, Cohen claims that privacy is important, even formative.

Writing in *The Atlantic* in 2013, Jathan Sadowski offered a quick overview of current scholarship on privacy, particularly privacy law, in the interest of presenting an answer to the question, “Why Does Privacy Matter?”⁶ Sadowski begins with a warning cry: “Our privacy is now at risk in unprecedented ways, but, sadly, the legal system is lagging behind the pace of

⁵ Julie Cohen, “What Privacy is For,” *Harvard Law Review* 126:7 (May 2013) 1904-27.

⁶ Jathan Sadowski, “Why Does Privacy Matter? One Scholar’s Answer,” *The Atlantic* (February 26, 2013).

innovation.” (I would argue that the same warning has been sounded for the last 125 years, and that the legal system always follows practice rather than leading it, but those observations can be expanded later.) Sadowski is interested in explaining not only why privacy is so important, but in defining what privacy is. Sadowski issues the expected warnings about the ways in which Facebook encroaches on its users’ privacy, but he is more interested in theorizing about privacy than in tracing its loss. He cites Julie Cohen, who argues that:

privacy is irreducible to a "fixed condition or attribute (such as seclusion or control) whose boundaries can be crisply delineated by the application of deductive logic. Privacy is shorthand for breathing room to engage in the process of ... self-development." What Cohen means is that since life and contexts are always changing, privacy cannot be reductively conceived as any one specific type of thing. It is better understood as an important buffer that gives us space to develop an identity that is somewhat separate from surveillance, judgment and the values of our society and culture (*Ibid.*).

Concerns that have beleaguered privacy scholars for decades are all here in this observation: privacy is somehow separate from, possibly opposed to, the “values of our society and culture” and yet it is important to self-development in a way that our society has chosen to nurture, perhaps in a way that defines our society. Even more: privacy is essential to personhood. Further, Sadowski’s reading of Cohen touches on the slippery nature of privacy. Since “life and society are always changing,” what privacy is, and does, changes too.

The idea that privacy is essential to personhood stems from the first formulation of the modern right to privacy, which attaches the protections of that right to an “inviolable personality.” In the essay recognized as the first, full articulation of the right to privacy, judges and legal scholars Samuel Warren and Louis Brandeis argued that the Constitution implied a right to privacy separate from the property-based protections extended under English and American common law. Since the middle of the sixteenth century, English law had held that the home was safe from incursions by the government or other subjects, but a privacy right that attached to a

“personality” seemed like something quite new, a potentially more expansive concept that applied not only to dwellings but to the people within them, whether or not they owned those dwellings. But attaching privacy to a personality raised other questions. Where does this new idea of *personal* privacy come from? Does a person need privacy? Does privacy make the person? Certainly, the debate over privacy has shaped American life over the last hundred years, with political positions on that topic informing policy on nearly every aspect of daily life, including housing, communication, marriage, and reproduction. This project attempts to remedy the lack of understanding, tracing the roots of privacy.

Aside from Warren and Brandeis’s “Right to Privacy,” whose words, ideas, and discontents lay at the heart of this inquiry, this project also owes an immense debt to Jurgen Habermas’s *The Structural Transformation of the Public Sphere*.⁷ Habermas claimed that the bourgeois public sphere of the eighteenth and nineteenth centuries emerged from the separation of private and public, with the private sphere of the home providing space for reflection and individuation. Individuals developed ideas in the home and shared and tested those ideas in the new public space supplied by coffee houses, clubs, meeting halls, and other sites dedicated to the pleasures of conversation and debate. This public space depended on freedom of assembly and freedom of speech. Freedom of speech also underlay another newly opened public arena, the exchange of ideas facilitated by the rise of print media, which created a sphere not limited by physical space. Habermas contended that the rise of the public sphere allowed for a more informed and engaged middle class. But the increasing value ascribed to the private sphere also

⁷ Jurgen Habermas, *The Structural Transformation of the Public Sphere* (1962), (Cambridge: MIT Press, 1991). Habermas writes, “[T]he experiences with which a public passionately concerned with itself sought agreement and enlightenment through the rational-critical public debate of private persons with one another flowed from a wellspring of specific subjectivity. The latter had its home literally in the sphere of the patriarchal conjugal family” (43).

contributed to the diminution of the public. If there is a legal right to privacy, if the state itself is enlisted in protecting the privacy of the individual, what does that mean for the importance of the public sphere?

1.1 THE AMBIGUITY IN THE BOX: PRIVACY AND ITS SYNONYMS

In one of my first classes in graduate school, a class looking at citizenship in seventeenth- and eighteenth-century America, I foolishly volunteered to research the concept of privacy in the early republic. I had a legal background, and I thought (mistakenly, arrogantly) that I would easily uncover what privacy meant to those new citizens. I was flummoxed when book after book, essay after essay, vaulted over the early republic, beginning with the words, “In 1890, Samuel Warren and Louis Brandeis published their influential article on the right to privacy.” “1890?” I thought, “Really? There was nothing before that?” I called a former law school classmate, an expert on the topic of privacy law, and demanded, “Tell me everything you know about the origins of privacy in America.” He cleared his throat and said, “Well, in 1890 . . .” Thus, this project began. I wanted to know what happened in those long years between the War for Independence and the December 1890 issue of the *Harvard Law Review*. What concerns were percolating in the young country that resulted in the extraordinary assertion of a legal right based in the Constitution but unrecognized until the pressures of life in the late nineteenth century demanded its acknowledgment? While privacy was not recognized or even mooted as a constitutional right until Warren and Brandeis’s 1890 law review article, I argue that the right did not spring fully formed, a legal Athena, from the teeming brains of two legal scholars. Instead (and in concert with most of the critics whose work I examine herein), I argue that, for a

century before Brandeis and Warren published their article, American writers had articulated formulations of privacy as helpful, even necessary to the national character; however, many (if not all) prolonged meditations on privacy occur in literature rather than case law. Literature moved more quickly than the law in anticipating the formulation of this right, and enjoyed more freedom to speculate about those formulations.

Since that day, other scholars have become intrigued by and published their own speculations on the origins of privacy in America. But this work attempts to trace the idea of privacy through both its legal and literary antecedents, examining how a concept rooted in property law came to apply to a notion of “inviolable personality,” an idea seemingly independent of real property ownership. Both law and literature rely on the power of the written word; this dissertation looks at concepts of the self in the written word, beginning with letters and epistolary novels and ending with newspapers and realist novels.

But before determining why privacy is important, it’s necessary to determine what privacy is. “Privacy” has proven to be a capacious and flexible term, encompassing several different (and sometimes contradictory) concepts. Literary scholar Milette Shamir argues that one of the fundamental concerns about the right to privacy is that it is “essentially empty – it potentially embraces everything and conveys nothing.”⁸ Suggestively, Shamir entitled her book *Inexpressible Privacy*, intimating that privacy exceeds or escapes definition, a notion to which I will return in a moment. Her concern also points to one of the fundamental questions about privacy – if it builds a shield to deflect the eager gaze of governments and neighbors, then

⁸ Milette Shamir, *Inexpressible Privacy: The interior life of antebellum American literature*. (Philadelphia: University of Pennsylvania Press, 2006), 1. Shamir “traces the lineage of the modern American ‘cult of privacy’ . . . to the middle decades of the nineteenth century, roughly between 1830 and 1870” (2). Because I am interested in the legal manifestations (and ramifications) of privacy my inquiry extends further into the past, and nearer in time to the future – in part because legal considerations of privacy took more definitive shape in those moments.

anything, or nothing, could happen behind that shield. However, “privacy” has been used as a synonym (or as a shield) for several different concepts. Many of these synonyms are particularly relevant to this inquiry:

- o *Privacy and Domesticity*: In *The Structural Transformation of the Public Sphere*, a work whose influence and arguments underlie almost all modern debates on publicity and privacy, Jurgen Habermas posits that the private sphere necessarily develops in tandem with, and enables the public. The Habermasian formulation of privacy associates the private as a creative realm with the home, in which nurturing is supposed to take place. However, domestic space did not nurture only potential citizens (children); the home also allowed adults to become active participants in the *polis*. The home offered space for reflection and renewal, permitting the citizen to participate fully and thoughtfully in the public sphere, hypothesizing a symbiotic relationship in which public and private worked together for the greater good – or at least the more effective and efficient function – of society. The association between domesticity and privacy became gendered, enabling the concept of separate spheres for men and women; women did not simply live in domestic space, but were charged with preserving it.
- o *Privacy and Interiority*: It can be difficult to tease out the distinction between the domestic and the interior, since it is tempting to treat the increasingly closed-off space of the home as commensurate with privacy. Further, the valuation ascribed to the domestic leads citizens to prize the emotional, the interior. The private citizen is eventually trapped within himself. For Christopher Castiglia, the developing rhetoric of privacy relocates the citizen’s energy, compelling him to look inward for improvement and reward. “If the citizen’s continual policing of his own interiority is necessary because the law has lost its ability to monitor an increasingly mobile and privatized citizenry, it is *justified* by the continual failure

to master passion.”⁹ (This valuation may explain, in part, the state’s willingness to recognize a right to privacy; it operates on the assumption that the good citizen is policing himself, and reinscribes the supposition that the citizen must/should police himself.) Milette Shamir suggests that, in the context of American culture at least, privacy was originally “restrict[ed] . . . to the similarly limited sphere of the mind” (152).¹⁰ This analysis conflates the Puritan’s “solitary reflection” with the notion of autonomy: because a Puritan’s conscience was answerable, ultimately, only to God, the conscience marked a space beyond the reach of legal authority but one that was also paradoxically relational, between believer and deity (*Ibid.*). In other words, one of the last areas to enjoy legal protection under the right to privacy was one of the first spaces to be recognized as private. Shamir also contends that such a radical restriction of privacy limited the possibility of sedition – if the individual enjoyed an inviolable privacy only in his or her mind, then communication would be both undesirable and impossible.

- o *Privacy and Deprivation:* The potential parameters of confinement are even closer than the walls of a house, and are sometimes associated with the grave. By the middle of the nineteenth century, novels persistently traced a connection between death and freedom, especially for those on society’s margins. Sentimental abolitionist novels and some slave narratives argued that slaves could hope to find freedom only after death. However, slavery itself was a living death, and slaves were simultaneously invisible to and defined by the law. They were legally constrained but had no rights under the law. Further, the slave’s daily experience was marked by privation. The literature of the nineteenth century depicts this privation overspilling its boundaries to touch the lives of those who associated with slavers. Privation and privacy share more than a root word: privacy often looks like, or stems from, lack and loss.

⁹ Christopher Castiglia, *Interior States: Institutional Consciousness and the Inner Life of Democracy in the Antebellum United States* (Durham: Duke University Press, 2008) 28.

¹⁰ Shamir argues that the most significant legal developments of the eighteenth century involved framing the individual’s home as his castle, in which he enjoyed a right to freedom from disturbance (154).

- o *Privacy and Secrecy*: Michael McKeon suggests that the dividing line between the positive and negative capacities of privacy, the freedom to vs. the freedom from, may be located in the interstice between privacy and secrecy. According to McKeon, privacy delineates a negative liberty, protection from “unwanted access by others” while secrecy is a “category of traditional knowledge” which often separates those in the know, those in power, from others.¹¹ Analyzed spatially, privacy may contain anything or nothing, but secrecy always contains something. Secrecy thus more closely resembles a property right, in that it depends on the possession of something, a piece of knowledge that others do not have. While McKeon focuses exclusively on British literature, secrets play an equally vital role in American literature of the late eighteenth and early nineteenth centuries. Plots concerning incest and seduction proliferate, in which secrecy is associated with sexual transgressions that can undermine both the domestic and the political or societal. As a form of traditional knowledge, a secret may have legal ramifications (as in the case of “The Purloined Letter”) but a secret is not a legal right. The keeping of secrets may be more widely available as a form of power and control.

- o *Privacy and Autonomy*: The notion (or hope) that privacy supports and shapes personal autonomy accounts for many of the assumptions of classic liberal philosophy. Habermas, the scholar to whose genealogy of the public sphere all subsequent scholars must (or at least do) respond, argued that participation in the political public sphere emerged from the public exercise of private autonomy (108-09).¹² To be sure, Habermas contended that this autonomy was chiefly

¹¹ Michael McKeon, *The Secret History of Domesticity: Public, Private and the Division of Knowledge*. (Baltimore: The Johns Hopkins University Press, 2005) 469 (citing Sissela Bok, *On Secrecy: The Ethics of Concealment and Revelation* [New York: Pantheon, 1982] 5). McKeon’s massive and engaging study specifically addresses British literature of the seventeenth and eighteenth centuries rather than American literature of the nineteenth, but his analysis is conceptually useful for any consideration of the proliferating terms surrounding (and clarifying, and sometimes obscuring) the notion of privacy.

¹² It is not only literary scholars who doubt the value of privacy. Others scholars have been questioning the loss of more communitarian values as well; for example, in *The Limits of Privacy*, Amitai Etzioni questions whether America has come to fetishize privacy rights at the expense of community safety and of human dignity. *The Limits*

commercial, grounded in the ownership of private property, but potential models or examples of private autonomy do not always emerge from property ownership. Certainly, some early laws that may have contributed to the development of the right to privacy associated privacy with autonomy. Legal developments in the late eighteenth and early nineteenth centuries do not initially associate domestic space with freedom, at least for women, although they hold forth the possibility of autonomy. Norma Basch locates a right to privacy-as-autonomy in colonial marriage laws. She says that attempts to pass divorce laws before independence were overturned by England's Privy Council, but with independence, divorce laws became widespread. In her history, Basch suggests that the private domestic was shaped by the public: She argues that divorce was modeled conceptually on the Declaration of Independence, which effectively severed members of one family and constituted a new family.¹³ Basch's reading does not simply reverse the typical equation of private and public sphere, however. She suggests that the two interact, with marriage serving as a potent metaphor for a "consensual but indissoluble" contract that was used to ridicule the idea of American independence (Basch 38). The possibility of divorce meant that husband and wife were no longer quite the same person at law (Basch 40). It also meant the disruption of the inviolate home, and offered the possibility of a challenge to simple formulations equating autonomy with property ownership.¹⁴

This list is not exhaustive; privacy, that flexible, potentially empty concept, has a host of synonyms. However, I argue that these concepts – domesticity, interiority, secrecy, privation, and autonomy – especially inform the privacy that Warren and Brandeis sought to protect under law.

of Privacy, New York: Basic Books, 1999. Legal scholars have also interrogated the value and enforceability of privacy rights, as described below.

¹³ Norma Basch. *Framing American Divorce: From the Revolutionary War to the Victorians*. (Berkeley and Los Angeles: University of California Press, 1999) 36-7.

¹⁴ Elizabeth Dillon's account of Anne Hutchinson, and her assertion of conscience as the motivating force of her actions, also suggests an early exercise of autonomy.

If the concept of privacy is beset by confusion and contradiction, the law of privacy appears, at least, to have defined its own parameters with comparative clarity. Dean William Prosser famously established the privacy torts (intrusion upon seclusion – *i.e.* interference with private affairs -- public disclosure of private facts, presentation of information that portrays the subject in a false light, and appropriation of name or likeness).¹⁵ These legal concepts overlap with broader cultural ideas of privacy in ways that allow for richer theorization. Anita Allen claims that the liberal concept of privacy (which underwrites invasion of privacy torts, the Fourth and Fifth Amendments of the U.S. Constitution, state confidentiality statutes, federal wiretapping legislation, and proposed genetic privacy codes) fosters “the idea that government ought to respect and protect interests in physical, informational, and proprietary privacy.”¹⁶ Allen defines these areas thus:

By physical privacy, I mean spatial seclusion and solitude. By informational privacy, I mean confidentiality, secrecy, data protection, and control over personal information. By proprietary privacy, I mean control over names, likenesses, and repositories of personal identity (3).

Allen offers a neat taxonomy for legal concepts of privacy in which physical, information, and proprietary rights can be differentiated from one another. And other legal scholars have proposed other taxonomies – most notably, Daniel Solove, in an astonishingly thorough article of almost 90 pages and Ken Gormley, in his history of the right to privacy.¹⁷ But the idea of privacy was not always so clearly subdivided – even Allen’s categories seem clearer in the enunciation than in the practice. (At first glance, how does control over personal information differ from control over repositories of personal identity? And doesn’t the very notion of a repository raise questions

¹⁵ William Prosser, Restatement (Second) of Torts, §§ 652A-652I.

¹⁶ Anita Allen, “Coercing Privacy,” *William & Mary Law Review* 40.3 (1999), 2.

¹⁷ Daniel J. Solove, “A Taxonomy of Privacy,” *University of Pennsylvania Law Review*, 154:3 (Jan. 2006) 477-564; Ken Gormley, “One Hundred Years of the Right to Privacy,” 1992 *Wisconsin Law Review*, 1335.

about spatial seclusion?¹⁸) Further, legal concepts of privacy draw on cultural definitions of privacy (seclusion, secrecy, control). Words cannot be divided neatly into legal and non-legal categories. Attempting to tease out the roots and branches of privacy can feel a bit like staring too long at an Escher painting – where do the lines end, and where do they begin? The amount of ink spilled over this subject suggests both its persistent fascination and its slipperiness. Throughout this study, I juggle the primary terms that I outlined above – domesticity, deprivation, secrecy, autonomy – to isolate the origins of the legal concept. A word of caution: while privacy seemed more synonymous with some concepts than others at different points in the nineteenth century, I do not argue that there is a neat delineation between the era of privacy-as-domesticity and privacy-as deprivation. Rather, I argue that domesticity can shade into deprivation, and that secrecy can support autonomy.

1.2 WHY LITERATURE?

In this work, I look at both literature and law in an effort to acknowledge the effect that culture has on law and to understand how and why privacy came to be a legal right.¹⁹ Eminent jurist and occasional literary scholar Richard Posner would question the methodology of an interdisciplinary project such as this. In his work on Law and Literature, Judge Posner writes, “Although the writers we value have often put law into their writings, it does not follow that

¹⁸ In fact, the right to informational privacy is of fairly recent date: in *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court recognized the individual’s interest in avoiding disclosure of personal information.

¹⁹ I understand that law also can affect culture but tracing out those connections might require another several hundred pages.

those writings are about law in any interesting way that a lawyer might be able to elucidate."²⁰ Certainly, many American writers in the long nineteenth century had training in the law and used law as a plot device, but that does not mean that lawyers used those writers' works in their briefs and opinions. And there have been other efforts within the legal community to excavate a history of privacy. But I turn to literature for several reasons. Using literary texts as primary evidence for changing views on privacy is unorthodox but not unprecedented. Certainly, Habermas used novels to address issues of the public and private. Further, one of the earliest attempts to paint a comprehensive portrait of American privacy law argues that Warren and Brandeis used ideas and concepts from literature to create their notions of privacy. Dorothy Glancy claimed that Warren and Brandeis's notion of a self worthy and capable of protection emerged from their reading of mid-nineteenth-century authors, like Emerson, Thoreau, and Dickinson. She argues:

Warren and Brandeis's insistence on self-determination as an exercise of and means to attain and to protect individual freedom reflected the traditional American emphasis on spiritual independence and self-reliance associated with Emerson, Thoreau, Dickinson [*sic*], and many other nineteenth century American writers. Theirs was a social and psychological tradition concerned about introspection and solitude, as well as interpersonal relationships.²¹

I am not proposing that there is a direct correspondence between the literary works of the nineteenth century and that era's legal developments; I will not argue that Warren and Brandeis borrowed their concepts, directly and wholly, from the authors I analyze. Instead, I argue that the idea of an "inviolable personality" emerged from literature and was filtered through the larger culture. I also claim that law (at least in this instance) emerges from and follows cultural developments rather than preceding them. Lawrence Friedman proposed a similar methodology

²⁰ Richard Posner, "Law and Literature: A Relation Reargued," *Virginia Law Review* 72 (November 1986), 1351-92, 1356.

²¹ Dorothy Glancy, "The Invention of the Right to Privacy," *Arizona Law Review* 21 (1979) 1-39, 25.

in his treatment of nineteenth-century extortion law. Friedman argued that the best way to understand law and legal developments is to examine the surrounding culture. He writes:

Most people - including lawyers and judges - never really understand their own society, what makes it tick. Rarely or never do the underlying cultural assumptions emerge into daylight; rarely or never are they described in the way that a good anthropologist would describe them, or perhaps a historian. What we are doing here is exploring a legal culture. . . It is the point of view of the outside observer, the person with a pencil and a pad, and an eye for obscure detail. The outside observer takes nothing for granted. He or she wants to understand the system better than it understands itself: wants to make it cohere, wants to unpack its postulates, and expose its inner core.²²

Literature allows me to look directly at some of these cultural assumptions, to see the ideas about self, community, and privacy developing through the nineteenth century. Literature also permits me to delve more fully into one of my central arguments about the origin and nature of privacy. In this project, I argue that the protections for which the privileged, white, male jurists argue at the end of the nineteenth century emerge from writings of and about those on the margins throughout the earlier parts of the century. While the marginalized – women and slaves – may not have been able to own property under the law, they could express themselves (and could express “selves”) in writing; they could convey the experience of marginalization.²³ Privacy may be a nullity, but, I argue, it is a nullity that spreads and that can be taken up and used.

While I have attempted to give an overview of the legal background of the right to privacy, I confess that my selection of literary works is somewhat arbitrary. I do not claim that the novels, stories, and memoirs I discuss below is exhaustive or even definitive. Rather, these works represent the thoughts about privacy and the personality running through nineteenth century American culture.

²² Lawrence Friedman, “Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History,” *Hofstra Law review* 30 (Summer 2002), 1093-1130, 1099.

²³ The present case study is limited to women and slaves, though I recognize that other groups, such as children and indigenous peoples could have been included in this analysis.

In Chapter 1, I consider the ways in which the need for privacy was connected to the written word – a reliable postal system was necessary for political reasons, and for nation-building, but the concerns and commonplaces that attended the act of letter-writing also suggested that letters served as emissaries of the self. This chapter also traces the move away from real property to a more disembodied notion of property as the grounds for demanding privacy.

Chapter 2 considers the link between privacy and gender – as women increasingly became the “angels in the house,” the protections extended to domestic space became conflated with standards to be enforced on and by women. I question whether domestic space protects women or disables them, and if there is a way in which privacy contributes to autonomy.

Chapter 3 addresses more fully the link between literacy, deprivation, and privacy, using narratives by Frederick Douglass, Harriet Jacobs, and others to see how the marginalization of slavery informed discussions of privacy. I argue that slavery represents a condition of contagious deprivation. Laws designed to prevent and punish the education of slaves applied broadly. I also argue that while literacy appears to emerge from conditions of privacy and lead to greater freedom, that link is not inevitable or uncontested.

Chapter 4 looks closely at how the rise of print culture and the American city contributed to a pervasive sense of being watched and how earlier notions of privation and personhood make their way into Warren and Brandeis’s “Right to Privacy.” I argue that the resonances of privacy, both positive and negative, that informed the newly recognized right came from the margins: if a right to privacy does not depend on property, then it can belong to anyone. But privacy can also underwrite disengagement from civic life.

My work in this study focuses on novels, short stories and memoir; however, articulations of privacy can be uncovered in other literary forms. For example, Emerson's essays on "Self-Reliance" and "The American Scholar" arguably articulate ideas of autonomy that illustrate at least one valence of the privacy debates. Further, Emily Dickinson's poems address issues of interiority, isolation, and autonomy that are relevant to articulations of privacy. For instance, "The soul selects her own society" is a provocatively gendered *cri de coeur*, articulating a longing for self-possession and independence that could be read alongside Hannah Webster Foster or Harriet Jacobs and Frederick Douglass. Perhaps more interestingly, Dickinson's poetry speaks a fierce desire for an inviolate personality (and an inviolate personality that is linked with political formations –"I've known her from an ample nation/ Choose one") long before Warren and Brandeis's law review article. My case study focuses on a few exemplary texts, but does not (and is not intended to) exhaust the possibilities of analysis for nineteenth-century American literature.

Throughout this study, I hope to show the ways in which the notion of privacy and its links to "inviolable personality" originated, transformed, and were appropriated for the uses of a changing society. I touch on the ways that, even in the nineteenth century, technology (in the form of print culture, telegraphy and photography, among other things) created a threat to traditional ideas of privacy, to domestic space and the unobserved self. As I type this, social media and commercially available drones have once again re-ordered our zones of privacy.

1.3 A NOTE ON LEGAL TEXTS

The ur-text of American privacy law is a law review article, a format more or less familiar to academic readers. The form of “the Right to Privacy” requires little explanation, except to note that as an essay, it had no precedential value. Courts were not required to – and in fact initially did not – accept its analyses as law. The fact that Warren and Brandeis’s inventive theorizing worked its way into court decisions shows the appeal of their ideas. The American legal system relies on the principles of common law, that is, cases decided by judges in various levels of courts. Each state has its own system of courts, beginning with courts of original jurisdiction, that is, with the court empowered to hear the case first, proceeding then through one or more levels of appellate court before reaching the state supreme court. Court decisions are binding only on lower levels of courts within their area or jurisdiction; a New York state intermediate appellate court does not have to follow a Massachusetts county court decision (although the Massachusetts appellate court would have to follow rulings by the Massachusetts state supreme court). This system is further complicated by the existence of a separate federal court system, organized into districts and circuits, culminating in the Supreme Court. Many of the decisions I discuss below are outliers from state courts. These cases hinted at privacy before the right was recognized federally, but they were not binding on higher level courts or courts in other states. In some ways, the right to privacy moves from the legal margins to the center, cropping up here and there in state court decisions before being recognized as part of the federal Constitution.

Readers unfamiliar with legal texts or the legal system also need to understand the importance of precedent. Popular perceptions about judicial activism aside, courts are reluctant to turn over new legal ground and will act only if there is precedent for doing so, that is, if there

is case law or some statutory evidence that a similar action has been taken in the past. (Hence, Warren and Brandeis's insistence that their right to privacy existed in the penumbra of the Constitution a hundred years earlier.) Legal texts work to establish continuity, not novelty. I also refer to a number of statutes; written by elected officials and passed by state legislatures, statutes rely less on custom and can make sweeping changes going forward.

2.0 THE WRITING CABINET: LETTER-WRITING AND PRIVACY IN THE EARLY REPUBLIC

In 1831, Alexis de Tocqueville undertook a journey across the American frontier; trundling through the woods by mail cart.²⁴ The landscape through which he traveled could have been a metaphor for the difficulties that attend the process of civilization. De Tocqueville writes that the roads “were scarcely marked out through immense forests,” and describes the gloom as “impenetrable” while the letters carried by the rough cart are “treasure” (221). But the difficulties attending enlightenment are real. Communication is impeded by physical hardships and limited technology: this anecdote illustrates the ways, both practical and figurative, in which correspondence bound the young nation together. The need, or simple desire, to send letters back and forth requires a reliable system of circulation, which is in turn supported and improved by the traffic in letters. But despite these difficulties, correspondence flourished. De Tocqueville observes, “There is an astonishing circulation of letters and newspapers among these savage woods.”(*Ibid.*) The effect of this system of correspondence was to create a sense of community, even of intimacy, that belied the geographic sprawl and relatively thin population of the country. He opines, “There is no French province in which the inhabitants knew each other as well as did the thirteen million men spread over the extent of the United States.” (*Ibid.*) Letters, then, afford a means of drawing the scattered states together, enabling the citizens of the young country to

¹ Alexis de Tocqueville, *Democracy in America*, Vol. I (1832) (New York: Waxkeep Publishing 2013) 222.

communicate with one another, to share not only news but national identity. The act of writing and the existence of a system to ensure the safe and efficient exchange of that writing were necessary to hold together a country spread out over miles of undeveloped land. Even the most frivolous letters, then, helped the nation to cohere. They formed the bonds of community.

De Tocqueville witnessed an enthusiasm for correspondence that preceded (and to some extent, created) the nation. Letters – both their content and their very circulation – helped to foster American independence and identity. They provided the technology for building a nation, carrying vital information along attenuated lines of communication. The proliferation of correspondence in the years between the War for Independence and America’s emergence as a nation in the nineteenth century supports a common narrative: the explosion of the epistolary form in the eighteenth century heralds the arrival of a new public sphere.²⁵ Letters support a sense of community that extends across vast distances. It would be easy to conflate that new public sphere with the developing nation. But the history and purpose of correspondence are complicated, as is the growth of the public sphere. The eighteenth century saw a plethora of essays in the guise of letters published in newspapers and journals; letters seemed to be both interventions in the public sphere and embodiments of inmost emotions (Polly 3). While correspondence seems to be a way of drawing together far-flung correspondents into a shared space, the letter itself is, per Jurgen Habermas, a pure expression of the self, written from the soul (Habermas 48-9).

In this chapter, I examine the letter as both a political instrument and a technology of the self. Do letters embody a national identity, a personal identity or both? I also consider how letters came to be associated with a need for privacy while serving as vehicles for critiques of privacy,

²⁵ Gregory Paul Polly, *Public and Private Letters: Epistolary Negotiations in the Early Republic*, ProQuest Dissertations Publishing 1997, 2.

how letters were treated as substitutes for the self in the late eighteenth century, and how the privacy afforded to letters was perceived as helping or harming the self. I argue that the letter was another self, an alternate body for the citizen.

2.1 THE POLITICS AND PRACTICE OF LETTER-WRITING

Both letters, and the laws surrounding them, played an important part in the formation of the early republic. One of the first acts of the Continental Congress was to establish a separate postal service that protected the exchange of correspondence.²⁶ The prioritization of a postal service may seem surprising, was purely pragmatic. Initially, such provisions were meant to guard against governmental intrusions, reflecting the young republic's lingering anxiety over the surveillance once exercised by the crown, which retained the ability to "intercept and open correspondence".²⁷ These laws served a practical purpose, allowing American letters to circumvent the British post office, which was an instrument of the crown -- it's impossible to plan a rebellion if the entity you're rebelling against can read all your mail (and foil all your plans). By the early 1770's, colonial letter-writers could have been charged with treason for the content of their letters (and could have been liable to commercial interference), and thus needed to shield their correspondence from the British government's prying eyes. Thus, the need to protect the contents of letters emerged not from early respect for individual privacy, but from the desire to create and protect a new community.

²⁶ "The Right to Privacy in Nineteenth Century America," 8 *Harvard L. Rev.* (1981): 1895-1910, 1899, citing 21 Journals of the Continental Congress, 1774-1789, (W. Ford. Ed., 1936) 671.

²⁷ Anuj Desai, "Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy," 60 *Stanford L. Rev.* (Nov. 2007): 553-94, 563-64.

But concerns with letters and the many ways in which they could go astray predate the Republic. Even before the American Revolution, writing and sending letters was a risky endeavor, one requiring an extensive and stable system of support. The post office in America predates the American post office, reaching back to 1692 when Thomas Neale was awarded a patent for a twenty-one year monopoly on postal service.²⁸ The post office had both personal and political import – correspondence was necessary for the management of far-flung colonies and for the maintenance of attenuated family (and friendly) ties. Without a regulated system, structures of relationship would break down. However, not all colonies opted into this service: while Massachusetts, Connecticut, New Hampshire formed part of Neale’s circuit, the rest of the American colonial world did not, leaving them to develop alternate systems, relying more on individual travelers and merchants (*Ibid.*). From fairly early on, though, there was a concern about letters being seen by unintended audiences. The Post Office Act of 1710 provided that “No person or Persons shall presume wittingly, willingly, or knowingly, to open, detain, delay or cause, procure, permit, or suffer to be opened, detained or delayed, any Letter or Letters, Packet or Packets.”²⁹ Arguably, this law protects the integrity of the Post Office as much as it protects the integrity of the letter. The safety of an individual’s correspondence is assured by, and assures in turn, the security of the institution that makes such correspondence possible. But the law also ensures a kind of relational privacy, that is, that only the intended recipient could read the communication. While this stricture certainly applied to “important” state communications, it applied also to personal correspondence. Nothing underscored the vulnerability of letters – or

²⁸ David Flaherty, *Privacy in Colonial New England* (Charlottesville: University of Virginia, 1967) 116

²⁹ Flaherty 120 citing 9 Anne, Cap. X, s. 40. Likewise, under Benjamin Franklin, postmasters had to take an oath (subscribed before a Justice of the Peace) not to willingly or knowingly open any letter (121). Benjamin Franklin, *The Papers of Benjamin Franklin, Vol. 5, July 1, 1753- March 31 1755*, Ed. Leonard W. Labaree (New Haven: Yale University Press 1962) 162-68 (1,2,5,13,22).

the damage they could do – so well as the case of Benedict Arnold. Arnold, a commander in Washington’s army and hero of two pivotal battles in the War for Independence, had been placed in charge of West Point, the fort that connected the northern and southern colonies.³⁰ The appointment was just the latest in a long line of positions of trust enjoyed by Arnold, who previously had served as the military governor of Philadelphia. However, Arnold had become disgruntled with an unappreciative Continental Congress and disillusioned with an apparently unwinnable war. Some months before taking command of West Point, Arnold offered his services to the British in a series of numerically encoded letters.³¹ The cipher was based on Blackstone’s Commentaries on the Laws of England, a source that managed to be both appropriate and ironic (*Ibid.*).

In correspondence dated July 15, 1780, Arnold offered the garrison of West Point to the British in exchange for twenty thousand pounds, along with a personal interview with a representative of the British government.³² John Andre, the head of British Secret Intelligence eventually conceded to Arnold’s demands and met with him in person. Unfortunately for Arnold, Andre was captured on his way back to British territory and Arnold’s letters were discovered in the heel of his boot (Trees 246). Andre was hanged for his participation in the scheme while Arnold fled to England. But the effects of Arnold’s betrayal continued to ripple across the young country. The discovery of Arnold’s letters proposing to sell out the nascent republic evoked panic: “When Washington first learned of the treason, he said to Henry Lenox, “Arnold has betrayed me. Whom can we trust now?” (Trees 248). Others thought that Arnold, trusted and

³⁰ Andy Trees, “Benedict Arnold, John Andre, and His Three Yeoman Captors: A Sentimental Journey or American Virtue Defined,” *Early American Literature*. Vol 235 no. 3 (2000) 246-78, 246.

³¹ The letters and their method of encoding can be seen at *Spy Letters of the American Revolution*, <http://clements.umich.edu/exhibits/online/spies/letter-1780july15-trans.html>, accessed September 2014.

³² Benedict Arnold letter to John Andre, July 15, 1780, <http://clements.umich.edu/exhibits/online/spies/letter-1780july15-trans.html>.

highly ranked, would be only the first of many to turn traitor. In the aftermath of the crisis, Major Henry Lee, Jr. wrote to General Wayne, “Have any other defection, have more conspirators come out?” fully expecting an affirmative answer (*Ibid.*). Colonel Alexander Scammell wrote, “We were all astonishment, each peeping at his next neighbor to see if any treason was hanging about him: nay, we even descended to a critical examination of ourselves.”³³ Scammell’s account reveals how profoundly Arnold’s actions led the colonists to question themselves and one another. Awareness of spies turned ordinary citizens into government agents – they suspected their neighbors of espionage, and in turn spied on them. Worse, it seemed that Arnold’s betrayal led the Americans to doubt their own capacity for loyalty. If Arnold, a soldier and a hero, could betray the nascent country, then anyone could. Arnold became a dark reflection of the American self.

But while Arnold’s correspondence with Andre revealed his questionable (and personal) motives for betraying the American revolutionaries, he claimed that these private letters did not present his true thoughts. Arnold followed up his private letter-writing campaign with a public one. In October 1780, the Royal New York Gazette published a letter from Arnold to “the inhabitants of America.” In that letter, Arnold presents himself not as a traitor or a man engaged in duplicity, but as an enemy of dishonest or clandestine behavior. He declares,

I am . . . only concerned in this address, to explain myself to such of my countrymen, as want abilities, or opportunities, to detect the artifices by which they are duped. Having fought by your side when the love of our country animated our arms, I shall expect, from your justice and candour, what your deceivers, with more art and less honesty, will find it inconsistent with their own views to admit.³⁴

³³ Alexander Scammell letter to Colonel Peabody, 3 October 1780 (Trees 248).

³⁴ Benedict Arnold letter dated October 21, 1780, Rivington’s Royal New York Gazette, reprinted in The London chronicle, November 11, 1780.

Remarkably, the infamous spy decries covert action. He blames the Continental Congress for “veiling [imperfections in our councils] from the public eye” and acting against the best interests of America (*Ibid.*). He accuses the Americans of “dup[ing]” the public through a series of “artifices.” A man already known for his own duplicity claims that he has in fact acted transparently, that it is only Congress’s deceit that makes his own frank concerns seem devious. Asserting that England intends to redress the wrongs of unfair taxation, Arnold repeatedly deploys images of honesty and disclosure. “I affect no disguise,” he claims (*Ibid.*). The notorious spy and traitor professes to act openly and plainly, sending a public letter in contrast to the private letters, an open communication to an entire nation (rather than about one). But the protestations of authenticity and honesty seem at odds with his purpose. His unadorned private letters to the British seem more authentic because of their bare and immediate concerns. However, the public letter is meant to convey something else. The letters are both political and personal. Arnold uses the public letter in an attempt to express himself – his motives, his loyalties, his character. But, despite his efforts to protect his reputation or at least to defend his motives, Arnold’s name became synonymous with villainy – when it wasn’t erased from historical records altogether. The gravestones of his father and brother were destroyed, the central fort at West Point (Fort Arnold) renamed, and his name struck from the record books of his former masonic lodge.³⁵ His former countrymen could conceive of no greater punishment than to be forgotten.

The fate that befell of Arnold’s hidden correspondence illustrates the need for systemic protection of correspondence. Aside from laws and institutions, private letters were surrounded

³⁵ Lori Ducharme and Gary Alan Fine, “The Construction of Nonpersonhood and Demonization: Commemorating the Traitorous Reputation of benedict Arnold,” *Social Forces* 73:4 (June 1995), 1309 - 31, 1321. Ducharme and Fine argue that this act of erasure reduces Arnold to a “nonperson.”

by customs and strictures meant to ensure their privacy. What the Post Office Act attempted to regulate by law, popular letter-writing guides attempted to regulate by custom. Similar strictures can be found in contemporary conduct manuals. For example, *The School of Good Manners* (originally published in Connecticut in 1715, but reprinted through the early nineteenth century) instructs readers not to look at another's books or writings, unless invited, and not to approach when a letter or other paper is read (16). This narrative -- the tension between the desire to open letters and the need to justify that desire -- could be extended through early colonial history.

The letter-writing guides emphasize not only the etiquette surrounding letter-writing but the purpose and propriety of their content. Eve Tavor Bannet has argued persuasively that letters are mechanisms of empire, that a functioning postal service makes government over long distances both cheaper and more effective.³⁶ But it also raises concerns about who is a subject, or a citizen, of empire. Bannet's work on letter-writing guides, which cover an astonishing array of topics, points to a growing participation -- or perhaps just a desire to participate in -- what she styles the Empire of Letters, which does not correspond entirely to any political empire. This empire represents a vast community, an alternate public sphere where people of different places and classes could converse. In his famous guide on rhetoric, Hugh Blair repeated the trope that letters are "easy and familiar . . . conversation carried out upon paper by two friends at a distance" -- they carry the imprimatur of intimacy and directness.³⁷ However, as the sheer number of guides that flourished in the eighteenth century evidenced, such advice was clearly not so easy to follow; clearly, writing wasn't as easy as conversing. Works like John Hill's *The*

³⁶ Eve Tavor Bannet, *Empire of Letters: letter manuals and transatlantic correspondence, 1688-1820* (Cambridge: Cambridge University Press, 2005) 230.

³⁷ Hugh Blair, *Lectures on Rhetoric and Belles Lettres* (1783) (Carbondale: Southern Illinois University Press, 2005) 300.

Young Secretary's Guide: or, A Speedy Help to Learning,³⁸ offer comprehensive possibilities for such participation, boasting that they "Contain[ed] the True Method of Writing Letters Upon Any Subject; whether concerning Business or otherwise."³⁹ Hill and other epistolary advisers promoted a vision of a broad and inclusive public space where the lowly could converse with the great upon "any subject." "If there is not a sense of "Public" per se, there is a sense of audience. Hill at least acknowledged that although the public sphere promised by his letter-writing guide was expansive, its denizens might require distinct vocabularies and forms of address. Not all differences were elided: "if you write to the Learned, you must raise your style, yet by all means avoid Affectation in Words, or Extravagancy in Rhetorical Expressions" while "if you write to the Unlearned . . . your Style must be plain and easie to be understood" (Hill 3). Another guide, *The Complete Letter Writer* offers directions on how to address the king ("sire," "sir" or "most gracious sovereign") alongside instructions on how to compose a letter to a shopkeeper (18, 11-12).⁴⁰ The guides bring the monarch and the merchant into proximity, if not into actual conversation with each other; they imagine a grand, inclusive community. The guides also betray a confusion about the purpose of correspondence or perhaps a concern about content. However, although we are inclined to think of letters as authentic, individual, sentimental, expressing the thoughts or outlining the contours of a true self, the letter-writing guide imposes a degree of uniformity. The popularity of letter-writing guides with their repeated advice belied the notion that each letter is an authentic reflection of a unique self.

The number and variety of guides points to an expanding community of writers (and an expanding notion of community). It seemed that anyone could participate in the world of letters.

³⁸ John Hill, *The Young Secretary's Guide: or, A Speedy Help to Learning* (London: H. Rhoades, 1696).

³⁹ J. Hall. D. Rhodes and Sons: Fleet Street, London, 1699.

The fact that there were letter-writing guides addressed to women and containing examples of writing by women even in the seventeenth and eighteenth centuries suggests that women at least shared some of the concerns with correspondence voiced by men. While the laws point to the importance of correspondence and the dangers that attended it, letter-writing guides offered expanding models for participation in a larger world. Even those whose existence was not acknowledged by the law could participate in this circulation of correspondence. Perhaps then, by the close of the eighteenth century, the citizen, or the emerging citizen had two bodies as well: the physical body and the embodiment of the letter (both idea and material form) which opened a new sense of rights

While the system of correspondence supplied by the Post Office helped to bind a nation, the security of individual letters provided an individual right, or at least the makings of such a right. As Elizabeth Hewitt has argued in her study of correspondence in the early republic, letters breach the wall between interior and exterior: they are supposed to demonstrate the writer's "true" thoughts and feelings, and carry a promise of authenticity.⁴¹ Because (with some rhetorical exceptions) personal letters were not supposed to be written for public consumption, they were assumed to be composed less guardedly; they were vehicles of feeling rather than rhetorical devices meant to persuade. The words that a person committed to paper, supposedly expressing the deepest and truest sentiments of their hearts, were not to be exposed or shared. Thus, letters represent an intersection of the personal and the legal, a manifestation of the self that is protected by law.

To be sure, Russ Castronovo has argued for a counternarrative to the conventional notion that letters are vessels of self. He claims that the most important feature of such communications

is the way in which those communications circulate.⁴² Castronovo maintains that these networks decentralize communication, leading to a diffuse, inconsistent, and polyvocal means of propagating knowledge (“State Secrets” 436). In such a system, individual agency becomes dispersed and de-emphasized (*Ibid.*). For Castronovo, letters undermine the idea of a unitary self. His test case for this is the scandal that dogged Thomas Hutchinson, the governor of Massachusetts Bay Colony in the years preceding the War for Independence. Copies of letters that Hutchinson had written to a London politician during his tenure as governor were turned over to the Sons of Liberty and subsequently published (Castronovo “State Secrets” 441). Controversy over the letters threatened to break out into violence when Benjamin Franklin admitted that he had obtained the letters and turned them over to the American revolutionaries (Castronovo “State Secrets” 441-42). Elizabeth Hewitt also recounts a version of this story, deploying the anecdote to explain how letters were perceived as a glimpse into another’s thoughts (or heart). According to Hewitt, Franklin precipitated the crisis when he sent Hutchinson’s letters to the Massachusetts Committee of Correspondence with the caveat that they shouldn’t be shared with the public – and of course, the letters were published (21). Their publishable value derived from their personal nature. American clergyman Samuel Cooper used the letters’ supposedly private and unguarded character for political ends. He argued that the letters should fuel revolutionary fervor since they showed the writer’s true sentiments (thus echoing the common assumption that letters embody truth) (*Ibid.*).

Castronovo argues that this incident contradicts the traditional narrative of Franklin as extraordinary individual, that what matters here is his role as a “sort of hyperlink that facilitates the transmission of information . . . across the complex network of British and North American

⁴² Russ Castronovo, “State Secrets: Ben Franklin and WikiLeaks,” *Critical Inquiry*, (Spring 2013) 425--450, 441.

colonies” (“State Secrets”444). He points out that Franklin did not even hide behind one of his many pseudonyms, but minimized his own agency in the scandal (*Ibid.*). For Castronovo, the salient feature of this network is its anonymity; it de-emphasizes or eradicates identity; not even the force of Franklin’s personality (or his considerable fame and influence) mattered to the transmission of the letters.

However, as Castronovo’s nod to Franklin’s fondness for pseudonyms acknowledges, this incident may be seen as one in a series of explorations of the uses of anonymity. Franklin had long used false names and misdirection as a tool for disseminating his ideas and for subverting various kinds of authority. One story goes like this: sixteen-year-old Benjamin Franklin had the talent and the ambition that would propel him to success in a half-dozen different fields of endeavor, but he did not have the professional respect that he craved. His older brother, a printer, refused to publish any of young Franklin’s work. So, one night, he slipped one of his compositions under the door of his brother’s printing-house.⁴³ The essay, which attracted immediate attention and admiration, was signed “Mrs. Silence Do-good” (Ford 224). The teenaged Bostonian boy assumed the persona of a middle-aged widow, a woman raised in rural seclusion, who passed her “leisure Time either in some innocent Diversion with the neighbouring Females, or in some shady Retirement, with the best of Company, *Books*.” (April 2, 1722). Franklin’s brother published the letter, to immediate interest and accolades; Franklin’s letters were supposedly so charming and persuasive that Mrs. Do-good even received marriage proposals from her devoted readers. Franklin’s strategy for gaining attention and influence seems counter-intuitive. In these letters, a young man uses the persona of a middle-aged woman to gain access to the public square. The country widow Silence Do-good claims to live her life outside

⁴³ See Paul Leicester Ford, *The Many-Sided Franklin* (New York: The Century Co., 1899) 224.

the circles of power, which may seem to lend her critiques a paradoxically greater authenticity. Her opinions were supposedly untutored and unaffected by debates of the day. But the canny use of this persona gave Franklin more than the satisfaction of seeing his words published in his brother's paper; they gave the young writer the protection of anonymity, maintaining his privacy in publicity. Anonymity does not weaken his agency. Instead, it allows Franklin real access to a new reading public and imaginative access to the thoughts and history of a figure as unlike him as possible. The figure of Silence Do-good permits Franklin to circumvent his brother, certainly, but she also offers something more than a convenient blind. She allows the young writer, a youth overlooked by his brother, to imagine himself in an even more marginal position. Silence Do-good's position (rural, female, widowed, "unfashionable") enables her to critique the foibles of American urban society. She seems to observe issues of education, religion, and morality from a place outside the channels of power and influence. Unlike young Franklin, who could hope to wield power one day, Silence Do-good could not exercise any direct influence on the matters of which "she" wrote. Her persona is thus more disinterested than Franklin's own. At the same time, Silence Do-good protects Franklin. "She" affords Franklin a measure of privacy in the form of anonymity – he can express opinions in "her" voice without scrutiny or censure.

2.2 THE LAW OF PRIVACY

If the law and customs attending letters hint at an early kind of privacy, other laws do no such thing. Even a cursory glance at the Constitution reveals something important for scholars of American privacy: there is no mention of the concept in the original document. The absence of explicit signaling has spawned debate and division. In 2003, former U. S. Senator (and perpetual

presidential candidate) Rick Santorum, speaking in response to the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), declared that the "right to privacy . . . doesn't exist in my opinion in the United States Constitution."⁴⁴ (Santorum dismissed the concept of privacy as a shield for deviant sexual behavior -- *Lawrence* held that the Constitutional right to privacy included the right to engage in private, consensual, homosexual activity, and Santorum opined that this ruling opened the way for legalized bestiality.) Even Samuel Warren and Louis Brandeis were forced to claim that the right to privacy shimmered faintly but clearly in a "penumbra" of rights emanating from the Constitution. While a twenty-first century reader might recognize the drafters' concerns with speech and religion, privacy was not among the rights enumerated and defined at the start of the nation. However, there were traces of something like privacy in the Bill of Rights, passed in 1792. We see these traces in the Fourth Amendment, which states that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated" and the Third Amendment which limits the quartering of soldiers in private homes without the owner's consent.⁴⁵ Both of these Amendments guarantee freedom from government interference, a negative liberty that is part, but not all, of modern notions of privacy. Further, both Amendments locate privacy in property, in the home or in a citizen's person or papers (a term that is not synonymous with letters).⁴⁶ The privacy contemplated here inheres in possessions and depends on ownership; it is concrete rather

⁴⁴ Associated Press, "Excerpt from Santorum Interview" *USA Today* 23 April 2003. http://www.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm .

⁴⁵ The third Amendment is notoriously overlooked and infrequently litigated, although a Nevada family filed a case protesting a police department's use of their home for surveillance purposes. See *Mitchell v. City of Henderson*, Case No. 2-13-cv-0154-APG-CWH (D. Nev. Feb. 2, 2015).

⁴⁶ This regard for property and indifference to "privacy" stems from English jurisprudence. Blackstone's Commentaries on the laws of England contain abundant reference to property but none to privacy. See William Blackstone and Thomas Cooley. Commentaries on the Laws of England, Volume II (1766), 3rd ed.(Chicago: Callaghan and Co., 1884) Volume II, 2-3.

than abstract. Its violation depends on interference with the body, domicile, or goods of a particular person. (By extension, if a person lacks either domicile or goods, and if that person suffers no physical interference, then that person experiences no loss and indeed, has nothing to lose.) This kind of privacy (if it can be described as privacy) has clear physical boundaries and consequences.

While the space that privacy takes up, the space in which privacy occurs, receives the clearest legal protection in the early republic, we catch glimpses of a concept of privacy that is both more expansive and more intimate. For instance, Constitutional scholar William Heffernan argues that the best known formulation of property rights, the so-called “castle doctrine” which asserts the sanctity of all homes against all intruders has less to do with the commercial value of the property itself than with its status as security against an invasive world, applying equally to the castle and the “hovel” (15). This formulation of the castle doctrine begins to level distinctions between rich and poor, by suggesting that the value of property is personal: a hovel matters just as much to its owner (and for the same reasons) as a castle does to its lord. But this protection still relies on property ownership. According to eighteenth century jurisprudence, the need to protect one’s own possessions was “the great end for which men entered into society”⁴⁷ In *Entick v. Carrington*, however, the English court expands the concept of property in ways that resonated for American law. The case arose a little more than a decade before the War for Independence, and would prove so influential that it later informed the protections of the Fourth Amendment.⁴⁸

⁴⁷ *Entick v. Carrington*, 19 Howell’s State Trials 1029 (1765), *quoted in* William C. Heffernan, “Privacy, Property and the Fourth Amendment,” *Brooklyn Law Review* (Summer 1994) 633. *Entick* concerned the Crown’s efforts to suppress anti-government pamphlets. Entick had been identified as a probable agitator, but investigators could not determine which if any of his papers might contain incendiary material, so they broke into his “boxes , chests, drawers &c.” and seized all of his papers.

⁴⁸ In fact, the Supreme Court recognized *Entick v. Carrington* as a forebear of the Fourth Amendment prohibition against unlawful search and seizure. *See Boyd v. United States*, 116 US 616, 626 (1886).

The story behind the case was typical of an era of political unrest. When the plaintiff was suspected of distributing illicit political pamphlets; agents of the crown broke into the plaintiff's house and ransacked his papers. (*Ibid.*) The home invasion was prolonged and violent: over the course of four hours, government agents broke into drawers, boxes, and cabinets in an attempt to find incriminating material. (*Ibid.*) The intruders were as thorough as they were brutal: they “read over, pried into and examined all the private papers, books, etc. of the plaintiff there found, whereby the secret affairs, etc., of the plaintiff became wrongfully discovered and made public” (*Ibid.*). The plaintiff then filed an action for trespass. The resulting opinion held that the government agents had no right to intrude on the plaintiff's home, even armed with a warrant from the Secretary of State. While the court's ruling focused on the legality of such an intrusion by the government into an individual's home, it also considered the nature of property. The judge, Lord Camden, asserted that papers constituted a property as valuable as – perhaps more valuable than – any other:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect (*Ibid.*).

As William Heffernan has pointed out, this language describing papers as an individual's “dearest property” blurs the distinction between their material worth and emotional value.⁴⁹ Admittedly, the court uses the terms “secret” and “private” interchangeably, but the aim of both words is to shield information that might reveal more about a person than merely his political views. Papers may not command a price on the open market but may still play a role in

⁴⁹ William C. Heffernan, “Fourth Amendment Privacy Interests,” *The Journal of Criminal Law and Criminology*, Vol. 92, No. 1/2 (Autumn, 2001 - Winter, 2002), pp. 1-126, 13-14.

“sustaining personal life” (Heffernan 13). Thus, while the purpose for ransacking Entick’s papers may have been to root out political dissidence, the court valued and protected the papers’ personal meaning, that is, the ways in which their content might sustain a person’s identity. The court’s finding of trespass depended not only on the invasion of the plaintiff’s home and the destruction of his property, but on the intangible damage done to the plaintiff himself. The property at risk is not the furniture of the home, but the furniture of the mind.

Entick is striking for the scope of its analysis, and for its willingness to treat the ideas contained in the letters of a private citizen as property. But its analysis of property remained unusual. While the case’s prohibitions on governmental intrusions into citizens’ homes influenced the Fourth Amendment, subsequent courts did not apply *Entick*’s understanding of the value of personal letters for well over a century. The problem with law is, and always has been, that it depends on the vagaries of life to develop and explore new ideas – what counts as property? What constitutes an invasion of privacy? Judges cannot theorize about the answers to these questions without concrete facts from which to extrapolate. Authors, however, can ponder these questions unfettered by specific circumstances. And in the early years of the republic, literature worried over concerns of property and the value of privacy, often concluding that privacy was fraught or downright undesirable.

Early American literature pondered the relationship between property, the written word, and privacy. In the works I examine below, traditional (“real”) property remains the domain of men, and seems to guarantee both freedom from scrutiny and some measure of independent action. But the works also begin to trace the ways in which words – particularly the words contained in correspondence – demarcate a boundary of the self, meriting protection (even if protection isn’t always forthcoming). I argue that these novels prefigure ideas of the “inviolable

personality” that energized and motivated Warren and Brandeis’s formulation of privacy while questioning whether privacy was a desirable value for a young nation.

2.3 LISTENING AT THE CLOSET DOOR: INFORMATION, INTRUSION, AND INTIMACY IN ARTHUR MERVYN

Charles Brockden Brown’s 1793 novel *Arthur Mervyn* is obsessed with private space, with what happens there, and how to gain access to it; it equates privacy with property. The novel opens with the as-yet-unnamed narrator arriving home to find a stranger on his front porch. The narrator immediately determines that the young man is ill and escorts him into his house. This moment is the first of many in the novel in which Arthur Mervyn is given extraordinary access to a place where he does not belong, establishing a tension between publicity and privacy, between revelation and concealment. It also shows that the main character, an ambitious and apparently altruistic young man, disregards the privacy of others while relentlessly pursuing it for himself as he acquires property and status.

Arthur habitually treats the boundaries of the home as permeable. When Arthur returns to the home of his friends, the Hadwins, after a long sojourn in the city, he enters the house without knocking or calling.⁵⁰ The family’s old retainer asks, “Who’s this that comes into other people’s houses without so much as saying ‘by your leave?’” (Brown 475). This query – who Arthur is and why he acts as he does – articulates the central mystery of this novel. Initially, Arthur Mervyn (as both character and novel) seems to be on the side of surveillance and revelation. A

⁵⁰ Charles Brockden Brown, *Arthur Mervyn Or Memoirs of the Year 1793* (1799) in *Three Gothic Novels* (New York: Library of America, 1998) 474. Subsequent citations will be included in the text.

young man who loudly proclaims his benevolent intentions at every turn, Arthur seems at first to be the champion of watchful and sympathetic republicanism. Arthur does not respect the divisions of private property or the rules that demarcate one person's space from another's but he insists that this negligence stems from an irresistible desire to do good. Whatever his motives, Arthur's disregard for private property becomes a defining characteristic. Arthur's entrances, often careless, occasionally become downright intrusive. He enters one home without permission, and on another occasion, he lifts the latch and walks in when he is refused an interview (Brown 546, 573).

For Arthur, these invasions appear to have a theoretical dimension. He associates them with autonomy and candor. When Arthur offers a justification for his conduct, he does not ground that justification in his own right to see or know. Rather, he defends his own right to act for the inhabitants' good (on nearly every occasion, he barges in to give information or money) and the inhabitant's right *not* to be secreted.⁵¹ Arthur decides to rescue Clemenza Lodi, whom his sometime benefactor, Welbeck, has hidden away in a brothel. He reasons that the proprietress, Mrs. Villars, cannot prevent her from seeing visitors: "This was an infringement of her liberty that equity and law equally condemned" (Brown 513).⁵² The legal right which Arthur asserts here is more akin to freedom of association than right to privacy, and it is this right whose primacy Arthur seems to assert.

The way in which private space is depicted in *Arthur Mervyn* initially seems to justify Arthur's intrusions. Physical privacy appears to be dangerous, shielding the sort of sexual and

⁵¹ Arthur's insistence that his intrusions serve the public good seems to anticipate certain contemporary defenses of surveillance. See, e.g. Dahlia Lithwick, "9/11 and the Law: Sacrificing Civil Liberties to Fight Terror: Not Without a Fight," *Slate*, Sept. 5, 2002, <http://www.slate.com/id/2070523/>

⁵² The irony here is that if the house in which Clemenza is staying is really a brothel, then the proprietress should want to encourage visitors.

financial secrets that could prove ruinous to a young republic. Arthur's first night in the city offers a harrowing vision of what goes on behind closed doors. Arthur is locked into a room in a strange house, where he overhears a man plot to foist his illegitimate child onto his bereaved wife (Brown 263). He then hears the couple plot to defraud someone called "the Nabob" (Brown 265-66). In the space of a few hours, Arthur learns that the domestic and economic foundations of the city are not what they appear to be; the private bedchambers of Philadelphia allow the sort of behavior that vigorous social surveillance is designed to prevent.

The existence of private space seems to allow for the proliferation of uncertainty and gossip. Brown suggests an entire economy based on rumor. Language also functions as a devalued currency as stories and rumors are traded, discarded, and amended.⁵³ Welbeck's sometime business partner, Old Thetford, is described as "that hoary dealer in suspicions" (Brown 435). This circulation of suspicion encompasses both the economic and the linguistic, allowing the criminal Welbeck to pass for a wealthy gentleman and enable his schemes. This economy displaces truth from surfaces to depths as a lack of verifiable knowledge calls even apparently legible exteriors into question. Stevens says that if he had "read [Mervyn's story] in a book," he would have found it impossible to believe, but the "face of Mervyn is the index of an honest mind" (Brown 436). But appearance cannot be trusted because in this world, even resemblances circulate as a kind of currency. At various times, Arthur is said to resemble his dead friend Clavering, Clemenza Lodi's dead brother, and his own mother; in two of these instances, Welbeck schemes to put Arthur's malleable features to work for financial or personal

⁵³ Michael Warner argues that since none of the oral narratives can be verified, the novel comes down firmly on the side of print culture as a means for establishing accountability and republican community. Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*. (Cambridge and London: Harvard University Press, 1990) 166.

gain. Louis McAuley points out that Arthur serves as a public persona who screens Welbeck from scrutiny (328).⁵⁴

Arthur, in contrast, professes great confidence in surfaces. He does not even blame his neighbors for believing salacious rumors about him: “They examined what was exposed to their view . . . to decide contrary to appearances, to judge from what they knew would prove them to be brutish and not rational” (Brown 539). He declares, “The internal and undiscovered character of another weighed nothing with me” (Brown 590). He asserts that everything he needs to know is immediately visible. He perceives his lover Achsa’s secret, her Jewishness, through looking in her eyes; she for her part tells him, “I was desirous that you should know nothing of me but what you see” (Brown 607).

In contrast to the uncertainties of the market, domestic space appears to be stabilizing, even defining, but it is unclear if the definition that space offers is beneficial, especially to women. As Elizabeth Hinds has observed, characters are defined by the spaces they occupy. Female characters in the novel “are associated in a matrix of houses, poverty, and need bearing as though on their persons a form of virtue dependent on reputation that, in turn, depends on the type and style of houses with which they are aligned” (Hinds 70).⁵⁵ *Arthur Mervyn* participates in the Gothic novel’s conflicted sense of the home as both bulwark against external threats and breeding ground for threats of another kind.⁵⁶ The privacy of the home may conceal prostitution, seduction, nefarious financial schemes, illness, and other wrongs. When Arthur asks himself

⁵⁴ Louis McAuley, “‘Periodical Visitations’: Yellow Fever as Yellow Journalism in Charles Brockden Brown’s *Arthur Mervyn*,” *Eighteenth Century Fiction* 19:3 (Spring 2007): 307-340, 328.

⁵⁵ Elizabeth Jane Wall Hinds, *Private Property: Charles Brockden Brown’s Gendered Economics of Virtue*. (Newark: University of Delaware Press, 1997) 70

⁵⁶ See, e.g., Kate Ferguson Ellis, *The Contested Castle* (Carbondale: University of Illinois Press, 1989) 11. Relegating women to the separate sphere of the home was meant to protect them, as the overheated conventions of the Gothic make clear, removing women from their husbands’ and fathers’ surveillance for long hours of the day exposed them to greater temptation and thus greater danger.

“Who and what was Welbeck,” he finds an answer through interrogating his surroundings; he comes to see that the pomp of the house “might be the mask of misery and the structure of vice” (Brown 292, 293). The formulation of Arthur’s question shows the extent to which houses and identities are commensurate. Of course, Welbeck lives in a rented house, which means that the building’s grandeur does not correspond to the man’s real moral or financial worth; it is only a mask. Domestic privacy both disguises and forms identities.

Exacerbating this problem is the possibility that the characters themselves may not recognize their surroundings or the meaning of those surroundings; the privacy of the home darkens into secrecy. When Arthur finally meets Achsa Fielding, he asks her, “Who, where, what are you?” as though those three markers of identity were synonymous – or perhaps as though he wishes to establish that they are *not* synonymous (520). Arthur wants to ensure that Achsa’s character and identity are not commensurate with the space she occupies, that is, the brothel where she is staying.⁵⁷ Nevertheless, it is hard to separate person from place. In fact, after Arthur catches Welbeck leaving Clemenza’s room, Arthur describes her as a kind of architecture – “I had formerly surveyed her as a precious and perfect monument, but now it was a scene of ruin and blast” (Brown 296, 298).⁵⁸ Eliza Hadwin loses her home through no fault of her own (her father dies while their property is encumbered with a mortgage), but she is equally, and more literally, reduced to the status of property. As Elizabeth Hinds points out, if the space in which the body is housed comes to define the person, the body becomes more like property.

⁵⁷ In her study of the 18th century dressing room, Tita Chico notes that Clarissa lived in a brothel, assuming it to be a respectable lodging-house. See Tita Chico, *Designing Women: The Dressing Room in Eighteenth Century English Literature and Culture* (Lewisburg: Bucknell University Press, 2005), 163.

⁵⁸ Clemenza Lodi, like Eliza Wharton, becomes a monument, except Clemenza is interred in her own living body. However, both “monuments” tell the same cautionary tale. Interestingly, Welbeck also becomes “a monument of ruin,” although he is less commodity than commodifier (*Arthur Mervyn* 533).

But if the house represents a fatal fixity for other characters, it represents more lively possibilities for Arthur. Physical space and emotion become linked through metonymy. Arthur's body houses his emotions, perhaps because until the novel's end, he has no "room of his own" and is defined by his mobility. Before his wedding to Achsa, he writes of his heart "bounc[ing] as if its mansion can scarcely hold it;" he also writes of excluding his emotions as a proprietary homeowner: "I must bar and bolt [my happiness] out for a time" (Brown 605). The trope linking house and body presents Arthur with a possibility of control that is also self-control – Arthur can lock out his emotions until he is ready to indulge them. Further, Arthur's body is not a monument, not a memorial of the past, but a lively domestic space – and, figured as a "mansion," it is the wealthy Achsa's domestic space, an indicator of how Arthur views the benefits of domestic privacy.

Michael Warner contends that Arthur is fully and unambiguously on the side of republican community, openness, and virtuous action. He asserts that Arthur "adopt[s] disclosure as a principle of conduct; he determines to be in the right by publishing information" (Warner 166). Indeed, Arthur proclaims, "I am anxious to publish the truth" (Brown 583). The truth that Arthur is anxious to publish, though, is inevitably about someone else. He decides to tell Susan Hadwin of his doubts about her fiancé's morals; he relates Welbeck's story after professing initial reluctance; he openly confronts his father for his drunkenness. He portrays himself as a martyr for the truth, claiming that his neighbors held it against him that he followed his father into taverns and grabbed the drink from his hands, "interfer[ing] publicly" and "expos[ing] him to mortification and shame" (Brown 542). However, Arthur also learns that knowledge – and the ability or opportunity to communicate that knowledge – is power. Trapped in the closet of the Thetfords' bedroom, his position of helplessness becomes a position of

control when he overhears the family's most intimate secrets. Arthur quickly recognizes the power he has been given: His position, and his silence, "empower[] [him] to communicate" to the man's wife the truth of the foundling's origins, as for the scheme against "the Nabob," Arthur reflects, "I may hereafter be enabled to profit by this detection of a plot" (Brown 265, 266). Arthur's drive to publicize the foibles of others anticipates the newspapermen of the late nineteenth century; he even profits from the revelation of these secrets.

However, Arthur guards against intrusions on his own privacy far more carefully than Warner credits; he publicizes his own story selectively, as the occasion or the audience warrants. While Stevens advises Arthur against concealment, Arthur repeatedly withholds parts of his story from his neighbors, from Stevens' circle of friends, and from Stevens himself (Brown 240, 243, 540). Welbeck asks Arthur not to tell the story of his origins to anyone, but Arthur doesn't fully inform Welbeck himself of his background (Brown 284-85).⁵⁹ Arthur exchanges information in the public sphere to shield his own privacy.

Even as Arthur seems to strive toward benevolent republican citizenship in the community by disbursing money and useful information, his narrative pushes toward his voluntary removal from public space. Arthur seems driven to re-establish the privacy of the domestic sphere from which he has been forced at the beginning of the novel. When his father marries their robust servant girl, Arthur describes his disinheritance in the most literal way: "the house in which I lived was no longer my own"; "I was become, in my own conception, an alien and an enemy to the roof under which I was born" (Brown 247). Like his sister (and Clemenza and Eliza), he is displaced. Tantalizingly, the exposure he risks is also both literal and

⁵⁹ In this novel of doubling and resemblance, it's worthwhile to note how closely Arthur's and Welbeck's stories parallel and intersect. Both of them determine to save Clemenza from ruin, both of them conceal parts of their past for their own mobility and gain; both of them establish homes with ersatz family figures – for Welbeck, the fake daughter Clemenza, for Arthur, the fake mother, Achsa.

metaphorical – not only does he spend most of the novel without a home of his own, his very identity becomes exposed to critique and conjecture by this dislocation.

The narrative distinguishes between solitary privacy, which is both dangerous and disorienting, and domestic privacy which for Arthur at least appears to offer both sanctuary and stability. Solitary privacy is associated with the grave (Arthur assists with the burial of two characters, and is nearly buried alive himself) and the prison. (In one of the novel's few potentially comic moments, the incarcerated Welbeck berates Arthur for visiting him, demanding, "How dare you thrust yourself upon my privacy?" (Brown 535).) Both of these examples offer images of extreme asociality. To be wholly private is to be incapable of participating in the community. Further, when Arthur finds himself alone – in the Thetfords' bedchamber, in the basement of Welbeck's house, in the attic – he becomes "struck with panic," "distempered by terror," fearful of suffocation (261, 328, 423). In each instance, the physical space in which Arthur finds himself becomes confining; the sheltering house becomes a tomb.

However, this transformation occurs only when Arthur is alone. The domestic privacy of the home is presented as a safe space, an alternative to both the horrors of the hospital and the emptiness of Welbeck's house. At the very outset of the novel, the home is depicted as a safe haven in a very literal way: when Stevens ushers Arthur into his home, Philadelphia is in the grip of a yellow fever epidemic, and being abroad is dangerous.⁶⁰

For Arthur, the privacy of the home represents more than safety from literal and figurative exposure, though. Domestic privacy realizes a fantasy of total access. He contemplates a non-marital relationship with Eliza Hadwin in spatial terms – "to reside under the same roof; to apply, to common use, the same property" -- and dismisses such an arrangement

⁶⁰ Louis McAuley also links the valorization of the home to fear of contagion – to survive, people were advised to remove themselves to the country and shut themselves up in their houses (328).

as impossible without marriage (Brown 500).⁶¹ When he dreams that Achsa's husband has returned, that possibility becomes a nightmare of exclusion from Achsa's home; he dreams that her door is locked against him (Brown 628). When Arthur contemplates marrying the orphaned Eliza, he thinks of the "boundless privileges of wedlock" – a privacy from which he cannot be shut out (Brown 493). In this intimate relationship in a shared space, there are, paradoxically, no boundaries. He eventually establishes that relationship with Achsa, from whom, he says, he has "scarcely a separate or independent existence" (Brown 620). At this point, Arthur's homelessness and his re-absorption into the domestic sphere appear to align him with the novel's helpless, displaced women. His reputation suffers, and he seems to lack an independent means of sustenance, making him vulnerable to the vagaries of the market. However, acquiring domestic security has different ramifications for Arthur than it does for the female characters. In light of then-current property laws, of course, the couple would not have had a separate legal existence, but rather than Arthur being completely overwhelmed by Achsa's maternal embrace, the law of coverture would have folded Achsa's legal existence (and her wealth) into Arthur's.⁶²

For Arthur, the domestic privacy he finds with Achsa Fielding also closes the circle of his narrative. The boy who idealized his mother and was rumored to have an affair with his stepmother finds happiness with a woman whom he calls his "lost mamma come back again" (Brown 621). In establishing his own domestic space, he returns home. But domestic privacy does not provide a fruitful model for, or even the impetus toward active citizenship. As Arthur retreats further into domestic interiority, he also withdraws from the public space of America

⁶¹ Eliza is content with mere neighborliness: "let me live in the next house . . . Shut me not wholly from your society" (*Arthur Mervyn* 500).

⁶² As Cathy Davidson points out, "the married woman typically lost her property upon marriage. She lost her legal right to make a will or to inherit property . . . a married woman's signature had no weight on legal documents and she had no individual legal identity." Cathy Davidson, *Revolution and the Word: The Rise of the Novel in America* expanded ed. (Oxford: Oxford University Press, 2004), 194-95.

altogether; after their marriage, Arthur and Achsa plan to leave the country (Brown 637). Once Arthur achieves the access (to Achsa's home, property, person) that he desires, he removes himself from all possibility of scrutiny. Rather than becoming a tale of participatory, communal, republican citizenship, *Arthur Mervyn* relates the story of an increasingly private romance in which privacy opposes active citizenship.

Arthur Mervyn offers a fairly conventional equation of privacy and property, especially domestic property. In the end, the male hero reaps financial and personal benefits from this equation. But elsewhere, authors were exploring other formulations of privacy and property, considering whether property necessarily had monetary value, and whether privacy exceeded both considerations.

2.4 FROM POLITICAL TO PERSONAL: *LETTERS FROM AN AMERICAN FARMER* AND THE PRIVACY OF THE FRONTIER

Letters from an American Farmer enjoys a strange provenance for a work that has been identified at times as a foundational text of the American literary canon. First published in London in 1782, and written by a Frenchman whose career included surveying and sales (as well as a stint as a farmer), the work's genesis does not seem especially "American."⁶³ However, the text has attracted attention and interest for what appears to be an almost sociological attempt to define the new nation before it truly is a nation, when "America" is a geographical entity rather

⁶³ Susan Manning, "Introduction," *Letters from an American Farmer* (1782) (Oxford, New York: Oxford University Press 1997) vii-xxxvi, ix.

than a political or cultural one.⁶⁴ The *Letters*' place among American letters is due in part to their grounding in time and place. Written about America at an early moment in its history, the work promises unusual insight into that moment. The *Letters* are read as representative. At the same time, the *Letters* are read as uniquely authentic because they are letters.

From the outset, the way in which the *Letters* are framed asserts their authenticity, and defines the community to which they are supposed to belong. The text begins with the claim that, "The following Letters are the genuine production of the American Farmer whose name they bear. They were privately written, to gratify the curiosity of a friend" (Crevecoeur 3).⁶⁵ This description seems designed to insure that the letters were not meant to be read as literary works, or as public documents, that they contain honest sentiments that might not appear in a document aimed at an audience beyond the writer's intimate circle. The fact that the letters are framed as private underscores their authenticity, and their honesty. The assumption was that privacy (or secrecy) allowed for freer expression.⁶⁶ A writer will speak more openly to a friend than to an ill-defined public audience. Further, the *Letters*' reading public would have been well-versed in the difference between public and private correspondence and would have adjusted their expectations for candor and veracity accordingly. The "Advertisement" that follows further underscores their authenticity: "That these Letters are the actual result of a private

⁶⁴ The narrator's own definition of "American-ness" in the third letter may contradict my assertion that this text's cosmopolitan, or polyglot origin is not American.

⁶⁵ Of course, the need to state something explicitly – "these letters are authentic" – invites consideration that the opposite is true. Cf. Voloshinov's perception that if a belief or viewpoint is taken for granted, then it need not be expressed. V.N. Voloshinov. "Discourse in Life and Discourse in Art," (1926) 151-96, 165). in *Freudianism: A Marxist Critique* London: Verso Press (2012). If it is spoken, it becomes dubious, or acknowledges that the concept is up for grabs.

⁶⁵ Michael Warner. *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*. Cambridge and London: Harvard University Press, 1990.

⁶⁶ *The New Universal Letter-Writer* trumpets that the advantage of epistolary communication is that "secrecy was maintained and social intercourse rendered more free and agreeable" (x)

correspondence may fairly be inferred (exclusive of other evidence) from the style and manner in which they were conceived . . . they are by no means exempt from such inaccuracies as must unavoidably occur in the rapid effusions of a confessedly inexperienced writer” (*Ibid.*). Thus, errors offer assurances that the writer is who he claims to be.⁶⁷ These “errors” are in fact markers of authenticity and also indicia of the process enacted in the text.⁶⁸ Here, the fact that the letters are “privately” written as the result of a “private” correspondence frees them from the taint of artfulness or literary ambition; they are meant to show what a “real” person “really” thinks and feels.

But *Letters from an American Farmer* is more than a canny exploitation of the epistolary form. The work also raises issues of privacy and community; it is presented as authentic and thus representative of a community *because* it is private. The private nature of the writing assures the reader of its authenticity and honesty, but also connects the writer (and reader) to a larger community. In fact, for all the protestations of privacy at the outset, the Letters begin as a joint effort, with their writer consulting his wife and his clergyman about what to say and how to say it. It is worth noting that the community, as represented by James’s learned minister, and his rather sharp-tongued Quaker wife, does not reach complete agreement about the value of correspondence. While the minister urges James that his writing will improve quickly, and may prove profitable, James’s wife wants him to keep the correspondence “a profound secret”: “If it were known abroad that thee writest to a great and rich man over at London, there would be no

⁶⁷ The Advertisement is followed by a dedication to the Abbe Raynal, and frames the book as a response to Raynal’s writings (7). The letters’ responsiveness (to European requests) is over-determined.

⁶⁸ Any “errors” in the text may thus resemble Wordsworth’s assertions in poems like “Tintern Abbey” that he was reflecting on and correcting his text as he wrote (“Once again I see/ These hedgerows, hardly hedgerows, little lines/ Of sportive green run wild”). The errors become a way of staking claim for immediacy, presence, and “present-ness.”

end of the talk of the people.”⁶⁹ She worries not only about how, and to whom, to write, but about the effect that supposedly personal correspondence will have on their own community. Her concern suggests that her husband does not write in isolation. His letters matter not only to his recipient but to the people around them.

Interestingly, James’s other advisor connects James to an even larger rhetorical world. If James’s wife embodies the sort of anxiety that may have driven ordinary citizens to buy letter-writing guides, the minister voices the kind of advice encapsulated in the guides. The minister asserts, in accordance with current wisdom, that “Writing letters is nothing more than talking on paper”; “let your answers be conceived and expressed exactly in the same language as if he was present” (Crevecoeur 13). He reiterates this figure some pages later: “What we speak out among ourselves, we call conversation, and a letter is only conversation put down in black and white” (Crevecoeur 17). Eve Tavor Bannet observes James does just that in his first letter, applying his minister’s advice literally and sending his correspondent a transcript of their conversation (277).⁷⁰ James’s artless form of address at the outset of the letter combines with this account to make the enlightened Englishman present and to make James’s community present for him in turn. James accepts on faith that he can communicate with Mr. F.B. as easily as he invited him into his home. However, *Letters from an American Farmer* eventually undoes the possibility that a community can come together through paper and pen.

The work instead describes the dissolution of a community – although Letter III is read as a representative depiction of the young country (as a cultural, economic and geographical entity

⁶⁹ J. Hector St. John de Crevecoeur, *Letters from an American Farmer* (1782). (Oxford, New York: Oxford University Press, 1997) 20.

⁷⁰ Bannet argues that, while the initial request to correspond may not be a joke, James’s response to it is. She argues that Crevecoeur is joking, allowing educated readers to observe the distance between conversation and effective letter-writing while poking fun at James’s literal-mindedness (277).

rather than a political one), by the end of the volume, the writer is anxious and despairing about the possibility of the future. The letters, taken together, depict the attenuation of ties – between the writer and his European friend, between America and empire, even between the writer and his immediate community. The narrator experiences a sense of isolation that is both an emotion and a physical condition, which might be the negative image of privacy. While the *Letters* begin with a sense of intimacy, they end with isolation. An excess of privacy is an undesirable outcome.

Letter I starts *in medias res*, bypassing any formal address to launch immediately into an analysis of the writer's situation: "Who would have thought that, because I received you with hospitality and kindness, you should imagine me capable of writing with propriety and perspicuity?" (Crevecoeur 11). The effect is disorienting, as the writer fails to identify himself or to address his correspondent. This apparent error lays the groundwork for the writer's later claims that he does not know how to write, depicting him as naïve, even artless. But the error functions in another way: it elides the distance between writer and reader. The writer enacts the hoary advice offered by every letter-writing guide, that you should write as you speak. (In fact, the local minister asserts, in accordance with current wisdom, that "Writing letters is nothing more than talking on paper"; "let your answers be conceived and expressed exactly in the same language as if he was present" (Crevecoeur 13).) So the writer dutifully begins as though his addressee were present and needed no identification or conventional expressions of politeness before launching into conversation. He assumes that he and his reader are already intimate and require no formalities to contextualize their correspondence. He lacks self-consciousness; it is unclear if that means that he lacks a "self." If the work offers the embodiment of a self, that self coheres only through suffering and isolation.

It emerges that the letter- writer, identified by other characters within the text as “James” (and conventionally referred to in criticism as “Farmer James”) has been asked by a wealthy Englishman, Mr. F.B., to write an account of his daily life.⁷¹ James’s initial question links written text with social behavior –his correspondent imagines that he will write with propriety and perspicuity because he has behaved kindly and hospitably in welcoming a guest to his home. Thus, the same virtues that enabled James to introduce and incorporate his foreign visitor into his immediate community are presumed to be commensurate with his ability to write about and represent that community. F.B. expects that James’s embodied practices of kindness can be translated into the written word.

Farmer James also wants his letters to traverse distances both geographic (between rural America and London) and social (between farmer and aristocrat). He wants his correspondence to also blur the boundaries between personal and social identities. The third letter, the one most excerpted in anthologies of American literature and taken as an early example of American literature, begins, “I wish I could be acquainted with the feelings and thoughts which must agitate the heart and present themselves to the mind of an enlightened Englishman when he first lands on this continent” (Crevecoeur 40). James then fulfills this wish by relating those feelings and thoughts. He speculates that his enlightened Englishman “must feel a share of national pride” in America “when he says to himself, this is the work of my countrymen who, when convulsed by factions, afflicted by a variety of miseries and wants, restless and impatient, took refuge here” (*Ibid.*). While James’s musings may be read as prescriptive (the enlightened Englishman *ought to* feel a share of national pride), they also describe what James imagines to be the viewpoint of an educated Englishman. Here, he imagines himself into the position of his

⁷¹ I shall refer to the narrative voice as “James” or “Farmer James”; attempting to differentiate Crevecoeur’s voice from James’s is beyond the scope of this paper.

correspondent, traversing physical distance as well as social rank in the process. The writer becomes the reader as he imagines no barriers between his own perception and the “enlightened Englishman’s.”

This ability to imaginatively occupy the position of the enlightened Englishman depends upon membership in a shared community. In order to depict the thoughts and feelings of an enlightened Englishman (and communicate those thoughts back to him), the American farmer must be able to enter into those thoughts and feelings. James here assumes that he knows what his correspondent feels, and that he can accurately represent those feelings. Further, those feelings depend on “a share of national pride” at the work of “his countrymen.” The connection here is more than merely personal – it demonstrates the link between one community and another. James here blurs the line between his community and his correspondent’s; it is unclear exactly which country is supposed to inspire the enlightened Englishman’s pride. He moves from describing what an enlightened Englishman must feel to depicting who “we” are: “We are a people of cultivators, scattered over an immense territory, communicating with each other by means of good roads and navigable rivers, united by the silken bands of mild government” (Crevecoeur 41).⁷² (Interestingly, James doesn’t point out that “we” communicate by means of letters as well as through roads and rivers.) This formulation asserts James’s typicality – “we are a people of cultivators” -- while presenting a vision of unity, in which communication ties the “people of cultivators” together. The inclusive pronoun also seems to invite the enlightened Englishman to share in this community, by way of national pride. Despite the immensity of the

⁷² He might have added, “communicating with each other through letters such as this.” Writing some time later, Tocqueville linked the post office to the creation and support of a unified American character (Hewitt 5). Correspondence was protected from the time of the Continental Congress onward, and a separate postal system developed early in the republic to foster this end. “The Right to Privacy in Nineteenth Century America,” 8 *Harvard L. Rev.* (1981): 1895-1910, 1899, citing 21 *Journals of the Continental Congress, 1774-1789*, (W. Ford. Ed., 1936) 671.

territory at issue, the new country is depicted as a single, connected entity, characterized by inclusion rather than isolation.

While Letter III is often held up as a statement of national identity, that use requires isolating it from its context and disregarding the remaining letters, which show something very different. Letter XII, which relates the “Distresses of a Frontier Man,” begins with the confession, “I wish for a change of place; the hour is come at last when I must fly from my house and abandon my farm!” (Crevecoeur 187). Farmer James dismantles the identity he has created through his letters as he imagines living among the Samoyeds or the Laplanders; he wishes to be neither a farmer nor American. (*Ibid.*). James fantasizes about joining another community, and jettisoning his identity, because the community with which he identified is gone:

Which ever way I look, nothing but the most frightful precipices present themselves to my view, in which hundreds of my friends and acquaintances have already perished: of all animals that live on the surface of this planet, what is man when no longer connected with society; or . . . surrounded by a convulsed and half-dissolved one? (*Ibid.*).

Here, Farmer James seems to suggest that “man” is necessarily social, that humanity is defined by its society. Even more: this question revisits the question asked (and, one might assume, answered) by Letter III – what is an American? *Letters from an American Farmer* finally defines “American” as a state of radical exclusion and isolation.

Literary critic Edward Larkin proposes that the apparent contradiction between the early letters (especially I and III) and the final letter can be resolved through the mediation of genre. He claims that *Letters from an American Farmer* must be read as a novel rather than as a work of non-fiction.⁷³ He claims that, “It is a mark of the success of this particular fiction that critics

⁷³ Edward Larkin. “The Cosmopolitan Revolution: Loyalism and the Fiction of the American Nation,” *Novel* 40:1/2 (Fall 2006), 52-77, 54.

have often treated its representations as factual accounts of the social and cultural landscape of Revolutionary America but to read this work as anything other than a fiction is to miss the central point of the text” (*Ibid.*). Readers must disregard all the claims and markers of authenticity. He argues that there is no contradiction between the first and final letters, if they are read as part of the same plot. Crèvecoeur’s view of America is “part of the deliberate design of the text . . . [he] wrote the entire text from more or less the same point of view – that of a loyalist” (Larkin 57). Unfortunately, Larkin explains Crèvecoeur’s political commitments more fully than his generic ones. He does not clarify why treating the work as a novel resolves the contradictions within the work, nor does his assertion that Crèvecoeur was always, only, a loyalist address Farmer James’s decision to withdraw from society (rather than, say, emigrate to Britain).⁷⁴

But if we think of the letters as chapters in a novel, written by a fictional correspondent to a fictional recipient (rather than by Crèvecoeur to a patron), the letters offer a different kind of self-expression. Rather than being a journalistic account of a young country, they become a portrait of an individual in crisis, both concealing and revealing the writer’s consciousness. Read as a novel, *Letters* is most notable for its increasing insight into a single mind.

Farmer James goes from wanting to connect with others (across the country, across the ocean) to retreating in order to protect himself and his family. He abandons what would have been recognized as a site of privacy (the home) to pursue complete disengagement. Instead of providing evidence of its author’s specific political commitment, *Letters from an American Farmer* represents a breakdown in community, a breakdown that affects even the language of the

⁷⁴ While I agree with Larkin’s conclusion that the work should be read as a whole (especially in light of the narrator’s concern with arrangement), Larkin’s arguments may reveal the shortcomings of literary readings of this work.

letters.⁷⁵ Early on in the twelfth and final letter, James writes, “From the mountains, we have but too much reason to expect our dreadful enemy” (Crevecoeur 188). James does not identify “our dreadful enemy”—in fact, he does not even specify that the country is at war -- only positing that there is a “we,” a community to whom the enemy is opposed. This ambiguity may suggest that all communities, or the very notion of community, is at stake here. However, the remainder of the letter destabilizes the identity of that “we,” positing a smaller and smaller group of people who may be designated by that term.

It is this dissolution of community that James confronts in his final letter. From the first lines of the letter, the reader is aware of James’s distress, but does not know its cause. James’s failure (or bare inability) to communicate the cause of his distress marks the disappearance of context, and the concomitant loss of communication.⁷⁶ There is no common purview, no “we” that encompasses both enlightened Europeans and rural Americans. This loss extends to the transatlantic, cross-class society that he shares with Mr. F.B. and to the society he shares with other Americans; he is divided from the former by his experience and from the latter by his views on the war.

Of his correspondence with Mr. F.B., he fears that war has sundered the possibility of common experience. James writes, “no relation can be equal to what we suffer, or what we feel”

⁷⁵ Christine Holbo has also proposed reading *Letters from an American Farmer* as a coherent text about community formation, but her direction differs from mine. She attends to the arrangement of the letters, arguing that the structure of the book describes a kind of “widening gyre,” extending outward from James’s immediate situation and feelings, to his surroundings, other colonies, and finally the wide world. (But of course, things fall apart, the center does not hold.) “Imagination, Commerce, and the Politics of Associationism in Crevecoeur’s *Letters from an American Farmer*,” *Early American Literature* 32:1 (1997), 20-65, 39.

⁷⁶ In this regard, James’s final letter is as artless as his first. However, the artlessness proceeds from a different source. The intervening texts have demonstrated that James knows how to write, how to deploy figures and modes of address. His failure to do so here reflects disillusionment with the possibilities of expression to create a community in the absence of a social context. This artlessness also becomes, like those errors referenced in the *Letters’* Advertisement, signs of authenticity, indicia of the genuineness of the writer’s emotions.

(Crevecoeur 190). His word choice here is telling: the disintegration of James's *relationship* with F.B. (because they no longer share a common situation or purview) has led to an inability to *relate* his story. The verbal and the social come together in this metaphor even as the link between them is severed. Further, James's alleged inability to express himself, which resonated comically in the first letter, is rendered tragic here. He describes a move from community to alienation: "can you enter with me into fellowship with all these afflictive sensations? Have you a tear ready to shed over the approaching ruin of a once opulent and substantial family?" (*Ibid.*).

Early in the text, James is able to enter into the thoughts and feelings of an enlightened Englishman because they are part of a shared community that extends across national boundaries. The boundaries of the self seem permeable. Here, though, he expresses doubt that the enlightened Englishman can "enter into fellowship" with James's feelings. James cannot communicate with Mr. F.B. because they do not share a context; words themselves have lost their meaning. If the *Letters* amount to talking on paper, then the conversation has been divorced from the shared context of social cues. Loss of community leads to loss of understanding and sympathy, and thus to loss of language.

Further, this loss does not affect only the relatively tenuous bonds of his transatlantic correspondence; it affects discourse within his immediate community as well. To be sure, James is concerned about the ability of language to stretch across the geographical and social distances it once did. His world has contracted: "As a member of a large society, which extends to many parts of the world, my connection with it is too distant to be as strong as that which binds me to the inferior division in the midst of which I live" (Crevecoeur 190). However, even within that "inferior division," James finds himself isolated, and unable to enter into a shared understanding. "So much is every thing now subverted among us, that the very word misery with which we were

hardly acquainted before, no longer conveys the same ideas, or rather, tired with feeling for the miseries of others, every one now feels for himself alone” (Crevecoeur 188). Here, he laments that the word “misery” has lost its meaning, that he can no longer communicate to Mr. F.B. what he feels because their referents now differ too sharply. However, the more immediate danger is not only his loss of ties to a larger world (the “metropole” in Larkin’s terms), but loss of ties within American society.⁷⁷ Everyone has an individual definition of “misery” because language is no longer commensurate with experience. There is a breakdown in understanding of language, or rather, in the ability of language to convey shared experience, such that the ties of sympathy are loosened, and “every one . . . feels for himself alone.”

James depicts a world in which he can no longer assume that he and his neighbors, though in like situations, share the same understanding of that situation. In part, the definition of “misery” has come unmoored because of a fissure within American society. Every man has his own definition of misery because opinion within the community has become radically divided, and disagreement prompts ostracism and alienation. James bemoans the fact that, “As a citizen of a smaller society, I find that any kind of opposition to its now prevailing sentiments immediately begets hatred” (Crevecoeur 190).

The society represented in Letter XII is small indeed; the discursive community shrinks until the only voice we “hear” is James’s. The minister and James’s wife, who were opinionated and identifiable voices in the book’s polyvocal first letter, have fallen silent by the final letter. In the first letter, James adopts his wife’s Quaker diction, speaking with her and relaying her voice. In Letter XII, she remains present but mute, adding to James’s misery but not communicating her own. James’s minister teaches him how to “talk on paper,” an instruction that James receives at

⁷⁷ Larkin writes, “The Revolution, he fears, will close off the networks of exchange that make the process of acculturation possible” (58).

first with comic literalness. However, by the end of Letter XII, the minister disappears altogether, and James's wife is in danger. James has reached the end of rhetoric, or of language – he has moved to a level of sophistication that recognizes and laments the shortcomings of its representational possibilities. Conversation drops out of the novel. He resists representing other voices, including the voices arguing about the war: “As to the argument on which the dispute is founded, I know little about it. Much has been written and said on both sides, but who has a judgement capacious and clear enough to decide?” (Crevecoeur 191). Farmer James is isolated from family and friends. Here, then, privacy seems to be an undesirable fate. Being left alone is not a freedom but a punishment, the fragmentation of a community rather than the integration of a self.

Of course, it would be easy to argue that for a man who initially wished to engage with a cross-class, transatlantic community, privacy represents a diminution of prospects, and a withdrawal from community. Other literature that considered the position of women reached a more complicated conclusion.

2.5 ENTERING ELIZA'S CHAMBER: CORRESPONDENCE, SURVEILLANCE, AND PRIVATE SPACE IN *THE COQUETTE*

Eliza Wharton, the “coquette” whose lively narrative and uncontrollable (sometimes indefinable) desires drive Hannah Webster Foster's 1797 novel, initially seems to assert a right to privacy consisting in freedom from surveillance. (It is worthwhile to recall that, at this stage of national development, Eliza's letters would have enjoyed greater legal protection than she herself would have. It is also interesting to note the ways in which Eliza and her letters are commensurate; she

writes herself into being, and vanishes as a narrating voice shortly before her death.) Eliza does not want to marry her pious admirer Boyer in part because becoming a clergyman's wife would "make [her] dependent for happiness, perhaps too for subsistence, upon a class of people who will claim the right of scrutinizing every part of [her] conduct."⁷⁸ Her suitor Sanford plays on these fears when he reminds Eliza of "the restraint, the confinements, the embarrassment to which a woman, connected with a man of Mr. Boyer's profession, would be subjected" (Foster132); he later warns that she will be subjected to the "invidious criticisms of a whole town" (144). At first, the privacy that Eliza seeks is not a freedom *to* (act or think in a certain way); it is a freedom *from*. Eliza wants to be free from scrutiny and from commentary, from intrusion and interpretation. The freedom Eliza claims is, in some ways, analogous to the communications privacy secured by the American post. She wishes to preserve her conduct for reception and understanding by only those people to whom she has "addressed" it.

However, Eliza cannot even control the extent to which her letters become common property. The very form of the novel indicates that the boundaries separating the private from the public may be more porous or unstable than we might at first assume. While a letter extends an invitation from the writer to share private thoughts and experiences, it also may be a public document, if addressed to the editor of a newspaper or published in a collection. Eliza's letters, though addressed only to her friends and her mother, reach a wider audience without being intended for publication. Lucy shares Eliza's letters with her fiancé (later husband): "What folly then would it be to affect reserve and distance, relative to an affair in which I have so much interest? Not that I am going to betray your secrets. These I have no right to divulge; but I must

⁷⁸ Foster, Hannah Webster. *The Coquette* 1797. New York: Penguin Books, 1996, 126. Subsequent citations will be included in the text. See also Weyler, Karen. *Intricate Relations: Sexual and Economic Desire in American Fiction 1789-1814* (Iowa City: University of Iowa Press, 2004), 59.

be the judge what may, and what may not be communicated” (Foster 128). Lucy’s domestic relationship proves antithetical to her friend’s privacy. Similarly, Boyer’s friend Selby is “almost tempted to break the seal of the letter’ from Eliza he carries to Boyer (Foster 141). And Eliza later forwards the correspondence between her and Boyer to Lucy, inviting Lucy to participate in and comment on their abortive romance (Foster 189). The ways in which communications privacy is breached prefigure the ways in which Eliza’s conduct will become a subject for comment and speculation, and the ways in which her own body becomes a text.

Eliza’s stratagems for avoiding scrutiny appear to be misguided, to say the least. It is not her relationship with Mr. Boyer that finally results in “restraint, confinements and embarrassment.”⁷⁹ From the outset, Eliza’s connection with Sanford makes her the subject of gossip – Selby recounts to Boyer how, when Eliza and Sanford appear together at a party, “The brilliance of their appearance, the levity of their manners, and the contrast of their characters, [were] found to be a general subject of speculation” (Foster 147). Similarly, Boyer later learns that “Eliza’s conduct had, for some time past, been a subject of speculation in the town” and Eliza herself finally becomes aware that “my affairs are made a town talk” (Foster 167, 184). Eliza does what she can to evade surveillance by withdrawing from society. But in her efforts to avoid being the subject of others’ talk, she silences her own discourse as well. Over the course of the novel, Eliza disappears from the text, writing fewer and fewer letters, and effectively concealing her illicit relationship with Sanford from her friends (Weyler 59-60). The diminishing number of letters mirrors Eliza’s growing reclusiveness as the story of her relationship with Sanford is displaced from her correspondence to her body. When Sanford impregnates her, Eliza concedes, “The effect of my crime is too obvious to be longer concealed;” she becomes a revealing, condemning

⁷⁹ Here the dual meaning of “confinement” is irresistible.

text (230).⁸⁰ With her death, her story passes beyond her control as she is reduced to text (in both newsprint and in an epitaph) in ways that contain and “fix” her story.⁸¹ Her fate is disclosed by a newspaper story (Foster 235-36) and Lucy advises the use of her story for public instruction: “From the fate of Eliza Wharton, let the American fair learn to reject with disdain every insinuation derogatory to their true dignity and honor” (Foster 241).

Fears arising from this intuition suggest that privacy is (to reverse my earlier formulation) not only a freedom from, but also a freedom to: an individual who is free from scrutiny may engage in actions or cultivate emotions that the society wishes to suppress (*see e.g.* Spacks 7-8). Certainly *The Coquette* encourages an equation between private space and emotional states. Eliza apparently uses physical privacy to explore her own emotions and shield them from inquiry. She reads Boyer’s letter to her in private (Foster 138). Likewise, she retreats to her room to contemplate Boyer’s proposal or Sanford’s portrait (Foster 127, 194). Her suitors attempt to intrude on this space to affect Eliza’s emotions, or to assert their own emotional “rights.” For example, when Eliza is in the Richmans’ garden alone, Sanford intrudes, encroaching on her physical autonomy by grabbing her hand and violating rules of hospitality by showing up on the Richmans’ property when Eliza “had no right to receive visitants independent of them” (Foster 132-33). The break with Boyer comes because of two successive intrusions: Sanford interrupts her solitary walk in her garden and shortly thereafter, Boyer learns that Eliza wanted to take a walk where “no person might intrude on her retirement” (Foster 178, 168). When he sees Sanford in conversation with her, Boyer assumes the worst – complicity and

⁸⁰ Eliza’s body also stands in for text missing from the novel itself. It is of course entirely in keeping with the literary decorum of the time that Webster Foster does not dramatize Eliza’s eventual downfall, but in the absence of any account of the seduction, we are left to read its results on Eliza’s body.

⁸¹ Eliza’s story becomes literally written in stone on her burial monument; her associative “looseness” is finally pinned down. Far from being the mobile coquette whose affections resist easy interpretation, Eliza acquires a final resting place and a final meaning.

seduction – because Sanford is in a place he has no right to be (Foster 169). Further, Boyer assumes something about who Eliza is (a coquette) because of where she is (alone with a man in a private space). Location becomes a way of reading identity. It seems almost an afterthought when, late in the novel, Eliza evokes her right to privacy in order to do exactly what critics of privacy rights fear: she uses her privacy to conduct her affair with Sanford (Foster 219). However, given the ways in which privacy figures ruin and reclusiveness, it is far from clear whether Eliza wants privacy per se, or a way of evading social accountability.

The novel suggests that, secluded gardens aside, the new republic affords too much privacy, too much room for the cultivation of new identities. Rodney Hessinger suggests that fears about the divide between the public self and the private self may have been exacerbated by the mobility of early American society, especially the mobility of young men – it was easy to be deceived in a “more anonymous world.”⁸² These fears reach their fullest expression in the character of Sanford. Although Sanford possesses neither morals nor money, this knowledge is withheld from society in part by distance and the relative difficulty of securing and checking information. Because information does not pass from place to place quickly enough and is not widely shared, Sanford can be accepted into polite society and purchase a home in Hartford. Lucy writes to Eliza, “many of our gentry are pleased with the prospect of such a neighbor. As an accomplished gentleman . . . he will be an agreeable addition to our social parties; and as a man of property and public spirit, he will be an advantage to the town” (Foster 128). The other barrier to full knowledge is erected not by distance but by social rules – rules that Eliza, independent-minded and sequestered for too long with a dying fiancé, does not understand.

⁸² Rodney Hessinger, “‘Insidious Murderers of Female Innocence’: Representations of Masculinity in the Seduction tales of the Late Eighteenth Century.” *Sex and Sexuality in Early America*. Ed. Merrill D. Smith. (New York & London: New York University Press, 1998) 262-82, 271.

Patricia Meyer Spacks speculates that expectations of decorum and sensibility – apparent expressions of internal states – may have afforded another kind of privacy, allowing an individual to shield his or her true emotions and motives beneath a conventional mask (11-14). While Eliza herself is understood to engage in this behavioral code by “coquetting,” she also becomes a victim of it. According to Karen Weyler, Eliza mistakes the social code of public politesse for a genuine evaluation of a person’s worth: When the Richmans accept Sanford into their home, she sees it as an acknowledgment of his character rather than his rank (Weyler 153). Eliza does not learn of Sanford’s character until after she attends a ball with him; her friend reasons that she did not warn Eliza sooner because “we thought it best to protract your enjoyment as long as possible” (*Coquette* 119).⁸³

Further, Sanford does not engage in the circulation of ideas that Eliza does. While she writes to Lucy, to Julia, to Mrs. Richman, to her mother, and to Boyer, Sanford writes only to a single correspondent, Deighton (whom he cautions to silence: “lisp not a word of my embarrassments for your life” [Foster 131]). Significantly, Deighton never writes back; Sanford’s life does not become a public and instructive text — at least until he is incorporated in the larger narrative of Eliza’s tragedy.

At first, it appears that both Eliza and Sanford benefit from this split between the public and the private in ways that allow them to manipulate their public personas and public perception. People don’t know his financial, or her emotional, status. This apparent doubleness leads Boyer to accuse Eliza of coquetry; he claims that he does not know what her true feelings or intentions are (Foster 164). But Eliza does not attempt to conceal her emotions; instead, she

⁸³ Sanford’s rank and facile public persona make it possible for Eliza to be seen with him in public space; it is in confusing or conflating the realms of public and private and what is appropriate for each that Eliza encounters trouble.

tries to assert an emotional (and social) independence. Eliza desires not seclusion, but autonomy. She does not want to marry or even to give answers about the state of her affections because she wishes to “enjoy [her] freedom” (144). She wishes to act, not without being seen, but without being censured. She also warns Boyer not to criticize her for her behavior; interestingly, she characterizes his critiques as “liberty” and “freedom” (Foster 162). Boyer’s attempts to control Eliza infringe upon her own autonomy. However, the right of being able to conduct her own affairs becomes a constraint: She tells Lucy that “I dare not converse freely with [my mother] on the subject of my present uneasiness, lest I should distress her. I am obliged, therefore, to conceal my disquietude” (Foster 190).

The more physical privacy Eliza has, the less autonomy she enjoys. Eventually privacy shades from independence to something else: Julia writes of Eliza “she has actually become, what she once dreaded above all things, a recluse!” (Foster 193). She does not participate in society; she does not write; she does not read. Eliza finally flees Hartford (in a private carriage, no less) for a place “where she was totally unknown” (Foster 232).⁸⁴

Several critics have argued that Eliza’s lonely death is not an ironic punishment for her desire for privacy but the tragic result of Eliza’s attempts to conflate public and private. Elizabeth Dillon also suggests that what Eliza seeks is not strictly privacy or self-determination, but a productive space in which the public and private self are not at odds, permitting the

⁸⁴ Eliza takes shelter at an inn, which seems like a very public destination for a woman seeking to avoid scrutiny. However, the fact that her identity is not known allows her to live (the last days of) her life as she chooses. In this context, it may be worth recalling that early libel laws focused on true information, and it was freedom from dissemination of such information that early litigants sought. Further the anonymity that affords her freedom here resembles the lack of information that permits Sanford to function in respectable society. Of course, Eliza achieves this freedom only on the brink of death.

creation and exercise of a self.⁸⁵ In Dillon's estimation, Eliza is not a coquette; she does not want to marry Sanford rather than Boyer; she does not see society as a means to a marital end. Rather, she wants exactly what she says she wants – a social space in which she is free to enjoy conversation and merriment. Dillon defines this desired space as “open sociality” in which identity is produced through “public representation and power” (Dillon 185). Similarly, Ivy Schweitzer argues that Eliza wants both liberty “in the form of a literal and imaginative freedom to dispose of oneself that is restricted to white men, and connection in the form of dyadic intimacy and larger sympathetic networks”.⁸⁶ Schweitzer claims that Eliza resists confinement to a “private, domestic marital sphere” and wants to participate in the public sphere (109). However, Eliza fails to understand that the social spaces in which she attempts to make an impact are really “closed,” propelling Eliza into the narrow, domestic confinement of marriage, and forcing her to enact a similarly suitably constrained role (Dillon 187). In other words, Schweitzer and Dillon suggest that Eliza wants a freedom to act publicly in ways that are denied to her by her gender and by concomitant social strictures.

Eliza's quest for privacy anticipates more modern notions of privacy-as-autonomy. She does not want to hide herself or her actions, but to act free of censure. The first half of the novel depicts Eliza in headlong flight away from intimacy, secrecy, and confinement. Indeed, Eliza views the privacy of the domestic sphere as a kind of death: Eliza writes, “Marriage is the tomb of friendship” and fears that marriage will separate Lucy from her (Foster 123, 160). Her fears are well-founded; writing of her own domestic bliss, Eliza's friend Mrs. Richman enthuses, “All my happiness is centered within the limits of my own walls; and I grudge every moment that

⁸⁵ Dillon, Elizabeth. *The Gender of Freedom: Fictions of Liberalism and the Literary Public Sphere*. (Stanford, California: Stanford University Press, 2004) 185-87.

⁸⁶ Ivy Schweitzer, Ivy. *Perfecting Friendship: Politics and Affiliation in Early American Literature*. (Chapel Hill: University of North Carolina Press, 2006) 108-09.

calls me from the pleasing scenes of domestic life” (Foster 182). Her description presents a private enjoyment that is both all-encompassing and confining – physically and intellectually. Mrs. Richman does not wish to move beyond the space of “her own walls” and does not wish to think of anything but her own familial happiness.⁸⁷ With the death of the Richmans’ child, the limiting walls of the home become linked with the narrow space of the coffin and domestic privacy borders on entombment.

Despite (or perhaps because of) the limiting and limited nature of domestic bliss, Eliza is criticized for being a coquette; her social circle assumes that her behavior, her “gaiety,” is a marker of private, heterosexual desire (Dillon 191). She withdraws from society only when she realizes that her intentions have been misread and that the social sphere available to her is closed; her sexual relationship with Sanford becomes a substitute for the lost pleasures of society (Dillon 192-3). She embraces privacy because other social and civic possibilities are closed to her.

The question remains though whether Eliza’s failure to fulfill her desire(s) (for either privacy or an effective public space) is merely a social failure or whether it has political ramifications. Habermas explicitly argued that privacy provides the necessary foreground for new models of the state that arose in the eighteenth century, that privacy offered opportunities for reflection and interrogation that contributed to a new “self aware” public (Spacks 4). McKeon also describes the private as offering, for women, a possibility of freedom from political commitments that could allow them to explore ideas of subjecthood based in ethics rather than in national loyalty (150). However, the writings of Margaret Cavendish suggest that, rather than

⁸⁷ If marriage is not literally the tomb of friendship, domestic space can be deadly. Foster acknowledges both the ephemeral nature of domestic happiness and the real risks of domestic life when she writes of the child’s death (*Coquette* 213).

being freed from political constraints, women found themselves constrained within an even smaller circle and became subject to their families (McKeon 151-52).⁸⁸

If Schweitzer and Dillon are correct, Eliza wishes to escape domestic constraint and engage in a community that is neither familial nor genuinely political. Dillon suggests that Eliza's interest in such communities is validated by Mrs. Richman's speech on politics (Foster 190). Mrs. Richman defends her interest in politics, and Eliza's, conceding that the women of the republic may not be "called to the senate or the field" but they "feel for the honor and safety of our friends and connections, and reserve the "right of inquiring into those affairs which may conduce to or interfere with the common weal" (Foster 139). Interestingly, while Mrs. Richman speaks of women's interest in political affairs, she couches her defense in the language of gossip and surveillance. When she asks, "Why should government which involves the peace and order of the society of which we are a part, be wholly excluded from our observations?" Mrs. Richman's word choice encompasses both conversation and monitoring.⁸⁹ Eliza, who already knows a bit about having her affairs inquired into, remains silent. It is unclear whether Mrs. Richman's model of watchful and sympathetic republicanism provides a fruitful model for female citizenship. However, Eliza's hopeful model for autonomous participation in the community appears emphatically unworkable in the new and growing country. Nor does Eliza's bid for an inviolable privacy offer a model for the citizen's rights – Eliza remains accountable, and becomes useful as a negative example, only through posthumous publicity.

⁸⁸ McKeon notes that Cavendish tries to recuperate this by suggesting that women could overcome the innate inequality of the marriage relationship through exercising their charms (152). Of course the question remains whether this constitutes a real form of equality.

⁸⁹ In a conversation with Eliza, Mrs. Richman also opines that the proper place for women to perform their duty as citizens is the home: "the little community that we superintend is quite as important an object; and certainly renders us more beneficial to the public" (Foster 123).

While *Arthur Mervyn* revels in domestic privacy, both *Letters from an American Farmer* and *The Coquette* depict privacy as an undesirable outcome. The privacy Arthur Mervyn covets is, not coincidentally, the privacy that Eliza Wharton dreads and that Farmer James seeks from disappointment and perhaps spite. Their genders account for this disjuncture: in marriage, Eliza would lose her identity legally (as a *feme covert*) and socially (as confirmed by Mrs. Richman's retreat into her own four walls). Arthur, in contrast, gets to assume (or subsume) an identity through the same legal mechanism that would deprive Eliza of hers. For Arthur, domestic privacy is constitutive rather than destructive.⁹⁰

Perhaps this difference plays out in the different ways the characters treat text as well. Eliza's story is epistolary; her letters are commensurate with her self in many ways. Not only do the letters present personal narratives, they also assume (or construct) a degree of privacy but are subject to scrutiny. We as readers get the sense that we are eavesdropping on a private correspondence. In an attempt to preserve her privacy, Eliza removes herself from the text, leaving her story to be narrated by others. Arthur, in contrast, expects his story to be distributed – he writes his tale at the request of Mrs. Wentworth, “as if it were designed . . . for those who have no previous knowledge . . . of me” (Brown 604). The text purports to reveal, but is not a personal letter written to an intimate friend; it is a text written, as it were, without an expectation of privacy. The form of Arthur's narrative follows the trajectory of the plot (such as it is). At first, Arthur's presence is ventriloquized by Stevens, but as Arthur acquires reputation and identity, his own voice takes over. Farmer James acquires a stronger voice over the course of his letters, but silences himself when he fears that community has broken down in the struggle for American independence.

⁹⁰ Conveniently, Achsa Fielding also prefers “the delights of privacy” (*Arthur Mervyn* 620).

At the end of the novel she inhabits, Eliza's story is taken over and moralized by others; privacy evades her. Arthur writes his story to evade meaning and, perhaps, to protect the privacy he has established with Achsa. Rather than fixing identity and inviting publicity, Arthur's narrative of his own life becomes a strategy for unsettling identity and guarding the private self. Farmer James asserts that meaning is impossible in a fragmented community; for him privacy is not a cherished refuge, but a loss. For all of these characters, privacy represents a retreat from the public sphere, disengagement whether forcible or voluntary. For both Eliza and James, privacy is a loss rather than a right. The wealthy Arthur Mervyn leaves America and enjoys his domestic bliss in Europe, but for the other characters, privacy is or stems from deprivation.

At the beginning of the nineteenth century, then, privacy is not something to be sought, let alone protected by law, but it does seem to be a persistent characteristic of life in the young country.

3.0 THE SECRETS OF THE HEARTH: GENDER, DOMESTICITY, SECRECY, LITERARY VALUE AND THE VALUE OF THE LETTER

This story begins (as so many stories of fear and conflict do) on a dark and stormy night. In rural Michigan in 1881, a frontier doctor named DeMay was called to the home of a poor, young couple, Mr. and Mrs. Roberts, to assist in the delivery of their child.⁹¹ He asked an associate, a young, unmarried man, to accompany and help him (*Ibid.*). DeMay was weary from hours of work and soaked to the skin, so his young associate (blessed with the allegorical name of “Scattergood”) took an unusually active part in the delivery. At one point, he even helped to restrain Mrs. Roberts as she was wracked by labor pains. However, sometime later, the couple filed a suit against the doctor, alleging that they had not realized that Scattergood was not a medical professional and that they would not have allowed him into their home if they had known he possessed no particular expertise. His presence in their home was an intrusion. In weighing whether DeMay and Scattergood had deceived the couple, the court considered the size of the plaintiffs’ home as well as the nature of the doctor’s intervention: the house was fourteen by sixteen feet, with a flimsy partition to delineate the bedroom; Mrs. Roberts’ lying-in was shielded only by a curtain (*Ibid.*). The court pondered both the nature and the site of the occasion in its ruling: “To the plaintiff the occasion was a most sacred one, and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended

⁹¹ *DeMay v. Roberts*, 46 Mich. 160 (1881).

existed in this case” (*Ibid.*). The court declared, “[t]he plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it” (*Ibid.*). Childbirth should be shielded from the eyes of interlopers even (or especially) if the woman giving birth is poor and enjoys only limited physical privacy.

This case, well known to students of tort law, appears to give women an explicit right to privacy nearly a decade before Samuel Warren and Louis Brandeis published their essay advocating recognition of a Constitutional right to privacy. After all, the court repeatedly refers to Mrs. Roberts as “the plaintiff,” apparently giving her rights that the court recognizes and enforces. In their essential study of “How Privacy Got Its Gender,” legal scholars Erin Mack and Anita Allen, however, argue that, rather than being a defense of female autonomy, this case represents “[a] vindication of women’s modesty.”⁹² Elsewhere, they concisely summarize the intersection of privacy and gender in nineteenth-century America:

Middle-class white women often had a great deal of privacy, in the sense of socially imposed isolation within a private household. However, across races and classes, women were seldom the heads of households, had little time to themselves, and little of that legal autonomy concerning sexuality, marriage and the family that is sometimes called ‘decisional privacy’ today (Allen & Mack 446).

Women had access to privacy of a kind, then, but that privacy was figured as protection from the incursions of a dangerous and demanding public sphere rather than freedom to act. Mack and Allen offer a neat division between positive valences of privacy (autonomy) that remain out of women’s reach and the negative valences (imposed isolation in the house) that characterize their lot. In fact, *DeMay v. Roberts* vividly illustrates a common nineteenth-century

⁹² Erin Mack and Anita Allen, “How Privacy Got Its Gender,” *Northern Illinois University Law Review*, 1991, 441-478.

equation linking gender, domesticity and privacy, where privacy was more akin to shelter and isolation, and where any hint of sexuality was to be concealed behind solid walls.

In this chapter, I will trace how that sense of privacy, linking domestic space and isolation, was established, questioned, and transformed by the practice (and the idea) of writing. I also will consider how the persistent association between femininity and domesticity shaped the meaning of privacy and may have helped to create a space in which women could form a resistant sense of self. In this chapter, I will explore the ways in which women may use the potentially disabling privacy of domesticity and isolation to formulate their own ideas of personality and autonomy through the medium of writing.

3.1 BLISS OR BLIGHT: THE CONFINEMENT OF THE DOMESTIC SPHERE

In his influential *Structural Transformation of the Public Sphere*, Jurgen Habermas posits that the private sphere necessarily develops in tandem with, and enables, the public.⁹³ The Habermasian formulation of privacy associates the creative possibilities of privacy with the home, in which nurturing is supposed to take place. However, domestic space did not nurture only potential citizens (children); the home also allowed adults to become active participants in the *polis*. The home offered space for reflection and renewal, permitting the citizen to participate fully and thoughtfully in the public sphere, hypothesizing a symbiotic relationship in which public and private worked together for the greater good – or at least the more effective and

⁹³ Habermas writes, “[T]he experiences with which a public passionately concerned with itself sought agreement and enlightenment through the rational-critical public debate of private persons with one another flowed from a wellspring of specific subjectivity. The latter had its home literally in the sphere of the patriarchal conjugal family” (43).

efficient function – of society. Habermas’s ideas are central to the debate about the emergence and importance of privacy; every theorist of the private responds to Habermas’s formulation of the public.⁹⁴

Scholarship suggests, however, that barely a century after the public sphere had reached its apotheosis, it was already on the wane, and the private which seemed both constructive and necessary had begun to sap vitality from the public. Writing of the way in which notions of privacy affected eighteenth-century society, Richard Sennett observed, man “made himself in public, but *realized* his nature in the private realm, above all in his experience with the family (18-9). Sennett’s formulation suggests that, to the eighteenth-century citizen, an individual was most fully and truly himself at home. His public self becomes then only a part or distillation of that true self. If Habermas’s account of the rise of the modern world hinges on the separation of public and private, other histories tell a story of loss, in which privacy is not enriching but debilitating and distracting. In *The Fall of Public Man* (whose title gives away the game), Richard Sennett describes a modern turning inward, focusing on “protecting and isolating” the psyche, and devaluing public life (3-4).⁹⁵ Sennett suggests that this isolating impulse harms not only community but the self: “[T]he more privatized the psyche, the less it is stimulated, and the more difficult it is for us to feel or to express feeling” (4). As the title of Sennett’s study might suggest, he mourns the passing of a “Public . . . [that] came to mean a life passed outside the life of family and close friends; in the public region, [where] diverse, complex social groups were to be brought into ineluctable contact” (17). The public meant engagement with unfamiliar ideas

⁹⁴ While Daniel Solove does not cite Habermas in his magisterial article on privacy law, he argues, “Privacy cannot be understood independently from society,” arguing that without society there would be no need for privacy. See Daniel J. Solove, “A Taxonomy of Privacy,” *University of Pennsylvania Law Review*, at 484. Privacy, he says, offers “relief from social friction” (*Ibid.*).

⁹⁵ Richard Sennett, *The Fall of Public Man*, (2nd ed). (London, New York: W.W. Norton & Co., 1992) 3-4.

and people, a willingness to test and change. But with a growing emphasis on the importance and reliability of emotion as the ultimate arbiter of meaning, with a concomitant location of emotion in the home and intimate relationships, western cultures have turned away from public life. Sennett posits that there has been a confusion between public and inner codes, that we rely on individual feeling to guide behavior (5). Sennett's formulation of the consequences of this confusion anticipates the work of contemporary scholars who argue that the valorization of feeling has marked a sharp and unfortunate turn inward, warning that the private can overtake the public, erasing any effective civic participation. He writes, "The world of intimate feeling loses any boundaries; it is no longer restrained by a public world in which people make alternative and countervailing investment of themselves" (Sennett 6).⁹⁶ In other words, the private overflows its boundaries and overtakes the vitality and importance of the public.

The shift from public to private can be seen in the way that marriage is regarded. Marriage is of course both an intimate relationship and a contract affirmed by the state; contemporary debates over marriage continue to weigh autonomy and intimacy against the supposed interests of society. But in the early modern period, legal safeguards emphasized the societal dimensions of the marital relationship. The English law from which American law grew had prescribed a strict, primarily public process for formalizing marriages. Couples who would wed went through, in order, "espousal, publication of the banns, execution of the espousal contract in church, celebration, and sexual consummation," with most of those steps performed

⁹⁶ I hesitate to associate privacy with "feeling" or to support a system founded on feeling. It could be argued for example that the current "War on Terror" represents a governmental attempt to manipulate citizens' feelings in a way that circumvents concerns about privacy or autonomy. Citizens have proven themselves willing, even eager, to yield privacy rights in exchange for relief from the feeling of terror or dread.

in public.⁹⁷ Even given the private nature of the final step, the process ensured the witness and approval of the surrounding society. But although these steps were meant to ensure that a marriage was ratified by the entire community and recognized by law, legal historian Michael Grossberg informs us that clandestine marriages also flourished (*Ibid.*). Couples eager to wed had religious and personal reasons for avoiding the eyes of the state (and of religious authorities or disapproving families). A 1753 English law aimed to put an end to such circumventions, requiring all couples (other than Quakers, Jews, and members of the royal family) to wed in religious ceremonies (Grossberg 66). This insistence on public affirmation crossed the ocean: every colony had its own marriage code (Grossberg 67). And the colonies added a further mechanism for ensuring state (and familial) approval of marriages. Those couples who did not publish their banns in church (which would have spread public knowledge of the marriage and allowed anyone who objected to the marriage to register their protest) could apply for a license (*Ibid.*). A license afforded another kind of guarantee that the state and the parents approved. All of these safeguards demonstrate the government's lively interest (and active role) in forming marriages. Nevertheless, as a metaphor for intimacy, marriage became the private relationship *par excellence*.

In the nineteenth century, the rhetoric describing marriage emphasized love and companionship over societal duty and the family came to be seen as “an idealized refuge, a world all its own, with a higher moral value than the public realm” (Sennett 20). Domestic space ceased to be a preparatory environment, and was imbued instead with significance as an alternative site of positive good. The home didn't simply groom citizens for the public sphere; rather, the home became a goal in itself to be sought, protected, and celebrated (just as privacy

⁹⁷ Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth Century America*. (Chapel Hill: University of North Carolina Press, 1988) 65.

would later be sought, protected, and celebrated). As Sennett noted, in an increasingly mobile and fragmented society, “Privacy and stability appeared to be united in the family” (20). In this configuration, then, privacy meant domesticity, and domesticity was conflated with femaleness in a way that essentialized and reduced gender.

This equation continues to be exposed to prolonged critique. Many critics have contested the notion that domestic privacy should be so relentlessly identified as a feminine value, or that domestic privacy should be seen as a positive good. In *The Gender of Freedom*, Elizabeth Dillon tackles the notion that domesticity, the female, and privacy are commensurate terms. She also confronts the belief that privacy is (or should be) primarily a shield for female modesty. Dillon recounts a 2001 Supreme Court case in which Justice Antonin Scalia objected to the use of infrared technology as invasive. Scalia wrote that such technology might disclose “at what hour of the night the lady of the house takes her daily sauna and bath” (Dillon 5, quoting *Kyllo v. United States*). Aside from Scalia’s rather charmingly dated reference to the “lady of the house,” this hypothetical conflates the home with the woman, intimacy, and forbidden (or at least potentially embarrassing) sexualized knowledge. Dillon makes note of how unremarkable the image is, of how easily and automatically a Justice of the Supreme Court imagines technology in the service of prurience, and at the expense of female virtue.

Her critique also questions whether privacy is entirely separate from, prior to, and generative of, the public. Dillon demonstrates how Scalia’s image of a woman in her bath is itself a public construction of what privacy looks like, and how longstanding associations between the female, domesticity, and privacy are in fact associations shaped by and for the public sphere, to ends that turn privacy into a limitation rather than a freedom. Instead, she argues that the public informs and shapes the private as much as the private shapes the public.

Meaning is reassigned to the private sphere, but only insofar as that meaning is already known, understood, and consented to; meaning is agreed upon in public. Dillon cites the 1835 translation of de Tocqueville for the principle that “Public opinion shapes and monitors private subjects” (123). The public sphere, as a space of debate, articulates and ratifies public opinion -- thus, the public becomes formative of the private citizen as those opinions are disseminated and carried back into private space (*Ibid.*). Dillon points to the public discussion of private marriage choices as an example of how an apparently intimate, personal choice is influenced by external factors (Dillon 125). Supposedly private relationships require public ratification (and provoke public discussion). Thus, the private relationship that purportedly abets and informs the public sphere is, in fact, shaped by it. The citizen’s apparent turn inward still serves societal interests (if not the citizen’s own).

This work complicates the idea that the private precedes and creates the public. Dillon disputes the assumption that privacy is a primary, formative space from which citizens “emerge into the public sphere to debate rationally their (already constituted, already known) needs and desires” (6). Instead, she suggests that we carry public judgments into our private lives. Unsurprisingly, she disagrees with gendered readings of privacy insofar as such analyses locate women in a prior (natural, sexual) state. Instead, she associates the actual protections afforded to privacy with the privileges extended to white, male property owners asserting that “the freedom that underwrites the authority of the liberal political subject . . . is linked to ownership of private property” (Dillon 21). In other words, you can claim and enjoy a right to privacy if there is a physical space that you can claim legally as yours. This reading of privacy explains the *DeMay* court’s emphasis on not just the size but the very existence of the Roberts home. Mr. and Mrs. Roberts may have been poor but they owned property, and they invited Dr. DeMay and Mr.

Scattergood into that property, their home. Although the focus of the privacy violation is apparently Mrs. Roberts' physical integrity and seclusion, the court's analysis is grounded in the location. Privacy grounded in property presupposes a certain economic status and a freedom to act.⁹⁸ Privacy is useful as a constitutive tool of state only if the holder of that right also may act in public. The privacy of the home is, then, formative and nurturing only for those who can escape the home's confines, that is, for men. Women become associated with privacy not because they benefit from it, but because they form part of the home furnishings sheltered by this linkage of privacy and the domestic.

The association of woman with home was both traditional and legal; the female body was regarded as property in many circumstances. Under colonial adultery laws, the "husband was regarded as having a property right in the body of his wife and an exclusive right to the personal enjoyment of her. The wife's adultery was therefore considered to be an invasion of the husband's property rights."⁹⁹ Under such laws, women had very little right to control their own lives, but that right expanded (for some very intriguing reasons) in the early republic.

Political theory had long used family units as models for the state. However, figuring the state as a married couple (a contractual, more-or-less consensual relationship) rather than as a parent and child reordered ideas of how the state related to its citizens. Writing in response to Sir Robert Filmer's defense of hereditary monarchy at the end of the seventeenth century, John Locke exposed the problem with equating the subject's relationship to the state with the child's

⁹⁸ Legal scholar Anita Allen similarly admits that, "'The liberal conception of privacy overlaps considerably with the liberal conception of private property'" (4). Joan Landes offers a similar critique of Habermas's view of the public sphere: she argues that the idea of the public sphere is predicated on the notion of rational debate; however, you could not participate in that debate unless you had a certain relationship to property. See Joan B. Landes, "The Public and the Private Sphere: A Feminist Reconsideration." *Feminism, the Public and the Private*. Ed. Joan B. Landes (Oxford & New York: Oxford University Press, 1998) 135-63, 141.

⁹⁹ Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in an Era of Public Morality*. (New Haven and London: Yale University Press, 2006) 79, n. 78, quoting 2 Am. Jur. 2d Adultery & Fornication 1-2.

relationship to the father.¹⁰⁰ Locke pointed out that parents do not always behave benevolently to their children, and that children themselves eventually grow up and become parents and thus assume authority, a “natural” progress that does not happen in the subject’s relationship to a king (56-7). According to Locke, only one thing could make a person subject to a type of government, and that was express consent: “Nothing can make any man so, but his actually entering into it by positive engagement, and express promise and compact” (Section 122).

In that regard, Locke’s notion of government more closely resembled the marital bond than the filial. He argued that “conjugal society” was the foundational relationship for civil society, and “is made by a voluntary compact between man and woman . . . [that] draws with it mutual support and assistance, and a communion of interests too” (Section 78). Locke did not think that the parties were on absolutely equal footing; “rule,” he wrote, “naturally falls to the man’s share as the abler and the stronger” (Section 82). However, Locke reserved for the wife “the full and true possession of what by contract is her peculiar right, and at least gives the husband no more power over her than she has over his life” (*Ibid.*) Further, “the power of the husband being so far from that of an absolute monarch . . . the wife has, in many cases, a liberty to separate from him where natural right or their contract allows it, whether that contract be made by themselves in the state of Nature or by the customs or laws of the country they live in” (Section 82). Marriage was not a monarchy in Locke’s formulation, but a contractual agreement, and a contract can be breached or dissolved.

The freedom promised by this egalitarian, contractual vision of civil and conjugal society seemed on the verge of fulfillment in early America. Norma Basch locates a right to privacy-as-autonomy in colonial marriage laws, which redefined marriage in ways that redefined the state.

¹⁰⁰ John Locke, *Two Treatises on Government* (1690), (London: C& J Rivington, 1824).

Basch observes that colonial attempts to pass divorce laws before independence were overturned by England's Privy Council, but with independence, divorce laws became widespread, for their symbolic resonance as much as for their practical effect.¹⁰¹ She argues that divorce was modeled conceptually on the Declaration of Independence, which effectively severed members of one family from one another and constituted a new family (Basch 36-7). Metaphor became law. She notes that marriage had served as a potent metaphor for a "consensual but indissoluble" contract that was used to ridicule the idea of American independence (38). The possibility of divorce meant that husband and wife were no longer quite the same person at law (Basch 40). Upon marriage, a woman lost her separate identity and merged with her husband, becoming a "feme covert." Divorce reversed that process, uncovering what is "covert" and re-establishing the woman's identity.

By passing divorce laws at the dawn of American independence, colonial governments turned metaphor into reality, seeming to afford wives the liberty recognized by "natural right" (and John Locke). But just because laws existed on the books did not mean that they were used, and while divorce offered a heady metaphor for rebellion and independence, it was still frowned upon in American society. The presence of divorce laws in the late eighteenth century did not translate into greater rights for women as the country entered the nineteenth. Rather than separating from their husbands, women were increasingly supposed to confine themselves to family and home.

The turn from the public square to the home was not presented as confinement but as freedom, especially freedom from the pressures of nineteenth century public life. In her study of

¹⁰¹ Norma Basch, "Declarations of Independence: Women and Divorce in the Early Republic," *Women and the United States Constitution: History, Interpretation and Practice*. Eds. Sibyl Schwarzenbach and Patricia Smith. (New York: Columbia University Press, 2003) 34-44, 36.

nineteenth century love letters, Karen Lystra includes passages from husbands rhapsodizing about the “haven of rest” and “blessed refuge” that their homes provide from the vagaries and “unsuitable associations” of public life.¹⁰² The language of these love letters celebrating the pleasures of home approaches the religious. For men at least, the haven is heaven. But critics have expressed doubts about the joys of the home and their uses. Domestic space, insofar as it offers any form of privacy or freedom, may serve most effectively as a distraction rather than as a tool for preparing citizens for public life. Lauren Berlant and Michael Warner argue that domestic privacy is exclusionary and future-oriented. Berlant and Warner contend that locating privacy in the home and family offers citizens a “promised haven that distracts [them] from the unequal conditions of their political and economic lives.”¹⁰³ Likewise, in *The Queen of America Goes to Washington City*, Berlant argues that citizenship has been “downsized” to a “mode of voluntarism and privacy.”¹⁰⁴ She maintains that this downsizing results from relentless division: “national culture demands a continuous pedagogical project for making people into ‘private citizens’ who understand their privacy to be the mirror and source for nationality itself”; in this formulation the nation has to trump all other forms of “collective sociality and power” (Berlant 56). A citizen’s life becomes separated into extremes of personal privacy and national identification. Habermas also saw the limitations of domestic privacy, acknowledging that the family is effective in serving as a site of constraint precisely because of its capacity to represent a site of freedom (47). The citizen can become diverted from the demands of public life by the turning inward to the family. Elevating the home as a restorative haven outside the pressures of

¹⁰² Karen Lystra, *Searching the Heart: Women, Men, and Romantic Love in Nineteenth-Century America* (New York, Oxford: Oxford University Press 1989) 194-95.

¹⁰³ Lauren Berlant and Michael Warner, “Sex in Public,” *The Cultural Studies Reader*, Second Edition, Simon During, ed. (London: Routledge, 1999) 354-68, 358.

¹⁰⁴ Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship*. (Durham: Duke University Press, 1997) 5.

the polis makes can reorder the importance of public and private life, distracting the citizen from participating in a larger social world, or from acting in his (or her) self-interest. Intimate space thus possesses representational value: it can be deployed as a fiction to serve other ends, perhaps because of its nullity.

Representations “portray the freedom of the intimate sphere” according to Elizabeth Dillon – or more directly, they portray intimacy as freedom (310).¹⁰⁵ As Karen Chase and Michael Levenson observe, the home itself could become a kind of theater.¹⁰⁶ Focusing on British homes of the nineteenth century, Chase and Levenson argue that writers like Sarah Stickney Ellis attempted to allay their readers’ desire for a world beyond the walls of the home by portraying the home as both instructive and spectacular, a space in which all human drama could be enacted (81). The public space is thus brought inside, tamed and domesticated. The home becomes a space for displaying and demonstrating values that have been deemed constructive to the world outside its walls. Like Dillon and Berlant, Milette Shamir also takes on the ways in which the female, domesticity and privacy are read as overlapping. Shamir focuses primarily on domestic space, the “enclosure of the private home” as the ground on which privacy is formed (3).¹⁰⁷ The house was subjective (often male) space according to Shamir (5). Domestic space acquired a use value for those citizens who were not forcibly constrained to that space.

¹⁰⁵ This fantasy is continually peddled to middle America. Think of the spate of films over the past two decades that argue for a simple, middle-class life centered on home and children as freer and more fulfilling than prestige, money, employment (*The Family Man*, *Daddy Day Care*). One of the most intriguing aspects of these films is the way in which they seem to be directed toward men.

¹⁰⁶ Karen Chase and Michael Levenson *The Spectacle of Intimacy: A Public Life for the Victorian Family*. (Princeton, NJ: Princeton University Press, 2000) 70, 81.

¹⁰⁷ Milette Shamir’s recent *Inexpressible Privacy* covers some of the same territory which I hope to explore; however, she emphasizes the ways in which physical space (domestic architecture, etc.) informed the development of the idea of privacy.

But for those who had no other choice, domestic space was far from a haven. Rather, the turn to the home and family limited and confined. In her volume on love letters, Lystra points out that women were responsible for enforcing and adhering to strict societal roles (192). Lauren Berlant extends this critique from domestic privacy to privacy plain and simple. Privacy for Berlant marks a “category of law and a condition of property that constitutes a boundary between proper and improper bodies”; finally, the zone of privacy erected by law protects only reproductive heterosexuality (58-60). Women become “the bearers of the values of privacy” (Berlant 70). Women are supposed to embody and maintain the meanings ascribed to privacy, particularly the equation of privacy and the domestic (or domesticated).

The constraint imposed by domesticity also has clear physical boundaries within the walls of the home. Some of our persistent critical interest in domestic space stems from its manifest materiality. Even if privacy does not depend directly on ownership of private, real property, the connection between privacy and the home, or privacy and architecture, allows us to envision privacy as a material right with a definable place and material consequences. Even Milette Shamir, who expresses an interest in letters as a locus and foundation of privacy, writes about those letters in relation to then-extant property law. She points to nineteenth century case law that attempted to distinguish between two rights of ownership: material property (who owns the paper and ink of a letter) and intellectual property (the ideas expressed therein) (Shamir 9). Shamir argues that the need for a privacy right that extended beyond ownership of property emerged from the concerns of people *written about* in those letters who had no control over distribution or content, rather than from the rights of authorship that could be extended to “ordinary” people (9). However, Shamir traces the relationship between letters and privacy to the letters’ materiality, including the place in which they are stored (or, to maintain my metaphor,

housed). Following Lori Merish, Shamir writes of how the architecture of the nineteenth-century home reified and reflected gender roles. She explains how the domestic novel emerged from the epistolary novel (with both forms promising intimacy, one through access to the interior of the home and the other through access to thought), and was designed to be read aloud in the parlor of the home, a kind of staged performance in a private or feminized domestic space while the more masculine study was a place of writing and reflection (Shamir 44, 46). She thus links writing and reading to the spaces in which they occurred, suggesting that for women, the home decreed order and confinement while for men, the home promised contemplation and autonomy.

However, it was not only men who saw the home as a site of potential freedom. Katherine Adams also argues that by the middle of the nineteenth century, at least one woman writer promulgated a vision of an intimate society, grounded in the home. Margaret Fuller championed an “inviolable, inalienable self-unity” that could be achieved only within a community of “private relations.”¹⁰⁸ Rather than focusing on the space of the home, Fuller examined the relationships that developed within it, relationships that could use freedom from society’s regard to question and re-order the public. Adams presents of vision of privacy that is directly constitutive of the public sphere, so that there is finally no meaningful separation between public and private: “In Fuller’s vision, private relations *are* the democratic public sphere and the circulation of private lives produces it” (35). According to Adams, Fuller subscribed to the Hegelian notion of a self, realized in privacy, that must be recognized by others (35). This mutual recognition, Adams says, frees privacy from property relations – identity is interior but shared, not linked to ownership of property, and in fact defies ownership (38). An individual may be *self*-possessed whether male or female, and whether that individual owns any possessions.

¹⁰⁸ Katherine Adams, *Owning Up: Privacy, Property, and Belonging in Women’s U.S. Life Writing*. (Oxford: Oxford University Press, 2009) 32.

Adams argues that this formulation of privacy comes close to what we may think of as a modern iteration of privacy where the individual citizen is in charge of herself and can command respect or at least acknowledgement for that self. Adams hints at the differently gendered positions on this concept of a private self that may be shared in a space of sociality – she notes that while Emerson also believed in the value of self-publication, he thought the risks were as great as the rewards (36-7).¹⁰⁹ However, Fuller’s formulation of privacy as social intimacy eventually narrows: Embodiment becomes for Fuller the “site of socially imposed difference,” with marriage ideally serving as a site of reconciliation (Adams 49). In marriage, those differences meet and interact, creating a mutually nurturing space.

Aside from the fear of confinement and the hope of fulfillment, the persistent association between women and (domestic) privacy had a dark side. Privacy often shaded into secrecy, that category of “traditional knowledge” that could be used to manipulate people, communities, and states. Revelations can emerge from the private that will unsettle the public. According to Michael McKeon, the quintessential example of a secret that is linked to both the domestic and to potential disruption of the state is the “Warming-Pan Scandal.” When, after many unsuccessful attempts, the Catholic James II of England and his second wife managed to (finally, belatedly) produce an heir in June 1688, rumor had it that the little Prince of Wales didn’t really belong to James or his royal wife. Instead, gossip claimed that he was the son of a bricklayer, or possibly a papal nuncio, and the bricklayer’s wife, smuggled into the palace in a warming pan (McKeon 550). This scandal nicely encapsulates the ways in which secrecy and domesticity

¹⁰⁹ Emerson offers (unsurprisingly) contradictory advice to his reader: “man is, as it were, clapped into jail by his consciousness. As soon as he has once acted or spoken with éclat, he is a committed person, watched by the sympathy or hatred of hundreds, whose affections must now enter into his account” Ralph Waldo Emerson, “Self-Reliance,” *Selected Writings*, William H. Gilman, ed. (New York: American Library, 2003) 269. A few pages later, he laments, “Man is timid and apologetic . . . he dares not say, ‘I think, I am,’ but must quote some saint or sage” (Emerson 279).

come together: no one knows what goes on behind palace walls, so those walls can shield sexual and class transgression (an affair between a cardinal and a laborer's wife). If women were confined to the home, beyond the sully reach of the public, they were also beyond public scrutiny, and thus capable of behavior that could scandalize and possibly undermine the public. The fear that women could not be confined completely in the home, or that they could use the home to hide transgressions, was not limited to questions of monarchical succession. There was plenty of sexual scandal in early America: for example, Alexander Hamilton's political career effectively ended when love letters between him and a younger, married woman (whom he had entertained in his home!) were intercepted by his rivals, and John C. Calhoun found his tenure as Andrew Jackson's vice-president imperiled when his aristocratic wife snubbed Margaret Eaton, the wife of Jackson's Secretary of War, who was rumored to have seduced a host of men in her father's boarding house.¹¹⁰ These cases, exemplary but not exhaustive, demonstrate the persistent connection between the home and secrecy and sexuality. It seemed that almost anything could happen behind closed doors, but despite the prophylactic enclosure of the home, things that happened in secret could affect the public. But if accounts of the private behavior of public figures (like Hamilton and Eaton) had value, the foibles of private citizens merited no such protection.

¹¹⁰ For a fuller account of these juicy stories, see Angela Serratore, "Alexander Hamilton's Adultery and Apology," *Smithsonian Magazine* (July 25, 2013) and Andrew Meacham, *American Lion: Andrew Jackson in the White House* (New York: Random House, 2009), 70ff.

3.2 PROTECTING THE PRIVATE VOICE: LAW AND THE WRITTEN WORD

For the first part of the nineteenth century, courts seemed to agree that, where the written word was concerned, the purely private lacked any value, and thus any protection. Writings were protected by the law only if they held some general interest. The written words of the famous and prominent had legal value because they had commercial value – the personal correspondence of a renowned author could be protected from publication because of the writer’s fame. This protection dated back to the eighteenth century, when a London bookseller obtained and published the personal correspondence of several famous writers in a volume entitled *Letters from Swift, Pope, and others*.¹¹¹ When Pope learned about the book, he sued. The bookseller, Curl, claimed that a letter is like a gift: once sent, the writer retains no property rights in it. The court disagreed, drawing a distinction between letter as physical object and the contents of the letter. The judge, Lord Hardwicke, declared:

Possibly the property in the paper may belong to [the letter’s recipient], but this does not give license to any person whatsoever to publish them [the letters] to the world; for, at most, the receiver has only a joint property with the writer (*Ibid.*).

Lord Hardwicke draws a neat line between the (essentially valueless) real property, i.e., the paper, which belongs to the letter’s recipient, and the contents of the letter, the ideas it conveys, which remain the property of the writer. Significantly, Hardwicke’s ruling does not depend on whether a letter’s content is particularly literary. He never suggests that a letter must contain a rough draft of an author’s publishable work in order to deserve protection. Even mundane or trivial contents merit protection, if those mundane or trivial ideas attach to a particular person. Arguably, this early decision recognizes the existence of a personality whose

¹¹¹ *Pope v. Curl*, 2 Atk. 342 (1741).

expression is protectable by law. But at this historical moment, the belief that private letters contained something valuable and worthy of protection extended only to the famous; Pope's grocery list could be withheld from publication without his permission not because it was a grocery list but because it was Pope's.

For the next several decades, however, ordinary people and their correspondence received no such consideration. More than a century after *Pope v. Curl* was decided, the question arose in the New York courts whether a third party could publish a private correspondence between two private citizens. The judge in that 1848 case, Chancellor Walworth, refused to enjoin publication, proclaiming that the letters had no literary value and could not be considered property – an extraordinary result, given that these supposedly uninteresting and unimportant documents had found a publisher.¹¹² The court in *Hoyt v. McKenzie* reasoned that, if the letters' content would discourage their author from seeking publication, then the letters must lack any literary merit and thus any value that required compensation (*Ibid.*). This reasoning yielded the extraordinary result that, the more private or personal the content, the less that work deserved protection. And as Justice Thomas Cooley observed in his magisterial late-nineteenth-century work on torts, the court's holding (that a letter has no value as "literature" if its contents would not encourage publication) was "a remarkable non sequitur, especially as in the very case in which the decision was made the defendant had published the plaintiff's letters, surreptitiously obtained, expecting to derive a profit therefrom."¹¹³ Legal protection was reserved for property, which according to the court, had some measurable, economic value (as well as a defined physical space). If the writer did not intend his work for publication, or did not think that his

¹¹² *Hoyt v. McKenzie*, 3 Barb. Ch. 320, 324 (1848).

¹¹³ Thomas M. Cooley, *A Treatise on the Law of Torts*, 2nd. Ed. (Chicago: Callaghan & Co. 1888) 320.

work had any literary (or public) significance, then he could not complain if the work was in fact published.

There were, however, some circumstances in which private letters had value, although that value might not be measured monetarily or protected under the law. In her comprehensive etiquette guide, *The Young Lady's Friend*, Eliza Farrar depicts letter writing as a necessary evil – socially expected, but of no lasting merit.¹¹⁴ Farrar characterizes correspondence as frivolity and compares it to conversation, to the stuff of personal relationships, a conventional move in letter-writing guides. Farrar appears to agree with the *Hoyt* court that the very factors that make letters personal and intimate also makes them unworthy of public attention. Nevertheless, such letters also require additional protections to remain private; just because personal missives don't deserve attention does not mean that they won't receive it. Interestingly, Farrar argues that the only way to prevent discovery of letters is to destroy them. Farrar admonishes her young ladies that:

life is too short and too much crowded with novel interests, to allow time for reading over quires of paper, filled with the chat of young girls, however good it may have been in its day; and therefore, the wisest plan is, to agree with your correspondent, to make each a bonfire of the other's letters when they shall be more than a year old (253).

She also displays an almost morbid dread of the ease with which the private could become, unexpectedly, the public. The 1857 edition of her tome advises her readers to

remember the liability of a letter to miscarry, to be opened by the wrong person, to be seen by other eyes than those for whom it is meant, and be very careful what you write to the disadvantage of anyone. Praise and admire as much as you please, but beware of blame. Your judgment may be wrong, and you know not when or where it may come up against you, and make you sorry you ever penned it (251).

¹¹⁴ Eliza Farrar, *The Young Lady's Friend* (Revised Edition), (New York: Samuel S. & William Wood, 1857).

While Farrar doesn't envision a specifically legal liability, she recognizes that letters are written within a web of social relationships and if their judgments come to light, they may cause harm. Private thoughts, committed to paper, may have social (if not precisely public) ramifications. Letters, then, are not private communications, and letter writers should anticipate a wider audience than the intended recipient. According to Farrar, letters should be treated with care not only because of the hurt they may cause to others, but also because of the damage they can do to the writer's reputation, and this concern extends beyond the writer's own life. Farrar warns that, "The letters of past years should either be destroyed, or carefully locked up, with directions on the box that in case of your death, they should be returned, unread, to the writers; or if that cannot be done, that they should be burnt, unread. The disposal of letters after death is often the only important part of a young girl's last will, and yet this is rarely provided for" (252). Farrar understands that words may outlive their authors, and she wishes to guard her readers' privacy even after death. But her reason for urging this caution is surprising. Farrar advises destroying letters not only because of their intimacy or potential liability, but because of their triviality. Because these letters do not merit scrutiny, they require protection from it.¹¹⁵

In her capacity as the "Young Lady's Friend", Farrar does not offer advice on how to write love letters – presumably because the sort of young lady Farrar envisioned, or wished to create, would not have engaged in such correspondence. However, she does offer counsel on how to *respond to* a love letter. The 1857 edition includes advice to young ladies who receive written "offers" from young gentlemen: "you should reply to it as soon as possible; and having in this case none of the embarrassment of a personal interview, you can make such a careful

¹¹⁵ The privacy status of correspondence is still contested. While the federal Wiretap Act prevents interception of electronic communications, the law permits discovery of email and allows employers to read employee email messages written on the company server. See *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996). Any such message may be personal, but it isn't private.

selection of words, as will best convey your meaning” (Farrar 271). Farrar does not clarify whether this care is due to the fact that the letter is potentially embarrassing and thus likely to remain private, or whether it is because the letter’s contents could become public.

Perhaps Farrar sounds a cautionary note because letters carried the authority of authenticity. Letters convey abstract values as well, providing a useful laboratory in which to explore emotion and self-formulation. In her study of the idea of romantic love in the nineteenth century, Karen Lystra depicts love letters as the most revealing and the most private form of self-expression. She posits that “total privacy was the foundation of romantic expression and romantic relationships were guarded by a deliberate wall of secrecy” (3). Lystra argues that diaries were less useful guides to self-revelation because they “lacked the crucial dimension of social interaction” (4). In contrast, love letters are more revealing than other types of correspondence because “Family letters might be shared among a circle of relatives; business letters might be read by a network of associates; letters of inquiry, or recommendation or introduction might be passed from hand to hand but in Victorian America, letters exchanged in a serious romantic relationship were carefully guarded” (Lystra 4). She argues that the letter was a stand-in for the presence of the lover, spoken to, kissed, and carried to bed (*Ibid.*). She contends that the letters were based on the notion that love consisted in “free and open communication of the self to the other,” a notion dependent on the growth of individualism and the idea of a self (Lystra 7- 8).

The publication of Farrar’s guide urging young ladies to protect their own letters occurred two years after the New York court changed its mind on the value of personal correspondence. In the 1855 case of *Woolsey v. Judd*, the court ruled against the publication of a

purely private letter.¹¹⁶ To oversimplify: in the 1855 case, a letter was protected not because it was worthy of publication, but because it was *not*. Legal protections were extended to those pieces of writing that were not meant for the public sphere, which suggests a shift in understanding about the relationship between writing and the self, as well as a shift in value. Following a long line of British case law, American courts had treated correspondence as worthy of protection only if publication deprived the writer of some commercial value. The idea the written expression of an individual's thoughts should be guarded from publication marks a development in the pre-history of privacy law: courts would protect not only the home, *i.e.*, the sort of private space that requires money to possess and maintain, but a space that lacked physical boundaries and was available even to those who could not afford other sorts of property. For the price of pen, ink, paper, and stamp, the letter-writer acquired rights commensurate with the rights of landed families. – at least insofar as those rights applied to the writers “property”: their thoughts and ideas, expressed in words. And as the concerns voiced by *The Young Lady's Friend* suggest, both men and women, those who could own property and those who could not, had to worry about keeping their correspondence private.

Of course, Farrar's cautious and discreet advice skirts the very real ways in which correspondence could affect the lives of young women, yielding tangible physical and financial consequences. Letters to and from young women discuss truths, and have results, that were far from trivial. Personal letters could affect their authors' financial well-being and property rights.

One such case from 1818 illustrates the legal connection between women, letters, and economic value. Maria Wightman had waited patiently for Joshua Coates to set a date for their

¹¹⁶ *Woolsey v. Judd*, 11 How. Pr. 49. Superior Court of NY (1855.).

wedding but Coates continued to put her off.¹¹⁷ Finally, Wightman brought suit for breach of promise. As evidence of the relationship, she produced the letters that Coates had written to her. The court treated the action as a hybrid of breach of contract and tort, focusing on the emotional harm suffered by the plaintiff. This focus on the heart represented a shift from the emphases, and the remedies available, under contract law for breaches of commercial agreement. In contrast, a breach of promise action entitled a woman whose fiancé had broken off their engagement to sue him in assumpsit for damages, including the actual expenses she had incurred in reliance on the marriage.¹¹⁸ She might also recover for her embarrassment, humiliation, and loss of other marriage opportunities (Brinig 204). Love letters provided not only evidence of the relationship but also proof of the depth of the harm inflicted when the relationship ended. Such letters almost certainly are not intended for publication; they can reveal intimate or embarrassing details about the parties involved. The letters however acquire – or confer – value when they are published. The emergence of a legal cause of action for heartbreak demonstrates the extent to which an intimate relationship involved public concerns, and could be subject to public scrutiny. This action endured through the nineteenth century and into the twentieth, suggesting that such letters should be composed carefully, and sent only under the most carefully considered circumstances. Under then-current American law (1818), Wightman could not have prevented Coates from publishing his letters; he could not have claimed that the letters had commercial value for him, although they proved to have such value for his former lover. In short, though, letters had legal and economic value for women and could be used as proof of relationships that anticipated or interfered with domesticity long before women could exercise other legal rights.

¹¹⁷ Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* at 35-6, citing *Wightman v. Coates*, 15 Mass. 2, 2-4 (1818).

¹¹⁸ Margaret F. Brinig, “Rings and Promises,” 6 *Journal of Law, Economics and Organization* 1 (Spring 1990), 203-15, 204.

3.3 INSCRIBING VALUES: THE LETTER AND THE TRANSGRESSIVE BODY

Louisa May Alcott's 1866 potboiler, *Behind a Mask*, relies on the device of missed and misdirected correspondence to explore the way in which a lower-class woman resists and manipulates patriarchal society.¹¹⁹ Alcott distances her story from American settings and American law by situating the story in England, but her questions about the relationship between privacy and gender are still pertinent to this discussion. The story also evokes traditional fears about privacy, the lurking suspicion that establishing a zone of personal behavior free from scrutiny might allow citizens to hide sins and crimes from their neighbors, manipulating their communities through careful deployment of public personas (or masks) that allowed them to conceal their true motives. In this regard, *Behind a Mask* explores privacy as secrecy, with its overtones of sexuality and the forbidden. But the novel complicates any easy condemnation of its secretive protagonist by giving her a happy ending.

The plot is at first conventional: an impoverished governess takes up a post with a wealthy aristocratic family and quickly captivates the family's two adult sons. But the novel quickly fulfills the title's promise and lets the reader see behind the mask: the governess, apparently beautiful and young, is neither. Shortly after arriving at the Coventry family's country home, Jean Muir retires to her bedroom and, unseen by her employer and her admirers, removes makeup, a wig, and false teeth (Alcott 14-15). At this moment, the reader enjoys or at least attains an intimacy that the Coventry family does not (although the family's sons and one uncle spend much of the book trying to gain access to Jean Muir's person and boudoir). The reader also learns that, in private, a person may be very different than she appears in public.

¹¹⁹ Louisa May Alcott, *Behind a Mask Or, A Woman's Power* (1866) (Rockville; Wildside Press LLC, 2005).

But words provide just as much access, and prove to be just as revelatory, as a visit to Jean's room. Late in the novel, Ned Coventry, the younger son and Jean's onetime suitor, obtains a stack of her letters. The letters, written to a friend who otherwise plays no part in the narrative, describe Jean's motives for seeking employment with the Coventry family. The letters are a vehicle for a truth that no one can actually observe. They refer to Jean's aging body (expertly disguised from her employer's family) and her scandalous past. The letters also relay Jean's real thoughts about the family she serves: her pupil is "silly," the younger son hot-headed, the elder son a fool. Further, the letters explain the motive behind her masquerade. Jean undertakes this elaborate deception to better her own socioeconomic status. She is an actress, divorced and disreputable; her best hope for protection and security is to use her talents to attract a wealthy husband. But Jean also indulges in her masquerade in part to humiliate the Coventry family -- on the day she arrives at their home, she has to walk from the train station to their estate because the elder son is too lazy to arrange a carriage for her. She decides to ensnare and humble him in revenge. She lets the family share her own sense of humiliation, vowing that once she has won the elder son's heart, she will turn and reject him (Alcott 114). Her own social and economic deprivation become contagious as she rejects both brothers, leading the elder to betray the younger and to cast off his devoted cousin -- and persuading their wealthy uncle to marry her. The novel ends with the brothers alienated from one another and the eldest estranged from his would-be fiancée, as Jean Muir takes her place as the lady of the manor. The novel's anti-heroine uses deception and disguise to rise through the ranks of society, and to humble those who would keep her in her place. Jean's motives are complex. Certainly, she desires security, position, leisure. But she also wants to make the wealthy family that hires her feel what she feels. She does not need to seduce each male member of the family in turn; she does so only to force them

to share her sense of loss and exclusion. The letters reveal her true self, or at least her true motivations, but they do not quite suggest an inviolate personality.

But if letters reveal the heroine in Alcott's novel, Nathaniel Hawthorne's most famous heroine becomes a letter in an act of transformation both reductive and revelatory. *The Scarlet Letter* does not explicitly deal with the act or law of correspondence but it shows the effects of law on female experience, and depicts its central character as a kind of message to and about her community. Hester Prynne's community aims to punish and isolate her but instead ends up inscribing her as essential to the community's identity and existence: Hester stands as a living reminder of and contrast to the community's values. In this act of inscription, *The Scarlet Letter* also demonstrates the ways in which the marginal can become central. The novel depicts an act of exclusion meant to separate a young adulteress from her Puritan community, but that act comes to characterize the community and to show the continuity between the sinful woman and her critics. The novel also shows the ways in which a letter – in this case, the symbolic letter that Hester is forced to wear on her dress – can communicate multivalent, private truths about both the “author” and the readers. Hester Prynne's letter is only a single figure, publicly displayed; arguably, she is not the author, since Boston's magistrates and clergy force her to wear the letter as punishment for her adultery. Nevertheless, the letter communicates a message, and while it is intended to shame Hester by publishing a private, even shameful, truth, the letter also communicates messages about the community. At the same time that Hester Prynne's scarlet letter attempts to inscribe her rebellious body with the values of her community, Nathaniel Hawthorne's *Scarlet Letter* illustrates the changing values of the larger American community, a community in which laws were increasingly sympathetic to adultery and censorious toward those who would expose it.

As Julie Husband points out in her 2010 study of antislavery literature, *The Scarlet Letter* is typically read as a profoundly conservative text, one in which Hester Prynne learns to internalize the judgment of her community as etched on her breast.¹²⁰ But, in contrast to Jean Fagan Yellin and Sacvan Bercovich, Husband cautions that Hester's apparent nonresistance to Puritan law does not mean acquiescence; she compares Hester's covert resistance with Thoreau, who accepted his punishment for refusing to pay taxes and famously spent a night in jail without agreeing that he did anything wrong (Husband 47). Instead, Husband argues, Hester asserts her right to raise her own child, refuses to reconcile with Chillingworth, and pursues her own living (48).¹²¹ She uses the writing upon her body and the separate sphere it enforces to assert her own autonomy.

Hester's letter is not the only form of correspondence in the novel. In his long and puzzling prologue to *The Scarlet Letter*, Hawthorne characterizes novel-writing as an act of correspondence, but a correspondence that is often necessarily private:

The truth seems to be . . . that when he casts his leaves forth upon the wind, the author addresses, not the many who will fling aside his volume, or never take it up, but the few who will understand him better than most of his schoolmates or lifemates. Some authors, indeed, do far more than this, and indulge themselves in such confidential depths of revelation as could fittingly be addressed only and exclusively to the one heart and mind of perfect sympathy, as if the printed book, thrown at large on the wide world, were certain to find out the divided segment of the writer's own nature and complete his circle of existence by bringing him into communion with it.¹²²

¹²⁰ Julie Husband, *Antislavery Discourse and Nineteenth-Century American Literature: Incendiary Pictures*. (New York: Palgrave Macmillan, 2010) 47. Husband reasons that Hawthorne himself was opposed to abolition and feminism, dismissing reformers as meddling and unbalanced (45). She also states that Yellin and Bercovitch read the novel as ultimately championing the "conservative, disciplinary mechanisms of the Salem theocracy" because of Hester's final embrace of the letter and because of the animosity between her and the other women (*Ibid.*).

¹²¹ Husband also links Hester's initial appearance on the scaffold to the iconography of the auction block, connecting two types of marginalized individuals, the adulteress and the slave (48).

¹²² Nathaniel Hawthorne, *The Scarlet Letter* (1850), Boston: S.E. Cassino, 1892, 2.

In this image, the act of publication becomes an act of correspondence, with some hopeful authors disclosing themselves (in “confidential depths of revelation”) to a single, perfectly sympathetic reader rather than to a broader (and potentially less sympathetic) audience. The image presents a contrast between public(ation) and private: the author’s “printed book,” “thrown at large on the wide world,” does not become a vehicle for mass communication. Rather, the novel represents an act of self-creation. What seems to be intended for the wide world becomes instead the means of reuniting the author’s own divided nature. The author communicates finally with himself. The strange introduction might also hint at another kind of correspondence – Hawthorne presents the narrator’s situation as analogous to Hester Prynne’s. Like Hester, the narrator has been subjected to public ignominy. He claims that when he is dismissed from his post as Surveyor, “the press had taken up my affair, and kept me for a week or two careering through the public prints in my decapitated state, like Irving’s Headless Horseman,” an image that links him to Hester on the public scaffold (although Hester never loses her head, literally or figuratively (Hawthorne 34)).¹²³

If an author struggles that one heart and mind that will understand and sympathize with his work, then the communication represented by the Letter has lacked such a sympathetic reader for more than a century. The papers recounting the story of Hester Prynne have been lost, finding their perfect audience only when the narrator discovers them. Among the other documents, the narrator finds the Letter. The object does not communicate its intent or even its identity clearly; instead Hawthorne-as-narrator speculates on the artifact’s meaning: “This rag of scarlet cloth – for time and wear and a sacrilegious moth had reduced it to little other than a rag – on careful examination assumed the shape of a letter” (Hawthorne 53). The narrator initially assumes that

¹²³ This image also anticipates the destructive force of the press described at greater length in Chapter 4 below.

the decorative object confers heightened status, but he acknowledges his own uncertainty and ignorance: “It had been intended, there could be no doubt, as an ornamental article of dress, but how it was to be worn, or what rank, honour, and dignity, in by-past times, were signified by it, was a riddle” (*Ibid.*). Finally, though, the narrator admits that he does not comprehend the meaning of the letter, only that it has meaning. He acknowledges, “Certainly, there was some deep meaning in it most worthy of interpretation, and which, as it were, streamed forth from the mystic symbol, subtly communicating itself to my sensibilities, but evading the analysis of my mind” (Hawthorne 54). The Letter’s significance is not self-evident. Instead, the Letter requires context and explication, from both the papers that accompany it and the novel it inspires. The novel then becomes a long act of reading and interpreting the letter.

From the outset, Hester Prynne is presented as a figure in need of interpretation, but the narrator cautions us that interpretation depends on context (especially the context proffered by community). When we first encounter Hester Prynne, she stands on a scaffold in the town square where she can be seen by everyone in town. Despite her visual prominence her visibility does not elevate Hester (although the narrator speculates that “Had there been a Papist among the crowd of Puritans, he might have seen in this beautiful woman, so picturesque in her attire and mien, and with the infant at her bosom, an object to remind him of the image of Divine Maternity”) (Hawthorne 98).¹²⁴ Rather, visibility and exposure supply the punishment for Hester’s adultery: “The very ideal of ignominy was embodied and made manifest in this contrivance of wood and

¹²⁴ Despite the Puritans’ intent to punish Hester and to deter other potential sinners, the meaning of the display – of both Hester and her letter -- is not fixed or inevitable. Just as a woman with a child in her arms may be either an image of holiness (the Madonna) or depravity (an adulteress abandoned by her lover), the symbol is not sufficiently specific. After all, Hester has to wear a single letter on her bodice, not a placard proclaiming “Adulteress and mother of an illegitimate child.” Understanding the meaning of the symbol requires a shared cultural context. Only those who know Hester and understand her history will recognize the meaning of the letter on her chest. Her punishment is legible only within her own community, or within one that shares that community’s beliefs and iconography.

iron. There can be . . . no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do” (*Ibid.*)¹²⁵ Her sin, presumably committed where no one could see, is punished by exposure. If we accept Elizabeth Dillon’s argument that marriage, a purportedly private relationship, ultimately emerges from public values and depends upon public ratification, then her community punishes Hester for ignoring and avoiding the community’s participation. In committing adultery, Hester makes a purely personal choice that is an affront to the entire community.

Hester’s behavior is, of course, more than an affront to her community. The laws of Massachusetts in Hester’s day provided, “If any Person COMMIT ADULTERY with a Married or Espoused Wife, the Adulterer and Adulteress shall surely be put to death, Lev. 20.19 & 18.20, Deut 22.23, 27.”¹²⁶ The text of the law prescribes a communal punishment for this presumably secret behavior. (The opposing spheres imagined by Puritan lawgivers may not be public and private, but public and secret.) Her sin (underscored by the law’s references to the Old Testament) merits death, but instead of executing Hester, the community places her on permanent display. The spectacle of Hester on the scaffold is presented as an alternative to execution, a punishment equivalent to death. Being set emphatically before the eyes of the community serves the same function as being removed from it forever.¹²⁷ This paradoxical gesture which simultaneously imposes a sentence of social death while granting Hester a place of

¹²⁵ Elsewhere, the narrator notes that the pillory “was held, in the old time, to be as effectual an agent, in the promotion of good citizenship, as ever was the guillotine among the terrorists of France.”

¹²⁶ William Henry Whitmore, *The Colonial Laws of Massachusetts, Reprinted from the Edition of 1672*. (Massachusetts: Rockwell and Churchill, 1890) 15. While this compilation of laws dates from 1672, laws from the preceding decades also treat adultery as a capital crime.

¹²⁷ That Hester’s punishment reduces her to a ghost is underscored by her eventual, belated meeting with Dimmesdale in the woods. When the former lovers meet in the wood, “it was like the first encounter in the world beyond the grave of two spirits who had been intimately connected in their former life, but now stood coldly shuddering in mutual dread, as not yet familiar with their state, nor wonted to the companionship of disembodied beings.”

contradictory prominence carries through into Hester's punishment. The narrator observes that the Letter "had the effect of a spell, taking her out of the ordinary relations of humanity, and enclosing her in a sphere by herself" (Hawthorne 94). But is that sphere private – for all that she exists there by herself -- or public? While Hester Prynne suffers a kind of social death, ejected from Puritan society, the letter that she wears reinforces her importance to that same society. Hester may be the sole inhabitant of her sphere, but her extraordinary status also helps to define her community. If, as Elizabeth Dillon suggests, the public (in the form of laws and societal pressures) shapes the private, the private also shapes the public. Hester's transgressive, private choice reifies her community's values.

But even as she is exposed and symbolically cast out, Hester remains an irreducible part of her community whose presence reminds them of the price of transgression. The letter in her breast is the letter of the law. On the scaffold, she reflects that she could hide herself in Europe or in the forests ("where the wildness of her nature might assimilate itself with a people whose customs and life were alien from the law that had condemned her") (Hawthorne 138). She chooses not to because she is, in some ways, already dead: "there is a fatality, a feeling so irresistible and inevitable that it has the force of doom, which almost invariably compels human beings to linger around and haunt, ghost-like, the spot where some great and marked event has given colour to their lifetime" (Hawthorne 139). Hester is not metaphorically a corpse, but a ghost, one who continues to haunt Puritan Boston and to make her presence felt. Society "could not entirely cast her off" (Hawthorne 147). But "every gesture, every word, even the silence of those with whom she came in contact, implied, and often expressed, that she was banished, and as much alone as if she inhabited another sphere . . . She stood apart from mortal interests, yet close beside, like a ghost that revisits the familiar fireside" (*Ibid.*). Her loss of social status also

implies a loss of privacy – although Hester tries to isolate herself in a cabin outside of town, the people of Boston assume a condescending intimacy. They know the worst about Hester: “an accustomed eye had likewise its own anguish to inflict. Its cool stare of familiarity was intolerable” (Hawthorne 151).

Hester’s experience of deprivation binds her to her community in another, more visceral way.¹²⁸ Hester imagines that the letter on her breast permits her to communicate with the other citizens of the town, making her privy to their secret desires and shame. If the letter tells the Puritans something about Hester, it also tells Hester something about them: “she felt or fancied that the scarlet letter had endowed her with a new sense. She shuddered to believe yet could not help believing, that it gave her a sympathetic knowledge of the hidden sin in other hearts” (Hawthorne 151). The letter thus serves as intimate correspondence: it not only lets the community know what Hester has done, it lets Hester know of the private thoughts and deeds of other members of her community. She wonders if “the outward guise of purity was but a lie, and that if truth were everywhere to be shown, a scarlet letter would blaze forth on many a bosom besides Hester Prynne’s?” (Hawthorne 152). This line of communication runs throughout the community, radically equating Hester with many dissimilar and apparently respectable characters:

Sometimes the red infamy upon her breast would give a sympathetic throb as she passed near some venerable minister or magistrate . . . Again, a mystic sisterhood would contumaciously assert itself, as she met the sanctified frown of some matron, who according to the rumor of all tongues, had kept cold snow within her bosom throughout life. (*Ibid.*)

¹²⁸ The same skill that Hester uses to mark herself as separate from society further incorporates her into the community. Hester makes a living by making clothing for public events – political ceremonies, christenings, everything but weddings. “In the array of funerals too . . . there was frequent and characteristic demand for such labour as Hester Prynne could provide.” Both the leader of the community (the governor) and its most innocent members (the children) are marked by her needlework. Hester’s industry incorporates her into the life of the community, a voluntary and constructive use of her artistry. She participates in the economy of the community.

Her public shame gives Hester access to the private shame of her neighbors. She experiences a sympathetic correspondence with the other members of her community and rather than dividing her from them, asserts their similarity. While Hester has been inscribed by law as an adulteress, she offers an unspoken absolution for the townspeople's imagined transgressions.

Hester's connection to her community extends beyond mystical sympathy. The community coheres through a shared sense of lack and loss. Over time, the community embraces Hester, and the meaning of the symbol she wears (and the symbol she *is*) is reconfigured again. She becomes a "familiar object" to the townspeople, and something more: "as is apt to be the case when a person stands out in any prominence before the community, and at the same time, interferes neither with public nor individual interests and convenience, a species of general regard had ultimately grown up in reference to Hester Prynne" (Hawthorne 284). Hester's physical prominence on the scaffold turns into status and the letter confers rank, honor, and dignity. However, Hester does not commend herself to the community solely because she is unobtrusive, or because the community gets used to her. Instead, her own experience of deprivation makes her invaluable when others suffer.

In all seasons of calamity indeed, whether general or of individuals, the outcast of society at once found her place. She came, not as a guest, but as a rightful inmate, into the household that was darkened by trouble, as if its gloomy twilight were a medium in which she was entitled to hold intercourse with her fellow creatures (Hawthorne 286).

Familiarity, even comfort, with deprivation enables Hester to help her community. At moments when other citizens of Puritan Boston approach death or loss, they welcome Hester. She becomes reintegrated into the community through a shared experience of deprivation. The Puritans intended to cast her out (without actually ejecting her from the town), but instead the other citizens of Boston discover a community rooted in loss, an alternate to the public sphere. This

acceptance of Hester shows how the experience of deprivation can overspill its boundaries, or erase the divisions between individuals and groups. This erasure reflects the ways in which other forms of deprivation, namely the deprivation of slavery comes to affect the larger community, and how those who would help slaves become marked by their losses.

The letter, which once communicated so clearly Hester's transgression, becomes open to interpretation even within the community:

The letter was the symbol of her calling. Such helpfulness was found in her – so much power to do, and power to sympathise – that many people refused to interpret the scarlet A by its original signification. They said that it meant Able, so strong was Hester Prynne with a woman's strength (Hawthorne 287).

Of course, here, a woman's strength is synonymous with both deprivation and with a woman's weakness. And, while Hester's public service does not result in public forgiveness, "Individuals in private life had quite forgiven Hester for her frailty; nay, more, they had begun to look upon the scarlet letter, not as the token of that one sin for which she had borne so long and dreary a penance, but of her many good deeds since" (Hawthorne 289). The citizens refer to her as "our Hester – the town's own Hester." They acknowledge that she belongs to them; that who and what she is communicate something about the town. Of course, that possessive pronoun conveys property as well as belonging. At the very end of the novel, the narrator describes Hester as "the people's victim and lifelong bond-slave," her experience of privation foreshadowing the privation depicted in slave narratives later in the century (Hawthorne 405). Hester is not merely like her fellow townspeople; she belongs to them. Her separate sphere also becomes a kind of elevation: "the scarlet letter had the effect of a cross on a nun's bosom. It imparted to the wearer a kind of sacredness, which enabled her to walk securely amid all peril" (Hawthorne 290). For Hester Prynne, solitude crafted by law and eventually embraced by Hester herself affords independence and agency.

Thanks to the flexible and polyvalent meaning of the letter, Hester's initial isolation shades into autonomy. Even as the community embraces her apparent affirmation of its values, Hester's isolation also enables her to engage in a form of self-fashioning. She becomes "[l]ittle accustomed, in her long seclusion from society, to measure her ideas of right and wrong by any standard external to herself" (Hawthorne 284). Hester becomes a free-thinker in ways that are unimaginable to, or by, her parochial community: "with a mind of native courage and activity, and for so long a period not merely estranged, but outlawed from society, had habituated herself to such latitude of speculation as was altogether foreign to the clergyman" (Hawthorne 356). The woman who could not contemplate removing herself from her Puritan town and seeking refuge in Europe creates a "foreign" internal space in the midst of her community. Her letter becomes a letter of passage: "The tendency of her fate and fortunes had been to set her free. The scarlet letter was her passport into regions where other women dared not tread" (Hawthorne 357). Hester, who has been inscribed by her transgressive experience, attains the capacity to inscribe her own fate.

If privation stimulates sympathy and eventually, identification, privacy enables sin and vengeance. Ironically, the figure most associated with the negative valences of privacy is not the adulterous Hester, but her estranged husband. The man who should embody wounded domesticity becomes instead an image of poisonous secrecy. His character is so defined by secrecy in fact that we never learn his real name: "Under the appellation of Roger Chillingworth . . . was hidden another name which its former wearer had resolved should never more be spoken" (Hawthorne 208). He also resists both public vindication and public humiliation; because "[h]e resolved not to be pilloried beside [Hester] on the pedestal of shame . . . he chose to withdraw his name from the roll of mankind" (Hawthorne 209). While Hester is forced by her

community into a position of unwanted prominence, Chillingworth apparently can choose to withdraw from the scrutiny of others. As a man, Chillingworth has greater control over when and how he is seen. His ability to withdraw at will from the community signals the greater mobility afforded to men, and seems to mark a certain kind of privacy as masculine. However, Chillingworth also represents the dangers of such privacy. His secretiveness not only undermines his own moral integrity; it threatens the entire community as he embarks on a clandestine mission to find and punish Hester's lover, the town's respected clergyman.

While Chillingworth preserves his own privacy, he seeks to violate the privacy of others. He insinuates himself into Dimmesdale's regard and his life, eventually discovering the mark on Dimmesdale's chest that mirrors Hester's embroidered letter. When Dimmesdale is asleep, "The physician advanced directly in front of his patient, laid his hand upon his bosom and thrust aside the vestment, that hitherto had always covered it, even from the professional eye" (Hawthorne 245). Upon his discovery, Chillingworth determines "To make himself the trusted friend, to whom should be confided all the fear, the remorse, the agony, the ineffectual repentance, the backward rush of sinful thoughts, expelled in vain! All that guilty sorrow, hidden from the world, whose great heart would have pitied and forgiven, to be revealed to him" (Hawthorne 247). By insinuating himself into the minister's home and trust, Chillingworth begins to transform what is private (Dimmesdale's sexual indiscretion and subsequent remorse) into something public. Dimmesdale's heart becomes a stage for Chillingworth: "He became thenceforth not a spectator only but a chief actor in the poor minister's interior world" (Hawthorne 248).

If *Arthur Mervyn* posits that solitary privacy is dangerous but domestic privacy offers safety, *The Scarlet Letter* argues that domestic privacy is debilitating while solitude may be enabling. Hester's relationship with Chillingworth represents a disrupted intimacy. Her estranged

husband first sees Hester when she is displayed on the scaffold. A townsman inadvertently expresses this estrangement when Chillingworth asks him about the woman on the platform. He replies, “You must needs be a stranger in this region, friend, . . . else you would surely have heard of Mistress Hester Prynne and her evil doings” (107). He *is* a stranger; he does not know his own wife though she has become a public figure. Chillingworth, in contrast, embodies interiority and intimacy, albeit in a twisted form. Chillingworth tells Hester, “I drew thee into my heart, into its innermost chamber, and sought to warm thee by the warmth which thy presence made there” (Hawthorne 131). Chillingworth describes an intimacy that has physical space – his heart is a chamber, occupied by Hester. But the image, while ostensibly nurturing (“I sought to warm thee”), is also confining. Chillingworth’s idea of the domestic fits neatly into feminist critiques of that sphere: it is supposed to be the woman’s realm, “warmed” or made beautiful by her presence, but it ends up isolating and restricting her. Further, it becomes a means of controlling both Hester and anyone that Hester loves: Chillingworth warns Hester, “Thou and thine . . . belong to me. My home is where thou art and where he is. But betray me not!” (134). Domestic space, as configured by the patriarchal Chillingworth, creates closeness without intimacy. Hester knows who the father of her child is, and she knows Chillingworth’s true identity, but neither man knows the other. However, Chillingworth’s claim, “My home iswhere he is” plays out in Chillingworth and Dimmesdale’s nightmarish domestic arrangement. They live together, while Chillingworth seems to care for the emotionally and physically fragile Dimmesdale, without either man (initially) knowing the other’s true identity. Their home becomes a repository of secrets, the two men living side-by-side while Hester conceals both her illicit relationship with Dimmesdale and her marriage to Chillingworth. She becomes a keeper of secrets, but she herself is significantly absent from the house.

Hester's vow to protect both her lover's secret and her husband's finds a surprising echo in Eliza Farrar's advice to young women – though perhaps Farr's counsel is more apropos of Chillingworth's situation. In her letter-writing guide, she tells a young woman how to turn down an offer of marriage. (Interestingly, Farrar does not tell her reader how to *accept* an offer.) If the girl refuses the offer, she should “put your refusal of his hand, on the score of your not feeling for him, that particular preference, necessary to the union he seeks” (Farrar 271). Farrar treats this admission of romantic feelings – and its commission to paper – as complicated, compromising, and potentially shameful. She writes, “The gentleman's letter should be returned in your reply, and your lips should be closed upon the subject forever afterwards. It is his secret, and you have no right to tell it to anyone; but if your parents are your confidential friends on all other occasions, he will not blame you for telling them” (Farrar 271-72). Secrecy is the province of men – but it is up to women (and perhaps, the women's families) to keep those secrets. If, as Michael McKeon argues, secrecy represents a realm of traditional knowledge, it is in Chillingworth's interests to protect that knowledge, to exploit it, and to derive power from it.

Why is Hester, the adulteress, criminal, sinner, and the public face of privation, embraced by the community, exonerated and elevated? Why is Chillingworth, the wronged husband, treated as a monster? Perhaps this treatment is due to the way in which the law had come to regard sins like Hester's. By the late nineteenth century, most states still had adultery laws on the books, although the accompanying penalties had changed. In the colonial period, fornicators and adulterers were fined, beaten or placed in the stocks (Friedman 1099). However, by the mid-nineteenth century, most states reserved severe punishment for adultery that was open and notorious; “secret, occasional, clandestine adultery was no longer against the law; adultery was a crime only when the adulterer not only broke the rules, but rubbed people's noses in that fact”

(Friedman 1100). The law thus apparently opened a space in which citizens could engage in immoral behavior. The law did not supply a mechanism for scrutiny; it did not actively seek out illicit behavior. Instead, the law provided punishment only where the crime became public. This shift in the law suggests that behavior not enacted in public should not be subject to scrutiny or punishment. There was a growing sense that certain actions – even actions that might be contrary to the values of the community – should not be exposed to the censure of the community.

Adultery was considered a crime, punishable by the state and carrying the possibility of imprisonment, rather than a tort (a wrong committed against a particular individual and requiring monetary compensation), because it was thought to undermine the stability of the state; it was not a purely personal transgression. However, statutes in California, Illinois, and Florida criminalized only *open* adultery and fornication; if it remained invisible to the eyes of the community, it remained invisible to the eyes of the law.¹²⁹ While sexual misbehavior remained a crime, the focus shifted from the behavior itself to public knowledge of the behavior.

The apparent discontinuity between the purpose of such statutes (to prevent and punish adultery) and their focus on the crimes openness reflects the law's mediation of public and private. Lawrence Friedman writes,

The criminal justice system was supposed to protect and maintain the traditional code, by punishing those who violated it. But, paradoxically, protection of the moral code also meant something which, on the surface, seems totally inconsistent: protection of the very people who violated the code - or to be more accurate, protection for some of the people who violated it; and who violated it in a particular way. The law, in other words, did two things at once. First of all, it defined what a good reputation consisted of, what respectability and virtue meant; and what sorts of behaviors would forfeit that reputation (and, perhaps, forfeit one's freedom as well). Yet at the same time, the law contained doctrines and institutions whose purpose was to preserve and protect the reputation of at least

¹²⁹ Cal. Penal Code 1872, 269a and b, Ill. Crim. Code 1868 div. 11, sec. 166; 1868 Fla. Laws ch. 59, Sec.

some of the people who belonged to respectable society - even when that person (man or woman) slipped and deviated, in certain common ways (1098).

Friedman argues that the purpose of certain laws was not to prevent or punish transgressions but to preserve the citizen's good name. The laws stand as a warning: if you do not flaunt your rejection of community standards, you will not be punished. As long as a private sin remains private, it also remains a sin and not a crime, susceptible to punishment. Of course, Hester's pregnancy made her crime impossible to overlook even as it rendered her punishment redundant. The scarlet "A" underscores the obvious. But the spirit of a law that would highlight what has been exposed already contrasts sharply with the blackmail laws, which suggest that some transgressions should remain hidden.

At the same time that Hester's behavior became less legally culpable, a host of new laws grew up around Chillingworth's. In his study of blackmail and privacy protections in the nineteenth century, Lawrence Friedman observes that the crime of blackmail was itself a nineteenth-century invention; previously, blackmail was synonymous with extortion, or the practice of threatening to harm an individual unless he pays for protection (Friedman 1111). Blackmail, payment in exchange for keeping a secret, appears in the statute books only in the early years of the nineteenth century. An early version of an anti-blackmail law appeared in Georgia in 1817, and associated such secrecy with correspondence. However, the correspondence did not convey the secret but threatened it. The statute made it a crime to "send or deliver any letter or writing, threatening to accuse another person of a crime, with intent to extort money, goods [or] chattels." Friedman observes that the law does not specify that the accusation must be untrue in order to be culpable: capitalizing on a real transgression is equally blameworthy. Another statute enacted in Illinois a decade later criminalized the act of sending or delivering a letter that "threaten[ed] to accuse another of a crime or misdemeanor, or of exposing

and publishing any of his or her infirmities or failings.”¹³⁰ This law extends not only to crimes but also to “infirmities or failings” and protects both men and women alike. A Massachusetts statute from 1835 (fifteen years before the publication of *The Scarlet Letter*) criminalizes spoken (and not just written) blackmail (Friedman 1110). The passage of these statutes indicates a shift in cultural values that presages later concerns with a right to privacy. The Puritans’ punitive exposure gives way to the belief that certain “infirmities or failings” should not be punished or even disclosed to the community at large. In fact, revelation of those infirmities and failings became worthy of censure. This shift in the law also recognizes that some things should remain out of the public eye, inscribing a zone of privacy that may not coincide with the home, and may, in fact, undermine the home. Adultery laws such as those that Hester Prynne violated were supposed to protect the sanctity of domestic space while blackmail laws acknowledged that occasionally domestic space was not the greatest good.

The connection between sexual crimes, privacy, and blackmail also emerges in Edgar Allan Poe’s 1842 mystery, “The Purloined Letter.” In “The Purloined Letter,” Auguste Dupin is hired to recover a letter that a government minister has stolen from a “royal personage.” The story’s premise – the theft of a letter from a monarch – emphasizes the vulnerability of letters in the mid-nineteenth-century. In his study of Poe and privacy, Louis Renza notes that print technologies and alternate methods of communication meant that while letters were vehicles of purely personal concern, they also remained vulnerable to interference by third parties.¹³¹ At the very outset of the story, Dupin and the Prefect of Parisian police argue over whether the mystery has remained unsolved because it is “a little too self-evident” (with that phrase echoing from the

¹³⁰ 1827 Illinois Laws 145.

¹³¹ Louis Renza, *Edgar Allan Poe, Wallace Stevens, and the Poetics of American Privacy*. (Baton Rouge: Louisiana State University Press, 2002), 61.

Declaration of Independence) or because it is “an affair demanding the greatest secrecy” (Poe 463). The story unfolds slowly: the Prefect refuses to state the matter directly but the facts of the case are known, he acknowledges: “The individual who purloined it is known; this beyond a doubt; he was seen to take it. It is known, also, that it still remains in his possession” (*Ibid.*). When Dupin asks how the Prefect knows this, he explains that continued silence demonstrates it – if the letter were to be used, its use would be felt immediately. In other words, the letter seems to be self-publicizing. In contrast to the letter whose mere existence announces its import, the Prefect’s formal and circumspect language (the “diplomacy of cant”) obscures and complicates. The spoken word, face-to-face communication, is less revelatory than writing. Of course the secret disclosed by the letter does not belong to the Prefect – as neither the writer nor the recipient of the letter, he cannot publicize its content.

In the case of “The Purloined Letter,” the letter’s content is not so much private as secret: Michael McKeon draws the distinction thus: secrecy is a “category of traditional knowledge” which often separates those in the know, those in power, from those who lack power or knowledge, while privacy is a negative liberty. A secret thus resembles property, useful and usable, although in other regards it is unlike property in that a secret seems to exceed legal control. Further, privacy may protect a secret. In this case, the implied nature of the secret evokes fears about privacy (that is, that privacy may shield illicit behavior) while preventing open legal interference or recourse. The police must search for the letter in secret rather than directly demanding its return. Further, a secret may implicate sexual or other “forbidden” knowledge.¹³² Here, the letter reveals and substitutes for physical intimacy. The thief, Minister D., discovers the

¹³² For an interesting account of the connection between secrecy and the erotic, see Simon Richter, “The Ins and Outs of Intimacy: Gender, Epistolary Culture, and the Public Sphere,” *The German Quarterly* 69:2 (1996) 111-124, 114-15.

letter in the “royal boudoir” and, observing the handwriting and the “confusion of the personage addressed, fathoms her secret” (Poe 463). While the narrative does not reveal the secret, the conjunction of the letter’s location (the boudoir) and the recipient (the “royal personage”) disclose the import of the letter even though its “contents [are] unexposed” (*Ibid.*).

That the boudoir is not a safe space is borne out by nineteenth-century case law. In *Newell v. Whitcher*, the plaintiff, a music teacher, young, female, and blind, went to the defendant’s home to instruct his daughters.¹³³ The defendant gave the teacher a room for the night, an apparently hospitable gesture that rendered the young woman even more vulnerable. He later entered the room and tried to solicit sexual intercourse, which the plaintiff refused. Unable to assert the young woman’s own physical integrity as grounds for recovery, the court considered her rights as a guest in another’s home. The court held that her right to that private sleeping room was exclusive, that the homeowner had trespassed on that right, and that by sitting on her bed and requesting sex, he had committed assault, entitling the plaintiff to exemplary damages.¹³⁴ In the end, Miss Newell could make a financial recovery, but she could not be kept safe from her host.

Minister D. will come to share in his victim’s violation. The prefect becomes convinced that the minister has kept the letter at his house. In Poe’s vision, the house is not protected space – not only does Minister D. penetrate a royal boudoir and steal from it, but in their quest for the letter, the police also repeatedly ransack the minister’s house, even taking apart his furniture to examine the spaces inside tables and chair legs (Poe 465). The Prefect assures Dupin that, “we opened every package and parcel; we not only opened every book, but we turned over every leaf in each volume, not contenting ourselves with a mere shake, according to the fashion of some of

¹³³ *Newell v. Whitcher*, 53 Vt. 589, 591 (1880).

¹³⁴ This case was later cited by Warren and Brandeis in “The Right to Privacy,” at note 29.

our police officers. We also measured the thickness of every book-cover, with the most accurate admeasurement, and applied to each the most jealous scrutiny of the microscope” (*Ibid.*).¹³⁵ There is no inner space that the law, in the form of the police, does not penetrate. But while the house is vulnerable, the letter proves to be elusive. It turns out that rather than secreting the letter, the minister has left the letter out in the open, albeit with the envelope turned inside out and re-addressed. Here, what is private is not hidden, and what is hidden is not necessarily private. Nothing is free from scrutiny, but the law, as embodied by the police, fails to discover the secret: law is intrusive and powerful, without being effective. Secret places can be breached but the letter remains impregnable.

Of course, part of what makes the letter important or valuable is the mere fact of its existence. The text strongly implies that the letter reveals a romance between a man and a married female royal and, while we never spy the letter’s contents, the material evidence of correspondence between a subject and queen poses a threat to state security. In fact, the “royal personage” cannot prevent the theft although she witnesses it herself because the “other exalted personage from whom it was her wish especially to conceal it” is also in the room (Poe 464). The letter’s import is, then, both personal and political. Certainly, the letter here may not describe illicit physical activity, but it nevertheless serves as evidence of that activity. The possibility of a private, apparently adulterous relationship affords the minister power over the queen. She, in turn, conceals the fact that she has regained the letter; the secret itself becomes the source of power.¹³⁶

¹³⁵ The joke here is that the books contain (or are thought to contain) information, but the desired information is not in the books’ contents.

¹³⁶ Arguably, the “royal personage” here enjoys neither freedom from scrutiny nor freedom to act; she is constrained by her position and by her visibility.

The letter remains private, in terms of content, but it cannot remain hidden; the form of the detective story demands discovery; it celebrates the inevitability of disclosure. Typically, the detective story also promotes the restoration of order and transparency, although Poe's tale defies this expectation. In "The Purloined Letter," power shifts from queen to minister and back again without any apparent change of order, or any semblance of transparency. The forces of law seem powerless, while power inheres in secrecy (which remains beyond the reach of the law). Throughout these shifts, power remains on the side of mystery and concealment: whoever possesses the letter and its secret (without disclosing it) has the upper hand. The letter is found but never read – in contrast to D.'s apartments which can be invaded and thoroughly dismantled, the written word, presumably the expression of an intimate truth, remains inviolate. The story presents a privacy that cannot be confined to any particular physical space, inscribing an interiority that defies discovery.

The female "royal personage" at the center of the mystery seems at first glance to have little in common with Hester Prynne beyond her gender – she has power and status that Hester, the walking embodiment of privation, cannot command. Further, while this royal personage is socially prominent, she remains offstage for the entire tale, never subjected to the humiliating gaze of her society or the reader. But the purloined letter, which remains unread, also powerfully resituates an experience of marginalization at the center of power. The tale invites the reader to assume that knowledge of a woman's sexual sin threatens to disrupt the social order. Tangible evidence of this sin, a written record of an intimate act (or at least an intimate relationship), shifts power away from the monarchy to a government official. But, in contrast to Hester Prynne's scarlet letter, displayed for everyone to see, the contents of this letter are never disclosed. We never know for certain if the queen has committed adultery (or even if the "royal personage" in

question is a queen). Further, Minister D. does not realize that the letter he has stolen, the letter on display in his apartments, has been recovered, and he is left in possession of a document that reveals nothing but his own powerlessness. Dupin, the great detective, is complicit in covering up a private indiscretion for the sake of the public good, a gesture that mirrors the way in which blackmail laws begin to be applied more widely than laws against adultery and fornication. While the social order of puritan Boston depends on the extravagant spectacle of Hester's sinful body and the "publication" of her letter, the stability of France demands the continued concealment of the absent royal personage and her incendiary letter. In the contemporary (nineteenth-century) setting of Poe's story, private sin threatens society far less than the possibility of revelation.

Of course, the story also suggests that knowledge of private sin can be a valuable commodity. Men benefit from women's sexual secrets. D. uses the letter to gain leverage and Dupin himself refuses to yield the letter or even to acknowledge that he has already solved the mystery, until he has been paid. Hester Prynne's embellished letter may have given her a certain kind of cultural currency (and her skill helped her to make a living) but Dupin recognizes that secrets command real financial value. The value of transgression was gendered in interesting ways. The early years of the nineteenth century witnessed the proliferation of "heartbalm" laws, intended to offer monetary compensation to women who had been promised, and denied, marriage. Lawrence Friedman points out that such laws for breach of promise were, by and large, laws that protected women (Friedman 1104). Women's reputations and marital prospects depended on their virginity; a woman who was promised marriage and acted on that promise was ruined and required some compensation for a loss that was often financial as well as emotional. Men were less likely to suffer such all-encompassing harm (*Ibid.*). It is instructive here to revisit

Wightman v. Coates, in which the court created a hybrid (contract and tort) action, based on the emotional harm suffered by the plaintiff. This focus on the heart represented a shift from the emphases, and the remedies available, under contract law for breaches of commercial agreement. To be sure, the plaintiff could receive traditional contractual remedies, recovering the actual expenses she had incurred in reliance on the marriage.¹³⁷ A breach of promise action entitled a woman whose fiancé had broken off their engagement to also recover for her embarrassment, humiliation, and loss of other marriage opportunities (Grossberg 204). In creating this action, the court did something extraordinary: While rejecting as absurd the notion that a young couple in love “should be obliged, before they considered themselves bound, to call witnesses, or execute instruments under hand and seal,” the court treated the love letters between Coates and Wightman as having the same effect as duly executed legal instruments: “the letters of the defendant which were submitted to [the jury], were couched in terms which admit only of the alternative, that he was bound in honor and conscience to marry the plaintiff, or that he was prosecuting a deeply laid scheme of fraud and deception, with a view to seduction” (1 Mass 5-6).¹³⁸ While the judge’s opinion states that Coates was “bound in honor and conscience” by his words, the fact that the letters were accepted as direct evidence of an enforceable promise establishes that Coates was bound by the law as well. *Wightman v. Coates* converted the love letter into a contract: It was a text that confirmed the existence of a relationship (emotional as well as economic) and imposed certain obligations.

¹³⁷ Margaret F. Brinig, “Rings and Promises” 6 *Journal of Law, Economics and Organization* 1 (Spring 1990), 203-15, 204.

¹³⁸ The court held that circumstantial evidence of a promise to marry was sufficient, but this case offered direct evidence of such a promise. Sadly, the court failed to append any of Coates’s letters to its opinion, so we cannot know just what he said to create this liability.

Another case, decided within a few years of the publication of both Poe's and Hawthorne's works, illustrates how letters could attain financial and legal value in the context of heartbalm laws.¹³⁹ In *Ellis v. Guggenheim* (1853), the plaintiff called on a friend to testify to the contents of some love letters that she had received from the defendant. The friend averred, "I read these letters; there was nothing in the letters but love; the last words were, yours for ever, until death. He also said that she should wait until he was able; he would marry her; she must have patience."¹⁴⁰ The court admitted her testimony but sounded a note of caution about love letters:

For myself, I greatly doubt whether her compendious criticism that 'there was nothing in the letters but love' could be regarded as proof of contents. Doubtless she so interpreted them, but she was called to furnish, not a construction or interpretation of the letters, but the *contents* themselves. The contents proved, the jury were the interpreters (*Ibid.*, 290).

The court tried to distinguish between the witness's gloss on the contents and the contents themselves. But here, the jury knew how to interpret phrases like "yours for ever, until death." The jury was familiar with the conventions too, and at the moment the evidence became legible as an expression of love, the defendant became liable. The jury decided that the defendant was sincere, that he meant what he said. The letter was an accurate expression of intent, and also possessed a calculable value.

But the next few decades would see the decline of heartbalm laws and the accompanying cases. Rebecca Tushnet attributes the disappearance of heartbalm laws to an increasing (or enforced) division between affairs of the heart and the marketplace – courts became reluctant to oversee intimate, personal relationships, because, they reasoned, affairs of the heart had nothing

¹³⁹ The courts recognized other types of heartbalm actions. For example, a betrayed spouse could sue a third party for interfering with the marriage or for alienating the other spouse's affections. See Viviana Zelizer, *The Purchase of Intimacy*, Princeton: Princeton University Press, 2009, 69.

¹⁴⁰ *Ellis v. Guggenheim*, 20 Pa. 287, 288 (1853).

to do with the “selfish market”(2586).¹⁴¹ The change also seemed to draw a firmer distinction between public and private – certain matters should not be resolved or even acknowledged publicly. The movement away from so-called “heartbalm” laws thus was read as a triumph of privacy. The reform was attributed in part to the fact that “businessmen – the ideal rational actors – were subject to heartbalm suits because they foolishly wrote down their sweet nothings,” thus demonstrating that love was utterly irrational and should not be subject to legal oversight (*Ibid.*). The courts justified their retreat from enforcement of these laws by asserting that litigation over breach of promise “degraded” both parties involved (*Ibid.*) In this instance, though, the retreat from legal recourse harmed women. Both *The Scarlet Letter* and “The Purloined Letter,” narratives about women’s transgressions written by men, posit privacy as enabling and desirable. While both *The Scarlet Letter* and “The Purloined Letter” depict women as the victims of blackmail, the targets of such crimes were more likely to be men. Lawrence Friedman suggests that blackmail laws developed in part to protect “respectable” middle-class men: while the laws protected both men and women, in effect, Friedman argues, they preserved the reputations of wealthy and well-born men who transgressed social mores. The works of fiction are thus more radical than the laws they depict, imagining agency and interiority for female characters that women did not enjoy in their daily life. In fact, while these works of fiction depict women benefiting from privacy, other laws were diminishing the protection extended to women.

Heartbalm laws declined in the apparent service of privacy. The law did not scrutinize breach of promise cases because such scrutiny also constituted a breach (of privacy). But in the last years of the nineteenth century, arguments in favor of privacy claimed that such privacy

¹⁴¹ Rebecca Tushnet, “Rules of Engagement: Laws Regarding Broken Marital Engagements” 107 Yale Law Journal 8 (June 1998) 2584-2618, 2586. The disappearance of such causes of action seems to illustrate the retreat of love and courtship (and memorials of such relationships into a private realm, protected from scrutiny.

needed to be protected by the courts. The disappearance of heartbalm laws also coincided with the ways in which privacy became the province of white, wealthy men – if not quite a property right, a right in the service of property. This shift in American legal culture traces a sense of deprivation that spreads from wronged women to the men who betrayed them, from margin to center. While property ownership and financial power had been the province of white men from the earliest days of the republic, the notion that those same white men were vulnerable and required protection from economic predations was new.

This legal shift accompanied yet another change in the way in which citizens – or persons – were thought of in nineteenth-century America. Legal scholar Kathleen Sullivan argues that the nineteenth century witnessed an expansion and abstraction of rights as groups and individuals who voices were drowned out or excluded from the political process pushed for reform:

workingmen's groups, land reformers, abolitionists, and woman's rights advocates produced theories that derived rights of a subject considered without recourse to the subject's place in society. Rights were then employed precisely against those impediments. Activists imbued familiar concepts, such as liberty and personal sovereignty, with an abstraction that had not been used before.¹⁴²

This advocacy meant that activists from marginalized groups insisted that there was no meaningful difference between them and those who wielded rights under the Constitution. Sullivan claims that the Constitution offered the possibility of rights based on what should be rather than on what had been, unlike the common law which was rooted in tradition (and traditional roles and privileges) (Sullivan 3, 34-5). Sullivan cites abolitionist Angelina Grimke's theory of moral agency as one example of the implications of this new rights-based discourse. Grimke thought that when rights were derived from social status, it was easy to deny them to

¹⁴² Kathleen S. Sullivan, *Constitutional Context: Women and Rights Discourse in Nineteenth Century America*, Johns Hopkins University Press, 2007.

women since women lacked status or the power to acquire it. But if rights were abstract *human* rights, they were equally available to women and men:

Grimke is best known as an abolitionist thinker and activist, but in Letter XII of her published *Letters to Catherine Beecher*, Grimke asserted that her work as an abolitionist informed her own sense of her rights as a woman.¹⁴³ Certainly, the bulk of Grimke's letters to Beecher explicate the values and virtues of the abolitionist cause, but Grimke makes a nod toward feminist issues too. She averred that, if rights were available to slaves as well as white property owners, they were available to women as well as men. Rights emerged from a radical, fundamental similarity. "Human beings have rights because they are moral beings," Grimke claimed (115). According to Grimke, "These rights can be "wrested away" but never fully alienated (*Ibid.*). Grimke posits rights that exist before and beyond the social contract and are thus available to all, apart from race or sex, which Grimke dismisses as a "mere circumstance" (116). In this letter, Grimke represents her friend and correspondent Beecher lamenting women's involvement in the corrupting, disputational world of politics. Rather than accepting Beecher's fears that women will be sullied by political engagement, Grimke worries about *men's* participation in partisan politics and bickering. She turns the conventional argument on its head, saying that men should be as pure as women; what is morally wrong for one to do is morally wrong for the other (Grimke 119). Grimke takes the arguments usually leveled against women, that is, that certain tasks are too dangerous or damaging, and turns them against men. She thus asserts a radical equality, claiming that men should be as worried about the state of their own souls as they are about women's. Grimke claims that not only are women as capable as men, but that men are as vulnerable as women. Grimke's thinking abstracts the notion of rights from

¹⁴³ Angelina Grimke, *Letters to Catherine E. Beecher in Reply to an Essay on Slavery and Abolitionism*, Boston: Isaac Knapp, 1837.

grounding in specific characteristics or circumstances, but it also suggests that individuals or groups whose characteristics or circumstances have been privileged may find themselves injured or marginalized by the loss of those rights. Grimke foreshadows the way in which vulnerabilities traditionally associated with women may be displaced onto (and eventually appropriated by) men. Specifically, this radical equivalence anticipates the ways in which a pair of white, male jurists at the end of the nineteenth century compare themselves to other, less privileged groups denied the right to privacy.

3.4 SECRECY AND DOMESTICITY: SOME FINAL THOUGHTS

Behind a Mask, *The Scarlet Letter*, and “The Purloined Letter” all explore the intersection between domesticity and secrecy. Each work portrays aberrant or transgressive sexualized behavior (divorce, seduction, adultery) that sets its central female character at odds with prevailing notions of domestic propriety. But the fates of Jean, Hester, and the “royal personage” also cast the values of their communities in high relief. The disreputable Jean Muir ends up as the wife of a nobleman, in part because his family will not reveal secrets and bring disgrace upon themselves. Even if the family does not embrace her, they include her within their ranks for the sake of maintaining their uncle’s happiness and their own façade. Puritan Boston sets Hester Prynne apart in an attempt to make her a living embodiment of their own values, the exception that proves the rule. But her experience of transgression and loss makes her indispensable to her community, which is bound together in a shared understanding of privation. And the royal personage remains undisturbed in power at the end of her story, the hierarchy of the state untroubled by her personal secrets, the nullity at the heart of her narrative. Her undisclosed secret

may suggest an erosion in the foundations of domesticity, but it also mirrors changing legal values. The rise of anti-blackmail laws represent a shift in cultural values – rather than exposing and punishing sexual transgressions, such laws recognized that some secrets should remain secret. And secrets, “traditional” knowledge about family, sexuality, the home and its discontents, begin to demarcate a space beyond the regard of the secret-holder’s fellow citizens, a space protected by the state. At the same time that the domestic is celebrated (rightly or wrongly) as a productive and formative space, secrecy offers a competing vision of private space as a haven for conduct that undermined the domestic, a space in which anything could and did happen.

4.0 OUT OF THE PIT: PRIVACY, DEPRIVATION, SLAVERY, AND LITERACY

Between 1936 and 1938, the Works Project Administration set out to collect the stories of former slaves. In one of these stories, a woman named Mandy Jones explained how and where literacy was acquired by some of the slaves that she knew:

I 'members what dey done in slave times, I was a chile but I used to set an' lissen to 'em talk. De slaves would run away sometimes, an' hide out in de big woods. Dey would dig pits, an kiver the spot wid bushes an' vines, an' mebbe lay out fer a whole year. An' dey had pit schools in slave days too. Way out in de woods, dey was woods den, an' de slaves would slip out o' de Quarters at night, an go to dese pits, an some niggah dat had some learnin' would have a school.¹⁴⁴

Although taken from life, Jones's story has all of the elements of a good allegory, neatly combining a tale of physical and intellectual escape from the confines of slavery with visions of darkness, concealment, stealth, and secrecy. But her imagery has further resonance. Her references to the pit evoke traditional images of the grave. It wouldn't be surprising if Jones embellished her memories of the pit schools to forge a deliberate link between freedom and the grave. As Russ Castronovo has pointed out, "the metaphor of death as freedom saturates nineteenth century culture," a saturation attributable to the stark division between the lived experiences of citizens and those of noncitizens, with these boundaries defined most starkly by

¹⁴⁴ Mississippi Slave Narratives from the WPA Records Submitter: [MSGenWeb Slave Narrative Project, msgw.org/slaves/jones-mandy-xslave.htm](http://msgw.org/slaves/jones-mandy-xslave.htm)

race.¹⁴⁵ Sentimental and apparently sympathetic works that lamented the lot of exoticized, marginalized nonwhites abounded; in these works, entire tribes sought out death rather than “endure a life hemmed in by fences and property markers” (Castronovo 35). For Native Americans, the qualified and curtailed liberty of white civilization was no liberty at all. Death represented resistance to white notions of property. For slaves, who were considered property under the law, death was more than resistance; it was seen as the only path to freedom (*Ibid.*). Hemmed in by physical and legal restrictions, those populations could not enjoy the liberties afforded to white male citizens, and thus could be free from the limitations that the law imposed on their bodies only if they “escaped” those bodies. They lacked freedom to participate in the public sphere and, when the very condition of being alive meant confinement and control, they could hope for a radical freedom from interference only in death.

In Jones’ evocative account though, escaped or resistant slaves descend into the pit not just to evade the restrictions of their lives but to engage with life in a new way. They seek out something like the invisibility of the grave to acquire learning and liberty. The pit schools described by Jones put a practical spin on a popular metaphor of the day. For the slaves, women, and Native Americans in Castronovo’s case studies of nineteenth-century literature, freedom must be postponed until an afterlife that transcends and erases material difference while in Jones’s recollection, descent into the grave enables education. Here, freedom and literacy depended not only on concealment but on embracing a kind of living death. The slave who would either escape from the plantation, or simply learn to read, would hide in a pit. Literacy emerges from a site suggestive of live burial; knowledge and freedom come from a grave. Even the language Jones uses to describe this practice evokes death – the slave would “lay out” in the

¹⁴⁵ Russ Castronovo, *Necro Citizenship: Death, Eroticism and the Public Sphere in the Nineteenth Century*, (Durham, NC: Duke University Press) 2001, 36.

woods as an undertaker would lay out a body to prepare for burial. This image encapsulates the negative and positive valences of privacy. Privacy is enabling – you can learn especially, perhaps only, if you can attain some form of seclusion – but it is also deadly. You have to mimic death to obtain privacy or any of the benefits that it confers. Of course, for any slave discovered engaging in this type of activity, the consequences were potentially dangerous, even fatal. But while white authors lament the limitations on nonwhites and present their “escapes” as noble and inevitable self-sacrifice, Jones’ narrative hints that slaves used these expectations to evade their masters’ eyes and achieve a measure of autonomy. This image of a formative and liberating space beyond the reach and regard of others mirrors more contemporary formulations of privacy. In this chapter, I explore how literacy, along with the ability to reflect on and convey personal experience in writing, was acquired by those deprived of the legal means to do so. I will consider two competing connotations of privacy, comparing the equation of privacy and domesticity with the equation of privacy and deprivation or death to examine how those connotations proved helpful or harmful to slaves. I also look at how states of profound deprivation could yield a sense of autonomy, albeit often at great cost, and how associations between death and freedom informed ideas of privacy as site radically beyond the reach of governmental and societal interference as well as a position of extreme deprivation. Finally this chapter examines how that deprivation affected ideas of domestic space and eventually passed from the margins to the mainstream.

4.1 READING AND RESURRECTION: TROPES OF LITERACY AND LIBERTY

Images of death and rebirth pervade slave narratives. Aside from Mandy Jones, other slaves deployed the image of the pit and other trappings of death to suggest that, in order to obtain freedom, they had to pass through the grave. In 1845, a slave named Henry Brown persuaded some friends to stuff him into a box and mail him from Virginia to Pennsylvania.¹⁴⁶ “Box” Brown later consciously invoked the metaphor of the pit to indicate to the audiences who flocked to hear his story that, in his escape, he had passed through death and been reborn as a free man. Marcus Wood notes that, in his lecture tours, Brown used a hymn that called to mind images of resurrection: “[The Lord] brought me up also out of an horrible pit, out of the miry clay, and set my feet upon a rock.”¹⁴⁷ Moreover, Brown’s very escape concretized images of death, as Henry Louis Gates observed. In his forward to Brown’s memoir, Gates writes, “Brown names this symbolic relation between death and life [implicit in enslavement] by having himself confined in a virtual casket” and by being “reborn” as a free man at the end of his flight from Virginia.¹⁴⁸ All talk of pits and graves, boxes and caskets aside, death was more than a metaphor. Slaves were considered dead under the law; a being that wasn’t free wasn’t fully a

¹⁴⁶ Hollis Robbins, “Fugitive Mail: The Deliverance of Henry ‘Box’ Brown and Antebellum Postal Politics,” *American Studies* 50:1/2 (Spring/Summer 2009) 5-25, 5. Robbins also recounts the way in which the postal service in mid-nineteenth-century America enabled the spread of the abolitionist movement by circulating inexpensive newspapers and pamphlets.

¹⁴⁷ Marcus Wood, *Blind Memory: Visual Representations of Slavery in England and America, 1780-1865* (New York: Manchester University Press, 2000) 80. Castronovo also points out that Frederick Douglass uses images of death and resurrection to describe his successful fight with a “slavebreaker” (*Necro Citizenship* 56).

¹⁴⁸ Henry Louis Gates, “Forward,” *Henry Box Brown, Narrative of the Life of Henry Box Brown, Written by Himself* (1851), Intro. by Richard Newman and Forward by Henry Louis Gates, Jr. (New York: Oxford University Press, 2002) ix.

person.¹⁴⁹ Slaves who founded or attended pit schools, slaves who fled their bondage in posted packages, did not precisely make the legal metaphor literal, but they deployed the metaphor to their own ends.

This image of a space simultaneously deathly and liberating partook of antebellum concerns about privacy as nineteenth-century America pondered the nature and value of the concept. The debate over privacy necessarily intertwined with the debate over slavery, presenting competing definitions of privacy. The grave may be a fine and private place, but while slaves experienced a living death characterized by legal disempowerment and constant surveillance. While slaves were dead in the eyes of the law, they were constantly under the eyes of their masters and overseers; their condition was marked by both an excess of privation and lack of privacy. At the same time, the domestic privacy of white citizens enjoyed both legal protections and sentimental defenses. This contrast can be seen clearly in the metaphors of freedom and privacy deployed for slaves and slave-owners. If slaves could hope for freedom only in or after death, slave-owners benefited from their domestic privacy (albeit a privacy complicated by the presence of slaves in their homes). Defenses of slavery even invoked the sanctity of the home to prevent oversight of the conduct of slave-owners. The grave simultaneously represented legal and material privation *and* freedom for slaves while the home offered nurture and protection for slave-owners. Over the course of the century, however, the location of privacy seemed to shift from the home to the grave, a move that seemed to allow greater power and protection to those dead under law (like slaves) and less power to those who relied on their homes and their property for their power. Seclusion and secrecy shaded into autonomy.

¹⁴⁹ Colin Dayan has a lively discussion of the limited choices available to slaves in her recent work, *The Law Is A White Dog: How Legal Rituals Make and Unmake Persons* (Princeton: Princeton University Press, 2011) 139.

In Jones's account of the pit schools, slaves use subterfuge and concealment in the ground as a means of evading their owners and the deathly conditions of their own lives. Similarly, in *Uncle Tom's Cabin*, Harriet Beecher Stowe depicts the correspondence between the marginalization of death and the marginalization of slavery in a way that suggests the appearance of death may be deployed in ways that are empowering. Near the end of the novel, the cruel slave-owner Simon Legree becomes convinced that his house is haunted. Uneducated and superstitious, he remains unaware that two of his slaves, Cassy and Emmeline, have "escaped" by taking refuge in the attic of his house, impersonating the slaves who have died under his cruelty. While Uncle Tom dies in apparent defiance of Legree's claim that he owns Tom "body and soul," Cassy and Emmeline suggest a way in which death becomes the source for a more immediate freedom. They use death as a conscious subterfuge to evade and intimidate the man who abused them. This raises the question of whether privacy is more enabling for those individuals who are already in a state of living death. But Cassy and Emmeline also use Legree's house in their subterfuge. The women convince Legree that he is not safe in his home, that his domestic privacy has been breached by the spirits of those whom he has tortured and killed.¹⁵⁰ Slavery undermines the sanctity of the home.

Stowe's use of this imagery is even more striking given the way in which efforts to romanticize and defend the institution of slavery from scrutiny relied upon another conventional and innocuous comparisons with the domestic. The situation of the slave was often guarded, explicitly or implicitly, by the privacy and sanctity of the home. In his account of race and law, Gregg Crane alludes to Henry Clay's characterization of the master-slave relationship as an

¹⁵⁰ Harriet Beecher Stowe, *Uncle Tom's Cabin, or, Life Among the Lowly*. (1852) Ed. Elizabeth Ammons. New York: W.W. Norton & Co., 2010.

“intimate and familial” one (13).¹⁵¹ By describing the relationship thus, Clay defends the relationship as caring and careful but also throws the veil of domesticity over it. Slavery cannot be meddled with because it takes place in the home, and while a slave might not demand respect for his own domestic space, a slave-owner could. In a February 6, 1850 speech to Congress, Clay says that it is “unkind” and “unneighborly” to allow the slave of a Southerner traveling in the North to escape.¹⁵² Clay suggests that the interfering Northerner fails to observe proper boundaries and violates rules of courtesy. He insists that, “Servants in the families are treated with all the kindness with which children in the families are treated.” (*Ibid.*) Thus, domestic space and its supposedly familial nature protect slavery from scrutiny. Defenders of slavery often argued that slave-owners cared for their slaves as they would care for their own children (overlooking the fact that slaves could be children – indeed, could be their owners’ biological children -- and that slaves were often separated from their own children). This argument not only sentimentalized the institution, but also suggested that slave ownership should be afforded the same distance and regard given to anything that occurred behind the walls of the home. In this case, privacy was disabling for the slaves. Accordingly, where slavery is seen as parental and affectionate, freedom is “seduction” – a peculiarly intimate and sexualized image, underscoring the illicit nature of the desire (*Ibid.*).¹⁵³

Domestic privacy – at least, the domestic privacy afforded to white property owners -- thus harmed slaves. They could not demand their own privacy; rather they fell within the

¹⁵¹ Gregg D. Crane, *Race, Citizenship and Law in American Literature*. Cambridge, UK; New York, NY: Cambridge University Press, 2002.

¹⁵² *Appendix to the Congressional Globe*, The Congressional Globe, Senate, 31st Congress, February 6, 1850, 123.

¹⁵³ According to Blackstone’s *Commentary on the Laws of England*, seduction was the act of tempting a female child to leave her parents for marriage or other purposes. *Commentary on the Laws of England Volume IV* (Oxford: Clarendon Press, 1769). Comparing the lure of freedom to seduction suggests that abolitionists have alienated slaves from the paternal affections of their masters.

purview of the slave-owner's privacy as (legally) property and (metaphorically) children. Even accepting the dubious proposition that slaves were cared for as children did not afford them greater rights, since privacy is typically asserted by the family unit against the world and not by one family member against another.¹⁵⁴ Slaves' lack of autonomy became coded as filial dependency, a natural relationship rather than a legal status. By invoking the domestic resonances of privacy, defenses of slavery discounted the possibility of slaves' agency.

Frederick Douglass critiques the genteel, domestic deference given to slavery when he compares the situation of urban and rural slave-owners. He says:

Slavery dislikes a dense population, in which there is a majority of non-slaveholders. The general sense of decency that must pervade such a population, does much to check and prevent those outbreaks of atrocious cruelty, and those dark crimes without a name, almost openly perpetrated on the plantation. He is a desperate slaveholder who will shock the humanity of his non-slaveholding neighbors, by the cries of the lacerated slaves; and very few in the city are willing to incur the odium of being cruel masters.¹⁵⁵

Unlike Clay, who saw interference with slavery as "unneighborly," Douglass argues that the slave-owner who allows his own cruel practices to infringe on those around him as unneighborly; what goes on in the home can undermine the community. It is a profoundly anti-social practice, and one that cannot be sustained under the scrutiny of an urban environment. He also revives some of the early fears about privacy, that is, that behind his own walls, a man might do anything with no regard for his community or its standards.

¹⁵⁴ Benjamin Shmueli and Ayelet Blecher-Prigat, "Privacy for Children," *Columbia Human Rights Law Review* 42.3 (March 2011): 759, 766-67.

¹⁵⁵ Frederick Douglass, *My Bondage and My Freedom*, New York and Auburn: Miller, Orton & Mulligan (1855), 147-48.

4.2 SECRET PUBLIC SPHERES: UNLAWFUL ASSEMBLIES AND THE PERILS OF READING

The anecdote about the pit schools aside, other accounts of quests for literacy and freedom associate the public sphere with both. Certainly, the anti-literacy laws that proliferated in the early- to mid-nineteenth century assumed that reading and writing required the presence of others, and access to public space. Legislators bundled anti-literacy provisions into laws prohibiting unlawful assembly. The Virginia Revised Code of 1819 provided:

That all meetings or assemblages of slaves, or free negroes or mulattoes mixing and associating with such slaves at any meeting-house or houses, &c., in the night; or at any SCHOOL OR SCHOOLS for teaching them READING OR WRITING, either in the day or night, under whatsoever pretext, shall be deemed and considered an UNLAWFUL ASSEMBLY; and any justice of a county, &c., wherein such assemblage shall be, either from his own knowledge or the information of others, of such unlawful assemblage, &c., may issue his warrant, directed to any sworn officer or officers, authorizing him or them to enter the house or houses where such unlawful assemblages, &c., may be, for the purpose of apprehending or dispersing such slaves, and to inflict corporal punishment on the offender or offenders, at the discretion of any justice of the peace, not exceeding twenty lashes.¹⁵⁶

Significantly, the laws of Virginia defined this practice as “productive of considerable evil to the community” (*Ibid.*). The imagined classroom poses a threat – and an alternative – to the legitimate (white) community, so slaves must be isolated from one another, and from free people of their own race. The penalty erases any distinction between slave and free: any offender is subject to corporal punishment. The statute does not identify the offender (or the offense, beyond gathering in a meeting house or school), so both teacher and student may be punished. Other state codes perpetuated this connection between literacy and unlawful assembly. The Alabama Slavery Code of 1833 likewise lists a prohibition against “attempt[ing] to teach any

¹⁵⁶ The Revised Code of Virginia Vol. I, Chapter 111, Section 15, Richmond: Thomas Ritchie, 1819, 424.

free person of color, or slave, to spell, read or write” immediately before a series of regulations forbidding free people of color from associating with slaves, and prohibiting more than five male slaves from being together without permission.¹⁵⁷ Several other states, including Maryland, Missouri, North Carolina, Georgia, and Louisiana, also enacted legislation that forbade teaching slaves to read and write, typically framing the prohibition as a restriction on disruptive gatherings.¹⁵⁸ The laws drew a clear line between literacy, freedom, and the public sphere.

But the association between freedom and literacy wasn’t confined to the antebellum anti-literacy laws. Many scholars who work with slave narratives point out that literacy is conventionally associated with freedom, although any instruction had to take place in private. In her account of slaves’ literacy acquisition, Heather Andrea Williams suggests a connection between privacy, literacy, and autonomy. In her formulation, literacy enabled slaves to develop a kind of private life that permitted them to form independent identities. She writes, “Because it often happened in secret, the very act of learning to read and write subverted the master-slave relationship and created a private life for those who were owned by others” (H.A. Williams 7).¹⁵⁹ Williams invokes the idea of secrecy, although in this instance, the secret is not “traditional knowledge” or sexual transgression, but another type of knowledge that has been categorized as forbidden. Here, secrecy produces privacy, specifically, a reflective private life defined by words. Williams points out that this self-making activity was literal and active as well as figuratively formative of the self – learning to read and write meant that a slave could write her

¹⁵⁷ John G. Akin, *A Digest of the Laws of the State of Alabama* - 1833, Sections 31-37.

¹⁵⁸ Maryland Code of 1860, Art. 66, Sections 58-65 (461-62); Missouri Laws 1847, 103-04; North Carolina Revised Statutes 1837, XXIV, Section 74 209, Chapter CXI, Section 27; Code of the State of Georgia Article III, Section VI (772-73); Digest of the Laws of Georgia (Philadelphia 1831) 316-17; Louisiana Digest of Laws (1841), Section 3499 521-22.

¹⁵⁹ Williams’ description of this process highlights some of the difficulties in understanding and writing about privacy – a slave needs to act in secret in order to achieve privacy.

own pass to freedom. Reading meant that the slave had a mind and writing allowed her to construct an “alternate narrative” of slavery (*Ibid.*). The slave could, metaphorically and literally, write herself into being, a possibility vividly illustrated by Williams’ anecdote about an angry slave-owner and a resistant slave, Mattie Jackson. When Jackson’s mistress tells her that she will be whipped and orders her to place a switch in the center of the room, Jackson bends it in the shape of an M (for Mattie), demonstrating literacy and resistance (H.A. Williams 11). Jackson uses the instrument of oppression to communicate with her mistress, showing that she is literate and that she has a separate identity. At the same time, in a gesture that Williams does not parse fully, the switch becomes a symbol of Mattie Jackson herself, conflating her identity with punishment. Elsewhere, Williams writes of Mattie Jackson and her mother eavesdropping on their owners in an attempt to gain weapons in their “private war” (9). This war is private not only in the sense of being conducted on a smaller scale than the civil war raging in the nation; it is private, even intimate, in its setting. Further, eavesdropping is a war *on* privacy, specifically, the privacy of the slave-owners. By discovering the kinds of decisions that the slave-owners attempt to make outside their hearing, the slaves’ eavesdropping challenges their ability to act without scrutiny or consequence. Eavesdropping became a form of resistance and knowledge: Booker T. Washington recounts how a man from his plantation became a conduit for news, giving the slaves an advantage. He writes:

Often the slaves got knowledge of the results of great battles before the white people received it. This news was usually gotten from the coloured man who was sent to the post-office for the mail. In our case the post-office was about three miles from the plantation and the mail came once or twice a week. The man who was sent to the office would linger about the place long enough to get the drift of the conversation from the group of white people who naturally congregated there, after receiving their mail, to discuss the latest news. The mail-carrier on his way back to our master's house would as naturally retail the news that he had secured among the slaves, and in this way they often heard of

important events before the white people at the "big house," as the master's house was called.¹⁶⁰

As Washington's anecdote demonstrates, the conventional association between literacy, privacy, and freedom tells only part of the story. While slaves were disabled from participating in the public sphere, their lives marked by constant oversight, they also were overlooked. The mail carrier uses the casual (and lawful) assembly of white people to hear and convey news. Being disregarded allowed them to overhear news, acquire and claim a space of their own.

Barred from licit institutions and meeting places, slaves developed an alternate public sphere, a space that relied on secrecy and on slaves' social invisibility, in order to gain access to literacy and some measure of liberty. Certainly, gaining access to a larger community made it easier to learn to read and write. Heather Andrea Williams writes that, "boys and men had wider access to public spaces" than did girls and women and thus had a better shot at escaping the confines of the plantation and developing literacy (20).¹⁶¹ Frederick Douglass also attributes much of his knowledge to learning acquired in public spaces. He writes that he learned how to spell by "using my young white playmates, with whom I met in the streets as teachers. I used to carry, almost constantly, a copy of Webster's spelling book in my pocket; and, when sent on errands, or when play time was allowed me, I would step, with my young friends, aside, and take a lesson in spelling" (F. Douglass 155). Douglass attributes his successful quest for knowledge to something that looks like not only a public sphere, but a public market, an interracial community based on barter, where he would exchange food for knowledge.¹⁶² Outside his master's house,

¹⁶⁰ Booker T. Washington, *Up From Slavery: An Autobiography*. Garden City, New York: Doubleday & Co., 1901, 8-9.

¹⁶¹ Williams, Heather Andrea. *Self-Taught: African-American Education in Slavery and in Freedom*, Chapel Hill: University of North Carolina Press, 2009, 20.

¹⁶² For a fuller discussion of the importance of public space in slave literacy, see Jacqueline Bacon and Glen McClish, "Reinventing the Master's Tools: Nineteenth-Century African-American Literary Societies of

Douglass can participate in an economy of exchange, circumventing his legal status as property that could be traded or moved about at his master's will (as later chapters in his autobiography demonstrate). The effectiveness of Douglass's self-education project depends on his access to a larger world, a public sphere, albeit a very particular type of public sphere than we may be used to contemplating. It also depends on mutual lack: Douglass was better fed than his white playmates, so he could trade food for knowledge (calling to mind another set of tropes about nourishment). In this instance, the association between slaves and children works in young Douglass's favor. He learns to read in public, but adults don't pay attention to this forbidden process. In an era in which many states enacted laws that prevent slaves or freed blacks from assembling in one place (for education or other purposes), Douglass's impromptu literacy instruction apparently goes unnoticed. The presence of children provides a screen for illicit activity.

Such a strategy has its limitations. Douglass succeeds in trading food for knowledge because he is one lone little boy. As mentioned above, laws prohibited slaves or free black men and women from gathering for purposes of education. If a single child could be overlooked, his larger community was subject to constant oversight. Slaves who sought more systematic education had to find ways of evading notice in order to create an alternative space for the purpose. Douglass himself begins to conduct his own illicit school for other slaves, held at first in a series of secret locations ("in the woods, behind the barn, and in the shade of trees") and then in the home of "a free colored man, who lived several miles from our house, to permit me to hold my school in a room at his house" (F. Douglass 267). He advises, "Let the reader reflect upon the fact, that, in this christian country, men and women are hiding from professors of

Philadelphia and Rhetorical Education," *Rhetoric Society Quarterly* 30:4, Autumn 2000, 19-47. There, the authors look at the importance of group reading and education – the social or public aspect of learning (21-2).

religion, in barns, in the woods and fields, in order to learn to read the *holy bible*” (F. Douglass 268). These men and women are not simply concealed, they are hiding, a term that suggests fear, shame, subterfuge. But the shameful activity in which they are engaged is bible study. Their activity must remain secret because it is illegal, but here secrecy masks piety rather than sexual transgressions or other types of “traditional knowledge.” In contrast, the sorts of activities in which slaves may engage publicly further degrade them. Elsewhere, Douglass accuses slave-owners of encouraging slaves to drink and fight in their very limited leisure time, because those pastimes reinforce the notion that slaves lacked the ability to reason. These hidden schools though nurture intellect and spirit; the fact that they must remain secret underscores the perversity of slavery. Notably, the privacy in which Douglass’s students learn to read is not an individual privacy; rather, the situation might be better described as an alternate public sphere composed of slaves who share a single purpose.

Elsewhere, Douglass appears to draw a more conventional equivalency between privacy, literacy, and individual liberty, in which rare moments of privacy offer Douglass the freedom to read, and the opportunity to acquire the literacy that leads to freedom. Douglass suggests that if his literacy was acquired, in part, in public, it was exercised and refined in rare moments of privacy. In fact privacy meant literacy. Douglass writes, “I was most narrowly watched in all my movements. If I remained in a separate room from the family for any considerable length of time, I was sure to be suspected of having a book, and was at once called upon to give an account of myself” (F. Douglass 154). (Of course, giving an account of himself is exactly what Douglass is doing in his autobiography.) But the ways in which Douglass describes his education raise the stakes for his project. He confides:

Nothing appeared to make my poor mistress . . . more angry, than seeing me, seated in some nook or corner, quietly reading a book or a newspaper. I have

had her rush at me, with the utmost fury, and snatch from my hand such newspaper or book, with something of the wrath and consternation which a traitor might be supposed to feel on being discovered in a plot by some dangerous spy (*Ibid.*).

Douglass must use stealth and cunning to practice his reading, an activity associated with quiet and confinement, and dependent on being unobserved. Even more though, Douglass's description of these furtive moments of self-education recall the link between the written word, secrecy, and independence that underlay the Early Republic's laws protecting correspondence. Consciously or not, Douglass invokes the arguments about nation-building encapsulated in the laws governing communication – he, like Franklin and Washington, is a traitor and his mistress is a “dangerous spy.” He replicates in miniature the treasonous resistance of the founding fathers. Of course, the image is ambiguous – Benedict Arnold is also a traitor who was discovered in a plot. Douglass thus hints at the slave's resistance to a law that does not recognize his agency. In likening himself to a traitor trying to evade surveillance and discovery, Douglass hints that reading creates new allegiances, a new citizenship.

Arguably, privacy is one type of property that a slave is denied. (How could property own property?) Unable to own a home or goods, a slave cannot claim even self-possession and has no space to assert as protected. The experience of slavery is one of constant surveillance. When Douglass is given to Covey, a “slavebreaker,” he finds that he is always watched. Covey ensures his slaves' docility through subterfuge; he exercises a control reminiscent of Foucault's Panopticon.¹⁶³ Douglass recalls, “He had the faculty of making us feel that he was always present. By a series of adroitly managed surprises, which he practiced, I was prepared to expect him at any moment. His plan was, never to approach the spot where his hands were at work, in

¹⁶³ According to Foucault, the panoptic prison, in which prisoners' cells are organized around a central guard tower, succeeds in controlling prisoners' behavior because it renders power unverifiable. Prisoners cannot be sure when or if they are being watched. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (NY: Vintage Books 1995, 202).

an open, manly and direct manner” (F. Douglass 215). Interestingly, Douglass compares Covey’s method of regulation with secretive, illicit behavior: “No thief was ever more artful in his devices than this man Covey. He would creep and crawl, in ditches and gullies; hide behind stumps and bushes, and practice . . . the cunning of the serpent” (215). The slave-owner (or slave breaker) can be hidden – in fact, he must be if he is to exercise his power, which comes from not being observed. In contrast, the slaves “were never secure. He could see or hear us nearly all the time. He was, to us, behind every stump, tree, bush and fence on the plantation” (F. Douglass 216). Douglass describes Covey (whose name of course sounds like covert) “lying flat in the ditch, with his head lifted above its edge, or in a fence corner, watching every movement of the slaves” after claiming that he is riding in to town (*Ibid.*). Although Covey does not rely on a fixed, visible structure to maintain his power over his slaves, his authority is in some ways, panoptic. The slaves have nowhere to hide, or at least, nowhere to feel secure in doing so while the overseer remains invisible. To borrow from Foucault, “the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so” (Foucault 201). Even when a slave is not *physically* confined, his experience is one of relentless visibility, of being always in public.

Covey’s predilection for secrecy later works in Douglass’s favor when the two get into a fight. Douglass beats Covey, but Covey does not prosecute him. Douglass speculates:

The only explanation I can venture to suggest, is the fact, that Covey was, probably, ashamed to have it known and confessed that he had been mastered by a boy of sixteen. Mr. Covey enjoyed the unbounded and very valuable reputation, of being a first rate overseer and *Negro breaker*. By means of this reputation, he was able to procure his hands for *very trifling* compensation, and with very great ease. His interest and his pride mutually suggested the wisdom of passing the matter by, in silence” (247-48).

Douglass evades punishment by keeping Covey’s secret.

The situation of the slave illustrated both the enabling and debilitating potential of privacy. A slave who attained some form of privacy could use that limited space not only to acquire literacy but to formulate a sense of self. The question of whether, in the context of slavery, privacy benefits (by allowing a slave to circumvent his master and acquire knowledge) or harms (by shielding a slave-owner's abuses from the eyes of the larger community) mirrors the persistent, ongoing debate about the nature and value of privacy. One besetting concern about the nature of privacy is whether it benefits or harms the citizen – does it empower, or does it encourage the citizen to turn inward, away from the duties of citizenship? Is it a freedom to be shielded or a right to be sought, or is it something far less beneficial? Katherine Adams, for example, links privacy to privation (in the writings of Harriet Beecher Stowe and in classic republican ideology). She argues,

Privacy is the domain of irrational, inexorable corporeality. It energizes the political sphere but represents in itself, a state of privation – or deprivation – where individual choice, will, and creativity are sacrificed to the body's mundane demands (Adams 76).

Adams's formulation of privacy is both compelling and counterintuitive. She argues that privation is not a physical lack (of, say, sustenance) but an excess of physical demand. A slave might have enough food – or, as in the case of Frederick Douglass, more food than some of his free, white contemporaries – but still exist in a state defined by deprivation. This form of privacy does not nurture; it starves – but it starves “choice, will, and creativity.”¹⁶⁴ In nineteenth-century America, privation was associated with the non-citizen *par excellence*, the slave . . . and, Adams argues, the excessive demands of slaves' radically controlled and constrained bodies was perceived as contagious. Adams contends that self-discipline and self-sufficiency come, not from

¹⁶⁴ Thus, in the anecdote from Douglass's autobiography quoted above, Douglass exchanges one kind of sustenance for another.

the material privilege to care for oneself, but from an exercise of the “virtuous democratic will” (77). However, privation, in its more conventional meaning, threatened to pass from black bodies to white, from slaves to free (Adams 82).¹⁶⁵ Privation refuses to remain private, instead extending beyond the physical constraints and bodily and spiritual deprivations enacted by slavery to infect the white population and the entire surrounding society. The fear then is not isolation, but contamination – if excessive privacy can isolate and separate, excessive privation can spill over and taint those in contact with it, potentially resulting in death. Of course, this privation emerges from domestic arrangements that are dependent on slavery, which distorts familial relationship and deprives an entire group of people of their rights. In this formulation, domesticity offers neither protection nor freedom.

4.3 LETHAL CITIZENSHIP AND LETTERS FROM THE DEAD

But while privation defined the lot of the slave, the imagery (or indeed, the consciousness) of privation extended beyond the slave quarters. Rather, a pervasive sense of self-denial and isolation informed the imagery of nineteenth-century America. Russ Castronovo goes even further than Adams in suggesting that privation and isolation may be at the heart of American citizenship as citizens became increasingly fixated on the trappings of death.¹⁶⁶ In *Necro Citizenship*, Castronovo argues that, in nineteenth-century America, active participation in the

¹⁶⁵ Adams offers a detailed reading of Harriet Beecher Stowe’s *Dred*, which depicts a population that exceeds a willingness or ability to work – bodies reproduce and cannot be supported (84). In other words, physical intimacy and desire (want, in one sense of the word) result in material lack (want, in another sense). Domestic relationships and arrangements become the source of loss rather than security.

¹⁶⁶ In “To His Coy Mistress,” Andrew Marvell drily observed, “The grave’s a fine and private place, / But none I think do there embrace,” connecting privacy and death but disarticulating the connection between privacy and the active, transgressive body.

polis is set up as a way of eliminating the citizen. Public space becomes marked as deadly: “Guaranteed formal equality and cultural autonomy, the citizen encounters politics as a near-death experience: he or she thus prefers privacy to public life, passivity to active engagement and forgetting to memory” (3). The citizen may see freedom as, most emphatically, freedom *from* – in this case, freedoms from responsibility and civic involvement. Death represents the ultimate form of privacy, as “[d]ying remains shrouded by the privacy of the survivors’ grief and severe dissociation from the community of the living” (Castronovo *Necro Citizenship* 4). It seems that death is both private and de-particularizing: “Citizenship can be seen as more than a state technology that narrows subjects to mere shadows of once embodied and engaged persons. Citizenship also presents possibilities that enliven people as political actors concerned with public welfare and civic liberty” (Castronovo *Necro Citizenship* 8).

Castronovo argues that for differently (and thus emphatically) embodied populations like women or slaves, death is not an alternative to freedom; it *is* freedom (*Necro Citizenship* 35).¹⁶⁷ The state disembodies persons, Castronovo argues, by separating them from the material and cultural elements of their existence. In this case, the privation of the disenfranchised does not spill over into social and civic life, infecting the society around it. Rather, the disenfranchised become increasingly isolated. In Mandy Jones’ narrative, however, slaves (who are non-citizens, who might as well be dead) derive freedom, physical and intellectual, from symbolic burial. The isolation of the pit becomes empowering, allowing those who descend into it to emerge literate and armed with the tools of freedom.

¹⁶⁷ But in *Grigsby*, the right to letters (and to the privacy represented by those letters) does not inhere only upon the writer’s or recipient’s death – the court suggests that the defendant’s wife would have enjoyed the same right during her life.

In his account of the “Occult Public Sphere,” Castronovo writes of the disembodiment that underwrites liberal citizenship (*Necro Citizenship* 102).¹⁶⁸ Castronovo argues that, “Interiority becomes possible only with the rise of a public that privileges the private recesses of bourgeois intimacy” (*Necro Citizenship* 103). He reverses the direction of Habermas’s formulation: Interiority is the effect, not the cause, of the public sphere (*Ibid.*). In this formulation, death becomes an idealized site of separation from engagement. Castronovo contends that occult practices like séances and spirit rapping are the mechanism for staging an interiority that engenders an ideal of citizenship separate from the material (*Necro Citizenship* 104). Privatization and the spiritual realm are associated as ideals of emancipation from an unsatisfying public sphere (Castronovo *Necro Citizenship* 105). He argues that, “In a world of undue mental excitement, the citizen’s survival lies in negative liberty (“freedom from”) modeled around a spectacle of passivity” (Castronovo *Necro Citizenship* 124).¹⁶⁹ The spectacle of death (which is, in the context of the séance, a participatory spectacle) becomes an image of freedom, in which the spirit exists beyond and separate from the material realm. The séance, with its promise of an afterlife in which spirits are free from the demands of life (although they can interact with the living), underwrites Cassy and Emmeline’s staged haunting in *Uncle Tom’s Cabin*. The women can work on Legree’s superstition and atrophied conscience from a place of apparent removal, performing death as freedom.

Contemporaneous legal developments also suggested a surprising connection between death and freedom, situating that connection in the law governing letters and their disposal. In

¹⁶⁸ This analysis looks closely at Hawthorne’s *Blithedale Romance* and the centrality of the Veiled Lady, the disembodied medium persona of Coverdale’s beloved Priscilla. Among other things, Castronovo argues that Priscilla’s veil offers her both privacy and negation.

¹⁶⁹ Incidentally, this association of interiority/ privacy and death becomes feminized, Castronovo claims. Female mediums enact women’s privacy (per Teresa Goddu) but also offer men freedom and renewal (124). Thus women come to embody an emphatically disembodied – i.e. spiritual – privacy that can be used to reinvigorate men.

some ways, early formulations of privacy characterizing the written word as both property and freedom emerge from the grave and lay the groundwork for the possibility that even a slave can lay claim to certain kinds of ownership. *Grigsby v. Breckinridge*, an 1867 state court case, was decided under copyright and contract law but clearly foreshadows a right to privacy that extends beyond either of those fields, and touches on posthumous rights, women's rights, and, tangentially, slavery.¹⁷⁰ The case tells the tale of a twice-married woman who had “carefully preserved a large number of friendly and confidential letters, which she had received during her girlhood, widowhood, and wedded life” (*Grigsby* 482). On her deathbed, the woman bequeathed the entire body of her correspondence to Grigsby, her adult daughter (*Ibid.*). Following the woman's death, her husband, Breckinridge, who had been appointed administrator of the woman's estate, filed a lawsuit enjoining any publication of her letters and demanding their return (*Ibid.*). Breckinridge argued that, as the husband of the deceased, the letters were legally in his possession at the time of her death, and that even if he was not the actual owner of the letters, he was still entitled to the letters as his wife's survivor and administrator (*Ibid.*). The circuit court agreed at least in part with Breckinridge's argument and enjoined the publication of the letters, ordering Grigsby to surrender any letters that Breckinridge had written to her mother as well as all letters received by her mother from anyone else during her marriage to Breckinridge (*Ibid.*). Grigsby appealed.

The appellate court reached a different conclusion, holding that Grigsby was entitled to ownership and disposal of any letters she received as part of her mother's bequest.¹⁷¹

However, the court didn't focus on Grigsby's right to possession. Instead, the court based its

¹⁷⁰ *Grigsby v. Breckinridge*, 65 Ky. 480; 1867 Ky. LEXIS 103; 2 Bush 480 (Ky. App. 1867).

¹⁷¹ Interestingly, the court suggests that publication offers a kind of protection: the modern common law, as expounded by preponderating authority, seems to recognize the author's right to publish even such letters as his property to the extent of that right, which he may protect by injunction against piracy or intrusion.

decision in the wife's right to her own personal correspondence outside the scope of her husband's examination. To state the principle simply, the husband could enjoin publication of any letters he had written to his wife, but the body of her correspondence remained hers. The deceased possessed a right to her own correspondence, an incipient right to privacy:

Nor could we admit that, in this age and country, a husband's rightful authority gives him, during marriage, dominion over his wife's chaste and friendly correspondence not affecting his rights; nor that, in all the plenitude of his marital power, he could, without her free consent, take from her, or destroy, or in any way control, the possession or gift of such letters. Any such ungracious interference with her confidential correspondence would impair social confidence and disturb domestic peace, and ought not to be encouraged by the judiciary, especially as it could do him no other good than to gratify a jealous and prying curiosity. According to befitting decorum, and in every valuable sense, such letters written to her to keep and read and cherish are hers; and if she, for reasons satisfactory to her own taste and judgment, choose not to give or show them to her husband, she has a right to keep them to herself as her own inviolable property; and a confiding wife will never withhold from a true husband her confidential letters without some good and sufficient reason (*Ibid.*).

This extraordinary decision stems from a stated effort to preserve the sanctity of the home ("domestic peace") but ends by asserting a right to privacy that seems more individualized than domestic. The decision subdivides the home. Wives can defend a space that exceeds their husbands' surveillance, a kind of privacy that seems to recognize the limitations of domesticity. The court does not give husbands a right to inspect or keep their wives' correspondence, suggesting instead that marital relationships are, in that way at least, beyond the court's regulation. The court avers that, in a good marital relationship, a wife will need no marker of personal privacy and no outside mechanism to enforce it. In doing so, the court cautions husbands against reading their wives' correspondence by evoking the image of a tyrannous lord spying on his subjects. Traces of the early republic's arguments in favor of a separate, inviolable system for correspondence linger in this decision. Further, the court distinguishes wives from slaves, to point out that the former have rights that the latter cannot

expect. However, the rights that the court outlines don't seem to depend on race or gender, or ownership of other property:

The existing code of both British and American law recognizes the personal individuality and moral responsibility of wives, and, consequently, guarantees their freedom of thought and of interchange of sentiments. Their ideas are their own, their emotions their own, and their affections their own. Here and now a husband must not be a tyrant, and ought not to be a spy over his wife, who is neither his slave nor his mistress, but should always be his free and equal companion. What law or policy gives her letters to him? And what property can he own in that which is of no appreciable value to him, and is, for every purpose of use and safe-keeping, hers? (*Grigsby* 492-93).

Here, a wife's "property" has no "appreciable value" for her husband; it is (the court claims) property without monetary significance. That property consists of something other than the physical letters – it is the wife's "ideas . . . emotions . . . and . . . affections." And while these things may be embodied or revealed in the letters a wife sends or receives, they do not belong to her husband as part of his property.

The case also seems to locate the right to privacy in the extraordinary far reaches of the grave: the dead wife can exert a control over her property after death that seems to acknowledge her individual rights in a way that might not have been possible in life. The court insists that it would not have to intervene in a "happy" marriage, putting the wife's lived experience beyond legal recourse. Further, privacy is guaranteed only to those documents that have no economic value. The court suggests that the law can and should intervene here because in life, an appropriately respectful marital relationship would have guarded Mrs. Breckinridge's letters from scrutiny. There would have been no need to invoke the law. Here, however, the law takes the place of the spouse, protecting Mrs. Breckinridge's letters in death as her husband should have in life. The court also treats the letters as something more than mementoes. Rather, letters embody "freedom of thought and . . . interchange of sentiments," the "ideas," "emotions," and

“affections” of the writer. This catalogue of meaning comes close to the inviolate personality protected by the legal right to privacy some decades later. And it suggests that new freedoms can emerge from a site of profound deprivation.

It should be noted that the circumstances of the late Mrs. Breckinridge’s case are unusual in that they concern a female defendant arguing for possession of letters received by another (dead) female. The case, however, took prevailing legal attitudes toward ownership of papers and applied them to parties who would otherwise have claimed limited rights in property. The case controlling ownership and publication of letters in mid-nineteenth century America centered on nothing less than the letters and legacy of George Washington. In *Folsom v. Marsh*, the court held that the author of any letters held the copyright in those letters, whether they were simply personal letters, business correspondence, or literary compositions, and that right passed to the author’s representatives after death.¹⁷² In the eyes of the law, Mrs. Breckinridge was as important as the father of the nation, and her letters equally valuable as property.

But if Mrs. Breckinridge enjoys some control over the disposition of her letters even in death, that is in part because of her race. The court notes that her husband has no right to spy on her correspondence because she is not “his slave.” A dead person has a greater right to privacy than a living slave. But the kind of property the court cordons off for the wife – ideas, emotions, and affections -- could belong with equal ease to any disenfranchised person. This decision seems to indicate a new kind of property and herald a new class of owners. But other narratives

¹⁷² *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.C. Mass. 1841). This case also is generally regarded as the first “fair use” case in American law: An author, Jared Sparks, had written what was meant to be an authoritative biography of George Washington, including supplemental materials, such as personal letters. The defendants wrote a shorter biography making use of – and quoting verbatim from -- the supplemental materials. The defendants argued that the letters were not under copyright because their author was deceased. The court disagreed, saying that Washington and his heirs held the copyright. For other discussions of letters and copyright law, see *Granard v. Dunkin*, 1 Ball. & B. 207; *Lytton v. Dewey*, 54 Law J. Ch. 293; *Gee v. Pritchard*, 2 Swanst. 419.

suggest that the relationship between privacy, literacy, and autonomy is not so straightforward or so unilaterally enabling.

4.4 NO ROOM OF HER OWN: HARRIET JACOBS' LETTERS AND LIVING DEATH

In Harriet Jacobs' *Incidents in the Life of a Slave Girl*, a woman who was effectively dead under the law (and who voluntarily undergoes a kind of live burial nearly as horrific as anything in Poe) writes herself into being, both expressing and protecting her privacy. *Incidents in the Life of a Slave Girl* offers a remarkable account of the disarticulation between letters and authenticity, between letters and embodiment. Henry Louis Gates and Charles Davis maintain that Jacobs' narrative depicts the process through which a slave writes herself into visibility and being, using language to produce her experience for her mostly white audience.¹⁷³ However, the relationship between writing and self, and between production and privation, is complex and ambiguous. Jacobs' work is a memoir about letters, and the power of letter-writing, although it is the simple fact of letter-writing rather than the content of the documents themselves that raises questions about privacy. Jacobs' narrative also dramatizes the paradox of citizenship which holds both promise and threat for the disenfranchised. In Jacobs' account of her flight from slavery, she achieves freedom through extreme privation and isolation; her only means of achieving freedom is through utter self-negation. Georgia Kreiger has argued that Jacobs' experience of "self-

¹⁷³ Charles T. Davis and Henry Louis Gates, Jr., "Introduction," *The Slave's Narrative*, eds. Charles T. Davis and Henry Louis Gates, Jr. (Oxford: Oxford University Press, 1985), xxiii.

incarceration” enacts a cycle of death and resurrection that allows her to be reborn as a free woman; I argue that her narrative presents a relentless pattern of privation and denial.¹⁷⁴

Harriet Jacobs’s professional life stems from efforts to intervene in, rather than withdraw from, the public sphere, although her subject is the kind of oppression protected within the walls of the house, veiled by domesticity. Jacobs begins her writing career by engaging in epistolary wars with proslavery writers like former President John Tyler’s wife.¹⁷⁵ Her initial letter points to the link between sexual assault and slavery – in other words, the text is tied to the body (*Ibid.*). She speaks publicly of intimate wrongs, enacted in private. The book was beset with controversy from the time of its publication; many critics suspected that Harriet Jacobs merely served as a mouthpiece for the abolitionist writer Lydia Maria Child (Hewitt 120). Thus, readers perceived a disjunction between the actual author and the purported author. Jacobs’s decision to write of herself as “Linda Brent” further complicates the question of authenticity. She claims to offer an accurate, even frank, account of her own experiences but distances those experiences through the use of a pseudonym. Jacobs uses a false identity, the persona of “Linda Brent,” to screen herself from her readers’ too-close scrutiny. She divorces authenticity from a kind of historicity – she is telling the truth but she does not offer herself, her own unmediated experience, as a seal of truth. Because Jacobs’s narrative was thought, for more than a hundred years, to have been written by Lydia Maria Child, it “makes central the issue of authenticity” (Hewitt 119). Further, Jacobs’s work throws the idea of authenticity into question – she starts out writing letters about her sister’s sexual relationship with her owner, but Jacobs apparently never had a sister (Hewitt 123). She fictionalizes her story to make a point, or to protect herself and her own life from scrutiny

¹⁷⁴ Georgia Kreiger, “Playing Dead: Harriet Jacobs’s Survival Strategy in *Incidents in the Life of a Slave Girl*,” *African American Review*, Vol. 42 (Fall – Winter 2008), 607-621.

¹⁷⁵ Hewitt, Elizabeth. *Correspondence and American Literature, 1770-1865*. (Cambridge, U.K.; New York: Cambridge University Press, 2004) 120.

and censure. However, Jacobs presents her relationship with reading and writing as complicated, not inevitably liberating. Accordingly, her relationship with privacy is complicated – she seeks it out, evading scrutiny by hiding; she uses anonymity to protect herself and to carve out a space for her actions outside her readers’ gaze, but privacy also proves overwhelming, even debilitating.

Initially, it seems as though Harriet Jacobs/Linda Brent suffers from the lack of privacy that marks the slave’s condition, a conventional equation that seems to promise a quest for an unmolested interiority. She is denied any sort of interior space: her master, the predatory Dr. Flint “peopled my young mind with unclean images.”¹⁷⁶ His ownership intrudes even into her mind, and creates a kind of spurious society there. She suggests that, at first, she is protected from some of his predations by the society around her: “It was lucky for me that I did not live on a distant plantation, but in a town not so large that the inhabitants were ignorant of each other’s affairs” (Jacobs 39). Like Frederick Douglass, Jacobs argues that slavery thrives in isolation. She also resists the conventional equation of literacy and liberty.¹⁷⁷ Literacy and correspondence are not initially a means of freedom for her. When Flint catches her reading, he seems displeased; however, “he came to the conclusion that such an accomplishment might help to advance his favorite scheme” (Jacobs 41). Flint begins to slip notes into her hand, but she denies that she can read. (*Ibid.*). Flint then reads them to her and asks, “Do you understand?” (*Ibid.*). Flint hopes to accomplish the seduction of Linda’s body by corrupting her imagination through the medium of

¹⁷⁶ Harriet Jacobs, *Incidents in the Life of a Slave Girl (1861)*, (Clayton, Delaware: Prestwick House, 2006), 37. Subsequent citations will be in the text.

¹⁷⁷ In *Letters of the Republic*, Michael Warner argues that the act of writing is inextricably linked with enfranchisement, even citizenship. He asserts that, “No longer a technology of privacy underwritten by divine authority, letters have become a technology of publicity whose meaning in the last analysis is civic and emancipator.” Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*. (Cambridge and London: Harvard University Press, 1990) 3. Significantly, he also links the technologies of writing to (white) race.

words, further binding her to him. Literacy and, more specifically, Flint's letters to Linda, seem to promise access to both mind and body. (Interestingly, the account suggests that Flint cannot or will not simply compel Linda's submission; he has to seduce her, acknowledging that she is in some way autonomous or independent.) She also imagines a secret repository of private papers detailing the sexual guilt of public men, intimating that her public, published narrative is also Dr. Flint's secret memoir (Jacobs 159).¹⁷⁸ Linda's relationship with privacy is fraught, to say the least: Dr. Flint's lust for her, and her relationship with the white father of her children, must both be concealed, the former because Flint has threatened her life if she "was not as silent as the grave," the latter because she dreads confessing "the sorrow I was bringing on my grandmother" (Jacobs 39, 67). It seems initially as though her actions must remain private, because of fear and shame; publicity would have real consequences. However, Linda learns that slave-owners dread publicity even more than she does.¹⁷⁹ Linda feels, in some measure, compelled to speak just as she has been compelled to keep silent. In the same chapter in which she recounts Dr. Flint's degrading overtures, she chastises her readers: "In view of these things, why are ye silent, ye free men and women of the north? Why do your tongues falter in maintenance of the right?" (39).

¹⁷⁸ If Michael McKeon is correct in his characterization of privacy and secrecy, in which privacy is connected to a kind of negative liberty, a freedom from unwanted interference while secrecy is connected to older, traditional forms of knowledge, then Harriet Jacobs's memoir exercises that power, revealing her former master's guilt. Further, she withholds the knowledge of her whereabouts, manipulating Flint and his son. McKeon, *The Secret History of Domesticity*, 469 (citing Sissela Bok, *On Secrecy: The Ethics of Concealment and Revelation* [New York: Pantheon, 1982]). In legal history, the term secrecy is associated with political power, attached most closely to the ballot box. See, e.g., *Williams v. Stein*, 38 Ind. 89; 1871 Ind. LEXIS 234.

¹⁷⁹ Jacobs tells of a Congressman who wrote to a slave "who was the mother of six of his children," asking her to send their children away lest any of his friends recognize their resemblance to him (Jacobs 159-60). The body is legible (although the letter the Congressman writes to his slave is not – she is illiterate).

Linda/Jacobs speaks not only for or about herself, but in defense of other slaves, and in accusation of slave-owners.¹⁸⁰

The reward that Flint offers her is, essentially, physical privacy, a room of her own. If she yields to him, he promises to “build a small house . . . , in a secluded place, four miles from town” (Jacobs 65). This seems to ensure her autonomy, but it also secures his privacy and his access to her. “I had rather live and die in jail,” Linda thinks (Jacobs 65). Instead, she enters a sexual relationship with another white man. She describes this decision in terms of secrecy: “I will not try to screen myself behind the plea of compulsion” (Jacobs 66). (Here she addresses her readers as “ye happy women whose purity has been sheltered from childhood,” alluding to conventional associations of the home with domesticity and protection (*Ibid.*).) Her literacy enables this relationship, which depends on correspondence. “He constantly sought opportunities to see me, and wrote to me frequently” (*Ibid.*). When Linda falls in love, Flint sends her a note summoning her to him. The correspondence compels her bodily obedience, and foreshadows even stricter compulsion: Flint tells her that she cannot marry and threatens her with jail (Jacobs 48-9). But at the heart of Flint’s objection is the intimacy represented by Linda’s correspondence: “He knew that I could write though he had failed to make me read his letters, and he was now troubled lest I exchange letters with another man” (Jacobs 50). Again, “letters” here seems to read as a euphemism for something else. Flint clearly worries not only about the ideas or sentiments exchanged in those letters but about the exchange of those letters – the letters may represent for him a zone of freedom, in which Linda may give her body to someone other

¹⁸⁰ Here it may be useful to think of Primo Levi’s concept of the witness, the survivor who tells the story on behalf of those who cannot. See, e.g. Primo Levi, *Survival in Auschwitz: the Nazi assault on humanity* (1958) (New York: Simon & Schuster, 1996), 41. Jacobs’s decision to publicize her own shame may be akin to her embrace of the radical privacy of confinement that she undergoes voluntarily at her grandmother’s house. Both may be read as acts of self-possession.

than the man who commands its service. Moreover, the letters serve as repositories of “ideas, emotions, and affections,” as in *Grigsby*. The novel briefly engages in the trope that literacy is (or enables) freedom. While a white minister admonishes the slaves in Linda’s community to be obvious in their comings and goings – “When you go from here, . . . go directly home and let your master and mistress see that you have come” (Jacobs 84). In contrast to this public warning from a minister, Linda teaches an old slave how to read in secret (Jacobs 87).

However, there is no indication that literacy is immediately freeing – the old slave wants to read so that he can look forward to the afterlife. Reading offers the solace of futurity and helps him acquiesce to his present bondage. In some sense, slaves cannot write texts because they are texts: Linda herself is a kind of text for her brother: “he put his arms around my neck, and looked into my eyes, as if to read there the troubles I dared not tell” (Jacobs 52). And of course slave-owners write on their slaves’ bodies, through beating, impregnation, and other visible forms of subjugation. Significantly, when Flint’s wife threatens to flog Linda, Flint will not let her because the beating will make his lust for Linda visible: “The application of the lash might have led to remarks that would have exposed him in the eyes of his children and grandchildren” (Jacobs 44). The body becomes a much more public text than the letters that circulate about and among the memoir’s characters. Bodies reveal shame and sorrow, while the contents of many of the letters written about in the narrative are not shared. Still, literacy is a danger. In the wake of Nat Turner’s rebellion, the homes of both slaves and free blacks are searched, with the apparent goal of finding incriminating correspondence (Jacobs 78-79). The posse, who are illiterate, find

some of Linda's correspondence, exulting, "Dis 'ere yaller gal's got letters!" (Jacobs 79).¹⁸¹ Compelled to produce them, Linda explains that most of them are from white people (*Ibid.*).

Here, Linda's correspondence associates her with whites and enables her to enter a more public sphere (as does the correspondence embodied in Jacobs's book). It asserts that she can communicate across racial lines. Moreover, the fact that Linda corresponds with white people is significant because it absolves her from the fear that she is participating in intra-racial rebellion. The incident also offers a synecdoche for the larger text: it asserts that Linda/Jacobs has written to white audiences before and has been accepted as a correspondent, an equal. It also suggests that, for the slave (whose body may be inscribed by her master's lust and violence), the liberating act is not reading, but writing. Elizabeth Hewitt argues that slaves cannot just be the subjects, the "texts," of abolitionist literature; they have to become authors themselves (122).

But writing remains uncertain at best and dangerous at worst. Jacobs seems to fear that her experience is irreducible to words, that she cannot communicate in a way that will make her audience sympathize with her lived experience. Jacobs argues, according to Hewitt, that "there is no kind of rhetorical act that will make the experience of slavery comprehensible to one who is not, or has never been, a slave"; in a gesture that recalls the disintegration of community at the end of *Letters from an American Farmer*, her assertion undercuts the possibility of national union (119). Jacobs's experience isolates her from her intended – required? – audience. She may

¹⁸¹ This anxiety over slaves' literacy and correspondence played a role in the run-up to the Civil War. "Suspicious" postal items were destroyed during an 1835 riot in Charleston, contributing to a civic debate over the type of material a postal service could carry across state lines (Hewitt 114). Much propaganda (both pro-and anti-slavery) took the form of letters, with their concomitant claims of familiarity (Hewitt 117). Again it is tempting to point out the similarity between the disposition of letters and the disposition of bodies – the concern about carrying mail across state lines reflects the legal prohibitions against transporting slaves across state lines. Of course, this moment is also worth noting because of Jacobs's representation of the white posse member's speech – his ungrammatical dialect contrasts starkly with the carefully crafted prose of Jacobs's memoir, highlighting that he is, in fact, unlettered.

escape slavery through clever deployment of the written word, but she cannot escape the unwanted privation of an inexpressible condition.

The way in which writing can both effect freedom and affirm isolation is dramatized vividly in Linda's unlikely escape plan. Linda escapes from slavery by spending seven years in hiding in her grandmother's house. She does not leave the south, or even the neighborhood of her master. Instead, she hides in her grandmother's attic, choosing confinement and concealment over physical mobility. She achieves a kind of privacy – a freedom from interference by her master – but for her, privacy is a kind of internment. (Linda writes that she cannot even stand upright in the attic, and all of her senses are constrained.) Linda's choice embodies in a literal sense an assertion of privacy that valorizes freedom-from over freedom-to.

Elizabeth Hewitt contends that, throughout *Incidents*, the text is tied to the body: Linda “re-enacts the epistolary convention of seduction” in which Dr. Flint pursues Linda through his letters, using her literacy to underwrite her physical subjugation (Hewitt120). In fact, Linda uses the assumption of authenticity that attaches to correspondence to conceal rather than to reveal. She disarticulates the connection between the written word and the body, while relying on the notion that the letter, and the letter-writer, can be seen as commensurate. (If the way in which Eliza Wharton's fictional correspondence is circulated and critiqued represents the supposed circulation of her body, Linda exploits this connection between letter and body to deceive her master.) “In order to make him believe that I was in New York,” she writes, “I resolved to write him a letter dated from that place” (Jacobs 145).¹⁸² Brent writes a fictional account of her life in New York to prevent Flint from finding her actual hiding place. Although she is not free, legally or physically, she secures for herself a freedom from discovery. As with Poe's “Purloined

¹⁸² Jacobs suggests that correspondence is a fundamental feature of citizenship. Note she makes much of the fact that a poor Englishman can send and receive letters (132).

Letter,” the significance, the assurance of authenticity offered by these letters has little to do with content, and more to do with the circumstances apparently represented by the letters. She has the letters posted from New York, and calculates the dates so as to support the presumption that they actually come from New York. Interestingly, the letters contain a further level of obfuscation – in one letter, Linda claims that she is living in Boston, but visits New York occasionally. This claim seems designed to be read as inauthentic – she knows that Flint will assume she is lying and will search for her in New York. She assumes that her letter will not be read as an expression of truth, but as a piece of strategic rhetoric. Elizabeth Hewitt argues that Linda uses the circulation of her letters (through the Free States and Canada) to secure her own freedom: the apparent movement of her letters eventually permits Brent to move more freely herself (Hewitt 130). However, while the letters move freely, Brent herself does not – instead, they support and enable her voluntary confinement in her grandmother’s house. The letters’ circulation protects Brent but does not liberate her.

It is the movement of the letters rather than their content that helps her; indeed, although Linda exploits the supposed truth value of letters, “misinformation functions as a strategy of subjugation” (Jacobs 122). Jacobs’s own fictionalized persona may also qualify as a freeing piece of misinformation. Just as Linda frees herself from her master’s scrutiny by secreting herself in her grandmother’s attic, Jacobs frees herself from the reader’s scrutiny (and perhaps frees herself to fictionalize her experiences) by constructing an alternate self. She uses her pseudonym in a way subtly different from Benjamin Franklin’s Silence Do-good. If the persona of Silence Do-good allows Franklin to pass as someone utterly different from himself, permitting an urban teenaged boy to imagine and present himself as a rural, middle-aged widow, Linda Brent affords Jacobs another kind of misdirection. Jacobs constructs an alternate self remarkable

for its resemblance to her, but that very closeness might allow Jacobs to conceal or deny some of the more sensational aspects of her story. Like the letters Linda posts from New York, the very persona of Linda is a liberating fiction that guides the reader's attention away from the writer of that fiction. Jacobs' deployment of a fictionalized persona foreshadows more modern perceptions of privacy.¹⁸³ Jacobs does not simply create a pseudonym: she creates a kind of avatar, permitting her to reveal her own story while shielding herself, even in public, behind the barrier of an alternate self that she creates. Privacy in this sense is not physical space but a distance between self and persona, or the misdirection permitted by that persona.¹⁸⁴

At the same time, it seems like privacy is not an unabashedly positive value. While Linda chooses this radical confinement she is choosing from among very limited options. Her privacy remains precarious as her grandmother's home is repeatedly searched; in the end, privacy is isolating rather than protective. Her very position cannot be communicated, and she must isolate herself from her children, denying them comfort and contact. She engages in correspondence that does not correspond: the letters that eventually help to effect her freedom are really directed to an audience other than the putative addressee. Further, her memoir is riddled with anxiety that her reader's experience does not and cannot correspond with her own.¹⁸⁵ Jacobs fears an isolation or

¹⁸³ Weblogs and MMORPGs (massively multi-player online role-playing games) have popularized the notion of such fictionalized personae. Of course, this raises the question about how shifts in technology mandate shifts in our ideas of privacy.

¹⁸⁴ Further, Jacobs needs privacy to write. According to Jean Fagan Yellin, Harriet Jacobs worked on her book "secretly and at night" "'Written By Herself': Harriet Jacobs' Slave Narrative", *American Literature* 53:3, 1981, 482. She wrote to Amy Post, "Poor Hatty's name is so much in demand I cannot accomplish much. If I could steal away and have two quiet months to myself, I would work day and night" (485).

¹⁸⁵ It may be instructive to compare Jacobs's fears about the incommensurability of her experience with the anxiety expressed by J. Hector St. John de Crevecoeur in *Letters from an American Farmer*. In his final letter, Crevecoeur's Farmer James frets that the experience of the revolution has divided him from his European correspondent both culturally and linguistically. James writes of his situation, "no relation can be equal to what we suffer, or what we feel." J. Hector St. John de Crevecoeur, *Letters from an American Farmer* (1782). (Oxford, New

separation so profound that, her letters to white correspondents aside, she cannot forge any kind of social bond with her readers. Likewise, Saidiya Hartman casts doubt on the freeing or self-fashioning possibilities of literacy.¹⁸⁶ She argues that a slave's "self-possession" merely replaced the collar and chains with a guilty conscience (6).

4.5 DANGEROUS CORRESPONDENCE: LITERACY EDUCATION AND DEPRIVATION

But if Jacobs worried that her letters and her memoir could not adequately convey her experience or excite sympathy in her white audience, a few other white writers suggested that they understood her sense of privation all too well, and literacy (if not letters) was the great leveler. To attempt to rectify slaves' privation was to share in it. Activists like Prudence Crandall and Myrtilla Miner found that teaching young black women to read resulted in their own expulsion from and punishment by their communities. Prudence Crandall's decision to turn her boarding school for young women into an institution exclusively for black students spawned a political crisis.¹⁸⁷ The Connecticut legislature passed a law prohibiting anyone from teaching, or rendering any service to those who taught, black students who were not already inhabitants of the state, a severe impediment for a boarding school (D. Williams 84-5). When Crandall refused to close the school or to send away students from outside Connecticut, she was thrown into jail (D.

York: Oxford University Press, 1997) 190. His word choice here is telling: the disintegration of James's *relationship* with F.B. (because they no longer share a common situation or purview) has led to an inability to *relate* his story.

¹⁸⁶ Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America*, New York: Oxford University Press, 1997.

¹⁸⁷ Donald E. Williams, Jr., *Prudence Crandall's Legacy: The Fight for Equality in the 1830's, Dred Scott, and Brown v. Board of Education* (Middleton: Wesleyan University Press) 2014, 26-7.

Williams 92-3). Myrtilla Miner's efforts to open a school for free black women in Washington D.C. excited the concern of Frederick Douglass and the criticism of the District's citizens.¹⁸⁸ In each case, the students were already free, but education promised a greater form of liberty. The teachers, meanwhile, were threatened with imprisonment and cut off from their communities. Literacy is not just the thing that frees the slave but confines the white educator – to give a black person the means to liberation is to lose some of your own.¹⁸⁹

Perhaps any kind of literary or social correspondence prompted other kinds of correspondence. For whites, contact with the disenfranchised spread privation. In her *Personal Narrative*, Margaret Douglass recounts how her efforts to teach free Black children how to read ended in her own imprisonment.¹⁹⁰ Douglass first offers her bona fides as a white Southerner, stressing the distance between her own sympathies and those of her pupils. She states emphatically that she is not an abolitionist and did not knowingly defy Virginia's law against teaching "free colored people" to read (M. Douglass 4-5). However, Douglass's circumstances mirror the privation of her students. While her stance and opinions are not marginal, her social status as a woman and a widow may propel her further from the center. She asserts that she led a "quiet and unobtrusive life" in the city of Norfolk until 1853, where she and her daughter were "retiring," even isolated (M. Douglass 6). Douglass rents her house under the assumption that it would "form a quiet and retired home for myself and my daughter" (M. Douglass 9). However, she is surrounded by tenements, and her neighbors "were not of the most refined class, and would prove no associates for us" (*Ibid.*). Separated from her (white) neighbors by perceived

¹⁸⁸ Mary Ellen Snodgrass, *Civil Disobedience: An Encyclopedic History of Dissidence in the United States* (London: Routledge) 2015, 106-07.

¹⁸⁹ It seems almost redundant to note that all of these educational reformers are women and thus have their own experience of social marginalization.

¹⁹⁰ Margaret Douglass, *Personal Narrative*, Boston: John Jewett & Co. 1854.

class differences, she “therefore determined to live very secluded and be seldom seen or heard” (*Ibid.*). But her self-imposed isolation yields unexpected consequences. In this anomalous position, Douglass chooses to cross racial lines rather than class lines (although it is unclear whether her sympathy for outcasts contributes to her circumstances or her circumstances breed sympathy).

This situation arises when she sees the sons of a Black barber with whom she is acquainted trying to study a spelling book and offers to teach them (M. Douglass 7).¹⁹¹ But the school is not primarily or only for the benefit of her students; instead, Douglass asserts that her reasons for pursuing this path are moral, personal, that is, private. She argues that because of “Living a life so retired,” she particularly needs benevolent activity (11). Her desire for engagement emerges from her isolation, in accordance with Habermas. Her withdrawal generates involvement. Douglass uses her physical isolation from other members of her class and her social isolation from her neighbors to create an alternate society, but the purpose of that society is for her own moral improvement.

But by inviting marginalized students into her home, Douglass renders the boundaries between her self-imposed, genteel isolation and their socially imposed segregation permeable. When one of her pupils falls ill (with consumption), Douglass and her daughter go to visit and sit with her (12). Like Douglass and her daughter, the student and her mother live in a dwelling surrounded by neighbors, but they remain isolated. But the situation does more than establish an equivalency between the two mother-daughter dyads. Douglass invites her audience to accompany her: “Will my readers go with me into a tottering negro hovel, situated in the very heart of the city of Norfolk?” (*Ibid.*). Douglass’s invitation to her readers uses their readers’

¹⁹¹ She points out that the children already attend Sunday School (8).

literacy to share this experience. By reading, they accompany her into this marginalized and impoverished setting. The gesture both imposes on the privacy of the suffering child, and creates an alternate society for Douglass, including her readers in her charitable work.

Douglass comes to share her student's isolation and tries to convey it to her readers. "Quietly and alone, my daughter and myself sat up, night after night, with the suffering child and endeavored to smooth her pathway to the grave" (13). However, Douglass's activities do not remain quiet and alone. When the girl dies, Douglass marches in the funeral procession, making visible her association with this poor and marginalized family. Douglass believes that participating in the child's funeral procession – making a public show – alerted her neighbors to her activities and led them to turn her in (13). Her behavior, like adultery, was tolerated only so long as it remained unseen. This public action in turn leads to an intrusion upon her own privacy. On May 9, 1853, a police officer demands entrance to the schoolroom, and Douglass shows him in (13-14). The house becomes permeable: after he inspects the schoolroom, another officer enters through the back door (M. Douglass 15). This sight in turn draws a crowd -- "Many spectators were present to witness the wonderful sight of a sudden descent upon a negro school" (M. Douglass 16). The school is exposed and emptied as a result of Douglass's public demonstration of mourning for her student. By openly grieving for a dead black child, Douglass takes on the status of that child. Her home can be invaded and overrun by "authorities." Douglass loses privacy, but privacy is then transformed into privation.

Confined to her home on a judge's orders, Douglass uses the same words to describe her situation that she used previously to describe her initial circumstances and to depict her vigil at the dying girl's bedside. She explains that, "I was left entirely alone, without even a servant" (M. Douglass 21). However, in this case, her isolation is not deliberately chosen or self-imposed, nor

is it the result of a poor fit between Douglass and her neighbors. Rather, the larger society of which she considered herself a part turns its back on her. Douglass hopes that, “In this city of churches, some one . . . would come forward and offer me sympathy and advice without being solicited therfor,” but “not one solitary individual” takes up her cause (25). She finds herself in the position of her students, marginalized, ignored, and in need of charity, a position mediated by the written word. While Douglass makes a point of the fact that her students are free-born, her experience with her students and ensuing encounter with the law places her in a position analogous to slaves. In an effort to plead her own case, to make herself visible before the law, she finds that “for four months, I was engaged in hard study, hard labor, and hard living, my mind being as fully occupied as my hands” (M. Douglass 23). This process of “hard labor” is also a literal and figurative drive toward freedom: “I was determined to express my views freely, should my case ever be brought to court” (M. Douglass 23). However, only the expression here is free; Douglass is in danger of losing her physical freedom.¹⁹² Her students’ privation becomes her own.

In the case of Margaret Douglass, the law does not draw a boundary around the home. Instead, it invades the home and punishes Douglass for what she does there. Subsequent legal developments also address attempted to deal with what happens when black and white citizens began to share public, and intimate, space. The debate coalesced over marriage law; the reverence accorded to domesticity did not extend to the domestic arrangements of nonwhites. Instead, the domestic becomes a site of privation (and death) for whites and nonwhites alike.

¹⁹² Douglass also experiences the dangers of misrepresentation in the press. When her daughter, who also worked at the school, goes to New York to visit friends, the newspapers apparently reported that the young woman had “run away” from the charges (24).

4.6 ABUNDANT PRIVATION: LAW, THE HOME, AND THE PRESS

The supposedly sacred, sheltering character of domestic space informs much of the discussion of marriage in the nineteenth century. But marriage law also had important practical ramifications. Certainly, marriage law governs the disposition of real property – who gets to inherit what, and from whom – which affects the composition of a community, its fluidity or stability. But marriage law also offers a potent symbol of a community's values, marking the line between what is permitted (and implicitly approved) and what is forbidden. It also addresses concerns about how bodies behave in private spaces.

The battle over marriage is nothing new, although the boundaries were drawn around race rather than gender. In the wake of the Civil War, Southern states found that laws varied from state to state and from one regime to another. Most Southern states, including Georgia, Virginia, and North Carolina, prohibited interracial marriage as a means of preserving “the purity and distinctness of the races inhabiting the state” (Ga. Code, § 1708 (1788)). The ills attending interracial marriage seemed self-evident to the legislators who drafted Georgia's statutes; just as obvious was the wisdom of the prohibition against it. When called upon to adjudicate the legality of an interracial marriage in 1890, the federal court for the southern district of Georgia upheld the state law, writing:

These statutes have received judicial construction by the supreme court of the state at a period when its judges were widely known, not alone for their conservatism, their devotion to the constitution of the common country, their broad and tolerant liberality of opinion, but also for their profound learning and conspicuous intellectual power.¹⁹³

¹⁹³ *State v. Tutty*, 41 F. 753, 1890 U.S. App. LEXIS 1581 (S.D. Georgia 1890), **6-7.

The opinion cannily defended the judges who upheld the statute for their commitment to the laws of the United States (“the common country”) and their erudition. By asserting that the statute and its judicial interpretation pre-dated the Civil War, the court claimed that the statute was not tainted by Confederate partiality and should be recognized as valid by federal courts.

However, not all Southern states forbade interracial marriage, and this inconsistency created a conflict between what seemed to be the clear and pressing wisdom of prohibiting miscegenation (or amalgamation in the language of the day) and the legal imperative to recognize the laws of other states. This conflict arose in *State v. Ross*, a case that required North Carolina’s state supreme court to construe the laws of another state.¹⁹⁴ There, the defendants, a “negro” man and a white woman, had been indicted for fornication and adultery, since they appeared to be living together without the benefit of marriage (**1). (The fact that the two were of different races may have been enough to prompt the charge: observers would have assumed that a black man and a white woman could not be lawfully married.) The defendants did not try to deny that they were living together; instead, they insisted that in fact they were married in the eyes of the law (*Ibid.*). The lower court found that the man, Pink Ross, was a native of South Carolina, who had lived there until August 1873 (*Ibid.*). The woman, Sarah Spake Ross, was a resident of North Carolina – a state that forbade interracial marriage – but in May, 1873, she traveled to South Carolina to marry Pink Ross (*Ibid.*). The couple was married in South Carolina according to the laws of that State in May, 1873; they lived in South Carolina until August, 1873, as man and wife when they moved to Charlotte, North Carolina (*Ibid.*). Since the laws of South Carolina did not forbid marriage between white persons and persons of color, the Judge held that the defendants were not guilty (**2). The State appealed (*Ibid.*).

¹⁹⁴ *State v. Ross*, 76 N.C. 242; 1877 N.C. LEXIS 219 (S. Ct. N.C. 1877).

The court's opinion showcases a conflict between what it considered legal and what it considered right. Writing for the majority, Justice Rodman acknowledged that the couple had been married in South Carolina, Pink Ross's home state, and that "upon the marriage the domicile [sic] of the husband became that of the wife and for that purpose it would be immaterial whether the marriage took place in the State of the husband or in any other State" (243, *citing* Story, *Conflict of Laws*, § § 194, 199). When a woman married, she became a citizen of her husband's home state and was governed by its laws. Therefore, the law of South Carolina governed the validity of the marriage no matter where the marriage actually occurred.

However, Judge Rodman did not simply examine the law of South Carolina to see if it permitted interracial marriage (it did); instead, he used the occasion to praise the superior wisdom of North Carolina law:

The State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy as tending to degrade them both. It has therefore declared such marriages void. It is needless to say that the members of this Court share that opinion. For that reason it becomes us to be careful not to be unduly influenced by it in ascertaining, not what the law of North Carolina is upon such marriages contracted within her limits--that is found in the Act of Assembly and is beyond doubt--but what the law of North Carolina is upon the question presented, and for that we must look beyond the statutes of the State (*Ross* 244).

Even before beginning to weigh South Carolina's laws, the court rehearses the policies underlying North Carolina's laws. The court isn't finished, though – Rodman also expresses disgust with laws that reach different conclusions, and offers an explanation for the discrepancy.

He writes:

However revolting to us and to all persons, who by reason of living in States where the two races are nearly equal in numbers have an experience of the consequences of matrimonial connections between them, such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world. When Massachusetts held such a number of negroes as to make the validity of such marriages a question of practical importance her sentiments

and her legislation were such as ours are to-day. *Medway v. Needham*, 16 Mass. 157. Now since she has got rid of her negroes the question is of no practical importance to her. And as far as may be gathered from her statute book she considers such marriages unobjectionable. Most of the States of the Union and of the nations of Europe with whom the question is merely speculative take a similar view of it (*Ross* 246-47).

Rodman contrasts the immediate experience of states in which black and white populations are nearly equal in number, like North Carolina, with those in which the number is more heavily weighted (like Massachusetts). He concludes that where interracial marriage does not pose a present danger, legislators can afford to extend a right that remains largely abstract, much like the divorce laws enacted by the early colonies. (He does not perform a similar demographic analysis of South Carolina.) With all of those caveats, the court reluctantly recognizes the validity of the Rosses' marriage, acknowledging that, "We are compelled to say that this marriage being valid in the State where the parties were bona fide domiciled at the time of the contract must be regarded as subsisting after their immigration here" (*Ross* 247). Rodman admits that one reason to recognize such marriages is to protect the legitimacy of any children born of the marriage, but even in drawing that conclusion, he distinguishes between what is moral and natural, and what is legal: "The only evil which could be avoided by a contrary conclusion is that the people of this State might be spared the bad example of an unnatural and immoral but lawful cohabitation" (*Ross* 248). The underlying fear is the effect on the public – people will see this bad example and emulate it. The intimate relationship between Pink Ross and Sarah Spake Ross necessarily influences their society, just as society weighs in on the validity of their marriage. Further, access to the public sphere doesn't necessarily mean greater freedom or regard for those who have been denied such respect.

Conflict of laws analysis seems like a dry and unpromising place to locate the central drama of a novel, but this conflict also demarcates the line between public and private, or

perhaps more accurately public and secret, in Charles Chesnutt's *The Marrow of Tradition*. In this novel, writing does not enable black characters to create themselves, and law does not permit them to assert themselves. Rather than being aligned with the public or the civic, law seems to be disregarded, suppressed, violated, or hidden away. Old Mr. Delamere, a character whose racial tolerance is repeatedly noted, laments, "Time was, sir, when the law was enforced in this state in a manner to command the respect of the world!" (Chesnutt 2150-66).¹⁹⁵ The climax of the novel occurs when a group of white men, spurred on by editorials in the white daily newspaper, stage a coup to overthrow the city's (duly elected) government. Delamere wants to forestall the lynching of an old family servant who has been accused of robbing, raping, and murdering an elderly white woman; in this case, the white lynch mob want to circumvent the law. The image of the lynch mob vividly illustrates the way in which the public and the law are at odds but the complexities of marriage and property law offer a more pointed example.

Early in the novel, we learn that Olivia Carteret, the wife of editor and white supremacist Major Philip Carteret, is the older daughter of Samuel Merkell, a wealthy landowner, who apparently carried on a relationship with his black housekeeper, Julia. That relationship resulted in the birth of another daughter, Janet. Olivia Carteret cannot bear the sight of her mixed-race sister, who resembles her so closely that they could be twins (Chesnutt 86-92). Janet's appearance publicizes not only her parents' supposedly illicit relationship, but her own relationship to Olivia. The truth of that relationship, however, remains secret until Olivia's aunt, Polly Ochiltree, hints that she stole some documents from Olivia's dying father (Chesnutt 1399,

¹⁹⁵ Charles Chesnutt, *The Marrow of Tradition* (1901), Digireads: 2004.

1416-21). ¹⁹⁶ Ochiltree claims that she acted in her niece's interest, to preserve her family and her inheritance, but her confession has the opposite effect. When Olivia is summoned to her aunt's house by news that the old woman has been robbed and murdered, her quick response is not motivated solely by affection. She fears that her aunt has found and kept "compromising" papers "which would seem to prove the preposterous claims made by her father's mulatto mistress" that she was legally entitled to a share of the family's property (Chesnutt 1801-14). Here, appearance and evidence, seeming and proof are at odds, and there is no room for compromise.

Olivia Carteret worries that her father's papers will confirm the existence and extent of an illicit relationship between her father and a "colored" woman, but instead of revealing a secret crime, they reveal a secret legal relationship, a marriage between her father and his black housekeeper, Julia. Marriage, the relationship at the cornerstone of sentimental nineteenth-century defenses of domesticity, becomes the inexpressible secret. However, this truth emerges only reluctantly and gradually, and never enters the awareness of the larger community. For a variety of reasons, the papers fail to communicate. This failure stems in part from the tenuous bond between writer and reader: written communication assumes a literate and willing reader, but communication breaks down if the document is not read. Here, Olivia avoids reading the papers, but instead "thrust[s] [them] into a bureau drawer;" on the verge of discovery, the family secret is once more hidden away in the furnishings of the home (Chesnutt 2601-07). She withdraws the documents later when she is alone but again fails to read them (Chesnutt 2607-13). Instead, she asks her husband what would happen if "my father had left a will by which it

¹⁹⁶ In recounting Merrell's death, Polly Ochiltree relays the words of both Samuel Merrell and Julia, enacting the roles of both the white master and the black servant, an act that may underscore the similarities between the races rather than their difference.

was provided that half his property should go to that woman and her child?” (*Ibid.*) The thread of communication becomes even more tenuous – Olivia asks her husband to interpret a document that she has not read and that he assumes to be hypothetical.¹⁹⁷ Her husband assures her that the law would not condone such a bequest since, “It would clearly have been due to the improper influence of a designing woman” (Chesnutt 2613-19). Major Carteret assumes the illegality of the will and the impropriety of the motive. Of Janet Miller, Olivia’s mixed-race half-sister, he asks, “Who was she, to have inherited the estate of your ancestors, of which, a few years before, she would herself have formed a part?” (Chesnutt 2619-26). Property cannot inherit property. When Olivia finally reads the documents and discovers that her father left a bequest of money and property to Janet, she burns the will, convinced that the bequest will only expose her father (and her) to shame.

When Olivia presents the story of the marriage certificate to her husband as a hypothetical, he says that if Merrell had married Julia “during the military occupation, or over in South Carolina, the marriage would have been legally valid, though morally and socially outrageous” (Chesnutt 2717-23). In those circumstances, if he had died intestate, the property would have been divided equally between Janet and Olivia – more than Merrell left in his will (Chesnutt 2723-30). Carteret’s reply demonstrates that the legal and the social are at odds, as the narrative notes in legal terms; for Merrell to have had a sexual relationship with his housekeeper was a “social misdemeanor” (Chesnutt 2730-36). To have married her was an “unpardonable social sin” (Chesnutt 2736-42). An illicit relationship is a minor legal infraction, but a legal

¹⁹⁷ Readers who have a familiarity with law will recognize Olivia’s presentation of hypothetical situations as a staple of legal education: law students are asked to analyze what would happen, under existing law, in a speculative set of circumstances.

relationship is, paradoxically, sinful (or in the words of *State v. Ross*, immoral and unnatural).¹⁹⁸

In contrast to *The Scarlet Letter*, where an illicit relationship is both sin and crime, the marriage at issue here is lawful but “sinful” – in the eyes of society, if not the church – and both types of relationships are secret.

At the root of laws prohibiting interracial marriage is a fear of mixed race children, a fear of confusing the “purity and distinctness of the races.”¹⁹⁹ But in *The Marrow of Tradition*, the purity and the distinctness of the races is a fiction – the mixed-race Janet Miller looks so much like her white sister that they could pass for twins while the scion of the aristocratic white Delamere family commits crimes in blackface. The lurking fear of future generations of mixed race children is undercut by the novel’s grim view of futurity: the Millers’ young son (identified as black) is killed in a white supremacist riot while the Carterets’ baby, the focus of his father’s dynastic hopes, is sickly and constantly in peril. (In fact, at the end of the novel, the child’s life depends on the intervention of the African-American Doctor Miller.) The future as represented by these children seems tenuous. Instead of children, this society’s fear of miscegenation produces ghosts. The law – like family secrets – acts as an unquiet spirit. Chesnutt writes of Olivia’s “haunting fear” that she would be disinherited and her relief when she assumes that her father’s will was not valid (Chesnutt 2619-25). However, even after Olivia burns the will, she finds that “the carbon residue of one sheet still retained its form and she could read the words on the charred portion. A sentence which had escaped her eye in her rapid reading stood out in ghostly black upon the gray background” (Chesnutt 2637-44). That sentence, which describes her as “the child of my beloved first wife,” sends Olivia back to the envelope that contained the

¹⁹⁸ Olivia compares the marriage to “some terrible crime” (2767-73). While she has committed the illegal act – destroying her father’s will – she imputes the illegality to him.

¹⁹⁹ Of course, these laws do not prohibit interracial relations *per se*, nor do they prevent the birth of mixed race children. What they circumscribe is the legality of the relationship.

will (*Ibid.*). There, she finds “a thin folded paper which had heretofore escaped her notice” (as the white citizens willfully overlook so many things) (Chesnutt 2644-49).²⁰⁰ The paper proves to be a marriage certificate from South Carolina, dated two years before her father’s death, confirming his marriage to Janet’s mother (*Ibid.*). This paper too goes into the fireplace and “the record of poor Julia’s marriage was scattered to the four winds of heaven as her poor body had long since mingled with the dust of the earth” (Chesnutt 2656-61). Bodies and papers are the same here, a reminder of the contingent legal status of African-Americans both before and after the Civil War.²⁰¹ But like the documents that will not remain hidden, the truth about Merrell’s marriage refuses to remain suppressed: “She had destroyed the marriage certificate, but its ghost still haunted her” (Chesnutt 2705-11). Here, the law exists in persistent traces, but persistent traces linked to secrecy and death.²⁰²

In *The Marrow of Tradition*, both law and truth are hidden while untruth is publicized. For example, Carteret’s newspaper reports the arrest of an aging black servant, Sandy Campbell, for Polly Ochiltree’s murder. Although Sandy is eventually exonerated, the false report is disseminated and sensationalized:

²⁰⁰ The envelope also contains a letter addressed to old Delamere (*Ibid.*). The letter reveals that Merrell wanted Delamere to “carry out his wishes, appreciate his motives and also “preserve the silence I desire” (2661-68). However, the letter fails to communicate since it has been diverted by Merrell’s sister-in-law and by the time Olivia discovers the letter, Delamere is dead. Delamere suffers a similar fate – he dictates a new will disinheriting his grandson, leaving Sandy three thousand dollars and devising the rest of the state to Dr. Miller to use for his hospital and nursing school (2391-97). Delamere tells Belmont to “lock it up in your safe until I die”; however, “[t]he will was never produced.” (*Ibid.*) Belmont does not reveal the contents of the will since it has “been made under the seal of professional secrecy” (2403-09). Belmont does not destroy the will but locks it away to show Tom in case he “might wish to change his legal adviser” (2409-15).

²⁰¹ Russ Castronovo’s claims are useful here. He argues, public space becomes marked as deadly: “Guaranteed formal equality and cultural autonomy, the citizen encounters politics as a near-death experience: he or she thus prefers privacy to public life, passivity to active engagement and forgetting to memory” (3).

²⁰² The imagery recalls the introductory narrative with which Mammy Jane regales Dr. Price, who reflects that “As family physician and father confessor . . . [he] has looked upon more than one hidden skeleton” (80-86). The hidden documents also recall Mammy Jane’s hidden charms which are meant to protect little Dodie but prove ineffective.

All over the United States the Associated Press had flashed the report of another dastardly outrage by a burly black brute – all black brutes it seems are burly – and of the impending lynching with its prospective horrors. This news, being highly sensational in character, has been displayed in large black type on the front pages of the daily papers. The dispatch that followed, to the effect that the accused had been found innocent and the lynching frustrated, received slight attention, if any, in a fine-print paragraph on an inside page. The facts of the case never came out at all (2384-91).

In the end, the documented falsehoods prove to be more harmful to the community than Tom Delamere's individual blackface masquerade. The newspaper and its increasingly sensationalistic accounts of the crime not only conceal Tom's guilt and obscure the truth; they create an alternate narrative that perpetuates a lie. The newspaper here not only undermines the ability to form an authentic self but constructs a fictional persona for Sandy Campbell and his community, opposing the legal documents at the heart of the case.²⁰³ In Heather Andrea Williams' account of slave literacy and self-formation, the newspaper serves as a means of communication between the pro-abolition North and slaves in the South. In Mattie Jackson's narrative, Union soldiers "took much delight in tossing a paper over the fence to us" (H.A. Williams 10). Jackson's mother even put up a newspaper photo of Lincoln in her room (*Ibid.*). The soldiers' defiant action assumes that the slaves are literate and assures them that they are not alone, that the war continues on their behalf. By the time of Chestnut's novel, the press has assumed a more

²⁰³ Chestnut's novel serves as a commentary on the unreliability of the press in other ways: it is a fictionalized account of race riots that took place in Wilmington, North Carolina in 1898. See Jae H. Roe, "[Keeping an 'Old Wound' Alive: The Marrow of Tradition and the Legacy of Wilmington](#)," *African American Review* 33:2 (Summer 1999), 231-43.

malevolent role. The press helps to relocate the African-American Wellington (and, implicitly, the rest of the South) from the center of the society to the margins. Chesnutt's novel ends with multiple deaths and the threat of even more. The law embodied by Merrell's will and Delamere's offers no life to future generations, occupying an uneasy and deathly place. Of course, these documents are not written by the novel's African-American characters; they are written about them. The novel depicts only one piece of writing by an African-American, a "frank and somewhat bold discussion of lynching . . . [that] denied that most lynchings were for the offense most generally charged as their justification" (Chesnutt 888-95). But this indictment of an illicit practice "violates an unwritten law of the South" assailing the wisdom of white men who act outside the law (Chesnutt 900-06). This article becomes the pretext for a brutal suppression of the black community. Writing here does not free but leads to privation.

The post-bellum change in the newspaper depicted by Chesnutt suggests that privation has spread beyond the slave quarters, and what has been a means of acquiring freedom becomes a mechanism for oppression. The novel illustrates a bitter insight: neither literacy nor the truth will set you free. Miller is educated; the African-American community has its own press, its own public sphere. But these measures only rouse anxiety and resentment. The white population of Wellington appear to feel that they have been oppressed by the emancipation of the slaves and their incipient social ascendancy. Carteret uses his newspaper to express a sense of personal and racial grievance, and to put the town's black citizens in their place, both literally and figuratively. This episode encapsulates both anxiety about the role of the press and a growing sense of white deprivation, a sense of deprivation that perhaps underlies the articulation of the right to privacy. The change in the function of newspapers shows the spread of privation. However, it is not only those at the margins who feel ill-served by the predations of the modern press. The anxiety over

misrepresentation felt by Sandy Campbell and members of his community was shared by those at the very center of *fin-de-siecle* American society.

5.0 FROM THE MARGINS TO THE CENTER: RELOCATING THE NEED FOR PRIVACY

In his 1869 guidebook, *Sunshine and Shadow in New York*, Matthew Hale Smith took his readers on a tour of New York City, introducing them to the highs and lows of the great metropolis, although the city seemed to offer little to Smith's imagined readers in the way of domestic peace.²⁰⁴ He cautioned them, "As a home, [New York] has few attractions for the stranger. Its babel and confusion distract and almost craze. Its solitude is distressing. In the midst of a crowd the stranger is alone" (Smith 26). Smith's depiction of the city underscores the paradox of urban life, an experience both crowded and isolating. The city dwellers of nineteenth-century America live in unprecedented proximity, beside (or above or beneath) their neighbors, but this proximity does not translate into intimacy. Smith evokes the tower of Babel, the biblical tale explaining linguistic differentiation to illustrate the cacophony and division of the city. Its residents may share physical space but they don't share a common tongue. Instead, the defining condition of urban life seems to be solitude. But, he advises, this apparent isolation transforms into something else after a short residence: "The loneliness and solitude find a compensation in the independence which each family and person secures. A man in New York can live as he pleases . . . No one will meddle with him or trouble him unless he undertakes to make a great display" (Smith 27). If privacy can be construed as freedom from attention, then the city, with its

²⁰⁴ Matthew Hale Smith, *Sunshine and Shadow in New York*, Hartford: J.B. Burr & Co., 1869.

abundant population, guarantees that no particular person will receive undue (or unwanted) attention. Smith suggests that the city offers a kind of privacy that is not commensurate with or defined by physical space, underscoring the difference between privacy and other sorts of “property” rights.

At the same time that Smith asserts that New York offers its citizens independence and freedom from unwanted attention, however, he packages the city and its residents as spectacle for his readers. Smith writes glowingly of the “panorama” of Broadway, the “elegant goods” on offer in the shop windows, the “ladies” who “dress so elegantly, and with so much expense, for the street” (27-8). While a city-dweller may be free from interference, he or she is still an object of admiration or observation. He concludes, “Orators, musicians, and men on whom nations like to look come to the very doors of the residents of this city” (Smith 28). But Smith does not direct his readers’ gaze only to the elegant and prominent, those who make a “great display.” For more than 700 pages, Smith guides his readers through all the sights of New York, not just society balls and grand churches, but also tenements and “houses of ill repute” (371). There is no moral project behind this display of the poor, the criminal, and the notorious; they are spectacle as much as the theaters and shop windows. The contents of the book appear random: a profile of a Wall Street stockbroker immediately follows a sketch of Jewish Sunday Schools; a description of the Vanderbilt home precedes “A Walk Around Five Points.” In its apparent randomness, the guidebook promises access to the full scope of New York society, offering up both high and low for its readers’ amusement. The guidebook’s approach is as broadly democratic as the educational project of letter-writing guides that sought to teach commoners how to address kings. But here both the prominent and the pedestrian are present to the reader, brought into proximity not through conversation but through Smith’s voracious gaze. His reader does not learn how to

interact with these diverse characters; instead, the reader observes. The book betrays a desire to see and to know as it reduces the entire metropolis to an object of (visual) consumption. Smith's New York is a place of extremes, of "sunshine and shadow," that can be reconciled, perhaps, only as both of those extremes are consumed for the instruction and entertainment of the middle class. The wealthy and prominent seem to invite display, and thus deserve whatever attention they get. Even Smith's description of elegant, upper-class ladies slyly equates them with prostitutes in the brothels: like their poorer sisters, these fashionable women "dress . . . for the street." At the opposite end of the economic scale, the poor have no way to prevent themselves from being seen. Only the person who relocates to the city with a desire to live independently can hope to escape notice.

Smith was not the only writer to render New York's social diversity as an object of tourism. Other books in this genre include *Lights and Shadows* by James Dabney McCabe, *Miller's New York As It Is* by James Miller, *The Great Metropolis: A Mirror of New York* by Junius Henri Browne, and *New York Illustrated*. All of these guidebooks assume that their reader can move easily through both Wall Street and the Bowery, and is not confined to any one place.²⁰⁵ The guidebooks also reflect a vast change in American society: between "1790, when the Bureau of the Census began keeping records, [and] 1890, the population of the United States had grown from four million to sixty-three million people."²⁰⁶ The tourist is interested in and privy to all of the places described. In these volumes, both wealth and poverty provide worthy

²⁰⁵ *New York Illustrated* offers both visual and verbal portraits of the sites it recommends, including the residents of the tenement among the features a tourist should look for: "The narrow street or alley reaching between the high walls of windows, dirtily tiered one row above the other, is more like a tunnel than a thoroughfare . . . yet little children are playing in it – tossing oyster-shells or throwing stones at a dead kitten." *New York Illustrated: containing illustrations of public buildings, street scenes, and suburban views; with a map and general stranger's guide*. D. Appleton & Co., 1870, p.35. The image is both picturesque and disturbing, a parody of domestic cheerfulness.

²⁰⁶ Dorothy L. Glancy, "The Invention of the Right to Privacy," *Arizona Law Review* (1979) 1-72, 7.

objects of urban voyeurism. The lingering question was whether those in the mansions or those in the tenements were worthier objects of scrutiny, and if privacy properly belonged in either, or both, of those domiciles.

In this chapter, I examine how, at the end of the nineteenth century, the lack of privacy that characterized the lives of the poor and marginalized came to be associated with more privileged citizens. I consider the ways in which the rise of the city and the press contributed to this perception. Finally, I argue that in delineating the constitutional right to privacy, Samuel Warren and Louis Brandeis appropriated arguments made about the dangers of publicity and surveillance as well as concepts of personhood associated with those on the margins.

5.1 CROWDED ROOMS: TOURISM AND TENEMENTS IN THE LATE NINETEENTH CENTURY

If in the earlier years of the nineteenth century those on the margins had suffered from an apparent excess of privacy, tipping over into privation, a different narrative emerged in the years following the Civil War. According to this narrative, life at the margins was characterized by a lack of privacy. In one of his autobiographies, Booker T. Washington writes of the ways in which freedom from slavery did not translate into freedom from deprivation, vividly depicting the squalor and enforced intimacy that characterized his family's situation. After emancipation, the family moved from the plantation to a salt-mining community outside Charleston, West Virginia (Washington 190). However, the physical conditions of freedom were no better than

those of slavery. Washington writes that the family's new home was worse than the one they had left behind:

Notwithstanding the poor condition of our plantation cabin, we were at all times sure of pure air. Our new home was in the midst of a cluster of cabins crowded closely together, and as there were no sanitary regulations, the filth about the cabins was often intolerable. Some of our neighbours were coloured people, and some were the poorest and most ignorant and degraded white people. It was a motley mixture. Drinking, gambling, quarrels, fights, and shockingly immoral practices were frequent (26).

Washington's catalogue of social ills suggests that privacy isn't the cause of illicit behavior, but lack of privacy is.

Jacob Riis's *How the Other Half Lives* indicts and reproduces this lack as it leads readers through New York's tenements at the end of the nineteenth century. Riis's narrative voice functions as a tour guide, taking readers on an intensely visual excursion along Mulberry Street and the Bend, and through "Jewtown." A common theme in all of the neighborhoods is an utter lack of privacy. Tenement residents, marked by their ethnic difference and immigrant status, attract attention and interference both benign and hostile. Lack of privacy extends from living conditions to seemingly inescapable surveillance. Not only are several individuals crammed into a single room, but they are subject to invasion by police officers, by housing inspectors, and of course, by Riis, with his camera and his amateur sociologist's curiosity. Their lives are subject to curiosity, evaluation, and oversight as Riis photographs, describes, categorizes, and sometimes dismisses the ethnic poor of New York. His apparently charitable interventions mimic the less benign actions of various authorities.

Riis's vivid account promises his readers direct access to the spectacle of poverty. He frames his narrative as a tour, directly addressing his reader as if that reader can see what he sees. Riis conveys a sense of immediacy: "Take the Second Avenue Elevated at Chatham Square and

ride up half a mile through the sweaters' district. Every open window of the big tenements . . . gives you a glimpse of one of these shops as the train speeds by".²⁰⁷ Riis's method forces his readers to see and know what happens behind the walls of the tenement. His stated purpose is to familiarize his readers with "the fate of those who were underneath," visually and socially beneath regard (Riis 1). To do so, he must expose, in both word and image, "every hiding-place and nursery of crime" and poverty (*Ibid.*, quoting the Secretary of the Prison Association of New York). This language suggests that Riis is out to discover secrets, and that those secrets are bad. Throughout his study Riis writes of bringing things to light both metaphoric and literal, of opening windows into the crowded tenements, of revealing unknown situations. Paradoxically, though, Riis described the defining condition of the "other half's" life as constant, unwanted attention.

While Riis justifies his chronicle as a necessary exposure of hidden ills, he establishes that lack of privacy is, in fact, an attending condition of the life of the poor. Exposure is unnecessary because their lives are lived in a constant state of panoptic regard. Riis's relentless expose appears to confirm the notion that privacy is linked to property, that it is a luxury or a privilege rather than a right. Riis's fantasy of access vividly illustrates his claim that "the absence of (privacy) is the chief curse of the tenement" (122). It also suggests that the only type of privacy that may be enjoyed by "those underneath" is negative and suspect.²⁰⁸ Secrecy may be associated with criminality too, with the stale-beer dives of Riis's narrative, unlicensed bars that

²⁰⁷ Jacob Riis, *How the Other Half Lives: Studies Among the Tenements of New York* (1890), Lorenzo Domingues, ed., Chelento Ink: NY, 2012, 97.

²⁰⁸ In his wide-ranging study of secrecy and privacy in the eighteenth century, Michael McKeon suggests that the dividing line between the positive and negative capacities of privacy, the freedom to vs. the freedom from, may be located in the interstice between privacy and secrecy. According to McKeon, privacy delineates a negative liberty, protection from "unwanted access by others" while secrecy is a "category of traditional knowledge" which often separates those in the know, those in power, from others McKeon, Michael. *The Secret Life of Domesticity: Public, Private and the Division of Knowledge*. (Baltimore: The Johns Hopkins University Press, 2005, 469 (citing Sissela Bok, *On Secrecy: The Ethics of Concealment and Revelation* New York: Pantheon, 1982, 5).

were subject to regular raids, or with unlicensed gaming establishments was subject to laws that applied to public gaming establishments.²⁰⁹ The only sort of privacy these tenement dwellers may enjoy is illicit, as evidenced by Riis's account of the "inscrutable" Chinese – to the extent that they are private, they are foreign, unknowable, unassimilable. Indeed, to the extent that the Chinese inhabitants refuse to present a suitable spectacle to Riis and his readers, Riis dismisses them as irredeemably foreign. He writes of the Chinese neighborhood, "Chinatown as a spectacle is disappointing. Next-door neighbor to the Bend, it has little of its outdoor stir and life, none of its gayly-colored [sic] rags or picturesque filth and poverty" (Riis 93). Riis compares Mott Street (the main avenue of New York's Chinatown) unfavorably with the quintessentially Caucasian Fifth Avenue for dullness, but he does not take this robust rejection of the picturesque as a point of similarity between the two cultures. Rather, he says, "[s]tealth and secretiveness are . . . part of the Chinaman in New York . . . His business, as his domestic life, shuns the light . . . the very doorways of his offices and shops are fenced in by queer, forbidding partitions suggestive of a continual state of siege" (94). Riis associates the unforthcoming nature of Chinatown with vice, with prostitution and drug addiction, concluding that, for those who fall into the "dissipation" of Chinatown, "there is neither hope nor recovery; nothing but death – moral, mental, and physical death" (103). Thus, lack of privacy is a curse, but the immigrants' insistence on privacy on their own terms leads to death.

At the same time that Riis was writing about the visibility that attended the life of the urban poor, American courts were enforcing limits on the ways in which wealthier property

²⁰⁹ *Smith v. Alabama*, 52 Ala. 384; 1875 Ala. LEXIS 360 (Ala. 1875). The court here found that the establishment's secrecy formed part of its attraction. In *Frantic Panoramas*, Nancy Bentley also elides the difference between secrecy and privacy, although her case studies are primarily middle and upper-middle class writers. She argues that in James's novels (including *The Death of the Lion*) the desire to enter into locked rooms or locked desks is equated with the desire to obtain some sort of secret, primarily sexual (47).

owners could escape scrutiny. Up until the last years of the nineteenth century, a property owner could build a structure as high as he wanted, even if that structure obscured his neighbor's view or access to sunlight, as long as it was on his own land.²¹⁰ In 1887, however, Massachusetts passed a law restricting the construction of "spite fences," that is, any fence over six feet high, built for the purpose of annoying or inconveniencing one's neighbors. A property owner challenged the constitutionality of that statute, but in 1889, writing for the Massachusetts Supreme Court, Justice Oliver Wendell Holmes, held that "[a]ny fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."²¹¹ Here, the property owner's motive is crucial to the ruling; his right to do as he wants with or on his own property is not absolute. In an increasingly urban landscape, property owners must be good neighbors and not build bad fences.

Jacob Riis was not the only author who presented the lives of the poor as an edifying spectacle. Other works of the time, both fictional and nonfictional, treated marginalized ethnic or economic groups as worthy subjects for contemplation. The well-intentioned voyeurism of Riis's expose is rendered as entertainment in William Dean Howells' *A Hazard of New Fortunes*, also set in New York. Here, to be visible means both display and deprivation. Basil and Isabel March, relocated from staid Boston to New York, treat their fellow citizens as a form of entertainment (an entertainment the Marches can enjoy only because of their own position of privilege). They travel on the elevated train, which the Marches prefer because, as Basil observes, "it was better

²¹⁰ *Camfield v. U. S.* 167 U.S. 518 (1897) citing *Mahan v. Brown*, 13 Wend. 261; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294; *Pickard v. Collins*, 23 Barb. 444; *Clinton v. Myers*, 46 N. Y. 511; *Phelps v. Nowlen*, 72 N. Y. 39; *Walker v. Cronin*, 107 Mass. 555, 564).

²¹¹ *Rideout v. Knox*, 148 Mass. 368, 369 (1889).

than the theatre, of which it reminded him.”²¹² They observe the people whose dwellings they pass, reflecting with pleasure, “What suggestion! What drama! What infinite interest!” (Howells *Hazard* 76).²¹³ The tenement dwellers unwittingly provide the Marches with a service that has commercial value, but they do not enjoy the benefits of that service. Further, this anecdote suggests the ways in which voyeurism had become entertainment. The fact that the Marches can view the lives of others as entertainment shows the distance between the middle-class family and the objects of their gaze. At the same time, this spectacle of poorer lives from which they are safely removed offers the illusion of relationship: Isabel March opines, “The fleeting intimacy you formed with people in second and third floor windows . . . had a domestic intensity mixed with a perfect repose that was the last effect of good society with all its security and its exclusiveness” (*Ibid.*). Separated from the apartment- (or tenement-) dwellers by the barrier of class (and possibly language) as well as by the physical barrier of steel and brick, Isabel nonetheless feels an intimacy that crosses those barriers. She imagines herself in sympathy with the people whose lives she observes; they are fleetingly part of the same (good) society – but of course Isabel is literally and figuratively mobile at this moment. The mobility that gives her access to the “family party of work-folk” and a “woman sewing by a lamp” also propels her away from them. Isabel March’s ability to look at and be amused by the lives of others marks her privileged position.²¹⁴ This regard skims the surface – the Marches do not imagine the inner lives of the people they pass by.

²¹² William Dean Howells, *A Hazard of New Fortunes* (1889), New York: Modern Library, 2002, 76.

²¹³ March briefly entertains the notion that he will write a series of articles exposing the condition of the poor in the city, but the articles never get written.

²¹⁴ Mobility in this novel encompasses both the ascent of the class scale (as in the case of the Dryfooses) and the flaneur’s consuming interest in spectacle (as in the case of the Marches). However, this mobility also shows a marginal experience moving into the center. All of these white, more-or-less middle-class characters seem to

Elsewhere in the novel, the Marches' voyeurism seems far less benign. Even after they have lived in New York for some time, the Marches like to travel on the "elevated roads which, he said, gave you such glimpses of material aspects in the city as some violent invasion of others' lives might afford in human nature" (Howells *Hazard* 305). The Marches are not just audience members here; they are witnesses to, or perhaps perpetrators of, an invasion.²¹⁵ Voyeurism shades into violence. The negative connotations of being on display prompt Isabel March's reaction when her husband convinces her to catch a ride on the roof of a passing bus. Isabel is scandalized: "'Think of our doing such a thing in Boston,' she sighed with a little shiver of satisfaction in her immunity from recognition and comment" (*Ibid.*). Isabel enjoys the moment of privacy in publicity: she is visible, conspicuous even, but she is anonymous. Because she and Basil are not surrounded by their "peers," she can escape recognition and comment while on display. (It is no accident that Boston is described as "close-shuttered" in contrast to New York (Howells *Hazard* 308).)²¹⁶ Isabel does not want to be on display to others as the tenement-dwellers are on display to her. Privacy seems to be not only connected to property, but is a kind of property itself, belonging to those who can afford the physical space to evade the gaze of

replicate, in limited ways, the experience of the immigrant; they must acclimate to new surroundings and new codes of conduct

²¹⁵ To be seen is to be vulnerable, a fact which is underscored by Colonel Woodburn's reaction when Fulkerson and Alma persuade his daughter to have her portrait drawn for the cover of *Every Other Week*. The Colonel vehemently refuses to having the sketch printed (204-05).²¹⁵ While he does not explain his objections, the novel suggests that people on display are too vulnerable to protect themselves (the tenement dwellers, Lindau) or too vulgar to know better (the Dryfooses).

²¹⁶ The Marches' attitude toward their home demonstrates their anxiety about display. They conceive of their home as both a measure of their character and as sacrosanct. In Boston, the Marches "had beautified [their home] in every way, and had unconsciously taken credit to themselves for it. They felt with a glow, almost of virtue, how perfectly it fitted their lives and their children's, and they believed that somehow it expressed their character" (26). This reflection emerges in part from consumer culture, from the "good pictures" they have acquired from an aunt and the books on which Basil "spent more than he ought" (*Ibid.*). But these objects are not for public display, since the Marches "kept to themselves" (*Ibid.*). The impermeability of their home, and their contempt for the showy ornamentation of their New York flat reinforce the notion that to be seen, or to desire to be seen, is lower-class.

others. In contrast, to be seen means to be reduced to a form of entertainment – to become a commodity oneself.

5.2 FAITHLESS CORRESPONDENTS: THE RISE OF THE NEWSPAPERMAN

For those who lacked Basil and Isabel March's access to the homes of others via the high road of urban tourism, there were other ways to find out about the lives and domestic practices of others. Writing in *The North American Review* in 1887, Dion Boucicault castigated the press for its corruption. He described it as the "tribune where Public Opinion is supposed to express and declare the will and mind of the world. The divinity from which few secrets are concealed, the tribunal to which public and private woes are amenable."²¹⁷ But, according to Boucicault, the commercialization of the press meant that newspapers would focus on those stories that would generate the most sales: the press's "emissaries were sent into the houses of private citizens to obtain the offal of society – the filthier the better" (*Ibid.*). The press created a market in private lives, allowing American citizens to peer into the windows of their neighbors' homes, sometimes with devastating consequences.

In the last years of the nineteenth century, technology permitted a resident of one city to read about and communicate with the residents of another in what seemed like the blink of an eye. But this was not always a force for good. Garbled communication could lead to misunderstanding and ruin. The press and the new technologies available in the latter quarter of the nineteenth century give the illusion of the kind of access to upper class homes that tourists

²¹⁷ Dion Boucicault, "The Decline and Fall of the Press," *North American Review* (July 1, 1887).

like the Marches have. The press offers virtual voyeurism. Jacob Riis needs to talk (or push) his way into his subjects' homes and Isabel March needs to ride on an elevated train that allows her to physically peer into the tenements, but newspapers do the looking for you – you can see what people do. But you also see their secrets, the sorts of things that are hidden behind the doors in the Chinese tenement. In August 1892, emerging technologies came together with an emerging press to sponsor litigation. A correspondent for the *World* newspaper in Cincinnati identified only as “Tarbell” hired a young man to compile all “good news” suitable for the paper’s New York edition.²¹⁸ The newspaper took precautions to ensure that communication between its offices remained as direct and clear as possible: a story was sent by telegraph through wires that came directly to the newspaper’s offices rather than passing through city telegraph offices. When it arrived, telegraph company employees stationed in the paper’s offices took down the messages, which were then delivered to the telegraph desk where they were turned over to the telegraph editors. The appropriate editor then reviewed the message not only “to correct the English” but also “to eliminate anything which he thinks does any injustice to anybody or anything, or which causes a doubt in the mind of the reader as to the accuracy of the dispatch, and to put headlines on” (*Ibid*). After the editor’s review, the story was passed on to the composing room and printed (*Ibid*). Tarbell’s new writer sent him an item that said, “Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio manager of the Standard Oil Co. until six months ago, when he strangely disappeared, had been located, living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane, and will be brought to a sanitarium here” (*Ibid*). However, when the message was published in the *World* on August 18,

²¹⁸ *Press Publishing Co. v. McDonald*, 63 F.238 (2d Cir. 1894), 238 - 248, 240.

1892, the story diverged substantially from the original telegram. The article stated, "McDonald, Southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada." The story ran under the head-line, "Missing Millionaire McDonald Located." (*Ibid.*)

Hauled into court by the outraged McDonald, representatives of the newspaper assured the judge that the *World* took precautions to ensure the accuracy of what it printed. The custom in the newspaper office was that, when an editor received a telegraph from another city, he could not change the wording unless there was something on the communication's face that made him doubt its accuracy (*Ibid.*). If he had doubts, he could opt to withhold the message from publication, depending on its importance (*Ibid.*). Apparently, when the telegram concerning Evan Smith reached the desk of the appropriate editor, nothing about the message sounded any alarm bells. McDonald sued the paper for libel. He claimed that the phrasing of the story suggested criminality:

the statement that a man of great wealth had strangely disappeared, had secreted himself for six months, and was finally found living in luxury at some small Canadian town, was calculated to suggest to the community in which the libel in this case was published the impression that he had been guilty of some offense against the civil or criminal laws, or of immoral or discreditable conduct (*Press Publishing Co.* 242).

In many ways, McDonald's claim is typical: he asserted that the paper had injured him by implying that he had engaged in criminal conduct. What made his case worthy of preservation was the ground he asserted for recovering damages. At trial, the incensed millionaire introduced evidence of his social standing to show that he had suffered more because of this publication than a person of lower status might have. On appeal, the defendant newspaper claimed that such evidence was improper, arguing that the only purpose of such evidence was to show that since plaintiff was "a man of very high position in the world [the jury] could only pay him for his

wounded feelings by a verdict out of all proportion to that which would be given to an ordinary citizen" (*Ibid.*). The appellate court for the Second Circuit held that, "the condition in life of the plaintiff may properly be given in evidence in chief to aggravate damages" (244). In other words, the harm is greater if the social standing is greater.

The story illustrates a shrinking world – not only did technology enable a reporter from New York to tell readers in Cincinnati about the supposed misdeeds of a fugitive in Canada, but the newspaper itself assumed that such a story would excite broad interest. Relatively trivial news is national rather than local (the newspaper's name conveys the scope of its ambition and its imagined community: the *World*). But the very things that seem meant to enable communication and connection instead foster misunderstanding and liability. The case combines print culture, technology, and social status to demonstrate what Warren and Brandeis called the complexity of life in the nineteenth century. Gossip about the employee and brother-in-law of a millionaire was relayed over the telegraph wires, and as in a children's game of telephone, the message became garbled. The employee's mysterious, possibly criminal, conduct was attributed to the employer, transforming an already juicy story into something potentially more significant. McDonald argued that the story borrowed its significance and its scandal from his social standing: if he had not been socially prominent, the story would not have been read so eagerly or harmed him so much.

The implications of the case are troubling for students of American law. If McDonald was correct and the damage done to a socially and financially privileged man was greater than the average citizen might have suffered, then the privacy of the privileged is more valuable. By finding in favor of McDonald's claims, the court indicates that concerns about privacy have

ascended the social ladder; a right initially located in marginalization has moved into the centers of power.

That shift exemplifies a new experience of disempowerment. It wasn't only Riis serving up the spectacle of private lives and it wasn't only the poor marked for consumption. For the first time, men like McDonald were finding themselves subject to the democratizing influence of the American press. Matters that might have been private scandals a generation earlier were reported in newspapers and consumed by the American public. Ordinary citizens could scrutinize the conduct of millionaires. At the same time that wealthy citizens like McDonald were asserting their worth, courts were granting greater leeway to the press. In *McAllister v. Detroit Free Press Co.*, the Michigan Supreme Court stated:

It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it had heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and widespread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be greater immunity to gossip in the newspapers, although the harm to the person injured is infinitely greater than it would be if published otherwise.²¹⁹

The court's figuration of the conflict sets the wealthy citizen not only against the press but against the greater public – “people are hungry for the news.” Even the court's metaphoric language here equates information with a basic need. The people are *hungry*.

And this hunger was decidedly unrefined. Nancy Bentley in *Frantic Panoramas* cites Charles Eliot Norton's “The Intellectual Life of America” (1888), which laments the average

²¹⁹ *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318, (1889).

American's appetite for "the coarse stimulants of personalities and scandal."²²⁰ Cheaper postal rates allowed magazines to proliferate, and daily newspapers increased from 574 in 1870 to 2,226 in 1900 (Bentley 32-3). Linotype machines and printing presses increased the amount of available printed material as well (Bentley 34). Wide distribution also "ma[de] physical place less consequential" (Bentley 35). The growth of new technologies (as well as the expansion of print media) had raised fears about the future of privacy. The development of telephones, typewriters, mechanical typesetters and telegraphic news corporations "enhanced capacity for swift gathering and disseminating of news."²²¹ There were more cities, more citizens, and more information in circulation about them. With an expanding print culture that made materials available across vast geographic distances, the notion of a purely physical right to privacy, based primarily on property, seemed less and less possible. Consumers were interested not in acquiring others' property or impinging on their lands, but in devouring stories, in learning about the details of others' lives. But how do you protect yourself from curiosity?

However, this change did not establish a new, more democratic and available public space. Rather, it fragmented physical communities, leading to a sense of isolation. Alan Trachtenberg argues that the proliferation of newspapers dramatized a paradox of metropolitan life: "the more knowable the world came to seem as *information*, the more remote and opaque it came to seem as *experience*" (125, emphasis in the original). Technology, urbanization, and the corresponding rise of the newspaper created a demand for intimacy, or at least the illusion of intimacy:

²²⁰ Nancy Bentley, *Frantic Panoramas: American Literature and Mass Culture, 1870-1920*. Philadelphia: University of Pennsylvania Press, 2009, 32.

²²¹ Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age*. 25th anniversary ed. (New York: Hill & Wang, 2007), 123

Each individual paper, a replica of hundreds of thousands of others, served as a private opening to a world identical to that of one's companion on a streetcar, a companion likely to remain as distant, remote, and strange as the day's 'news' came to seem familiar, personal, and real (*Ibid.*).

In other words, the proliferation of newspapers did not simply enable citizens to learn about and identify with the subjects of their stories, people different (and perhaps distant) from them; the newspaper also contributed to the fragmentation of the actual, physical community. The citizen's place in the world became more abstract. The danger to privacy comes not from trespassers but from information. But the question remains: what is at stake? Certainly, in the case of millionaires like McDonald, information could harm both commercial interests and social standing. But the law of privacy argues that even more is at stake. Warren and Brandeis seek to protect something beyond the financial and the social. I will address precisely what that "something" is below, but I want to suggest that literature offers a fuller (more nuanced, more flexible) vision of the dangers posed by the tabloid world. Howells and James argue that what is at stake is nothing less than the self – relentless exteriorization empties out the individual. Writing – at least newspaper writing -- does not create or express the self but usurps it. The tabloid replaces the letter.

William Dean Howells's *A Modern Instance* (1882) explores a culture in which writing seems to offer no hope for interiority or privacy – the intent is to publicize. *A Modern Instance* was a sensation at the moment of its publication, heralded as a reflection of *au courant* ideas and concerns (it seems very nearly ripped from the headlines). By the time Howells wrote his book, an "Indiana divorce" was part of the cultural conversation: Indiana was known for its lenient divorce code and, by the 1850s, the development of the railroad made it the destination of choice

for residents of other states looking for a quick divorce.²²² By 1873, the statutes were revised to require two years of residency by a party and proof (Basch 212, n.53). Moreover, divorce trials represented a new phenomenon for newspapers; special pamphlets generated by these events were part of the print explosion of the nineteenth century (Basch 148). But while *A Modern Instance* seemed entirely of its moment at the time, in the decades since its publication, this early Howells novel has been largely ignored or treated as an historic curiosity, an ironic bit of reportage from a particular cultural moment in which concerns about the growth of newspaper culture and the decline of the nuclear family seemed to coincide. This work, however, may represent a refutation, in both content and form, of the way in which the newspaper overtakes personal life. Nancy Bentley argues that the plot of *A Modern Instance* parallels the sensational newspaper events that Howells decries, suggesting perhaps that the realist novel is a more appropriate medium for considering such topics than is the newspaper (84). Realistic literature “was to be a bulwark against the power of the market to remake the real” (Bentley 85).

The novel seems at first a simple cautionary tale: an ambitious young man, Bartley Hubbard, and his passionate sweetheart elope, leaving rural Maine for the urban delights of Boston where the young man falls into bad habits and even worse journalistic practices. Bartley abandons his possessive wife and young daughter, eventually seeking a quick and sensational Indiana divorce. But Bartley is not simply an example of deteriorating social mores; he embodies the practices of publicity that threaten those mores. He is both cause and effect. Bartley is, significantly, a newspaperman (there is a pun lurking in that label, which he readily embraces – Bartley is both a professional journalist and a man brought into being by, and with no more substance than, a newspaper). Conversely, he fails to recognize the distinction between public

²²² Norma Basch. *Framing American Divorce: From the Revolutionary War to the Victorians*. Berkeley and Los Angeles: University of California Press, 1999, 60.

and private. He initially presides over a small town journal, where he attempts to give the news a personal cast. There, “He modeled the newspaper upon the modern conception through which the country press might cease to have any influence in public affairs, and each paper became little more than an open letter of neighborhood gossip.”²²³ The newspaper is compared explicitly to an epistle, but it is undirected. There is no intimacy between writer and recipient, only an undistinguished sociality. He uses the newspaper to publicize what might otherwise be private.

Bartley is also a correspondent in the traditional sense. He writes letters – however, these letters are not to his sweetheart, Marcia. Rather, they are intended to be published. Early in the novel, in an effort to create a persona (or a self) that elevates his status in the village, Bartley “sent letters to one of the Boston journals which he reproduced in his own sheet, and which gave him the importance that the best endeavor as a country editor would never have won him with the villagers” (Howells *Instance* 34). The subject of these letters is ultimately Bartley himself: the fact that his letters are good enough to be published in larger urban newspapers makes Bartley himself part of the news. His idea of the public is not the notion of the public square, but of a mass of individuals; his ideal takes a communication whose form and content should be private (a letter) and turns it into a public text. His public does not band together for a common good or common goals, but to share a common fascination with a particular form of

²²³ William Dean Howells, *A Modern Instance* (1881). (Boston, New York, Chicago, San Francisco: Houghton Mifflin Co. 1910), 33. Subsequent citations will be in the text. In contrast to Jacobs’s *Incidents in the Life of a Slave Girl*, *A Modern Instance* has received very little scholarly attention in the last few decades. The most recent scholarly works addressing this curious novel date from the 1970’s, including George Perkins, “A *Modern Instance*: Howells’ Transition to Artistic Maturity,” *New England Quarterly*. 47: 3 (Sept. 1974), 427-39, George Spengler, “Moral Anxiety in *A Modern Instance*,” *The New England Quarterly*. 46:2 (June 1973) 236-49, and Allen Stein, “Marriage in Howells’s Novels,” *American Literature*. 48: 4 (Jan. 1977), 501-24. George Perkins positions this as a transitional novel, not only in terms of Howells’ career, but in terms of setting – the novel moves, he claims, between country and city. Perkins attributes Bartley’s moral disintegration to the social and economic pressures of the city (429). Stein focuses on the social effect of the Hubbards’ marriage, arguing that their conflict contributes to Ben Halleck’s decision to flee into the ministry and Squire Gaylord’s stroke at the divorce trial.

entertainment. His work confuses or eliminates the difference between public and private, with newsprint substituting for intimacy in a very literal way. When Bartley's wife goes on holiday while he stays behind to work, he warns her that his newspaper "must pass for a letter from him when he did not write" (Howells *Instance* 331). Anything his wife would want to, or could, know about him, he suggests, is appropriate material for a newspaper.²²⁴ Bartley turns himself into a journalistic subject. A colleague tells Bartley that, when "I saw in the Record personals that Mr. Hubbard, of the Events, was spending the summer months with his father-in-law, Judge Gaylord, among the spurs of the White Mountains, I supposed you wrote it yourself" (Howells *Instance* 342). Significantly, the account is personal, but inaccurate and inauthentic: Bartley alters the location of the visit (from the backwater of Equity, Maine to the more fashionable White Mountains of New Hampshire) and its length (from a few days to an entire season, suggesting leisure and the wealth to enjoy it). He also promotes his father-in-law from country lawyer to judge. If the newspaper substitutes for a letter to his wife, then it fictionalizes his life, and hers. The newspaper is then no more a guarantee of factual authenticity than the epistle was a guarantee of emotional authenticity: both offer convenient poses.

Bartley also represents a world in which not only his own life, but also the lives of others may be regarded as public property. At one point, Bartley's old friend, Kinney, comes to stay with the Hubbards in Boston. Over dinner, Kinney tells of his adventures and confides, "I've always thought that, if I ever got run clean ashore, high and dry, I'd make a stagger to write it out and do something with it" (Howells *Instance* 354). Bartley promptly writes up Kinney's story

²²⁴ Bartley himself is a blank page on which different texts can be imprinted: When Bartley begins to read law, an attorney questions him on his initial reading. "The very language seemed to have been unbrokenly transferred to his mind, and he often gave the author's words as well as his ideas." Compare this assessment with Ben Halleck's description of Bartley as "a poor cheap sort of creature . . . that assimilated everything to a certain extent and nothing thoroughly" (Howells *Instance* 243). Halleck combines the economic (poor and cheap) with Bartley's ability to almost absorb things but not quite – he is a blank slate, but class-inflected.

and sells it to an editor. While Bartley does not assert that Kinney has given him permission to use his life story as the subject for an article, he claims an even greater privilege. He asserts that he knows Kinney well enough that he doesn't need formal permission: "Do you suppose I'd do this if I didn't understand the man and know just how he'd take it?" (Howells *Instance* 359). He suggests that there are no barriers between his understanding and his friend's, that he understands Kinney as his fictional creation. For Bartley the newspaperman, other people are subjects who lack subjectivity, who can be manipulated as creations of his own imagination. Bartley seems like a nightmare vision of Whitman's poetic voice, containing multitudes.²²⁵ Howells offers a vision of a world in which narratives about lives are not limited to private letters, or to communications around a dinner table, among friends. If a life is worth something (in strictly monetary terms) because of its novelty or sociality, then it becomes fodder for a newspaper article.

There is little question here that worth is determined monetarily: Bartley shows Kinney's anguished letter to his article's publisher in a misguided attempt to demonstrate that not writing the story would have been a "wicked waste of material" (Howells 366). Bartley confesses he wrote the piece and then offers excuses – he put the material in better shape than Kinney could

²²⁵ To be sure, Bartley's disregard for the privacy of others is depicted as the deviation rather than the norm. Many of the characters repudiate Bartley's actions: Marcia, when she first reads the story, considers it "base," "shameful," and "stealing" (Howells *Instance* 359). The story also creates problems with Bartley's employer, who is upset that Bartley wrote a story for (and sold it to) another newspaper (Howells *Instance* 364-65). He later gets a letter from Kinney who has read the story, excerpted in his local newspaper; he characterizes it as a "string of lies" and says that the editor who published the story is no gentleman (Howells *Instance* 366). The publisher breaks off his friendship with Bartley, and Bartley's employer, Witherby, finds Bartley's actions too much a violation of journalistic ethics – he scolds Bartley for using "material . . . which had been intrusted to you under the seal of confidence and . . . you left it to be inferred that Mr. Ricker had written the article himself" (Howells *Instance* 378). Certainly, Bartley's crass commodification of his friend's life story is not the prevailing view – but in 1882, the story presents a sort of dystopian "what-if." Further, the other characters' horror at Bartley's actions arises only after the damage has been done – they neither anticipate nor prevent Bartley's appropriation of Kinney's life. They are powerless in the face of the demands of the market.

have; nobody will remember the story; Kinney can tell the story again without depleting it (again, suggesting that a life is a renewable resource that may be used and commodified repeatedly) (Howells *Instance* 360).²²⁶ The collapse of the distinction between public and private also suggests a shift in meaning of the written word, and a shift in the value of the life story. Eliza Wharton tries to write personal accounts of her life to make alternate public spaces for friendship and intimacy; Harriet Jacobs uses her life as both a means of bridging a racial gap and a commentary on that gap. In contrast, Bartley treats life stories as news and as marketable commodities. There is no private sphere, only a public one, and that public sphere is a marketplace.²²⁷ Publicity becomes equated with the commercial – people want to read about the lives of others so those lives acquire monetary heft as they lose privacy.²²⁸ According to Jurgen Habermas, publicity as a commodity developed in tandem with the burgeoning public sphere. Commercial events, news from royal courts, and sensational stories about murders and disasters excited enough interest that they had commercial value and could be compiled into early journals (Habermas 21). Stories that had some commercial value acquired publicity and were disseminated into a broader “public sphere” than their immediate community. However, publicity also undermines the public sphere as it manipulates the community’s opinions, degenerating into propaganda and show (Habermas 206). Publicity flattens the citizen’s engagement with his or her community; it “strengthens one’s own position” without actually engaging in public discussion (Habermas 200). The public sphere is reduced to an arena for

²²⁶ It is also worth noting that Kinney is on the margins, an itinerant worker.

²²⁷ Of course, Bartley is, unlike either Eliza or Harriet/Linda, male and a writer by profession.

²²⁸ Howells suggests that if the Hubbards recognize any mechanism for creating a self, it is consumerism: throughout the novel, the young couple put their home and belongings on display. The acquisition and exhibition of goods replaces an interior life.

display, demonstrating the prestige of the person engaging in publicity but inviting no interaction or commentary (*Ibid.*).

Fittingly, the most intimate drama of Bartley's life is played out in a newspaper, in a manner that demonstrates the dangers of publicity. After Bartley abandons his wife and child in Boston, his friend, Ben Halleck, receives by chance a newspaper from Tecumseh County, Indiana. The paper contains a notice proclaiming that Bartley Hubbard has sued Marcia G. Hubbard for divorce on the grounds of abandonment and gross neglect of duty (Howells *Instance* 458). Significantly, Marcia is not informed directly of this charge or this upheaval in her life. Communication is directed to the world at large. Further, the divorce notice reaches Marcia only by accident: Bartley's attorney argues that the newspaper notice is sufficient (legally) even if Marcia never saw it – the mere fact of publication trumps actual knowledge (Howells *Instance* 498). Interpersonal communication has broken down entirely in this (modern) instance; intimacy is overtaken by the newspaper. For Christopher Castiglia, who has written on the way in which domesticity and interiority have come to replace civic engagement in American life, this conflation of the domestic/ private and the public might dramatize a problematic substitution, in which the domestic relationship of marriage comes to symbolize civic health. Castiglia writes that, "Marriage . . . is the privatized theater in which dramas of national security are made comprehensible to a radically de-publicized citizenry" (61). Marriage has been "put to use" as an institution, as a way of regulating and modeling normative citizens' roles (Castiglia 62). Here, the domestic relationship is reduced to an advertisement in a newspaper, with all the resonance of commodification that implies. Certainly, within the context of Howells's novel, the Hubbards' marriage and divorce functions as a synecdoche for the state of society but unlike Castiglia who worries that interiority has replaced the civic as the site of citizenship, Howells worries that

publicity has replaced inner life.²²⁹ Further, the (supposed) intimacy of marriage is subverted and exposed by a misdirected newspaper. Bartley's announcement of the dissolution of his marriage reaches the other party to that relationship only by chance. Eventually, Bartley himself becomes both participant and victim of his text. At the end of the novel, he is reduced to a "spicy" story in a newspaper, perhaps even the newspaper that he started, when he is shot after printing some unflattering remarks about the domestic life of one of the town's leading citizens; the story noting "that 'Mr. Hubbard leaves a (divorced) wife and child somewhere in the East' was quite in Bartley's style" (Howells *Instance* 510-11).

If Hannah Webster Foster's heroine fretted about how to secure privacy and Harriet Jacobs entertained doubts about the desirability and reach of privacy, Howells seems vexed by the disappearance of privacy in "modern" life. While Howells depicts a society that appears increasingly socially and physically mobile (Bartley can travel from small town to city and from Boston to Indiana with ease), the society is not necessarily freer. No one, it seems, is free from scrutiny.²³⁰ At the same time, Howells's style tracks an apparent shift from interior to exterior, from fictional correspondence and fictionalized memoir to realism, with an omniscient narrator. Its inclusion may seem anomalous in study of the role of the epistolary in constructions of privacy, given that the novel is told from the perspective of a third person narrator and we have very little access to the characters' personal correspondence. However, the novel reveals fears about the disappearance of the epistolary and the private (fears that, arguably, fueled Warren and

²²⁹ Of course, the details of Bartley and Marcia's failed marriage are publicized further when their divorce is tried in open court. Further complicating the relationship between professional and personal, public and private, is Marcia's father, who represents her in the case: "we are here not only in the relation of attorney and client, but in that of father and daughter, and . . . I stand in this place singularly and sacredly privileged to demand justice for my own child" (500).

²³⁰ Interestingly, scrutiny does not necessarily translate into interference as in the case of *The Coquette*. Moreover, Bartley does not internalize his community's disapproval; he is all surface.

Brandeis's demand for a legally recognized right to privacy, as discussed below). Howells's protagonist attempts to write himself into being. But Bartley Hubbard's behavior stands in stark contrast to that of Hannah Webster Foster's Eliza Wharton, who uses her letters to friends to make a passionate appeal for an alternate public space, or from Farmer James who tries to create a cross-class, transatlantic community. Further, his writing differs from that of Harriet Jacobs, who seems to deploy writing as a guarantee of authenticity. In this instance, epistles and memoirs have been replaced by the newspaper. In the society Howells depicts in *A Modern Instance*, first-person narratives have disappeared, or have been appropriated, as in the case of Kinney, where his life story has been rewritten and sold by Bartley.²³¹ There is nothing – not even an epistle or a lapse into first person -- to resist the public voice.²³² Eliza Wharton wishes to rewrite others' impression of her and create an alternate sociality; Jacobs deploys an alias in the same way that her fictionalized self posts false letters: to create a zone of privacy around her. Howells's protagonist experiences no such divide because he has no "private" self. His life can be summarized in a few columns of newsprint. Bartley Hubbard's fate demonstrates the consuming power of the press. Hubbard attempts to make himself a public figure through his writing, becoming both author and subject, but his devotion to publicity proves fatal. He is killed over one of his stories, becoming no more than a sensational story himself. To live by the pen means to die by the pen.

A Modern Instance also represents a shift in genres from the more personal forms of the earlier years of the century, as Nancy Bentley suggests. But the novel's realism is more than a

²³¹ The appropriation of Kinney's life and voice by Bartley recalls concerns about Harriet Jacobs's memoir: can you tell if a story "belongs" to the person who recounts that story?

²³² The "public voice" of the newspaper is not the voice of the public – in *Criticism and Fiction*, Howells contemplated the development of a public taste that was "simple, honest, and natural," when the writer measured himself (and yes, for Howells, it was "himself") not against other writers, but against human nature. William Dean Howells, *Criticism and Fiction*, (New York: Harper and Brothers, 1891) 12, 8. Further, in "The Man of Letters as a Man of Business," Howells defends authors who get their start writing in newspapers.

rebuke to the rise of newspaper culture, or a critique of the personal viewpoints of epistolary novels. Alan Trachtenberg also makes the case that Howells saw literature as an alternate public sphere, “where civilized acts might be performed ‘in the light of common day,’ upon a greensward of measured vistas and balanced views: a communal spectacle of a revived Republic” (200). Realism became the generic vehicle for the presentation of such views (Trachtenberg 188-89). Howells, Trachtenberg argues, does not prefer a vanishing private to an encroaching public, but maintains an alternate sphere of the public. However, this account does not attend to Howells’ implicit and explicit critiques of popular journalism and commercial “show” in *A Modern Instance*

The rise of the press also affected the legal climate in which the right to privacy blossomed. Criminal libel, a form of defamation law that levied criminal penalties against those who published “malicious” stories, intended to provoke anger, contempt, or ridicule, had largely passed out of favor (perhaps because of First Amendment defenses of the press) (Glancy 12). Truth served as a defense only in cases of public libel, that is, libel directed against public figures – exposing the personal foibles of private individuals was legally indefensible (Glancy 14). Actions for civil libel (for which the penalty was monetary rather than incarceration) enjoyed greater success, although truth was not a defense. Just over twenty years before the publication of “The Right to Privacy,” a court held that a clandestine photograph representing its subject in a ridiculous light remained actionable: “The greater the truth, the greater the libel” (*Ibid.*). But as courts came to accept truth as a defense, a gap opened in the law. The right to privacy to fill this vacuum supplied “legal grounds for individuals victimized by the unconsented publication of true personal information to sue the publishers” (*Ibid.*).

The relationship between the press, privacy, and social status is also at the heart of Henry James's novella, *The Reverberator*, which follows the misadventures of an ambitious journalist and an American family in France. James's story raises the problems of intimacy and access and how print culture can mediate or complicate those things. Like Bartley Hubbard, the young newspaperman at the center of the story wishes to create a community that is simultaneously global and intimate, but his pursuit of this goal shows that you can have publicity or intimacy but not both. The plot focuses on a small circle of Americans who descend on Paris for various reasons: the wealthy Mr. Dosson and his two daughters have come to acquire culture and spend his money; the expatriate Proberts fled Carolina a generation earlier in the wake of the South's defeat in the Civil War; and the ambitious newspaperman, George Flack, is seeking European society news. At first glance, this short novel, which James dismissed as a *jeu d'esprit*, seems to construct an easy binary between the old world and the new: on the one side are Flack and the Dossons, who seem to stand for publicity, openness and America; on the other side are the Proberts, who have married into French aristocracy and who seem to stand for the implicitly European virtues of privacy and interiority.²³³

Certainly, Delia Dosson experiences Paris as a relentless denial of access. She and her family are isolated, excluded. Even letters fail. Although friends in America "would 'write out' that other friends were 'somewhere in Europe'," the Dossons miss connections – "Two or three times people had called at the hotel when they were out and had left cards for them without an address and superscribed with some mocking dash of the pencil – 'so sorry to miss you!' or 'Off to-morrow!'" (James 28). There is no real correspondence or communication between these parties, and the letters do not inform. Letters become instead a source of worry. Much later,

²³³ Henry James. *The Reverberator* (1888). New York: Charles Scribner & Sons, 1908, v.

Delia's younger sister Francie feels terrible anxiety when she writes to her fiancé: "She had expressed a wish . . . for a couple of hours of independence: intending to write to Gaston, and having accidentally missed a post, she had determined her letter should be of double its usual length" (James 119).²³⁴ The set-up is conventional, apparently equating domestic space with intimacy: Francie retreats to the privacy of her room to spill what should be her most intimate thoughts. However, domestic pace does not prove to be productive: "Francie was not skilled in composition; she wrote slowly and had in thus addressing her lover much the same sense of sore tension she supposed she should have in standing at the altar with him" (*Ibid.*) The scene conflates correspondence and intimacy. Francie's anxiety about writing does not simply mirror an anxiety (or reluctance) about marriage, but an unfamiliarity with intimacy. Francie, who describes herself as "only an American girl," has never acquired the knack for revealing the self through words. She is celebrated for her surface. The question about this simple (representative?) American girl is whether Francie possesses no interiority or has no practice in reflecting on or revealing anything about herself.

Unsurprisingly, the novel's primary source of conflict, and medium for information, is the newspaperman, George Flack. As Matthew Rubery points out, Flack is not an investigative reporter, but a correspondent.²³⁵ He gathers his information through personal interviews and relays it in the form of letters that are "lively, 'chatty,' highly calculated to please" (164).²³⁶ Flack successfully mimics the kind of correspondence that Francie fails to produce, creating an

²³⁴ Francie's name is almost parodic, a joking diminutive of the country where she and her family have landed, but the Dossons and France are never really on a first name basis. Flack's name is also a joke. According to the Oxford English Dictionary, "flack" was American slang for a press agent. George Flack's identity and his function are one and the same.

²³⁵ Matthew Rubery, "Wishing to be Interviewed," *Henry James Review* 28:1 Winter 2007, 57-72, p 64.

²³⁶ For the Dossons, the newspapers substitute for the intimacy that they keep missing. "George Flack reported his interviews, that is his reportings, to which Delia and Francie gave attention only in case they knew something of the persons on whom the young emissary of the Reverberator had conferred this distinction."

illusion of intimacy for his readers. In fact, Flack sees himself as a conduit for intimacy. He confides in Francie, “I’m going for the inside view, the choice bits, the chronique intime, as they say here; what the people want’s just what ain’t told and I’m going to tell it!” (James 63). Flack promises a type of news that may, in fact, be more intimate than a conventional letter; he wants to occupy the position of his subjects (the “inside view”) and communicate those matters that are not told in letters.

At first Flack, like the Dossons, cannot discover how to access this tantalizing interior. He uses the Dossons as bait, displaying them at cafes along the boulevards; they sit in public. However, such public means fail to secure access to Parisian society’s fiercely guarded privacy. He then convinces Francie to have her portrait painted by the American artist, Waterlow. Flack assures the Dossons that Waterlow would “give them an article that would fetch them five times the money in about five years” (James 35). Here, the slippage in language is telling. “Article” refers to the portrait of Francie that Waterlow proposes to paint while suggesting Flack’s newspaper article about that representation of Francie. The painting can be displayed but it also can be acquired and preserved for the buyer’s gaze alone. In fact, Waterlow jealously guards the finished work and refuses to “give up” her portrait: “He wants to keep it near him to look at it in case he should take a fancy to change it” (James 125).

It is no accident that Francie is reduced to an article at this moment. When Francie initially resists having her portrait painted by Waterlow, Flack tells her “they couldn’t get out of it, inasmuch as he had already written home to the *Reverberator* that Francie was to sit” (James 35). The Dossons accept Flack’s explanation as “a kind of supernatural sign . . . for they believed everything they ever heard quoted from a newspaper” (*Ibid.*) The Dossons seem to be a step beyond Bartley Hubbard in *A Modern Instance*: they don’t substitute the newspaper for

real life, they take directions from it. The report of their actions precedes and precipitates their actions; they don't just believe what they read, but what they *hear quoted*. The newspaper predicts, or dictates, their actions.

If the Dossons neither have nor want private life beyond the public eye, Gaston Probert and his family seem to exist entirely beyond public scrutiny. When Gaston Probert first betrays an interest in Francie Dosson, Flack promises to find out everything he can and relay that knowledge to her family. He “said the best plan would be that the results should ‘come back’ to her in the *Reverberator*; it might have been gathered from him that ‘the people over there’ – in other words the mass of their compatriots – wouldn’t be unpersuadable that they wanted about a column on Mr. Probert” (James 42). Although Flack undertakes the investigation on behalf of the Dossons, he does not intend to relay the information to them alone, or directly. He bypasses intimate communication in favor of publishing any information that he discovers about Francie’s suitor. He assumes that Francie’s interests in a potential suitor are no different than the interests of the American reading public. However, “the young journalist couldn’t scare up a single person who had ever heard of him. He had questioned up and down and all over the place, from the Rue Scribe to the far end of Chaillot, and he knew people who knew others who knew every member of the American colony” (James 43). An entire chain of informants fails to result in information. While Flack assumes that Probert’s anonymity means that he has no particular status, Delia guesses, correctly, that this means the opposite, that Gaston and his family “were just THE cream and beyond all others. Wasn’t there a kind of inner, very FAR in, circle, and wouldn’t they be somewhere about the center of that?” (James 44). The Proberts’ secrecy marks their interiority, their status, and their access to Parisian society. (In fact, the daughters have married into the

aristocracy.) It also paradoxically makes them objects of interest – secrecy becomes an invitation to curiosity.

The cultures of publicity and privacy clash when Francie becomes engaged to Gaston Probert. In Gaston's absence, Francie invites Flack to view her portrait with her, an act of almost unpardonable intimacy in the eyes of her future in-laws. Further, during a stroll through the Bois du Boulogne, Francie begins to spill her observations about her future in-laws, their connections, their foibles, their marital discord. Flack encourages the confidence, telling her, "You make me feel quite as if I were in the grand old monde" (James 139).²³⁷ Flack initially wants intimacy with Francie, but willingly substitutes intimacy with her future in-laws for any romantic union. (The only point at which Flack refers to intimates of his own he includes all 200,000 readers of the *Reverberator*.) Francie is soon summoned to the Probert family home where Gaston's sister Suzanne tells her that she discovered, "a newspaper sent this morning from America to my father – containing two horrible columns of vulgar lies and scandal about our family, about all of us" (James 142). Here, the private, even the secret (family scandal) has not only been disclosed but has been transmitted across national and geographic boundaries. The Proberts' concern about the revelation of family secrets anticipates Warren and Brandeis's notion of what is protected by the right to privacy, that is, the information that a man did not dine with his wife. Similarly, that information has the potential for scandal and also relies on inference.

Francie accepts responsibility for giving the story to Flack, but their reaction differs markedly from the Proberts'. The Dossons are surprised by what is missing from Flack's story. When the Dossons finally read the piece on the Proberts:

²³⁷ Matthew Rubery says that Flack accepts an interview in lieu of marriage ("Wishing to be Interviewed," 65). At this moment, Flack identifies with Francie, feels that he is part of her new world (66).

as a family they were rather disappointed in this composition, in which their curiosity found less to repay it than it had expected, their resentment against Mr. Flack less to stimulate it, their fluttering effort to take the point of view of the Proberts less to sustain it, and their acceptance of the promulgation of Francie's innocent remarks as a natural incident of the life of the day less to make them reconsider it (James 164).

It would be easy to characterize the differing reactions as nationalized responses to publicity: the Americans are immune to the effect because “perhaps they had read so many such bad things that they had lost the delicacy of their palate, as people were said to do who lived on food too violently spiced” (James 165).²³⁸ In contrast, the Europeans are horrified by public revelations about their family. However, closer examination suggests that what offends the Proberts is not, or not only, the exposure of family secrets to strangers. Rather, the Proberts recognize an element of the article that they treat as a kind of personal communication. While Delia “didn’t exactly see what there was in it to take back or explain away . . . , she was aware that there were some points they didn’t understand and doubtless these were the scandalous places” (James 164). She reflects, “why should [the Proberts] have minded if other people didn’t understand the allusions (these were peculiar but peculiarly incomprehensible) any better than she did?” She assumes that because the article is incomprehensible to her, the potential scandal is limited; however, the scandal may inhere in the article’s opacity. Because the story cannot be expressed plainly, the underlying truth is unspeakable.

Flack’s vision for his newspaper seems to align the Americans firmly on the side of publicity. He announces, “I mean to make [the *Reverberator*] bigger; the most universal society paper the world has seen. That’s where the future lies, and the man who sees it first is the man

²³⁸ Again, the newspaper – or more precisely, its contents – becomes an object of consumption.

who'll make his pile. It's a field for enlightened enterprise that hasn't yet begun to be worked" (James 62). Visibility has commercial value. He goes on,

That's about played out, anyway, the idea of sticking up a sign of 'private' and 'hands off' and 'no thoroughfare' and thinking you can keep the place to yourself. You ain't going to be able any longer to monopolise any fact of general interest, and it ain't going to be right you should; it ain't going to continue to be possible to keep out anywhere the light of the Press. Now what I'm going to do is to set up the biggest lamp yet made and make it shine all over the place. We'll see who's private then, and whose hands are off, and who'll frustrate the People – the People THAT WANTS TO KNOW. That's a sign of the American people that they DO wants to know (James 63).

While Flack speaks of privacy in conventional, special terms, the privacy he opposes is more pervasive, more abstract, and more class-inflected. Flack envisions himself as a champion of "the People." While he describes the press as a tool of enlightenment, it is also a leveling tool – the press, in Flack's terms, offers access to knowledge that has been kept off-limits. This also becomes an implicit contrast between French aristocracy and American populism. Curiosity – and more, a distaste for privacy – become signs of national identity. Writing is furthermore not a means of self-creation, but of access to the other.

But the equation isn't so easy: Interestingly, George Flack, the newspaperman, knows where everyone is, but wants to sequester the Dossons for himself ("he didn't want any outsiders"). He wants to construct an alternate interiority. Further, the Proberts do not represent privacy so much as collectivity. The expatriate Proberts do not want a life separate from each other. Gaston reflects that, "His family however had been so completely Gallicised that the affairs of each member of it were the affairs of all the rest, and his father, his sisters and his brothers-in-law had not yet begun sufficiently to regard this scheme as their own for him to feel it substantially his. It was a family in which there was no individual but only a collective property" (James 40). This formulation may hearken back to earlier equations of privacy with the

domestic, but what the Proberts do not represent freedom from interference or a right to be let alone so much as a narrowed circle of information and interference.

Further, Waterlow tells Gaston that he must marry Francie and defy his family in order “[t]o save from destruction the last scrap of your independence . . . They’re doing their best to kill you morally – to render you incapable of individual life” (James 205). If what the Proberts practice is privacy, then privacy is not freedom or independence or individuality. Gaston leaves Paris with Francie and her family, but “with no idea of where they were going to go,” neither Europe nor America are viable choices. However, Matthew Rubery observes that they have achieved perfect privacy since Francie has assured Flack that her wedding is off. They find shelter in misdirection.

5.3 (RE)WRITING THE LAW: IDENTIFYING THE RIGHT TO PRIVACY

If literature attempted to address this anxiety in one way, law tried to address it in another. By the last decade of the nineteenth century, these developments prompted a new discussion of rights – or perhaps, a discussion of new rights. Where more people were living side by side or were furnishing amusement for their fellow citizens through the medium of newspapers, freedom from scrutiny and interference assumed greater importance. The jurist Thomas Cooley, in his treatise on torts, identified a right to be let alone.²³⁹ In July 1890, in *Scribner’s Magazine*, E.L. Godkin argued that the state had to protect the good reputations of its citizens (Barron 886). The literature of the last years of the century also traced what seemed to be

²³⁹ James H. Barron, “Warren and Brandeis, The Right to Privacy, 4 Harvard Law Review 193 (1890). Demystifying a Landmark Citation,” 13 *Suffolk University Law Review* 875 (1979), 886.

a seismic shift in American domestic life. It seemed that privacy was on the brink of disappearing from American life altogether. Concern about the volume of the public voice and about the new market created in private lives spurred the composition of Samuel Warren and Louis Brandeis's still-controversial "The Right to Privacy."²⁴⁰ Here, it should be noted that "The Right to Privacy" had no precedential value: since it was an essay theorizing about a right that should be recognized rather than a case adjudicated in the courts, courts were not required to apply its ideas nor did it have any persuasive weight. To some extent then, the best and best-known articulation of the right to privacy has more in common with the realist novels of the day than with contemporary case law. At the very moment that Jacob Riis was decrying the lack of privacy among the urban poor, Brandeis and Warren were issuing a warning about its disappearance further up the social scale. Discussing the right as if it already existed and merely required recognition by courts of law, Brandeis and Warren stated, "the evil of invasion of privacy by the newspapers, [has been] long keenly felt."²⁴¹ The article continues:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle (Warren and Brandeis 196).

²⁴⁰ Legal scholars continue to debate not only the parameters but also the enforceability and the usefulness of this right. Judith Jarvis Thomson has argued that privacy en route to her conclusion that privacy should therefore enjoy no special protections. "The Right to Privacy," *Philosophy and Public Affairs*. 4:4 (1975) 295–314. Richard Posner more recently argued that privacy claims are usually inefficient and should (on the whole) not be protected. Richard Posner, "An Economic Theory of Privacy," *Regulation* 19–26 (1978).

²⁴¹ Samuel D. Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review*, IV: 5 (December 15, 1890), 193–220, 195.

The article describes the situation earlier dramatized by Howells and by James. Further, the jurists explicitly link the problem to the creation and sustenance of a new market, lamenting that encroachments on privacy have increased because, “In this, as in other branches of commerce, the supply creates the demand” (*Ibid.*). Brandeis and Warren distinguish the right they seek to illuminate from the protections offered by copyright by focusing on the content rather than the form:

A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence (201).

Thus, unlike copyright laws (which shield an author’s unique expression), the protection offered by the right to privacy applies not to the expression, but to the act described by the expression. The private letter is protected insofar as it tells (too much) about the disposition of the citizen’s body.²⁴² Warren and Brandeis assume a direct connection between the word and the body, that the letter or body will reveal some truth about the citizen’s actions, or even the state of his emotions, although as this study should make clear, words may disguise or mystify as well as reveal. Further, it protects the citizen from becoming the subject of someone else’s expression.

Further, while Brandeis and Warren’s phrasing (“domestic occurrence”) suggests that the right to privacy inheres in a particular place, the right applies more closely to a type of relationship. An even closer look at the example that Brandeis and Warren select as illustrative of the need to recognize a right to privacy reveals something very curious: the right is imagined

²⁴² Granted, the situation that Warren and Brandeis describe here incorporates the written text, physical privacy, and the home.

as preventing the revelation of something that *did not* occur (the fact that the husband did not dine with his wife). The right is imagined in the context of a domestic disruption, and a letter writer's unwitting admission of that disruption. Brandeis and Warren do not then imagine the home as a sacrosanct haven from the pressures of modern life, but as a locus of potential shame and embarrassment. Their imaginary letter-writer wants his personal account of his home life shielded from publication not because publication would sully his domestic bliss, but because it might reveal marital troubles, or a slippage between the face the writer presents society and his domestic self. Thus, even as Brandeis and Warren seek protection for and of a private sphere, they tacitly acknowledge that the sphere encompassed and sheltered by that right is not an unalloyed good.

Read together with Howells' works, the law review article (itself arguably a piece of creative writing) suggests that loss of privacy results in loss of freedom and of self—for Howells, exposure to (or the quest for) excessive publicity leads to actual death. The self-representation of the letter gives way to the externally compelled representation of the newspaper. The propertied white men who inhabit the fictions of Howells experience something like disenfranchisement when they refuse or are denied privacy, specifically the privacy represented by letters.

One of the critiques leveled at Warren and Brandeis's proposed right to privacy is that it favors men who too closely resemble the authors: privileged, propertied. In that estimation, the essay reflects a fear that the incursions of tabloid reporters have violated the home and dethroned the privileged. The article appears to erect a virtual wall around the homes of the wealthy whose privacy has been breached by tabloids. However, the argument in favor of this right begins in a strange place – onstage -- and with an unexpected protagonist, the actress Marion Manola. The authors summarize Manola's situation thus:

[T]he complainant alleged that while she was playing in the Broadway Theatre, in a role which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued ex parte, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition (Warren and Brandeis 193).

Warren and Brandeis deploy this curious example to demonstrate the clear demand for a legal right to privacy. There appears to be very little about Manola's situation that we would recognize as private. Instead of decrying the breach of family homes by the popular press, the two jurists base their plea on a person whose very profession calls for publicity. She is doing her job when she is photographed by a person hired by her employer. The example is extraordinary for another reason: Manola is a woman and thus would have had comparatively few rights under the law. This example indicates that even a person who voluntarily becomes a public figure may assert a right to privacy in the most public circumstances; moreover, this right pertains to women as much as men. Significantly, Warren and Brandeis do not argue that the photograph deprived Manola of any gains from the commercial value of her image. Rather, they suggest that not only did Manola have a proprietary right to her image but also a more tenuous, emotional right that demanded recognition and recompense.

5.4 MANOLA, MADENDA, THE IMAGE, AND THE STAGE

Born Mina Stevens, Manola grew up in Cleveland, Ohio, married a scion of Cleveland society, and performed in private theatricals (probably similar to the performance of "Under the

Gaslight” in which Theodore Dreiser’s Carrie made her stage debut).²⁴³ When her husband experienced a financial setback, the couple fled to Europe where she studied voice. She made her debut in Bath, England, taking the name of a popular operetta as her stage name. By 1890, she had achieved a stardom based more on her voice than her appearance (the *Dramatic Mirror* assured its readers that “There is in her face something more than prettiness”) (Glancy “Miss M.”403). However, Manola’s stardom was plagued by legal controversy: she had tried to leave the light opera company to which she was under contract, but was prevented by a court-issued injunction (Glancy “Miss M.”404). Subsequently, she joined another company which cast her as a young man in the light opera, *Castle in the Air* (*Ibid.*). In a publicity stunt, the company’s manager, Benjamin Stevens, hired a photographer to capture Manola’s image during a performance (Glancy “Miss M.”405). Manola was outraged not only by the timing of the photograph but by its content: she was wearing tights at the time.²⁴⁴ Manola filed for an injunction to prevent the company from using her image in its advertisements.²⁴⁵ Specifically, Manola wished to prevent the display of any photographs of her “in this style of stage costume” (*Ibid.*). Manola considered herself a serious singer and actress whose work and reputation would be diminished by a gimmicky, salacious, tights-clad photo. Further, at the time the photograph was taken, Manola had a nine-year-old daughter who had been educated in convents; Manola reportedly did not want her child to see her in such a light (Glancy “Miss M.” 407). Manola had appeared onstage in tights before, but she wanted to control where, when, and by whom she was seen in such dress. The photograph compromised both her personal and professional roles. The

²⁴³ For an excellent summary of Marion Manola’s career and a brief account of her role in Warren and Brandeis’s thinking, see Dorothy J. Glancy, “Privacy and the Other Miss M.,” *Northern Illinois University Law Review*, 10 (Summer 1990), 401-35.

²⁴⁴ “Photographed in Tights,” *New York Times*, June 15, 1890 at 2.

²⁴⁵ “Manola Gets An Injunction,” *New York Times*, June 18, 1890 at 2.

case offers a curious testing ground for privacy: Manola's profession required her to appear in public in a variety of costumes; she did not argue that her image should not be circulated at all, but that she had a right to determine how that image was deployed. While the case itself was never fully adjudicated, Warren and Brandeis used this incident as an example justifying the recognition of a right to privacy. Manola had a proprietary right in her image, certainly, but Manola's primary interest was not in securing her own financial gain nor in preventing the gains of others. Rather, she wanted to preserve what Warren and Brandeis label her "inviolable personality," an interest that transcends conventional property rights and encompasses the notion of emotional harm (an interest, furthermore, that is not confined to the safety of the home). She can assert privacy in the midst of publicity.²⁴⁶



Figure 1. Marion Manola

²⁴⁶ Warren and Brandeis's interest in reasoning from the margins to the center also can be seen in their use of *Newell v. Witcher*, in which a Vermont state court protected the rights of a young blind woman who had been assaulted by a man who was both her employer and her host – she was a guest at his house when the assault took place. See also the discussion of *Newell* in Chapter 2, above.

It might seem like a stretch to connect Marion Manola with Carrie Madenda (who, after all, never has to perform in tights).²⁴⁷ The real actress was known for her legitimate musical skills and her acting while the fictional performer has no training and relies entirely on an ineffable charm rooted in her appearance and expression. Yet both demonstrate the possibility of public privacy and of the inviolate personality.

Typically read as an allegory of consumerism, *Sister Carrie* may also explore how the inviolate personality negotiates a kind of public privacy. *Sister Carrie* depicts a culture in which knowledge travels greater distances and is more widely accessible, thanks to the spread of newspaper culture. Initially, newspapers pose a threat. When Hurstwood first flees Chicago, he scans the papers for news of his crime, and schemes to keep them away from Carrie (Dreiser 262).²⁴⁸ The problem is not that the newspapers have intruded on Hurstwood's private life, but that they report his theft of money from his employer's safe. If Hurstwood fears what the papers will report accurately about his life, the results of his crime reorder his relationship to newspapers. Hurstwood and Carrie end up in New York, where Hurstwood tries unsuccessfully to re-establish himself as a bar manager. Intimidated by the scope and pace of the city, Hurstwood feels that he has been alienated from this new society as effectively as if there were a wall around the city (Dreiser 302). When he loses his position, Hurstwood uses the papers as an escape and as a means of access to that walled city:

He buried himself in his papers and read. Oh, the rest of it – the relief from walking and thinking! What lethean waters were these floods of telegraphed intelligence! Here was a young, handsome woman if you might believe the newspaper drawing, suing a rich, fat, candy-making husband in Brooklyn for divorce. Here was another item detailing the wrecking of a vessel in ice and snow

²⁴⁷ When Carrie first gets her place in the chorus, she reflects, "Fortunately, she did not have to wear tights" (354).

²⁴⁸ Theodore Dreiser, *Sister Carrie* (1900), Lee Clark Mitchell ed., Oxford and New York (Oxford University Press), 1998, 262.

off Prince's Bay on Staten Island. A long bright column told of doings in the theatrical world (Dreiser 317).²⁴⁹

The newspapers offer the illusion of connection with a larger, more glittering world. At the same time, Hurstwood begins to withdraw from Carrie, apparently substituting the newspapers' contents for the challenges of his domestic situation. Here, the narrative participates in a literary distrust of the press common to the period, reiterating that newspapers overtake more intimate forms of communication.

Dreiser, however, is more measured in his assessment. The press does not pose the threat to either Hurstwood or Carrie that it does to characters in Howells and James. Even if Hurstwood uses the newspapers as a substitute for real social engagement, Carrie's relationship to the press is more complex. As an aspiring actress, Carrie wants to be noticed (402). In fact, being noticed is not only a performer's job – recognition in the press offers a measure of a performer's success, and spurs further success. Carrie's acting career coincides with the advent of theatrical portraits in newspapers and in popular magazines like *Cosmopolitan*:

It was about this time that the newspapers and magazines were beginning to pay that illustrative attention to the beauties of the stage which has since become fervid. The newspapers . . . indulged in large, decorative theatrical pages in which the faces and forms of well-known theatrical celebrities appeared, enclosed with artistic scrolls (Dreiser 402).

The presentation of the image marks its importance, its artistic value. The image also marks the artistic value of the person portrayed. When Carrie first moves out of the chorus and into a role, she merits a brief notice in the newspaper. However, Carrie wants to have her picture in the paper too (Dreiser 402-03). Simple reportage isn't enough; there must be visual evidence of her ascent.

²⁴⁹ While Hurstwood uses the newspapers to forget his life, the stories reflect or predict his circumstances, from the young woman who leaves her husband to the notices of disaster to the theatrical notices.

Carrie's visual representation, both onstage and in the newspapers, is central to her success. The narrator repeatedly calls attention to Carrie's looks – her youth and beauty open doors for her even when she lacks skill, and she is promoted through the chorus because of her appearance. Her big break comes when, cast in the part of a silent “little Quakeress,” Carrie maintains a single disapproving expression throughout the entire play.²⁵⁰ Her ability to do so seems almost photographic. Both audience and critics respond to this with uproarious approval (408). The narrative is sparing in its analysis of Carrie's success, although it suggests that what the audience finds appealing is the presence of critical commentary embodied onstage. (Presumably, the gray-garbed “Quakeress” disapproves of the theatrical merriment around her and in her sober association with religious devotion, she may represent an image of privacy in public.) At first, viewers are unsure if Carrie's frown is real (and thus “not fun”) or merely a ‘delightful bit of character work,’ but when Carrie sustains the expression throughout the performance, the audience laughs.²⁵¹ An expression prompted by Carrie's real discontent is amplified into something else, something that undermines and upstages the words and songs of the comedy. To that extent, Carrie's power is un- or even anti-theatrical.

To be sure, most of the men in Carrie's life reduce her to mere surface and image. Drouet, Hurstwood, and her troupe of admirers see Carrie as a beautiful object to be possessed. The power that she wields over them is the power of image. Hurstwood, near the end of his rope (and his life) sees Carrie's name up in lights on Broadway: “He looked up, and then at a large,

²⁵⁰ The expression is a combination of artifice and nature. Displeased with the size of her part, Carrie unconsciously begins frowning during a rehearsal (406). The play's author notices and points her out to the stage manager, who instructs Carrie to scowl at everything she sees (*Ibid.*). Her wordless display ends up upstaging the star of the show (407).

²⁵¹ Her power to sustain a single expression over the course of the play might be described as photographic.

gilt-framed poster-board on which was a fine lithograph of Carrie, life-size” (Dreiser 451). Addled by hunger and failure, Hurstwood begins talking to the photograph: “‘That’s you,’ he said at last, addressing her” (*Ibid.*). Hurstwood “addresses” the photograph as if it were Carrie herself; the flattened image stands in for the living woman. However, the narrative does not endorse Hurstwood’s gesture here. Hurstwood has deteriorated so drastically that he cannot clearly distinguish illusion from reality. Further, Hurstwood has valued Carrie for her appearance all along, failing to recognize her strength and her artistic talent.

Carrie is not only (or even primarily) a visual object. Rather, she deploys her power in a way that not only reveals something universal in humanity (as Ames suggests) but also conveys an inner life that cannot be expressed in performance, or in image. Thus, when her photograph appears in the newspaper, it does not intrude on her privacy or express an aspect of her life that she would wish to suppress. Further, the photograph does not substitute for communication. Although Carrie rejoices when the picture appears in its decorative scroll, she decides against buying several copies of the newspaper: she has no one to send them to (Dreiser 404). She is a private figure – when a young man takes her out to dinner, he offers to guess what she is thinking about. She resists, replying, “Oh, no . . . Don’t try” (Dreiser 367). Her admirers’ inability to guess what she is thinking forms part of her attraction: “So peculiar indeed was her lonely, self-withdrawing figure in the public eye – she was so quiet and reserved” (Dreiser 439). This summary suggests that Carrie succeeds not only because of what she expresses, but because of what she withholds. She may excite curiosity but she does not offer access. Carrie conveys, perhaps, the possibility of a self that cannot be fully revealed on stage or in photographs. Unlike

Marion Manola, she does not have to defend herself against inaccurate portrayals.²⁵² Carrie Madenda embodies Warren and Brandeis's inviolate personality in a way that Warren and Brandeis may not have envisioned. Her privacy cannot be breached by newspaper accounts, publicity photos, or her audience's curiosity because her personality cannot be violated; her performances amplify her own feelings or offer a "natural expression of the world's longing" (Dreiser 443). Newspapers, which serve as cultural bogeymen for many other narratives of the period, fail to infringe on Carrie's privacy or substitute for more direct forms of communication. Hurstwood, whose sense of self relies so heavily on place, uses newspapers as a substitute for that lost identity, but Carrie suffers no such fate. Carrie may represent a self so fully integrated that the essential cannot be easily divided from the performative, and the press cannot substitute for presence.

But of course both the fictional Carrie Madenda and the real Marion Manola had public presence and public value. To some extent, their images retain some commercial value which makes privacy seem like a right that inheres in, or is, a kind of property. The legal protection to which Manola seems to be entitled and the autonomy that Carrie enjoys may not have extended to private citizens – for "ordinary" women, such protections did not apply. The 1902 case of *Roberson v. Rochester Folding Box Co.* recounts the plight of a young woman, Abigail Roberson, who had gone to a photographer to have her portrait taken.²⁵³ Without Roberson's knowledge or consent, the photographer sold her image to the Franklin Mills Flour Company (and its packager, the Rochester Folding Box Company). The company then used Roberson's

²⁵² In contrast to Manola, who does not want her slightly racy professional life to affect her personal life, Carrie does not want her personal life to taint her professional life. When Hurstwood confronts Carrie in front of her theater to ask her for money, Carrie "felt the strain of publicity" (439).

²⁵³ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).

image to advertise its product. Roberson's experience was closer to Marion Manola's fears than to Carrie Madenda's hopes. Instead of making Roberson a celebrity, the company's action subjected her to "the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name [was] attacked, causing her great distress and suffering both in body and mind" (*Roberson* 543). The sudden transformation from private citizen to involuntary public figure traumatized Roberson, who filed a complaint seeking monetary damages, which the trial court granted. But Roberson's youth, gender, and inexperience did not matter to the appellate court that ruled on Roberson's complaint. Rather, the court seemed baffled by her actions, observing that the "likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and therefore, one easily recognized" (*Ibid.*). In other words, the court did not understand why Roberson would object to the dissemination of an accurate, even flattering, portrait "where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes" (*Ibid.*).

But Abigail Roberson wanted no such compliments; she just wanted the defendants to stop using her portrait. The court, however, found no legal precedent for such an action and rejected the esoteric argument Roberson forwarded – that in 1890 Warren and Brandeis had articulated the startling notion that:

a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise (*Roberson* 544).

The court's sarcastic summary fails to distinguish between neighborly gossip and publication of a story, between conversation and news. Here, the press (and commercial publication) is conflated with the discussion of a man's eccentricities, without differentiating the purpose or scope of those activities. The court's example is telling in other ways: although the plaintiff before them is a young woman (with limited opportunities for participation in public life) who has been made into a public figure against her will, the court imagines a man who voluntarily engages in newsworthy business enterprises or "experiments," and then tries to deprive the public of the benefits of those endeavors.²⁵⁴ The court even suggests that Roberson should be flattered by her unsought transformation into a public figure. The court here seems to conceive of her image as a product that she has created, but it overlooks the difference between the notice that a person attracts by merely "passing through the world" and the notice that comes with marketing an image.

The slippage between a real young woman and an imaginary man of business is not a simple elision, however. The court's use of example demonstrates their fear of the ways in which, once applied, the posited right of privacy might overspill its proper bounds:

to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in

²⁵⁴ It is instructive to look at some contemporary accounts of the ways in which young women who ventured out in public were treated. In 1906, Eleanor Gates wrote a series of articles for *Cosmopolitan* about the plight of unmarried women in public life. See, e.g. "The Girl Who Travels Alone, Part 2," *Cosmopolitan* 42, December 1906, 163-172. Gates tries to assert a right to be left alone in public: by interacting socially and professionally with other city-dwellers, Gates argues, a woman does not implicitly consent to make herself accessible (emotionally or sexually) to those other city-dwellers. The key term "alone" does not necessarily indicate vulnerability or loneliness, but solitude (important in an increasingly populous city) and independence.

violation of such a right and with many persons would more seriously wound the feelings than would the publication of their picture. (*Ibid.*, 544-45).

The court fears that, if the right of privacy becomes law, legal rules will be governed by personal standards. If an individual feels offended by the publication of a story or image, the court will then become the individual's instrument, applying and enforcing the individual's sense of insult. The court envisions a fragmenting of public life, in which information that the public wants or needs becomes cordoned off by individual senses of outrage.

The court's comparison envisions not only the subversion of the group by the individual but the subversion of male by female. The court posits that, if it applies Warren and Brandeis's reasoning, adult men will behave like sheltered young girls. Those at the center will begin acting like those at the margins. In such a scenario, men of business may allow their own feelings of being deprived (of control over their actions and images) to supersede the public good. Of course, this equation suggests similarity between the male and female, between positions of power and of vulnerability. The language also indicates that men should be public.

But if the arc of the universe does not bend toward justice, it certainly bends toward irony. In 1904, Alton Parker, the presiding judge in *Roberson*, resigned from the court to run for the presidency against Teddy Roosevelt.²⁵⁵ He quickly received an education in unwanted publicity. In his new capacity as a public figure, Parker was beleaguered by reporters and photographers who recorded his smallest move. He griped, "I reserve the right to put my hands in my pockets and assume comfortable attitudes without being everlastingly afraid that I shall be snapped by some fellow with a camera" (Banner 146). In other words, Parker wanted control over how he was presented to the public, just like Marion Manola . . . and Abigail Roberson. Abigail Roberson saw her chance and took it, writing in to the *New York Times* to crow, "I take

²⁵⁵ Stuart Banner, *American Property*. Cambridge, Massachusetts: Harvard University Press, 2011, 146.

this opportunity to remind you that you have no such right as that which you assert, “citing Parker’s own opinion against him.”²⁵⁶ Roberson points out that she was a “poor girl,” trying to earn her own living while Parker is a candidate for the presidency and thus a “legitimate centre of public interest” (*Ibid.*). Roberson’s shrewd characterization recognizes that Parker, male, privileged, and powerful, exists at the center of their shared society, in contrast to Roberson herself. Roberson concludes that, although she sympathizes with Parker’s wife, “I know of no reason why you or your family have any rights of the nature suggested which do not equally belong to me” (*Ibid.*). If Parker’s opinion had treated the vulnerable young woman as having the same degree of agency as a professional man, the continuing rise of the press reduced the professional man to a new level of vulnerability. Encroachments on privacy have leveled any distinction between the poor working girl and the prominent judge.

Parker’s complaints represented a turning point in debates over Warren and Brandeis’s “Right to Privacy.” In short order, statutes were enacted in New York and Virginia (Banner 147). Fifteen years after the publication of “The Right to Privacy,” the Georgia Supreme Court ruled in favor of a man whose picture had been used without his consent in an advertisement for a life insurance company.²⁵⁷ Again, the use of his image was meant to be flattering; Pavesich’s likeness was supposed to represent a healthy man who had purchased insurance for his family. The court, however, affirmed that, “The body of a person cannot be put on exhibition at any time or at any place without his consent” (*Pavesich* 220). The court based its opinion on an impressive catalogue of precedent stretching from Roman law up to *Roberson* (thus establishing a genealogy for the relatively new right to privacy). After reviewing the controversy caused by *Roberson*, the Georgia judges had little doubt they were right. “So thoroughly satisfied are we

²⁵⁶ Abigail Roberson, Letter to the *New York Times*, printed on p. 1, July 27, 1904.

²⁵⁷ *Pavesich v. New England Life Insurance Co.* 122 Ga. 190 (Ga. 1905).

that the law recognizes, within proper limits, as a legal right, the right of privacy,” they declared, “we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained”(Ibid.).²⁵⁸ Entertaining views of young women had become entertaining views of older, more established men and, far from decrying men who demanded to be treated like sheltered young girls, courts began to recognize that something valuable had been taken from them when their images were appropriated and used. The sense of vulnerability had spread from margins to center.

Arguably, that sense of vulnerability has continued to expand – from women to men, from individuals to corporations (which seems to indicate that the right to privacy no longer requires an “inviolable personality”). Rather, privacy responds to a sense of violation or scrutiny. At the same time, the null space of privacy continues to spread. The European Commission for Justice, Fundamental Rights, and Citizenship has declared the existence of a new privacy right, the right to be forgotten: the right allows Internet users to delete data about themselves that they post on their own sites, and information that appears on others’ sites.²⁵⁹ What seemed like a fitting punishment for the treacherous Benedict Arnold may become a new right to be embraced by citizens. These expansions of privacy rights appear to eradicate the person, and the personality, raising new questions about what privacy is and does: if privacy does not attach to property or persons, then what is being protected? The territory of privacy continues to expand,

²⁵⁸ Banner offers an extensive account of statutes and case law that followed in the wake of *Roberson*:

In Indiana a trial judge prohibited a newspaper from printing sketches of a criminal defendant without his permission. The Louisiana Supreme Court barred the police from circulating photographs of people who had not been convicted of a crime. In Wisconsin and Kentucky, courts held that negatives and prints of photographic portraits belonged to the sitter, not to the photographer. A right not to have one’s picture used in advertising without one’s consent was recognized by courts in Pennsylvania, Missouri, and Kansas. By 1909 even the United States Supreme Court agreed that a person could recover damages where an advertiser had used her picture without her consent, at least where the advertisement caused harm to her reputation. *Ibid.* at 147.

²⁵⁹ Jeffrey Rosen, “The Right To Be Forgotten,” *Stanford Law Review Online* 64.1 (2012): 88.

its sphere reaching from the home into the public square, its emptiness seeming to absorb everything in its path.

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