

# FREIE UNIVERSITÄT BERLIN

JOHN F. KENNEDY-INSTITUT  
FÜR NORDAMERIKASTUDIEN

Abteilung für Kultur

WORKING PAPER No. 48/1992

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The Bostonians



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To start: a scene from The Bostonians. The transplanted southerner Basil Ransom has returned to Boston from New York on a business trip and decides to look up Verena Tarrant, whom he had met the year before while visiting his cousin Olive Chancellor, a reformer and advocate of women's rights. Basil knows that Olive despises him for his conservative views, but even so, risks stopping by with the hopes of locating Verena. Seeing instead the old abolitionist Miss Birdseye leaving Olive's house, Basil gets from her Verena's Cambridge address and elicits from her a promise not to tell Olive that she had seen him. Believing in the "victory of truth" and that Verena will convert Basil to their cause "privately," Miss Birdseye assents, "She will affect you! If that's to be your secret, I will keep it" (B 227).

Proceeding to Cambridge, Basil finds Verena and goes with her for a long walk through the Harvard campus. At a crucial moment the question arises as to whether Verena will tell Olive of the visit. "How will she know," Basil asks, "unless you tell her?" (B 247). "I tell her everything," responds Verena (B 247), all the while suggesting that she might after all keep the visit secret.

"Well, if I don't tell Olive, then you must leave me here," said Verena, stopping in the path and putting out a hand of farewell.

"I don't understand. What has that to do with it? Besides I thought you said you must tell," Ransom added. In

playing with the subject this way, in enjoying her visible hesitation, he was slightly conscious of a man's brutality--of being pushed by an impulse to test her good-nature, which seemed to have no limit. It showed no sign of perturbation as she answered:

"Well, I want to be free--to do as I think best. And, if there is a chance of my keeping it back, there mustn't be anything more--there must not, Mr. Ransom, really."

"Anything more? Why, what are you afraid there will be--if I should simply walk home with you?"

"I must go alone, I must hurry back to mother," she said, for all reply. And she again put out her hand, which he had not taken before.

Of course he took it now, and even held it a moment; he didn't like being dismissed, and was thinking of pretexts to linger. "Miss Birdseye said you would convert me, but you haven't yet," it came into his head to say.<sup>1</sup>

Later we learn that Ransom's visit, "buried in unspoken, in unspeakable, considerations," becomes, "the only secret [Verena] had in the world--the only thing that was all her own" (B 286-87).

Staged around a handshake -- the most common gesture standing for the enactment of a contractual agreement -- this scene creates a private space between Basil and Verena, giving to her a secret that is her only possession in the world. In this essay I want to examine the construction of a space of privacy in The Bostonians, especially the possibility for it under the terms set down by the

marriage contract. But I want to do more. Even though frequently we refer to privacy, it is not all that clear what we refer to when we do. As the author of a legal text on the right of privacy notes, "The word 'privacy' has taken on so many different meanings and connotations in so many different legal and social contexts that it has largely ceased to convey any single coherent concept."<sup>2</sup> Or, as a book co-authored by the lawyer who defended Ulysses against charges of obscenity puts it, "The word 'privacy' has different meanings for all of us."<sup>3</sup> The notion of privacy seems to evoke private meanings. Given this confused sense of privacy, there still might be some lessons to be learned from James's fictional construction of the private, even if we no longer accept them as lessons from the master.

## I

One reason for the legal confusion over privacy is that law in the United States distinguishes between two kinds of privacy. On the one hand, there is the so-called constitutional right of privacy that protects against governmental actions. On the other, there is the common law or tort right to privacy that protects against actions by other private parties. The confusion is heightened by the fact that the Constitution makes no mention of a right of privacy, nor is one mentioned in the common law until the late nineteenth century when two American lawyers gave it a rationale and a name. Constitutional privacy is in large measure a creation of the Warren Court, especially Justice Douglas, who argued that various amendments of the Bill of Rights contain

"penumbras," which, when taken together, create "zones of privacy" into which the government should not intrude.<sup>4</sup> For instance, a Constitutional right of privacy is the basis of Roe v. Wade, the Supreme Court case that limits the government's power to interfere with a woman's choice to have an abortion or not. In contrast, the common law right to privacy grows out of a Harvard Law Review essay published in 1890. Its authors, Samuel Warren and Louis Brandeis, like James, attended Harvard. Constructed out of his milieu and at almost the same time that he was writing, this right to privacy would seem to be the one most pertinent to his works.

Brandeis and Warren graduated first and second in their law school class. Warren came from a wealthy Boston family. Brandeis would become the first Jewish member of the Supreme Court. Brandeis's biographer quotes Roscoe Pound as saying that their article did "nothing less than add a chapter to our law."<sup>5</sup> Its intent was to protect human dignity from the prying of others. They were especially concerned about abuses by the press.

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. The intensity and complexity of life,

attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>6</sup>

This hostility to the press has sparked imaginative accounts of their article's origin. According to legend, Warren sought Brandeis's help in response to press coverage of his family's social life. In 1883 Warren married Miss Mabel Bayard, daughter of Thomas Francis Bayard, Sr., a senator from Delaware who was nearly nominated for president by the Democrats, although his southern connections raised suspicion about him with some northerners. As Secretary of State, Bayard forged a cooperative alliance with Great Britain known as "hands across the Atlantic."<sup>7</sup> It is only appropriate, then, that the famous writer of transatlantic novels, Henry James, knew Bayard's daughter, having met her on a visit to Washington, D.C. in 1882. Impressed by her charm, he wrote to his mother that she and her friends were, "Such as one ought to marry, if one were marrying."<sup>8</sup> James wasn't marrying, but a year later Mabel was. According to one of Brandeis's biographers, the Warrens "set up housekeeping in Boston's exclusive Back Bay section and began to entertain elaborately. The Saturday Evening Gazette, which specialized in

'blue blood items,' naturally reported their activities in lurid detail."<sup>9</sup> Reporters, we are told, snuck into social affairs as waiters, carrying hidden cameras: For six years, according to the authors of a book on privacy, Warren and Brandeis considered legal means to halt such intrusions, using that time meticulously to arrange "the words that convey the ideas that constitute [their] argument."<sup>10</sup>

Recently this account of the article's origins has been disputed. Unearthing very few reports of the Warrens' social life, less sympathetic scholars speculate that the actual cause of Warren's outrage was the handling of Senator Bayard in 1889.<sup>11</sup> But whether the image of Samuel Warren knocking a camera out of a disguised reporter's hands is a fabrication or not, it is clear that many of the so-called "best men" of the time were concerned about the intrusiveness of the press. For instance, Warren and Brandeis cite a Scribner's article written the same year by E.L. Godkin, the editor of The Nation. Godkin argues that the threat to privacy grows out of the development of new technologies of publicity. Admitting that there is "some substance" to the claim that "the love of gossip is after all human," he adds

But as long as gossip was oral, it spread, as regarded any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the

pain or mortification of knowing that he was gossiped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack on his reputation. His peace and comfort were, therefore, but slightly affected by it.

Not only does the wide circulation of papers reveal someone's imperfections to people hundreds or thousands of miles away, worst of all it "brings to his knowledge exactly what is said about him, with all of its details." Thus he must suffer "the great pain of feeling that everybody he meets in the street is perfectly familiar with some folly, or misfortune, or indiscretion, or weakness, which he had previously supposed had never got beyond his domestic circle."<sup>12</sup>

James was obviously intrigued by the power of the press to cause such affronts to personal dignity. For instance, a major part of his 1888 novel, The Reverberator, describes how a vulgar American reporter almost halts the marriage of a sophisticated French-American man to an innocent American woman when he publishes information that he obtains from her. The information is about the private life of her family-to-be, which, in turn, considers anyone who would give such information to a reporter unworthy of membership in its exclusive circle. James's plot indicates that, whether or not we can trust a biographer's account about journalistic accounts of the private life of the Warren family, Warren and Brandeis had available vivid, if fictional, accounts of just how unscrupulous the press could be in its reporting. Their

concern was not with libel. That was already covered by the law. Instead, they wanted to guarantee legal protection against the sort of intrusions that James imagines, whether the information was true or not.<sup>13</sup> They sought this protection by claiming that, although it had never been articulated, the common law guaranteed a right to privacy or, as they put it, "the right 'to be left alone'."<sup>14</sup>

The political consequences of such a right to privacy in our own day are not at all clear. A number of liberals point to its Mugwump origins to confirm their conviction that it is a relic of an elitist, bourgeois ideology. For evidence they could point to an 1890 editorial in The Nation commenting on the Warren and Brandeis article. While deploring violations of privacy, the author is pessimistic about providing for its protection. One reason that he cites is that "In all democratic societies today the public is disposed either to resent attempts at privacy, either of mind or body, or turn them into ridicule."<sup>15</sup> To defend privacy seems, in other words, undemocratic. Shortly thereafter, however, an editorial in Scribner's Magazine takes issue with this account. "It is important to note, " it insists, "that privacy is not by any means an attribute of aristocracy as opposed to democracy." Nonetheless, the Scribner's article only fuels the fire of those who find the defense of privacy conservative. It begins: "In the great future battle of the world between the two systems of Socialism and Individualism, one of the vital points of difference is to be privacy."<sup>16</sup>

But if late nineteenth-century capitalists linked the threat

to privacy to socialism, today some capitalists decry a right to privacy while some radicals cry out for it. For instance, the radical feminist Andrea Dworkin is incensed with the recent New York Times and NBC News policy of reporting the names of rape victims. "If a woman's reporting a rape to the police means she will be exposed by the media to the scrutiny of voyeurs and worse, a sexual spectacle with her legs splayed open in the public mind, reporting itself will be tantamount to suicide." Like Warren and Brandeis years earlier, Dworkin considers the truth of the reporting irrelevant. "The media," she says, "use you until they use you up." What the rape victim needs, she argues, sounding very much like our Mugwumps, is "privacy, dignity, lack of fear."<sup>17</sup>

In contrast to Dworkin, we have Judge Richard Posner's pronouncements on privacy. It is hard to fit Posner's complicated thinking under simple labels, but he is certainly not a socialist. He is, however, extremely critical of a tort right to privacy.

Very few people want to be left alone. They want to manipulate the world around them by selective disclosure of facts about themselves. . . . Reputation is what others think of us, and we have no right to control other people's thoughts. Equally we have no right, by controlling the information that is known about us, to manipulate the opinions that other people hold of us. Yet this is the essence of what most students of the subject mean by privacy.<sup>18</sup>

Posner's stand on privacy is consistent with that aspect of his thought that makes him an economic conservative: he is a

staunch defender of the freedom of the market. Thus he disagrees with Warren and Brandeis's attempt to provide legal protection for those who wanted to keep information about themselves, true or not, from circulation in the market. Posner would seem to agree with the reporter in The Reverberator that such information belongs to the public. Any consideration of the political effect of a right to privacy should take into account Warren and Brandeis's attempt to resist the logic of the market.

The attempt to have the right to privacy resist the logic of the market forced the two lawyers to distinguish privacy from property rights. The attempt to disassociate a right from rights of property in the United States in the late nineteenth century might at first glance seem a foolish move. After all, labor leaders and political radicals decried the legal privileges granted to the propertied and declared that the major social conflict was one between the interests of workers and the interests of property. But, as legal historians point out, this was not the age of property in the law but the age of contract.<sup>19</sup> The law may have protected vested interests of property; nonetheless, the value of property was subordinate to the contract relation. Whereas in the eighteenth century there was a general tendency to assume the intrinsic value of a piece of property, in the highly developed market economy of the late nineteenth century value was determined by contractual exchanges in the marketplace. The consequences of the reign of contract for the attempts to guarantee a right to privacy are best understood if we remember Locke's crucial

distinction between life and labor. For Locke labor is alienable from the person and thus becomes a form of property. Life, however, is not alienable. To subordinate the right to privacy to that of property is to make it alienable. But the entire point of a right to privacy is to protect aspects of the personality from circulation in the marketplace. Privacy, therefore, had to be related to an inalienable part of one's personality.

One way of looking at the history of the tort right to privacy is to note how difficult it has been to disassociate it from property.<sup>20</sup> For an example, we can turn to Godkin's argument about reputation. Reputation, Godkin argues, is one of man's most valuable possessions, as important or more important for the comfort and happiness of life as "tangible property." As he quotes Shakespeare:

Who steals my purse steals trash; 'tis something, nothing;  
'Twas mine, 'tis his, and has been slave to thousands;  
But he that felches from me my good name  
Robs me of that which not enriches him,  
And makes me poor indeed --<sup>21</sup>

But even though Godkin insists on reputation as being more valuable than money, the courts protected reputation by linking it to tangible property. Because reputation could increase earning power, it, like labor, was a form of property. For instance, one of Albion W. Tourgée's most ingenious attacks on the separate but equal law challenged in Plessy v. Ferguson was that, in labelling Homer Plessy, who was seven eighths white, black, the Jim Crow law

deprived him of his reputation as a white man, which affected his earning power and consequently violated the Fourteenth Amendment's protection of life, liberty, and property. The Supreme Court did not deny Tourgée's argument that reputation was a form of property; it merely denied the relevancy of his argument to the law in question.

If reputation itself is marketable, how can it be an inalienable part of someone's personality? Indeed, the seeming inability completely to disassociate the right to privacy from property would seem to point to the folly of arguments like Warren and Brandeis's that appeal to the notion of an "inviolable personality" capable of resisting the market. As a generation of literary critics has been trained to believe, the very notion of an inviolable, private self is a construct. Students of late nineteenth-century United States culture have used this insight to suggest that far from resisting the logic of the market, the notion of an inviolable, private self is a product of it. For instance, Philip Fisher problematizes the opposition between public and private by arguing that in The Bostonians the private self does not preexist the public but is created by disappearing from it. The "genius" of James's novel he asserts, "is not to ask the question of how, out of normal human materials" a performing public self is constructed. "Instead he begins with Verena's instinctively public self and asks how, out of this, an intimate and human-scale personality might be won." Verena's "full possession of an individual self," he argues, comes from her final act of

disappearing from the public.<sup>22</sup>

Providing a new historicist twist to Laurence Holland's argument about the expense of vision in James's work,<sup>23</sup> Fisher's reading would seem to complicate a genteel, Mugwump vision of a private, autonomous self that pre-exists the realm of publicity. It is worth noting, however, that the Mugwump vision was not quite as essentialist as contemporary critics make it out to be. For Gilder a private self is not an ahistorical self. "Privacy," he maintains, "is a distinctly modern product, one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies."<sup>24</sup> Even if we are put off by Gilder's Eurocentric views of civilization and barbarism, we have to acknowledge that they make clear that for him a private self is not some pre-given, natural self, but one that is produced by a particular civilization, a self that he feels is well worth preserving. Likewise, the purpose of Warren and Brandeis's article was to demonstrate that the common law is a historically adaptable institution that contains within it the principles to provide legal protection against new threats to a particular version of the self. Present commentators almost always overlook the fact that Warren and Brandeis refer to a right to privacy, not a right of privacy, which is the common phrase today. They shouldn't. The difference is subtle, but a right to privacy is more appropriate for a right to be left alone that carries with it the implication that unless it is guaranteed an inviolate personality will be impossible to maintain, whereas a right of privacy, a bit more strongly, implies

something that an inviolate personality has as an inalienable possession. A right to privacy is more a creation of the law, a right of privacy more an appeal to natural rights.

My point is that Warren and Brandeis come closer than some give them credit for to Robert Post's very contemporary argument that the issue at stake concerning privacy "is not whether the law ought to protect personality, but rather how the law ought to conceptualize personality for the purposes of legal protection."<sup>25</sup> The Mugwumps conceptualized personality in a very particular way and felt that it should be protected. What is interesting when we look at James in conjunction with their concept of personality is that he too asserts a notion of personality, but one that problematizes the Mugwump version. In problematizing it he does not, however, reduce it to a pure product of the public sphere or the market. The private self in James does respond to new market conditions and new techniques of publicity. But even though those forces shape the nature of the self, they do not completely determine its shape.

The problem with a reading like Fisher's is that it corrects the notion that a private self preexists a public realm by turning the relationship upside down. James's novel works by a "reversal of terms." He underlines a "strategy of self-creation that inverts the strategy of publicity and visibility that are the machinery of the celebrity" (my emphasis).<sup>26</sup> The private is formed by disappearing from what must be a preexisting public realm. The legal distinction between the Constitutional and tort rights of

privacy points to the flaw in such an inversion. To recall, Constitutional privacy is concerned with violations of privacy by the government; tort privacy with violations by other private parties. If privacy can be violated by private parties, we cannot rest content with a simple opposition between public and private. Instead, we need to distinguish between different realms of the private.<sup>27</sup> For instance, whereas it seems to make sense to contrast the private self to the "public" realm of the market, in the late nineteenth century the market was very much considered a part of the private realm. After all, a main principle of laissez-faire economics was that the public realm of government should not interfere with private business contracts between free individuals.<sup>28</sup> But even if we grant that the realm of the market was for the most part considered private rather than public, it still makes sense to consider the market less private than the domestic sphere into which Verena disappears at the end of The Bostonians. It is the almost sacred realm of the domestic circle that Warren and Brandeis and Gilder seem most concerned to protect. They share that concern with Justice Douglas, who in Griswold v. Connecticut appealed to the sanctity of the domestic circle to uphold the right of a married couple to use contraceptives. Waxing eloquently he asks:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with

a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.<sup>29</sup>

The domestic circle may be considered by many of us the most sacred zone of privacy, but, as Douglas's quotation makes clear, it is not an asocial realm. Indeed, at the heart of the domestic circle is a contractual relation, that between husband and wife. The nature of that contract complicates any exploration into the notion of privacy.

## II

The marriage contract, lawyers in the late nineteenth century willingly granted, is a special sort of contract. In an 1867 essay Godkin favorably evoked Sir Henry Maine who argued that the "movement of the progressive societies has . . . been a movement from Status to Contract."<sup>30</sup> Casting off feudal relations based on status, progressive societies were founded on contractual relations of free and equal individuals. Honoring the "freedom" of contract as no society before it, the United States in the late nineteenth century could claim to be the most progressive of progressive societies. But the marriage contract raises an important problem. Involving two mutually consenting adults, it, nonetheless, creates a relationship of status, a relationship that the United States Supreme Court called "the foundation of the family and of society."<sup>31</sup> A society supposedly founded on freedom of contract, in fact, had an equally important foundation in a domestic relation

of status.

Because the social order depends upon the proper ordering of the private domestic realm, the contract creating that space has a quasi-public nature. Thus, in an age in which the courts considered interference with market transactions an unwarranted violation of the freedom of contract, they asserted their right to regulate the marriage contract. Divorce, for instance, was not simply a matter of two individuals who could freely enter into or out of a contractual relation. As Justice Thomas M. Cooley of Michigan wrote, "There are three parties to every divorce proceeding, the husband, the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise, shall divorce be allowed under circumstance as to reduce marriage to a mere temporary arrangement of conscience or passion . . . ."32

Cooley is most famous for his Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (1868), often appealed to by defenders of laissez-faire economics. But although he was very reluctant to interfere with the terms of business contracts between private citizens, he, like most of his generation, believed in governmental regulation of the marriage contract. Cooley is also the person who provided Warren and Brandeis with their crucial phrase, "the right 'to be left alone'."33

Cooley was willing to have the state regulate the marriage

contract because social health depended upon the proper ordering of the domestic sphere. Once the state guaranteed that husband and wife assumed their proper status, however, the state's regulatory function more or less ceased, and the domestic circle became a sanctified private realm supposedly immune to public and private interference. This did not mean that regulation of the domestic sphere ceased. Its regulation, however, was left up to husband and wife who were expected to perform their proper duties, duties that established a clear-cut legal hierarchy in their relationship.

As some critics of traditional marriage pointed out, the courts' attitude toward marriage was similar to the attitude southern courts had adopted toward slavery. In both cases, courts tried to guarantee a proper relation of status but refused to interfere with it once it was established. For instance, Basil Ransom grew up in a society that classified master and slave and husband and wife as parallel parts of the law of domestic relations.<sup>34</sup> The end of slavery did not mean the end of the courts' treatment of marriage in the same way. In fact, emancipation fueled fears of miscegenation, which led to powerful assertions of the government's right to regulate the terms of the marriage contract. For instance, in a decision that declared homes the "nurseries of the States," an Alabama court dissolved an interracial marriage. Who, it wondered, can "estimate the evil of introducing into the most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles, and estrangements of kindred? While

with their interior administration, the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard against disturbances from without."<sup>35</sup>

Because the domestic circle had such an important social role it was established by a contract much more public in nature than the business contract. This public contract created a sacred sphere that should not be violated by public or private parties. Private as that sphere might seem, however, it was not a sphere in which husband and wife could legally assert "the right to be left alone" against one another. On the contrary, the marriage contract created one legal body out of two. James's works can help us sort out the complications that the marriage contract presented to notions of a private personality. It's time, then, to return to The Bostonians.

### III

The relationship established between Verena and Basil in Cambridge is defined by two very different contrasts. One is between their encounter and the location in which it begins to take shape. Their intimacy is first established in Memorial Hall at Harvard, a semi-public space commemorating the private deaths of the "sons of the university" who gave their lives in public service during the Civil War. As James puts it, "They were discussing their affairs, which had nothing to do with the heroic symbols that surrounded them; but their affairs had suddenly grown so serious that there was no want of decency in their lingering there for the

purpose" (B 247).

The other contrast is between their relationship and the one that Verena has with Olive. Because Verena ends up promising to marry Basil, most critics assume that the relationship between the two women stands for an alternative to traditional marriage. To a certain extent this is true, since traditional marriage is heterosexual. Indeed, the status that the marriage contract constructed between husband and wife was justified on the basis of the "natural" forces of heterosexuality. But if James presents an alternative to traditional marriage by eliminating the forces of heterosexuality from Olive and Verena's relationship, the alternative that he presents experiments with the ideal of marriage put forth by many feminists of the period. Only a minority of those advocating women's rights clamored for the abolition of marriage. Most continued to support the notion of marriage as a sacred union of mutual consent and a balance of mutual obligations and duties. What concerned them was that the relationship of status created by the marriage contract did not allow a relationship of equality. In the relationship between Verena and Olive James experiments with the possibility of achieving that ideal without what many in his generation considered a natural barrier to its fulfillment: heterosexuality.<sup>36</sup>

Many contemporary critics look at Olive's feminism and assume that she opposes the institution of marriage. To be sure, she would "hate it for herself" (B 105). But that hatred has more to do with the fact that marriage for her was possible only with a

man. Indeed, Verena's initial radical disapproval of the marriage-tie "gave her a vertigo" (B 105). She especially "didn't like the 'atmosphere' of circles in which such institutions were called into question" (B 105). Unlike Verena, she is not an advocate of "free union" (B 105). Quite traditional in her views, she idealizes a relationship that requires renunciation. What distinguishes her from traditional advocates of marriage is that she wants a relationship with Verena that renounces the heterosexual attraction that supposedly shaped the status granted male and female by the marriage contract.

As Olive acknowledges, the "union of soul" (B 101) that she seeks with Verena would take a "double consent" (B 101). Based on mutual consent, their relationship creates a "partnership of their two minds" (B 169). That partnership is not, however, based on radical notions of "free union" (B 105) in which the partners are free to dissolve it at will. Instead, Olive seeks, as in a marriage contract, a promise that "would bind them together for life" (B 129). That she seeks from Verena a promise not to marry would seem to undercut my claim that James uses their relationship to experiment with the possibility of a truly egalitarian "marriage." But her subsequent refusal to accept Verena's spoken promise when it is offered, preferring to "trust" her "without a pledge" (B 152), serves to emphasize the way in which their relationship approaches the ideal of a union between two people more closely than the existing marriage contract. The marriage contract, after all, depends on legal sanction to enforce its

lifelong bond. Verena and Olive's bond demands a perpetual renewal based on mutual trust. Coming together in a partnership that compensated for the lack each one possessed, they form an "organic whole" (B 169).

Verena and Olive's success in creating one body out of two is in stark contrast to Basil's lone attempt to form a partnership. Having difficulty making ends meet as a southern lawyer in New York city, "he had formed a partnership with a person who seemed likely to repair some of his deficiencies--a young man from Rhode Island, acquainted, according to his own expression, with the inside track" (B 197).<sup>37</sup> Rather than compensate for Basil's deficiencies -- one of which was capital -- his new partner took what little money the partnership had and snuck off for Europe.

As successful as Verena and Olive's partnership is by contrast, its very success allows James to suggest an indirect criticism of the institution of marriage that Olive herself is not willing to make. If Verena and Olive's union creates an organic body that compensates for their respective deficiencies, what it lacks, as we have seen, is a space for Verena to call her own. The problem is not simply, as some critics pose it, that Verena's relationship with Olive grants her a public role, whereas her relationship with Basil confines her to a private one. To be sure, Verena and Olive work together to present a voice to the public, whereas Basil will deny Verena that voice. Nonetheless, both offer her a private, domestic life. Olive, though opposed to marriage for herself, is extremely domestic. On his first visit to her,

Basil is most struck by the tasteful arrangement of his cousin's home. Like the proper wife, "Olive Chancellor regulated her conduct on lofty principles" (B 52). "Her house," we are told, "had always been thoroughly well regulated" (B 184). This domestic regulation is one of the most important things that Olive offers to Verena, who comes from a most unregulated family.<sup>38</sup> But even though such regulation heightens her cultural refinement, it leaves her with no space of her own.

This is not to say that at the end of the novel she will find it with Basil. James is highly conscious of how the private sphere of the domestic circle creates a realm in which individual privacy is hard to come by. This, indeed, is part of the message of The Reverberator. It is easy to read that work as James's attack on the press' intrusion into the private realm of the domestic circle. But James also directs his satire against the proper French-American family, the "house of Probert," that is held together by a delicate "bond" that makes "each for all and all for each" (R 68-9). Acting as a corporate body, it would forbid son and brother Gaston to marry a lovely, but unrefined, American, who in her innocence betrays family secrets to the press. Family secrets is the right phrase, for everyone in the family knows about them. As imagined by James, this family is so close that no secrets are allowed, although a lot of hypocrisy is. For instance, the family seems willing to relent in its judgment of Francie, if she would only lie and say that she was forced into confiding to the journalist. But innocent Francie insists on the truth, forcing

Gaston to choose between his family and his lover. In a crucial scene, his friend, an American artist, advises him to marry, "To save from destruction the last scrap of your independence" (R 205). Gaston's family, he tells him, is rendering him "incapable of individual life" (R 205). Gaston ends up proving his independence by choosing to marry, but, in a typical Jamesian move, that choice creates the conditions for yet another domestic circle. Similarly, in The Bostonians Verena escapes from one domestic relation into another.

In most respects her relationship with Basil promises to be even more confining than her relationship with Olive. In addition to being predicated on her willingness to hold "her tongue" (B 256) and to no longer speak in public, her relation to Basil introduces the force of sexuality into Verena's life, a force that makes it impossible to maintain the delicate balance of equality for which Olive and Verena strive. Indeed, the holding of Verena's tongue and the force of male sexuality are linked early in the book when Olive warns her, "There are gentlemen in plenty who would be glad to stop your mouth by kissing it" (B 151).

The image of Verena's mouth being stopped by a kiss invites direct comparison with the scene between Basil and Verena in Cambridge. If that scene culminates in a handshake, the act most symbolic of contractual relations between equal partners, the kiss is the act most symbolic of sealing the contract between man and wife. The nature of Verena's life in marriage is anticipated by the imagery of the final scene. Wrenching Verena from Olive "by

muscular force" (B 432), Ransom thrusts the "hood of Verena's long cloak over her head to conceal her face and identity" (B 433). No wonder that the union she is about to enter promises to produce more tears than the ones she sheds at that moment.

As Lynn Wardley has pointed out, Verena's marriage with Basil does not, as Fisher would have it, signal the end of her performing self for a private self, since Verena will continue to perform. The difference is that she will now perform with Basil as her private audience.<sup>39</sup> She has not disappeared from the public realm to assert the "full possession of an individual self," because the domestic sphere she is about to enter, while decidedly private, will not allow her the space for a self to exist. Indeed, the marriage contract incorporates her into the body of her husband.

The book's ending does not mean, however, that James offers no space whatsoever for a private self to be constructed. Such a space occurs, even if momentarily, during the handshake between Verena and Basil.

#### IV

Like the kiss about which Olive warns Verena, Verena's handshake with Basil leads to a holding of her tongue. But whereas the kiss would put an end to her addresses to the public so as to reserve them for Basil, the handshake implies that she will keep her meeting with Basil secret from Olive, another private party. Furthermore, she does not submit to her silence, but offers it on the condition that Basil leave her a space of her own. If offering her hand seals a moment of intimacy between her and Basil, it also

established boundaries between them. "'Well, if I don't tell Olive, then you must leave me here,' said Verena, stopping in the path and putting out a hand of farewell" (B 248). To be sure, at first Basil refuses to enter into the agreement she offers. He even momentarily enjoys playing with her and testing her good nature while being "slightly conscious of a man's brutality" (B 248). But Verena's resistance continues, working to control the natural brutality that would force itself upon her. "Well, I want to be free--to do as I think best. And, if there is a chance of my keeping it back, there mustn't be anything more--there must not, Mr. Ransom, really" (B 248).

Of course, Verena's desire to be "free" can be read ironically in light of the book's ending. Far from offering her freedom, this moment can be read as leading to her subsequent submission to Basil's masculine will. Nonetheless, at this moment a delicate balance is reached; a balance achieved when Basil, despite irritation at "being dismissed" (B 248), takes the hand she once again offers. In James's world a space in which a private self can take shape is constructed in such a balanced moment.

The nature of that moment can be appreciated by comparing it to perhaps the most famous moment in American literature sanctifying a private relationship between a man and a woman: the meeting of Hester and Dimmesdale in The Scarlet Letter. Whereas Hawthorne's lovers meet in the forest, James's, as we have seen, meet in a semi-public realm. Part of the sanctity of their moment together results from the sanctity of that semi-public space, not

their withdrawal into nature. Furthermore, whereas Hester and Dimmesdale share privacy because of their illicit sexual union, Verena and Basil create the possibilities of privacy through the establishment of boundaries. As Olive puts it trying to wrench Verena's secret from her later in the novel, "Verena Tarrant, what is there between you?" (B 362). A private personality for James does not result from protecting a self that preexists social relations. Nor does it result from the union of two selves into one that underlies the so-called sanctity of the domestic sphere. It does not even result from disappearance from the public. Instead, it has to do with the creation of a space between, a space that establishes connection while simultaneously helping to define the parties involved as individuals.

What complicates the establishment of this space between in James is that it depends upon an empty space within the two parties involved. We can see this most obviously with Verena.

Verena's remarkable capacity to establish relationships with people results not from a fullness, but an emptiness, "the extraordinary generosity with which she could expose herself, give herself away, turn herself inside out, for the satisfaction of a person who made demands of her" (B 370). Her role as medium is her most obvious manifestation of this "generosity."<sup>40</sup> She seems capable of speaking the voice of whomever is in control of her. Her generosity suggests that James has merely given her the traditional definition of a woman as an empty vessel, waiting to be filled and given identity by her union with a man. For

instance, during his first encounter with her, Basil comes close to "attributing to Miss Tarrant a singular hollowness of character" (B 85). But the hollowness that defines Verena's essence turns out to inhabit other characters as well. It is, after all, deficiencies, not a fullness, that cause Basil, Verena, and Olive to seek out partnerships. Furthermore, if Verena's voice seems capable of being taken possession by whomever she is around, it is that very voice that seduces Basil, penetrating the core of his being so that he, in turn, wants to take sole possession of it.

Taking possession of another is as much a cardinal sin for James as it is for Hawthorne. Unlike Hawthorne, however, he does not imagine an alternative to it to be a full moment of organic unity. In contrast, James's alternative balances the generosity that he associates with Verena against the resistance that she displays in her handshake with Basil. Owing much to the ideal of the period's market exchanges, that balanced vision also points to its limits.

The ideological power of contract as a mode of exchange depends upon an image of balance, an image of two free and equal parties willingly consenting to a transaction from which both can benefit. What needs to be stressed, however, is that in the business contract this image rules out the possibility of truly interpersonal exchanges. This is because, whereas the exchange ideally leads to financial profit for both involved, it concerns alienable property, not the essence of the people themselves. Accumulated property can be merely added onto an already existing

self.

James's image of exchanges is quite different. For James no essential self exists outside of exchanges and yet precisely for that reason all exchanges are interpersonal and thus affect the very nature of the self. This is because, as we have seen, a self cannot achieve definition without a "space between" that only interpersonal relations can provide, while, at the same time, interpersonal relations are impossible without an emptiness within the self, an emptiness making one vulnerable to penetrations -- and dominations -- by another. This image of exchange leads to a very different account of how business contracts lead to profit.

Rather than present a world in which a balanced agreement between equal partners can lead to mutual profit -- as Basil hoped for in forming his law partnership -- James presents a world in which profit results from imbalances, dominations, and submissions. Even in those transactions in which both parties reap a financial gain, for James, a personal loss is involved. Indeed, rather than assume that the basis of a contract is a preexisting balance between bargaining partners whose agreement signals a meeting of the wills, James shows that a balance can be achieved only, as Verena temporarily does, through the resistance of one party to the will of another.

This vision puts him at odds with many of the most outspoken critics of the marriage contract of his day -- but not because he is an apologist for marriage. I have already pointed out how Olive shares the belief of some feminists, who continued to consider

marriage a sacred bond but were intent on making it more egalitarian. Other, more radical, advocates of marital reform turned to a belief in freedom of contract to remedy the status relation created by the marriage contract. For instance, there is free love advocate and first female Wall Street broker Victoria Woodhull whom James used for a model in "The Siege of London." Woodhull proclaimed that in marriage, "There is neither right nor duty beyond the uniting -- the contracting -- individuals."<sup>41</sup> If husbands and wives could only be considered free and equal contracting parties, like those entering into a business contract, the institution of marriage would be reformed. James offers a different vision. Unlike Locke who felt that someone could enter into exchanges and alienate property (or labor as a form of property) without affecting an essential, inalienable self, James presents a self that is defined by the exchanges into which it enters, just as the marriage contract alters the status of the contracting parties. As a result, rather than use the ideal of the business contract as a model to reform the marriage contract, he uses the imbalances that critics noted in the marriage contract to suggest that such imbalances inhabit all exchanges; that all, like the marriage contract, involve imbalanced structures of the status of the person that they in part construct. Nonetheless, within this framework -- there was no other available to him -- James does present an exchange that achieves a momentary balance as Basil and Verena, in shaking hands, create a space between themselves, a space that both constructs and -- so long as it exists -- helps to

maintain a private self otherwise denied Verena.

V

The moment of privacy constructed between Verena and Basil in this scene helps us to understand another contract that James tries to negotiate in his works; that between reader and text. I want to turn the terms of that contract in such a way so as to address two recent charges levelled against James. The first is the complaint by some feminists that he denies Verena any possible autonomy.<sup>42</sup> The second that he is a champion of a discredited notion of artistic autonomy. My response to these complaints is linked. Yes, James does deny Verena autonomy, but he also explicitly compares her to a work of art. Since few would deny that James regards art very highly, it follows that James's denial of autonomy to Verena should not be seen negatively. It also follows that James does not champion artistic autonomy. What he does champion, I would claim, is artistic "privacy."

The most important link between Verena and a work of art is her capacity to be simultaneously vulnerable and seductive. Her seductiveness comes from her charm, which for Mrs. Burrage gives her the appearance of an autonomous work of art whose originality creates its own value. "When a girl is as charming, as original, as Miss Tarrant, it doesn't in the least matter who she is; she makes herself the standard by which you measure her; she makes her own position" (B 303). But, as we have seen, Verena's "originality" derives, not from her autonomy, but from a hollowness

at her core that makes her dependent upon relations. That dependency, in turn, makes her the most fascinating figure in the book. She may not drive the plot, but it is generated by her "generosity." Making her vulnerable to possession by those around her, this generosity also opens her to life. For instance, on the beautiful spring day that Basil visits her in New York, Olive leaves them alone and walks along the streets "barely conscious of the loveliness of the day, the perfect weather, all suffused and tinted with spring" (B 299). In contrast, although Verena is at first nervous about her walk with Basil, once she "was fairly launched the spirit of the day took possession of her" (B 319).<sup>43</sup>

The openness that makes Verena vulnerable to possession also accounts for her seductive and original charm. Both her vulnerability and seductiveness are in turn related to her voice. Neither Olive nor Basil are originally attracted to the ideas that she expresses. Olive, as we have seen, is repulsed by her notions of free union; Basil by almost everything. As he tells Miss Birdseye, "Does a woman consist of nothing but her opinions? I like Miss Tarrant's lovely face to begin with" (B 226). Verena's ideas, it seems, are alienable from Verena's body. And more than from her body, from her voice. Completely charmed by her voice as she performs in New York, Basil takes for granted that "the matter of her speech was ridiculous. . . . She was none the less charming for that, and the moonshine she had been plied with was none the less moonshine for her being charming" (B 266). Indeed, it is Verena's voice that proves so seductive. Its power is economically

expressed when Ransom overhears her practicing her speech for the Music Hall, "Murder," he exclaims, "what a lovely voice!" (B 348). So murderous is its power that Basil would virtually murder to possess it. As he waits to steal her away at the end of the book, he could imagine how a young man "waiting in a public place" might feel, who "has made up his mind, for reasons of his own, to discharge a pistol at the king or the president" (B 348). For Basil, Verena's voice, not her opinions, represents her "character." As he tells Mrs. Luna, Olive's sister, "You like me for my opinions, but entertain a different sentiment for my character. I deplore Miss Tarrant's opinions, but her character--well, her character pleases me" (B 407).

But lest we think that in James's world only the ideas of women seem alienable from the voice that stands for their character, it is important to remember that Verena also separates her attraction to Basil from his opinions. Challenged by Olive about her attraction to a former slave owner, she with "majesty" responds, "I don't loathe him--I only dislike his opinions" (B 363). Just as Basil is seduced by Verena's voice, so she marvels at "how wonderfully he can talk" (B 368). The "spell" that each casts on the other, like the spell that works of art cast on their audiences, cannot be explained by mere reference to ideas and argument.

The separability of a work or a character from its ideas may seem to return us to a doctrine of individual autonomy, for it implies that there is some mysterious essence to both work and

character that cannot be reduced to their ideas. Eliot, for instance, praised James for having a mind so fine that no idea can violate it, and his obvious distrust of novels of ideas is one reason for his revival in the years after World War II when critics were suspicious of ideological criticism from both the right and the left. But my distinction between privacy and autonomy complicates this commonplace reading of James's inviolability. Warren and Brandeis may have associated privacy with an inviolate personality, but for James a personality is by definition prone to violation.

Rather than establish autonomy, the failure of a character or work of art to be identical with its ideas actually forces it into relations of dependency. Autonomy would occur, not when there is a discrepancy between voice and content, but when there is an organic merger of the two. Indeed the failure to merge the two makes Verena's voice vulnerable to appropriation by others who speak through her as a medium. There is, in fact, no better expression of the emptiness at the core of her being than the discrepancy between her voice and the ideas that it expresses. It is, however, that emptiness that allows her to be both vulnerable and seductive. So too with a novel, especially because its medium is language, which by nature cannot be, as perhaps music can, pure voice.

Constituted by language, a literary work possesses a voice that is not identical to the ideas that it expresses, a discrepancy that renders readers' efforts to reduce it to ideas a violation of

what I have called its "privacy." At the same time, because language would not be language unless it expressed ideas, any reading that attempts completely to separate a work from its ideas is as flawed as the effort to alienate a worker's labor without altering his self. Just as Verena and a work of art are not identical to the ideas that they express, so a worker is not identical to his labor. This lack of identity would seem to indicate that ideas, like labor, are alienable from the essential character of a person or a work of art. Verena should be able, in other words, to enter into exchanges of ideas with Olive or Basil that would leave her essential self untouched. But because she is defined by a lack, rather than a pre-existing autonomy, this is impossible. Her self is, at least partially, involved in any exchange that she enters, just as the worker's self is, at least partially, involved in any exchange that he makes for his labor. This is most obvious in Verena's proposed marriage with Basil. In marriage Verena's character will be altered because the very structure of the relationship established by the marriage contract is not negotiated through a free exchange of ideas but already dominated by ideas held by Basil.

The point is, then, not only that a discrepancy between voice and ideas creates a dependency on relationships, but that people and works are defined by the specific relationships that they enter into. The ways in which Olive and Basil relate to Verena offer two negative models for the contract between reader and text.

Possessed by Verena's voice, both Basil and Olive attempt to

possess it. Basil's mode of possession grows out of his recognition of gendered difference, difference defined for him by a hierarchical relationship of status. Having separated the charm of Verena's voice from what it says, Basil does not care so much to influence its content, which he dismisses as moonshine. For him Verena's voice is a purely formal performance. He merely wants to reserve its performances for himself. In contrast, Olive, in striving for an egalitarian union, demands a perfect merger of form and content. That merger, however, demands a loss of difference. As a result, her way of achieving it becomes in one important respect more proprietorial than Basil's. If Basil allows Verena her voice and dismisses its content, Olive appropriates it as a medium to express her own ideas. Thus she is like numerous readers who use a work of literature as a vehicle to make public their own point of view. Basil reads Verena's voice performatively; Olive constitutively. For James a contract between reader and text that will preserve a text's privacy depends upon a resistance to such acts of possession.

In making privacy dependent upon a resistance to possession James would seem to confirm Warren and Brandeis's claim that a right to privacy needs to be distinguished from a right to property. But to look at the two lawyers' effort to make that distinction is to mark a subtle, but crucial, difference, a difference that will allow me to draw a few tentative consequences of my argument.

## VI

It is no accident that in order to distinguish privacy from property Warren and Brandeis turned to a series of famous copyright cases that often involved works of art. To be sure, to claim copyright is to transform a work of art into a form of property available for circulation through publication. But Warren and Brandeis were interested in those cases that established the artist's right to withhold publication. That right, they claimed, establishes the precedent for a right to be left alone. They could rely on these cases to establish a right to privacy because of the special position that artistic creation occupies in our culture. On the one hand, it can be alienated and become a form of property. On the other, prior to its act of alienation, it seems to be coextensive with the life of its creator. To attempt to possess it without his permission is not so much the theft of a piece of property -- its market value may be worthless -- as it is a violation of his personal dignity, or as Warren and Brandeis would have it, his privacy. Thus a work of art seems to be simultaneously a potential piece of alienable property and an expression of its creator's innermost self.

James complicates this already complicated situation by reminding us that an innermost self is itself the product of relationships with others. So too a work of art, which has no life unless it is brought into relationship with an audience, a relationship that makes it vulnerable to possession. But what does it mean to possess a work of art?

So long as possession is seen in terms of ownership and property, the effort to separate privacy from property remains impossible. What it means to possess a work of art is, however, double edged. On the one hand, someone can hold legal title to it and copyright the earning power brought about by its publication. On the other, someone with no legal claim at all can "possess" a work through an imaginative act of appropriation. The first is clearly within the realm of the law. The second, however, is difficult to articulate in legal terms. Indeed, what lawyer would claim that a reader's imaginative possession of a work is a claim to legal ownership over it? This second form of possession does not fit under the law of copyright.

And there is at least one more complication. Although the law attempts to maintain a clear-cut distinction between works of fiction and life, so that authors often proclaim their works fictional in order to protect themselves from libel suits, works of art with a mimetic component can themselves, as James knows, involve an urge to appropriate life or some aspect of it. Thus for James a work is not, as it is for Warren and Brandeis, coextensive with its creator until he alienates it as a piece of property to the public. Instead it is defined by a variety of relations, although it cannot be reduced to any one. First, there is the gap between it and its creator; second, between it and readers that would possess it; third, between it and the life that it would possess. What I have been calling the "privacy" of a work of art depends upon establishing a "space between" in at least these three

directions. As I have shown, such privacy is not a moment of autonomy in which a work can speak for itself. Instead, it is constructed by maintaining a space that keeps it from being dominated by the very relations that define it. It depends upon a moment akin to that delicately balanced moment in which a self, created through exchanges, is not effaced by them. It depends, in other words, upon a moment like that moment of courtship in The Bostonians when Verena, so vulnerable to being possessed by others, maintains the power to possess her would-be possessors.

Of course, in The Bostonians that moment is not sustained. Similarly, the spaces defining the privacy of a work of art are always vulnerable to appropriation. Thus, although there is a difference between Jamesian representations of the act of possessing a self or a work of art and the legal notion of property, James's location of privacy as a resistance to possession still seems as doomed as Warren and Brandeis's effort securely to distinguish privacy from property. But once again there is a subtle distinction. Faced with the demands of legal rhetoric, the two lawyers attempt to assign privacy and property to separate legal compartments. But James operates in a different rhetorical world. Relieved of the need to assign privacy to a distinct realm or a particular entity, James makes it dependent upon a relationship in which it is constructed by resisting that which in part defines it. That resistance may be doomed to failure. Like Warren and Brandeis's effort to locate privacy within the self, James's delicately balanced moment of privacy constructed by a

"space between" may be impossible to maintain, just as a balanced reading of a Jamesian novel (including mine) may be impossible. Nonetheless, there is still something to be gained by striving to achieve it.

What is gained would, however, be very difficult to translate into the realm of the law, especially a legal system, like the one in the United States, that works at least in part by assigning rights. For instance, to whom would it assign a Jamesian right to privacy, which depends upon a space that belongs to no one person although it is a product of human exchanges? Or, for another example, try to determine if there would be any inevitable application of James's notion of privacy to today's legal debates over abortion. It would, I suggest, not fit neatly into the rhetoric of either side.

But if it would be difficult to translate into the law what is gained from striving to achieve a Jamesian notion of privacy, what is lost by not doing so is revealed by a similarity, not a difference, between James and the two lawyers. The threat to Warren and Brandeis's right to privacy today is not, as some Mugwumps a hundred years ago feared, socialism. Instead, it is, as the two lawyers sensed, the uncontrolled free play of the market that would turn everything including personality into a commodity. Similarly, the major threat to a Jamesian notion of artistic privacy is the effort by many recent critics to subsume the notion of the aesthetic under that of rhetoric, thus allowing them to possess a work by assuming that its value is determined by the

amount of persuasion it accomplishes in the marketplace of ideas. One consequence of identifying these threats is that it does not seem that, contrary to the hopes of some politically engaged critics, elimination of a realm of the private or of a Jamesian notion of the aesthetic will be a first step towards freedom from the logic of a capitalist economy. On the contrary, for those intent on resisting the logic of the market, aspects of the notions of both privacy and art constructed at this time, despite certain ideological corruptions associated with them, seem well worth preserving. For proof I merely invite you to return to The Bostonians and establish your own relationship to it, one that, I hope, will be at least slightly affected by my own appropriations of it in this essay.

## Notes

1. Henry James, The Bostonians (New York: Penguin, 1986), p.248. Future references to this work will be cited parenthetically within the text and designated (B). The other works by James cited parenthetically will be The Reverberator from The Novels and Tales of Henry James, v.13, (New York: Scribner's, 1908), cited as (R) and The Aspern Papers and The Turn of The Screw (New York: Penguin, 1986), cited as (AP).
2. J. Thomas McCarthy, The Rights of Publicity and Privacy (New York: C. Boardman, 1987), p.1-3.
3. Morris L. Ernst and Alan U. Schwartz, Privacy: The Right to Be Let Alone (New York: Macmillan, 1962), p.1.
4. Griswold v. Connecticut, 381 US 479 at 484 (1965).
5. Alpheus Mason, Brandeis: A Free Man's Life (New York: Viking, 1946), p.70.
6. Samuel Warren and Louis Brandeis, "The Right to Privacy," Harvard Law Review, 4 (1908), 196. The most influential account of the tort law of privacy since Warren and Brandeis is William L. Prosser, "Privacy," 48 California Law Review 383 (1960).
7. Charles Callan Tansill, The Foreign Policy of Thomas F. Bayard, 1885-1897 (New York: Fordham U.P., 1940).
8. Henry James, The Letters of Henry James, ed. Leon Edel (Cambridge, MA: Harvard U.P., 1974) v.1, p.408.
9. Mason, Brandeis, p.46.
10. Ernst and Schwartz, Privacy, p.47.

11. James H. Barron, "Warren and Brandeis, The Right to Privacy, 4 Harvard L. Rev. 193 (1890): Demystifying a Landmark Citation," Suffolk University Law Review 13 (1979), 875-922. Lewis J. Paper, Brandeis (Englewood Cliffs, NJ: Prentice-Hall, 1983).
12. E.L. Godkin, "The Rights of the Citizen: IV. To His Own Reputation," Scribner's Magazine 8 (1890), 66.
13. In France a law was on the books that levied a fine of 500 francs on every publication in a periodical of a fact of private life. Warren and Brandeis cite this law in "The Right to Privacy." Whether James was aware of it or not is unclear from the action of The Reverberator. On the one hand, he makes it clear that the French papers planning to reproduce The Reverberator article must be more careful about what they print than their American counterpart. On the other, the action that the French-American family contemplates if they overstep their bounds is a "suit for defamation" (R 170).
14. Warren and Brandeis, "The Right to Privacy," 195. They cite Thomas M. Cooley, Treatise on the Law of Torts, 2nd ed. Brandeis reuses the phrase thirty eight years later in his famous dissent in a governmental wiretapping case, indicating that for him at least intrusions by government and private parties violate the same right. The "right to be let alone," he asserts, is "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277

US 438 at 478 (1928).

James frequently describes characters who seek this right. In The Aspern Papers the note sent by Miss Bordereau's niece to the narrator expresses her aunt's desire that the narrator's colleague "would let her alone" (AP 51). In The Reverberator three different people or groups of people are described as wanting to be left alone. The American girl, Miss Francie, "who had not even the merit of knowing how to flirt," only "asked to be let alone" (R 58); The French-American family thinks of itself as "quiet people who only want to be left alone" (R 197); and the son is told by his artist friend that it would be fair play for the family itself to "let [him] alone" (R 203).

15. "The Right to Privacy," The Nation, Dec. 25, 1890, 496-7.
16. "The Point of View," Scribner's Magazine, 9 (1891), 261. John Dewey addresses the flaw of assuming that the "distinction between private and public is . . . equivalent to the distinction between individual and social." John Dewey, The Public and Its Problems: An Essay in Political Inquiry (Chicago: Gateway Books, 1946), p.12. The book was first published in 1927.
17. Andrea Dworkin, "The Third Rape," Los Angeles Times, April 28, 1991, M6.
18. Richard A. Posner, "The Right to Privacy," Georgia Law Review 12 (1978), 400, 408. Posner levels another attack against a right of privacy in the introduction to his book on law and

- literature. See Law and Literature: A Misunderstood Relation (Cambridge, MA: Harvard U.P., 1988), pp.4-5.
19. See Grant Gilmore, The Death of Contract (Columbus: Ohio State U.P., 1974); Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 Buffalo Law Review 205 (1979); and Peter Gabel and Jay M. Feinman, "Contract Law as Ideology," in The Politics of Law: A Progressive Critique, ed. David Kairys (New York: Pantheon Books, 1982), 172-85.
  20. Walter Benn Michaels argues that "the explicit attempt to shift privacy away from property nonetheless produced a dramatic extension of property rights, produced, in effect, new property." "The Contracted Heart," New Literary History 21 (1990), 526n.13.
  21. Quoted in Godkin, "Reputation," 59.
  22. Philip Fisher, "Appearing and Disappearing in Public: Social Space in Late-Nineteenth Century Literature and Culture," in Reconstructing American Literary History, ed. Sacvan Bercovitch (Cambridge, MA: Harvard U.P., 1986), 180, 178. For an overlapping, but different view, see Ian F.A. Bell, "The Personal, the Private, and the Public in The Bostonians," Texas Studies in Literature and Language 32 (Summer 1990), 240-56.
  23. See Laurence Holland, The Expense of Vision: Essays on the Craft of Henry James (Princeton: Princeton U.P., 1964).
  24. Gilder, "Reputation," 65.
  25. Robert C. Post, "Rereading Warren and Brandeis: Privacy,

- Property and Appropriation," mss. version, 18.
26. Fisher, "Appearing and Disappearing," 180, 179.
  27. Fisher makes such an effort, but not in a way to complicate his opposition between the public and the private.
  28. A major complication for laissez-faire thinkers was the rise of corporations. For instance, Gilder refers to railroad corporations as "those large quasi-public enterprises." "Reputation," 63.
  29. Griswold v. Connecticut, 381 US 479 at 485-86 (1965).
  30. Sir Henry Maine, Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas (New York: Dorset, 1986, rpt. 1861), p.141. Godkin's evocation of him appears in "The Labor Crisis," North American Review, 105 (1867), 183.
  31. Maynard v. Hill 125 US 190 at 211 (1887).
  32. People v. Dawell, 25 Mich. 247 at 257 (1872).
  33. See fn. 14 above.
  34. Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," The Journal of American History 75 (1988), 477.
  35. Green v. State, 58 Ala. 190 (1877), cited in Michael Grossberg, Governing the Hearth: Law and The Family in Nineteenth-Century America (Chapel Hill: U. of North Carolina P., 1985), p.138.
  36. It seems obvious to us today that Olive and Verena's relationship is based on homosexual rather than heterosexual

attraction. I am not, however, convinced that James consciously constructed such an attraction between them. Whether he did or not does not affect my argument, which is merely that he removes from their relationship that force that determined the "natural" positions of status in marriage.

On feminist ideals of marriage see William Leach, True Love and Perfect Union: The Feminist Reform of Sex and Society (New York: Basic Books, 1980). Leach's discussion of the feminist call for a doctrine of "no secrets" about the mysteries of marriage might seem to imply that the lack of secrets between Olive and Verena is an effort to live up to this ideal. But the "no secrets" doctrine was based on the belief that previously unspoken aspects of marriage (like sex) should be made public so as to demystify marriage and place it on a rational foundation. In contrast, the lack of secrets between Olive and Verena results from the similarity of their union to that of traditional marriage in which ideally husband and wife had no secrets. Try to imagine Olive making public details of her life with Verena.

37. Albion W. Tourgée has a fictional character describe a law partnership as a marriage. "If lawyers are in a partnership they ought to be like husband and wife, -- no secrets between them." With Gauge & Swallow, Attorneys (Philadelphia: J.B. Lippincott, 1890), p.136.
38. For a literary portrayal of the danger to society brought about by a daughter lacking the proper domestic regulation see

John Hay, The Bread-Winners: A Social Study (New York: Harper & Brothers, 1883). Both William Dean Howells and Thomas Wentworth Higginson labelled Hay's Maud Matchin "ill-regulated." Although Maud was compared to James's Daisy Miller as a new type of American girl receiving treatment in fiction, James in early 1884 wasn't impressed with Hay's novel. Verena is, in part, his more impressive portrayal of the fate of a daughter brought up in an ill-regulated home. For citations, see Charles Vandersee's introduction to The Bread-Winners (New Haven: College and University Press, 1973), pp.20, 29, 30.

39. Lynne Wardley, "Woman's Voice, Democracy's Body, and The Bostonians," English Literary History 56 (Fall 1989), 639-65.
40. On Verena as a spiritualist see Howard Kerr, Mediums, and Spirit-Rappers and Roaring Radicals: Spiritualism in American Literature, 1850-1900 (Urbana: U. of Illinois P., 1972), pp.190-222 and Susan Wolstenholme, "Possession and Personality: Spiritualism in The Bostonians," American Literature 49 (1978), 580-91.
41. Quoted in Stanley, "Conjugal Bonds," 474.
42. See, for instance, Jean Fagan Yellin's remark, "Because James's young heroine Verena is essentially selfless, there is never any possibility that she will achieve autonomy." Women & Sisters: The Antislavery Feminists in American Culture (New Haven: Yale U.P., 1989), p.164.

43. In consciously evoking Verena's role as a medium, her ability to be taken possession of by spirits, this description calls attention to one of the most important strategies in the book. Habegger has noted that the book divides in two. The first half is predominantly a satire of the reformist and spiritualist movements; the second, a psychological exploration of the attractions between Verena and Olive and Verena and Basil. In the first half James satirically discredits the spiritualist vocabulary of magic and the occult associated with Verena. But in the second half he finds himself returning to it as he struggles to describe the seemingly mysterious attractions connecting his major characters. At times his use of it is almost unnoticeable, as when he frequently refers to Verena's "charm." At other times it is quite explicit. Contemplating how rapidly she has been persuaded by Basil's courting toward the end of the book, Verena "felt it must be a magical touch that could bring about such a cataclysm. Why Basil Ransom had been deputed by fate to exercise this spell was more than she could say--poor Verena, who up to so lately had flattered herself that she had a wizard's wand in her own pocket" (B 375). The vocabulary of magic and spiritualism does more than explain the "spells" cast by characters on one another. It becomes the only available vocabulary to explain the seductive attraction of art. The two, in fact, merge in Verena. For Habegger's argument see: "The Disunity of The Bostonians," Nineteenth-

Century Fiction 24 (1969), 193-209.