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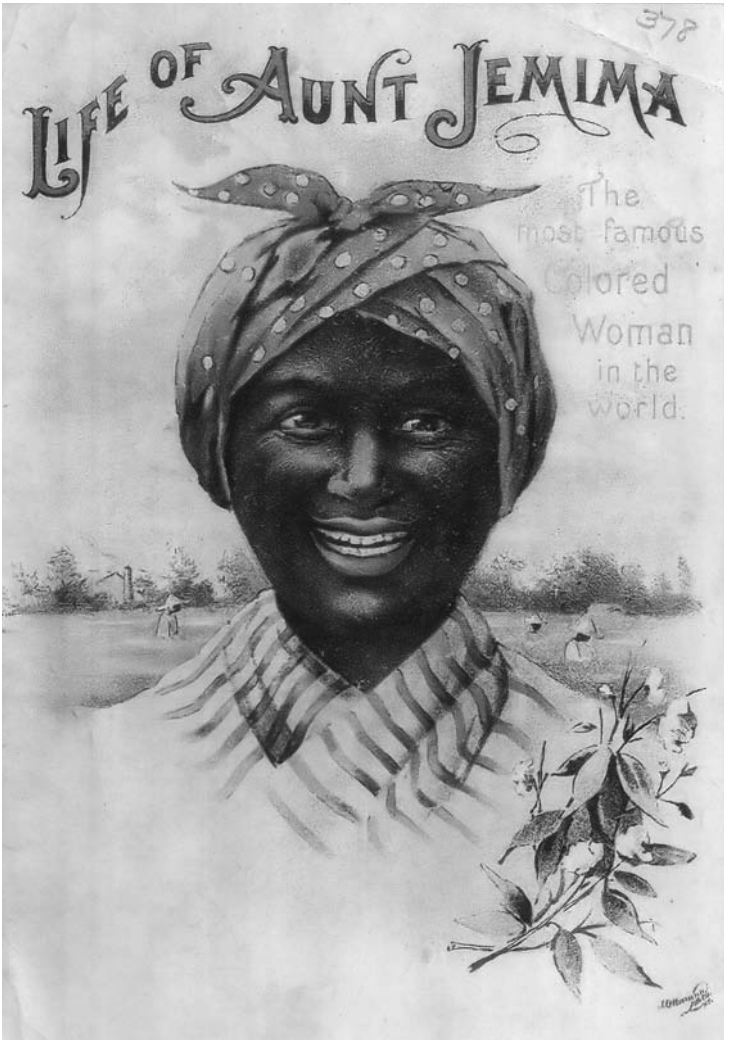

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The Whiteness of Privacy: Race, Media, Law

Eden Osucha

Framing "The Right to Privacy"

In 1890, two influential Boston jurists—Samuel Warren, the scion of a socially prominent family and the son-in-law of a secretary of state, and his law partner, the future Supreme Court justice Louis Brandeis—published an article in the newly founded *Harvard Law Review* that defined, for the first time, the concept of a right to privacy in the American legal tradition.[1] In "The Right to Privacy," Warren and Brandeis decried modern media publicity's corrosive effects on gendered, classed, and raced social norms. They feared that the ideal of bourgeois propriety alone was inadequate to defend "the sacred precincts of private and domestic life" from what they framed as the "invasion" of the domestic sphere by "instantaneous photographs and newspaper enterprise" (195)—that is, from the double threat of new visual technologies and related media industries. Warren and Brandeis were especially concerned with the social impact of technological and commercial developments that had transformed photography between the medium's invention and early practice in the 1830s and the explosion in amateur photography that followed the introduction

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of the roll-film camera to the US market in 1888.[2] Thus they reasoned that "to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds," legal defense against the combined forces of media publicity was required (206).

Superficially at least, "The Right to Privacy" regards law as an essentially compensatory undertaking: if social custom alone could no longer enforce the intrinsic and necessary "privacy of private life" (215), then the latter should be enshrined as a legal right. For today's readers, the article gives the strong impression of wounded gentility and an alarmist defense of traditional values, from Warren and Brandeis's opening appeals to the law's regard for "man's spiritual nature . . . feelings and . . . intellect" (193) to the clichéd description of "man's house as his castle" (220) that concludes their arguments. Yet despite its rhetoric of cultural conservatism, "The Right to Privacy" presents a legal project unprecedented in the history of American law and keyed to innovations in that tradition. Warren and Brandeis's proposed rights claim marked a radical extension of existing legal concepts of individual autonomy and personal injury, underwritten by a reconfiguration of the traditional political model of the self-possessive individual in light of new economic processes specific to the era's nascent mass media.[3] Although Warren and Brandeis offered creative interpretations of property law and legal copyright to demonstrate that the common law tradition tacitly recognized a right to privacy, they framed their proposals within the historically recent and distinctly modern domain of tort law—a branch of the law concerned with defining and remedying forms of personal injury.[4] By this account, media publicity is redescribed as an experience of acute personal injury, and the media industry's routine business of generating publicity becomes a condition of legal liability.

In practical terms, the proposed doctrine of media privacy addressed "the right of one who has remained a private individual, to prevent his public portraiture" in *any* form (213). Under this doctrine's protections, even the mere "discussion by the press of one's private affairs" could be prevented (214).[5] However, in the article's

broader account of an epidemic of "ruthless publicity" (214) that anchors the legal argument, Warren and Brandeis give greater weight to the dangers of media "portraiture" than to those of media "discussion," deploying the novel term *pen portraiture* to describe written accounts and *public portraiture* as a synonym for *media publicity* in general. Such substitutions indicate how the imputed "ruthlessness" of media publicity referred to wider cultural concerns about *visual* media technologies—specifically the transformation of social life by commercial and private photographic practices.

The central role of this article in shaping the historical right to privacy in the US, as well as the significance of concepts of visuality in that history, is evidenced by the passage, barely a decade after Warren and Brandeis's writing, of the nation's first privacy laws, which were created directly in response to a legal case largely premised on "The Right to Privacy." As I will elaborate in this essay, *Roberson v. Rochester Folding Box Company* (1902) concerned a young white woman whose photographic portrait had been sold by a photographer to a company who used her image to market a prepackaged commercial flour mix under the punning motto "Flour of the Family."[6] Abigail Roberson claimed that the public circulation of her commodified likeness through these advertisements constituted a gross invasion of her personal privacy in a lawsuit that named as codefendants the box-manufacturing company and the Franklin Mills Flour Company. Her initially successful claim of invasion of privacy was overturned by the New York State Court of Appeals, which ruled that no applicable precedent could be found either in case law or in a relevant rule in statutory law.[7] The case had received widespread media attention throughout the appeals process, as Roberson's plight connected with a culture already sympathetic to Warren and Brandeis's ideas, and public outcry over the decision in *Roberson v. Rochester*, as the case is now known, proved decisive in the state legislature's decision the following year to recognize a right to privacy under the New York Civil Rights Law.[8] This statute closely hews to Warren and Brandeis's original vision for a privacy tort.

Because of its immediate impact on the codification of privacy rights in the law, "The Right to Privacy" is generally considered

by legal scholars to be the single most influential law review article ever written.[9] The essay has also become a key text in the fields of media studies and literature interested in tracing the historical origins of the American notion of the right to privacy.[10] In the cultural histories, two central themes carry over from legal scholarship on this topic: first, the role of the development of mass media and the historic alignment of visuality and consumerism in inciting a need for this right; and second, the privacy tort's basis in a paradigm of private ownership. This work departs from more conventional legal scholarship in terms of the conceptualization of mass media, which legal studies tend to treat as a monolithic whole, rather than as a complex and variegated set of practices and institutions. In this regard, privacy's cultural historians consider how the development of this rights doctrine was shaped by specific media technologies and practices and by the discourses that surrounded them—especially popular anxieties about the commodification and exposure of women in visual culture.[11]

These concerns are amply reflected in the text of "The Right to Privacy," in which the technologized consumer gaze produced in the mass-mediated public sphere is characterized as an intrinsically pornographic one. In Warren and Brandeis's discussion, the archetypal violated object of this gaze is invariably gendered female. Such constructions are central to their legal reasoning. "If you may not reproduce a woman's face photographically without her consent," they write, "how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination" (212). Significantly, Warren and Brandeis call on the camera's latent potential for injury to illustrate the general hazards of media reproduction for female subjects.

This passage reiterates an implicit distinction that runs through "The Right to Privacy" between the male rights-bearing subject—the undisputed head of what Warren and Brandeis term "a man's castle"—and the specifically female victim of the invasion of privacy, with these gendered positions defined by class and race assumptions as well. In this construction, bourgeois women's exemplary status for the negative depiction of media publicity

reflects a double and contradictory symbolic function of the white female body—its positioning both as a naturalized object of visual consumption and as the privileged signifier of domesticity in the traditional public/private distinction. The effectiveness of this symbolism in shaping the early history of the privacy doctrine can be seen in the sympathetic spectacle of wounded white femininity in *Roberson* and in the immediacy of the legislative response. For the case, the evidence of Roberson's appropriated image does not just attest to her privacy's violation—it also establishes its existence as the condition of possibility for such an injury. The portrait functions as the incontrovertibly self-evident, "natural" sign of an idealized femininity, which qualifies Roberson as intrinsically vulnerable to wounding by media publicity.

As texts, *Roberson* and "The Right to Privacy" reproduce in the legal domain the articulation of femininity and privacy normalized in nineteenth-century visual culture. The doctrine of media privacy that grows out of these legal texts seeks to contain the circulation of women both as objects of representation and as consumers of media. The legal project of media privacy thereby acts to stabilize a conventionally gendered division between public and private by replacing this outmoded and increasingly unsupportable distinction with a set of cognate terms—namely, *publicity* and *privacy*—uniquely adapted to the mass-mediated public sphere.[12] And yet the opposition between individual privacy and media publicity that structures the Warren and Brandeis doctrine does not easily map onto the political-symbolic terrain of the traditional public/private distinction that, according to many scholarly accounts, publicity/privacy neatly supersedes.[13] For privacy is not, strictly speaking, the opposite of publicity. This is where the present essay marks an intervention into prior accounts of the historical origins of the right to privacy: it asks what historical contexts and political logics ground this presumed opposition.

As Michael Warner has stated, publicity "is a distinct concept, meaning not merely publicness or openness but the use of media, an instrumental publicness associated most with advertising."[14] Of publicity and its cognates he writes, "none of these terms has a sense that is exactly parallel to or opposite private. None are

simple oppositions, or binaries" (28). The "publicness" of publicity refers to an ontological state: a condition of *being* in the spaces of media life, informational exchange, and consumption that broadly count as public. The concept of privacy at issue in "The Right to Privacy" does not, in fact, mark an outside or beyond to the spaces of publicity; on the contrary, this privacy represents a very particular way of doing publicness, of deploying what Warner terms the "resources for interiority and contexts for self-elaboration" that publics, as a routine matter, provide (31). Privacy, in this sense, is also an instance of what Warner terms "instrumental publicness." Thus the distinction between publicity and privacy at stake in the privacy doctrine might be more precisely located in terms of how these two ways of using media culture aspire to divergent and categorically opposed ends—that is, in terms of the opposition between a self-possessive, individual interiority and a terrain of social identity and otherness, associated not just with advertising but with a range of projects of visual culture and exemplified in Roberson's claims of dispossession and self-estrangement.

My purpose here, in underscoring the incommensurability between the publicity/privacy distinction posited by "The Right to Privacy" and the traditional public/private distinction, is not merely to recapitulate Warner's point that publicity and privacy should not be read as "simple oppositions, or binaries." Rather, I want to suggest that this incommensurability reflects how the role of gender in separate-spheres ideology does not readily transfer to the discourse of media privacy, in which femininity is iconic both for the individual ideal of privacy and for the wounding of that ideal through uses of publicity. In this modern discourse of privacy, the symbolic labor of gender is mediated by race—the latter historically being the nation's exemplary logic of otherness, of dispossession and self-estrangement. Thus the distinction between privacy and publicity trades on how these terms are articulated as a logic of racial difference in the commercial media milieu that concerns "The Right to Privacy." The racialization of the concepts of publicity and privacy underwrites the discursive distinction and shapes Warren and Brandeis's influential redefinition of privacy as a distinctive property right and cultural privilege.

In what follows, I argue that the negative assessment of media publicity and of the technologies and practices that the term designated, which informed the creation of the right to privacy, targets publicity's function as a technology of racialization, emblematic in the conspicuousness of racist stereotype and caricature in nineteenth-century commercial print culture. As my brief sketches of "The Right to Privacy" and the *Roberson* case indicate, spectacles of white women in peril saturate the early discourses of media privacy, indicating how articulations of the new legal concept called on an existing cultural association between white femininity and the ideal of privacy. The salience of these spectacles for the evolution of the doctrine of media privacy depended on a series of both contrasts and alignments involving race and gender, consumer and commodity, and individual and type. For example, in *Roberson*, the plaintiff's counsel used the supposed injury of the appropriated image in question to establish the white woman's delicacy, virginity, and *intrinsic* vulnerability to wounding by the disputed media forms. This was *not* because the image was considered a negative or unappealing one. In fact, the lawyers argued that it was *because* the representation was so flattering to her likeness that it was especially injurious; the flattering nature of the image could be linked only to her. Rather, the problem lay in precisely the way in which the image transformed the unique white woman into a generalized object of exchange, a typified product—that is, into another available commodity body. The specter of injury to privacy that haunts "The Right to Privacy," *Roberson*, and the laws that followed in their wake thus finds more concrete expression in the media depictions of people of color in that era, images generically shaped by abjecting and frequently grotesque racial stereotype. In other words, the cultural anxieties that held unwanted media publicity to be an experience of proprietary dispossession reflect the understanding that to be subject to media publicity is to be, in effect, racialized. The racialization of cultural concepts of privacy and publicity, articulated in nineteenth-century visual culture through racially coded representational norms, shapes Warren and Brandeis's influential redefinition of privacy as a privileged form of property and publicity as an invidious experience of injury.

Representative Interiorities: Photography and the Technologization of Race

As John Tagg has argued, the individual portrait has historically long served as "a sign whose purpose is both the description of an individual and the inscription of social identity," which is to say that it produces a paradoxical positioning of the individual in terms personal *and* public, both seemingly unique and yet still typical.[15] The advent of the photographic portrait intensified the double logic of the portrait-as-sign by extending this cultural practice to the rising middle and the lower middle classes. At the time of the publication of "The Right to Privacy" the photographic portrait had become a cheaply produced mass commodity, thus entrenching in market culture the processes of individuation and differentiation involved in the double logic of photographic portraiture. Commodification helped democratize portraiture, enabling ever widening access to the individual portrait's terms of ritual self-display; at the same time, its positioning within market culture tied the photographic portrait to an a priori arena of class distinction and social difference.

While the photographic portrait retained the contradictory purposes, defined by Tagg, from the middle of the nineteenth century on, the mass proliferation of these increasingly inexpensive images indicates an additional symbolic function for portraiture in this medium. In addition to describing an individual, the photographic portrait describes the *idea* of individualism, its expansive image repertoire playing a central role in the cultural construction of the discourse of individualism and of such key tropes as privacy. This third, modern sense of the portrait-as-sign underlies Roland Barthes's claim, written nearly one hundred years after the publication of "The Right to Privacy," that photography made possible "the creation of a new social value," which Barthes terms "the publicity of the private."[16] For Barthes, this new social value is the exemplary logic for how "the age of photography corresponds precisely to the explosion of the private into the public" (98). It is in this sense that the photographic portrait is the figurative locus for the purported boundary crisis that occasioned Warren and Brandeis's intervention.

The simultaneously private and public address that photography inherited from earlier forms of portraiture is additionally inscribed by medium-specific qualities of the photograph, such that the private/public distinction, as it is carried by and reconfigured in photographic discourse, is always an invidious one. The defining characteristic of the photographic system of portraiture is likewise its duality; Allan Sekula describes it as "a system capable of functioning both honorifically and repressively."[17] Sekula argues that as a historical development, "the photographic portrait extends, accelerates, popularizes, and degrades" the portrait's traditional "honorific" function, "that of providing for the ceremonial presentation of the bourgeois self"—a self now subject to art and science, to contemplation and control.[18] This marks a slight but crucial elaboration of Tagg's terms: portraiture does not merely *describe* the self but also honors, elevates, distinguishes it. However, Sekula adds, photographic portraiture also "began to perform a role no painted portrait could have performed in the same thorough and rigorous fashion. This role derived not from any honorific portrait tradition, but from the imperatives of medical anatomical illustration. Thus photography came to establish and delimit the terrain of the *other*" (6). Indeed, during the decades of photography's nascence, the biologization of human difference through the pseudosciences of physiognomy and craniometry and an imminent science of criminal type reimagined the diagnostic imperatives of traditional medical illustration through the social and political imperatives of differentiating the human in terms of race, ethnicity, sexuality, and disability. Among these regimes, photography was instrumental in consolidating racial, sexual, and pathological differences. Constituting the supposedly material evidence of this difference, photographic archives, such as Francis Galton's infamous composite photographs of racial types or Alphonse Bertillon's biometrics practices, simultaneously confirmed the suppositions of science, the state, and cultural "common sense" and provided an external basis for those knowledges. In this way, what Sekula terms photography's "instrumental realism" was indispensable for rendering existing classifications of racially and other marked bodies systematic within modern epistemologies of the visual.

The objectives of social regulation and repression at the core of such knowledge projects mark a precise inversion of the property claim (a claim of *self*-ownership) expressed by the honorific function. As Sekula notes, "to the extent that the legal basis of the self lies in the model of property rights, in what has been termed 'possessive individualism,' every proper portrait has its lurking, objectifying inverse in the files of the police" (7). If the honorific "proper portrait" affirms the self-possession of its subject, repressive deployments of the medium—the mug shut and the ethnographic photograph alike—portray their subjects as individuals dispossessed of selfhood.

I want to underscore that while Sekula's project locates these contrasting and indeed inverse functions in distinct photographic archives, his analysis suggests that both these properties—the honorific and the repressive—are latent within the photographic portrait and that the predominance of either is determined by contexts of circulation and consumption. Like Tagg, who highlights how portraits simultaneously register personal and public meanings, Sekula ascribes to the photographic portrait a fundamental instability. In the *honorific* function, the image's personal meaning seems to eclipse its social or public meaning, while in the particular historical uses of photographic portraiture characterized by Sekula as *repressive*, these terms are reversed, and it is the personal that gets eclipsed. Sekula's discussion focuses on representational instances in which the operation of photographic meaning along this binary remains unambiguous, suggesting that portraits of dispossessed personhood are produced entirely apart from the visual record of possessive individualism that he deems honorific. However, in the final decades of the nineteenth century, the rapid expansion of commercial markets in which photographs were valuable commodities—including the "newspaper enterprise" disparaged in "The Right to Privacy"—created a media environment in which otherwise irrefutable instances of what Sekula terms the "proper portrait" circulate in ways that countermand the cultural ideal of individual self-ownership.

Although a historically recent development, the understanding of the image as a form of commodity had become, by the

time of Warren and Brandeis's writing and through the very market developments they decry, a dominant cultural paradigm. The subjects of photography were not merely "seen" but "consumed." This understanding also refers to an established notion of the ontology of the photographic image, in which the equivalence of image and referent is presumably encoded in the photograph.[19] Thus the subject is *already* positioned as an object of consumption by the camera itself, as the taking of the photograph may seem tantamount to a literal taking of something *from* the subject—that is to say, taking the subject from himself or herself. This suggests why Warren and Brandeis understood photography to be paradigmatic for media publicity, in general, and why the medium proves instrumental in their characterization of the invasion of privacy as an experience of commodification.

The exchange value conferred on photographs by an explicitly commercial public circulation implied a proprietary interest in the personal image on the part of the individual photographic subject. In the photographic order of things, individual physical appearance had become the privileged sign of individual self-possession. Yet, as its double status as both personal and public indicates, the personal image, when photographic portraiture circulates commercially, is also a sign of exchange value; the semiotic guarantee of property-in-oneself becomes the very form of appearance of value for the image-commodity. This symbolic transaction coordinates the basic terms of Warren and Brandeis's description of media publicity as public portraiture and media forms as intrinsically injurious, characterizing the invasion of privacy by unwanted media publicity as an experience of unlawful appropriation and the rights claim of privacy itself as a form of property right. That is, if one's self-possession implies the possession of one's image, then the unbidden circulation of that image can constitute a kind of theft.

Media subjectivities in this era reflect this tension between, on the one hand, a regime of photographic portraiture grounded in the divergence of the form's honorific and repressive deployments and, on the other hand, the cultural formation of the image-commodity by which any portrait can be made to function repressively—that

is, as a sign of the individual's dispossession. This tension resolves, in part, in the racially differentiating representational protocols of nineteenth-century American media culture, protocols that, I am arguing, coordinate the privacy doctrine's critically enabling distinction between concepts of privacy and publicity. By "representational protocols" I mean to suggest how racial difference was elaborated in visual culture through the conjunction of honorific deployments of photography with a thoroughly repressive grammar of popular stereotype related to the taxonomic gaze established in the visual practices of science and the state. The nonindividuating modes of representation conventional for the depiction of people of color stand in contrast to the routine signification of whiteness in nineteenth-century visual culture through explicitly individuating forms of image making—most prominently, the commercially produced, privately circulated photographic portrait.[20] Such practices affirmed whites' supposedly natural endowment with capacities for "self-elaboration" and also aligned white subjectivity with the very notion of self-possessive interiority that Warren and Brandeis describe as the natural basis of the privacy rights claim.

This discourse of white interiority materializes most explicitly in formal photographic depictions of white middle-class subjects, a massive archive whose testament to a passion for self-display among the white bourgeoisie would seem to contradict the phobic inflections of photography in "The Right to Privacy." However, the modes of circulation, display, and composition involved in constructing this archive actually served to distinguish the white middle-class subject from its others in terms of "an inviolate personality"—to use Warren and Brandeis's favored term—whose existence these visual discourses of whiteness affirmed rather than threatened. That is, whites' representative interiority and privacy constituted a countersign to the eminently public bodies installed in the image archives of scientific and state surveillance and reproduced in mass culture via popular entertainment and the racially denigrating visual consumption of African Americans in the commodity marketplace. These various visual forms, through their contrasts, therefore "stabilized a white middle-class subject by endowing it with a laudable interiority . . . [and] producing a visual repertoire

for its signification" (7). However, one might argue that by 1890, the material cultural context for the photographic practices and practices of display associated with the emergence of the portrait's honorific function had evolved in ways that actually undermined such attempted stabilizations. Thus the signification of whiteness in visual culture depends greatly on the practices regularly enrolled in picturing other bodies, consolidating their status as supposedly natural objects of visual consumption. By this positioning, people of color are constitutively unviolable (defined as always already available) in the terms of the privacy rights project. Privacy is a form of property and legal personhood only available to those subjects whose entitlement to this rights claim is recognized by dominant cultural norms.

Media Publicity in the Era of Commodity Racism

The right to privacy attests to and forecasts the increasing instrumentality of the media for modern American racial formations as concepts of media publicity are articulated to concepts of racial otherness—and to racial blackness in particular. Concerns about the commodification of media subjects via the routine functioning of publicity thus bear the trace of a historically prior social order. In the systematic classification of racial difference under slavery, the baseline of difference was the literal commodification of human beings and the proprietary dispossession that structured the collective historical experience of the enslaved. With its recycled discourse of commodification and dispossession, media publicity in the 1890s of Warren and Brandeis was inflected as a technique of racialization and gendering precisely by these ideological residues. In other words, fears about the invasion of privacy and the dehumanizing effects of media commerce were partially the inheritance of the overlapping symbolic, visual, and commercial economies of slavery, for which the spectacle of the enslaved body serves as the central organizing principle. Hortense Spillers has justly used the term *pornotroping* to describe this form of American racial reification.[21] In slavery's visual regimes, as Spillers observes, the spectacularization of black embodiment

becomes lodged in the American cultural consciousness, such that this zero degree of exteriority—Spillers's term is "flesh"—is a veritable codex for productions of difference, for technologies of othering in the public culture. Thus what masquerades in the era of "The Right to Privacy" as an anxiety about the vulnerability of the modern social subject to the abstract threat of publicity is at base a fear about the vulnerability, under publicity's regimes, of the lines of difference that found and maintained specifically racialized subjectivities.

The shift in Western racial knowledge between the seventeenth and nineteenth centuries in particular highlights significant transformations in thinking about human difference within the episteme of visuality. Racial thinking migrated from "a view of skin color as variation to a view of skin color as the basis of classification[,] . . . from a view of the body as a superficial sign to a view of the body as the exterior expression of a deeper organic truth of the organism."[22] The body thus became the sign of a difference that exceeded the body, in that what it revealed as race on the surface was supposed to be the interior, the visually unavailable "truth" of the subject. This intrinsically unstable episteme of visuality accounts for the central importance in the nineteenth century of institutional uses of photography on behalf of projects of racial knowledge production. Photography's eminence as a privileged form not only for the production of wants—that is, consumer desires—but also for knowledge production lent critical authority to inscriptions of social difference. At the same time, such taxonomizing relied on a supposed photographic realism whose ideological effects, established in the medium's first decades, had by 1890 largely transferred to the commodity marketplace.

Visual epistemologies of a newly biologized race and the disciplinary and surveillant practices associated with them were not merely culturally adjacent to more frivolous instances of image production and consumption belonging to the mass-mediated public sphere; in fact, they operated through them. The phenomenon of "commodity racism" illuminates how, in this period, the symbolically masculine gaze of science was supplemented and reinforced by the prosaic and traditionally feminized forms of visual fascination mediated by consumer culture, as the representational con-

ventions specific to the modern commodity spectacle and advertising practices "took explicit shape around the reinvention of racial difference."[23] In the new cultural formations mediated by the era's twinned visual and commodity logics, commodity racism provided a grammar for the social and institutional practices involved in the systematic formalization of race in American law, denoted by the rise of the color line in many of the spaces of public life.

The emergence of commodity racism in the American consumer marketplace coincided with the protracted collapse of federal Reconstruction and the systematic formalization of racial hierarchy in the law. It was characterized by the reproduction and proliferation of racist iconography in the emergent mass culture, transforming racist Southern archetypes into a national culture. With "Sambo and Mammy figures adorning everything from greeting cards to soap dishes and match covers" and "bug-eyed, large-lipped faces gracing kitchen wares," the grotesque entertainment spectacles of the minstrel stage were soon being consumed at the most intimate registers of an American cultural everyday.[24]

The appearance of racialized commercial imagery in earlier historical periods generally falls outside of the ideological apparatus I am describing. In the eighteenth century, for example, images of Native Americans or African slaves used to advertise Virginian tobacco were understood to refer to the commodity's present or historical means of production and to serve as a mark of the product's distinctive New World authenticity and quality.[25] Regardless of how ideologically freighted these images were, the archetypal "Indian chieftain" or "enslaved African" emblazoned on the tobacco tin also functioned to index material aspects of the commercial origins of the product they marked. By contrast, postbellum commodity racism tendered more figurative correspondences between the look of the commodity and its content or function. The mammy figure and the housewares that assumed its form, or commercial products whose packaging bore its distinctive features, became joined by metaphor: a fantasy of black servility rooted in a burgeoning national "impulse to romanticize slavery" through popular consumptions of antebellum fantasia.[26]

The second major feature of commodity racism in the American context is how trade in such objects and images rearticu-

lated the black-white color line in terms of the symbolic and juridical oppositions between object and subject, property and owner, established in slavery by combining the obscene mimetic blackness of the minstrel stage tradition with practices of private ownership and consumption. The sum effect is a strikingly antebellum commodity marketplace: as the folklorist Patricia A. Turner notes, "in 1863 the selling of real black human beings was at long last over, but the selling of distorted caricatures had just begun" (33). As the practices of publicity pertinent to commodity racism involve representations that depict only stereotypical abstractions—that is, nonindividuating representations—they fall outside the categories of publicity mobilized within privacy doctrine, which is strictly concerned with representations of individuals, not types. My argument, however, is that these excluded media practices and their effects on those individual subjects injuriously interpellated by these practices are fundamental to how the privacy doctrine understands publicity as commodification. In other words, the representational and consumer practices and media markets associated with American commodity racism conditioned the meanings of publicity at the heart of the right to privacy.

The relationship between power and visuality normalized in nineteenth-century photographic discourse, and ritualized in media culture by practices of commodity racism, holds that white privilege is more than simply a matter of the synonymy of whiteness and spectatorship as an ideological apparatus. Power also lies in the constitutive dissimulation of this position: modernity's scopic regimes rendered whiteness effectively invisible. David Theo Goldberg speaks of whites as "the ghosts of modernity": "*Racially* invisible . . . whites could assume power as the norm of humanity, as the naturally given. Unseen racially, that is, unseen as racially marked—or seen precisely as racially unmarked—whites could be everywhere."[27] Or, in Richard Dyer's formulation: "The invisibility of whiteness as a racial position in white (which is to say dominant) discourse is of a piece with its ubiquity."[28] As the privileged condition of being racially unmarked in a historical era newly obsessed with marking race, this invisibility translates in "The Right to Privacy" into a conceptualization of the properties of legal person-

hood that remains *rhetorically* abstract while nonetheless referring to evidently transparent, "natural" signifiers of personhood such as "personal appearance, sayings, acts, and . . . personal relations, domestic or otherwise" (213). Notably, these qualities compose the very grammar of the racial stereotype.

Injury and Identity: The Intimate Calculus of Harm in the Law of Media Privacy

The concept of "media injury" that Warren and Brandeis propose narrowly circumscribes the othering effects of media publicity. This delimitation excludes the forms of racial injury routinely perpetrated in print media and the commodity marketplace at the end of the nineteenth century. This exclusion reflects the theory of legal injury that underwrites the doctrine of media privacy.

Tort law is a form of legal reasoning that turns claims of physical or emotional injury and moral responsibility into literal economies of pain by assigning compensatory damages in the wake of wrongful actions committed against individuals or their property. Its expansion in the decades following the Civil War reflects the rapid growth of industries in which accidental physical injury to both laborers and consumers had come to be regarded as an ordinary risk of everyday modern American life. As Sarah Jain notes, "in assuming that injury is always incidental to American culture, tort law and its promise of reparable harms re-distribute human wounding"—wounding that is already distributed through what Jain describes as "the prior machinations of consumption and capitalisms."[29] Tort law, in effect, rationalizes the risk of physical harm as the cost of techno-capitalist progress, with "vast implications of whose bodies [these costs] fall into" (5). In this calculus, injury broadly correlates with disadvantage. Yet the tort doctrine of privacy marks a notable exception from this axiom in that the emotional injury that "The Right to Privacy" identifies might be seen as a sign of valued distinction rather than of disempowering difference (such as the otherness delimited by, for example, the expendability of the laboring body in industrial capitalism).

However, even with this claim of social distinction, the right to privacy paradoxically disavows a complex notion of social identity, the symbolic coinage of public culture—an omission that is quite telling in a text preoccupied with what it feels like to be made an object of public scrutiny, to be rendered subject to the othering mediations of mass culture. For unlike arguments based on social reputation—which Warren and Brandeis suggest reflects merely properties external to the subject, as this connotes the perceptions and feelings of *others*—their concern is with the individual's *own* feelings, with the emotional life that consists of having a "personality."[30] Thus Warren and Brandeis's claims about the injurious effects of media representations on the individual's feelings—those most personal of properties that their proposed right aspires to protect—concern representational forms exclusive of their content. That is, even if an image is "flattering" (like the one, as previously noted, in *Roberson*, which was said to be), the very fact of its existence and circulation can, they reason, cause harm.

This way of understanding media representations points to privacy doctrine's location in a historically recent shift in the discursive construction of racial difference—a shift that can be characterized as a repositioning of race's conceptual onus, following the abolition of slavery, from the conjunction of the *social* forms of property and personhood to the determinations of alleged *personal* properties expressed via aspects of consumer culture, including those related to popular media and entertainments.[31] This also marks one key conceptual point where the concept of media injury articulated in "The Right to Privacy" departed from existing laws regulating media practices. Again, throughout their polemic, Warren and Brandeis tacitly assert the peculiar, heretofore overlooked dangers of the media *form* over the law's extant concern with matters of injurious *content*. Unlike existing torts of slander and libel, which protected the individual's reputation from demonstrably untrue stories or negative media portrayals, the proposed tort of privacy law asserted that commercial media structures, in themselves, were intrinsically harmful to individuals, irrespective of questions of content.

Yet Warren and Brandeis have surprisingly little to say about *how* media forms cause pain: beyond the most general and abstract

references to hurt "feelings" and "sensibilities," they fail to explain how it is that a subject can be substantively injured by the publication of his or her likeness when the representation in question is neither "false" nor "defamatory." Warren and Brandeis are explicit on this point:

> The truth of the matter published does not afford a defense. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, *but to prevent its being depicted at all.* (218; emphasis mine)

This is the most radical of their proposals for the protection of privacy in media culture, revealing the stakes in Warren and Brandeis's concern with forms of public circulation and display. If individuating modes of photographic representation can be reinflected, through their public circulation, to undermine rather than reaffirm a claim of self-ownership, then even "good"—or, in *Roberson*'s terms, "flattering"—media content can always be made to function as "bad," which is to say, as personally injurious.

In a related passage of the text, the authors of "The Right to Privacy" describe this problem of the marketplace in terms of the distinction in the paradigmatic relationship of photographer and subject between, on the one hand, the consensual photographic "sitting" and, on the other hand, the surreptitious "taking" of a photograph in, respectively, the time of the medium's earliest decades and the time of Warren and Brandeis's article in the wake of the invention of the easy-to-use, highly portable roll-film camera and the related advent of amateur photography.

> Now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford

the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection. (211)

This protection must go beyond that of social *trust* to concern itself with social—and, particularly, commodity—*exchange*. That is, the problem with media technology is always, for Warren and Brandeis, a problem of the media marketplace—of new possibilities and new models for the individual's commodification.

Thus the authors underscore their claim about the danger of photography by pointing out that advances in the "art" of photographic marketing have made it possible for even legitimately, consensually produced portraits to function as vehicles of "surreptitious" image taking, as when intentionally private portraits become subject to general sale or to other modes of circulation and display not intended by the sitter. To substantiate this claim, they cite, with approval, an 1888 case whose circumstances resembled those that led to *Roberson*. In this earlier case, known as *Pollard v. Photographic Co.*, a photographer also used a woman's picture for advertising purposes. Although the decision was made in the plaintiff's favor as an instance of breech of contract, the judge felt compelled additionally to affirm, in principle, what the plaintiff's attorneys had argued was her essential property right in her personal image, even though this claim proved immaterial to the decision and legally indefensible. Likewise, Warren and Brandeis use this case to indicate how photography produces a new mode of media publicity that demands, in response, a new conception of privacy as a legally defensible and enforceable right.

Publicity's Racial Objects: The Personal Properties of Aunt Jemima

One media text from the era of Warren and Brandeis's writing that helps bring my argument and its stakes into sharp relief is the Aunt Jemima brand commercial trademark. First introduced to the American public in 1890, Aunt Jemima traded on the pre-

sumably national appeal of the nostalgic figure of the plantation mammy—a reliable signifier of domesticity, servility, and maternal nurturance—to market an instant pancake mix. Indeed, this marketing proved so successful that the Aunt Jemima figure became the most popular, most widely recognizable trademark in the last decade of the American nineteenth century and one of the first truly national brands in American mass culture (as well as what is now regarded by critical race scholars as the exemplary instance of the historical phenomenon of American commodity racism discussed earlier).[32]

As with the advertising materials at issue in the *Roberson* case, which used a woman's portrait to publicize a flour mix, the Aunt Jemima pancake mix trademark was held to be a reproduction of a real woman's likeness, even though, in truth, the trademark's namesake and signature mammy visage referred to a popular song from the theatrical tradition of blackface minstrelsy. While the popular appeal of this song and stage character and the familiarity of the racial, gendered archetype on which it trades have much to do with the brand's phenomenal popularity, its success owes as much (if not more) to the widely disseminated fiction that behind the Aunt Jemima trademark smile there was a real woman, and it was her personality that was being sold along with the pancake mix. That, in the same historical moment, the literal commodification of one woman—African American, elderly, working class—would be enthusiastically embraced by American consumers, while another—white, young, bourgeois—woman's rather tenuous, purely symbolic claim of commodification was met with proportionate horror and condemnation helps highlight, for the purposes of my argument, the specific racial, gendered, and class contours of the injuries claimed by Abigail Roberson and of the legal doctrine that this seminal lawsuit engendered.

To say that in 1893 Aunt Jemima made her spectacularly successful debut on the national stage is not a claim that draws on metaphor. For the setting in which Aunt Jemima first met her public was actually a *real* stage, in an exhibit booth designed to look like a giant flour barrel from which she emerged, serving up songs and stories of life on "the old plantation" along with an estimated 2 million pancakes over the course of several days. Among the throngs

who came to be entertained and to sample her unusual food product—pancakes made from a self-rising mix blending three distinct flours—were merchants who immediately placed more than fifty thousand orders, ensuring that Aunt Jemima, through the mimesis promised by the box that bore her image, would soon be replaying this performance in kitchens nationwide.[33] The scene of this performance was, indeed, profoundly national: the 1893 World's Columbian Exposition in Chicago, which marked the culminating event in the yearlong commemoration of the "founding" of America in the course of European explorers' New World incursions.

In the context of an extravagant world's fair intended to present an image of deep history and cultural homogeneity for the young and factionalized nation, Aunt Jemima's inordinately crowd-pleasing performance constituted product and display as already familiar emblems of American tradition, framing this genial survivor of slavery as the name and likeness of the first mass-produced commodity brand and trademark to circulate as symbols of national culture. Even today, Aunt Jemima—albeit considerably made over—remains one of the best known trademarked images in American consumer society. In light of the extensive, highly organized efforts of protestors—including Ida B. Wells, Frederick Douglass, and other black intellectuals of the day—of the world fair's exclusion of exhibits celebrating African American achievement, Aunt Jemima might, at first glance, seem an exceptional instance of choreographed attention to black entrepreneurial success, technical innovation, and cultural pride at an event widely critiqued among civil rights activists for its racist imperial spectacles and segregationist design.[34] Two key details regarding the face of Aunt Jemima's famous pancakes prove the lie to this impression: although the fifty-nine-year-old woman serving pancakes was in truth a former slave, her real name was Nancy Green, and prior to taking up residence in a sumptuous outsized flour barrel in one of the fair's exhibition halls, she was employed as a housekeeper for a prominent Chicago family.[35] The "real" Aunt Jemima for whom the pancake mix was named was actually a corked-up white man in cross-racial, cross-gender drag, whose dazzling minstrel-stage impersonation of the stock blackface entertainment figure of the

mammy and accompanying rendition of the popular tune "Old Aunt Jemima" inspired the new owner of a bankrupt flour mill (another white man, Chris Rutt) with the idea of building a commercial brand identity and marketing campaign around just precisely such an instance of "southern hospitality personified."[36]

In capitalizing on the popular appeal of this particularly durable entry in Hortense Spillers's American grammar book of black female misnaming, Rutt devised a product and a publicity approach that proved increasingly salable in the era's burgeoning consumer culture.[37] His "adopt[ion] as trade name and image something that was readily evident in the public domain" wedded his product's dual promise of laborsaving convenience and high-quality nurturance to a nostalgic, mythical figuration of an antebellum black maternity whose devotions were legion and reserved almost entirely for her white "family," by whom she was only too happy to be owned.[38] The fantasies in which Rutt's Aunt Jemima was vested were broadly distributed throughout white American culture—not only in commercial manufacturing but also in popular entertainments and literature. This was especially the case in the years following the publication of Harriet Beecher Stowe's *Uncle Tom's Cabin* (1851–52), as Uncle Tom's spouse, Aunt Chloe, provides a definitive portrait of the mammy type with her emblematic physicality, visage, and preternatural talent and passion for white nurturance.[39] Rutt's Aunt Jemima parlayed popular memory of Aunt Chloe's outsized face and cooking talents into a slightly shabbier, more aggressively solicitous figure, whose "beam[ing]" face was less suggestive of the sentimental moorings of Stowe's novel than it was of its translations for the minstrel stage and the leering blackface grotesques come to life in those productions. Straddling the comforting assurances of this antebellum fantasy *and* the titillations of a popular entertainment form, Rutt's revolutionary, laborsaving food product was therefore packaged and marketed "in an expanding consumer system via an appropriation of the iconography of slavery."[40]

In addition to the presumed appeal (to white audiences) of the mammy figure, Rutt's business plan depended on a ready-made publicity forum, consisting of the preexisting and ongoing mass-

mediated circulations of the minstrel character Aunt Jemima and her blackface kinfolk, in addition to the mammy figure's numberless appearances in forms of popular entertainment from the page to the stage. Yet lacking both any real strategy for specifically marketing his particular product and a network for its distribution—two indispensable planks of the era's new commercialism—Rutt's business soon failed, and he forfeited his trademarked formula and distinctive brand identity to an established firm, the R. T. Davis Milling Company. As M. M. Manring notes, the experienced businessman Davis "put more than capital behind the Aunt Jemima brand. . . . He brought a promotional strategy," which aimed to redescribe the ribald figure of "Old Aunt Jemima" in terms more in line with Aunt Chloe. Davis's Aunt Jemima would be more than an illustrated trademark: she would be a living, breathing emblem, the pancake-mix packaging foregoing the merely "amus[ing] counterfeit of drag and blackface . . . to persuade [customers] with the presence of a 'real' slave woman."[41] The anticipated dividends of such unassailable supposed authenticity aimed to demonstrate the authentic qualities of the product itself. Combining the formerly discrete seductions of both the traveling salesman and the human trademark, this embodied trademark assumed the guise of a "legendary cook" whose live performances, calculated to show off her charming personality and powers of persuasion, were intended to serve the dual purposes of marketing and distribution, as Aunt Jemima's charms targeted both potential customers and merchants. Central to the marketing strategy would be the creation of a "legend" that specified the narrative terms by which Aunt Jemima pancakes would trade both on projected nostalgia for the Old South and a desire for cohesive national identity occlusive of sectional difference beyond "local color."[42]

The legend is definitively recorded in a "biography" of Aunt Jemima, published for promotional purposes by the Davis Milling Company in 1895. *The Life of Aunt Jemima* incorporated the story of the pancakes' successful debut at the Columbian Exposition, thereby integrating Nancy Green's life story into the Aunt Jemima media text and promoting what, in the regnant terms of media privacy doctrine, might be considered the image's "personality"

(77–78).[43] Indeed, when Green died in 1923, her published obituaries incorporated details of Aunt Jemima's "biography" (77). As recently as 1989, popular historical accounts of "the real Aunt Jemima" blended fact and fiction culled both from Green's biography and from the Davis Company's fabrications (78).

As all this suggests, a public imagination both provided and stoked the image, personality, and history for the Aunt Jemima figure; all the commercial product and the publicity needed was a living body to authenticate the brand and trademark. The circumstances that led to Green's recruitment to the role of Aunt Jemima involved an informal casting call carried out through what Davis presumed to be the racialist acumen of his large network of food brokers. Davis asked these white men to find him the "natural" personification of the fictional persona, a request keyed to a very particular racial, gendered type: "A black woman with an outgoing personality, cooking skills, and the poise to demonstrate the pancake mix at fairs and festivals" (74). Green's physiognomy, disposition, capacities for labor, and past history as a slave, as well as her further "preparations" for the role gained via her current position as a servant, proved decisive in her hiring. But to be clear, the physiognomy, personality, laboring capacity, and personal history that underwrote this assignment were not hers in any sense that would be meaningful for the constructions of personhood at stake in privacy rights. These markers of an individual identity belonged to the fictional character she was hired to play; what Green herself possessed was the marked identity for which this commodified "Aunty" was already emblematic. In other words, her special suitability was based precisely on the fact that she was *typical* for the visualization of racial otherness—that she could displace her private self in a display for public perception.

In this sense, in the commercial economy organized around the value of the commodity image attributed to her, Green's status was constituted as essentially fungible. This implication is born out in her posthumous treatment by the company, Quaker Mills, that owned the Aunt Jemima image at the time of Green's death in an automobile accident at the age of eighty-nine; in lieu of either an official public statement or a quiet retirement for the market-

ing strategy previously grounded in Green's purportedly singular person, the company promptly replaced their spokesmodel without comment. Indeed, the company records indicate that, adhering to the convoluted logic of both publicity display and disavowal, Quaker marketing executives addressed the occasion of Green's death as an opportunity to hire a woman who, in her ample figure and youthful face, more closely resembled the image of Aunt Jemima than did Green herself.[44]

The wild success of that first Chicago appearance inaugurated a traveling commodity minstrel show that effectively lasted well into the twentieth century. Over the years, the advertising strategy centered on or including live appearances of Aunt Jemima involved thousands of performances and dozens more women after Green before it was retired in the 1960s. This promise of live presence, of "personality" behind the publicity, is expressed in the brand's trademark motto, a line that the advertising copy would put into the mouth of Aunt Jemima: "I'se in town, honey." Like her signature headscarf and indefatigable grin, the historical Aunt Jemima's trademark statement of self-presence, intoned in the confabulated dialect that is the aural signifier of blackface performance, authenticates her pancakes as the product of slave labor. In a marketplace in which commodified blackness signals devalued personhood (suggesting, precisely, public objectification rather than private subjectivity), this line, like the image, ironically serves as a mark of distinction for the commodity-object. It authenticates the figure of Aunt Jemima as a "natural" artifact of plantation economies in the linguistic deformations of a stylized, performance-oriented "black" vernacular and in the fungible mobility of the commodity whose position might be forcibly

Commercial publicity as blackface minstrelsy. Aunt Jemima advertisement, R. T. Davis Mill Co. "I'se in Town, Honey!" (c. 1895).

From the minstrel stage to the stage of commerce and back again. Cover illustration, Samuel H. Speck and George Cooper, *Aunt Jemima's Lullaby*, "Written for the R. T. Davis Mill Co. St. Joseph, Mo." (S. H. Speck: United States, 1896). Courtesy of the John Hay Library Sheet Music Collection, Brown University Library.

relocated at any moment at the whims of market exchange. The motto in this way aligns consumer appetites for those famous pancakes with a particular hunger for memory. This gesture redoubles in the signature address to the consumer as a familiar "honey," an address that positions Aunt Jemima as the all-loving, nurturing mammy figure and her consumers as simultaneously infantile and superior.

The trademark phrase also functions as the signature of minstrel origins—even after Davis's makeover of Aunt Jemima, which represented a conscious attempt to move away from the crass minstrel iconicity of Rutt's original product packaging and advertising toward more naturalistic representations for which the actual image of Green supposedly served as a model (27). Yet Davis's novel marketing strategy in fact reframed the trademark's production and circulation in the precise terms of blackface minstrel performance practice and spectatorship. Fittingly, in the advertising texts keyed to subsequent local appearances, the face that heralded the arrival of the Columbian Exposition's prize-winning "Pancake Queen" was not Green's but that of the blackface archetype she had been hired to replace. In the advertisements and on the product packaging of this era, as shown here, Aunt Jemima is entirely shorn of any distinguishing marks of gender identity beyond her matching shawl and turban, which frame a frankly grotesque vis-

age contoured by the aesthetic conventions of minstrel entertainments. The face is dominated by its outsized grin, comprising the minstrel mask's whitened lips and copiously articulated dentition. There is thus some irony in the advertisement's promise to bring the "original" Aunt Jemima, for indeed this face originates in the sheet music for Billy Kersand's wildly popular minstrel song, "Old Aunt Jemima." It is this same face that inscribes the Aunt Jemima pancake mix advertising broadsheet; the semblance is reinforced in the design of the advertisement, which looks exactly like a minstrel playbill in terms of the typeface and the arrangement of text, graphic illustration, and the rhetorics of spectacle attraction and authenticity. That the logics of blackface minstrel performance—its signature appropriative and derisive styles—proved central to the new consumerist technologies through which Davis's Aunt Jemima achieved mass-mediated publicity is demonstrated by how the minstrel figure of Aunt Jemima became reinflected and supplemented by the pancake mix and its publicity campaign.

Propriet(ar)y Whiteness: Anti-Jemima and the Case for Media Privacy

Certainly the early history of the Aunt Jemima trademark indexes the overt racism of late nineteenth-century American mass culture and the popular troping of the mammy figure as a particularly acute point of converging cultural expressivities, consumer desires, and historical nostalgia. The Aunt Jemima commercial trademark is further a product of the same historical confluences of technological and market change that inspired the right to privacy. Yet what brings the figure of Aunt Jemima directly into the line of my argument about the racialization of media privacy in this era is how the trademark's circulation as the commodified image of Green provides a striking inversion of the landmark 1902 *Roberson* case with which I began.

At the center of the *Roberson* case was a woman whom I wish to bring into view as "anti-Jemima." As I mentioned earlier, Abigail Roberson was a young, upper-class, white woman whose own photographic portrait was used to market a prepackaged

flour mix. Franklin Mills—the company whose products had been branded with Roberson's portrait—competed in the same marketplace as the Davis Milling Company, which then controlled the Aunt Jemima trademark. Like Aunt Jemima, Roberson's image appeared both in advertisements and on product packaging; but, in contrast to Green, Roberson herself was not directly enrolled in the company's marketing efforts. So while she argued that her acquaintances all recognized her likeness—a somewhat specious claim, given her depiction via a slightly obscured profile view—the commercial product and brand were never attached to her as an individual in any way comparable to how the Aunt Jemima brand was directly aligned with (and arguably, became) Green's personality and likeness. Although not as extensive as the Davis Milling Company's marketing campaign for its prize product, Franklin Mills's publicity efforts were fairly aggressive: twenty-five thousand lithographic copies of the print advertisement featuring Roberson's image, produced as a stand-alone bill (as opposed to a market insert or magazine ad copy), were circulated throughout the state of New York and the Northeast region. The scope and manner of the publicity to which Roberson was subject were key factors in the legal attempt to prove an invasion of privacy.

When Roberson pursued the case, her lawyers argued that, given the youth and delicacy of their plaintiff, the invasion of her privacy went beyond a question of the "theft" of her likeness by the unauthorized reproduction. Indeed, because her picture was "conspicuously posted and displayed in stores, warehouses, saloons and other public places" where Roberson herself would never even dream of going, given the self-evident unseemliness of female traffic in such areas of public life, Roberson was effectively made a prostitute by this circulation and display. In other words, her lawyers claimed that the adventurous peregrinations of her commodified image brought on her person a shame and distress as real as if she herself had been sold and circulated in such a way. The "severe nervous shock" that she suffered as a result required the care of a doctor, and Roberson sued the box manufacturing company for $15,000 in compensation. That Roberson's mental "distress and suffering" expressed itself in physical illness served,

in this case, as evidence not simply of a wound to her privacy but of the very *existence* of her privacy. Her convincing neurasthenic performance in the court of law reinforced Roberson's authenticity as the embodiment of that particular white feminine form through which the value of privacy was habitually expressed in this era. Together with the outrage of her "sale," this thus seemed to establish her status as a "private person."[45]

Nonetheless, this could not yet be legally established: although two lower court decisions ruled in Roberson's favor, the case was ultimately overturned in New York's Court of Appeals. Writing for a 4–3 majority, Judge Alton B. Parker declared invalid the previous courts' support for Roberson's right to privacy, as those earlier decisions were based not on case law itself but entirely on Warren and Brandeis's law review article; and in the decisive 1902 case, Warren and Brandeis were quoted directly not only by Roberson's lawyers but also by the judge who authored the dissenting opinion, who addressed "The Right to Privacy" as an appealing if still not adequately precedential argument. While the court's decision ultimately repudiated her privacy rights claim, this was *not* because it was seen to have no merit. For the court did acknowledge that the plaintiff was "so humiliated . . . by the notoriety and by the public comments it has provoked, as to cause her distress and suffering, in body and in mind, and to confine her to her bed with illness" (542).

Reactions to the decision both in the popular public sphere and in the legal press uniformly derided the court's perceived failure to redress Roberson's injury—her "distress and suffering, in body and in mind"—by recognizing her claim of invaded privacy. This reaction is encapsulated in an editorial that appeared soon after the decisions in the prestigious *Yale Law Journal*. Claiming that "there is another aspect of this case which the court in its regard for 'precedent' does not seem to have considered," the editors condemned how "the sweeping character of this decision greatly strengthens the claim, advanced by the sensational press of to-day [*sic*], of a right to pry into and grossly display before the public matters of the most private and personal concern."[46] Yet no "matters of the most private and personal concern" were actually involved

in the circumstances before the *Roberson* court. That is, nothing "about" Roberson—aside from her likeness in her photographic portrait—had been publicly circulated. Instead, this interpretation of the violating force of media circulation in itself seems calibrated to Roberson's particular person and the resonance of white femininity with the anxieties about media publicity. In general, the news coverage of the case was framed in terms of discourses of media and the law, subjectivity and representation, private matters and gross display, rather than the questions of proprietary interest and commercial practices addressed in the court majority's framing of the case.[47]

These scholarly and popular assessments of the case thus would seem to confirm Warren and Brandeis's judgment that the individuating usage of photography to invade privacy is a self-evident instance of this category of injury. This construction depends, however, on the deployment of white femininity as the sign of a privacy that is always already invaded on behalf of the broader legal principle in which privacy is understood to be fundamentally unsignifiable. As Eva Cherniavsky observes, historically "white women's claim to a protected interiority receives the widest cultural sanction, insofar as white women are required to embody interiority *for others*."[48]

The comparison between, on the one hand, the public outrage over and swift legislative response to a higher court's reversal of Roberson's initially successful suit and, on the other, Green's status as a human commodity and embodied trademark suggests that the very forms of injury theorized by privacy doctrine become routinized as forms of specifically racial recognition in mass culture in the moment of their articulation. It reveals how, rather than a racialized exception to the consolidation of the right to privacy in American culture and law at this time, the mass-mediated circulation of blackface stereotype—transferring from the minstrel stage to the market shelf, advertising poster, trade card, magazine page, and back—naturalizes the racial connotations of privacy as a material condition of racialized embodiment in public culture. As such, the racialization of publicity helps to stabilize articulations of racial difference through mass-media forms in an era in which, as

Robyn Wiegman notes, "the logic of race attached to a corporeal essence is challenged at its most fundamental level of bodily belief," given the historical "loss of the epistemological assurance in the referent" generalizable for visual modernity.[49]

What I think is at stake in the story of Aunt Jemima is not a question of whether Green herself, as a historical figure, is analogous to Roberson. The question of her own agency in relation to the contractual obligations that have sutured her personal identity to the trademark image since the 1893 world's fair is nearly impossible to reckon in terms of the Aunt Jemima brand historical archive. Indeed, what bears witness to the constraints on her agency, I am arguing, is the *Roberson* case. Green's concomitant spectacularization *and* erasure via "her" public image precisely parallel the alleged injuries impugned to advertising media in *Roberson* as the grounds of what Warren and Brandeis condemn as an invariably "ruthless publicity." For Aunt Jemima is a depiction of Green only to the extent that the trademark image reproduces a familiar trope of racial visuality. This points to Green's ultimately fungible status in the eyes of the company that owned the Aunt Jemima image, in relation to which she was paradoxically situated as both model and interpreter—that is, as both referent and signifier. That the Davis Milling Company signed Green to a lifetime contract, which transferred *automatically* with the Aunt Jemima brand's copyright, effectively transformed this former slave into the living commodity she was hired to portray. Rather than representing the brand to the public, she *became* a public brand—literally, a media figure. Green's sheer incomprehensibility to Warren and Brandeis's account of media privacy and media injury thus reveals how the privacy doctrine's anxieties about the representation of women in turn-of-the-century media culture tie to anxieties about the instability of race as a category of visible social difference in an era of nominal political equality. Yet however incomprehensible to the legal discourses of the time, Green's "case" remains critical for us today: located at the nexus of technologies of media, law, and consumer culture, it underscores the complex ways in which race and gender, commodification and citizenship, media and subjectivity have been profoundly—even if sometimes paradoxically—linked.

Notes

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1. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193–220. The essay will hereafter be cited parenthetically in the running text.

2. This history is covered extensively in Beaumont Newhall, *The History of Photography: From 1839 to the Present Day* (Boston: Little, Brown, 1982). For a more narrowly focused account of the development and marketing of this new type of camera, specifically in relation to the new legal paradigm of privacy that developed in response to the cultural practices—and cultural meanings—associated with the rise of amateur photography, see Robert E. Mensel, "'Kodakers Lying in Wait': Amateur Photography and the Right of Privacy in New York, 1885–1915," *American Quarterly* 43 (1991): 24–45.

3. In what remains the authoritative text on the subject, C. B. Macpherson argues that this notion of the self-owning individual is, paradoxically, at once the central problem of modern liberal democracy and its central precept. See his *Political Theory of Possessive Individualism: Hobbes to Locke* (New York: Oxford University Press, 1962). My own engagement with Macpherson's argument and the understanding of its implications for the historical evolution of a self-possessive privacy right have benefited greatly from two theoretical works that reconsider the ideology of "possessive individualism" in light of the commodity

forms and commodity subjectivities associated with media publicity: Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law*, trans. Elizabeth Kingdom (London: Routledge and Kegan Paul, 1979), 68–87; and John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (Minneapolis: University of Minnesota Press, 1993).

4. Warren and Brandeis's choice to define their legal project as an extension of tort law was highly ironic as this remunerative framework effectively entrenched individual privacy in the marketplace, even while decrying markets and commercialism as the chief threats to privacy.

5. This wide-sweeping definition links the sphere of personal privacy to the specter of the closet, that encrypted site of knowledge relations that also originates in the era of "The Right to Privacy"—a coincidence signaled in the article's opening salvos, which situate the modern "invasion of privacy" in terms of a general crisis around privacy in the age of the secret's technological reproducibility, warning that "numerous mechanical devices threaten to make good the prediction that 'what is *whispered in the closet* shall be proclaimed from the house-tops'" (193; emphasis mine). Tellingly, the phrase appears in quotation marks but without attribution. Warren and Brandeis anticipate Eve Kosofsky Sedgwick's thesis regarding the axiomatic status of the closet for the cultural orders of the modern. See her *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

6. *Roberson v. Rochester Folding Box Company* 171 N.Y. 538 (1902).

7. The initially successful suit was the 1901 case *Roberson v. Rochester Folding Box Company*, 71 N.Y. Supp. 876.

8. The New York Privacy Statute, enacted in 1903, comprised two addendums to the New York Civil Rights Law. Section 50 defines the invasion of privacy as any instance in which "[a] person, firm or corporation . . . uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person." Section 51 provides "action for injunction and for damages" in the thoroughgoing terms first advocated by Warren and Brandeis. The law recognizes the right of "any person whose name, portrait or picture is used within this state for advertising

purposes or for the purposes of trade without the written consent" to seek a legal injunction to prevent and restrain such activities and seek monetary damages against "the person, firm or corporation" responsible.

9. Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), 179. Some scholarly texts in legal history and philosophy that address "The Right to Privacy" and its impact include Jeb Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102 (1989): 737–67; Randall P. Bezanson, "The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990," *California Law Review* 80 (1992): 1133–75; Dorothy Glancy, "The Invention of the Right to Privacy," *Arizona Law Review* 21 (1979): 1–38; Lawrence Edward Savell, "Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes without Prior Written Consent: History and Scope in New York," *Albany Law Review* 48 (1983): 1–46; Judith Jarvis Thompson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975): 295–314; Susan Gallagher, "A Man's Home: Rethinking the Origins of the Public/Private Dichotomy in American Law," www.historyofprivacy.net (accessed 11 November 2007); Ellen Alderman and Caroline Kennedy, *The Right to Privacy* (New York: Vintage, 1997); and Adam Carlyle Breckenridge, *The Right to Privacy* (Lincoln: University of Nebraska Press, 1970).

10. See, especially, Phillip Brian Harper, *Private Affairs: Critical Ventures in the Culture of Social Relations* (New York: New York University Press, 1999), 33–58; Stacy Margolis, *The Public Life of Privacy in Nineteenth-Century American Literature* (Durham, NC: Duke University Press, 2004); Deborah Nelson, *Pursuing Privacy in Cold War America* (New York: Columbia University Press, 2002); Milette Shamir, "Hawthorne's Romance and the Right to Privacy," in *Inexpressible Privacy: The Interior Life of Antebellum American Literature* (Philadelphia: University of Pennsylvania Press, 2006), 157–62; William E. Moddelmog, "Disowning 'Personality': Privacy and Subjectivity in *The House of Mirth*," *American Literature* 70 (1998): 337–36; Walter Benn Michaels, "The Contracted Heart," *New Literary History* 21 (1990): 495–531.

11. Feminist legal studies has taken up this argument. See, especially, Dorothy Glancy, "Privacy and the Other Miss M," *Northern Illinois University Law Review* 10 (1990): 401–34; and

Anita L. Allen and Erin Mack, "How Privacy Got Its Gender," *Northern Illinois University Law Review* 10 (1978): 441–78.

12. Phillip Brian Harper describes this discursive gesture as a "metonymic shift": "In Warren and Brandeis, the slightly older private-public opposition is retained, but that dichotomy becomes less and less compelling with the emergence of the private as synonymous with the personal. What happens in other words, is that the concern about preserving the sanctity of the private bourgeois home gets displaced onto the person, the individual, who then experiences media exposure as personal injury" (*Private Affairs*, 180). This displacement centers on an economic logic, "the concern for 'sacred precincts,' per se," by what Jane Gaines, in her own close reading of "The Right to Privacy," terms "the *personal quality* of the effects and activities potentially located in and associated with them" (*Contested Culture*, 51).

13. See, for example, Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca, NY: Cornell University Press, 1996).

14. Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002), 28.

15. Tagg, *Burden of Representation*, 41.

16. Roland Barthes, *Camera Lucida: Reflections on Photography*, trans. Richard Howard (New York: Hill and Wang, 1981), 98.

17. Allan Sekula, "The Body and the Archive," *October* 39 (1986): 5.

18. Sekula writes: "Photography subverted the privileges inherent in portraiture, but without any more extensive leveling of social relationships, these privileges could be assigned on a new basis. . . . Honorific conventions were thus able to proliferate downward" (7).

19. André Bazin argues that this naturalized equivalence is in fact the "ontology of the photographic image"—the photograph's status "as the object itself, the object freed from the conditions of time and space that govern it . . . no matter how lacking in documentary value the image may be, it shares, by virtue of the very process of its becoming, the being of the model of which it is the reproduction; it *is* the model." André Bazin, "The Ontology of the Photographic Image," in *What Is Cinema?*, ed. and trans. Hugh Gray (1967; Berkeley: University of California Press, 2005), 14.

20. Shawn Michelle Smith, *American Archives: Gender, Race, and Class in Visual Culture* (Princeton, NJ: Princeton University Press, 1999), 8.

21. Hortense Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book," *Diacritics* 17 (1987): 64–82.

22. Samira Kawash, *Dislocating the Color Line: Identity, Hybridity, and Singularity in African-American Narrative* (Stanford, CA: Stanford University Press, 1997), 130.

23. Anne McClintock traces the origins of this phenomenon to commercial marketing practices of advertising and product packaging for mass-produced household commodities in Victorian England. The mass proliferation of these products and advertisements of racial and colonial tropes—the iconicity of British imperialism—and of implicitly racialized figurations of class difference, McClintock argues, coordinated a genuinely popular form of racial knowledge production. Whereas access to the scientific discourses of race that filled elite cultural media such as academic journals, literature, and travel writing was relatively limited, "[racial] kitsch as consumer spectacle . . . could package, market and distribute evolutionary racism on a hitherto unimagined scale" (*Imperial Leather: Race, Gender and Sexuality in the Colonial Context* [New York: Routledge, 1995], 209). While McClintock's analysis deals specifically with the history of commercial soap advertisements in Victorian England, I take her argument about the racialized logics of the commodity spectacle and its promotional texts to be generalizable to the history of advertising and consumerism in the US and to the ways in which commodity culture historically serves as fertile ground for producing social difference.

24. Kenneth W. Goings, *Mammy and Uncle Mose: Black Collectibles and American Stereotyping* (Bloomington: Indiana University Press, 1994), xvii–xxi; and Robyn Wiegman, *American Anatomies: Theorizing Race and Gender* (Durham, NC: Duke University Press, 1995), 41.

25. Faith Davis Ruffins, "Reflecting on Ethnic Imagery in the Landscape of Commerce, 1945–1975," in *Getting and Spending: European and American Consumer Societies in the Twentieth Century*, ed. Susan Strasser, Charles McGovern, and Matthias Judt (Cambridge: Cambridge University Press, 1998), 380.

26. Patricia A. Turner, *Ceramic Uncles and Celluloid Mammies: Black Images and Their Influence on Culture* (Charlottesville: University of Virginia Press, 1994), 29.

27. David Theo Goldberg, *Racial Subjects: Writing on Race in America* (New York: Routledge, 1997), 83.

28. Richard Dyer, *White: Essays on Race and Culture* (London: Routledge, 1997), 3.

29. Sarah S. Lochlann Jain, *Injury: The Politics of Product Design and Safety Law in the United States* (Princeton, NJ: Princeton University Press, 2006), 5.

30. Here, Warren and Brandeis actually depart from existing critiques of media publicity in which the synonymy of *personality* and *reputation* is established usage. This departure lies at the crux of their argument for locating the defense of privacy outside existing laws of libel and slander, yet Warren and Brandeis claim these earlier legal cases or critiques concerning media privacy as precedents for their own claims without acknowledging these crucial differences in usage. For example, aligning their argument with an influential article by the *Nation* founding editor E. L. Godkin, they write that "the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer," but *reputation* and *privacy* are used interchangeably throughout Godkin's essay, which is in fact titled not "The Right to Privacy," but "The Right of the Citizen to His Reputation." Warren and Brandeis, "The Right to Privacy," 195; E. L. Goldkin, *Scribner's* 8 (1890): 58–67.

31. The sum effect in the shifting registers of race is a historical reconfiguring of the internal logics of the American racial project—from the treatment of race as a matter of *status* distinction (something "natural" reflected in the social order maintained by slavery) to its regulation as a matter of *formal* distinction, ratified with the state sanctioning of segregation. See David Theo Goldberg, *The Racial State* (New York: Routledge, 1997), 177.

32. For an especially astute discussion of the history of "Aunt Jemima" in light of the peculiar desires and anxieties regarding black maternity on which this brand's creation and marketing capitalizes, see Doris Witt, *Black Hunger: Food and the Politics of U.S. Identity* (New York: Oxford University Press, 1999), 21–39.

33. Ruffins, "Reflecting on Ethnic Imagery," 380; M. M. Manring, *Slave in a Box: The Strange Career of Aunt Jemima* (Charlottesville: University of Virginia Press, 1998), 75.

34. Turner, *Ceramic Uncles and Celluloid Mammies*, 49–50.

35. Manring, *Slave in a Box*, 75; Goings, *Mammy and Uncle Mose*, 28.

36. Manring, *Slave in a Box*, 61–69; Ruffins, "Reflecting on Ethnic Imagery," 381.

37. Spillers, "Mama's Baby, Papa's Maybe," 67.

38. Goings, *Mammy and Uncle Mose*, 12–18, 71.

39. The racist cultural logic is forecast by the character's first appearance in the text; Stowe's description of Aunt Chloe associates this archetypal mammy with her exemplary food products through a bizarre isomorphism: "A round, black, shiny face is hers, so glassy as to suggest the idea that she might have been washed over with the whites of eggs, like one of her own tea rusks. Her whole plump countenance beams with satisfaction and contentment from under a well-starched checked turban, bearing on it, however, if we must confess it, a little of that tinge of self-consciousness which becomes the first cook of the neighborhood, as Aunt Chloe was universally held and acknowledged to be" (Harriet Beecher Stowe, *Uncle Tom's Cabin*, ed. Elizabeth Ammons [New York: Norton, 1994], 31).

40. Witt, *Black Hunger*, 36.

41. Manring, *Slave in a Box*, 74.

42. The basic narrative of the legend is as follows: As a slave, Aunt Jemima lived on the fictional Higbee plantation in Louisiana, happily serving the gustatory and emotional needs of a family whose patriarch—a prosperous planter—later became a Confederate colonel during the Civil War. Aunt Jemima was known throughout the South for her cooking skills and, in particular, for her famed pancakes, the recipe for which was a closely guarded secret. With Jemima in their keep, the Higbee family was the envy of the region. The crucial turning point in the narrative of the slave's transformation into a national brand occurs when Aunt Jemima intercedes on behalf of the colonel who had been captured by Union soldiers, just at the moment that his captors were preparing to "rip off" the Southern patriarch's prodigious mustache—a gesture with laughably

obvious phallic significance. The mammy's method of rescue? Food, of course. While Aunt Jemima served up her delicious pancakes, the colonel made his escape. Though the Northern aggressors lost their chance to seize a unique (to say the least) war souvenir, they eventually managed to attain the slave's pancake epistemology, as years later, the legend maintains, some of the men returned to the Higbee home, hoping to persuade Aunt Jemima to share her secrets. As the colonel had by then passed away, forfeiting his proprietary claim in the recipe (and its author) as his own property, Aunt Jemima agreed to "come up river and share her secret with the world" (75–76).

43. The fictional biography was not only crucial in establishing the veracity of the figure Davis used to promote his pancakes; it also served as a primer for copywriters charged with promoting Aunt Jemima in years to come. As Manring notes, *The Life* definitively introduced "themes that would dominate Aunt Jemima ads for years to come": "Aunt Jemima rescues her owner or another man with pancakes; northerners discover a southern secret and return years later to bring it to the nation; Aunt Jemima demands to be paid in gold, not currency, for her recipe" (76). In a later version of the legend, found in an ad copy from 1920, the imperiled white man rescued by Aunt Jemima's nourishment is none other than Robert E. Lee, who discovered the slave's cabin while on the run from Union troops; according to the ad, Lee and his exhausted men were on the brink of starvation when they heard "the sound of a mammy's voice and . . . sometin' about huh chilluns havin' an evahlastin' appetite fo' pancakes" (quoted in Goings, *Mammy and Uncle Mose*, 31). Not coincidentally, ads positioning Jemima as the savior of the Southern cause appeared merely five years after the release of *The Birth of a Nation* (dir. D. W. Griffith, US, 1915), a film whose benighted Southern patriarch bears a striking resemblance to the illustrations of Colonel Higbee found in the earliest editions of Aunt Jemima's fictional biography.

44. Witt, *Black Hunger*, 45.

45. *Roberson v. Rochester Folding Box Co. et al.*, 64 N.E. 442 (N.Y. Ct. App. 1902).

46. "An Actionable Right of Privacy? *Roberson v. Rochester Folding Box Co.*," *Yale Law Journal* 12 (1902): 37. See also "Right of Privacy," *Michigan Law Review* 3 (1905): 559–63.

47. Mensel, "'Kodakers Lying in Wait,'" 38.

48. Eva Cherniavsky, *Incorporations: Race, Nation, and the Body Politics of Capital* (Minneapolis: University of Minnesota Press, 2006), xxv–xxvi; emphasis original.

49. Wiegman, *American Anatomies*, 40.

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Franklin Mills Flour advertisement, "Flour of the Family" (Rochester Folding Box Co., 1900)