Love, Story, Law — From the Scarlet Letter to Freedom and Privacy

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Abstract, What are the limits of artistic freedom? How beholden is literature to truth? How confined is literature by truth? What should be the fate of a book relating the love affair between an older married man and a young woman, with close accuracy, so much so that the young woman could be identified by distant acquaintances despite the pseudonyms? An Israeli Supreme Court case rendered a few years ago ruled that the publication of the book would harshly violate the woman's privacy, while non-publication would moderately injure the author's artistic freedom. Hence the publication of the book was prohibited and the author was liable to compensate his former lover in the sum of NIS200,000. The triangle of Love—Story—Law is obviously not a unique Israeli matter. Similar stories raise universal hot debates. The Israeli case took an extreme stand compared with other legal systems. The statement "There are norms for which it is worth even losing a few 'good books'" raises concerns about the enforcement of the right to privacy as an oblique way of imposing censorship on grounds of morality. The controversial judgment begs the question of its potential value as a precedent. Alternative balancing between the competing rights, some binary, some distributive, which have been adopted in German and American case law, reflect normative decisions along the axis through freedom of action, artistic freedom, privacy and conservatism. But apart from the question of balancing conflicting rights, our love story reveals a whole set of changing values which will be historically scrutinized, starting from Nathaniel Hawthorne's story *The Scarlet Letter*. Both stories reflect changing normative, cultural and legal perceptions of the freedom to love, and of the power to control the exposure of love in public. The fate in life and literature of women-protagonists of intimate stories of this kind exhibits a history of a reversal of social—legal perceptions. Policing of personal intimacy gradually gives way to a loosening of sexual fetters and more freedom. At the same time control of publication on the public level yields to lifting the ban on circulation of obscene matter and entrenchment of practically unlimited freedom of expression. State responsibility for policing of such publications gives way to the individual's bearing the burden of preventing publication of matters that might harm one's dignity, reputation and privacy. The courthouse that was once open to all, even for hearings on intimate family details, now

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offers protection of names and of identifying details of litigants followed by the closure of its doors to the public for hearings on personal matters. And finally the Platonic perception of art as dangerous and false imitation, to be hidden away, is replaced by the requirement of hiding art away because of the truth in it.

PREFACE

What are the limits of artistic freedom? How beholden is literature to truth? How confined is literature by truth? What should be the fate of a book relating the love affair between an older married man and a young woman, with close accuracy, so much so that the young woman could be identified by distant acquaintances despite the pseudonyms?

An Israeli Supreme Court case rendered a few years ago[1] ruled that the publication of the book would harshly violate the woman's privacy, while non-publication would moderately injure the author's artistic freedom.[2] Hence the publication of the book was prohibited and the author was liable to compensate his former lover in the sum of NIS200,000.[3]

The triangle of Love–Story–Law is obviously not a unique Israeli matter. Similar stories raise universal hot debates. The Israeli case took an extreme stand compared with other legal systems. The statement "There are norms for which it is worth even losing a few 'good books'"[4] raises concerns about the enforcement of the right to privacy as an oblique way of imposing censorship on grounds of morality. The controversial judgment begs the question of its potential value as a precedent. Alternative balancing between the competing rights, some binary, some distributive, which have been adopted in German and American case law, reflect normative decisions along the axis through freedom of action, artistic freedom, privacy and conservatism.

But apart from the question of balancing conflicting rights, our love story reveals a whole set of changing values which will be historically scrutinized, starting from Nathaniel Hawthorne's story *The Scarlet Letter*.[5] Both stories reflect changing normative, cultural and legal perceptions of the freedom to love, and of the power to control the exposure of love in public.

The fate in life and literature of protagonists of intimate stories of this kind exhibits a history of a reversal of social–legal perceptions. Policing of personal intimacy gradually gives way to a loosening of sexual fetters and more freedom. At the same time control of publication on the public level yields to lifting the ban on circulation of obscene matter and entrenchment of practically unlimited freedom of expression. State responsibility for policing of such publications gives way to the individual's bearing the burden of preventing publication of matters that might harm one's dignity, reputation and privacy. The courthouse that was once open to all, even for hearings on intimate family details, now offers protection of names and of identifying details of litigants followed by the closure of its doors to the public for

hearings on personal matters. And finally the Platonic perception of art as dangerous and false imitation, to be hidden away, is replaced by the requirement of hiding art away because of the truth in it.

LOVE, STORY, LAW

LOVE

Let us start with love:[6] John Doe, married with children, lived with his family in Jerusalem. Jane Doe, a student at an art college, lived with her partner near John Doe's neighborhood. She made a living working at a cinema in Jerusalem, and there she met John. With the passage of time the tie between the two grew firmer, and became a close and intimate relationship, which lasted about five years. At first it was secret, and later it was revealed to their close circle. At the climax of the affair Jane left her boyfriend, and John divorced his wife. Jane concentrated on her final thesis in art, about the relation woven between a man and a woman. John too began to work on a book of his own, his maiden novel, whose plot was "a drama of the breakup of a family" (as stated on the book's cover). Thus we arrive at the story.

LOVE STORY

John Doe's novel portrays an intimate relationship between a man of the author's age, who despairs of his married life, and a young woman student. It begins with their first encounter at a cinema in Jerusalem. The occupations of the novel's protagonists are similar to those of John's and Jane's. At the start of their acquaintance the hero is married, living with his wife in Jerusalem. The heroine, a young, single woman, a student at an art college, rents an apartment in Jerusalem near the hero's home, where she lives with her boyfriend. In appearance the heroine is like Jane, even in the number of tattoos on her body. The novel contains letters she penned to the hero, as well as the final thesis that she wrote in the course of her studies; the intimate tie between the two is presented minutely in all its shades.

On completion, the novel was published by a well-known publisher. The book contained a disclaimer:

> The plot, the characters described in it, and their names, are all the product of the author's imagination. Any connection between the novel's plot and events that occurred in reality, as well as between the characters named in it and persons or names of individuals living or dead, is entirely accidental.

The book's launch was accompanied by a marketing campaign through the media, including an interview in the weekend supplement of a widely circulated newspaper and a television interview, and on various internet sites.

LAW CONCERNING A LOVE STORY

Now it is the turn of law to step in: immediately upon publication of the novel Jane Doe approached John Doe and the publishing house with a demand to cease the marketing and distributing of the novel, to recall all copies that had been distributed, and to compensate her for damages she had suffered. The publisher decided temporarily to halt distribution of the novel, of which until then over 900 copies had been sold, and collected from the bookshops the copies still unsold. The negotiations between the two sides failed, whereupon Jane resolved to sue, and the court issued a temporary injunction prohibiting distribution of the novel.

Jane claimed that there was an exact match between her life and the life of the book's protagonists (except the names). The book was therefore a precise autobiographic account of the author's life and hers, and contained details of the intimate layer of the relation between him and her, with grave injury to her privacy and an utterance of libel. The author's decision to publish the book under his real name exposed her intimate life story to all her friends and acquaintances. The heroine's character contained many specific identifying elements, which let her relatives and friends recognize her easily. The author omitted no detail of her world – her body, her feelings, her weaknesses, her secrets, her relations with her parents and family members, her sexual preferences. He also used her letters, and her final thesis, thus infringing her copyright in them. The book was a major attack on her privacy, and was libelous, portraying her as being engaged in an affair with a married man while living with her partner, thus manipulating people "as if they were objects."

For his part, John Doe, the author, claimed that the book was a work of fiction, as he indicated in the book itself. To substantiate his argument he had recourse to two reputable experts in literary criticism, who pointed out that this was not an autobiography but fiction, and that if the claim were accepted it would be a serious violation of literary freedom. And as for sullying her reputation, here the author relied on the evidence of the author Mira Magen, who stated that the heroine's character, as created in the book, sparked affection in the reader. The author argued that he had acted in good faith, and in the belief that Jane would be pleased and proud of the character created under her inspiration, and of the novel, which was altogether an appreciation of her final thesis. In his opinion, insofar as there was any invasion of Jane's privacy, it must be weighed against his artistic freedom. In the circumstances of the case, he claimed, withdrawing the book was unthinkable.

The Supreme Court ruled unanimously that Jane Doe's privacy had been violated.[7] The court held that the details set forth in the book called for the conclusion that the heroine was an image of Jane, and their accumulation was sufficient for her identification by the reasonable passing acquaintance, work colleague, fellow student and potential student.[8] Justice Sohlberg, who wrote the main ruling, stressed that the novel was a documentary work disguised as work of fiction that inflicted a grave injury on the respondent's privacy. He stated that the right to

privacy prevails when injury to freedom of expression is slight or moderate, while the injury to the core of privacy is serious. In the present case it was decided that the element of fiction was slight and the injury great. Identification of the respondent in the book in her image as the heroine, along with an account of her inner life cycle, including intimate details described undisguised, cumulatively outweighed the injury to John's freedom of expression, a mixture of ideal and interest. In consequence, distribution of the book was prohibited, and John was ordered to pay Jane NIS200,000 damages for invasion of her privacy. The court did not relate to the defamation cause of action, because it carried no additional implications with regard to the remedies.

Public reactions, mainly of the media – forever concerned about freedom of expression – were mixed: some supported the result, others raised a hue and cry about book censorship; writers loudly bewailed the resurrection of book banning.[9]

The story raises a thorny dilemma, eliciting serious issues. Does a book which labels itself as "fiction" grant its writer absolute immunity and allow complete artistic freedom, even if the author makes use of biographical details of others? Should the heading matter, or the contents of the book?

FICTION AND BIOGRAPHY: SOME LITERARY IMPLICATIONS

A considerable part of the Israeli judgment was devoted to autobiographical writing, its virtues and its serving as a means to decipher the truth and demolish the monopoly on knowledge.[10] But our context is rather different: the book did not pretend to be autobiographical, even though after the event it was determined that it bore such a character. In any case the tension between the autobiographical composition and the fictional one lies at the heart of the ruling.

How do fiction and non-fiction writing differ? The simple distinction is based on the latter resting on facts and persons that existed in reality, while the former rests on an imaginary plot and invented characters. With a written documentary the intention is that readers believe that the events portrayed relate to events that actually happened, while in fiction the intention is that the readers imagine the plot.[11] Yet this basic distinction is dubious. Epistemologically, the question what is reality and what is the 'truth' describing it is inherently vague. One might argue that literature is all fiction, but also that it is all truth: an author draws on what lies in the domain of her personal knowledge and experience even when she writes an imaginary piece.[12] In 1580 Montaigne wrote in his preface to his Essays: "I am myself the matter of my book" expressing the idea that any book is bound to be a book about its author.[13] Indeed many writers attest personally that in every one of their invented works a link to their own or to others' reality can be found, not to mention that quite a few fictional books are romans à clef. Take for example Nobel laureate S. Y. Agnon's great work *Shira*,[14] written in the 1930s in Jerusalem, in which the Hebrew University with its myriad of professors plays a major role. Some

are portrayed with derision. It is hard to imagine that a court would ban publication of a book of that sort on the grounds of libel or of invasion of some of the professors' privacy. Although extracts of the book were published in Agnon's lifetime, he was unable to complete it and it was published after his death in 1971. Agnon himself rejected the notion that he was writing a roman à clef,[15] but literary critics held otherwise. As stated, Agnon delayed the book's publication. He might not have wanted to risk litigation by some of the book's protagonists forcing their way in from the real world, nor did he wish to put his own privacy at risk: presumably parts of the novel reflect his own life as well.[16]

Here is another example: some say that Saul Bellow's *Ravelstein*,[17] a novel also partly devoted to academic life, centers on the renowned literary critic Alan Bloom, who is not depicted in the most flattering colors.[18] The issue of its publication did not arise in this case, because in the absence of a lawsuit the book was distributed unhindered.

True enough, literature – a kind of imitation of reality – is the product of writers' imagination, which at times is limited by their experiences of reality: hence the blurred lines between fiction and biography or autobiography. In his influential article "Autobiography as De-Facement,"[19] Paul de Man argues that both genres stem from the same linguistic, political and epistemological principles, which create and describe the character, or an illusion of the character; hence the distinction between autobiography and fiction as a literary genre does not exist. Does this literary indistinctness carry legal implications?

FICTION AND BIOGRAPHY: LEGAL IMPLICATIONS

As noted, the author had recourse to the opinions of two literary experts, from which it transpired that "the very publication of a book as a work of fiction, which carries the accepted literary features of a work of fiction, creates an impassable buffer between the content of the work and reality, and raises a barrier against regarding the book's content as documentation describing reality."[20]

These words express the notion that a work of literature defining itself as fiction protects itself against an action for libel or invasion of privacy.[21] But does it? A great controversy rages among literary critics, as it does among law scholars, lawyers and judges, over the intention of whoever governs the interpretation of a literary work or a legal text.[22] Such an interpretation covers the composition's content, but also its classification. The stance of the literary experts reflects the view that it is the author who determines the classification and the interpretation. That is, the writer of a book need only call it fiction for it to be defined thus in every respect, even formally. Yet others place the work itself at the center, and put forward the act of reading and interpreting. Roland Barthes' position is particularly well known: he is the extreme representative of the supremacy of the reader–interpreter, when he speaks of the "death of the author"[23] and when crowning the reader–interpreter

creator of a new work through her act of interpretation[24] – it too subject to interpretation ad infinitum.

The relevant reader in our context is the court, hence not an ordinary reader–interpreter but a reader–interpreter with binding authority. When the issue has been brought before the court, the authority to rule on it is obviously placed in its hands, even if the literary community would have it otherwise. The expert has no judicial powers, and even if the court is aided by an expert whom it itself has appointed, the authority to rule remains in the court's hands; all the more so when experts are brought by one of the litigants.

The court chose to put the question of fiction or documentation to the substantive test, therefore rejected both the experts' argument and the author's and publishers' disclaimer that the book's plot, its characters and their names were all the product of the author's imagination. To decide whether it was a fictional or a documentary story the court compared the lives of the protagonists, as presented to it in evidence with their literary depiction, and concluded that the respondent and the heroine of the appellant's story were identical.

The court therefore buttressed the opinion prevalent among literary critics such as Paul de Man that from the writer's standpoint there can be no division between fiction and documentation, nor does such division exist from the reader's standpoint. The autobiographical composition may well be displayed as an expression of the author's autonomy, reflecting its author's viewpoint, but when the autobiography refers to others it becomes a composition depicting the heroes, who find themselves involuntarily involved in a plot that may not be to their liking.[25] When story and reality are markedly similar, and the story also sets out factual descriptions of others, the author has a duty to those others anchored in their right to their reputation and privacy.

COMPARATIVE NOTES – PROPERTY AND LIABILITY RULES

The ruling shelved the book, and ordered the author to pay damages to the claimant for invasion of her privacy. Did the judgment go too far?

In rendering his decision the judge resorted particularly to a ruling of the federal German constitutional court, which in fact prohibited the publication of a novel entitled *Esra*.[26] The novel told the romantic story of a writer and an actress. The actress, erstwhile partner of the writer, claimed that there was a match between her person and the character of the heroine as depicted in the novel which, she asserted, exposed intimate details without her consent. The German court ruled that despite the author's declaration that this was a work of fiction, the book was in fact grounded in the reality of the author's life. It was disguised as fiction, but the claimant's social circle could easily identify her as the protagonist of the novel. Because at issue here was a direct injury to the core area of private life, the book was banned for publication.

It should be noted that the German ruling, which raised a storm in Germany, was delivered by a majority of five to three, and the claim for damages against the author, which was heard separately, was dismissed.[27]

The resort to European law in the Israeli case was based on the assumption that American law would rule for freedom of artistic expression, which it sanctifies. It is therefore doubtful whether the competing privacy right would lead to banning a book which describes itself as fiction. Yet the American cases to which the court referred concerned autobiographies (presented as such),[28] whereas our case centers on a book that pretends to be fiction but in fact is documentation. The endless controversy on the subject notwithstanding, courts in the United States occasionally impose liability for defamation or invasion of privacy committed in writings described as fiction but which in fact are not.[29]

Smith v. Stewart[30] is a conspicuous example. In that case liability was imposed on Hayward Smith, writer of the book *The Red Hat Club*, which featured on the *New York Times* bestseller list in 2003, on account of injury to the reputation of the claimant, Vicky Stewart, a friend of the writer for 50 years. Despite the heroine's different name – SuSu – and even though the later editions of the book carried a disclaimer that the story and its characters were fictional, the court ruled that this book related the life of the plaintiff. The judgment pointed out the similarity between the heroine and the plaintiff, her background, employment, the men in her life and the circumstances of her husband's death, and ruled that her depiction as a promiscuous drunk stewardess was injurious. The court emphasized that because the case did not concern a public figure, it was enough that the writer had behaved negligently in the portrayal of the plaintiff in the book. The court did not relate to the cause of invasion of privacy, as damages on its account were in any case included in the defamation claim. Distribution of the book was not withheld, but the author and the publishers were ordered to pay the plaintiff damages in the amount of US$100,000.[31]

The outcome of the case highlights the difference between American and European law: American law would not sanction withdrawal of the book, but would occasionally[32] impose liability[33] on the author for violation of privacy.[34] Following the classic distinction between property and liability rules,[35] the German case awarded the plaintiff a proprietary remedy,[36] whereas the American court in Smith v. Stewart[37] granted the plaintiff a liability–monetary remedy. From the viewpoint of the right to privacy the award of damages alone places a "price tag" on the invasion of a person's privacy, and expresses a perception whereby the injury is an event that the defendant can purchase. By contrast, a remedy which orders withdrawal of the book reflects a view that the invasion of privacy is ongoing, and cannot be quantified in money (as long as the book is on the shelves, and reaches a larger readership, the invasion constantly widens and is not concluded with the launch of the book). Therefore, in principle when an American court allows an expression that invades privacy to continue to exist (along with liability for damages) it does not

express true aversion to the invasion of privacy perpetrated in the guise of fictional literature. In fact, it is only "partial protection."

A similar approach was recently taken in the European Court of Human Rights, albeit under different circumstances:[38] an authoress, a Portuguese national, published a book presenting the life of a family under a nom de plume. The book, which was published in one hundred copies, was distributed gratis to the author's friends and relations. In the book it was noted that the work was the product of the author's imagination, and that any similarity to reality was purely fortuitous. Some of the author's relatives submitted a criminal complaint against her for defamation of their reputation and honor. The Portuguese court imposed on her a duty to pay damages in the amount of €53,000, and divided the sum among the injured family members. The European Court of Human Rights confirmed this ruling, and determined that the right balance had been struck between the author's freedom of expression and the relatives' right to privacy. In the circumstances of the case there was no point in withdrawing the book because it had been published not for commercial purposes, and in any case its distribution was limited in advance.

OVERT AND COVERT MESSAGES: FREEDOM, PRIVACY, VICTIMIZED WOMAN, CONSERVATISM

The course taken by the Israeli case, awarding the plaintiff both a property and a liability remedy, forcefully protected an intimate liaison which was conducted in parallel to married life. The decision in favor of the heroine's privacy determined the fate of fiction that makes too much use of true materials. But court decisions, like a literary work, are a matter for diverse interpretation. Some interpret them according to the plain text, some according to the context and some according to the subtext. The plain text of the judgment presents a conflict between artistic expression and the right to privacy. The subtext may well be different. The court blocked publication of an erotic book which defiled family honor. Did the judge thereby wish to express his outlook, standing for modesty, restraint, and guardianship of traditional moral norms? Let us listen to what he said:

> […] The Torah describes the crowd, to whom the first tablets of the covenant were given, and their shattering; and the second tablets, which were given to our Master Moses alone, and became the diadem of the work. The first tablets were given […] at Mount Sinai, before the eyes of the entire people of Israel. The second tablets were given to our Master Moses in a still small voice. […] Our eyes see that modesty and the private domain are likely to bring forth a great work. The work is not necessarily the product of freedom of expression. Precisely restraint, privacy, modesty, may well be fertile soil for growth and renewal. […] Needless to say, it is man, lord of

> Creation, who is the offspring of the most intimate touch. […] There are regions hidden to the eye, which we are bound to safeguard by every means as they are, not only as protection against injury, but in order to ensure fecundation, creation and realization […].[39]

These words, resting on the scriptures and their interpretation, hold up the norm of modesty. Our story can by no means be called modest, and it certainly does not reflect scriptural norms. Banning the story and hiding it from public eyes reflect these traditional values. But in that case, why did the court award the plaintiff, a party to the breach of traditional norms, a substantial sum as damages? Did it see her as a victim, a young woman who had to be protected from exploitation by an older man of social standing, who lured her from the right path? Would a male exposed in a written work by a woman writer have enjoyed the same protection, or would revelation of those details have been considered less injurious?[40]

The decision in our case was unanimous, and the request for a further hearing was denied,[41] but it is hard to see it as uncontroversial. The question how it will be interpreted in the future and what its value as a precedent will be is certainly anxiously awaited, perhaps with misgivings.[42] Will it be analyzed according to its circumstances, or according to a different balance to be struck between the competing rights? Will it become a guiding precedent, or will it be cast aside by a critical examination which will sing the normative praises of artistic expression? The decision seems to bolster emotional freedom liberated from bygone formal strictures of morality. However, it pulls its addressees and readers in various directions. What is the underlying message: silencing a publication about betrayal of the wife, or revenge of the abandoned partner? Silencing and withdrawing a worthy book, or publicity for a book which may or may not excite public interest? Disregard for the maiden novel of an unknown writer, or a warning to all writers? General protection of injured parties involuntarily exposed, or giving protection to a young woman who has been victimized by a senior male figure? And above all: are there "norms for which it is even worth losing a few 'good books'"?[43]

It is worth mentioning that two of the minority judges in the German *Esra* case,[44] noted that the stance holding that an intimate narrative should be clothed in fictional garb leads to the imposition of a taboo on sexuality, along with unreasonable restriction of freedom of artistic expression.[45] They commented that by the stance of the majority judges Goethe's *The Sorrows of Young Werther* would have been barred from publication; it too was a maiden novel, telling of Goethe's beloved Lotte, and her fiancé.[46] Are the Israeli case and the majority in the German case liable to take us back to the dark days of censorship from which we were liberated not long ago?

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So far the discussion has been devoted to the contest between freedom of artistic expression and the right to privacy. The court gave precedence to the latter. The

couple's names were not revealed, but their private story was set forth in the ruling. Can a connection be found between their private story and the legal decision to withhold their life story? To answer, let us return to literature, this time Nathaniel Hawthorne's *The Scarlet Letter*,[47] apparently based on documentation of actual events,[48] which in some way parallel the story of John Doe and Jane Doe. Both stories reflect diverse moral, cultural and legal perceptions of the freedom to love and the ability to keep the secrets of love.

BACK TO STORY, LOVE, LAW
THE SCARLET LETTER: HESTER'S DISGRACE AND JANE DOE'S FREEDOM

In 1850 Nathaniel Hawthorne published *The Scarlet Letter*, considered by many one of the best and most moving novels in world literature. It is the story of forbidden love, denial, public condemnation, jealousy, tragedy.

Hester Prynne is a married woman, whose husband has sent her ahead of him to the New World, where she lives alone in 17th-century Boston. Sometime after her arrival it is discovered that Hester is pregnant. She is jailed for adultery. Attempts to exact from her the father's name fail. She protects the remnants of the privacy she still has, and refuses to disclose her lover's name. She is prosecuted, convicted, placed on the scaffold of shame, with the infant, the fruit of her sin, before the entire settlement; then she is sent away with her daughter to the edge of the settlement. She is condemned forever to carry on her garments the stigma "A," standing for "Adulteress."[49] Hester, the most skilled needlewoman in the colony, herself embroidered the spectacular sign in scarlet; we may keep in mind that "A" is also the first letter of the word "Artist." The plot thickens: Hester's husband arrives in Boston, and Hester's and her lover's plan to leave the place and realize their love fails. In the end the lover is exposed. He places himself on the scaffold of shame before the eyes of the public and dies. Deviation from the community's norms has brought physical and spiritual quietus.

Hawthorne wrote the book as a historical novel, apparently drawing on authentic events of the 17th century. A native of the town of Salem, Massachusetts, of ill repute for its "witch hunts,"[50] Hawthorne describes the tragic twists of extra-marital love in 17th-century Puritan New England, the community's hypocrisy, and the tension between the individual's soul and society's fetters. Some claim that the book was written as an atonement for the role played by one of his ancestors, a judge in Salem who convicted some of the "witches" of that time.

The Scarlet Letter portrays a cultural and legal reality. This reality could not be fully exposed in the minutest detail in the pages of 17th-century American literature because such literature was proscribed. Intimacy could be revealed only through court records and rulings, or through private diaries, which constituted documentation of real life, not works of fiction.

Times have changed, and with them norms, on the personal and the public level equally. Jane Doe's fate has been kind to her, as has the fate of all women in the liberal democracies from the 20th century on. Jane, who like Hester engages in art, is free to build her intimate emotional life. She lives with a partner, not in the framework of marriage. She maintains a sexual relationship with another partner, married, whose marriage is formally breaking up at the time of his connection with her. Society does not haul her up onto a scaffold of shame. She is not considered an adulteress. And on the public level, free speech and the freedom to create allow the telling of bold stories that lay bare the details of love life. But even freedom of writing has its limits. Publication of the book brought disgrace on Jane Doe; not criminal disgrace like Hester's, but the disgrace of exposure of her privacy. Jane has the right to live her private life as she wishes, far from the public eye, and the public exposure imposed on her against her will is prevented. Contrary to Jane, Hester was not entitled to live any private life she might choose, nor could she prevent its exposure to all.

What is the legal mantle which in the past shaped Hester's life and in the present shapes Jane Doe's life in the personal domain? What are the legal rules that in the past sealed and in the present seal the fate of literary works distributed in the public space and whose concern is the revelation of real or fictional intimacy?

PURITANISM: PERSONAL BONDS AND HINDRANCE TO WRITING

The Scarlet Letter is planted in an oppressive Puritan world. America had not rid itself of the Puritan shackles, certainly not in the second half of the 19th century, when Hawthorne wrote his story. The prevailing moral code was that of the ancient and modern scriptures. Family sanctity and sexual purity were norms of supreme importance. Adultery was a criminal offense punishable by public censure, incarceration – sometimes death.[51] Actually, there is no need to go as far as America, in either time or place: here too, in our Near East region, quite often instances are heard of murder for desecration of family honor; they usually remain a mystery, unsolved by the police. In any event, at that time the norms of family purity carried extremely powerful implications in Anglo-American criminal and civil law alike. For example, a husband was entitled to claim damages from a third party who caused alienation of his wife's feelings or damage to the marriage because of a romantic tie with the wife.[52]

In the 19th century an action by women against men for breaking a promise of marriage was common. Actions for breach of a promise of marriage made the courts "the best show in town"; there the audience could hear intimate uncensored stories of events not to be spoken of otherwise.[53] Such intimate stories could be told in such minute detail only in court – provided they were true – and not at the theater, which for the most part was an imitation of real life.[54] At the theater plays that presented fictional intimate secrets could not be staged due to restraints of censorship

which controlled moral decency.[55] In the oppressive shadow of the Puritan culture, life itself was the best story, and it could be presented to anyone watching in a courtroom or the town square. Imitation of intimate life usually presented in theater and literature was heavily chained by the Puritan code.

Stories of criminal convictions for adultery sound outdated. But the law of adultery persists in some American states to this day, and some people justify it in respect of civil actions against third parties who have violated the marriage bond.[56] As for the criminal offense of adultery – the number of criminal indictments has indeed decreased, and the offense is not usually prosecuted, but conservative groups that favor safeguarding morality through the law continue to ensure the existence of morality offenses despite constitutional uncertainty as to their validity.[57]

LIBERALISM: PERSONAL LIBERTY AND FREEDOM TO WRITE

What then is the legal mantle that today shapes the real life of Jane Doe, the story's heroine, in the personal domain? Jane's life is free; she enjoyed sexual freedom with a partner outside the marriage framework. She maintains a sexual connection with another partner, who is married. His marriage is breaking up formally in the course of the relationship with her, and the court praises the hallowed intimacy of the romantic tie parallel to married life. This is how the court defines the intimacy of the romantic connection:

> Deep friendships and ties between partners are built and based on the keeping of the most intimate secrets. A world in which privacy is trodden underfoot, and secrets become a shattered dream, is a world wherein people will refuse to share with their friends the fiber of their soul, fearful to expose it to all and sundry. These words apply to professional relationships, to friendly relationships, and all the more to romantic relationships. In such relationships, the partners are exposed mutually […] their most secret desires, wishes and ambitions. […] This sensitive information is given to the other partner […] on the assumption that he or she will act as a loyal consort and a keeper of secrets. This is the "unwritten" contract between partners, who engage in a long-term romantic relationship.[58]

Together with this the judge devotes warm and sensitive words to the intimacy of married life. Here is an extract:

> A special place is reserved for the long-term intimate relationship between partners, particularly in marriage. The commitment forged between married partners does not merely amount to purely economic arrangements. These constitute the body of the marriage,

> while relations of trust and love form its soul. The one serves as the "intimate" of the other. The devotion, the firm friendship, the endless empathy – these are the quintessence of married life.[59]

It seems that this powerful reasoning for the fiduciary duty between partners indeed arouses a strong feeling of solidarity, but in the factual context under discussion it also raises strong feeling of unease: Jane Doe and John Doe maintain a partnership parallel to that of John Doe and his wife; all relationships have crumbled: the wife has been deserted by John Doe, Jane Doe's partner has been deserted by her, and all duties of fidelity have been violated.

True, we have leapt a few generations. In the 21st-century Jane Doe is not obliged to stand in public on the scaffold of shame, nor does she carry any stigma upon her. She is not sent to a hut on the edge of the settlement, away from the community. The public does not have the right to know about her life. Jane wishes to continue her life in the community without her story being laid bare in all its intimate detail. She demands the right to be let alone,[60] and she wins it.

Since the second half of the 20th century almost the entire Western world has changed. In a liberal society religious faith is a private matter. A liberal society lauds liberty, equality, women's liberation, sexual permissiveness and the formation of new kinds of partnership contrary to scriptural precepts: this kind does not need divine sanction, or even state approval, to exist. Emotional and sexual liberty is the name of the game. Adultery is not a crime.[61]

PRIVACY: FROM STATE CENSORSHIP TO PERSONAL CENSORSHIP

Now the trammels are loosened not only between the intimate partners themselves. Even the chains of censorship in the name of public morality have been cast off: intimate life is broadcast by anyone wishing to broadcast it in a personal story, in photographs, in art.[62] State censorship hardly exists.[63] Theater, cinema and literature conceal nothing. Art is not enslaved to religion or religious ethics.

One of the heralds of cultural change was D. H. Lawrence, who first published *Lady Chatterley's Lover* in Florence in 1928.[64] The Italian culture could manage the book's audacity, but the English could not. In England, official publication of book was made only in 1960, following an action against Penguin Books, publisher of the book in England.[65] The claim was based on the argument that the book was an infringement of the British Obscene Publications Act, which prohibited such publications unless they bore literary and artistic merit.[66] The book passed this artistic test in court, and the judgment introduced the age of permissiveness into England.[67]

Censorship was lifted, and has almost wholly disappeared, but new obstacles arose in the world with the untying of old bonds. A person injured by exposure is entitled to request the legal system to withdraw the publication in the name of

privacy. The right to privacy was born with the rise of freedom of action on the personal level and freedom of expression on the public level, which prepared fertile ground for media exposure and potential assault on the private life of every person.[68] The right to be let alone was formulated theoretically in the seminal article of Warren and Brandeis at the end of the 19th century.[69] Already then the authors pointed out the phenomena of invasion of privacy and the need to offer legal protection against it. Never in their wildest dreams could they have imagined the technological developments since then. Nowadays Big Brother is hidden – better revealed – in each and every one of us through the tools of immortalization and dissemination, some form of which almost everyone carries about: cameras, recording devices, newspapers, books, plays, films, social networks, internet and, of course, cellular phones – in which all of these are contained. The phenomenon of shaming poses a challenge before every system of law. What are the proper limits of freedom of expression? How are the fences and precincts of the self to be guarded? How may involuntary exposure be prevented? How are hidden islands of intimacy created in a world exposed before the eyes of all?[70] The internet and social networks generate thorny problems for privacy, and it is argued that upholding this right in the present day is almost impossible. In this framework I do not discuss these weighty issues, but mention only that European law recognizes the right to be forgotten, whereby the individual may demand the erasure of injurious matter that is no longer relevant or of public interest from the procurers of digital information.[71]

Today's problems differ wholly from those of the time when everything intimate was policed through criminal and civil legislation, when entry into the intimate-home citadel was barred,[72] nor could documentary or fictional writings that struck the individual's privacy be published. In that age the need for protection of privacy was not acute. The buds of the current developments can be traced back to the mid-19th century and the "Victorian Compromise" as described by Lawrence Friedman.[73] The Victorian code imposed a certain kind of legal and moral rules designed for the protection of family's integrity and respectability. Yet Victorian society accepted the inevitability of deviations from its moral code. As a result, the law was sometimes ready to forgive certain transgressions and also to make sure that everyone forgot them. It is at this point that privacy enters the scene. Privacy provided a way for certain individuals, mostly men of a certain social status, to receive a second chance. For example, a legal ban on blackmail served the purpose of keeping a secret life under wraps and furthered the image of the respectability of the elite.[74]

But with the rise of gender equality, with the loosening of legal–moral rules and with the liberation from state policing, which oversaw intimate behavior on the individual level, and the lowering of barriers to audacious publications on the public level, everyone, women included, became vulnerable to invasive publicity that touched private life. Dishonor lurked for everyone, in the form of humiliating or shaming publicity. The task of defending the intimate citadel now passed partially to the individual herself, through development of her right to privacy. This defense

is operated in Israel by the Privacy Protection Act,[75] which states that such publications are liable to make whoever disparages another person a perpetrator of the tort of invasion of privacy.[76] Moreover, malicious invasion of privacy is a criminal offense, and can be subject of a state prosecution.[77]

ROLE REVERSAL IN THE INTIMATE PLAY: LOVE, STORY, LAW

Down the course of history, the fate in life, literature and law of protagonists of intimate books of the kind under consideration exhibits a reversal of socio-legal perceptions; today adultery is not a tort or a criminal offense. Unlike Hester, heroine of *The Scarlet Letter*, Jane Doe enjoys both freedom of action and the right to privacy, which afford her protection against unauthorized publications regarding her intimate life and conduct, considered adultery in the past. Today Hester's story would probably not be considered a criminal offense and would not be publicly exposed against her will. Hester, who in the past undermined the moral code, would be deemed today a victim and possessor of lawful rights to prosecute her denouncers and prevent her condemnation.

Censorship has changed its form. Nowadays no sexual–moral censorship by the state exists, and it is not the state that forbids intimate, daring publications. But whoever is injured is entitled to request prohibition of publication. Apparently, in this way legitimacy is granted to liberated boldness on the personal level.[78] However, privacy and political correctness have become a kind of alternative to state censorship. Thus privatization of censorship is likely to have privacy encounter conservatism: in the name of privacy it is possible to prohibit publication of audacious and intimate details, the issue of which conservative circles would probably oppose from the outset.[79] In the spirit of the shift described by Michel Foucault it may be said that while in the past the sovereign made use of publicity of punishment to impose order and police ways of life, today social construction is constituted by nonviolent means – in our case by preventing the sale of a book that portrays "improper" behavior from focusing the public's attention on it. Privatizing censorship thus allows the legal system to serve as a disciplinary function, educating for good or bad by modifying or prohibiting a book that offends the model of the ideal family.[80]

Privatization of censorship involves shifting the burden of operating it from the state's shoulders to those of the claimant whose privacy has been invaded, that is, the full financial cost of blocking publication of an intimate detail falls on the injured party. She must also act swiftly to prevent dissemination through modern communication means, which for the most part are not restricted by legal orders. This heavy burden that the injured party must carry is the inevitable price to be paid for life in a liberal society that does not examine every piece of information before its publication, but allows the individual to halt damaging publications.

The ability to prevent publications showing this liberated audacity reveals the tension between truth and falsehood in life and in literature. Plato was concerned about the falsity of literature,[81] while today literature actually causes concern because of exposure of the truth. In recent decades we have been immersed in a certain illusion that we have come to terms with literature. Nowadays it transpires that art and literature are still a threat – by disclosing life itself.

The earlier chain of contrasts: sexual restriction against freedom; prohibition of publication of obscenity against almost limitless freedom of expression; shifting the burden of prohibition of publication from the state to the individual; censure of falsehood in literature against censure of the truth in it – is joined by another tension, concerning the nature of the court as a public arena open to all. At the time of state censorship, when the state policed the individual's intimate life and prohibited publication of fictional writing that corrupted moral decency, the court served as a public forum for condemnation of sinners, exposing before the public daring and forbidden life stories. Today personal freedom and artistic freedom are almost unimpeded, but the principle of the court's open doors has been eroded. Precisely the legitimacy that swathes boldness and recognition of the right to privacy justifies blocking access to the court and its documents. The result is that when courts deal with intimate matters the names and other identifying details of the litigants are omitted from the judgments and often such cases are heard in closed doors.[82] No longer is the best theater life itself as played out in the court, but imitation of life as presented in the theater, in art, or in literary works, provided that they are far from the truth. This matter leads us to the tension between shelving the book and publication of the ruling, and the paradox therein.

The story of the "fleeting affair" of Jane Doe and John Doe, which was prohibited from distribution and withdrawn because of its identifying details, finds itself, despite the whiting out of the protagonists' names and their being turned into the "Does," splashed all over the decision's pages, with many identifying details in place. These pages will probably carry the story of these two for a longer time, and will propagate them among a wider public, than the pages of John Doe's novel would have done.

We conclude the encounter of love, story, law with a short summation: the start of the story is a love that has died; its continuation is a story that wished to resurrect that love if only temporarily; and its end is a court case that killed the story of the love, and lit a fire that consumed the story's pages in the temple of privacy. As fierce as death love indeed is.

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No potential conflict of interest was reported by the author.

1. CA 8954/11 Ploni v. Plonit (April 4, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.). I shall refer to this case as Doe v Doe, since the Hebrew word "Ploni" stands for John Doe, whereas "Plonit" stands for Jane Doe.
2. Israel does not have a formal constitution. The rights are defined as constitutional by virtue of Israel's Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 P. 150. While freedom of speech and artistic expression are not stated in the law expressly, these freedoms are considered as the breath of life of democracy; Doe (note 1), sections 53—66. The right to privacy is mentioned expressly in article 7 of Basic Law: Human Dignity and Liberty.
3. At the time of the judgment this sum was equivalent to roughly US$50,000.
4. Doe (note 1), section 155.
5. Nathaniel Hawthorne, *The Scarlet Letter* (Boston: Ticknor, Reed and Fields, 1850).
6. A detailed factual background of the love story is presented in the Supreme Court's judgment; Doe (note 1), sections 3—10.
7. However, the publishers, which were also sued, were exempt from liability. It was ruled that they did not know from the facts before them when they published the book that it involved an invasion of privacy.
8. Doe (note 1), sections 140—3.
9. Maya Sela, *Is the Ban on Publishing a Book that Invades Privacy an Assault on Freedom of Expression?* Ha'aretz Gallery (May 25, 2014) (in Hebrew), www.haaretz.co.il/gallery/literature/.premium-1.2334101
10. Doe (note 1), sections 61—6. For a discussion on the importance of autobiographical writing in the search for truth, see Sonja R. West, "The Story of Me: The Underprotection of Autobiographical Speech," *Washington University Law Review* 84 (2006), 905—967, at 944—8; but see *idem*, "The Story of Us: Resolving the Face-Off between Autobiographical Speech and Information Privacy," *Washington and Lee Law Review* 67 (2010): 589—562, for her description of "The Story of Us," the situation of which is obviously different.
11. James Wood, *How Fiction Works* (New York: Farrar, Straus and Giroux, 2008), 237; Richard Posner, *Law and Literature* (3rd ed.) (Cambridge: Harvard University Press, 2009), 512.
12. For an account and illustration of the blurred lines between fiction and documentation in popular Anglo-American literature, see Posner, *Law and Literature*, 512—13.
13. Michel de Montaigne, *The Complete Essays of Montaigne 2* [1580], ed. and trans. Donald Frame (Redwood City: Stanford University Press, 1958). This served as a motto to W. Nicholas Knight, *Autobiography in Shakespeare's Plays* (Studies in Shakespeare, Vol. 6), gen. ed. Robert F. Wilson Jr. (New York: Peter Lang Publishing, 2002).
14. S. Y. Agnon , *Shira* [1971], trans. Zeva Shapiro (Jerusalem: Toby Press, 2014).
15. "Never have I set out to create in my stories a character of whom it may be said, 'The author is alluding to X with this character'; instead, for a true writer, an alliance is formed whereby every soul he creates in his story is a living soul"; S. Y. Agnon, *Proceedings of the Academy of the Hebrew Language*, 32—3 (1979): 15.
16. Dan Laor, *The Life of Agnon* (New York: Schocken, 1998), 410—11 (in Hebrew).
17. Saul Bellow, *Ravelstein* (New York: Viking Press, 2000).
18. For example, Jonathan Wilson, *Bloom's Day* (New York: New York Times — Books, 2000), www.nytimes.com/books/00/04/23/reviews/000423.23wilsont.html.
19. Paul de Man, "Autobiography as De-Facement," *New Mexico Law Review* 94 (1979): 919—930. For a critical approach, see Jakki Spicer, "The Author is Dead, Long Live the Author: Autobiography and the Fantasy of the Individual," *Criticism* 47 (2005): 387—403.
20. Doe (note 1), section 15.
21. Ibid.
22. Richard Shusterman, "Interpretation, Intention, and Truth," *Journal of Aesthetics and Art Criticism* 46 (1988): 399—411; Alfred R. Mele and Paisley Livingston, "Intentions and Interpretations," *Modern Language Notes* 107 (1992): 931—949; Kalle Puolakka, Relativism and Intentionalism in Interpretation: Davidson, Hermeneutics and Pragmatism (Plymouth: Lexington Books, 2011).

23. Roland Barthes, "The Death of the Author," in *Image — Music — Text*, trans. Stephen Heath (London: Fontana Press, 1977), 142, 148: "The birth of the reader must be at the cost of the death of the Author."
24. Jacques Derrida, *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore: John Hopkins University Press, 1997).
25. West, "Story of Us."
26. BVerfGE 119, 1 (Ger.) 61 NJW 39 (2008) (Ger.) (hereinafter The *Esra* case). Another plaintiff was the actress's mother, but her suit failed because it was decided that there was a fair distance between her person in reality and the literary character. The decision ordered the author to delete some parts of the book, but being indispensable to the plot, the whole book was in fact prohibited; Paul M. Schwartz and Karl-Nikolaus Peifer, "Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?," *California Law Review* 98 (2010): 1925—1988, at 1932—37, 1960—63.
27. BGH, Urteil v. 24.11.2009, Az. VI ZR 219/08. The lower court imposed damages of €50,000, but the Court of Appeal overturned the ruling, stressing that the harm sustained by the plaintiff was not so grave as to impose a parallel duty of damages. That would be a further injury to freedom of artistic expression, which had suffered enough by the prohibition on the book's publication.
28. Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980); Bonome v. Kaysen, Mass. Super. Ct. (2004) (dealt extensively in Schwartz and Peifer, "Prosser's Privacy and the German Right of Personality").
29. For a summary and a critique of American case law, suggesting to impose limited liability for defamation on fiction writers, see Mark Arnot, "Note: When is Fiction Just Fiction? Applying Heightened Threshold Tests to Defamation in Fiction," *Fordham Law Review* 76 (2007): 1853—1904; for an earlier position justifying the balance struck between freedom of expression and the right to reputation in such cases, see Frederick Schauer, "Liars, Novelists, and the Law of Defamation," *Brook Law Review* 51 (1985): 233—268; and Daniel Smirlock, "Note: 'Clear and Convincing' Libel: Fiction and the Law of Defamation," *Yale Law Journal* 92 (1983): 520—543.
30. Smith v. Stewart, 291 Ga. App. 86, 101 (Ga. Ct. App. 2008).
31. This ruling drew media criticism: e.g., Jane Kleiner, *When Art Imitates Life: Suing for Defamation in Fiction* (Digital Media Law Project) (November 4, 2010), www.dmlp.org/blog/2010/when-art-imitates-life-suing-defamation-fiction; Stephen Gurr, "Jury Rules for Plaintiff in Red Hat Club Trial," Gainesvilletimes.com (November 19, 2009), www.gainesvilletimes.com/archives/26196.
32. For cases where no liability was imposed on the writer to compensate the plaintiffs, see Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207 (Ct. App. 1997); and Tamkin v. CBS Broad., Inc., 122 Cal. Rptr. 3d 264 (Ct. App. 2011). In these cases the court recognized in principle the right to damages for loss caused by a fictional work that invaded the plaintiff's privacy, but made this conditional on the following: the work must contain enough details to allow identification of the plaintiff by a reasonable man, the portrayal must be negative, and, moreover, there is no public interest in the publication of the defamatory work. However, recently the district court of Minnesota imposed damages of over US$1.8 million on the estate of Chris Kyle, author of the book *American Sniper*, for unjust enrichment and defamation of Jesse Ventura, former governor of Minnesota (the book contained an incident in which Kyle punched an unnamed character at a bar, while Kyle stated in media interviews that the unnamed character was in fact Ventura). The court was convinced that the event was fabricated by Kyle, thereby causing unjust enrichment (via the book's royalties) and defamation. Note that the court did not stop the marketing of the book (but even so, the incident was removed from copies sold after the judgment); Ventura v. Kyle, No. 12-472 (RHK/JJK) (D. Minn August 7, 2014). For restitutionary claim for defamation and violation of privacy, see Daniel Friedmann, "Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong," *Columbia Law Review* 80 (1980): 504—5548, at 511; and Daniel Friedmann, "The Protection of Entitlements via the Law of Restitution — Expectancies and Privacy," *Law Quarterly Review* 121 (2005): 400—420.
33. For the justification of this approach, see Posner, *Law and Literature*, 512. See also a reference to claim following invasion of privacy, ibid., 515, n. 49.
34. For a critical review, see Matthew Savare, "Comment: Falsity, Fault, and Fiction: A New Standard for Defamation in Fiction," *UCLA Entertainment Law Review* 12 (2004): 129—168, which proposes softened criteria that will balance writers' freedom of artistic expression with the right to reputation of the people on whom the stories are based: the intention to defame reputation and manifest

similarity between the literary character and the real person; Robert D. Richards, "When 'Ripped from the Headlines' Means 'See You in Court': Libel by Fiction and the Tort-Law Twist on a Controversial Defamation Concept," *Texas Review of Entertainment and Sports Law* 13 (2012): 117—137; for an earlier similar position, see Alfred Hill, "Defamation and Privacy under the First Amendment," *Columbia Law Review* 76 (1976): 1205—1313, at 1310—11 (the fear of limiting freedom of expression does not grant immunity to literary exposure of the sex life of former couples. Still, considering the definition of the writing as fiction, the plaintiff will have to shoulder a heavy burden of proof to prove that a significant reading public is alert to the fact that the allegedly fictional account in the book is an actual description of the person of the plaintiff).

35. Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972): 1089—1128, at 1115—24.
36. See note 27.
37. See note 30; liability was based on libel.
38. Almeida Leitão Bento Fernandes v. Portugal (Chamber Judgment of 12.03.2015).
39. Doe (note 1), section 82.
40. For a discussion of the unequal way in which society perceives female, as distinct from male, sexual behavior, see Danielle Keats Citron and Mary Anne Franks, "Criminalizing Revenge Porn," *Wake Forest Law Review* 49 (2014): 345—391, at 353 (the authors call for heavy penalties on men who publicize sexual content about their former partners without their consent, out of awareness that women are harmed much more severely by this exposure); this inequality may also be seen in Jewish law under which a married woman who engages in sexual relations with a strange man commits a serious religious offense (adultery), which carries heavy economic sanctions such as denial of alimony, while a married man who engages in sexual relations with an unattached woman is excused of any sanction.
41. The court prohibited the publication of the decision which rejected a further hearing.
42. For a discussion of the various ways in which a precedent is perceived by the courts, the academic community and the public, see Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents* (Temple University Legal Studies Research Paper No. 2015—16), 103—72, ssrn.com/abstract=2574661. The author presents four kinds of interpretations of a precedent, over a time span from its delivery till its regular acceptance: declared meaning, implied meaning, understood meaning and developmental meaning. The different precedential meanings can reverse over the years, and the relevant historical context obviously has decisive importance in that matter.
43. Doe (note 1), section 155.
44. See notes 26 and 27.
45. Ibid., justices Hohmann-Dennhardt and Gaier, section 116.
46. Ibid., justices Hohmann-Dennhardt and Gaier, section 117; Johann Wolfgang von Goethe, *The Sorrows of Young Werther* [1774], trans. Burton Pike (Oxford: Oxford University Press, 2005).
47. See note 5.
48. John C. Stubbs, "Hawthorne's 'The Scarlet Letter': The Theory of the Romance and the Use of the New England Situation," *Publications of the Modern Language Assosiation of America* 83 (1968): 1439—1447, at 1444.
49. For a modern application of *The Scarlet Letter*, albeit in a different context, see Ifeoma Ajunwa, "The Modern Day Scarlet Letter," *Fordham Law Review* 83 (2015): 2999—3026. The author maintains that a criminal conviction carries far-reaching legal implications for the convicted, especially women, which constitute a kind of "modern Scarlet Letter."
50. A historical event that is described in Arthur Miller's play *The Crucible* (1953).
51. JoAnne Sweeny, "Undead Statutes: The Rise, Fall and Continuing Uses of Adultery and Fornication Criminal Laws," *Loyola University Chicago Law Journal* 46 (2014): 127—173, at 132—6.
52. The English rule, valid until the early 1980s, granted a husband the right to claim damages for loss of his wife's services against anyone who has injured his wife. Originally the action was called *per quod consortium amisit* (loss of services of the wife); it was repealed in the Administration of Justice Act 1982, c. 53 §2(c)(1). For details, see Nancy C. Osborne, "Loss of Consortium: Paradise Lost, Paradise Regained," *Cumberland Law Review* 15 (1985): 179—210; Martin S. Amick, "Who Should Recover For Loss of Consortium?," *Maine Law Review* 35 (1983): 295—313; Jacob Lippman, "The Breakdown of Consortium," *Columbia Law Review* 30 (1930): 651—673. Likewise, a husband was entitled to sue a seducer who persuaded his wife to leave him. Needless to say, for many years a claim of that sort was at the disposal only of the husband, not the wife: Winsmore v. Greenbank (1745) Willes, 577, 125 E.R. 1330. Later, with some hesitation, the wife too was granted a parallel claim: Gray v. Gee (1923) 39 TLR 429. In the 19th century the

seduction claims gave rise in English law to liability for inducing breach of contract: Thomas K. Leeper, "Alienation of Affections: Flourishing Anachronism," *Wake Forest Law Review* 13 (1977): 585—601. Seduction claims were abolished in the Law Reform (Miscellaneous Provisions) Act 1970, c. 33, § 4, 5. For a renewed discussion of the tort as an instrument to preserve "family purity," see William R. Corbett, "A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career," *Arizona State Law Journal* 33 (2001): 985—1056, and along these lines, see also Lance McMillan, "Adultery as Tort," *North Carolina Law Review* 90 (2012): 1987—2032. For support of applying tort law as corrective machinery to repair emotional harm caused by intimate partners, see Jeffrey Brian Greenstein, "Sex, Lies and American Tort Law: The Love Triangle in Context," *Georgetown Journal of Gender and the Law* 5 (2004): 723—762; and Fernanda G. Nicola, "Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts," *William and Mary Journal of Women and Law* 19 (2012—13): 445—510.

53. For an account of these discussions, in which the court functioned as an "open theater," see Ginger S. Frost, *Promises Broken: Courtship, Class and Gender in Victorian England* (Charlottesville: University Press of Virginia, 1995), 25—39 (a description of the feature in the English court); and Lawrence M. Friedman, "Lexitainment: Legal Process as Theater," *DePaul Law Review* 50 (2000): 39—558 (a description of the feature in the American court).
54. Down the years, and in early times in history, literature dealt with love: with its fluctuations, with deceit and adultery. See, for example, Gaius Petronius, *Satyricon* (written first century CE); Apuleius, *The Golden Ass* (written second century CE) — but the detailed acts coupled with it are not revealed in all their coarseness.
55. Donald Thomas, *A Long Time Burning: The History of Literary Censorship in England* (Santa Barbara: Praeger, 1969).
56. For the relevant law in North Carolina, where a tort action on account of adultery can still be found, and for a defense of this practice, see McMillan, "Adultery as Tort."
57. Sweeny, "Undead Statutes," believes that although adultery and fornication may be treated as outdated and unused criminal offenses, they carry symbolic value which may be utilized by opportunistic parties. Anyone who fosters the abolition of these offenses becomes vulnerable to invasion of their privacy, embarrassment, and shaming. The offenses will stand in a vacuum without use, but their menacing strength will be preserved, until the advent of a sweeping cultural change.
58. Doe (note 1), section 86.
59. Ibid., section 87. For regarding privacy as based on respect for people as emotional human beings, see Julie Innes, *Privacy, Intimacy and Isolation* (Oxford: Oxford University Press, 1992), 56—92.
60. This is the essence of the right to privacy, as defined in the seminal article on this subject: Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193—220. For a detailed analysis of the historic background behind this article, and the way it shaped the right to privacy in American law ever since, see Charles E. Colman, "The Lawyer and the Aesthete," *Harvard Law Review* (forthcoming January 2016).
61. Although not considered a crime, committing adultery can still grant advantageous legal position to the non-adulterous spouse in some jurisdictions; Sandi S. Varnado, "Avatars, Scarlet 'A's, and Adultery in the Technological Age," *Arizona Law Review* 55 (2013): 371—416, at 386—91.
62. Warren and Brandeis, "Right to Privacy," 198—200.
63. For an illustration of the limitations imposed on state censorship in American law, see Owen M. Fiss, "State Activism and State Censorship," *Yale Law Journal* 100 (1991): 2087—2106, at 2090—1.
64. D. H. Lawrence, *Lady Chatterley's Lover* (Florence: Tipografia Giuntina, 1928).
65. R v. Penguin Books Ltd [1961] Crim LR 176.
66. Obscene Publications Act 1959; the law states in section 4 that obscenity may be permitted to be published if at issue is a work "in the interests of science, literature, art or learning, or of other objects of general concern."
67. The book underwent legal ups and down in the United States too, and was allowed to be published in 1959; Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (SDNY 1959); D. H. Lawrence, *Lady Chatterley's Lover and A Propos of 'Lady Chatterley's Lover'*, ed. Michael Squires (Cambridge: Cambridge University Press, 2002), xxxv—xxxvi.
68. For a clarification of the socio-cultural factors underlying the development of the right to privacy, expressed in the present context in breaking anonymity and exposing personal information, see Ruth Gavison, "Privacy and the Limits of Law," Yale Law Journal 89 (1980): 421—471.
69. Warren and Brandeis, "Right to Privacy." On the development of the right, see William L. Prosser, "Privacy," *California Law Review* 48 (1960): 383—423, at 383. For a comparison of the principles

of its development by Prosser with the development of the German law, see Schwartz and Peifer, "Prosser's Privacy and the German Right of Personality."

70. Citron and Franks, "Criminalizing Revenge Porn." The authors call for imposition of criminal liability for public shaming on a network, or by other means, accomplished by distributing information of a sexual hue with the intention of exacting revenge. In Israeli law such an injury might constitute a criminal offense under section 5 of the Privacy Protection Act, 5741—1981, 1011 LSI 128; see below note 77. For a general discussion, see David J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven and London: Yale University Press, 2007).
71. For the decision of the European Court of Human Rights on the matter, see Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (2014). On the right to be forgotten, see Meg Leta Ambrose, "It's About Time: Privacy, Information Life Cycles, and the Right to be Forgotten," *Stanford Tech. Law Review* 16 (2013): 369—422; and Emily Adams Shoor, "Narrowing the Right to be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation," *Brook Iyn Journal of International Law* 39 (2014): 487—520.
72. For example, by the evidential immunity granted to an accused in violent acts toward family members. This immunity was abolished in Israel by section 5 of the Evidence Ordinance, Ch. 54, 2 LSI (New Version) 198. In the UK it was abolished by section 80 of the Police and Criminal Evidence Act 1984. In the United States it was abolished in most states after World War II; Nicola, "Intimate Liability," 454—7; Benjamin Shmueli, "Tort Litigation between Spouses: Let's Meet Somewhere in the Middle," *Harvard Negotiation Law Review* 15 (2010): 195—260, at 215—16.
73. Lawrence M. Friedman, "Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy" (Redwood City: Stanford University Press, 2007): 67—9.
74. Paul M. Schwartz, "From Victorian Secrets to Cyberspace Shaming," *University of Chicago Law Review* 76 (2009): 1407—1448, at 1407—11 (Book Review).
75. And by Basic Law: Human Dignity and Liberty (see note 2).
76. Section 4 of the Privacy Protection Act states that invasion of privacy is a civil wrong.
77. Section 5 of the Privacy Protection Act states that the offender is liable to a five-year prison sentence.
78. For example, Duchess of Argyll v Duke of Argyll [1967] Ch 302, in which an English court prohibited the publication of intimate details about the Duchess of Argyll which were given to the media by her husband; the husband's argument that the wife had committed adultery did not rule out her right to privacy based on fiduciary relations between husband and wife, which continue to exist even after the termination of the relationship.
79. Cf. similar processes in which prohibition of presentation of exposed women is requested in the name of feminism, and conservative circles certainly do not oppose this; Janis Searles, "Sexually Explicit Speech and Feminism," *Revista Juridica Universidad de Puerto Rico* 63 (1994): 471—492, at 485—6; on fear in the UK about the ability of conservative-leaning bodies to impose censorship on improper content in the theater, see Adrianne L. Krauss, "I Do Not Agree With Your Play, But I Will Defend to the Death Your Right to Stage It," *Entertainment and Sports Lawyer* 27 (2009): 6—40.
80. For an account of the transition from violent public punishment to non-violent punishment, see Michel Foucault, *Discipline and Punish: the Birth of the Prison* [1977], trans. Alan Sheridan (2nd ed.) (New York: Vintage Books, 1995), 101. For the role of law in modern society, see Michel Foucault, *The History of Sexuality: Volume 1: An Introduction* [1978], trans. Robert Hurley (Vintage, 1990), 144; and Sheila Duncan, "Law's Sexual Discipline: Visibility, Violence, and Consent," *JJournal of Law and Society* 22 (1995): 326—9. See also Friedman, "Lexitainment," 539—51, describing another change regarding the purpose of punishment in American law: initially punishment was public, with the aim of educating the public. Following the understanding in the 19th century that public punishment was ineffective as an educational tool, and was only a form of entertainment, infliction of punishment was made private. Contributing to this understanding was also the change in social structure, from small communities and frameworks in which "everyone knew everyone" to big, alienated cities.
81. Plato, *Republic*, III, 398—9; for an analysis in the literary—legal context, see Kenji Yoshino, "The City and the Poet," *Yale Law Journal* 114 (2005): 1835—1896.
82. As a rule, court hearings in Israel are public: article 3 of Israeli Basic Law: The Judiciary, 5744-1984, SH No. 1348 P. 237 ("A court shall sit in public unless otherwise provided by Law or unless the court otherwise directs under Law"), section 68(*a*) of the Courts Law, 5744-1984 (Consolidated Version),

1123 LSI 198 ("the Court will hear in public"); however, section 68(*b*) and section 68(*e*)(1)(2) of the Courts Law provide many exceptions, in which case the court will be able to hear certain matters in camera; these include protection of state security, ethics, trade secrets, a minor or helpless person, a complainant or a person accused of sexual offenses, where a public hearing would be liable to deter a witness from giving evidence or from giving evidence freely, and also family matters and youth issues.

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