



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 20
Number 2 *Symposium: The Fifteenth Annual
Supreme Court Review*

Article 12

December 2014

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Recommended Citation

Hecht, Deborah (2014) "Private Letters and the Law: Edith Wharton's Questions About Ownership and the Right to Publish Private Letters," *Touro Law Review*: Vol. 20: No. 2, Article 12.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol20/iss2/12>

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PRIVATE LETTERS AND THE LAW:

EDITH WHARTON'S QUESTIONS ABOUT OWNERSHIP AND THE RIGHT TO PUBLISH PRIVATE LETTERS

*Deborah Hecht, Ph.D.*¹

Questions and concerns about ownership and the right to publish private letters, particularly those exchanged between close friends or lovers, are evident in Edith Wharton's award-winning fiction as well as in her private life. Although Wharton grew up in a late nineteenth century world in which a proper lady's name was mentioned in print only three times (at her birth, her marriage, and at her death), she started publishing her work in the late nineteenth century and she became a best-selling author. She was the first woman to win a Pulitzer Prize², and the first woman to be awarded an honorary doctorate of letters from Yale.³

Wharton's questions about ownership and the right to publish private letters are embedded in at least three relatively

¹ Director of the Writing Resources Center at Touro Law Center; SUNY at Stony Brook, Ph.D. The author thanks Dean Howard A. Glickstein, for his ongoing support of scholarly work. The author also thanks the colleagues who so generously and patiently helped throughout the process of writing and completing this article: Jennifer Bentley, Professor Louise Harmon, Melanie Hendry, Professor Jeffrey Morris, Veronica O'Keefe, and Professor Martin Schwartz.

² R.W.B. LEWIS, *EDITH WHARTON: A BIOGRAPHY* 3 (Harper-Colophon Books 1977) (1975) (noting that Wharton was awarded the Pulitzer Prize in 1921).

³ *Id.* at 450 (noting that Wharton was awarded the honorary doctorate in 1923).

early works of her fiction: *The Touchstone*,⁴ "Copy,"⁵ and *The House of Mirth*.⁶ These questions and concerns were equally important in Wharton's personal life; these concerns are dramatically evidenced in aspects of her friendships with the noted attorney Walter Berry and the notorious journalist Morton Fullerton.

Wharton is not alone in her questions and concerns about the fate of private letters. Indeed, she can be viewed as part of a longstanding American tradition of concern that became increasingly intense during the latter part of the nineteenth century.

Thomas Jefferson and John Adams offer us a glimpse of late eighteenth and early nineteenth century Americans who are seriously concerned with issues of epistolary privacy. As early as 1813, Thomas Jefferson wrote to John Adams⁷ expressing outrage at the unexpected and unauthorized publication of two of his (Jefferson's) letters in a third party's book of memoirs. Jefferson calls this "the very act of the grossest abuse of confidence, by publishing private letters which passed between two friends, with no views to their ever being made public" and "an instance of inconsistency, as well as of infidelity of which I would rather be

⁴ EDITH WHARTON, *TOUCHSTONE* (Gross Pointe: Scholarly Press 1968) (1900) [hereinafter *TOUCHSTONE*].

⁵ EDITH WHARTON, *Copy*, in 1 *COLLECTED SHORT STORIES* 275 (R.W.B. Lewis ed., 1968) [hereinafter *Copy*].

⁶ EDITH WHARTON, *THE HOUSE OF MIRTH* (Charles Scribner's Sons 1990) (1905) [hereinafter *MIRTH*].

⁷ *THE ADAMS-JEFFERSON LETTERS* xxiii (Lester J. Cappon, ed., 1987) [hereinafter *LETTERS*]. According to the editor, publication of the letters was "anticipated in their lifetimes but never encouraged by them."

the victim than the author."⁸ Jefferson's use of the word "infidelity" suggests the seriousness of this betrayal of trust; in addition, he specifically mentions the publication of letters that were exchanged between friends, thus adding to the gravity of the betrayal and also recognizing the special nature of friendship.

Adams, in return, reassures Jefferson that the letters will not harm either of Jefferson or himself. However, in the next line he continues:

You have right and reason to feel and to resent the breach of Confidence. I have had enough of the same kind of Treachery and Perfidy practiced upon me, to know how to sympathize with you. I will agree with you, in unqualified censure of such Abuses. They are the worst Species of Tyranny over private Judgment and free Enquiry. They suppress the free communication of Soul to Soul.⁹

Jefferson's outrage at the appropriation and unauthorized publication of letters continued and became more vehement. In August of 1815, Jefferson noted that his correspondence with Adams seemed to have been "observed at the post offices, and thus has attracted notice. Would you believe that a printer has had the effrontery to propose to me the letting him publish it? These people think they have a right to everything however secret or sacred. I had not before heard of the Boston pamphlet with Priestley's¹⁰ letters and mine".¹¹ In 1822, he writes to Adams that

⁸ *Id.* at 331.

⁹ *Id.* at 333.

¹⁰ *Id.* at 632. Joseph Priestley was a noted theologian and scientist.

¹¹ *Id.* at 453.

"I should wish never to put pen to paper; and the more because of the treacherous practice some people have of publishing one's letters without leave. Lord Mansfield¹² declared it a breach of trust, and punishable at law. I think it should be a penitentiary felony." ¹³

Legal questions concerning the ownership of letters are evident in nineteenth century cases including *Woolsey v. Judd et al.*;¹⁴ *Grigsby and wife v. R.J. Breckinridge*;¹⁵ *Waterhouse v. Spreckels and Irwin*.¹⁶ In addition, legal questions concerning both privacy and copyright issues form the basis of late nineteenth century articles discussed later in this article..

As Eaton S. Drone notes in the Preface to his now-classic work on copyright law, originally published in 1879, "the nature of literary property is somewhat peculiar." ¹⁷ Drone continues: "in making a written communication to another, the writer does not consent to part with any right of property therein; but simply gives to the receiver the privilege of reading the letter for his own benefit, without the right to make any public use of its contents."¹⁸

¹² LETTERS, *supra* note 7, at 423. Lord Mansfield was an English magistrate, 1700's.

¹³ LETTERS, *supra* note 7, at 578.

¹⁴ 4 Duer 379, 11 N.Y. Super. Ct. 379 (1855) (holding that whether the author's letter has literary value or would have a negative effect on society is not the basis for granting an injunction of publication but rather whether the author has a remaining exclusive property interest in the letters).

¹⁵ 65 Ky. 480 (1867) (holding that an author has a property interest to the contents of his letters and he alone has the right to publish).

¹⁶ 5 Haw. 246 (1884) (an action for libel may be sustained though the publishing of a private letter with the intent to injure the plaintiff).

¹⁷ EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879).

¹⁸ *Id.* at 127.

Although writer and editor E.L. Godkin does not focus specifically on literary property, his ideas and his article, titled "The Rights of the Citizen, IV.-To His Own Reputation," represent an important development in late nineteenth century attitudes toward privacy. In that article, published in Scribner's magazine in July 1890 Godkin states:

The right to decide how much knowledge of [a man's] personal thought and feeling, and how much knowledge, therefore, of his tastes and habits, of his own private doings and affairs, and those of his family living under his roof, the public at large shall have, is as much one of his natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours.¹⁹

Godkin notes that oral gossip spread "over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but seldom reached, those who knew nothing of him."²⁰ In contrast, "the advent of the newspapers, or rather of a particular class of newspapers, has made a great change. It has converted curiosity into what economists call an effectual demand, and gossip into a marketable commodity...gossip about private individuals is now printed, and makes its victim, with all his imperfections on his head, known hundreds or thousands of miles away from his place of abode."²¹

¹⁹ Edward Lawrence Godkin, *The Rights of the Citizen, IV. – To His Own Reputation*, SCRIBNER'S, July 1890, at 58, 65.

²⁰ *Id.* at 66.

²¹ *Id.*

In their much discussed and influential²² Harvard Law Review article²³, "The Right to Privacy," Samuel Warren and Louis Brandeis note:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone'. Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'²⁴

In addition to their references to photographs and newspaper enterprises, Warren and Brandeis state:

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted...Neither does the

²² RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 31 (2d ed. 2002). "It is likely that the Warren and Brandeis article has had as much impact on the development of law as any single publication in legal periodicals. It is certainly one of the most commented upon and cited publications in the history of our legal system. A more influential piece of scholarship is difficult to imagine."

Id.

²³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-220 (1890).

²⁴ *Id.* at 195.

existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent.²⁵

Warren and Brandeis revisit and re-emphasize Drone's concern with literary property; they make a forceful argument for the individual writer's ownership of his or her work.²⁶

In addition, their attitudes are similar to those of Godkin, particularly in their emphasis of the dangers of newspaper gossip

Wharton felt the sting of unwanted newspaper gossip when her engagement to Harry Stevens was broken. In an instance that Warren and Brandeis, as well as Godkin, would have deplored, the Newport, Rhode Island *Daily News* reported

The only reason assigned for the breaking of the engagement hitherto existing between Harry Stevens and Miss Edith Jones is an alleged preponderance of intellectuality on the part of the intended bride. Miss Jones is an ambitious authoress, and it is said that, in the eyes of Mr. Stevens, ambition is a grievous fault.²⁷

²⁵ *Id.* at 199.

²⁶ For important and well-presented articles on the development of privacy law, see DON R. PEMBER, *PRIVACY AND THE PRESS* (1972); Robert Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, 34 AM. J. JURIS. 87, 104 (1989); Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281 (1966). Pember's critique of Warren and Brandeis's law review article is noteworthy.

²⁷ LEWIS, *supra* note 2, at 45.

Decades after Jefferson wrote the previously quoted letters to John Adams, Wharton expresses her own concerns about the misuse of private letters. However, the reader first sees this concern in Wharton's fiction as opposed to her private letters.

The three literary works written by Wharton²⁸ and selected for close examination in this article center on letters exchanged between women and the men they love. All three works, *The Touchstone*²⁹, "Copy", and *The House of Mirth* are published relatively early in Wharton's literary career; all three predate

²⁸ This article does not give critical consideration to Wharton's poignant short story, "The Letters" (1910), because the story, which appears in the previously noted collection of short stories edited by R.W.B. Lewis, belongs to another (forthcoming) study of themes in Wharton's work. However, the story needs to be acknowledged: Lizzie West, an impoverished tutor is seduced by Vincent Deering, an aspiring artist who is the father of one of her students. When Deering's wife dies, he leaves for America. For a time, Deering writes to Lizzie--love letters that she treasures. Although the letters stop, a heartbroken Lizzie continues to write to Deering, but to no avail. Three years pass. Lizzie inherits money from a distant relative. Deering, coincidentally, reappears--shabby and discouraged looking. They renew their relationship; they marry; they have a pretty home and a baby. Lizzie and a friend, cleaning the attic, discover all of Lizzie's letters to Deering--saved, but unopened. Unread. Lizzie, after careful consideration of the drabness of her life before Deering and the (relative) riches he has brought to her, understands and loves him despite his failings. The story dates to the time of Wharton's involvement with Fullerton; much of the anguish expressed by Lizzie in her letters to Deering are reminiscent of anguish expressed by Wharton in her own letters to Fullerton; several of these letters appear later in this article and additional letters can be reviewed in THE LETTERS OF EDITH WHARTON (R.W.B. Lewis & Nancy Lewis eds., 1968) [hereinafter WHARTON LETTERS].

²⁹ N.B. My article "Law and Lawyering" includes discussion of this novella and its central character, Stephen Glennard, as representative of one aspect of nineteenth century law and lawyering. Deborah Hecht, *Law and Lawyering*, in *Law and Literature* (MICHAEL MEYERS ED., 2004) (forthcoming).

Wharton's international acclaim and her love affair with Morton Fullerton.³⁰

In *The Touchstone*, Stephen Glennard becomes romantically involved with author Margaret St. Aubyn, who proves to be as prolific a letter-writer as Wharton herself was in real-life.³¹ Glennard is a young man reading for the bar in his uncle's New Jersey law office. Aubyn, whose first novel has recently been published, is conveniently separated from her husband. As long as Aubyn is technically unavailable, Glennard is comfortable with their relationship and he allows Aubyn to believe that his interest in her has romantic possibilities.

However, two events cause Glennard to look at Aubyn with unloving eyes: when Aubyn's second novel is published to critical acclaim, Glennard becomes uneasy. "It was not that she bored him; she did what was infinitely worse--she made him feel his inferiority."³² When her husband dies, he edges away from the

³⁰ Morton Fullerton, discussed more fully later in this article, was an American journalist who may be best known for his betrayals of those who cared deeply for him. For further information, see Hermione Lee, *Gatsby of the Boulevards*, LONDON REVIEW OF BOOKS, March 2001, at 8.

³¹ R.W.B. Lewis notes that there are 4000 letters from Wharton that would have been appropriate for the collection; he also notes that at least another 4,000 letters exist. WHARTON LETTERS, *supra* note 28. Wharton was not alone in her epistolary productivity: her younger colleague, F. Scott Fitzgerald, was another prolific letter writer. According to scholar Matthew Bruccoli, at least 3,000 of Fitzgerald's letters have been located. Bruccoli believes that this figure represents less than half of the letters Fitzgerald actually wrote. Bruccoli notes that Fitzgerald saved a great deal of useful material, and he notes, too, that after Fitzgerald's death, his daughter Scottie Fitzgerald Smith took an active role in suggesting that her father's letters be used as part of a novel and in donating his materials to Princeton. CORRESPONDENCE OF F. SCOTT FITZGERALD xv (Matthew J. Bruccoli & Margaret M. Duggan eds., 1980).

³² TOUCHSTONE, *supra* note 4, at 18.

relationship; indeed, after a year in which "their friendship dragged on with halting renewals of sentiment, becoming more and more a banquet of empty dishes from which the covers were never removed, " ³³ Glennard moves to New York where he takes a job with a corporate law firm.

Aubyn writes to him, and she continues to write to him even after she moves to London and becomes internationally celebrated. Glennard is both buoyed and burdened by Aubyn's letters. In the beginning, when he is still a newcomer to Manhattan, "the sight of Mrs. Aubyn's writing was like a voice of reassurance in surroundings as yet insufficiently aware of him." ³⁴ However, there are other times when he avoids looking in his letterbox. Glennard is emotionally unwilling and intellectually unable to fully understand the letters Aubyn writes to him. However, he keeps the letters--hundreds and hundreds of them, enough for a book.

When Aubyn dies, Glennard--aided and abetted by Flamel, a book collector with whom he is acquainted--sells the Aubyn letters to a publisher. The question of ownership of the letters is all too easily answered by Glennard and Flamel themselves. Glennard, the young corporate lawyer, does not research the issue nor does he ask any of his colleagues at the law firm for their opinions. Instead, he lies to Flamel: he claims that the letters were written to a friend of his, a man who has since died and left the letters to Glennard. "They're mine fast enough. There's no one to prevent--I mean there

³³ TOUCHSTONE, *supra* note 4, at 20.

³⁴ TOUCHSTONE, *supra* note 4, at 21.

are no restrictions--" ³⁵ Flamel asks no further questions; Glennard's one stipulation is that neither his name nor the name of his supposed benefactor ever be mentioned.

The letters are published as a book-length collection, and they are a critical and a financial success. Glennard makes a substantial profit from their sale and from royalties, but he must endure hearing the letters discussed wherever he goes. The letters themselves are lavishly praised; the unknown recipient of the letters, however, is universally denounced for his emotional and moral failings. Glennard begins to realize the depth of his betrayal: in Thomas Jefferson's previously quoted words, Glennard has committed the "grossest abuse of confidence." He has betrayed the trust of a woman, now dead, who loved him selflessly.

Of course, as previously noted, research would have led Glennard to Warren and Brandeis's law review article, "The Right to Privacy" as well as to the several previously listed cases. Furthermore, if Glennard read *Scribner's* (in which, coincidentally, Wharton published some of her early stories) he might have come across Edward Lawrence Godkin's previously mentioned article "The Rights of the Citizen, IV.-To His Own Reputation."

However, the author of the letters is dead. The evidence of the text suggests that she dies intestate. There is no mention of a will; there is no mention of a widower; there is no mention of heirs or of an estate. This may be Wharton's oversight, but this would--

³⁵ TOUCHSTONE, *supra* note 4, at 46.

or so it seems--give Glennard the legal freedom to do as he pleases with the Aubyn letters.

In contrast to the situation presented in *The Touchstone*, "Copy" presents the reader with two authors who are very much alive and fully aware of the dollar value of everything they have ever written--including their letters to each other. "Copy," one of Wharton's early short stories, is another example of Wharton's concern with the ownership of private letters exchanged between friends or lovers.³⁶

The two authors (one a poet and the other a novelist) discuss possible publication of letters they wrote to each other long ago--when they were lovers. "Copy," published in 1901 as part of the collection *Crucial Instances*, is written in the form of a play; the two authors are former lovers who are meeting after twenty years.

Ventnor, the poet, has initiated the meeting, which takes place at novelist Helen Dale's apartment. However, it has been so long since the two last met that Ventnor seems initially unable to recognize Mrs. Dale with any certainty.

Stage directions let us "see" the symbolic trappings of authorship. We are told that "books are scattered everywhere--mostly with autograph inscriptions, 'From the Author,'--and a large

³⁶ Both Sarah Bird Wright and Melissa McFarland Pennell raise (but do not answer) the question of who has the right to publish private letters. See SARAH BIRD WRIGHT, *EDITH WHARTON A TO Z: THE ESSENTIAL GUIDE TO THE LIFE AND WORK* (1999); MELISSA MCFARLAND PENNELL, *STUDENT COMPANION TO EDITH WHARTON*. Also, Stacey Margolis's essay discusses "Copy" and THE

portrait of Mrs. Dale, at her desk, with papers strewn about her, takes up one of the wall panels."³⁷

From the beginning of the story, we see evidence of Helen Dale's ongoing attachment to memories of her love affair with Ventnor. She has saved his letters; she keeps a book of poetry that he dedicated to her nearby; she has even revisited a garden in which they used to walk. However, although Dale is clearly attached to her memories, we cannot be as certain of Dale's feelings for the person Ventnor has become. Indeed, in her dialogue with Ventnor, Dale's comments show her wariness of the poet and his motives. She reminds him that it has been twenty years since they last met, and asks if it is "the reflection of my glory that has guided you here, then?"³⁸ She zeroes in on their respective commodification even before Ventnor tries to take a now-valuable first edition of his poetry, a book he dedicated to Helen Dale, a book that she has obviously treasured. He tells her that a copy sold in London for forty pounds, and that he's been told that the book would now sell for twice as much. She takes the book back, saying, "I know that."

Dale has already noted that she has, over the years, become "a figment of the reporter's brain--a monster manufactured out of newspaper paragraphs, with ink in its veins. A keen sense of

TOUCHSTONE from a different perspective. Stacey Margolis, *The Public Life: The Discourse of Privacy in the Age of Celebrity*, 52 ARIZ. Q. 81 (1995).

³⁷ Copy, *supra* note 5, at 275.

³⁸ Copy, *supra* note 5, at 277.

copyright is *my* nearest approach to an emotion."³⁹ Ventnor agrees with her comment that the two are now public property.

Despite some banter about their romantic past, the subject on Ventnor's mind is the business of writing and the dollar value of their respective work. Indeed, Ventnor's visit has a purpose: he wonders whether she has kept his letters. "Oh, *you* were a celebrity already. Of course I kept them!" she says. The stage directions state that she is speaking playfully. She continues: "Think what they are worth now!"⁴⁰

Although Ventnor has come in hopes of retrieving the letters he wrote to Helen Dale so that he can publish them as part of his memoirs, she has no intention of returning his letters. Indeed, she has (or says that she has) similar plans of her own; furthermore, she asks Ventnor to return *her* letters to him. The two dispute ownership of their respective letters. When Dale demands all the letters, those she wrote to him as well as those he wrote to her, Ventnor objects: "if we're going to settle the matter in the spirit of an arbitration treaty why, there are accepted conventions in such cases...it is usual--that technically, I mean, the letter--belongs to its writer--"⁴¹

Dale counters: "But you couldn't have written them if I hadn't--been willing to read them. Surely there's more of myself in

³⁹ *Copy, supra* note 5, at 278.

⁴⁰ *Copy, supra* note 5, at 279.

⁴¹ *Copy, supra* note 5, at 283.

them than of you." She continues, "a woman's love letters are like her child. They belong to her more than to anybody else--"⁴²

Thus, in the initial phase of their dispute, we see Ventnor and Dale as business people, writers who commodify themselves as well as their work. However, some of their former affection for each other begins to surface. Furthermore, we see that some of Dale's respect for herself as an artist remains as well. Artistic self-respect is evident when Helen Dale points to the letters and says, "Do you suppose we could have written a word of these if we'd known we were putting our dreams out at interest?"⁴³

Dale's affection for her former sweetheart is again evident when she relates a recent visit to a run-down, deserted garden they had often walked in. In the twenty years since their last afternoon there, the garden has been sold; it is now a public park where "excursionists sit on cast-iron benches admiring the statue of an Abolitionist...and the man who sold the garden has made a fortune he doesn't know how to spend."⁴⁴

Ventnor, who remembers every detail of the garden, is moved by the story. He relents. On impulse, he says, "let's sacrifice our fortune and keep the excursionists out!"⁴⁵ He throws the letters, his as well as hers, into the fireplace.

⁴² *Copy, supra* note 5, at 283.

⁴³ *Copy, supra* note 5, at 285.

⁴⁴ *Copy, supra* note 5, at 285.

⁴⁵ *Copy, supra* note 5, at 285.

The stage directions indicate that as Ventnor leaves, Helen Dale takes a step toward him but then, "turning back, she leans against the chimneypiece, quietly watching the letters burn."⁴⁶

Throughout this short story, we see that despite Helen Dale's businesslike discourse, the letters and their fate have emotional meaning to her. Although she initially describes herself as a "monster manufactured out of newspaper paragraphs,"⁴⁷ she responds with passion when she first realizes that Vintner wants her to return his letters so that he can publish them. She refuses, saying: "Ah, I paid dearly enough for the right to keep them, and I mean to! Have you ever asked yourself how I paid for it? With what month and years of solitude, what indifference to affection?"⁴⁸

In contrast, Ventnor's interest in the letters, as with his attempt to take the first edition of his poetry, seems to be as businesslike as his language. He must be persuaded to put aside his pecuniary interest in the letters. However, he *is* persuaded and the story ends with both sets of letters going up in flames. Thus, "Copy" presents us with an instance in which two famous authors destroy their letters to each other rather than further commodifying themselves and their long-ago love affair. By destroying the letters, the authors deliberately prevent future biographers from access to an intimate exchange.

⁴⁶ *Copy*, *supra* note 5, at 286.

⁴⁷ *Copy*, *supra* note 5, at 278.

⁴⁸ *Copy*, *supra* note 5, at 283.

Both *The Touchstone* and "Copy" deal with the question of who may publish private letters exchanged between friends or lovers; in each of those, the person who wants to profit is one of the letter writers. A very different question surfaces in Wharton's 1905 best-seller, *The House of Mirth*.

In this novel, unmarried lawyer Lawrence Selden is having a casual affair with a married woman, Bertha Dorset, who writes him passionate, incriminating letters. In addition to the affair with Bertha Dorset, Selden has an ongoing flirtation with Lily Bart, the doomed heroine of the novel. Indeed, it becomes clear that Selden and Lily come as close to loving each other as they can to loving anyone.

However, Lawrence Selden is not a candidate for marriage to Lily Bart; indeed, he does not seem interested in making a lasting commitment to anyone. He is a self-declared spectator, and a critical one; he is a man with the appraising eye of the connoisseur or collector.⁴⁹ At the beginning of the novel, when he meets Lily by chance at Grand Central Station, he notices that "under her dark hat and veil she regained the girlish smoothness, the purity of tint, that she was beginning to lose after eleven years of late hours and indefatigable dancing."⁵⁰ In addition, as he gazes with supposed pleasure at her, he questions whether or not her hair is "ever so slightly brightened by art?"⁵¹

⁴⁹ In his role as self-declared spectator and in his detachment from long-term commitment, Selden has some similarity to Wharton's real-life friend, Walter Berry. Berry was, like Selden, a lawyer who never married.

⁵⁰ MIRTH, *supra* note 6, at 6.

⁵¹ MIRTH, *supra* note 6, at 7.

Lily Bart is still beautiful, but--as Selden has observed--she is no longer young. Furthermore, she must marry a wealthy man. As she says to Selden, "I am horribly poor--and very expensive. I must have a great deal of money."⁵² In contrast to Lily's declared need for a great deal of money, Selden seems to manage on whatever he makes from his lawyering. When Lily asks if he minds having to work, he says, "Oh, the work itself is not so bad--I'm rather fond of the law."⁵³

Selden has as little to lose by flirting with Lily as he does by having an affair with a married woman; thus, he is as careless of Lily's reputation (and of the feelings he awakens in her) as he is with Bertha Dorset's letters. Indeed, he takes so little care with Bertha Dorset's letters that they fall into the hands of a charwoman, Mrs. Haffen.

Mrs. Haffen, who mistakenly believes that Lily Bart is Selden's mistress, brings the letters to Lily. The two women have already encountered each other on the stairs of Selden's apartment at the Benedick. In that encounter, the charwoman is scrubbing the stairs.

Her own stout person and its surrounding implements took up so much room that Lily, to pass her, had to gather up her skirts and brush against the wall. As she did so, the woman paused in her work and looked up curiously, resting her clenched red fists on the wet cloth she had just drawn from her pail. She had a broad sallow face, slightly pitted

⁵² MIRTH, *supra* note 6, at 10.

⁵³ MIRTH, *supra* note 6, at 12.

with small-pox, and thin straw-coloured hair through which her scalp shone unpleasantly.

"I beg your pardon," said Lily, intending by her politeness to convey a criticism of the other's manner.

The woman, without answering, pushed her pail aside, and continued to stare as Miss Bart swept by with a murmur of silken linings. Lily felt herself flushing under the look. What did the creature suppose?⁵⁴

Lily's discomfort and her sense of guilt at this encounter are notable.⁵⁵ The charwoman embodies at least two of Lily's deepest fears: being ugly and being poor. Indeed, what Lily feels as the woman's "persistent gaze" makes her fearful.

The next time the two women meet is at Lily's aunt's house, when the charwoman seeks Lily out. Lily is surprised to see the charwoman; on this occasion Lily's gaze once again fixes on the charwoman's pockmarked face and "the reddish baldness visible through thin strands of straw-colored hair."⁵⁶

The woman begins,

"I should like to say a word to you, Miss." The tone was neither aggressive nor conciliatory: it revealed nothing of the speaker's errand. Nevertheless, some precautionary instinct warned Lily to withdraw beyond earshot of the hovering parlour-maid..."I have something here that you might like to see,

⁵⁴ MIRTH, *supra* note 6, at 13.

⁵⁵ See Kathleen Moore, *Edith Wharton's Lily Bart and the Subject of Agency*, EDITH WHARTON REVIEW, Spring 2003, at 8. In this essay, Moore discusses the charwoman as Lily Bart's psychological double and writes: "Just like Mrs. Haffen, Lily sees herself as endlessly battling poverty; Mrs. Haffen eventually tells Lily that she is forced to extort money from Lily because Mr. Haffen's loss of a job has brought poverty upon them." *Id.*

⁵⁶ MIRTH, *supra* note 6, at 80.

Miss Bart." She spoke the name with an unpleasant emphasis, as though her knowing it made a part of her reason for being there. To Lily, the intonation sounded like a threat.⁵⁷ You have found something belonging to me?" [Lily] asked, extending her hand. Mrs. Haffen drew back. 'Well, if it comes to that, I guess it's mine as much as anybody's,' she returned.

The charwoman opens the packet she has been holding and spreads letters out on a table so that Lily can see them. Lily recognizes the handwriting; she knows that these are letters written by Bertha Dorset to Lawrence Selden. She has no interest in protecting Bertha Dorset; the women are rivals and Bertha's vindictive enmity is thinly disguised. Although at this point, Lily is unaware of how dangerous Bertha will become, she does know that Bertha has been reckless in writing to Selden. In the world of Old New York, as Lily knows,

there is nothing society resents so much as having given its protection to those who have not known how to profit by it: it is for having betrayed its connivance that the body social punishes the offender who is found out. And in this case there was no doubt of the issue. The code of Lily's world decreed that a woman's husband should be the only judge of her conduct: she was technically above suspicion while she had the shelter of his approval, or even of his indifference.⁵⁸

⁵⁷ See *People v. Wickes*, 98 N.Y.S. 163 (1906). "...No precise words are needed to convey a threat. It may be done by innuendo or suggestion; ...no express demand for money is necessary to constitute the crime of blackmail..."; see also Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567 (1993). For interesting historic perspective see R. H. Helmholz, *The Roman Law of Blackmail*, 30 J. LEGAL STUD. 33 (2001).

⁵⁸ MIRTH, *supra* note 6, at 82.

Lily tells the charwoman that she doesn't know anything about the letters; Lily says: "I have no idea why you have brought them here."⁵⁹

The charwoman replies, "I'll tell you why, Miss. I brought 'em here to sell."

She [Lily] understood now--Mrs. Haffen supposed her to be the writer of the letters. In the first leap of her anger she was about to ring and order the woman out; but an obscure impulse restrained her...Men do not, at worst, suffer much from such exposure; and in this instance the flash of divination which had carried the meaning of the letters to Lily's brain had revealed also that they were appeals--repeated and therefore probably unanswered--for the renewal of a tie which time had evidently relaxed. Nevertheless, the fact that the correspondence had been allowed to fall into strange hands would convict Selden of negligence in a matter where the world holds it least pardonable...⁶⁰

Lily is swayed by her personal feelings for Selden; she imagines a court, a trial, and a conviction that might result in a lawyer being suspended or disbarred. Her thoughts, in this instance and in subsequent interior monologues, are phrased in the language of the law. Lily says to the charwoman, "What do you wish me to pay you?"⁶¹

Mrs. Haffen names a figure, but "Miss Bart showed herself a less ready prey than might have been expected from her

⁵⁹ MIRTH, *supra* note 6, at 82.

⁶⁰ MIRTH, *supra* note 6, at 83.

⁶¹ MIRTH, *supra* note 6, at 83.

imprudent opening. She refused to pay the price named, and after a moment's hesitation, met it by a counter-offer of half the amount."⁶²

Lily, victorious, now has possession of the letters. She knows that having possession of Bertha Dorset's letters gives her enormous power: "She had, indeed, a quick vision of returning the packet to Bertha Dorset, and of the opportunities the restitution offered; but this thought lit up abysses from which she shrank back ashamed."⁶³

Lily's first impulse is to burn the letters; she does not want to risk having the letters fall into anyone else's hands. However, in the next scene, her aunt's gleeful account of a Bertha-engineered engagement that effectively destroys Lily's hopes of marrying Percy Gryce, infuriates Lily. Lily goes to her bedroom where "she approached her desk, and lighting a taper, tied and sealed the packet; then she opened the wardrobe, drew out a despatch-box, and deposited the letters within it."⁶⁴

Throughout the rest of the novel, Lily has opportunities to use Bertha Dorset's indiscreet letters to her own advantage. However, despite the disastrous consequences of Bertha's campaign of malicious innuendo and cruel actions, Lily does not use the letters; she does not even mention the existence of the letters to anyone.

⁶² MIRTH, *supra* note 6, at 83.

⁶³ MIRTH, *supra* note 6, at 83.

⁶⁴ MIRTH, *supra* note 6, at 87.

At a time when Lily is fighting for survival, Rosedale--an enormously wealthy outsider, a Jew who was formerly scorned by Lily--pressures her to use the letters, which he has known about from the first. His plan is simple: if Lily uses the letters, she will reclaim her place in society. If she will do that, then he will marry her. "I'm more in love with you than ever, but if I married you now I'd queer myself for good and all, and everything I've worked for all these years would be wasted."⁶⁵ Lily is unwilling to use the letters, but Rosedale continues to pressure her. "I don't suppose you bought those letters simply because you're collecting autographs."⁶⁶

Lily's initial horror at Rosedale's coercive plan, a plan in which now Lily will become a blackmailer, is grounded in

its subtle affinity to her own inmost cravings. ..this reduced the transaction to a private understanding, of which no third person need have the remotest hint. Put by Rosedale in terms of business-like give-and-take, this understanding took on the harmless air of a mutual accommodation, like a transfer of property or a revision of boundary line.⁶⁷

But Lily refuses to participate in Rosedale's plan. Her situation worsens; she is losing the struggle to survive. When Rosedale comes to see her again, she again refuses his offers of help. However, that night, she lies awake.

In fending off the offer he was so plainly ready to renew, had she not sacrificed to one of those

⁶⁵ MIRTH, *supra* note 6, at 200.

⁶⁶ MIRTH, *supra* note 6, at 201.

⁶⁷ MIRTH, *supra* note 6, at 202.

abstract notions of honour that might be called the conventionalities of the moral life? What debt did she owe to a social order which had condemned and banished her without trial? She had never been heard in her own defence; she was innocent of the charge on which she had been found guilty; and the irregularity of her conviction might seem to justify the use of methods as irregular in recovering her lost rights. Bertha Dorset, to save herself, had not scrupled to ruin her by an open falsehood; why should she hesitate to make private use of the facts that chance had put in her way? After all, half the opprobrium of such an act lies in the name attached to it. Call it blackmail and it becomes unthinkable; but explain that it injures no one, and that the rights regained by it were unjustly forfeited, and he must be a formalist indeed who can find no plea in its defence.⁶⁸

And so, Lily decides to use the letters. She is on her way to Bertha Dorset's house when thoughts of Selden intrude. "The sudden longing to see him remained; it grew to hunger as she paused on the pavement opposite his door."

The following scene brings Lily--and the reader--back to the beginning of the novel and sets the ensuing events with Mrs. Haffen in motion: Lily is once again alone with Selden in his room.

Two years have passed. It is now early evening as opposed to early afternoon; a fire flickers on the hearth. Lily's life is in ruins; she is exhausted, without hope. She and Selden look at each other

⁶⁸ MIRTH, *supra* note 6, at 234.

...with a kind of solemnity, as though they stood in the presence of death. Something in truth lay dead between them--the love she had killed in him and could no longer call to life. But something lived between them also, and leaped up in her like an imperishable flame: it was the love his love had kindled, the passion of her soul for his.⁶⁹

Lily kneels on the hearthrug, warming her hands. Selden thinks he sees her "draw something from her dress and drop it in to the fire"; without a word to him, and in a quiet, heroic gesture even the reader might miss, Lily burns Bertha Dorset's letters.

Wharton herself, as mentioned earlier in this article was a prolific letter writer. As R.W.B. Lewis writes in the Introduction to Wharton's collected letters, "Scarcely a day passed, in her maturity and in good health, when she did not compose and dispatch half a dozen letters, many of them carrying forth ongoing conversations. (Returning once from a short trip, in 1924, she found sixty-five letters awaiting her...)⁷⁰

The survival of Wharton's thousands of letters indicates, for the most part, the high regard in which her friends and colleagues held her. R.W.B. Lewis, who also edited *The Letters*, notes that the first of Wharton's friends to save her letters was Sally Norton⁷¹; Bernard Berenson⁷² is another friend who saved Wharton's letters--

⁶⁹ MIRTH, *supra* note 6, at 241.

⁷⁰ WHARTON LETTERS, *supra* note 28, at 3.

⁷¹ Sally Norton's father was Charles Eliot Norton, described by Lewis as a Harvard professor and scholar.

⁷² Berenson is described by Lewis as a "distinguished Italian Renaissance art connoisseur and historian; after a shaky start to the friendship, Wharton was a welcomed guest of BB's at his Villa I Tatti. WHARTON LETTERS, *supra* note 25, at 1. Wharton was on cordial terms with BB's wife Mary as well as with BB's

more than 600 of them. (Berenson worked with an appraising eye to the future: he "kept and catalogued every letter ever written to him by anyone of importance over the better part of a century."⁷³)

But not all of Wharton's letters survived. As Lyall H. Powers reports, Henry James burned all his personal papers--not once, but on two occasions: "The correspondence between James and Wharton must have originally amounted to some four-hundred items--letters, telegrams, postcards--...In November 1909, in the gloom of complex depression, James made a grand bonfire of his personal papers, including most of Wharton's letters to him...on his last return to his home in Rye, October 1915, he repeated the act of burning his personal papers."⁷⁴ In addition, Wharton's correspondence with her supposed friend, the malicious Percy Lubbock,⁷⁵ is apparently no longer in existence.

associate and long-term mistress Nicky Mariano. Mariano's 1966 memoir, *Forty Years With Berenson*, offers fascinating insights into Wharton as well as into the entire circle of friends who were part of the I Tatti world. The introduction to the memoir is written by Sir Kenneth Clark, a friend of BB's as well as of Wharton; Clark allowed RWB Lewis, at the time Lewis was writing Wharton's biography, access to 120 letters and postcards from Wharton.

⁷³ WHARTON LETTERS, *supra* note 25, at 4.

⁷⁴ HENRY JAMES & EDITH WHARTON LETTERS: 1900-1915 26 (Lyall H. Powers ed., 1990).

⁷⁵ As I have discussed in my essay "The Poisoned Well," Lubbock used solicited and carefully selected letters written by (supposed) friend of Wharton to create a distorted and unkind portrait of her that omits any discussion of her literary works. Deborah Hecht, *The Poisoned Well*, 62 AM. SCHOLAR (1993). Lubbock and Wharton had not been on speaking terms for ten years before her death; prior to that, they had a friendship of unequals. Lubbock's intense resentment of Wharton's close friendship with his idol, Henry James, is evident in *Portrait of Edith Wharton*. PERCY LUBBOCK, *PORTRAIT OF EDITH WHARTON* (1947). The malice of that book has been noted by R.W.B. Lewis and by William Royall Tyler, son of Elisina Tyler, Wharton's residuary legatee.

In at least one instance, Wharton herself made sure to retrieve the letters she had written. R.W.B. Lewis writes,

Within days of Walter Berry's death in October 1927, Edith Wharton went around to his Paris apartment, retrieved all the available letters she had written Berry over the years, and apparently destroyed them all. (This is the only considerable instance of Edith Wharton making away with anything she had written.)⁷⁶

Lewis, writing before the Fullerton letters came to light, is technically correct. However, Wharton's correspondence with Berry was not the only collection of letters she would have liked to "make away with." Indeed, Wharton was intensely secretive about the nature of her relationship with Morton Fullerton; she would definitely not be pleased to know that their correspondence survived, and was published.

Although Wharton and Fullerton knew some of the same people, they met each other through their mutual friend, Henry James. R.W.B. Lewis, writing in 1988, graciously describes Fullerton as

an American journalist on the staff of the Paris office of the *London Times*. Fullerton, born in Norwich, Connecticut, in 1865, had graduated from Harvard after a brilliant undergraduate career, had served as literary adviser on a Boston newspaper and then gravitated to London, where he found a job on the *Times*. In his London years, he became an ardent disciple of Henry James and a friend of Oscar Wilde; he also enjoyed a liaison with Margaret Brooke, the Ranee of Sarawak...He was

⁷⁶ LEWIS, *supra* note 2, at 552.

married briefly in 1903 to a French *chanteuse*; and was otherwise involved erotically with a number of individuals of both sexes."⁷⁷

This description is a model of tact and understatement. The noted scholar Hermione Lee describes Fullerton more bluntly:

when Fullerton met Edith Wharton in 1907, he had in his luggage a disreputable homosexual past, a divorced wife and a blackmailing mistress. But there was more. He was also involved in an intense, quasi-incestuous relationship with his adopted sister and cousin Katherine Fullerton, who had grown up in his house and was deeply in love with him. Fullerton proposed to her [Katherine] in the same month that he began his relationship with Wharton, October 1907, and the course of his affair with Wharton over the next three years ran in tandem with his promises to and abandonment of Katherine.⁷⁸

Wharton knew nothing of Fullerton's relationship with Katherine; indeed, in letters to Fullerton she repeatedly refers to Katherine as 'your sister.'

Edith Wharton was neither cautious nor was she discreet in her letters to Fullerton. The letters are, in turn, passionate, loving, and despairing. She begs "instant cremation" for one letter that she wrote to Fullerton in early April, 1908; in December of that year she asks for the return of her letters.

Dear Mr. Fullerton,
You have--if they still survive--a few notes & letters of no value to your archives, but which happen to fill a deplorable lacuna in those of their writer.

⁷⁷ WHARTON LETTERS, *supra* note 28, at 121.

⁷⁸ Lee, *supra* note 30, at 8.

I shall be in Paris on Monday next--the 21st--for a day only, & I write to ask if you would be kind enough to send them to me that day at my brother's. Perhaps the best way of making sure that they come straight into my own hands would be to register them.

Yrs sincerely,
E. Wharton⁷⁹

But then, in a letter dated August 12, 1909, she writes:

Mon aime, It is just a month today since I came down to dinner at Rye, & found you standing by the hearth in the drawing-room talking to Henry. (Your back was turned to the door, & you didn't *feel me come in*, but went on talking....)

During that month I have been completely happy. I have had everything in life that I ever longed for, & more than I ever imagined! Et je tenai a te dire before the anniversary is over...⁸⁰

The happiness was not long-lived. In November, 1909, Wharton again asks for the return of her letters.

Cher ami--Can you arrange, some day next week--before Wednesday--to bring, or send, me such fragments of correspondence as still exist? I have asked you this once or twice, as you know, & you have given the talk a turn which has made it impossible for me to insist without all sorts of tragic implications that I wished above all to avoid. Therefore I write instead.

In one sense, as I told you, I am indifferent to the fate of this literature. In another sense, my love of order makes me resent the way in which inanimate things survive their uses! Et voila tout!⁸¹

⁷⁹ WHARTON LETTERS, *supra* note 28, at 170.

⁸⁰ WHARTON LETTERS, *supra* note 28, at 189.

⁸¹ WHARTON LETTERS, *supra* note 28, at 193.

The correspondence continues, but the letters written by Wharton are increasingly despairing. Fullerton has failed her as a lover, and he fails her as a friend.

The question of how the letters came to light remains ambiguous. Fullerton died in 1952; the letters were purchased in 1980. The letters are housed at the University of Texas; they are part of the Ransom Center collection. The Ransom Center offers an online "Biographical Sketch" that contains the following information: "The correspondence described here came to light in 1980 and was purchased by the Ransom Center from a Parisian owner through Zeitlen and Ver Brugge Booksellers." The section titled "Scope and Contents" includes the notes:

Wharton's letters to Fullerton have been divided into two groups: the first arranged by date of the letter and the second arranged by type of stationery. The arrangement of these materials was complicated by the fact that Wharton did not date the vast majority of her letters. Some of them have been dated in another hand, possibly Fullerton's. In attempt to attribute dates to as many letters as possible to facilitate their arrangement, two sources proved very useful. The first was R.W.B. Lewis's book, *The Letters of Edith Wharton* (New York: Scribner, c. 1988). The second was the original sale listing from Zeitlin and Ver Brugge, which has been noted to contain a number of inaccuracies.⁸²

Morton Fullerton died in 1952. Fullerton, like his fictional predecessor, Stephen Glennard of *The Touchstone*, may be best remembered as undeserving of the love he was so freely given.

Thus the reader sees that Wharton's questions and concerns about ownership and the right to publish private letters are predictive of events in her personal life and reflective of late nineteenth century concerns about ownership and the right to publish private letters. Wharton's work, examined in the context of ideas in articles published by Godkin, Drone, and Warren and Brandeis, offers another way to consider nineteenth century concerns.

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