

# Edith Wharton, Privacy, and Publicity

Jessica Bulman<sup>†</sup>

## I. INTRODUCTION

“It’s the woman’s soul, absolutely torn up by the roots—her whole self laid bare . . . . I don’t mean to read another line; it’s too much like listening at a keyhole.”<sup>1</sup> When Mrs. Touchett speaks these words in Edith Wharton’s early novella, *The Touchstone*, we may wonder whether Wharton is mocking her own voyeuristic readership and grappling with her tenuous privacy as a professional female author. Despite her protestations, Mrs. Touchett has relished reading the letters of Mrs. Aubyn, a deceased novelist whose former lover, Stephen Glennard, has published her correspondence. It is precisely because these love letters (or “unloved letters”<sup>2</sup> as Mrs. Touchett characterizes them) promise to reveal the private truth of a woman’s life that they have become such a sensational bestseller. Perhaps avenging the version of herself that is Mrs. Aubyn, Wharton refuses to show her own readers the published letters, but she has sparked our curiosity, which instead clings to Glennard’s life, or even to Wharton’s. Indeed, *The Touchstone* presciently anticipates questions of privacy, publicity, and personality that would underlie Wharton’s mature fiction, her interpersonal relationships, and her very conception of herself. By probing these issues through the lens of an author’s intimate correspondence, she both gestures to her own concerns about privacy as a female writer and enters a raging legal debate launched a decade earlier.

In 1890 Samuel Warren and Louis Brandeis published *The Right to Privacy*,<sup>3</sup> one of the most influential legal articles ever written. Maintaining the need to protect human dignity from invasive prying, the two lawyers advanced

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<sup>†</sup> B.A., English, Yale University, M.Phil., English, University of Cambridge. I would like to thank Victoria Coulson of the University of Cambridge for helpful comments on a draft of this paper; Ruth Bernard Yeazell, Wai Chee Dimock, and Robert Dunne of Yale University for stimulating conversations about the novel and privacy; and David Pozen, Ronnie Janoff-Bulman, and Alan Schoenfeld for their capable editorial assistance.

1. Edith Wharton, *The Touchstone*, 27 SCRIBNER’S MAG. 354, 370 (1900).

2. *Id.*

3. Samuel Warren & Louis Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

an argument for a right to privacy, and they invoked intellectual property cases to articulate and ground this right. Wharton's mapping of letters and privacy concerns, then, echoes not only Henry James's 1888 *The Aspern Papers*—which involves a similar, though thwarted, effort to publish letters that lie at the intersection of authorial fame and personal romance<sup>4</sup>—but also this legal discussion. Turning in particular to cases concerning authors' prepublication rights, Warren and Brandeis argue that the individual has the right to determine “to what extent his thoughts, sentiments, and emotions shall be communicated to others,”<sup>5</sup> and they note, “[t]he same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay.”<sup>6</sup> For Warren and Brandeis, written works were at once literary property and expressions of the self.

Consequently, a notable aspect of *The Right to Privacy* is a tension between protecting privacy as a species of property and protecting privacy as a necessary condition of personality. Perhaps motivated by John Locke's treatment of property as alienable and life as inalienable,<sup>7</sup> Warren and Brandeis attempt to cast privacy in terms of selfhood rather than property. They insist, “[t]he principle which protects personal writings . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality,”<sup>8</sup> and they champion “the more general right to the immunity of the person—the right to one's personality.”<sup>9</sup> Despite this use of copyright to withstand conceptions of privacy as property and to resist the market's commercialization of private information,<sup>10</sup> Warren and Brandeis never fully circumvent the property framework that defined rights in late nineteenth-century and early twentieth-century American law.<sup>11</sup> They proceed to discuss not only literary expression, but also one's personality in terms of ownership: “The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.”<sup>12</sup>

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4. HENRY JAMES, *THE ASPERN PAPERS* (Penguin Books 1986) (1888).

5. Warren & Brandeis, *supra* note 3, at 198.

6. *Id.* at 199.

7. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

8. Warren & Brandeis, *supra* note 3, at 205.

9. *Id.* at 207.

10. See BROOK THOMAS, *AMERICAN LITERARY REALISM AND THE FAILED PROMISE OF CONTRACT* 59 (1997).

11. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). See also MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 151 (1992) (emphasizing the discourse of property rights and arguing that “during the 1880s and 1890s . . . American courts came as close as they ever had to saying that one had a property right to an unchanging world”); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967).

12. Warren & Brandeis, *supra* note 3, at 211. See Walter Benn Michaels, *The Contracted Heart*, 21 *NEW LITERARY HIST.* 495, 526 n.13 (1990) (arguing that Warren and Brandeis's “explicit attempt to

In *The Touchstone*, Wharton extends this argument to its logical conclusion. Exploiting the tension between property and personality, she reverses Warren and Brandeis's logic. Property rights serve not to protect Mrs. Aubyn's private personality, but to transform the author herself into a commodity. The organic relationship the lawyers posit between writer and text does not guard literary expression from unwanted publication, but instead turns the writer into a text vulnerable to public consumption. As the novella begins, Glennard overlooks Mrs. Aubyn's name in the newspaper because it has "long been public property,"<sup>13</sup> and we quickly learn that the public's possession extends beyond her name. Wharton repeatedly emphasizes the loss of self-ownership that successful authorship can effect. By writing popular novels, Mrs. Aubyn has become a personage and ceased to be a person,<sup>14</sup> and the public claims ownership of her: "A personality as big as Margaret Aubyn's belongs to the world."<sup>15</sup> She effectively has lost both the right to her personality and the right to privacy.

At the beginning of her own career, Wharton no doubt worried about externalizing, and potentially alienating, her identity in a published text, especially as late nineteenth-century biographical and journalistic practices presented authors' personalities as objects of legitimate mass consumption, and readers clamored for information about these public figures.<sup>16</sup> In *The Touchstone*, Wharton criticizes the construction of the popular author as public property. "[U]nlike the authors who give their essence to the public and keep only a dry rind for their friends," Mrs. Aubyn, we learn, carefully erected a barrier between her public and private selves and allowed only the former to be commercially traded.<sup>17</sup> Whereas she distinguished the letters she intended for intimate acquaintances from the novels she published, Glennard dismantles the

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shift privacy away from property nonetheless produced a dramatic extension of property rights, produced, in effect, new property.").

13. Wharton, *The Touchstone*, *supra* note 1, at 354.

14. *Id.* at 359.

15. *Id.* at 370.

16. See, e.g., RICHARD SALMON, HENRY JAMES AND THE CULTURE OF PUBLICITY 79 (1997). See also JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 14-36, 79-117 (Thomas Burger trans., 1992) (discussing how the bourgeois political theory of the eighteenth century considered publicity essential to the construction of a critical public that would expose the private interests of monarchy and aristocracy). Notably, Warren and Brandeis's "right to privacy does not prohibit any publication of matter which is of public or general interest," for, they argue, certain people "have renounced the right to live their lives screened from public observation." Warren & Brandeis, *supra* note 3, at 214-15. Still today, the right of the public to know certain information is often protected over individuals' privacy. For discussions of the conflict between privacy rights and the First Amendment, see Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329 (1979); Bruce E. H. Johnson, *The Battle over Internet Privacy and the First Amendment*, 18 COMPUTER & INTERNET L. 21 (2001); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 97 (2000); Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking about You*, 52 STAN. L. REV. 1049 (2000).

17. Wharton, *The Touchstone*, *supra* note 1, at 360.

boundary between these two forms of literary expression and transforms her personal sentiments into property. His publication exploits Mrs. Aubyn's distinction, for the private voice of her epistles is precisely what makes them so popular. When Mrs. Touchett pronounces the letters unreadable, she ironically underscores the value of the volume. It is because reading the letters is like listening at a keyhole that a mass audience devours them. Glennard's publication not only commodifies Mrs. Aubyn's letters, but also her person. The public may have claimed ownership of this "famous shrine"<sup>18</sup> before her letters were published, but it lacked intimate information about her; it is Glennard's act that allows readers to imaginatively possess Mrs. Aubyn's life.<sup>19</sup>

In "Copy," a satiric dialogue Wharton published two months after *The Touchstone*, the female author self-consciously gives her "essence to the public."<sup>20</sup> Throughout her dialogue with Ventnor, a famous poet who was once her lover, Mrs. Dale suggests that her private personality is a mere residue of her public persona. She calls herself "a figment of the reporter's brain—a monster manufactured out of newspaper paragraphs, with ink in its veins"<sup>21</sup> and states that the "last shred of [her] identity" is in public keeping.<sup>22</sup> Despite her dramatic complaint, it is clear that she enjoys being popularly owned and can only think of herself in terms of her public persona. Her very lament is a theatrical presentation that at once informs Ventnor's image of her and her own sense of self. Unlike Mrs. Aubyn, who carefully withheld her private self from publicity, Mrs. Dale raises the possibility that publicity may underlie the female author's only self. In "Copy" Wharton challenges Warren and Brandeis's fundamental idea of an inviolate personality, for Mrs. Dale, it seems, has no private personality beyond the public's conception of her, a conception that she has informed but does not control.

Perhaps this is why, like Warren and Brandeis, Mrs. Dale appears to be confused about whether her letters to Ventnor are property or expressions of her inmost personality. She passionately claims that she owns the letters because they are outpourings of private emotions, but later reveals a more sordid profit motive: She wants to publish the correspondence in her memoirs. While it would be easy to discount her declaration of personal interest as a ploy, both of Mrs. Dale's claims resonate; she believes at once that the letters

18. *Id.* at 350.

19. If publishing letters makes private information public property in *The Touchstone*, it also, paradoxically, returns public information to the private realm. Glennard appreciates the intimacy of Mrs. Aubyn's correspondence only after he reads pages of the published volume. Threatened by public appropriation, letters that had long lost their private meaning for him regain their personal significance. Looking at a random page in the published volume, he winces: "Why had he included that one among the others? Or was it possible that now they would all seem like that?" Wharton, *The Touchstone*, *supra* note 1, at 485. As readers of *The Touchstone*, we recognize that they would all seem like that; in the light of publicity, the contours of privacy emerge more clearly.

20. Wharton, *The Touchstone*, *supra* note 1, at 360.

21. Edith Wharton, "Copy": *A Dialogue*, 27 SCRIBNER'S MAG. 657, 658 (1900).

22. *Id.* at 659.

represent her personality and that they would sell well, and her confusion of private and public motives is so entrenched that she cannot differentiate between them. To publish her memoirs would be to articulate her sense of self. When she and Ventnor ultimately burn their correspondence, she watches ambivalently—she has, perhaps, reclaimed part of her personality from the greedy public, but she has also lost marketable material that would define her private personality by amplifying her public persona.

Considered together, *The Touchstone* and “*Copy*” anticipate Wharton’s lifelong engagement with questions of personality, privacy, and publicity and offer two competing views: Mrs. Aubyn’s private personality that is threatened by publicity and Mrs. Dale’s public persona that is, in fact, her inmost self. Throughout her own career, I will argue, Wharton negotiated a path between the extremes of Mrs. Aubyn and Mrs. Dale by employing the very threat of public exposure to forge a distinct private personality. Like Mrs. Dale, many of Wharton’s female characters depend on performance for their identities, so that their senses of self reside in publicity. Wharton’s own self-dramatizations instead created a private identity that was dialectically related to publicity. Ultimately, in her fictional and autobiographical works, Wharton illuminates the complications of female privacy and inverts Warren and Brandeis’s terms. Whereas they posit an inviolate personality, she posits an interdependent self; and whereas they champion “the right to be let alone,”<sup>23</sup> she suggests that privacy is only possible in the context of publicity.

In Part II of this Article, I explore the historical context of Wharton’s engagement with privacy. Beginning with a discussion of Warren and Brandeis’s *The Right to Privacy*, I examine the social and legal developments that motivated their article, and the response to their proposed right to privacy. Both a media-driven public sphere and the Victorian ideology of separate spheres, I argue, influenced Warren and Brandeis, as they drew on legal precedents for protecting information and the logic of domestic privacy in crafting their argument. After discussing the implications of *The Right to Privacy* for women and noting Wharton’s place in turn-of-the-century discussions of publicity and privacy, I consider in Part III two of Wharton’s most popular novels, *The House of Mirth* and *The Custom of the Country*, and focus on the privacy of the novels’ female protagonists. Lily Bart and Undine Spragg define themselves through public displays and self-objectification, I maintain, and publicity therefore precedes any sense of private identity the women have. Wharton also, however, hints at a self that depends not on the objectifying gaze of society, but rather on intimate companionship, and she thereby suggests another possible way to forge an interdependent personality.

Both of these models of self-construction—self-objectification and intimacy—were central to Wharton’s own personality, and in Part IV of the

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23. Warren & Brandeis, *supra* note 3, at 195 (quoting Judge Thomas Cooley).

paper I examine how Wharton fashioned her personality by engaging with other people and literary texts. Drawing on her memoirs and diaries, I argue that Wharton's sense of self depended on public representations and inhered in a dynamic of exposure and creation. By threatening violation, publishing paradoxically lent her a private identity. Finally, in Part V, I consider Wharton's ambivalent relationship to her readership. She explicitly derides mass consumption and casts readers as a threat to the novel's privacy by gesturing to information beyond the text that we cannot access. At the same time, she invites readers into an intimate relationship with herself and her novels and casts us as sympathetic co-creators. The tension between these two relationships with her readership, I argue, structures her novels and underscores her complicated understanding of privacy.

Ultimately, the paper interrogates three different but related privacy concerns: the privacy of fictional characters, the privacy of the author, and the privacy of the text. In Part III, I take up the privacy of Wharton's female characters and explore how the self-construction of Lily and Undine dramatizes women's subjectivity at the turn of the century and reveals potential shortcomings of a right to be let alone. As Wharton grappled with her characters' privacy, she also had her own anxieties as a female author publishing for a mass readership. In Part IV, I turn to the author's privacy and discuss how Wharton's personality, forged largely through potentially violating self-publication, illuminates authors' negotiations of privacy in the early twentieth century. In Part V, I explore what might best be called textual privacy. While Part III examines the privacy of characters within a fictional world, Part V examines the privacy of these characters with regard to the reader of the novel. Textual privacy encompasses not only the way the author exposes characters to or shields them from readers, but also the larger privacy of the novel, which implicates that of the author, and ultimately that of the reader as well.

In her early works, *The Touchstone* and "Copy," Wharton grafts these three different privacy concerns onto each other by using female writers as her fictional protagonists. She explores Mrs. Aubyn's and Mrs. Dale's privacy as both characters and authors, and further examines the textual privacy of these women's works as they circulate in a fictional world. *The Touchstone* is also instructive in considering textual privacy with respect to Wharton's reading public. In the novella, Glennard experiences his violation of Mrs. Aubyn's privacy as a violation of his own. As if undergoing one of Dante's *contrapasso* punishments, he constantly imagines a "relentless human gaze, pressing close upon [his] privacy. It was as though [he] sat in a brightly lit room, uncurtained from a darkness full of hostile watchers."<sup>24</sup> Glennard's privacy is never actually invaded in the novella, but his sense of being constantly observed is peculiarly

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24. Wharton, *The Touchstone*, *supra* note 1, at 367.

accurate, for he operates under the watchful eye of the reader. Wharton does not merely record Glennard's shame and torment but is directly responsible for his *contrapasso* punishment with regard to her own readership. This raises an important question: Is Wharton's construction of her novella, with its telescopic attention to Glennard's consciousness, the fictional equivalent of his publishing Mrs. Aubyn's letters? If James's *Aspern Papers* dramatizes the prying reader/critic and uncomfortably aligns the narrator's voyeurism regarding the author with our own,<sup>25</sup> Wharton's novella suggests the author's complicity in invasions of privacy. Does she participate in the very sort of intrusion she condemns? As readers, I will argue, we want to and should resist this charge, but an appropriately nuanced understanding of how Wharton's literary works position themselves with regard to privacy becomes possible only after considering the historical context of her career and some of her other fictional and autobiographical writings.

## II. *THE RIGHT TO PRIVACY* AT THE TURN OF THE CENTURY

Legend has it that Warren and Brandeis's *The Right to Privacy* grew not so much out of sober legal discussion as Warren's heated clash with the Boston press. According to Dean William Prosser, Warren, long frustrated with the Boston newspapers' reporting of his wife's social functions, grew particularly upset "when the newspapers had a field day on the occasion of the wedding of a daughter."<sup>26</sup> While this account has since been discredited,<sup>27</sup> it remains instructive, for it places in a single narrative two discourses of privacy that inform *The Right to Privacy*: On the one hand, concerns about informational privacy generated by a voracious media and, on the other, an ideology of domestic privacy that regarded the home as a haven sheltered from the public marketplace. In the apocryphal wedding story, the press both publishes information about an individual's private life and violates the sacred boundaries of the home. The rather dramatic genesis of the article popularized by Dean Prosser may be inaccurate, but it nonetheless cuts to the heart of Warren and Brandeis's concerns.

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25. See JAMES, *supra* note 4. See also SALMON, *supra* note 16; THOMAS, *supra* note 10.

26. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960) (citing ALPHEUS T. MASON, BRANDEIS, A FREE MAN'S LIFE 70 (1946)). Prosser argued that Warren's daughter must have been very beautiful, since hers was "the face that launched a thousand lawsuits." *Id.* at 423.

27. Among other problems, Warren's daughter would have been six or seven years old when Warren and Brandeis wrote the article. See LEWIS J. PAPER, BRANDEIS 35 (1983); James Barron, *Warren and Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193 (1890): *Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875, 893 (1979).

### A. *Informational Privacy*

The late nineteenth century was the age of “yellow journalism” in the United States.<sup>28</sup> As the country industrialized, the press grew to meet the demands of an exploding population of urban workers; the number of newspapers almost doubled in the 1870s to roughly 7000 and climbed to 12,000 by 1890.<sup>29</sup> Following the Civil War, publishers also revitalized the idea of the penny press to enable mass circulation.<sup>30</sup> Gossip columns overtook political commentary,<sup>31</sup> huge banner headlines boasted dramatic tales,<sup>32</sup> and colorful advertisements featured pictures of people surprised to suddenly find themselves the public faces of products as diverse as flour, medicine, and life insurance.<sup>33</sup> The technological advances that made newspapers cheaper and more eye-catching<sup>34</sup> went hand-in-hand with sensationalistic media practices, and the “palliative of sin, sex, and violence”<sup>35</sup> offered by “keyhole journalism”<sup>36</sup> raised new fears about the tainting of public discourse and the publication of personal information.

Warren and Brandeis leave no doubt that *The Right to Privacy* was, at least in large part, a response to sensationalistic newspaper practices. They complain,

[t]he press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and vicious, but has become a trade, which is pursued with industry as well

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28. See generally SIDNEY KOBRE, *THE YELLOW PRESS AND GILDED AGE JOURNALISM* (1964); FRANK L. MOTT, *AMERICAN JOURNALISM, A HISTORY 1690-1960* (3d ed. 1962). See also Ken Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335 (discussing the impact of “yellow journalism” on Warren and Brandeis and citing Kobre’s and Mott’s influential works).

29. MOTT, *supra* note 28, at 411.

30. See KOBRE, *supra* note 28, at 1 (arguing that in the 1830s, during the first revolution in American journalism, penny presses made newspapers cheaper and available to average citizens, and during a second revolution following the Civil War, newspapers were massively popularized through sensationalism and new technologies).

31. Before the Civil War, newspapers primarily served as appendages of local political parties. MOTT, *supra* note 28, at 411-12.

32. *New York World* headlines included “A Bride but not a Wife” and “Baptised in Blood.” Gormley, *supra* note 28, at 1351 (quoting WILARD G. BLEYER, *MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM* 328 (1927)).

33. See, e.g., *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (permitting use of plaintiff’s picture, without her consent, in a flour advertisement); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (Sup. Ct. 1891) (enjoining the unauthorized use of physician’s signature in medicine advertisement); *Pavesich v. N.E. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (enjoining use of plaintiff’s picture, name, and fake endorsement in an insurance advertisement).

34. Among other developments were linotypes, fast presses, color printing, and instant photography. Gormley, *supra* note 28, at 1351 (citing EDWIN EMERY & MICHAEL C. EMERY, *THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA*, 349-50 (3d ed. 1972)).

35. EMERY & EMERY, *supra* note 34, at 351.

36. MOTT, *supra* note 28, at 444 (discussing “keyhole journalism” and arguing that sensationalism was closely connected to invasions of privacy by reporters).

as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.<sup>37</sup>

According to the lawyers, privacy was a peculiarly modern need. The intensity and complexity of modern life had made people especially sensitive to publicity, but as technological developments rendered privacy more desirable, they also facilitated its invasion.<sup>38</sup> This unfortunate paradox was not beyond remedy, however, because technological advances posed a challenge that the common law could grow to meet.<sup>39</sup> Framing their argument in response to prying journalists and photographers, Warren and Brandeis insisted that the law must respect individuals' right to be let alone by furnishing them with an explicit right to privacy.

Warren and Brandeis were not the first scholars to seize upon privacy as a modern necessity. As they note, their famous phrase, the right "to be let alone," came from Judge Thomas Cooley's *The Law of Torts*.<sup>40</sup> They also acknowledge their debt to an article on invasions of privacy published by E.L. Godkin in July 1890.<sup>41</sup> Additionally, ten years earlier Godkin had remarked, in language Warren and Brandeis would echo,

[n]othing is better worthy of legal protection than private life, or in other words, the right of every man to keep his affairs to himself . . . . The press has no longer anything to fear from legal restriction of any kind, as regards its influence or material prosperity; while the community has a good deal to fear from what may be called excessive publicity, or rather from the loss by individuals of the right to privacy.<sup>42</sup>

Furthermore, while *The Right to Privacy* was the first article to advocate a distinct legal right to privacy, Warren and Brandeis found wide-ranging support for their proposal in case law. The common law furnished no explicit right to privacy, but a number of judicial opinions in cases concerning intellectual property, contract, and libel already seemed to further an underlying principle

37. Warren & Brandeis, *supra* note 3, at 196.

38. *Id.*

39. *Id.* at 193 (arguing that "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.").

40. *Id.* at 195. See THOMAS M. COOLEY, *THE LAW OF TORTS* 29 (1888) (discussing the right to be free from physical attack). The phrase also appeared in the copyright case *Wheaton v. Peters*, 33 U.S. 591, 634 (1834) ("The defendant asks nothing—wants nothing, but to be let alone until it can be shown that he has violated the rights of another.").

41. See Warren & Brandeis, *supra* note 3, at 195 (calling Godkin's article a discussion by "an able writer" of "the evil of invasion of privacy by the newspapers"). See E.L. Godkin, *The Rights of the Citizen: To His Own Reputation*, 8 SCRIBNER'S MAG. 58 (1890).

42. E.L. Godkin, *Libel and Its Legal Remedy*, 12 J. SOC. SCI. 69, 80, 82 (1880) (discussing intrusions by the press into personal affairs).

of privacy. In Warren and Brandeis's estimation, the law was "groping" to protect private information through other established doctrines.<sup>43</sup> Their article was not, therefore, a piece of judicial legislation, but rather an explication of a hidden legal right: "[T]he existing law affords a principle from which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for rewording or reproducing scenes or sounds."<sup>44</sup> They were merely matching modern needs to established doctrine.<sup>45</sup>

According to Warren and Brandeis, intellectual property cases in particular upheld the "general right of the individual to be let alone."<sup>46</sup> Whereas copyright statutes guaranteed an author profits, they argued, the common law afforded the more capacious right to control the act of publication or not to publish at all.<sup>47</sup> Moreover, because prepublication rights did not depend on the quality of a work—a letter or scribble received the same protection as a masterpiece—Warren and Brandeis maintained that such rights protected individuals' privacy more than their literary property.<sup>48</sup> Their article draws at some length on *Prince Albert v. Strange*<sup>49</sup> and also invokes the copyright cases *Woolsey v. Judd*,<sup>50</sup> *Millar v. Taylor*,<sup>51</sup> and *Jefferys v. Boosey*,<sup>52</sup> as well as trade secret law.<sup>53</sup>

43. Warren & Brandeis, *supra* note 3, at 212.

44. *Id.* at 206.

45. Obviously this claim was, and remains, controversial, and many scholars have questioned the legal and factual bases for the right to privacy Warren and Brandeis advanced. See, e.g., Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902) (discussing the *Roberson* case and defending the court's decision not to "embark on the business of making new law to suit a particular case"). For more contemporary criticisms, see Barron, *supra* note 27; Frederick Davis, *What Do We Mean By "Right to Privacy"?*, 4 S.D. L. REV. 1 (1959); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326 (1966); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

46. Warren & Brandeis, *supra* note 3, at 205.

47. See *id.* at 200.

48. See *id.* at 199, 205.

49. 41 Eng. Rep. 1171, *aff'd* 64 Eng. Rep. 293, 321 (1849) (enjoining a printer from publishing a catalogue of Prince Albert's etchings and suggesting that not only a property right, but also a more fundamental right to privacy was being safeguarded: "Upon the principle, therefore, of protecting property, it is that the common law . . . shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known."), discussed in Warren & Brandeis, *supra* note 3, at 200-05.

50. 11 How. Pr. 49, 51 (N.Y. Sup. 1855) (holding that the publication of private letters without the writer's consent was a violation of the writer's property interest), noted in Warren & Brandeis, *supra* note 3, at 200 n.3.

51. 98 Eng. Rep. 201 (1769) (recognizing perpetual common-law copyright in a divided opinion). Justice Yates, the sole dissenter who argued that ideas should not be treated as property, implied a right to privacy in his opinion: "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends," quoted in Warren & Brandeis, *supra* note 3, at 198 n.2. Justice Yates was vindicated five years later when the substantive decision of *Millar v. Taylor* was revised in *Donaldson v. Beckett*, 1 Eng. Rep. 837 (1774) (ruling that copyright was limited in duration and not a perpetual or absolute privilege).

52. 10 Eng. Rep. 681 (1854), cited in Warren & Brandeis, *supra* note 3, at 194 n.6, 200 n.2.

53. See Warren & Brandeis, *supra* note 3, at 212.

In addition to the implicit protection offered in intellectual property cases, Warren and Brandeis argued, courts often redressed invasions of privacy by finding a breach of contract or confidence. The judges in *Pollard v. Photographic Co.*, for instance, held that a photo studio could not sell cards with a woman's picture on them; the plaintiff had agreed to have her photo taken but not published, and the court ruled that publication would breach an implied contract between photographer and subject.<sup>54</sup> While they agreed with the outcome of this decision, Warren and Brandeis worried about its reasoning in the face of technological advances. They insisted, "now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation [than breach of contract]."<sup>55</sup> Indeed, a "somewhat notorious case"<sup>56</sup> a short time after *Pollard* underscored the limitations of the implied contract doctrine with regard to photographs. Actress Marion Manola appeared on stage in tights during a Broadway play and was secretly photographed by two members of the audience. In *Marion Manola v. Stevens & Myers*, the plaintiff sought to restrain the defendants from publishing her picture and, just months before Warren and Brandeis's article, received a preliminary injunction.<sup>57</sup> Her suit was discussed at great length in the newspapers, though this seemed hypocritical to those who found verbal descriptions as invasive as photographic depictions.<sup>58</sup> As E.L. Godkin noted in an astute early commentary, publicity would often be necessary to redress invasions of privacy: "[T]he man who feels outraged by publicity will, in order to stop or punish it, have to expose himself to a great deal more publicity."<sup>59</sup> To Warren and Brandeis, cases like *Manola v. Stevens* suggested that a modern

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54. 40 Ch. D. 345 (1888), cited in Warren & Brandeis, *supra* note 3, at 208-10. Warren and Brandeis also quote at some length the opinion in *Tuck v. Priester*, 19 Q.B.D. 639 (1887) (holding that a printer breached an implied contract by selling unauthorized reproductions of a picture a customer left for copying). Warren & Brandeis, *supra* note 3, at 208 & 209 n.1. In addition, they discuss *Abernethy v. Hutchinson*, 47 Eng. Rep. 1313 (1825) (enjoining medical students from publishing a series of their teacher's lectures based on an implied confidence). Warren & Brandeis, *supra* note 3, at 207-08. The lawyers further note that in *Prince Albert v. Strange* Lord Cottenham located a breach of trust in addition to a violation of property rights. See Warren & Brandeis, *supra* note 3, at 208.

55. Warren & Brandeis, *supra* note 3, at 210-11.

56. *Id.* at 195.

57. Apparently there was no reported opinion for this case, but *The New York Times* commented on it on June 15, 18, and 21, 1890. See *Manola v. Stevens*, N.Y. TIMES, June 21, 1890, at 2; *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3; *Photographed in Tights*, N.Y. TIMES, June 15, 1890, at 2. See Warren & Brandeis, *supra* note 3, at 195 n.7. See also W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 850 n.10 (1984) (citing *Manola v. Stevens*, N.Y. Sup. Ct. 1890 (unreported)).

58. See *Liberty vs. License*, N.Y. TRIBUNE, Jan. 26, 1890, at 6.

59. E.L. Godkin, *The Right to Privacy*, 51 NATION 496 (1890) (continuing, "[i]n order to bring his persecutors to justice, he will have to go through a process which will result in an exposure of his private affairs tenfold greater than that originally made by the offending article.").

right to privacy could not be limited to special relationships but must instead be a right “against the world.”<sup>60</sup>

Most relevant in this respect was libel law, which also furnished some protection for an individual’s privacy in the nineteenth century.<sup>61</sup> Of course, defamation lawsuits hold the truth of the published matter to be a complete defense,<sup>62</sup> while an invasion of privacy is often injurious precisely because it concerns true information. Nonetheless, courts had extended the civil libel remedy to cover substantially true accounts; judges insisted on the exact truth of all published information and on publication of the truth in its entirety.<sup>63</sup> A loss of privacy could therefore be addressed in a defamation suit as long as the offending publication contained some inaccuracy or omission.

Given these disparate but rich precedents, Warren and Brandeis concluded that the law was advancing toward a more specific right to privacy. Rather than shelter the principle of privacy under the guises of intellectual property, contract, and libel law and run the risk that future technological developments would outstrip the relevance of these doctrines, the lawyers insisted it was time to explicitly safeguard the right of the individual to be let alone.

### B. Domestic Privacy

“Yellow journalism” and the concerns it raised about informational privacy constituted only one of the historical developments motivating Warren and Brandeis. Their article also stemmed from a broad social ideology of the nineteenth century—the doctrine of separate spheres and the division between the public market, which was gendered male, and the private home, which was gendered female.<sup>64</sup> Industrialization during the Victorian era spawned not only a popular culture of publicity but also a so-called cult of domesticity that celebrated the home as a refuge from the sordid marketplace where increasing numbers worked. This separation of the spheres was always more prescriptive than descriptive—lower-class women, slaves, and immigrants certainly worked outside home, and many upper-class women were active in voluntary associations.<sup>65</sup> Nonetheless, as an ideology, the doctrine of separate spheres was extraordinarily influential, and it left its mark on a series of important legal

60. See Warren & Brandeis, *supra* note 3, at 213.

61. See Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1907-08 (1981).

62. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*126; WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 116, at 796-97.

63. Note, *supra* note 61, at 1907 (citing *Sharpe v. Stephenson*, 34 N.C. (12 Ired.) 348, 350 (1851), and *McAllister v. Detroit Free Press Co.*, 43 N.W. 431, 437 (Mich. 1889)).

64. See generally NANCY F. COTT, THE BONDS OF WOMANHOOD 63-100 (1977); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, AM. Q. 151 (1966).

65. See Martha Minow, “Forming Underneath Everything That Grows”: *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 861-82.

decisions, most notably *Bradwell v. Illinois*, which upheld Illinois' exclusion of women from the legal profession.<sup>66</sup> In an oft-cited concurrence, Justice Bradley cast "the domestic sphere as that which properly belongs to the domain and functions of womanhood" and insisted that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."<sup>67</sup>

It is perhaps not surprising, then, that the case that most explicitly addresses a right to privacy before Warren and Brandeis's article concerned not an unwelcome publication but rather the privacy a woman could expect in her home. In *DeMay v. Roberts* the Supreme Court of Michigan awarded damages against a physician who brought an untrained (and perhaps more damning, unmarried) assistant into the plaintiff's home to observe her childbirth.<sup>68</sup> The court held that childbirth was a "sacred" occasion and ruled that DeMay's legal "right of privacy" had been violated.<sup>69</sup> Implicitly linking the privacy of the home to the privacy of the female body, the court secured protection for both the woman and her domestic space.<sup>70</sup>

More commonly, however, the law protected the privacy of the man in his home—a sheltered space in which he controlled not only his own privacy but also that of his wife and children. English and American criminal procedure long held a man's house to be his castle,<sup>71</sup> and trespass law secured the privacy of the physical home from unwanted intruders.<sup>72</sup> The idea that a man's home was his inviolable space also underlay the Third Amendment's guarantee against quartering soldiers and the Fourth Amendment's guarantee against unreasonable search and seizure. Judge Cooley, who wrote of the "right to be let alone," explicated the link between the criminal procedural aspect of privacy and the Fourth Amendment: "The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clause prohibiting unreasonable

66. 83 U.S. (16 Wall.) 130 (1872).

67. *Id.* at 141.

68. 9 N.W. 146 (Mich. 1881).

69. *Id.* at 149. Curiously, this case attracted little media attention when it was decided, and Warren and Brandeis do not cite it in their article.

70. *Pollard v. Photographic Co.* and *Manola v. Stevens* would again focus on the female body and highlight a particular social concern with women as private beings even when they entered public spaces.

71. See, e.g., Paxton's Case, Mass. Sup. Ct. 1761, reprinted in Quincy's Mass. Rep. 1761-62, 51 (1865) (insisting that "a man's house is his castle; and while he is quiet he is well guarded as a prince in his castle"); Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1605); Anonymous, Y.B. Mich. 21 Hen. 7, f. 39, pl. 50 (1499), cited in 2 THE REPORTS OF SIR JOHN SPELMAN 316 n.2 (J. H. Baker ed., 1978). See also 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*223 (justifying criminal punishment of burglary, arson, nuisance, and eavesdropping and arguing that the law has "so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity").

72. See Note, *supra* note 61, at 1894-96 (discussing the moorings of trespass law in the maxim "a man's home is his castle").

searches and seizures.”<sup>73</sup> In *Boyd v. United States*, decided just four years before the publication of *The Right to Privacy*, Justice Bradley insisted that the Fourth Amendment was intended to protect “the sanctity of a man’s home and the privacies of life.”<sup>74</sup> Later, Brandeis himself initiated the expansion of Fourth Amendment protections when, as a Justice, he again invoked “the right to be let alone” in his famous *Olmstead* dissent.<sup>75</sup>

While Warren and Brandeis located the most explicit precedents for their right to privacy in cases concerning intellectual property and breach of contract, the notion of domestic privacy and its attendant patriarchal ordering of the family also informed their article. The very intellectual property cases they cite frequently exhibit their own logic of domesticity. In *Prince Albert v. Strange*, for example, the Vice-Chancellor not only referenced the Prince Consort’s property rights, but called the publication “an intrusion . . . offensive to the inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us).”<sup>76</sup> Warren and Brandeis, too, focused on the man’s privacy within his home. They insisted that gossip columns only gathered their material by “intrusion upon the domestic circle”<sup>77</sup> and further decried that “[i]nstantaneous 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.’”<sup>78</sup>

The situating of Warren and Brandeis’s proposal within nineteenth-century domestic ideology had important implications for women’s privacy rights at the turn of the century. Most obviously, the lawyers treated privacy as a male prerogative. They did not so much use the male pronoun as a universal (a pardonable offense in nineteenth-century tracts) as describe a distinctly male privacy, and their examples—for instance, the man who does not dine with his wife and wishes to keep this a secret<sup>79</sup>—underscore the gendered meanings of privacy in their article. In their view, a husband could keep his domestic activities to himself, but would his wife enjoy the right to keep her dining habits a secret? It is doubtful, for, in casting property ownership as the implicit basis for a right to privacy, Warren and Brandeis suggested that a man had the

73. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299-300 (1868).

74. 116 U.S. 616, 630 (1886).

75. *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) (arguing that the makers of the Constitution “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment”).

76. 64 Eng. Rep. at 313.

77. Warren & Brandeis, *supra* note 3, at 196.

78. *Id.* at 195.

79. *See id.* at 201.

right to determine not only the bounds of his own privacy but also those of his family members. E.L. Godkin put it most explicitly: "The right to decide how much . . . of his own private doings and affairs, and those of his family living under his roof, the public at large shall have is . . . one of [man's] natural rights."<sup>80</sup> A woman's dining habits would be her husband's private information, not her own.

As this suggests, *The Right to Privacy* conflates various types of privacy, for Warren and Brandeis explicitly champion an individualistic, private male personality, but this personality itself emerges through a category of social interaction—domestic relationships—that the lawyers also label "private."<sup>81</sup> Warren and Brandeis conclude, "[t]he common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"<sup>82</sup> As their rhetorical finish highlights, Warren and Brandeis reference both the privacy of the individual and the privacy of the home, and they layer the two, indelibly linking male privacy to family privacy. The seemingly inviolate masculine personality in fact depends on relationships that are shielded from public scrutiny. This had notable repercussions for nineteenth-century women. Because male privacy contained within it female experience, women were the objects rather than the subjects of privacy. They represented the category "private" and the sheltered domestic sphere, but, in the words of Warren and Brandeis's contemporary, Charlotte Perkins Gilman, the privacy of the home was no more than a "filmy fiction" for women.<sup>83</sup> Within this space they did not exercise a meaningful right to privacy, for their homes were their husbands' castles.<sup>84</sup>

80. Godkin, *supra* note 41, at 65.

81. For instance, when Warren and Brandeis discuss the man who does not dine with his wife, they determine that what is protected is "[s]urely not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence." Warren & Brandeis, *supra* note 3, at 201.

82. *Id.* at 220.

83. CHARLOTTE PERKINS GILMAN, *THE HOME* 45, 40 (Univ. of Illinois Press 1974) (1903) (continuing, "[f]rom parlour to kitchen, from cellar to garret [the mother] is at the mercy of children, servants, tradesmen, and callers. So chased and trodden is she that the very idea of privacy is lost to her mind; she never had any, she doesn't know what it is"). In an earlier work, Gilman distinguished family privacy from individual privacy. See CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* (Carl N. Degler ed., Harper & Row 1966) (1898).

84. Gillian Brown argues that "the nineteenth century advanced and delimited individualism by identifying selfhood with the feminine but denying it to women." GILLIAN BROWN, *DOMESTIC INDIVIDUALISM: IMAGINING SELF IN NINETEENTH-CENTURY AMERICA* 4-5 (1990). By extension, this construct denied women forms of privacy that rest on individuality and autonomy. Women were the objects of individualism and privacy—necessary for their construction, but excluded from their enjoyment. See generally William E. Modellmog, *Disowning "Personality": Privacy and Subjectivity in The House of Mirth*, 70 AM. LIT. 337, 342-45 (1998) (discussing assumptions about female privacy and subjectivity at the turn of the century).

These clear shortcomings of privacy rights for women have led, in more recent years, to a powerful feminist reevaluation. Because women have traditionally been symbols of privacy rather than full legal subjects, scholars argue, they have had too much privacy in terms of imposed domestic isolation, modesty, and chastity and not enough in terms of private choice.<sup>85</sup> Worse, by protecting a man's home as his castle and refusing to intervene, the law has drawn a curtain<sup>86</sup> over the home and sheltered wife beating and marital rape.<sup>87</sup> Due in part to this problematic tradition of privacy, many legal scholars have challenged the grounding of abortion<sup>88</sup> and contraceptive<sup>89</sup> rights in privacy, arguing that equality should be the principle guaranteeing such constitutional rights.<sup>90</sup> While these critiques did not appear until the late twentieth century, the limitations of female privacy were apparent in Warren and Brandeis's era and called into question the value of a right to privacy for women.

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85. See generally, ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988). See also Lisa R. Pruitt, "On the Chastity of Women all the Property in the World Depends": *Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965 (2003) (arguing that sexual slander law commodified women's sexual privacy and propriety to the benefit of their fathers and husbands).

86. A popular metaphor in nineteenth-century cases concerning domestic violence was the curtain that concealed the home from the public gaze. See, e.g., *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 457 (1868) (arguing that the evils of domestic violence were less than "the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber"); *State v. Oliver*, 70 N.C. 60, 61-62 (1874) ("If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive"). See generally Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

87. See, e.g., Sally F. Goldfarb, *Violence against Women and the Persistence of Privacy*, 61 OHIO STATE L.J. 1, 18-28 (2000); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Siegel, *supra* note 86. Doctrines such as coverture, which held husband and wife to be one person in law, and interspousal tort immunity ensured that there was little legal recourse for domestic violence. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*430 (describing husband and wife as "one person in law"). The marital rape exemption, which grew out of the marital unity doctrine, has similarly sheltered violence against women. See generally Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986).

88. E.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that categorical prohibition of abortion violated the Fourteenth Amendment). Justice Blackmun's majority opinion stated, "This right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court, in the Ninth Amendment's reservation of rights to the people is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

89. E.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut statute forbidding the use and distribution of contraceptives violated the right of marital privacy). *Griswold* derived the right of marital privacy from First, Fourth, and Fifth Amendment privacy cases, Fourteenth Amendment liberty cases, and the older idea of the home-as-castle articulated by Lord Camden in *Entick v. Carrington*. *Id.* at 481-86.

90. See, e.g., Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989).

### C. *The Response to The Right to Privacy*

In the decades following Warren and Brandeis's proposal, debates over privacy rights came to occupy a central place in courtrooms, legislatures, and newspaper columns throughout the country. Most immediately, several courts in Massachusetts and New York accepted the new right to privacy and enjoined the use of defendants' names and likenesses in advertisements.<sup>91</sup> The first case to attract great attention, however, held that no right to privacy existed under common law. Abigail Roberson filed suit when Franklin Mills Flour published her picture on posters without her consent and accompanied the text with the words, "Flour of the Family." In *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals rejected Roberson's use of Warren and Brandeis's ideas as a basis for recovery and insisted that a right to privacy would lead to "litigation bordering on the absurd."<sup>92</sup>

What is perhaps more noteworthy about this case, though, was the public outcry that met the decision, an outcry that led one of the judges to defend the court's holding in a law review article.<sup>93</sup> Although it did not explicitly encourage such action, moreover, the court implied that the New York Legislature might create a statutory right to privacy,<sup>94</sup> and *The New York Times* argued vehemently for immediate legislative action.<sup>95</sup> Sounding much like critics of the paper, the *Times* maintained, "[i]f there be . . . no law now to cover these savage and horrible practices, practices incompatible with the claims of community in which they are allowed to be committed with the impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law."<sup>96</sup> Heeding public demand, the New York Legislature joined California in enacting privacy statutes, and Pennsylvania, Virginia, and Utah soon followed.<sup>97</sup>

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91. See, e.g., *Marks v. Jaffa*, 26 N.Y.S. 908 (Sup. Ct. 1893) (enjoining the publishing of a picture of an actor in a newspaper popularity contest without his consent); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (Sup. Ct. 1891) (enjoining the use of a doctor's name in advertising medicine without his consent). See also *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C. Mass. 1894) (holding that a public figure may not prohibit the publication of his biography and portrait, but suggesting that private figures retain this right). But see *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 289 (Mich. 1899) (criticizing Warren and Brandeis and calling an invasion of privacy "one of the ills that, under the law, cannot be redressed").

92. 64 N.E. 442, 443 (N.Y. 1902).

93. O'Brien, *supra* note 45.

94. See *Roberson*, 64 N.E. at 443.

95. Editorial, N.Y. TIMES, Aug. 23, 1902, at 8 (discussing *Roberson*).

96. *Id.*

97. In 1899 California made it a misdemeanor to publish a person's portrait in a newspaper or book or on a handbill or poster without his or her consent. This law was, however, never used to prosecute a case and was repealed in 1915. Gormley, *supra* note 28, at 1354 n.90. For New York, see Act of Apr. 6, 1903, ch. 132, §§ 1-2, 1903 N.Y. LAWS 308 (prohibiting use of an individual's name or likeness, without consent, for advertising or trade). This statute later became an amendment to New York's Civil Rights Law. N.Y. CIV. RIGHTS §§ 50-51 (McKinney 1976 & Supp. 1988). For Pennsylvania, see Act of May 12, 1903, 1903 PA. LAWS 265 (allowing damages for negligent but nondefamatory newspaper

But the courts did not simply cede the issue to legislatures throughout the country. In *Pavesich v. New England Life Ins. Co.*, decided in 1905, the Supreme Court of Georgia recognized a right to privacy grounded in Warren and Brandeis's arguments.<sup>98</sup> The plaintiff sued when an insurance company published, without his consent, his name, picture, and a feigned endorsement in a newspaper advertisement. Overruling the trial court and criticizing the earlier *Roberson* decision, the justices found a right to privacy "derived from natural law" and awarded damages.<sup>99</sup> The opinion predicted that a right to privacy would come to be widely acknowledged in American law,<sup>100</sup> and, after years of increasing acceptance, the Restatement of Torts in 1939 codified the right.<sup>101</sup>

#### D. Wharton and Privacy

Edith Wharton may or may not have been aware of particular cases and statutes implicating privacy, but it seems almost certain she would have been familiar with wide-ranging social discussions that grappled with privacy's meaning, value, and violation in the years she was writing her most famous novels. Her literary career, in fact, mapped almost perfectly onto the years of most heated debate. She published one of her first poems in the July 1890 issue of *Scribner's Magazine* in which E.L. Godkin published his article on privacy, and she died two years before the first Restatement of Torts firmly established a right to privacy. Wharton had residences in both New York and Massachusetts, the two states that most explicitly and publicly tackled invasions of privacy in the years following Warren and Brandeis's article, and she no doubt read newspapers such as *The New York Times* that often contained invective reporting on privacy cases.

Evidence of Wharton's concern with privacy, and the law more generally, abounds in her novels. Her plots often turn on issues of privacy and publicity;

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publications). The law was relatively unused and was repealed in 1907. See Gormley, *supra* note 28, at 1354 n.92 (citing Act of May 1, 1907, 1907 PA. LAWS 124). See also VA. CODE ANN. § 8.01-40 (1950) (enacted 1904) (modeled on New York statute); UTAH CODE ANN. §§ 76-4-8 to -9 (1953) (enacted 1909) (modeled on New York statute).

98. 50 S.E. 68 (Ga. 1905).

99. *Id.* at 70.

100. *Id.* at 80-81 (arguing, "[s]o thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, . . . that we venture to predict that the day will come that the American bar will marvel that a contrary view was even entertained by judges of eminence and ability").

101. RESTATEMENT (FIRST) OF TORTS § 876 (1939). The Restatement of Torts in 1977 distinguished four separate privacy torts: unreasonable inclusion upon the plaintiff's seclusion or solitude; public disclosure of embarrassing private facts about the plaintiff; appropriation of the plaintiff's name or likeness; publicity that unreasonably places the plaintiff in a false light in the public eye. RESTATEMENT (SECOND) OF TORTS § 652A (1977). This is not, of course, to argue that the *Pavesich* court's sweeping prediction has been realized in full. Many lawyers and judges remain skeptical about the right to privacy. See, e.g., Davis, *supra* note 45; Kalven, *supra* note 45; Richard Posner, *Privacy, Secrecy, and Reputation*, 28 BUFFALO L. REV. 1 (1979). Nonetheless, more than a century after Warren and Brandeis's article, privacy is an established part of tort law.

her characters speak of “rights,” “property,” and “personality”;<sup>102</sup> and vignettes within the novels evoke the newspaper columns and advertisements of the day. In *The Age of Innocence*, for instance, Wharton describes a shoe-polish advertisement that could readily have found itself at the center of a *Roberson*-like lawsuit,<sup>103</sup> and a mother’s concern about prying photographers at her daughter’s wedding recalls the apocryphal Warren story.<sup>104</sup> A humorous moment in Wharton’s late novel, *Twilight Sleep*, plays on the tension between individual and family privacy. Pauline Manford begins to deliver her birth control speech to the assembled Mothers’ Meeting and declares that female privacy is of utmost importance: “Personality—room to develop in: not only elbow-room but body-room and soul-room, and plenty of both. That’s what every human being has a right to.”<sup>105</sup> Catching some astonished glances from the audience, she redefines her grand opening as her antagonists’ position and champions the importance of motherhood—in other words, of domestic relationships rather than personal privacy, of a family privacy that would limit the mother’s privacy rather than an individual right to be let alone.<sup>106</sup> While amusing, Wharton’s satire on Pauline’s attempt to “reconcile these contradictions”<sup>107</sup> is more than mere satire, and Pauline becomes a mouthpiece for important questions of Wharton’s fiction: How to reconcile autonomy with intimacy, tradition with modernity, and privacy with publicity?

Wharton returns to these questions again and again not only in her novels, but also in her autobiographical works. As a female writer who sought both to establish her reputation and to protect her private life, Wharton shed the model of domestic lady writer and self-consciously positioned herself in the public sphere.<sup>108</sup> She was accordingly sensitive to her competing needs for publicity and privacy and to the complications of each. Although feminist criticisms of privacy rights would not emerge until after her death in 1937, Wharton’s works offer a nuanced critique of Warren and Brandeis’s proposal, particularly with regard to women—both her female characters and her own authorial self. I will take up this critique in the following two sections of the paper.

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102. See, e.g., Edith Wharton, *The Other Two*, 32 *COLLIER’S WEEKLY* 15 (1904); EDITH WHARTON, *TWILIGHT SLEEP* (Simon & Schuster 1997) (1927). See generally Modellmog, *supra* note 84, at 340.

103. EDITH WHARTON, *THE AGE OF INNOCENCE* 35 (D. Appleton & Co. 1920).

104. Worrying about newspaper reporters who fight to get near the wedding, Mrs. Welland exclaims, “Why, they might take a photograph of my child *and put it in the papers!*” *Id.* at 182-83.

105. WHARTON, *TWILIGHT SLEEP*, *supra* note 102, at 97.

106. *Id.* at 98-99.

107. *Id.* at 99.

108. See generally Amy Kaplan, *Edith Wharton’s Profession of Authorship*, 53 *ELH* 443 (1986).

## III. EXPOSING THE FICTION OF FEMALE PRIVACY

Wharton's engagement with questions of privacy and publicity at the turn of the century is readily apparent in two of her most popular novels, *The House of Mirth* and *The Custom of the Country*, each of which follows a female protagonist as she negotiates elite New York society. *The House of Mirth* is the story of Lily Bart, a beautiful woman who is unmarried at age twenty-nine due largely to her own ambivalence about New York's marriage market. She repeatedly thwarts possible engagements and does not marry her true love, Lawrence Selden, initially because he is not wealthy and later due to a series of mishaps. Visiting her friends' rich estate, Lily cunningly and yet somewhat naïvely appeals to the married Gus Trenor to invest her money for her, and she begins to spend lavishly. When Trenor propositions her, she learns that he has been giving her his own profits, and he insists she repay her debt in sexual attentions. Lily recoils from him and embarks on a Mediterranean cruise with George and Bertha Dorset. Bertha has invited Lily to keep her husband distracted while she pursues an affair, and, to deflect attention from herself, Bertha ultimately dismisses Lily from the yacht, insinuating that she and George were having an affair. Expelled from society, Lily could rebuild her reputation by publicizing an earlier affair between Bertha and Selden, and she is encouraged to do so by her wealthy suitors, but she refuses to trade on Selden's past. Instead, she becomes a secretary and milliner and finally moves into a boarding house. When she receives a small inheritance from her aunt's estate, she pays off her debt to Trenor and overdoses—perhaps intentionally—on the chloral she has come to rely on for sleep. Selden arrives the next morning intending to propose marriage and finds Lily dead.

*The Custom of the Country's* heroine, Undine Spragg, is more ruthless than Lily and rises quickly in society after her nouveau-riche family moves from Kansas to New York City. Like a robber baron, Undine trades on her beauty to gain access to old-money New York, and she wins over the romantic poet Ralph Marvell. Following their marriage and the birth of a son, Undine finds herself unsatisfied, and she divorces Ralph, who ultimately commits suicide so as to avoid the potentially vicious custody battle Undine has contrived. Undine next infiltrates the French *fauborg* society and marries aristocrat Raymond de Chelles. Again discontented after her conquest and unwilling to moderate her lifestyle in accordance with French tradition, Undine divorces once more and marries her final husband, Elmer Moffatt, an incredibly wealthy businessman who is also originally from Kansas and was secretly Undine's husband in her adolescence. By the end of the novel, both Undine and Moffatt are recognized as prominent members of the upper class, for the nouveau-riche have effectively replaced established society at the top of the social hierarchy. But

the insatiable Undine remains unhappy, as she learns of a role her divorce has barred her from and comes to desire it most of all.

These are necessarily simplistic summaries of Wharton's novels, which are not only well-plotted fiction, but also incisive social satire. In *The House of Mirth* and *The Custom of the Country*, Wharton responds to the same mass publicity and voracious media as Warren and Brandeis, and she levels many similar complaints. Her fiction also stands in revealing counterpoint to the lawyers' article, however. While condemning an overreaching press and an invasive social gaze, Wharton nevertheless maintains that publicity is essential to her heroines. Insofar as both Lily's and Undine's subjectivity is enabled via publicity, Wharton suggests that a right to be let alone would be meaningless for these women and that privacy necessarily depends on publicity.

#### A. *Conspicuousness and Shamelessness: Damaging Publicity*

Five years after publishing *The Touchstone*, Wharton rewrote Glennard's decision in *The House of Mirth*. While Glennard momentarily considers burning Mrs. Aubyn's letters but instead publishes her sentiments for personal gain, Lily, who operates in a world saturated by publicity, secretly burns Bertha's letters to Selden. Lily has less to lose and more to gain than Glennard—whereas he claims to be a friend of Mrs. Aubyn's lover, Lily actually is the third party to the romance in question, but she nonetheless honors the privacy of the letters that could reinstate her in New York society, letters that presumably, like Mrs. Aubyn's "unloved letters,"<sup>109</sup> reflect Bertha's continued interest in Selden after he has ended their affair.

Driven largely by her love for Selden, Lily's protection of Bertha's letters stands as a painfully selfless act in a novel in which "conspicuousness passe[s] for distinction and the society column [is] the roll of fame."<sup>110</sup> The letters, sold by a chambermaid who needs money for rent, come to Lily appropriately wrapped in dirty newspaper, which denotes not only the route they have taken to her and the sordidness of buying another woman's private correspondence, but also the possibility of her using these communications to publicly coordinate her return to society's graces. She could, that is, treat the letters as if they were themselves newspaper articles—bits of private information sold on the public market—but she recognizes this possibility as self-contaminating and does not even read them. Although she considers blackmailing Bertha, she further realizes that this approach would guard the letters' privacy but would necessitate profiting by a secret of Selden's past, and this chills "her blood with shame."<sup>111</sup> Instead, she burns the package in Selden's library, simultaneously

109. Wharton, *The Touchstone*, *supra* note 1, at 370.

110. EDITH WHARTON, *THE HOUSE OF MIRTH* 227 (Signet Books 2000) (1905).

111. *Id.* at 322.

destroying its threat and its promise. The essential privacy of this act is underscored by Selden's failure to note Lily's gesture; his usually microscopic vision does not see her shelter his privacy, and such a pronounced lack of observation in a novel marked by scrutiny and publicity indelibly aligns Lily with privacy.

Lily's act is all the more noteworthy because Bertha, earlier in the novel, has staged an elaborate embarrassment of Lily that gathers its force through publicity. In contrast to the soft intimacy of Selden's library, Bertha's dismissal of Lily from her yacht occurs in a large, thronged restaurant where "their table seem[s] set apart in a special glare of publicity" and Dabham of the *Riviera Notes* snatches eagerly at the scene with his tentacle-like eyes to amplify its visibility.<sup>112</sup> Dabham both represents and produces the shallow publicity of New York high society, and his article, which Bertha has counted on, will guarantee Lily's expulsion from this society. It is not Lily's dismissal that matters—particularly given the nearly universal recognition that she has been wrongly, if obliquely, accused—but rather the display and publication of this dismissal.

Indeed, one of the most resonant features of *The House of Mirth* and *The Custom of the Country* is the culture of publicity that permeates American society and, in turn, the pages of Wharton's fiction. Wharton's concern was widely shared by other authors, including her close friend Henry James, who wrote about "the invasion, the impudence and shamelessness, of the newspaper and the interviewer, the devouring *publicity* of [modern] life, the extinction of all sense between public and private."<sup>113</sup> Such pervasive and invasive publicity also, as I have discussed, elicited E.L. Godkin's pieces and Warren and Brandeis's article. Godkin discusses the unique violation of gossip published in newspapers:

[A]s long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but barely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossiped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation.<sup>114</sup>

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112. *Id.* at 227.

113. HENRY JAMES, *THE NOTEBOOKS OF HENRY JAMES* 82 (F.O. Matthiessen & Kenneth B. Murdock eds., 1961).

114. Godkin, *supra* note 41, at 66.

Warren and Brandeis still more vehemently describe gossip's evolution from a mere "resource of the idle" to "a trade," and complain that newspaper columns brim with lascivious gossip.<sup>115</sup>

*The Custom of the Country's* Mrs. Heeny, a masseur and general confidant of New York society, embodies the fusion of provincial gossip and mechanized publicity that Godkin and Warren and Brandeis bemoan. She is the idle gossip of a small community and trades secrets of New York's elite as she moves between clients. At the same time, she carries a bag stuffed with strips of newspaper that depersonalize private lives and, often tattered and grimy from use, serve as symbols of modernity's far-reaching publicity.

Mrs. Heeny is, however, an innocuous and even compassionate figure for the union of gossip and mass media, and it is instead through the relationship of Undine and Ralph that Wharton dramatizes the conflict of publicity and privacy. Undine is a product of showy modern America; she relishes her appearances in newspapers and bathes in the "bright publicity of the American air."<sup>116</sup> Associating with figures like Peter Van Degen and Elmer Moffat, whose bulging stare and red glossy face respectively serve as metonymies of their characters, Undine only feels comfortable when she is the center of attention. Ralph, by contrast, only feels comfortable when he has escaped public attention and can inhabit his own mind. If bulging eyes and shiny faces designate "promiscuous" men, Ralph is characterized by his "furtive possession" of a secret childhood cave,<sup>117</sup> and he seeks shelter from modernity in privacy.

Such shelter proves meaningless, however, when Undine marshals the forces of publicity to steamroll Ralph's private life. She demands a divorce, and he is disgusted at the thought of taking the public into his confidence by contesting her claims, but he later finds that his own reticence has not stopped the publicity machine:

[A]s he sat in the Subway on his way down-town, his eye was caught by his own name on the first page of the heavily head-lined paper which the unshaved occupant of the next seat held between grimy fists . . . . For the first time in his life the coarse fingering of public curiosity had touched the secret places of his soul, and nothing that had gone before seemed as humiliating as this trivial comment on his tragedy.<sup>118</sup>

Wharton is relentless; Ralph's media persecution does not stop in the dirty subway, but continues at his dentist's office, where his plight becomes one of

115. Warren & Brandeis, *supra* note 3, at 196.

116. EDITH WHARTON, *THE CUSTOM OF THE COUNTRY* 174 (Oxford Univ. Press 1995) (1913).

117. *Id.* at 49.

118. *Id.* at 215.

the "Heart problems" proposed to readers with a gramophone, corset, and vanity-box offered as prizes for its solution. A short time later, he reads about Undine's second marriage in the newspapers.<sup>119</sup>

It is particularly by focusing the end of the novel on Undine's son that Wharton underscores her criticism of modern publicity and its perverse function of inverting public and private relationships.<sup>120</sup> Because Undine seeks the crowd's notice at the expense of attending to her family, her intimate relationships become secondary to her public displays. Lacking direct access to his mother, Paul learns about her through Mrs. Heeny's suitably "long discoloured strip" of newspaper, which most of her clients have already perused.<sup>121</sup> Of course, the newspaper's brand of information, concerning Undine's appearance and possessions, is not what he desires; but, Wharton suggests, there is nothing else to know about Undine. Her private relationships can be no more than second-hand publicity.

### B. *The Necessity of Publicity and Limitations of Being "Let Alone"*

While *The Custom of the Country's* criticism of modern publicity is clear, to reduce the novel to this critique would be to underestimate Wharton's powers as an author and acute psychological observer. Undine's showiness is often grotesque and inevitably superficial, but Wharton forces us to ask what privacy for a woman like Undine would mean. Unlike Ralph but like many of the women in her milieu, Undine lacks a developed autonomous self. She has not been encouraged to cultivate a private interior; rather, her social worth depends on her beauty and her status as a visually pleasing object.

Well aware of such social appraisals, Undine has acquired an uncanny ability to turn herself into an object. After failed attempts to shape his wife's personality, Ralph realizes that her spirit flutters in a barren, "half-lit place,"<sup>122</sup> but rather than function as a liability, this core emptiness enables her to mold and remold herself for her observer. As John Berger has famously argued, socialization by a male gaze results in women who are internally divided into subject and object: "A woman must continually watch herself . . . Men look at women. Women watch themselves being looked at."<sup>123</sup> Undine is a perfect

119. Wharton's lengthy indictment may reflect her own anger, while writing *The Custom of the Country*, at the rumor of her upcoming separation from Teddy being published in a Paris newspaper. See SHARI BENSTOCK, *NO GIFTS FROM CHANCE: A BIOGRAPHY OF EDITH WHARTON* 224 (1994).

120. Warren and Brandeis use similar language when discussing gossip: "It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people." Warren & Brandeis, *supra* note 3, at 196.

121. WHARTON, *THE CUSTOM OF THE COUNTRY*, *supra* note 116, at 366.

122. *Id.* at 92.

123. JOHN BERGER, *WAYS OF SEEING* 46-47 (1972). The idea of woman as object, in contrast to man as subject, is indebted to Simone de Beauvoir. See SIMONE DE BEAUVOIR, *THE SECOND SEX* (E.M. Parshley trans., 1973) (1949). More recently, social psychologists have studied female self-objectification. See, e.g., Barbara L. Fredrickson & Tomi-Ann Roberts, *Objectification Theory: Toward*

example of this split woman, for “[a] cool spirit within her seemed to watch over and regulate her sensations, and leave her capable of measuring the intensity of those she provoked.”<sup>124</sup> She is first pleased by being a mother when she encounters Elmer Moffatt while carrying Paul, and recognizes herself as an attractive image of young motherhood. As she relishes “the image of her own charm mirrored in the general admiration,”<sup>125</sup> Undine internalizes society’s scrutiny, and she takes self-objectification to its logical extreme, so that the “image of herself in other minds [is] her only notion of self-seeing.”<sup>126</sup> Her very personality inheres in performing for an audience; even when society’s mirror is absent, it remains present in her mind so that her inner void is really a residual mirror.

Lily Bart, Undine’s more sympathetic counterpart, similarly relies on the gaze of the other for her identity,<sup>127</sup> but self-objectification is tragic for her in ways it is not for Undine, who manipulates appearances to her full advantage. Much of Lily’s time is spent considering how others perceive her, for she inhabits a world in which men collect and consume women and women self-consciously put themselves on display.<sup>128</sup> On the train to the Trenors’ country house, as she schemes about how to become Percy Gryce’s latest item of Americana, Lily considers the charm of her seemingly effortless presentation as she watches him watch her make tea. She proves her skill at such displays only to reveal her ambivalence about them, yet her ambivalence stems not from an autonomous self-image but rather from seeing herself through a particular set of eyes—Selden’s. While Lily’s habit of “scanning her little world through [Selden’s] retina”<sup>129</sup> has the potential to serve as a moral influence beyond the

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*Understanding Women’s Lived Experiences and Mental Health Risks*, 21 PSYCHOL. OF WOMEN Q. 173, 177 (1997) (arguing that society’s objectifying treatment coaxes women to “treat themselves as objects to be looked at and evaluated”). See also Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in NOMOS XIII: PRIVACY 2, 7 (J. Ronald Pennock & J.W. Chapman eds., 1971) (drawing on Jean-Paul Sartre’s philosophy to discuss the role of surveillance in limiting the individual’s freedom and claiming that being seen as “an object of scrutiny, as the focus of another’s attention, brings one to a new consciousness of oneself, as something seen through another’s eyes,” so that the observed person “is fixed as something—with limited probabilities rather than infinite, indeterminate possibilities”).

124. WHARTON, *THE CUSTOM OF THE COUNTRY*, *supra* note 116, at 184.

125. *Id.* at 98.

126. *Id.* at 252.

127. Many literary critics have discussed Lily’s reliance on others’ perceptions for her sense of self. See, e.g., JUDITH FRYER, *FELICITOUS SPACE: THE IMAGINATIVE STRUCTURES OF EDITH WHARTON AND WILLA CATHER* (1986); Modellmog, *supra* note 84, at 337; CYNTHIA GRIFFIN WOLFF, *A FEAST OF WORDS: THE TRIUMPH OF EDITH WHARTON* (1977). Gloria Erlich argues that Lily “incorporates the audience, or viewer, [into her theatrical production] so that she can imagine herself as perceived by the other.” GLORIA ERLICH, *THE SEXUAL EDUCATION OF EDITH WHARTON* 71 (1992).

128. Appropriately, a favorite touchstone of *The House of Mirth*’s critics has been Thorstein Veblen’s work, which describes “conspicuous consumption” as a defining feature of the leisure class. Women, in his model, adorn themselves to represent their husbands’ wealth and status and thereby display leisure. See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 68-101 (Penguin Books 1981) (1899). See also MAUREEN E. MONTGOMERY, *DISPLAYING WOMEN: SPECTACLES OF LEISURE IN EDITH WHARTON’S NEW YORK* (1998).

129. WHARTON, *THE HOUSE OF MIRTH*, *supra* note 110, at 56.

pettiness of New York society, Wharton is careful not to valorize Lily's dependence on the novel's "negative hero."<sup>130</sup> Her internalization of Selden's perspective proves self-destructive, for he, too, values her as an aesthetic object, even as he speaks of a republic of the spirit.

Throughout the novel, which Wharton first called *A Moment's Ornament* and then *The Year of the Rose*, thereby underscoring the transience of Lily's decorative identity, Lily acts as both an artist and a piece of art. "You are an artist, and I happen to be the bit of colour you are using today,"<sup>131</sup> Selden teases her, and implicit in his comment is that Lily always paints herself. This is most literally true in the *tableaux vivants* scene, when Lily is most an artist and most an artifact. She engages in a complex act of self-portraiture, representing herself as the painting of another woman. Seemingly ironically, Wharton, speaking for the assembled crowd, comments on "the predominance of personality" and notes that Lily is able to "embody the person represented without ceasing to be herself."<sup>132</sup> It is also at this highly artificial moment of self-representation that Selden believes he sees "the real Lily Bart."<sup>133</sup> We are, I think, initially inclined to read Selden's thoughts as an illustration of his more pervasive inability to see Lily, for how can this double artifice be "the real Lily"? Selden habitually registers the slightest details of her appearance but fails to note more significant aspects of her character. It therefore comes as no surprise that he would think he was fully seeing Lily when she has turned herself into a pure surface.

This reading, however, fails to note something fundamental about Lily herself: Self-objectification is so central to her malleable character that the "real Lily Bart" *is*, in many ways, the performance of beauty. Her pliability and dramatic instinct are the most resonant aspects of her character, and her *tableau vivant* merely makes explicit her constant project of artistically fashioning herself for other eyes. Publicity precedes Lily's sense of personality, for it is only by looking at herself from without that she can come to know herself.

Both Lily and Undine are not merely split into actor and observer, as John Berger's formula suggests, but are actually reduced into products of self-objectification. The "ripples of self-consciousness" that play "up and down [Undine's] watchful back"<sup>134</sup> and Lily's acute knowledge of how she affects others constitute each woman's being. Cynthia Griffin Wolff has argued, "[t]he woman who elects to form her nature as a pleasing accommodation to the demands of those around her can do so only by a systematic mutilation of her own identity. . . . [She] may find that she has retained no more than a hollow,

130. R. W. B. LEWIS, *EDITH WHARTON: A BIOGRAPHY* 155 (1975) (quoting Wharton).

131. WHARTON, *THE HOUSE OF MIRTH*, *supra* note 110, at 68.

132. *Id.* at 141.

133. *Id.*

134. WHARTON, *THE CUSTOM OF THE COUNTRY*, *supra* note 116, at 31.

empty shell of self."<sup>135</sup> Wharton takes her critique farther than Wolff acknowledges; Lily's and Undine's performances for patriarchal society do not mutilate identities that somehow precede these performances. Rather, such performances stunt the development of private personalities from the outset. Each woman's interiority inheres in self-conscious dramatizations, and she never realizes the opportunity to forge a self that is not a hollow, other-directed representation. Even Lily's most significant act—burning Bertha's letters—is inspired by her internalization of Selden's perspective and functions as an abnegation of self.

This absence of autonomous personality is highlighted by the fact that both Undine and Lily hate to be alone. Lily constantly strives "to get away from herself,"<sup>136</sup> and Undine regards privacy as a mere intermission in life's drama. To the extent that these women have private personalities, they are the reflected views of other eyes. Lily and Undine invert the ostensible ordering of privacy and publicity; instead of private selves that need to be sheltered from the invasive gaze of modern life, they have public selves that deflate when unobserved. Wharton is critical of publicity in both of her novels, yet her protagonists depend on it for the very identity it would seem to erode.

For Lily and Undine, then, the kind of privacy Warren and Brandeis advocate is not a genuine possibility. This is perhaps not surprising, given that the lawyers themselves gender privacy as male in their article. Implicitly criticizing the logic of nineteenth-century domesticity and anticipating late twentieth-century feminist critiques of privacy, Wharton's novels expose the consequences of treating women as the objects, rather than subjects, of privacy and classing their personalities as commodities to be managed by men. She takes her critique further still when she intimates that the inviolate personality Warren and Brandeis champion is an elaborate fiction with little meaning for women and that a right to privacy would therefore not help women fashion or guard unique identities.

### C. *Intimacy as Subjectivity*

If Lily and Undine's "violate" personalities depend on self-objectification, Wharton also indicates that a woman's interdependent personality might be forged through intimacy, which similarly depends on others but is a more positive, interactive model for self-construction.<sup>137</sup> At the end of *The House of*

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135. WOLFF, *supra* note 127, at 107.

136. WHARTON, *THE HOUSE OF MIRTH*, *supra* note 110, at 16.

137. Many social psychologists have argued that the interdependent self is a non-Western and female notion, in contrast to the independent self that is Western and male. See, e.g., Susan Cross & Laura Madson, *Models of Self: Self-Construals and Gender*, 122 *PSYCHOL. BULL.* 5, 8 (1997) (arguing that "women are more likely than men to develop an interdependent self-construal, whereas men are more likely than women to develop an independent self-construal"); Hazel Rose Markus & Shinobu

*Mirth*, Lily's very absence of core identity becomes the basis for establishing interpersonal connections.<sup>138</sup> Undine lacks not only an autonomous personality but also the capacity for intimacy that could enhance the self; she regards close relationships as a pretext for the "total absence of expression,"<sup>139</sup> and her "inmost ideal of domestic intimacy" is parading in public with her husband as a male ornament.<sup>140</sup> So too, she dreads pregnancy and considers motherhood a burden. Like Warren and Brandeis's autonomous male subjects whose homes and selves are "impregnable," Undine wants to remain impregnable by avoiding pregnancy.

By contrast, motherhood becomes for Lily a final vision of intimacy that recasts the malleable boundaries of her personality. Woman's permeable nature may preclude an autonomous personality, Wharton suggests, but it may also positively ground an identity that encompasses others and a privacy that accommodates intimacy. Although not herself a mother, Lily lies with the imagined presence of a friend's infant, and the baby's weight increases, "sinking deeper and penetrating her with a strange sense of weakness as though the child entered into her and became a part of herself."<sup>141</sup> Earlier in the evening, Lily tried to leave part of herself with Selden but realized that, while her personality was intimately connected to his, it was fundamentally her own: "[T]hat self must indeed live on in his presence, but it must still continue to be hers."<sup>142</sup>

With the baby, Lily develops an affirmative awareness of her violated personality and recognizes the possibilities of incorporating others into her fluid self. Pregnancy, which physically unites two bodies, becomes the ultimate emblem of mutually sustaining interdependence.<sup>143</sup> Once Lily experiences this

Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. BULL. 224 (1991) (discussing cultural differences in construals of the self).

138. My argument here resembles Brook Thomas's claim that characters in Henry James's *The Bostonians* achieve self-definition through the "space between" people in relationships, but these very relationships depend on "an emptiness within the self" that allows penetrations by another. THOMAS, *supra* note 10, at 70.

139. WHARTON, *THE CUSTOM OF THE COUNTRY*, *supra* note 116, at 95.

140. *Id.* at 318.

141. WHARTON, *THE HOUSE OF MIRTH*, *supra* note 110, at 335.

142. *Id.* at 328.

143. Although Wharton ends *The House of Mirth* with this positive vision, she suggests her ongoing ambivalence about the female lack of autonomous identity not only through Lily's self-objectification and death, but also, in another work, through a phobic vision of women as penetrable vessels. In *The Other Two*, Waythorn regards his twice-divorced wife as "a shoe that too many feet had worn." He fears that she has "left hanging" to each of her past married identities "a little of her privacy, a little of her personality, a little of the inmost self where the unknown god abides," and he conveys an acute disgust for the "traces" her earlier marriages have left on her nature. Wharton, *The Other Two*, *supra* note 102, at 20. In Wharton's late novel *Twilight Sleep*, Wharton inverts Waythorn's metaphor of hanging shreds and once again offers an affirmative glimpse of a self created by relationships. In a landscape of people clamoring to express themselves by severing interpersonal ties, Nona recognizes that the self cannot be expressed outside of relationships and notes that her personality includes "shreds and fibres" of other people." WHARTON, *TWILIGHT SLEEP*, *supra* note 102, at 201.

“continuity of life,”<sup>144</sup> she bemoans her years of solitude and “the feeling of being something rootless and ephemeral, mere spindrift of the whirling surface of existence, without anything to which the poor little tentacles of self could cling before the awful flood submerged them.”<sup>145</sup> In this elaborate metaphor, Wharton transforms the tentacles of Dabham’s eyes from a predatory public force into the private need of one individual for intimate communion. Although she will never realize her vision, Lily glimpses the possibility of her “tentacles of self” grasping others who would help her forge a personality.

#### IV. WHARTON’S TEXTUAL PERSONALITY

As the baby becomes a part of Lily, Wharton dramatizes her claim that “the bounds of a personality are not reproducible by a sharp black line, but that each of us flows imperceptibly into adjacent people and things.”<sup>146</sup> This, it seems, is her answer to the question posed by Vance Weston, the writer-protagonist of her later novel *Hudson River Bracketed*: “Where was the real primordial personality, each man’s indestructible inmost self? . . . Or was there no such unchangeable nucleus?”<sup>147</sup> Wharton not only undermines Vance’s groping for an autonomous self but also, in her autobiographical writings, suggests that her own personality was thoroughly interwoven with others, through both intimate relationships and literary publication. A degree of publicity was essential to her most private self-construction.

##### A. *Intimacy and Self-Representation*

Wharton’s memoir *A Backward Glance* offers the most extended meditation on her intertwined personality. She begins by casting herself as “[t]he little girl who eventually became me, but as yet was neither me nor anybody else in particular, but merely a soft anonymous morsel of humanity” and describes how she was waked to consciousness by vanity and love.<sup>148</sup> These two approaches to self-construction almost perfectly reproduce the tension between Lily’s dependence on self-objectification and intimacy. Although Wharton’s discussion of her literary career will again describe a personality fashioned through self-objectification, she devotes a great deal of space in her memoirs to close relationships. She depicts Walter Berry as a friend “who seems not a separate person, . . . but an expansion, an interpretation, of one’s self, the very meaning of one’s soul.”<sup>149</sup> Similarly, she

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144. WHARTON, *THE HOUSE OF MIRTH*, *supra* note 110, at 339.

145. *Id.* at 338.

146. EDITH WHARTON, *THE WRITING OF FICTION* 10 (Simon & Schuster 1997) (1925).

147. EDITH WHARTON, *HUDSON RIVER BRACKETED* 294 (Scribner’s 1985) (1928).

148. EDITH WHARTON, *A BACKWARD GLANCE* 1 (Simon & Schuster 1998) (1933).

149. *Id.* at 115.

opens her chapter on Henry James, “[w]hat is one’s personality, detached from that of the friends with whom fate happens to have linked one? I cannot think of myself apart from the influence of the two or three greatest friendships of my life.”<sup>150</sup> Wharton regards her personality not as inviolate but rather as dynamic and dependent on relationships.

If she was porously open to the influence of other individuals, she was also susceptible to literary texts, and she relied on works of art to forge her sense of self. The image of “making up” she offers us in *A Backward Glance* humorously represents her reliance on other works. Even before she could read, she would hold books, often upside down, and turn pages to simulate reading aloud while orally creating her own stories. Once she learned to read, not only her storytelling, but also her very conception of her personality came to depend on literary works, and throughout her career her imaginative engagement with other texts provided a means of creating her textual persona and understanding her inmost self.

Indeed, the Love Diary that documents Wharton’s affair with Morton Fullerton suggests that he came to inform her sense of herself largely through the influence of literature.<sup>151</sup> When writing about Fullerton—the bisexual dilettante who also enchanted Henry James and a host of men and women—Wharton turned to authors including Dante, Ronsard, and Nietzsche to understand and convey her most personal sentiments. Her diary therefore often reads like a commonplace book, but Wharton’s looking outside of herself to grasp her most private feelings is only superficially paradoxical, for her most deeply felt emotions stemmed from literature. She constructed her personality and her ideas about intimate relationships in large part through reading and projected the myriad expressions of love she cherished in literature onto Fullerton. In turning her lover into an imaginative possession, Wharton recorded in her Love Diary not so much her relationship with Fullerton as her relationship with his influence on her. She cited other authors both because they informed her thoughts about love and because literature allowed her to rewrite her lover as a character in one of the texts she admired. By experiencing Fullerton’s presence as textual, she was able to absorb it, much as she absorbed literary works, and this heightened her sense of intimacy as a part of herself.

Even as it documents her absorption of Fullerton, her diary underscores the complexities of interpersonally constructing the self. Wharton describes the relationship as an intimate communion that expands her private personality, but she also worries that her overwhelming love is blotting out her individuality and that she has no self beyond the affair: “[T]he personality I had moulded

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150. *Id.* at 169.

151. See Kenneth M. Price & Phyllis McBride, “*The Life Apart*”: Text and Contexts of Edith Wharton’s Love Diary, 66 *AMERICAN LITERATURE* 663 (1994).

into such strong firm lines has crumbled to a pinch of ashes in this flame!"<sup>152</sup> Her diary registers her ambivalent recognition that her affair at once promises to enhance her personality and threatens to destroy it.

Often, Wharton's feelings of ecstatic communion and loss of self are indistinguishable, for her personality is enhanced at the very moment she documents its effacement. She writes, "[n]othing else lives in me now but *you*—I have no conscious existence outside the thought of you, the feeling of you. I, who dominated life, stood aside from it so, how I am humbled, absorbed, without a shred of will or identity left!"<sup>153</sup> This reads as a complaint—her personality has come to rest so entirely in the relationship that she is bereft of identity. Yet the very energy of the writing, not to mention her use of an exclamation point, implies a degree of excitement about losing her unique personality in an amorous fusion. In part, it seems, her excitement stems from her emulation of literary texts; because she thrives on injecting her newfound sentiments into earlier literary paradigms, she can relish even the abjection love inspires. In this sense, her diary is a record of her love affair with a love affair, or even her love affair with writing about a love affair.

Her ironic rapture, however, also reflects something internal to the affair and to her own act of writing. It is at the pressured moments of the relationship, when Wharton feels at risk of losing herself, that she paradoxically gains a more robust private personality, and writing is the mechanism that negotiates this transition. Publishing her loss of identity facilitates an ecstatic communion with herself and forges a personality that inheres in this self-representation. In other words, by documenting the erasure of her personality, writing ironically functions as an act of self-possession that inscribes her ownership of a unique private self. Her personality depends on a dramatic representation, which only becomes possible because she feels her personality to be threatened.

This dramatic representation, moreover, depends on an audience, and Wharton wrote the diary with a reader in mind. Apostrophizing Fullerton, she declares in the first entry, "it is absurd to write down what one says to one's self; but now I shall have the illusion that I am talking to you."<sup>154</sup> She never names her lover, but only refers to him in the second person, as if the important thing is to be speaking to someone. Indeed, her comment implies that she is writing for her own benefit (though she ultimately did show Fullerton the diary), but that she must cast her communion with self necessarily as a communication between self and other. There is therefore an inherent theatricality to the journal. In a sort of literary version of the self-objectification that defines Lily and Undine, Wharton's articulation of her personality depends on an internalized audience that is always already there. It matters little whether

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152. *Id.* at 674.

153. *Id.* at 673.

154. *Id.* at 670.

it becomes an actual audience or remains only an “illusion,” for Wharton’s performance of her personality is ultimately self-directed.

### B. *Publishing the Self*

The delicate balance of gaining a private personality through potential effacement defined not only Wharton’s relationship with Fullerton, but much of her literary career, and publishing fiction allowed her to fashion a personal identity in a still more public space than her diary. It is not, of course, surprising that writing was indispensable to Wharton’s sense of self. She often described her novels and stories as reflections of her soul, which was burgeoning through the very process of writing. She mentions, for instance, “the *soul* of the novel, which is (or should be) the writer’s own soul,”<sup>155</sup> and, speaking through Vance Weston, underscores the private character of literary works: “[A]n artist’s work was essentially a part of the private life, something closer than the marrow to the bone.”<sup>156</sup> More generally, the vivid experience of letters as more personal than their author is a recurring theme in Wharton’s fiction; it is as if one’s private personality forms itself through writing rather than lived experience. Mrs. Aubyn’s letters in *The Touchstone*, for example, “oddly enough, seemed . . . to bring her nearer [to Glennard] than her presence.”<sup>157</sup>

What is surprising, however, is that Wharton credited publishing, rather than writing, with the creation of her personality. If her private self was forged through and expressed in her fiction, it is unclear why publishing would constitute her private identity rather than threaten it with exposure. But, she insists in *A Backward Glance*, she only “acquire[d]” a “real personality of [her] own” when she published her first volume of stories,<sup>158</sup> a book she also credits with calling her soul to life.<sup>159</sup> As Wharton’s curious statements suggest, publishing was not a catalyst for recognizing a hidden personality—she did not discover a preexisting self, even one created by writing, upon the circulation of her volumes. Rather, publishing itself created her personality. As was true in her relationship with Fullerton, it seems, the development of Wharton’s

155. WHARTON, *THE WRITING OF FICTION*, *supra* note 146, at 115.

156. WHARTON, *HUDSON RIVER BRACKETED*, *supra* note 147, at 246.

157. Wharton, *The Touchstone*, *supra* note 1, at 358. Other examples abound. In *The Letters*, Deering’s communications lend Lizzie “sensations even more complex and delicate than Deering’s actual presence had ever occasioned.” Edith Wharton, *The Letters*, 80 *CENTURY MAGAZINE* 485, 492 (1910). So too, Mattie’s note to Ethan Frome and his “possession of the paper [gives] him a strange new sense of her nearness.” EDITH WHARTON, *ETHAN FROME*, in *EDITH WHARTON: NOVELLAS AND OTHER WRITINGS* 129 (Cynthia Griffin Wolff ed., 1990) (1911). In *The Custom of the Country*, Undine’s letters to Ralph from Paris similarly serve as physical representations of her—aesthetically pleasing but largely devoid of content; and Ralph regards holding the sheets of paper as holding his wife’s hand. WHARTON, *supra* note 116, at 192.

158. WHARTON, *A BACKWARD GLANCE*, *supra* note 148, at 112.

159. *Id.* at 119.

personality inhered in a dynamic of exposure and creation. Precisely because it threatened violation, publishing lent her a sense of a private self.

To understand how exposure constructed Wharton's private personality, it is helpful to examine her own accounts of writing and publishing. From her early days of "making up" in her mother's bedroom, Wharton's creativity hinged on a fragile union of privacy and publicity. In *A Backward Glance*, as well as her more robust autobiographical fragment *Life and I*,<sup>160</sup> she describes how she needed privacy to create and would sneak away, even from visiting friends, to engage in her ecstatic process of storytelling. At the same time, she needed an audience. Her description of "making up" underscores this balance of solitude and surveillance, for she notes "(I always had to be alone to 'make up')" only after she has registered the "[p]arents and nurses, peeping at me through the cracks of doors."<sup>161</sup> Her very privacy appears to depend on her knowledge that she is being watched. The parenthetical appearance of her seclusion nestles it within observation and visually represents the publicity that invariably enclosed Wharton's sense of privacy. By subjecting herself to an audience, she was able to conceive of a private self.

When Wharton did not have an audience, moreover, she became her own. Like Undine, who dresses up for her own eyes and parades before a mirror, imitating laughter and conversation, Wharton from a very early age read and responded to her own fiction. She wrote unrelenting reviews of her first book, *Fast and Loose*, comparing the author to a sick, sentimental schoolgirl and declaring, "every character is a failure, the plot a vacuum, the style spiritless, the dialogue vague, the sentiment weak and the whole thing a fiasco."<sup>162</sup> This fake review is not merely modest self-deprecation or evidence of Wharton's desire to distinguish herself from sentimental female novelists. It also intimates that her writing, even when directed only to herself, was always a performance and that the consideration of publicity was inherent in the project of writing from the outset.

Wharton's literary self-objectification extended not only to her diary, but also to her professional career. In *A Backward Glance*, she proposes to offer her reader a glimpse of the writer at work. She notes that "so few writers seem to have watched themselves while they wrote,"<sup>163</sup> and thereby suggests that she is an exception, that her consciousness is divided into actor and scrutinizing observer. The chapter that documents her literary practices, however, seems to indicate the limitations of regarding one's actions as if one were a detached outside observer, for Wharton never does fully explain her writing process. She

160. Edith Wharton, *Life and I*, in EDITH WHARTON: NOVELLAS AND OTHER WRITINGS, *supra* note 157, at 1069.

161. WHARTON, *A BACKWARD GLANCE*, *supra* note 148, at 34.

162. See LEWIS, *supra* note 130, at 31 (quoting Wharton).

163. WHARTON, *A BACKWARD GLANCE*, *supra* note 148, at 197-98.

leads us to a “secret region on the sheer edge of consciousness,”<sup>164</sup> teasing us with the promise of revelation. Yet she quickly turns our attention away, to her encounters with friends and neighbors, and frustrates our ability to peer into her inner mind.<sup>165</sup>

Rather than reflect her own lack of access to her writing process, this sudden turn exemplifies Wharton’s narrative method in her autobiography and *Love Diary*—she gestures to a wealth of private information she will share but then shifts our attention and keeps us skimming the surface. There are gaps at the most significant moments of both texts. What is important is that Wharton does not simply omit information, but rather points out that she is omitting information. As her description of her writing process illustrates, she hints at a space beyond the narrative in which privacy exists, but the very construction of this space depends on her public claim to an imagined reader.

It would appear, then, that Wharton creates a private space beyond her texts that inheres in outlining it for her readers, but not probing it. Her public gesturing to privacy, by threatening it, paradoxically constructs it; and self-creation becomes the outcome of perilously close self-exposure, much as the parents and nurses peeping at Wharton underscored her privacy. In her early architectural work, *The Decoration of Houses*, Wharton expresses a similar conception of personality formed on the border of revelation and concealment. She insists that decoration should “express the individuality of the occupant by externalizing the self onto surrounding objects, without entrapping the self.”<sup>166</sup> Individuality is only fully realized when externalized, but such externalization must be a theatrical gesture, a sort of dramatized self-possession, rather than sheer exposure. By hinting at a private self that is related to and yet kept apart from the self mirrored in such decoration, the house’s occupant can create a private identity through publication that suggests what is not being published.

Ultimately, therefore, Wharton’s public claims of privacy do not point to an autonomous, preexisting private identity but rather forge such an identity. An audience is necessary to foster her sense that she has a private life. Her life-writings not only complicate but invert Warren and Brandeis’s legal formulations of privacy and personality. If for them, the “right to one’s personality” inheres in “the immunity of the person,”<sup>167</sup> for her, it inheres in the vulnerability and interdependence of the person. Her self-construction depends on having her personality both engaged within intimate relationships and potentially invaded by an audience. Meaningful privacy can only be realized in the context of publicity, for subjectivity emerges not through being let alone, but rather through subjecting the self to others.

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164. *Id.* at 205.

165. See FRYER, *supra* note 127, at 156.

166. Kaplan, *supra* note 108, at 443.

167. Warren & Brandeis, *supra* note 3, at 207.

## V. BETWEEN THE LINES: WHARTON AND HER READER

The fragile dynamic of privacy and publicity that informed Wharton's personality also structures her relationship with the reader of her fiction. As in her autobiographical writings, she carves out a private space by explicitly denying us access to certain information. Yet she also fosters an intimate relationship with her reader, whom she engages as a co-creator of both characters' consciousnesses and the novel itself. Wharton therefore establishes two competing roles for her reader—the invading would-be voyeur and the intimate partner—that are never fully reconciled, but rather continually vie for priority. Readers are necessary to the construction of privacy within Wharton's fiction, it appears, both because we are a threatening public that privacy can be formed in opposition to and because we are a private circle that constructs an interdependent text.

A. *Threatening Readers and Veiled Disclosures: Protecting Textual Privacy*

Wharton's ambivalent relationship with her reader seems to underlie her complicated treatment of private information in many of her novels. She goes to great lengths to protect it in certain instances yet relishes sharing it in others. In *The Touchstone*, for instance, she does not show us Mrs. Aubyn's letters, which are the very heart of the story. By refusing to participate in Glennard's publication, she underscores the sordidness of his act and aligns us with the greedy public within the text. Presumably, to show us the letters would be to further violate Mrs. Aubyn's privacy. If Wharton protects Mrs. Aubyn's epistolary sentiments, however, she allows us a privileged view of Glennard's mind, and such access to her protagonist's inmost thoughts implicitly differentiates our sympathetic reading from that of the novella's public. Presenting personal information to us, it seems, need not violate characters' privacy.

Wharton again prevents us from reading private letters in *The House of Mirth* and *The Custom of the Country* and thereby associates us with the novels' voyeuristic publics, and herself with Lily, who destroys Bertha's letters without reading them. Wharton also derides newspapers' invasions of characters' private lives, but her attempts to differentiate her literary project from journalism suggest an uncomfortable likeness. Her novels may "beat the society pages at their own game by telling the *real* truth behind the gossip."<sup>168</sup> Indeed, *The House of Mirth's* initial wrapper proclaimed, "for the first time the veil has been lifted from New York society."<sup>169</sup> Although Wharton demanded the removal of this phrase, the revelation it advertises resonates within her

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168. Kaplan, *supra* note 108, at 451.

169. LEWIS, *supra* note 130, at 151 (quoting *The House of Mirth's* wrapper).

novels, and she described training “the most searching gaze”<sup>170</sup> on New York’s high society. Dabham may write a damning story in his *Riviera Notes*, but only we know the “real truth” of what happened between Lily and Bertha. Likewise, Selden may imagine that he sees Lily as she looks when she is alone, but it is only readers who have such an intimate view.

Ironically, the very intensity of the novel’s stare may differentiate it from the press in a way that limits the harm of its probing. Jeffrey Rosen has argued that the injury inflicted by invasions of privacy is that of being “misdefined and judged out of context in a world of short attention spans,” a world in which people lack the background knowledge to adequately understand discrete bits of information about others.<sup>171</sup> Wharton embeds a similar claim in her novels, for the public’s most harmful invasions reflect not so much its access to private information as its lack of access to *complete* information. If Selden, or even the New York newspapers, knew Lily’s story in the comprehensive way that the novel’s readers do, their scrutiny would be less violating.

Recognizing this paradoxical approach to self-protection, Wharton left abundant private records for posterity so that she would be understood in context. In addition to her Love Diary, she bequeathed many personal letters, a fragment of the unpublished pornographic novella *Beatrice Palmato*, a diary she began in the 1920s, and a packet labeled “For My Biographer.” Aware that she would be closely studied, she wanted to make sure we would “find the gist” of her.<sup>172</sup> Nonetheless, she destroyed most of her intimate correspondence with Walter Berry and repeatedly asked Fullerton to return her letters, though, like Glennard, he ultimately sold his lover’s correspondence.<sup>173</sup> Wharton’s negotiation of privacy with regard to posterity, then, simultaneously manifests as a desire to reveal her “true” self and a desire to conceal her “true” self. Moreover, her autobiographical revelations complicate the idea of a private self that exists beyond public engagement, for her privacy depends on publicly announcing it.

In her fiction, Wharton similarly takes readers to the brink of exposure and then gestures to information that we cannot access. As illustrated by her concealment of letters in *The Touchstone* and *The House of Mirth*, she almost

170. WHARTON, A BACKWARD GLANCE, *supra* note 148, at 206.

171. JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 8 (2000).

172. LEWIS, *supra* note 130, at xii (quoting Wharton).

173. When reading Wharton’s often abject letters to Fullerton, we therefore may feel, like Mrs. Touchett, that we are listening at a keyhole; while we believe Fullerton is a scoundrel for not returning or destroying his lover’s letters, we gladly consume the fruits of his transgression. It remains possible, however, that Wharton did not so much wish to destroy the letters as to control the conditions of their publication. She wrote to Fullerton that the letters were “of no value to your archives, but . . . fill a deplorable lacuna in those of their writer,” and thereby suggested that, like Mrs. Dale, she might purposefully include this personal correspondence in her archives. Letter from Edith Wharton to Morton Fullerton (Dec. 19, 1908), in THE LETTERS OF EDITH WHARTON 170 (R.W.B. Lewis & Nancy Lewis eds., 1988).

compulsively declares that there is a private space “beyond” the novel’s pages. We also never learn, for instance, what word Lily and Selden want to say to each other in the final pages of *The House of Mirth* (or even whether there is one word or two). In a Victorian novel, this unspoken word might offer a happy ending despite the heroine’s death, but Wharton denies her reader such a neat conclusion. Her withholding of information underscore privacy’s dependence on the threat we pose as a mass audience. Privacy does not exist prior to the possibility of exposure, but instead inheres in her very announcements to us that we are being kept out.

As in her autobiographical writings, it seems, an audience is necessary to the creation of privacy in Wharton’s novels because of the publicity it threatens. Wharton takes her critique of the fiction-reader even further by expressing disdain for the reading public. She writes in *A Backward Glance*, “[i]t is discouraging to know that the books into the making of which so much of one’s soul has entered will be snatched at by readers curious only to discover which of the heroes and heroines of the ‘society column’ are to be found in it.”<sup>174</sup> In a letter to Fullerton, her reaction against the reader becomes visceral as she follows “the poor written word . . . on its peregrinations through heaven knows what indifferent hands, & under what derisive eyes, to its last rest in a gutter or a rag-picker’s bag—worse still, in an autograph album!”<sup>175</sup>

This effusive indictment of readers, replete with snowballing climax and exclamation point, recalls Wharton’s description of the media’s invasion of Ralph Marvell’s privacy in *The Custom of the Country*, as well as her documentation of her own abjection in the *Love Diary*. Much as she ecstatically recorded her loss of identity so as to forge an identity, in her letter to Fullerton she seems delightedly disgusted by the imagined reader’s insensitive and devouring publicity because it enables her to define her own authorship by contrast. Wharton negotiated her public authorship in part, that is, by denouncing the very market that sustained it. She rejected debasing readings by readers and critics and formed a critical self “within the breast”<sup>176</sup> that registered her unique appreciation of texts and dialectically asserted a private identity amidst mass consumption.<sup>177</sup> She celebrated derisive publicity precisely because she could bemoan it. By refusing to self-objectify as a commodity, she fashioned a private authorial identity.

Notably, Warren and Brandeis also decry the process by which an author’s personal sentiments appear in an autograph album. Invoking writers’ prepublication rights, they argue that publishing a work without the author’s

174. WHARTON, *A BACKWARD GLANCE*, *supra* note 148, at 212.

175. Price & McBride, *supra* note 151, at 667-68 (quoting a letter from Wharton to Morton Fullerton).

176. WHARTON, *A BACKWARD GLANCE*, *supra* note 148, at 212.

177. See MARGIT STANGE, *PERSONAL PROPERTY: WIVES, WHITE SLAVES, AND THE MARKET IN WOMEN* 39-40 (1998).

consent violates privacy because it converts an expression of the creator's personality into alienated property.<sup>178</sup> Wharton's comment to Fullerton, gleefully exaggerated as it may be, indicates that she, too, worried about readers appropriating and commodifying her writings. Unlike the authors Warren and Brandeis discuss, however, Wharton chose to publish her works, and the property value of her books—as items that “[a]ny one walking along the streets might go into any bookshop” and buy<sup>179</sup>—was fundamentally important to her identity as a professional author.

Wharton's anxiety about the reader's commodification instead concerns a different kind of appropriation, which Warren and Brandeis do not engage in their argument but which captured Wharton's attention. Someone can possess a literary work either by owning its copyright and exercising property rights over it (or by exercising such rights in the absence of copyright ownership, as in the cases Warren and Brandeis discuss), or by imaginatively appropriating it.<sup>180</sup> In her autobiography, Wharton temporarily conflates these two kinds of possession but underscores her concern with the latter: “If one has . . . sold one's wares in the open market, one has sold to the purchasers the right to think what they choose about one's books.”<sup>181</sup> Wharton's expansive sense of privacy, which hinges on the needs of the interdependent self rather than the right to be left alone, suggests why she would be acutely sensitivity to readers' thoughts about her books. Much as she herself absorbed other literary works, readers imaginatively possess Wharton's fiction. There are, of course, different ways to do so, and her complaints about the literary marketplace imply that she scorned the appropriation of a particular kind of audience—superficially curious and derisive gossipers—but welcomed readers who would instead be invested and sympathetic partners.

### B. *An Ambivalent Welcome: Literary Intimacy*

For Wharton, the threat of publishing for readers who would indifferently treat her works as commodities was always accompanied by the possibility of literary intimacy, and her denunciation of her audience ambivalently coexists with appeals to us to serve as intimate co-creators of her novels. Her most

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178. See Warren & Brandeis, *supra* note 3, at 198-200.

179. WHARTON, A BACKWARD GLANCE, *supra* note 148, at 113.

180. See, e.g., THOMAS, *supra* note 10, at 79. The distinction between idea and expression has long been central to Anglo-American copyright law. Readers may not use the author's expressions as their own, but they are welcome to appropriate the ideas within books. As Martha Woodmansee has noted, Johann Gottlieb Fichte wrote in the late eighteenth century that while the material book belongs to the reader upon purchase and the form in which ideas are presented remains the property of the author, the ideas themselves become the common property of author and reader. See MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 51 (1994). See also MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 143-45 (1993) (exploring how the distinction in copyright law between idea and expression might relate to privacy).

181. WHARTON, A BACKWARD GLANCE, *supra* note 148, at 212.

damning indictment, which appears in the aptly titled *Vice of Reading*, also serves as her greatest tribute to the reader's participation. She criticizes mechanical readers who do not engage their inner selves and therefore fail to alter the book in their absorption of it. "What is reading, in the last analysis," she questions, "but an interchange of thought between writer and reader?"<sup>182</sup> The gravest offense a reader can commit, she insists, is to lack a "point of contact with the author's mind."<sup>183</sup> If Wharton worries that her audience will read to its own ends and change her texts in a way she does not condone (e.g., picking out "society column" regulars), she also fears that it will not be invested enough in her works to transform them. The key to reconciling these positions, it would appear, is intimacy—we must reshape the texts through the close relationship we develop with them and their creator.

Even as Wharton gestures to spaces in her novels we are seemingly excluded from, she invites us to construct characters' consciousnesses and information that lies beyond the novels' pages. If we invest ourselves in her fiction, she intimates, we can imaginatively appropriate it in a way that enables the story and characters to inhabit our minds as well as hers. While her autobiographical writings forge a private self that depends on our imagined presence but ultimately keeps us at a distance, her fictional works include us in the construction of privacy even as they resist certain kinds of participation. As she wrote in the introduction to her ghost stories, "I was conscious of a common medium between myself and my readers, of their meeting me half way among primeval shadows, and filling in the gaps in my narrative with sensations and divinations akin to my own."<sup>184</sup> Although the primeval shadows are the unique province of ghost stories, this quote is deeply informative about all of Wharton's fiction. The gaps in her narrative can signal resistance to the reader, but they can also signal a privacy that is meant to be "filled in" by our sensations, commingling with her own. The narrator of *Ethan Frome* tells us, "I had the sense that the deeper meaning of the story was in the gaps."<sup>185</sup> This is generally true in Wharton's stories—she guides us to the gaps and then, while telling us we cannot proceed any further, demands our active participation to imbue her fiction with meaning.

This ambivalent welcome applies particularly to Wharton's delineation of characters' consciousnesses, for she seems to protect her characters' privacy through both concealment and the mutual construction of a character's personality by author and reader. Discussing *The House of Mirth*, Ruth Bernard Yeazell argues that Wharton "takes advantage of the possibilities of fiction: insisting that in Lily Bart's world only appearances count, she nonetheless

182. Edith Wharton, *The Vice of Reading*, 177 N. AM. REV. 513, 513 (1903).

183. *Id.* at 516.

184. See CANDACE WAID, EDITH WHARTON'S LETTERS FROM THE UNDERWORLD: FICTIONS OF WOMEN AND WRITING 176 (1991) (quoting Wharton).

185. WHARTON, *ETHAN FROME*, *supra* note 157, at 65.

offers us an interior view, the privileged access to another's consciousness that only fiction can provide."<sup>186</sup> Taking issue with this claim, William Modellmog maintains that the novel highlights an "illegible element at the core of Lily's self" and refuses to expose her "to the unimpeded gaze" of readers.<sup>187</sup> Both of these arguments, I believe, overlook a fundamental aspect of the reader's relationship to *The House of Mirth*. Wharton neither freely provides access to Lily's consciousness nor entirely withholds it, because, she suggests, in this novel Lily's consciousness is not autonomous, but rather the outcome of the reader's careful engagement with the text.

At pivotal moments in the novel, Wharton purposefully renders her protagonist's motivations opaque. Noting this, Modellmog insists that Wharton keeps Lily's intentions in burning Bertha's letters indecipherable in order to valorize Lily's private decision.<sup>188</sup> While this is an attractive way to unite character and author, I believe it is a flawed interpretation. Wharton does not dramatize all of Lily's thoughts and emotions in this moment, but she has fostered our intimacy with Lily throughout the novel so that when we reach the boundaries of explicit knowledge, our relationship allows us to enter the private spaces of her mind. Much as Lily realizes that her personality flows into and out of the tender life of her friend's baby, we feel that our consciousnesses are engaged in a dynamic exchange with Lily's. Wharton has insisted on characters' "violate" personalities within her novels, but it is most emphatically the fictional relationship of character and reader that entails the fluid interaction of personalities. We cannot read Lily as an autonomous character; we must read some of ourselves into her, and at the very moments when she is most inscrutable, she is, therefore, in some ways most knowable.

Thus, when Wharton does not fully dramatize Lily's state of mind upon burning Bertha's letters or upon taking chloral before her final night of sleep, she is not valorizing her protagonist's private decision so much as eliciting our private participation. The truth of Lily's life can be realized only through the reader's contribution. This may well make "the real Lily Bart" a different character for each reader; but, Wharton suggests, fiction should have a unique existence in each reader's mind: "If the book enters the reader's mind just as it left the writer's—without any of the additions and modifications inevitably produced by contact with a new body of thought—it has been read to no purpose."<sup>189</sup>

This appeal, like all of Wharton's overtures to her readers, is ultimately self-protecting. If we approximate the negative models of reading she offers in *A Backward Glance* and *The Vice of Reading*, she insists, our superficial

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186. Ruth Bernard Yeazell, *The Conspicuous Wasting of Lily Bart*, 59 *ELH* 713, 731 (1992).

187. Modellmog, *supra* note 84, at 339-40.

188. *Id.* at 355.

189. Wharton, *The Vice of Reading*, *supra* note 182, at 513.

engagement will ensure that we are forever barred from the text's privacy. If, instead, we dedicate ourselves so that our own privacy is at stake, we can surmount the barriers she erects. To truly grasp Wharton's fiction, we must invest ourselves, so that the novel's privacy becomes a matter of mutual understanding. Even as we shape her texts through our engagement, we shape our own minds, for the inverse of her claim is also true. If the reader's mind remains unaltered after engaging a book, the book has been read to no purpose.

## VI. CONCLUSION

Ultimately, Wharton's literary and autobiographical writings challenge the legal definitions of privacy that Warren and Brandeis advance in *The Right to Privacy*, definitions that became increasingly embedded in American law in the later years of Wharton's life. While Warren and Brandeis argue that the individual's independent personality must be protected through being let alone, Wharton insists that personalities are necessarily interdependent and that privacy is always bound up in publicity. For her, the female personality in particular relies on other people, whether through the process of self-objectification or the more affirming give-and-take of intimate relationships. Both the heroines of her novels and the female novelist—Wharton herself—forge their personalities in conjunction with others and value privacy only to the extent that it incorporates publicity. Intimacy and performance are more central to women's experience of privacy, Wharton insists, than being let alone. The right to privacy advanced by Warren and Brandeis therefore inadequately addresses women's needs.

Over the course of the twentieth century, many legal theorists and philosophers have explored the complications of privacy, including its interpersonal dimensions. Privacy is essential to development of human relationships, these scholars argue, and an important end of protecting privacy is facilitating intimacy; different degrees of self-revelation define our various relationships, and privacy allows us to determine the level of intimacy in each relationship.<sup>190</sup> While Wharton's works do not directly address legal theories of

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190. See, e.g., CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970) (arguing that "[i]ntimacy is the sharing of information about one's actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anyone," and that "[b]y conferring this right, privacy creates the moral capital which we spend in friendship and love"); Robert S. Gerstein, *Intimacy and Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY 265, 265 (Ferdinand David Schoeman ed., 1984) (insisting that "intimate relationships simply could not exist if we did not continue to insist on privacy for them"); JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 56 (1992) (maintaining that three "apparently disparate areas [of privacy] are linked by the common denominator of intimacy—privacy's content covers intimate information, access, and decisions"); ROSEN, *supra* note 171, at 8 (claiming that "the intimate relationships on which true knowledge of another person depends need space as well as time [to flourish]: sanctuaries from the gaze of the crowd in which slow mutual self-disclosure is possible"). But see JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 75-77 (1997); Jeffrey H. Reiman,

privacy-as-intimacy, they nonetheless have something to contribute to this discussion. These theorists predominantly contend that privacy must precede intimacy in order to facilitate individual choices about sharing personal information. Wharton inverts their terms and suggests that it is not privacy that facilitates intimacy so much as intimate relationships that facilitate private self-creation. For her, personality does not exist outside of the context of interpersonal relationships—be they intimate relations or simply the awareness in an individual's mind of the audience to which she presents herself. Furthermore, whereas contemporary scholars by and large treat the connection between privacy and intimacy as positive, Wharton insists that the individual's dependence on others can both affirm and diminish the self. She enriches our understanding of the complexity of personality, privacy, and publicity precisely because she resists drawing firm conclusions.

This is why, I believe, Wharton's novels not only make for good reading but also lend us valuable insights into privacy. Her contribution is not expressly legal, and, if anything, she makes the question of the individual's personality and privacy more tangled by arguing that privacy must always be considered in terms of publicity and relationships, and that this can have both positive and negative repercussions. But this, however paradoxical, is her contribution. Literature has room for ambiguities that the law cannot always accommodate, and Wharton's writings productively engage the tension between individual privacy and intimacy, between public theatricality that stunts the development of interiority and public theatricality that can create a private self. What her novels give us, ultimately, is not a definition of privacy or a program for judicial rulings, but rather a more nuanced understanding of the issues. Her complicated portrayals of privacy increase our sensitivity, so that after reading her works we bring an enhanced perspective to some thorny legal debates. Wharton's works continue to resonate today, and they challenge us to think more expansively about privacy nearly one hundred years after the publication of *The House of Mirth*.