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## Book Review [The Unwanted Gaze: The Destruction of Privacy in America]

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## BOOK REVIEW

**The Unwanted Gaze: The Destruction of Privacy in America.** By Jeffrey Rosen. New York, New York: Random House, 2000. Pp. 274. Hardcover. \$24.95.

*Reviewed by Michael Carney\**

While the right of privacy has long played a role in the law, its modern development owes much to the 1890 article by Louis D. Brandeis and Samuel D. Warren in which they characterize it, famously, as the right “to be let alone.”<sup>1</sup> Yet since that time its development has taken a circuitous route through the Constitution in the series of cases, leading to *Roe v. Wade*,<sup>2</sup> in which the Supreme Court, with an inscrutable logic, came to see it as the right to make choices about reproduction. A more promising, and fruitful, line of inquiry is taken by Jeffrey Rosen in his recent book, *The Unwanted Gaze: The Destruction of Privacy in America*.

In his book Rosen develops a conception of privacy as a process of controlling what information we allow others to know about us, revealing more or less depending on the context and the relationship:

Privacy protects us from being misdefined and judged out of context in a world of short attentions spans, a world in which information can easily be confused with knowledge. True knowledge of another person is the culmination of a slow process of mutual revelation. It requires the gradual setting aside of social masks, the incremental building of

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1. Louis D. Brandeis & Samuel D. Warren, *The Right of Privacy*, 4 HARV. L. REV. 193, 195 (1890).

2. 410 U.S. 113 (1973).

trust, which leads to the exchange of personal disclosures.<sup>3</sup>

Sometimes, though, we imprudently or carelessly disclose personal information, or others invade our privacy and obtain that information on their own. The harm depends on the recipient:

When intimate personal information circulates among a small group of people who know us well, its significance can be weighed against other aspects of our personality and character. By contrast, when intimate information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences. . . . [W]hen our reading habits or private e-mails are exposed to strangers, we may be reduced, in the public eye, to nothing more than the most salacious book we once read or the most vulgar joke we once told.<sup>4</sup>

With this conception as his point of departure, Rosen examines privacy in a number of different contexts, from our privacy rights in our personal papers and diaries, to the consequences of employer monitoring of workplace e-mail and Internet use. He then considers how hostile environment sexual harassment law threatens to do more harm than good, aided by amendments to the Federal Rules of Evidence, and he suggests that tort law can better address the harm that hostile environment law seeks to regulate; finally he looks at how privacy on the Internet is eroding, and how that erosion might be mitigated.

In chapter one, Rosen considers how the legal framework that protects basic personal property from search and seizure has eroded, opening up to public scrutiny things that most regard as fundamentally private, one's papers and diaries. The locus of the right to privacy in one's personal effects is the Fourth Amendment to the U.S. Constitution, which provides in part that "persons, houses, papers, and effects" are protected against unreasonable searches and seizures.<sup>5</sup> Historically, the guiding principal regarding privacy in our papers and effects was that "mere evidence" of guilt could not

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

4. *Id.* at 9.

5. U.S. CONST. amend. IV.

be seized by the government in criminal cases; only items clearly related to the criminal behavior, namely fruits, instrumentalities, or contraband, were subject to search and seizure.<sup>6</sup> This principal had been followed in the United States until the Supreme Court, in *Warden v. Hayden*,<sup>7</sup> eliminated the distinction by allowing the seizure of what was formerly “mere evidence.” Now that category is fair game. For example, when Bob Packwood, the senator from Oregon, became embroiled in the ethics investigation concerning sexual advances he had been accused of making towards former employees and lobbyists, his diaries, which he admitted contained entries of the alleged encounters, were subpoenaed as part of the investigation.<sup>8</sup> The humiliation of the disclosure was only compounded when unrelated excerpts were published in the *Washington Post*.<sup>9</sup>

The injury that such disclosures cause, in Rosen’s view, is a “breaching of boundaries: information that might be appropriate to share with friends or acquaintances has been taken out of context and exposed to the world.”<sup>10</sup> The published excerpts had nothing to do with the allegations, but instead concerned his observations on domestic life, food, his favorite supermarket, among other things.<sup>11</sup> Rosen sees the harm here in Packwood being judged by others based on what was intended for personal reflection but had been publicly wrenched out of context. As a remedy to such invasions by the press, Rosen considers the four torts for invasions of privacy familiar to all law students: appropriation of name or likeness, false light, intrusion upon seclusion, and public disclosure of private facts.<sup>12</sup> While the latter two have the most utility in protecting privacy here, that utility is limited since it is a defense to such claims that the matters disclosed are newsworthy.<sup>13</sup> Another barrier Rosen notes is that the publication must be “highly offensive to a reasonable person.” However, given our culture’s taste for the salacious, few could probably agree on what would offend the privacy sensibilities

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6. See ROSEN, *supra* note 3, at 30.

7. 387 U.S. 294 (1967).

8. See ROSEN, *supra* note 3, at 31.

9. See *id.* at 40.

10. *Id.* at 41.

11. See *id.*

12. See *id.* at 45.

13. See *id.* at 48.

of a "reasonable person."<sup>14</sup>

Probably of more immediate interest to many is the subject of the second chapter, the erosion of privacy in the workplace occasioned by employer monitoring of employee e-mail and web browsing. E-mail is especially prone to being taken out of context because of its very nature: it is easy to retrieve and hard to delete, and it lacks the contextual accompaniments of tone, voice, facial expression, and can often be misunderstood unless the recipient has some familiarity with the sender.<sup>15</sup> Further, since it is often written quickly and sent immediately without the opportunity for second thoughts that ordinary mail provides, it may not always be fully accurate.<sup>16</sup>

To understand employers' motivation in monitoring employees' e-mail and web browsing, Rosen examines a number of Supreme Court decisions tracing the evolution of Fourth Amendment interpretation.<sup>17</sup> *Katz v. United States*<sup>18</sup> announced the now-familiar test that the Fourth Amendment protections apply when there is a subjective expectation of privacy that is reasonable.<sup>19</sup> The problem with this formulation, Rosen observes, is that as technology allows increasingly intrusive surveillance, expectations of privacy have diminished, reducing Fourth Amendment protection.<sup>20</sup> This led to *O'Connor v. Ortega*,<sup>21</sup> which held that public employees may have an expectation of privacy in their offices, desks, and file cabinets, but that such expectation "may be reduced by virtue of actual office practices and procedures. . . ."<sup>22</sup> This has had the perverse effect of causing employers to more frequently search private areas of the workplace in order to decrease their employees' expectation of privacy.<sup>23</sup> The lowered expectation of privacy opens the door to increased monitoring. The motive, then, for e-mail and web monitoring is readily apparent: because, as Rosen

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14. See ROSEN, *supra* note 3, at 53.

15. See *id.* at 75.

16. See *id.*

17. See *id.* at 58-63, 71-72.

18. 389 U.S. 347 (1967).

19. See ROSEN, *supra* note 3, at 60.

20. See *id.* at 61.

21. 480 U.S. 709 (1987).

22. ROSEN, *supra* note 3, at 68 (quoting *O'Connor*, 480 U.S. at 717-20).

23. See *id.* at 70.

explains, employers bear the brunt of sexual harassment liability, they have an incentive to reduce exposure by regularly monitoring e-mail and web browsing in order to identify and eliminate communications that might contribute to “hostile environment” sexual harassment liability.<sup>24</sup>

What is lost, Rosen contends, is the “backstage” area where employees can relax, joke, and interact informally free from official scrutiny.<sup>25</sup> Pointing out that a good deal of workers’ e-mail is unrelated to work, Rosen suggests that companies and universities could recapture some of the privacy lost by setting aside e-mail accounts and network areas to host backstage interaction free from monitoring unless there was cause to suspect misconduct.<sup>26</sup>

The centerpiece of the book is Rosen’s analysis, in the third chapter, of sexual harassment law and the consequences it has had on privacy. The roots of sexual harassment law are found in Title VII of the Civil Rights Act of 1964, which makes it illegal to, among other things, “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>27</sup> From this, two forms of sexual harassment have been recognized: *quid pro quo*, encompassing the “sleep with me or you’re fired” threat,<sup>28</sup> and hostile environment. The hostile environment test was first endorsed by the Supreme Court in *Meritor Savings Bank v. Vinson*<sup>29</sup> and addresses itself towards “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” that “has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.”<sup>30</sup>

Rosen believes that the hostile environment test blurs “the boundaries between public and private spheres”:

By allowing women (or men) to complain about any sexually oriented speech or conduct that they found

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24. See *id.* at 79-80.

25. See *id.* at 89.

26. See *id.* at 90.

27. *Id.* at 95 (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)).

28. See ROSEN, *supra* note 3, at 13.

29. 477 U.S. 57 (1986).

30. ROSEN, *supra* note 3, at 13 (quoting *Meritor Savings Bank*, 477 U.S. at 65).

hostile or abusive, the new test allowed aggrieved coworkers to object to overheard jokes and to e-mail, suggestive pictures, or even their colleagues' consensual flirtation, even if the men in question never intended their conduct to be offensive, and the woman to whom the conduct was directed didn't perceive it as offensive.<sup>31</sup>

This problem is especially acute in cases involving consensual sexual relationships between supervisors and employees. One example Rosen discusses is a suit brought by a former editor at *Spin* magazine who sued its publisher, Bob Guccione, Jr., for sexual favoritism, alleging that he passed her over for promotion in favor of women in the workplace who slept or flirted with him.<sup>32</sup> This led to invasive investigations into the private lives of a number of women whom the plaintiff said had been favored, as she attempted to explain promotions and assignments by reference to the sexual dynamic of the workplace.<sup>33</sup>

The result is that a body of law intended to protect the privacy and dignity of men and women has had the effect of invading the privacy of innocent third parties.<sup>34</sup> Given the inherently vague nature of the hostile environment test, reasonable persons will disagree whether a pattern of conduct in the workplace rises to the level of discrimination, especially where there really are no tangible employment consequences to point to.<sup>35</sup> The solution, Rosen argues, is to eliminate the hostile environment test in favor of the invasion of privacy torts. He explains that certain behavior and speech, while perhaps offensive, are not properly regulated by sexual harassment law, since they threaten no retaliation, nor change the terms and conditions of employment.<sup>36</sup> It is simply boorish. Such behavior—"unwanted advances, suggestive looks and gestures, sexual joking and teasing, and the display of sexually explicit material"—is better understood as an invasion of privacy.<sup>37</sup>

Yet there appears to be a lacuna in Rosen's argument here: while the invasions of privacy he discusses throughout

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31. *Id.* at 107.

32. *See id.* at 91.

33. *See id.* at 91-92.

34. *See id.* at 94.

35. *See id.* at 101-02, 112-13.

36. *See ROSEN, supra* note 3, at 112-13.

37. *See id.* at 112-13, 115.

the book concern information that we generate which is either taken from us (as by legally compelled production of our papers or e-mail or information about our sexual habits) or which we freely give but then is used by others (as when our web browsing records are used for targeted advertising), it is nevertheless information that we have created, and in that sense it is accurate. When we are then judged out of context on that basis, Rosen's conception shows its explanatory utility: something true about us is distorted, overblown, and while true, nevertheless misrepresents us; our privacy is indeed invaded. However, when we are subjected to boorish behavior, the information that is taken out of context does not originate with us, rather, it is *attributed* to us and we have nothing to do with its creation. Being subjected to unwanted sexual banter or coarse humor, for example, at worse means that someone might think we appreciate it or do the same ourselves. Thus, it is difficult to see how, on Rosen's view of privacy, there can be any invasion of privacy from merely boorish behavior: while being judged out of context may be injurious, the harm is only to one's dignity and not to one's privacy because the information upon which such judgment is made is not ours.

Nevertheless, where the conduct in question does invade privacy, Rosen makes a good case for the relative benefits of the "tort versus hostile environment" approach. In particular, the invasive discovery and investigation that hostile environment litigation engenders would be limited, because the torts focus on harm to the individual making it difficult for third parties to object to sexual jokes, banter, and distasteful postings.<sup>38</sup> The requirement that the conduct be "highly offensive" to a reasonable person would tend to weed out boorish behavior from actionable conduct.<sup>39</sup> Most important, the tort model places responsibility on the perpetrator, not the employer, removing a considerable incentive to litigation, and allowing a concomitant decrease in employer monitoring.<sup>40</sup> Rosen argues that this would restore the balance between privacy and transparency in the workplace, allowing the private spaces that workers need to

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38. *See id.* at 121.

39. *See id.* at 120.

40. *See id.* at 122.

express themselves and relax to be reconstructed.<sup>41</sup>

It can be questioned whether Rosen's suggested shift away from the hostile environment theory of sexual harassment towards a tort regime has any more than a theoretical appeal. Employers would welcome the reduction in liability exposure, yet the opposing interests of potential litigants and the plaintiff's bar might prove that trimming Title VII (also known as the "Lawyers Full Employment Act") in such a way is more easily done in the abstract. But these are political issues that really have no bearing on the analytical merit of Rosen's proposal. Further, while Rosen's proposal seems to leave an entire class of litigants without a ready legal remedy—those who cannot prove *quid pro quo* harassment or tortious invasion of privacy—there should be no mistake that Rosen's proposal is better than the alternative: the remedy for boorish behavior is social disapproval, not litigation that invades rather than protects privacy.

Facilitating the invasions of privacy caused by the hostile environment theory of sexual harassment are amendments to the Federal Rules of Evidence allowing evidence of personal sexual history to be admissible in cases involving sexual harassment. In chapter four Rosen describes how, traditionally, the rules of evidence did not allow admission of evidence of an accused's sexual past, which was seen as too prejudicial, yet at the same time allowed admission of evidence of the accuser's past as evidence of consent.<sup>42</sup> To counter the perceived unfairness of allowing inquiry into the accused's sexual past without allowing inquiry into the accuser's, the rules were amended.<sup>43</sup> The amendments, however, eventually effected a complete reversal of the traditional rules, opening inquiry into the accused's past while closing inquiry as to the accuser.<sup>44</sup>

For instance, Rosen argues that Paula Jones's sexual harassment suit against President Bill Clinton shows how a legally questionable allegation of harassment can, through the rules of evidence, invade the privacy of innocent third

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41. See *id.* at 122-23.

42. See ROSEN, *supra* note 3, at 133.

43. See *id.*

44. See *id.* at 134, 136.

parties.<sup>45</sup> In the suit, Jones had alleged that Clinton granted employment benefits to women who succumbed to his advances while denying benefits to her because she rejected his advances.<sup>46</sup> In order to prove this her lawyers sought certain information about all the women with whom Clinton had “sexual relations” leading up to the alleged hotel exposure.<sup>47</sup> Among those women was Monica Lewinsky, whose plight later played out notoriously in the Kenneth Starr investigation. Rosen believes that the violations of Lewinsky’s privacy could have been avoided had Jones instead sued Clinton for invasion of privacy, which he contends would have been summarily dismissed. Even if it had not, discovery would have been more narrow and less invasive, focusing on Clinton’s treatment of Jones, and not third parties.<sup>48</sup> Ultimately, Rosen suggests, the privacy of the accused should be brought back into balance by amending the Federal Rules of Evidence to give accused harassers the same protections as their accusers.<sup>49</sup>

The last chapter shifts away from sexual harassment law to examine the loss of privacy on the Internet, while considering the ways our electronic privacy might be rebuilt. Rosen illustrates just how serious the consequences of this loss of privacy can be through the example of the dean of the Harvard Divinity School who was forced out of his position once it was discovered that he had downloaded pornography from the Internet onto his home computer.<sup>50</sup> Previously, the dean had requested that a university computer with greater memory be brought to his home, and while the Harvard technician was transferring files from the dean’s home computer to the new one, the technician noticed that the dean had saved thousands of pornographic pictures.<sup>51</sup> Even though the downloading was done at home on his home computer, once this information became public, the university asked

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45. *See id.* at 150. The suit grew out of Clinton allegedly exposing himself to Jones; later the complaint was amended to add an allegation of contact bringing it within the scope of a “sexual assault” under the new Federal Rule of Evidence 415; thus, opening up Clinton’s sexual past. *See id.* at 130-31.

46. *See id.* at 150.

47. *See id.* at 151.

48. *See* ROSEN, *supra* note 3, at 154.

49. *See id.* at 155.

50. *See id.* at 159.

51. *See id.*

him to resign.

Rather than being a wholly private activity, Rosen explains that the dean's case demonstrates how public our Internet reading habits have become, since anyone with access to our computer (especially in educational and workplace settings) can simply review our computer caches, Internet history files, and cookies.<sup>52</sup> The greatest threat to Internet privacy, Rosen believes, comes from the "electronic footprints" we leave as we search and browse the web, leading, for example, to "the unsettling experience some Internet users have had of being bombarded with targeted ads after expressing an interest in a particular topic."<sup>53</sup> As this information is amassed and recorded, the danger of it being taken out of context increases.<sup>54</sup> The solution, Rosen argues, lies in technologies such as the various modes of e-mail encryption<sup>55</sup> and web browsing anonymity providers, some of which are unable, by design, to link users with their data streams.<sup>56</sup> Where issues of authentication arise, in shopping for example, rather than indiscriminately disclosing information, Rosen suggests that digital certificates could conceal our ultimate identity while revealing sufficient, selected authenticating information.<sup>57</sup> Rosen believes that these technologies, and not the law, are the most promising way to protect online privacy, since legislative attempts have largely languished due to the opposition of corporate marketers, insurers, law enforcement, and health care interests.<sup>58</sup>

Rosen concludes with an examination of the consequences the erosion of privacy has in the political, social, and personal spheres. In the political sphere, the loss of privacy occasioned when political differences are fought through the "revelation, investigation and prosecution" of individuals, inhibits deliberation and fosters partisan

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52. See *id.* at 161.

53. *Id.* at 163.

54. See ROSEN, *supra* note 3, at 194.

55. See, e.g., *id.* at 173-74.

56. See, e.g., *id.* at 173-77. The president of Anonymizer.com told Rosen that "Our strategy is to be technologically unable to cooperate with subpoenas." *Id.* at 175.

57. See *id.* at 177-79.

58. See *id.* at 170-71.

extremism.<sup>59</sup> In the social sphere, such as public and private workplaces, surveillance and monitoring increase anxiety and lower productivity, while injuring personal dignity.<sup>60</sup> And in the personal sphere, our ability to form intimate relationships is compromised when we lose the ability to control the disclosure of personal information.<sup>61</sup>

Rosen's work is wide ranging and provides a thoughtful analysis of privacy from a number of different perspectives, both legal and non-legal. His conception of privacy as a regulation of personal information allows him to show that privacy concerns more than the right "to be let alone"; it plays an important role in how we shape our identities and relationships.

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59. *See id.* 210-12.

60. *See* ROSEN, *supra* note 3, at 212-15.

61. *See id.* at 215-16.

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