BOOK REVIEW

THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA

BY JEFFREY ROSEN

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Reviewed by William T. Bogaert[*]

Monica Lewinsky, Senator Robert Packwood and Supreme Court Justice Clarence Thomas do not resonate in the public's mind as victims, yet each has suffered a violation of their privacy. Each has been misdefined and judged out of context by strangers who have formulated notions of who these people are based solely upon bits and pieces of scandalous information and without any understanding of their full personalities and characters. This is one of the points Jeffrey Rosen makes in his thoughtful and far-reaching discussion of the legal, technological, and cultural developments that have led to what he laments as the destruction of privacy in America. For Rosen, privacy allows us to control what personal information is communicated to others and enables us to prevent small pieces of deeply personal information from being communicated out of context to strangers who then misjudge our personality and character. In his discussion of Lewinsky, Packwood, and Thomas, Rosen examines how changing legal standards permitted the required production and examination of intensely personal information. Once disseminated by the press, often in one-minute sound bites, this information permanently colored the public's perception of the character of these individuals. As Rosen notes, Justice Thomas will forever be remembered by the public, less for the opinions he authors on the nation's highest court, than for crude and sexist remarks he allegedly made to a former colleague.

While Rosen's use of high profile cases effectively illustrates the extent to which legal and technological developments have permitted an erosion of privacy, he is

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primarily concerned about the loss of privacy ordinary citizens have suffered. Rosen examines the erosion of privacy, at home, at work, and in cyberspace, detailing how intimate personal information is increasingly vulnerable to unintended disclosure, appropriation, and misuse. Rosen explores how the evolution of legal precedent and the development of technological innovations now permit the access of personal information which only decades ago would have been protected from disclosure.

Rosen's notion of privacy in *The Unwanted Gaze* is informed largely by eighteenth century norms of privacy. Indeed, the notion of privacy which forms the core of the book's analysis is drawn from an 1890 *Harvard Law Review* article authored by Louis D. Brandeis, the future Supreme Court Justice, and his law partner, Samuel D. Warren. For Brandeis and Warren, as for Rosen, privacy respects the rights of the "inviolate personality" and encompasses the "right to be left alone." According to Rosen, privacy matters because "[it] protects people from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge." As he explains, "true knowledge of another person is the culmination of a slow process of mutual revelation," which generally requires "the incremental building of trust" leading to the "exchange of personal disclosures." We are more likely to share our fantasies, fears and prejudices with those we know well and trust. We do so because such intimate disclosures made to those who truly know us well, will be considered in the context of their understanding of our entire character and personality. When these disclosures are removed from their personal context and revealed to strangers, however, we are subject to being misjudged and known by our most embarrassing thoughts or deeds without an appreciation for the totality of our character. Rosen warns that, as we increasingly expose our views and thoughts through e-mail, chat-rooms, on-line shopping and the like, we risk losing control of how we are perceived through the piecemeal dissemination of fragmentary personal information taken and received out of context.

The Unwanted Gaze excels in its concise yet scholarly review of the evolution of legal doctrine which, until the middle of this century, safeguarded a person's thoughts, sexual activities and private papers from involuntary disclosure. The genesis of Rosen's book was Special Prosecutor Kenneth Starr's January 1998 investigation into President Clinton's alleged false testimony regarding Clinton's alleged adulterous affair. Rosen set out to examine how Paula Jones' lawyers were permitted, through the use of discovery in a civil law suit, to delve into the details of the President's sex life, based merely on Jones' allegation of an unwanted sexual advance by Clinton. Rosen examines the intrusive impact of this "fishing expedition" on the privacy of others who were not parties to the civil case, especially Monica Lewinsky. Lewinsky was compelled to describe under oath her consensual sexual relations with the President. Moreover, during his investigation, Starr was subsequently able not only to subpoena a bookstore where Lewinsky shopped and obtain records of her book purchases, but was also permitted to seize Lewinsky's home computer and retrieve from its hard drive e-mails and love letters she had written to the President but never sent. These letters were attached as an

exhibit to Starr's report to Congress and later released to the public. In Rosen's view, these pervasive inquiries, fully sanctioned by the legal process, into such personal matters as one's sexual activities, personal writings, and book purchases represent an unreasonable search far more invasive than the original alleged offense. Once, this was the commonly shared view. In the late eighteenth century it was generally agreed that the Fourth and Fifth Amendments prohibited prosecutors from seizing and reading a person's private papers in the hope of securing evidence of a crime. Similarly, in civil actions, it was well settled that the common law protected an individual's diaries, financial records, and private papers from involuntary disclosure thus securing the individual's ability to determine whether, and to what extent, his thoughts would be revealed to others.

Constitutional protections for private papers and diaries have over time been eviscerated, Rosen explains, largely as a result of the effort to eradicate white-collar crime. More invasive searches were permitted to allow government agents to obtain corporate records from criminal suspects who otherwise refused to turn them over. As part of this effort, the New Deal Supreme Court held that the Fifth Amendment did not prohibit the subpoena and required production of business records, even if they were incriminating, in circumstances where government regulations required companies to keep such records. As Rosen notes with irony, it was the Warren and Burger Courts that created the greatest threat of innocent persons' involuntary disclosure of their private information by dramatically expanding the right of the police to engage in intrusive searches. After the adoption of the "exclusionary rule" which held that information obtained from unconstitutional searches was inadmissible in criminal trials, the Court subsequently narrowed the definition of unconstitutional searches to exclude certain intrusive activities such as bugging witnesses, rummaging through trash cans, and high-tech spying. As Rosen explains, simultaneously with narrowing the scope of unconstitutional searches and seizures, the Court expanded the possible objects of permissible warrants and subpoenas to include not only the "fruits" of criminal activity, but documents and objects providing "mere evidence" that such activity occurred. Commenting on this winnowing of constitutional protections, Rosen states wryly that "any society that ties its privacy to the rights of the accused is a society in which the legal protections for privacy will quickly evaporate."

According to Rosen, the Warren and Burger Courts recognized that technological advances enabled police officers to conduct searches or seize evidence while avoiding a "physical intrusion" upon the individual involved, such as occurs in a wiretapping. The Court held that constitutional protection from this type of surveillance existed only where a person had an actual or subjective expectation of privacy in the speech or conduct being observed. Importantly, the Court determined that this expectation of privacy had to be reasonable based on societal standards. While initially hailed as a victory for privacy, the Courts later held that a person relinquishes all reasonable expectations of privacy in information that is shared with other people.

Rosen believes that this waiver of privacy is premised upon a fundamental misunderstanding of human relationships. Such a view fails to recognize that

people frequently reveal certain private information in one context and expect to conceal that same information in other contexts. Rosen argues that information obtained from an individual for a particular purpose should not be disclosed for another purpose without that individual's consent. While Rosen is undoubtedly correct regarding the public's expectation of privacy relating to the belief and desire of an individual's control over the disclosure of confidential information to selective trusted confidants, he fails to acknowledge, much less take into account, the pervasiveness of the waiver of privacy rule or its importance for the orderly enforcement of justice. For example, it is generally held that a person's confidential communications with her attorney are waived once they are revealed to a third party. Such a rule most likely is at odds with societal expectations of privacy yet clearly this rule fosters consistency of results in legal disputes by not requiring the courts to determine the client's subjective expectation of privacy in the privileged information which has been disclosed.

Current legal standards, especially when coupled with recent technological advances, afford the government an almost unchecked ability to pry into the lives of its citizens. As an example, Rosen discusses the plight of Catherine Allday Davis. Davis, Lewinsky's best friend, had corresponded with her via e-mail during Lewinsky's affair with Clinton. As a result, Starr lawfully seized Davis' computer as part of his investigation. E-mails that Davis had deleted in an effort to protect her privacy were restored by the Special Prosecutor and made exhibits to Starr's report to Congress. One deleted e-mail included as an exhibit contained an intimately personal account by Davis of her recent honeymoon.

The most thought-provoking aspect of *The Unwanted Gaze* is Rosen's discussion of the impact that sexual harassment law has had on privacy in the work place. While he is firmly opposed to "quid pro quo," that is, sleep-with-me-or-you're-fired sexual harassment, Rosen is troubled by the "hostile working environment" theory of sexual harassment as gender discrimination. "Hostile working environment" harassment occurs when offensive words or actions demeaning to an employee because of her gender become "sufficiently severe or pervasive" within a workplace to alter the conditions of employment. Under this legal standard of harassment, it is the employer and not the individual perpetrator who faces liability for monetary damages. As a result employers have considerable incentive to monitor their employees' speech, actions and electronic communications. Many companies, large and small, have instituted computer surveillance policies intended to ensure that an actionable work environment is not created by employees' transmission and receipt of crude jokes via e-mail or their viewing of pornography on the Internet. In so doing, employers purposefully attempt to diminish any expectation that their employees might have that such communications are private or confidential. In addition to the rise in employer surveillance, evidentiary rules in sexual harassment cases may also serve to increase the intrusion into employees' privacy. Such rules severely restrict inquiry into the accuser's sexual history while permitting extensive inquiry into the sexual activities of the accused. Often, extensive inquiry may be made into the sexual history or activities of persons who are not parties to the harassment action. For example, co-workers may be forced to

reveal intimate relationships with fellow workers. All of which leads Rosen to conclude that "hostile environment" sexual harassment law raises serious privacy issues "which threaten values of free expression" within the workplace.

Rosen questions whether many instances of "hostile environment" harassment are really gender discrimination. Rather, he suggests that the real harm suffered by a woman who is subjected to unwanted advances or crude e-mails and jokes in the work place is an invasion of her privacy: she is "being objectified and simplified and judged out of context." Accordingly, Rosen suggests that "hostile environment" liability be replaced by an expanded right of employees to sue co-workers for violations of the employees' privacy rights. As Rosen explains, "[s]ince invasion of privacy law focuses on speech targeted at a particular woman that has the purpose or effect of insulting or humiliating her," replacing existing "hostile environment" liability with employee claims of privacy violations would properly place the blame on perpetrators, not employers, and would make it more difficult for employees to bring suits against employers for more minor abuses. Rosen believes that, as a result, communication in the workplace would be freer and employers would no longer have an incentive to so carefully scrutinize the speech and conduct of their employees.

While Rosen's proposed tort remedy for privacy violations could alleviate employers' fear of "hostile environment" liability, it is less clear that employers would then allow employees to "reconstruct private spaces inside and outside the workplace, in which employees can express themselves with out fear of being monitored and observed." Rosen fails to consider the other factors, such as trade secret protection or productivity concerns, which provide alternative incentives for employers to monitor their employees' communications and conduct. It is also doubtful that the adoption of a privacy tort remedy would result in fewer lawsuits or less intrusion into the lives of third parties. In this regard Rosen seems to have forgotten his earlier observation of the trend in legal standards permitting more invasive searches and discovery. He also fails to acknowledge the trend in the civil courts to allow generally expansive discovery of any matter that might lead to the discovery of admissible evidence. It is not apparent that replacing one cause of action for another would narrow the scope of permissible discovery, even if the new cause of action is couched in terms of privacy.

In one of his final observations, Rosen notes that "cyberspace has altered the traditional private areas in which we can retreat from observation and expectation of our employers and colleagues." Although the right to read and write anonymously "has played a central role in the history of free expression in American," consider the role of *The Federalist Papers,* for example. This right has been greatly abridged by use - largely voluntary use - of the Internet. Individuals may believe that through the use of passwords and monikers, the Internet offers privacy through anonymity and greater freedom of communication. However, such beliefs are misplaced. As Rosen notes, "nearly everything we read, write, browse and buy" on-line leaves "electronic footprints which can be traced back to us revealing detailed patterns concerning our tastes, preferences and intimate thoughts." Not only can companies compile this personal information as part of

their marketing efforts, but also anyone who has the technological know-how can access and publicize it. Of course, once such information has been misappropriated and made public, technological know-how is no longer necessary for it to be disseminated to recipients unintended by web user. As Rosen warns, one danger of the Internet is that fragments of personal information taken from website visits, chat–rooms or e-mails may be used out of context to brand us as what we are not.

Rosen argues that fundamental changes in the Internet's architecture are needed to protect users' privacy and he believes that technology is available to curb some cyberspace intrusions. For example, copyright management systems can protect anonymous on-line reading and the use of untraceable digital cash could permit anonymous on-line shopping. However, the implementation of such ideas has failed to resonate with either Congress or the public. In contrast to the absence of popular support for government regulation of the collection and dissemination of individuals' personal information in cyberspace, businesses actively oppose restrictions on their ability to profit through the collection and use of personal information.

In the absence of regulatory protections, Rosen suggests that individuals will be able to restore and preserve their privacy on the Internet through the purchase and use of encryption software. This muted optimism, however, begs the larger question of whether citizens in a free society should need to purchase software in order to protect their privacy. Moreover, placing our hope for privacy in technological innovations fails to recognize that, so long as the financial incentives and cultural indifference persists, technological advances allowing greater surveillance and intrusion will always prevail. Any protection that technological advances afford is merely temporary. Rosen fails to explain the apparent lack of concern evident amongst the Internet-using public. Perhaps that is because while technological developments have made the sophisticated collection of an individual's preferences easier to obtain, it may not significantly differ from pre-Internet compilation of customer lists. Are Internet purchases really more revealing than a store purchase with a personal check?

What is further left unanswered by *The Unwanted Gaze* is whether the erosion of privacy it so ably chronicles matters to the general public as much as it does to Rosen. Perhaps Rosen's notion of privacy drawing as it does on eighteenth-century cultural values fails to resonate in our contemporary voyeuristic culture. Or maybe Rosen's fear that our most intimate thoughts and actions are susceptible to uninvited disclosure appears to most law-abiding people to be an unlikely occurrence. Regardless, Rosen's concern that the erosion of such privacy due to the unwanted disclosure either by the state or through technology will lead to decreased intimacy appears to be unfounded and there is little impetus to check the forces which make such intrusions possible.

At its best, *The Unwanted Gaze* is a thought-provoking analysis of the technological, societal and legal forces that have eroded the right to an "inviolate personality." While the reader may have a vague awareness of this erosion and intimations of the dangers therefrom, Rosen traces for the reader the various complex and intermingled forces at work. While Rosen is less persuasive in his

proposed remedies to curbing the destruction of privacy, he provides the reader with a valuable and stimulating account of what he believes to be a far-reaching societal harm, and any shortfall in terms of solutions may merely be reflective of the difficulty of the problem envisioned.