

## SYMPOSIUM

### The Wanted Gaze: Accountability for Interpersonal Conduct at Work

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#### INTRODUCTION

I would like to make two points by way of comment on Jeffrey Rosen's book, *The Unwanted Gaze: The Destruction of Privacy in America*.<sup>1</sup> The first point is that the destruction of privacy in America is threatened by "wanted" as well as "unwanted gazes."<sup>2</sup> The second point is that in the context of the workplace, accountability for interpersonal conduct justifies subjecting employees to unwanted gazes.

#### I. OUR VOLUNTARISM

In the United States today, it is common to think of privacy as a good thing, both for individuals and for society. Americans think of privacy as connected to dignity, freedom, and good government. But is it also common to think that privacy is something that individuals may forego at will. Privacy rights conferred by social norms and law are, for the most part, deemed waivable and commercially alienable. Thus, if someone chooses to sit in front of her window reading or watching television all day where she can be observed by others, we have no grounds for concern or complaint about her privacy-waiving conduct.

Similarly, we have no grounds for concern or complaint if curious neighbors exploit privacy waivers and observe one another sitting in front of their open windows. We tolerate commercial alienability of privacy as well as uncompensated waivers: One is permitted to sell to a publishing firm an article in which one reveals intimacies that are otherwise protected by the intrusion or public disclosure tort<sup>3</sup> and the Fifth Amendment;<sup>4</sup> one can work in what is euphemistically called the "adult entertainment" industry as a dancer or actor, revealing

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

2. Cf. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999) (arguing that if Americans lose their taste for privacy and their expectations of privacy, the consequences for liberal democracy may be dire).

3. The common law of privacy recognizes four basic privacy rights, first distinguished in William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). The four are rights against (1) intrusion upon seclusion, province of the "intrusion" tort; (2) publication of embarrassing private facts, province of the "public disclosure" tort; (3) publicity placing a person in a false light; and (4) appropriation of name, likeness, and identity. See RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977) (incorporating Prosser's basic four-fold analysis).

4. U.S. CONST. amend. V ("[N]or shall any person . . . be compelled in any criminal case to be a witness against himself.").

parts of the body and intimacies that strangers would otherwise see only if they were trespassers or peeping toms. The optional, waivable, and alienable character of privacy is reflected in current thinking about the new economy as well. We seem to think that privacy is well protected in cyberspace so long as e-businesses post privacy policies and more or less stick to them; it is left to the consumer to decide how much information to give, share, sell, or simply leave unsecured.

Our prevailing conception of privacy is thus voluntarist. We have a right to give up privacy if we want to and a duty to respect the privacy other people want, but we have no duty to be private or to respect the privacy people do not want. We believe privacy is respected by our society, even if individuals choose to waive and alienate much of their privacy, so long as their acts of waiver or alienation are fully consensual and informed.

## II. NONVOLUNTARISM IN TRADITIONAL JEWISH LAW

According to two recent interpreters, Jeffrey Rosen and Wendy Shalit, the conceptions of privacy reflected in medieval and traditional Jewish law have relevance for secular America today. Rosen's and Shalit's claims of contemporary relevance are striking because the conceptions of privacy they attribute to the Jewish tradition are distinctly nonvoluntarist. Could it be that Jewish law is an implicit critique of contemporary U.S. voluntarism? Could it be that the dominant, voluntarist conception of privacy is too dominant? Answering in the affirmative to these two questions, Shalit employs Jewish law precisely to criticize U.S. voluntarism. By contrast, Rosen employs Jewish law as persuasive authority for robust privacy protection in contemporary America. Yielding to modern libertarian impulses, Rosen falls short of embracing the nonvoluntarist dimension of the Jewish law he cites.

In her book, *A Return to Modesty: Discovering the Lost Virtue*,<sup>5</sup> Wendy Shalit invokes Jewish law prohibiting exposure of the intimate to develop a criticism of contemporary American culture. Shalit reports becoming interested in traditions of sexual modesty after seeing an old photograph in which a young Jewish couple stood side by side, but without touching or looking at one another.<sup>6</sup> The Jewish law of *tzniut* required that the body of an unmarried woman remain unseen and untouched, even by her fiancé.<sup>7</sup> Respect for a woman requires that she not be subjected to (or treated to!) physical intimacy, even if she herself desires a lover's touch. Again, privacy cannot be waived.

Wendy Shalit's book is so provocative and curious precisely because it goes against the mainstream of privacy voluntarism. Shalit argues for the resurrection of sexual modesty, defined as premarital virginity and chastity, as a respected virtue for women. Shalit, a twenty-something, upper middle class, college-educated, self-described feminist, wants young women to want modesty (for

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5. WENDY SHALIT, *A RETURN TO MODESTY: DISCOVERING THE LOST VIRTUE* (2000).

6. *Id.* at 3.

7. *Id.*

moral and prudential reasons) and wants parents and others to impose rules and expectations consistent with sexual modesty. Shalit believes, in effect, that norms mandating unwanted privacy are a good thing. At least in the moral domain, privacy should not be deemed wholly optional and voluntary.

In *The Unwanted Gaze*, Jeffrey Rosen describes a concept from Jewish law, *hezzek re'iyah*, defined as the injury caused by seeing or the injury caused by being seen.<sup>8</sup> According to Rosen, under traditional Jewish law it was an offense to individuals and their community to observe others' intimacies: " 'To whatever extent the unwanted gaze establishes its sway [over the private domain of another], there is injury, because the damage caused by the gaze has no measure.' "<sup>9</sup> Moreover, under medieval Jewish law it was also an offense to cause or permit one's own intimacies to be observed. Thus, "a window overlooking a common courtyard had to be removed, even if the individual whose privacy was violated failed to protest."<sup>10</sup> Although the Jewish law recognized the individual's power to waive or alienate ordinary rights of property, the individual lacked the power to waive or alienate certain rights of privacy. As Rosen explains, "[O]ne is not permitted to 'breach the fences of Israel' or act immodestly so as to cause the Divine presence (Shekhinah) to depart from Israel."<sup>11</sup> Some forms of privacy cannot be waived or alienated because at stake in losses of such privacy is even more than individuals' "constricted lives"<sup>12</sup> or loss of freedom of speech, conduct, and self-definition. The integrity of the community itself is at stake.

Combining Rosen's and Shalit's observations, we learn that in Jewish law it was a wrong, first, to invade others' privacy and, second, to be indifferent about one's own privacy or to be an exhibitionist. The laws of *hezzek re'iyah* and *tzniut* define a moral tradition of thinking about privacy that is nonvoluntarist. The Jewish tradition was nonvoluntarist in the sense that, more pervasively than in contemporary U.S. culture, whether privacy norms have been violated does not depend upon the will, wishes, or preferences of the individuals whose privacies have been exposed. Persons are morally powerless to waive or alienate certain of their own privacies. Moreover, coercive collective authority is properly marshaled both to protect "wanted" privacy from the "unwanted gaze" and to protect "unwanted" privacy from the "wanted gaze." Privacy could, in effect, be imposed on the unwilling or uninterested. The Jewish tradition required something of both potential victims of privacy-norm violations as well as perpetrators: I have an obligation to myself and to our community to safeguard my privacy, and you have an obligation to me and to our community not to violate my privacy.

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8. ROSEN, *supra* note 1, at 18.

9. *Id.* at 19 (alteration in original).

10. *Id.*

11. *Id.*

12. *Id.*

## III. NONVOLUNTARISM IN U.S. LAW AND SOCIETY

Under ancient Jewish law, individuals were not the sole arbiters of privacy. Both what I have called the “wanted gaze” and what Jeffrey Rosen calls the “unwanted gaze” were deemed problems. The ancient nonvoluntarist privacy orientations cited by Rosen and Shalit have analogues today. In the name of respect for privacy, we Americans sometimes worry both about the fact that people do not have the privacy they want, and about the fact that people do not want the privacy we believe they ought to have. A number of our actual norms, laws, and practices go against the prevailing voluntarist conception for privacy.

For example, nonvoluntarism is at play in policies behind laws that enforce single-sex public toilets. In a nonvoluntarist privacy regime in which urination is defined as appropriately private conduct, the fact that a person is indifferent to privacy or is an exhibitionist does not mean it is morally permissible to peek into his bathroom window and watch him use the toilet. It may be morally impermissible for one person to watch another use the toilet *and* morally impermissible for one person to intentionally, knowingly, or negligently cause or permit another to watch him use the toilet. Suppose *X* and *Y* are members of opposite sexes, and *X* asks *Y* to accompany *X* into a public restroom reserved for members of *X*'s sex. We have rules of law that would penalize *Y* despite *X*'s lack of modesty, apparently on the ground that most people are, or should be, modest about toilet use (a privacy-related policy basis), in addition to the theory that shared restrooms could lead to sex crimes and vice (a public safety and morals-related policy basis).

In addition to the single-sex public toilets, our society has established other practices that impose privacy. Indecent exposure laws, building codes, military “Don’t Ask, Don’t Tell” rules, and professional confidentiality rules applicable to lawyers and physicians all impose or coerce privacy. Their existence implies that many Americans believe that certain unasked for or unwanted privacies, including many relating to the body and sexuality, should be mandatory even though most privacies should not. So, I can choose not to disable my cookies or encrypt my e-mail, and I can be a guest on *Oprah* and describe the saga of my hospitalization for mental illness; but I cannot sign an agreement at the start of the attorney-client relationship waiving my right to confidential representation, I cannot walk around New York City in the nude, I cannot disclose my lesbian sexual orientation to my fellow naval officers, and I cannot build my house entirely of glass.

Clearly a part of the American landscape, privacy nonvoluntarism is nonetheless overshadowed by the pronounced voluntarism of the modern-American liberal mainstream. The mainstream perspective is that a man can draw his curtains and a woman can behave modestly, if they want to. They do not have to erect privacy fences for their own sake or the community’s. The community has no right to impose privacy and related modesty on me if I do not want it, but the community must come to my defense if others interfere with the privacy that is mine and I want to keep.

## IV. "WANTED GAZE" WORRIES

Privacy in America can be destroyed by failures to guard against "unwanted gazes." However, privacy can also be destroyed by inattention to the consequences of "wanted gazes."

The problem of the "unwanted gaze" is addressed in law through the First, Third, Fourth, Fifth, and Ninth Amendments,<sup>13</sup> through the invasion of privacy torts,<sup>14</sup> and through state and federal privacy statutes.<sup>15</sup> Nonlegal norms of

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13. See U.S. CONST. amends. I, III, IV, V, IX. These Amendments protect interests in physical and informational privacy, but limit government access to our homes, persons, records, and ideas. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Third Amendment provides: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Fifth Amendment provides: "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Finally, the Fourteenth Amendment, which the Court, in *Whalen v. Roe*, 429 U.S. 589 (1977), held extends to protect the confidentiality of medical information held by state government, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

14. The invasion of privacy torts are: (1) Intrusion upon Seclusion, RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."); (2) Appropriation of Name or Likeness, *id.* § 652C ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."); (3) Publicity Given to Private Life, *id.* § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."); (4) Publicity Placing Person in False Light, *id.* § 652E ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.")

15. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2000) (opening government records to the public, but containing privacy exceptions for medical, personnel, and "similar files"); Privacy Act, 5 U.S.C. § 552a (2000) (mandating "fair information practices" and limiting third-party access to personal information contained in federal records systems); Computer Matching and Privacy Protection Act, 5 U.S.C. § 552a (a)(8)-(13), (e)(12), (o)-(r), (u) (2000) (amending Privacy Act to regulate the practice of sharing and comparing data about identified individuals contained in different government data banks); Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2000) (governing certain banking and financial transactions); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (2000) (limiting disclosures of consumer credit information); Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506 (2000) (requiring that Internet sites aimed at children under thirteen receive "verifiable" parental consent for the child's use of the site); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 (2000) (regulating the surveillance and interception of telephone calls placed on regular tele-

privacy also address privacy. The problem of the “wanted gaze” is addressed in law as well. Laws that restrict nudity and obscenity impose privacy, in the sense of requiring bodily concealment and reserved speech. The recently enacted Children’s Online Privacy Protection Act<sup>16</sup> imposes data privacy protections on children under thirteen, many of whom are indifferent to privacy. The “Don’t Ask, Don’t Tell” policy respecting gays in the military silences gays and lesbians who might want to share facts about their intimate lives and identities with peers.<sup>17</sup> Nonlegal norms of accountability to family, church, community, and employer have dictated whether and the extent to which people are both permitted and required to embrace various modes of privacy, solitude, seclusion, reserve, modesty, secrecy, confidentiality, anonymity, and so forth. Complex norms of etiquette impose privacy in the sense of limiting our ability to share certain information and intimacies with others in certain contexts.

By invoking Jewish law, Rosen, like Shalit, invites us to consider privacy from the perspective of nonvoluntarist regimes in which both the “wanted gaze” and the “unwanted gaze” are potentially privacy problems. Yet, Rosen’s book turns out to be an especially eloquent, but in key respects, standard civil libertarian, defense of norms that protect us from the unwanted, often technology-aided gaze of media, employers, government, and businesses. The privacy problem of the “wanted gaze” suggested by Rosen’s account of Jewish law drops from sight after a cameo appearance.

This is unfortunate, for we have entered an era in which concern about the “wanted gaze” may be more appropriate than ever.<sup>18</sup> Arguably excessive voluntary abrogation of domestic privacy and modesty traditions are the order of the day. Moreover, exhibitionism and indifference to one’s own privacy are fast becoming fixtures of popular culture.<sup>19</sup> Television, radio, and cyberspace are domains in which ordinary individuals, performers, and professionals voluntar-

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phones, portable phones, cellular phones, and certain communications via beepers, e-mail, voicemail, and faxes); Video Privacy Protection Act, 18 U.S.C. § 2710 (2000) (governing access to individuals’ movie video rental records); Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (2000) (limiting use of polygraphs by employers); Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (2000) (setting procedures for government access to newspapers’ records and information).

16. Children’s Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501-6506; *see also* 16 C.F.R. § 312 (2001) (implementing COPPA).

17. The federal courts have upheld the policy of forcing gays and lesbians in the military into a closet of secrecy. *See Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996), *appeal after remand*, 155 F.3d 628 (2d Cir. 1998). Under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (2000), homosexuals can be dishonorably discharged from military service when their homosexuality is discovered under any one of three articles of the Code: Article 125, which prohibits sodomy, § 925; Article 80, which prohibits attempts to commit a punishable offense, § 880; or Article 134, which prohibits conduct of a nature to bring discredit upon the Armed Forces, § 934.

18. *Cf. Allen*, *supra* note 2, at 723 (arguing that if privacy is vital to liberal democracy, the voluntary abrogation of privacy, if excessive, is a serious problem).

19. *See, e.g., Rachel Kreisel, Reality Shows: A Form of Therapy for Viewers?*, L.A. TIMES, July 10, 2000, at 3; Kara G. Morrison & Michael H. Hodges, *Reality TV Bares U.S. Ugly Side: Some Say Shows like “Survivor” Mirror Our Culture That Encourages Backstabbing*, DETROIT NEWS, July 12, 2000, at 1.

ily share vast amounts of personal information with viewing and listening audiences. The “wanted gaze” problem is not merely a product of the Internet, cell phones, and the media. People freely converse at work, and even in public places (trains, shops, and so forth), with friends and with strangers, about the intimate details of their lives. “Privacy, it’s gone, get over it!” is how one commentator responds to the problem of the *unwanted* gaze.<sup>20</sup> “Privacy, who cares?” and “Privacy, who needs it, if the price is right?” are the way some people seem to be responding to the problem of the *wanted* gaze.

Rosen’s neglect of the problem of the “wanted gaze” is unfortunate for another reason. At the same time that our society is confronting arguably excessive voluntary abrogations of privacy, our society is also characterized by arguably excessive, prejudicial, and oppressive impositions of privacy. As I have already noted, despite the U.S. penchant for thinking of privacy in voluntarist terms, our social and legal traditions have never been strictly or uniformly voluntarist. Nor has voluntary privacy been available to all under conditions of equal opportunity. There have always been those (such as slaves, mill workers, women, migrant laborers, welfare dependent families, and homosexuals) who could not get the privacy and related autonomy they wanted, and those (sex workers and pop-culture celebrities) who care less about their own privacy than others think they should. U.S. moral and legal traditions have always regulated the “wanted gaze” as well as the “unwanted gaze,” never permitting individuals to be the absolute sole arbiters of their own privacy.

The just regulation of the “wanted gaze” is anything but a problem of the ancient past. It is a problem addressed to an extent—perhaps to an inadequate, unjust extent—by current law and norms. Yet, in a society that stresses the importance of individual choice and seeks to allow individual preferences to dictate conduct and lifestyle, regulation of the “wanted gaze” is practiced but automatically suspect. Liberals, keeping to our own core principles, know we can only accept a limited number of reasons for regulating privacy. Liberals cannot appeal unblinking to the ideal of the common good as a just constraint on individual choice—a move open to Amitai Etzioni and the communitarians.<sup>21</sup> The most controversial justification for privacy regulation and privacy choice perceived within modern western liberal democracies is the felt need to enforce collective morality or the moral tone of society. More consistent with classical liberalism are reasons relating to the felt need to prevent serious harm to others, and, in the case of the young or incompetent, harm to self. The paternalistic Children’s Online Privacy Protection Act<sup>22</sup> is arguably justifiable to

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20. Polly Sprenger, *Sun on Privacy: “Get Over It,”* WIRED NEWS (Jan. 26, 1999) (quoting Scott McNealy’s remark, “You have zero privacy anyway, get over it.”), at <http://www.wired.com/news/politics/0,1283,17538,00.html>.

21. See generally AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (1999) (providing communitarian defense of measures to protect the common good even if doing so requires interference with individual privacy).

22. 15 U.S.C. §§ 6501-6506 (2000).

prevent children from hurting themselves by thoughtless waiver of informational privacy. No federal law is similarly designed to prevent adults from hurting themselves by thoughtless waivers of informational privacy. Yet bans on public nudity are sometimes justified by concerns about harm that may befall adult victims of criminal predators and public health crises. Thus, we suppress the sex workers' "wanted gazes," among other reasons, in the name of public health and crime control. Pornography and obscenity laws restricting the ability of consensual adults to create, distribute, and use sexually explicit materials are controversial with libertarian purists precisely because those laws seem to be addressed solely to the demands of prudish morality and the moral tone of the community.

#### V. ROSEN'S LIBERTARIAN CRITIQUE OF SEXUAL HARASSMENT LAW

Jeffrey Rosen's focus on "unwanted gazes" (and correlative neglect of pernicious "wanted gazes") is a function of his civil libertarianism, a political orientation he announces in the final chapter of his book. He is not the traditionalist briefly suggested by his seeming endorsement of the nonvoluntarist dimensions in Jewish law. On the contrary, Rosen defends privacy by appealing to two great liberal principles, embraced to a degree by Democrats, Republicans, and independents alike: first, the principle of individuality; and second, the principle of limited government. Privacy norms maintain social boundaries that allow individuals to be the individuals they choose to be, and that keep government properly limited, tolerant, and nontotalitarian. The social boundaries we and our society erect in the name of privacy help in the formation of healthy relationships of varied intimacy and distance. It is important that there be some people who know us extremely well, such as family, friends, and mental health providers, and others who know us less well and leave us peacefully and respectfully alone.

Rosen's commitments to individuality and limited government may explain why, when he does turn his attention to the problem of pernicious "wanted gazes," it is to condemn laws inviting voluntary disclosures that harm dignity and constrain individual expression. Rosen attacks the federal law of sexual harassment because he believes it is an unwarranted governmental interference with individual privacy interests. The law invites alleged victims of harassment to speak openly about the "private" conduct of others in the workplace in proceedings that may also require them to disclose their own "private" conduct.

In *The Unwanted Gaze* and in a subsequent article in *The New Republic*,<sup>23</sup> Jeffrey Rosen condemned the law of sexual harassment in the workplace as an example of the unwanted gaze of government, employers, and co-workers undermining the dignity of workers. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex and certain other

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23. Jeffrey Rosen, *Fall of Private Man*, NEW REPUBLIC, June 12, 2000, at 22-29.

traits.<sup>24</sup> Current Equal Employment Opportunity Commission regulations<sup>25</sup> and Title VII jurisprudence endorsed by the Supreme Court,<sup>26</sup> treat sexual harassment as employment discrimination. Victims of sexual harassment have a remedy under Title VII for employment discrimination when employers are responsible for either “hostile environment” harassment or “quid pro quo” harassment.<sup>27</sup> Title VII has been under intense scrutiny by legal scholars, some of whom say Title VII sexual harassment law clashes with rights of free speech and worker privacy.<sup>28</sup> In like vein, Rosen believes Title VII appropriately provides a remedy for quid pro quo harassment. Rosen argues, however, that the “hostile environment” doctrine invites unduly extensive scrutiny of the personal lives of workers. Rosen suggests, in effect, that employee accountability for interpersonal misconduct at work is more vital when the consequence of misconduct is loss of employment opportunity than when the consequence of misconduct is the creation of an inhospitable workplace.

Feminists who believe it imperative to be able to speak openly and freely about the injuries suffered “in private” and concerning “the private” will be reluctant to embrace Rosen’s analysis of Title VII jurisprudence. Symbolized by the slogan that “the personal is political,” feminists advocate inviting the public to gaze into traditional spheres of personal, sexual, and domestic life in order to discern and address subordination, discrimination, and inequality.<sup>29</sup> Title VII plaintiffs alleging sexual harassment believe the goal of accountability for interpersonal conduct can trump the goal of protecting perpetrators from the unwanted gaze. Plaintiffs want the very gaze that, for alleged perpetrators, is unwanted.

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24. See 42 U.S.C. § 2000e-2(a) (2000) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to 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; . . .”).

25. 29 C.F.R. § 1604.11(a) (2000), defines sexual harassment as

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

See also EEOC Policy Guidance on Current Issues of Sexual Harassment, 3 EEOC Compl. Man. (BNA) No. N-915-050, at 4031, 4033 (Mar. 19, 1990).

26. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (recognizing sexual harassment as a form of employment discrimination, and hostile environment as a form of sexual harassment actionable under Title VII).

27. *Id.*

28. See generally Symposium, *Strengthening Title VII: 1997-1998 Sexual Harassment Jurisprudence*, 7 WM. & MARY BILL RTS. J. 671 (1999).

29. For a comprehensive discussion of the feminist critique of privacy, see Debra Morris, *Privacy, Privation, Perversity: Toward New Representation of the Personal*, 25 SIGNS 323 (2000).

## VII. PRIVACY AND ACCOUNTABILITY

Can there be both privacy at work and accountability for wrongful interpersonal conduct at work? Both would seem to be important. We need privacy at work. Many employees are spending well over forty hours a week in offices and other workplaces. Rosen argues that privacy at work should include “backstage areas where people can joke, let down their hair, and form intimate relationships free from official scrutiny.”<sup>30</sup> It is hard for anyone who values privacy to altogether oppose Rosen’s idea of a “backstage.” We cannot be “on stage” all the time. Rosen firmly believes that what happens backstage should remain in that context.

Rosen brings a contextualist accent to his libertarian case for privacy. Individuals are entitled to privacy to avoid having their words and deeds taken out of context. Invasions of privacy cause harm by taking information about personal matters out of the intimate contexts where they belong, and thrusting them before the public eye for what inevitably turns into prurient, curious distortions and misunderstandings that limit our freedom and cause us shame, humiliation, and embarrassment.<sup>31</sup> Indeed some gay people may have preferred the closet if they had known that information about their sexuality would turn their meaningful same-sex relationships into tawdry items for gossip and misplaced moralism. I believe the desire to avoid having his conduct interpreted out of context led Oscar Wilde to the deception and lawsuits that ultimately led to his incarceration and premature death.<sup>32</sup> For Rosen, employers and their workers should not be generally accountable for the words and behaviors that fall short of crimes or torts and that deny no one employment opportunity.

The general point Rosen makes—through the metaphor of the “backstage”—about the importance of privacy at work is appealing. However, sexual harassment law arose because women were being routinely, and as a matter of course, *forced* “backstage” for unwanted jokes, informality, and intimacy when they wanted to remain “center stage” in their professional roles. Men and women who complain of sexual harassment have done so in part because a boss, supervisor, or co-worker forced them to endure words or behavior more suitable for a date, kitchen table, or sleazy motel room.

One of the primary purposes of the U.S. law of sexual harassment is to improve economic opportunities for previously excluded women by making employers and employees more accountable for sex-related interpersonal misconduct in the workplace.<sup>33</sup> Workers are made more accountable by holding their

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30. ROSEN, *supra* note 1, at 89.

31. *See id.* at 8-9.

32. *See* Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 178 (1999).

33. There have been many efforts to explain what is wrong with sexual harassment. *See, e.g.*, Katherine Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691, 693 (1997) (explaining that sexual harassment is wrong because it embodies gender stereotypes, rather than because it would not have taken place but for the plaintiff's sex, because it is sexual in nature, or because it sexually subordinates women to men); *see also* Kathy Abrams, *The New Jurisprudence of Sexual*

employers liable. As a practical matter, the law of sexual harassment requires that victims of harassment be willing to make public otherwise private facts about themselves and the perpetrators of the harassment. From the point of view of a person victimized by harassment who brings a formal sexual harassment charge, the resultant privacy losses are more or less voluntary. The gaze is wanted, if only reluctantly, as a cost of legal vindication. From the point of view of persons accused of sexual harassment, sexual harassment law constitutes an “unwanted gaze”—an invasion of their privacy—as their words and actions, some pertaining to their intimate lives, are turned into objects of legal scrutiny.

Numerous theorists have argued that the privacy of men and the spheres of life they control are overvalued, thus shortchanging women. Feminists have argued that only by shining a bright light into traditionally private sanctuaries can justice be done. “Unwanted gazes” must become “wanted gazes.” Professor Anita Hill became a heroine to some feminists because—at considerable cost to her own privacy and that of Justice Clarence Thomas, their families, and their friends—she opened the door to governmental, media, and public scrutiny of the sex-related tastes and habits of a prominent judge.<sup>34</sup> Although Paula Jones failed to become a heroine of the feminist movement, she also jettisoned sexual privacy, inviting the gaze of the public in order to pursue lucrative legal claims against President Bill Clinton.<sup>35</sup> Both women believed the powerful men they sought to expose had behaved badly toward them, and that the men should be made publicly accountable in spite of, and because of, the sexual nature of the alleged interpersonal misconduct.

Rosen argues that the law of sexual harassment is “excessive.” It is a heavy-handed way to attack a problem that is better seen as a privacy-norm breach than gender discrimination, he says.<sup>36</sup> Rosen offers a concrete proposal for minimizing the unwanted gazes brought on by sexual harassment law. He suggests jettisoning the hostile environment doctrine and encouraging women whose work environments are filled with demeaning sexual innuendo, offensive

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*Harassment*, 83 CORNELL L. REV. 1169, 1218 (1998) (noting that “sexual harassment disadvantages its victims as workers,” and “may compel choices that trade professional advantage for a more secure or peaceful environment”).

34. See CATHERINE MACKINNON, ONLY WORDS 64-68 (1993). Compare ANITA HILL, SPEAKING TRUTH TO POWER (1997) (describing her testimony in Congressional hearings on the nomination of Justice Clarence Thomas and its impact), with Michael Wines, *The Thomas Nomination: Compelling Evidence on Both Sides, but Only One Can Be Telling the Truth*, N.Y. TIMES, October 15, 1991, at A20.

35. President William Jefferson Clinton settled for \$850,000 a lawsuit brought by Paula Jones, who claimed that he took her from her work, asked for sex, and exposed himself to her in a Little Rock hotel room. Following his acquittal in impeachment proceedings in the Senate, Judge Susan Webber Wright of the federal district court in Little Rock issued an order on April 12, 1999, holding Clinton in contempt of court for “false, misleading and evasive” testimony about his relationship with former White House intern Monica Lewinsky in his deposition in the Jones lawsuit. See *Excerpts from the Judge’s Ruling*, N.Y. TIMES, April 13, 1999, at A20.

36. But see Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 450 (1997) (arguing that hostile environment sexual harassment is a type of incivility or disrespect that merits a Title VII remedy).

language, leering, and overtures to bring tort actions for invasion of privacy against responsible offenders. In this way, “highly offensive” privacy-invading sexual harassment will have a remedy, but the more merely offensive, tasteless, and privacy-invading sexual harassment will not.<sup>37</sup> Nor should it, Rosen believes. Minor breaches of social norms and etiquette should not be elevated to the level of legal wrongs, and they cannot be without inviting unwanted gazes.

Rosen’s argument presupposes that employers and supervisors will face so few plausible suits for hostile environment under the privacy-invasion rubrics of tort law, that they will be able to relax surveillance of e-mail, intimate relationships among coworkers, and other workplace conduct. Employers anticipating what are really breaches of taste and etiquette will not feel compelled to aggressively monitor workplace speech and conduct, Rosen concludes. The “wanted gaze” of accountability for interpersonal conduct will be narrowed by blinders of limited liability. But what if employers remain worried about norms? And what if the number of tort actions match the number of Title VII actions for hostile environment?

Rosen suggests that an otherwise respected, upwardly mobile professional worker like Professor Anita Hill, faced with a boss who likes to describe dirty movies and make sexual innuendos, will have no Title VII claim, and perhaps no good privacy tort claim either. A victim of a single act of sexual impropriety, an otherwise respected worker like Paula Jones, would have no Title VII claim either, though her tort claim might pass muster under the tort liability standard. According to Rosen, “[I]f and when Bill Clinton exposed himself to Paula Jones in a Little Rock hotel room, the injury she suffered may be better described as an invasion of privacy than as a form of gender discrimination.”<sup>38</sup> Clinton’s alleged invasion of Jones’s privacy objectified, belittled, and insulted Paula Jones, according to Rosen; and such leering and exposure is wrong for those reasons, not most problematically on account of sex inequality. If Clinton had been a woman, and Jones a man, we would more naturally think of such behavior as a breach of etiquette than as sex discrimination, Rosen suggests. As a privacy invasion complained about in a tort action, exposing one’s penis to a stranger simply because one finds her attractive, or prattling about pubic hairs and pornography could be deemed “highly offensive” and actionable—or not.

Of course, one might object to the “wanted gaze” of accountability to victims of sexual harassment on the basis of concern for the victims’ privacy. Paula Jones and Anita Hill may have deserved privacy, even if President Clinton and Justice Thomas did not. Indeed, feminists have often expressed concern that, ironically, victims of sexual harassment, like victims of rape, can remedy

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37. Commentators question whether even Title VII has provided an effective remedy in hostile environment cases. *See, e.g.*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 856 (1991) (observing that courts were “slower to recognize hostile environments in the first instance, and are now more reluctant to impose liability for them”).

38. ROSEN, *supra* note 1, at 21.

privacy-invading wrongs only by giving up more privacy.<sup>39</sup> However, Rosen's attack against Title VII reflects his voluntarist libertarian impulses rather than feminist or nonvoluntarist impulses. Legal liability for sexual harassment must be restricted, he argues, because it leads to unwanted scrutiny of private life that distorts through decontextualization. Rosen objects to the "wanted gaze" of victims of sexual harassment on the basis of concern about the perpetrators. His perpetrator focus is redeemed somewhat by the fact that every victim is, in theory, also a perpetrator, so vulnerable are we all to breaches of social norms. We are all human.

Still, Rosen's criticism of hostile environment discrimination is troubling. We are all human, but some of us are female humans. Rosen's polite attacks on feminism and the law of sexual harassment in the workplace are no doubt the most controversial aspects of his book. As feminists have emphasized, it is important to give up some privacy—as liberalism has defined it—to get protection and access.<sup>40</sup> We ought not want too much privacy for ourselves and others because privacy can shield neglect and violence. Rosen believes that, in response to feminism, our society now calls attention to sexual intimacies in ways that are hurtful and harmful to legitimate privacy interests.

Many forms of what is called sexual harassment are invasions of privacy. As I argued a dozen years ago, the invasion of privacy torts should be employed against sexual harassment in the workplace.<sup>41</sup> I disagree, though, with Rosen's non sequitur that the hostile environment doctrine should be dropped from Title VII jurisprudence in the interest of workplace privacy.<sup>42</sup> Rosen's argument against the hostile environment doctrine depends critically on an ability to clearly distinguish quid pro quo harassment from hostile environment harassment. A semantic distinction can be made between the two; but, at root, liability for both is premised on a policy decision to combat unjust female exclusion from the workplace. The hostile environment doctrine reflects the judgment of the courts and fair-employment lawyers that the ability of women to be at work rather than at home depends both upon employers' willingness to hire and promote women who want to work outside the home, and upon women's willingness to endure working outside the home.

Once upon a time, men and women both understood that a woman's decision to enter the workforce was a decision to subject herself both to the frustration that comes from having one's potential and accomplishments undervalued, and to the indignities of sexual harassment. A working woman had two choices: be a realistic tough cookie and take the crap male co-workers and bosses dished out, or be a crybaby and go home. For the women who "had to work," the option of going home did not exist. Women in food service and clerical positions had it

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39. MACKINNON, *supra* note 34, at 66.

40. See Anita L. Allen, *Privacy*, in *A COMPANION TO FEMINIST PHILOSOPHY* 456, 456-465 (Alison M. Jaggar & Iris Marion Young eds., 1998)

41. See ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988).

42. See Rosen, *supra* note 23.

bad. Women who tried “male” occupations had it really bad. Three decades ago, husbands took a certain pride in the fact their wives did not have to earn money in order for the family to survive. But they also slept easier knowing that their wives would not have to leave home only to become objects of leering, uninvited sexual overtures, and other forms of sexual harassment.

Professor Rosen believes the position of women in the workplace is elevated and secure today, partly due to Title VII’s ban on overt discriminatory exclusion based on gender and its ban on quid pro quo harassment. He seems to assume that incivility does not typically function to deny women the economic opportunity that is a promised civil right. Yet, when women who have a choice about whether and where they work outside the home are making their choices, those choices are being wrongfully constrained by beliefs about, among other things, the amount of unchecked sexual harassment they are likely to face in various settings.<sup>43</sup> To jettison the hostile environment doctrine would be to fail to understand that quid pro quo harassment and hostile environment harassment still work in tandem to deny women the equal employment opportunity promised by Title VII’s vision of civil rights.

It *is* discrimination on the basis of sex for employers, managers, and co-workers who hold sway over economic fates to repeatedly demean, humiliate, or embarrass employees because of their gender through sexual overtures and innuendos. Rosen argues that law is often less effective than social norms and technological solutions, which can achieve the same policy result without threatening the privacy of innocent people in the process. In short, the legally-buttressed “wanted gaze” sometimes should be rebuffed in favor of nonlegal “norms” to protect people from “unwanted gazes.” This may be true, but Rosen has failed to provide evidence or persuasive arguments indicating that women would not more frequently self-exclude in favor of domesticity or stereotypical “women’s work” under the truncated Title VII regime he paints than under the current regime.

Just how should people behave at work? Although Rosen sees privacy-invading sexual harassment as a kind of incivility that breaches norms of etiquette, he is too laissez-faire liberal in the end to proffer idealized conceptions of good conduct and relations between men and women as such. Wendy Shalit, whose take on privacy is less voluntarist than Rosen’s, is a fellow critic of contemporary sexual harassment laws, but one who dwells unashamedly on the virtues: modesty for women and honor for men. She objects to sexual harassment laws on the ground that they address the outer man of action rather than the inner man of conscience and virtue. She wants men to feel an obligation of male honor to treat women in accordance with “the ideal relation

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43. Cf. Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1156 (1995) (rejecting “tort-like treatment of sex-based harassment claims,” and defining sexual harassment as “sex-based non-job-related workplace conduct that would lead a rational woman to alter her workplace behavior—such as refusing overtime, projects, or travel that would put her in contact with a harasser, requesting a transfer, or quitting—if she could do so at little or no cost to her”).

between them and women.”<sup>44</sup> Ideally, men treat all women as ladies—with respect and without debasement, she insists.

The choice that must be made is between a legal regime that provides more meaningful employment opportunity or a legal regime that provides more privacy and uncoerced virtue. Shalit’s “retro”-chic book is evidence of a writer seeking (in vain, I believe) in sexual modesty and manly honor a weapon against rampant sexual harassment. Rosen’s advice to a young woman concerned about hostile environment sexual harassment would be that she try to be a tough cookie, advocate social norms, and wait until things get bad enough to bring a tort suit. My advice: Forget the false veil of sexual chastity; do not hold your breath for the resurgence of manly honor; and cooperate with efforts that may include responsible, privacy-sensitive employer monitoring, enforceable conduct codes designed to minimize sexual harassment<sup>45</sup> and other forms of gender-related misconduct not related to sexuality as such.<sup>46</sup>

Rosen has decried the “fall of the private man,” represented by the direction of current sexual harassment law. He has thereby placed himself in a camp occupied by other scholarly libertarians.<sup>47</sup> However, let us not forget that there are two dimensions to the “fall of the private man” and the destruction of

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44. SHALIT, *supra* note 5, at 102, 147-48.

45. A critic of the privacy implications of certain forms of employer monitoring and conduct codes, such as forcing employees to sign dating waivers, need not advocate abandoning hostile environment law. See, e.g., Niloofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J. EMP. & LAB. L. 325, 327 (1999) (“[C]urrent requirements for hostile work environment claims under Title VII are leading employers to take . . . undesirable and unrealistic . . . role[s] in consensual office relationships,” but “recently elucidated employer liability standards for hostile work environment claims are proper . . .”). Nejat-Bina argued that alternatives to dating waivers include developing and distributing clear policies, educating workers about improprieties and policies, implementing effective grievance procedures and educating employees about their use, and finally, instituting employer measures to end immediately any ongoing harassment. *Id.* at 358-59; see also Jennifer L. Dean, *Employer Regulation of Employee Personal Relationships*, 76 B.U. L. REV. 1051, 1053 (1996) (defending employer restriction of employee personal relationships, but urging that dating outside of work and by persons not in supervisor-subordinate relationships not be a basis for discharge); Kathleen M. Hallinan, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 COLUM. J.L. & SOC. PROBS. 435, 464 (1999) (“If properly constructed, co-employee dating policies will . . . protect[] the privacy interests of employees.”).

A critic of the First Amendment implications of employer monitoring and conduct codes need not advocate abandoning hostile environment law either. See, e.g., Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 451 (1999) (“[T]he current formulation of hostile environment harassment [which restricts the laws that regularly reach to the most extreme, persistent, and unwelcome forms of workplace harassment] strikes the best possible balance between the fundamental interests of equal opportunity and free speech thus far articulated.”).

46. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998) (arguing that hostile environment law has been overly sexualized; some of the conduct that makes workplaces hostile to women “has little or nothing to do with sexuality but everything to do with gender”).

47. See, e.g., David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133 (arguing that constitutional civil liberties should triumph over sex discrimination laws).

privacy. The fall that occurs because other people do not respect a man's privacy—the “unwanted gaze”—is one dimension. The fall that occurs because a man does not respect his own privacy—the “wanted gaze”—is the second. The “unwanted gaze” and the “wanted gaze” equally lead to the destruction of privacy. When a man seeking sex in a professional setting exposes his penis and sexual fantasies to an arbitrarily selected strange woman, we discern a lack of respect for his own privacy, as well as his lack of respect for hers. The private man at work who cannot keep his zipper up or who indulges in uncivil conversation about his sexual life, his medical problems, or his personal financial woes is hardly a private man at all. We need to find a way to address the “fall of the private man,”<sup>48</sup> without precipitating the fall of the working woman.<sup>49</sup> Jettisoning hostile environment law is not clearly the way to go about it.

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48. Rosen, *supra* note 23, at 22-29.

49. Many defend, for example, state laws that protect workers' off-the-job privacy rights to socialize with co-workers and to engage in high risk and unhealthy activities. See generally Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47 (1999).