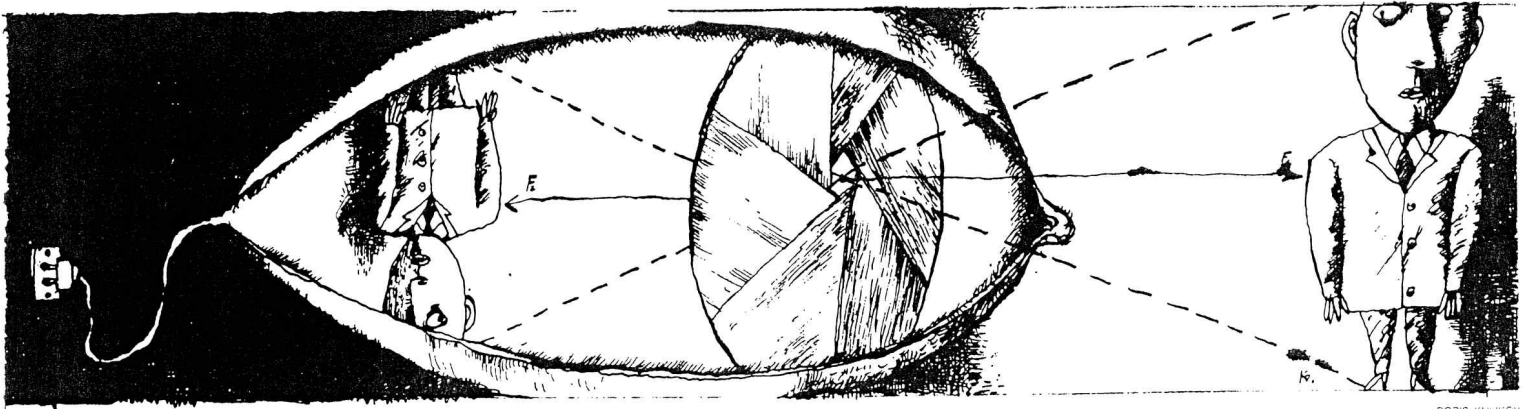


Pull Down the Blinds

Jeffrey Rosen presents an impassioned argument in defense of privacy.



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THE UNWANTED GAZE

The Destruction of Privacy in America.
By Jeffrey Rosen.
274 pp. New York:
Random House. \$24.95.

By Alex Kozinski

IN "The Unwanted Gaze," Jeffrey Rosen, an associate professor of law at George Washington University, tackles one of our most daunting problems: how to preserve privacy in a world where law and technology have conspired to make it increasingly difficult to shield our affairs from intrusion by others. Over the past decade, Rosen's writings in *The New Republic* have established him as one of our most trenchant legal analysts. One might quibble with some of the solutions he proposes, but his book serves an important purpose by speaking directly to the uneasy feeling most of us have that our privacy is slipping away in ways we don't fully recognize.

"Monica Lewinsky is an improbable spokesperson for the virtues of reticence," Rosen writes in his prologue, but "her ordeal raises deep questions about recent changes in law and technology that threaten individual control over personal information." Indeed it does. Where in an earlier day we would have used pen and paper or the telephone to communicate and record our thoughts, we now rely on computers, which have become ubiquitous both at work and at home. Unlike telephone conversations, which are not routinely recorded, and unlike ink records, which cease to exist if destroyed, computers have long memories. Every e-mail message, every draft, every Web search, every keystroke is stored somewhere on a computer's hard drive and can usually be recovered, which is how Ken Starr's investigators were able to track down Lewinsky's discarded love letters. The home computer has become a secret monitor

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of our daily activities, our foibles and our typos (actual and metaphorical), which can now be retrieved and used against us later if we are unlucky enough to become entangled, even peripherally, in a legal controversy.

Rosen uses Paula Jones's sexual harassment case against President Clinton, the Clarence Thomas confirmation hearings and some other high-profile scandals to explore the ways in which the law has evolved to permit — indeed, to encourage — the ransacking of people's private lives. Jones, it will be recalled, sued the president on the basis of conduct that had allegedly occurred while he was governor of Arkansas. Her lawyers sought information that would corroborate Jones's account of what happened. Just a few years ago, their investigation would have been limited to the circumstances surrounding the incident in question. In an ironic twist of fate, however, President Clinton had signed into law the Molinari amendments to the federal rules of evidence in 1994. Named after Susan Molinari, who championed their adoption when she was a New York congresswoman, the amendments reversed centuries of common-law wisdom by permitting inquiry into whether an alleged sex offender had committed similar acts in the past. This change in the law opened the investigation into Clinton's affairs, and attempted affairs, with women who had worked for him.

Whatever one may think about the fairness of examining the alleged sexual harasser's sexual history, it is an unfortunate fact that another person will be involved in each such event, and that this person's most intimate experiences can, and most likely will, be scrutinized by perfect strangers. Monica Lewinsky provides only the most visible example of the inexorable logic of this process.

Rosen also dissects another development in sexual harassment law — employer liability for what are known as "hostile environment" claims. Hostile environment claims, which are often much more amorphous than the classic *quid pro quo* claim, consist of allegations that the boorish conduct of certain employees in the workplace (generally men) has made life miserable for other

employees (generally women). Federal law imposes liability for such conduct not on the offending employee but on the employer. Against this (often substantial) threat of liability, employers have moved aggressively to curb and monitor employee conduct that might lay the foundation for hostile environment claims by other employees. Such measures range from prohibiting sexual banter in the workplace to monitoring employee e-mail messages and Web searches. Rosen describes the increasingly strict policies that have cropped up to regulate e-mail correspondence. One sample policy, devised by cautious employment lawyers, forbids the use of company e-mail "for gossip ... for emotional responses to business correspondence or work situations," or "in any way that may be seen as insulting, disruptive or offensive by other persons, or harmful to morale." Rosen views such rules with alarm. Employees, he argues, must enjoy a measure of privacy in their work environment, to blow off steam and communicate with one another in informal and nonprofessional ways.

Perhaps the book's most valuable contribution is Rosen's impassioned defense of privacy. Privacy, he argues, helps to protect us from being judged "out of context" — that is, from having an isolated bit of personal information exposed to the world, so that it becomes our defining characteristic in other people's eyes. Privacy, moreover, helps us to develop close personal relationships and to be creative without fear that our confidential disclosures will be held against us. In a culture of transparency and fleeting attention spans, Rosen observes, "privacy is a form of opacity, and opacity has its values. We need more shades and more blinds and more virtual curtains."

Less satisfying are Rosen's policy recommendations. For example, he suggests reassigning liability in hostile environment claims to the offending employee, thereby reducing the employer's incentive to monitor private employee conduct. But, as they say in the software business, employer monitoring of employee conduct is not a bug, it's a feature. The architects of our sexual har-

assment jurisprudence meant for employers to police the work environment to keep it free of sexual banter and dirty jokes. Suits against solvent, deep-pocket employers create strong incentives to curb employee misbehavior, while suits against harassing employees, who may not have the means to satisfy any jury award, are much less effective. Shifting liability for sexual harassment from employer to employees, even if it were politically feasible to do so, might well result in more obnoxious behavior in the workplace. Rosen may consider this an acceptable trade-off to regain some of the workplace privacy that has been lost, but he fails to acknowledge that it is a trade-off, or to explain why the exchange would be a net gain.

IT is also difficult to say how we should deal with the prior misconduct of accused harassers. Because *quid pro quo* harassment takes place in private, and no witnesses or other corroborating evidence can back up either side's version of what happened, it is very tempting to consider how the defendant has acted in similar situations in the past. After all, we assume in our daily lives that people who have acted badly in the past are more likely to act badly in the future. But there are many reasons, conscientiously cataloged by Rosen, why we might not want to draw the same inference in court. Repeal of the Molinari amendments might, in fact, be a good idea. But the outcome would not be neutral, as Rosen seems to think. A repeal would almost certainly allow some sexual harassers to go unpunished simply because they lie more convincingly than their victims tell the truth.

But whether or not one agrees with Rosen's prescriptions for what ails us, he has vividly captured the threat to privacy posed by cyberspace and sexual harassment law. This remarkably rich and detailed book sharpens our understanding of a problem that most of us prefer not to think about. It gives us the tools for considering these issues further and drawing our own conclusions. A book that does this is, by any measure, a success. □