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## Privacy and Power

Rosa Brooks

*Georgetown University Law Center*, [rosa.brooks@law.georgetown.edu](mailto:rosa.brooks@law.georgetown.edu)

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# Privacy and Power

ROSA EHRENREICH\*

Something has gone wrong in modern America, argues Jeffrey Rosen in *The Unwanted Gaze*. Our medical records are bought and sold by health care providers, drug companies, and the insurance industry. Our e-mails are intercepted and read by our employers. Amazon.com knows everything there is to know about our reading and web-browsing habits. Poor Monica Lewinsky's draft love letters to President Bill Clinton were seized by the villainous Ken Starr, and ultimately plastered all over the nation's newspapers.

To Rosen, the nature of the problem is clear: These examples are all part of a troubling "phenomenon that affects all Americans: namely, the erosion of privacy at home, at work, and in cyberspace, so that intimate personal information . . . is increasingly vulnerable to being wrenched out of context and exposed to the world."<sup>1</sup> Rosen is, of course, hardly unusual in viewing all these issues as quintessential privacy violations. In the past few years the media seem to have woken up to privacy issues, and most of us have been sympathetic readers of dozens of popular articles addressing just such a range of "privacy violations."<sup>2</sup> At the moment, the language of privacy seems to be the only language we have for talking about issues such as workplace e-mail monitoring, electronic cookies, medical records, and Monica's love letters.

Is this a good thing? Unquestionably, Rosen's examples are troubling, but are they all troubling in precisely the same way? Does it make sense to analyze them all as solely or primarily examples of the erosion of "privacy"? Moreover, is there a coherent and articulate conception of "privacy" that underlies all of Rosen's examples?

There is a jurisprudential tradition—sometimes noble, sometimes not—of quarreling over the concept of "privacy."<sup>3</sup> I hesitate to join the fray, because I

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\* Associate Fellow, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, and Consultant to the Open Society Institute and Human Rights Watch.

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

2. See, e.g., Maura Dolan, *The Right to Know vs. the Right to Privacy*, L.A. TIMES, Aug. 1, 1997, at A1; *The End of Privacy*, ECONOMIST, May 1, 1999, at 15, 15-16; Jonathan Gaw, *Privacy for Sale*, MINNEAPOLIS STAR TRIB., July 6, 1997, at D1; Bob Herbert, *A 'Right to Privacy' Still a Pipe Dream in Electronic World*, DALLAS MORNING NEWS, Oct. 4, 1998, at J5.

3. What, after all, is this thing "privacy"—which, some say, protects rights (or claims of rights, or interests, or conditions) relating to everything from abortion to medical records to what we do in the bedroom when (we hope) the neighbors are not looking? As Nadine Strossen recently remarked, perhaps somewhat ruefully, the right to privacy seems "broad and sweeping . . . a capacious unifying concept that encompasses all of the various separate facets of . . . diverse rights . . . that sometimes seem quite disparate." Nan Hunter, Nadine Strossen & Jed Rubenfeld, *Contemporary Challenges to Privacy Rights*, 43 N.Y.L. SCH. L. REV. 195, 196 (1999). Scholars have killed trees and sacrificed unknown megabytes of disk space on the altar of privacy, attempting to define it, defend it, subdivide it, excoriate it, and occasionally even deny it. Privacy has been variously defined as "the right to be left alone," THOMAS COOLEY, *THE LAW OF TORTS* 29 (1888); "a limitation of others' access to an individual,"

am inclined to think that attempts to find an abstract and neutral definition of privacy are doomed,<sup>4</sup> at least if they purport to offer an explanation of how threats to abortion rights, neighborhood peeping toms, and electronic cookies are really all “the same thing.” From an anthropological perspective—or, to use the currently fashionable term, a cultural studies perspective—privacy is what we believe it to be,<sup>5</sup> and it is not particularly troubling for the cultural studies devotee (or for the common law, as Robert Post has noted)<sup>6</sup> that the way we use the term “privacy” when we speak of permissible press activities differs from the way we use the term “privacy” when we are speaking of searches in the workplace.<sup>7</sup>

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Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980); “the control we have over information about ourselves,” Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968); the protection of that sphere involving “intimate information or activity . . . which draws its meaning from an agent’s love, liking, or care,” JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS AND THE RISE OF TECHNOLOGY 55 (1997) (discussing JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* (1992)); and “whatever is not generally . . . a legitimate concern of others.” DECEW, *supra*, at 58.

To some, privacy is more easily digested when chopped up into bite-sized analytic chunks; thus, informational privacy is distinguished from spatial privacy, decisional privacy from bodily integrity-based privacy. To others, breaking down privacy into bite-sized chunks does not go far enough: The concept of privacy should, as MacKinnon memorably suggested, be “exploded.” See CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 191 (1989). To others still, as Tribe observes, “privacy” is “a grab bag of unrelated goodies,” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1303 (2d ed. 1988), an illusory and unnecessary concept that perhaps does not in fact exist at all, but is merely a word we use when we *really* mean something else: for instance, the rights to property and bodily security, see Judith Jarvis Thomson, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976), or the right to autonomy, see generally Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

4. Some have tried, to be sure, see generally Gavison, *supra* note 3, but scholars from Anita Allen-Castellitto to Robert Post have ably critiqued Gavison’s definitions. See, e.g., Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 463-64 (1987); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 969-70 (1989).

5. When I say “we,” I mean Americans. This is not to imply, of course, that Americans are a homogeneous lot (we are not) or that the idea of “privacy” is uncontested in America (it is not). Nonetheless, it is easy to identify a cluster of core ideas associated in most people’s minds with the word “privacy.”

6. See, e.g., Post, *supra* note 4, at 1008-09.

7. This is not, of course, to suggest that the law might as well give up its project of categorizing and defining—after all, this is critical to legal reasoning. It is important to know (and argue about) what we mean when we use the term “privacy” in a given context: the tort context, say, or the constitutional context. We should not, however, be unduly troubled by the slipperiness of the idea of privacy. It is slippery because by its nature it is a creature of social norms, dialectically constructed and contested. Acknowledging these essential ambiguities, philosopher Judith Wagner DeCew calls privacy a “a broad and multifaceted cluster concept” involving a set of related but distinct claims concerning information, physical access, and those decisions that most express our selfhood. DECEW, *supra* note 3, at 61. But see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989), for a powerful critique of the notion that we should be free to define ourselves. This definition, of course, tells us little about the precise content of those claims, and why some often appear to us far more forceful than others. And, whether or not there is a unified abstraction called “privacy,” few would disagree that many of the issues we often refer to as privacy issues could also be described using other terms and concepts. Most of the time, privacy claims also involve other claims about property rights, or free expression rights, or liberty.

Nonetheless, what I want to do in this short Review Essay is reflect a bit upon the choices we make when we decide to discuss certain issues under the rubric of privacy, rather than under some other rubric. In particular, I want to suggest that there are dangers in relying too much on the language of privacy, for the privacy rubric has the potential to obscure certain kinds of consequential harms that are felt differentially by people in different social and economic groups. Thus, I want to suggest that some of the issues we routinely think of and speak of as “privacy issues”—in particular, issues such as the privacy of medical records and electronic monitoring in the workplace—might be better described and analyzed as issues of *power*. I want to examine the reasons we hesitate to describe such issues as power issues, and explore some of the potential pitfalls of the overbroad use of the privacy rubric. Finally, however, I want to look briefly at a few of the fascinating ways in which issues of privacy and issues of power are bound up together, and suggest that the privacy discourse might be rehabilitated after all—if we insist on bringing to the fore the issues of power that are intimately bound up with issues of privacy.

To begin, we should ask whether Rosen offers us a satisfying and coherent conception of privacy. Rosen himself seems to oscillate between (and sometimes merge) two potentially different conceptions of privacy: one that has to do with information control, and one that has to do with notions of intimacy and exposure. But while most of the examples Rosen gives do involve an individual’s loss of control over how personal information will be disseminated, it is less clear that they all involve issues of intimacy and shame.

First, consider information control. If Monica Lewinsky had had any choice in the matter, she presumably would not have shown her draft love letters to another living soul. Workers who find that their personal e-mail is routinely read by their employers (whether in the name of preventing sexual harassment, tracking productivity, or preventing “misuse” of company resources) generally resent it. All things being equal, they would presumably prefer to have their e-mail read only by the intended recipient. Web surfers are generally astounded to realize just how much information they leave behind in the form of those deceptively innocuous-sounding “cookies.” And, of course, the would-be purchaser of health insurance who finds her application denied because the insurance company has learned, somehow or other, that she already has signs of melanoma, would no doubt have given quite a lot to keep that information away from the insurance company. At least in this sense of privacy-as-information-control, these four examples appear to have a good deal in common.

But when Rosen claims that the erosion of privacy involves “intimate personal information . . . being wrenched out of context and exposed to the world,” he implies that there is more to his understanding of privacy than simple information control.<sup>8</sup> The key words here are “intimate” and “exposed,” and Rosen alludes to a different conception of privacy, one that may in fact be more

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8. ROSEN, *supra* note 1, at 3.

familiar to the layperson. Most Americans, if asked to offer an off-the-cuff, lay definition of "privacy," would probably find themselves referring to notions of intimacy, the body, sexuality, exposure, and shame. I would guess that most Americans first hear the word "privacy" as small children, when they ask why Mommy has started closing the bathroom door, or why Daddy insists that you have to knock before you enter his bedroom: You have to respect people's "privacy," the child is told. Though people come, later in life, to apply the term privacy to an expanding group of issues and claims, it remains, for the most part, rooted in the corporeal and intimate realm.<sup>9</sup>

This alternative idea that privacy involves the intimate sphere is not necessarily the "best" way to make sense of what is at stake when we speak of privacy (nor is it the only alternative way to conceptualize privacy),<sup>10</sup> but it is probably the conception of privacy most widely shared by Americans. Consequently, if we want to understand what is revealed (and what is obscured) when our political discourse labels certain kinds of issues as "privacy" issues, it is worth examining these issues in light of this common understanding of privacy. When our newspapers speak of privacy issues, when television shows lament threats to "our" privacy, when Rosen publishes a book on privacy, the word comes to us, unavoidably, with these connotations of intimacy and shame.

Indeed, Rosen suggests, the notion of a private sphere that is rooted in the body and the intimate circle is by no means unique to the Anglo-American legal and political culture.<sup>11</sup> Virtually every culture has some equivalent notion of physical boundaries and taboos relating to domestic spaces and to sexuality, birth, death, and other natural functions such as excretion and eating. As Milton Konvitz noted, "Almost the first page of the Bible introduces us to the feeling of shame as a violation of privacy."<sup>12</sup> He refers, of course, to Adam and Eve's sudden awareness, after eating the forbidden fruit, of their nakedness and their instant dash for the fig leaves. Konvitz observes, "[M]ythically, we have been taught that our very knowledge of good and evil—our moral nature as men—is somehow, by divine ordinance, linked with a sense and a realm of privacy."<sup>13</sup> Similarly, when Ham sniggers over his father Noah's nakedness while Noah lies

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9. For a discussion of the relationship between conceptions of the body and the evolution of the idea of privacy, see generally THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

10. See *supra* note 3 and accompanying text.

11. See ROSEN, *supra* note 1, at 18.

12. DECEW, *supra* note 3, at 11 (quoting Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 *LAW & CONTEMP. PROBS.* 272 (1966)).

13. *Id.* Interestingly—and perhaps contrary to some of the arguments about "personhood"—there is some evidence that it is not only humans who ritualistically create spheres of privacy. DeCew briefly discusses animal studies suggesting that "virtually all animals seek periods of individual seclusion or small group intimacy," and that this urge towards privacy serves "various biological purposes, especially those of ensuring propagation of the species." See *id.* at 12.

“uncovered in his tent,” God sees to it that Ham’s descendants are forever condemned to be servants and slaves.<sup>14</sup>

In legal terms, privacy of this sort, if violated, leads to dignitary harms. Such privacy violations damage our “personality interests,” and in some way or another cause us to experience psychic pain: fear, revulsion, humiliation, outrage, insult, shame, and so on. It is easy enough, then, to understand why the retrieval and publication of Lewinsky’s draft love letters resonates as a quintessential privacy violation; after all, overheated musings and fantasy communications with the President are surely rooted in the body, in sexuality, and in the most intimate sphere. Even the steeliest political cynic can hardly doubt that publication of the letters caused Monica Lewinsky the most intense feelings of exposure and shame. Similarly, we intuitively grasp the privacy violation that occurs when a member of the paparazzi—or merely a prurient neighbor—photographs us sunbathing in the nude with a special, long-distance lens, or when a gay person is “outed” to his family against his will.

But if our intuitive understanding of privacy is rooted in the corporeal, intimate sphere, and the pain of invaded privacy leads to dignitary harms such as humiliation, exposure, and shame, why is it that we also speak so readily of electronic cookies, workplace e-mail monitoring, and the disclosure of medical information to insurance companies as fundamentally “privacy violations”?

These seem, at first glance, to be different issues entirely. If Amazon.com is somehow able to tell that I visited three other online bookshops before visiting its site, or that I am fond of gardening manuals, who cares?<sup>15</sup> Similarly, if my employer monitors my workplace e-mailing habits,<sup>16</sup> this would seem to have little to do with my body or my intimate sphere and is most unlikely to lead to feelings of exposure and shame on my part—though it might well lead to other kinds of serious negative consequences (of which more later). Even when my medical records somehow end up in the possession of every existing insurance company, and I am subsequently denied health insurance because I smoke or carry a gene that is likely to cause a debilitating disease, it is by no means clear that my privacy has been violated in the intuitive sense in which we understand the term. I have never met the insurance company clerk who sees my records (or more likely programs the computer that assesses my records and sends me form letters). My health is not something I ought to be embarrassed about, and even if I am embarrassed by my health status, it does not cause feelings of

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14. *Id.* at 11 (quoting Konvitz, *supra* note 12, at 272).

15. Indeed, even if Amazon.com records that my preferred leisure reading is soft porn, it is not even particularly clear that this should bother me. After all, I do not know the computer operators or the warehouse workers at Amazon.com. In every way that matters to me, my online order of soft porn offers me far more privacy than does buying my porn at the little neighborhood newsstand.

16. My former employer most certainly monitored. Until August 2000, I worked at the U.S. Department of State, and every morning, when I logged on to my computer (both my classified computer and my unclassified computer), I was greeted by a stern welcome screen reminding me that “this computer is the property of the U.S. Department of State . . . You have no reasonable expectation of privacy.”

shame or exposure when Blue Cross/Blue Shield rejects me. Frustration? Yes. Anxiety? Yes. But shame? Probably not.

Rosen, citing Georg Simmel, discusses this “stranger phenomenon”: We are apt to care little when strangers obtain information about us, even if that information would be embarrassing if known to our family, colleagues or neighbors.<sup>17</sup> The disapproval of a stranger does not affect our reputation; the warehouse employee at Amazon.com cannot see us and will likely never meet us. Nor will the Blue Cross/Blue Shield employee. Nor will the faceless bureaucrat who randomly monitors workplace e-mail. So why do we lump these issues together with the neighborhood peeping tom and the prurience of Ken Starr, or even the indignities of having to undergo a workplace investigation into allegations of sexual harassment?

It could be argued, of course, that all of these situations contain at least the *potential* for shame and exposure. Perhaps the faceless bureaucrat reading my e-mail will come across the message in which I confess to having a crush on a coworker and will forward this to my boss as evidence that I am an incipient sexual harasser. Perhaps Blue Cross/Blue Shield will send my employer a letter noting that it cannot insure me because of my HIV status, the letter will somehow get around, and I will be ostracized by my colleagues.

These potentialities are by no means impossible,<sup>18</sup> but they do seem far-fetched, or at least sufficiently far-fetched to make it less than obvious why we so readily group workplace e-mail monitoring, electronic footprints, and medical confidentiality with Ken Starr and the local voyeur. After all, we faced this sort of danger even before the advent of new technologies: My purchase of a pornographic magazine at a seemingly safe, distant newsstand could have been witnessed by my nosy neighbor. My idle scribbles about my office crush might have been discovered when I accidentally left my steno-pad in the cafeteria. If that were to happen, it would certainly be bad luck—but we would hardly be inclined to declare that an invasion of privacy occurred.

Why consider these examples? Rosen’s oscillation between the notion of privacy as information control and privacy as intimacy may be a little inconsistent, but why is this significant?

The problem with the concept of “privacy,” however defined, is that whatever work it does, its problematic overuse can obscure certain issues of power and consequential harm. Certainly, there is *something* that bothers us about the idea that our workplace e-mail is monitored, that our medical records may end up in the hands of insurance companies, and so on. It is just not clear to me that the “something” that bothers us is the same something that bothers us about the

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17. See ROSEN, *supra* note 1, at 198 (discussing GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 404 (Kurt H. Wolff ed. & trans., 1950)).

18. Indeed, Rosen’s book is full of cases in which similar potentialities have, in fact, occurred. See *generally id.*

neighborhood peeping tom. To put it differently, it is not clear that what *ought* to bother us is the same thing that *does* bother us about the local voyeur.

When we think about issues such as the confidentiality of our medical records and workplace monitoring, what *really* bothers many of us, I think—or what certainly *should* bother us—may or may not have much to do with “privacy,” conceived of in either the information control sense or the dignitary sense, but it has a great deal to do with power. More specifically, what should bother us are balances of power that are damaging or inequitable.

Let me illustrate this by reference to two of my earlier examples: the disclosure of medical records and workplace monitoring. In the first instance, in what way have I been harmed when my medical records end up in the hands of insurance companies? If I am fairly lucky (that is to say, healthy), I will not be harmed at all. If I am a habitually unlucky person, it is possible that some embarrassing detail relating to, say, my treatment for heroin addiction will get back to my friends and neighbors, causing serious dignitary harm: My reputation will most likely suffer. But if I am only garden-variety unlucky—if, for instance, I smoke, or am HIV-positive, or show signs of incipient melanoma—I am likely to suffer a perfectly clear-cut and tangible kind of consequential harm: I will be denied insurance coverage, or offered coverage only at an astronomically high rate that I may be unable to afford. As a result, I may go into debt to afford decent health care, I may decide that I can only afford poor health care if I am to avoid going into debt, or I may be unable to afford health care at all. If it is impossible to purchase health care, I may, as a result, get very sick, or even die.

Is this a privacy issue? Perhaps it is, for some of us, at least some of the time. It may or may not make sense to describe this example as a privacy issue, but it is certainly a power issue. Health insurance companies are, for the most part, entirely free to refuse to insure me or charge me excessive premiums, and I have virtually no recourse. In the United States, unlike in many European countries, people have no right or entitlement to affordable health care, and, as we know, the United States government has thus far shown little interest in or ability to change the system to guarantee that all have decent health care. An unhealthy would-be health insurance consumer has virtually no power. The insurance companies, in contrast, have quite a lot.

Put this way, the “problem” here is not, most fundamentally, a privacy problem or a dignitary harm problem. The problem is that America lacks a decent health care system, and this can be devastating to those without extensive private resources. This is a problem that is intimately tied to power relations. Consequently, the solution to this problem is not, ultimately, the protection of our medical records from unauthorized disclosure—that may help, but it is only a Band-Aid, to use a medical metaphor. The true cure is to guarantee affordable access to decent health care for all Americans.

Consider a second and perhaps even more powerful example: employer monitoring of workplace e-mail. Here, too, the problem is not, most fundamentally, that my boss is likely to find out something about me that is “private” and



that will cause me intense humiliation and shame if discovered. The problem is that my boss can fire me for a wide range of reasons, and unless I am a union member with a particularly good contract and effective representation, I will have little recourse. I may be disciplined or fired if my boss discovers my habit of sending sexist jokes to all my colleagues, and this might cause me some humiliation, to be sure. But in the typical employment-at-will context, I may be disciplined or fired for a wide range of other reasons, too. My boss may find my haircut, my clothes, or my attitude “disruptive,” for instance. If my boss monitors my e-mails, maybe he finds the literacy level of my messages too low, or thinks that I type them too slowly, or send too many, or too few, or am a little too candid in my criticisms of the work environment or company policies. It does not really matter which: Chances are, the boss can fire me.

Here too, depending on the context, it may or may not make sense to construe this as a privacy issue. Yet regardless of whatever else it is, it is surely a power issue that stems both from the deep structure of American employment law and from the economic and social framework of our society more broadly. It is a power issue, and the harm I will suffer if I am fired will not merely be a dignitary harm.<sup>19</sup> If I am fired or demoted, I am likely to suffer some tangible and extremely unpleasant economic harms. Depending on my personal circumstances, these harms may be quite literally devastating.

Again, the “problem” here is not that my e-mail is monitored. That is only a symptom. The *problem* is that despite the erosion of at-will employer traditional privileges, most American workers have very little power in relation to their employers. Most can be fired for an astonishingly large number of reasons and can have an awful lot of their rights infringed upon with impunity.<sup>20</sup> The solution to this problem is not the creation of laws or policies forbidding e-mail monitoring by employers, although that would be helpful as a first step. The solution would involve a radical overhaul of employment law.

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19. Of course, there is nothing “mere” about dignitary harms. See, e.g., W.S. Brown, *Ontological Security, Existential Anxiety and Workplace Privacy*, 23 J. BUS. ETHICS 61 (2000). However, it makes sense analytically to distinguish them from tangible and quantifiable physical and economic harms.

20. For instance, private employees can, in general, be fired for speech their employer disapproves of, with certain well-defined exceptions. See *Smith v. Upson County*, 859 F. Supp. 1504 (M.D. Ga. 1994); *Newman v. Legal Servs. Corp.*, 628 F. Supp. 535 (D.D.C. 1986) (reiterating that the First Amendment applies only to state action, and that in the employment-at-will context, an employer is free to dismiss employees for virtually any reason, including a bad reason, although narrow public policy exceptions exist); *Korb v. Raytheon Corp.*, 574 N.E.2d 370 (Mass. 1991); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 689 (1997) (“Particularly in the private sector, employers enjoy nearly untrammelled power to censor and punish the speech of their employees, subject only to a variety of limited statutory and common law restrictions.”). See generally Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996). For a critique of the way in which the distinction between the private and the public has traditionally been used to maintain this state of affairs, see Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982). Klare argues that “the public/private distinction poses as an analytical tool in labor law, but it functions more as a form of political rhetoric to justify particular results.” *Id.* at 1361-62.

In a recent article about workplace harassment, I argued that Title VII's discrimination paradigm provided an incomplete understanding of the harms of workplace harassment because it fails to account for the aspect of dignitary harm.<sup>21</sup> I noted that not all workplace harassment is discriminatory either in intent or in impact under the terms of Title VII, even if it causes intense dignitary harms.<sup>22</sup> Conversely, some blatantly discriminatory workplace actions (differential hiring, training, or promotions, for instance) may have little or no obvious dignitary impact upon victims. To be sure, much workplace harassment is both discriminatory in intent and produces dignitary harms. I suggested, as a result, that we might imagine two circles, overlapping but distinct: one labeled "dignitary harms" and one labeled "discriminatory actions." Some workplace harassment would fit into only one circle; some would fit into the area of overlap.<sup>23</sup>

We might wish to imagine a similar set of circles when we consider the many issues habitually thought of under the privacy rubric. One circle might be labeled "privacy violations causing dignitary harms." True, this is only one aspect of what we call privacy, but it is a major aspect and worth separating out. Another circle might be labeled "power issues."<sup>24</sup> (I am not entirely happy with this terminology, which seems imprecise, but I cannot at the moment come up with a better terminology. But more on this later).

If we imagine these overlapping circles, we can be much clearer about where things are on the privacy-power continuum. Thus, if my neighbor peeps through my bedroom window, it seems fairly easy to place this sort of intrusion in the "privacy violations causing dignitary harms" circle. When Ken Starr snatched Monica's computer, it caused her great dignitary harm—but it was also a power play on the part of the independent counsel's office and the Republican right. This would then go into the area of overlap between the circles. If my prospective insurer discovers that I am HIV-positive, this too might well fit into the area of overlap—but if my insurer merely discovers that I smoke, perhaps it should fit only into the "power issues" circle. If my e-mail is monitored by my boss, and I am subsequently fired for sending too many non-work-related e-mails, or for criticizing workplace policies, this too might be seen as fitting most comfortably in the "power issues" circle.

I said early in this Review Essay that I doubted the possibility of arriving at an abstract and neutral definition of privacy, and for my purposes, it is neither here nor there that we use the word "privacy" in a range of different ways, not all of which are fully consistent. But I am concerned about our collective

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21. See Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999).

22. Consider a workplace in which one worker is mocked for her accent or obesity in a way that is unconnected to sex, race, and so on.

23. See Ehrenreich, *supra* note 21, at 63.

24. Because discrimination is inevitably about power, this maps more or less onto the "dignity" and "discrimination" circles.

readiness to lose sight of the issue of power and subsume it wholly into the murky and contested notion of privacy.<sup>25</sup> It seems to me that distinguishing between the two circles I just described—while recognizing that they can overlap substantially—is important, both analytically and practically.

Analytically, it helps to know what it is we are talking about when we speak of privacy—leaving aside the question of whether it matters that we end up talking about what Nadine Strossen called “the various separate facets of . . . diverse rights . . . that sometimes seem quite disparate.”<sup>26</sup> Whatever words we use, we need to know just what is at stake, and a concept as capacious and flexible as “privacy” can obscure as much as it reveals. In particular, the language of privacy may blind us to the fact that the exposure of certain kinds of information about ourselves—intimate or not—can cause distinct consequential harms that have a differential impact upon people who are already vulnerable.

Practically, it also makes a tremendous difference, because if we fail to distinguish between these separate but overlapping categories, we are likely to pour our energies into the wrong policy initiatives.<sup>27</sup> We are likely, for instance, to become fixated on protecting the confidentiality of medical records and to forget all about the importance of ensuring access to health care for all Americans. Or we will focus on preventing workplace e-mail monitoring—but forget that this leaves employees as vulnerable as ever to being fired or having important speech and associational rights infringed. Conversely, were we, as a society, to find a way to guarantee decent health care for all or to increase worker rights (or create a social safety net generous enough that being fired would be less catastrophic), we might well discover that the “privacy” issues Rosen identifies with regard to medical records and workplace monitoring would simply dissolve, or at any rate lose much of their salience.

But if these power issues are so important, why are they so rarely discussed? Why is it that we generally discuss these issues in terms of privacy? I think there are at least three reasons.

The first reason may be connected to something I mentioned a moment ago, when I noted that I was not entirely happy with the terminology I was using; to speak of “power” or “power issues” strikes me as worryingly imprecise. But perhaps this is due to something more than my own failure of imagination—perhaps my own failure to devise a more precise terminology reflects a more general difficulty many of us have. In this postideological age, it seems to me that we no longer have an adequate vocabulary for talking about issues of

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25. Cf. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 9 (1992) (noting that “[u]se of the same term, such as privacy, in different contexts often hides the significance of the normative-descriptive dimensions and is likely to cause confusion”).

26. Hunter, Strossen & Rubinfeld, *supra* note 3, at 195.

27. Cf. Gavison, *supra* note 25, at 43 (noting that “the ambiguity of terms may lead to errors in practical reasoning”).

power. The Marxist discourse strikes most of us as discredited, or, at best, quaint, but we have yet to come up with a new language.

As a result, we cannot speak truth to power; we can hardly even bring ourselves to acknowledge that there *is* something called power, and that some people have a lot of it, while others have little or none of it.<sup>28</sup> My own understanding of what the word “power” means owes much more to Weber than to Foucault (Weber famously defined power as “the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests”).<sup>29</sup> But in the academic discourse today, speaking about power generally leads your listeners to conclude that you are a turgid and feckless devotee of Foucault (in other words, a “Crit,” and the sort of person with whom mainstream scholars have lost patience), or, perhaps even worse, one of those unpleasantly literal-minded clinical advocacy types, forever going on about poverty and the like—as if all scholarship should be judged by whether it feeds the hungry! In our broader political discourse, an insistence on using the word “power” (in contexts other than a discussion of pro-wrestling or turbo engines) marks one as an old-fashioned populist type who just cannot seem to move on.

To speak of “power” in modern America is outré, and somewhat distasteful; it reminds us of inequalities most would much rather forget. All Americans are supposed to be equal.<sup>30</sup> To speak of “privacy,” however, seems safely all-American. After all, Americans can all agree that privacy is a good thing.

This, then, is the second reason we find it easier to speak of issues like workplace monitoring under the rubric of privacy rather than power. Power is hard to talk about, but privacy is easy to talk about. At any rate, we imagine that it is easy to talk about, because virtually all Americans think they know what it is. The notion of privacy has great resonance for us, rooted as it is in the corporeal, intimate realm. When we imagine certain kinds of privacy violations (having our unsent love letters printed for all to see, for instance), we experience strong and visceral feelings of exposure, shame, and outrage. As I argued earlier, such dignitary violations lie at the core of our intuitive understanding of privacy. We can teach ourselves to think of other things as privacy violations,

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28. *But cf.* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF PRISON* (Alan Sheridan trans., 1977) (critiquing the idea that power is something that individuals or institutions can meaningfully be said to “possess” or “lack”).

29. *See* MAX WEBER, *The Fundamental Concepts of Sociology, in THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 157 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947).

30. Interestingly, the European approach to privacy issues makes extensive use of the vocabulary of “dignity,” but in many ways the European conception of privacy is linked to an idea of dignity that is rooted in traditions of social inequality (and is thus deeply linked to issues of unequal power). As Jim Whitman puts it, the legacy of social hierarchy in Europe has led Europeans to use ideas of dignity and civility as “leveling up” mechanisms: Everyone demands the same measures of civility and respect once accorded only to the elite. In America, Whitman argues, we lack the same history of class hierarchy, and tend to “level down” instead. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279, 1387 (2000).

too (restrictions on abortion, or electronic footprints, for instance), and we can convince ourselves that doing so is justified and helpful. When we decide to label those things “privacy violations,” some of the powerful connotations of the word “privacy” may make us care more—or care differently—about these issues than we otherwise would.

This has practical consequences for those interested in policy reform, too: It is a lot easier to be sanguine about our ability to achieve better privacy protections than it is to be sanguine about our ability to readjust the balance of power between insurers and the uninsured, or employees and workers. It is not hard at all to imagine members of Congress reading Rosen’s lucid and compelling book and deciding to introduce legislation tightening protections of medical records or regulating some kinds of workplace monitoring. But it *is* hard to imagine members of Congress getting together and deciding that this time they are really going to overhaul the health care system or the employment law system.

The third reason we treat these issues as privacy issues rather than power issues is more complicated. I have argued for the importance of analytically distinguishing issues of privacy and issues of power. Indeed, I have suggested at points in this Review Essay that “privacy” and “power” lie at opposite ends of a continuum, and I have also drawn upon the image of two overlapping but conceptually distinct circles, one labeled “privacy violations causing dignitary harms” and the other labeled “power issues.” I offered these two spatial images to help us distinguish between two concepts that are often entirely conflated, and I hope the images have helped to disaggregate them. But useful as these images may be, they are also themselves misleading because they are both static images; they fail to acknowledge that “power” and “privacy” not only overlap, but construct one another.

Perhaps, then, it is hard for our political discourse to distinguish fully between privacy and power in part because privacy and power are intimately bound up with each other. In fact, it would probably not be an exaggeration to say that without privacy, power could not sustain itself; and without power, privacy could not exist. As I argue in the remainder of this Review Essay, the realm of the “private” is always constructed in relation to social power: Power constructs privacy and, to maintain itself, power also destroys privacy. Privacy, in turn, both constructs power and challenges it.<sup>31</sup>

This issue is too large and complex to be dealt with adequately in so short an essay, but too important to ignore. I will try, then, to give at least a brief sketch of some of the ways in which privacy and power are interconnected.

While every human society has a concept of “the private,” the specific contents of that concept vary greatly. Historically, things Americans now see as critical aspects of privacy and the private realm are associated with the rise of

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31. It is no coincidence, of course, that the Biblical Ham is punished for gazing upon Noah’s nakedness by being condemned, with all his descendants, to live in servitude. *Genesis* 9:18-29.

the urban bourgeoisie. The private realm was defined in opposition to the public realm, and this emerging conception of the private sphere was used to justify bourgeois resistance to monarchical and feudal power.<sup>32</sup> Meanwhile, in the domestic realm, the emerging bourgeoisie differentiated themselves from servants and apprentices by retreating to “private” bedrooms and bathrooms, and by developing more and more complex rituals relating to clothing, etiquette, and so on.<sup>33</sup> No longer was sleeping in the same room with servants and animals acceptable for the master and mistress of the house; the new bourgeois elite carved out private areas as a spatial symbol of their greater social and economic power.<sup>34</sup>

In America, issues of privacy are linked to issues of power particularly along the axes of gender, race, and class.<sup>35</sup> Robert Post reminds us that in 1890 E.L. Godkin<sup>36</sup> called privacy “one of the luxuries of civilization . . . unknown in primitive or barbarous societies”—and the example Godkin offers is that of “loafers” in a Wild West mining town, who, “in their own rude way,” are insulted by a traveler’s insistence on performing his toilet out of their sight.<sup>37</sup> Warren and Brandeis were famously outraged when the press publicized a “private” and upper-class affair to the masses and promptly began to insist on the tort of invasion of privacy. Ernest Goffman observed that privacy’s “rules of deference and demeanor” serve to affirm the social order, and a generation of feminist scholars has demonstrated the ways in which nineteenth-century middle-class conceptions of the private-public divide operated to exclude women from powerful public roles,<sup>38</sup> and the ways in which the idea of the “private” also

32. See generally, e.g., CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

33. Peter Brooks notes that this was reflected in almost all aspects of domestic life:

Privacy . . . belongs to a conception of upper- and middle-class leisure and family life that emerged, first in England, and then in France, starting sometime in the seventeenth century, and developed rapidly in the eighteenth century. The notion of privacy is tied to the rise of the modern city . . . . [P]rivacy is reflected, for instance, in domestic architecture, in the shift from the communal living, eating, and sleeping spaces of the medieval house to the well-demarcated private apartments, boudoirs, “closets,” and alcoves of eighteenth century upper- and middle-class housing.

PETER BROOKS, *BODY WORK: OBJECTS OF DESIRE IN MODERN NARRATIVE* 28 (1993); see also FERNAND BRAUDEL, *CAPITALISM AND MATERIAL LIFE, 1400-1800*, at 224 (1973) (discussing privacy as “an eighteenth century innovation”). See generally *A HISTORY OF PRIVATE LIFE* (Phillip Aries & George Duby eds., 1986).

34. See, e.g., PETER GAY, *THE EDUCATION OF THE SENSES* 403 (1984) (discussing the rise of the idea of privacy among affluent middle-class Victorians: “No other class at any other time was more strenuously, more anxiously devoted to the appearances, to the family, and to privacy, no other class has ever built fortifications for the self quite so high.”).

35. See, e.g., Y.K. Chan, *Privacy in the Family: Its Hierarchical and Asymmetric Nature*, 31 *J. COMP. FAM. STUD.* 1 (2000) (discussing domestic privacy in Chinese culture).

36. Godkin, Post notes, was approvingly cited by Chief Justice Warren and Justice Brandeis. Post, *supra* note 4, at 976.

37. *Id.*

38. For a summary and discussion of some common feminist critiques of the public-private distinction, see generally Gavison, *supra* note 25.

justified the failure of public officials to intervene to protect women from domestic violence.<sup>39</sup> Similarly, Jed Rubenfeld has eloquently reminded us that constitutional privacy rights can only be understood and justified by reference to state strivings toward totalitarian power.<sup>40</sup> On the transnational level, the idea of “sovereignty” has been forcefully attacked as the privacy of states to do as they wish to their citizens without interference from other states. (If sovereignty is the cloak of privacy claimed by powerful but abusive states, “human rights” is the counterclaim, an assertion, among other things, of individual privacy—in the sense of irreducible dignity, personhood, autonomy—as a challenge to the state’s totalizing ambitions.)<sup>41</sup>

In general, those who have power have the luxury of defining what is and what is not private, and the luxury of controlling their own privacy while denying that of others.<sup>42</sup> It is no accident that absolute power demands absolute privacy for itself and zero privacy for others, for this is a crucial part of how those with power maintain their power and destroy that of others. More concretely, consider the totalitarian regime that specializes in late-night raids on the homes of its citizens and turning friends and lovers into informants; consider the concentration camp guards who force prisoners to defecate in front of them, while punishing those prisoners who look guards directly in the eye.<sup>43</sup> These examples may seem extreme, but students of crime and punishment recognize that even the most “civilized” and human rights-oriented societies use the denial of privacy as a mechanism of social control.<sup>44</sup>

While the content of the “private” varies from culture to culture—and can shift radically within a culture<sup>45</sup>—having our privacy respected, in certain minimal and culturally constituted ways, is indeed critical to our personhood.

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39. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2150 (1996).

40. See generally Rubenfeld, *supra* note 7. Rubenfeld restricts his argument to privacy in the constitutional sense. In the private sphere too, however, privacy should be understood as intimately bound up with aspirations towards totalizing power.

41. It is worth noting, in this regard, that the distinction between “national” and “international” in international law maps almost exactly onto the domestic distinction between the private and the public. With the rise of a transnational human rights discourse, the legitimacy of the national-international distinction is now under attack as never before, and increasing globalization renders the distinction still harder to maintain.

42. See, e.g., Louise Marie Roth, *The Right to Power Is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 *LAW & SOC. INQUIRY* 45, 68 (1999) (“The more powerful are always more able to define and defend the boundary between public and private in their lives.”).

43. See generally WOLFGANG SOFSKY, *THE ORDER OF TERROR: THE CONCENTRATION CAMP* (William Templer trans., 1997).

44. See, e.g., FOUCAULT, *supra* note 28, at 196-201. See generally JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990* (1993); Teresa A. Miller, *Sex and Surveillance: Gender, Privacy, and the Sexualization of Power in Prison*, 10 *GEO. MASON U. CIV. RTS. L.J.* 291 (2000) (discussing how guards, officials, or other prisoners often exploit a prisoner’s sexuality in order to assert control over that prisoner).

45. Indeed, as Anita Allen-Castellitto has pointed out, today many Americans appear to revel in casting off their privacy; Allen-Castellitto cites tell-all television talk shows and the rise of web cams. As Allen-Castellitto notes, if we believe that certain forms of privacy are necessary to a liberal society,

This is true not merely from a philosophical point of view. There is evidence that it is also true from a biological point of view.<sup>46</sup> MacKinnon spoke of the need for feminists to “explode the private,” alluding to the ways in which the construction of the “private” sphere may operate to render invisible the abuses of the powerful (in particular, violence against women).<sup>47</sup> MacKinnon’s analysis was compelling—but, as many feminists and human rights advocates have argued since, she gave short shrift to the ways in which the powerful are themselves eager to “explode the private” when doing so offers a convenient way to humiliate and control.

If we accept this idea that privacy and power are intimately bound up, it may help explain why we habitually speak of things such as workplace monitoring and the disclosure of medical records in terms of privacy, rather than in terms of power. On some level, perhaps we do this because we sense that to speak of privacy is already to speak of power; it is addressing issues of power through the back door. When an employer monitors his workers’ e-mail, it is, among other things, a way of saying: “There is nothing that is yours. All that you think is yours is really mine.”<sup>48</sup> Such workplace e-mail monitoring is, of course, on a continuum that also includes surveillance cameras in the workers’ lounge or changing room, and urine samples delivered on demand as part of antidrug policies. Further back, in the darkest recesses of our collective awareness, workplace e-mail monitoring is also on a continuum with the company town’s total control, with the chain gang, the gulag, and the slave.<sup>49</sup>

In practice, the distance between those intrusions and acts that implicate the corporeal, intimate realm and those that do not do so in any obvious way may not be far at all. The employer who monitors computer use in the name of productivity or antiharassment policies is likely also to demand the frequent

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this raises troubling questions about whether (and when, and how) the state should compel these forms. See generally Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

46. DeCew mentions studies suggesting that when animals (especially primates) are denied spatial or physical privacy, they become depressed and dysfunctional. DECEW, *supra* note 3, at 12.

47. See MACKINNON, *supra* note 3, at 168-69.

48. In the employment-at-will setting, this is implicit in basic understandings of the employer-employee relationship: The employee “sells” his body and labor to the employer, albeit for a specified period of time. The employee becomes, in a sense, the “property” of the employer, just as the workplace itself and the equipment with which the employee works are the property of the employer. If, as some have suggested, privacy rights are a species of property rights, see *supra* notes 4-8 and accompanying text, the worker in the employment-at-will setting has contracted away his privacy (property) rights at the workplace door. See Roth, *supra* note 42, at 57 (“[S]urveillance is applied most vigorously to those with the least ability to define the boundaries between their private and public lives.”).

49. See KEVIN BALES, *DISPOSABLE PEOPLE: THE NEW SLAVERY IN THE GLOBAL ECONOMY* 9 (2000) (“Slaves are often forced to sleep next to their looms or brick kilns; some are even chained to their work tables. All their waking hours may be turned into working hours.”). Similarly, American workers complain of being symbolically chained to their desks and jobs, as new technologies blur the boundaries between “work” and “nonwork.” Physical chains cannot be equated with metaphoric chains, but perhaps the distance between the slave and the average American worker is not quite as vast as one likes to assume.



production of urine samples. And from using these tactics in pursuit of productivity or a harassment-free or drug-free workplace, it is only a small and imperceptible step to using these tactics as a naked reminder of power. In one workplace I know of, for instance, workers active in efforts to form a union began to find themselves hauled in to provide urine samples nearly every day—allegedly randomly. The message was not lost on them.<sup>50</sup>

Given this, perhaps we should not, after all, be so critical of Rosen's tendency to speak of such issues under the privacy rubric.<sup>51</sup> Perhaps speaking of these issues as privacy issues is, in some sense, a "subaltern discourse," as the cultural critics would have it, a way of indirectly problematizing and destabilizing power. To speak of privacy can be, in some contexts, to challenge the legitimacy of power and assert strong counterclaims about human dignity. By appealing to the resonant language of privacy, we evoke concepts of shame and humiliation and exposure, even when they are not immediately or obviously involved; we remind ourselves of our vulnerability, even when we consider ourselves secure, and we—perhaps—create a way for the powerless and the powerful alike to rally around an issue. Employers may be loathe to give up power over employees, and insurers loathe to increase consumer power—but calls for "privacy" resonate with us all.

I have come full circle. My goal is not to argue that it is always wrong to speak of such issues as privacy issues, and always right to speak of them as power issues. Analytically and strategically, there are times when it may be useful to use one term, and times when it may be useful to use the other, or to use both.<sup>52</sup>

But while it may not always matter which term we use, I believe that it is important for us to know what it is that we mean when we use each term, to know just what is at stake, and for whom—and for us squarely to confront the issues of power that lie at the heart of privacy.

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50. Interview with Gary Stevenson, former Director of Organizing for the Teamsters, in Washington, D.C. (Sept. 30, 2000).

51. In a recent article, Lawrence Rothstein argues that "dignity" would be a better framework for addressing workplace e-mail monitoring than "privacy." He uses "dignity" in its robust European sense, and draws explicitly upon French, Italian, and European Union approaches to workplace monitoring. Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 383-98 (2000). To the extent that the European legal tradition conceives of dignity as a notion necessary precisely to overcome historical power and status inequalities, I very much agree with Rothstein. Here too, however, I would note that our American conception of "privacy" may operate to pull issues of power in through the back door. After all, privacy is, in the tort sense, traditionally conceived as an issue of dignitary harms.

52. Cf. Post, *supra* note 4, at 971. Speaking of common-law privacy conceptions, Post notes that the common law "is primarily interested in maintaining the forms of respect . . . and relatively indifferent to whether particular forms of respect should be denominated as 'privacy.'" *Id.*