

Three Concepts of Privacy

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Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all. Jeffrey Rosen's courage in eloquently addressing the subject with the sweep and vigor evident in *The Unwanted Gaze* is entirely admirable.¹ He has composed a rich and useful book, filled with perceptive observations and nuggets of sound advice. But as to capturing the core concept of privacy itself, I find myself cautious and reserved.

In this brief Review Essay, I shall isolate and review three different and in some respects incompatible concepts of privacy that are each mentioned in the Prologue to *The Unwanted Gaze*. The first connects privacy to the creation of knowledge; the second connects privacy to dignity; and the third connects privacy to freedom. I shall argue that the first concept should not be understood as a question of privacy; that the second is a helpful way of apprehending privacy, but that it should focus our attention primarily upon forms of social structure; and that the third is best conceived as an argument for liberal limitations on government regulation.

Rosen introduces the first sense of privacy early in the Prologue when he seeks to explain the "sense of violation"² that Monica Lewinsky undoubtedly experienced when her "consensual sexual activities"³ were forcibly made public. Rosen argues that "a central value of privacy" is to protect persons "from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge."⁴ Rosen argues that Lewinsky, like any normal person, would feel violated if she were "misjudged on the basis of [her] most embarrassing, and therefore most memorable, tastes and preferences."⁵ Rosen continues:

Monica Lewinsky didn't mind that her friends knew she had given the President a copy of Nicholson Baker's *Vox*, because her friends knew that she was much more than the type of person who would read a book about phone sex. But when our reading habits or private e-mails are exposed to strangers, we may be reduced, in the public eye, to nothing more than the most salacious book we once read or the most vulgar joke we once told.⁶

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

2. *Id.* at 8.

3. *Id.* at 4.

4. *Id.* at 8.

5. *Id.* at 9.

6. *Id.*

Rosen contrasts the superficial knowledge of the public to the “true knowledge of another person, in all of his or her complexity” which “can only be achieved with a handful of friends, lovers, or family members.”⁷ “[I]nformation wrenched out of context is no substitute for the genuine knowledge that can only emerge slowly over time.”⁸

There is no doubt that Rosen has accurately and eloquently identified a real social concern. We can all empathize with Lewinsky’s distress at being misunderstood by the public. The question, however, is whether this distress relates to the concept of privacy. Misrepresentation in the public eye is independently distressing whenever it occurs, regardless of whether it is caused by the revelation of “private” facts. If a competent professional athlete becomes stereotyped and misjudged on the basis of a single bonehead play, he suffers an injury analogous to Lewinsky’s, even though his error may have been committed in the full view of a packed football stadium. The risk of misperception is endemic to public life; it is built into the very sociology of public understanding. How, then, does it relate to the specific value of privacy?

At the most general level, Rosen seeks to situate an account of privacy within the field of knowledge. Privacy, he suggests, blocks the flow of information in order to avoid error and misrepresentation. This view of privacy surfaces throughout *The Unwanted Gaze*. It is an odd view, however, because knowledge is necessarily dependent upon information.

All knowledge, even intimate knowledge about friends and lovers, alters in response to new information. To interrupt the flow of information is to short-circuit the formation of knowledge. We therefore cannot set up an opposition between information and “true knowledge,” for in human life all knowledge is provisional and uncertain. All things being equal, those with more information will have more secure knowledge. The more information released about Lewinsky, the better the public will understand her. If the public has reason to learn about the Lewinsky affair, the fact that the public will never understand Lewinsky as deeply or as comprehensively as her mother cannot be a reason to prevent public disclosure.

Perhaps, then, Rosen means to suggest that privacy protects against certain typical and unfortunate errors in the creation of knowledge. Privacy prevents the disclosure of the kind of information that cannot be adequately understood in the absence of special circumstances, like intimacy. To pursue this line of analysis, however, we must distinguish between two foci of concern. The first imagines the function of privacy as preventing cognitive errors by persons who seek to acquire knowledge; the second imagines privacy as protecting persons who are the subject of information from misrepresentation.

Rosen adopts the first focus when he speaks of privacy as analogous to rules of evidence in a courtroom that preclude the introduction of inflammatory

7. *Id.* at 8.

8. *Id.* at 10.

information that might confuse or mislead a jury. Rosen notes that “when prurient information is introduced in court, it can distract jurors and the public at large, leading them to judge the accuser and the accused on the basis of embarrassing past acts rather than their guilt or innocence of the charges in question.”⁹ Rosen interprets Warren and Brandeis as arguing that “prurient information is so luridly interesting that, when widely publicized, it crowds out all other topics of public discussion, making it difficult to think or talk about anything else.”¹⁰ Privacy thus safeguards “the public’s interest in not being distracted by prurience.”¹¹

Once again, Rosen has identified an important social concern. The question is its relationship to the value of privacy. Prurience, after all, can be public or private. If Clinton had an overt affair with Lewinsky, it would be equally distracting to the public as a private affair. Conversely, many of the details of Clinton’s private life are not distracting, but merely boring and uninteresting. The general point is that the distinction between distracting and pertinent information does not align with the distinction between public and private information. The distinction between distracting and pertinent information would seem instead to turn entirely on the purpose for which the information is required. Information about my private sex life might be merely distracting to the editor of my book, but it may be highly pertinent to my psychoanalyst.

Judicial decisions to exclude inflammatory evidence follow this logic. Judges typically weigh the relevance of evidence against its likelihood to mislead. Judges do not exclude information merely because it is private. Evidence of improprieties in my private bank records might be excluded from litigation involving a car accident, but not from litigation involving financial fraud. The operative question is not whether the information is private, but whether it is relevant to the decision at hand. Similarly, when judges decide whether evidence is sufficiently inflammatory or prejudicial to be excluded, their decision does not depend upon whether the evidence concerns public or private information. Evidence of past crimes, which is undoubtedly public, is typically excluded as potentially prejudicial.

When Rosen contends that the public ought to be protected from information about the private sex lives of public officials, he constructs an argument that is analogous to that which supports the exclusion of evidence in a trial. If our analysis so far has been correct, however, he is not actually making an argument about privacy, but about the pertinence of this information for public deliberation. This pertinence is independent of the privacy of the information. I take it that no one would contend that the public ought to be protected from information revealing that the President was engaged in sexual relations with a North Korean spy, regardless of whether this information might in other contexts be

9. *Id.* at 156.

10. *Id.* at 142.

11. *Id.* at 158.

deemed private. The conclusion that the President's private life is merely distracting to the public must ultimately be defended on the grounds that such information is not pertinent to an evaluation of the President. This is not a question of privacy. It is instead a particular account of the role and responsibilities of the Presidency, and, therefore, of the grounds upon which he may be rendered accountable to the public.

I should add that for the past forty years the First Amendment has been interpreted to stand for the proposition that only the public can determine whether information is relevant or irrelevant for the evaluation of public officials. No legislation or judicial decree can advance a particular conception of the proper role of public officials as a basis for excluding information from public discourse as "irrelevant." This point fits nicely within a larger theme of *The Unwanted Gaze*, which is "the superiority of norms over law in protecting privacy."¹² Even if particular conceptions of the responsibilities of public office cannot be imposed by law, they can nevertheless be advocated by prominent authors, like Rosen. No doubt we would all be better off if Rosen's sense of official role, which supports a stronger distinction between public and private behavior, became more influential within public discourse.

If the value of privacy does not correspond well with the concern of preventing cognitive errors by persons who seek to acquire knowledge, perhaps it fits better with the concern of protecting persons from misrepresentation. Rosen reiterates this theme throughout *The Unwanted Gaze*. He concludes the book, for example, by stressing "the importance of maintaining private spaces to protect individuals from being judged out of context in a world of fleeting attention spans."¹³ "All Americans," Rosen insists, "are entitled to be regarded as self-defining individuals rather than as prisoners of sexual stereotypes and generalizations."¹⁴

Public knowledge is not intimate knowledge. All public knowledge deals in stereotypes and generalizations, so that all individuals who become the subject of public knowledge risk misrepresentation. Rosen rightly expresses concern about this issue, but the question is how the issue relates to privacy. Senator John Glenn can become stereotyped as a hero because of his public duties as an astronaut; Michael Milkin can become stereotyped as a villain because of his public financial shenanigans. Most persons desire to define themselves and to have others accept their self-definition. But this desire is incompatible with the ways in which public discussion necessarily appropriates the authority and the power to define persons that are the subject of public consideration. Public debate defines persons for its own purposes, and in its own ways. Judged from the perspective of intimate knowledge or of personal self-presentation, these public definitions almost always consist of stereotypes and generalizations. This

12. *Id.* at 219.

13. *Id.* at 223.

14. *Id.*

is true whether or not the information that forms the basis for public knowledge is private or public.

Perhaps it might be said, however, that stereotypes based upon private information are more hurtful to persons than stereotypes based upon public information. If this is true, it cannot be because privacy uniquely protects the abstract right to define oneself as something more than a stereotype, because this right, if it exists, is equally compromised by every absorption of a person into the maw of public knowledge. It must instead be true either because it is particularly important to individuals to resist misjudgments based upon private information, or because it is particularly hurtful to individuals to be misjudged based upon private information. But there is no reason to accept either proposition.

Persons normally stake their identity both on aspects of themselves that are public, like their work, and on aspects of themselves that are private, like their sexuality. I do not see any reason to believe a priori that it is necessarily more important to avoid public misjudgments of my work than of my private life. It would seem instead important to avoid misrepresentation with respect to all significant aspects of my life. The harm of public stereotyping, moreover, would seem normally to depend on the content of a stereotype, rather than on the source of information upon which a stereotype is based. If I am publicly stereotyped as a liar, it is equally harmful whether the stereotype comes from public statements made to the police or from private statements made to my friend.

It is true that if I am publicly stereotyped as a liar on the basis of private statements to a friend, it may be difficult to defend myself in public without further compromising my privacy. This difficulty arises because of a conflict between desiring a certain public image and a reluctance to disclose private information. But this same dilemma can arise whether or not the initial public stereotype is formed on the basis of private information. If on the basis of public information the public forms an inaccurate and stereotyped image of me as a poor teacher, I can face the same hard choice about whether to combat the image by revealing otherwise private exchanges with my students. To the extent that private information is relevant to the formation of public image, persons can be put to the test of whether they care more about their privacy or about their image.

But what does it mean, then, for persons to care about their “privacy”? We might begin our consideration of this question by noting that, regardless of its impact on my public image, I suffer an independent and additional harm if my friend discloses my private conversation to the press. This is not the harm of being “unfairly defined by isolated pieces of information that have been taken out of context.”¹⁵ It is instead the injury of betrayal, which is an entirely different matter. The injury of betrayal comes from the violation of confidence.

15. *Id.* at 158.

An analogous sense of violation can arise if my private conversation with a friend is secretly taped by a third party, like a reporter, who then discloses it to the press. Instead of tying the concept of privacy to potential errors in the creation of public knowledge, therefore, it may be more useful to explore the connections between privacy and the independent harm of violation.

This harm derives from the rupture of significant normative expectations. These expectations can range from mutual understandings of confidentiality between friends to assumptions that third parties will not record and disclose private conversations. We can conceive privacy as identifying socially sanctioned expectations of this kind. On this account, privacy inheres in social norms that define the forms of respect that we owe to each other. These norms are socialized into the identities of persons. Infringements of these norms are experienced as intrinsically harmful, because they are violative of the self.¹⁶

Rosen alludes to this second concept of privacy when he writes in the Prologue that an invasion of privacy can constitute "an intrinsic offense against individual dignity."¹⁷ An offense is "intrinsic" when it causes harm regardless of contingent consequences, like public misrepresentations. And offenses against "individual dignity" differ from offenses against "individual autonomy."¹⁸ Autonomy refers to the ability of persons to create their own identity and in this way to define themselves. Dignity, by contrast, refers to "our sense of ourselves as commanding (attitudinal) respect."¹⁹ Unlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons. That is why modern legal systems so often set autonomy and dignity in opposition to each other, as for example in the area of bioethics:

In the name of dignity of the person, French law basically refuses the individual the right to dispose of his or her body and its parts; American law has allowed greater latitude for proprietary and commercial relations concerning the body and person, privileging autonomy and value over an inherent and inalienable dignity. Autonomy contra dignity, dignity contra autonomy, antinomies linked in an uneasy seesaw, with neither tradition totally eliminating what the other valorizing.²⁰

To equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community. So understood, privacy presupposes persons who are socially embedded, whose identity and

16. For a full discussion of this account of privacy, see Robert Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991); Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989) [hereinafter Post, *Social Foundations*].

17. ROSEN, *supra* note 1, at 19.

18. For other references in *The Unwanted Gaze* to privacy as protecting dignity, see *id.* at 12-17, 94.

19. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 15 (1989).

20. PAUL RABINOW, *FRENCH DNA: TROUBLE IN PURGATORY* 93 (1999).

self-worth depend upon the performance of social norms, the violation of which constitutes “intrinsic” injury. In these respects, the conception of privacy as a form of dignity is in theoretical and practical tension with Rosen’s observation that “[t]he ideal of privacy . . . insists that individuals should be allowed to define themselves.”²¹

If privacy is conceived as a form of dignity, it presupposes a particular kind of social structure in which persons are joined by common norms that govern the forms of their social interactions. These norms constitute the decencies of civilization. Although much of our social life occurs within such a social structure, we also inhabit many kinds of social structures that are quite different. Privacy does not typically obtain between surgeons and their patients, for example, because the social structure of a hospital is instrumentally organized around the task of making patients healthy. Surgeons typically regard their patients as bodies to be healed, rather than as persons deserving of reciprocal norms of respect. Similarly, privacy does not typically obtain between historians and the objects of their investigation, because historians regard their subjects as objects to be understood, rather than as selves who are to be respected.

Sometimes public discussion provides an occasion for reaffirming membership in a common community; in such contexts norms defining decency (and privacy) are ordinarily observed.²² A good example might be law school faculty meetings. But in large, impersonal democracies like the United States, public debate frequently has a different purpose, which is to understand public matters and hold public officials accountable.²³ When public discourse is conducted for this purpose, persons become the object of investigation. They are to be apprehended, rather than respected.²⁴ That is one reason why persons caught in the “pitiless glare” of public attention typically feel naked and demeaned. It is one cause of the “sense of violation” that Monica Lewinsky undoubtedly experienced.²⁵ It is degrading to be mercilessly questioned and probed in ways that are unbounded by the forms of respect that usually govern our lives. Caught in the crosshairs of such public discussion, the loss of privacy derives from a social structure that follows the imperatives of knowledge, rather than the decencies of community norms. In such a context, the value of privacy must thus be set against the value of public comprehension.

21. ROSEN, *supra* note 1, at 223. The matter is complicated, however, because some forms of privacy, particularly those associated with spatial norms and protected by the tort of intrusion, are essential for the formation of an independent self. See Post, *Social Foundations*, *supra* note 16, at 973-74. This does not tend to be true with informational privacy, which is protected by the tort of public disclosure. See *id.* at 986-87.

22. For a legal description of this concept of public debate, see Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 627-33 (1990).

23. See Post, *Social Foundations*, *supra* note 16, at 998-1008.

24. See *id.* at 999-1003.

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

An analogous tension occurs when the state mobilizes to investigate and prosecute crime. Rosen eloquently discusses the many ways that law enforcement can degrade the very citizens it is designed to protect. Law enforcement follows an instrumental logic designed to deter and punish criminal behavior. From the vantage of this objective, the dignitary norms of privacy are merely hindrances and burdens. The warrant requirement of the Fourth Amendment precisely hampers the efficiency of law enforcement in order to extract rudimentary acknowledgements of the privacy norms of our community. In such a context, the value of privacy must be set against the value of effective crime control. There can be no final resolution of this tension. The steady and more or less unconscious erosion of privacy before the daily and pressing imperatives of crime control can, however, be retarded and perhaps even checked. That is why Rosen is right to call for “more independent mechanisms for protecting privacy—such as grand juries or other popular accountable bodies—which can balance the claims of the police against the privacy of individuals and decide whether a search is reasonable before information is disclosed.”²⁶

These balancing mechanisms would be quite pointless if, as Rosen sometimes suggests, constitutional efforts to interpret the Fourth Amendment to protect “reasonable expectations of privacy” were “entirely circular.”²⁷ It is undoubtedly true that judicial interpretations of “reasonable expectations” will affect the actions of law enforcement agencies, which will in turn affect the actual social norms that define privacy. These matters are dialectical and thus involve some circularity. But it is not true that social norms are entirely a product of legal action. Rosen himself acknowledges this when he appeals to “the kind of privacy that citizens expect in the real world”²⁸ as a ground of critiquing judicial decisions interpreting the Fourth Amendment. If privacy is understood as a form of dignity, there can ultimately be no other measure of privacy than the social norms that actually exist in our civilization.

Privacy as dignity locates privacy in precisely the aspects of social life that are shared and mutual. Invading privacy causes injury because we are socialized to experience common norms as essential prerequisites of our own identity and self-respect. This understanding of privacy contrasts sharply with yet a third notion of privacy that is also discussed in the Prologue to *The Unwanted Gaze*. In discussing how sexual harassment law has diminished privacy, Rosen suggests that “[p]rivacy protects a space for negotiating legitimately different views of the good life, freeing people from the constant burden of justifying their differences.”²⁹ Rosen contends that “we should preserve private spaces for those activities about which there are legitimately varying views, activities that no one in a civilized society should be forced to submit to public scrutiny.”³⁰

26. *Id.* at 63.

27. *Id.* at 60.

28. *Id.* at 61.

29. *Id.* at 24.

30. *Id.*

The ultimate justification for this kind of privacy, as Rosen elsewhere acknowledges, is liberal freedom: "A liberal state respects the distinction between public and private speech because it recognizes that the ability to expose in some contexts parts of our identity that we conceal in other contexts is indispensable to freedom."³¹

From a theoretical point of view, this third concept of privacy as freedom is an almost exact inversion of the concept of privacy as dignity. Privacy as freedom presupposes difference, rather than mutuality. It contemplates a space in which social norms are suspended, rather than enforced. It imagines persons as autonomous and self-defining, rather than as socially embedded and tied together through common socialization into shared norms.

Of course, real persons in the real world possess selves that are both independent and socially dependent. In fact, the American sociologist George Herbert Mead proposed a theory of the self that precisely depended upon the phased interaction of these two aspects of the self. Mead distinguished between what he called the "I" and what he called the "me." Mead identified the socialized structure of individual personality with the "me." He was quite aware, however, that there could be no such thing as a completely "institutionalized individual."³² Persons always retain the inherent and irreducible capacity to modify or transcend socially given aspects of themselves. Mead identified this capacity as the "I":

The "I" is the response of the organism to the attitudes of the others; the "me" is the organized set of attitudes of others which one himself assumes. The attitudes of the others constitute the organized "me," and then one reacts toward that as an "I."³³

The "I" is spontaneous, unpredictable, and formless; the "me" is structured and relatively static. Mead viewed each as a fundamental and indispensable aspect of the self. He associated the "me" with "social control," and the "I" with "self-expression."³⁴ "Taken together, they constitute a personality as it appears in social experience. The self is essentially a social process going on with these two distinguishable phases."³⁵

Privacy as dignity protects the "me"; privacy as freedom protects the "I." Privacy as dignity safeguards the socialized aspects of the self; privacy as freedom safeguards the spontaneous, independent, and uniquely individual aspects of the self. Each seems necessary in a civilized society, but they are also incompatible with each other. Privacy as dignity seeks to eliminate differences by bringing all persons within the bounds of a single normalized community;

31. *Id.* at 11.

32. GEORGE HERBERT MEAD, ON SOCIAL PSYCHOLOGY 239 (Anselm Strauss ed., 1964).

33. *Id.* at 230.

34. *Id.* at 238, 240.

35. *Id.* at 238.

privacy as freedom protects individual autonomy by nullifying the reach of that community. Privacy as freedom carves out a space in which, as Rosen elsewhere states, individuals can be “allowed to define themselves.”³⁶

Privacy as freedom used to be associated with nature. As Richard Sennett has observed, traditionally the “line between public and private was essentially one on which the claims of civility—epitomized by cosmopolitan, public behavior—were balanced against the claims of nature—epitomized by the family.”³⁷ From this perspective, privacy as freedom was a sphere of spontaneous, authentic personal liberty that lay behind the constraints of social norms and obligations. Modern commentators, however, have tended to cast privacy as freedom more politically, viewing it as a sphere of liberty from government regulation, rather than from social norms generally. This classically liberal vision is, in fact, conceptually related to the “right to privacy” recognized by the Court in *Roe v. Wade*.³⁸

The question of the proper nature and extent of state regulation has of course spawned an enormous literature.³⁹ Rosen is especially concerned with state regulation of sexual harassment in the workplace. This is an important and complex issue, and Rosen is undoubtedly correct to note that it entails significant legal intrusion into relationships between the sexes. But the question of whether this intrusion is justified cannot be settled merely by adding up the costs to which the concept of privacy as freedom alerts us. As with any issue of state regulation, the costs of state interference must be measured against the consequences of failing to intervene. With its sharp focus on privacy, *The Unwanted Gaze* does not seriously canvass the latter.

Rosen’s suggestion that sexual harassment law might simply be replaced by a privacy tort is theoretically interesting, but practically undeveloped. Rosen is right to notice that sexual harassment law understands itself as (in part) prohibiting “a hostile or abusive work environment,”⁴⁰ which it defines in moral terms that circle around normative concepts like “intimidation, ridicule, and insult.”⁴¹ These concepts are closely related to the civility norms that privacy as dignity safeguards.⁴² Indeed, in the context of workplace racial harassment, the tort of

36. ROSEN, *supra* note 1, at 223.

37. RICHARD SENNETT, *THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM* 18 (1978).

38. 410 U.S. 113 (1973). *But cf.* ROSEN, *supra* note 1, at 15 (arguing that in *Roe* “the justices were using privacy as a clumsy metaphor for rights of reproductive choice”).

39. *Compare* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1959) (arguing that the law must enforce Christian morality), *with* H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963) (arguing that governments need not and should not enforce popular morality).

40. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

41. *Id.* at 65.

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

intentional infliction of emotional distress, which is sociologically akin to a privacy tort,⁴³ has been used to impose liability on outrageous utterances.⁴⁴

But to argue that “speech and conduct that . . . employees may find offensive, but that [do not] change the terms and conditions of employment, should be regulated by invasion of privacy law rather than by employment discrimination law,”⁴⁵ is to bring the relationship between the sexes within the workplace under the control of “the social norms of decency or propriety”⁴⁶ legally enforced by privacy as dignity. This is just as inconsistent with the sphere of autonomy protected by privacy as freedom as are the regulations of antidiscrimination law. In each case, individual speech and conduct is subject to legal review and liability. The distinction between Rosen’s preferred solution and our current sexual harassment law thus cannot be that the latter blurs “the boundaries of the public and private spheres,”⁴⁷ while the former does not. The difference is that antidiscrimination law limits individual liberty in the interest of achieving specified social goals, whereas privacy torts limit individual liberty in the interest of enforcing common social norms.⁴⁸

This difference suggests why privacy torts cannot simply be substituted for antidiscrimination law. Contemporary sexual harassment law differs from privacy law in that the former places civility norms within the context of a strong commitment to a “broad rule of workplace equality”⁴⁹ that asks whether violations of civility norms are so severe and asymmetrical as to constitute “discriminat[ion] . . . because of . . . sex.”⁵⁰ Privacy law has no such focus on the systematic consequences of privacy violations. This suggests that privacy torts can supplement sexual harassment law, but they cannot supplant it. The purposes and foci of the two forms of regulation are ultimately distinct. Antidiscrimination law seeks to alter social norms and practices, whereas privacy torts seek to enforce them. In this important respect, antidiscrimination

43. See Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV*, at 163, 168-69 (John W. Chapman & Ian Shapiro eds., 1993); Post, *supra* note 22, at 616-26.

44. See, e.g., *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173 (Wash. 1977) (holding that an employer’s use of racial slurs and other outrageous language in the workplace may support an employee’s intentional infliction of emotional distress claim).

45. ROSEN, *supra* note 1, at 94-95.

46. *Id.* at 115.

47. *Id.* at 107.

48. To use terminology that I have elsewhere developed, the difference is that antidiscrimination law creates a “managerial” regime, whereas privacy torts attempt to instantiate a particular vision of “community.” For a discussion of the distinction between these two forms of law, see ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 3-6, 10-15 (1995).

49. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

50. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79-80 (1998) (holding that Title VII does not merely impose “a general civility code,” because violations of civility are by themselves insufficient to justify liability—the violations must also amount to discrimination).

law differs from privacy law.⁵¹ The latter protects dignity, but does not necessarily prevent discrimination.

When feminists claim that the “personal is political,” the point is that areas of social life previously closed off from state regulation because deemed important for the development of free individuality actually function to dominate and oppress persons. The argument is that state intervention is necessary to avoid injustice. Antidiscrimination law is typically justified in this way. It is true that the enforcement of antidiscrimination law carries costs, and Rosen has admirably specified the ways in which these costs can add up in contemporary sexual harassment law. But a final judgment on the question of retaining that law would require an equally careful and comprehensive specification of the consequences of failing to intervene. Substituting a privacy tort for sexual harassment law will not eliminate these consequences. The concept of privacy as freedom is thus useful in alerting us to the costs of regulation, but it cannot settle the question of whether regulation is necessary or advisable. Privacy as freedom emphasizes what is lost by state regulation; it does not begin to specify what is gained.

51. I would also note that antidiscrimination law is presently enforced by agencies as well as by private suits. Whether an enforcement scheme that relies entirely upon private litigation, as do privacy torts, would adequately substitute for the enforcement mechanisms of our present antidiscrimination law is another serious question that requires thoughtful analysis.