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BOOK REVIEW

AN INVITED SCRUTINY OF PRIVACY, EMPLOYMENT, AND SEXUAL HARASSMENT: A REVIEW OF *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA*

BY JEFFREY ROSEN. NEW YORK, N.Y.: RANDOM HOUSE.
PRICE: \$24.95.

Reviewed by B. Glenn George*

ABSTRACT

Professor George reviews Jeffrey Rosen's book, *The Unwanted Gaze: The Destruction of Privacy in America*. In her Book Review, Professor George focuses on Professor Rosen's discussion of sexual harassment law and his proposal that the claim of hostile environment sexual harassment be eliminated as a cause of action under Title VII of the Civil Rights Act of 1964. Professor George argues that instead of eliminating the claim of sexual harassment, Professor Rosen merely redefines the scope of sex discrimination to include the hostile environment claims already permitted by the Supreme Court. Professor George also takes issue with Professor Rosen's suggestion that sexual harassment claims are often simply "unfortunate misunderstandings," and that employees should be entitled to "zones of privacy" in the workplace. Professor George asserts that Professor Rosen mischaracterizes the current state of the law in this area, and that courts are already limiting the scope of the claim in much the way proposed by Professor Rosen.

Jeffrey Rosen, unlike most law academics, has found numerous outlets for his views beyond the world of law reviews. He is

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well known for his work at *The New Republic*¹ and his commentary on National Public Radio, as well as his essays and reviews in other sophisticated and popular publications. In his first book, *The Unwanted Gaze: The Destruction of Privacy in America*,² Professor Rosen describes his original mission as unraveling the forces that culminated in the remarkable drama of the impeachment of President Clinton. The journey ultimately led to a book that purports to explore the demise — and possible rehabilitation — of our traditional “zones of privacy” invaded by both law and technology.³

In *The Unwanted Gaze*, Professor Rosen explores a variety of ways in which he claims technology and law are being used to intrude on aspects of our personal and “private” lives that we may have once thought inviolate. Using a variety of anecdotes and high profile scandals — ranging from the Monica Lewinsky saga to the pornography files on the Harvard Divinity School dean’s computer to the Clarence Thomas/Anita Hill hearings — Professor Rosen laments the purported erosion of privacy in both the home and the workplace. In his book, Professor Rosen takes on the legal system and its diminishing protections on issues such as electronic monitoring by employers; access to private correspondence and diaries through judicial and other legal proceedings; the wide range of personal information now readily accessible in cyberspace; and the law of sexual harassment. Professor Rosen apparently hopes to sound the alarm and return us to “zones of privacy” both at home and at work where will once again be free to “relax” and “be human.”⁴

Within this broad range of topics, Professor Rosen repeatedly turns his attention to the law of sexual harassment as a key example of privacy erosion. Sexual harassment law, according to Rosen, is largely responsible for employer monitoring in the workplace and it has robbed us of the freedom to engage in normal social interactions (including the inevitable misunderstandings that may sometimes occur) in the workplace. In fact, his boldest suggestion of the book may be his proposal to eliminate the legal claim of hostile environment sexual harassment alto-

1. Professor Rosen is the legal affairs editor at *The New Republic* and regularly writes for that publication.

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

3. *Id.* at 3.

4. *Id.* at 127.

gether. It is on this front that I take issue with both his analysis and his conclusions.

Professor Rosen attacks the law of sexual harassment by first criticizing the application of the claim by the courts, but he only succeeds by fundamentally misrepresenting the actual case law in this area. Then, while claiming to remove the claim of hostile environment harassment from Title VII of the Civil Rights Act of 1964,⁵ Rosen carefully redefines "sex discrimination" to include precisely the same hostile environment claims that are already permitted. Indeed, he creates a standard that is virtually identical to the one established by the Supreme Court in recognizing hostile environment harassment as a form of sex discrimination under Title VII. As will be developed more fully below, this sleight of hand allows Professor Rosen to claim a major change in the law of discrimination while leaving the law virtually untouched.

Professor Rosen makes many, if not most of his points, by example and anecdote rather than by a careful legal analysis of a body of law. For the lay reader, his approach is no doubt more interesting and more accessible than a more thorough legal development would be. Nevertheless, these anecdotes, as is often true of anecdotes, are selected to show us the extremes rather than the usual or the average, in order to make the point more dramatically. Thus, while the anecdotes themselves may be truthfully presented, the conclusions drawn from them often are not.

In reviewing the potential (and often unexpected) invasions of privacy possible through technology, Professor Rosen's warnings will hit home for a large segment of the population. To highlight the point, Professor Rosen cites some of the well-publicized examples surrounding the Paula Jones lawsuit and Independent Counsel Kenneth Starr's investigation of President Clinton and Monica Lewinsky. For instance, Professor Rosen describes the retrieval of deleted e-mails from the computer hard drive of Ms. Lewinsky's best friend, Catherine Allday Davis.⁶ Surely neither Ms. Lewinsky nor Ms. Davis contemplated that these deleted missives would or could be retrieved and ultimately read by Congress and the general public. No doubt many average citizens

5. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1994 & Supp. II 1996).

6. See ROSEN, *supra* note 2, at 54.

thought twice about their recent book purchases and video rentals when Ms. Lewinsky's bookstore receipts were subpoenaed.⁷

Most of Professor Rosen's "real life" examples are far less convincing as potential threats to our privacy than Ms. Lewinsky's e-mails and bookstore receipts.⁸ As another e-mail anecdote, Professor Rosen expects our outrage for Michael Smyth, a Pillsbury employee fired for e-mail comments deemed "inappropriate and unprofessional."⁹ Professor Rosen's message is the risk that even "private" e-mails can be used against you. These circumstances, however, are a far cry from the confidences exchanged between Ms. Lewinsky and Ms. Davis. Pillsbury had promised its employees that e-mail was confidential and no employee would be fired based on "intercepted" e-mail. Mr. Smyth's troubles began when he responded to an e-mail from a supervisor, and stated that he felt like "kill[ing] the back-stabbing bastards" on the sales force and described a future holiday party as the "Jim Jones Koolaid affair."¹⁰ As a result, the company retrieved all of Mr. Smyth's e-mails for the month and then fired him after reviewing their content. A court later rejected Mr. Smyth's claim for invasion of privacy. Professor Rosen laments, "This can't be right. The privacy interests that are invaded by reading private e-mail are very high indeed."¹¹

Many years ago I made my living as a labor lawyer advising employers, and I have continued to work and teach in the areas of employment discrimination and employment law. I thought about what my advice would have been to the Pillsbury supervi-

7. *See id.* at 167.

8. At the outset, I should note that I intend to quote specific phrases and passages as evidence of the points I believe Professor Rosen is making. In doing so, I may be at odds with one of Professor Rosen's recurring themes — the problem of taking statements out of context. Professor Rosen provides various anecdotes illustrating his point that invasions of privacy can lead to misunderstandings when a statement or joke is taken out of the context of the communication and the relationship. *See, e.g., id.* at 55-56 (describing Microsoft's use of an e-mail sent by Harvard Law Professor Lawrence Lessig to a colleague to challenge Professor Lessig's appointment as a special master in the Microsoft antitrust litigation, discussed *infra* at notes 20-22 and accompanying text). Certainly, anyone who wishes a more complete understanding of Professor Rosen's arguments should read the book in its entirety. The thoughts here, however, are not of private e-mail origin. Professor Rosen has offered his words in a widely publicized book from a distinguished publisher. He surely hopes that, for reputational and monetary reasons, the book will be read by a large number of people. Thus, I am assuming that he has invited our discussion and scrutiny in the context of the public arena.

9. *Id.* at 74; *see Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).

10. ROSEN, *supra* note 2, at 74.

11. *Id.* at 75.

sor if he or she had called me about Mr. Smyth's first e-mail. Violence and shootings in the workplace have become all too common in our society.¹² Imagine the outcry (not to mention the victims' lawsuits) if a supervisor had ignored such an e-mail and the employee later carried out some of his threats. (Even if Pillsbury did not believe that there was a potential for violence here, the amazingly poor judgment of sending such a message to a supervisor might cause me to question Mr. Smyth's value as an employee.)

I would defend Pillsbury's right to fire Mr. Smyth based on this single e-mail; I certainly would not question Pillsbury's caution in reviewing other e-mails to determine if this particular message was an isolated incident or customary conduct. Pillsbury was not randomly monitoring Mr. Smyth's e-mail; Mr. Smyth's own behavior not only invited but demanded closer scrutiny. Professor Rosen notes that Mr. Smyth was at home, using the company computer network, when he read the supervisor's e-mail and responded.¹³ Elsewhere, Professor Rosen states that "the rise of cyberspace has blurred the distinction between home and office."¹⁴ I wonder if Professor Rosen would have reached a different conclusion if Mr. Smyth's comments had been made face-to-face in the office. If so, Professor Rosen needs to consider why the convenience of working at home on a company computer using company e-mail should alter the employer's standard of expected employee conduct.

In another anecdote of an employee losing his job through the use of technology, Professor Rosen warns of the potential public exposure of Internet use. This incident involved the recent forced resignation of the Harvard Divinity School dean in the aftermath of the administration's discovery that he had saved *thousands* of pornographic pictures on his school-provided computer.¹⁵ A computer technician discovered the pictures when asked, at the dean's request, to install a new computer with more memory (room for more pictures?) and transfer the existing files from the old computer to the new computer. Harvard publicly defended its decision by pointing to a policy prohibiting the per-

12. See, e.g., THE BUREAU OF NAT'L AFF., INC., 16 INDIVIDUAL EMPLOYMENT RIGHTS 52 (Sept. 19, 2000) ("Workplace violence in 1998 was the leading cause of death for women in the workplace and the second-ranked cause for men . . .").

13. See ROSEN, *supra* note 2, at 75.

14. *Id.* at 160.

15. See *id.* at 159.

sonal use of university computers inconsistent with the school's mission. Professor Rosen suggests, however, that the real reason may have been that use of pornography was in violation of the dean's obligations as an ordained minister of the Lutheran Church.¹⁶ He then attacks the straw man he has erected by noting that, "it's not clear that secular universities should be in the business of disciplining faculty for breaching their sectarian commitments."¹⁷

Again, I think Professor Rosen misses the point. Harvard would have likely reached the same result even if the dean had not been an ordained minister and/or there were no church statement condemning the use of pornography. In fact, I would speculate that another dean at Harvard would have received the same treatment. For all its prestige, Harvard is still in the business of convincing parents to relinquish their eighteen-year-old sons and daughters to their care and instruction. The dean's behavior was inconsistent with an image the school seeks to maintain on a variety of levels, and the institution has a right to insist on that image, particularly for high profile administrators.

Professor Rosen concludes that, "The real lesson of the Divinity School scandal wasn't legal but technological: the dean's downfall reminds us how much of our reading habits on the Internet are exposed to public view."¹⁸ Note, however, that no one went snooping into the dean's Internet browsing practices. The dean could have deleted the pictures from his computer before asking the technician to transfer his files. He could have transferred the files himself. To fan the flames of outrage, Professor Rosen highlights the fact that the computer was in the dean's home,¹⁹ yet the dean asked that a university employee come to his home to replace the university-issued computer. The same sequence of events could have just as easily been triggered by a maintenance employee finding similar materials in a university bookcase the dean asked to be repaired, or the school secretary being asked to copy pornographic materials.

16. As reported by Professor Rosen, the Lutheran Church had "issued a pastoral statement condemning the consumption of pornography as a misuse of sexuality, a form of self-degradation that violate[d] the more general proscription of sexual relations outside of marriage." *Id.* at 160.

17. *Id.*

18. *Id.* at 161.

19. *See id.* at 159-60.

To illustrate the danger of reviewing communications “out of context,” Professor Rosen describes Harvard Law Professor Lessig’s brief exposure to the public eye when considered for the position of special master in the massive antitrust litigation brought by the government against Microsoft. In examining Professor Lessig’s fitness for that position, Microsoft questioned his objectivity based on an e-mail sent by Professor Lessig to a colleague at Netscape. That e-mail included a “joke” in which Professor Lessig refers to his actions in downloading Microsoft’s Internet Explorer as having “sold his soul.”²⁰

Professor Rosen uses Professor Lessig’s experience as an example of “the risk that our private letters and jokes can be taken out of context and misunderstood.”²¹ The issue, as defined by Professor Rosen, is not about invasion of privacy, however — Professor Lessig himself did not consider the exposure of the e-mail a privacy issue. Instead, Professor Lessig complained that he did not have enough time or attention in the public arena to explain “the truth” of all that transpired,²² although there is no suggestion that the court failed to give Professor Lessig a full opportunity to explain and provide the context of his remarks. Professor Lessig’s removal from the position for other reasons created an erroneous impression to the general public that Professor Lessig had been forced to resign because of bias against Microsoft.

Professor Rosen, I would contend, has identified only one part, and not the largest part, of Professor Lessig’s issue. E-mail access is of little relevance here, and the problem of taking a comment out of context is but a subpart of the larger culprit: modern media coverage. The media operates in sound bites, and media consumers want summaries and excerpts. The parties who

20. Professor Lessig had downloaded Microsoft’s Internet Explorer as part of a contest to win a Macintosh computer. Afterwards, Professor Lessig found that all of his Netscape bookmarks had been erased, and he e-mailed an acquaintance at Netscape to express his irritation. Quoting from a Jill Sobule song, Professor Lessig remarked in the e-mail, “sold my soul, and nothing happened.” *Id.* at 55. Even though the remark in context apparently was intended as a joke, it is still hard to imagine that Professor Lessig was attempting to flatter Microsoft. I am not questioning Professor Lessig’s qualifications to be a special master, at least not based on this e-mail “slip.” Given the stakes, however, I would be reluctant to criticize efforts by Microsoft or the judge to examine any hint of bias in a prior reference to Microsoft, whether positive or negative. As any lawyer knows, even the “appearance” of impropriety can create ethical concerns.

21. *Id.* at 56.

22. *Id.* at 55-56.

are the subject of such arguably "negative" coverage are rarely provided the chance to offer a full and unedited explanation of what happened and why. How often does the target of negative press feel that his story was fairly reported? Finally, the technology link is largely irrelevant here. Had the reported statement occurred in a telephone conversation instead of by e-mail, the result likely would have been the same.

Professor Rosen's treatment of privacy and technology in the workplace may implicitly suggest that the law and the lawmakers have stood by quietly as mere spectators to the technology revolution, but that implication is erroneous. Without question, technology has quickly outpaced the development of legal regulations, and perhaps we can thank Kenneth Starr for enhancing the public's awareness of the problem. This issue, however, is not new. The vast majority of large employers now use e-mail as an almost instantaneous means of communication and dissemination of information.²³ Consequently, the issue of privacy and electronic monitoring in the workplace has been a hot topic in employment law for almost a decade.²⁴ Congress first imposed restrictions on technological surveillance as early as 1968 in Title III of the Omnibus Crime and Control and Safe Streets Act, regulating the monitoring of "wire communication" and "oral communication."²⁵ Title III was amended in 1986²⁶ to

23. Laurie Lee notes,

Electronic mail has become an indispensable tool that has revolutionized the workplace. More workers are able to communicate everything from simple memos to complex business plans to colleagues and clients across the hall or around the world in a matter of seconds. Companies and employees alike recognize the benefits of a technology that has the power to speed communication and improve productivity and efficiency.

Laurie T. Lee, *Watch Your E-Mail! Employee E-Mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop,"* 28 J. MARSHALL L. REV. 139, 140 (1994). The National Institute for Occupational Safety and Health estimates that 66% of all computer users are subject to some type of electronic monitoring by their employers. See Robert B. Fitzpatrick, *Privacy Issues in the Electronic Monitoring and Surveillance of Employees*, C742 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS 1165, 1169 (1992).

24. See, e.g., Fitzpatrick, *supra* note 23; Paul E. Hash & Christina M. Ibrahim, *Selected Topics on Employment and Labor Law: E-Mail, Electronic Monitoring, and Employee Privacy*, 37 TEX. L. REV. 893 (1996); Judith B. Prowda, *Privacy and Security of Data*, 64 FORDHAM L. REV. 738 (1995); Jarrod J. White, *E-Mail@Work.Com: Employer Monitoring of Employee E-Mail*, 48 ALA. L. REV. 1079 (1997); Charles Pillar, *Bosses With X-Ray Eyes*, MACWORLD, July, 1993, at 118.

25. 18 U.S.C. §§ 2510-2520 (1994).

26. Electronic Communication Privacy Act of 1986, 18 U.S.C. §§ 2510-2521, 2701-2710, 3117, 3121-3126 (1994).

expand those protections to “electronic communication,” including e-mail.²⁷ Even the White House recently latched onto this high profile problem by proposing new legislation to limit cyberspace surveillance.²⁸

While the protections offered by Title III are far from exhaustive,²⁹ Congress has been struggling with these issues for some time. Both national and state legislatures continue to play “catch up,” but they are addressing at least some of the public concerns about technological invasions of privacy.³⁰ As one small example, noted by Professor Rosen and likely inspired by Ms. Lewinsky’s experiences, most states have now enacted legislation that protects library checkout records.³¹

While Professor Rosen touches on a range of privacy issues — potential access to a plethora of personal information through technology, monitoring of employees’ computer use and e-mail, access to personal diaries and other private information through discovery in civil litigation, the Independent Counsel Act, etc. — a remarkable amount of his book focuses on sexual harassment in the workplace. Issues of sexual harassment appear in each of the five chapters of the book, and dominate two of them.³² The

27. See S. REP. NO. 99-541, at 14 (1986) (suggesting that the term “electronic communication” includes “electronic mail”).

28. See Stephen Labaton & Matt Richtel, *Proposal Offers Surveillance Rules for Internet*, N.Y. TIMES, July 18, 2000, reprinted in NEWS & OBSERVER, July 18, 2000, at A1 (reporting on a proposal of legislation from the White House to establish limits on law enforcement surveillance in “cyberspace” similar to limits currently imposed on telephone wiretaps).

29. For example, Title III makes no reference to Internet access or usage. Furthermore, there are several statutory exceptions (e.g., prior consent, 18 U.S.C. § 2511(2)(d)(1994)) that may limit the Act’s protections, particularly in the workplace. See e.g., *Wason v. Sonoma County Junior C. Dist.*, 4 F. Supp. 3d 893 (1997) (holding that an employee cannot claim expectation of privacy for computer files where he has consented to the monitoring of those files). See generally White, *supra* note 24; Hash & Ibrahim, *supra* note 24.

30. See, e.g., ROSEN, *supra* note 2, at 170, 232 nn.27-31. See generally Lee, *supra* note 23, at 175-77 (discussing state statutory versions and variations on the federal legislation).

31. See ROSEN, *supra* note 2, at 167.

32. See, e.g., *id.* at 6, 12-18 (Prologue, describing the developing law of sexual harassment as a key issue in the erosion of privacy rights); 31-33 (Chapter 1, describing the subpoena of Senator Bob Packwood’s personal diaries as part of the Ethics Committee investigation into claims of sexual harassment by more than two dozen former employees and lobbyists); 79-90 (Chapter 2, discussing employer’s fear of liability for sexual harassment as the primary motivation for the monitoring of employee e-mail and computer use); 91-127 (Chapter 3, discussing the law of sexual harassment and proposing the elimination of hostile environment harassment, to be replaced with private tort litigation against the harasser); 130-31, 143-58 (Chapter 4,

Supreme Court's recognition of a claim for hostile environment sexual harassment under Title VII,³³ flanked by changes in civil discovery rules, such as allowing access to private diaries, and the Independent Counsel Act³⁴ form the centerpiece of the erosion of privacy rights according to Professor Rosen. When added to the recent explosion in technology which allows us to electronically track virtually every aspect of a person's life, these developments, Rosen argues, are destroying the "sanctuaries of privacy" we have traditionally enjoyed.³⁵

Professor Rosen grabs our attention by first extracting selected events in the Jones/Lewinsky saga. Given his background with *The New Republic*, his history as a frequent commentator on legal and political issues, and the very issues that prompted the book, he predictably turns to the experiences and/or allegations of Paula Jones, Monica Lewinsky, and Anita Hill as sensational illustrations. As socio-political phenomena, these stories continue to command our attention in many respects. As analyses of sexual harassment law for public consumption, however, Professor Rosen's accounts leave much to be desired.

For example, the turmoil surrounding the allegations by and against Anita Hill, Paula Jones, Monica Lewinsky and even Senator Bob Packwood³⁶ are controversies about the very concept of sexual harassment, not its status as a formal legal claim, as Professor Rosen suggests. Anita Hill and Monica Lewinsky neither filed nor litigated claims of sexual harassment under Title VII. Anita Hill provided testimony during the confirmation hearing of a Supreme Court justice. The Senate was not asked and did not decide whether an actionable claim for Title VII harassment existed. Anita Hill, as Professor Rosen acknowledges, was careful to note during her testimony, "What I was trying to do when I provided information to you was not say to you, 'I am claiming that this man sexually harassed me.' What I was saying and what I state now is that this conduct took place."³⁷ Monica Lewinsky was forced to provide evidence about a relationship that she be-

discussing the Paula Jones litigation and the Hill-Thomas hearings); 186-87, 191-94 (Chapter 5, discussing issues of sexual harassment involving e-mail and internet use).

33. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1994 & Supp. II 1996).

34. See ROSEN, *supra* note 2, at 6.

35. *Id.* at 25.

36. Professor Rosen uses the Packwood illustration primarily as an example of the availability of private diaries in legal proceedings. See *id.* at 31-35.

37. *Id.* at 145.

lieved was consensual. Again, no claim of sexual harassment was ever asserted, filed, or litigated by her.³⁸ She was unwittingly caught, in her view, in someone else's war.³⁹

Similarly, the proceedings against Senator Packwood involved hearings before the Senate Ethics Committee. A court became involved only when Senator Packwood himself filed an action to quash the subpoenas issued by that body demanding Senator Packwood's private diaries.⁴⁰ Senator Packwood's accusers had not filed Title VII claims; the issue in question was whether Senator Packwood's conduct violated the Senate's own self-imposed ethical standards of behavior. Professor Rosen notes that many of these allegations involved sexual advances "that had occurred before the Supreme Court decision in 1986, that definitely recognized sexual harassment as a civil offense."⁴¹ Here, Professor Rosen ignores the authority of the Senate to regulate a variety of inappropriate activities by its members regardless of the existence of a statute or Supreme Court opinion.

The Paula Jones litigation is more to the point. Ms. Jones did, in fact, file a claim of sexual harassment under Title VII. The claim was ultimately dismissed, however, not because Ms. Jones was unable to convince a jury at trial, but rather because there was no legal basis for a cause of action on the allegations presented. Ms. Jones' complaint was dismissed on a motion for summary judgment because she had failed to state a claim *as a*

38. Of course, the inherent age and power differential between President Clinton and Ms. Lewinsky may raise sexual harassment concerns for some. (Even putting aside the "sexual harassment" label, many would agree with Professor Rosen that "sexual relations between presidents and interns, like sexual relations between professors and students, are entirely inappropriate, not because they are necessarily coercive, but because the great imbalance of power and experience makes it impossible, in most cases, for the two parties to choose each other on equal terms and to sustain a relationship based on mutual respect." *Id.* at 23-24.) To my knowledge, however, Ms. Lewinsky has never claimed she was coerced or considered the relationship anything other than welcome and consensual. Within the law of sexual harassment, no claim could possibly be made under such circumstances. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'") (citing 29 C.F.R. § 1604.11 (1985)).

39. *See ROSEN, supra* note 2, at 26-27. *See generally* ANDREW MORTON, *MONICA'S STORY* (1999).

40. Over two dozen lobbyists and employees accused Senator Bob Packwood (a Republican from Oregon) of making unwanted sexual advances over an extended period. The Senate Ethics Committee initiated hearings to investigate these allegations. The proceedings included a subpoena for all of Senator Packwood's diaries between 1989 and 1993. *See ROSEN, supra* note 2, at 31-32.

41. *See id.* at 31.

matter of law. Professor Rosen argues that the extensive discovery permitted in the case is the real culprit, criticizing Judge Wright's decision to allow Ms. Jones to "rummage through Clinton's consensual sex life" and ultimately expose extensive private information about both President Clinton and Ms. Lewinsky.⁴² If the rules of civil discovery are the problem, perhaps we should focus more directly on that issue rather than the underlying claim.⁴³

Thus, if one were interested in a serious look at the law of sexual harassment, the circumstances of Ms. Hill, Ms. Jones, and Ms. Lewinsky would offer limited information. Only one of those women even filed a Title VII claim, and she was thrown out of court before even getting to trial. Unfortunately, Professor Rosen's use of these proceedings is indicative of his analysis of sexual harassment law in general — plenty of smoke and mirrors but a disappointing amount of substance.

One further caveat: I am not defending President Clinton's actions or Kenneth Starr's subpoenas or Paula Jones's lawsuit or the discovery rulings made in *Jones v. Clinton*. Those issues are important, but for another time and place. Nor am I defending the current state of the law of hostile environment sexual harassment. I could argue (and have argued) that the claim should be defined and applied differently.⁴⁴ I am suggesting, however, that before attacking the law of sexual harassment, Professor Rosen owes us a more accurate view of its use and application.

42. *Id.* at 151-53. Professor Rosen has previously criticized Rule of Evidence 415 as applied in the Jones litigation. See Jeffrey Rosen, *I Pry*, NEW REPUBLIC, Mar. 16, 1998, at 19.

43. Inexplicably, Professor Rosen would not have denied Ms. Jones any claim at all — rather he would recast her claim as one for invasion of privacy and asserts that this different claim would not have resulted in discovery involving Ms. Lewinsky. See ROSEN, *supra* note 2, at 153-54. Professor Rosen reaches this conclusion by assuming that Ms. Jones' suit would have been dismissed before any discovery was allowed, yet discovery is typically permitted prior to the grant of a summary judgment motion. See EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 96-97 (1994). If Ms. Jones' attorneys had pursued a claim of invasion of privacy, they likely could have successfully survived a pre-discovery summary judgment motion — thus allowing a possible repeat of the Lewinsky discovery. But the fact remains that the law of Title VII *did* deny Ms. Jones a claim; her claim was dismissed on summary judgment.

44. See generally B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1 (1993) (arguing that the prima facie case for sexual harassment should be modeled more closely after the elements of a prima facie claim for other types of discrimination under Title VII).

Professor Rosen's core analysis seems to go as follows: the claim for hostile environment sexual harassment under Title VII (as distinguished from quid pro quo or harassment resulting in a tangible employment action⁴⁵) should be eliminated. The law has gone amok, resulting in shocking invasions of privacy in the name of discovery, "big brother" style surveillance, and enforcement of politically correct behavior in the workplace. Instead, aggrieved individuals should pursue a common law tort claim of intrusion on seclusion against the harasser himself (or herself), rather than the employer. This approach will eliminate the discovery woes of civil litigation, release employers from any need to monitor employee behavior, and return us to traditional zones of privacy where we are free "to relax" and "be human."⁴⁶

It is on this front that the book is perhaps the most disappointing and will ultimately distract the reader from the serious debates on the issue of sexual harassment. Professor Rosen's analysis and proposal is flawed in several respects. First, his assumptions about traditional zones of privacy in the workplace are unfounded. Notions of privacy were virtually nonexistent in early employment law. Furthermore, the solution he proposes, replacing hostile environment Title VII claims with private tort claims against the harasser, offers a cure no better than the purported disease.

The most significant shortcoming in Professor Rosen's analysis is that he creates a problem that doesn't exist, remedies the problem he has created, and then takes back the remedy, leaving us essentially where we started. Professor Rosen creates the problem by asserting that hostile environment harassment law routinely is applied to redress trivial misunderstandings in the workplace. The courts, however, are already dismissing the kinds of trivial claims he has in mind as insufficiently severe to state a claim under Title VI; the problem is largely a straw man.

45. "Quid pro quo" has long been used by the courts and the commentators as the label for sexual harassment claims where a job benefit or detriment is conditioned on the employee's response to the supervisor's sexual overtures (i.e., sleep with me and you'll get that promotion) — as distinguished from hostile environment claims that lack the same kind of "tangible" job impact. The term is now disfavored by the Supreme Court, however, which has categorized this class of sexual harassment cases as ones involving a "tangible employer action." See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1, 14-15 (1999).

46. ROSEN, *supra* note 2, at 127.

Having created the problem, Professor Rosen then proposes correcting it by reformulating employment law to eliminate the hostile environment sexual harassment claim altogether. The proposal is a bold one, presumably requiring an amendment to Title VII to reverse almost fifteen years and five cases of Supreme Court precedent. But Professor Rosen ultimately retreats from this precipice and fails to take that jump after all. His reformulation of Title VII defines sex discrimination to include precisely the kind of harassment claims recognized by the Supreme Court, missing only the offending label of "hostile environment." His proposal retains hostile environment claims after all; he simply begs the question by calling those claims "sex discrimination" instead.

With respect to Professor Rosen's "nostalgia"⁴⁷ for the workplace of yore, his privacy benchmark is woefully misplaced. Historically, employers had almost unlimited control over their employees. It is "modern" employment law that has curbed that unfettered discretion and placed some restrictions on how employees may be treated and monitored.⁴⁸ The very need for regulations in this area has been prompted by the general assumption that there are no principles in place to otherwise limit the employer's behavior. Admittedly, the use of technology has provided new and efficient means for controlling employees, but Professor Rosen's fundamental premise is at odds with the historical reality of privacy in the workplace.

Professor Rosen is hardly alone in his idealized view of the workplace. For many of us, work is a core aspect of our self-esteem, part of the way in which we define ourselves.⁴⁹ And many, if not most, employees assume that they have far more protection than they in fact do. As noted by one commentator, "[W]orkers tend to regard themselves as having a certain 'right

47. *Id.* at 225.

48. See SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 877 (2000) ("Privacy developments governing the private sector . . . are in a nascent state — a patchwork of rights and theories from a variety of sources."); MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 1.1, at 2 (1994) ("Modern American employment law is a recent departure from a legal past in which workers had little equality of rights with their employer-masters. The change in the modern legal framework has come both as a result of recent federal and state statutes and of recent decisions of state courts.").

49. See MACK A. PLAYER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW* 7 (1994) ("[M]any observers recognize the inherent human need to perform meaningful and fulfilling work.").

of possession' in jobs they hold."⁵⁰ The realization that we have so little control over something so central to our lives is not an easy one to accept. There is certainly a disconnect on issues of both control and privacy between our average expectations in the workplace and the employment law of the courts. But if Professor Rosen believes a different paradigm is in order, he at least owes us a more accurate view of the legal status quo.

The traditional legal norm in our society, absent a contractual agreement to the contrary, has been the doctrine of "employment-at-will."⁵¹ Employment law in the nineteenth century was based on a notion of master and servant, if not master and slave.⁵² The employment-at-will concept, established in a nineteenth century treatise based on questionable authority,⁵³ meant that the employer was free to terminate an employee at any time for any reason. He could act arbitrarily, irrationally, or capriciously. Subsumed in that ultimate power to deny the employee a job entirely, the employer was also entitled to dictate almost every aspect of your life as an employee:⁵⁴ how to dress, how to wear your hair,⁵⁵ how much you could weigh,⁵⁶ what to do, and when to do it.

50. *Id.* (citing FEDERICK MEYERS, *THE OWNERSHIP OF JOBS: A COMPARATIVE STUDY* 1, 112 (1964)).

51. See ROTHSTEIN ET AL., *supra* note 48, at 9-11.

52. See *id.* at 1-3.

53. See H. G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 272 (1877); see also Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AMER. J. LEGAL HIST. 118 (1976).

54. See generally ROTHSTEIN ET AL., *supra* note 48, at 13-14 ("Given that masters enjoyed considerable control over working people, regardless of their employment status, there were relatively few limitations on a master's prerogative in making an unreasonable demand or giving an employee an unreasonable order. . . . [I]n practical effect, the working person's only redress was to quit.").

55. See, e.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (permitting an employer to apply different hair length policies to men and women so long as the distinctions made do not relate to immutable characteristics and legally protected rights). Compare *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977) (allowing an employer to lawfully impose comparable grooming standards for men and women) with *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1032-33 (7th Cir. 1979) (requiring female employees to wear uniforms while allowing male employees to wear business attire was "demeaning to women" and constituted disparate treatment on the basis of sex).

56. In a number of cases involving weight restrictions for flight attendants, the courts have acknowledged the right of the airlines to impose weight restrictions, but only when comparably applied to both male and female attendants. See, e.g., *Independent Union of Flight Attendants v. Pan Am. World Airways, Inc.*, No. C 84-

For the employer of the twenty-first century, the employment-at-will doctrine is alive and well, and the employer retains much of the discretion inherent in that principle.⁵⁷ To be sure, that power has been limited by specific statutory protections, such as Title VII's prohibition of race and sex discrimination.⁵⁸ In addition, some common law torts have been used successfully to limit the employer's behavior in egregious circumstances.⁵⁹ But apart from these limited and defined exceptions, the employer can continue to control the employee as he sees fit. In some ways, that control has become increasingly intrusive, such as the routine use of drug testing by many private employers.⁶⁰ As described by one commentator, "The statutory law of the United States stands virtually alone [in the industrial world] in failing to recognize individual job security or industrial justice to the individual worker as a basis for regulating the power of em-

4600TEH, 1987 U.S. Dist. LEXIS 15017, at *1 (N.D. Cal. Apr. 30, 1987); *Air Lin Pilots Ass'n v. United Air Lines, Inc.* 480 F. Supp. 1107 (E.D.N.Y. 1979); *Laffey v. Northwest Airlines, Inc.*, 374 F. Supp. 1382 (D.D.C. 1974), *aff'd* 567 F.2d 429, (D.C. Cir. 1976).

57. While most states now recognize at least some exceptions to the doctrine where a significant public policy is at stake, the basic premise remains unchanged. *See, e.g.*, *Howard v. Wolff Broad. Corp.*, 611 So. 2d 307, 213 (Ala. 1992) (refusing to recognize an exception to the traditional doctrine of employment-at-will for sex discrimination, where employer was not governed by Title VII); *Banas v. Matthews Int'l Corp.*, 502 A.2d 637, 647-48 (Pa. Super. Ct. 1985); *Murphy v. American Home Products Corp.*, 448 N.E.2d 86 (N.Y. 1983). *See generally*, Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern Employment At Will Rule*, 51 UMKC L. REV. 189 (1983).

58. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1994 & Supp. II 1996).

59. *See, e.g.*, *Bratt v. IBM, Corp.*, 785 F.2d 353 (1st Cir. 1986) (recognizing that in some instances a plaintiff could state a claim for invasion of privacy under Massachusetts law for disclosure of plaintiff's medical problems and use of a confidential grievance procedure); *Hall v. May Dep't Stores, Inc.*, 637 P.2d 126, 133 (Or. 1981) (upholding jury verdict for employee claim of intentional infliction of emotional distress where employee was accused of stealing; evidence supported conclusion that plaintiff was "subjected to severe mental and emotional distress . . . as a cold-blooded tactic of interrogation upon scanty evidence").

60. For example, by 1987, nearly half of the Fortune 500 corporations used drug testing. *See* Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L. REV. 683, 703-03 (1987). Public employees, of course, are protected to a greater extent by constitutional limitations. *See, e.g.*, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (subjecting to constitutional scrutiny the employee drug testing program of the United States Customs Service). *See also* MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 297 (1989) ("To contain the problem [of employee theft] many companies employ specialists in industrial security who utilize a variety of police-like techniques of surveillance, undercover operations, and the like.").

employers to hire, fire, and establish terms and conditions of employment.”⁶¹ While the legal reality of workplace autonomy may seem harsh, that is the baseline for discussion, not the sanctuaries of privacy that Professor Rosen assumes.

I now turn to the issue of hostile environment sexual harassment that is the centerpiece for much of Professor Rosen’s analysis. Professor Rosen characterizes harassment law, an actionable form of employment discrimination under Title VII, as a recent phenomenon.⁶² Yet harassment claims were acknowledged quite early in the evolution of Title VII. The Fifth Circuit first considered the issue of racial harassment in 1971,⁶³ just six years after Title VII became effective.⁶⁴ Other courts soon followed suit, at least with respect to race,⁶⁵ national origin,⁶⁶ and religion.⁶⁷ “Quid pro quo” sexual harassment — those cases in which a supervisor conditions some employment benefit, such as keeping a job or getting a promotion, on the employee’s acquiescence to the supervisor’s sexual advances — was recognized as early as 1978.⁶⁸

61. MACK A. PLAYER ET AL., *supra* note 49, at 8.

62. See ROSEN, *supra* note 2, at 5-6.

63. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (remanding the case for further discovery on plaintiff’s claim of discrimination based, in part, on the employer’s alleged practice of segregating its Hispanic patients, although the two justices in the majority did not agree on a rationale for their decision). In the landmark case of *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), *Rogers* was described by the Supreme Court as “the first case to recognize a cause of action based upon a discriminatory work environment.” *Id.* at 65.

64. Title VII was enacted in 1964 and became effective on July 1, 1965. 42 U.S.C. § 2000e-15(a) (1994 & Supp. II 1996).

65. See, e.g., *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (“[Title VII] grants an employee the right to ‘a working environment free of racial intimidation.’”) (quoting *Discharge for “Turmoil” Was Bias — Segregating Patients Tainted Job Environment*, 1983 EEOC Dec. (CCH) No. 74-84, 66450 (Feb. 8, 1975)); *Crocker v. Boeing Co.*, 437 F. Supp. 1138, 1192-98 (E.D. Pa. 1977), *aff’d en banc*, 662 F.2d 975 (3d Cir. 1981).

66. See, e.g., *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977).

67. See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 157, 161 (S.D. Ohio 1976).

68. See *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C.), *rev’d on procedural grounds*, 587 F.2d 1240 (D.C. Cir. 1978). For an extensive review of the history of sexual harassment as a basis for liability under Title VII, see ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE*, §§ 2.3-.13 (3d ed. 2000) and Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-26 (1991). To avoid confusion, I will use the “quid pro quo” term as used by Professor Rosen and numerous other commentators. The term is now disfavored by the Supreme Court, however, which has categorized this class of sexual harassment cases as ones involving a “tangible employer action.” See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *George*, *supra* note 45, at 14-15 (1999).

"Quid pro quo" harassment is not Professor Rosen's concern, however. In fact, he is explicit about its continued viability under his proposal.⁶⁹ Rather, it is the claim of hostile environment sexual harassment that he seeks to eradicate from the law. Hostile environment sexual harassment was first recognized by the Supreme Court in the 1986 case of *Meritor Savings Bank v. Vinson*.⁷⁰ Workplace harassment constitutes sex discrimination under Title VII, the Court held, where the harasser's unwelcome conduct becomes "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁷¹

Note that many of the early harassment cases prior to *Vinson* focused on the issue of race, rather than sex. At no point does Professor Rosen even mention the issue of racial harassment; nor does he imply that our lost "sanctuaries of privacy" should include the right to relax in the workplace and reveal to our fellow employees of color any racist jokes or sentiments we might want to express. Assuming Professor Rosen would reject such a suggestion, we are lacking any explanation of why other categories enumerated under Title VII (race, color, religion and national origin)⁷² should be entitled to a statutory claim of hostile environment harassment while the category of "sex" should be denied that same claim. As the Supreme Court stated in *Vinson*, quoting the Eleventh Circuit and building on the developing law of racial harassment:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege

69. See ROSEN, *supra* note 2, at 111-12 ("The existing law of quid pro quo harassment would be unaffected by the repudiation of the hostile environment test. . . . [I]t's not hard to conclude that implicit or explicit threats to fire someone for failure to submit to sexual demands is a form of discrimination in the terms or conditions of employment because of . . . sex . . ."). Note that Professor Rosen's reference to "threats" misstates existing law of "quid pro quo" harassment. In 1998, the Supreme Court made clear that unfulfilled threats do not constitute a "quid pro quo" or tangible employment action claim. Such threats alone, if actionable, could only support a claim of hostile environment sexual harassment. See *Ellerth*, 524 U.S. at 753-54.

70. 477 U.S. 57 (1986).

71. *Id.* at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

72. 42 U.S.C. § 2000e-2(a) (1994 & Supp. II 1996).

of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.⁷³

If Professor Rosen's remedy is to eliminate all hostile environment claims from the ambit of Title VII, his proposal is far more radical than he admits. If his proposal applies only to "sex" discrimination, the serious reader is entitled to some justification for the limitation.

I turn next to Professor Rosen's purported thesis: the need to eliminate the claim of hostile environment sexual harassment altogether. Professor Rosen's extensive discussions of sexual harassment are both frustrating and puzzling — frustrating because of his repeated misrepresentations and mischaracterizations of the law, and puzzling because his ultimate proposal to address the problem suggests almost no change in existing legal standards.

In ridiculing the law of hostile environment sexual harassment, Professor Rosen captures our attention and our sense of injustice by describing the claim as one which allows "aggrieved coworkers to object to overheard jokes and to e-mail, suggestive pictures, or even their colleagues' consensual flirtation, even if . . . the women to whom the conduct was directed didn't perceive it as offensive."⁷⁴ Virtually every element of his description is misleading.

First, the reference to "coworkers" is deceptive. Courts and commentators consistently use the term "coworker" only to describe non-supervisor harassment.⁷⁵ Professor Rosen's use of the term thus paints an image that minimizes or ignores the most invidious type of hostile environment harassment — harassment by a supervisor. Although a hostile environment can be created by either a coworker or a supervisor, the victim is likely to feel far more threatened by the behavior of a supervisor. As noted by the Supreme Court, "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor" who may be empowered to control hiring, firing, and other terms and condi-

73. *Vinson*, 477 U.S. at 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

74. ROSEN, *supra* note 2, at 107. This language is repeated elsewhere, eliminating any concern that this definition was an unfortunate and isolated choice of words. *See, e.g., id.* at 127.

75. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998) (referencing as distinct categories "supervisor" harassment and "coworker" harassment).

tions of employment.⁷⁶ The courts, including the Supreme Court, have consistently highlighted the distinction between the two situations by imposing different standards of liability on the employer.⁷⁷

Second, Professor Rosen has not offered a single case in which “overheard jokes,” e-mail, or “suggestive” pictures alone formed the basis for a successful Title VII claim. In an earlier chapter, Professor Rosen does include in a footnote a claim of sexual harassment that he describes as based solely on “off-color jokes and cartoons.” The finding was made, however, in an apparently unpublished decision by the Montana Human Rights Commission, not a court of law.⁷⁸ One wonders how he even managed to unearth the example.

I would question whether a successful Title VII claim exists based on nothing more than overheard jokes or e-mail, unless they are extremely serious and frequent. Even a casual survey of the case law indicates that such claims — at least in the relatively benign form described by Professor Rosen — would not survive a motion for summary judgment, let alone form the basis for recovery.⁷⁹ This is not to say that e-mails, jokes, and suggestive pictures have not been used as evidence of sexual harassment; rather, such conduct alone generally has not supported a successful claim absent far more egregious behavior as part of an overall pattern of behavior.

Professor Rosen’s reference to “colleagues’ consensual flirtation” as the basis for a hostile environment claim is equally exasperating. I assume that Professor Rosen’s reference is to a line of cases challenging the loss of a job or promotion where the supervisor has provided those benefits to his or her paramour. He devotes a number of pages to this issue, discussing two appel-

76. *Faragher v. City of Boca Raton*, 524 U.S. 773, 802 (1998) (citing to *Estrich*, *supra* note 68, at 854); *see also Ellerth*, 524 U.S. at 763 (“[A] supervisor’s power and authority invests his or her harassing conduct with a particular threatening character . . .”).

77. As clarified in the Supreme Court’s 1998 companion cases of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 773 (1998), employers are liable for harassment by co-workers only if they knew of the harassment and failed to correct it, while employers are subject to strict liability for supervisor hostile environment harassment unless they can prove a two part affirmative defense. *See George*, *supra* note 45, at 12, 16-20.

78. *See ROSEN*, *supra* note 2, at 238 n.49 (describing the claim of *Dernovich v. City of Great Falls, Mont. Hum. Rts. Comm’n No. 9401006004* (Nov. 28, 1995)).

79. *See infra* notes 103-07 and accompanying text.

late opinions and the EEOC guidelines on the subject.⁸⁰ Both cases arose in the mid-1980s, however, before the claim of hostile environment was even recognized by the Supreme Court. In fact, both cases were decided as issues of generic sex discrimination, not hostile environment claims.

Professor Rosen is certainly correct that the courts have struggled with the problem, and cases can be found on both sides of the issue. The recent trend, however, generally seems to be a rejection of these claims.⁸¹ More to the point is that, regardless of the merits, these cases are, at best, on the periphery of the sexual harassment issue. Such cases are more appropriately characterized as issues of sex discrimination outside of the hostile environment arena.

Last, but certainly not least, Professor Rosen's description of sexual harassment suggests that a valid claim can be stated "even if . . . the women to whom the conduct was directed didn't perceive it as offensive." The "target" of the conduct under these circumstances would fail in a claim of sexual harassment because the conduct must be subjectively offensive to the plaintiff in order to state a claim.⁸² If Professor Rosen is suggesting that a bystander who is not the target of questionable conduct may be able to state a claim, I would challenge him to find examples from a forum more consequential than a state human rights commission.

Apart from Professor Rosen's efforts to trivialize Title VII hostile environment claims, the critical question remains: Does Professor Rosen in fact mean to replace Title VII hostile environment claims with often unpromising tort actions against the harasser? The answer apparently is "no," although Professor Rosen does his best to obscure this concession. This puzzling aspect of the analysis begins with Professor Rosen's discussion of the 1986 Supreme Court case that recognized hostile environ-

80. See ROSEN, *supra* note 2, at 95-104.

81. See, e.g., *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366 (10th Cir. 1997); *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588 (9th Cir. 1992); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986). See generally ARTHUR B. SMITH, JR. ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* (5th ed. 2000) ("More recent decisions [involving employees promoted by a supervisor with whom they are having a sexual relationship] have usually found no Title VII liability in these circumstances, since all other male and female employees have been equally disadvantaged by the supervisor's special relationship.").

82. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'") (citing 29 C.F.R. § 1604.11 (1985)).

ment sexual harassment as an actionable form of sex discrimination under Title VII, *Meritor Savings Bank v. Vinson*.⁸³

Plaintiff Mechelle Vinson alleged that her supervisor propositioned her, fondled her, and raped her.⁸⁴ Ms. Vinson continued to be promoted and received regular salary increases during her employment, however, and she did not allege that her supervisor's behavior impacted those "tangible" aspects of her job.⁸⁵ Based on these allegations, the Court concluded that the plaintiff should be able to pursue a claim of hostile environment sexual harassment as a violation of Title VII's prohibition of sex discrimination.⁸⁶ Professor Rosen, in response, states that the Court "might have held that Taylor's constant sexual demands on Vinson clearly changed the terms and conditions of her employment because of sex."⁸⁷ But Professor Rosen then acknowledges in the same paragraph that the Court defined the claim as subjecting the plaintiff to conduct "'sufficiently severe or pervasive to alter the condition of the [victim's] employment.'"⁸⁸ If there is a distinction between Professor Rosen's standard and the Court's, I am unable to discern it.

Anyone who has not studied the law of sexual harassment would appropriately conclude from reading the book, as well as Professor Rosen's recent summary of his proposal in *The New Republic*,⁸⁹ that Professor Rosen is recommending the complete elimination of hostile environment harassment claims under Title VII.⁹⁰ Indeed, Professor Rosen unequivocally states: "How could sexual harassment law be refined so that it protects privacy

83. *Id.* at 57.

84. *See id.* at 60.

85. *See id.* at 59-60.

86. *See id.* at 66-67.

87. ROSEN, *supra* note 2, at 106.

88. *Id.* at 107.

89. Jeffrey Rosen, *Fall of Private Man (Sexual Harassment: A Solution)*, *NEW REPUBLIC*, June 12, 2000, at 22, 24.

Something has gone wrong in the law of sexual harassment There is, however, a solution that would retain the important benefits of harassment law while avoiding its debilitating side effects. It lies in abandoning the hostile-environment test and returning to the text of the Civil Rights Act of 1964 [S]peech and conduct that some employees may find offensive but that has no tangible consequences for employment should be recognized for what it is: not a form of gender discrimination but an invasion of the offended person's privacy.

Id.

90. As noted earlier, Professor Rosen makes no reference to racial or other categories of harassment claims. His arguments apparently are limited to sex discrimination. *See supra* notes 72-73 and accompanying text.

instead of threatening it? In my view, the hostile environment test has proved more distracting than clarifying in identifying illegal gender discrimination, *and it should be eliminated.*"⁹¹ Yet, on the next page, Professor Rosen asserts that, under his proposal:

[A]ny evidence of pervasive gender-based animosity . . . would change the terms and conditions of employment in a way that would obviously constitute discrimination because of sex. The often overlooked second sentence of the relevant section of Title VII makes illegal to "limit, segregate, or classify" employees in a way that tends to "deprive any individual employee of employment opportunities or otherwise adversely affect his [or her] status as an employee because of . . . sex." This covers the gauntlet situations that seem to be more common in blue-collar professions, in which women are forced to endure a pattern of sexist taunts and abuse on a daily basis.⁹²

Professor Rosen fails to provide a label for this particular type of actionable discrimination, but it is hard to identify such a claim as anything other than hostile environment harassment. Again, compare Professor Rosen's language with the Supreme Court's description of actionable hostile environment harassment under Title VII:

[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. Of course, . . . not all workplace conduct that may be described as harassment affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the condition of [the victim's] employment and create an abusive working environment."⁹³

Professor Rosen criticizes the Court's definition of the claim, yet his own proposal uses almost identical language.

Concluding this critical description of his proposal, Professor Rosen asserts that the only category of cases left out of his analysis, and thus no longer subject to title VII regulation, are those involving "speech and conduct of a sexual nature that can't possibly be characterized as sex discrimination."⁹⁴ Professor Rosen has already admitted that speech and conduct of a sexual nature can constitute actionable discrimination; it is just not a violation

91. ROSEN, *supra* note 2, at 111 (emphasis added).

92. *Id.* at 112.

93. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (citations omitted).

94. ROSEN, *supra* note 2, at 112.

of Title VII if it “can’t possibly be characterized as sex discrimination.” To quote my daughters, “Huh?”

If Professor Rosen intends to save hostile environment sexual harassment claims, defined just as the Supreme Court did almost fifteen years ago, then what is his point? Three possibilities come to mind. First, perhaps Professor Rosen is implicitly suggesting that the courts need to “tighten” the availability of the claim. Alternatively, Professor Rosen may be offering potential victims yet another weapon in the arsenal of harassment-related claims by focusing the attention of the plaintiff’s bar on the intrusion on seclusion tort. Finally, Professor Rosen may be seeking to remove what he believes are incentives under existing law to monitor employee computer use and behavior, returning, or perhaps achieving for the first time, a “backstage” or “zone of privacy” in the workplace.

If only suggesting a tightening of the definition, Professor Rosen may want to spend some time reviewing the lower court decisions in this area. Without delving too deeply into the actual law, Professor Rosen tries to convince us that his proposal will eliminate “trivial”⁹⁵ allegations that are often the result of nothing more than “unfortunate misunderstandings.”⁹⁶ A closer look at how the cause of action for hostile environment is actually applied by the courts, rather than the anecdotes offered by Professor Rosen outside of the context of Title VII litigation, reveals that the law has generally eliminated such allegations from the realm of actionable claims.

My own survey of recent cases, albeit not exhaustive, indicates that the courts are already heeding the Supreme Court/Rosen standard. Cases where claims have been upheld or permitted to go to trial typically involve allegations of precisely the kind of “pervasive animosity” and “pattern of sexist taunts and abuse” that Professor Rosen would permit as claims of sex discrimination. On the other hand, consistent with Professor Rosen’s view, the courts routinely have dismissed on summary judgment cases involving isolated or less serious allegations of nothing more than a few jokes or pictures or even unwanted touching.⁹⁷

95. *Id.* at 120.

96. *Id.*

97. *See e.g.*, *Brooks v. City of San Mateo*, 214 F.3d 1082, 1091 (9th Cir. 2000) (holding a single incident involving touches on stomach and breast did not constitute actionable harassment); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (stating that requests for dates, being called a “dumb blond,” love notes, and

Some recent cases will illustrate. *Henderson v. Simmons Food, Inc.*,⁹⁸ a case from the Eighth Circuit, presumably represents the kind of claim that Professor Rosen would recognize under the continuing unnamed claim involving a “pattern of sexist taunts and abuse.” Jodie Henderson was employed on the assembly line in a chicken processing plant. A coworker, Sergio Sanchez, tortured her with a variety of offensive behavior, including groping, rubbing his pelvis against her, shoving a broom handle into her crotch, and making a “barrage of sexual vulgarities” and “cannonade of perverted anatomical traducelements.”⁹⁹ The harassment continued for three years, and Ms. Henderson complained more than 40 times to her supervisors. The employer responded, in part, by threatening her if she continued to complain. The Eighth Circuit upheld Ms. Henderson’s jury verdict, including \$15,000 in lost wages, \$100,000 in punitive damages, and \$60,000 in compensatory damages.

Or consider an appellate court’s reversal of summary judgment for the defendant in a non-blue collar setting in the case of *Smith v. First Union National Bank*.¹⁰⁰ The alleged facts were too much even for a conservative Fourth Circuit. The plaintiff’s allegations, many of which were undisputed by the employer, painted a picture of repeated humiliation by a supervisor, Scoggins, and a company’s indifference to Ms. Smith’s complaints.

Scoggins’ remarks began when he informed Smith that he would have preferred a male in the team leader position because males are “natural leaders.” Scoggins made this comment more than thirty times in the first few weeks that he supervised Smith. Scoggins also told Smith that women should not be in management because they are “too emotional to handle a managerial role.” When a female employee was upset, Scoggins would frequently remark to Smith that the employee was menstruating or that she needed a “good banging.” Scoggins did not make these types of remarks about male employees.

Scoggins also demeaned the workplace successes of women at First Union. Scoggins told Smith that “the only way for a woman to get ahead at First Union was to spread her legs.” Scoggins told Smith that he wished he had been a woman so that he could “whore his way through life.” Scoggins

an attempted kiss not sufficiently pervasive to constitute hostile environment harassment).

98. 217 F.3d 612 (8th Cir. 2000).

99. *Id.* at 616.

100. 202 F.3d 234 (4th Cir. 2000).

claimed that women should be barefoot and pregnant, and that they went through life looking for a man to marry.

Scoggins' behavior toward Smith was often threatening. For instance, Scoggins began standing over Smith's cubicle and barking orders at her. Scoggins often concluded his orders to Smith with the remark, "or else you'll see what will happen to you." Scoggins also threatened Smith when he called her at home at 10:00 p.m., accusing her of conspiring with his supervisor, George Andrews, to "get him."

In mid-1995, First Union selected Scoggins as a team leader after an internal administrative reorganization. Smith elected not to remain on Scoggins' team. Scoggins' harassment of Smith consequently escalated. In October 1995, Scoggins appeared in Smith's cubicle as she was sitting at her desk. Scoggins grabbed the handles of Smith's chair and spun her around to face him. Scoggins then looked her over and stated, in an apparent reference to the O.J. Simpson trial, that he could "see why a man would slit a woman's throat."¹⁰¹

The employer's response to Ms. Smith's complaints was a nominal investigation and an admonition to Mr. Scoggins that he need to work on his "management style." Sexual harassment was never mentioned. The Fourth Circuit reversed the district court's grant of summary judgment for the First Union and agreed that Ms. Smith at least deserved a trial. Surely neither *Smith* nor *Henderson* represent the kind of "unfortunate misunderstanding" that Professor Rosen had in mind when describing the line-drawing problems of sexual harassment.¹⁰²

By contrast, other recent cases demonstrate that the courts are more than willing to grant summary judgment in less egregious circumstances. In *Richmond-Hopes v. City of Cleveland*,¹⁰³

101. *Id.* at 238-239 (footnote omitted).

102. Even when a hostile environment claim can be properly alleged, the courts are now routinely granting summary judgment in the wake of recent Supreme Court authority refining the issue of employer liability. In a pair of 1998 cases, the Supreme Court held that an employer could avoid liability for these claims if it had acted reasonably to avoid and prevent harassment and the employee unreasonably failed to take advantage of corrective opportunities. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998). *See generally* George, *supra* note 45. A number of courts have applied this standard to let the employer off of the Title VII hook, even assuming the "severe and pervasive" standard has been met, if there was a prompt investigation and reasonable response following an employee complaint. *See, e.g.,* *Montero v. Argo Corp.*, 192 F.3d 856, 861-63 (9th Cir. 1999); *Mikels v. City of Durham*, 183 F.3d 323, 330 (4th Cir. 1999); *Whitmore v. O'Connor Mgmt., Inc.*, 156 F.3d 796, 800 (8th Cir. 1998).

103. No. 97-395, 1998 U.S. App. LEXIS 29572, at *1 (6th Cir. Nov. 16, 1998).

for example, the plaintiff got into an argument with her supervisor about the allocation of overtime. As described by the court, Their exchange escalated into a heated argument in which Ricciarelli allegedly accused Hopes of causing trouble, called her a “bitch,” grabbed his crotch, made a gesture near his crotch mimicking masturbation, and said, “Stroke me, stroke me.” She had seen Ricciarelli make this gesture before to at least one other male employee.¹⁰⁴

Although the conduct was crude and graphic, the court concluded that this one incident was both ambiguous in its meaning and not sufficiently severe and pervasive to rise to the level of hostile environment sexual harassment.

Similarly, in *Adusumilli v. City of Chicago*,¹⁰⁵ the plaintiff complained that her supervisor and coworkers made several arguably crude comments to her (some concerning how to eat a banana), stared at her breasts, and engaged in some unwanted physical contact involving her arm, her fingers, and in one case, a “poke” in her buttocks. The Seventh Circuit readily concluded that these incidents lacked the severity required to state a claim for hostile environment.¹⁰⁶ In language of which Professor Rosen would no doubt approve, the court noted, “It is well established in this Circuit that there is a ‘safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex.’”¹⁰⁷

Although a close reading of the text indicates that Professor Rosen would retain a claim that looks like hostile environment harassment after all, the next step of his proposal is the introduction of a common law tort as a replacement. Professor Rosen suggests leaving issues of speech and conduct that “can’t be described as sex discrimination” to the tort of “intrusion on seclusion.” Employers should heartily endorse this proposal, since the claim would only involve the harasser as the defendant and the victim as the plaintiff. The employer would escape responsibility altogether.

If “sex discrimination” under Title VII includes a now unnamed claim of hostile environment harassment under Professor Rosen’s proposal, his suggestion of an additional tort claim is a

104. *Id.* at *2.

105. 164 F.3d 353, 357 (7th Cir. 1998).

106. *See id.* at 361.

107. *Id.* at 362 (quoting *Galloway v. General Motors Ser. v. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996)).

modest contribution indeed.¹⁰⁸ There is nothing remarkable in the pursuit of common law torts as means of redressing harassment issues. Prior to the Civil Rights Act of 1991,¹⁰⁹ which added the possibility of compensatory and punitive damages to Title VII,¹¹⁰ plaintiffs' lawyers routinely pleaded common law claims in hostile environment harassment actions to seek the kinds of monetary damages that were unavailable under Title VII.¹¹¹ Even after the Civil Rights Act of 1991, the practice has continued in an effort to avoid the cap on damages included in Title VII.¹¹² Nor is there anything remarkable about suing the harasser himself (or herself); the practice is uncommon not because it is unavailable, but because it is rarely lucrative. The individual harasser often will not have the assets to make the litigation worthwhile from a plaintiff's perspective, nor are attorneys' fees generally available with such claims.

The recent decision of the Seventh Circuit in *Hostetler v. Quality Dining Inc.*¹¹³ may serve to illustrate the problem. There only two incidents were considered sufficient to support a claim for hostile environment harassment. Ms. Hostetler, an assistant supervisor at a Burger King, was accosted by a coworker who one day "forcibly stuck his tongue down her throat" and the next day "attempted to unfasten her bra." Given the "physical, intimate, and forcible character of the acts," the Seventh Circuit re-

108. Given the general tenor of Professor Rosen's discussion and proposal, it is, of course, tongue-in-cheek to suggest that his purpose here was to augment the legal ammunition available to Title VII sexual harassment plaintiffs.

109. Pub. L. No. 102-166, 105 Stat. 1071.

110. 42 U.S.C. § 1981a (1994 & Supp. II 1996).

111. See, e.g., *Stockett v. Tolin*, 791 F. Supp. 1536, 1539 (S.D. Fla. 1992) (involving a case where plaintiff successfully sued for battery, invasion of privacy, false imprisonment, and intentional infliction of emotional distress under state tort law, in addition to claim for sexual harassment under Title VII); *Pease v. Alford Photo Indus.*, 667 F. Supp. 1188, 1190-93 (W.D. Tenn. 1987) (involving alleged quid pro quo harassment where plaintiff was awarded compensatory and punitive damages for claims of assault and battery, intentional infliction of emotional distress, invasion of privacy, and outrageous conduct); *Priest v. Rotary*, 634 F. Supp. 571, 574-580 (N.D. Cal. 1986) (involving an action for sexual harassment under Title VII, false imprisonment, assault and battery, and intentional infliction of emotional distress); Christine W. Lewis et al., *The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment*, 55 ALA. LAW. 33 (1994); Peter G. Nash & Jonathan R. Mook, *Employee Tort Actions for Sexual Harassment in Virginia: Negotiating the Liability Mine Field*, 1 GEO. MASON U. CIV. RTS. L.J. 247 (1990).

112. Compensatory and punitive damages are capped under the Civil Right Act of 1991, depending on the size of the employer. The caps range from \$50,000 (for employers with 100 or fewer employees) to \$300,000 (for employers with more than 500 employees). 42 U.S.C. § 1981a(b)(3) (1994& Supp. II 1996).

113. 218 F.3d 798 (7th Cir. 1999).

versed the district court's grant of summary judgment for the employer.

Would Professor Rosen consider this coworker's behavior merely "boorish advances that the plaintiff failed to make clear were unwelcome"?¹¹⁴ Possibly, since he states that the "most intentionally hurtful and harassing behavior can be regulated by the intentional torts Unwanted groping sometimes rises to the level of assault and battery."¹¹⁵ If Professor Rosen would relegate this plaintiff to the world of tort, he has effectively relegated her claim to the dumpster. Under Professor Rosen's tort proposal, the only claim possible here would be a tort action brought by Ms. Hostetler against her coworker, not involving Burger King at all (nor any claim for an award of attorneys' fees).¹¹⁶ One doubts that an assistant manager at Burger King makes enough money to hire an attorney at an hourly rate, and it seems equally unlikely that a lawyer would be willing to sue another fast food chain assistant manager on a contingency fee. Do we really want to send a message to employers that this kind of conduct in the workplace is not their problem or responsibility?

Professor Rosen also is ultimately unpersuasive in arguing that the intrusion tort would avoid the purported pitfalls of a hostile environment claim under Title VII. Professor Rosen asserts that the intrusion tort "has proved to be an effective mechanism for distinguishing serious violations of privacy from unfortunate misunderstandings."¹¹⁷ As proof of this assertion, he notes that, "The requirement that the indignity must cause 'outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities' sets the bar high enough so that relatively trivial indignities are no longer actionable."¹¹⁸ The statement assumes (erroneously, I believe) that "trivial indignities" would be actionable under Title VII, all evidence to the contrary.

Professor Rosen continues by claiming that the intrusion on seclusion standard avoids the problems of a "reasonable person" standard under Title VII. The intrusion tort, he explains, re-

114. ROSEN, *supra* note 2, at 118.

115. *Id.* at 117-18.

116. Attorneys fees are routinely awarded to successful plaintiffs under Title VII. 42 U.S.C. § 2000e-5(k) (1994). *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

117. ROSEN, *supra* note 2, at 120.

118. *Id.* (footnote omitted).

quires that the conduct be “‘highly offensive to a reasonable person,’ and therefore must be serious enough so that any reasonable person, man or woman, would consider it an unambiguous violation of privacy.”¹¹⁹ Can Professor Rosen seriously be contending that the tort standard of “highly offensive to a reasonable person” is more readily decipherable than the Supreme Court standard of asking whether a “reasonable person” would find the conduct “sufficiently severe or pervasive to . . . create an abusive working environment?”

Professor Rosen further contends that the intrusion tort will not create the same discovery problems highlighted by the Paula Jones litigation. How he reaches that conclusion is not entirely clear. The issues would seem to be quite similar (i.e., whether the conduct was “highly offensive” or “severe and pervasive” to a reasonable person). Civil discovery rules in state courts, while not always identical to federal court rules, often include the same liberal standard for open and far-reaching discovery.¹²⁰

Perhaps Professor Rosen’s real concern is the increasing efforts of employers to insist on appropriate behavior in the work place. He repeatedly references sexual harassment concerns as the rationale for employer surveillance and codes of conduct. Professor Rosen is certainly correct that some attorneys are handing out this advice, and some employers are following it.¹²¹ And no doubt some employers have become overzealous in this regard.¹²² But an employer who justifies surveillance of his employees based solely on sexual harassment law (as opposed to an interest in assuring that office time and equipment are being used for business purposes) is misinformed.

There is nothing in the law of sexual harassment that demands or even encourages random employer surveillance. The law does offer an incentive for employers to adopt and distribute an anti-harassment policy, including accessible methods of griev-

119. *Id.*

120. See generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 388-89 (3d ed. 1999) (“The scope of discovery is extremely broad under the Federal Rules and comparable state practice.”).

121. See ROSEN, *supra* note 2, at 79, 237-38 n.46.

122. Employers may now be more cautious, however, in the wake of the well publicized \$26.6 million verdict against Miller Brewing Company for firing an executive charged with sexual harassment. The harassment complaint followed a discussion about a *Seinfeld* episode in which Seinfeld cannot remember the name of his date but does recall the name rhymed with a part of the female anatomy. See James L. Graff, *It Was a Joke! An Alleged Sexual Harasser is Deemed the Real Victim*, TIMES, July 28, 1997, at 62.

ing inappropriate behavior. Over two years ago the Supreme Court established that the employer can avoid liability for unreported supervisor misconduct altogether — even for the most outrageous acts of hostile environment harassment — if such a policy is in place and the victim unreasonably failed to use the procedures offered.¹²³ But the law has never required the employer to ferret out the harassment by any means available, only to address it when a complaint is made. An employee's use of e-mail or the Internet or jokes to harass other employees imposes a risk for the employer *only* if he fails to take action when someone complains, assuming an anti-harassment policy is in place. Perhaps even Professor Rosen would agree with those more limited responsibilities.

Professor Rosen laments the loss and argues for the reinstatement of a “backstage” in the employment arena. A backstage he defines as a place where employees can relax, take “refuge from social expectations,” engage in “male bonding,” “are free to be lustful, sloppy, indiscreet, or playful, to form intimate bonds, and to indulge in behavior that would be inappropriate if practiced in more formal areas of the workplace.”¹²⁴ Professor Rosen contends that a number of benefits to both men and women will flow from such an atmosphere: men will feel freer to mentor women if they are free to make jokes and sexual comments;¹²⁵ intimate relationships will be allowed to form,¹²⁶ and creativity will flourish.¹²⁷

Professor Rosen may be correct that we all need a backstage in our lives, but I challenge him on the assumptions that we have the right to such a “backstage” environment at work and that the employer has the obligation to provide it. As an employer, even with full immunity from sexual harassment litigation, I might be reluctant to provide any opportunity at my workplace for employees to be “lustful” or “indiscreet.” I find it unlikely that most businesses would benefit in the long run from allowing inappropriate behavior in a professional forum. Requiring appropriate conduct, and insisting that business equipment be used

123. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 769 (1998). For coworker harassment, liability is limited to circumstances where the employer fails to respond to an employee's complaint. Vicarious liability cannot be imposed. See generally George, *supra* note 45.

124. ROSEN, *supra* note 2, at 123-24.

125. See *id.* at 124-25.

126. See *id.* at 215.

127. See *id.* at 217.

only for business purposes and communications, is a far cry from the Orwellian surveillance that Professor Rosen describes.

Unless the workplace itself is considered a "zone of privacy," what kind of backstage is possible in *Henderson v. Simmons Food* for Ms. Henderson and her harasser on the assembly line of a chicken processing plant?¹²⁸ Or consider the supervisor's conduct in *Richmond-Hopes v. City of Cleveland* (hint: "Stroke me, stroke me.").¹²⁹ Although the court rejected the sexual harassment claim, the employer investigated the incident and disciplined Mr. Ricciarelli for his inappropriate behavior. Would Professor Rosen protest the employer's vigilance in controlling Mr. Ricciarelli's speech and behavior in these circumstances? Or are we to assume the employer would have ignored this incident if he were confident no valid claim of sexual harassment could have been stated? I hope not, on both fronts.

As a final appeal, Professor Rosen suggests our "free speech" rights are in jeopardy, but his angst is misplaced. For employees of a private company, the First Amendment is irrelevant within the context of their jobs. The private employer has, and traditionally has had, almost unlimited authority to control speech in the workplace. The Constitution limits government or public interference, not private companies.

But where Professor Rosen and I would strike the balance on speech in the workplace is largely irrelevant to his point and mine. Almost fifteen years ago, the Supreme Court defined hostile environment harassment in terms virtually identical to Professor Rosen's. Litigation results in the lower courts indicate that the law is being narrowly interpreted in most cases to confine the cause of action to only the most egregious set of circumstances, consistent with Professor Rosen's wishes. If, in the final analysis, Professor Rosen's ultimate proposal is a plea for more leniency in the workplace, he perhaps should make that pitch more directly. The law of sexual harassment has already arrived at Professor Rosen's chosen destination.

In his Prologue, Professor Rosen pauses to "emphasize that [his] goal is not to eliminate sexual harassment law, but to rethink it in a way that is consistent with the principles of classical liberalism." He succeeded in his goal not to eliminate sexual harassment law, even for hostile environment claims; I am less sure

128. See *supra* notes 98-99 and accompanying text.

129. See *supra* notes 103-04 and accompanying text.

he has succeeded in rethinking the law in any significant way. Some will find it difficult to accept his dismissal of these claims as generally based on nothing more than “misunderstandings,” but there are indeed misunderstandings at the heart of his analysis.

