Privacy and Attention Span

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I begin with a story from Harvard, and then a story from Jeffrey Rosen's book, *The Unwanted Gaze*,[1] and finally a suggestion about how the two are related.

At a talk to a group of Harvard law students, Justice Antonin Scalia was asked why he opposed television cameras in the Supreme Court courtroom. His answer was straightforward: If he were convinced that people would watch from the start of an argument to the end, then he would have no objection to cameras in the courtroom. But that is not how the video would be used. Instead, only snippets of the argument would be seen—only the most dramatic, or the most extreme—with the result being, Scalia said, that there would be less understanding about what the Court did, rather than more. Less speech, in this case, was better than more.

There are many moments in Rosen's book where the reader is arrested, and where the reader may think, "Hmm, that's something new." Two obvious examples are the role of proportionality within our tradition of privacy jurisprudence,[2] and Rosen's very different appreciation of sexual harassment.[3]

I want to discuss a moment that particularly arrested me—the thought that privacy might be related to the problem of attention span. Rosen's argument goes something like this: Privacy's opponents—Judge Richard Posner for example[4]—have criticized excess protection for private facts by arguing that such protection distorts the information-about-individuals market. Keeping facts about *X* private will make it harder for *Y* to make good judgments about *X*. That will distort the information market as it affects *X*.[5]

At some extreme, of course, Posner is correct. *X*'s fraud conviction is, no doubt, relevant to a bank's decision to hire *X*. But in the ordinary case, the argument seems too strong. What should *X*'s duty to "the market" be? How much should *X* be required to suffer?

Rosen offers a different justification for *X*'s desire to keep information private: attention span.[6] There are some issues, for some audiences, that we can be confident will not be understood well. The issue, for example, might require ten minutes of attention to be understood; we can be confident it will get ten seconds. And yet, after these ten seconds, a judgment will be drawn. That

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1. *See* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 126 (2000).
2. *Id.*
3. *Id.* at 54-60.
4. *Id.* at 209.
5. *Id.* (discussing Richard Posner, *An Economic Theory of Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 333, 337-38 (Ferdinand David Schoeman ed., 1982))
6. *Id.* at 200-01.

judgment will be incomplete, yet in some cases compelling. It will affect *X*, and in the fairest sense we could imagine, this effect would be unfair. It is not, in other words, the judgment others would have made had they had the opportunity to judge fully.

Among the examples that Rosen uses to explicate this idea is one with which I am quite familiar.[7] It is an unpleasant, but illuminating, example as it brings out the dynamics of the argument quite well. This is the example of my appointment by Judge Thomas Penfield Jackson as special master in the Microsoft case,[8] and my subsequent removal after a decision by the Court of Appeals for the D.C. Circuit.[9]

If you know of this story from a source other than Rosen's book, then you believe that the facts are something like this: Judge Jackson appointed me special master in the government's consent decree case against Microsoft; Microsoft objected, charging that I was biased. At first they based their claim on facts such as my using a Macintosh; they then produced an e-mail from my computer (how they got it is a mystery to all). This e-mail was their smoking gun; in it, I called Bill Gates "the Devil" and other such kindly things. The D.C. Circuit, reviewing Microsoft's plea to be spared the bias of this Macintosh-toting law professor, agreed with Microsoft and removed me from the case.

If this is what you believe, then Rosen's point has been made—for what you believe is false. It is true that I was appointed special master by Judge Jackson. But Microsoft did not produce my e-mail; the e-mail was produced by the government. The e-mail said nothing about Bill Gates; it was, instead, a question to a Netscape employee about whether Internet Explorer (IE) interfered with Netscape Navigator. The e-mail recounted a particularly unpleasant interference between the two not-so-friendly programs. A bit embarrassed to be asking a Netscape employee about my experience installing it, I explained that I had installed IE to enter a contest to win a computer. I did not win the contest, and so I quipped, quoting a song by Jill Sobule, that I "sold my soul and nothing happened."

Microsoft latched onto this e-mail in its case to establish bias; the judge, applying the ordinary test for bias, found no bias.[10] This view, as I learned after spending many hours speaking with judges and experts on the matter, was not idiosyncratic. Steven Gillers of New York University, with whom I did not consult, reviewed the matter at the request of national media. He said he had seen "hundreds of recusal cases, and this would not even register on the radar."[11] Microsoft appealed the judge's no-bias finding, but the D.C. Circuit

7. *Id.* at 56-57.

8. United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (ordering reference to special master).

9. United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998) [hereinafter *Microsoft II*].

10. United States v. Microsoft Corp., No. CIV.A.94-1564-TPJ, 1998 WL 30147, at *1 (D.D.C. Jan. 14, 1998).

11. Julia Angwin, *Adviser Won't Quit Microsoft Antitrust Case*, S.F. CHRON, Jan. 7, 1998, at D1.

did not review that finding.[12] The D.C. Circuit concluded, without reaching the question of bias, that the scope of the case that the judge had granted me was beyond the scope permitted by the special master statute. Thus the court vacated the appointment and remanded the case.[13]

Rosen uses this story for a very obvious feature. To tell it requires time, and yet it is a story that properly deserves no real time. It is a story that merits a few seconds of attention, if that, and yet to understand the facts necessary to reach a fair judgment requires something much more. The result, Rosen argues, is less understanding of the facts, not more understanding. The consequence is misunderstanding of what happened, rather than knowledge.

Privacy, the argument goes, would remedy such a problem by concealing those things that would not be understood with the given attention span. Privacy's function, in this story, is not to protect the presumptively innocent from true but damaging information, but rather to protect the actually innocent from damaging conclusions drawn from misunderstood information.

Of course, in my case not all who misunderstood did so because of a lack of attention span. I had written my e-mail to a Netscape employee, Peter Harter, whom I had met but three times. I had ended my missive with an invitation that when he was next in Cambridge, we should get together and "do whatever." A very enterprising reporter in a Seattle newspaper took that line, "do whatever," and very creatively suggested that I was "in bed" with Netscape in more than one sense of the term.[14] This, of course, surprised my then girlfriend, and future wife—not in an awful way, of course, as she is a quite modern soul—but it surprised her nonetheless. Clearly, that surprise was not generated by a lack of attention on the writer's part.

The exception notwithstanding, the structure of the story is clear enough, and the example is well drawn to suggest a host of similar cases: cases where we know a matter will get less attention than it needs, and where the consequence of this lack of attention will be misunderstanding. These cases, Rosen suggests, are ripe for a defense of privacy. In these cases, I should be allowed to keep secret that which others will not truly understand.

The important point about this defense of privacy is that it does not suffer under the Posner criticism. Posner can make no claim which shows that failing to reveal such information will weaken the information market. Quite the contrary—these are cases where revealing the information, given the limits in the market, will weaken the information market. Or alternatively, they are cases where the information revealed will force an unfair burden on the subject—unfair under an efficiency analysis, as the burden to defend in a context where understanding cannot be had is a resource poorly spent. Thus, this justification for privacy is, in this sense, stronger than the argument ordinarily offered in

12. *See Microsoft II*, 147 F.3d at 935.
13. *Id.*
14. *Fordham Sets Event on Media Mergers*, N.Y. L.J., Feb. 8, 1999, at 6.

favor of privacy. The claim is not that the truth should be hidden; the claim is that the truth will not be heard.

And yet, while true against Posner, there is still something a bit odd about this argument as an argument about privacy. The claims about understanding are true; indeed, I have personally come to understand just how true the misunderstandings can be. I agree that this gives reason to hide certain facts about our lives—a reason that is far better than the reason that Posner attacks.

But the problem with Rosen's argument is that the example has nothing to do with privacy. To wit, the issues about whether I was biased were not private matters; obviously, there was nothing improper about Microsoft raising the issue and giving it a shot. Misunderstanding may well have been the consequence, but I have no complaint grounded in privacy against that misunderstanding.

Rosen has identified the structure of a problem, but the flaw in his argument is that the problem is more general than privacy. Privacy could be one solution to a more general failing of the information market. But it will not, on its own, solve this problem with the information market.

And this brings me back to Justice Scalia. Notice how Scalia's argument for exclusion is, in essence, Rosen's argument for privacy (but notice even more clearly that this is not really within the realm of "privacy"). Scalia, too, is reacting to a failure in the information market—to an understanding about how the information market will fail. If arguments are taped, Scalia argues, then either people, or their proxies (editors) will cut apart the arguments, so that only the most extreme—or the most powerful—moments will be seen, with the result that there will be less understanding of the Supreme Court rather than more. Scalia is happy to have an audience (very happy, I am tempted to say) so long as he can ensure that the audience is properly exposed to the material. He trusts the audience to read the Court well, so long as he can be assured the audience will actually read.

For teachers, Scalia's intuition is completely understandable. To understand complex issues, one wants the ability to minimize distraction—to eliminate, in other words, the easy opportunity to switch channels, as it were. If at every moment, those listening could look elsewhere or surf to a different station, then the ability of the teacher to convey tedious or difficult or complex ideas would be reduced. More competition for attention reduces the attention to the tedious.

We can use these examples to make a more general point about the structure of speech in modern democracy. Imagine that for a given topic X, an attention span (AS) O is necessary for an accurate understanding of X. (For X = arguments in the Supreme Court, Scalia's argument is that O must be the full argument, or close to a full argument.) For a given market ("average viewers"), the AS for the topic X is A. The first question we should ask is whether $(AS)O < (AS)A$. If it is, then there is no problem—or at least there is not the problem that I want to discuss. If $(AS)O < (AS)A$, then attention span is not a constraint on the accurate transmission of some truth. There are many ex-

amples: If some nation declared war on the United States and bombed a U.S. port, then one expects that the attention span of the average viewer would be greater than what is necessary. People would stay tuned in to the news; the existence of *I Love Lucy* on Channel 33 would not have much effect.

But if (AS)O > (AS)A, then we have a very different concern. If one believes that the actual attention span is less than the necessary attention span, then one believes that "accurate understanding" will not be conveyed. Two responses to this problem are possible. One is to do nothing. "Let the attention span change to fit what is necessary," this respondent says. "My concern is to convey the truth, not to worry about whether it is understood."

An example from magazine journalism is relevant here. In 1993, the *New Republic* ran a story about the *Harvard Law Review*'s decision to publish the Harvard Law School tenure piece of then Assistant Professor Charles Ogletree.[15] If one read just the first part of the story, one would have had the impression that the *Harvard Law Review*'s decision was driven by political correctness, and not by merit. If one read the full story, however, one would understand that the meaning the author intended to convey was precisely the opposite—that the decision was, in fact, grounded in merit, but that most discussed it as if it were driven by political correctness. Indeed, the author's intent was more complex than this—for by creating this "misimpression" early in the story, the author intended to suggest something about the cause of this misimpression—namely, that people did not pay attention to the full story. Thus, the author's meta-argument was very similar to my primary argument—that misunderstanding is generated by this constraint on attention span.[16]

But this meta-purpose did not relieve the author, Ruth Shalit, from criticism.[17] Regardless of her purpose, some argued that Shalit should have been aware that the article would mislead. Responsible journalism, the critics argued, requires an accounting for the average attention span. The article should have been written with this attention span in mind.

Complaints like this lead to the second response to the relation (AS)O > (AS)A: that the author or broadcaster simplify or contract the story to fit (AS)A. If the attention span of the average viewer is fifteen seconds, then the author or broadcaster should present the story so it can be understood in fifteen seconds.

This response would be fine if every idea, or truth, could be reduced to a fifteen-second version. But for the same reason that English teachers object to Cliffs Notes in literature classes, or for the same reason that Scalia objects to C-Span, one could well object to the view that every story could be reduced to fit any arbitrary attention span without loss of fidelity. As with software compression routines, there is a limit to how compressed an argument can be.

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15. *See* Ruth Shalit, *Hate Story*, NEW REPUBLIC, June 7, 1993, at 11.

16. The ordinary structure of news stories, of course, recognizes this constraint, for the main points of a story are placed at the top of the column, and details are explained later on.

17. *See, e.g.*, Robert C. Clark, Letter to the Editor, NEW REPUBLIC, July 5, 1993, at 4 (decrying Shalit's perpetuation of "a false and ugly rumor regarding the scholarship of Charles Ogletree").

This is not to say that no compression is possible; it is only to say that there is a limit. There are plenty of examples. Think about the war in Bosnia. Coverage of this story was extensive. Yet to understand the critical history underlying the conflict requires an (AS)O > (AS)A. The same is true with trade policy, or many aspects of foreign policy—all these are matters of public import, but they are not matters that will be understandable in sound bites.

For those stories that cannot faithfully be compressed, one response might be to not carry the story. I have heard reporters say that they cannot write a story about X precisely because there is no way to accurately represent the facts about X within the constraint of the length of a news story. This response is an acknowledgment of the constraint of attention span, and it respects that constraint. One might argue that it manifests a responsible restraint.

But increasingly, this is not the media response. Rather than not covering a story, our twenty-four-hour-a-day news culture will cover the story, subject to the same constraint on attention span. So Bosnia will be covered in two minutes of television footage; the battle over open trade covered in eight hundred words in an op-ed column.

In one sense, one might believe this effect quite benign. That is, most have a superficial understanding of matters of public import, and the news contributes to the superficial character of that understanding. So what? Is it not marginally better that people have some understanding than that they have no understanding? Would it really be better if they watched more of *The Simpsons* than *Headline News*?

But there is a harm, as the effect of this speech winds its way through our (or any sufficiently democratic) political system. For this partial coverage creates the impression of knowledge. People believe they know something about a subject.[18] Partial coverage creates a view. Without a view, when people are asked what they think about X, there is at least hope that they will say, "I don't know." But with a view, they are likely to express it. And their expression will have an effect. People are fed sound bites. After grazing for a sufficiently long time, they believe that they know something about the subject, and soon thereafter, they are quite willing to express their views about what ought to be

18. Political scientists have long noticed a phenomenon called "non-attitudes" or "phantom" opinions. "Non-attitudes" was coined by Philip E. Converse and refers to the phenomenon of individuals reporting a view about a nonexistent matter. *See* Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, *in* IDEOLOGY AND DISCONTENT 245 (David E. Apter ed., 1964). For example, psychologist Eugene Hartley conducted a survey in 1946 about racial attitudes. The questions probed the views of students about attitudes towards various racial groups. Included among the groups were the "Wallonians" and "Pireneans"—obviously fictitious groups. Nonetheless, the students expressed strong views about whether immigration should be permitted for either and about whether they should be permitted to be integrated into local neighborhoods. *See* JAMES S. FISHKIN, THE VOICE OF THE PEOPLE 80-84 (1995). My point here takes the nonattitude problem one step further. However confidently people might express views about matters that they have not heard anything about, my assumption (admittedly untested) is that they would be even more confident about matters they have heard something about.

done. The thought "I don't know enough to know what ought to be done" escapes them because, in their minds, they "know" plenty.

The nomination of Lani Guinier for Assistant Attorney General for Civil Rights is a perfect example. Guinier's nomination was attacked because she was said to favor quotas. No fair reading of her writings could conclude that she favored "quotas." The problem, however, is that a fair reading of her writings—writings within the genre of this Review Essay—required real work. To the average reporter, it was extremely difficult to understand Guinier's arguments in law reviews. To the average Senator, there just was no time. So instead, her argument was collapsed to the account that might fit within the two minutes of coverage that any such story would get. But her views were not amenable to a two-minute rendering. Thus, it was the cartoon of her views, and not her true views, that were represented. And opposition to that cartoon was strong.

When President Clinton withdrew her nomination, he did so with a fabrication that speaks volumes to the current state of rhetorical ethics. Clinton's representatives told a television audience that he had read her writings in one morning.[19] This was, he said, the first time he had done so, and he had concluded from that reading that he just did not agree with what she said. But of course, no one versed in the language of law review articles believed Clinton had devoted the time necessary to understand the 273 pages of writings that Guinier had produced. It was an obvious falsehood to say that he had.[20] What he had done—quintessential politician that he is—was to conclude that there was no way to convey the substance of Guinier's writing in a way that would sell. Again, Guinier's message was a hard sell not necessarily because the substance was flawed or too controversial when properly understood, but because, given the attention span constraint, it could not be properly understood.[21]

Some qualifications are necessary. First, my claim, again, is not about every topic of public import—there are any number of news blockbusters that capture a sustained attention from the public. *Bush v. Gore*,[22] the impeachment of President Clinton, the affairs of President Clinton, the death of Princess Diana, the crash of TWA 800—these are all events that by their nature capture the attention of an audience and where the speaker might expect a sufficient span of

19. George Stephanopoulos, White House Press Briefing, U.S. Newswire, June 4, 1993 ("And as you know, he spent much of yesterday morning reading her writings.").

20. There is a suggestion that he focused on only one article: Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991). However, the impression he gave was that he read the whole corpus of her writings.

21. This is not to say things are hopeless. Guinier then published two books, LANI GUINIER, LIFT EVERY VOICE (1998), and LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994), which explained her views quite forcefully, and distinguished her position from quotas quite effectively. In the end, the controversy might have done more to push understanding of her subtle and powerful position than anything else could have done.

22. 531 U.S. 98 (2000).

attention. The point is not, therefore, that only context determines attention span; obviously subject matter does as well.

Second, any harm caused by what we might call the attention span constraint can be corrected over time by frequent, if partial, exposures. Just as a complex painting can be produced by many tiny brushstrokes, or a complex problem in a well-designed computer program can be solved by chopping the problem into many small parts, so too a complete understanding of a complex story might be understood by frequent and repeated exposure to different facets of the story over an extended period of time. Even those who paid no attention to the facts surrounding the impeachment of President Clinton cannot help but to have absorbed much about the story. With millions of stories broadcast about the case, at some point even those consciously avoiding the story will have absorbed much about it.

Thus, any problem with the attention span constraint is not a problem that will affect every aspect of democratic speech. But it will affect some. However many aspects it does affect, my argument is that there are more problems than there would be were the constraint of attention span recognized responsibly.

Third, my claim is not that things were great in the past and are just getting worse over time. I do not believe that I am captured by the golden age fallacy. Again, I believe we are seeing an increase in news coverage (if one considers the full range of broadcasting) and an increase in the range of topics being discussed. More importantly, we are seeing an increase in the exposure of average Americans to newsworthy topics. A great, egalitarian change has occurred in the exposure of people to matters of public and international import.

But the consequence of egalitarianism is not necessarily an improvement in understanding. There may be greater exposure and less understanding. So, there is a troubling conflict (for an egalitarian, at least) between greater access and greater understanding. As more people are exposed, more people have views about the matters to which they are exposed; they express these views; these views get reported ("sixty-five percent of Americans believe blah blah blah"). Yet if the understanding shaping these views is crude, then we should at least wonder about the advantages that this egalitarianism has produced. Are we better off in a world where the recommendations of policymakers must compete with strong but ill-informed views of the public? And if we are not better off, then what possible remedy to this "problem" could we imagine?

For in the end this is the real trouble that the emerging architecture for speech presents. It is not just that there will be less exposure to effective democratic speech. It is also that the exposure that there is, for many of the most important issues that government faces, will be an exposure that creates less understanding. The stories will be reported and some sort of understanding will be created. The understanding that is created, however, will not necessarily have any fidelity to the truth or the true complexity of the facts. Yet this understanding—in this age of democracy—will matter to democrats. Policymakers and politicians will be affected by this misunderstanding—it too will become a

constraint on decisions. And the constraint, to the extent that it is a product of misinformation, incomplete information, or ignorance, will be a compromise in the policymaking process.

This is not a point that others have failed to notice. It is commonplace to criticize the press, for example, for failing to capture the truth they report. It is similarly commonplace to notice that one trusts most of what the press reports, except those things one actually knows something about. But the mistake is to blame the press. The author of a story faces real constraints;[23] a news reporter who told her editor that a particular story could not be reported in less than four thousand words would be told to find another job. Every story can be told in seven hundred words—whether told accurately or not. But the constraint of seven hundred words is real—it is formed by a market of publications—and cannot simply be remade by saying that it should be different. The constraint is real, and my argument is that the constraint has an effect on the public's understanding about these matters of public import. On balance, it is likely to reduce the value of democratic speech.

So what can be done? Well, notice first the difference in remedies that these different problems create. In Rosen's context, the remedy is privacy; in Scalia's context, it is an architecture that achieves much the same end. Both structures—legal and architectural—keep the nonunderstood speech away from those who might not understand. Both achieve separation, but through very different means.

These are possible solutions to this problem of attention span. But what should be clear is that there is no guarantee that a particular problem of attention span will have any solution at all. Privacy is sometimes a solution, norms at other times might be a solution, and architectures too may solve the problem. But sometimes we will get stuck. Often, the constraints we choose, and the constraints entailed by the technologies we embrace, leave us with no clear or direct solution to the problem of attention span.

Let me telegraph one such example. One feature of the Internet revolution is that it ends, or could end, the concept of a "channel." This is not necessarily so, but probably. "Channels" represent a choice, made by someone else, about what is available for public consumption. When there were few channels, these choices were important. It is just a fact of nature that given the choice of a few channels, even a few bad channels, most people will still watch television. That means, in turn, that what is on those channels is important, and because the choices are relatively few, the market power of any particular channel is high.

In this model, market power equates with control over the attention span, and it follows that when competition for content increases, market power, and hence control over attention span, decreases. The ability to hold people focused on an

23. Online publications face less of a constraint. This is a virtue of publications such as *C|Net* that can afford to be more complete in their coverage.

issue falls as the competition over content increases. Extensive discussion of news, or matters of public import is reduced; headline news takes its place.

But notice how little we could do, at least through legislative action, to remedy this problem. We are not going back to three-channel television. We are not going to mandate thirty minutes of serious state-sponsored news each night because a law mandating anything in this matter would fail constitutional review; a movement to build a norm would be silly. Rather we have a problem of attention span, just the problem Rosen wrote about, without a solution at hand.

All this is not to deny the insight Rosen has had, nor is it to deny the remedy he offers within some domains. Rather, the point is to use his insight to underline a more general concern. If privacy, as Robert Post and others have written,[24] is a social commitment to matters properly left free from the review of others, the problem Rosen has identified underlines our need for a social commitment to matters importantly kept within the review of others. Our problem, then, is we, or I, cannot see how.

24. *See generally* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).