To answer the question that schoolchildren will continue to ask for as long as the Clinton impeachment is studied — "Why did I have to learn so much about Monica Lewinsky's bra hooks?"— you must journey in time back to 1991, when William Kennedy Smith was acquitted of rape. Smith insisted that his accuser had consented to sex, but then became angry about something he said, and that only then did she claim that he had sexually assaulted her. The alleged victim testified that Smith had been charming when she met him at a local bar, but suddenly turned violent after she accompanied him to the Kennedy compound in Palm Beach. To demonstrate that Smith had a propensity to act that way, the prosecution tried to offer testimony from three other women who said that he had assaulted them in a social setting. But the judge refused to let the jury hear evidence about Smith's sexual past. That refusal outraged many women and built up pressure for legal reform. At the time, Deborah L. Rhode, a feminist legal scholar at Stanford, told a reporter that the Smith trial was "a textbook illustration of what rape victims and sexual-assault victims have long claimed, which is that they're assaulted twice in the process of trying to prove it." Rhode subsequently became the chief counsel for the House Democrats during the Clinton impeachment inquiry.

In Congress, Susan Molinari, then a Republican representative from New York, introduced changes to the federal rules of evidence allowing juries in sexual-assault and child-molestation cases to consider evidence that the accused had committed similar crimes in the past. (Bob Dole introduced a companion bill in the Senate.) A broad cross-section of
judges, legal scholars, and congressional Democrats opposed these revisions, in part because they feared that prosecutors might dredge up earlier offenses for which the defendant had never been charged, let alone convicted. The Federal Judicial Center worried that the new rules would trigger a series of "'mini-trials' within the main trial, where the charges and countercharges surrounding each previous bad act would be presented and rebutted. More generally, some opponents of the new rules believed that graphic sexual details were likely to be so inflammatory that a jury hearing them would seek to punish the defendant for what it perceived to be his immoral behavior, whether or not it was convinced of his guilt beyond a reasonable doubt. Moreover, critics of the legislation warned, the proposed definition of "sexual assault" – which included any attempted contact, "without consent, between any part of the defendant's body or an object and the genitals or anus of another person" – was dangerously broad. In their view, Molinari's zeal to "protect the public from rapists and child molesters," as she put it, had produced language that could apply to any fanny-pinching executive, so that the proposed rules would affect not only rape trials but also garden-variety sexual harassment investigations. When Molinari learned that her rule was being invoked in Paula Jones's sexual harassment suit, she professed to be surprised. "That was not my focus at the time," she told me, with a touch of defensiveness.

At first Molinari's proposals drew little support. Then Bill Clinton was elected President. "Clinton basically assisted me in passing that legislation," Molinari told me. In 1994, when Clinton's crime bill seemed hopelessly stalled in the House, she recalled, the President called her and asked what he could do to win her support. She agreed to endorse the legislation if the President accepted her amendments about admitting the evidence of previous offenses by defendants in sex trials. "He told me that he was shocked that it wasn't part of the bill, and he supported it," Molinari said. When the President signed the crime bill, in September of 1994, he described its mission in glowing terms. "We together are taking a big step toward bringing the laws of our land back into line with the values of our people and beginning to restore the line between right and wrong," he intoned in the Rose Garden ceremony.

Perhaps Clinton should have paid more attention to the warnings from the legal establishment. By including Molinari's amendments to the rules of evidence (No. 413 in criminal cases and No. 415 in civil cases),
he may also, unwittingly, have taken a giant step toward precipitating his own impeachment. At the end of 1997, lawyers for Paula Jones amended their legal complaint to allege that Clinton had “put his hand on Plaintiff’s leg and started sliding it toward the hem of Plaintiff’s culottes, apparently attempting to reach Plaintiff’s pelvic area.” The original complaint had not included this detail, and it was added to help establish a sexual assault within the meaning of the new federal rules, so that Jones’s lawyers could try to introduce other incidents from Clinton’s past. Eventually, investigators working for Jones turned up seven “Jane Does” who were rumored to have had sexual encounters with the President. Though Jones’s harassment claim was widely judged to be weak on the law, her lawyers apparently calculated that if jurors heard enough sleazy sexual details about the President, they might be inclined to punish him for his bad character regardless of whether they were convinced that his conduct met the legal definition of harassment.

As it turned out, Judge Susan Webber Wright dismissed the Jones suit in April 1998 after concluding that even if Jones’s allegations about Clinton’s conduct were true, they did not rise to the level of illegal harassment. By then, however, Jones’s lawyers had been able to depose Clinton about his contacts with other women and — using a definition that expanded on the language of Molinari’s rule — about whether he had “sexual relations” — with one of the Jane Does, Monica Lewinsky. Then, five months later, Kenneth Starr submitted an impeachment report to Congress, alleging that Clinton lied under oath and obstructed justice in the Jones case. By filling his report with gratuitous, X-rated details about Clinton’s intimate moments with Lewinsky, Starr appeared to be following the same strategy as Jones’s lawyers: shore up a questionable legal case with reams of graphic sexual material. As opponents of the Molinari amendments tried to warn Clinton in 1994, it is hard to have a calm debate about legal guilt or innocence when you are distracted by graphic sexual information.

It seems counterintuitive, on some level, not to let jurors consider evidence from a person’s past that might shed light on his or her propensity to commit a particular crime. All of us make judgments about character every day by assuming that if someone is kind, say, in one situation he is likely to be kind in others. Psychologists call the tendency to generalize about a person’s character on the basis of a few good deeds “the halo
effect." And they caution that such character judgments can be unreliable. In 1968, a psychology professor named Walter Mischel, who now teaches at Columbia, published an influential book called *Personality and Assessment*, which argues that it is hazardous to generalize from behavior in one situation to behavior in other situations. Someone who is highly aggressive in the workplace, for example, could be exceptionally tender with his family. These days, Mischel advocates a contextual view of character; he argues that people may behave honestly at one time and dishonestly at another because different situations may implicate different abilities, feelings, and beliefs. “Someone who cheats on an arithmetic test might not cheat on a spelling test,” he observes.

Mischel's findings bolster the traditional reluctance of English and American courts to allow prosecutors to present evidence that proves nothing but the defendant's bad character — precisely because such evidence can be so prejudicial. “The inquiry is not rejected because character is irrelevant,” Justice Robert Jackson wrote in a Supreme Court case from 1948 involving a man who had been arrested for receiving stolen goods 27 years before he was charged with bribing federal officials. “On the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”

Prurient information weighs more than most. Yet in sex cases, courts have sometimes recognized exceptions to the general prohibition of character evidence. For example, English law at one time allowed prosecutors to introduce evidence of deviant sexual history to prove indecency charges. That is why, when Oscar Wilde was tried for committing indecent acts, a parade of his former lovers was called to the stand. Similarly, some American states at one time permitted evidence of past offenses to demonstrate a defendant’s “lustful disposition” or “depraved sexual instinct” in certain sex-crime cases. But when Congress set out to codify federal rules of evidence in the early 1970's, it did not take that approach. Rule 404(a) says, “Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.”

Past offenses can be, and often are, admitted to prove things other than bad character, such as motive or intent. Nevertheless, a disparity became apparent in sexual assault trials. The sexual history of the accuser
could be examined in order to cast light on the question of consent, yet the past behavior of the accused was generally off limits. Why was it relevant that she had a habit of wearing short skirts, feminists protested, and not that he had a habit of lunging at women who wore short skirts? And so, in 1978, Congress adopted a rape-shield law, which protected an alleged victim from being grilled about her sex life. In 1994, this protection was extended to civil cases in which women charged sexual harassment. At the same time, feminists argued that it was unfair to exclude evidence of a man’s sexual misdeeds because a woman’s version of what happened in private might not be believed unless her testimony could be corroborated by women who had suffered similar treatment. Persuaded by that argument, Clinton accepted the Molinari amendments in 1994 and thus completed a reversal of the traditional rules of evidence: now the sexual history of the accuser was more or less off limits, while that of the accused could be mined for damaging incidents.

The new protection for the sexual privacy of plaintiffs was hailed by feminists as a necessary response to the Supreme Court’s amorphous definition of sexual harassment, which seemed to put the thoughts and feelings of the plaintiff on trial. The Supreme Court has stressed that, to be illegal, sexual advances and expression in the workplace have to be “unwelcome.” The welcomeness requirement is the test that judges use to distinguish consensual from non-consensual encounters at work: not all sexual advances are unwelcome, the courts have reasoned, and it is impossible for a man to know whether or not his advances are welcome unless he asks. Nevertheless, some feminists questioned the welcomeness requirement, claiming that it shifted the focus of harassment trials from the harasser to the victim. The welcomeness requirement also encouraged defendants to invade the privacy of plaintiffs in an effort to argue that the advances in question were reciprocated. In the Meritor case, for example, Chief Justice Rehnquist held that the appellate court had erred by excluding testimony about Mechelle Vinson’s personal fantasies and sexually provocative dress. Evidence of “a complainant’s sexually provocative speech or dress,” Rehnquist held, is “obviously relevant” in determining “whether he or she found particular sexual advances unwelcome.”

When Congress, in 1994, amended the federal rape-shield rule to apply to sexual harassment trials, it declared that evidence “offered to prove that any alleged victim engaged in other sexual behavior,” including her
fantasies, dreams or "sexual predisposition," is generally inadmissible in court. In the wake of the new Rule of Evidence, No. 412, judges in sexual harassment cases have been more reluctant to admit evidence of the sexual history of the plaintiffs. In a federal case from 1995, for example, Winona Sanchez, alleging that her supervisor, Mohammad Zabihi, had made unwanted sexual advances toward her and had created a hostile work environment, sued the New Mexico Department of Health. The Health Department, arguing that Sanchez, not Zabihi, had been the sexual aggressor, asked Sanchez to supply detailed information about any sexual advances she had received from, or made to, her co-workers at any job during the previous ten years. "In the last (ten) years, have you ever... had a close personal, romantic, or sexual relationship, however brief, with any co-worker, or any person with whom you worked at the time, or any person who also worked at your same place of employment?" the interrogatory asked. "If so, for each item above, please identify the person(s) involved, the relevant date(s), the relevant place(s) of employment, the number and/or frequency of any such advance(s), whether such advance(s) were welcome or unwelcome, whether you or the other person(s) involved ever complained in any way regarding any such advance(s), and the length and duration of any such relationship(s)." Citing the new federal rules protecting the privacy of plaintiffs, the judge narrowed the scope of the inquiry to the past three years, and held that Sanchez did not have to answer any of the questions regarding a co-worker whom she eventually married.

This seems exactly right. A woman should not have her marital history opened up for public inspection merely because she alleges she has been harassed by one obnoxious co-worker. As the federal advisory committee put it, the new Rule of Evidence, No. 412, "aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process." But the asymmetry of the new federal rules is hard to justify: why should the sexual history of the plaintiff be shielded from exposure while that of the defendant is fair game? In an effort to justify the different treatment of plaintiffs and defendants, the Clinton Justice Department, writing in defense of the Molinari amendments, announced that, "Violent sex crimes are not private acts, and the defendant can claim
no legitimate interest in suppressing evidence that he has engaged in such acts when it is relevant to the determination of a later criminal charge."

But an unwanted grope, although lamentable, hardly qualifies as the kind of “violent sex crime” that should justify the exposure of all the other unwanted advances that an accused man has ever made in his entire life.

Supporters of the Molinari amendments, stressing the improbability that someone would be falsely accused of rape or child molestation on more than one occasion, pointed to a legal theory known as the doctrine of chances. Rather than generalizing about the bad character of the suspect, the doctrine of chances assumes that other allegations of similar acts by the defendant make it more likely that the current allegation is true. The doctrine of chances emphasizes the unlikelihood that someone will be accused of an unusual crime more than once. In an English case around the turn of the century, for example, when a defendant claimed that his wife had drowned accidentally of an epileptic seizure in her bath, the court admitted evidence that two of his previous wives also had drowned in their baths.4 Because it is statistically improbable that all three women had drowned accidentally, the earlier incidents made it more likely that the more recent one was not an accident.

There is, in fact, a lively statistical debate about whether rapists and child molesters are more prone to repeat offenses than most other criminals. Opponents of the Molinari rules argued that the recidivism rates for sex offenders are equal to, or even lower than, those for people who commit other crimes, such as burglary or drug offenses.5 In 1989, for example, the Bureau of Justice studied 100,000 offenders over three years and found that the recidivism rates were lower for sex offenders than for most other criminals. (The rates ranged from 31.9% for burglars to 24.8% for drug offenders, 19.6% for robbers, 7.7% for rapists, and 2.8% for murderers).6 Furthermore, some feminists criticized the rules of evidence for embracing an unduly rosy view of rape as a pathological activity carried out by a small, mentally ill group of repeat offenders, rather than something that even otherwise healthy men may commit once in their lives.7 But whether or not the doctrine of chances might justify making a special exception to the rules of evidence in cases involving truly depraved crimes, like rape or child molestation, it is hard to justify as a predictive device in sexual harassment cases, where the distinction between conduct that is boorish and conduct that is illegal may not be obvious until after
the case has gone to the jury.

The most prescient objection to the Molinari amendments came from Miguel Mendez, a law professor at Stanford. In comments submitted to the federal judicial conference charged with reviewing the new rules, Mendez cautioned that the halo effect has a corollary, which he called the "devil's-horn effect." If jurors tend to expand a few bits of favorable information into a unified theory of someone's good character, they are even more likely to generalize from past crimes or offensive acts that someone is a bad person and to overlook any exculpatory information.

According to one of the best-known studies of jury verdicts, "The American Jury," published in 1966 by Harry Kalven, Jr. and Hans Zeisel, this effect is particularly dramatic in cases involving sexual behavior—which are precisely the cases affected by the Molinari rules. Kalven and Zeisel studied a series of trials in which defendants had engaged in sexual behavior that fell short of the legal definition of a particular crime. "In each of the cases," they concluded, "the jury is so outraged by the defendant's conduct that it overrides distinctions of the law and finds him guilty as charged."

William Miller, who teaches law at the University of Michigan and has published a book called The Anatomy of Disgust, gives another explanation for the devil's horn effect: the phenomenon of the synecdoche, in which the part comes to stand for the whole. Bad thoughts tend to drive out good thoughts, Miller suggests, and sexual thoughts tend to drive out all other thoughts entirely. The achievement of the Starr report, Miller argues, was to reduce Clinton to an image of nothing more than his grossest impulses. "Who can look at Clinton? All you think about is sexual organs," Miller says. "He is canceled as a moral human being, as someone who needs to be deferred to. He becomes gross matter. There was always this hint about him, overeating, too much hair on his head, something about his fleshiness that made him look almost like Vice in a medieval allegory play."

Miller's study of disgust also suggests that jurors and citizens are more likely to remember kinky sex acts than conventional ones because unusual acts defy euphemism. "There are certain things that there are no decorous ways of talking about," Miller says. "That's what sank Clarence Thomas. A pubic hair is the proper term. I think although we can turn a blow job into 'oral sex,' and make it go away, once a stain is there, the very
word stain can not be euphemized. It’s wet spots; it’s stains. It’s already irrevocably low and unsalvageable by euphemism.” Perhaps for this reason, revelations of extramarital affairs by Republican Representatives Dan Burton, Helen Chenoweth, and Henry Hyde did not have the same resonance in the public mind. It is far easier to forget a sentence like “I fathered a child” than a sentence like “She also showed him an email describing the effect of chewing Altoid mints before performing oral sex.”

Starr insists that he was upholding the rule of law when he decided to flood the country with lurid private information. But did he also preempt any chance for a reasoned public debate about the President’s behavior? Although Clinton and Thomas may have been reduced, in the public mind, to a vision of their crudest impulses, the introduction of prurient material into the United States Senate did not distort the public’s judgment in precisely the way that the devil’s horn effect predicted. American citizens proved to be more sophisticated than their elected representatives. Rather than succumbing immediately to the urge to punish Clinton as a bad man, a majority of the public drew nuanced distinctions between Clinton’s private conduct and his public achievements and thereby resisted the effort to impeach him for misdeeds that, in their view, did not rise to the level of high crimes or misdemeanors. Thomas, similarly, was initially given the benefit of the doubt: although a majority of the public believed that he was telling the truth at the moment of his confirmation, a year later, public opinion had shifted to favor Anita Hill.

In the Senate, President Clinton was acquitted by an almost entirely partisan vote of 51-49, and Justice Thomas was confirmed by a similarly partisan vote of 52-48. The polarizing effects of prurience are consistent with recent studies of social norms. When debate over the objective rightness or wrongness of highly personal conduct is difficult, these studies suggest, people divide themselves into political camps that seem more homogenous than they really are in order to signal their broader ideological allegiances. “I don’t think there is a standard or sane response to sexual material of this kind,” says the political philosopher Thomas Nagel. “Both the material itself and everybody’s response to it are highly personal. So it’s simply inappropriate to try to introduce those responses into a public forum where agreement is the point.”

This phenomenon illuminates the central importance of privacy in a pluralistic democracy. In this diverse and truculent country, there are
fierce and irreconcilable differences of opinion about the moral, political, and cultural battles that culminated in the Clinton impeachment. In a polarized age, privacy allows citizens to interact on civil terms without confronting areas of fundamental disagreement. When the privacy of public officials is respected, citizens can think each other hopelessly mistaken about questions of sexual conduct, religious obligation, and marital fidelity, yet live together without violent and unproductive clashes that will only exacerbate partisan divisions and make them appear even wider than they already are. When discussions of private conduct and belief are allowed to invade and to occupy precious public space, public deliberation may break down entirely, as citizens retreat angrily into ideological camps.

In their essay on privacy, Warren and Brandeis worried that the widespread circulation of prurient information would corrupt and lower public morals. "Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality," they wrote. "Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people." Other liberals of the progressive era lamented the yellow journalism and realist novels of the 1890's, which published details of adultery and divorce trials and other domestic scandals that would have been unthinkable to discuss in print even a decade earlier. When the details of private affairs are published in the national press, warned E.L. Godkin, the editor of The Nation, "a petty scandal swells to the dimensions of a public calamity."

The concern that a sea of prurience leads to a "lowering of social standards and of morality" seems antiquated today. This is, for better or for worse, a madly sexualized age, in which movies, television, and the Internet ensure that every aspect of popular culture is saturated with images and conversations about sex. The notion that political sex scandals shape public morality more than they reflect it is implausible. It seems more likely that the Clinton and Thomas scandals freed politicians, judges, and journalists to write candidly about sexual practices that most Americans engage in and talk about without embarrassment. "A good effect that probably will be lasting is the encouragement of franker pub-
lic discussion of sex,” Judge Richard Posner writes of the Clinton scandal. “Among the more absurd assertions made in the public debate over the crisis are the Right’s charge that the revelation of Clinton’s affair with Lewinsky has weakened parental control over the sexual behavior of their children and the Left’s charge that the Starr Report is voyeuristic and pornographic. People who say these things (and mean them, as perhaps few do) don’t understand the family and sexual culture of late twentieth-century America.”

Brandeis and Warren’s more relevant objection is that the prurient information is so luridly interesting that, when widely publicized, it crowds out all other topics of public discussion, making it impossible to think or talk about anything else. “When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance,” they wrote. “Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive, under its blighting influence.” Because the space available for public discussion is limited, privacy serves as a shield against what social scientists have called the “availability heuristic,” which holds that, in order to engage in rational thought and discussion, we need information screens to prevent our minds from becoming overwhelmed by the mass of information that competes for our attention. “It’s not inconsistent for the public to say ‘I wish it would go away’ and ‘I wish it had never come up’ but also to be unable to resist reading about it and allowing it to crowd everything else out,” says Thomas Nagel. By its very nature, explicit sexual material crowds out all other thoughts and ideas, which means that during episodes of public prurience, such as the Thomas hearings and the Clinton impeachment, it is very difficult for the public to focus on anything else.

Since national sex scandals are relatively infrequent, the phenomenon of lurid material crowding out all other topics of public discussion will not bring the government to a halt. The more lasting legacy of the devil’s horn effect is that knowing everything about someone’s private life
inevitably distracts us from making reliable judgments about his or her character and public achievements. E.L. Godkin, for example, deplored the loss of proportion that ensued when gossip circulated outside the context of a community of people who were acquainted with the parties involved and could judge their behavior. Tabloid gossip, he sniffed, would commit "a fraud on the public" by giving the opinions and wishes of obscure and unimportant people "an amount of respect... to which they are not entitled," at the same time depriving "men of real value of their proper place in the public estimation." 12

Although Godkin's concerns seem unfashionably aristocratic today, Washington is full of public servants whose reputations have been unfairly stained by the exposure of relatively small private transgressions. Clarence Thomas is a vivid illustration. After nearly a decade on the Supreme Court, he has developed into a provocative, fiercely independent, and interestingly radical justice, willing to rethink entire areas of constitutional law from the ground up. But in the public mind, he remains nothing more than a dirty joke. In Resurrection, John Danforth's oddly prurient memoir of the confirmation ordeal, Thomas reflected eloquently about the unfairness of being reduced to the sum of his most embarrassing impulses. "It showed me just how vulnerable I am.... It showed me how vulnerable any individual is," Thomas told his friend Danforth. "It also showed me something that I will never lose, and that is that 2 percent or 1 percent or 0.2 percent can always be used to destroy a human being when there are no barriers, when there is no perspective and no context." 13

Viewed through the prism of the Clinton impeachment, the Hill-Thomas hearings look far different than they did in 1991. Even those who believe that Anita Hill was telling some version of the truth when she alleged that Thomas had asked her out on dates and had discussed pornographic movies at work must feel qualms about having condemned Thomas's denials as categorically as many of us did at the time. 14 If Clinton's lies about his encounters with Monica Lewinsky were justified or mitigated by the claim that he should not have been asked to discuss such private matters in the first place, shouldn't Thomas be excused for resorting to a similar form of self-exculpation? Clinton himself came to understand the moral complexity of Thomas's response to Hill when he tried, during his own grand jury testimony, to explain the apparently
irreconcilable contradiction between Monica Lewinsky’s testimony and his own in recalling the sexual details of their encounter. “This reminds me, to some extent, of the hearings when Clarence Thomas and Anita Hill were both testifying under oath. Now, in some rational way, they could not both have been telling the truth, since they had directly different accounts of a shared set of facts,” Clinton said. “When I heard both of them testify, what I believed after it was over, I believed that they both thought they were telling the truth. This is – you’re dealing with, in some ways, the most mysterious area of human life.”

Critics of Clinton and Thomas insist that the relevant question was perjury, not sexual harassment, and that it was the unequivocal denials, not the sexual misconduct, that justified the public exposure. But people often lie when interrogated about sex, and American law used to be more sensitive to human frailty than it is now. For most of American history, courts did not put people under oath in situations where they might be tempted to perjure themselves, and judges also distinguished among different kinds of lies by examining the liar’s state of mind, the seriousness of the lie, and its effects on other people. There is no legal entitlement to lie about sex, nor should there be. But if it was inappropriate to ask Clinton and Thomas about their private conduct in the first place, self-exculpatory lies designed to protect privacy should not provide a moral justification for the evisceration of privacy.

It seems particularly unfair that Thomas’s privacy should be turned inside out by allegations of misconduct that can not clearly be identified as illegal harassment, even 10 years after the fact. This is a consequence of the ambiguity of harassment law itself. At the time, Hill stressed that although she believed she had been the victim of legally actionable harassment, she recognized that others might disagree because the law was in flux. “I would suggest that saying that it is sexual harassment and raising a legal claim are two different things,” she told Senator Arlen Specter. “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.” But even in light of the Supreme Court’s subsequent refinements of the law, it is still not clear whether or not Hill was sexually harassed in the legal sense. She claimed that during the time that she worked for Thomas at the Department of Education and the Equal Employment Opportunity
Commission, between 1981 and 1983, Thomas asked her out on dates between five and 10 times, discussed pornographic movies, told a vulgar joke, and boasted about his sexual prowess, without ever explicitly asking her to have sex with him.

Was this conduct "severe or pervasive enough to create an objective hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive," to use the Supreme Court's current test? None of the Court's suggestions for judging hostility or abusiveness — the "frequency and severity of the conduct; whether it was physically threatening or humiliating as distinguished from a mere offensive utterance" and "whether it unreasonably interferes with an employee's work performance"— are particularly helpful in providing an answer. Are five or six requests for a date during a two-year period frequent or severe? Was the vulgar joke about the coke can abusive and humiliating or merely offensive? Hill says that she was hospitalized for five days for acute stomach pains, which she attributed to stress on the job, and that she feared that Thomas would retaliate against her for rebuffing his advances. But in fact, Thomas told her he was pleased with her work and supported her effort to begin an academic career. Hill, far more ambitious than she acknowledged, accepted Thomas's support and continued to rely on him as a mentor and an advocate. Most important of all, Hill never invoked the grievance procedure at the EEOC or filed a formal complaint, a choice that she called "maybe... poor judgment, but it wasn't dishonest and it wasn't a completely unreasonable choice that I made given all the circumstances." In light of the Supreme Court's most recent pronouncements, Hill's failure to complain might by itself doom any subsequent harassment suit and protect her employer from legal liability because it did have a grievance procedure in place.

Held in the Senate, the Thomas hearings were conducted without the protections of the rules of evidence that apply in an ordinary harassment trial, and yet it is surprising how precisely the unconstrained hearings anticipated the way actual harassment trials would come to be conducted under the new rules of evidence. In a crude effort to discredit Hill, Thomas's supporters tried to prove that she was a sexual fantasist: on the basis of a single encounter with Hill, John Doggett memorably alleged in an affidavit that, in his opinion, "Ms. Hill's fantasies about sexual interest in her were an indication of the fact that she was having a problem
being rejected by men she was attracted to." In the same spirit, several former law students at Oral Roberts University were moved to swear that Hill had put pubic hairs in their exam booklets. Even Bush administration officials, according to Thomas's sponsor, Senator John Danforth, found this absurd; and Danforth confessed in his memoir that he now regrets the unhinged ruthlessness with which he tried to discredit Hill, without showing any concern about fairness or evidence.

Thomas's privacy was also shattered, with similarly brutalizing consequences. In order to corroborate Hill's claim, her supporters tried to present evidence of other sexual misconduct for which Thomas had never been charged in the past. They offered an affidavit by Angela Wright, a former E.E.O.C. employee who claimed that Thomas had a peremptory way of inviting her on dates: "You know you need to be dating me – I think I'm going to date you." Although this contradicted Thomas's claim that he had never asked out anyone on his staff, and it echoed language that Hill said Thomas had used with her, Wright herself acknowledged that this might not be considered legally actionable harassment. Most disgracefully of all, Senate investigators and journalists sifted through Thomas's private magazine collection and video rental records, and the titles of movies he had allegedly rented were later broadcast on national television. Evidence that Thomas had a habit of watching pornographic movies and talking graphically about them among friends was not exactly irrelevant to corroborating Hill's charge that Thomas had a habit of discussing pornographic movies in the workplace. The question is whether the charges were serious enough to justify the assault on Thomas's privacy that resulted from the effort to prove them. The sin of having discussed pornography with an employee in his office was hardly so grave that it merited the exposure of Thomas's most intimate thoughts and fantasies to the entire world.

As I suggested earlier, Thomas seems to have been guilty not of gender discrimination – his record of promoting women in general was beyond reproach, and he helped Hill repeatedly after she rejected his advances – but of invading Hill's privacy. Yet if Hill had sued Thomas for intrusion on seclusion, her suit could have been summarily dismissed without an intrusive discovery process. Even assuming Hill's allegations to be true, it is not clear whether Thomas was engaging in a clumsy but well-intentioned courtship ritual that she never made clear offended her. If we
take the dimmest view of Thomas's conduct, we might surmise that he singled out Hill for special attention precisely because of her prudish and reserved manner: he knew that she would be especially embarrassed by pornographic talk, and he took a perverse pleasure in discomfiting her. Even so, courts have held that vulgar jokes and unwanted requests for dates, unaccompanied by unwanted touching, would not be highly offensive enough to "outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities". The talk about kinky pornographic movies was the most obvious violation of Hill's privacy, but dirty talk has been actionable under the privacy tort only when it is part of intrusive questions about the employee's own private life. Assuming Hill's allegations to be true, in short, if the Senate had treated Hill's allegations like an ordinary suit for invasion of privacy, it could have dismissed the charges, and avoided the need to violate Thomas and Hill's privacy in the process. The focus would have been on Thomas's treatment of Hill rather than on Thomas's treatment of women in general.

If the Thomas hearings provided a preview of the invasions of privacy that are inherent in harassment law, the Jones case provided a full-scale confirmation. In dismissing Jones's case as without legal merit, Judge Susan Webber Wright assumed that Clinton had indeed exposed himself to Jones in a hotel room, asked her to "kiss it," and then retreated when he was rebuffed. Even if Jones's allegations were viewed as favorably as possible, however, Judge Wright found that Jones still had not made out a plausible case of quid pro quo harassment because she suffered no tangible job detriments for having rebuffed Clinton's advance. And Judge Wright found Jones's claim that she suffered from "hostile environment" harassment to be similarly questionable. It is rare for a single sexual advance to be punished as sexual harassment. Because men cannot know whether or not an advance is unwanted unless they ask, courts have tended to give employers one bite at the apple. The EEOC's most recent Policy Guidance on Sexual Harassment says that "unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment." Because Clinton's self-exposure was not "frequent, severe, or physically threatening," Judge Wright concluded, it could not be considered pervasive enough to have altered the conditions of Jones's employment and created an abusive work environment.
Given the amorphousness of the hostile environment standard, a jury, or an appellate court, might have reached a different conclusion than Judge Wright about whether a reasonable person would have found Clinton's conduct hostile or offensive. In their appellate brief, Jones's lawyers noted a recent decision by the federal appeals court in Little Rock in which the judges observed: "we cannot say that a supervisor who pats a female employee on the back, brushes up against her, and tells her she smells good does not constitute sexual harassment as a matter of law."[17]

The Jones case showed that even a legally questionable allegation of harassment can result in dramatic invasions of the privacy of innocent people during the period before the case is ultimately dismissed. In October 1997, as I discussed earlier, Jones's lawyers amended her complaint to allege that Clinton was a "sexual predator." He had discriminated against Jones "because of her sex," they argued, by granting employment benefits to other women who succumbed to his advances, while denying similar benefits to Jones because she rebuffed him. To support their theory, they asked Clinton to name all women other than his wife with whom he had "proposed having" sexual relations during the nearly 20 years that he was attorney general of Arkansas, governor, and president. The audacity of the claim was striking: as Clinton's lawyers pointed out, courts have held repeatedly that it is not illegal for an employer to favor his paramour over other employees, and they asked Judge Wright to limit discovery in the case "to purported incidents, if any, of non-consensual conduct."

But in a crucial response drafted by the two anonymous Jones advisors who later would introduce Linda Tripp to Kenneth Starr, Jones's lawyers listed a number of reasons that they should be able to pry into Clinton's consensual affairs. First, they noted, the new Federal Rule of Evidence, No. 415, makes similar acts of sexual assault admissible to show that the defendant had a propensity for abusing women. This seemed like a stretch. Rule 415 only authorizes the admission of previous acts of sexual assault, while Jones argued that she should be able to rummage through Clinton's consensual affairs. But Jones's lawyers insisted that "[t]here is no practical means for this Court, in advance, to limit discovery to non-consensual sexual behavior because only after discovery can the existence of consent be determined."[18] With a MacKinnonite flourish, they added that sexual consent "is extremely difficult for anyone to
define" and that Clinton "may have convinced himself that a woman con-
sented when in fact she did not."19

Because she already had ruled that Jones was not the victim of attempted sexual assault, Judge Wright could have, and should have, rejected Jones’s request to rummage through Clinton’s consensual sex life. But a month later, she granted part of Jones’s request, ruling that Clinton had to identify any state or federal employees with whom he had sexual relations, or proposed to have sexual relations, during the five years before or after May 8, 1991, the date that Paula Jones was allegedly traumatized in the Excelsior hotel. “The Court cannot say that such information is not reasonably calculated to lead to the discovery of admissible evidence,”20 Judge Wright observed, accurately citing the permissive discovery stan-
dard. At the President’s deposition in January, when Jones lawyers presented Clinton with a definition of “sexual relations” that closely fol-
lowed the language of Rule 415, Clinton’s lawyer, Robert Bennett, objected that part of the definition could be construed to encompass non-
consensual contacts between two people. “[I]f the president patted me and said I had to lose ten pounds of my bottom, you could be arguing that I had sexual relations with him,” Bennett argued. Agreeing with Bennett, Judge Wright stressed that she was interested in “contact that is consensual,” and she restricted the definition to include contact with the private parts “of any person with an intent to arouse or gratify the sexual desire of any person.” In restricting the definition, she observed, “The Court has ruled that consenting contact is relevant in this case.”21

The chaos that followed from that ruling showed the folly of allow-
ing courts to scrutinize purely consensual affairs in the workplace. As critics of the Molinari rules had warned, the discovery process triggered a series of mini-trials, as the most minute details of Clinton’s interactions with each of the Jane Does were scrutinized to determine whether or not the encounters were consensual, and whether or not they had resulted in job benefits or detriments. Given the ambiguities of sex in the workplace, both of those questions proved, in each case, hard to answer.

After Judge Wright excluded evidence of Clinton’s affair with Lewinsky on the grounds that it was not essential to the core issue in the case – namely, whether Jones herself had suffered from illegal sexual harassment – Jones appealed the ruling by arguing that Clinton’s affair with Lewinsky could not be considered consensual because of the power
imbalance between the two parties, and therefore it had to be admitted under the Molinari rules of evidence. "If any aspect of Defendant Clinton's sexual conduct with respect to Ms. Lewinsky was not consensual, then it is admissible under Fed. R. Evid. 415," Jones's lawyers wrote. "Sexual advances by the President to a 21-year-old intern who is working in the White House are inherently coercive." Under this analysis, any affair between a powerful man and a younger woman is a sexual assault, even if both of the parties concerned believe that it is consensual.

The Jones lawyers justified their questions about Monica Lewinsky by insisting that her ordeal would help them prove their case that Clinton conditioned job benefits on sexual favors. But once again, the facts failed to support their theory. Rather than providing an example of how an employee who succumbed to Clinton's advances was rewarded with a government job, Monica Lewinsky's experience showed how an employee who took the initiative of starting an affair with the President was transferred out of government. But this was not obvious until after Clinton's affair with Lewinsky had been exposed, and the damage to Lewinsky's privacy was irreparable.

Before she became a household name, Lewinsky filed a motion to quash her subpoena, in an effort to avoid having to testify in the Jones case. The motion itself is a sobering testament to the poverty of existing legal protections for the privacy of intimate secrets. "The discovery process may seriously implicate privacy interests," Lewinsky's lawyer, Frank Carter, wrote. "Surely if plaintiff has the resources and the time, she could depose each and every woman who ever worked at the White House during the administration of Defendant Clinton, all in an attempt to see if there was any shred of rumor or innuendo which she might uncover. This would have the impact, as this deposition is having on Jane Doe #6, of invading the privacy of each woman and causing each to expend money for counsel fees and costs."

Lewinsky was especially upset about the private documents demanded by Jones's subpoena. "They want, among other things, 'every calendar, address book, journals, diaries, notes, letters, etc.'" Frank Carter objected on January 20, 1998. Arguing that Jones was trying to "unreasonably invade" Lewinsky's privacy and to "disrupt her private life," Carter asked Judge Wright to quash the subpoena. Before Judge Wright had a chance to rule on Lewinsky's motion, however, Kenneth Starr had intervened.
If Paula Jones had sued Clinton for invasion of privacy, rather than sexual harassment, the unnecessary violations of Lewinsky’s privacy would have been averted. Like Anita Hill’s hypothetical suit for intrusion on seclusion, Jones’s suit might have been summarily dismissed before discovery began, although the invasion that Jones suffered was arguably greater than that of Anita Hill. Having someone unexpectedly expose himself in a hotel room might be considered a more dramatic violation of a woman’s personal boundaries than repeated requests for dates. In one recent case, for example, an Alabama court said that a reasonable jury might have found that the employee suffered an intrusion on her seclusion when her boss invited her to a hotel purportedly to review business papers relating to a theft at a local outlet. After telling her that her job was not in jeopardy, he wrapped his arms around her waist; he then shut and locked the door, pulled her toward the bed, and when she headed for the door a third time, tried to hug and kiss her. After the incident he made daily comments about her appearance; and when she tried to leave his office, he grabbed her and told her to sit down.23

Clinton behaved more grossly if he exposed himself as Jones alleged; and even if we assume that he touched Jones only once, and retreated after he was rebuffed, many women would be genuinely and understandably distressed and traumatized by such a crude advance. But a gross exposure is not ordinarily legally actionable as an invasion of privacy. Even if a judge had allowed discovery in a hypothetical invasion of privacy suit against Clinton, the discovery process would have focused on Clinton’s treatment of Jones, rather than his treatment of all the women to whom he had made sexual advances, and the privacy of innocent third parties would have been preserved.

If Hill and Jones had sued Thomas and Clinton for invasion of privacy, judges sensitive to privacy concerns would be faced with hard questions about whether to exclude certain evidence as more prejudicial than probative. Evidence of Thomas’s video rental habits or Clinton’s proclivity for making passes at women in the workplace would not be entirely irrelevant in a hypothetical invasion of privacy suit, but an alert judge, balancing its probative value against its potential for invading privacy, could exclude the evidence. And because the invasion of privacy tort, unlike the law of sexual harassment, focuses on a particular encounter rather than a pattern of behavior, a sensitive judge would have more dis-
cretion to exclude invasive evidence without making it impossible for the plaintiffs to put on their case.

Congress could enhance this judicial discretion by amending the federal rules of evidence, so that accused harassers enjoy the same protections as alleged victims against being judged on the basis of their past sexual misconduct. (At the very least, the definition of "sexual assault" in the new rules of evidence should be refined so that it does not apply to garden-variety harassment cases.) Congress also could create a sexual privilege protecting parties and witnesses in harassment cases from having to discuss their consensual sexual history. Like the attorney-client privilege or the psychotherapist-patient privilege, the consensual sexual privilege might be overcome in extraordinary cases involving other serious crimes or imminent harm. A privilege along these lines would, of course, make some sexual harassment allegations harder to prove. But throughout American history, legislators have balanced privacy claims against the seriousness of the offense in question, and have concluded that it is worth tying the hands of prosecutors in categories of cases in which uncovering guilty activity requires the exposure of a great deal of innocent activity.

Indeed, sexual harassment suits today share at least some of the characteristic of the heresy and blasphemy prosecutions that the framers of the Constitution were willing to underenforce in the interest of protecting privacy. In England, blasphemy was one of the four branches of criminal libel – the others were obscenity, sedition, and defamation – all of which covered dignitary offenses and were designed to ensure that speech did not violate norms of respect and propriety. The distinction between legal and illegal speech could turn not only on the substance of the speech, but on the outrageousness of its manner of expression, which meant that it often was impossible to know before trial what, precisely, juries would condemn. In the 20th century, similarly, harassment law has been designed to protect the reputation of women in general, and it achieves its purpose by forbidding the verbal denigration of women in some terms but not others. Because harassment suits often turn on subjective reactions that are hard to verify, allowing plaintiffs in harassment suits to subpoena the private papers and diaries of co-workers potentially exposes the innocent, but embarrassing, secrets of a great many citizens to public view – precisely the invasion of privacy that Lord Camden feared in libel
cases. For this reason, a Congress sensitive to the history of the Fourth Amendment might conclude that the Constitution compels the creation of some kind of sexual privilege that limits the exposure of private diaries and consensual sexual activity without very good reasons.

I have argued in this essay that when prurient information is introduced in court, it can distract jurors and the public at large, which leads them to judge the accuser and the accused on the basis of their most embarrassing past acts rather than their guilt or innocence of particular charges. Let me now consider a potential objection to my argument. By focusing on unusual national spectacles, such as the Clinton and Thomas scandals, perhaps I have chosen cases that illustrate the persistence of privacy in America, rather than its erosion. In addition to being appropriately subjected to forms of surveillance that ordinary citizens seldom experience, the objection might go, Clinton and Thomas are figures in whom and through whom the relationship between norms and law was publicly elaborated. The public, alternatively repelled and fascinated by the spectacles, may have taken prurient pleasure in witnessing the violation of its own norms, but ultimately was able to make subtle and nuanced distinctions between the entertaining melodrama and the political outcome. Public trials, as Emile Durkheim recognized, have a strong ritual element; and the process of identifying and punishing exemplary violations of moral and social rules is the process by which we identify what, precisely, those rules are. By insisting that Clinton be acquitted and Thomas confirmed, perhaps the public established clear limits on what kinds of violations of privacy it would tolerate, and, in the process, it reasserted the boundaries between the public and the private sphere.

In hindsight, however, the social meaning of the Clinton and Thomas ordeals is not so easy to identify. Although Thomas was confirmed, his reputation in the eyes of the general public was seriously damaged, while Clinton's popularity after his acquittal by the Senate remained high. The very different public images of Clinton and Thomas illuminate, I think, another aspect of the phenomenon of the synecdoche: those with unlimited access to the public's attention have a greater chance of being judged in context than those who do not. Because Justice Thomas is compelled by the conventions of his office to remain secluded, he has had less opportunity than President Clinton to reveal other aspects of his identity and to correct the damage that his
public humiliation did to his reputation. Similarly, it is hard to think of President Ford without recalling his tripping at the airport, because Ford's presidency was so short and produced few other memorable images, while it is possible to think of President Bush without recalling his becoming ill at the state dinner in Japan, because Bush was able to define himself in other ways (Gulf war hero! No new taxes!) that compete in the public memory with the spectacle of his indisposition. Private citizens, I argue in related essays, are more like Justice Thomas and President Ford than like Presidents Clinton and Bush: we have fewer opportunities to present ourselves publicly in all of our complexity; and, therefore, as more of our private lives are recorded in cyberspace, the risk that we will be unfairly defined by isolated pieces of information that have been wrenched out of context has increased dramatically.

Privacy is a duty as well as a right, some have suggested, and in order to have the freedom to behave unconventionally in private, one should take care not to flaunt unconventional behavior in public.25 By this reasoning, it might be argued that when public officials or private citizens behave recklessly, the recklessness itself creates a public issue out of what ordinarily should be considered private conduct.26 But this confuses an individual's personal interest in privacy with the public's interest in not being distracted by prurience. Congress should restore the frayed boundaries between sex and politics, in other words, not for the President's sake, but for ours.


See, e.g., Katharine K. Baker, “Once A Rapist? Motivational Evidence and Relevancy in Rape Law,” 110 Harvard Law Review 563 (1997) (“[T]he new rule will fail to reflect precisely what feminist scholarship of the past twenty-five years has established: the prevalence of rape in all social classes, among all races, and by all sorts of men... by singling out rape for special treatment, the new rule fosters the prevailing view that rape is different from other crimes.” because rapists are ‘crazy’.


See Posner, supra note 8 at 14.


See Gurstein, supra note 9 at 47-48 (citing E.L. Godkin, Opinion-Moulding (1869)).


For my own sins on this score, see Jeffrey Rosen, “Confirmations,” The New Republic, December 19, 1994, at 27.


Rorie v. United Parcel Serv., 151 F:3d 757, 762 (8th Cir. 1998).

Plaintiff’s Memorandum in Opposition to the Motion of Defendant Clinton to Limit Discovery at 5, Jones v. Clinton (No. LR-C-94-290).
19  *Id.*, at p. 20.


22  Memorandum in Support of Jane Doe #6's Motion for Protective Order and Motion to Quash, *Jones v. Clinton*, *Id*.


25  *See Posner, supra* note 8 at 209 (discussing Thomas Nagel, "Concealment and Exposure," 27 *Philosophy and Public Affairs* 3 (1998)).

26  *Id.* ("[F]launting makes it a public issue").