

A TALE OF TWO BLOGGERS: FREE SPEECH AND PRIVACY IN THE BLOGOSPHERE

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I was reading Glenn Reynolds's new book, *An Army of Davids*,¹ and I started thinking about two bloggers. The bloggers share a lot in common. Both have very popular blogs that receive a lot of visitors; both have become quite well known; both have frequently been interviewed by the media; both like to blog about the U.S. Congress; and both like to blog about sex.

The first blogger is Eugene Volokh. Of course, Eugene blogs about Congress, but if you read the Volokh Conspiracy, you'll also see he likes to blog about sex. He has written posts with titles such as *The Birds and the Bees*,² *The Sex Market as a Driving Force in Technology Development*,³ *Negligent Sex*,⁴ *Why Do People Enjoy Kissing?*,⁵ and more. All this sex once prompted one of Eugene's co-bloggers to ask: "[M]aybe he needs to get a babysitter for the kids and have a nice romantic evening out with the wife?"⁶

Who is the other blogger I have in mind? Who shares these things in common with Eugene? The other blogger isn't a law professor; she is a young woman named Jessica Cutler. Jessica wrote a blog called *The Washingtonienne*,⁷ where she chronicled her life working for a U.S. senator. But people didn't read her blog for her thoughts on Congress; they read it for her explicit posts about sex with a number of different men. When her blog was linked to by the very popular political gossip blog *Wonkette*, Jessica gained instant celebrity. Her blog was discussed in *The*

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1. GLENN REYNOLDS, *AN ARMY OF DAVIDS* (2006).
2. Posting of Eugene Volokh to *The Volokh Conspiracy*, <http://volokh.com/posts/1140214374.shtml> (Feb. 17, 2006, 16:12 EST).
3. Posting of Eugene Volokh to *The Volokh Conspiracy*, <http://volokh.com/posts/1120595424.shtml> (July 5, 2005, 16:30 EST).
4. Posting of Eugene Volokh to *The Volokh Conspiracy*, http://volokh.com/archives/archive_2005_05_15-2005_05_21.shtml#1116334050 (May 17, 2005, 8:47 EST).
5. Posting of Eugene Volokh to *The Volokh Conspiracy*, <http://volokh.com/posts/1120668641.shtml> (July 6, 2005, 12:50 EST).
6. Posting of Todd Zywicki to *The Volokh Conspiracy*, <http://volokh.com/posts/1120861102.shtml> (July 8, 2005, 18:18 EST).
7. April Witt, *Blog Interrupted*, *WASH. POST MAG.*, Aug. 15, 2004, at W12.

Washington Post, *The New York Times*, and CNN. She posed for *Playboy* and landed a book deal with a \$300,000 advance.⁸ Jessica is currently being sued by an individual for discussing intimate details about their sex life. According to the complaint:

No reasonable person would want the intimate physical, verbal, emotional, and psychological details of his or her sexual life and romantic relationships life exposed against his or her will on the Internet for the entire world to read. It is one thing to be manipulated and used by a lover, it is another thing to be cruelly exposed to the world.⁹

Eugene and Jessica came to mind when I was reading Glenn Reynolds's *An Army of Davids*. Glenn writes with giddy excitement about the power of bloggers. He speaks about the virtues of the little guy bloggers taking on the mainstream media. He notes that until the emergence of the blogosphere, large mainstream media entities "have set the agenda for public discussion."¹⁰ With the growth of blogs, "power once concentrated in the hands of a professional few has been redistributed into the hands of the amateur many."¹¹ Bloggers are "doing a better and better job of supplementing, and challenging, Big Media coverage," Glenn writes. "News and reporting used to be something 'they' did. Now it's something that we all do."¹² Speaking about blogging as well as other phenomena, Glenn observes: "[W]e're likely to see an army of Davids taking the place of those slow, shuffling Goliaths."¹³

As I read the book, I kept thinking to myself, who is David? We have a rather romantic vision of bloggers. When we envision a blogger, who do we see? I bet for many of us David is Eugene. We see blogging as something that enhances the freedom of the little guy, providing new ways for people to engage in expression and self-development.

But the average blogger isn't Eugene, and the average blog isn't anything close to scholarship. According to one estimate, over fifty percent of blogs are written by children and teenagers under age nineteen.¹⁴ About twenty percent of teens with Internet access have a

8. Lester Haines, *Washington Sex Blogger Signs Book Deal*, THE REG., July 2, 2004.

9. Complaint ¶ 33, *Steinbuch v. Cutler*, No. 05-0970 (D.D.C. May 18, 2005).

10. REYNOLDS, *supra* note 1, at 91.

11. *Id.* at 92.

12. *Id.* at 95.

13. *Id.* at 9.

14. G. Jeffrey MacDonald, *Teens: It's a Diary. Adults: It's Unsafe*, CHRISTIAN SCI. MONITOR, May 25, 2005, at 11. There are on average 31.6 million blogs. Carl Bailik, *Measuring the Impact of*

blog.¹⁵ The most common blogger is a teenage girl.¹⁶ Many blogs are more akin to diaries than news articles, op-ed columns, or scholarship. In other words, David is more like Jessica than Eugene. And that's why there's a problem.

From the dawn of time, people have engaged in gossip. According to one study, about two-thirds of all conversations involve gossip.¹⁷ As Keith Devlin notes, "What people talk about is mostly other people."¹⁸ Before the advent of modern communications technology, gossip would remain within an individual's social circle—the group of people with whom that person associates.¹⁹ We live amid a number of social circles, such as our colleagues at work, various groups we belong to, and different circles of friends. We share information within these circles. It is often rare for gossip to leap from one social circle to another—because people in one social circle will often not know or care about a person in a completely different circle.²⁰ But when gossip goes online, it transforms from forgettable whispers within small local groups to a permanent and widespread record that can be pulled up instantly in a Google search. Gossip can more readily jump the boundaries of various social circles, because all it takes is for the gossip to come to the attention of a popular blog, where it can quickly become the buzz of the blogosphere and spread far and wide throughout cyberspace.

We might find it harder to engage in self-exploration if every false step and foolish act were chronicled forever in a permanent record. This record would affect our ability to define our identities, to obtain jobs, to participate in public life, and more. Ironically, the unconstrained flow of information on the Internet might impede our self-development and freedom.

Currently, many of the views on regulating speech on the Internet are quite libertarian. Eugene Volokh, for example, argues that many privacy

Blogs Requires More than Counting, WALL ST. J. ONLINE, May 26, 2005, <http://online.wsj.com/public/article/SB111685593903640572.html>.

15. Press Release, Pew Internet & American Life Project, *57% of Teen Internet Users create Remix or Share Content Online* (Sept. 2, 2005), available at http://www.pewinternet.org/PPF/r/113/press_release.asp.

16. MacDonald, *supra* note 14.

17. KEITH DEVLIN, *THE MATH GENE* 255 (2000).

18. *Id.*

19. The manner in which information spreads through social circles is the subject of social network theory. For more background about social network theory, see DUNCAN J. WATTS, *SIX DEGREES: THE SCIENCE OF A CONNECTED AGE* (2002); ALBERT-LÁSZLÓ BARABÁSI, *LINKED* (2002); MALCOLM GLADWELL, *THE TIPPING POINT* (2000).

20. See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

laws threaten free speech: “The difficulty is that the right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me.”²¹ Eugene argues that speech on matters of private concern should be subjected to First Amendment strict scrutiny.²²

Not all forms of speech, however, are protected with strict scrutiny. Under current Supreme Court law, not all forms of speech are protected equally. For example, the Supreme Court gives less protection to commercial speech, which occupies a “subordinate position in the scale of First Amendment values.”²³ Speech of private concern should be given less protection than speech of public concern. The Supreme Court has endorsed this view to a limited extent. Although the Supreme Court has applied strict scrutiny to restrictions on speech of public concern, it has not yet done so to restrictions on speech of private concern.²⁴ In one case, the Supreme Court concluded that “not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’ . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.”²⁵ In short, the Supreme Court has indicated that speech of private concern should be given much less protection than speech of public concern.

Such a result is normatively justifiable. Bloggers like Jessica should not have an unfettered free speech right to disclose intimate details about people’s private lives that are not of legitimate concern to the public. The most frequently articulated rationales for why we protect free speech are that it promotes individual autonomy,²⁶ is necessary for a robust political discourse,²⁷ and is essential for truth to win out in the “marketplace of

21. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1050–51 (2000).

22. *Id.* at 1083–84.

23. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

24. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (The Court refused “to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question”); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (noting the Court’s “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”).

25. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

26. *See, e.g., Martin H. Redish, The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (“[F]ree speech ultimately serves only one true value, which I have labeled ‘individual self-realization.’”).

27. *See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 154–55 (1960).

ideas.”²⁸ Privacy also furthers these goals. It protects autonomy by enabling people to engage in unconventional activities and express unpopular ideas without fear of retaliation.²⁹ Privacy promotes democracy in that it enables people to speak more candidly about controversial issues.³⁰ Speech of private concern often does not contribute much to politics. Regarding the marketplace of ideas, truth must be weighed against other values,³¹ and the truth about a private person’s personal life is often not of much importance. Therefore, a balance between free speech and privacy might achieve these interests more effectively than merely protecting speech at all costs.³²

Jessica certainly has a right to speak about her life, but she should do it more carefully by concealing the identities of the people she blogs about.³³ But should we expect young amateurs like Jessica, who are not professional journalists, to be more careful? While we can’t expect bloggers to be perfect, we should hold them to a reasonable standard of care. If we give David the power of Goliath, with that power should come some responsibility.

It is true that existing law lacks nimble ways to resolve disputes about speech and privacy on the Internet. Lawsuits are costly to litigate, and being sued can saddle a blogger with massive expenses. Bloggers often don’t have deep pockets, and therefore it might be difficult for plaintiffs to find lawyers willing to take their cases. Lawsuits can take years to resolve. People seeking to protect their privacy must risk further publicity in

28. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

29. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 37 (1967); Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 455 (1980) (“Privacy is also essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy.”); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 *VAND. L. REV.* 1609, 1665 (1999) (noting that privacy shapes “the extent to which certain actions or expressions of identity are encouraged or discouraged”).

30. As Keith Boone contends: “Privacy seems vital to a democratic society [because] . . . it underwrites the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public eye and without fear of reprisal.” C. Keith Boone, *Privacy and Community*, 9 *SOC. THEORY & PRAC.* 1, 8 (1983).

31. Frederick Schauer, *Reflections on the Value of Truth*, 41 *CASE W. RES. L. REV.* 699, 706 (1991); see also Anita L. Allen, *The Power of Private Facts*, 41 *CASE W. RES. L. REV.* 757, 760 (1991) (“It is appropriate that, when faced with the task of adjudicating privacy tort claims, courts consider the impact the rules they fashion will have on the relative allocation of power among affected parties.”); Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 *GEO. L.J.* 2029, 2036 (2001) (“The belief that more personal information always reveals more truth is ideology, not fact, and must be recognized as such for informational privacy to have a chance.”).

32. For a more fully developed account of this argument, see Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 *DUKE L.J.* 967, 988–98 (2003).

33. *Id.* at 1018–19.

bringing suit. These are certainly serious problems, but the solution shouldn't be to insulate bloggers from the law. The solution is to create a system for ensuring that bloggers blog responsibly without the law's cumbersome costs. Perhaps systems of alternative dispute resolution could be used.

We often speak and think of blogging with a romantic image of scholars like Eugene in mind. But for many bloggers, blogging has nothing at all to do with scholarship. Therefore, when we think about the legal regulation of blogging, we should not just have the Eugenes in mind, but we should also be thinking of the Jessicas.