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# Privacy, Cyberspace, and Democracy: A Case Study

MICHAEL J. GERHARDT\*

## INTRODUCTION

The first anniversary of the Senate's acquittal of President Clinton has come and gone without a ripple. Such a non-event tempts one to think that there is nothing significant or worthwhile left to say about the investigation, impeachment, and trial of the President. Yet, as Professor Paul Schwartz's wonderfully insightful article on the Internet and privacy demonstrates,<sup>1</sup> one would be wrong to yield to this temptation. The Starr Report, including the circumstances and consequences of its release and ultimate fate, helps to illuminate not only the arcane federal impeachment process, but also a critical issue of concern to everyone participating in this commentary—the relationship between the Internet and democratic decision making. Professor Schwartz, of course, recognizes and explores this significant relationship, among the other important topics that he addresses in his excellent paper. The purpose of this essay is not to take issue with any of Professor Schwartz's important insights into the latter relationship, but rather to clarify this relationship further by undertaking a case study of the problems and ramifications of the release of the Starr Report (and other salacious material relating to the President's misconduct) on the Internet. This case study illuminates, *inter alia*, those things that we can reasonably expect to get in return for the kinds (or extent) of threats to and invasions of privacy interests posed by the Internet as described by Professor Schwartz.

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1. See generally Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815 (2000).

## I. INTERNET AND OTHER PRIVACY INTERESTS THROUGHOUT THE CLINTON IMPEACHMENT PROCEEDINGS

The first problem arising from the release of the Starr Report on the Internet is explored in some detail in Professor Schwartz's article. In particular, he discusses how the Independent Counsel, in the course of investigating President Clinton's efforts to conceal the nature of his relationship with Monica Lewinsky, gained access to, and ultimately published in the Starr Report, certain sensitive, private information on discarded e-mails and computer records.<sup>2</sup> It did not take the House of Representatives long—in fact, less than two days after receiving the Report—to reveal the Report's inflammatory contents to the world by deciding to release them on the Internet.<sup>3</sup> Professor Schwartz agrees with Chief Judge Richard Posner that the hastiness with which the House Judiciary Committee staff prepared the Starr Report for Internet release exacerbated its potential for compromising privacy interests.<sup>4</sup> Such hastiness virtually guaranteed publishing worldwide some extremely embarrassing personal data that bore little, if any, nexus to the critical question of whether the President committed possible impeachable offenses. Professor Schwartz agrees further with Judge Posner that the intemperate release of the Report on the Internet made instantaneously available to viewers world-wide "an astonishing farrago of scandal, hearsay, innuendo, libel, trivia, irrelevance, mindless repetition, catty comments about people's looks, and embarrassing details of private lives."<sup>5</sup>

As Professor Schwartz suggests, the release of the Starr Report represents one significant way in which the Internet can become a significant source of and means for distributing personal data. Moreover, the personal information collected within the Starr Report (and later broadcast on the Internet) was the product of other technological invasions into privacy. The Report is filled with information gathered from not just the discarded e-mails and computer records to which Professor Schwartz alludes, but also phone records (including, but not limited to, cellular phone calls and White House telephone logs), credit card purchases, book store receipts, and DNA testing.<sup>6</sup> Moreover, the Independent Counsel's office outfitted Linda Tripp with a wire that allowed it to eavesdrop on private conversations between Tripp and Monica Lewinsky (at least conversations the latter thought were private), and it received and benefitted from another egregious violation of privacy—Linda Tripp's taped records of telephone con-

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2. *See id.* at 818.

3. *See* JEFFREY TOOBIN, A VAST CONSPIRACY 331-32 (2000).

4. *See* Schwartz, *supra* note 1, at 841-42 (citing RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 81-82 (1999)).

5. Schwartz, *supra* note 1, at 842 (quoting POSNER, *supra* note 4, at 88).

6. *See generally* TOOBIN, *supra* note 3, *passim*.

versations with Monica Lewinsky.<sup>7</sup> Nor did the office want to stop there, but tried to persuade Lewinsky to wear a wire in conversations with the President and his aides.<sup>8</sup> Lewinsky briefly considered, but ultimately rejected, the request.

## II. NORM ENTREPRENEURSHIP AND THE INTERNET

The release of the Starr Report marked a turning point for the Internet—it confirmed the arrival of the Internet as a means for not only delivering news instantaneously, but also providing the means for shaping the very event on which it was delivering news. As Professor Schwartz explains, the release of the Starr Report on the Internet proved to be “an excellent example of norm entrepreneurs at work; its release marks an attempt by Republicans in Congress to shape the terms of public discourse by shifting that which is and is not discussed.”<sup>9</sup> While, as Professor Schwartz recognizes, it was the hope of these norm entrepreneurs “that citizens would react with venom against the President’s behavior and lies about it,” at the same time “competing norm entrepreneurs sought to neutralize this strategy by creating a mirror focal point through their release of humiliating information about the personal li[ves] of leading Republicans.”<sup>10</sup> The Internet was only one of many outlets—including network television, cable, newspapers, radio, and magazines—used by these competing norm entrepreneurs for broadcasting their defenses of and attacks on the Starr Report (as well as defending and attacking Independent Counsel Starr’s judgment in fashioning the Report in the manner that he allowed his staff to do).

Of course, the contest between competing norm entrepreneurs to influence public debate and opinion is hardly unique to the Internet. Such contests have occurred within every medium throughout the history of mass communication, and the stories are legion about the ways in which privacy interests have been threatened or invaded in each media. Nevertheless, clarifying the ways in which these contests are similar or different illumi-

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7. The first lawyer to represent Tripp during the course of her taping of conversations with Lewinsky was Kirby Behre. When Behre learned of the tapes, he strongly urged Tripp to stop making any others because her taping violated Maryland privacy law (which requires all parties to consent to a taped recording of their phone conversation). Rather than follow Behre’s counsel, Tripp fired him and hired another lawyer. See TOOBIN, *supra* note 3, at 180-81. Tripp’s new lawyer, Jim Moody, encouraged her to continue taping, and later was able to arrange an immunity agreement for her with the Independent Counsel’s Office. More than a year after the end of the President’s Senate trial, a Maryland state prosecutor brought charges against Tripp for violating the relevant portions of the Maryland law, and the presiding judge rejected as inapplicable the immunity agreement into which she had entered with the Independent Counsel.

8. See TOOBIN, *supra* note 3, at 204.

9. Schwartz, *supra* note 1, at 842.

10. *Id.*

nates the precise significance of the competition among norms entrepreneurs to use the release of the Starr Report on the Internet as a means for shaping opinions about the need to oust President Clinton.

One possible similarity is that competition among norms entrepreneurs to shape public opinion has usually involved only a very small set of people, regardless of the medium. Such was certainly the case with the competition to shape popular opinion about the Starr Report. The Starr Report was the product of a relatively small group of lawyers (most of whom were only peripherally involved), and only a few staff persons in the House participated in preparing the Report for release on the Internet.<sup>11</sup> And, as one might expect, in the days immediately following the release of the Starr Report on the Internet (the ones in which public opinion was most malleable), the competition among norms entrepreneurs involved only a relatively small cast of characters on both sides.<sup>12</sup>

One important difference in the competition among norms entrepreneurs on the Internet as opposed to other media (such as radio, newspapers, network television, and cable) is that the Internet provides comparatively inconsequential barriers to entry. The Internet offers its users virtually instantaneous communication world-wide at little or no financial cost, whereas access to established media (such as newspapers, television, and radio) faces numerous formal barriers. For instance, throughout the nineteenth century and for most of the twentieth century, competing norms entrepreneurs either owned or were closely aligned with the owners or publishers of the elite media.<sup>13</sup> In this century, corporate interests largely dominate access to the major media, including cable, network television, newspapers, magazines, and radio. Such interests do not dominate or formally limit access to the Internet. The Internet is characterized, in part, by the availability of information from a variety of sources and perspectives. Moreover, the Internet affords users the opportunities to customize their own Web pages that would facilitate, by means of bookmarks and other devices, their access to preferred Web sites (including news sources).<sup>14</sup> Nevertheless, the average Internet user does not conduct a lot of comparison shopping for news. The intense competition between and proliferation of Web sites has led Internet users to gravitate to less than a handful of commercial Web sites from which to get breaking news. Indeed, it became

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11. See TOOBIN, *supra* note 3, at 328-30.

12. Among these norms entrepreneurs were, on the one side, the Internet gossip Matt Drudge (whose inside information came primarily from Lucianne Goldberg, Linda Tripp, and a small group of conservative lawyers who informally consulted with Paula Jones' second set of lawyers) and, on the other, the President's most ardent defenders, notably James Carville.

13. Henry Luce and William Randolph Hearst are just two of the more notorious examples of such powerful owners and publishers in the 20th century.

14. Cf. ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION* (2000) (analyzing the technology revolution and calling for a greater governmental role in control of the Internet); see also Cass R. Sunstein, *Code Comfort*, *NEW REPUBLIC*, Jan. 10, 2000, at 37.

much easier for those interested in reviewing or downloading the Starr Report once it was released on the Internet to get it from commercial sites (such as *The New York Times* and the *Washington Post*) than even from the government site on which it was initially released, because the former were better designed to handle very heavy traffic.

Moreover, the competition among norms entrepreneurs to shape public attitudes about the necessity for President Clinton's resignation or removal both underscored and was intensified by the uniqueness of the document at the center of the controversy—the Starr Report. The latter was a public document unprecedented and unparalleled in American legal history. It did not represent the culmination of a long or adversarial fact-finding process in which all the interested parties had participated or in which official public notice and comment had been solicited either before or in response to its release. Nor was it like other grand jury investigations, the details of which are rarely publicized, especially when they have not yet resulted in any indictments of the principals being investigated. Instead, the Report was the product of a special process in which only one side—the Office of the Independent Counsel—fully controlled the contents. The Office of the Independent Counsel dictated the questions that were being asked, the witnesses who were interrogated, and the information that was released. Once released, the Report was cloaked in a degree of respectability and authority that it did not deserve. It spoke in terms of possible impeachable offenses and referred to the possibility that some potentially indictable misbehavior might have occurred; however, these assertions did not have—or could not pretend to have—any formal legal weight. The assertions were nothing more than the suppositions or speculation of the prosecutors based on their one-sided investigation. The publication of such a document, especially considering its target (the President) and subject (sex), was bound to overshadow, as the norms entrepreneurs fashioning it hoped it would, the actual reliability and credibility of its contents.<sup>15</sup> Indeed, as I explore in more detail below, this publication had both intended and unintended consequences, including the degradation of public debate and news coverage.

### III. THE DEGRADATION OF NEWS COVERAGE

The release of the Starr Report on the Internet also brought attention to

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15. See, e.g., POSNER, *supra* note 4, at 88-94. Ironically, the public's ultimate reaction to the Starr Report—to reject its implicit judgment that the President should be impeached for his efforts to conceal his relationship with Lewinsky from Starr's staff, Paula Jones's lawyers, and the public—undercuts the salience argument some have made about its contents. The argument is that the Starr Report, being full of juicy revelations about sex, would reveal so much disgusting information about the President that it would persuade the public to support ousting Clinton from office. In fact, the public made up its mind relatively early to oppose efforts to oust Clinton (particularly for things that seem to have had more to do with his character than with his performance in office) and maintained this opposition in spite of those revelations.

(and arguably gave rise to) another difficulty. The Report was the culmination of a series of revelations and discoveries initially reported and spread on the Internet that pressured mainstream media organizations to alter their techniques for gathering and reporting news.<sup>16</sup> The twenty-four hour news cycle (principally on cable) and the rise of unfiltered items on the Internet have helped, in the judgment of Bill Kovach and Tom Rosenstiel, to transform “both the time scale and the standards for what is news. Together, these developments have blurred the line between mainstream news and unsupported gossip. They have made the sensational—however unsubstantiated—acceptable.”<sup>17</sup>

By the time the Starr Report was released on the Internet, the transformation in news gathering and coverage had already begun. Several important stories relating to the President’s deception in the Jones deposition (and later in his grand jury testimony) were initially made public on the Internet. For instance, late in the evening of the day on which the President had been deposed in the Jones case, Matt Drudge, an Internet gossip, beat the competition in reporting that the President had testified falsely in his deposition by denying a sexual relationship with Monica Lewinsky.<sup>18</sup> The focus of Drudge’s so-called “Report” was *Newsweek*’s decision not to run a story about the President’s relationship with Lewinsky. Drudge’s sources (though not named at the time) were Lucianne Goldberg and Linda Tripp, who gave him the information that they had wanted to see published in *Newsweek* when the latter declined to publicize it.<sup>19</sup> Drudge was also among the first to report (based on information again given to him by Goldberg and Tripp) the existence of a semen-stained dress that belonged to Lewinsky that could, by means of DNA testing, verify the existence of an illicit relationship between Lewinsky and Clinton.<sup>20</sup> While Drudge often reported sensational but ultimately erroneous material,<sup>21</sup> his reporting earned him a regular spot among the talking heads on MSNBC and Fox

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16. To illustrate the relationship between the Internet and mainstream news organizations, I need go no further than to relate an episode from my own experience during the Clinton impeachment proceedings as CNN’s designated expert on the federal impeachment process. I observed that one of the first things many anchors and senior analysts did upon arriving on the set at CNN’s Washington bureau was to access the Internet for the purpose of monitoring the possible hot “rumor” or news of the moment. I do not mean to suggest that there was anything wrong with what these professionals did. To the contrary, I mean to illustrate that because the Internet had become a source for releasing information much more quickly than—and oftentimes without the same safeguards for verification as—mainstream news organizations, the latter felt compelled to take into account Internet rumors and chatter in their routine news gathering.

17. BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED* at vi (1999).

18. *See id.* at 11-12.

19. *See id.*; TOOBIN, *supra* note 3, at 229-33.

20. *See KOVACH & ROSENSTIEL, supra* note 17, at 139-43.

21. For instance, Drudge reported erroneously that evidence being gathered by the Independent Counsel would prove the existence of not just another staffer with whom the President had had an inappropriate relationship, but “hundreds” of others. *See id.* at 29.

television networks. His reporting was correct often enough that he could not be easily ignored by the mainstream media.<sup>22</sup> Regardless of their explicit use of or reliance on Drudge (or his report) as a source in their own reporting, mainstream journalists and reporters could not easily ignore Drudge or his report—nor, for that matter, could the public. One poll by the Pew Research Center for the People and the Press found that more than ever before the public turned to Internet sites (such as the Drudge Report) as news sources during the Clinton-Lewinsky saga.<sup>23</sup>

The advent of Internet gossip posed several unprecedented challenges for the mainstream media in its coverage of the President's evolving legal and impeachment troubles. First, it offers the ability to provide constant updates with deadlines that are anything but fixed. Like a wire service, news can be published on the Web in a moment's notice; however, unlike a wire service, smaller Web sites have comparatively little editorial supervision. This raises the risk of proliferating unreliable and erroneous data. Second, the intensification of competition for reporting breaking news brought about by the Internet raises a serious question about whether the online version of a news story has the same standards of proof as the slower print version of a story. More than a few of the established elite media cut corners in order to compete with Drudge and others in trying to report breaking news on the Clinton-Lewinsky drama. And more than a few were subsequently forced to retract or admit errors in their reports.<sup>24</sup> Third, the Internet and the twenty-four hour news cycle have pressured the mainstream media to increasingly substitute commentary or speculation for factual reporting in the absence of breaking news. To be sure, the public has complained loudly and consistently that there has increasingly been too much commentary substituting for reporting in the media. Nevertheless, the Internet and the twenty-four hour news cycle have underscored the

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22. It is even more striking to consider that even though Drudge's accuracy rate was sufficiently low that it eventually got him fired by Fox television, he is still considered by many to have been the hero of the hour in breaking the Clinton-Lewinsky scandal.

23. See Pew Research Center for the People & the Press, *Event Driven News Audiences, Internet News Takes Off* (visited Feb. 7, 2000) <<http://www.people-press.org/med98rpt.htm>>.

24. I offer only two of the more prominent examples of this problem. First, the *Wall Street Journal* posted on its Web site before the paper had had a chance to verify a story that a White House steward had told a federal grand jury that he had seen the President alone with Lewinsky (contradicting the President's testimony that he had never been "alone" with her). See KOVACH & ROSENSTIEL, *supra* note 17, at 28. The next day the paper changed the report, clarifying that the steward had told Secret Service agents about an alleged encounter. See *id.* Ultimately, the Starr Report related no such testimony. Second, the *Dallas Morning News* reported on its Web site a story about an alleged Secret Service witness to an intimate encounter between Clinton and Lewinsky. See *id.* The paper reported the story before it could verify it by conventional means; it was trying to beat the competition on the Web, in print, and on the air. No sooner had the story been released on the Web than its veracity began to be questioned in other mainstream media, including *Nightline* and *Larry King*. See *id.* Before the night was over, the main source for the story called the paper to retract its statement; and the paper had to publish a retraction during the next news cycle. See *id.*



economic efficiency (and popularity) of using talking heads to fill dead air or space until such time as breaking news arises. It is cheaper for a network to find a few "experts" to talk (or, more accurately, comment and speculate) about a subject than to produce more costly investigative reports.<sup>25</sup> Talking heads, in effect, have become cheap entertainment.<sup>26</sup> Perhaps nothing in the past year demonstrates this phenomenon more vividly than the around-the-clock, non-stop discussion in the media after the plane crash of John F. Kennedy, Jr., even though it was several days before his death was actually confirmed, and there was—in the interim—no additional "news" to report.

#### IV. ALIENATING THE PUBLIC

The increased emphasis on commentary and speculation in news coverage did not have purely salutary effects. One problematic consequence is that it apparently disenchanting the public. For instance, according to a survey conducted by the Pew Research Center for the People and the Press in early February 1998, eighty percent of the American people felt that there was too much commentary (even then) in the coverage of the President's relationship with Monica Lewinsky.<sup>27</sup> Moreover,

the public sensed a rush to judgment [no doubt aided by the instantaneous delivery of data on the Internet] by the press against [President] Clinton. While most Americans were still [trying to] reserve judgment in early February 1998, seven [out of] ten thought most reporters believed [President] Clinton [had lied] in his Jones deposition (and other public statements) regarding his relationship with Lewinsky.<sup>28</sup>

Further, "[m]ore than six in ten (sixty-five percent) thought the press was doing a poor or fair job of checking the facts before reporting. Six in ten thought the press was doing a poor . . . or only fair job of 'being objective.'"<sup>29</sup> While the public's anger would intensify as the drama unfolded during the next several months (culminating in the issuance of the Starr

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25. See generally POSNER, *supra* note 4, at 247, 264.

26. For any of us who spent any significant amount of time during the impeachment proceedings as commentators on cable news networks, it is not hard to think of examples of so-called "news" programs whose producers encouraged their guests to take sharply conflicting positions that would allow for very lively television. I hasten to emphasize that I personally tried to steer away from such programs and consider the programs on which I had the privilege to participate at CNN to be the exact antithesis of such programming.

27. See KOVACH & ROSENSTIEL, *supra* note 17, at 63 (citing Pew Research Center for the People & the Press, *Scandal Reporting Faulted for Bias and Inaccuracy, Popular Policies and Unpopular Press Lift Clinton Ratings*, Question 16 (Feb. 6, 1998) <<http://www.people-press.org/feb98que.htm>>).

28. See *id.* at 77-78.

29. See *id.* at 78.

Report), the President's popularity climbed more than ten points higher than it had been before the scandal broke.<sup>30</sup>

Nor did the release of the Starr Report have any discernible impact on the public's increasing anger over the media's coverage of the Clinton-Lewinsky scandal. To be sure, there were record numbers of people using the Internet to access the Report (on the day of its release and very shortly thereafter). However, the numbers dropped with each subsequent release of other pertinent data (such as the video of the President's testimony before the grand jury). There are several possible explanations for this decline in the public's use of the Internet to stay on top of the information relating to the scandal. One likely explanation is that, as I have previously suggested, some of the contents of the Report had already been leaked to the public by various means well before its official release. Hence, many people were already aware of (or had good reason to believe they were informed about) some of the likely revelations within it. In addition, many people may have preferred to view the video of the President's testimony in edited form on either television or cable.

It is also important to keep in mind that many people made up their minds relatively fast and early in the reporting process on the central issue—the necessity, or lack thereof, for the President's removal. While the release of the Starr Report might have been a subject of interest to some people, it did not change most people's ultimate verdict on the President's fate. Ironically, the Starr Report contained the most authoritative version of the worst possible view of the President's misconduct. If, however, it was not enough to lead one to support his removal from office, it was unlikely any other revelations would have been forthcoming to justify changing one's opinion. If the referral's charges were enough to lead one to support the President's ouster, then that was all that needed to be said. In either case, prolonging the inquiry seemed unnecessary. Indeed, much of the empirical data that we have about the public's attitudes about the impeachment effort against the President confirms that virtually nothing that was said or done in or about the proceedings changed public opinion.<sup>31</sup>

Moreover, the media's emphasis on speculation and commentary rather than actual reporting signaled the absence of noteworthy new revelations of hard data. The more commentary, the more the public might have been

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30. *See id.* at 82.

31. For instance, it is striking to note that more than ten times more users visited sites posting the Starr Report than the President's rebuttal. In other words, many people did not need to go further than accessing the Starr Report to formulate their opinions on the necessity for removing the President. *See* Frances Katz, *When Web Numbers Start to Mean Something*, ATLANTA J. & CONST., Sept. 16, 1998, at 7D, available in LEXIS, News Library, Atlanta J. & Const. File. Moreover, it bears repeating that in spite of the comparatively low traffic in accessing the President's rebuttal, public support for the President intensified over the course of the few days during which the Starr Report was initially released and consumed.

convinced that there was literally nothing new to talk about.

## V. THE POSSIBLE DEGRADATION OF CIVIL DISCOURSE

The apparent transformation in the quality, tone, and substance of news coverage of the Clinton-Lewinsky scandal highlights another problem—the possible degradation of, and decline in, the norms of civil, political, and public discourse. As Robert Post, among others, has argued, one important reason for the decline is that one of the essential ingredients or elements for a democracy is absent on the Internet—a community in which one can interact with others in the course of defining oneself and learning and refining opinions about public issues.<sup>32</sup> The model community for intelligent public discourse is one in which people have relatively close (physical) proximity to each other such that they not only know each other, but have shared life experiences. The absence of a community on the Internet similar to the sort of which I write—those, for instance, in small towns or college campuses—ensures the absence of any means by which community norms might constrain or inform public discourse.<sup>33</sup> Moreover, as Larry Lessig has recently argued, the fact that users are able to hide or cloak their real identities on the Internet might help to liberate them to act in ways that they would not in real-world encounters.<sup>34</sup> Indeed, they might find it easier to inhibit rather than facilitate or tolerate civil exchanges.

The problem with the latter argument is that it is by no means clear that it is empirically true that civility norms have declined in our society, much less that the Internet has caused this problem.<sup>35</sup> Political discourse has

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32. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); Schwartz, *supra* note 1.

33. Indeed, the staff of the House Judiciary Committee was the only gatekeeper charged with the duty to monitor the release of the Starr Report on the Internet; and the only constraint on the staff's judgment was, as Professor Schwartz recognizes, purely internal, i.e., the values, judgments, and norms of those responsible for publishing such data on the Internet. No doubt, one important norm driving the process was the aspiration to keep the public informed about an important evolving political and legal event. It is certain that other norms were also at work, including shortening the bridge between members of Congress and their constituents, and reinforcing the image of Congress as an institution responsible to the public (and thus bent on keeping the latter informed as to its work). In this regard, the Internet offered something akin to an institutional advantage long enjoyed by presidents over members of Congress, i.e., the bully pulpit or its modern analogue of presidential recourse directly to radio or television (and cable) that allows presidents simply to bypass Congress and the media that they do not like (or that does not like them) and to address the public whenever they please as directly as possible. See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987).

34. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 80-82 (1999).

35. There is still a good bit we do not know about the degree to which the Internet (or the material on the Internet) influences public opinion or attitudes, much less their discourse. For instance, one obvious difficulty has been the trouble we have in determining the real significance of such an event because so much important data about it is still unknown (or unknowable with given technology). To begin with, no one can say for sure just how many people accessed the Starr Report, how closely they

lacked civility throughout most of our history.<sup>36</sup> Consequently, it is not clear that the Internet has given rise to this problem as much as it might have exacerbated it. It might have exacerbated this problem for the reason that Professor Lessig has suggested—that some individuals are able to avoid responsibility or disregard certain social or community norms by operating anonymously on the Internet.<sup>37</sup>

Civility generally consists of several things, almost all of which were absent in the Internet chatter about the impeachability of President Clinton's misconduct. One is a respect for privacy. Yet, as Professor Schwartz has aptly recounted, the Starr Report rode roughshod over various privacy interests, and the violations were exacerbated when the Report was released on the Internet. More than a few of the major Web sites (such as *Newsweek's*) that carried the Starr Report did so in edited fashion. It is telling that professional journalists did a far better job than either Starr's staff or the staff of the Judiciary Committee in determining how to edit the Report for public consumption while trying to preserve its essence. Moreover, civility presumably consists of avoiding overblown or inflammatory rhetoric, which unfortunately filled the coverage of the scandal in its initial days.<sup>38</sup> Civility also requires a respect for accuracy and evenhandedness in reporting. Yet, the Report did not include references to any exculpatory evidence, and the rush to beat the competition in reporting breaking news, especially on the Internet, led to inaccurate and often reckless reporting.<sup>39</sup>

Interestingly, the controversial political consultant Dick Morris' newest venture, Vote.com, might prove to be an excellent test of the Internet's capacity for fostering meaningful, civil discourse, and decision-making on public issues. In 1999, Morris launched Vote.com, a Web site that allows people to cast votes on certain issues (e.g., do you believe gay marriage should be allowed?) and then to have those votes aggregated, and to forward the votes (as separate e-mail attachments) to the President or

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read it, or how well they understood its contents. See Katz *supra* note 31, at 7D. Different Web sites use different means for formulating these figures, and they do not have any agreements to share the information that they do have about their likely numbers of users. Someone who is not privy to the information that is held by each individual web server is in no position to speak definitively about how many people accessed a particular document, the relative level of intensity of interest in accessing the document, how much time the average user spent trying to digest it, or how many times the same person might have accessed the same information. This state of ignorance complicates efforts not just to claim the Internet as an unambiguously successful vindication of democratic values, but also cautions against relying on such unsubstantiated claims as a basis for future regulation of the Internet.

36. See, e.g., Randall Kennedy, *The Case Against "Civility,"* AM. PROSPECT, Nov.-Dec. 1998, at 84, available in LEXIS, News Library, Am. Prospect File.

37. See *supra* note 34 and accompanying text.

38. See, e.g., KOVACH & ROSENSTIEL, *supra* note 17, at 110 (noting that, in the first four days of the scandal, the press leapt to various conclusions that it later had to retract).

39. See *id.* at 20-32 (discussing several examples of inaccurate reporting which resulted in confusing and contradictory stories).

members of Congress.<sup>40</sup> The venture demonstrates the strengths and weaknesses of employing the Internet as a democracy-enhancing device. First, as with polling generally, these votes are mere snap-shots of people's attitudes towards the particular issues that Morris (and his staff) have identified as justifying public consideration. They do not necessarily represent long-term judgments. Second, Vote.com gives its users no chance to formulate the questions. Users are subject to having their responses manipulated to some extent, depending on the questions being asked. Third, Vote.com does not provide for a community experience remotely similar to town hall meetings or college seminars. Hence, it does not allow the public to deliberate meaningfully on the issues on which its opinions have been solicited. Nor, for that matter, does Vote.com provide the means by which individuals can interact and exchange ideas or arguments on the issues in question. An effective democracy presumably requires some meaningful opportunity for citizens to engage in meaningful and authentic interaction for the purpose of exchanging information and shaping each other's views. Fourth, Vote.com has encountered serious problems in forwarding its results to the President and members of Congress. The problem is that neither the White House nor members' offices are equipped to receive the quantities of attached e-mails that Morris' service tries to send to them. As a result, the President and others have agreed to limit the numbers of e-mails delivered daily. Thus, the recipients of the e-mails are likely not to have received all of the e-mails until they are no longer timely or relevant.

Arizona has gone significantly further than Morris's Vote.com by becoming the first state to allow presidential primary voters to cast ballots on the Internet.<sup>41</sup> Professor Schwartz aptly identifies this development as a possible new means by which the use of the Internet could threaten some privacy interests. From March 7 to the 12th, the Democratic Party of Arizona arranged for people in a presidential primary to cast ballots over the Internet. The new program attracted more participants in the Arizona Democratic presidential primary than ever before.<sup>42</sup> The initiatives clearly allowed for an increase in voter participation in the presidential primary (in spite of the fact that the Democratic primary battle ended earlier in the week when Bill Bradley withdrew), but raised several possible problems. The possible problems include the following: (1) allowing voters to cast

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40. See Dick Morris & Eileen McGann, *Vote.com* (visited Feb. 7, 2000) <[http://www.vote.com/about\\_us.phtml](http://www.vote.com/about_us.phtml)>.

41. See Carolyn Barta, *The E-Lectorate; Internet Polling Idea May Click with Voters*, THE DALLAS MORNING NEWS, Mar. 12, 2000, p. 18A; *Point, Click and Vote / 37,765 Online Ballots Cast by Arizona Democrats*, NEWSDAY, Mar. 12, 2000, at A27.

42. In 1996, less than 12,000 Democrats cast ballots in the presidential primary in Arizona. On the first day on which Democrats could cast ballots on the Internet, 13,000 voted. By midnight on the Friday before the day of the primary, 35,765 online ballots had been cast—easily the most ever cast in a Democratic presidential primary in the state.

their ballots without reference or exposure, to at least some minimal amount of campaigning by the major candidates in their state; (2) not formalizing or allowing for some significant interaction with others (including candidates) on the issues at stake; (3) administrative snafus (such as lost personal identification numbers or delays in distributing personal identification numbers); (4) imperfect protection against fraud (in obtaining or use of PINs or in vulnerability to hackers); and (5) the inequity of access to computers for the purpose of participating in the Internet balloting. Though none of these problems is necessarily insurmountable, addressing them is crucial for ensuring that voting by means of the Internet not only is immune to the problems with ventures such as Vote.com but also is an enhancement rather than a poor substitute for deliberative democracy.<sup>43</sup>

## VI. QUESTIONING GOVERNMENTAL COMPETENCE TO REGULATE THE INTERNET

The events surrounding the release of the Starr Report on the Internet also underscore the federal government's relative ineffectiveness (as compared with commercial enterprises) in using the Internet to shape public opinion. For example, the House demonstrated extraordinarily poor judgment in permitting the Starr Report to be broadcast on the Internet in as poorly edited fashion as it did. Virtually no members of Congress had read the document (including its voluminous accompanying materials), nor had any of them bothered to share its contents with its target (the President) prior to releasing its contents to the world. Moreover, government Web sites that made the Starr Report available did not just freeze, but also became unusable for other purposes because of the unusually high traffic.<sup>44</sup>

One of the ways in which the release of the Starr Report on the Internet marked a historic moment was that it constituted the first time that the full contents (or what was supposed to pass as the full contents) of a criminal investigation were made public before the authority responsible for prosecuting (or impeaching) had made any formal decisions on how to proceed. The dilemma the revelations posed for the House (and later the Senate) had no chance to keep pace with the story once its contents were released, and the public (and media) were given the chance to make up their own minds. This problem was exacerbated by the fact that, in spite of its desire to keep the public informed, the House appeared to be relatively indifferent to public opinion. It pursued its inquiry against and vote to impeach Clinton in spite of public polls and the 1998 mid-term elections that reflected the

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43. Earlier in the year, the state of Minnesota made news by becoming the first state ever to broadcast live on the Internet its gubernatorial inauguration. There are no figures on the precise numbers of people who accessed the event on the Internet.

44. See, e.g., Niall McKay, *Net Survives Starr Supernova*, WIRED NEWS (Sept. 11, 1998) <<http://www.wired.com/news/technology/0,1282,14981,00.html>>.

public's continued opposition to such efforts.

Last but not least, the federal government's response to some of the problems for which it was responsible—such as the release of the embarrassing, sexually explicit details of the Starr Report on the Internet, and thus in a place that could be accessed relatively easily by children—was itself inadequate. Even before the impeachment inquiry against the President had formally begun, Congress passed a law to address the harm that it perceived children might have suffered from being exposed to sexually explicit material on the Internet.<sup>45</sup> It did not take long for various groups, including the American Civil Liberties Union and even some members of Congress, to claim that the statute's filtering mechanisms would protect children from sexually explicit material such as the Starr Report. The constitutionality of this statute is, however, quite dubious. Perhaps most importantly, the statute is indistinguishable from the federal statute struck down in *Reno v. ACLU*.<sup>46</sup> Both statutes target sexually indecent material, a category that is still afforded some protection by the Supreme Court. Since the Internet is filled with Web sites devoted to museums, art, literature, theater, and film, it is easy to see how a statute that targeted sexually explicit material would have both overbreadth and vagueness problems. On the one hand, owners would avoid putting legitimate material on the Internet because they figure there is too great a likelihood they would be prosecuted for it. On the other hand, they would avoid putting some material on the Internet because they simply would not be sure whether it was prohibited by the relevant statutory language. Moreover, the statute is not narrowly or, for that matter, carefully tailored. For instance, there is no hard data on just how many children accessed the Starr Report, much less the harm that they suffered as a result of having actually read the Report. Nor is there any data to suggest whether the latter harm was any greater or more substantial than that which children might have incurred as a result of listening to the radio, or watching television, or reading the newspapers throughout the Clinton impeachment proceedings.

## VII. CONCLUSION

Professor Schwartz's article makes eminently clear that the release of the Starr Report on the Internet was not an unmitigated success. To be sure, it did confirm the potential of the Internet for making available to the public cheaply and quickly important public documents. As such, it would appear to confirm the potential of the Internet to enhance or facilitate deliberative democracy. Nevertheless, this benefit came at some significant costs, not the least of which were the degradation of public discourse, gra-

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45. See Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6502 (Supp. IV 1998).

46. 521 U.S. 844 (1997).

tuitous and unnecessary invasions of privacy, and media pressure to cut corners and to substitute commentary and speculation for the reporting of actual events.

Nor is it clear that any of these problems necessarily merit enhanced government regulation of the Internet. Many of the problems ensuing from the release of the Starr Report on the Internet can be traced back to government or public officials, who invaded privacy interests, poorly edited sensitive material to protect innocent or tangential figures in the investigation of the President's misconduct, failed to read much of the aforementioned sensitive material before releasing it on the Internet, and crafted poorly conceived, ham-handed reforms.

Indeed, the appropriate solution seems to be non-governmental. In all likelihood, the negative backlash from the release of the Starr Report on the Internet will decrease the chances of another similar release any time soon. Instead, one can imagine that the political fallout from the release of the Starr Report might well sensitize government decision-makers in the future in making critical decisions about the timing and substance of releasing information on the Internet. If this were to happen, then the release of the Starr Report on the Internet could prove to be salutary. If, in other words, the House had not acted with such indifference to privacy interests, good taste, and the quality of public discourse, the outcome might not have been so unattractive. If instead, the government had demonstrated both a desire to keep the public informed and a respect for its judgment, the release of the Starr Report on the internet might be viewed as a constructive development for deliberative democracy rather than a challenge or impediment to it. As long as the government has so little sensitivity to privacy or respect for the public interest, however, it is counterproductive to expect, much less to entrust government with, democracy-enhancing reform of the Internet.



