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Legal Epistemologies

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I. LEGAL EPISTEMOLOGIES OF PUBLIC AND PRIVATE

"A pregnant woman walks into a bar." That is not the beginning of a tasteless joke, it was the beginning of a criminal prosecution. The (very visibly, eight-month) pregnant woman in question is known to the State of Wisconsin as Deborah J.Z.[1] This was one of several cases that made headlines in the late 1990s. A survey of cases between 1973 and 2007 finds 418 instances of prosecutions brought against pregnant women based on claims of conduct that posed a risk of harm to the fetus. The conduct in these cases ranged from illegal drug use (eighty-four percent of cases) to refusal of medical treatment or refusal of delivery by caesarian section. The defendants, unsurprisingly, have disproportionately been women of color and/or lower socioeconomic status.[2]

These moves involve an intersection of a number of elements: abortion politics, the increasing popularity of the idea of "fetal rights," and the general surrender of privacy to government authority imposed as a condition of interactions—voluntary or not—with state agencies.[3] Yet while these political factors may explain the increase in the enactment of statutes and the conduct of prosecutors, they leave out an important conceptual element that makes it possible to readily translate political attitudes into legal arguments. The discussion of fetal rights is a good example. Katha Pollitt sums up the critique of such arguments nicely. "Pro-choice activists rightly argue that

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1. The woman's real name has long since been released in the press, but I see no reason to repeat that violation of privacy here—a point which arguably has some relevance to this entire discussion.

2. *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 300 (2013); *see also* Sarah Letitia Kowalski, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255 (1998); Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89 (2000).

3. *See, e.g.*, Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011); Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 25 (2008); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995).

antiabortion and fetal-rights advocates grant fetuses more rights than women. A point less often made is that they grant fetuses more rights than two-year-olds—the right, for example, to a safe, healthy place to live."[4] The idea of fetal rights is one that has never been recognized under either the United States or state constitutions, although that has not stopped state legislatures from employing the idea, and someday courts may decide to adopt that vocabulary as well. But as Pollitt's comment points out, even if courts were to accept the idea that fetuses have rights, those rights would have to be balanced against the undoubted rights of persons to bodily liberty. The outcomes in particular cases may be inconsistent with liberal norms, but the language of traditional, negative, liberal "rights" provides a perfectly adequate basis for criticizing those outcomes even if something called "fetal rights" were to be added to the discursive mix.[5] To put the matter another way, the criminal prosecution or preventive detention of a pregnant woman seen drinking in public would have been unthinkable fifty years ago. What changed?

It is possible that critics of state intervention in pregnancy are mistaken to focus on the case as *sui generis*. Far from representing an abandonment of governing norms, the logic justifying state action in these cases is inherent in the model of the public/private divide that currently informs American legal discourse.

Focusing on the public/private divide, rather than on the "right to privacy," is an approach that turns away from the language of rights to a broader consideration of the principles that legitimize state action in the first instance. The power of the state is not limited to the vindication of rights, nor is it the case that the state's interests necessarily give way any time a claim of right is asserted. There are obviously profound questions of rights involved in this discussion, but their resolution takes place against a background understanding of "public" and "private" as categories of political legitimation.

The basic formulation of Millean liberalism is the idea of a private sphere, defined as the area of "self-directed" activities, meaning those that have no direct consequences for others except by their voluntary agreement. The idea that self-directed conduct is outside the reach of legitimate public

4. Katha Pollitt, *"Fetal Rights": A New Assault on Feminism*, *in* "BAD" MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 285, 292 (Molly Ladd-Taylor & Lauri Umansky eds., 1998).

5. For a discussion of a similar warning against overstating the importance of recognizing fetal rights in the abortion context, see MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 16–38 (1996). For a discussion of the ways in which an expansive notion of negative liberty can be used to craft a far-reaching feminist critique of legal practices, see Nancy J. Hirschmann, *Revisioning Freedom: Relationship, Context and Politics of Empowerment*, *in* REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 51–74 (Nancy J. Hirschmann & Christine DiStefano eds., 1996).

control is the central premise of liberalism. This is not to say that Mill was anything like a modern libertarian. For one thing, the conduct that is properly subject to public authority encompasses a broad range. For another, Mill was perfectly comfortable with the idea that there is a category of conduct that is a proper subject of social pressure even though it is not so consequential as to warrant coercive interventions. Here again, however, the question turns on whether the conduct affects anyone other than the actor.[6] The Millean liberal conception of the public/private divide has been the subject of endless and often fruitful critique on republican, feminist, and other grounds. And there are certainly other conceptions of "privacy."[7] But the basic idea that "public" means "affecting others" has been, and remains, a central element of the legal conception of "privacy."

Returning to the case of Deborah J.Z., this observation identifies the underlying reasoning that justifies intervention. The public understanding that drinking alcohol while pregnant poses a risk to the future-born child—treated as an "other"—satisfies both the Millean requirement of other-directed consequences and the police powers formulation of health, safety, welfare, and morals. But that answer begs important questions. Similar prosecutions would have been considered outrageous fifty years earlier. What governing conceptions are at work in the proposition that a legislature can legitimately regulate the conduct of pregnant women in ways that would not have been considered reasonable in earlier eras?

The answer, I will argue, is the emergence of a new legal epistemology. New ways of conceiving cause and effect, harm, and risk were incorporated into legal thinking, resulting in a reconfiguration of the public/private divide. A similar expansion in the understanding of causation and harm had previously taken place in the 1930s. In that period, a new model based on the idea of "markets" shattered older conceptions of privity and opened whole new categories of public interest and authority. The market conception of the public/private divide was driven by the pervasiveness of new forms of economic activity in the structure of corporate industrial capitalism, and new ways of thinking promoted by the emergence of the social scientific disciplines. In the 1970s, the new model was ecological. Ideas of causation and harm were reconceived as descriptions of effects occurring within complex systems of interacting elements rather than discrete, particular events. In this model, a pregnant woman ingesting alcohol is analo-

6. JOHN STUART MILL, J.S. MILL: ON LIBERTY AND OTHER WRITINGS (Classic Books Int'l. 2010) (1851).

7. Beatte Rössler identifies five distinct versions of the ideal of privacy, of which the most general is "a condition in which one is protected in various respects from the unwanted interference of others." Beatte Rössler, *Privacies: An Overview*, *in* PRIVACIES: PHILOSOPHICAL EVALUATIONS 1, 7–9 (Beatte Rössler ed., 2004).

gous to a polluter, as the cause of the harm or risk is conduct affecting the gestational environment rather than an act of physical violence.[8]

What occurred in the 1930s and the 1970s is occurring again today, not in relation to either economic or biological understandings, but in terms of the legal epistemology that is employed in the conception of public and private information. Now as then, new patterns of interaction and new ways of thinking threaten to undermine the coherence of a perceived understanding of the public/private divide. The forces driving change, as always, are both empirical and intellectual. Empirically, the driving force has been the rise of new technologies of communication that have permitted, if not required, entirely new ways of social and economic interaction. Intellectually, the shift is to an understanding that people live simultaneously in a physically defined local environment and in the unbounded realm of networks. These changes in the ways people live challenge the existing legal epistemology of privacy.

There is an interesting historical story to be told here about the intellectual dominance of particular fields. The early decades of the 1900s were the period in which economics emerged as a central field of intellectual endeavor; the 1980s were the period in which the biological sciences are said to have displaced physics in the postwar intellectual pantheon, particularly with the dominance of evolutionary and genetic models (think of "genetic algorithms" in computational science).[9] By the same token, it may be argued that we are living through a period in which the science(s) of information are rapidly taking over as the dominant source of metaphors, models, and methods across a broad range of intellectual endeavors.

II. MARKETS AND ECOLOGIES

A. "For the Larger Benefit of All"

The first modern shift in legal epistemology in the modern era was evidenced by the change in reasoning that occurred between *Lochner v. New*

8. In 2014, Tennessee adopted a law permitting a woman to be charged with assault if she is found to have ingested narcotics outside of a treatment program while pregnant, if a subsequently born live child is found to have suffered harm, or exhibits drug dependency. Assoc'd Press, *Tennessee: Governor Signs Bill Targeting Drug Use During Pregnancy*, N.Y. TIMES (Apr. 20, 2014), www.nytimes.com/2014/04/30/us/tennessee-governor-signs-bill-targeting-drug-use-during-pregnancy.html. A similar bill is under consideration in Oklahoma. Oklahoma Watch & M. Scott Carter, *Bill Would Penalize Pregnant Women Who Use Drugs*, KGOU (Mar. 7, 2015), kgou.org/post/bill-would-penalize-pregnant-women-who-use-drugs. These bills may be taken as indications that an ecological conception of harm has become so internalized within legal discourse that it is no longer necessary to treat such claims as somehow separate from traditional categories.

9. Freeman Dyson, *Our Biotech Future*, N.Y. REV. BOOKS (July 9, 2007), http://www.nybooks.com/articles/archives/2007/jul/19/our-biotech-future/.

York[10] and the cases that accepted expanded notions of both state and federal power in the 1930s.[11] This momentous shift in constitutional doctrine has been studied and debated to death, with a significant amount of attention paid to the ways in which new legal doctrines reflected shifts in the understanding of the public/private divide. Without either endorsing or disputing the main schools of thought about changes in legal doctrines, however, I want to examine the shift in thinking about fundamental concepts of causation and harm that were articulated in the process of arriving at those new legal principles.[12]

In *Lochner*, as in the other cases of its period, the question of whether the State was properly asserting police powers was understood in terms of direct threats to the health or well-being of the actors immediately involved in a situation: workers facing immediate threats of injury, purchasers of potentially unsafe or unwholesome products, or extraordinarily unhealthful working conditions. Writing for the majority in *Lochner*, Justice Peckham rejected two kinds of claimed harms. The first included gradual, slowly-accreting health effects from ordinary activities: "It is unfortunately true labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?"[13] Here, the slippery slope argument points to the danger (from Justice Peckham's perspective) of allowing extended conceptions of health effects to be the basis for intervention. The application of this argument drew Justice Harlan's ire, as he pointed out that evidence was presented that baking was in fact an unwholesome occupation to an exceptional degree. Second, in a move Justice Holmes criticized, Justice Peckham rejected the idea that regulation of economic relations between individuals could be a matter of public "welfare": "Viewed in the light of a purely labor law . . . a law like the one before us involves neither the safety, the morals nor the

10. 198 U.S. 45 (1905).

11. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144 (1938); West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Home Blgd. & Loan v. Blaisdell, 290 U.S. 398 (1934); Nebbia v. New York, 291 U.S. 502 (1934).

12. The discussion in this Paper does not seek to take any position on the controversies surrounding the question of how we ought to understand *Lochner v. New York*, but seeks only to suggest an observation that may or may not resonate with other readings. A very partial list of those readings includes: DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS (1993); PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL (Peter Charles Hoffer & N.E. H. Hull eds., 1998); Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009); Howard Schweber, Lochner v. New York *and the Challenge of Legal Historiography*, 39 L. & SOC. INQUIRY 242 (2014); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).

13. *Lochner*, 198 U.S. at 59.

welfare of the public, and . . . the interest of the public is not in the slightest degree affected by such an act."[14]

It is striking to compare *Lochner* to the discussion of the minimum wage law in *West Coast Hotel Co. v. Parrish*.[15] For one thing, in *West Coast Hotel* Justice Hughes understood that negotiation for wages in a particular case takes place in the context of a general labor market that effectively sets conditions for individual participants. Second, Justice Hughes took for granted the continued existence of a social welfare system, and viewed the operation of private business in light of their relations to such public operations:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[16]

Justice Hughes emphasized the public interest in the overall conditions of the labor market taken as a whole system rather than focusing on the question of the public interest in a particular employment relationship. He stated:

> The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection.[17]

The point is emphasized repeatedly, as when Justice Hughes writes that the restrictions upheld in *Muller v. Oregon*[18] were "not imposed solely for her benefit, but also largely for the benefit of all,"[19] or quoted *Holden v. Hardy*[20] for the proposition that the fact that the parties to a contract "are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or

14. *Id.* at 57.
15. 300 U.S. 379 (1937).
16. *Id.* at 399.
17. *Id.* at 398–99.
18. 208 U.S. 412 (1908).
19. *West Coast Hotel*, 300 U.S. at 394–95 (quoting *Muller*, 208 U.S. at 422).
20. 169 U.S. 366 (1898).

where the public health demands that one party to the contract shall be protected against himself."[21]

It was not only the conception of the employment that was reworked in response to a market model. Equally, concepts of risk and probability, indirect costs and consequences, and the consequences of inaction as well as action have dramatically expanded our shared understandings of social responsibility, reflected in areas such as tort law.[22] The period from *Lochner* to *Wickard v. Filburn*[23] was also the period of the emergence of professionalized social sciences, one of whose driving ideas was "interconnectedness" of different areas of social activity.[24] The idea of an "economy" as something to be regulated, was a new addition to the vocabulary that made sensible the idea that regulation of labor markets affected the public welfare of society writ large. It could even be argued that the very existence of a national, or even a statewide, "economy" was the result of improvements in the technologies of communication and transportation that transformed the landscape—literally and figuratively—from the mid-nineteenth century onwards.

That shift in understanding reflected cultural and intellectual consequences of the emergence of new forms of economic and social organization that produced new ways of thinking about causation, harm, and complex interactions. In the economic arena, the shift was from viewing transactions as isolated, independent events to seeing "the economy" and "markets" as complex, interconnected systems in which events in one location have ripple effects across a network of related interactions to produce effects in another. For want of a better term, this might be deemed "market system" reasoning.

B. "Through Hindsight, Everything Is Foreseeable"

Just as the market conception of public effects was at the heart of the 1930s reconsideration of contract and property rights, the adoption of an ecological model beginning in the 1970s reimagined tort and criminal law.

Munn v. Illinois[25] relied for its analysis on the image of grain elevators standing at the "gateway" to a "toll" road of commerce.[26] In later cases, the

21. *Id.* at 393–94.

22. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055 (N.Y. 1916) (discussing negligence liability of an auto manufacturer and noting that "the more probable the danger the greater the need of caution").

23. 317 U.S. 111 (1942).

24. *See generally* THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY (Johns Hopkins Univ. Press 2000) (1977); DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991).

25. 94 U.S. 113 (1876).

idea of extended consequences increasingly took on the clothing of naturalistic metaphors exemplified in the phrase "the stream of commerce." The analogy of economic activity to the flow of a stream both naturalizes and, by extension, valorizes the market system. At the same time, the adoption of naturalistic metaphors conveys the notion that what is released into the "stream" at one point will affect the rest of the downstream flow, and this extended conception of consequences was precisely at stake in the expansion of government's authority to regulate economic activities. In private law, this model of outward-rippling waves of causation was developed in new doctrines of "foreseeability," by which actors would be required to foresee the consequences of their actions and to guard against them up to some arbitrary limit of probabilistic predictability.

"Foreseeability" was not a new idea in American law. In late-nineteenth-century private law, foreseeability was employed by courts to limit liability (for example, the doctrine of contributory negligence).[27] In the twentieth century, however, the concept took on entirely new meaning. The connection between defining the boundary between public and private and determining the scope of government policy forced American courts to move into areas that challenged the traditional categories of legal thinking. In playing this quasi-policymaking role, courts have had to wrestle with problems of fitting traditional concepts of evidence and proof to the problems of balancing public benefits with private interests. "Foreseeability" became the key point of connection between private rights and public policy. In *Palsgraf v. Long Island R.R. Co.*,[28] Judge Cardozo described a standard of "unreasonable hazard" based on knowledge of circumstances and "ordinary vigilance" that defined the court-mandated duties. Applied to corporations, these "private" duties took on both the function and the form of a scheme of regulation.

The difficulty with Judge Cardozo's approach is that the definition of unreasonable hazard in terms of foreseeable consequences was something entirely unrecognizable from a common law perspective that appealed to the common understanding of the community. As noted earlier, by the 1920s, courts had begun to wrestle in earnest with prevalent social scientific understandings that emphasized interconnectivity in social interactions and the idea of economic systems. Assumptions about the commonplace understanding of terms like "cause" were threatened by these increasingly sophisticated modes of analysis. Oliver Wendell Holmes, in particular, wrestled with the tension between new ways of conceiving foreseeable consequences

26. *Id.* at 132.

27. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

28. 162 N.E. 99, 99 (N.Y. 1928).

and his conviction that legal liability should flow only from morally culpable conduct. An enthusiastic supporter of incorporating probabilistic and statistical reasoning into legal reasoning, Justice Holmes promoted a standard of "foreseeability" that extended to whole industries and classes of person.[29] Conversely, he recognized that without a limiting principle of blameworthiness—that persons should only be held liable for failing to foresee consequences where such a failure was unreasonable—"any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage."[30]

The most profound alteration in the meaning of foreseeability, and consequently in the reach of courts' public, quasi-regulatory function, was the introduction of the language of ecology in the 1970s, a process whose beginning in public discourse can probably be marked at the publication of Rachel Carson's *Silent Spring*.[31] From that time forward, an ecological model of hazard has become pervasive in political vocabulary. The incorporation into law of such a sophisticated understanding of causation, traditional in the natural sciences for a century, was absolutely necessary in light of the far-reaching consequences of modern technologies. But the incorporation of such vocabularies threatens the stability of traditional categories of legal thought inherited from an earlier age.[32] Consciousness of the possibility of harms created through ecological processes of causation removed all conceptual limits from the legal translation of private injuries into claims of public good in both public and private law.

In public law, an exemplar of the ecological model of causation is a statutory scheme such as the Comprehensive Environmental Reclamation and Liability Act ("CERCLA," also known as the "Superfund" law).[33] Under CERCLA, government agencies and private plaintiffs would not have to demonstrate the specific act that led to the specific presence of a specific pollutant; instead, it would be sufficient to demonstrate that a defendant had released the pollutant in question into the environment in such a way that the particular sample could have come from that source. The costs of cleanup would be spread among those defendants who were shown to have "caused" the pollution in this characteristically ecological sense of the word

29. DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 109 (1995).

30. OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 76–77 (Mark DeWolfe Howe ed., 1963) (1881).

31. RACHEL CARSON, SILENT SPRING (1962).

32. For a discussion of both the acceptance and the limitations placed by courts on the use of epidemiological evidence, see SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 126–34 (1995).

33. 42 U.S.C. §§ 9601–28 (2012).

"cause." Other environmental statutes followed similar approaches to determining causation.[34]

The ecological model of causation affected private law, as well, spreading far beyond consideration of the natural environment to become the basis for the discovery of bases of liability for exposure to secondhand smoke, including the conclusion that exposure to such smoke constitutes cruel and unusual punishment in violation of "current standards of decency."[35] Ecological models of causation have been at the heart of "market share" theories of liability that would hold drug or gun manufacturers liable for their participation in markets that, taken as a whole, create an environment of risk to vulnerable plaintiffs, and as well the basis for arguments that certain forms of speech are analogous to toxic pollutants of the political environment.[36] Robert George's argument for restrictions on pornography illustrates the spread of the ecological metaphor beyond its original, biological sense:

> What is true of public health and safety is equally true of public morals. Take, as an example, the problem of pornography. Material designed to appeal to the prurient interest in sex by arousing carnal desire . . . damages a community's moral ecology in ways analogous to those in which carcinogenic smoke spewing from a factory's stacks damages the community's physical ecology.[37]

The cases involving the harms of secondhand smoke are among the most interesting exemplars of particular ways of thinking about harm, causation, and public duties. Significantly, regardless of the outcomes, courts considering these claims have treated the harmful effects of secondhand smoke to be a matter of public consciousness rather than a matter requiring expert demonstration. These harmful effects "seem clear to a large proportion of the population," observed the Seventh Circuit.[38] "[S]tandards of decency are indeed 'evolving' on the issue of smoking."[39] A district court in New York declared that the failure of prison officials to enforce existing

34. The Comprehensive Environmental Reclamation and Liability Act is essentially a statutory enactment that takes the form of tort liability. In addition, much of the action in Superfund litigation involves the invocation of state common law tort theories of recovery, which are generally permitted in such litigation. One unfortunate historical result of this approach has been inconsistency in the formulation of standards for liability and remedies. *See* Howard Schweber, C*leaning up the System: The Need for Federal Preemption of Third Party Contribution Claims Under CERCLA*, 12 TEMPLE ENVTL. L. & TECH. J., 187 (1993).

35. Helling v. McKinney, 509 U.S. 25, 35 (1993).

36. *See* Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 46 (2d Cir. 2000); Am. Booksellers' Ass'n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985); Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 844 (E.D.N.Y. 1999); Sindell v. Abbott Lab, 607 P.2d 924 (Cal. 1980).

37. ROBERT P. GEORGE, CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 92 (2001).

38. Oliver v. Deen, 77 F.3d 156, 157 (7th Cir. 1996).

39. *Id.* at 160.

bans on smoking, "in light of the numerous commentaries and government reports concerning [environmentally transmitted smoke], cannot be said to be objectively reasonable."[40] In some cases in which courts concluded that employees have a right to a smoke-free workplace, no evidence was taken on the issue of risk at all; instead, the harmfulness of secondhand smoke was treated as a matter for "judicial notice," a rule permitting courts to give cognizance to commonly known facts that are neither in dispute in the case nor matters for contention in the public mind.[41] And beginning in the 1990s, the possibility of exposure to secondhand smoke has been recognized as a relevant factor in determining child custody.[42]

The model of ecological harms appears with a vengeance in cases in which state authorities seek to regulate the conduct of pregnant women, including instances involving the dangers of smoking as well as drinking alcohol or using drugs.[43] In pursuing their mandate to determine acceptable standards of conduct, courts' adoption of ecological models of causation makes it much harder to argue that a given area of conduct deserves the exceptional status of "private."

Returning, again, to the early examples of aggressive intervention in the 1990s consider the case of "Angela M.W."[44] Angela's obstetrician discovered evidence of drug use while she was pregnant. That statement alone requires some consideration. Constructions of both responsible social practice and the technological enhancement to the disciplinary gaze of the medical community are invoked. As a matter of social practice, prenatal visits to a medical professional are to be encouraged, because of the recognition that interventions may be required to ensure that future citizens are not harmed by imperfections in fetal environments. At the same time, the occurrence of a prenatal visit creates a moment of potentially unwanted visibility as a result of technologies that permit doctors to observe and evaluate a range of environmental circumstances. Part of the point of conceiving an "ecology" is that the interrelationships among events are not thought of as the mysterious outcomes of a "black box" but rather as explicable, visualizable elements of the environment. Advances in visualization technologies in the 1990s, such as ultrasound and amniocentesis, played a role in connecting the idea of a fetal environment to an ecological conception of causation and harm by rendering events inside the womb literally or metaphori-

40. Warren v. Keane, 937 F. Supp. 301, 306 (S.D.N.Y. 1996).

41. Smith v. W. Elec. Co., 643 S.W.2d 10 (Mo. Ct. App. 1982); Shimp v. N. J. Bell Tel. Co., 368 A.2d 408, 414 (N.J. Super. Ct. Ch. Div. 1976).

42. Unger v. Unger, 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994).

43. *See, e.g.*, LAURY OAKS, SMOKING AND PREGNANCY: THE POLITICS OF FETAL PROTECTION 171–88 (2001).

44. State ex rel. Angela M.W. v. Kruzicki, 541 N.W.2d 482 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1995).

cally visible, hence potentially accessible to the public.[45] Today it is essentially taken for granted that with the application of technology, the course of a pregnancy is "public" because it is visible.

The trial court ruled that the seizure was justified by the imminent risk of harm to the child created by the expectant mother's use of cocaine, and the Wisconsin Court of Appeals upheld the verdict. The Court of Appeals based its conclusion in part on "the admonition . . . that the common law should be flexible enough to adopt itself to current medical and scientific truths."[46] It must be emphasized that the crucial point was not that Angela's drug use was illegal—that would be a matter for a criminal trial—but that her conduct, whatever its legality or illegality, constituted an "extreme situation" of a future child's exposure to foreseeable harms. In an earlier era, Holmes observed that setting fire to one's own house with the result that a neighbor's house is burned is counted as arson. "If that may be the effect of setting fire to things which a man has a right to burn . . . why, on principle, should it not be the effect of any other act which is equally likely under the surrounding circumstances to cause . . . harm?"[47]

When Angela M.W.'s case came to the Wisconsin Supreme Court, the decision was overturned on the narrow ground that the child protection statute was not intended to include a fetus. That same point of statutory construction was the basis for decision in *Wisconsin v. Deborah J.Z.*, the case with which this Paper began. Following these rulings, the Wisconsin state legislature enacted an explicit authorization for the detention of pregnant women in future like cases.[48]

In recent years, there has been a spate of new criminal prosecutions based on allegations of misconduct by pregnant women that risks endangering the welfare of a future born child.[49] Many of these cases involve attempts to criminalize abortion, others involve a perceived new front in the war on drugs. But their logic is based on the same ecological reasoning that

45. *See* ROBERTA H. BLANK, MOTHER AND FETUS: CHANGING NOTIONS OF MATERNAL RESPONSIBILITY (1992); RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA (1999); Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47 (1997).

46. State ex rel. Angela M.W, 541 N.W.2d at 488.

47. Holmes, *supra* note 30, at 54.

48. *See* Wis. Stat. Ann. § 48.133 (West 2015) (adopted 1997) ("Jurisdiction over unborn children in need of protection or services and the expectant mothers of those unborn children. The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has exclusive original jurisdiction over the expectant mother of an unborn child described in this section.").

49. *See* Paltrow & Flavin, *supra* note 2, at 305–09.

sees "foreseeable risk" as the basis for public intervention into what would otherwise be private conduct. If it is not possible to articulate legal principles that define when the state may regulate the conduct of pregnant women, there equally will be no principled way to argue that a given attempt at intervention has exceeded the bounds of such a definition. Furthermore, there is no obvious reason why pregnancy should be the event that triggers the state's recognition of consequences, and hence of a state interest. Nutrition, work environments, or chemical exposures occurring well prior to conception can plausibly be argued to create risks of negative consequences for subsequently created children.

The argument is not purely hypothetical. In 1991, a California court considered a claim of liability for harms caused to an eventual fetus by injuries sustained in a car accident two years prior to conception. Confronted by that claim, Judge Woods of the Court of Appeals was moved to observe, "through hindsight, everything is foreseeable."[50] The Court of Appeals upheld a ruling by the trial court that the duty of care could not extend to a point in time prior to the existence of a fetus, but that decision is no more or less logically consistent with an ecological model of harms than the opposite conclusion would have been, particularly in cases involving exposure to hazardous substances rather than violent events.[51]

III. "WE MUST LIVE ON THE NETWORK"

At one time, economic transactions were conceived as affecting only those in privity with one another, those immediately involved in the event. Later, the idea was accepted that each transaction occurs within a complex system of economic markets, and each event has consequences that extend throughout that system. The external stimulus for this new way of thinking was new forms of economic activity and the prominence of new, social scientific ways of describing behavior in "the economy." Once introduced, the language of markets and systems extended beyond its original context of economic behavior and affected reasoning about a range of social and physical conditions.

50. Hegyes v. Unjian Enterprises, Inc., 286 Cal. Rptr. 85, 103 (Cal. Ct. App. 1991).

51. A commonly discussed example is the issue of whether it is desirable to prevent women of childbearing age from being exposed to lead. The Center for Disease Control is unequivocal: "Primary and secondary prevention of lead exposure among females of childbearing age is needed to avert neurobehavioral and cognitive deficits in their offspring." Ctrs. for Disease Control, *Lead Exposure Among Females of Childbearing Age—United States, 2004*, MORBIDITY & MORTALITY WKLY. REP. (Apr. 27, 2007), www.cdc.gov/mmwr/preview/mmwrhtml/mm5616a4.htm. Where private employers attempt to create such policies, however, issues of gender discrimination may arise. *See* United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991). In contrast, European courts have found that national policies preventing women of childbearing age from working in environments characterized by exposure to lead or radiation are permissible. *See* LENIA SAMUEL, FUNDAMENTAL SOCIAL RIGHTS: CASE LAW OF THE EUROPEAN SOCIAL CHARTER 234–35 (2d ed. 2002).

At one time, conduct that did not immediately cause injury to an identifiable individual was assumed to be self-regarding. Later the idea was accepted that the well-being of ecologies as well as economies are affected by the ripple effects of localized events. The stimulus for this new way of thinking was the increasingly visible consequences of widespread deployment of chemical agents into the physical environment, and a biological sciences-based political movement that promoted new ways of describing harms to "the environment." Once introduced, models of ecological causation and harm extended beyond their original context of pollution to describe a wide range of activities having to do with health and welfare.

Each of these shifts in thinking had dramatic consequences for the legal construction of the public/private divide. Private law doctrines of tort liability, the scope of public regulation, and constitutional analysis all were affected by the extension of the consequentialist model of "public" by the adoption of new models of thinking about consequences. The basic liberal calculus of balancing consequences to others against the intrusion on personal autonomy remains the same, but in each case the underlying conception of "consequences" underwent a profound change. These are shifts, in other words, in legal epistemology, not merely in legal doctrine.

It is plausible that we presently are living during another moment of such an epistemological shift. This time the expanded system of consequential interactions involves not money or chemicals, but information. I do not mean to focus on the actions of government, for example, spying on our cell phone conversations. Certainly, new surveillance technologies drive consideration of old questions in new contexts, whether those technologies involve microphones or heat sensors.[52] But the "threat," if that is the word, to our present model of public and private as those terms relate to information may be more easily seen in a less obvious, less ominous question. Assume that at a given moment there is a piece of information about me that is legally classified as "private" and consequently subject to various constitutional and statutory protections. What are the consequences for the status of that information if I voluntarily share it with someone else?

The framing of the question reveals that it is based on a way of thinking about information and privacy that is increasingly irrelevant to the conditions of modern life. The phrase "a piece of information" speaks to a conception of data as a collection of discrete facts that can be considered separately from one another, analogous to traditional forms of property. In

52. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001). It is interesting to note that Justice Scalia's majority opinion in that case focused on the question of whether a particular technology of surveillance was widely in use such that one could plausibly expect its existence to be factored into the assessment of a "reasonable" expectation of privacy. The application of this principle to the Internet raises the disturbing possibility that at some point in the future (if not the present) where people conduct a significant portion of their lives online there will be no limits to the government's utilization of online information.

addition, the ideas of "voluntary" and "sharing" are of limited use. This was already evident in the discussion of the cases involving pregnancy, as legal and medical requirements of seeking appropriate care meant exposure of private information and the technologies of observation made the most personal aspects of a pregnant woman's bodily integrity publicly visible. But even in that situation, the issue involved was information about the person. In the world of cyberspace, the information *is* the person; rather than the selective disclosure of discrete bits of information, what is at issue is the public exposure of the entirety of a person's identity.

Return to the question of what is the legal significance of voluntarily disclosing a piece of personal information. The traditional answer is that once a piece of information is voluntarily shared, it is open to any and all use. There are gray areas, to be sure, forms of disclosure for legally recognized restricted purposes (for example, medical diagnosis and intellectual property), but they are special instances that reflect the boundary work involved in maintaining the basic distinction. The basic, traditional model is what might be called the "conversation" model. I say something to you in a conversation, that information is yours. Just as Mill said, there are social conventions against gossip that may limit the use you make of that information, but there is no invasion of my legal rights if you choose to repeat my words to others. By the same token, what I say to a reporter, write in a blog post, or write on a t-shirt for all to see is information that has passed out of my legal sphere of control. In this traditional approach information is treated as a form of property. When I have voluntarily surrendered ownership of an object—as in the case of giving a gift—the recipient now "owns" that object. The key is that I voluntarily chose to share the information; for that reason, there is no invasion of "privacy."

Part of the assumption of this model is that the circle of shared information is localized. But cyberspace is obviously different. In cyberspace, all the information in all the world is joined in a single complex system, a "network" that connects communicative acts just as an economy connects individual behaviors or an ecology describes the connections among life forms occupying a biological system. The old property ownership-based model of public and private communication is severely tested by this development, and a new legal epistemology of public and private is needed. To see why, consider cases of revenge pornography and "Squeaky Dolphin."

A. Revenge Pornography

In 2014, Illinois became the sixteenth state to adopt a law criminalizing "revenge porn," the nonconsensual posting of intimate material.[53] Unlike most earlier versions of such statutes adopted in other states, the Illinois

53. *See* 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2015).

law contains no specific intent requirement, no nudity is required, and the statute applies to images created by the victim herself as well as to pictures taken by others. Victims' advocate and lawyer Carrie Goldberg hailed the innovations in the statute:

> So much is said about how laws butt up against free speech, . . . but if we lose the expectation of privacy in taking images meant only for someone we trust, then we lose another valuable form of speech: our private speech. There is nothing wrong with taking pictures of yourself that are meant only for another person you trust.[54]

Supporters of the law point to the need to bring the reality of virtual life under scrutiny for its real life consequences:

> If we're to tackle the problem, we need to stop viewing the [I]nternet as "virtual" reality. We need to recogni[z]e that the [I]nternet is a real, tangible location for rights violations. For victims of revenge porn, there is nothing "virtual" about their experience. There is nothing "virtual" about moving house, changing your name, being stalked, or committing suicide. Revenge porn has struck a vein of misogynist gold, which has found a powerful voice on the [I]nternet. It's a voice which is no less harmful merely because it speaks through a screen.[55]

Some commentators have suggested that these cases do not require anything particularly novel in the way of legal responses; application of criminal statutes or an extension of copyright law principles might be sufficient.[56] But the larger point is that as far as the legal construction of "public" is concerned, the decision to present a loved one with an intimate image as a gift is not distinguishable from the decision to appear as the model in a centerfold—except that the latter image is subject to greater legal protections by virtue of commercial contracts, copyright, and the protectable interests of the publisher.

Both the phenomenon of revenge porn and the very valid concerns that it raises point to questions that go beyond the formulation of a prosecutorial

54. Barbara Herman, *Illinois Passes Revenge Porn Law with Teeth: 'Other States Should Copy,' Says Privacy Lawyer*, INT'L BUS. TIMES (Jan. 6, 2015) http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974. A review of other revenge porn statutes is available at *Press Releases*, CYBER CIVIL RIGHTS INITIATIVE, http://www.cybercivilrights.org/press_releases (last visited Aug. 8, 2015).

55. Bernard Keenan, *Revenge Porn: Human Rights Online*, THE LONDON SCH. OF ECON. & POL. SCI. (May 17, 2014), http://blogs.lse.ac.uk/humanrights/2014/05/17/revenge-porn-human-rights-online/.

56. *See, e.g.*, Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014) (arguing that copyright law can be extended to cover voluntary sharing of intimate images); Jenna K. Stokes, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929 (2014) (arguing that existing criminal laws can be effectively applied to the Internet).

strategy. The real question is how we make sense in a world of global cyberspace of established categories of private and public communication. The problem is that the technology of communication and reproduction alters the nature, not merely the scale, of the disclosure. In the past, letters could be published, conversations could be repeated, but they could not readily be turned into eternal archives of personal exposure available to the current and future population of the planet. Furthermore, it is not an adequate response to say that these are unfortunate side effects of a generally valid principle of publicity. Many of the principled reasons for supporting publicity in general make little or no sense in the current context. "Sunlight is said to be the best of disinfectants," said Brandeis, and we understand the context of his statement.[57] But what does the same sentiment mean in other contexts? Is "disinfection" the only priority? Is "disinfecting" the only thing sunlight does, or should we also be concerned about skin cancer? What does "best" mean?

Consider, for example, the online availability of court filings. In general, the idea that court filings should be public documents is rooted in the idea that secret court proceedings are instruments of tyranny. But while "publicly available" in an archive means one thing, "publicly available" online means something else entirely. Papers filed in lawsuits have become matters of massive public examination, meaning that unsubstantiated allegations, embarrassing details, painful memories, and deeply personal conflicts must be available to millions of viewers as a resulting cost of open access to the courts. These unintended forms of publication are not only unfair to defendants who may be ultimately found to be blameless, they impose burdens on plaintiffs in the form of unwanted publicity that are having the effect of discouraging victims from coming forward.[58] The equation of values that made sense of the old idea that a voluntary release of information for a particular purpose made that information "public" does not seem to adequately capture the concerns of the Internet age.

Unwanted, unanticipated, and massive publicity is only one side of the coin. Another side is the fact that the Internet, despite its information hierarchies and security protocols, is ultimately one network. That means that it is not only information that is released, it is patterns of information, or information about the release of information.

57. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf.

58. Jodi Kantor, *"Lawsuits" Lurid Details Draw an Online Crowd*, N.Y. TIMES (Feb. 22, 2015), http://www.nytimes.com/2015/02/23/us/lawsuits-lurid-details-draw-an-online-crowd.html?_r=0.

B. Total Identity and Squeaky Dolphin

Among the many (known and as yet unknown) government and private projects aimed at collecting and analyzing data about individuals, one stands out as an illustration of the idea of this paper. The SuperIdentity Project is a joint effort of the U.S. Department of Energy's Pacific Northwest National Laboratory and six British universities.[59] It is headquartered at the University of Southampton. The idea of the project is to take the partial bits of identifying information that appear in different places and put them together to create a core "superidentity" that not only enables observers to track individuals as they move across different social media or cybernetic locations, but actually determines the authentic core of the identity of the person. "The assumption underlying this project is that, whilst there may be many dimensions to an identity—some more stable than others—all should ultimately refer back to a single core identity—the source or 'superidentity.'"[60]

The program explicitly draws on psychological theories and combines multiple forms of measurement—biometric, biographic, and cybermetric—to create an identity profile. For example, the personality characteristic of 'extroversion' might predict a long stride length or hand gestures, firm pressure in a mobile phone swipe gesture or keystroke depression, or a large online presence with multiple friend sets in multiple cyberspace locations. By combining these bits of information into a psychological profile, the individual's superidentity, as individual as a fingerprint, can ultimately be constructed.[61] Moreover, although these psychological profiles do not make it possible to track known suspects, they can be used to predict potential criminal or terrorist activity. As Peter Galison puts it, "the race is on to anticipate other future preferences and actions from crimes, voting, and dating to terrorism."[62] As the NSA memorandum introducing the program announced, "we must live on the network."[63]

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59. *See SuperIdentity: About the Project*, UNIV. OF SOUTHAMPTON, http://www.southampton.ac.uk/superidentity/about/index.page? (last visited Aug. 14, 2015); Sue Black et al., *SuperIdentity: Fusion of Identity Across Real and Cyber Domains* (ID360 Conference, Working Paper, 2012), http://eprints.soton.ac.uk/336645. The discussion in this Section was inspired by the 2014 Tanner Lectures in Human Values delivered by Peter Galison at Cambridge University. *See* Peter Galison, Address at the University of Cambridge Tanner Lectures on Human Values: The Gesticulating Disquiet of Those Reduced to Silence (Nov. 25, 2014), http://upload.sms.cam.ac.uk/media/1853532; Peter Galison, Address at the University of Cambridge Tanner Lectures on Human Values: We Must Live on the Network (Nov. 25, 2014) http://upload.sms.cam.ac.uk/media/1853576 [hereinafter Galison, We Must Live On the Network].

60. Galison, We Must Live On the Network, *supra* note 59, at 7.

61. *See SuperIdentity Stimulus Database*, UNIV. OF SOUTHAMPTON, http://www.southampton.ac.uk/superidentity/ssd/ssdhomepage.page (last visited Aug. 13, 2015).

62. Galison, We Must Live on the Network, *supra* note 59.

63. *Id.*

One particularly interesting part of the SuperIdentity Project is Squeaky Dolphin. Squeaky Dolphin is a program that collects information across social media by using identified stable personality traits as markers. This is part tracking and part projecting; patterns of psychological traits derived from observation lead to superidentity markers that make it possible to track people across social media, from which multiple observations are then fed back into the superidentity model.

What makes Squeaky Dolphin so interesting is the proposition that, in conjunction with the larger project, it enables the analysts to know their subjects *better than they know themselves*. That is, the superidentity is constructed by bringing together the fractured identities that individuals embody (irony intended) in their online persona. It is commonplace for individuals to "be" one person on Facebook, another on a dating site, a third and fourth in other areas of their lives. The advent of the Internet in this way only accelerated a phenomenon that has been associated with modernity by sociologists and social psychologists for decades. But a superidentity is the inescapable core of our being that lurks beneath all the different exercises in self-expression.

None of the elements of the SuperIdentity Project represent an "invasion of privacy" in its classic sense. All of this depends on the collection of information that the individual has willingly shared with the world, it is only the particular use to which the information is put that is disquieting. Revenge porn presents the spectacle of willingly shared information unwillingly made public; Squeaky Dolphin points toward the spectacle of information *unknowingly* made public, and even unknown to the very individual involved. If there is a desire to conceive of a legal public/private barrier that identifies something "wrong" with the Squeaky Dolphin program it cannot depend on the question of whether there was consent in the conversational model. The revenge porn case at least involves a situation of a conversation under expected conditions of privacy, and perhaps it can be reached by an extension of something like copyright doctrine prohibiting nonconsensual use of images created with an expectation of privacy. But that formulation does not begin to touch Squeaky Dolphin, let alone the next generational iteration of this form of behavioral profiling or the one after that. Just as we learned to accept that economic behavior occurs within a larger market, and the release of chemicals occurs within a biological ecosystem, we are learning that our identities and our acts of self-expression take place on a network whether we want them to or not.

IV. THE PUBLIC/PRIVATE DIVIDE RECONSIDERED AGAIN: AN EMERGENT LEGAL EPISTEMOLOGY

The theme of this Paper has been that change in the understanding of the public/private divide reflects a shift in legal epistemology. In the case

of the network, the shift is from information as a form of property to information as an element of identity. The idea has been taken up by a number of individuals and groups considering the impact of networked information on legal thinking. The Future of Identity in the Information Society ("FIDIS") is a "Network of Excellence," a nonlocal academic consortium established by the European Council.[64] In a booklet titled *Identy in a Networked World*, FIDIS provides a provocative illustration of their argument in an essay and in a graphic representation.[65] The essay explains the idea that "John" should have control over the aspects of his information that make up his total identity, and subsequent resharing or retransmission of that information ought not to be allowed. The governments involved, FIDIS argues, have an affirmative obligation to establish legal regimes to make this possible.

As a legal proposition, the model in the FIDIS illustration is wildly alien to standard American understandings. But the basic conceptual elements are not. The idea of an affirmative state obligation to provide a meaningful form of "privacy" has been raised by numerous political and legal theorists in the context of a feminist critique of the inadequacies of a model of privacy as merely negative liberty.[66] As Zillah Eisenstein puts it, "[t]he dilemma of privacy is that the state should not have the last word on who gets to have privacy, and yet the state must play a role in affirming its actual availability."[67] Speaking from a neorepublican perspective, Patricia Boling emphasizes that citizens need political and private categories of life as "important parts of the process of nurturing democratic citizens,"[68] an argument that echoes Jean Bethke Elshtain's emphasis on the private sphere as "a locus of human activity, moral reflection, social and historical relations, the creation of meaning, and the construction of identity having its own integrity."[69]

In legal discourse, European courts have begun to wrestle with alternative ways of thinking about the public/private divide in ways that go farther to take into account the market, ecological, and network understandings of "public" than most American courts have yet been willing to go. There is no reference to "privacy" in the European Convention on Human Rights,

64. FIDIS, http://www.fidis.net/ (last visited Aug. 14, 2015).

65. To view an insightful graphic of this idea, see Marit Hansen, *User Controlled Identity Management: The Future of Privacy, in Future of Identity in* IDENTITY IN A NETWORKED WORLD: USE AND CASE SENARIOS 5 (Sabine Delaitre ed., 2006), http://www.fidis.net/resources/networked-world/.

66. *See, e.g.*, MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE (1999).

67. Zillah Eisenstein, *Equalizing Privacy and Specifying Equality*, *in* REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY, *supra* note 5, at 181, 187.

68. PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE 4 (1996).

69. JEAN BETHKE ELSHSTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 322 (2d ed.1993).

but Article 8 secures a right to "private life" and other articles mention the concept of "private" in passing.[70] Article 8's protections are understood to guarantee "a sphere within which [the individual] can freely pursue the development and fulfillment of his personality," the "right to establish and develop relationships with other human beings."[71] Retention of information collected in criminal investigations, in turn, is limited to two years.[72]

The European Court of Human Rights has declared that Article 8 imposes affirmative obligations as well as negative limitations on interference:

> [I]n addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. . . . The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests.[73]

The phrase "private life" covers "the physical and psychological integrity of a person, . . . aspects of an individual's physical and social identity, . . . a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."[74]

Famously, this flexible right has recently been held to include a "right to be forgotten," established in a European Union Directive[75] and applied by the European Court of Justice ("ECJ") to require private companies such as Google to remove links to information on request under appropriate cir-

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70. The word "private" appears five times: in Article 6 as an element of a right to a fair trial, in which public access to trials may be limited "where the interests of juveniles or the protection of the private life of the parties so require;" in Article 8 (below); in Article 9, in which freedom of conscience and religion includes the right "either alone or in community with others and in public or private to manifest his religion or belief," and in Article 5, in a reference to quality between spouses which states that "spouses shall enjoy equality of rights and responsibilities of a private law character between them and in their relations with their children." European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6, 8 & 9, Apr. 11, 1950, C.E.T.S. 5.

71. L. Doswald-Beck, *The Meaning of the "Right to Respect Life" Under European Convention on Human Rights*, 4 HUM. RTS. 283, 287, 298 (1983) (first quoting Application No. 8307/78 DR21, 124; then quoting Application No. 6825/74 DR5, 87).

72. *See generally*, Francesca Bignami, *Privacy and Law Enforcement in the European Union: The Data Retention Directive*, 8 CHI. J. INT'L. L. 233, 242, 251 (2007); Doswald-Beck, *supra* note 71, at 283.

73. Odièvre v. France, 2003-III Eur. Ct. H.R. 24 (internal citations omitted).

74. Pretty v. United Kingdom, 2002-III Eur. Ct. H.R.33.

75. Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC).

cumstance. The ECJ opinion focused on the issues of information and its role in a networked world:

> The Court observes, furthermore, that this information potentially concerns a vast number of aspects of his private life and that, without the search engine, the information could not have been interconnected or could have been only with great difficulty. Internet users may thereby establish a more or less detailed profile of the person searched against. Furthermore, the effect of the interference with the person's rights is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such lists of results ubiquitous. In the light of its potential seriousness, such interference cannot, according to the Court, be justified by merely the economic interest which the operator of the engine has in the data processing.
>
> However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, the Court holds that a fair balance should be sought in particular between that interest and the data subject's fundamental rights, in particular the right to privacy and the right to protection of personal data.[76]

The idea that seems to be emerging from all of this is something on the order of an obligation on the part of governments to create conditions in which individuals can engage in "user-controlled identity management."[77] In the same way that regulation of economic relations created a set of conditions for meaningful economic decisionmaking by workers and consumers, and environmental health regulations give individuals the ability to control the health qualities of their environment, governments need to have the ability to engage in transnational cooperative efforts to create conditions in which individuals have the ability to make meaningful decisions about the disclosure of their information in the network. The pregnancy cases remind us that new forms of conceiving of the legal consequences of individual conduct carry risks of overly intrusive regulation as well as potential benefits. And the pregnancy cases also remind us that nothing is ever resolved: the difficult decisions about the scope of economic and environmental regulation that is consistent with constitutionally guaranteed liberties are with us today, and issues arising out of attempts to secure autonomy within a global

76. Press Release, Court of Justice of the European Union, An Internet Operator Is Responsible for the Processing that it Carries Out of Personal Data Which Appear on Web Pages Published by Third Parties (May 30, 2014), http:// curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf.

77. Marit Hansen, *supra* note 65, at 4.

informational network will likewise raise difficult questions. But it seems evident that the traditional legal epistemology of public and private information are inadequate to make sense of the questions posed by the conditions of life on the network. We are participants in markets, we occupy ecologies, and we live on the network.