April 6, 2008

'In Hindsight Everything is Foreseeable': Ecological Harms and the Public/Private Divide

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“In Hindsight, Everything is Foreseeable”: Ecological Harms and the Public/Private Divide

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Abstract:

In the classic liberal language of privacy rights, individuals’ freedom should extend as far as possible consistent with the limits of the harm principle. In Part I, this article uses an examination of cases involving states’ attempts to regulate the conduct of pregnant women to argue that the application of ecological models of causation and harm expand the harm principle to the point where it destabilizes the idea of privacy rights. In Parts II and III the article presents a brief discussion of the development of ecological models of harm in American law and the replacement of a public-private divide by a language of legal rights, then turns to a treatment of some of the major critiques of the liberal public-private divide. Accepting the strength of these critiques, in Part IV the article argues that it is nonetheless the case that in order to articulate a coherent and stable basis for shielding areas of conduct from state intervention, we would do well turn away from the model of privacy rights in favor of a restored model of a public/private divide based on an extension of the metaphor of “occupation of [a] field.” In this model, the burden is placed on the state to affirmative define a contested area as “public” through its actions, rather than leaving the burden on the individual to demonstrate an exceptional “right” to privacy. The article concludes in Part V by considering some of the advantages to this approach, and providing responses to some anticipated criticisms.
One week before her due date in 1997, a woman known to the Wisconsin courts as Deborah J.Z. was drinking in a local tavern when she felt she was going into labor. Deborah's mother came and took her to a local hospital, where Deborah was uncooperative, belligerent at times and registered a blood alcohol concentration of more than 0.30%. Deborah allegedly told a nurse that "if you don't keep me here, I'm just going to go home and keep drinking and drink myself to death and I'm going to kill this thing because I don't want it anyways." Shortly thereafter the baby was born exhibiting the classic symptoms and morphology of fetal alcohol syndrome and with a blood alcohol level of 0.199.\(^1\) Deborah J.Z. was charged with attempted homicide. This prosecution followed an earlier case brought against a woman known as “Angela M.W.,” whose obstetrician discovered cocaine in her bloodstream during a routine visit. Angela M.W. was not charged with a crime, instead the state Department of Human Services attempted to take her fetus - and herself - into custody.\(^2\) Both cases were ultimately dismissed on the grounds that the relevant statutes had not been drafted to include fetuses.

It is surprising, perhaps, that the Wisconsin legislature had never provided authority for the state’s actions in the Deborah J.Z. and Angela M.W. cases. But the question of a role for the government in regulating the conduct of pregnancy is a relatively new one, and it both poses new problems and brings basic questions to the fore. In this article, I will argue that thinking about the question of where the state’s authority ends in matters affecting a pregnancy illuminates a basic instability of the model of privacy rights. The problem is not simply that the bounds of the right to privacy are inappropriately drawn, the problem is that the language of rights is a poor


\(^2\) State of Wisconsin ex rel. Angela M.W. v. Kruzicki, 209 Wis. 2d 112 (Wis. 1997).
way to approach the question altogether. As Jennifer Nedelsky puts it, “[w]hen the leading category for conceptualizing the rights of a pregnant woman is privacy, we are in trouble.”

Nedelsky was speaking of abortion, which is the usual starting-point of any discussion of privacy. The reason is straightforward: in American constitutional doctrine, contraception and abortion were the issues around which the “right to privacy” was constructed in the 1970s. In fact, however, I want to argue that cases involving state’s efforts to regulate the conduct of pregnant women are more significant, and more troubling, settings in which to consider the structure of privacy rights. The basic constitutional framework for thinking about abortion is set out in Roe and Casey. A woman’s right to privacy is “broad enough to encompass the decision whether to terminate a pregnancy.” The limit of this aspect of the right to privacy is found in the state’s interests. A fetus is not a rights-bearing person, say the courts, but the state has an interest in “potential life,” and past the point of viability (in Casey’s reformulation of the Roe trimester framework) that interest supercedes a woman’s privacy rights. Moreover, the state’s interest is never absent. Hence, prior to viability the state may regulate abortion so long as those regulations are not “unduly burdensome,” while after viability the state may ban abortion outright so long as exceptions are retained for cases where the life or health of the pregnant woman are at stake.

Whatever one thinks of this formulation of the balancing of a woman’s rights and a state’s interests, it does little to illuminate the issues involved in striking a similar balance in the regulation of pregnancies which are expected to proceed to term. The reason is that in the case of a pregnancy that is not terminated, there is a person in being - the born live child, and later

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adult - whose presence casts a shadow backward in time. That fact alone, however, does not
demonstrate the ways in which the issue of pregnancy calls the model of privacy rights into
question. The Supreme Court, after all, was quite willing to find an ill-defined public interest in
“potential life” in the absence of a rights-bearing person. Why does the fact that there may at
some point in the undetermined future be a person - a child, and later an adult - with interests of
his or her own alter the equation so dramatically?

The answer is two-fold. First, the idea of privacy and privacy rights derives from
classical liberal principles in which we are called upon to value individual freedom, limited by
John Stuart Mill’s classic statement of the harm principle that says that one person’s liberty ends
where another person suffers as a consequence. “The only purpose for which power can be
rightfully exercised over any member of a civilized community, against his will, is to prevent
harm to others.” Mill insisted that there could be no justification for state regulation of conduct
that was purely “self-regarding,” a category that by definition could not be harmful to others. This was the great distinction between liberal political thought and earlier forms of
republicanism; the affirmative possibility of creating good outcomes would not justify state
action, only the prevention of harm. For all other activities, individuals retained privacy, “the
right to be let alone.”

The model of privacy rights limited by the harm principle does not, in itself, alter the
equation with respect to thinking about pregnancy, at least not so long as we stop short of
recognizing fetuses as persons. The element that changes the equation - and that enables recent

4 Roe v. Wade, 410 U.S. 113 (1973); Casey v. Planned Parenthood of Southeastern
6 Id., at 13.
7 Olmstead v. United States, 277 U.S. 438 (1928).
moves to use law to regulate pregnancy despite the existence of constitutionally protected privacy rights - is the inclusion of ecological models of harm and causation. By “ecological” I mean models that encompass a modern understanding of the interrelatedness of elements in systems. An ecological model of causation is one that recognizes the lessons of the natural and social sciences that “cause” is an attenuated, probabilistic, and holistic concept. At its most extreme, the idea of causation attenuated in time and space is captured in the image of a butterfly’s wingstrokes “causing” a hurricane thousands of miles away, but more prosaic and predictable examples abound.\(^8\) The actions of introducing chemicals into an environment, introducing a rumor on the Internet, or offering information about a securities available for purchase may have ripple effects that span the globe and linger across generations. “Cause” becomes probabilistic when we recognize that a risk of harm, as well as an actual and immediate harmful consequence, requires a public response. And cause becomes holistic when we acknowledge that harms may result from an accumulation of causal factors even if it is not possible to isolate and quantify the precise effects of each element acting independently.

Applied to the basic model of privacy, an ecological model of causation expands the harm principle to the point where it swallows the underlying claim of privacy in all but the narrowest range of cases. This is not merely a matter of legal doctrine, it is fundamental to the logic on which the liberal right to privacy is predicated.

Ecological concepts also inform the most powerful and important critiques of liberalism, beginning with feminist challenges to the use of the “separate spheres” doctrines to justify the

\(^8\) The phrase “butterfly effect” captures the idea first formulated by Edward Lorenz that it is impossible to predict the weather on a local scale because of the effects of minor fluctuations on subsequent events. This discovery is often considered one of the starting-points of chaos theory, which is the study of phenomena with respect to which even ecological models of
exclusion of women from public life. The famous slogan “the personal is political” expressed
the rejection of the idea that there exists a prepolitical, private sphere of life to which women can
legitimately be relegated without recourse.9 In Catharine MacKinnon’s words, “The private is
public for those for whom the personal is political.”10

These two developments, in law and in feminist political philosophy, converge with a
vengeance in the question of the state’s authority to regulate pregnancy. I will argue, in fact, that
these cases demonstrate the basic instability of privacy rights and the inadequacy or rights
language to secure a meaningful sphere of personal privacy. The failure is two-fold: the

causation break down. For a popular exploration of this idea, see James Gleick, Chaos: Making

9 The phrase “the personal is political” originated in an essay written in 1969 by Carol
Hanisch, for a collection of writings entitled Notes From the Second Year. The editors of that
collection, Shulamit Firestone and Anne Koedt, chose the title for Hanisch’s article, and in the
process - wittingly or not - redefined the discussion about feminism until today. “The Personal
Is Political” was the provocative title that the editors chose for Hanisch’s essay. The essay began
as a 1969 memorandum for the Southern Conference Educational Fund. In Hanisch’s words, at
the time she was employed by the SCEF as a “subsistence-paid organizer doing exploratory work
for establishing a women’s liberation project in the South,” a description that highlights the
extent to which the feminist movement drew on the political organizing tactics of the civil right
movement. The point of Hanisch’s memorandum was to emphasize the value of consciousness-
raising. In this early period of feminist organization, many of the activists and organizations that
were involved were drawn from the Civil Rights, Anti-Vietnam War, and Old and New Left
groups” for many of whose members the idea of consciousness raising - altering the way people
thought about themselves and their lives rather than focusing on objectively identifiable material
conditions - was not truly “political.” ‘[T]hey belittled us no end,” writes Hanisch, “for trying to
bring our so-called ‘personal problems’ into the public arena - especially ‘all those body issues’
like sex, appearance, and abortion.” Hanisch, “Introduction to ‘The Personal Is Political,” 2006,

10 MacKinnon, Catherine, Toward a Feminist Theory of the State (Cambridge MA, 1991),
191. “The personal is political is not a simile, not a metaphor, and not an analogy. It does not
mean that what occurs in personal life is similar to, or comparable with, what occurs in the
public arena. It is not an application of categories from public life to the private world . . . It
means that women’s distinctive experience as women occurs within that sphere that has been
socially lived as the personal - private, emotional, interiorized, particular, individuated, intimate -
so that what it is to know the politics of woman’s situation is to know women’s personal lives,
particularly women’s sex lives.” As a result, “The private is public for those for whom the
personal is political.” Id., at 119-20.
language of privacy rights fails both to provide any secure protection against state intrusion and, at the same time, to provide any clear basis for identifying instances where state intervention is justified. As a result, there is much more at stake in this discussion than a question of legal doctrine, or even the state of the constitutional right to privacy. If all actions have foreseeable consequences for others, then nothing is private in any analytically stable way, and there is no coherent basis within the language of American liberalism to counter the assertion of state interest.

In place of privacy rights, I propose a return to an older concept of a public-private divide informed by robust understandings of “public” as well as “private.” But the revival of a concept does not mean that we are bound to return to earlier conceptions of its requirements in practice; any discussion of privacy, and especially one that focuses on the regulation of pregnancy, must take into account the lessons that have been learned from powerful criticisms of the traditional liberal public-private distinction. Nor do I want to suggest that “privacy” is a category that does not deserve recognition and protection in law. Instead, I want to argue that within the dominant tradition of liberalism there are good reasons to recognize the existence of

My argument may thus be read as the converse of Jean Belke Elshtain’s argument proposing that the cure for the ills of liberal society is a revival in the focus on the virtues of private life. Elshtain, Jean Bethke, Public Man, Private Woman: Women in Social and Political Thought (Princeton, NJ, 1993). The argument that I am presenting here is also different in kind from those that call for retaining the language of privacy rights but redefining their justification. Jennifer Nedelsky, for example, has proposed a concept of “relational rights,” in which rights would be designed to foster the kinds of relationships that are socially desirable. The right to privacy, by this argument, would be recognized in situations where there is a societal judgment in favor of sheltering the relationship at issue, an approach far more appropriate to matters involving intimate relations of care than one based on property rights. Compare Nedelsky, Jennifer, Private Property and the Limits of Constitutionalism: Tha Madisonian Framework and its Legacy (Chicago, 1994) and Nedelsky, Jennifer, “The Practical Possibilities of Feminist Theory,” 87 Northwestern University Law Review 1286 (1993). So long as these rights constructions remain vulnerable to ecological demonstrations of harm, however, they remain
three categories: areas that are genuinely, uniquely public; areas that are genuinely, uniquely private; and a third area in which the default state should be that authority is left to private choices but that may be made public by the affirmative actions of public authorities. The barrier between public and private occurs in this middle contested area, and in fixing that barrier, the burden should be on the state to establish a justification for the exercise of its authority rather than on the individual to assert an exceptional countervailing claim of personal rights. This, I will propose, is an approach that restores coherence and stability to the idea of privacy without abandoning the liberal tradition of a public-private divide as a basic limitation on government power.

To develop this argument, I will briefly discuss the recent rise in the use of state power to regulate conduct during pregnancy. I will then turn to a brief review of some historical developments in American law that, I will argue, set the stage for these kinds of state intervention. Next, I will discuss some of the most important critiques of the traditional liberal conception of the public-private divide, and argue that the force of those critiques has to be taken into account in any attempt to revise our understanding of the meaning of privacy. Finally, I will argue that a consideration of the case of pregnancy points toward a new way of conceiving of the categories of public and private that can provide a coherent and stable framework for meaningful division between public and private matters that is consistent with the foundational tradition of liberalism in American law.

I. Regulating Pregnancy

Inadequate to do more than suggest arguments in favor of one policy choice or another rather than a coherent basis for limiting the reach of state power per se.
Following the Deborah J.Z. case, the Wisconsin legislature responded to its oversight by enacting a fetal protection law in 1998.\(^\text{12}\) This made Wisconsin something of a trendsetter, as South Dakota passed a similar statute at the same time, and numerous other state legislatures have adopted or considered statutes designed to permit state intervention to prevent pregnant women from endangering the health of their fetuses, frequently by otherwise lawful conduct - such as drinking or smoking cigarettes\(^\text{13}\) - as well as by the use of controlled substance.\(^\text{14}\) South Carolina remains makes fetal abuse a crime, and state authorities have actively pursued prosecutions under that law.\(^\text{15}\) In Arizona, Colorado, Florida, Indiana, Louisiana and Nevada exposure to drugs or alcohol in utero was added to the definitions of child abuse or neglect by

\(^{12}\) Wis. Stat. 48.01 created a category of “unborn child” abuse. Wis. Stat. 48.193 permits the Department of Human Services to hold pregnant adult woman in custody if “a law enforcement officer believes on reasonable grounds that . . . there is a substantial risk that the physical health of the unborn child . . . will be seriously affected or endangered due to the adult expectant mother’s habitual lack of self-control in the use of alcoholic beverages.”

\(^{13}\) In Arkansas in 2006, Rep. Bob Mathis, who had earlier sponsored a law making it illegal for someone to smoke in a car with children, introduced a proposal to ban pregnant women from smoking. Governor Huckabee has been quoted as supporting Mathis’ proposed measure. (www.tompaine.com/articles/2006/7/17.)


\(^{15}\) Between 1989 and 2003, South Carolina courts reviewed more than seventy cases involving prosecutions based on drug use during pregnancy. (Linder, 2005: 879n.) Regina McKnight was convicted of homicide based on her use of crack cocaine during pregnancy and the still birth of her baby in 1999. That conviction was upheld by the South Carolina Supreme Court, and the U.S. Supreme Court denied certiorari. McKnight v. State of South Carolina, 352 S.C. 635 (2003), cert den. 540 U.S. 819 (2003). As a result, other states remain free to follow South Carolina’s example in the future.
laws adopted between 2003 and 2006. In New York, a family court has concluded that a child abuse law that does not mention actions during pregnancy nonetheless creates a basis for removing children from the custody of a woman who used drugs while pregnant under a theory called “derivative neglect”; Ohio’s supreme court reached the same conclusion by defining a fetus as a child in the custody of its mother. In Wyoming, an effort is underway to amend the state’s felony child endangerment law to include the protection of fetuses. Many if not most states define the destruction of a fetus as a form of homicide, and in some versions where illegal conduct is involved these statutes can be used to prosecute mothers for their actions during pregnancy.

Moreover, as in the Deborah J.Z. case, even in the absence of statutes such as those described above prosecutors have taken it upon themselves to seek criminal penalties for conduct during pregnancy. In the past twenty years, hundreds of women have been prosecuted under various theories of “fetal abuse” in 32 states, despite the fact that none of these states defined such a crime in their statutes. In 2004, prosecutors in Utah charged Melissa Ann Rowland with murder when one of two twins she was carrying was stillborn. Rowland had refused to undergo a


\[\text{In Re Unborn Child, 179 Misc. 2d 1 (Family Court of Suffolk Cty., NY, 1999); In Re Baby Blackshear, 90 Ohio St. 3d 197 (2000).} \]

\[\text{Billings Gazette, Oct. 3, 2005.} \]

\[\text{In 2006 Oklahoma amended its criminal code to make homicide include “an unborn child.” Okla. Stat.s 691 D states that the “mother of an unborn child” shall not be prosecuted under the section “unless the mother has committed a crime that caused the death of the unborn child,” thus opening the door for prosecutions of the kind previously seen in South Carolina. Even before the enactment of these statutes, moreover, the Idaho Supreme Court in 1992 upheld the conviction of a woman for felony injury based on the death of her 9-week old child due to cocaine in his system. State v. Reyes, 121 Idaho 570 (1992).} \]
Caesarian delivery, and according to a doctor who delivered the twins that was the cause of the stillbirth. In January 2004, the Utah legislature had altered its law to make destruction of a fetus at any stage of development a “homicide.” Ultimately, the charges were changed to two counts of child endangerment based on Rowland’s use of cocaine prior in the weeks prior to delivery (the surviving baby had both cocaine and alcohol in her bloodstream), and was sentenced to 18 months’ probation and ordered to participate in a drug treatment program.\textsuperscript{21} In the summer of 2006, two women were arrested in Alabama in unrelated cases and charged with “torture or willful abuse of a child” after giving birth to babies with drugs in their systems, despite the fact that Alabama has no fetal protection statute and the state’s supreme court has previously ruled that the law under which the women were arrested does not apply to cases involving the delivery of drugs to a fetus.\textsuperscript{22} There are reports of similar arrests in 2006 in South Carolina, New Mexico, Arizona, Alabama, Colorado, Georgia, Missouri, North Dakota and New Hampshire.\textsuperscript{23}

\textsuperscript{20} As noted earlier, it is difficult to find an exact number of prosecutions. Several researchers cite a statistic that more than 200 such prosecutions had occurred by 1992. (Schroedel, 2000; Kowalski, 1998; Paltrow, 1992.)

\textsuperscript{21} The case attracted enormous publicity. Initially, a spokesman for the prosecutor’s office alleged that Rowland had resisted a Caesarian delivery solely for “cosmetic” reasons, a claim that was swiftly refuted when it was revealed that Rowland already had a scar from a previous C-section delivery. Ultimately the prosecution recommended a sentence of 0 to 5 years without jail time; in rejecting that recommendation in favor of simple probation and drug treatment the judge in the case, See http://www.usatoday.com/news/nation/2004-03-12-mother-charged_x.htm; Kirk Johnson, “Probation in Casearian Death,” New York Times April 30, 2004, A19; “Plea Agreement for Mother in Baby’s Death,” New York Times, April 8, 2004, A25; “Gropus Defend Utah Mother; Prosecution in C-Section Case Goes Too Far, Advocates Say,” Washington Post, March 17, 2004, A7.


Where intervention has taken the form of criminal prosecution under previously existing statutes, state courts have usually struck down resulting criminal convictions on appeal.\textsuperscript{24} Thus the pattern of these cases is aggressive intervention by police and prosecutors, followed by more restrained interpretations of state authority by judges. But that is not a complete description. For one thing, even where convictions did not result, however, the fact of prosecution often meant pre-trial detention, and many cases are settled by plea bargain rather than by convictions challenged on appeal. And for another, there is no guarantee that judges can be relied upon to continue to check prosecutors, nor is there any reason to think that prosecutors are moving away from pursuing these prosecutions. While it is almost literally impossible to catalogue patterns of prosecution in localities across the nation, there is a generous amount of anecdotal evidence that indicates that these trends in prosecutorial conduct continue. As for judges, a national trend of increasing ideological and partisan extremism in judicial elections, fueled by the intrusion of outside money from interest groups and relaxation of rules limiting the conduct of judicial officials, suggests that it in the future we may see occupants of state court benches who are more rather than less willing to embrace politically popular stances that would allow police and

\textsuperscript{24} In August 2006 the Maryland Supreme Court overturned the conviction of a woman who gave birth to a baby who had been exposed to illegal drugs \textit{in utero} for violation of the state’s reckless endangerment law. \textit{Cruz v. State of Maryland} (2006). In other cases, convictions have been overturned in Hawaii, Texas and Florida (State v. Aiwohi, 123 P.3d 1218 (Haw. 2005); \textit{Chenault v. Huie}, 989 S.W.2d 474 (Tex. App. 1999); \textit{State v. Ashley}, 701 So. 2d 338 (Fla. 1997)). In 2003, the Arkansas Supreme Court overturned a lower court permitting state agents to take a viable fetus into custody based on the pregnant woman’s use of drugs. \textit{Ark. Dept. of Human Services v. Collier}, 351 Ark. 506 (2003) All of these cases, however, were decided on the basis of statutory construction, leaving open the possibility of subsequent legislation of the kind adopted by Wisconsin in response to the actions of its own courts.
prosecutors to target pregnant women whose conduct does not measure up to socially acceptable standards.25

The record from courts in European and Canadian courts, interestingly, is not significantly different. In three cases, the European Court of Human Rights has overturned member states’ efforts to take custody of a new-born baby based on evidence of risk compiled during pregnancy.26 These rulings, however, were largely based on member state governments’ failure to meet their burden of demonstrating sufficient evidence of risk, not on the basis of any principled objection to the form of the states’ actions. Two Canadian cases are similarly equivocal. In a 1999 case the Supreme Court of Canada declined to find a common law duty of care between pregnant woman and fetus but left open the possibility of legislative action.27 A similar conclusion resulted from authorities’ attempt to civilly detain a pregnant woman to prevent her from drinking and using drugs.28 Thus the pattern that emerges in European and

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25 For a suggestion as to the likely consequence of these developments in judicial elections, see Huber, Gregory A. and Sanford C. Gordon, “Accountability and Coercion: Is Justice Blind when It Runs for Office?,” 48 American Journal of Political Science 247 (2004) (finding that judges in Pennsylvania increase criminal sentences in the period prior to retention elections regardless of the general ideological bent of the judge or his/her constituency. The authors attribute these outcomes to the nature of information sharing in elections and the general level of voter knowledge concerning judges’ activities. See also Kritzer, Herbert, “Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century,” 56 DePaul L. Rev. 423 (2007).


28 Winnipeg Child & Family Services (Northwest Area) v. D.F.G., [1997] S.C.J. No. 96 (QL). French courts have resolutely refused to find that causing the destruction of a fetus is a form of “homicide,” but these cases have all involved claims of involuntary homicide brought against parties other than the pregnant woman, as in the dismissal by the Court de Cassation (France’s highest court of appeals) of a case in which a physician who inadvertently caused the destruction of a fetus was charged with unintentional homicide. This ruling was upheld by the European Court of Human Rights (“ECHR”). The ECHR held that the French court’s ruling did not violate Article 2 of the European Convention on Human Rights, obliging member states to
Candian cases appears quite similar to that displayed by state courts in the U.S.: prosecutors continue to file cases alleging that the destruction of a fetus should be considered homicide, courts continue to be reluctant to uphold convictions based on those prosecutions, but the door remains open for legislatures to alter the equation in future cases.

Commentators who have looked at the cases described above, have tended to argue that imposing liability on pregnant women based is to open the door to the near-total regulation of the lives of pregnant women, particularly poor women of color whose lives are more exposed to state intervention to begin with. 29 Potentially a state could assert an interest in preventing or encouraging a wide range of conduct by pregnant women based on its consequences for her future child, including eating unhealthy foods, consuming alcohol or drugs, or smoking, including exposure to second-hand smoke. 30 Others critics of coercive measures focus on policy arguments to the effect that enforcement measures are counterproductive. 31

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There are good reasons for critics of intervention to fear that fetal protection statutes are vehicles for agendas framed in terms of gender, and perhaps also race and class, rather than genuine efforts to protect public health. It is telling that legislatures and prosecutors have focused their attentions on imposing duties of care on pregnant women, rather than including other persons (male and female) who are in a position to affect the health of the future child. For example, no efforts have been made to prevent persons from exposing pregnant women to second-hand smoke, which is known to have harmful consequences for the fetus. Nor is the evidence establishing the connections between consumption of alcohol and drugs by a pregnant


Fentiman, Linda C., “The New ‘Fetal Protection’: The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children,” 84 Denver Univ. L. Rev. 537 (1996); Linder, Erin L. “Punishing Prenatal Alcohol Abuse: the Problems Inherent in Utilizing Civil Commitment to Address Addiction” Illinois Law Review 2005 (2005): 873-901; Drago, James, “One For My Baby, and One More For the Road: Legislation and Counselling to Prevent Prenatal Exposure to Alcohol,” 7 Cardozo Women’s Law Journal 163 (2001); Palmer, Carolyn S., “Fetal Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota,” Hastings Women’s Law Journal 10 (1999): 287-346. In addition, both critics and supporters of coercive interventions in the conduct of pregnant women often focus on the issue of fetal rights. Pollitt, Katha, “‘Fetal Rights,’ A New Assault on Feminism,” in ed.s Molly Ladd-Taylor and Lauri Umansky, “Bad” Mothers: The Politics of Blame in Twentieth-Century America (New York, 1998): 285-298; Schroedel, Jean Reith, “Is the Fetus a Person? A Comparison of Policies Across the Fifty States,” 22 Theoretical Medicine and Bioethics (2001), 385-89; Drago, supra., 2001: 165n.) On reflection, however, it may appear that the focus on fetal rights is something of a red herring in this particular context. The idea of fetal rights is one that has never been recognized under either the United States or state constitutions. Moreover, legislatures have not attempted to invest fetuses with the full range of rights possessed by persons-in-being, only with limited “rights” sufficient to justify whatever particular powers they want their government to have. Finally, 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 privacy provides a perfectly adequate basis for criticizing those outcomes even if something called “fetal rights” were to be added to the discursive mix. (Graber, 1996.)
woman and subsequent harms nearly as unequivocal as it is popularly conceived to be.\textsuperscript{32} On the other hand, as a general proposition the statement that the ingestion of harmful substances during pregnancy imposes significant risks on the long-term health of a future child is uncontentious.\textsuperscript{33}

And while alcohol and drug abuse during pregnancy occur in only a small minority of cases, that number is sufficiently large to warrant concern as a matter of public health (a phrase which carries an enormous range of implications in and of itself.)\textsuperscript{34} As a result, while no one doubts the relevance of treatment, education, and prevention, there are strong arguments that coercive state-imposed remedies have at least a place in a system designed to protect children against harms that result from their mothers’ conduct during pregnancy.\textsuperscript{35} But the extension of state authority into the control of the conduct of pregnant women is obviously disquieting, especially where that conduct is not already criminal in its own right. This disquiet is produced by the kinds of


\textsuperscript{34} The National Household Survey on Drug Abuse (NHSDA), a survey conducted by the Substance Abuse and Mental Health Services Administration, concluded that approximately 97,000 women used illegal drugs while pregnant in 2004-2005, representing 3.9\% of all pregnancies. By comparison, the number of women aged 15-44 using illegal drugs in 2004-2005 was estimated at 5,836,000 (9.9\% of the population), down from 6.1 million (10.4\% of the population) in 2002-2003. Alcohol use, predictably, is more prevalent. Binge alcohol consumption, defined as drinking five or more drinks at a sitting, was experienced by 3.9\% of pregnant women in 2004-2005, representing 96,000 cases. Heavy alcohol use, an overlapping category defined as “consuming five or more drinks on the same occasion on each of 5 or more days in the past 30 days” occurred among 0.7\% of pregnant women, representing 18,000 cases in the same period. It is not possible to determine from the data how many of the cases of alcohol consumption are also cases of drug use. Smoking is reported by pregnant women at a rate of 23.7\% in the first trimester, 12.9\% in the second trimester, and 13.7\% in the third trimester. www.oas.samhsa.gov/nsduh/2k5nsduh/tabs/Sect7peTabs68to75.pdf
resources and the sources of authority that are mobilized in order to effectuate that supervision, by the difficulty in principle in distinguishing between criminal and non-criminal acts in the context of harm to a future child, and by the ability of legislatures to redefine “criminal” acts by revising statutes, as occurred in Wisconsin. These consideration make these prosecutions tests of the boundary between public and private spaces within the body of a pregnant woman.

As I suggested at the outset, the question of whether and when state intervention in pregnancy can be justified forces us to consider the basic liberal framework of American law. The basic claim that is being asserted in these cases is that pregnant women have a duty of care toward their fetuses. Or rather, that pregnant women have a duty to care for their fetuses; whether that duty is owed to the fetus or to the public at large is an interesting question, as is the question of whether that duty is enforced by public authorities or private parties. In American law more than in other systems, private actors are relied upon to deliver public goods in a variety of settings. Martha Fineman uses the phrase “the privatization of dependency” to point out the extent to which American legal discourse simultaneously recognizes a publicly enforceable obligation to care for those who cannot care for themselves and yet leaves the performance of that obligation to private actors. The result, interestingly, is to place the state and the individual caregiver in an essentially adversary relationship, in which the state’s intervention takes the form of punishment for failure to provide care, or enforcement of the obligation to provide support, but not the direct provision of the care or support that is needed in the first place. A second form of state reliance on private action might be called the “privatization of law enforcement.” In the American system more than in many others (any other?), the enforcement of public

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regulatory standards depends on the actions of private actors filing private law claims or acting as some form of private attorney general.\textsuperscript{37}

Conversely, American private law doctrines serve clear and well-recognized public regulatory functions. In some cases, formal legal recognition is the prerequisite for the existence of a relationship, as in the case of the corporation. In other situations law does not create human relationships, but it determines whether and how the resources of the state will be brought to bear to reinforce the ties of obligation that exist between persons, just as political decisions determine whether and how the resources of the state will be made available in the form of support for relations recognized by law.

These very broad observations about the complexities of the relationships between public and private actors in American law ** COMPLETE PARAGRAPH< TRANSITION


\textsuperscript{37} William Rubenstein identifies three distinct models of “private attorney general” actions in which the private plaintiff’s suit serves as a “substitute,” “supplemental,” or “simulated” public law action. “Substitution” occurs when government agencies employ private lawyers to pursue public cases, or in qui tam actions; supplementation describes the situation of private individuals filing suits to enforce statutes, exemplified in certain forms of environmental litigation; and “simulated” public actions are those in which lawyers are awarded fees based on their success in securing benefits for a class of persons who define a limited “public,” as in class action suits. Rubenstein, “On What A "Private Attorney General" Is - And Why It Matters,” 57 \textit{Vand. L. Rev.} 2129, 2143-2151 (2004). As Rubenstein points out, the classification of different forms of private pursuit of public interests is complicated, as one might focus on the parties, the lawyers, or the body of law that is involved, and the distinctions are not always clear. See also Lynda Dodd, “Implementing the Rule of Law: The Role of Citizen Plaintiffs,” 13 \textit{The Good Society} 36 (2004); Kritzer, Herbert M., "Contingency Fee Lawyers as Gatekeepers in the American Civil Justice System." 81 \textit{Judicature} 22 (1997); Jeremy A. Rabkin, “The Secret Life of the Private Attorney General,” 61 \textit{Law & Contemporary Problems} 179 (1998); John C. Coffee, Jr., “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working,” 42 \textit{Maryland Law Review} 215 (1983); r. The general point remains, however, that in a large number of cases the American system relies on private litigation for the vindication of public interests.
The policy questions of what kinds of relations deserve support from government are beyond the scope of this article; my focus is on the justifications for state interventions in relationships to define and enforce the duties that we owe one another. To understand the reasoning behind those justifications, it is important to recognize the historical trends in the development of American privacy law, particularly the shift from a public-private divide to a language of privacy rights and the development of an ecological model of harm; together, these two developments provide the legal background for the sudden emergence of widespread efforts by state authorities to assert authority over the lives of pregnant women.

II. Ecological Harms, Legal Duties, and the Dissolution of the Public-Private Divide

The appearance of prosecutions and statutes directed at the regulation of pregnancy undoubtedly reflects a combination of social, cultural, and political trends. Legally, however, these actions by state authorities demonstrate the present culmination - although by no means the end-point - of a trend that began with the replacement of a public-private divide by a model of privacy rights in both constitutional and ordinary law. In the older model, the burden was on the state to justify its assertion of authority over an area of life by demonstrating its public character; in the absence of such a showing, the basal state was privacy. Later, that set of assumptions was reversed, so that all property, all areas of life, essentially all actions are presumed to be matters
of public concern unless a specific showing of privacy can be made. When the right to privacy came into the legal lexicon in the 1970s, it was articulated in terms of this background assumption of public-ness.

What drove the shift from a public-private divide to privacy rights was the introduction of ecological models of causation and harm. Once all activities came to be recognized as elements in an interdependent system of economic, social, or physical relations, it became clear that all activities have consequences for the system as a whole, and hence are subject to regulation as matters of public concern. The adoption of ecological models carry the idea of public interest into any and all realms of life without restriction until it runs into some specifiable constitutional “right.” Constitutionally, this way of thinking in law began with the adoption of the idea of the national economy as a single, interrelated system in which one person’s use of their property produces ripples of causation that reach across the nation. As a consequence, all property becomes public; not in the sense of being owned by the government, but in the sense of being a proper matter for governmental concern and control unless some specific constitutional limitation such as the Fourth Amendment dictates to the contrary.

But the constitutional expansion of state authority is only one part of the story; the other part concerns the application of ecological models to the understanding of individual liability in private and regulatory law. Here, again, the idea that we all interact with one another within an interrelated system in which actions have consequences at a distance of space and time is the driving force for an expansion of state authority, this time the authority of courts and legislatures to define standards of private and regulatory liability. The issue is the range of foreseeable harms that a person can be required to recognize and act to prevent; to the extent that the law
gives cognizance to scientific and social scientific understandings of ecological causation the “zone of foreseeability” expands to the point of infinity.

These two applications of the idea of ecological causation - one in defining the reach of public authority into private lives, the other in defining the duties of care that public authority can impose - meet with a vengeance in the cases discussed in the previous section of this article. While the history of these legal developments is well known, a brief review focusing on the way in which ecological models of harm and causation became the solvent of the public-private divide bears revisiting and helps illustrate the central importance of reconstructing that division to the project of securing privacy in any meaningful sense.

The idea of a sharp distinction between public and private life was central in 19th century American culture. In Democracy in America, Alexis de Tocqueville described a dual social system in which liberal public values were balanced by republican, moral values in the female-dominated home. Tocqueville wrote that in America “more than anywhere else in the world, care has been taken constantly to trace clearly distinct spheres of action for the two sexes.”

Tocqueville was not alone in his assessment, his comments accurately captured the dominant opinion among America’s governing elites. But far from representing a liberal check on government power, this division in social roles was treated in republican terms as a justification for intervention by courts, legislatures, and social leaders. The profound importance of private

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family life in shaping citizens made the affairs of hearth and home - and particularly that familial roles of women - a matter for public concern and intervention.  

The contrary notion that a division between public and private might serve as a general constraint on governmental powers entered American constitutionalism with the adoption of the XIVth Amendment. Prior to that time, states were understood to have inherited the common law tradition of general “police powers,” which justified extensive regulation of all areas of life by local authorities. The guiding principle of the common law was “salus populi suprema lex est,” “the good of the people is the supreme law,” and idea that arrived in America with the earliest European settlers. Armed with that tradition of local authority both legislatures and courts exercised their authority over a broad range of areas of life.

The adoption of the XIVth Amendment introduced a constitutional requirement of justification. States would have to demonstrate that the laws under review served a legitimate purpose, and were not arbitrary or designed to “oppress” a particular group. In the process of

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40 The records of the 1630s Massachusetts are filled with regulations concerning the price, size, and quality of bread and beer; the use of canoes and firearms; dealings with Indians; wages and price controls, import and export restrictions and a myriad other forms of regulation. And notoriously, the community’s authority extended to regulating the peace of households, relations between family members, and sexual practices, to cite only a few examples. *See* Noble, John, ed., *Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-92.* (Boston, 1904.)


42 For interesting examples of the non-arbitrariness principle in action, compare *Gulf, Colorado and Santa Fe Railway Company v. Ellis,* 165 U.S. 150 (1896) with *Minnesota Iron Company v. Kline,* 199 U.S. 593 (1905). In *Ellis,* a Colorado law awarding attorney’s fees to parties prevailing in suits against railroad companies was overturned on the grounds that the state had no legitimate reason to single out railroad companies (a highly debatable conclusion.) By contrast, in *Kline* the Court upheld a Minnesota law that distinguished between completed rail
assessing the adequacy of state’s proffered justification, the Supreme Court made frequent reference to the idea of the public-private divide, as the opposite of an arbitrary law was one that served a genuine public purpose. Unsurprisingly, the primary area in which discussions of the public-private divide occurred was property. In Munn v. Illinois, in 1877, the question was whether states could regulate the operation of grain elevators. The operators insisted that private property could not be regulated by the government unless it fell into the categories of nuisance or “common carriers,” private business such as ferrymen and coachmen who in England held monopolies granted by the Crown in return for taking on special obligations to provide services for all. These businesses could be regulated not only to prevent harms, but to maximize the public good. Writing for the majority, Justice Waite had no trouble in finding that grain elevator operators occupied an analogous position. “They stand . . . in the very gateway of commerce and take toll from all who pass.” But Waite went further, deriving a more general proposition: “When private property is affected with a public interest, it ceases to be juris privati only.” Nor was Waite troubled by the idea that his argument was extending old legal categories to cover new situations. The case, he wrote, “presents . . . a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.” In upholding the statute, the majority in Munn the regulation declared as a matter of constitutional principle that where states sought to regulate

lines and rail lines under construction in imposing liability for injuries to workers on the grounds that the period of construction might reasonably be considered to be especially dangerous. Concerning the assertion of liberty of contract - the argument that would be accepted in Lochner v. New York later in that same year - Justice Holmes, writing for the majority, simply observed “There is no doubt that that freedom may be limited where there are visible reasons of public policy for the limitation.”

the use of property they would bear the burden of demonstrating that was “clothed with a public purpose,” but they made the division between public and private purposes a moving target.

Dissenting, Justice Field would have gone farther. He argued that the XIVth Amendment created an absolute division between public and private property, and he denied states the authority to determine where that division lay. “There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. . . . One might as well attempt to change the nature of colors, by giving them a new designation.” Presciently, Field warned that allowing the reach of public authority to expand to follow new conceptions of public interest would eventually undermine the security of private property itself. “The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, any thing like so great an interest.”

If any property could be used in a way that would promote the public good, then any property would become the proper subject of regulation.

For a time, Field’s fears may have seemed ungrounded. In a number of instances, to be sure, the Court upheld regulation of private business on the grounds that the states had met their burden of demonstrating a public interest that took the property in question out of the category of “juris privati” or posed a direct threat to health and welfare. But the principle that states bore

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44 Munn, 94 U.S. at 138, 143.
45 See Holden v. Hardy, 169 U.S. 366 (1897), upholding regulation of working conditions in mines, Peckham and Brewer dissenting. In the majority opinion, Justice Brown noted that the kinds of laws under review were novel ones, but insisted that the rise of an industrial economy required novel forms of regulation. “[I]n the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments.” This, said Brown, was merely an application to the economic sphere of the more general proposition that “in passing upon the validity of state legislation
the burden of justifying their regulations by demonstrating a public dimension to the use of property remained central to the analysis. The majority in Plessy v. Ferguson is notorious for their conclusion that the existence of racially segregated facilities carried no indication of inferiority - a departure from reality that even in 1896 could have fooled no one - but what is less remembered is the basis on which Justice Brown insisted that the XIVth Amendment continued to limit state authority. “[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”46 In the most famous case of the era, Lochner v. New York in 1905, the Court declared the limiting principle on the ability of states to assert a public dimension to the use of property.47 In Lochner, a law limiting the working hours of male bakers was struck down on the grounds that it constituted an impermissible regulation of the economy unaccompanied by health or safety concerns. The key point was that the state was asserting an interest in regulating private property based on its effects on the economy, rather than based on a showing of particular harms to particular persons. “It seems to us that the real

under [the Fourteenth] amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science.” Holden, 169 U.S. at 393, 385. It can be argued that the adoption of an ecological model of causation was the necessary response to the development of technologies and a political economy that permitted actions to cause harm to others at much greater distances than had been possible in previous eras.

47 Lochner v. New York, 198 U.S. 45 (1905). There is a copious and contentious literature devoted to the question of how the developments of Lochner and the other cases mentioned here ought best to be understood. (Gillman, Howard, The Constitution Besieged (Durham, NC, 1993; Nelson, William E., The Fourteenth Amendment: From Political Principle to Judicial Doctrine (Cambridge, MA, 1988); Benedict, Michael Les, “Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism,” 3 Law and History Review 293 (1985). The analysis here suggests that these cases can be understood as consistent in their reasoning with earlier decisions such as Munn. This description of Lochner, it should be noted, gives as much credence to the dissenting opinion of Justice Harlan as to the more famous dissenting opinion of Justice Holmes.
object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business.”

The main point is that in all cases the calculus remained consistent despite variations in the outcomes. The question was always whether the state had demonstrated a sufficient public interest to justify its intervention into what would otherwise be assumed to be a private matter. The default state in all cases was “private”; for property to be treated as “public” required evidence either of a danger to the health and welfare of the community or a showing that the property in question was “clothed with a public purpose.” To permit regulation merely on the basis that property was involved in the larger economy would be to accept an ecological model of economic activity in which all economic actors were connected in a single, interdependent system. Accepting such a model of the economy would mean that any private property could be made “clothed with a public interest,” since any use of property could enhance the health of the economy as a whole.

That ecological model of economic relations arrived with Nebbia v. New York in 1934. In upholding a law regulating milk production and sale, the Court declared precisely the untramelled notion of “public purpose” that Justice Field had warned of in his Munn dissent. “The phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”

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48 Lochner, 198 U.S. at 64.
50 Nebbia, 291 U.S. at 537.
In West Coast Hotel Co. v. Parrish\textsuperscript{51} the Court went even further. Upholding a law establishing a minimum wage, the Court reiterated the proposition that there is a public interest in the regulation of the economy that justifies the regulation of any species of property. “The community may direct its law-making power to correct the abuse which springs from [employers’] selfish disregard of the public interest.”\textsuperscript{52} The notion that a property-owner or employer has a duty to regard the public interest - not only to avoid harming his neighbors but to act in ways that would be beneficial to the polity at large - represents the reversal of the burden of justification. The state no longer has to establish that a given piece or category of property was clothed with a public interest, instead all property is subject to public regulation by virtue of the recognition that each individual’s use property was an event in the larger economic system. This is not to say that states have been granted unlimited power over economic activities; they remained bound by other provisions of the federal and their own constitutions, and by federal law. But the idea that the Constitution imposed a generalizable limitation on state intervention in economic affairs had given way to the “social science” recognition that economic activities are bound together in an interactive system - an ecology, in other words - whose operation was a matter of public concern. Put another way, in Munn and Lochner there had been only markets; in Nebbia and Parrish the Court had discovered the existence of an economy.

The assertion in the 1970s of a right to privacy occurred against this background. An assertion of a right to privacy appears as the identification of a specific, narrowly defined area of activity outside the scope of state governments’ otherwise all-encompassing authority. The cases and their outcomes are too familiar to require review: in Eisenstadt v. Baird the Court found that individuals have a right to use contraception, in Bowers v. Hardwick the Court found no similar

\textsuperscript{51} West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
right to engage in homosexual sodomy. In all cases, courts and legal actors ceased to focus on the question of what justifies the definition of a public sphere in the first place, leaving that category to be the implicit environment against which a protected private space was to be defined, fenced, and protected. When Justice Douglas in Griswold v. Connecticut proposed that the existence of “penumbral” where “privacy is protected from government intrusion” in the guarantees of rights in the First, Fourth, Fifth, and Ninth Amendments, he was arguing from the shared presumption that, unless such a showing could be made in a particular case, everything was potentially public.

During the same period that the public-private divide was being dissolved in constitutional cases, the same thing was happening with respect to private and regulatory legal doctrines, beginning with tort law. Courts discovered the concept of ecological causation in the articulation of 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 the late nineteenth century private law, it was a concept that had been employed by courts to limit liability. In the twentieth century, however, the concept took on entirely new meaning as the basis for imposing liability, and for permitting state regulation of conduct. Benjamin Cardozo was perhaps the single most influential judge on this score. In his famous opinion in Palsgraf v.

52 West Coast Hotel Co., 300 U.S. at 399-400.
Long Island R.R. Co., Cardozo described a “zone of foreseeable consequences” that defined the scope of court-created legal duties.\textsuperscript{56}

The problem lay in defining the outer limits of the “zone of foreseeable consequences,” just as in cases involving constitutionally protected uses of property the problem had been defining the outer limits of “public purpose.” At the time Cardozo wrote his opinion, courts had begun to wrestle in earnest with prevalent social scientific understandings that emphasized interconnectivity in social interactions and the idea of economic systems.\textsuperscript{57} Assumptions about the common-place understanding of terms like “cause” were threatened by these increasingly sophisticated modes of analysis. Oliver Wendell Holmes, in particular, had explored the tension between new ways of conceiving foreseeable consequences and his conviction that legal liability should flow only from morally culpable conduct. An enthusiastic supporter of incorporating probabilistic and statistical reasoning into the legal reasoning, Holmes proposed a standard of “foreseeability” that extended to whole industries and classes of person.\textsuperscript{58} At the same time, however, Holmes recognized that without a limiting principle, captured in the idea that actors are responsible only for reasonably foreseeable harms, the rule of liability could extend without limit. “[A]ny act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage.”\textsuperscript{59} Without such a limiting principle, given the modern language of social science and statistics, everything would be “foreseeable.” To the extent that the law depended for its coherence on concepts that were subject to redefinition by

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\textsuperscript{57} Ross, Dorothy, The Origins of American Social Science (Cambridge, MA, 1991; Haskell, Thomas L., The Emergence of Professional Social Science (Urbana, IL, 1977.)
\end{flushleft}
science and social science, it would itself be vulnerable to redefinition in ways that judicial actors might not even recognize.

Holmes concern that foreseeability could expand indefinitely paralleled Field’s earlier concern about the limitless reach of the public interest. These were not discrete developments of particular legal and constitutional doctrines, they represented a new, emerging way of seeing the world. The most profound alteration in the meaning of foreseeability in private and regulatory law context was the introduction of the language of environmental harms in the 1960s, a process whose beginning in public discourse can probably be marked at the publication of Rachel Carson's Silent Spring. From that time forward, the law of liability across a range of areas has come to be marked by an ecological model of causation, characterized by the foreseeability of causal relationships attenuated in space and time. Exemplars of the ecological model of causation in public law can be found in statutory schemes such as the Comprehensive Environmental Reclamation and Liability Act (“CERCLA,” the Superfund law). Under CERCLA, government agencies and private plaintiffs did not have to demonstrate the specific act that led to the specific presence of a specific pollutant, only 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 clean-up would be spread among those defendants who were shown to have caused the pollution in this characteristically ecological sense of the word “cause.” Other environmental statutes followed similar approaches to determining causation.\textsuperscript{60}

\textsuperscript{59} Holmes, Oliver Wendell, Jr., \textit{The Common Law}, ed. Mark DeWolfe Howe (Boston, 1963), 76-7.

\textsuperscript{60} CERCLA is essentially a statutory enactment that takes the form of tort liability. 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. See Schweber, "Cleaning Up the System: The Need for Federal Preemption of Third Party Contribution Claims Under CERCLA," 12 \textit{Temple Journal of Environmental Law & Technology} (1993).
Fertilizer run-off, acid rain, and global warming are all examples of publicly acknowledged environmental risks that would have been incomprehensible a century ago, and the same vocabulary can be seen in a variety of other contexts.

Ecological models of causation and harm also appear in the discovery of bases of liability for exposure to second-hand smoke,\(^{61}\) and in arguments ranging from theories of product liability to the assertion that certain forms of speech are toxic pollutants of the political environment, to a general proliferation of mass tort claims.\(^{62}\) And as Holmes predicted, the expansion in the conception of causation was accompanied by an expansion in the range of foreseeability, vastly expanding the responsibility of manufacturers to foresee the (mis)conduct of their customers. In 2006 the Supreme Court of New Jersey found that a manufacturer of asbestos should have foreseen the secondary exposure of the spouses of employees to asbestos carried into the home on the employees’ clothing, and could therefore be liable for harms resulting from that exposure.\(^{63}\) Other courts have extended the idea of ecological causation to a theory of “market

\(^{61}\) Significantly, regardless of the outcomes, courts considering these claims have treated the harmful effects of second-hand smoke to be a matter of public consciousness rather than a matter requiring expert demonstration. That is, social attitudes about “blameworthiness” have adapted in response to the increasing prevalence of an ecological model of harm, rather than acting as a check on the consequences of that model as Holmes had hoped. The common law appeal to community understandings here appears as a public recognition of ecological models of causation, between exposure to second-hand smoke and health risks. See *Oliver v. Reed* 77 F.3d 156 (7th Cir. 1996); *Warren v. Keane* 937 F.Supp. 301 (S.D.N.Y., 1996).

\(^{62}\) Jurisdiction over cases involving claims of product liability is based on the distinctly environmental characterization that the corporation’s products had entered “the stream of commerce.” *Asahi Metal Industry Co., Ltd. v. Sup. Ct. Of California*, 480 U.S. 102 (1987). The analogy of toxic speech was most forcefully argued in *American Booksellers’ Ass’n. v. Hudnut* 771 F.2d 323 (5th Cir., 1985).

\(^{63}\) *Olivo v. Owens-Illinois, Inc.*, 186 N.J., 394 (NJ 2006). But the New York Court of Appeals reached the opposite conclusion on the basis that while the harms may have been foreseeable, there was no previously established duty of care between the employers and the employees’ spouses. *Holdampf v. A.C. & S., Inc.*, 5 N.Y.3d 486 (2005).
share” liability, a model of causation whose clear precedent is found in environmental statutes applied, as before, to the economy.\(^{64}\)

The resulting dissolution of constitutional limitations on states’ assertion of public interest and the expansion of duties of care to follow expansive conceptions of foreseeable harm are at the heart of the recent wave of prosecutions of pregnant women. In a model based on a sharp division between public and private activities, these actions could be challenged by the requirement that the state first meet its burden of establishing the public character of the behavior at issue. But once the language of a public-private divide was abandoned in favor of model of generalized public authority checked by specified privacy rights, the burden shifted to the pregnant woman to prove her asserted right to privacy. Moreover, that right is defeasible by the demonstration of potential consequences, and the application of ecological models of causation and harm in this context means that there is no inherent reason why almost any conduct on the part of a pregnant woman should be protected against state intervention. The expanded notion of foreseeability, in other words, threatens to make the harm-based exception to privacy rights swallow the rule entirely outside of a very narrow range of cases.\(^{65}\)

\(^{64}\) *Smith v. Eli Lilly & Co.* 137 Ill.2d 222 (Illinois, 1990). The market share theory of liability, like the secondary exposure theory, is not universally accepted. The Second Circuit Court of Appeals rejected the application of the theory to gun manufacturers in *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001). The point is both instances is that the vocabulary of ecological causation has entered into legal discourse, not that it is always and uniformly applied.

\(^{65}\) It is noteworthy that the development of an ecological model of harms in American law occurred first in tort law, then spread to the regulatory context. This observation reflects an important shift in the modern relation between legal and political theory. Early attempts to define the public-private divide had been made in terms of property rights, especially at the level of constitutional doctrine. Nedelsky, 1994, *supra*. But while many feminist critics of American law, in particular, focus on the role of contract law principles in formulating and institutionalizing certain models of autonomous individualism, tort law - which carries the “harm principle” into law - both influences and reflects the discourse of privacy rights to a far greater degree. In law as in morals generally it is simply not the case that obligation necessarily depends
Faced with the prospect of public authority expanding throughout a system of ecological causes and effects, some writers have attempted to preserve the ideal of privacy by insisting that pregnancy is a unique area in which the law should simply fear to tread. “[M]aternal duty should be defined in a unique manner by, and not for, each individual woman. If a state forces a woman to conform to a legislatively or judicially prescribed concept of maternal duty, it enacts an intolerant legal regime, one that fails to recognize personal, cultural and gender distinctions.” Palmer begs the question when she goes on to include the caveat “unless a complete breakdown of ... maternal duty occurs,” but the basic argument remains in the form of a call for a subjectivization of the understanding of pregnancy to replace the formulation of uniform standards of conduct. “[A] language of pregnancy derived from women's experiences must take the place of the voices of law-makers and physicians. Women's autonomy demands no less.” (Morris, 1997: 96.) There is undeniable appeal in this evocation of the innate individuality of subjective experience, and the value of human autonomy. But the emphasis on a unique and subjectively defined experience challenges the capacity of law’s language to craft any kind of rule. As for drawing the line that defines a “complete breakdown of maternal duty” is, presumptively, is a policy program to be undertaken by elected authorities.

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In other words, the argument that public regulation can not be extended to pregnancy at all is a principle that proves far too much to be politically feasible or legally sensible. And if it is not possible to articulate legal principles that define when the state may regulate the conduct of pregnant women, there will equally be no principled way to argue that a given attempt at intervention has exceeded the bounds of such a definition. Furthermore, even in the context of discussions of the welfare of children there is no obvious reason why pregnancy should be the chronologically first event that triggers the state’s recognition of consequences, since behaviors occurring prior to conception can have consequences for subsequently born children. It was in considering a claim of liability for harms caused to an eventual fetus resulting from injuries sustained in a car accident two years prior to pregnancy that a California judge made the observation that gives this article its title: “through hindsight, everything is foreseeable.”

67 Hegyes v. Unjian Enterprises, Inc. 234 Cal. App. 3d 1103 (1991), rev. den. 234 Cal. App. 3d 1103 (1992). The court of Appeals dismissed the claims against the negligent driver on the grounds that the law only imposes a duty to avoid inflicting harms that are “reasonably foreseeable.” Hegyes, 234 Cal. App. 3d at 1130. In general, the California Court declared that liability for preconception negligence would be limited to cases involving a “special relationship,” such as that between doctor and patient. Id., at ___. See also Taylor v. Cutler, 306 N.J. Super. 37 (NJ App. 1997) (no liability for premature birth caused by preconception car accident due to lack of foreseeability.) By contrast, where claims of medical malpractice are involved, courts have been more willing to find liability, based on a physician’s presumed superior ability to “foresee” the longer-term consequences of medical conditions. In Torres v. Sarasota County Hospital Board, 961 So.2d 340 (Fla. 2007) the Florida Supreme Court declared, “Instead of adopting a blanket no-duty rule based on the timing of the physician’s alleged negligence, we believe it is appropriate to assess the viability of Luis’s claim as we would any other medical malpractice claim brought against a physician by someone other than a patient.” Torres, 961 So.2d at 345-46. See also Lynch v. Scheininger, 162 NJ 209 (2000); Lough v. Rolla Women’s Clinic, Inc., 866 S.W.2d 851 (Mo. App. 1993); Walker v. Rinck, 604 N.E.2d 591 (Ind. 1991); Renslow v. Mennonite Hospital, 67 Ill. 2d 348 (1977). It is important to recognize that these cases are different from so-called “wrongful life” cases, in which courts have generally been reluctant to find liability. See, e.g., Kush v. Lloyd, 616 So.2d 415 (Fla. 1992); Viccaro v. Milunsky, 406 Mass. 777 (1990), Gleitman v. Cosgrove, 49 N.J. 22 (1967). The issue of foreseeability in other contexts, too, has proven difficult. In Grover v. Eli Lilly, 63 Ohio St. 3d 756 (1992), the Ohio Supreme Court held that Eli Lilly could not be held liable for harms suffered by the grandchild of a woman who had ingested DES on the grounds that such
Nor does adding the traditional caveat “reasonable” in front of foreseeable, as many courts have done, improve the situation. The category of “reasonably foreseeable” is a moving target. Consider, in a different context, the case of second-hand smoke. The dangers of second-hand smoke first appeared in a Surgeon General’s Report in 1972, although there are suggestions that the tobacco companies had knowledge of these dangers far earlier. Beginning as early as the 1970s, the same dangers began to be recognized by courts. By the 1990s, courts treated the harmful effects of second-hand smoke to be a matter of public consciousness rather than a matter requiring expert demonstration. These harmful effects "seem clear to a large proportion if the population," observed the Seventh Circuit in an VIIIth Amendment case in 1996, and more and more people feel that nonsmokers have a right to avoid second-hand smoke.” A District Court in New York likewise declared that the failure of prison officials to enforce existing bans on smoking, "in light of numerous commentaries and government reports concerning ETS" (environmentally transmitted smoke), "cannot be said to be reasonable." In two cases in

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68 See discussion, note 63.
70 In Shimp v. New Jersey Bell Tel. Co., 145 NJ Super. 516 (1976), a New Jersey court held an employer liable for failing to provide a smoke-free environment for employees, thus placing their health at risk.
71 Oliver v. Reed, 77 F.3d 156 (7th Cir. 1996), relief denied.
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 second-hand 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.\footnote{731}

The recognition of the harms of second-hand smoke is not limited to cases involving
employees and prisoners; in a series of cases the risks of second-hand smoke have been the basis
for decisions in child custody cases. In 1996, in Gilbert v. Gilbert,\footnote{74} a Connecticut superior
court had to decide a challenge to a joint custody order.\footnote{75} The judge acknowledged that both
parents were capable caretakers. “There is one exception to this observation, however. Despite
the fact that Daniel has been a severe asthmatic since he was an infant, Mrs. Dumond [the
mother] and her present husband have both continued to smoke throughout that period and are
presently smokers. Mr. Gilbert does not smoke, nor does he permit smoking in his house or car.
Mrs. Dumond testified that she does not smoke in Daniel's presence nor in her car.” Despite the
mother's testimony about the precautions that she took to shield her son from the effects of
second-hand smoke, and despite the child's stated preference to live with the mother, the court
ordered custody to remain with the father. "Family or parental autonomy is not absolute," wrote
the judge, "and may be limited where it appears parental decisions will jeopardize the health or

\footnote{73}{"[B]y failing to exercise its control and assume its responsibility to eliminate the
hazardous condition caused by tobacco smoke, defendant has breached and is breaching its duty
to provide a reasonably safe workplace." Smith v. Western Electric Co., 643 S.W.2d 10


\footnote{75}{Originally the mother had been given sole custody over the two children from the
marriage; that order had been modified to joint custody in 1990, and due to a series of mishaps to
the mother the children had been living with their father since 1994. Ibid.}
safety of [a] child." Similar reasoning has appeared in more recent cases, including a series of cases from New York treating exposure to smoke as a relevant factor in determining custody awards and a case from Ohio in which the presence of second-hand smoke was the decisive factor in the determination based on the court’s acceptance of the risks involved despite the absence of any evidence of negative health effects. More recent responses have come from legislatures. Numerous cities have banned indoor smoking, and a number of states have moved to specifically ban smoking in cars carrying young children and to ban smoking by foster parents in the presence of their charges. Interestingly, the cases and statutes involving custody disputes and foster parents reflect situations in which the family relationship has come under the supervision of a court for other reasons; there are not yet statutes imposing general prohibitions on parents smoking in the presence of the children except as part of general prohibitions on

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76 Ibid., p. 8. In a similar case with inverse facts (a mother challenged a father's custody on the grounds that the father was a smoker) another court again awarded custody to the non-smoking parent; on appeal, the order modifying custody was reversed, but on the condition that "the Appellant [father] and his family provide a smoke-free environment for Justin." Michael Scott v. Victoria L.M., 192 W. Va. 678 (1994). Both cases were decided on the sole grounds that the decision to expose the children to the effects of second-hand smoke -- or, in the Gilbert case to expose the child to the risk of being exposed to the effects of second-hand smoke -- represented parental actions contrary to the best interests of the child.


78 Pierce v. Pierce, 168 Ohio App. 356 (2006); but see Heagy v. Kean, 864 N.E. 2d 383 (Ind. App. 2007), no abuse of discretion in family court’s decision to decline to modify custody decision based on exposure to second-hand smoke in the absence of negative consequences for child.

smoking indoors or in cars. Such laws are not unthinkable, however, as the moving target of “reasonably foreseeable harms” is propelled by increasingly powerful scientific findings.

The point in these cases is that the enforceable social duty of avoiding the creation of foreseeable risks, a standard devised in response to the public experience of technology, is being driven into new and hitherto unexpected areas of social life by technology's relentless advancement of our ability to predict outcomes based on increasingly attenuated chains of probabilistic causation and increasingly revealing applications of the technologies of perceiving. In particular, recent studies have emphasized the risks to fetal development posed by exposure to second-hand smoke by pregnant women. The cases above dictate the obvious policy consequence of this discovery: pregnant women who live in areas that subject them to exposure to second-hand smoke should be subject to state intervention to prevent them from exposing their fetuses to the foreseeable consequences of what might be called tertiary exposure to nicotine.

The point of this discussion, obviously, is that cases involving the regulation of pregnancy are illustrative of a larger issue. If the division between public and private is to have analytical force, something other than the model of an individual right limited by the harm principle is required. The foreseeability of consequences for others has been exploded by scientific and social scientific understandings to the point where characterizing the conduct of a pregnant woman as purely self-regarding simply makes no sense. What is required, therefore, is

some other basis for treating a matter as public as well as a basis for treating a matter as private. If such a description can be found, it points toward the possibility of establishing a shared set of legitimating assumptions for legal principles even where there is disagreement over the desirability of specific outcomes. But it will not do to blindly recapitulate the understandings of past eras; a useful rearticulation of the liberal public-private divide must take into account the lessons that have been learned from the numerous critiques of that tradition. In the next section, I turn to a consideration of some of those lessons.

III. Liberalism and the Challenge to the Public-Private Divide

The criticisms of the public-private divide appear in a wide range of arguments. For the most part, these critiques accept the two basic Millian principles that there should be areas of life to which the state has no access, and that the limiting principle of that idea is the risk of harm. The critiques, then, have tended to focus on the line where the division between public and private is drawn, and the sensitivity with which “harm” is recognized. Communitarian writers such as Etzioni and Glendon assert that we fail to pay enough attention to the harms that are done to public concerns, and consequently prevent needful information-gathering and the exercise of political control in areas where such control is genuinely warranted. Social conservatives make a parallel argument, but from an affirmative rather than a negative perspective. They argue that too broad a definition of privacy weakens the ability of the community to shape itself and the attitudes of its members in desirable ways. Neorepublicans make the affirmative version of the same claim, that we harm ourselves by refraining from exercising political influence to affirmatively promote virtues; by this argument when we leave issues such as character and
personality development to private decision-making we fail to maximize the private virtues essential to society, and thus cause harms to our collective good through inaction.\textsuperscript{82}

The most powerful critiques of the public-private divide, however, came early on from feminist writers, who pointed out that the traditional “separate spheres” of private life are frequently arenas of violence and domination. In such an environment private violence and oppression, almost always directed against women and children by men and always directed at the disempowered by the powerful, becomes invisible to the public gaze, its existence either denied or discounted, and consequently its victims left without effective remedies short of self-help.\textsuperscript{83} In Catherine MacKinnon’s memorable phrase, in this form privacy is “an injury got up as a gift.”\textsuperscript{84} A long and doleful history of societal toleration of spousal and parental abuse, sexual and otherwise, is the most obvious and simplest form of the phenomenon of oppression disguised as privacy. Thus, like communitarians and conservatives, in this moment feminists call for a greater degree of state intervention into “private” life; in Mari Matsuda’s words, “the places the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live.”\textsuperscript{85}

The maintenance of places where the law does not go becomes particularly galling when one recognizes that these spaces are, themselves, the creation of public and political acts rather

\textsuperscript{81} Etzioni, Amitai, \textit{The Limits of Privacy} (New York, 2000); Glendon, Mary Ann, \textit{Rights Talk} (New York, 2004).
\textsuperscript{84} (MacKinnon, 1984: 52) FIND THIS SOURCE***
than pre-political natural states, so that the appearance of what Beate Rossler calls a “quasi-natural” dichotomous division between them is an illusion.\(^8^6\) Particularly where questions of law are concerned, it will not do to treat a public-private divide as a natural object around which laws are constructed; that is the power not only of the radical feminist critiques but more fundamentally of the even simpler observation that the ideology of separate spheres was a trap for those whose greatest vulnerability came from private actors rather than from state interference.

The feminist critique challenges liberal thinkers to relocate the public-private divide in order to remain true to any version of the harm principle. This observation can lead in one of two directions. Ruth Gavison distinguishes two different responses to the recognition that law creates, rather than reflects, the division between public and private, which she categorizes as “internal” and “external” critiques of liberalism.\(^8^7\) External critiques find that the implication of public actions in the definition and maintenance of private areas of life demonstrates the necessity of dissolving the distinction between public and private altogether.

This need not be a call for a totalitarian, all-consuming state, but as Judith DeCew puts it an external critique is one that seeks “to do away with the whole public/private dichotomy as it has been understood in the past.”\(^8^8\) Critics who take this approach do not necessarily deny the value of privacy in an ideal world, but they assert that fundamental aspects of American society -

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- a pervasive culture of sexist domination\textsuperscript{89} or a political economy based on commodification and alienation,\textsuperscript{90} or a background social order of male domination and uncompensated women’s labor\textsuperscript{91} -- necessarily render the assertion of “privacy” a shield for various forms of violence and exploitation. As a result, these writers essentially see the public-private divide as an ex post facto justification for social, economic and political systems that are themselves unjust.

Internal critiques, by contrast, hold that what is needed is not the replacement of existing categories, but rather greater efforts to give liberal principles meaning in practice. By these arguments privacy cannot be made valuable until individuals, especially individual women, are provided with the resources to make use of that privacy in ways that will be valuable for themselves.\textsuperscript{92} 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” (Eisenstein, 1996: 187.) In this way, “privacy” is preserved in its present understanding, but its consequences take the form of an affirmative entitlement to state provision of resources rather than in the negative form of a limit on the state’s regulatory authority.

These different feminist critiques of the liberal public-private divide have required a basic reconsideration of the traditional terms of the argument. The realization that the home is a frequent locus of violence; the recognition of the constant and pervasive role of the public sphere in shaping and limning the “private” sphere; the observation that the absence of resources and

\textsuperscript{88} DeCew, Judith Wagner. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca NY, 1997), at 90, emphasis in original.
opportunities is, in practice, as profound a barrier to self-realization as formal legislative restrictions; these and related observations have required liberals to reconsider the simplistic notions of public and private that frequently pervade American law and legal practice.

But the truth is that even the most radical critic of the public-private divide does not truly endorse the idea of doing away with that division altogether even with respect to state action. No one writing in the area of privacy and the law, to my knowledge, has ever proposed an enforceable requirement that all sex acts take place in public, that there be no limits on the means by which agents of law enforcement are permitted to collect information, that all life decisions be subject to being overruled by political authorities, or even that all forms of property be always subject to direct and unlimited governmental control. These are fanciful examples, of course, but the fact remains that without making the perfect the enemy of the good the conclusion is inescapable that in many ways, in the past thirty-odd years personal freedom has been greatly enhanced by the recognition of privacy rights held by individuals - men, women, and children - rather than by collective entities such as “families” or “households” whose boundaries are themselves the result of political and legal construction.93 “What, if not a right to personal privacy,” asks Jean Cohen, “protects the variety of identities of individuals and groups living I

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92 See, e.g., Nussbaum, Martha C., Women and Development (Cambridge, 2000); Boling, Patricia, Privacy and the Politics of Intimate Life (Ithaca NY, 1996).
93 Allen, Anita, Why Privacy Isn’t Everything: Feminist Reflections on Personal Accountability, (Lanham MD, 2003), at 35. Judith Wagner DeCew calls on us to recognize the need for a category of “privacy” to limit government totalitarianism. DeCew, 1997, supra., an argument whose force can only have increased in the days since 9/11/2001. 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,” an argument that echoes Jean Belke Elsttain’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.” Boling, 1996, supra., Chapt. 1 generally; Elshtain, 1981, supra., at 322.
modern civil societies from leveling in the name of some vague idea of community values or the majority’s conception of the common good?"  

Moreover, feminist writers who work in the area of jurisprudence and political policy are at times impatient with the idealism of purely philosophical explorations of an imagined alternative. In the inaugural issue of the Berkeley Women’s Law Journal, Heather Wishik articulated a philosophical form of feminist jurisprudence. “Once we have probed the data from law and women’s lives and the distance in between, then it seems necessary to skip to an imagined future when all is possible in order to envision what we want. Afterwards we can look at whether and how our desires can be made real through changes in or in spite of existing law.” But as Gavison observes, “When we remember the urgent social problems that call for resolution, it is more than just frustrating to be stuck in the realm of theoretical polemics.”

One thing that at times seems to be missing from the most theoretically critical discussion is an adequate appreciation of the political consequences of adopting an argument that can be so easily turned against the purposes that originally motivated its formulation. For a discussion of the politics and discourse of American law, moreover, the basic framework of liberalism is inescapable if the conversation is to be relevant; despite the unlamented demise of liberal consensus theory, basic elements of liberal ideology remain widely shared across the spectrum of


American political thought and practice. There are also prudential political reasons for remaining within the liberal tradition of a public-private divide; arguments of this kind can be made persuasive to people from across the political spectrum, rather than being restricted in their relevance to those who might already be inclined to support the kinds of policies that feminists, political liberals and progressives would like to see enacted. 

The challenge, then, is find the place for a version of the public-private divide within the dominant framework of liberalism despite the inadequacy of the harm principle as a check on state authority. In an article published in 1980, Gavison proposed that what is needed is an affirmative declaration of privacy as an extra-legal value recognized in law. Gavison argues that we need a neutral, coherent, and legally “useful” concept of privacy as the starting-point of the discussion, since otherwise one ends up in the tautological position of defining privacy in law as that which the law recognizes as privacy. “Privacy,” observes Gavison, “has as much coherence and attractiveness as other values of which we have made a clear commitment, such as liberty.” The result, she points out, “would not necessarily or even primarily be more legal rules to protect privacy.” Instead, a commitment to a coherent and neutral principle of privacy would provide a basis for critique and reform of existing legal remedies and proceedings, and a principle to guide interpretation, “perhaps with a presumption in favor of protecting privacy.”

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99 Gavison, “Privacy and the Limits of Law,” 89 *Yale Law Journal* 421, 460-66 (1980); see, especially, the critique of Dean Prosser’s analysis at 460, n. 118.
100 *Id.*, at 468, 471. As a starting point, Gavison suggests “accessibility to others” as the test for privacy, a starting-point that encompasses discussions of informational privacy as well as discussions of control over decision-making and restricted spaces, rejecting alternative descriptions of privacy as “a claim, a psychological state, or an area that should not be invaded” as well as “privacy as a form of control.” *Id.*, at 426-28. Beatte Rossler identifies five distinct versions of the ideal of privacy, of which the most general is: “a condition in which one is
Gavison’s approach provides a response to the consequences of ecological models of causation by insisting that privacy should have an affirmative definition, rather than being negatively defined as the absence of the potential for harm. Building on Gavison’s approach, in part, other writers have urged the incorporation of principles of accountability and obligation into the liberal paradigm. One of the negative consequences of a version of “privacy” based on markets and contracts, after all, is that it opens a space for autonomy by denying the salience of duty. But as Anita Allen points out, the harm principle that limits privacy simultaneously defines a basis for obligation. “Liberals recognize reasons to hold others accountable for personal matters if harm can thereby be averted. The fights are about what constitutes the relevant sorts of harm.”

Allen recognizes clearly that the contract-based notion of obligation based on consent simply does not capture the reality of social life; the truth is that we all recognize obligations that are only tangentially related to our voluntary choices, based on the facts of reliance, intimate relationships, public need, and dependency.

Eva Kittay points out that a particularly powerful case for the recognition of obligation as an element that limits autonomy arises in the case of dependency. But whereas for Kittay the fact of dependency requires an effective abandonment of the liberal paradigm, Martha Fineman asserts the centrality of the obligations of care within a liberal framework. Fineman suggests that the privacy of the family should be thought of in functionalist terms as an example of privatization; just as we rely on private firms, rather than the state provide health insurance, we

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102 Id., at 21-23; see also Hirschmann, 1996, supra. at 170.
103 Kittay, Eva Feder, Love’s Labor (Thinking Gender), (Routledge, 1998.)
rely on private families to provide care for dependents. Here, “privacy” appears as a family relative of the use of private litigants and courts to make and enforce public policy. Fineman proposes that the contributions of caretakers deserve and require greater recognition and reward than they presently receive reward as a matter of contractual fairness, a model she described as “social debt.”

Fineman also finds that the traditional family has ceased to work (to the extent that it ever did) as the prime mechanism for the provision of care, resulting in a change in what she calls the “background conditions” of the privatization contract. It is the functional failure of the traditional family to provide caretaking services, rather than some abstract principle of justice, that ultimately grounds Fineman’s call for the state to take an expanded role. The government, having failed to act to prevent the market from degrading American families, now has an obligation to fill the “caretaking void” that has resulted.

Fineman’s pragmatism and her core liberal principles do not imply that her approach is in any way timid; she calls for “radical and massive transformations in the workplace,” as well as a reconceptualization of the legal definitions of family and marriage. But in the pursuit of equality Fineman does not argue for altering the consciousness of the population, both out of an aversion to theories of false consciousness and in recognition of the inescapable fact that caretaking remains a gendered activity. Indeed, it is in part because she has concluded that male-female interpersonal relations are not susceptible to being remade by political action that she

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105 Id., at 47-9.
106 Id., at 88-94, 177.
107 Id., at xx, 121-41.
finds it necessary to radically alter the world of economic work and social policy.\textsuperscript{108} Her liberal commitments thus appear not only in her deployment of contractual claims, but also in her insistence in retaining a genuinely private space, an area of personality formation shielded from interference. She argues, however, that we should consider a different dividing line that grants an expanded role to the state and relaxes the exclusivity of traditional family arrangements in order to secure social goods. “Privacy, just like subsidy, should attach to units performing societally necessary and essential functions, such as caretaking.” As always, the limiting factor is the harm principle, a point that she observes in nearly the last sentence of the book, the caretaker-dependent unit deserves privacy “if it is not abuse or neglect (we can argue about where to draw those lines later.)” (Finaman, 2004: 303, 306-07, emph. added.)

In these critiques of the liberal public-private divide the harm principle remains the critical limiting principle for any positive conception of “privacy.” But in political philosophy as in law, the limiting principle of privacy threatens to swallow the concept entirely. Fineman’s functionalist argument for a form of privacy that serves social needs, like Allen’s focus on relationships of obligation, still takes place within an analytic environment in which everything is presumed to be public unless privacy can be affirmatively justified, and consequently suffers from the destabilizing effects of introducing an ecological model of cognizable harms. And where the description of such harms is extended to include processes of personality or preference formation,\textsuperscript{109} the division between public and private dissolves entirely, not because of a direct

\textsuperscript{108} \textit{Id.}, at 171, 178-81.
analytical challenge to its foundations, but as the result of a consequentialist model built into the vocabulary of the argument.

Gavison’s argument for an affirmatively defined value of privacy does not clearly address the problem of limiting state authority in the face of a plausible case of ecological harms. Beyond calling for a presumption in favor of privacy in doubtful cases, to continue to apply the basic model of privacy rights that stand like islands in a sea of public authority leaves barriers to state authority subject to being washed away by the endless capacity of science and social science to see ever-more attenuated connections and consequences. Gavison’s solution is to admit a degree of arbitrariness in where the limit of privacy is drawn. “The real question . . . is whether we can intelligibly distinguish among activities according to the quality, magnitude, probability, and irreversibility of the effects that they may have on others.”¹¹⁰ The problem with this approach is the unbridled discretion that it leaves to state officials to recognize previously unexplored categories of harm. The regulation of pregnancy, indeed, is the perfect example.

I propose to reverse Gavison’s and Fineman’s formulations. Rather than seeking an affirmative definition of the value of privacy, I propose a revival - in reconceived form - of the affirmative definition of public. And instead of treating privacy as a reward for social contribution, I want to argue that the state should carry the burden of its assertion that the conduct of pregnant women is “public” in a way that justifies intervention without justifying a complete eradication of the category of “private” in the process. I do not mean to diminish the moral strength of Fineman’s and others’ call for adequate support for caretakers, nor of Allen’s moral concerns for the environment in which obligations are experienced, and certainly I share Gavison’s insistence that the category of privacy requires more rather than less protection in the

¹¹⁰ Gavison, 1992, supra. at 15.
categories of American law. And it would require an act of outright dishonesty at this late date to pretend that the category of cognizable harms can be contained within the parameters of immediate physical injury or direct interference with material access. What is needed is not a new and better expression of the harm principle, what is needed is an argument that refocuses the burden of justification on the side of the party asserting a public purpose in the first place.

IV. Reconstructing the Public/Private Divide: Occupation of the Field

In thinking about the case of states regulating the conduct of pregnant women, we are confronted by the destabilization of the divide between public and private caused by the limitless capacity to conceive of harmful consequences from a perspective of ecological causation. The effort to define privacy in terms of an assertable right, rather than as a requirement of justification for state action, puts the burden of justification on the weaker party and opens the door for state interventions motivated by a range of purposes. To accept this course of development without defining stable limiting principles has invited the complete dissolution of a legally cognizable sphere of privacy, a phenomenon illustrated in the cases involving the regulation of pregnancy. By extension, the absence of a limiting principle to check the effects of incorporating ecological harms into the equation casts doubt on the viability of privacy as a legal category outside of very limited contexts.

In place of this approach, I have suggested a revival of an understanding in which the burden is on the state to establish a matter as public in order to justify its regulations and interventions. But as feminist critics of liberalism remind us, it is not enough to speak of the state demonstrating public-ness as some kind of naturally occurring fact. The recognition that public as well as private status is constructed by the categories of legal discourse demonstrates
that the burden on the state must be to make a matter public by its actions in order to justify the
assertion of its coercive authority. But this is not to suggest that all existing categories of
understanding should be swept away and replaced by a new, totalizing conception of the
categories of public and private life. It is beyond peradventure that there are areas of concern
that are necessarily and genuinely public, in the consequentialist sense that word was used early
on in this discussion. Most, perhaps the vast majority, of the activities of governments fall self-
evidently into this category; in a modern state, it is far too late to argue that public investment,
regulation of commerce, military defense, or provision of public services are not “public”
activities. With respect to law enforcement, no one denies the necessity of the night watchman,
nor the authority of the state to intervene into even intimate relationships to protect weaker
individuals against the direct infliction of harm through violence or dishonesty. The Lockean
“night watchman”/”neutral umpire” state – the idea that legal authority exists, in the first
instance, to protect us from one another and to provide mechanisms for the resolution of private
disputes – is fundamental to any conception of political organization that values the capacity for
individual autonomy. The feminist critique of the separate spheres model of privacy provides
the clearest and most powerful indictment of any theory that would seek to create “places where
the law does not go” without first considering the risks of private domination and abuse that
might exist in those loci. This observation merely restates the continuing vitality of the Millian
harm principle as a basis for the imposition of law on social relations.

Moreover, we cannot – and cannot possibly want to – return to a pre-20th century
understanding stripped of the categories of ecological interaction and sensitivity to harms that
may be caused at a distance of space or time. The reason to demand a special level of
justification for state regulation to prevent ecological harms is that those are the forms of state
action in which traditional modes of justification burst their bounds and dissolve the basic liberal
commitment to a limited state. There can be no serious question that the state is justified in
acting to prevent the direct infliction of immediate harms; there can be little question that the
state is sometimes justified in acting to prevent the indirect infliction of ecological harms. If a
dividing line between permissible and impermissible state action is to be established at all, it will
have to be constructed on the unstable terrain of ecological harms and interactive systems.

Conversely, as I have argued at length here, it is equally the case that we cannot and
cannot possibly want to do away with a category of “privacy” altogether, nor allow it to be made
meaningless in practice. Thus, still squarely within the liberal tradition, we are called upon to
recognize three distinct categories of activity: those that are truly, irreducibly private by virtue of
the fact that they do not result in cognizable harms to others (which revives the question of what
will count as a cognizable “harm); those that are necessarily and always public, exemplified by
processes of law- and policy-making; and a third category. The boundary between public and
private - a fluid and changeable boundary, to be sure - occurs in the space of that third, middle
category, the space of indirect or ecological harms.

In that third space, I propose that the burden should be on the state to establish the
location of the public-private divide, and to establish the conditions under which its actions can
be understood to fall on the public side of that line. As a result, where government seeks to
intervene based on the assertion of ecological harms, whatever conduct it seeks to regulate
should be understood to be left to the discretion of private judgment unless the government has
taken actions sufficient to justify its treatment as public.

What would this form of justifying state action look like? To borrow a metaphor, where
the justification for state action is an ecological harm, the state should be required to “occupy the
field” in which it seeks to exert its authority. The phrase comes from the law of federal pre-
emption. While this analogy might seem strained, a brief look at pre-emption doctrine suggests
some interesting parallels. Where the national government has indicated an intent to occupy a
field of activity through regulation, states are not permitted to create regulations governing the
same field. The basic test for finding that government intent was stated in 1988: “Such a purpose
properly may be inferred where the pervasiveness of the federal regulation precludes
supplementation by the States, where the federal interest in the field is sufficiently dominant, or
where "the object sought to be obtained by the federal law and the character of obligations
imposed by it . . . reveal the same purpose."”111 The burden of persuasion is on the federal
government, as in general, there is a strong presumption against preemption.112 Commonly
voiced reasons for this reluctance to find pre-emption are that where pre-emption is found, the
operation of federal statutes interferes with traditional areas of state control, may leave
inadequate protections in place, and denies existing rights of compensation.113 Determining
whether there has been occupation of a field for pre-emption purposes is always a matter of fact-
specific, case-by-case interpretation.114

Even where pre-emption by occupation of a field is found to have occurred, the question
of defining the relevant “field” remains. Some commentators argue that the scope of the field
should be construed narrowly in light of the evident intentions or expectations of the drafters.115

111 Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988);
112 Cipollone v. Liggett Group, 505 U.S. 504, 516, 532, 546 (1992
113 See discussion, opinion of Judge Jack B. Weinstein, Burke v. Dow Chemical Co., 797 F.
Supp. 1128, 1131-32 (EDNY 1992)
domain as questions the statute either answers or authorizes a judge to answer. “Unless the
statute plainly hands the courts the power to create and revise a form of common law, the domain
Caleb Nelson proposes a different approach. Nelson appropriates the term “policy bundles”\textsuperscript{116} to help us identify the related questions that can plausibly be thought to have been federalized at the same time\textsuperscript{117} (538). For example, Nelson points out that “virtually all” American choice-of-law rules provide that the determination of which state’s laws govern the definition of a cause of action likewise implies that the same state’s laws govern the measure of damages, the availability of defenses, assignability of claims, the release of parties, and a variety of other related matters. “These issues,” he writes, “are widely understood to be part of a single policy bundle. Correspondingly, courts presume that when Congress creates a federal cause of action to enforce a federal duty, all of these issues come within the domain of federal law.”\textsuperscript{118} He also makes the interesting observation that “courts are somewhat more likely to infer preemption when the challenged state law is an outlier than when most other states have similar rules.” (560) Finally, Nelson freely acknowledges that the “policy bundle” approach does nothing to relieve judges (or other reviewing officials) from the necessity of exercising judgment, but that in the exercise of that judgment reviewers should err on the side of restraint. “[C]ourts must infer the boundaries of the occupied field from the substantive regulations that Congress adopted . . . [T]he primary reason for inferring field preemption is that the policies enacted by Congress imply a special need for uniformity and therefore preclude supplementary state rules on the same


\textsuperscript{118} \textit{Id.}, at 544.
subjects. This rationale applies more naturally to issues that policymakers typically link together than to issues in other policy bundles.\textsuperscript{119}

The analogy of federal-state relations to relations between the state and the individual or family unit need not lead us into Rousseauian explorations of the good or bad effects of intervening collectivities. The point, instead, is the simple one that privacy serves the same function for government generally that the doctrine of enumerated powers serves for the federal government: it requires the government to bear the burden of justifying its actions within an established framework of analysis and employing a specified and specialized language. As in the case of pre-emption law, the phrase “occupation of the field” offers few specific standards to define a “field.” In the pre-emption case, examples are evaluated on a case-by-case basis depending on the extent to which a federal goal might be impaired by the imposition of state regulations. Where the regulation of ecological harms is concerned, the definition of the “field” cannot be drawn from the legislation itself. Pre-emption concerns the interaction between two different forms of legislation; in that context it makes sense to ask the federal legislators to “speak” to those from the states. Where privacy is concerned, the interaction is between the state and the lives of citizens. What is required, then, is that the legislators in these situations speak to the conditions of people’s lives. The “field” is not a formal legal concept imported into politics, it is a social and political concept that I am proposing should be imported into law.\textsuperscript{120} In Jurgen Habermas’ terms, the field is a concept drawn from the “lifeworld” or ordinary experience.

\textsuperscript{119} Id., at 561.
\textsuperscript{120} If we imagine this to be a standard to be applied by a reviewing court, the standards involved will be fact-specific, and involve the application of common experience. The principle at stake here, moreover, is not strictly “legal” at all; it may better be understood as quasi-constitutional, a parallel to the idea of conventions or what Giovanni Sartori called a “constitutional telos.” The main point, however, is not to fit this argument into an existing
I will return to this point in a moment, but first, in addition to defining the concept of a “field” it is necessary to say something about what “occupation” entails. Here, the crucial recognition that comes out of the rejection of a simplistic, “right to be let alone” version of liberal privacy is that authority should not be separated from responsibility. To grant husbands authority over their wives without holding them accountable for their exercise of that authority was to invite abuse. In principle, at least, it is universally recognized as an immediate requirement of the harm principle. Similarly, the adoption of ecological models of causation in tort and regulatory law reflected nothing more than the insistence that the authority to use one’s property must be accompanied by the responsibility for the consequences of that use for others, the concept that derives directly from the common law action of nuisance. Applied to the case of pregnancy, the combination of authority and ownership over one’s own body ran squarely into the consequences of the expanded harm principle. But as much as the “right to privacy” cannot encompass conduct by a pregnant woman that will result in harm to a subsequently born live child, it is equally the case this limitation on the right to privacy is not an automatic assumption of public authority.

What remains unexamined is the proposition that the principle the assertion of authority implies acceptance of responsibility is equally valid when applied to the state. In response, then, to the hypothetical (and tautological) argument that “the state makes something public by the act of regulating it,” one can point out the inadequacy of the understanding of the role of the state that is implied. If it is meaningless to speak of a right to abortion where no facilities for the provision of abortions exist, it is beyond meaningless to threaten criminal sanctions for the failure to perform tasks for which the resources do not exist.
To see how this reasoning works in practice, let us return to the case of pregnancy with which we began. If the state wants to exercise legitimate authority over the conduct of pregnant women, then it must establish its claim to that political terrain by the extension of legal protection and the expenditure of capital - financial, political, and social - to shape the environment of pregnancy in ways deemed to be desirable. The sense of this argument is most immediately evident at the outer margins of the discussion, those situations in which the state attempts to regulate conduct that is most clearly only “harmful” in an ecological sense. If the state will not guarantee the availability of prenatal care, it has declined to exercise the responsibility over the area of prenatal care that would justify it in making such care a legal requirement. If the state will not guarantee access to nutrition, medicine, vitamins, or a smoke-free environment, then the failure of a pregnant woman to secure these environments for her fetus cannot be a violation of duties that the state may enforce.

What makes the case of pregnancy interesting in the first place, of course, is that all assertions of harm to a subsequently born child take the form of ecological claims. By the same logic, then, if the state will not guarantee access to drug and alcohol rehabilitation facilities for pregnant women, it cannot justify special interventions in the case of pregnant women who drink alcohol and use drugs. (Note that this last says nothing about the legitimacy of enforcing ordinary drug laws against pregnant women in the same manner that such laws are enforced against everyone else, although the policy questions involved are complex.) Applied to abortion, this becomes an entirely different basis for the argument that a state should be required to provide abortion services for those women who cannot afford to exercise their right to choose:

liberalism meaningful against the background of modern law.
not as an affirmative implication of that negative right, but as a necessary step in justifying the state’s choice to exercise its regulatory authority to limit access to abortions at all.

Consider how this approach would work in practice in the case of Deborah J.Z. Adopting the notion of an affirmative definition of “public-ness” of the type proposed here, the first question to ask would be whether Wisconsin had occupied the relevant field. How do we define the relevant “field”? At a minimum, it could be asked whether Wisconsin had demonstrated an effort to regulate the consumption of alcohol, tobacco, and other potentially harmful substance by pregnant women. A second, broader construction of the field might focus on the question of whether Wisconsin had demonstrated an intent to regulate conduct during pregnancy generally. Finally, Construing the issue in the broadest possible way, one might ask whether Wisconsin had occupied the field of fetal health.

Framing the question in the first way, the answer is fairly clearly “no.” Neither Wisconsin nor any other state has imposed a regulatory scheme to dictate the amount of alcohol that pregnant women may consume, nor to dictate what advice doctors may give on the subject. These observations point out an additional incidental advantage to construing the question in this way; this analytical framework leaves prosecutors far less room to be creative in coming up with hitherto-unknown forms of public offense. Has Wisconsin demonstrated an intent to occupy the field of “childbirth” generally? Here, even more clearly, the answer is “no.” And finally, there is no argument to the effect that Wisconsin has undertaken to occupy the field of fetal health. As noted earlier, even states that prosecute pregnant women for drug use or drinking do not attempt to prescribe healthy conditions for fetal development by, e.g., making it a crime to fail to obtain prenatal care, or imposing punishments for exposure of a fetus to second-hand (or “tertiary”)
smoke, let alone by making any meaningful effort to make adequate resources available to those without private funds.

Which raise an interesting question: why not? Leave aside the question of affirmative rights of access, or the moral responsibility of governments to provide the minimally necessary resources for its declared goals to be achieved. Why have states such as Wisconsin not undertaken to regulate the conduct of pregnant women tout court, rather than focusing solely on a few “hard cases” of the kind that create such very bad law? The short and cynical answer is “because these things cost money.” Which is entirely the point. The idea of imposing a burden of justification on government is to alter the system of incentives by preventing the cost-free, selected target model of intervention that divorces authority from responsibility right up to the point where a “special relationship” is created through the fact of incarceration. This is not a call for a wholesale revisitation of the idea of affirmative rights, it is a much more limited claim that where the government chooses to intervene based solely on a claim of ecological harms, its presence in that contestable, uncertain area of public authority requires justification in the form of actions sufficient to pull the question toward the public side of the divide.

The approach to reconstructing the public-private divide in the middle space between purely private and purely public conduct is the complement to the relational approaches described by Nedelsky, Hirschmann, Fineman, and others. Where those writers focus on the individuals involved, in classical liberal fashion I am focusing on the role of the state. It is true, after all, that how we construct our notions of privacy does a great deal to construct relations between persons, but it is much more immediately and directly the case that the construction of the public-private divide defines the relations between individuals and the state. That relationship requires as much thought and consideration, and should reflect the lessons that have
been learned from generations of scholarship and discussion. A state that exercises authority without responsibility is the natural complement to citizens who assert rights without obligations. Perhaps both reflect the kinds of relationships that are engendered by competitive market capitalism, but regardless of the cause the point of commonality is that the model being applied fails to reflect the complexity of the real life relationships involved. The need for citizens who recognize the fact of public obligation is the political equivalent to society’s need for caretakers. The argument that I have presented here does not go so far as to purport to explain how such citizens are to be created, it only makes the much more modest assertion that citizens who will not undertake responsibility for the lives of others should not be entitled, through their elected representatives, to assert authority over those lives.

Similarly, my argument does not equate to an assertion of an affirmative right to state services; the only argument that is being made is that if the state wishes to assert its authority in an area of life in the gray area between purely private and purely public conduct, then it must assume equivalent responsibility for the conditions in which that area of life occurs. This is not, therefore, an argument that would be sufficient to demonstrate the necessity of policy outcomes that many critics of liberalism seek. This is also not an argument that would secure the untramelled autonomy of women during pregnancy, even to the extent that women (or men) have genuine autonomy during other periods of life. Where the activities involved are not purely self-regarding, the state’s willingness to undertake responsibility for the provision of the resources that are required to achieve desirable outcomes does, by my argument, grant the state greater authority to regulate personal behavior. If authority requires responsibility, then it is equally the case that a willingness to assume responsibility justifies some measure of authority.
The argument that I have presented comes from within the tradition of liberalism. Like Fineman and Gavison, I continue to insist that there are areas of activity that are purely self-regarding - or rather, that there are areas of life that are not other-regarding in ways that we should recognize for purposes of defining legal and political categories. That means that we cannot permit the state to justify its coercive powers by appealing to the harms of patterns of preference- and personality-formation. The inculcation of undesirable or even oppressive attitudes, or the reinforcement of cultural norms whose consequences when generalized into practice may be to limit the equality of access or opportunity. We must insist that the state justify its actions by harms to persons as they exist, not in terms of the failure of persons to be as perfect as they might otherwise be, in accordance with some idealized standards of citizenship.

There are some significant additional advantages to the approach that I have outlined here. For one thing, this may be an approach that moves us away from the strangely adversarial conception of the relationship between state and pregnant or potentially pregnant women that has come to characterize discussions of the issues raised here.121 The “right to privacy” cannot encompass conduct by a pregnant woman that will result in harm to a subsequently born live child, but the absence of a right to privacy is not an automatic assumption of public authority. If the state wants to exercise legitimate authority over the conduct of pregnant women, then it must establish its claim to that political terrain by the extension of legal protection and the expenditure of capital - financial, political, and social - to shape the environment of pregnancy in ways deemed to be desirable.

In addition, placing the burden of justification on the state -- in a way that recognizes the lessons of liberalism’s critics – reduces the cognitive disconnect between the legal and political

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121 Minow, 1985.
discourses of privacy. Where the legal principle legitimating government action becomes
decoupled from the political understanding of the voting public, the two discourses talk past one
another. The issue should not be restricted to whether Deborah J.Z. is so undesirable a member
of society that she should be deemed to have forfeited rights that she might otherwise have had.
The issue ought to be whether the political community has expressed itself in favor of extending
public authority into this area in the first instance. The model of an affirmatively defined public
sphere proposed here does not necessarily secure a particular outcome in that debate, but it
reconnects the legal vocabulary in which outcomes can be defended or assailed to the political
vocabulary of legitimate government action. An individual’s right can be taken away from an
unpopular set of individuals; this is a legal issue that has no necessary political resonance. The
definition of the scope of public concern, however, is not so easily confined in a way that avoids
political scrutiny. A public debate about laws conducted in terms of the meaning of “public” as
well as “private” restores the element of generalizable rule-making that characterizes the
political, as opposed to the adjudicatory, conception of law in a liberal constitutional system.

An argument of just this type is implicit in Justice Kennedy’s words in Lawrence v.
Texas: ““In our tradition the State is not omnipresent in the home. And there are other spheres of
our lives and existence, outside the home, where the State should not be a dominant presence.” 122
A key element of Kennedy’s discussion was an appeal to the harm principle. “The statutes . .
.seek to control a personal relationship that, whether or not entitled to formal recognition in the
law, is within the liberty of persons to choose without being punished as criminals. This, as a
general rule, should counsel against attempts by the State, or a court, to define the meaning of the
relationship or to set its boundaries absent injury to a person or abuse of the institution the law

122 Lawrence, 539 U.S. 558, 558 (2003).
protects.”  The fragility of a public-private divide grounded in the harm principle could not have been more perfectly illustrated than it was in Kennedy’s subsequent opinion in Gonzales v. Carhart, in which he recognized the “harm” of a risk of future regret on the part of women as a proper justification for state regulation of abortion without abandoning the previous recognition of that field as contained within the sphere of “privacy.”  Moreover, Kennedy’s argument in Lawrence considered the easiest case for privacy, the one least vulnerable to disruption by an ecological model of harms. If there is any activity, after all, that satisfies the Millian standard of “self-regarding” conduct, sexual practices conducted in private by consenting adults is most likely it. The question that needs to be asked is what other forms of state presence “in the home” are within or outside of the legitimate scope of an affirmatively defined scope of “public” concern. For that conclusion to be justified, the identification of a harm cannot be sufficient if the liberal ideal of privacy is to be meaningfully expressed in law.

V. Some Objections, and Responses

There are a number of objections to the approach that I have proposed immediately present themselves. Why not remain within the rights/harms model and find a way to distinguish

\[123\] Id., at ___ (emph. added).
\[124\] In Gonzales v. Carhart, 127 S.Ct. 1610, 1634 (2007), Justice Kennedy wrote “Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” As a separate justification for Congress’ action, Kennedy also identified the possibility that the reputation of the medical profession might be at stake. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Id., at 1635. This analysis demonstrates the inherent weakness of the harm principle as a basis for the protection of privacy that was implied in
among ecological harms by classifying certain harms as “public” or “private” and then proceed
on that basis? Alternatively, following Martha Fineman we could abandon the search for a
public/private divide framed in terms of areas of life or activity, and instead reason from public
purposes. Or we could abandon the search for an overarching theory altogether. That is, we
could accept that the consequences of recognizing ecological harms are that we are forced to
recognize the irreducibly fluid nature of the categories “public” and “private,” abandon both the
public/private divide and the idea of a right to privacy, and leave it to the political process to
determine when state interventions are appropriate, subject of course to background
constitutional requirements of equal protection and due process.

None of these solutions is satisfactory from the perspective of an observer who is
committed to even the most basic conception of liberalism. The first argument, that we can find
limitations on state action based on the characterization of certain categories of harm as beyond
government cognizance, is precisely the argument that I have described as unstable. What, in
principle, prevents governments from accepting Martha Nussbaum’s invitation to recognize the
harm of “malformed preferences,” and thus justifying intrusion into every aspect of life?125 By

125 In a recent article in the American Political Science Review, for example, Cory
Bettschneider extends the idea of public reason to relations within the family. “[T]o become
publicly justifiable, private beliefs that clash with public reason must largely remain at the level
of conscience; they should not influence publicly relevant action, including . . . certain actions
within the family. Indeed, to be publicly justifiable, these beliefs should not be communicated to
children, for instance, for fear of affecting them.” Bettschneider, “The Politics of the Personal: A
proceeds from an assumption that the existence of a sphere of privacy must be publicly justified
in terms of its contribution to the goal of creating desirable citizens. This is the opposite, of
course, of the argument I have been making for the burdens of public justification. On the other
hand, Bettschneider does not necessarily envision the extension of the coercive power of the
state in all cases. Instead, the argument is essentially normative: “the values of free and equal
citizenship, including the requirement of reasonable treatment, should serve as a way of judging
justice within the family . . . Even in instances in which the state should not directly intervene to
situating the discussion squarely within the dominant tradition of liberalism and focusing on the necessity of justifying state action, the approach that is described here is less prone to manipulation in favor of policy outcomes that might be favored by one group but not by another. To put the matter bluntly, whether the majority of a legislature are Christian conservatives or feminist progressives, the burden should remain on those legislators to justify their exercise of authority, and that burden should be especially difficult – if not impossible -- to meet where the state seeks to intervene in the processes of psychological development. The suggestion that we insist on justifications grounded in public purposes similarly presents no meaningful limit on state authority; the whole point of the discussion in this article has been that the very traditional public purpose of preventing harms, in its modern understanding, is what renders the idea of privacy-based limitations on the state effectively nugatory in the first place. The cases cited above concerning the regulation of pregnancy provide ample evidence that legislatures, if not limited by some side constraint, will gleefully seize authority over an ever-expanding range of activities.

By linking responsibility for positive action to authority for intervention, the system of incentives is fundamentally changed. The costs involved in occupying very broadly defined fields of activity are prohibitive. Even if the field is defined more narrowly, one aspect of

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126 CITE to Nozick
“occupation” that deserves mention is that it is an either/or test: one cannot argue that a state has occupied a field with respect to certain classes of persons, or in certain situations. One can, to be sure, debate the characterization of the relevant field; I will return to that point in a moment. But both the tendency of governments to intrude into the decision-making of pregnant women and the tendency of government to impose its burdens only on those who lack the resources to seek private alternatives run contrary to the burden of establishing the public status that I have described here. No state, for example, will ever seriously undertake to regulate the diet of all pregnant women within its confines - or at the least, any such regulation would not last long! - for the very good reason that the vast majority of the population would regard such intrusive regulation as far beyond the legitimate reach of the state’s authority. It is nearly as unlikely that any state would undertake to ban smoking in all private homes, rather than those that have a special relationship with state control. The worst nightmare scenarios in which government would seek to exercise totalitarian control over the lives of pregnant women may be consistent exercises of legal logic, but they are political absurdities. By contrast, without something like a burden of establishing public authority by occupation of a field, politically there is no great objection -- and there may indeed by capital to be gained -- by publicly prosecuting isolated individual women such as Deborah J.Z. in Wisconsin.

There are some significant additional advantages to the approach that I have outlined here. For one thing, this may be an approach that moves us away from the strangely adversarial conception of the relationship between state and pregnant or potentially pregnant women that has come to characterize discussions of the issues raised here. In addition, placing the burden of justification on the state in a way that recognizes the lessons of liberalism’s critics reduces the

\[127\] Minow, 1985.
cognitive disconnect between the legal and political discourses of privacy. Where the legal principle legitimating government action becomes decoupled from the political understanding of the voting public, the two discourses talk past one another. The issue should not be restricted to whether Deborah J.Z. is so undesirable a member of society that she should be deemed to have forfeited rights that she might otherwise have had. The issue ought to be whether the political community has expressed itself in favor of extending public authority into this area in the first instance. The model of an affirmatively defined public sphere proposed here does not necessarily secure a particular outcome in that debate, but it reconnects the legal vocabulary in which outcomes can be defended or assailed to the political vocabulary of legitimate government action. An individual’s right can be taken away from an unpopular set of individuals; this is a legal issue that has no necessary political resonance. The definition of the scope of public concern, however, is not so easily confined in a way that avoids political scrutiny. A public debate about laws conducted in terms of the meaning of “public” as well as “private” restores the element of generalizable rule-making that characterizes the political, as opposed to the adjudicatory, conception of law in a liberal constitutional system.

There are three additional obvious objections to the approach that I have recommended. First, it will be argued that for areas of conduct such as drinking while pregnant that fall in the middle category of harms (neither direct nor purely ecological), my argument does not actually prohibit state action in the way that a claim to an absolute right to privacy might. Second, the complaint may be raised that in formulating the rule I have proposed I have not focused specifically on the tendency for laws relating to pregnancy to be applied most heavily against woman of color and poor women. Third, it will rightly be pointed out that I have been entirely too glib in my characterization of the relevant “field” to be occupied in the case of Deborah J.Z.;
why should that field be defined as “prenatal health” rather than, simply as “pregnancy,” “pregnant drinking,” or “the conduct of pregnant women in bars”?

The first objection is that the standard that I propose does not present an absolute bar to state regulation. This is correct. To take only one example, it is not clear that anything I have argued here requires abandoning references to exposure to second-hand smoke in child custody cases, since in those situations the state has arguably “occupied the field” of child welfare by virtue of its authority to determine the best interests of the child, and has done so through the voluntary agreement of the parents to submit their dispute for governmental resolution. The “right to privacy” cannot encompass conduct by a pregnant woman that will result in harm to a subsequently born live child, but the absence of a right to privacy is not an automatic assumption of public authority. If the state wants to exercise legitimate authority over the conduct of pregnant women, then it must establish its claim to that political terrain by the extension of legal protection and the expenditure of capital - financial, political, and social - to shape the environment of pregnancy in ways deemed to be desirable.

On close inspection, both the objections to the effect that the approach I have outlined does not present an absolute bar to state intervention and that it does not focus specifically enough on the problems of governments targeting poor women and women of color, are cases of “praising by faint damnation.” It is quite true that I have not argued that the harm principle should be entirely displaced in favor of absolute privacy rights. But the entire point of this argument begins with the recognition of the fact that an ecological model of harm and causation has rendered the protections of “privacy rights” essentially nugatory in contexts where indirect harms are concerned. Worse, since “rights” may be sacrificed by their holders, the very language of rights makes unequal interventions inevitable, since as the Ferguson case illustrated
it is those women who are required to make use of publicly funded health facilities who may be required to submit to the surveillance of government agencies.

In contrast, placing the burden on the state to demonstrate the public-ness of a particular field of conduct places both a practical and a theoretical barrier to state action. As a practical and political matter, it is reasonable to suppose that few governments will be willing to take on the burden and expense of occupying the field of pre-natal health, and consequently that few governments will be willing to meet the burden of justifying attempts to regulate conduct on that basis. By contrast, at present there is essentially no costs involved in enacting legislation of the kind adopted in Wisconsin, other perhaps than the loss of support from exceptionally committed feminists among a politicians constituents. In the rights/harms model of liberal lawmaking, merely reciting the existence of an ecological causal link between conduct and some future consequence is sufficient to justify state intervention. But ultimately, the answer to the objection is simpler than that: there are cases in which the state is justified in intervening to prevent conduct by a pregnant woman on the grounds that it poses a risk of harm to a future live child. Judith Jarvis Thompson has proposed a famous analogy in order to illuminate the issues at stake in the debate over the right to abortion. She asks us to imagine that we are connected by intravenous tubes to a famous violinist, and that unless we continue to share our blood with him, he will die. No one, she insists, would argue that the law should be able to compel us to continue to remain attached to those tubes against our will.128 The analogy may or may not be persuasive for the case of abortion, but in any case it does not do very much to inform the case of pregnancy. Perhaps there would not be an argument for compelling us to remain attached to the violinist, but that does not mean that we would be justified in deliberately injecting ourselves

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with poison while we were so attached. In that situation the libertarian defense “I am only harming myself” rings hollow; I and the violinist occupy a single hematological ecology. In other words, it is not possible to put the genie of scientific knowledge back into its bottle. Unless we are willing to abandon the idea that governments have a mandate to protect us from ecological harms at all and return to a legal intellectual world of the late 19th century, we have no choice but to recognize that there will be justifications for intervention in cases that might at first glance not seem obvious. Including the behavior of pregnant women.

In rights talk, interestingly, the converse proposition is well recognized. That is, when the state assumes responsibility for something, it also claims new areas of authority. Insofar as a limitation on state action depends on the identification of a harm as “private,” the restriction on state action is subject to suspension whenever the state is involved in the provision of services, with the result that “privacy” turns out to be a protection available only to those who are economically independent; this is precisely the problem that was observed in Ferguson. And since dependency on publicly provided services turns out to be correlated with class, gender, and racial status, this innocuous-seeming principle – that where the government provides a service it should be entitled to demand that recipients give up certain claims to privacy – turns out to be a vehicle for an enormous range of inequalities. These unequal outcomes are the result a model of state intervention that fails to ask whether a field has been occupied rather than a few targets of opportunity selected for intervention.129

The most substantive objection has to do with the definition of “fields” that the state is called upon to “occupy” in order to justify its actions. Earlier I proposed that in order to justify

129 It also must be remembered that this discussion does not take place in a vacuum, but rather against a background of other, well-established constitutional principles that limit the exercise of state authority.
the regulation of Deborah J.Z.’s behavior, the State of Wisconsin should have met its burden of asserting responsibility by occupying “the field of fetal health.” It can equally be argued, however, that the “field” at issue is the consumption of potentially harmful substances by pregnant women, or “conduct during pregnancy” generally. And in each of these definitions, there are responsibilities that the state would be argued to undertake as a consequence of its exercise of regulatory authority: assuring access to prenatal health care, assuring the availability of healthy foods and a healthy environment for pregnant women, or assuring the existence of conditions that make the kinds of choices the legislature deems desirable practicable in the first place. In other words, even if one imagines a world in which each and every legislator was persuaded to conceive of the public-private divide in the manner that I have described, the policies that would result cannot be known in advance. Socially conservative legislators might be entirely willing to embrace the burden of occupying a field -- by providing a system of regulation combined with the affirmative provision of resources -- in order to address a “harm” that a more libertarian observer might think it better to leave unaddressed. And in any number of other ways, the actual outcome of a policy debate couched in the terms that I have proposed might not please me, or another reader. But once we recognize the weaknesses of the rights/harms model as the basis for a vocabulary in which to describe the division between public and private, we should equally recognize that it is the right debate to have.