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The Domain of Reflexive Law

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REVIEW ESSAY

THE DOMAIN OF REFLEXIVE LAW

REGULATING INTIMACY: A NEW LEGAL PARADIGM. By Jean L. Cohen. Princeton: Princeton University Press, 2002. Pp. 277.

*Reviewed by Michael C. Dorf**

In Regulating Intimacy: A New Legal Paradigm, *Jean Cohen synthesizes liberal and egalitarian justifications for a right to sexual privacy. Cohen proposes that regulation of sexual privacy, where permissible, be accomplished through "reflexive law." This Review Essay expresses broad sympathy for Cohen's project, while suggesting an expansion. In Cohen's reflexive paradigm, the sovereign in its lawmaking capacity sets general standards that steer primary actors but simultaneously leave them with a substantial zone of freedom in which to engage in self-regulation. Although it permits substantial autonomy, Cohen's conception of reflexive law is essentially top-down. This Review Essay offers an amended account of reflexive law in which data drawn from experience at the relatively local level are continually refined and transmitted to the relatively central standard-setter, which uses the data continually to update the standards all must meet. This amended account is accordingly both top-down and bottom-up, and for that reason it may be particularly well-suited to contexts—such as regulation of issues touching on sexual privacy—where the simple announcement of a controversial legal norm would meet with substantial opposition.*

INTRODUCTION

If a legal scholar were to write a book about the constitutional right of privacy, the regulation of same-sex intimacy, and the law of sexual harassment, she would likely focus on questions of legal interpretation. Can one infer a right of sexual intimacy from the open-ended language of the Fourteenth Amendment and the Bill of Rights? Are distinctions drawn on the basis of sexual orientation analogous or equivalent to distinctions based on sex, and thus presumptively invalid?[1] Does the federal statutory

* Professor of Law, Columbia University School of Law. This essay is loosely based on an oral presentation, on which I received very helpful comments from Jean Cohen, Reva Siegel, Susan Sturm, and Kendall Thomas. Scott P. Martin provided excellent research assistance and Bela August Walker oversaw a painless editing process.

1. Compare Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915, 915–23 (1989) (providing an affirmative answer), Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 201 (1994) (same), and Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 18–23 (1994) (same), with George W. Dent, Jr., The Defense of Traditional Marriage, 15 J.L. & Pol. 581, 608–14 (1999) (providing a negative answer), and Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. Rev. 1, 83–88 (same).

proscription of workplace discrimination "because of . . . sex"[2] apply to a superior's unwanted sexual advances toward his subordinates? And most crucially: Do courts act legitimately in providing affirmative answers to these questions, given societal disagreement about the underlying moral questions?

Political scientist Jean Cohen has written a book about the constitutional right of privacy, the regulation of same-sex intimacy, and the law of sexual harassment, but these are not her questions. Instead, Cohen locates these issues within a theoretical debate between liberals and welfarists, a term she uses to encompass civic republicans, feminists, and egalitarians more broadly. Liberals rely on the public/private distinction to secure a zone of personal autonomy that the state may not enter, but, welfarists complain, in doing so, liberals license the abuse of private power. The marital rape exemption dramatically illustrates how one man's liberty can be another (wo)man's subordination.[3] Yet many egalitarians also recognize the value of limiting the state's ability to dictate the terms of intimate relationships. Liberals and egalitarians alike think the state should be able to prohibit marital rape but not same-sex intimacy. The regulation of intimacy is thus a site of contestation between the sometimes conflicting claims of liberty and equality.

Cohen accepts the validity of what lawyers and legal scholars would call the legal realist critique of liberal rights. She writes: "[I]t seems paradoxical that privacy and autonomy rights are being asserted as fundamental in American jurisprudence just when their supporting philosophical arguments seem no longer convincing."[4] Privacy, like property, is not a presocial, prepolitical natural right, but the product of historically contingent, dynamic social processes. Rights to privacy, like rights to anything else, are not simply out there; they must be constructed.

In *Regulating Intimacy: A New Legal Paradigm*, Cohen turns the postmodern critique of rights on its head. So what that privacy rights must be constructed, she says. We can agree with Jeremy Bentham that prepolitical rights are "nonsense upon stilts,"[5] and still deem rights valuable. Accordingly, Cohen offers a "constructivist" justification of a right of privacy, i.e., an account that is "constructed" from our situated experience and reflections.[6] "We must reason reflectively and constructively," Cohen writes, "in full awareness that it is we—not nature, tradition, or

2. 42 U.S.C. § 2000e-2(a)(1) (2000).

3. See Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 101 (1987) ("[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor . . . .").

4. Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm 7 (2002) [hereinafter Regulating Intimacy].

5. Jeremy Bentham, Anarchical Fallacies, *in* 2 The Works of Jeremy Bentham 501 (Edinburgh, John Bowring pub., W. Tait ed., 1843) (1824).

6. Regulating Intimacy, supra note 4, at 52–57.

God—who give ourselves and interpret basic rights and the laws that construct and protect our autonomy."[7]

Although subtitled "A New Legal Paradigm," *Regulating Intimacy* actually offers two new legal paradigms. In addition to substituting constructivism for what she deems antiquated naturalism in justifying and defining privacy rights, Cohen offers a new paradigmatic *form* of regulation of intimacy and other activities: reflexive law. Cohen uses this term to mean regulation of self-regulation, as opposed to traditional command-and-control regulation. Regulation of self-regulation is reflexive because the subject (regulation) "reflects" the object (self-regulation). In a chapter that ably explains and critiques various continental versions of reflexive law, Cohen advances her own particular account of reflexive law,[8] which, she contends, can sometimes be used to ease the tensions between liberty and equality that arise in the regulation of intimacy.[9]

Cohen "favor[s] publicly articulated general legal norms whose content, however, is developed on the local level through institutional (substantive and procedural) innovation oriented toward effective, fair problem solving."[10] This version of reflexive law is quite similar to what Charles Sabel and I have called "democratic experimentalism,"[11] and, not surprisingly, I am sympathetic to Cohen's project. Her discussion of reflexive law in the context of the regulation of sexual harassment shows how reflexive law allows individuals voice in the application and elaboration of general norms such as gender equality.

Cohen does not think that reflexive law is a new legal paradigm in the sense that it will or should replace traditional direct regulation. Rather, she claims that the emerging reflexive law paradigm can be used to supplement other forms of regulation. How should courts, legislatures, and the public choose between reflexive law and other forms of legal regulation? By using the same sort of processes that reflexive law itself employs. In other words, these actors can articulate general, corrigible norms of norm selection, whose precise content will evolve over time in response to practical experience. In this sense, Cohen contends that reflexive law is not just a new paradigm of regulation but also a "metaparadigm" for selecting among forms of regulation.[12]

This Essay elaborates and evaluates Cohen's claims for constructivism and reflexive law. Part I describes and analyzes Cohen's constructivist

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7. Id. at 73.

8. Id. at 151–79.

9. As I explain below, Cohen uses the term reflexive law in two ways. Broadly, she describes any system of regulation that leaves regulated actors with a zone of self-regulation as reflexive. More narrowly—and more usefully—she also uses the term to connote regulation by goal-setting to encourage local problem solving and norm internalization. See infra text accompanying notes 33–35.

10. Regulating Intimacy, supra note 4, at 17.

11. Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 267 (1998).

12. Regulating Intimacy, supra note 4, at 5.

justification of a right of sexual intimacy. Part II examines her account of reflexive law. Part III briefly explores a hypothesis suggested, but not expressly articulated, by *Regulating Intimacy*—that reflexive processes can be used to implement morally divisive norms in ways that may make them more acceptable to those who would otherwise be inclined to reject such norms. I suggest that reflexive law can be employed to make rights revisable rather than permanent, and that conceptualizing rights as provisional would draw some of the sting of recognizing rights in the face of moral opposition.

I. A CONSTRUCTIVIST JUSTIFICATION OF A RIGHT TO SEXUAL INTIMACY

Cohen's constructivist justification of a constitutional right of privacy aims to preserve the core right while jettisoning its traditional association with patriarchy, a strong public/private distinction, and natural rights. In my view, she succeeds in showing the possibility of (re)constructing privacy along these lines, although she is vulnerable to a different criticism: namely, that the particular conception of the right of privacy that she constructs will not have universal appeal.

Cohen offers her constructivism as a solution to the apparent conflict between liberty and equality. Cohen proposes to resolve the tension by formulating a right of privacy as a "fundamental right to equal liberties."[13] Like Ronald Dworkin, Cohen aims to show that "liberty and equality are, in general, aspects of the same ideal, not, as is often supposed, rivals."[14] Thus, there is no inconsistency in granting consenting adults the right to use contraception or to choose same-sex partners while denying a husband's right to rape his wife. The former are examples of freely chosen decisions, while the latter is an expression of freedom for the man but subordination for the woman, and thus fundamentally inconsistent with the notion of *equal* liberty for all.

Cohen's chapter on sexual orientation, for example, takes aim at the argument that by claiming a right to privacy, sexual minorities relegate themselves to the closet.[15] If privacy only protects a right to be left alone, privacy's critics contend, there is no correlative obligation on the government to accept sexual minorities as full members of *public* society. On this reasoning, privacy's champions have no capacity to criticize laws such

13. Id. at 53. Cohen takes this formulation from Jürgen Habermas. See Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 82–31 (1996).

14. Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 29 (1996).

15. See, e.g., Eve Kosofsky Sedgwick, Epistemology of the Closet 71 (1990) (declaring that "[t]he closet is the defining structure for gay oppression in this century"); Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1454–56 (1992) (explaining that in relying on privacy, "'the closet' is less a refuge than a prisonhouse" for gay men and lesbians).

as the federal statute requiring that gay and lesbian members of the armed services conceal their identities.[16]

Cohen disagrees. A right of privacy, she insists, is not—or at least need not be—a "duty of privacy."[17] Indeed, she reminds us that what makes "don't ask, don't tell" viable is precisely the fact that the Supreme Court, in *Bowers v. Hardwick*, *rejected* a right of privacy encompassing same-sex intimacy.[18] Had the Court recognized such a right, the military policy could not be justified on the ground that it aims at revelations of proscribable conduct, for the underlying conduct—"a homosexual act or acts"[19]—would not be proscribable. In such a counterfactual world, a military policy of excluding gays and lesbians would have to be justified by reference to status, and that would raise serious equality questions.[20] As Justice Scalia's dissent in *Romer v. Evans*[21] underscores, the failure to extend privacy protection to sexual minorities complicates rather than assists the argument for their equal status.

This is not to say that it is logically impossible to affirm a principle of equality for sexual minorities without also recognizing privacy protection for "homosexual conduct." The *Romer* majority clearly thought the two principles compatible, as did some courts and commentators before *Romer*.[22] But Cohen is plainly right that *Hardwick* stood as an obstacle to be overcome in making the equality argument, not as a building block in that argument. More broadly, for Cohen, privacy and equality, properly conceived, are complementary, not antagonistic.[23]

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16. Subject to affirmative defenses, federal law requires discharge of members of the armed services who engage (or attempt to engage) in a "homosexual act or acts," who state that they are homosexual or bisexual, or who marry or attempt to marry a person of the same sex. 10 U.S.C. § 654(b)(1) (2000).

17. Regulating Intimacy, supra note 4, at 89.

18. 478 U.S. 186, 190–91 (1986).

19. 10 U.S.C. § 654(b)(1)–(3).

20. Regulating Intimacy, supra note 4, at 91.

21. 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.").

22. See Meinhold v. United States Dep't of Def., 123 F.3d 1275, 1277 (9th Cir. 1997) (invalidating gay armed services member's discharge under the predecessor policy to "don't ask, don't tell"); Watkins v. United States Army, 875 F.2d 699, 709–11 (9th Cir. 1989) (en banc) (same, invoking estoppel principle); Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163–64 (1988) (arguing that *Hardwick* did not foreclose recognizing sexual orientation as an illegitimate basis for discrimination because the equal protection principle is forward looking while the doctrine of substantive due process has been understood as backward looking). But see Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 116 (1991) ("[A]s a matter of . . . strategy, Sunstein's proposal is a good one. As a matter of constitutional theory, however, his approach seems somewhat dubious. It is hard to imagine a defensible approach to the two clauses that does not take greater account of the inseparability of liberty and equality.").

23. Regulating Intimacy, supra note 4, at 92–94. The Supreme Court will soon decide whether *Hardwick* remains good law. See Lawrence v. Texas, 41 S.W.3d 349 (Tex. App. 2001), cert. granted, 123 S. Ct. 661 (2002). Should the Court overturn *Hardwick*, the

Cohen makes a parallel maneuver with respect to the state action doctrine. The decision to proclaim sexual freedom as a freedom from government interference, she argues, does not necessarily prevent recognition of a right, under some circumstances, to government assistance. As she puts it, "Articulating [privacy] rights as negative liberties when appropriate, as rights against the state, does not lock one into the liberal legal paradigm."[24] The key words here are "when appropriate," for in Cohen's constructivism, rights are always constructed, never taken for granted. Accepting the legal realist critique of natural rights, for Cohen, means recognizing that state action is omnipresent. We can construct a right to abortion that includes a right to public funding of abortion if we deem that decision appropriate. Or not. It is up to us.

Ah, but there's the rub, for who are we? *Regulating Intimacy* often portrays modern legal doctrine governing sexual intimacy as responding to the dramatic changes in the status of women over the last century, but the book is not primarily a work of descriptive sociology. It sets forth a normative argument for, among other things, a right to privacy. And the public at large comprises the audience for that argument. Thus, the "we" who must construct our rights includes the entire political community.

Moreover, the right to privacy Cohen champions is not merely urged as a matter of policy. She envisions it as an essential precondition for securing fair terms of social cooperation. Accordingly, it would not be sufficient for Cohen's prescription to carry by a fifty-one to forty-nine percent vote. She must secure universal assent. That burden, of course, is impossible to meet, which is why Cohen settles for "the criterion of reasonable nonrejectability,"[25] rather than actual nonrejection.

It is not entirely clear how to assess arguments for reasonable nonrejectability. In any polity that is not trivially small, it will be impossible to secure unanimous agreement on any set of fundamental political principles. Two courses seem most fruitful. First, one could seek principles upon which there is general consensus, understood as something more than a bare majority but less than unanimity. Second, one could couch one's arguments, as Cohen does, in terms of nonrejectability, where nonrejectability itself depends upon acceptance of higher-order principles, for otherwise any proposition is, in principle, rejectable by someone.

Cohen builds her argument on "what we now think it means to be free as a person and an equal citizen."[26] Let us grant that, stated at this

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decision would almost certainly rest on a view about discrimination based on sexual orientation, even if the decision were formally to rest on an elaboration of the meaning of liberty rather than equality.

24. Regulating Intimacy, supra note 4, at 75.

25. Id. at 53.

26. Id. at 73. Although the American Constitution's liberty-bearing provisions generally attach to "persons" rather than to the narrower category of "citizens," Cohen appears to use the terms interchangeably, as will I for these purposes.

level of abstraction, this principle is widely accepted. There remains profound disagreement about what liberties are required to be a free and equal citizen.

Some of that disagreement can perhaps be dismissed as insincere. People who champion a marital rape exemption do not really think that women should be treated as equal citizens, even if they rationalize their position on the ground that such an exemption can be written in formally gender-neutral terms.

But not all disagreement can be so readily dismissed. Some opposition to abortion is rooted in a belief that women should occupy a subordinate role or in purely religious considerations that may not be an appropriate basis for legislation. However, it is certainly possible to believe, on secular grounds, that abortion should be proscribed out of concern for the wellbeing of the fetus, notwithstanding the insult to sex equality. After all, even Cohen thinks that "rights are not absolute trumps; they are mechanisms that trigger inquiry into the justification for governmental decisions."[27] Certainly there can be reasonable disagreement about the point in pregnancy (if any) at which the interest in fetal life blossoms into a sufficient justification for an abortion prohibition.

Nor is abortion a special case. The state routinely prohibits adultery, polygamy, and consensual nonprocreative adult sibling incest. With respect to each of these practices, there is a plausible prima facie claim for inclusion within the right of privacy, but also a plausible argument for overcoming that right. Adultery might be prohibited as a means of giving effect to a right to marriage (at least where the parties agree in advance to the prohibition); polygamy can be seen as inherently exploitative (although not without assuming false consciousness); and nonprocreative adult sibling incest might be proscribed as a prophylactic measure to reinforce a taboo that protects the health of offspring (although it is hardly clear that the taboo requires official enforcement). Can arguments to include or exclude any of these practices in a constitutional right of privacy fairly be characterized as nonrejectable?

Given the nature of the debate, nonrejectability is probably too strong a criterion for inclusion within the right to privacy. Perhaps Cohen would do better to follow the alternative strategy I suggested above—to root protection for the specific entailments of a right of privacy in consensus. If that is the goal, then her argument should be understood not as a meta-argument for the nonrejectability of her claims but as a simple effort to persuade people to adopt her understanding of the right of privacy. Despite her talk about reasonable nonrejectability, understanding her project in this way would better jibe with her democratic sentiments—the idea that "we" must collectively construct our rights.

However, *Regulating Intimacy* is unlikely to change many minds. For one thing, it is a distinctly academic book, rewarding though sometimes

27. Id. at 74.

difficult going, even for other academics. More fundamentally, while Cohen's response to egalitarian critics is interestingly original, her argument for the particular entailments of the right to privacy—i.e., the argument that takes aim at anti-abortion traditionalists and the like—is rather familiar. In discussing abortion, for example, she emphasizes the body: "It should be obvious that to force a woman to endure an unwanted pregnancy is to partially impose an identity upon her—the identity of pregnant woman/mother."[28] No doubt the point is obvious by now,[29] but, if that is so, then stating it again will not persuade those who nonetheless think that there is a sufficient justification for imposing an identity on women.

To be clear, *Regulating Intimacy* makes important points in what is best understood as an intramural debate among left-leaning liberals and egalitarians. It has substantially less to say in favor of the right to privacy to those outside that debate.

II. Reflexive Law

Cohen's invocation of reflexive law distinguishes *Regulating Intimacy* from other efforts to synthesize liberal and egalitarian commitments. What is reflexive law and what work does it do in Cohen's approach?

Let us be clear about what reflexive law is not. In her constructionist mode, Cohen emphasizes that we, the polity, choose our rights, and, therefore, we must be *reflective* about what rights we want and what legal forms we want to instantiate those rights. However, Cohen does not mean reflexive law as a synonym for reflecting, i.e., thinking hard, about the choice of rights and forms of regulation. She writes "that reflection (knowledge) and self-reflection (self-knowledge and thinking about thought) are different from reflexivity even if self-reflection is one form of the latter."[30] Reflexivity is Cohen's general term for a circumstance in which the subject mirrors (reflects) the object. Thus, thinking about thought is reflexive thought, cleaning a vacuum cleaner (my example, not Cohen's) is reflexive cleaning, and regulation of regulation is reflexive law.

Cohen's account of the general right of privacy makes that right reflexive in a limited sense. The law governing intimacy regulates what happens inside intimate relations, and the actors involved in such relations govern, or regulate, themselves. For example, in a chapter on family law, Cohen criticizes traditional conceptions of the marital unit as an entity (generally equated with the husband), classical liberal conceptions of marriage as purely voluntarist and contractual, and communitarian vi-

28. Id. at 61.

29. See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 788 (1989) ("[L]aws against abortion . . . confine, normalize, and functionalize identities. . . . Anti-abortion laws produce motherhood.").

30. Regulating Intimacy, supra note 4, at 166.

sions that, in her view, overreact to the liberal model in advocating a return from contract to status.[31] Cohen proposes instead that the state regulate the forms and terms of marriage, while reserving to individuals who decide to marry substantial ability to govern themselves. Though bounded by the constraint of equal liberty, in Cohen's "understanding the constitutionalization of individualized privacy rights ascribes to the intimate associates themselves the competence to choose the forms in which they pursue happiness and attempt to realize their conceptions of the good of intimacy."[32] Regulation of such an institution is thus regulation of self-regulation, or in Cohen's terminology, reflexive.

However, Cohen's constitutional right of privacy is reflexive in only a limited—and not especially interesting—way. Regulation of any institution in which the regulated actors exercise some power to regulate themselves is, on Cohen's criterion, reflexive. And since only totalitarianism regulates everything, leaving persons and institutions with no choices, it would appear that in a free society, all regulation is regulation of self-regulation. What, then, is the point of applying the term reflexive law to any particular field of regulation?

The point, for Cohen anyway, is to steer a middle path between communitarianism and libertarianism. As against communitarians, Cohen insists on the utility of "rights talk,"[33] while as against libertarians, Cohen insists that rights are not absolute.[34] Yet with the exception of Hugo Black, almost no mainstream American liberal has maintained that rights cannot be derogated if necessary to advance a sufficiently important government objective.[35] Indeed, it has long been blackletter constitutional law that fundamental rights—including the right to privacy—can be overridden when necessary to advance a compelling government interest.[36] Only if one equates the liberal paradigm with rights absolutism does a

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31. Id. at 180–203.

32. Id. at 198.

33. Id. at 72. For a communitarian critique of "rights talk," see generally Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991).

34. Regulating Intimacy, supra note 4, at 74.

35. Whether Ronald Dworkin counts as another exception is an interesting question that I do not address here. Certainly Dworkin's idea that rights are trumps suggests that no mere utilitarian interest suffices to overcome a right. See Ronald Dworkin, Taking Rights Seriously 193 (1977). Yet another of Dworkin's signature ideas—that legal principles (including, presumably, principles giving rise to rights) have weight rather than a simple on/off character, see id. at 26—indicates that rights are derogable, that they can be outweighed.

36. See, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." (citing Roe v. Wade, 410 U.S. 113, 155–56 (1973) (citations omitted))); see also, e.g., Richard H. Pildes, Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 727–33 (1998) (arguing that the more accurate conception of American constitutional law treats rights as subject to being overridden rather than as absolute "trumps").

shift to Cohen's constructivism result in a parallel shift to derogable rights, and only then would the fact that recognizing rights still leaves room for state regulation appear novel. But if one begins with the assumption that rights need not be absolute, then referring to the partial regulation of rights-bearers as regulation of self-regulation, and thus reflexive law, does not distinguish Cohen's paradigm from the prior, liberal one. We are, and have been for quite some time, all champions of reflexive law.

Nevertheless, in her discussion of the law of sexual harassment, Cohen does use the notion of reflexive law in an interesting and novel way. She begins her discussion of sexual harassment law where her discussion of privacy and sexual orientation leave off. Where the first two chapters of *Regulating Intimacy* defend a liberal construct—the right of privacy—against an egalitarian critique, most of Chapter Three defends an egalitarian construct—the prohibition of sexual harassment—against liberal objections.[37] At the end of that chapter, however, Cohen addresses a quite different issue: Where the state chooses regulation of the workplace, what form should that regulation take? She answers this question by pointing to existing law, which, she notes, consists of "federally established incentives to employer self-regulation, conciliation procedures, and a private cause of action,"[38] an ensemble that she calls—you guessed it—reflexive law.

In describing the structure of sexual harassment law as reflexive, Cohen has in mind a departure from what might be called, for lack of a better term, command-and-control regulation. In the latter, where the government perceives a need to intervene in private ordering, it commands an outcome. A prohibition on intentional homicide is a command-and-control regulation, as is a requirement that new automobiles be equipped with airbags. By contrast, a requirement that new automobiles meet a safety performance standard set by representatives of the automobile industry and consumer groups would be reflexive in the way that Cohen has in mind. Government regulates reflexively by setting a general standard to govern self-regulation by the affected actors. (To state this set of examples is to make clear that reflexivity and, as it were, command-and-control-ness, are matters of degree. "Airbag" or even "airbag made of thus and such materials" is itself a general standard in the sense that it does not dictate every last detail of the safety device. But the difference between specific rules and general standards is clear enough that we can pass over this point.[39])

37. Regulating Intimacy, supra note 4, at 125–42.

38. Id. at 149.

39. Another way to put the point: Reflexive law relies on standards rather than rules, but as we know, standard-ness and rule-ness are matters of degree. See Margaret Jane Radin, Presumptive Positivism and Trivial Cases, 14 Harv. J.L. & Pub. Pol'y 823, 828–32 (1991) (explaining that rules and standards are relative terms in the course of arguing that judges are more apt to follow rules when they perceive the moral stakes as low).

In what sense is the law of sexual harassment reflexive rather than command-and-control-ish? The actual requirements of Title VII, as interpreted by the Supreme Court, are quite ambiguous. Although Court doctrine declares it illegal for an employer to demand that an employee submit to a quid pro quo or to create (or tolerate) a hostile work environment,[40] the leading decisions leave open substantial questions of application and scope.[41] Beyond questions of coverage is the matter of employer liability. Most businesses covered by Title VII are large enterprises which can only harass (or perform other acts) through their agents. Under what circumstances is a business liable under Title VII for the harassing acts of its employees? The law provides a reflexive answer: Vicarious liability attaches unless the employer has "exercised reasonable care to avoid harassment and to eliminate it when it might occur."[42] In other words, sexual harassment law operates by regulating employers' regulation of their own workplaces. It is reflexive in an interesting way.

Cohen approves of this form of regulation because of its capacity to induce employers and employees to internalize the legal norm against sexual harassment.[43] And indeed, case studies by my colleague Susan Sturm indicate that some employers have deployed successful systems by integrating harassment prevention and remediation with other operations.[44] Further, because employers shape their harassment policies to meet the unique circumstances of their particular workplaces, the law guides but does not determine their content.[45] Finally, as both Sturm and Cohen observe, vicarious liability realigns incentives. By contrast

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40. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that an abusive work environment can and often will violate Title VII even if it does not "seriously affect employees' psychological well-being"); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–66 (1986) (accepting EEOC interpretation that sexual harassment violates Title VII "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment'" (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (1985))).

41. See, e.g., Katherine M. Franke, What's Wrong With Sexual Harassment?, 49 Stan. L. Rev. 691, 693 (1997) (arguing that existing theories "provide indeterminate and unprincipled outcomes to both central and marginal cases of sexual harassment"). See generally Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998) (arguing that courts' emphasis on sexual desire as a necessary component of sexual harassment prevents extension of claims to cases where harassment occurs because of the employee's sex, rather than because of sexual desire for the employee).

42. Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998) (adding that the employer must also show "that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards"); accord Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (stating the same test articulated in *Faragher*).

43. Regulating Intimacy, supra note 4, at 149–50.

44. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 492–520 (2001) (describing approaches at Deloitte & Touche, Intel, and Home Depot).

45. Id. at 520.

with a command-and-control approach that prohibits designated acts given a particular scienter, under current (reflexive) doctrine, employers are liable for failing to know what is happening under their noses, because ignorance signals an inadequate policy of detection and remediation. The doctrine thereby encourages problem solving.[46]

From her concrete explanation of the reflexive paradigm in the sexual harassment example, Cohen moves several steps up the ladder of abstraction in discussing "The Debate over the Reflexive Paradigm," as she titles Chapter Four, which summarizes and criticizes the leading accounts of reflexivity (under various names). In my view, this chapter obfuscates more than it clarifies, not because of any flaw in Cohen's recounting of the theorists she discusses, but because the theories are unnecessary to understanding the utility of reflexive law.

Cohen's discussion of Gunther Teubner is illustrative. Teubner argues that modern society is so complex and fractured that command-and-control regulation is bound to fail.[47] Reflexive law is thus the best tool for the society in general to influence the individual social subsystems with which the law interacts, because it encourages actors within subsystems to internalize the general norm. Teubner builds on the work of Niklas Luhmann, who used the term "autopoiesis" to describe social subsystems that operate by their own logic relatively autonomously of one another.[48] Teubner and Luhmann acknowledge that distinct subsystems—such as law[49] and work—interact with one another, but they do so from a distance, which is why, in this account, reflexive law is preferable to other forms of regulation that assume greater permeability between subsystems.

Yet if, as Teubner argues, law and other disciplines are autopoietic, one immediately wants to know how these subsystems interact. That is the central dilemma that Teubner's work addresses.[50] And, as Cohen ex-

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46. See Regulating Intimacy, supra note 4, at 148–49 (noting that existing law provides an incentive for over-regulation and proposing an open-ended norm that would encourage problem solving and realign incentives); Sturm, supra note 44, at 482 (arguing that vicarious liability "makes the creation of an administrative problem-solving process a part of an employer's legal obligation").

47. Gunther Teubner, Substantive and Reflexive Elements in Modern Law, 17 Law & Soc'y Rev. 239, 270–85 (1983).

48. Niklas Luhmann, Das Recht der Gesellschaft 30 (1993) (applying the theory of autopoiesis to law). For criticism and exegesis of autopoiesis, see Hugh Baxter, Autopoiesis and the "Relative Autonomy" of Law, 19 Cardozo L. Rev. 1987, 1997 (1998) (arguing that "whether or not one decides to adopt Luhmann's categories and terminology in one's own work, Luhmann's autopoietic theory still can operate as a productive stimulus for legal theory").

49. Significantly, in this account, law itself is an autopoietic subsystem. See generally Luhmann, supra note 48.

50. See Gunther Teubner, After Legal Instrumentalism? Strategic Models of Post-Regulatory Law, *in* Dilemmas of Law in the Welfare State 299 (Gunther Teubner ed., 1986); Gunther Teubner, Law as an Autopoietic System (Zenon Bankowski ed., Anne Bankowska & Ruth Alder trans., 1993); Gunther Teubner, Social Order from Legislative

plains, Teubner has no general solution: "He insists that reflexion processes have to differ according to the specific internal logic of the regulated subsystem."[51] But if that is so, one wants to ask, why do we care that subsystems are uniform in their relative autonomy? If they are diverse in how they respond to external efforts at regulation, we need to know about the details of individual domains of regulation, not about the general phenomenon of autopoiesis.

Cohen agrees. She deems it unnecessary "to buy into the thesis of self-referentially closed, autopoietic subsystems"[52] to appreciate Teubner's argument. Yet, stripped of autopoiesis, Teubner's approach borders on the banal, and, as presented by Cohen, Teubner's stripped-down theory yields no useful prescription. It says, in essence: Life is complicated, so regulate reflexively. But what counts as effective reflexive regulation is also complicated, defying cross-disciplinary explanation.

Cohen addresses other champions of the reflexive paradigm besides Teubner, eventually developing her own synthesis.[53] She makes an important contribution by constructing a firewall between reflexive law and privatization. Acknowledging that reflexive law does afford regulated actors some autonomy, she denies that it is completely indeterminate. Although "[r]eflexive law does not determine specific outcomes . . . it steers self-regulation in the right direction"[54]—i.e., in the general direction set by the polity through its collective legal processes.

Ultimately, however, Cohen shares Teubner's reluctance to generalize about where and how reflexive law may be useful. Enamored of the notion of reflexivity as a "metaparadigm" for selecting among forms of regulation,[55] she leaves for reflexive processes the determination of where to apply reflexive law.[56]

III. A Role for Reflexive Law in Implementing a Right to Sexual Intimacy?

Cohen is plainly right that reflexive law cannot and should not replace command-and-control regulation in all domains. Certainly it would be unwise, for example, to replace the homicide prohibition with a general goal of "respect for human life" to be interpreted and implemented through local participatory processes. Likewise, we would not do well to exchange the Thirteenth Amendment's ban on slavery for a general goal of "encouraging human freedom." Categorical rules have their uses.

Noise? Autopoietic Closure as a Problem for Legal Regulation, *in* State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective 609 (Gunther Teubner ed., 1992).

51. Regulating Intimacy, supra note 4, at 156.
52. Id. at 153.
53. Id. at 157–79.
54. Id. at 178.
55. Id. at 5.
56. Id. at 176.

Despite her caution that reflexive law is not always the most appropriate legal form, by introducing it in the context of a book on the regulation of intimacy, Cohen suggests that it is well suited to addressing many aspects of the regulation of intimacy. However, *Regulating Intimacy* does not explain how reflexive law—of the interesting sort, i.e., as a distinct form of regulation—can provide traction on the problem that takes up roughly the first half of the book: defining the contours of rights to intimacy.

Indeed, there is at least a prima facie reason to think that reflexive law is particularly poorly suited to defining the right of privacy, given the fact of moral disagreement. As Cohen cogently explains, what distinguishes reflexive law from, on the one side, deregulation, and, on the other side, command-and-control, is that reflexive law sets goals or principles that "are broad enough to leave particular ways of conforming with them relatively open and to permit local, contextual development of the content of these norms, but they are not completely indeterminate."[57] One might, therefore, think that reflexive law is best suited to questions as to which there is consensus on broad goals or principles, but uncertainty about means. For example, the reflexive paradigm could be invoked in favor of a performance standard capping emissions of some pollutant rather than specifying a particular technology (such as scrubbers) that must be used to achieve that standard.[58] Similarly, where society has decided to bar workplace sexual harassment (in the United States, by legislative acquiescence to judicial decisions interpreting a statute barring sex discrimination), reflexive law can be used in combination with respondeat superior liability to encourage employers to develop their own procedures for preventing and remedying harassment. However, where there is deep social disagreement—over, for example, whether abortion ought to be a right or a crime—how can reflexive law be of use?

Although Cohen brackets the counter-majoritarian difficulty,[59] she cannot escape the difficulty posed by moral disagreement. Let us grant that the question of how to define a right of privacy is addressed to the public or its elected representatives. How are *they* to cope with the fact that people hold quite different views about the proper dimensions of a right of privacy?

Cohen's discussion of sexual harassment suggests a possible answer. Like abortion, gay rights, and other subjects addressed in *Regulating Intimacy*, the legal prohibition of sexual harassment has been intensely controversial. Popular fiction in the 1990s appealed to the sentiment—no doubt felt by a great many men and some women—that false charges of

57. Id. at 178.

58. See Dorf & Sabel, supra note 11, at 349–51 (describing advantages of performance standards over design standards).

59. Regulating Intimacy, supra note 4, at 8; see also Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962) (examining counter-majoritarian nature of judicial review).

sexual harassment were rampant,[60] while sexual harassment scandals at the highest levels of every branch of the federal government,[61] hinted at widespread failure of even national leaders to internalize the anti-harassment norm. Under such circumstances, reflexive law's ability to engender internalization of the anti-harassment norm—as indicated by Sturm's case studies—is impressive.

Nonetheless, inducing recalcitrant actors to accept a previously-rejected norm is not the same problem as deciding, collectively, what our legal norms should be. What if people are deeply and closely divided on the propriety of the legal norm itself? Reflexive law may not issue firm mandates, but it does require broadly defined goals, and much of the controversy regarding the domain of intimacy concerns goals: whether to treat abortion as a right; whether to privilege heterosexual lives; and so forth.

I want to suggest that reflexive law can be useful even where there is no agreement about goals. To see how that might be so requires an emendation to (or possibly only a clarification of) Cohen's account of reflexivity. For Cohen, as for systems theorists like Luhmann and Teubner, reflexive law is a mechanism by which collective decisions of society as a whole steer other actors and institutions. In my version (democratic experimentalism), it is also a mechanism by which relatively local actors and institutions influence collective decisions.

To make that last point concrete, consider the role of the Equal Employment Opportunity Commission (EEOC) in enforcing the anti-harassment norm. Given the structure of that norm, the EEOC might "take the lead in disseminating the most successful strategies for preventing and combating sexual harassment."[62] To do so would first require the EEOC to be familiar with those strategies, in other words, for it to compile lists of what are sometimes called "best practices." Those best practices, of course, come from the regulated entities themselves. As in the case of discerning the best currently known method of minimizing the production of some harmful pollutant, so with sexual harassment, the role of the central government (or in some cases, nongovernment actor) is to set initial goals, collect data from the regulated entities about what works and what does not, and then disseminate that information back to the

60. See, e.g., David Mamet, Oleanna (1993); Disclosure (Warner Bros. 1994).

61. See generally S. Rep. No. 104-137, at 14 (1995) ("Packwood Report") (accompanying committee resolution to discipline Senator Robert Packwood, in part for "sexual misconduct"); Office of the Indep. Counsel, Referral to the United States House of Representatives pursuant to Title 28, United States Code § 595(c) (Sept. 9, 1998) ("Starr Report"), available at http://thomas.loc.gov/icreport (on file with the *Columbia Law Review*) (presenting findings, inter alia, of misconduct by President Clinton); Jane Mayer & Jill Abramson, Strange Justice: The Selling of Clarence Thomas 6 (1994) (describing conflicting testimony of Anita Hill and Justice Thomas as having "become part [of] an active battlefront in America's culture wars").

62. Michael C. Dorf, The Supreme Court 1997 Term—Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 77 (1998).

regulated entities so that they may learn from each other's successes and failures. The entire process is then repeated, leading to a regime of "rolling" regulation, in which performance standards are continually ratcheted up as local experimentation reveals what is possible.[63]

A rolling regulatory regime is not simply a mechanism for finding ever-better means of achieving fixed ends. It can also lead to the transformation of ends, because human activity rarely proceeds with a single-minded focus. A regime for producing clean air may lead petroleum refiners to include an additive in gasoline that leaches out of storage tanks into ground water, inducing regulators to reformulate their goal as minimizing the combined impacts on air and water.[64] Efforts to implement workplace antidiscrimination norms (including but not limited to the norm against sexual harassment) may raise a distinct but related problem: The background presumption that employers may terminate employees for arbitrary but nondiscriminatory reasons undermines antidiscrimination law by complicating issues of proof; accordingly, a regulator might be led to question and then supplant the employment-at-will rule.[65] More broadly, reflexive law, like the social processes it aims to influence and by which it is influenced, should be conceived in dynamic, multidirectional terms.

Implementing controversial norms—such as the prohibition against sexual harassment or the right to abortion—through reflexive processes can draw some of the sting from the defeat of those who oppose those norms at the level of goals. First, by encouraging local, participatory processes in the implementation of relatively open-ended norms, reflexive law gives citizens some voice in their application, and thus their meaning in context. Second, if, as I have suggested, reflexivity goes both up and down, local participation always has ingredient in it the prospect of changing the principal norm.

To the extent that Cohen's project addresses the question of how a polity chooses its constitutional norms, legal processes seem almost destined to follow the iterative course just described. For example, in the United States, despite extraordinary obstacles to constitutional amendment, the movements for abolition and for civil and political rights for African Americans played an important role in inspiring the movements

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63. Dorf & Sabel, supra note 11, at 350–54 (describing regulation by rolling rules); id. at 464 (suggesting possibility of rolling regime for definition of constitutional rights).

64. See Cal. Exec. Order No. D-5-99 (Mar. 25, 1999), available at http://www.energy.ca.gov/mtbe/davis_orders.html (on file with the *Columbia Law Review*) (prohibiting inclusion of oxygenate Methyl Tertiary-Butyl Ether (MTBE) in gasoline after Dec. 31, 2002); Cal. Exec. Order No. D-52-02 (Mar. 15, 2002), available at http://www.energy.ca.gov/mtbe/davis_orders.html (on file with the *Columbia Law Review*) (extending deadline for MTBE-free gasoline by one year).

65. For an argument to this effect, see Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 Tex. L. Rev. 1655, 1678–82 (1996).

for women's suffrage and equal rights,[66] as well as subsequent rights movements, such as gay liberation. A movement for rights for one group succeeds in changing the law (whether by judicial interpretation, constitutional amendment, or legislative action), and that movement, along with the social changes that occur in response to the new law, in turn inspire movements for other rights, which if successful, repeat the process. Over time, the meaning and scope of the underlying norm that the rights movement seeks to vindicate change profoundly.

Yet the processes just described typically play out over the course of a generation or more. If one accepts Cohen's constructivist claim that "we," the people of the here and now, must construct our own rights, even if we construct them in part from inherited texts, then there must be some mechanism by which our goal-articulating organs such as Congress and the Supreme Court can respond in real time to the percolating up redefinitions of basic rights. With respect to the Court, one would demand, at a minimum, that the Court be exposed and responsive to what Frank Michelman terms "the full blast of sundry opinions and interest-articulations in society."[67] And a Court that gives no room to bipartisan majorities in Congress to expand constitutional understandings of religious freedom,[68] women's equality,[69] discrimination against the old,[70] and the rights of those with disabilities,[71] is hardly acting responsively. Accordingly, despite her desire to bracket the counter-majoritarian difficulty, Cohen's vision of reflexive law—subject to what I expect she would regard as my friendly amendment to make clear that norms move in both directions between the center and the periphery—provides ample grounds for criticizing the Supreme Court as insufficiently attentive to democratic values.

CONCLUSION

Criticism of the Supreme Court, of course, is not the point of *Regulating Intimacy*, which is not a book for lawyers. Nonetheless, lawyers and

66. See Michael C. Dorf, The Paths to Legal Equality: A Reply to Dean Sullivan, 90 Cal. L. Rev. 791, 798 (2002) (noting that in the 1960s, "as it had a century earlier, the struggle for racial equality led to a movement for women's equality").

67. Frank I. Michelman, Brennan and Democracy 60 (1999).

68. See City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (invalidating Religious Freedom Restoration Act and disallowing Congress' power to expand definition of rights under Fourteenth Amendment).

69. See United States v. Morrison, 529 U.S. 598, 619–27 (2000) (holding that civil remedy provision of Violence Against Women Act was not a valid exercise of power to enforce Fourteenth Amendment).

70. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that Age Discrimination in Employment Act was not a valid exercise of power to enforce Fourteenth Amendment, and, therefore, could not abrogate state sovereign immunity).

71. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that Americans With Disabilities Act was not a valid exercise of power to enforce Fourteenth Amendment, and, therefore, could not abrogate state sovereign immunity).

legal academics can profit from it in two ways. First, by offering an argument for a right of privacy without the distraction of the usual hand-wringing over judicial role, Cohen challenges each reader to defend his or her own normative account of liberty and equality. Second, by introducing the concept of reflexive law into the debate over the regulation of intimacy, Cohen suggests that our collective disagreements do not invariably boil down to first-order moral disagreements.

In an era when, distressingly, the best-known self-styled legal pragmatist proclaims moral discourse worthless,[72] Cohen strikes a blow for a more optimistic sort of pragmatism than Judge Posner's pragmatism-as-instrumentalism.[73] By proposing a role for reflexive law outside the realm of technocracy, Cohen offers the possibility that our collective efforts to solve our practical problems can aid in articulating the rights that define the kinds of persons we are.

72. See Richard A. Posner, The Problematics of Moral and Legal Theory, 111 Harv. L. Rev. 1637, 1637 (1998). To be fair, Judge Posner does not say all moral discourse is useless, but he would clearly include the sort of Rawlsian constructivism in which Cohen engages in the category of "academic moralism" that he derides. See id. at 1639–40 (including John Rawls on the hit list).

73. See Michael C. Dorf, Create Your Own Constitutional Theory, 87 Cal. L. Rev. 593, 595–96 (1999) (distinguishing between philosophical pragmatism and pragmatism-as-instrumentalism).