Indeed, even the first condition is unnecessary, as Klosko himself recognizes, because he wants to justify state redistribution in favour of the needy. He thus acknowledges that his public goods-based argument for political obligation needs to be supplemented by another, based on a principle variously called the 'samaritanism' principle or the duty of mutual aid. Oddly, Klosko says these are natural duties of justice, yet claims they are needed to *supplement* the fairness principle (p. 91). Surely they are part of it (as Rawls argues). Klosko is wrong to think that the fairness principle applies only to public goods.

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Regulating Intimacy: A New Legal Paradigm
Jean L. Cohen
Princeton University Press, Princeton, 2002, xiv + 290pp.
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In this interesting and well-argued book, Jean Cohen addresses the problem that freedom and equality are often positioned as being in opposition. She wants to move beyond both liberal and welfare paradigms in the regulation of reproductive rights, sexual harassment issues and gay rights, by focusing upon the meaning of 'privacy' and by advocating 'reflexive law'. While her discussion is clearly situated within the US, it does raise theoretical issues that are relevant to readers in different legal jurisdictions.

In the first chapter, Cohen considers how the right to use contraception and to have an abortion have developed in US law as 'privacy rights'. The courts decided that police should not have the power to check to see if a couple (initially a married couple) were using contraception and so contraception was legalized by employing a framework of 'privacy'. This approach initially appears to do no more than re-state a liberal public/private divide, in which the state does not interfere with what happens in the 'private' domestic sphere — the traditional logic that left men free to abuse women in the home. However, in the 1960s, US law transposed this traditional notion of privacy into a doctrine that singled out the individual rather than the family unit, 'as the bearer of autonomy insulated from publicly created norms' (p. 39). While this development has been criticized by communitarians as presupposing an image of ourselves as atomistic 'possessive individuals', it is a development that Cohen seeks to defend. She argues that the communitarians' argument employs a category mistake; that it is unnecessary to presume any view of what it is to be a self in order to decide upon the norms and laws relating to privacy.

Cohen points out that, having contested the meaning of ‘equality’, feminists could carry out the same work with regard to the term ‘privacy’. Given that the US law develops from interpretations of such a broad principle, this is not a purely philosophical exercise but is played out in court judgements. Interpretations of words in legal judgements are never neutral but have implications for later cases. Cohen’s general approach reminds me of Drucilla Cornell’s work in that legal analysis is tightly woven with the philosophical analysis, which ultimately is deployed to produce a particular legal outcome. Cohen’s concern to hold onto and redefine ‘privacy’ is based upon the need to reinterpret fundamental rights derived from the US Constitution.

This is illustrated by the way that she discusses privacy in the context of gay rights. While Cohen recognizes the concern that in these cases the appeal to ‘privacy’ appears to consign gays to the closet, she distinguishes between a right to privacy, which she supports, and a much condemned ‘duty of privacy’ (illustrated by the policy relating to gays in the military: don’t ask, don’t tell). A right to privacy therefore entails a freedom of intimate association that is defended by the state. This would include not only the right to conceal one’s sexual identity but also the right to be publicly open about it. Why redefine ‘privacy’ in this broad way? The term appears to be associated more with a right to be left alone ‘in private’ than more positive rights. For Cohen, one of the issues at stake in her redefinition is to complicate and undermine Berlin’s separation between positive and negative freedom. By this point in the book Cohen has already made clear that her philosophical claim to redefine ‘privacy’ doubles as a legal argument about the way in which ‘privacy’ as a constitutional right is to be understood. Hence, there are also pragmatic reasons for holding onto the term rather than claiming the same rights without employing it. This does not mean that the claim is purely pragmatic. There is no essential, fixed meaning of the term and reworking it is also useful philosophically. However, her argument appears to be driven by the practical legal considerations.

The practical concern about not only the existence of case law but also its impact is illustrated in Cohen’s discussion of sexual harassment. She supports ‘reflexive law’ in which the law sets the framework for negotiation between the parties, which I found less convincing, but rightly qualifies this claim by recognizing the problems of the dismal failure of US law to provide adequate worker protection. It is a crude point but has to be made: in the context of ‘employment at will’, setting up a framework of negotiation is simply naive.

Cohen then discusses theoretical aspects of ‘reflexive law’ or the ‘regulation of self-regulation’, including the positions of Teubner, Habermas and Beck. In the final chapter, she outlines the problems with the ‘law and economics’ approach to intimacy, on the one hand, and the communitarian argument that status in marriage can be re-evaluated in an egalitarian manner, on the other.

These appear as (the worst possible?) examples of theoretical positions that employ formal and substantive law, respectively. In contrast, she repeats the need to employ reflexivity to consider when it is appropriate to employ different approaches to law, one of which being the 'regulation of self-regulation'. It would be interesting to compare Cohen's advocacy of this approach from a legal perspective with the more critical analysis of governmentality, by writers such as Nikolas Rose whose work is not discussed. While Cohen argues that she does not rely upon a particular concept of self to advocate the 'regulation of self-regulation', it can be argued that her conception of the role of the state does involve it in facilitating the development of the 'self'. This view of the role of the state resonates with the legal and administrative developments that are the subject of Rose's critique.

It is well worth reading this clearly written book to recognize the way in which familiar and important problems are being thought through and developed in the US legal context.

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