

## **The New Legal Paradigm of Jean Cohen and Its Implication for Public Online Dispute Resolution**

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### **Abstract**

Cohen improves Teubner's reflexive legal paradigm to insure self-regulation stays in contact with the society-wide formation of public opinion and legal principles. This article discusses Cohen's paradigm and Sturm's analysis of the sexual harassment issue as the second generation of labor discrimination, which is compatible to Cohen's model. The author then illustrates how an improvement of Dworkin's theory of adjudication that emphasizes the inclusion of social dialogue can strengthen Cohen's paradigm, and how the development of public online dispute resolution can be an important step towards realizing Cohen's ideal.

**Key Words:** reflexive, self-regulation, co-original, legal principle, public online dispute resolution

## I. Introduction

The development of law in the Internet age is in search of a new paradigm. The command and control idea of the law simply cannot cope with a society embedded in a web rich in context (Balkin, 2004; Fiss, 1995; Goldstein, 1997; Katsh, 1989). The search for a new paradigm of law began some time ago, and social theories of law have also debated the evolutionary stages of the law for some time.

The reflexive paradigm of law advocated by Gunther Teubner is one of the more prominent social theories of law and attempts to synthesize different approaches to the evolutionary theory of the law (Teubner, 1983). Locating within the system theory of Niklas Luhmann, Teubner synthesizes three neo-evolutionary theories of law, namely, the responsive law of Nonet and Selznick (Teubner, 1983: 246), Habermasian organizational principle of society (Teubner, 1983: 260), and Luhmann's socially adequate complexity theory (Teubner, 1983: 262), and brings forward that of reflexive law.<sup>1</sup>

Jean Cohen has long been an advocate for the revival of civil society. She believes that a true tri-partite unity, consisting of government, market and civil society, can best resolve the liberal and communitarian conflict (Cohen & Arato, 1992: 8-10). In *Regulating Intimacy: A New Legal Paradigm* (Cohen, 2002), Cohen reconceptualizes the reflexive paradigm with a synthetic, pluralist approach (Cohen, 2002: 175-179). Cohen believes that the systems-theoretical model of Teubner lacks universalism, and hence democratic legitimacy, which is what the action-theoretical

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<sup>1</sup> Teubner believes that although the responsive law of Nonet and Selznick does not overlook the role of external social forces entirely, they consider its role marginal (Teubner, 1983: 258). Teubner also differs with Juergen Habermas. From a system point of view, Teubner thinks the communicative action of Habermas impossible because the meta-rule of discourse that regulates the discourse among different spheres produces only funny justice, i.e. one of the parties becomes judge (Teubner, 1998).

approach of Habermas recently tried to reformulate (Cohen, 2002: 157). However, the benefit of the Habermasian approach is purchased at the cost of efficacy on normative and empirical levels, which is exactly the opposite of the case with Teubner (Cohen, 2002: 162). Cohen believes Ulrich Beck provides a synthesis of these two models by proposing that reflection be built into reflexive mechanisms within the various subsystems (Cohen, 2002: 166). However, Cohen believes Beck suffers the same fate as Teubner, because focusing exclusively on subpolitics, the deficit of the democratic legitimacy remains unresolved (Cohen, 2002: 168).

The responsive self-regulation of Philip Selznick is what Cohen examines last because Selznick maintains that public values and concerns for morally legitimate outcomes must inform the theory of reflexive law (Cohen, 2002: 169). But, Selznick still sacrifices the general to the particular, according to Cohen (Cohen, 2002: 171), because Selznick's concern for the internal morality of the institutions is disproportional to the conformity to external standards, and hence overlooks the imperative of mutual recognition and mutual influence between local and general purposes and moralities (Cohen, 2002: 171).

Drawing on the research and criticism of the reflexive paradigm, and the American regulatory experience in intimacy relationship, Cohen improves the reflexive model by a better receptivity on the levels of both political bodies and the subpolitical. She believes that political bodies ought to be receptive to the influence of civil publics, and at the same time, the subpolitics ought to be receptive to the influence of both political publics and legal principles on the one side, and to subpolitics and other subpolitics on the other (Cohen, 2002: 177).

This paper represents a further effort by the author to inquire into the construction of legal forums on the Internet (Chen, 2004). Taking Cohen's synthetic, pluralist approach as a reference point, this article seeks to further explore what the Internet in general, and the online dispute resolution (ODR) specifically, can do to approximate Cohen's model. The author believes that a

well-designed public sphere on the Internet, possibly with the ODR as its primary means of implementation, is essential to Cohen's scheme. Before bringing forward the conclusion of the author, I first wish to analyze Cohen's plan (part I) and how it can be applied to the regulation of intimacy accordingly (part II). I then illustrate how Ronald Dworkin's theory of adjudication can be better put into context in light of Cohen's model and how this improvement can benefit Cohen as well. I use the issue of communicative decency to demonstrate my idea (part III). In the end, I suggest the need of the development of public online dispute resolution and its significance for an approximation to Cohen's model.

## II. The New Legal Paradigm

Cohen rightly points out the utmost importance of a reflexive model of law that emphasizes reflexivity on both the level of the public and subpolitics. Cohen's theory can be seen as a social theory of law that initiates a new generation of concerns, after the first wave of sociological jurisprudence initiated by Eugen Ehrlich, who tried to counter the dominance of the state law (Ehrlich, 1975), and the different reflexive models of the law Cohen examines in her book that develop sociological thought into a full theory. The regulation of self-regulation, or the assurance of the morality of reflexive law, becomes the primary concern of Cohen.

However, Cohen's project is a rather ambitious one, since she not only demands that state laws, in a broad sense, genuinely open to the criticism of civic opinions like that of Habermas, she also stipulates that all subpolitics be receptive to the influence of political bodies, the principle of the law, other subpolitics and the subpolitics itself in the sense of learning like that of Teubner. Her strong message of a truly mutual informing and enabling model of reflexive law is clear and sound. All three social theories of law, those of Teubner, Beck and Selznick, are deemed deficient in terms

of democratic legitimacy or universalism.

Teubner's reflexive law realizes the complexity of contemporary society and the impossibility of control by a single centralized polity. The difficulty one finds in the welfare model given state intervention exhibits the problem. Teubner believes what can be achieved is the building into each subsystem a discursive structure that enables all players in the subsystem to reflect on the external pressure and irritations and make decisions accordingly. However, Cohen points out that the operative closure of the subsystems precludes any coordinative scheme to encounter the problem of universalism. The legitimacy concern becomes merely a part of the pressure and irritation of the environment. The system-theoretical model of Teubner's reflexive law thus cannot be accepted (Cohen, 2002: 153-157; see also Cohen & Arato, 1992; Teubner, 1983).

Cohen considers Beck's sociological reflexivity model an improvement since Beck addresses the issue of irresponsible and illegitimate reflexive modernization.<sup>2</sup> Emphasizing subpolitics instead of subsystem, Beck insists on an effective democratic public space inside each subpolitics, where all affected people can communicate and debate. Nevertheless, Beck's focus is still on the subpolitics exclusively, and short of a society-wide discussion to influence the law-making process that provides normative guidance to eventually regulate the self-regulation of the subpolitics (Cohen, 2002: 164-169).

Unlike the reflexive models of Teubner and Beck, Selznick's responsive law focuses on normative issues. The internal morality of the institution needs to justify the strategies of self-regulation and respond to the public interest.<sup>3</sup> However, Cohen believes that

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<sup>2</sup> Lacking adequate reflection, Beck considers the theories of Luhmann and Teubner dangerous. Uncontrolled genetic engineering and biotechnology placing long term effect to the environment are the only two examples.

<sup>3</sup> For example, the trust and shared commitment of family life and impartiality and opportunity for proofs and arguments of adjudication.

Selznick relies too heavily on internal morality as a resource for public policy, and the conformity to external rules is marginalized (Cohen, 2002: 169-172).

The action-theoretical approach of Habermas is Cohen's favorite for two reasons: the public sphere is where society-wide communication takes place; it grants all people affected by the law an opportunity to shape its derivation, which Habermas calls public autonomy. In addition, the co-originality thesis of Habermas (Habermas, 1996: 133-151) advocates the mutual enabling and informing relationship between public autonomy and private autonomy, which is essentially the personal rights protected by the law, i.e. the product of public autonomy. However, Habermas is insensitive to the reflexivity of the subsystem or subpolitics and thus cannot be fully embraced (Cohen, 2002: 157-164).

After examining the above four models of law, Cohen realizes perfectly that self-regulation is the legal trend and ought to be followed; the main issue resides in how to regulate the self-regulation. Understanding that arbitrary and unfair regulation may very well be the result when open-ended legal norms are involved, and that this is true both for both the state and the private institution, no matter whether the norm is procedural, organizational or substantive (Cohen, 2002: 172-175), Cohen's synthetic and pluralist approach to the reflexive paradigm relies on the principle of the law to solve the dilemma of regulated self-regulation.

Cohen believes regulated self-regulation ought to rest on clearly defined legislative goals. But here the goals are principles and not outcomes. Legal principles leave ample space for local, contextual development, but are based on liberal principles embedded in the Constitution and are not completely indeterminate. Also, self-regulation should not rest on a voluntary basis, the threat of lawsuits or the stipulation of internal grievance procedures, which are also necessary parts of the regulated self-regulation (Cohen, 2002: 175-179).

### III. Sexual Harassment: A Case Study of Cohen's Legal Paradigm

The regulation of sexual harassment is the specific case study Cohen uses to derive her improved reflexive approach to regulation (Cohen, 2002: 125-150).<sup>4</sup> Since Cohen finds that Susan Sturm's paper on the same issue exhibits a similar approach to hers, I intend to first draw lessons from both in this section (Cohen, 2002: 18; Sturm, 2001).

Sturm identifies sexual harassment as part of the second generation of employment discrimination. Unlike the first generation of discrimination that involves usually a certain group of people, the second generation tends to be subtle, contextual and structural. It is the "byproduct of ongoing interactions shaped by the structures of day-to-day decision-making and workplace relationships" (Sturm, 2001: 469).

Direct intervention by the state laws, no matter whether through legislation or court decisions, is helpful to set the right direction of the development of the sexual harassment law. But, traditionally, state laws are eager to provide a universally applicable standard. Lacking the translation needed to dissimilate the message inside the corporate environment, state laws not only easily miss the target, but their message may also be wrongly received by the corporation, intentionally or otherwise, and informal social contact among men and women may be discouraged as a result (Sturm, 2001: 477).

In addition, the word "translation" used in the previous paragraph reveals the need of further improvement since it connotes an idea that treats the workplace as an object of regulation, which only receives the norm passively without a chance of reflection. This may be the problem itself. Building on

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<sup>4</sup> Chapter 3: Sexual Harassment Law: Equality vs. Expressive Freedom and Personal Privacy?

the studies of the public law remedies (Sturm, 1991),<sup>5</sup> Sturm suggests that the United States Supreme Court's decision can play an "important but de-centered role" in addressing sexual harassment issues (2001: 479).

In *Harris*,<sup>6</sup> the Supreme Court interpreted the "terms, conditions, or privileges of employment" in Title VII of the Civil Right's Act of 1964<sup>7</sup> as showing the intent of Congress "to strike at the entire spectrum of disparate treatment of men and women in employment," which includes requiring that people work in a discriminatorily hostile or abusive environment.<sup>8</sup> But the court specifically refused to define the condition in concrete terms and believed that all the circumstances needed be examined. Later,<sup>9</sup> the court developed an affirmative defense for the defendant if the employer has "exercised reasonable care to avoid harassment and to eliminate it might occur."<sup>10</sup> Sturm believes the focus of the establishment of an effective internal structure and process to deal with the sexual harassment issue in the workplace, and demands for such arrangements sensitive to external normative concerns and guidance represent a model more likely to succeed in the resolution of the second generation discrimination cases (Sturm, 2001: 480-484). Sturm's analysis is well received by Cohen, since it represents a needed paradigm shift in regulation.

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<sup>5</sup> Sturm surveys the remedy practices of the court in public law litigation, which departs traditional adversarial model and emphasizes participation and dialog, and analyzes the normative theories of public law remedies. Sturm develops her model of deliberative remedial decision making that advocates the structural and evaluating roles of the court to lead to a consensual remedial solution.

<sup>6</sup> *Harris v. Forklift System Inc.*, 510 U.S. 17 (1993).

<sup>7</sup> Which reads: ". . . an unlawful practice of an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

<sup>8</sup> 510 U.S. 17, 21.

<sup>9</sup> See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>10</sup> 524 U.S. 17, 805.

Citing Teubner, Cohen believes “a paradigm of law is not a scientific theory or a legal doctrine—it is an integrated set of cognitive and normative background assumptions about the relationship the law should establish between the state and society, and the form legal regulation must take” (Cohen, 2002: 143). Three legal paradigms analyzed in Cohen’s case study of the law of sexual harassment are, namely, the liberal, the welfare and the reflexive paradigms.

The liberal paradigm of law may be the best developed and most dominant of all. Grasping the prevailing core value of contemporary society, the liberal paradigm takes human dignity and freedom as being of paramount importance. Accordingly, liberals believe that human freedom should thrive in the social world and not be interfered with by state law. It is, therefore, a general rule for liberals to separate the private from the public, and the law reaches only the latter.

Thanks to the feminist movement sexual harassment is treated seriously by the law.<sup>11</sup> But although a welfare paradigm of law posits that state action is needed to counterbalance the inequality of social power, its juridification, i.e., excessively looking for judicial solution, is substantive, intrusive, and outcome dictating. As a result, overregulation may not be the only consequence, as mentioned above: an incorrect image of the traditional gender relationship may also be hardened.

The reflexive paradigm aims to create regulated autonomy. But without adequate implementation, it easily degenerates into deregulation or privatization, emphasizing only self-regulation, but not regulated self-regulation. Highly intrusive and repressive corporate regulation may be the result. This is why Cohen stresses the importance of society-wide debate to the external legal principle and its actual guidance to the development of the internal

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<sup>11</sup> There are serious intellectual efforts by the feminists to pinpoint the harm of sexual harassment, including debates between the feminists and the liberals and among feminists themselves (Cohen, 2002: 127-142).

learning process and the formation of local norms in her reflexive model (Cohen, 2002: 142-150).<sup>12</sup>

#### IV. Toward a Reflexive Principled Paradigm?

Cohen's paradigm is rich and ambitious. In order to arrive at a detailed and clear understanding of the issues involved, I will limit my discussion of the paradigm to the tension between court adjudication and alternate dispute resolution.<sup>13</sup> The basic idea I want to elaborate here is that in today's plural and fast changing world, social dialogue is ever more important for social ordering. From an adjudicative point of view, discourses among sectors with different values and interests may substantially improve the factual basis of the cases the courts face and clarify the issues of the case to a point where meaningful arguments between the disputing parties and precedent setting opinions of the court can be expected. We therefore ought to emphasize the social dialogue and argumentative functions of alternate dispute resolution practices. In this article, the newly developed form of alternate dispute resolution on the Internet, i.e. the public online dispute resolution, could serve as the needed platform for such a social dialogue.<sup>14</sup> However, what prevents this from happening lies not in the

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<sup>12</sup> See the discussions in the first section and See the discussions in the first section.

<sup>13</sup> Cohen explicitly points out the importance of the internal conflict resolution in her model. For on the level of subpolitics, the procedure, discursive structure, and the conflict resolution mechanism ought to be established and influenced by the political publics, legal principle, other subpolitics and self leanings (Cohen, 2002: 177).

<sup>14</sup> There is no clear cut formula to divide the labor between court adjudication and alternate dispute resolution. Lon Fuller believes social interaction and the community of purpose is needed to yield legal doctrines from the opinions of court adjudications; on the other hand, "when we encounter social contexts similar to those of a primitive society, we too resort to mediative rather than adjudicative methods of problem solving" (Winston, 2001: 113-118, 141).

technological aspects, but rather the conceptual. I will illustrate this point in this section first by a contrast between the legal theories of Dworkin and Cohen, and then I will use an example to further clarify my point.

I believe one can construct three elements out of Cohen's refined reflexive paradigm, i.e., it must be reflexive, co-original and principled. The reflexivity of the paradigm precludes any flat or uni-dimensional view of the regulatory space; rather, regulated self-regulation is the norm. In other words, polity-wide regulatory institutions, like the court, ought to regulate the subpolitics whenever a principle of law can be better derived.

The co-originality requirement emphasizes the true reciprocal relationship between the regulatory bodies and the self-regulated subpolitics. They should not only inform each other well, but also join together to form an enduring partnership in search of legal principle. An attitude of willing participation, communication and learning, both in the subjective and passive sense, is clearly needed.

It is the principled aspect of the paradigm that Cohen has in mind when it comes to ensuring that self-regulation will not run-away and become uncontrolled. Substantive meaning contained in established legal principle can also prevent an arbitrary solution without guiding from the established law and legal principles during the law making process of self-regulation. This can also prevent self-regulation, the local, from losing contact with the established legal principles (Cohen, 2002: 178).

Dworkin's principled jurisprudence is what Cohen needed in her paradigm since the whole judicial experience, in the form of judicial precedent, can serve as the basis of normative development in Cohen's legal paradigm, on which Cohen should place greater emphasis (Dworkin, 1977: 105-123). Though Dworkin's theory lacks the reflexivity and cooriginality elements, I am in the opinion that it can be amended. Previously, I advocated Dworkin's theory of adjudication as an improvement on the co-original critique of

Habermas.<sup>15</sup> Here, I want to further point out that such an endeavor can be better reconstructed in light of Cohen's improved reflexive paradigm for cases involving self-regulation.

Legal experiences contained in the judicial records are highly valued by Dworkin's theory of adjudication.<sup>16</sup> In the first phase of Dworkin's theory of adjudication, all precedent chains in the judicial records that pass a threshold test are identified. These candidate precedent chains are further examined in the second phase of Dworkin's theory of adjudication: the justification phase. In that phase, one of the competing moral conceptions that coheres best is selected and used as the basis of a decision. Since the whole process is based primarily on the interpretation and construction of the judge, which is criticized by Habermas as a loner since no dialogue whatsoever is involved, both co-originality and reflexivity emphasized by Cohen's model are clearly nonexistent and impossible.<sup>17</sup>

However, I believe that if Dworkin's judge were to respect an objective concept of coherence measured by the discursive reality of the issues, i.e. the discursive coherence, and leave the issues whose objective coherence do not meet a threshold test to further deliberations either in the form of alternate dispute resolution or internal conflict resolution, like the sexual harassment issues described by Sturm (Sturm, 2001), the co-original and reflexive elements Cohen emphasizes can be realized. In the remaining part of this section, I use the development of issues of indecent information in the Internet and the protection of youngsters as an example to illustrate my point.

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<sup>15</sup> Chishing Chen, "Toward a Discursive Public Reason in the Internet World," first presented at the 22nd World Congress of the International Association of Social and Legal Philosophy, Granada, Spain, 2005, and to be published.

<sup>16</sup> I believe these legal experiences are also highly valued by Cohen's paradigm discussed in this paper.

<sup>17</sup> See Chen *supra* note 15, at II. A co-original critique of Dworkin's Theory of Adjudication.

Concerned for minors, the Congress of the United States enacted the Communication Decency Act in 1996 (CDA). The Act included criminal punishment for knowingly transmitting “patently offensive” or “indecent” information to persons under 18 years old.<sup>18</sup> This part of the CDA was found to be unconstitutional in *Reno v. American Civil Liberty Union (ACLU)* due to the vagueness of the two phrases and their destructive effect on the right of freedom of expression for the adult.<sup>19</sup>

This is a typical case in which traditional law-making descends to a deadlock that Cohen’s new paradigm wants to correct. Without the reflexive thinking, traditional law always tries to come up with well-defined legal terms so that the law can be objectively applied. The vagueness of the term in the CDA reflects the difficulty of such task. But the cost of failure is rather high and unfortunate. The unconstitutionality and invalidation of CDA meant no comprehensive legislative effort could successfully address the issue of protecting the minors from indecent content on the Internet (Chen, 2003).

In the end, the Congress of the United States dramatically curtailed the scope of the legislation and only required public libraries receiving funds from the federal government to install software filters to screen out indecent materials. However the constitutionality of this legislation is challenged again in *U.S. v. American Library Association (ALA)*,<sup>20</sup> the only Supreme Court decision that validated Congress’ effort to protect minors on Internet.<sup>21</sup> Here, I want to focus on the traditional law making idea maintained by the majority opinion and the reflexive

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<sup>18</sup> See 47 U.S.C.A. §223 (A) and (d) (1996).

<sup>19</sup> See 521 U.S. 644 (1997).

<sup>20</sup> See 539 U.S. 194; 123 S. Ct. 2297 (2003).

<sup>21</sup> Previously, the author wrote two articles (Chen, 2003; Chen, 2007) to comment these two cases; here I reconstruct my idea in light of Cohen’s improved reflexive paradigm. I place the focus on *U.S. v. ALA* is because, in that case, there is a non-profit organization, ALA, involved in the regulation effort, but the regulated self-regulation approach was not adopted.

approach reflected by the minority opinion.

In the Children's Internet Protection Act (CIPA),<sup>22</sup> public libraries are asked to install filtering software to block pornography and other information harmful to minors on their Internet-accessing computers in order to qualify to apply for federal assistance. The American Library Association (ALA) and other concerned parties filed a lawsuit to challenge the constitutionality of CIPA and the act was invalidated by the federal district court for violation of patrons' First Amendment rights.<sup>23</sup>

The majority opinion in *U.S. v. ALA* reversed the decision of the district court and found the CIPA constitutional.<sup>24</sup> The court divided on the perception of the functions of public library. The majority opinion believes that the mission of the library is to collect information that best serves the interests of the community, leaving the institution with broad discretion on the selection of materials for collection for the library to fulfill its mission. The public forum principle the district court used to invalidate CIPA is inappropriate since providing Internet-accessing terminals in the public library is neither a tradition of the library nor an affirmative choice of the library to open its property for use as a public forum.<sup>25</sup>

The reflexive nature of the dissenting opinion is most relevant to the discussion of this paper. Justice John Stevens agrees that the public library enjoys wide discretion in selection, but a nationwide law requiring every public library to choose one method, i.e. installing filtering software to qualify for federal assistance, to protect minors is quite different. The filtering software may not only provide a false sense of security, since parents and other

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<sup>22</sup> Pub. L. No. 106-554, tit. XVII, 114 Stat. 2763A-335 (2000).

<sup>23</sup> *ALA v. U.S.* 201 F. Supp. 2d 401 (2002).

<sup>24</sup> 539 U.S. 194 (2003).

<sup>25</sup> 123 S. Ct. 2302-6. The majority also adds that the filtering software can be disabled according to CIPA, dissents concern of over blocking of the filtering software should not be a concern since the filtering software can be disabled according to CIPA. 123 S. Ct. 2306-7.

concerned may feel safe and stop looking to protective means while the effectiveness of the software is questionable; CIPA also precludes public libraries develop local practices to serve local needs autonomously. Justices David Souter and Ruth Ginsburg further point out that the Federal Communications Commission (FCC) refused to set the policy and standards to regulate situations in which it would be appropriate for a local library to disable the filtering software since any such measure would likely be overbroad, imprecise, potentially chilling speech, or otherwise confusing.<sup>26</sup>

In light of Cohen's discussion of the form of the law, I believe a substantive and criminal sanction, as a major means to protect the minors, represents a brute force approach and not acceptable as it obstructs other values protected by the Constitution. But a nationwide requirement to install filtering software is also inadequate since it leaves too little room for trial and error and the development of local solutions appropriate to local circumstances. In other words, an objective nationwide standard for software filtering represents again the traditional idea of a uni-dimensional regulatory space. The law addresses each and every circumstance with the same criteria to achieve a just result. On the other hand, what Cohen emphasizes is regulation through empowerment and guiding self-regulation or subpolitics that can better respond to local contexts.

As Amitai Etzioni points out, the central issue is "how to protect children from harmful cultural products" (2004a), but the development of the law did not focus on this issue. Additionally, indecent information is not the only one hurtful to children: violent and vile information is still more severely damaging to children, but they go unnoticed by the law (Etzioni, 2004b). This shows great disparity between the legislative perception of social issues and the truth of social reality. The legislative process may thus lag behind the development of society. A search for objective

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<sup>26</sup> 123 S. Ct. 2312-20.

criteria to be laid down by the legislature may also lose sight of the contextually sensitive nature of the issues. The idea of reflexive legal principle, emphasizing collaboration between the public and private sectors in the law-making process, is what Cohen and Sturm have in mind, and is what is needed today. The state, through legislation, court decision-making or even administrative rule-making, can bring forward a legal principle to be pursued and, at the same time, empower the private sectors to develop self-regulatory norms to realize that legal principle. In this way, the state law-making process and the self-regulatory development of norms may be mutually beneficial. As a result, according to Cohen, the co-originality of relations between the law of the states and the society at large respects both the justice of the law and its local context.

The reflexive legal paradigm of the law, at least in Cohen's version, not only emphasizes the importance of self-regulation, it also addresses a vital element needed by contemporary law making—communication and dialogue—what Habermasian communicative ethics values and achieved through enforcement of the co-original relationship between private autonomy and the law-making capacity of the public autonomy.

The strategic and adversary nature of court proceedings prevents courts from becoming a forum in which the law could structure a dialogue sufficient to all we need to resolve social controversies leading to dispute. An alternative dispute resolution scheme, on the other hand, can be designed to fill the necessary gap. This is the reason why I emphasize the communicative function of public online dispute resolution. And this is what I will discuss further in the final section.

## V. Public Online Dispute Resolution—Conclusion

Online dispute resolution (ODR) is an emerging field of the law (Katsh & Rifkin, 2001; Perritt, 2000; Ponte, 2002;

Ramasastry, 2004; Schultz, 2004), and of legal informatics (Lodder & Huygen, 2001; Lodder & Zeleznikow, 2005). However, the adversarial model still prevails. The term “public online dispute resolution (PODR)” used in this article is meant to differentiate the communicative and the adversary model of the ODR. PODR denotes the ODR that emphasizes full participation and mutual understanding through dialogue in the online dispute process. This article does not discuss how a PODR ought to be constructed and what other legal and institutional issues may be involved in building such an ODR, with social dialogue as its primary function in mind. In light of Cohen’s improved reflexive paradigm and the discussion in the previous sections, I hope to be able to argue for the thesis that to construct the schemes of PODR, based on Cohen’s theory, is imperative, and the theoretical and practical legal issues involved are worth pursuing.

ODR not only breaks the limits of time and space to bring together disputing parties, the mediators or arbitrators, consultants, and other parties affected or interested, but if properly designed, could also connect well with the various internal conflict resolution schemes and provide society-wide communication, comments and research efforts. I believe this is crucial to Cohen’s model, which emphasizes the need for the reflexive approach to remain in contact with the development of the legal principle guiding its operation to prevent run-away self-regulation. Furthermore, a truly co-original relationship between private and the public autonomy cannot be achieved without effective absorption of the insight obtained through local experiment and self-regulation. All the intermediaries vital to the success of Sturm’s case study can help in both directions, bringing their learning to bear on enriching local self-regulation and in forming public opinion (Sturm, 2001).<sup>27</sup> The rich empirical information maintained by the ODR systems will be valuable to scholarly research, which will certainly be of benefit both in local and more universal contexts.

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<sup>27</sup> See III. The Pivotal Role of Intermediaries in a Structural Regime.

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## 寇恩新法律典範對公共線上爭議 解決機制之啟發

陳起行

### 摘 要

寇恩 (Jean Cohen) 改善屠布涅 (Gunther Teubner) 的自發性法律，以確保自律不會背離社會公共意見以及法律原則的要求。本文探討寇恩的法律理論以及史東 (Susan Sturm) 運用相容的理論解讀性騷擾這項美國第二代勞動歧視法律的發展。作者並且進一步指出，德渥金 (Ronald Dworkin) 的裁判理論可以藉由寇恩的法律典範加強社會對話，而後者的理論也會因此更形完整。最後，本文建議發展公共線上爭議解決機制，做為落實寇恩法律典範重要的一步。

**關鍵詞：**自發性、自律、戶生性、法律原則、公共線上爭議解決