J. COHEN ON PRIVACY

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In "Privacy, Pluralism, and Democracy", Joshua Cohen develops a sensible view on privacy, a controversial and, to some extent, elusive idea[1]. He starts by distinguishing two areas where privacy seems to be important: the formal, public realm, in which the point is whether there should be a right to privacy, protected and enforced by law (particularly by constitutional law), and the informal, cultural realm, in which the issue is about conventions of privacy: to what extent we should, as a matter of decency, respect other's private decisions and information, and avoid intrusion. Cohen's view is anti-skeptical regarding the first aspect: he defends a strong right to privacy as a matter of constitutional law and founds such a defense on his theory of deliberative democracy. On the contrary, he endorses a rather skeptical view on privacy as an informal convention. In this regard, he argues against Thomas Nagel, who has recently sustained a kind of "cultural liberalism", which entails a strong duty of reticence[2].

In this comment, I will focus on two main points. First, I will claim that Cohen's argument in favor of a constitutional right to privacy, which is based on his conception of deliberative democracy, is in tension with our common understanding about what privacy is. Second, and more important, I will claim that both Cohen and Nagel are partially right and partially wrong concerning our informal duties to respect privacy. I will stress an important distinction made by Cohen, which, in my view, enables us to think informal privacy in a different and richer way.

I.

Let's start considering privacy as a right protected by legal enforceable norms enacted in a constitutional deliberative democracy. At this formal political level, privacy

[1] J. Cohen, "Privacy Pluralism and Democracy," en J.K. Campbell, M O´Rourke y D. Shier (comps.), *Law and social Justice.* Cambridge (Mass.), MIT Press 2005. In the following footnotes, all the page numbers will refer to this article.
All quotes on this article make reference to an unpublished and revised version of Cohen´s paper.
[2] T. Nagel, "Concealment and Exposure". En *Concealment and Exposure and Other Essays.* Oxford: Oxford University Press. Quoted in Cohen p. 18-19.

has two aspects rightly distinguished by Cohen: what he calls "tort privacy" and "constitutional privacy". The first kind of privacy consists in the "interest in avoiding disclosure of personal matters"[3]. It refers to the right to certain kind of information about the individual not to be publicly accessible. The second kind of privacy must be understood as the right that protects "the interest in independence in making certain kinds of personal decisions"[4]. This is, in my view, an important distinction, and I will come back to it in the second section, when discussing informal privacy.

Cohen focuses only on the second understanding of the privacy right, namely the right to make certain kinds of independent personal decisions. The problem Cohen must face is that his view of democracy seems, at the first sight, insufficient to justify non-political rights (that is, rights beyond those which are necessary to ensure deliberation). Cohen claims that to say that certain spheres (like family, marriage, etc.) are private and *therefore* must be protected is essentially misleading because these spheres are the product of social arrangements that can be subject to criticism. So we are assuming what we are supposed to prove. We must thus proceed the other way around: to offer first a good argument to protect certain kinds of decisions and *then* declare this set as the private sphere.

Now, what kind of argument must one give to identify the decisions worthy of protection? Cohen thinks that the set of decisions to be protected by a privacy right is defined by the weight of the reasons that support them, as they are interpreted by the comprehensive philosophy of life of the individual[5]. In this way, abortion should be protected as a case of privacy right because the kind of reasons that usually support the decision to abort (or not) are essential to the philosophy of life endorsed by people: the meaning of human existence, the mystery of human life, and so on. The same for sexual life: the kind of intimate relations we have, says Cohen, works out a sense of our identity.

This way of defining privacy certainly avoids the arbitrary stipulation of certain domains as private, but it has two problems. The first problem is rather formal. It is that Cohen's account is not able to distinguish privacy rights from other non-political liberties. In fact, Cohen's argument for privacy is exactly the same as his argument for all

[3] Cohen, p. 1.
[4] Cohen, p. 12.
[5] See Cohen, p. 12

other non-political rights (religious, moral, and non-political expressive liberties). In all cases, we face the right to make certain personal decisions free from coercion. If we are to distinguish privacy from other personal liberties, we must provide some features of the kind of decision that are at stake in this case. We say that in the case of decisions concerning abortion, assisted suicide or sexual life (Cohen's examples) privacy is at stake, and not in the case of decisions concerning religion, expression of ideas, etc. But the distinction between these different domains remains obscure, because they are ultimately founded on the same kind of reasons.

I don't think this is a very important problem. On Cohen's conception of deliberative democracy, every exercise of state power must arise from reasons that can be shared by all politically reasonable positions. When this kind of consensus does not arise, there are strong reasons to let people follow their own convictions. These decisions must remain unregulated by coercive legal norms and, at the same time, the values underlying them should not be coercively imposed to others. Once we accept this, the distinction between different kinds of decisions remains conventional.

However, there is a second problem, which is perhaps more important. Cohen emphasizes the fundamental importance of the reasons that support the decisions and of the weight of those reasons. Privacy rights depend on the reasons underlying the decisions. I think this way of understanding privacy is at odds with our common understanding. It is true that privacy rights concerns decisions on issues on which there is no reasonable agreement and which are of fundamental importance for persons. The *issues* are important, but not necessarily the reasons that support the decision itself. The weight of the reasons on which different philosophies of life support the relevant decisions can be very different and that should not affect the degree of respect of rights. If there is a right to abortion based on privacy, it should be conferred for *whatever* reason the woman has to undergo abortion. They needn't be fundamental reasons. If we believe that the decision to undergo abortion is a private one, then we have to permit a woman to interrupt her pregnancy even if she would do it only to prevent the frustration of her next vacations. But if we, as Cohen says, "let political ideas of burdensomeness track the weight of reasons within the reasonable views"[6], then we should make the permission of

[6] Cohen, p. 13.

abortion depend on the weight of the reasons the woman has to offer. But privacy means precisely that we don't ask her why she wants to make such a decision or how burdensome the decision to continue pregnancy would be for her. The same holds with sexual life. What is important for us is the *issue* (sexual life) on which we believe that a privacy right applies. The reasons why someone adopts sexual decisions, as being homosexual or heterosexual, or having sexual relations with this or that person are irrelevant. In fact, the reasons might be completely trivial. Privacy consists, precisely, in *not* asking about those reasons.

II.

Let's consider now the second privacy issue and Cohen's discussion of Nagel's provocative position. By reading both authors, one cannot help thinking: both must be right! Both are right in a certain sense. Nagel seems to be right in defending a virtue of civility that hinders the use of private information to assess the competence for public positions. He seems also to be right in emphasizing the danger of homogenization and hypocrisy. But Cohen seems also to be right in pointing out the tendency of this kind of cultural liberalism to legitimate the *status quo* and to avoid every sort of social criticism[7].

If both positions were incompatible we could only satisfy one of them at the cost of the other, or, at most, reach some kind of unstable compromise. But I think they are not incompatible. To see why, I would like to recall Cohen's distinction regarding the right to privacy at the formal political level. One sense of privacy understood as a right that should be protected by enforceable legal norms is the right that certain intimate information not be available to others (tort privacy). The other one is the right to make certain kind of decisions rooted in our comprehensive moral, religious or philosophical views (constitutional privacy). Both senses are relatively independent, in the sense that a legal order could protect one interest and not the other one. For example, the law might permit homosexual relations while not protecting them from public exposure. Or the law might prohibit this kind of relations but, at the same time, guarantee their secrecy.

[7] See Nagel, op. cit, p. 25; Cohen, p. 20-21.

I think a similar (although not identical) distinction should be made on the cultural informal sphere. Both Cohen and Nagel speak on privacy at this level as if it were only one thing. I think this is misleading. I will try to explain why.

One aspect of the informal norms of reticence and respect of privacy concerns personal information. Even if the access to this kind of information is restricted by enforceable legal norms of privacy (tort privacy), social pressure can make it impossible to keep it private. In this sense, informal norms of privacy are strictly parallel to formal ones. Let's call this aspect "informational privacy".

Another aspect of this kind of conventions concerns critical assessment of substantial values. Even if the right to make personal decisions rooted in our own philosophy of life is guaranteed by legal norms of privacy (constitutional privacy), social pressure can make it impossible to escape critical discussion about these decisions. In this second sense, the virtue of privacy would hinder, as Nagel says, "trying to achieve a common understanding" and discussing controversial issues on religious, moral, aesthetic or personal values. Let's call this aspect "reticence to criticism"[8].

My view is that, if the right to privacy is protected by legal norms and, moreover, informal norms of civility respect informational privacy, then the reticence to criticism is not necessary anymore. And it can even be harmful.

Most of Nagel's concerns about public exposure of private matters are related to informational privacy: spreading publicly intimate information of particular persons (usually public persons, like Bill Clinton, judges, legislators, etc.) and the utilization of this information by press and mass media. And most of Cohen's concerns about *status quo*, absence of social criticism, are related to the second aspect of privacy: reticence to criticism.

To be sure, both aspects of cultural liberalism are not totally independent, so that defending one and rejecting the other can force us to make difficult compromises among them. But such compromise is not theoretically unstable because it is conceptually clear. The relative weight of each aspect depends on the particular value at stake. It is not accidental that Nagel's favorite issue along his essay is sex, because it is difficult to exercise criticism and discussion about sex without, at the same time, exposing our own

[8] See Nagel, op. cit, p 23 and 24; Cohen, p. 18.

sexual preferences. But that needn't be so, even in this case. Rejecting reticence to criticism does not necessarily lead to frustrating informational privacy. It depends on how criticism is made. Informational privacy poses restrictions on how informal public discussion can be made: we can discuss the moral status of adultery without personalizing the issue on Clinton or whoever.

I think there are independent arguments for, on one hand, translating tort privacy into informational privacy at the informal level and, on the contrary, not doing the same with constitutional privacy.

The rationale of tort privacy, the non-access to some kind of information about persons, is the same as the rationale of informational privacy in the sphere of social conventions. If people know something about me that I don't want them to know, it is the same whether they know it by breaking the law or by breaking social conventions. In both cases, they are invading my privacy. On the contrary, the rationale of constitutional privacy (the liberty to make a certain kind of decisions without state coercive intrusion) is *not* the same as the rationale of reticence to criticism. In my opinion, privacy rights, like other non-political liberties, should be the *outcome* of social criticism and discussion, the outcome of seeing that we don't agree on fundamental matters and, therefore, we have to leave these matters up to individual decision.

It is true that, in the case of making independent personal judgments or decisions, social pressure could also be intrusive and suffocating. And, if on the formal political level political liberalism imposes strong restrictions on the kind of reasons that can be accepted, we could ask: why not think that the same restrictions should be informally imposed on the cultural domain?

With respect to this, I disagree both with Cohen and Nagel (and also with Rawls) over an important point. Both assume that reasonable pluralism of comprehensive views implies that, as Cohen says, "we cannot, in any case, expect agreement on these matters"[9]. And Nagel says: "we should stop trying to achieve a common understanding in this area [he is speaking of sex but it applies also to other fundamental issues] and leave people to their mutual incomprehension, under the cover of conventions of reticence"[10].

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[9] Cohen, p. 8.
[10] See Nagel, op. cit, p. 23. Quoted in Cohen, p. 18.

So both are thinking that pluralism and disagreement are unavoidable. And they are. But I think that a fundamental feature of every rationally defended comprehensive view is that it *aims* to be true and, therefore, to be accepted by every rational person. This aim excludes, in my view, both skepticism and dogmatism, and should be understood rather in a fallibilist way. I don't understand how a catholic and an atheist can discuss about the existence of God if they are skeptic about reaching the truth and, therefore, skeptic about reaching some kind of agreement. Of course we know that reaching the truth or agreement is no more than a regulative idea, and that it will be not achieved in fact. But the same happens in science about reaching the truth. However, the aim or aspiration to achieve truth is what impulses this enterprise.

If we are skeptic about reaching agreement and convincing others, then Nagel would be right in the sense that social criticism would be pointless. The mere bearing witness or presentation of my thoughts would be only a way to annoy others without any further ambition. But, on the other hand, Nagel could not explain why we endorse some particular values or conception of the good, except as a matter of taste.

If we, instead, are dogmatic, then we cannot justify any kind of liberal tolerance toward those that don't think like us. If everyone is dogmatically sure to be right, then social criticism tends inevitably to collapse into a fight for domination[11].

The middle way is, I insist, some kind of fallibilism. But fallibilism requires criticism and is essentially interested in testing one's own views against rival ones. Therefore, privacy as reticence to criticism is incompatible with fallibilism.

To sum up. Should privacy be part of our informal norms of civility? My answer is: it depends. If we are speaking about avoiding social pressure to disclosure features of our most intimate life or avoiding the utilization of this information for public purposes, then, my answer is yes. If we instead are speaking about avoiding pressure to discuss and review critically our own conceptions on religious, moral or philosophical issues, then, my answer is no. Our ultimate decisions must be protected; but we should not be protected from cultural challenges.

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[11] I defend this fallibilist position in E. Rivera López, "De la racionalidad a la razonabilidad. ¿Es posible una fundamentación epistemológica de una moral 'política'?", *Crítica. Revista Hispanoamericana de Filosofía*, Vol. 29, Nº 86, 1997 (53-81).