Still Facing The Dilemma of the Fact: Gilligan and Habermas (Re)Visited

Myra Bookman

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[T]he "dilemma of the fact": that in the experience of life choices, no single perspective could adequately encompass the problem... has been consistently mistaken... for a retreat from the adolescent cognitive apogee—in this case from the principled morality of Kohlberg's highest stages.¹

Facts trouble. They persistently and stubbornly trouble attempts to universalize higher order thinking, to justify moral norms, and to defend formal legal equality. Habermas in Between Facts and Norms² shoots at the trouble, but like his predecessors he doesn't quite mitigate it. The same recalcitrant "lifeworld" or sociological facts that plague Habermas also continually trouble the universalizing claims of Freud, Piaget, and Kohlberg, a few of Habermas's theoretical fathers. And like them, Habermas refuses to relinquish a model of psychological and social development that relies on autonomy, separation, and individuation as its ground note. Reliance on such models for the legitimation of law translates into a façade of legal neutrality that is "functionally biased" and fails to address the dilemma of the "facts" that arise out of difference.³ Incorporation of Carol Gilligan's⁴ work enriches the substantive base of Habermas's legitimation enterprise without forfeiting its theoretical elegance, essential logic, or structural integrity.

Gilligan's reformulation of moral development theory and the rhetoric of rights provides a correction toward a critique and reinterpretation of dominant legal doctrine without losing validity claims or reverting to a crude contextual relativism. Mary Joe Frug suggests a "progressive reading" of Gilligan's research not for the purpose of privileging women's approach to life or the law or to compare legal treatment of

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¹. Carol Gilligan & John Michael Murphy, Development from Adolescence to Adulthood: The Philosopher and the Dilemma of the Fact, in INTELLECTUAL DEVELOPMENT BEYOND CHILDHOOD 85, 96 (Deanna Kuhn ed., 1979).
⁴. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).
men and women through case reviews. Rather it is to show how "life-world" or experiential differences, in this case gender-linked, can provide clues to the invisible undergirdings of the dominant interpretations of the law and offer keys to critique and change. Just as Gilligan's work underwrites a transformation in philosophical moral theory and psychological development theory, it can also serve legal theory. By tracing a developmental path through women's criteria for moral justifications, she introduces a previously unnoticed line of moral development, the now well known "care voice." The findings reveal that Kohlberg's stages—derived from an all-male sample—tell only a partial story. Herefore unrepresented experiences are shown by Gilligan's work to be "facts" or content that cognitive reflection abstracts into a set of previously untheorized principles, that is, new forms. New subjects, new "facts," new interpretations expose the hidden uniformity of assumptions behind moral, legal, and developmental "universals." Space opens for recognizing that different figurative content spawns different formal structures. The "postconventional" thinking that Gilligan proposes is just such a form. It is contextual, yet neither relative, unreflective, nor devoid of consistent justificatory claims. It arises out of a lifeworld fraught with attachment, vulnerability, and relational responsibility—a lifeworld beyond ego, separation, and blind fairness.

My purposes in writing this essay are pedagogical and rhetorical as well as experimental. I attempt to inform and convince, but I also sketch the outline of new connections. As a cognitive-developmental psychologist cum social theorist, I first demonstrate, in section one, how Habermas links morality and law through a theoretical reliance on "developmental logic" specified by Piaget, and then elaborated by Kohlberg. In section two, I show how this theoretical ancestry inadvertently supports Freudian notions of the originary self-serving id. Such implicit support invisibly scaffolds existing normative hierarchies and legitimizes Habermas's "normative substantive values"—democracy, autonomy, equality—despite his claims to a postmetaphysical, strictly procedural, normatively empty position. Finally, in section three, I suggest that Gil-

5. See Frug, supra note 3, at 52-53.
6. GILLIGAN, supra note 4, at 62-63.
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Gilligan's reformulations are consistent with the developmental logic with which Habermas has impressive affinities. But her findings broaden the substantive foundations on which his work rests. Specifically, I argue that impartiality, reciprocity, and solidarity are justifiable, but particular, outcomes of particular "social facts." Different social facts can result in different, but equally justifiable, "postconventional" norms. Concluding remarks weave the discussion back into the law and show that principles of "care" neither replace those of "justice," nor are subsumed under them. Rather they coexist in productive tension.10

I. MORALITY AND LAW—THE "POSTCONVENTIONAL"

Habermas draws heavily on Kohlberg's "postconventional" morality, which in turn depends on Piaget's "decentered" subject whose maturity is measured by her ability to apply formal logic to moral problems and whose thinking is not polluted by particulars of local conventional life.1 According to Habermas, an analogous evolutionary process describes a "rationalization of the lifeworld" that is necessary for valid law "through a separation of law and morality, and of public and private law, ... a separation achieved at the post-conventional level of social evolution."2 A strictly procedural discourse based on formal pragmatic rules of language ensures that such separations are sustained through abstract conditions of universalism. But despite his claims of a "strictly procedural" approach, substantive values steeped in assumptions of functional equality and autonomy lurk. Habermas seems to counterpose his profound apprehensions about parochial blindness with a blind faith in a rational autonomous subject. But this hypothetical mature subject whose sensitivity to particulars should be trumped by justice and fairness doesn't match the developmental "facts," whether that subject is a man or a woman. In other words, the traditional formal separation between an ethics of practical life and a higher more abstract morality (where the latter subsumes the former) continues to trouble attempts to translate justification into application.

Both Piaget and Kohlberg reconsider this problem in their later work when empirical evidence continually reveals the reentry of "reality," "commitment," and "responsibility" in late adolescents and young adults who had previously achieved the "postconventional" stage. The standing framework requires this to appear as a regression to conventional morality.3 Kohlberg addresses the problem with a scoring revision that increases the formal requirements of the highest stages. Gilligan departs in another direction—a direction that may align better with Piaget who supports the correlativity of form and content and the limitations of

11. See HABERMAS, supra note 2, at 71.
12. Deflem, supra note 9, at 6-7.
13. See Gilligan & Murphy, supra note 1, at 90.
formalization. He writes, "[T]here is no 'form as such' or 'content as such,' that each element—from sensory-motor acts through operations to theories—is always simultaneously form to the content it subsumes and content for some higher form." Gilligan demonstrates the key role of particular social experiences in the process of moral development and how those experiences of subjectivity constitute content. This diverse content gives birth to diverse but not infinite structural forms. Pluralistic "lifeworlds" in the late-twentieth-century world demand a theory open to diverse experience, yet one that remains loyal to a "developmental logic" that holds validity claims.

Frug threads this back to the law when she suggests that when interpreted "progressively," Gilligan provides a "strategy of difference" to circumvent legal moves that in the guise of formal equality are detrimental to subordinated groups. By "progressively," she seems to indicate the importance of the above understanding—that this is not about affectivity vs. reason, or contextualism vs. absolutism, or the quotidian vs. the higher-order, but about how abstract justifications applied to concrete circumstances harbor within them hidden substance and are not formally pure. The next section explores the substantive beliefs that support the so-called normatively empty forms that Habermas assumes in his communicative ethics. Legal rhetoric of justice and rights, like its handmaids and interpreters—philosophy, psychology, and social theory—presupposes the same substantive beliefs.

II. NORMATIVE HIERARCHIES AND PSYCHOLOGICAL THEORY

Kohlberg formalizes "postconventional" justice by explicitly drawing on Kant, Piaget, Mead, and Rawls. He points to a "moral point of view" that involves "impartiality" and "reversibility" as necessary aspects of "cognitivism, universalism, and formalism." Habermas, when proposing communicative ethics as an ameliorative for some of Kohlberg's theoretical problems, suggests that "strategic action" and "normatively regulated action" constitute the two directions of cognitive restructuring. They operate on an egocentric "preconventional morality" on the path toward "conventional morality" until the individual "decen ters" and differentiates "between lifeworld and world" to emerge as postconventionally moral. In this section, I want to submit a sketch that sets the scene for my contentions in section III, where I (1) expose "imparti-

14. PIAGET, supra note 8, at 35.
15. Frug, supra note 3, at 49.
18. Id. at 141–56.
19. Id. at 138–41.
ality" and "reversibility" (moral reciprocality) as one important outcome of cognitive operations but not the necessary outcome, and (2) outline how "strategic action" and "normatively regulated action" can be substantively different for differently socially situated subjects and therefore can provide different contents upon which cognition operates to result in new forms.

I shudder to "psychologize" to an audience of philosophers, social theorists, and legal scholars. But in order to ground my comments, I must. Consider it an excursus. Piaget explicitly relies (and therefore Kohlberg and Habermas implicitly rely) on traditional Freudian notions of originary egoism, tempered by encounters with reality and cultural norms, culminating in separation and detachment as developmental goals. This defines a trajectory that translates into "reciprocity" or "solidarity" as moral ideals—a stance that "always refers back to the self." Gilligan presupposes a different originary scene. In an alternative construction she draws upon John Bowlby's twist on psychoanalytic theory. Bowlby places attachment at the center of psychological growth and castigates the trend toward valorization of separation, detachment, and disengagement, which he viewed as fraught with pathogenic potential. Gilligan extends this danger to civilization itself.

Contemporary empirical evidence corroborates infantile response to connection and relationship. Traditional psychological theories neglect this dimension of human psychology and concentrate instead on the egoistic dimension where perceptions of inequality and oppression subsume the human psyche. These perceptions, an important aspect of human psychology, force attention towards ideals of reciprocal rights and equal respect. They reflect a need for "justice" criteria. But a "care perspective" responds to an equally primordial, albeit neglected, human vulnerability—"problems of detachment or abandonment [that] hold up an ideal of attention and response to need." Both dimensions are equally affective and potentially subject to cognitive reconstruction toward "de-

20. Id. at 122.
22. Carol Gilligan, Remapping the Moral Domain: New Images of Self in Relationship, in MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION 3, 6 (Carol Gilligan et al. eds., 1988).
23. See id. at 10; see also John Bowlby, Attachment and Loss: Attachment (1969); John Bowlby, Attachment and Loss: Separation, Anxiety and Anger (1973).
Both aspects are present in young children and are not sex-linked. They often become gender-associated through gender soaked cultural expectations and conventional norms. Societal structures sanction many boys to bury attachment and express individuation, while a preponderance of girls internalize mechanisms aimed at preventing the loss of attachment. This is not a theory about innate differences, nor is it one that valorizes emotion over reason, particulars over absolutes, or women over men. Frug’s admonitions about the dangers of a “crude Gilliganism” applied to the law are germane here. She warns that “vulgarization of Gilligan’s book has been a catastrophe for feminists. Ripped from the context...[it] los[es] its edge as a disruption of previous research methods or a challenge to existing normative hierarchies.”

Mainstream psychology normalizes existing hierarchies. Therefore when “the dilemma of the fact” appears—when particularism and benevolence appear to override absolute fairness—it is read as a “regression” rather than as a sophisticated moral form underwritten by the universal injunction “to do the least harm.” Gilligan’s research, coupled with her theoretical assumptions that designate attachments as originary moments along with egoism, allow her to reject the interpretation of this apparent dilemma as a regression. Instead it becomes an adult equilibration of the prior adolescent “egocentric belief in the omniscient capacity of formal logic” and represents a “postconventional morality of care.” A fresh framework rescues the “fact” from “dilemma” and elevates it to a positive outcome—a moral stage that transcends both the impediments of conventional ethical life and the empty formalisms of abstract reason and replaces both with an awareness of need and avoidance of detachment. Yet, in agreement with philosophers such as Levinas and Derrida with whose work Gilligan appears not to have familiarity, she places equality and justice on an equal plane with an ethic of care. Each moral justification responds to pivotal, but different, notes of human psychology—separation and attachment. The transcendental subject of pure reason, mythologized at least since Kant, vanishes once tradition suspends disbelief that both self and attachment form an originary affect on which cognition operates but does not vanquish.

28. Gilligan & Murphy, supra note 1, at 86.
29. See Gilligan & Attanucci, supra note 25, at 224–25; see also Honneth, supra note 10, at 319 (commenting on the inadequacy of modern law to deal with the question of “care”). Honneth also presents a discussion of the problems with Habermas’s attempt to mediate between the two moral principles with discourse ethics. For Honneth, as with Gilligan, “care” is a necessary counterpoint to justice.
III. IMPARTIALITY, RECIPROCITY, SOLIDARITY AS OUTCOMES OF SPECIFIC FACTS AND NORMS

The singular ego that encounters the other as "object" or alter ego levels all others to ancillary variations of himself. Habermas's moral alternative to justice, "solidarity," rests on this foundation. For Habermas, "the perspective complementing that of equal treatment of individuals is not benevolence but solidarity. . . . [E]ach person must take responsibility for the other because as consociates all must have an interest in the integrity of their shared life context in the same way."\(^{30}\) The other is an object of "reciprocity"—concern for others is given equally to all. There is no privileging or asymmetry. We take the role of the other to ensure our shared communal life. The other is the object of "reversibility"—the sine qua non of the orthodox Piagetian stance combining autonomy and formal logic.\(^{31}\) Piaget links moral reciprocity to the development of formal logical structures—transformations applied to propositions—in this case, reversibility. "[T]he logical act consists essentially of operating, hence of acting on things and toward people."\(^{32}\)

Habermas, like Piaget and Kohlberg, has been roundly criticized for emptying people of content and for relegating substance to mere affectivity and particularism. But these theorists have not emptied their subjects. Instead they fill them with substance that commentators from Karl Marx, Hannah Arendt, and Carol Gilligan to contemporary political and legal theorists describe in various ways.\(^{33}\) Until recently, this was a substance so elusive as to be nearly invisible, so rooted is it in our intellectual tradition. Habermas, Piaget, and Kohlberg all assume a psychology and developmental trajectory that is rife with substantive content—content that limits their observation, interpretation, and prediction of life-world facts and social norms. An originary narcissistic ego is tacitly construed, one that is non-social and non-rational. Fears of inequality and oppression eventually drive rationality and socially directed thinking. Hence, "impartiality, reciprocity, solidarity"—engagement with a generalized other to ensure individual fairness coupled with survival of a shared community—emerge as valued, anything but neutral, outcomes of this imagined journey of the lone ego. Our constitutional scheme as well as liberalism in general presupposes the same self that these outcomes

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30. Habermas, supra note 21, at 47.
31. See Piaget, supra note 8, at 136–37.
33. See Seyla Banhabib, The Debate over Women and Moral Theory Revisited, in Feminists Read Habermas: Gendering the Subject of Discourse 181, 182–93 (Johanna Meehan ed., 1995) (exploring the implications of Gilligan's research for universalist moral philosophy) [hereinafter Feminists Read Habermas]; Jodi Dean, Discourses in Different Voices, in Feminists Read Habermas, supra, at 205, 220–25 (introducing the notion of an "orientation toward connection," to fill out Habermas's account of moral development).
assume—a view of self that limits both questions and answers about democracy, constitutionalism, and judicial review.34

Lev Vygotsky, early-twentieth-century Russian psychologist, provides me with a transition to write about a different, equally cognitive but less rationalistic and detached, outcome through his recognition of Piaget's shortcomings. Vygotsky proves to be a good stand-in interpreter for me because his work never involved gender differences. Nevertheless he saw the limiting metaphysics in which Piaget, like Freud, was mired, and presented an alternative to which Gilligan's much later work can be related. Vygotsky places the social at the center of development, the originary moment. Whereas Piaget's child overcomes egocentrism with social language and pure thought, Vygotsky's child is first connected and social. Knowing at all levels is born of interaction, activity, sociality—the "interspsychological." The bifurcated world of inner-outer is anathema to him. Piaget, Vygotsky tells us, gives the narcissistic ego an independent metaphysical beginning, which forces him to represent realistic thinking as "completely severed from the real needs, interests, and wishes of the organism, that is, as pure thought."35

Habermas, too, avoids severing inner from outer world and mitigates the problem of "pure thought" by keeping the lifeworld in play—both individual and societal. He holds that paths toward legitimate norms, whether in moral development, social evolution or law, consist of continual cognitive reconstructions of the experienced world. For Habermas, as with Vygotsky, language serves as the lynchpin of this process. But for all these similarities, Vygotsky's initial condition of all transformations, "social speech," takes the more Piagetian form of inner egocentric thinking for Habermas. The social aspect maps on later, in Habermas's view, and culminates in the honing of language and the pragmatics of discourse as the medium of understanding and universalizing in the "postconventional" moment. However, two contrasting types of actions, "strategic action" and "normatively regulated action" precede the postconventional maturity that secures universal legitimate norms for Habermas. These motivations or "actions" enter at the crossroads where the child's egoistic development meets "conventional" morality. Self-interest drives behavior and conventional norms constrain it until an individual (or a culture) "thematizes" the latter to set it off from the lifeworld. To achieve such a "decentered understanding" requires that

a hypothetical attitude is introduced. Before the reflective gaze... the social world dissolves into so many conventions in need of justification. The empirical store of traditional norms is split into

social facts and norms. The latter have lost their backing in the certainties of the lifeworld and must now be justified in the light of principles. Thus the orientation to principles of justice and ultimately to the procedure of norm-justifying discourse is the . . . inevitable moralization of a social world become problematic. Such are the ideas of justice that, at the postconventional stage, take the place of conformity to roles and norms.6

But “social facts and norms” constitute differently for different groups and therefore provide different motivations for strategic action. In addition, different conventional expectations offer a different focus for the “reflective gaze” and “norm-justifying discourse.” Gilligan’s inclusion of girls and women in moral justification studies, which had previously only included boys and men, provides a potent example of such differences. Her empirical findings, commensurate with the theory of originary attachment, suggest that girls often strategically avoid detachment since the social injunctions to separate are not as operative as they are with boys. This form of “strategic action” works in conjunction with conventional norms of self-sacrificial “female goodness” until conflicts about equality and fairness emerge and force cognitive reconstructions of moral dilemmas and justifications. Notions of impartiality enter and demand the subject’s recognition of herself as a subject. She understands the logical grounds for the conflict—principles of fairness to self against those of unconditional maintenance of relationship7—and struggles with the resulting tension. In a move toward what Gilligan names “postconventional care,” this social actor refuses to relinquish the moral injunction to stay attached. She rejects a detached application of reversibility operations to others but instead justifies her acts based on an awareness of need, her own, that of the other, and of non-violence to the relationship. Autonomy, symmetry, ability to take the role of the other, or “what the other means to me” do not drive this morality.8 Yet it responds to issues of fairness. “Do the least harm to self and others,” expresses the universal norm-justifying validity claim of this discourse. Different life-world contents produce different postconventional forms. “Principles of care” should be added to complement “principles of justice” in the Habermas passage above, but should never be subsumed under them. Postconventional “care” is cognitive, principled, and the result of a “reflective gaze.”

36. HABERMAS, supra note 17, at 165.
37. See BROWN & GILLIGAN, supra note 24, at 177-81 (providing descriptions of either-or framing of “selfish or selfless, self or relationship” as a constructive tension toward potential resolution of conventional norms that dictate such dichotomies).
38. It should be made clear that this is not a response based on empathy, being able to exchange oneself for the other or “walking in the others’ shoes.” Rather it is a genuine disinterested response and responsibility to another simply rooted in need. See id. at 38 (describing this distinction as one rarely made in the psychological literature).
IV. CONCLUDING REMARKS

Tradition relegates empirical differences or "facts" that are anomalous within the prevailing theory to mere particularism or relativism, regression or immaturity, or affectivity. That is, to content—as opposed to universal form or reason. This tradition impedes theories of legal and political legitimacy as it has moral philosophy for centuries. The importation of Carol Gilligan's findings and interpretations into Habermas's project palliates the serious consequences of this "'rationalist' bias," which "abstract[s] away from the embedded, contingent, and finite aspects of human beings"... [and] neglect[s]... the contingent beginnings of moral personality." Yet, the inclusion of Gilligan's view does not destroy the cognitivism that Habermas requires for legitimacy based on Piaget's "developmental logic" driven by the "reflective gaze." In this essay, I show how the experiences of differently situated subjects provide "facts" or figurative content on which Piagetian reflexive abstraction operates to create forms that correlate to that content. "At each level, formalization of a given content is limited by the nature of this content;" form and content are correlatives, not absolutes. Gilligan describes two dimensions of early relationship, perceptions of autonomy/inequality and of attachment, each of which constitutes originary content. Depending on individual situatedness and cultural factors, social norms selectively highlight and transform each dimension into differentiated objects of the "reflective gaze." When the first dimension—autonomy, inequality, detachment—is foregrounded, "principles of justice" instantiated through "impartiality" and offset by "reciprocity and solidarity" represent logical formal outcomes. But when attachment is theoretically recognized as equally foundational content, and is then cognitively transformed, "principles of care" logically emerge as another consequent set of formal justifications that define mature moral development. Both outcomes are cognitive, result from operations on originary affect and of attachment, each of which constitutes originary content. Critiques of formal equality models and of the liberal self as legitimate frameworks for law abound, especially from feminist legal scholars. Yet "limited cross-fertilization" has occurred between these critics and constitutional theory and studies of legal legitimacy. Tracy Higgins unpacks the debate between democracy and feminism by suggesting that "liberalism's emphasis on individualization may constitute a normative claim about the value of individuation rather than a descriptive claim

40. PIAGET, supra note 8, at 35–36.
41. Id. at 28.
42. Higgins, supra note 34, at 1660.
Moreover, she adds that critiques of liberalism simply present an alternative normative claim bolstered by complementary descriptive claims of the self, which should inform an analysis of alternative structures to assess legal policy. The interpretation of Gilligan’s work presented here provides both theoretical and empirical support toward such an analysis without reducing alternatives to crude contextualism or false oppositions that frame affect against thought.

Gilligan’s logic like that of Piaget and Kohlberg retains validity claims by assuming that cognitive reflection yields moral competence through increased decentration from conventional norms and unexamined emotivism. While the “postconventional morality” she describes refuses detachment from the relational “facts” of everyday life, it requires justificatory claims. In a lifeworld where attachment figures as centrally as individualism, developmental reflection operates on that attachment and transforms it into a “postconventional” morality in which human connection plays as a counterpoint to the individual. The theory reworks assumptions about originary egoism, proposes different frameworks for problem solving, and new possibilities for competence criteria. Alternative standards resist both disengagement and total submission of self while upholding responsibility for the suppressed or vulnerable other. A morality of “care” neither replaces a morality of “justice,” nor is subsumed under it. They coexist as “bifocalities”—living in a productive tension.” Gilligan’s theory provides normative claims to complement those of classical liberalism and simultaneously assists Habermas’s rescue mission—saving lifeworld “facts” from obliteration by transcendent moral norms without sacrificing reliable justification. It expands the departure point for Habermas’s journey toward “postmetaphysical thinking.”

43. Id. at 1692.
44. See Gilligan & Attanucci, supra note 25.
45. See Honneth, supra note 10, at 316.