Can Rights, Democracy, and Justice be Reconciled through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law

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CAN RIGHTS, DEMOCRACY, AND JUSTICE BE RECONCILED THROUGH DISCOURSE THEORY? REFLECTIONS ON HABERMAS'S PROCEDURALIST PARADIGM OF LAW

Michel Rosenfeld*

INTRODUCTION

There are different images or paradigms of law which correspond to different conceptions of justice and different sources of legitimacy. Moreover, in the context of complex, pluralistic contemporary societies, the relationship between law, justice, and legitimacy has become acutely problematic as competing conceptions of the good cast legal relationships as relationships among strangers, and as justice according to law seems irretrievably split from justice against or beyond law. In the face of these difficulties, one could simply abandon the quest for justice beyond law and settle for a combination of democracy and legal positivism which would reduce political legitimacy to majority rule and confine the role of law to the stabilization of expectations among legal subjects. However, if fearful of tyrannical majorities and dissatisfied with the prospect of predictable but unjust laws, one could opt for justice beyond law and embrace human rights as a shield against the abuses of legislative majorities and the inequities of positive law. In short, in a contemporary pluralist society, law's legitimacy seems to require sacrificing either democracy or justice.*

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1 Cf. MAX WEBER, ECONOMY AND SOCIETY 637 (Guenther Roth & Claus Wittich eds., 1968) (greater differentiation characteristic of modern legal systems was prompted by the advent of the market which brought strangers together to exchange goods and which had to be regulated by universal laws transcending the biases of incommunal norms).

2 "Justice according to law is achieved when each person is treated in conformity with his or her legal entitlement." Michel Rosenfeld, Autopoiesis and Justice, 13 CARDOZO L. REV. 1681, 1681 (1992) (footnote omitted).

3 "Justice against law, on the other hand, is the justice that makes it plausible to claim that a law is unjust (even if it is scrupulously applied in strict compliance with the entitlements which the law establishes)." Id.

4 Recent debates in American constitutional law offer a salient example of the split between democracy and justice. Some have advocated restrictive interpretations of constitutional rights, for fear of unduly trampling on the will of legislative majorities, while others have not hesitated to promote enlarging the scope of antimajoritarian constitutional rights in the name of "fundamental justice" and "basic fairness." Compare, e.g., the ma-
Being relegated to either democracy or justice is bound to be frustrating, in as much as majoritarian rule cannot be purged of all arbitrariness and justice cannot shed all intracommunal roots to rise above the reach of partial communities. There is, however, an apparent way out of the vicious circle circumscribed by arbitrary democracy and parochial justice. That way out is through proceduralism, or, more precisely, through the kind of proceduralism that is capable of yielding what John Rawls calls “pure procedural justice.” It bears emphasizing that most kinds of proceduralism will not do. After all, democratic lawmaking can be viewed as a form of proceduralism based on universal suffrage and majority rule. Nonetheless, it is conceivable that there could be some kind of proceduralism capable of overcoming the residual arbitrariness of democratic lawmaking while, at the same time, maintaining a neutral stance toward the diverse and often conflicting conceptions of the good found throughout the polity.

Habermas’s proceduralist paradigm of law has all the makings of a most attractive candidate for the purpose of establishing the legitimacy of law through pure procedural justice. Indeed, Habermas’s proceduralist approach based on communicative action deals with the residual arbitrariness of democracy by relying on dialogical consensus as the source of law’s legitimacy. On the other hand, Habermas’s proceduralism provides fundamental rights a legal grounding that seemingly obviates any need to justify such rights in terms of any conception of the good not equally shared by all the members of the polity. Moreover, not only does Habermas’s proceduralist approach to law offer a way to resolve the conflict between democracy and justice, it also aims at estab-

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5 Justice beyond law cannot achieve complete impartiality toward all strangers in the relevant class of legal subjects. Therefore, it must, at least in part, rely on a vision of the good that has intracommunal roots, thereby favoring members of the relevant intracommunal group over the remaining legal subjects. Thus, even the most basic and fundamental human rights embodied in numerous international covenants have been criticized as being somewhat parochial or culturally biased. See generally Burns H. Weston, Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION (Richard P. Claude & Burns H. Weston eds., 1989) (focusing on western liberal origins of modern human rights conceptions); see also WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 4 (1995) (“Traditional human right standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities.”).

6 According to Rawls, pure procedural justice is achieved when any outcome is justly provided because a fair procedure was properly followed. JOHN RAWLS, A THEORY OF JUSTICE 86 (1971).
lishing an internal connection between popular sovereignty and human rights, thus providing a normative underpinning for a legal regime that is poised to satisfy both democracy and justice.

In the last analysis, the value of proceduralism and the possibility of achieving pure procedural justice depend on the background assumptions and the material conditions surrounding the insertion and deployment of the relevant procedural devices and practices. Consistent with this, I will argue that Habermas's proceduralist paradigm of law ultimately fails to generate pure procedural justice and that it falls short of furnishing a comprehensive resolution of the conflict between democracy and justice. Habermas appears to have taken proceduralism as far as it can go, and through his discourse theory has made great progress over the proceduralism that has emerged from the works of his major predecessors, namely, Hobbes, Kant, and Rawls. But, as I shall endeavor to indicate in what follows, even Habermas's more nuanced and versatile proceduralism ultimately confronts the need to embrace contestable substantive normative assumptions in order to contribute to the resolution of conflicts that divide the members of the polity.

In order to be in a better position to provide a principled assessment of Habermas's proceduralism, I shall first attempt to put it in context. Accordingly, in Part I, I briefly examine some of the most salient general features of proceduralism as a means to establish its normative legitimacy. In Part II, I concentrate on the background assumptions, material conditions, and tasks which give shape to Habermas's proceduralism and I provide a critical assessment of certain problems it raises. In Part III, I take a close look at a type of feminist objection which seems to go to the heart of Habermas's discourse-theoretical justification of law. Finally, in Part IV, I conclude that Habermas's discourse-theoretical approach to law, while incapable of generating pure procedural justice, nonetheless can play an important constructive role in determining the normative legitimacy of contemporary law.

I.

Procedural justice—of which pure procedural justice is a limiting case—is a necessary component of any complex system for dispensing justice. Procedural justice, moreover, has an essentially twofold role in a contemporary constitutional legal system: first, to insure the just application of substantive norms belonging to the realms of distributive, corrective, or retributive justice; and second,
to protect the worth and dignity of persons whose legal entitlement and obligations are subject to determination or modification by instrumentalities of the state. While these two roles of procedural justice are often intertwined in practice, they remain conceptually distinct. Thus, for example, in the context of the United States's adversarial criminal law system, the defendant's right to counsel and right to cross-examine witnesses can be viewed in two ways. These rights can be seen as both an important tool in the pursuit of the truth—which is essential to the fair application of the substantive norms embodied in the relevant criminal statutes—and as a means of recognizing the defendant's inherent dignity by guaranteeing his or her right of participation in a proceeding that may result in a drastic change in his or her legal status. Conceptually, however, procedural justice as a means of application is generally parasitic on the substantive norms which it is designed to implement. Accordingly, the adversary system's suitability as a vehicle of procedural justice depends on whether it provides a reliable means to ascertain the guilt or innocence of the accused. Providing such a means is essential to the implementation of the relevant substantive norms of justice embodied in the criminal code. In contrast, procedural justice as a means to vindicate the dignity of the accused is largely independent from, though it cannot squarely frustrate the application of, the above mentioned relevant substantive norms. Consistent with this reasoning, even when the evidence against a criminal defendant is so overwhelming that guilt is obvious beyond any reasonable doubt, the defendant is still entitled to have "his day in court."

Accordingly, procedural justice simultaneously depends on and transcends particular substantive norms of justice. It does not follow from that, however, that by virtue of transcending a particular substantive norm, or a particular set of substantive norms, procedural justice transcends all substantive norms. In fact, even when procedural justice vindicates human dignity, it depends on

7 Furthermore, to the extent that its ability to ferret out the truth is what makes the American adversary system of criminal justice procedurally just as a means of applying relevant substantive norms of retributive justice, some of its key features as a guarantor of human dignity—such as the Fifth Amendment's privilege against self-incrimination, which allows the criminal defendant not to testify against him or herself—seem somewhat at odds with its role as a procedural vehicle for the application of substantive justice.

8 Actually, the dependence between procedural justice and substantive norms of distributive, corrective, or retributive justice is mutual rather than one sided. Indeed, if a substantive norm is not capable of being applied in a procedurally just manner, it is altogether not suitable as a legitimate legal norm, although it may still qualify as a legitimate moral norm.
substantive norms. However, the norms on which procedural justice depends, in that instance, operate at a higher level of abstraction than the particular substantive norms sought to be applied in a just manner. Furthermore, because it is likely that there would be a greater consensus regarding the substantive norms operating at higher levels of abstraction (compared to the less abstract substantive norms sought to be applied in a just manner), the more abstract norms may appear to be universal or beyond conflicting conceptions of the good. In other words, from the perspective of the level of abstraction at which the conflict of particular substantive norms unfolds, the more abstract norms may be perceived as remaining beyond dispute.

To illustrate this last point, let us consider the following example. Suppose that a state guarantees a certain minimum standard of living to every citizen; everyone who can prove that he or she cannot reach this standard through his or her own means is entitled to receive public assistance. To implement this policy, the state erects a welfare administration charged with the responsibilities of processing applications for public assistance, determining whether to award public assistance to particular applicants, and determining whether to terminate such assistance upon a finding that a particular recipient no longer needs it. Suppose, further, that the state’s constitution requires that each citizen be given an opportunity to be heard before the revocation of any statutory entitlement. To assess the administrative procedures designed to carry out the state’s public assistance program, reference must be made to the following two norms: each citizen has a right to a state-guaranteed minimum standard of living; and every citizen is entitled to be treated with dignity and respect—which in this case requires that he or she be afforded an opportunity to be heard before the termination of public assistance payments. Although both of these norms are substantive and contestable, the first, which is more concrete, is much more likely to generate controversy than the second. Thus, whereas libertarians, utilitarians, and egalitarians would undoubtedly all endorse the second norm, they would most certainly disagree concerning the legitimacy of the first norm, with the libertarians strongly objecting against welfare rights. Also, from within the trenches of the conflict over welfare rights, the equal

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10 See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
dignity norm may be perceived as universally valid or at least settled beyond dispute.

The importance of procedural justice for modern legal systems and the importance of its structure enabling it to fulfill the twofold role identified above are no accident. Given modern law's strong tendency to cast relationships among legal subjects as relationships between strangers, it is hardly surprising that matters of procedure should be brought to the forefront often predominating over matters of substance. Perhaps less obvious, but equally important, is the fact that this flight to procedure can never be completely successful, since matters of substance persist although they are often either concealed or displaced. A particularly important example of how substantive norms can be concealed by procedural ones emerges through a closer look at pure procedural justice.

Rawls suggests gambling as an example of pure procedural justice. In his own words, "If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is." In other words, any distribution resulting from a series of fair bets is just, so long as the bets remain fair. If there is no tampering with the betting procedure, such as there would be in the case of cheating, then the outcome of the betting is purely procedurally just (or purely procedurally not unjust). Moreover, since gambling is a means to distribute or redistribute money or goods, gambling which consists exclusively of a series of fair bets produces, in a purely procedural manner, outcomes which further, or at least do not contradict, the requirements of distributive justice.

If we look more closely at the proposition "any distribution resulting from a series of fair bets is just," we can discern two different plausible interpretations: one narrowly focused on gambling as a procedure, the other more broadly focused on gambling as a distributive device. Under the narrow interpretation, fair gambling, in contrast to unfair gambling, is just to the extent that all participants in fair gambling obtain everything which they are enti-

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11 An extreme example of the uses of procedural issues to mask conflicts between parties with widely divergent conceptions of the good is provided by the protracted discussions concerning the shape of the negotiating table at the onset of certain peace talks. See, e.g., Thomas L. Friedman, Third Round of Mideast Talks Closes with Scant Progress, N.Y. TIMES, Jan. 17, 1992, at A1; Jackson Diehl & David Hoffman, Participants Gather for Mideast Peace Talks, WASH. POST, Oct. 29, 1991, at A16.

12 RAWLS, supra note 6, at 86.
tied to expect, namely an equal opportunity\(^{13}\) (in the sense of an equal probability) to become the winner. From the broader perspective, however, fair gambling can only be just—or, much more likely, not unjust—if certain material conditions and certain normative assumptions are present. Thus, if fair gambling only involves individuals who risk small amounts of discretionary income, in the context of a normative setting where random allocations of discretionary income would not contravene prevailing norms of distributive justice, then any outcome of fair gambling is not unjust. If, on the other hand, fair gambling were to involve large sums of money, including what for some gamblers would be considered sums necessary for purposes of their subsistence, and if the gambling were to take place in a setting in which, according to prevailing substantive norms of distributive justice, redistributions of income that cause any one to fall below the subsistence level are deemed to be unjust, then even such fair gambling would clearly be (distributively) unjust.

As the example of gambling indicates, pure procedural justice depends on substantive norms of justice as much as the other forms of procedural justice. Pure procedural justice differs only in that under the confluence of certain material conditions and certain substantive norms of justice, application of a given procedure is bound to produce a just (not unjust) outcome or one of many equally just (not unjust) outcomes. Moreover, the perception that pure procedural justice remains independent from substantive norms of justice is made possible by a twofold abstraction. First, the legal subjects who avail themselves of the relevant procedure are abstracted from (in the sense of being lifted out of) the lifeworld of their daily existence. Second, the relevant procedure is abstracted from the concrete material conditions and particular substantive norms on which it depends for its ultimate justification. The second abstraction would be performed through lifting the relevant procedure from its broader legitimating factual and normative context, and then focusing on this procedure so narrowly as to leave its factual and normative setting out of the resulting picture.

The processes of abstraction present in both procedural and purely procedural justice, while operating somewhat differently, are ultimately relied upon to perform largely similar tasks. On the one hand, abstraction is supposed to sufficiently detach legal subjects from the totality of their concrete trappings in order to place

\(^{13}\) See Michel Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry 42 (1991).
the spotlight on similarities among such subjects, while downplaying the differences that set them apart. Accordingly, in the example of gambling, the individuals involved are considered in relation to their placing bets and not in terms of their differing wealth, education, social class, or family status. Similarly, in the context of the economic marketplace or of contract as a legitimate tool of procedural justice, individuals are considered in their capacities as producer, buyer, seller, or consumer rather than as men or women, rich or poor, or members of an ethnic majority or minority.

In addition to lifting legal subjects out of their concrete socio-political circumstances, abstraction serves to minimize or to conceal reliance on contestable substantive norms when attempting to settle conflicts among legal subjects. Moreover, these two different tasks performed by abstraction are not independent from one another, but rather, are closely connected. As already mentioned, the principal normative function of law in complex modern societies is to provide for just intersubjective dealings among legal subjects who relate to each other as strangers. And, as between strangers, justice would seem to require, above all, that all those involved be treated as equals and that the customs, normative beliefs, and ethical commitments of some not be favored over those of others. Also, because one is most likely to perceive a stranger in terms of the ways he or she differs from the members of one’s own group, justice among strangers seems to require conceptualizing the realm of intersubjective transactions at a level of abstraction that optimizes awareness of what strangers have in common.

Where legal subjects relate to each other as strangers, procedural justice becomes extremely important and promotes a brand of equality that clusters around similarities. Genuine equality, however, requires taking into account relevant differences as well as relevant similarities. Accordingly, procedural justice seems prone to overemphasize similarities, while underemphasizing differences. Because of this, from the standpoint of achieving global justice, every move in the direction of the greater abstraction required by procedural justice should be paired with a move in the opposite direction in order to prevent the eradication of relevant differences. This latter move, moreover, may either be set in motion automatically, in the context of pure procedural justice operating under propitious material conditions and normative

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14 Inequality results as much from treating those who are different as inferior as it does from imposing treatment as equals onto those whose relevant differences have been disregarded or suppressed. See id. at 222-24.
assumptions, or it may be triggered by the application of substantive norms that counter the flight toward abstraction promoted by procedural justice. In short, the task of justice is to account for and reconcile relevant identities and relevant differences. Viewing law as a medium, the above proposition means that the formal equality derived from law, which conforms to procedural justice, must be reconciled with the substantive equality that properly incorporates differences. Furthermore, substantive equality can be promoted through the content of legal norms.

Before turning to an examination of Habermas’s proceduralist paradigm, in light of the preceding observations, there are two further points about proceduralism in general which must be briefly mentioned. First, it does not necessarily follow that although proceduralism cannot do away with the need to embrace substantive norms, pure procedural justice is impossible. Clearly, proceduralism cannot rise above substantive norms or appeal to universally valid substantive norms. However, this does not preclude reliance on contestable substantive norms to the extent that such norms must be implicitly or explicitly embraced by all those confronted with the necessity of interacting with others, as legal subjects having to relate to each other as equals and as strangers. In other words, proceduralism may be acceptable in the context of contestable substantive norms. This is true provided that the latter norms cannot be legitimately contested by those who come under the sweep of the background assumptions and material conditions underlying the proceduralism under consideration.

Second, a distinction must be drawn between what may be called “primary proceduralism” and what may be referred to as “derivative proceduralism.” Under primary proceduralism, deployment of the relevant procedure is both indispensable to and determinative of any outcome that may be considered legitimate. However, under derivative proceduralism, outcomes are ultimately determined and legitimated by something more fundamental than, or logically antecedent to, the relevant procedure. Consequently, the relevant procedure is relegated to an auxiliary or essentially rhetorical role. As an illustration, one can cite the difference between “pure” or “primary” social contract theory and derivative social contract theory:

Pure social contract theory posits that the ultimate justification of all legitimate social and political institutions lies in the mutual consent of the individuals affected by such institutions. . . . Derivative . . . social contract theories, on the other hand, recognize the social contract device, but do not rely at the deepest level on
mutual consent as the source of the legitimacy of social and political institutions.\textsuperscript{15} Consistent with this distinction, Hobbes is an exponent of pure social contract theory, whereas Locke is an exponent of derivative social contract theory.\textsuperscript{16} In Locke’s theory, the ultimate source of legitimacy is not the social contract itself, but rather the natural right to property. This right to property both prompts the passage from the state of nature to civil society and delimits the scope and function of the social contract.\textsuperscript{17}

More generally, pure procedural justice requires primary proceduralism and is ultimately inconsistent with derivative proceduralism. Therefore, derivative proceduralism is not genuine proceduralism but rather substantive theory in procedural garb.

II.

Habermas’s proceduralism, rooted in his discourse theory, emerges against the background of Hobbesian as well as Rawlsian contractarianism. Hobbesian contractarianism satisfies the requirements of primary proceduralism yet remains morally arbitrary; Rawlsian contractarianism incorporates the standpoint of Kantian morality, but proves ultimately to belong to the realm of derivative proceduralism.\textsuperscript{18} In Hobbesian contractarianism, the contractual device both shapes and legitimates the contract of association, which marks the passage from the state of nature to civil society.\textsuperscript{19} The contractual device, moreover, performs a critical intersubjective task both by mediating between the conflicting wills of individual contractors and yielding a common will, which differs from every individual will involved, yet is nothing but the product of a voluntary compromise among all the contractors.\textsuperscript{20}


\textsuperscript{16} See id.

\textsuperscript{17} See \textit{id.} at 857-58.


\textsuperscript{19} For a more detailed discussion of Hobbes’s social contract theory, see Rosenfeld, \textit{supra} note 15, at 849-50, 852-55, 858-59.

\textsuperscript{20} In a paradigmatic contract between a buyer who wishes to obtain a coveted good as cheaply as possible, and a seller who wishes to sell that good as expensively as possible, the contract price will be set at a level that is higher than what the buyer wishes, but lower than that wished for by the seller. Moreover, the contract price has to be such that neither the buyer nor the seller prefers to walk away from the contract rather than entering into it. Thus, the conflict between the will of the buyer and that of the seller is settled upon agreement on a contract price, which becomes the joint (intersubjective) will of buyer and seller but which transcends each of their (initial) individual wills.
Also, in the context of Hobbesian contractarianism, the state of affairs resulting from implementation of the contract may comport with the requirements of pure procedural justice, provided certain material conditions and normative assumptions are satisfied. Those conditions and assumptions are the ones that underlie Adam Smith’s conception of a market society in which the “invisible hand” of competition transforms the clash of private interests into a realization of the public interest.\(^1\) In the context of the kind of atomistic competition envisaged by Adam Smith, contract serves to transform the products emanating from the arbitrary wills of individuals into building blocks for the emergence of the public interest.

Absent atomistic market competition, and upon rejection of the Smithian conception of the relationship between the pursuit of private self-interest and promotion of the public interest, contract alone cannot serve to bridge the gap between private and public interest. Accordingly, contract loses its ability to produce pure procedural (distributive) justice. Furthermore, while still a medium for mediation of conflicting wills, contract no longer serves as a means to transcend the arbitrary wills of individual contractors. Finally, in the context of atomistic competition, each contractor presumably has an equal opportunity to influence the shaping of the common will through joint and mutual contract, whereas in the absence of rough material equality among contractors, the superior bargaining power of some contractors allows them to have significantly greater influence than others on the configuration of the intersubjective will produced through contract.\(^2\) In short, cut loose from its Smithian moorings, Hobbesian contractarianism in the end is both morally arbitrary as well as partial toward some of the contractors.

\(^1\) For a more extended discussion of the relationship between Adam Smith’s conception of a market society and the achievement of pure procedural justice through the implementation of contracts, see Rosenfeld, *supra* note 15, at 873-77.

\(^2\) Whereas it is obvious that the mere fact of contracting tends to lose its legitimating role in the context of a legal contract between two contractors with widely different bargaining power, it is not immediately apparent that an analogous change takes place in the context of the social contract. Upon reflection, however, the analogy seems to hold to the extent that once the “invisible hand” premise is dropped, all the different conceptions of the good are not likely to fare equally well when subjected to the social contract device. Thus, for instance, communitarian and feminist conceptions of the good are much less compatible with the ideology of contract than are individualistic and atomistic conceptions. See, e.g., Carol Pateman, *The Sexual Contract* 2, 108 (1988) (social contract establishes a “fraternal patriarchy” through which men rule over women). Accordingly, if differences had to be settled through a contractual agreement, atomistic individualists would have a built-in advantage over communitarians or feminists.
Rawlsian contractarianism proposes to resolve both of the defects which plague its Hobbesian counterpart. To overcome moral arbitrariness, Rawls infuses his social contractors with Kantian moral universalism. Whereas Hobbesian contractors are motivated to enter into the social contract to secure indispensable social cooperation on terms most favorable to the furtherance of their own arbitrary will, Rawlsian contractors seek to establish principles of justice upon which they could all equally agree. Moreover, to avoid the pitfalls caused by differences in power among contractors and by partiality, Rawls places his hypothetical contractors behind a "veil of ignorance." This is designed to make it possible for contractors to agree upon principles of justice without taking into account either their social position or their conception of the good.

The veil of ignorance secures equality by allowing strangers to ascend to a higher level of abstraction. At this level they can discover the core of their common identity, unhampered by the power struggles and the clashing differences of their daily existence. Based on that new-found equality predicated on their common identity, strangers, through reciprocal recognition, can discover fair principles of justice to govern all of their intersubjective dealings. However, Rawls's use of the contract device at a higher level of abstraction comes at too high a cost. Indeed, in the course of establishing abstract equality behind the veil of ignorance, Rawls has sacrificed difference, has reduced the social contract from a dialogical to a monological device, and has unwittingly paved the way for the predominance of some perspectives which cannot be justified as being superior to those against which they compete.

Rawls's abstract equality behind the veil of ignorance is objectionable to the extent that it drastically downplays difference in its search for a solid common core of identity. Genuine equality requires taking into account relevant differences as well as relevant similarities. Rawls's contractors have been deprived of the means to perceive diversity, and are thus unable to factor relevant differences into their elaboration of fair principles of justice. Differences are also essential to the proper functioning of the institution of contract, as only contractors with different needs, desires, motivations, and resources are likely to seek out one another to negotiate a contractual exchange. Ultimately, Rawls's contractors behind

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23 See Rawls, supra note 6, at 11-12.
24 See id. at 11.
25 For an extended discussion of these shortcomings of Rawls's contractarianism, see Rosenfeld, supra note 13, at 233-37.
the veil of ignorance are reduced to the position of mere abstract egos. And since abstract egos are interchangeable, as identically constituted and uniform in perspective, individual conclusions would not differ from those reached in concert concerning legitimate principles of justice. Under these circumstances, the contract device seems altogether superfluous, rendering Rawls's principles of justice monological rather than dialogical, and his brand of contractarianism derivatively proceduralist at best.

The most serious defect of the Rawlsian process of abstraction is that it ultimately makes it possible, under the guise of remaining neutral among different perspectives, for some perspectives to gain the upper hand over others. This results from the very means of abstraction that Rawls sets into motion in order to transform the totality of everyday individuals embedded in their particular socio-political norms, institutions, customs, and practices into a collection of pure abstract egos acting as social contractors behind a veil of ignorance. Looking closely at this process of abstraction, a distinction can be drawn between physical differences and differences in perspective. For example, there is a difference between racial identity as a function of skin pigmentation and racial identity as the product of a distinct historical and cultural-based perspective. Now, we can accept that the veil of ignorance conceals differences based on skin pigmentation just as we can readily imagine a society that is not comprised of differences in skin color. However, if historical events such as slavery and racial apartheid have created distinct perspectives, which by and large correspond to differences in skin color, then how can we go beyond these differences in perspective while discarding differences in skin pigmentation? If there is a universal perspective that transcends all particular perspectives, proceduralism would be entirely superfluous or merely trivial. Absent such a universal perspective, however, the abstract egos behind the veil of ignorance would have to adopt either a racial minority or a racial majority perspective in order to arrive at any common principles sufficient to sustain fair principles of jus-

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26 [Under Rawls's] original position ... common principles emerge only after all differences in life plans and in natural and social assets have been set aside. Under these circumstances, common principles are reached, not from a diversity of perspectives that incorporates the multitude of existing differences, but from the mere abstract identity that equalizes all individual perspectives after having neutralized all the possible sources of individual differences. *Id.* at 234-35.

27 This analysis is consistent with Habermas's assessment of Rawls's theory. See JÖRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 66 (Christian Lenhardt & Shierry W. Nicholsen trans., 1990).
tice. Under these circumstances, a racially influenced perspective becomes a material condition that is bound to have an impact on the selection of principles of justice, yet it remains concealed behind the erasure of differences relating to skin pigmentation.28

Habermas's discourse-theoretical proceduralism provides the means to overcome the particular limitations of both Hobbesian and Rawlsian contractarianism. By relying on communicative action—action oriented toward reaching understanding29—as a means to generate consensus, Habermas provides a procedural approach that makes for a clear demarcation between the generation of intersubjective norms and their use to one's own advantage. Consistent with this demarcation, and as a consequence of excluding "strategic action"30 from the process designed to lead to the consensual adoption of intersubjective norms, Habermas provides a way to surmount the arbitrariness and lack of impartiality inherent in Hobbesian contractarianism. Indeed, contract is, above all, the institution of choice to channel peaceful and orderly interaction among strategically oriented social actors. Accordingly, the use of contract to generate intersubjective norms seems destined to subordinate the perspective of the rulemaker to that of the strategic actor who wishes to press his advantage as far as the rules permit. However, from the standpoint of communicative action, where the focus is on reaching a consensus, both arbitrary will and the strategic actors' thirst for success seem sufficiently isolated and neutralized to move beyond the constraints inherent in Hobbesian contractarianism.

Communicative action also provides the means to overcome the two principal defects of Rawlsian contractarianism—namely its inability to properly account for differences and its unintentional privileging of certain perspectives over others. Not only is everyone supposed to participate in Habermas's discursive procedure for generating and validating intersubjective norms, but there is no

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28 For a more extended discussion of the role of race in shaping different perspectives in the context of American society, as well as the relation between such perspectives and norms of justice, see ROSENFELD, supra note 13, at ch. 9.


30 According to Habermas, in strategic action, "the actors are interested solely in the success, i.e., the consequences or outcomes of their actions, [and] they will try to reach their objectives by influencing their opponent's definition of the situation, and thus his decisions or motives, through external means by using weapons or goods, threats or enticements." HABERMAS, supra note 27, at 133.
veil of ignorance and everyone is free to introduce any matter of concern for discussion. Accordingly, differences are not eliminated *ex ante*, but are taken into full account; the ultimate decision as to which differences to count as relevant to be reached by consensus after full and uninhibited discussion. Moreover, Habermas's dialogical approach, unlike Rawls's contractarianism, is not reductive when it comes to taking different perspectives into account. Indeed, not only does Habermas envisage taking all different perspectives into account, but he insists that his discursive procedure calls for the complete reversibility of the perspectives of all participants in communicative action. In other words, Habermas's proceduralism requires, as a prerequisite to reaching a legitimate consensus, that conflicts presented for discursive resolution be considered by all participants from each and every perspective involved.

Having thus set the procedural path free from unwarranted Hobbesian and Rawlsian constraints, Habermas proposes his proceduralist paradigm. According to this paradigm, the legitimacy of law is to be gauged from the standpoint of a collectivity of strangers who mutually recognize one another as equals and jointly engage in communicative action to establish a legal order to which they could all accord their unconstrained acquiescence. By means of communicative action, a reconstructive process is established through which the relevant group of strangers need only accept as legitimate those laws which they would all agree both to enact as autonomous legislators and to follow as law abiding subjects.

In accordance with this proceduralism, legal subjects can construct a perspective that enables them to view themselves simultaneously as the authors and the addressees of law. From that perspective, moreover, they may jointly determine which laws would be acceptable to them in their capacities as both authors and addressees. And, consistent with this proceduralism based on communicative action, democracy and rights not only can be reconciled but also apprehended as internally connected and mutually dependent. Indeed, absent the safeguards built in through communicative action, democracy and rights not only can be reconciled but also apprehended as internally connected and mutually dependent.

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31 See id. at 122.

32 As Habermas states, a legal order is legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens; at the same time, however, it owes its legitimacy to the forms of communication in which civic autonomy alone can express and prove itself. This is the key to a proceduralist understanding of law.

tive action, democracy and rights remain at loggerheads since the only guarantee against oppression by legislative majorities would come from antimajoritarian rights limiting the scope of legitimate democratic lawmaking. However, from the standpoint of communicative action, the same rights, which those in the minority would otherwise grasp as shields against the majority, would loom as part of the same bundle of rights and freedoms which enables each member of the legal community to become integrated with every other member of that community.

In addition to reconciling rights and democracy from the standpoint of communicative action, Habermas's proceduralist paradigm of law also offers innovative means to pursue the purely procedural achievement of justice. Indeed, as Habermas indicates, the principal task of the strangers who relate to each other as equal consociates under law is to reconcile the requirements of legal equality with those of factual equality. In other words, through communicative action, legal actors are supposed to reach agreement among themselves as to which factual similarities and differences ought to be taken into account by the law. As we have seen, Hobbesian contractarianism shortchanges the demands of justice to the extent that its proceduralism favors recognition of the identities and differences dear to the most powerful. Likewise, Rawlsian contractarianism also proves inadequate because, among other things, its removal of certain differences ex ante renders it only derivatively procedural. Finally, substantive resolutions of the problem of justice necessitate recourse to justice beyond law, which compels favoring certain conceptions of the good over others. In light of these alternatives, Habermas's procedural proposal seems particularly attractive for at least two important reasons: first, it allows all identities and differences to be considered while weeding out strategic uses of them; and second, it requires subjecting all of the identities and differences to every one of the perspectives represented by participants in communicative action. Accordingly, Habermas's proceduralism promises to reconcile legal and factual equality in a way that not only accounts for all existing identities and differences, but that also takes into consideration the importance of every asserted identity and difference for each of the different perspectives represented in communicative action.

The reconciliation of legal and factual equality is a paramount task for postmetaphysical justice. As Habermas notes, however, the two postmetaphysical legal paradigms—namely the liberal-

33 See id. at 778-79.
bourgeois paradigm and the social-welfare paradigm (which he seeks to replace with his proceduralist paradigm)—have not satisfactorily dealt with the nexus between legal and factual equality. The liberal-bourgeois paradigm reduces justice to the equal distribution of rights, thus basically ignoring factual equality. The social-welfare paradigm, on the other hand, seeks to remedy this deficiency by zeroing in on the eradication of factual inequality, and in so doing reduces justice to distributive justice. As a consequence of this, in order to achieve factual equality, the dignity and autonomy of those who must be clients of the welfare state become substantially undermined.

The material conditions underlying the emergence of Habermas’s proceduralist paradigm of law thus include both the successive existences and failures of the liberal-bourgeois and social-welfare paradigms. The liberal-bourgeois paradigm relies primarily on a formal conception of equality that clearly places identity above differences. The social-welfare paradigm, in contrast, fosters a material conception of equality that places differences and the need to account for differences in the forefront, leaving equality as identity in the background.

From the broader perspective of the struggle for equality, originating in the repudiation of the feudal order, one can observe an intertwining dialectic between identity and difference as well as between equality and inequality. A brief look into this dialectic is warranted at this point in order to place the struggle to reconcile legal and factual equality, and the three paradigms of law discussed thus far, in a broader context. This should make for a more thorough picture of the background and normative assumptions and of the material conditions surrounding Habermas’s proceduralist paradigm of law.

In the struggle against feudal hierarchy, equality as identity achieved predominance, as clearly evinced in the American Declaration of Independence’s famous phrase, “All men are created equal.” Moreover, the emergence of equality as identity being a rallying point for eighteenth century bourgeois revolutionaries is

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34 See id. at 776-80.
35 See id.
36 See id.
37 See id.
38 In other words, in the liberal-bourgeois paradigm, rights are distributed equally to everyone since every individual is considered identical to every other individual as a being who is inherently entitled to have rights. But if (material) differences among individuals tend to be downplayed, inequalities in the capacity to exercise rights will be disregarded.
set against the feudal order’s association of difference with hierarch­
chical relations between superiors and inferiors. In other words, in
this particular setting, equality goes hand in hand with identity
whereas inequality is coupled with difference. Consistent with this
view, the pursuit of equality as identity is to promote the establish­
ment of equal dignity of citizens regardless of status or birth.

There are, however, other contexts in which equality as iden­
tity can be used as a weapon against treating all members of society
as equals.39 This occurs when equality has to be purchased at the
price of giving up cherished differences; for example, when equal
membership in a polity is conditioned on the adoption of an official
religion which may require repudiating or suppressing one’s own
religious preferences. More generally, in terms of the dynamics be­
tween identity, difference, equality, and inequality, whether equal­
ity as identity ultimately contributes to, or frustrates, treating every
member of society as an equal depends on whether equality as
identity is pursued in a setting that is best characterized by the met­
aphor of the master and the slave or by that of the colonizer and
the colonized. Indeed, the master treats the slave as inferior be­
cause he is different, whereas the colonizer offers the colonized
equal treatment provided that the latter give up his own language,
culture, and religion and adopt those of the colonizer.40 Accord­
ingly, in a master-slave setting, equality as identity is a weapon of
liberation whereas in a colonizer-colonized setting, it is a weapon
of domination.41

The dialectic between equality as identity and equality as dif­
ference unfolds in the context of the struggle for equality against
the backdrop of commitment to prescriptive equality—that is, ac­
cepting, as a normative proposition, that all persons are inherently
equal autonomous moral agents. Moreover, a discrepancy exists

39 Following Dworkin’s distinction, equal treatment—that is, giving to each the same
thing—must be contrasted with treating persons as equals—that is, as possessors of the
same inherent worth and dignity. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227
40 For a more extended discussion of these issues, see ROSENFIELD, supra note 13, at
222-24.
41 A clear example of this contrast is furnished by the constitutional treatment of racial
differences in the United States. At the time when racial apartheid was constitutionally
sanctioned, the slogan “the constitution is colorblind” was a weapon used against the de­
nial of equal dignity to African-Americans. See Plessy v. Ferguson, 163 U.S. 537, 552
(1896) (Harlan, J., dissenting). In the context of modern day claims to entitlement of af­
firmative action, as a remedy against the lingering effects of past discrimination, however,
“the constitution is colorblind” has become the rallying point for those who refuse to re­
dress continuing inequities against African-Americans. See, e.g., Paul C. Roberts, The Rise
between the ideal of prescriptive equality, which requires a reconciliation of legal and factual equality accounting for all relevant identities and differences, and the conception of equality embraced by active combatants in the struggle for equality. As long as the full realization of the ideal of prescriptive equality remains elusive, combatants struggling for equality seem bound to embrace positions more tilted toward identity or difference, according to whether they wage their fight against particular inequalities grafted upon particular differences or, on the contrary, against inequalities maintained through exploitation of certain identities. In as much as the tilt required to combat inequality unduly sweeps ideally relevant identities or differences, the struggle for equality forces its protagonists to temporally forgo the acknowledgment of certain identities or differences that ultimately must figure in any legitimate reconciliation between legal and factual equality. Finally, the dialectic between identity and difference assuredly compensates for deviations that tilt too far toward identity or difference, without ever reconciling the path of the struggle for equality with the one carved by the ideal of prescriptive equality.

Regardless of whether questions of justice can ultimately be determined independently from questions concerning conceptions of the good, from the standpoint of those engaged in the struggle for equality, how much equality there should be and for whom is always embedded within the limited horizon of a concrete conception of the good. To the extent that the struggle for equality is likely to involve more than two protagonists, a protagonist’s tilt toward identity or difference in dealing with one antagonist may come back to haunt that protagonist when confronting another antagonist. Thus, for example, from the perspective of the generation that carried out the American Revolution and adopted the Constitution, their tilt toward identity, reflected in the phrase “all men are created equal,” was undoubtedly useful in the struggle against Britain’s monarchy. That same tilt, however, proves to be a nuisance if not a downright obstacle in the context of establishing a constitutional democracy that recognizes the institution of slavery as lawful.42 This example is admittedly extreme in that the per-

42 It is noteworthy that the United States Constitution of 1787 implicitly recognizes the legal validity of slavery. See, e.g., U.S. CONST. art. I, §§ 2, 9. Neither does the Constitution contain equality rights, thus remaining at odds with the 1776 Declaration of Independence. It would not be until after the Civil War that the Constitution would be amended to repudiate slavery, and establish equality rights. U.S. CONST. amends. XII, XIV. For a thorough and enlightening discussion of these issues, see David A.J. Richards, Revolution and Constitutionalism in America, 14 CARDOZO L. REV. 577 (1993).
perspective embraced by America’s founding generation leads to a blatant contradiction, unless one is prepared to proceed as if slaves were less than human.\(^{43}\) Even in more mundane cases, however, there is likely to be a tension, if not a contradiction, between the tilt one is forced to assume in one’s struggle for equality and the optimal amount of interplay between legal and factual equality consistent with one’s perspective grounded in one’s own conception of the good. In sum, considering that the struggle for equality is waged from multiple perspectives and against many differently positioned antagonists, the dialectic between equality and inequality generates tilts, either in the direction of identity or difference, which require correction. Overly sweeping claims are also generated, which require adjustment to become better (without ever becoming fully) reconciled with the comprehensive perspective from which they are made. Thus, the interplay between identity and difference must be treated as though it were a dynamic process affecting both the configuration and the scope of equality at any given time and place.

Consistent with the preceding analysis, from the standpoint of every perspective shaped by a particular conception of the good (which is compatible at the highest levels of abstraction with prescriptive equality), the reconciliation between legal and factual equality must satisfy two distinct and, at least to some degree, incompatible requirements. First, such reconciliation should satisfy the optimal relationship between identity and difference within the conception of the good espoused by the relevant perspective. Secondly, such reconciliation should level the playing field between the existing tilts and excesses that result from the ongoing struggle for equality among representatives of different perspectives. If the desired balance is not achieved, the optimal mix between identity and difference could not properly be set in motion in order to become effective. On the other hand, achievement of the desired balance requires reliance on certain identities and differences that are bound to upset, or at least postpone, the implementation of the optimal mix.

The three paradigms of law discussed by Habermas can now be put in context, both in terms of the dynamic struggle for equality, and in terms of competing perspectives on equality and justice. In terms of the struggle for equality, there is a dynamic progression from the tilt toward identity of the liberal-bourgeois paradigm, to

\(^{43}\) Shamefully, this is what the United States Supreme Court did in its infamous *Dred Scott* decision. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
the tilt toward difference of the social-welfare paradigm, and fin­nally to the attempt to incorporate, reconcile, and balance the vir­tues of liberal identity and social-welfare difference within the proceduralist paradigm proposed by Habermas. Therefore, as against the two paradigms which it seeks to replace, Habermas's proceduralist paradigm appears to have significantly levelled the field on which the battle for the optimal reconciliation of legal and factual equality must be fought. This, however, does not necessarily imply that Habermas's paradigm levels the field sufficiently as between the competing perspectives it encompasses, or that it can yield any reconciliation of legal and factual equality that would be acceptable to all the encompassed perspectives.

Focusing on the issue of the perspectives encompassed within Habermas's proceduralist paradigm, three important questions arise. First, does Habermas's proceduralist paradigm, by the very nature of communicative action, effectively exclude certain perspectives? Second, does the proceduralist paradigm provide a workable means of achieving a genuine consensus among the competing perspectives it encompasses regarding the optimal mix of identities and differences, in relation to the legitimate reconciliation of legal and factual equality? And, third, does the proceduralist paradigm provide an adequate means of leveling the field on which the perspectives it encompasses compete for justice and equality? Phrased somewhat differently, these three questions can be restated as: (1) which perspectives can expect justice under Habermas's proceduralism?; (2) can such proceduralism produce justice among different perspectives?; and (3) can such proceduralism yield equal justice as gauged from within each of the encompassed perspectives?

Consistent with Habermas, in answering the first question it is clear that some perspectives are effectively excluded from the discursive resolution of questions concerning justice. Thus, all perspectives that could be broadly characterized as metaphysical perspectives—including those framed by religious dogma and ideology—would effectively be excluded or, more precisely, would effectively exclude themselves from any dialogical process designed to resolve issues of justice. To be sure, this is not problematic for Habermas's proceduralist paradigm since he makes it clear that his paradigm is designed for postmetaphysical conflicts over justice. The exclusion of metaphysical perspectives is noteworthy. It underscores that communicative action is not neutral as between all conceptions of the good, even if in the final analysis it remained
neutral among the different conceptions of the good that are not incompatible with it.

Communicative action effectively excludes not only metaphysical perspectives but also nonmetaphysical ones that reject adherence to prescriptive equality. Indeed, there seems to be little point, from the standpoint of nonmetaphysical perspective adherents (who maintain that some are inherently superior), to submit their views concerning justice for discussion with those whom they do not consider as equals. Even if convincing the unworthy is not deemed futile, communicative action by its very structure would still remain manifestly unfavorable toward blatantly inegalitarian ideologies that altogether reject prescriptive equality. In short, it remains to be seen whether Habermas's proceduralism is neutral as between the perspectives it encompasses. However, the exclusion consistent with Habermas's proceduralism of metaphysical and nonmetaphysical hierarchical perspectives indicates that it is ultimately tied to certain substantive normative assumptions, albeit negative ones.

The answer to the second question—namely, whether communicative action can carve out a common ground for justice encompassing all of its perspectives—depends on the nature of the procedural devices involved in communicative action as well as on the existence of material conditions making it plausible for the reversal of perspectives (undertaken by actors engaged in communicative action) to generate fruitful consensuses or compromises. As conceived by Habermas, communicative action requires each participant to have an equal opportunity to present claims for consideration and a universal commitment to be swayed only by the force of the better argument. Thus, the only legitimate normative regulations under Habermas's proceduralist paradigm would be those which have been assented to by all the participants in rational discourse who might be affected. Moreover, in the context of legal as opposed to moral norms, Habermas stipulates that assent could be based on bargaining and compromise as well as on consensus. Finally—and an important advance over Rawlsian contractarianism—the needs, wants, and interests of participants in communicative action are not taken by Habermas to be immutable; rather they are subject to evolution and transformation pursuant to dia-

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44 For a comprehensive discussion of communicative action, see 1 HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, supra note 29, at 273-337.
45 See HABERMAS, supra note 18, at 459-60.
46 See id. at 460.
logical exchanges. Because communicative action, as conceived by Habermas, can contribute to the formation of opinions and wills, it is not simply relegated to finding overlapping interests; it is also equipped to harmonize interests through dialogical transformation.

In view of the characteristics of Habermas’s proceduralism, there are at least three significant impediments to the goal of achieving an accord on justice among representatives of the diverse perspectives engaged in communicative action. First, the reconciliation of perspectives might ultimately prove to be a purely contingent matter. In that case, Habermas’s proceduralism would prove inadequate because under many plausible circumstances it would fail to lead to any legitimate reconciliation of legal and factual equality.

One way to avoid this latter possibility is by emphasizing the requirement of rationality. Indeed, if rationality is called for by communicative action in the selection of ends, in dealing with the means toward one’s ends, and in dealing with conflicts that exist among persons who pursue different ends, then attaining an accord on justice may no longer be contingent. But that leads to the second problem. If the requirement of rationality is strong enough to foreclose the contingency of an accord, then that accord is dependent on the operative norm of rationality rather than on dialogical reciprocity. Consequently, Habermas’s proceduralism would become essentially derivative.

Relying upon bargaining and compromise, as well as on consensus coupled with emphasis on the transformability of needs, provides an alternative way to minimize the chance that the proceduralist paradigm will fail to yield an accord. This last alternative, however, leads to the third problem. If the pressure to reach an accord is intense, then bargaining and compromising—even if they remain free of strategic action—may favor certain perspectives over others (as contrasted with certain individuals over others). If that were the case, Habermas’s proceduralism would fail to remain neutral as between the perspectives which it encompasses (much like Hobbesian contractarianism proved unable to remain neutral as between all contractors).

The preceding observations fail to identify any definitive answer to the second question. However, they raise significant doubts whether Habermas’s proceduralism alone, unsupported by

47 See id. at 461-62.
substantive norms, can reliably lead to an accord on justice among different perspectives without favoring some of those perspectives.

The last of the three questions—namely, can the proceduralist paradigm level the field on which competing perspectives vie for justice—as with the second, cannot presently be given anything nearing a definitive answer. To the extent that proceduralism's search for an accord on justice leads to the favoring of some perspectives, the third question would seem to require a negative answer. However, assuming an accord could be reached without having to favor any of the relevant perspectives, the success of Habermas's proceduralism to level the playing field would appear to depend on whether the requisite leveling could be achieved through dialogue, or whether it calls for predialogical or extradialogical adjustments. To further clarify these matters, I now turn to an important feminist objection to Habermas's proceduralism.

III.

The feminist challenge to Habermas's proceduralism is particularly serious since it is launched from a perspective that is neither metaphysical nor hierarchical in nature. Moreover, the feminist challenge attacks Habermas's proceduralism on at least two different levels. On one level feminists can argue, even assuming communicative action remains neutral between feminist and male-oriented perspectives, the respective needs, wants, and interests of each are given such disparate interpretations that it is not realistic to expect any general agreement on how to reconcile legal and factual equality. On another level, feminists can argue that discursive proceduralism cannot level the playing field which has traditionally heavily tilted toward male-oriented perspectives. Additionally, feminists could press the more radical claim that by its very structure communicative action favors male-oriented perspectives over feminist ones. Consequently, no purely dialogical determination of the relation between legal and factual equality could ever prove genuinely acceptable to feminists.

Habermas agrees with the feminists that both the liberal-bourgeois and the social-welfare paradigms evince biases against wo-

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48 It is important to remember that what distinguishes feminist perspectives from male-oriented ones are primarily gender-related differences. These differences are largely sociocultural constructs rather than differences merely based on sex. Furthermore, while feminist perspectives may more likely be embraced by women than by men, certain men are genuinely feminists just as certain women side with antifeminists.
men. However, he disagrees with the feminists when it comes to the proceduralist paradigm. Essentially, Habermas’s response to the feminist challenge is that since gender differences are constructed and not pre-established, conflicts between feminist and male-oriented views should be amenable to dialogical resolution just as other interperspectival conflicts.

To determine whether Habermas’s proceduralism can successfully overcome the feminist challenge, it is first necessary to take a closer look at some of that challenge’s principal characteristics. Moreover, since there is by no means unanimity among feminists, I shall take a reconstructive approach and combine various elements that have figured in feminist critiques, while advancing the most effective good faith feminist challenge possible. Also, as gender-related issues may vary among cultures, I will only refer to gender-related issues as they arise in the United States.

The feminist challenge in the United States is premised upon a constitutional, legal, cultural, and social tradition that has repeatedly used and/or constructed differences between men and women to the detriment of the latter, in order to perpetuate a male-dominated society. In that society, with its male-oriented institutions, the best women can hope for is that gender differences will not be used against them. In other words, women’s only realistic escape from being subordinated has required them to settle as being colonized in a male run colony. From the standpoint of the relationship between legal and factual equality, women have generally experienced two different regimes during the course of American history. Initially, the relationship between legal and factual equality unfolded in a setting tilted toward difference, with differences being, for the most part, weighted against women. More recently, the tilt has shifted toward identity, but women still have been significantly disadvantaged, in as much as identity has essentially meant conformity with male identity.

It is against this background of exploited differences and coerced identities that feminists may construct a comprehensive per-

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49 See Habermas, supra note 32, at 781-82.
50 See id. at 783-84; see also supra pp. 796-98.
51 See the distinction between master/slave and colonizer/colonized relationships, supra notes 40-41 and accompanying text.
52 See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (state refusal to allow women to practice law held constitutional on grounds that a woman’s proper role was that of a wife and mother).
53 See Martha Minow, Justice Engendered, 101 Harv. L. Rev. 10 (1987) (arguing that Supreme Court adjudication on sexual discrimination and pregnancy has posited men’s experience as the “norm” against which women are measured).
spective, with a vision of the good based upon a recasting of identities and differences in ways that are likely to be liberating and enriching for women. Inspired by Carol Gilligan’s vision, feminists might construct a conception of the good stressing intimacy, attachment, interdependence, care, concern, responsibility, and self-sacrifice.54 Such a feminist conception of the good would sharply contrast with its typical male-oriented counterpart, emphasizing separation, competition, and achievement.55

Now, let us suppose that representatives of the above-sketched feminist perspective (to whom I shall refer as “the feminists”) confront representatives of the typical male-oriented perspective (to whom I shall refer as “the masculinists”), and that they jointly endeavor to reach a dialogical consensus on a mutually acceptable reconciliation of legal and factual equality. Let us suppose, further, that from the outset the feminists stipulate that they concede that the proceduralist paradigm is neutral as between masculinist and feminist perspectives. Under these circumstances, the feminists will start the confrontation by recounting the history of sex discrimination and will argue for the adoption of legal norms that would enhance care, responsibility, and meeting the needs of concrete others.56 The masculinists, on the other hand, while acknowledging past inequities, will propose legal norms emphasizing autonomy and fair competition which would preclude gender-based discrimination.

Assuming that no legal norm capable of equally satisfying the masculinists and the feminists were to emerge at that point, our protagonists could proceed to engage in a reversal of perspectives. This would allow them not only to achieve greater empathy toward their antagonists’ plight, but also to become aware of the relative importance of each particular claim from within the comprehensive perspective it originated. Awareness of the relative importance of


55 Habermas has rejected the validity of Gilligan’s challenge relating to issues in the theory of moral development. See HABERMAS, supra note 27, at 175-84. That controversy, however, has no direct bearing on the use of Gilligan’s work to outline the contours of a plausible feminist conception of the good.

56 Cf. GILLIGAN, supra note 54, at 11 (contrasting men’s tendency to focus on “the generalized other” with women’s draw toward the “particular other”).
conflicting claims within their respective perspectives might prove quite helpful—it would be rational to sacrifice a claim of lesser importance within one’s own perspective to accommodate a claim that within another perspective is much more important. Such a sacrifice would be rational (in the sense of rationality of means rather than rationality of ends) considering the potential for reciprocal gestures that would ultimately inure to the benefit of all those involved.

Now, let us assume that after ranking all wants and interests and abandoning the pursuit of those which rank lower in the hierarchy, in order to facilitate the realization of those which rank higher, the masculinists and the feminists still have not been able to settle on equally acceptable legal norms. At that point, it is possible that each would try to convince the other to change their needs and wants. Thus the feminists would argue that competition is not everything and greater connectedness could enrich the lives of the masculinists. The masculinists would try to impress upon the feminists that competition is not as bad as they think, particularly if it is scrupulously rid of all vestiges of gender discrimination.

At that point in the dialogue, it is possible that a consensus regarding legal norms might be reached. But it is equally possible that a consensus on equally acceptable legal norms might never be reached. The inability of reaching a consensus would not occur because of any strategic behavior, but simply because the honestly held divergent conceptions of the good, even after accounting for all the concessions and adjustments mentioned above, would remain too far apart.

Thus far I have assumed that the feminists do not challenge the proposition that the proceduralist paradigm is neutral as between the feminist and the masculinist perspectives. There are, however, several plausible reasons which would lend support to such a challenge. Furthermore, the feminists could bring either a moderate or a radical challenge against the proposition regarding proceduralist neutrality.

For the moderate challenge, feminists would argue that the procedural guarantees afforded by dialogical proceduralism are insufficient to level the playing field since public discourse has historically been heavily tilted toward masculinist perspectives, as have the liberal-bourgeois paradigms and the social-welfare paradigms and most existing legal norms. Given that masculinist views are so entrenched in the ideology and the institutional structures of the polity, to have an equal opportunity to present one’s claims and to
attempt to transform existing needs, wants, and interests, seems fairly unlikely to balance the conflicting positions. This is true not because of any strategic conduct by the masculinists, but rather because they are so deeply set in their ways.

Even assuming its validity, the moderate challenge may not be fatal to proceduralism, since even deeply entrenched positions could change over time. However, time is not a trivial matter when it comes to legitimating legal norms. If meaningful changes in opinion- and will-formation can be expected to take several generations, then exclusive reliance on dialogical proceduralism would seem undesirable and inadequate.

Much more threatening to discursive proceduralism is the radical feminist challenge. That challenge takes as its first point of argument Gilligan's view that men's ethics are oriented toward rights, equality, and fairness, while women's are oriented toward responsibilities, equity, and the recognition of differences in need among concrete others. Suppose the masculinists and the feminists incorporate, as part of their conceptions of the good, the views that Gilligan ascribes respectively to men and to women. Feminists could then launch the following attack. By its very structure—which is designed to lead to justice, equality, and rights—the proceduralist paradigm is inherently biased in favor of masculinist perspectives, against feminist perspectives. Ironically, because it provides for a reversal of perspectives, the proceduralist paradigm does not exclude expression of the needs, interests, or desires of feminists and even allows for masculinist empathy toward feminist claims. But those virtues are eventually nullified, in that, by its very nature, the proceduralist paradigm channels all intersubjective conflicts toward resolutions that must comport with justice, equality, and rights. Although the proceduralist paradigm gives the impression of treating feminists as full partners in the dialogical process, the very structure of that process forces feminists to suppress their most fundamental differences in order to obtain a measure of recognition that does not seriously threaten the hegemony of masculinist perspectives. In short, the proceduralist paradigm makes it possible for an individual feminist claim to be given priority over a competing masculinist claim, but it forecloses something much more fundamental from a feminist perspective—the replacement of "the hierarchy of rights with a web of relationships."
In defense of the legitimacy of the proceduralist paradigm, it could be argued that if the radical feminist challenge proves anything, it proves too much. Because its targets include justice, equality, and rights as such, rather than any particular conception of them, the radical feminist challenge implies that law itself cannot possibly be justified as a medium for legitimate intersubjective interaction. Therefore, the radical feminist challenge would ultimately lead to a social universe devoid of law, in which feminists would either forcibly convert those who would oppose the implementation of their conception of the good, or their antagonists would go their own separate way.

Feminists, however, could argue that their radical challenge does not necessarily have the dire implications mentioned above. Viewed more closely, the radical feminist challenge is not against law itself, but against a paradigm of law which is buttressed by a particular conception of law and rights. Following this line of reasoning, a brief focus on Habermas’s conception of rights reveals that while he is open as to the content of legal rights, he clearly embraces a “static” rather than a “dynamic” conception of law as a medium of intersubjective interaction.\(^59\) In Habermas’s view, legal rights (as opposed to moral rights) are above all entitlements, which are logically prior to the duties they trigger.\(^60\) Therefore, such rights carve out boundaries which tend to separate the rightholder from those who must assume a duty as a consequence of his or her entitlement. In the context of a dynamic jurisprudence such as the common law, however, because of the presence of greater flexibility, open-endedness, and indeterminacy, rights and duties become the product of interaction among legal actors; thus, they are always susceptible to further perfection through cooperation.\(^61\)

\(^{59}\text{See Arthur J. Jacobson, The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences, 11 CARDOZO L. REV. 1079, 1125 (1990); see also Arthur J. Jacobson, Hegel’s Legal Plenum, 10 CARDOZO L. REV. 877, 889-90 (1989) [hereinafter Jacobson, Hegel]. For present purposes, the key distinction between these two jurisprudences is that dynamic jurisprudences are open-ended and primarily concerned with the realization and development of legal personality. Static jurisprudences are primarily concerned with instituting legal order and, accordingly, draw sharp lines between legal relationships and other intersubjective relationships which remain essentially beyond the reach of law.}\n
\(^{60}\text{In Habermas’s own words, “[w]hereas in morality an inherent symmetry exists between rights and duties, legal duties only result as consequences of the protection of entitlements, which are conceptually prior.” HABERMAS, supra note 18, at 451.}\n
\(^{61}\text{Cf. Jacobson, Hegel, supra note 59, at 890-91 (in the common law system persons cannot interact without generating rights and duties, yet cannot know what those rights and duties are until after they have interacted).}\
With the distinction between static and dynamic jurisprudences in mind, the feminists can argue that their radical challenge does not demand the abolition of law, justice, equality, and rights—it calls only for the replacement of the proceduralist paradigm and its static conception of rights with an alternative paradigm creating a dynamic conception of rights. This alternative paradigm would alter the importance of justice, equality, and rights, by balancing them against normative standards designed to enhance promotion of the “web of relationships.” Moreover, any alternative paradigm of law designed to be consistent with the radical feminist challenge, could neither be exclusively dialogical nor merely procedural. It would have to press substantive feminist norms against masculinist objections, thus having to rely on predialogical or extradialogical sources of legitimacy.

Proponents of legal proceduralism may object to any alternative feminist paradigm which would countenance the imposition of feminist norms over masculinist objections arguing the paradigm would be arbitrary or inconsistent with a commitment to prescriptive equality. Feminists however could counter, arguing that their proposed alternative paradigm would neither be arbitrary nor in violation of the dictates of prescriptive equality. Focusing on the dialectics between identity and difference, and between equality and inequality, feminists could claim that progress toward an optimal reconciliation of legal and factual equality has always been achieved through a series of thrusts that overshoot their intended target, thereby tilting legal paradigms toward certain conceptions of the good to the detriment of other conceptions. This state of affairs requires compensation which necessitates generating a tilt toward the opposite direction. Therefore, the feminist alternative paradigm, with all its bias, is a logical moment in the ongoing struggle to reach an optimal reconciliation of legal and factual equality. Consequently, such an alternative feminist paradigm is neither arbitrary nor contrary to prescriptive equality.

Based on the above examination of the feminist objection to Habermas’s proceduralist paradigm of law, it is now possible to give a more complete answer to the two questions left open at the end of the Part II. First, unaided by additional substantive norms, legal proceduralism cannot be expected to produce justice among different perspectives within its domain. Second, proceduralism alone fails to yield equal justice as gauged from within each of the encompassed perspectives.
IV.

Considering that pluralism implies a lack of agreement regarding substantive norms, it would seem to be the most promising ally of pure procedural justice. Ideally, proceduralism should save pluralism from the embarrassment of having to choose among the various competing conceptions of the good it encompasses. However, pluralism and pure procedural justice are ultimately incompatible. Conversely, whereas a community that shares the same substantive norms may seem to have no use for mere procedural justice, pure procedural justice can assume a legitimate role in the context of shared substantive norms, as indicated by the gambling example discussed earlier.® If these observations are correct, then Habermas's legal proceduralism may be vindicated to the extent that it is confined to contexts regulated by shared substantive norms. Moreover, while such vindication may fall quite short of pluralist expectations, it is by no means trivial.

Before looking into the relationship between pluralism and pure procedural justice, a distinction concerning pluralism must be briefly addressed. Pluralism may either be methodological or comprehensive. Methodological pluralism can be characterized as a tool designed to prevent any substantive conception of the good from achieving a dominant position in the public sphere. Comprehensive pluralism, on the other hand, is a full-fledged substantive perspective encompassing a particular conception of the good which requires the inclusion and protection of different substantive perspectives that can be accommodated peacefully within the polity. The distinction between these two kinds of pluralism raises the following question: Since comprehensive pluralism relies on shared substantive norms, is it not then compatible with pure procedural justice? As we shall see, the answer to this question is eventually negative, even though comprehensive pluralism reserves an important but limited role for proceduralism.

To get a better understanding of the relationship between pluralism and proceduralism, it is useful to refer back to the image of transcommunal market relationships among strangers.® At first, one can assume that the market where strangers came to exchange goods was an important yet occasional focus for intersubjective dealings. Under these circumstances, the market required transcommunal laws to regulate dealings among strangers and to stabi-

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62 See supra pp. 796-98.
63 See supra notes 20-27 and accompanying text. For a more extended discussion, see Rosenfeld, supra note 2, at 1689-94.
italize the latter's expectations. Aside from the occasional forays into the market, intersubjective dealings also took place intracommunally, where they were regulated primarily by common religious and ethical norms or by laws conforming to such norms. Given that everyone returned to his or her own community except for limited market exchanges, it makes sense that the legal norms regulating market transactions would be procedural in nature. Although one cannot properly speak of pluralism in this scenario, it would be fair to speak of a proceduralism bound by a plurality of distinct communities.

At the next stage, one can imagine that the market has become more important, and that all the bordering communities sending people to the market will associate into a loose confederation. In this situation, pluralism and proceduralism co-exist, but their respective spheres of operation remain completely separated from one another.

As the market encroaches ever more on communal life, however, proceduralism and pluralism enter a collision course. On the one hand, the market increasingly expands onto the terrain formerly reserved for communal ethical and religious life, forcing substantive communal norms to spill over into the sphere of market interactions for lack of another suitable outlet. On the other hand, since markets are not perfect, the more pervasive market relations become, the greater the need to bring in substantive norms in order to channel market transactions toward the common good.

To the extent that market self-regulation is no longer satisfactory, proceduralism must give way or become subordinated to substantive norms. Methodological pluralism may be used in an effort to prevent proponents of certain conceptions of the good from subjugating proponents of other conceptions, but it is merely a limited tool with restricted potential. Comprehensive pluralism, on the other hand, provides a full-fledged perspective and therefore deserves a closer look.

The ideal underlying comprehensive pluralism is to create a society in which all conceptions of the good are equally encompassed, but in which none is dominant (or superior). However, this ideal cannot possibly be realized. It is obvious that the entire pluralist project will collapse unless comprehensive pluralism itself is given priority over the remaining conceptions of the good. Therefore, to survive, the project of comprehensive pluralism must split and proceed at two distinct levels. Furthermore, this split must take place in two logically, though not necessarily temporally, dif-
ferent moments. In the first moment, comprehensive pluralism must be detached from other perspectives in order to ascend to the requisite position of primacy. Yet to survive, pluralism cannot remain detached because it is ultimately parasitic on other perspectives. Indeed, if all other conceptions of the good were to disappear, pluralism would become meaningless. Accordingly, a second moment must follow.

In the second moment, pluralism must be reconnected with the perspectives from which it had been detached. However, the reconnection must allow pluralism to retain its primacy while allowing the other perspectives to remain equal among themselves. To be viable, pluralist norms must occupy the place of a second order of norms, while the norms which emanate from other substantive conceptions of the good would operate as first order norms.

If the equal subordination of all first order norms to the second order norms of pluralism were possible, then comprehensive pluralism could in principle go hand-in-hand with proceduralism. However, this is not possible since equal subordination requires detachment as well as reintegration. Indeed, detachment of pluralism as a second order norm is realized through a process of negation that is embraced by all comprehensive pluralists and deals equally with all first order norms. Hence, in its negative work, comprehensive pluralism could rely on purely procedural devices.

However, with respect to the positive task of reintegrating subordinated first order norms, neither equality nor unanimity can be achieved by comprehensive pluralism. Because, when it comes to reintegrating into a comprehensive pluralist framework, some first order norms—such as those of crusading religions—will prove altogether incompatible with pluralism and therefore have to be suppressed. Other first order norms—such as those of noncrusading religions—will have to be displaced but they will not have to be suppressed. For example, while such norms will be expelled from public places, they will be given a protected place in the private sphere.

Even among those first order norms which should be granted full reintegration into the comprehensive pluralist polity, some will fare better than others. This seems inevitable since the second order norms operating alone cannot determine the configuration of a pluralist society’s legal and political institutions. Since all fully admitted first order norms are not likely to coalesce into a harmoni-
ous whole, institutional norms and practices are bound to rely more heavily on some than on others.

In sum, comprehensive pluralism is a dynamic system that depends on the concurrent work of a thrust and counterthrust which is propelled by the permanent tension generated by the friction between its negative and positive work. In such a setting, proceduralism has an important negative role to play—it can be vital in pluralism's struggle against the permanent entrenchment of any particular set of first order norms that it encompasses. However, proceduralism can also play a limited, but nonetheless crucial, role on the positive front. By exposing particular inequities through its leveling mechanisms and by revealing concealed inequities through the reversal of perspectives (in the case of Habermas's dialogical proceduralism), proceduralism can channel pluralism's need for contested first order norms toward more encompassing, widely shared, and less oppressive alternatives. Although this would not solve the problem of reconciling legal and factual equality, it might significantly alleviate existing inequities.

To be sure, this seems to be a far cry from what Habermas seems to expect from his proceduralist paradigm of law. All the same, while Habermas may not have reconciled democracy, rights, and justice through proceduralism, he has certainly shown us creative and fruitful new ways to approach these elusive subjects, and has afforded us new means to sharpen our grasp of them.