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Caring discourse

The care/justice debate revisited

Abstract The ethic of care has often been opposed to the ethic of justice as offering a different and even a contradictory approach to moral problems. This article argues that, from the perspective of the discourse ethic, both approaches are complementary in a very fundamental sense, since each one applies to one of two stages of moral reasoning that are as different as they are interconnected. It argues, in particular, that while justice is concerned with the justification and elaboration of norms, care is concerned with finding a solution for specific moral situations. The article then places considerations of care at the centre of ideal discourse and subordinates the importance of rational understanding and moral justification to intuitive communication.

Key words application · care · communication · discourse · empathy · family · friendship · gender · justice · justification · self-determination

1 Care vs. justice: a debate

Since the ethic of care worked its way into the field of moral thought in the early 1980s, primarily by the hands of Carol Gilligan, Nel Noddings and Sara Ruddick,¹ it has been the object of animated debates among scholars from different social branches. Debates have mainly revolved around three focal points. A first point concerns the relationship between the newly developed ethic of care and the ethic of justice that prevails in modern western thought. Following Hume in his understanding of morality as an ‘active virtue’ that ‘depends on some internal sense or feeling, which nature has made universal in the whole species’, Nel Noddings makes the ethic of care rest upon two such feelings.² One is the sentiment of natural caring; the other one is the remembrance of that sentiment as felt in one’s best moments. Both sentiments lead to

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caring. The second one, however, leads not to natural, but to ethical caring, because responding to our remembrance of care requires an effort and therefore involves the notion of duty. I am obliged under this ethic to engage in caring for persons who arouse in me the feeling of remembrance of caring situations. I must do so, even if I do not naturally care for these persons, because I am under the moral obligation to live up to my remembrance of care, to the best picture I have of myself as caring and being cared for. Ethical caring rests, in other words, upon care for myself as a caring person.

This view of the self as embedded in relationships shaped by moral duty contrasts with accounts of individuals as isolated, rational holders of equal rights. This account is typical of modern moral theory and has been labelled the ethic of justice. The contrast is reinforced by the ethic of care's concern for specific persons and for concrete real-life situations, while the moral point of view of justice is characterized by impartiality and universality. Justice rests on principles regarded as universally valid, formulated as abstract dicta that must be applied in concrete real-life situations in a deductive manner. This is so because justice is primarily concerned with individuals' basic equality as human beings and has therefore their equal treatment at heart. Justice reasoning is abstract reasoning. It is reasoning detached from the defining features of specific circumstances and concrete persons, as it concentrates instead on their commonalities. Caring, on the other hand, requires that each person be approached as unique. It demands that attention be paid to the particularities of specific persons and circumstances, to the difference they make. Each individual is taken 'as a being existing in her own right', not 'as someone instantiating general moral categories'.³

The question now is how the ethic of care relates to the ethic of justice. Some have suggested that care thinking is reducible to traditional modes of thinking in terms of justice,⁴ that care is therefore but an aspect of justice, mostly because considerations of care are also subject to universalization. Thus regarded, 'the ethics of care would not identify a different voice, new at least to philosophy, but would rather present a somewhat different way of listening to a familiar voice, emphasizing elements previously ignored by moral philosophers'.⁵ For the most part, however, the ethic of care has been granted conceptual autonomy from the ethic of justice and each has been thought to stand for a different and irreducible way of approaching the same (sets of) moral problems. This has led some scholars to establish a hierarchical order of sorts between care and justice. Some consider care inferior to justice, so that considerations of justice must validate or else trump considerations of care,⁶ whereas others believe the opposite to hold.⁷ More conciliatory positions advocate the reciprocal modulation of justice and care⁸ and

ultimately aim for an integration of both in one comprehensive morality yet to be articulated.⁹ Finally, the ethic of care has also been regarded as independent from, though complementary with, the ethic of justice, as covering areas this latter has thus far largely neglected, notably the areas of family and personal relationships. A variation of this view would identify morality, understood in universalistic terms, with questions of justice understood as questions of right and wrong. This would leave care outside the field of deontology. Rather than moral questions, care would cover evaluative questions of the good life, questions pertaining to the fulfilment of an individual's life plans and ideals that are as such not subject to universalization.¹⁰

This leads us to the scope of the ethic of care, a second subject of debate. Consider Noddings' following statement:

... an ethic of caring implies a limit on our [moral] obligation. Our obligation is limited and delimited by relation. We are never free, in the human domain, to abandon our preparedness to care; but, practically, if we are meeting those in our inner circles adequately as ones-caring and receiving those linked to our inner circles by formal chains of relation, we shall limit the calls upon our obligation quite naturally. We are not obliged to summon the 'I must' if there is no possibility of completion in the other. I am not obliged to care for starving children in Africa, because there is no way for this caring to be completed in the other unless I abandon the caring to which I am obligated.¹¹

We cannot, it seems, care for everyone in the strong sense of the term prescribed by the ethic of care. Concern for the specific circumstances and differentiating features of particular persons and situations naturally limits our ability to care. Care requires closeness, be this physical, emotional, cultural or otherwise, to the person we care for, some kind of affinity with that person's experience and needs, in order that we can relate to that experience and suitably respond to these needs. The ethic of care thus appears to be purely personal in scope, covering relations among family members, relatives and friends. At best it might also extend to others who share some of our experiences (a disability, a specific problem, our sexual orientation), or our religious, ideological or cultural values, in as far as those experiences or these values are concerned. The ethic of care can then escape its purely personal dimensions, but nevertheless remain parochial in nature.

Such a narrow construction of the ethic of care would seem to confine it to the field of personal relationships, leaving justice to prevail in the public realm. Care would appear to be at best unsuitable to regulate social and political relations, at worst a dangerous controlling value of these relations leading to cultural parochialism and narrow-mindedness, even to intolerance and nepotism. Most scholars, however, in particular scholars who sympathize with the insights of the ethic of

care, object both to such narrowly drawn boundaries and to the absoluteness with which caring is expected to prevail within those boundaries. They urge for criteria that allow us to discern for whom we must care, as well as when and to what extent we must do so, both in our personal relations and beyond. The ethic of care would then only be valid under two provisos. It must, on the one hand, go beyond the personal and the parochial and play a role in the public sphere.¹² On the other hand, it must provide criteria to discern what has been called 'good',¹³ 'true'¹⁴ or 'enlightened'¹⁵ care, from caring that is morally flawed inasmuch as damaging for the caring person and/or for the person cared for.¹⁶

Most animated have probably been the debates concerning the identification of the ethic of care with femaleness. Once more Noddings puts the point boldly when she names the ethic of care a feminine ethic and opposes it to the 'masculine ethics of universal love or universal justice'.¹⁷ Women, thus the assumption goes, relate to others (primarily) as caring persons, whereas men relate to others (primarily) on the basis of considerations of rights and justice. Carol Gilligan is more cautious in this regard. In her rendition, the different voice she claims to have discovered and aims to bring forth in her work 'is characterised not by gender but by theme'. 'No claims, I state, are made about the origins of these voices or their distribution in a wider population, across cultures or time. Thus the care perspective in my rendition is neither biologically determined nor unique to women'.¹⁸ Nonetheless, the characterization of the ethic of care as typically feminine, and of the ethic of justice as typically masculine, is pervasive in her rhetoric and controlling in her examples. In Gilligan's work the association of the different voice with women stands as an empirical observation.

This is a controversial point. Many scholars have turned against the gendered account of care and justice. Some have challenged the empirical evidence on which such an account rests. Thus a number of studies point to the similarity of women's and men's thinking about moral questions at one or more age levels, and at the same level of education and occupation.¹⁹ Others go further to question the representativeness of the cases Gilligan brings forth as the factual basis of her claims, even the fidelity and impartiality of her account of these cases.²⁰ To be sure, many scholars endorse the gendered account of care and justice at an empirical level.²¹ Yet some among these find a further ground for criticism in the absence of an explanatory level going to the source of whatever differences might actually exist between men and women. Due consideration of men's and women's gendered socialization as determinant of their different approaches to morality is found missing,²² despite wide agreement that differences in men's and women's moral reasoning are a

reflection of specific social structures of gender differentiation and domination. But if this is so, then building uncritically upon such structures, identifying femininity with the voice a woman utters while '[a man's] foot is on her throat',²³ can only help to reinforce women's subordination to men.²⁴ In addition, the absence of an explanatory level, the inattention to the social subtext of different approaches to morality, is also criticized for melding women's views into one single voice, regardless of considerations of culture, race or class.²⁵ Just like the ethic of justice, the ethic of care seems to have fallen victim to oversimplifications drawn from the perspective of a dominant group, this time claiming universality for what presumably is western, white, middle-class women's voice.

I will not dwell on this latter debate in this article. I will simply assume that, whether or not there are actual differences in men's and women's moral reasoning, the ethics of care and justice do mirror, respectively, our symbolic understanding of women and men.²⁶ They reflect, that is, what our western societies expect from them as genders. The implication is that any uncritical division between these two ethics along gender lines, whatever its descriptive force, should be regarded as suspicious, as both a product and an enforcing mechanism of social structures of gender domination.

Nor will I concern myself with the question of the proper scope of the ethic of care, at least not directly. I will rather concentrate on the relationship between the ethic of care and the ethic of justice. In particular, I shall argue that both moral approaches are not only compatible, but also they are complementary in a very fundamental sense. More precisely, I would like to point 'to a more basic dimension of human relationships which incorporates, without compromising, all the features of [justice and care]'.²⁷ I am referring to human communication as thematized by the discourse ethic.

2 Merging care and justice in discourse

The discourse ethic offers a model of moral justification through free discussion. Only through discussion among free and equal individuals can we conclude what is morally right, draft moral norms and justify moral action. To this end, everyone must be equally free to join in ongoing discussions on matters that interest her or to initiate new discussions. Similarly, actual participants in discussions must enjoy equal freedom to defend their views and to question the views exposed by others.

Communication and interchange with others are also at the core of care. Indeed, as a communicative ethic, the discourse ethic shares with

the ethic of care a vision of individuals as fundamentally embedded in relationships, of various kinds and degrees of proximity, that make up individuals' social context and contribute to shaping their identity. Interestingly, the discourse ethic combines this vision of individuals with a deep concern for their autonomy or self-determination. Only it does not conceive of self-determination as freedom from encumbrances. Rather, individuals are thought to build their identity as autonomous beings, as beings aware of their own will and needs and of their capacity to respond to them satisfactorily, from within the complex contexts of communicative (social) relations to which they are part and which condition them in a fundamental, constitutive sense.²⁸ More specifically, an individual derives her identity from the unique combination of her natural, social and material circumstances. This does not make identities static. Rather, the identity of an individual and that of the different social groups she belongs to define one another in a symbiotic relationship where both elements are equiprimordial.²⁹ Nor are individuals condemned to bearing with their encumbering relations uncritically. An autonomous person is one who builds her identity, who defines her will and needs, by subjecting her encumbering circumstances to critical scrutiny. She is someone who can critique some of her interlocking social relations and roles from the standpoint of some of her other ones, who can thus assume 'reflexive role-distance'.³⁰ Guaranteeing the autonomy of participants in discourse amounts to safeguarding the conditions for such a self-critical stance and for acting upon it, notably by preventing the formation of power relationships that would erode participants' self-determination.³¹

Thus the discourse ethic is not concerned with our capacity to achieve isolation. Instead, it assumes our relatedness, our social embeddedness, and is concerned with our critical ability to reflect on it. Insofar as this account connects the discourse ethic with the ethic of care, it suggests that the discourse ethic embraces only instances of care that respect the self-determination of everyone involved. It embraces only caring relationships that are fulfilling for the person that provides care and empowering for the person that receives it and thus qualify as good or true, as enlightened or indeed as just caring relationships. Justice constitutes the backdrop of care. At the same time, people's relatedness in discourse is such, our proximity with others links our fate to other people's fate to such an extent, that solidarity comes forth as the flip-side of justice. Justice does not exist without solidarity; the one conceptually requires the other.³²

In sum, the discourse ethic is committed both to individuals' relatedness and to their self-determination. This makes it a likely bridge between the ethic of care and the ethic of justice. Admittedly, the discourse ethic still appears to side up with justice and against care in some

important respects. Take, in particular, its commitment to universality and its commitment to rationality. However, a closer look allows us to qualify the position of the discourse ethic on these points and to bring discourse and care closer together. Consider, first, commitment to universality. The discourse ethic aims at universal agreement on moral matters. More specifically, it aims at attaining moral norms by universal agreement in ideal speech situations. Ideal speech situations are defined by universal participation, limitless knowledge and endless time for discussion. In ideal speech situations, norms must be accepted by everyone who thinks that she is affected by them. This is a normative ideal. In practice, the aim is not to reach *actual* agreement on norms, but to draft norms that, as far as one can tell, *could be* accepted by everyone affected by them. Now only questions that could receive universal answers belong to the field of morality. These are typically questions that concern individuals' self-determination, what have traditionally been labelled questions of justice. Different from these are questions that pertain to considerations of the good life, to the views of a specific person or group on what qualifies a lifestyle as good. Such views are regarded as private matters. They do not concern individuals' self-determination, but individuals' self-realization according to their own life plans and vision of the good. Consequently, questions pertaining to the good life cannot receive a universal answer; they stand out of the moral domain altogether. Against this theoretical background, Habermas aligns questions of care with questions of the good life. He binds care to a person's self-fulfilment rather than to her self-determination and leaves it out, as a result, of the field of morality.³³

Communitarian critics of the discourse ethics have taken issue with the division between morality and questions of the good life. They have argued that all moral questions can ultimately be reduced to questions of what is good for (all of) us – for all of us who share a communicative ethic.³⁴ One could also argue in this vein that universality does not amount to generality, that the requirement that norms be universal does not prejudice the scope of application of norms. A moral norm could be drafted in extremely narrow terms and still be universal if everyone affected by it could agree on the consequences of its general observance within that scope. Now, as a communicative ethic, aimed to bring about understanding and agreement through discussion, the discourse ethic calls for close concern for details. Indeed, the more we abstract from details, the more information we will be rejecting as irrelevant, to the detriment of our understanding of the issue under discussion.³⁵ The more we consider the specific and differentiating features of concrete persons and situations, the more we will be able to respond to the requirements of these persons and situations adequately. The narrower the scope of application of a norm, the more likely it is to

have these requirements at heart and the more will it then comply with the purpose of discourse.³⁶

From a discourse-theoretical standpoint, Seyla Benhabib also makes the division between morality and questions of the good life a central point of disagreement with Habermas. Yet unlike communitarian critics, Benhabib does not reject the division; she simply rejects overly rigid accounts of it. She argues that a communicative ethic precludes a priori definitions of the field of morality on the basis of the universality principle and the resulting exclusion of certain discussion topics as pertaining to questions of the good life. Under a communicative rationale, any participant in discourse is free to bring any issue up for discussion; 'the agenda of the conversation is radically open'.³⁷ No matter, nor the means of discourse itself, the language it uses and the way this is interpreted, can be regarded as pre-decided.³⁸ Different voices and, just as importantly, different ways of listening,³⁹ must all find their way into discourse. This means that only in the context of discourse can we settle whether an issue pertains to morality or to the good life, whether it affects individuals' self-determination and therefore deserves a universal answer, or else affects their self-realization and must be solved privately by the individual or individuals concerned. The line between questions of justice and questions of the good life must thus be subsequent, not prior to the process of discursive will formation.⁴⁰ Indeed, at the core of moral debates often lies a disagreement on whether a given issue touches on self-determination and deserves a universal answer, or rather concerns self-realization and must therefore receive a private answer by each person concerned. The spirit of the discourse ethic is thus best captured by a flexible definition of the boundaries of the moral domain. Moreover, conceiving of self-determination as relational and of justice as impregnated with solidarity, as the discourse ethic does, is bound to result in an expansion of morality and the need for universal answers to questions that more classical accounts of justice would regard as questions of the good life and, more specifically, as questions of care. There is indeed an observable trend in this direction. Claims that justice must also prevail within the family are a case in point.⁴¹

Consider, secondly, the discourse ethic's commitment to rationality. Discourse-theoretical discussions aim at reaching an agreement on moral questions among all participants on the basis of the strength of the best argument. This appears to lay the emphasis on rational argumentation.⁴² Indeed, and according to Habermas, '[E]xactly those action norms are valid to which all those possibly affected could agree as participants in *rational* discourse'.⁴³ Emphasis on rationality restricts the scope of morality. It is widely responsible for the exclusion of questions of care from that scope. Yet such restrictions are not in tune with a communicative ethic. A communicative ethic committed to

unhindered interaction among individuals must seek perfect understanding beyond the limits of rationality. To this end it must allow for deliberation to be impregnated with emotions. Habermas himself regards the merging of reason and emotion in discourse as a mark of mature moral judgement.⁴⁴ He sees this as inherent in the requirement that participants in discourse take the viewpoint of all others in order to appreciate the force of their arguments. Everyone must try to see questions through the eyes of every other participant, so as best to comprehend their views before being in a position to embrace or refute them. Every participant in discourse must thus exercise an enlarged mentality toward every 'concrete other', an operation that merges cognition and emotions, rationality and empathy.⁴⁵

3 Applying care, justifying with justice

To summarize, the discourse ethic combines respect for individuals' self-determination with an acknowledgement of their relatedness; it requires that moral norms be universal while allowing them to take detailed account of individual circumstances; it qualifies rationality with empathy and emotions. Much of the tension between justice and care thus seems to vanish within the discourse-ethical project. Nevertheless, regarded through the lenses of the discourse ethics justice and care continue to stand for different moral viewpoints. Justice still appears to be more abstract and rational than care. Conversely, care is still more concerned for details, and for more details, than justice is and also pays closer attention to emotions than justice does. We cannot therefore be satisfied to point to the discourse ethic as a framework where justice and care do not conflict. The question now is how exactly these two moral perspectives fit within the discourse ethic, how they relate to each other in this context.

I will approach this question by turning to the distinction between the justification and the application of norms, between justification and application discourses, explored by Klaus Günther.⁴⁶ The justification of norms poses a motivational problem. Justification discourses are concerned with the reasons for adopting a norm and are made up by arguments that bear on the grounds for its adoption. The application of norms, on the other hand, poses a cognitive problem. Application discourses must find the most adequate norm to regulate a specific situation. To this end, account must be taken of all the defining features of the situation at hand, as well as of all the norms that could arguably apply to that situation. This requires sensitivity to identify those features, to appreciate their moral relevance and to identify the norm best suited to regulate them.⁴⁷

In ideal discourse, carried out under conditions of perfect knowledge, unlimited time and universal participation, the justification and the application of norms constitute one single moment. The justification of a norm includes an account of all the possible present and future situations in which the norm could be applied; the problem of its application remains embedded in its justification. On the other hand, participants in real discourse cannot elaborate comprehensive norms providing detailed and final answers to all moral questions, as they are subject to the double contingency of time pressure and limited knowledge. Norms adopted under this double contingency do not take account of all practical situations to which they can possibly apply, but only of the situations that participants in their justification discourses could foresee at the time of a norm's adoption.⁴⁸ Indeed, aware of their limited knowledge and time for discussion, participants in real discourse must call discussions to a halt and reach interim conclusions to serve provisionally as norms, as the basis for moral action, under the understanding that discussions can be resumed whenever participants wish to do so.

A gap exists, therefore, between the justification and the actual application of norms in real discourse. Because of the provisional character of norms, when all the features of specific situations are contemplated, some will always appear to be uncovered by any existing norm, while others will appear to fall under several and often contradictory ones. The application of norms thus comes forth as a different problem from that of their justification, a problem that must be solved in the context of a different type of discourse. Whereas justification discourses rest on arguments that there are sufficient grounds to adopt a norm *under unaltered circumstances*, application discourses rest on arguments that a given norm is the most appropriate one to regulate a particular situation *all circumstances considered*.⁴⁹ In particular, application discourses take account of all the norms within a system and confront them with all the features of a particular situation that could be relevant for the application of those norms.⁵⁰ Which norm best fits a situation is then decided with a view to the coherence of the normative system: it will be the one whose application is most in accord with all other norms applicable to the situation and with the variety of meanings the given situation enshrines.⁵¹ Appropriateness thus translates into coherence.

The distinction between justification and application corresponds to the distinction between the moral agent as legislator and as judge.⁵² More relevant to our purposes, this distinction bears on the distinction between the ethics of justice and care. Indeed, my contention is that what is usually labelled as justice reasoning is reasoning aiming at the justification of norms. It is reasoning concerned with a norm's universal validity, hence with equality. As such, it relies on some abstraction from

the situations to which norms will be applied. Care reasoning, on the other hand, aims at the application of norms. It naturally tends to take account of every feature of a given situation so as best to ascertain which norm should be applied as most appropriate in that specific situation. It is therefore reasoning concerned with particularity and with difference.

From this perspective, care stands as the guiding criterion for the solution of cognitive problems leading to the application of moral norms, whereas justice is made to bear on their justification. This would seem to support the view that justice and care represent different and unassimilable approaches to moral phenomena. They would seem to relate, as Carol Gilligan has suggested, as ambiguous figures, so that as you focus on the one the other becomes blurred.⁵³ It would appear that 'there is no third, "mature", single integrative moral perspective within which each orientation has its place'.⁵⁴ However, justification and application discourses, justice and care, do not relate as ambiguous figures. Remember, above all, that justification and application, hence justice and care, merge into one in ideal discourse. As they conflate into one, justice and care ideally become synonyms.

This ideal is controlling for real instances of discourse. The conjunction of justice and care remains an ideal to be pursued in all contexts, from the most personal and informal to the most institutionalized relationships, as can be the relationship between individuals and public power. Here as elsewhere, care and justice ideally conflate into what a specific person requires in order to enjoy self-determination in a deliberating society. In real discourse, moreover, justification and application discourses not only complement one another, but at the same time also permeate and inform each other from within. Justification discourses, hence considerations of justice, do not find their source in *a priori* principles. They are triggered instead by real-life situations. More specifically, they are triggered by the perception of some situation as morally problematic, accompanied by a concern for the need to respond to the situation adequately.⁵⁵ The creation of norms thus rests on (natural or ethical) caring, conceptualized as moral perception. It rests on sensitivity for the specific moral features of a certain situation and on the feeling that one must respond to that situation in a suitable way.

Conversely, if arbitrariness is to be avoided, the particularistic mode of reasoning of discourses of application, hence of care, must be subject to the check of justification discourses, hence of justice, at three different levels. First, the moral correctness of a specific discourse of application must be verified in a discourse of justification, where it must be checked whether the same norm would be equally applied in other cases that are similar in a relevant way. In other words, the act of selecting the norm that applies to a specific case must be considered valid where relevant circumstances remain unaltered. This explains why, in the legal

field, decisions taken by the judiciary in application discourses engross the normative background as judicial precedents to be considered in future judicial decisions.⁵⁶

Second, and as a premise to the above, justice controls which features of a situation can be regarded as relevant, and how relevant, thereby controlling which other cases can be considered 'similar' to the case at issue. In particular, the relative relevance of each feature is measured by how it bears on individuals' self-determination.⁵⁷ Ultimately, some features will have to be discarded as irrelevant for the sake of impartiality.

Third, and as a premise to the above, justice qualifies care at its very inception by setting the boundaries of application discourses. Justice controls how detailed our understanding of a situation must be in discourses of application. As Laurence Blum puts it, '[o]nce one perceives a particular situation as a moral one, calling for a moral response, there remains an issue of the degree of detailed understanding . . . that one needs in order to make an adequate moral response'.⁵⁸ This is determined by how the situation affects our self-determination. Now a situation can affect our self-determination directly, because we are personally involved in it, or indirectly, because it affects someone with whom we stand in some sort of relationship. Relationships shape the identity and self-determination of the individuals that are a party in them. The circumstances of one party matter to the others and that this is so matters to all the parties involved. Understanding others and being understood by them are here matters of self-understanding, the premise of critical self-determination. This is the more so the closer is the relationship. The closer we are to someone involved in a given situation the more insightfully will she expect us to respond to that situation and also the more will we be interested in doing so, the more will our doing so be relevant for both her self-determination and our own. Hence the more detailed must be our understanding of the situation.⁵⁹ Discourses of application come here, as a result, closer to reality.

On the other hand, we are less likely to be interested in (to care for) the details of situations involving strangers, just as we are less likely to be interested in disclosing to (some) strangers (some) details of (some of) the situations in which we are involved. Limiting the disclosure of personal details is justified, above all, in the context of power relationships, by the risk that disclosed information be used to our disadvantage in a manner that threatens our self-determination. The risk exists even if we assume that power relationships comply with the discourse ethic, in that they have a communicative basis, or at least rest on the free consent of everyone involved. Assuming that this is the case, we can be made to disclose personal information in the context of a power relationship only insofar as required by the internal logic of the

relationship. To this extent, consent to disclosure must be considered implicit in consent to the relationship.⁶⁰ More generally, reluctance to disclose information is justified by the risk of falling prey to power relationships that might arise anew on the basis of the information disclosed.⁶¹ This applies regardless of how immediate we perceive this risk to be, whether or not our perception of the risk is well grounded, even whether our reaction against disclosure is rather instinctive or the result of a rational analysis of the risks involved. Indeed, the mere fact that certain others know certain details of our lives can make us feel too self-conscious for self-determination. Self-determination thus entails a right to control who can gain information about what details of our lives.

To summarize, justification and application discourses are fundamentally interwoven; neither of them can be conceived without the other. Considerations of justice and justification discourses are triggered by care, while care and application discourses are shaped by considerations of justice in three important ways. First, justice subjects every discourse of application to universalization, thus making sure that the application of a norm to a specific case is valid under unaltered circumstances. Second, and prior to the above, justice sets the relative relevance of the features of a situation being considered in an application discourse. Third, and prior to the above, justice determines which features of a situation must be taken into account in application discourses, thereby controlling how detailed application discourses must be. More specifically, justice requires that application discourses be brought to a halt at the point when they would threaten self-determination.

Now note that the requirements of justice do not open a gap between application and justification discourses. Justification rests on information collected in application discourses, but only insofar as application discourses conform to the requirements of justice. This means that the requirements of justice, or self-determination, shape justification discourses in the same measure as they shape application discourses. Even subject to the limits of justice, application and justification discourses can (ideally) merge into one.

On the other hand, bringing discourses of application to a halt does create a gap between justification and application discourses, on the one hand, and real life, on the other. Now, being close to real life, indeed conforming to reality, is the final aim of discourse. Ideally, discourse aims at considering every aspect of the situation being discussed. Just as the gap between the justification and the application of norms, the gap between discourse and reality disappears in ideal discourse. To this end, ideal discourse rests upon perfect insights into reality. But if this is so, and on the basis of the preceding considerations, it then follows that ideal discourse can only take place in the context of close relationships insofar as they remain unspoiled by elements of power.

4 As particularity triumphs

Let us briefly recollect. From the perspective of the discourse ethic, justice and care stand for two different albeit complementary approaches to moral issues, each of which corresponds to a different stage in moral reasoning and action. Justice prevails in the elaboration of moral norms, whereas care prevails in the process of their application. Nevertheless, the justification and the application of norms constitute one single moment in ideal discourse. Also in real discourse they are fundamentally intertwined. So are, therefore, considerations of justice and considerations of care. This makes sense of the common observation that there can be no justice without care, nor any true care without justice.⁶² Also the remark that a society can survive without justice but not without care⁶³ is confirmed by the foregoing account. For in the above rendition norms do not derive from a priori principles, but are rather constructed by abstracting from the solutions given to concrete real-life situations. They are arrived at not deductively, but inductively. In this sense, care logically precedes justice.

Now it is not difficult to understand why justice has been associated with men, at least with western men,⁶⁴ while women have been identified with the ethic of care. The situation bespeaks men's traditional role as drafters of norms and women's exclusion from that role. Women have not traditionally taken part in the elaboration of norms at the moral, the legal or the practical level. They have rather been expected to apply norms previously created by men. This explains why, when facing moral action, men are expected and might usually feel compelled to make abstraction of details and concentrate on the validity of general norms. Women, on the other hand, are expected to contemplate as many details as possible. They might indeed tend to do so. They might even feel compelled to circumvent existing norms when all seem unfitting to a specific case, and opt for ad hoc solutions; but this only means that women as well as men have widely internalized the division of moral roles along gender lines that prevails in our societies.

Creating (general) norms is a western male ideal. It responds to the modern ambition of making sense of human behaviour according to the principles of equality and freedom, from which women have long and largely been excluded. In the legal field, this corresponds to the codification project, to the ambition of organizing a system of norms that replaces pre-modern sectarianism and arbitrariness. However, this has required norms to rest upon oversimplified accounts of human behaviour. Modernity has typically regulated human behaviour on the basis of presumptions, the controlling one being that individuals are free and equal and should be treated as such. Modern legal history can be read

as a continuous effort to qualify the strong presumptions underlying modern laws, as a struggle to narrow the gap between presumptions and real life, under the leading ideals of equality and freedom. The result has been an increasing concern for substantive and not merely formal equality and this has led to increasing attention to details, to individuals' specific and differentiating features, contemplated through the prisms of their equal rights of freedom.

The increasing attention to details characteristic of late modernity explains the present decline of general legal norms. Norms drafted in general terms that presume equality among their addressees are being largely replaced by programmatic laws that leave the administration scope for the adoption of substantive decisions, beyond its traditional executive role, on the basis of a detailed understanding of every situation at hand.⁶⁵ In a similar vein, as concern for the particular and the ideal of substantive equality prevail, courts pay ever closer attention to the circumstances of the cases they solve. Their decisions are sometimes so narrowly related to these circumstances that, although they are universalizable, they can conceivably fit rather few further cases. Universality then becomes a largely intellectual exercise.

Against this background, the ethic of care has the double merit of stressing the moral relevance of discourses of application, regarded as moral operations in their own right, and of calling attention to the symbolically female features of this operation. It brings forth the importance of particularity and casuistic details, a traditional concern of women, at a time when modern attachment to general norms is declining. Also importantly, the ethic of care emphasizes the moral dimension of private relations. In so doing, it propounds the expansion of morality beyond the public field, where individuals have traditionally been regarded as independent rational operators, to the context of personal relationships, where individuals' encumbrances and emotional involvement are most salient. Furthermore, and this is perhaps its greatest merit, the ethic of care has developed a language to phrase the moral dimension of family and other close personal relationships. Special attention is paid to the family, under the implicit claim that, as modernity breaks into the family walls, what goes on within them becomes a matter of moral concern.

Indeed, what often goes on in the family, as in other close personal relationships, is a great deal of care. This is the more so the closer the relationship and the more it is free of elements of power. It is particularly the case within families that partake in the ideal of self-determination.⁶⁶ The more this is the case, the more family members have an interest in everyone paying close attention to the particular circumstances of all others and of the situations in which they find themselves. In such contexts, discourses of application take account of

every detail that seems relevant to the situation. Here what has been called 'detail' particularity⁶⁷ prevails. Detail particularity amounts to concern for a highly detailed understanding of specific persons in specific situations. Accordingly, detail particularity makes every detail count. Every feature of a person and of the situation she is in counts as relevant and contributes to shaping behaviour towards that person in that specific situation; that this is so matters to the self-determination of every party in the relationship. The result is that behaviour is usually tailored to fit a situation and can hardly be extrapolated beyond it. Discourses of justification are here most particular, while the universality required from application discourses is least likely to be of practical consequence.

Detail particularity denotes, in brief, deep caring for others and their specific circumstances. To be sure, this does not rule out considerations of justice. Also in the form of detail particularity, care remains under the check of justice and justification discourses. In the family, justice ensures that care respects the equal freedom of everyone involved, that the numberless situations with moral salience that make up daily family life are solved with a view to enhancing the self-determination of its members, understood in a discourse-theoretical critical sense. What specifically characterizes close personal relationships, including family relationships committed to self-determination, is that here everyone's self-determination is thickly intertwined with everyone else's, that the goal of self-determination requires us to pay close attention to the details of moral situations involving one party in the relationship. In a close personal relationship all parties wish detail particularity to prevail, because detail particularity enhances the self-determination of all of them. Not all details of a given situation have the same relative importance, however, and it is the role of justice to assess that importance. Most notably, justice prevents details from being considered in a manner that can threaten the self-determination of family members, as can typically happen with features such as gender or age. Universalization can rest on details only insofar as they are considered in a manner compatible with justice.

Although detail particularity is shaped by considerations of justice, it embodies the spirit of care. Care is concern for all details of a situation and stands for the tendency to consider them all in application discourses. Although justice must certainly check this tendency, care seeks to make application discourses as detailed as possible, ideally to make them coincide with real life. Detail particularity actualizes this aim. Detail particularity renders every moral situation unique and in need of an equally unique response. In so doing it brings care and application discourses closest to real life, hence closest to the standards of ideal discourse.

5 Integrating empathy and reason, enlarging discourse

Care rests upon detail particularity and ideal discourse rests upon both. Consequently, ideal discourse can take place only in the context of close personal relationships. Indeed, inclusive participation, ample if not perfect knowledge and long if not limitless time for discussion are all the more possible, the more intense, intimate and long-term human relations are within a given discourse framework. This means that, while justice and care, justification and application discourses, ideally merge in all contexts, both types of discourse only come close to reality in the context of close personal relationships.

Detail particularity forces us more than ever to expand the conceptual scope of discourse beyond rationality. Taking every detail of a situation into account requires a strong capacity to empathize with the individuals involved in the situation. Every individual must be understood as a being existing in her own right, rather than as 'a simple projection of what one would feel if one were in her situation'.⁶⁸ Application discourses are all the more impregnated with feelings the closer they stand to reality and so are the justification discourses into which they translate.

Now qualifying reasons with empathy is one thing. Yet detail particularity presses upon us the question whether we can conceive of instances of discourse that rely exclusively on empathetic communication. This is especially so as we confront individuals incapable of rational communication, yet who can express their will and needs in some way or other and who also expect a response when they do so. It is the case of small children, the mentally impaired, the senile. The crucial question is, can these individuals be considered participants in discourse? Whether this is so depends on whether we can presume them to have an interest in participating in discourse. This depends, in turn, on whether we can presume them to have some capacity for critical self-determination and for expressing it in some manner. If we do, we must then abandon conceptions of discourse that have rational communication at their core.

Sara Ruddick's notion of 'embodied wilfulness'⁶⁹ appears useful in this regard. With this notion Ruddick expresses the double circumstance that capacities of will are often expressed bodily, including bodily speech, and that they can be curtailed by subjecting human bodies to pain, to fear of pain or to memory of pain. Ruddick uses this notion mainly to denounce instances of domination that take place through the infliction of bodily or mental pain. Accordingly, commitment to embodied wilfulness is conceived as a 'self-conscious commitment not to dominate', by 'relinquishing the conception of a person as an object of property and renouncing the *ambition* to appropriate her affection

or labour or to intrude upon her body or mental life'.⁷⁰ Yet the notion of embodied wilfulness appears to go beyond freedom from violence to stand more broadly for freedom from domination, hence for self-determination. The merit of the notion lies in that it emphasizes the importance of bodily speech as a form of communication that can channel both acts of domination and expressions of self-determination. It thus allows for self-determination to be expressed in non-rational forms.

The notion of embodied wilfulness urges us to identify individual will as expressed in non-rational forms of communication, such as bodily speech, and to respond to the will thus made manifest. More importantly, this notion allows us to think of individuals incapable of rational communication as possessing some capacity for self-determination. This is so even though persons unfit for rational communication must express their self-determination in relations of necessary inequality. It is so, moreover, even where such persons may lack an understanding of their own identity as separate individuals and/or of their connection with others – where their self-determination can only be preserved by others who relate to them. It is so, furthermore, even where embodied wilfulness can be expressed in manners that are self-destructive, aggressive or in some direct or indirect way harming to self or others. Some control over embodied wilfulness appears necessary in such cases. Yet, as Ruddick also emphasizes, it must be exercised in a spirit of self-restraint. An appropriate balance must be found between irresponsible permissiveness and coercive paternalism. The point of balance lies on the ideal of self-determination. This is so even where self-determination amounts to little more than the self-definition of a person's needs and wants and of the ways to satisfy them. Needs and wants expressed through embodied wilfulness must be responded to whenever possible – a right balance must be achieved between our needs and wants and those of others. Bearing the ideal of self-determination in mind, we must be able to ascertain when certain behaviour is or might turn out to be truly harming and when we disapprove of it on different grounds. This requires a great deal of care, a commitment to detail particularity. Only thus can unequal relations remain free from (non-discursive) elements of power, from power that endangers others' fitness for discourse. Only thus can we preserve our own understanding as discursive individuals.

Naturally, bodily speech plays a more important role in close personal relationships. Here rational discourse is less relevant in promoting our self-determination than are less rational and less explicit modes of communication based on empathy and intuitive mutual understanding. In the context of close personal relationships, having to make one's standpoint explicit and to explain it rationally stands as a second

best to less than explicit speech and to intuitive understanding of that speech. We run the risk of missing the goal by aiming at it.⁷¹ The less explicit communication needs to be, and the less it needs to rely on rational explanations, the more attuned and the closer a relationship can be presumed to be; the more discourse and reality will blend into one.

This brings us back to ideal discourse. The foregoing considerations portray a vision of ideal discourse as intuitive and empathetic rather than explicit and rational, where explicitness and rationality create a gap between discourse and reality (real feelings, real will, real needs) that necessarily renders discourse less than ideal. This vision of ideal discourse recalls Nancy Fraser's account of a fully panoptimized society, of a society where every member is under the perfect gaze of every other, hence where everyone is every other's omniscient guard and naked prisoner. Fraser proposes an account of such a society, not as a threat to, but as the sublimation of the ideal of self-determination. Where

... normalising power has become so omnipresent, so finely attuned, so penetrating, interiorized and subjectified, and therefore so invisible ... hierarchical, asymmetrical domination of some persons by others would have become superfluous ... The disciplinary norms would have become so thoroughly internalized that they would not be experienced as coming from without. The members of this society would, therefore, be autonomous.⁷²

Just as members of Fraser's fully panoptimized society have internalized the supervision exercised by every other, to the extent of making it unnecessary in practice, ideal discourse aims at every participant's internalization of one another's will and needs. Making one's will and needs explicit becomes redundant in this context. Indeed, through the interiorization of supervision, and as Fraser points out, 'the members of the fully panoptimized society are in an ideal speech situation' also. This does not preclude solitude. In ideal discourse, individuals' need to retreat, to take shelter in their solitude for rest, reflection or for the sheer enjoyment of their aloneness must be perceived as acutely and respected as faithfully as the terms of their interaction with others. The aim of ideal discourse is not that everyone should appropriate (expropriate) everyone else's needs and wants as their own. It is rather that everyone should acknowledge and respect those needs and wants as the needs and wants of others, and as they are made manifest by others. Respect for solitude is accordingly crucial in this context. We cannot respect and respond to the other as other, without each being allowed a return to oneself.⁷³

Just as crucially, ideal discourse does not stand as a challenge to self-determination. As in the fully panoptimized society, domination in ideal

discourse is diluted through its general accessibility, which here consists in the generalization of intuitive access to the conditions of one another's self-determination leading to the internalization of these conditions. Moreover, the internalization of these conditions rather enhances self-determination, provided it takes place under conditions of perfect reciprocity and given general awareness that this is indeed the case.⁷⁴ It makes participants in ideal discourse aware of how interrelated individuals' conditions for self-determination are, hence of how the self-determination of each individual depends on everyone else's. Deliberation then only needs to be resorted to where intuition and empathy fail. Deliberation *must* indeed be resorted to in such situations, as a means both to call attention to the failure of intuition and empathy and to ensure that this circumstance does not come to endanger self-determination. Explicit communication is both a sign that something in the relationship has gone amiss, that the conditions of discourse are no longer ideal, and a means of restoring the relationship and the conditions of discourse. Admittedly, the need for too much explicit communication might damage a context for ideal discourse to the extent of making its restoration unlikely. In this sense, to borrow an image, explicit deliberation resembles 'the net underneath the tightrope act [that] keeps people and their lives from being ruined if they fall off the wire. But the act is ruined if the net actually comes into play'.⁷⁵ Just as the net ruins a specific act for the sake of people's lives, explicit discourse ruins a specific instance of communication, even a specific communicative context, but it does so for the sake of preserving people's self-determination, hence their most fundamental capacity to participate in discourse more generally. By preserving people's self-determination explicit discourse also sets them on the right track towards ideal discourse.⁷⁶ Indeed, as we have seen, (ideal) self-determination and ideal discourse are tightly intertwined, so much so that it does not seem possible to conceive of the former outside the framework of the latter.

In the above rendition ideal discourse stands, in short, as a form of non-discourse – as a form of discourse based on non-speech. In the same line, self-determination ideally becomes a form of trusting reliance ('*Zurechnung*'⁷⁷) in others' respect and fulfilment of our will and needs that only works under conditions of acknowledged reciprocity. It thus amounts both to a state of affairs and to a state of mind: to the certainty that we can develop our identity in harmony with everyone else. It amounts to the certainty that others will positively contribute to the formation of our will and needs, that these will be fulfilled in harmony with the (internalized) will and needs of every other and that we can otherwise express our discontent in conditions of equal freedom with everyone else. This is rendered possible by the critical edge of self-determination, by our capacity to rely on some aspects of our complex

(natural, social, material) identity in order to criticize others on how they (fail to) contribute to the fulfilment of our will and needs. As soon as our self-determination must be made manifest, however, that is, as soon as it translates into explicit manifestations of our will and needs, it becomes less than ideal.

Even in the closest relationships, this vision of ideal discourse remains strongly normative. Yet it is a normative ideal that is actually controlling in close relationships and that in thus far finds a descriptive basis in real life. Close personal relationships ideally aspire to high levels of intuitive, empathetic communication also in real life. This is also true of parent-child relationships that rest on respect for self-determination and embodied wilfulness. They aspire to transcend symbolic language, to bridge the cleavage between individuals' reality and symbolic language, in order to attain some form of non-linguistic communication.⁷⁸ Phrasing this ideal in discourse-theoretical terms helps us to give it moral salience. It allows us to articulate the moral importance of detail particularity and care in personal relationships. At the same time, it also helps us to respond to the failure of implicit discourse and to acknowledge the importance of justice also in close personal relationships. Ultimately, it helps us to understand and articulate the role of explicit discourse as a guarantee that justice will indeed prevail where intuitive communication fails.

Inasfar as they epitomize deep care and detail particularity, close relationships stand as the model of ideal discourse. Inasfar as the discourse ethics aims for ideal discourse, therefore, it takes the logic of implicit (emotional, intuitive, corporal, empathetic) communication characteristic of close relationships as its aim. Explicit rational discourse is a second best, but also a means to approach the ideal. Moral and legal norms draw, as well as language, a positivistic vision of the world that differs from its intractable reality while endlessly aiming at it. The ethic of care reminds us of our duty to stay attuned to the unspeakable complexity of reality,⁷⁹ while the ethic of justice allows us to stay afloat within the parodic versions of reality that our social and political involvement, indeed our involvement in other than the closest personal relations, forces us to create.

University of Seville, Spain

Notes

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- 1 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Sara Ruddick, 'Maternal Thinking', in *Mothering*, ed. Joyce Trebilcock (Totowa, NJ: Rowman & Allenheld, 1983); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984). This ethic finds a crucial source of inspiration in Nancy Chorodow's study of the influence of women's mothering on children's early psychological development, in *The Reproduction of Mothering* (Berkeley: University of California Press, 1978).
- 2 Noddings, *Caring*, pp. 80 *et seq.*
- 3 L. A. Blum, 'Gilligan and Kohlberg: Implications for Moral Theory', *Ethics* 98 (1987/1988): 472–91 (475).
- 4 Thus Susan Moller Okin argues that 'feelings such as caring and concern for others are essential to the formulation of principles of justice, [which on the other hand] does not suggest that such principles can be replaced by contextual caring thinking' ('Reason and Feeling in Thinking about Justice', *Ethics* 99 (1989): 229–49 (247)).
- 5 Alison M. Jaggar, 'Caring as a Feminist Practice of Moral Reason', in *Justice and Care: Essential Readings in Feminist Ethics*, ed. Virginia Held (Colorado: Westview Press, 1995), pp. 179–202 (185).
- 6 See the impartialist rejoinders to Carol Gilligan as commented on by Lawrence A. Blum, in particular what Blum lists as rejoinders 3, 4, 6, and 7, in 'Gilligan and Kohlberg', 478 *et seq.*
- 7 See Jonathan Dancy, 'Caring about Justice', *Philosophy* 67 (1992): 447–66 (esp. 464 *et seq.*); Virginia Held, 'The Meshing of Care and Justice', *Hypatia* 10 (1995): 128–32 (131 *et seq.*); Joan Tronto, 'Care as a Basis for Radical Political Judgments', *Hypatia* 10 (1995): 141–9.
- 8 Thus Marilyn Friedman, 'Care and Context in Moral Reasoning', in *What Are Friends For? Feminist Perspectives on Personal Relationships and Moral Theory* (Ithaca, NY: Cornell University Press, 1993), pp. 91–116; see also her 'Beyond Caring: The De-Moralisation of Gender', in *Justice and Care*, pp. 61–77 (68) (reprinted as 'Gendered Morality' in *What Are Friends For?*, pp. 117–41); Annette C. Baier, 'The Need for More than Justice', in *Justice and Care*, pp. 47–58 (52 *et seq.*); Claudia Card, 'Gender and Moral Luck', in *Justice and Care*, pp. 79–98 (esp. 85 *et seq.*).

- 9 Grace Clement, *Care, Autonomy, and Justice: Feminism and the Ethic of Care* (Colorado: Westview Press, 1998), pp. 114 *et seq.*
- 10 See Lawrence Kohlberg, 'A Reply to Owen Flanagan and Some Comments on the Puka-Goodpaster Exchange', *Ethics* 92 (1982): 513 *et seq.* (515); Jürgen Habermas, 'Moralbewußtsein und kommunikatives Handeln', in *Moralbewußtsein und kommunikatives Handeln* (Frankfurt am Main: Suhrkamp Taschenbuch Wissenschaft, 1983), pp. 127–206 (189 *et seq.*).
- 11 Noddings, *Caring*, p. 86.
- 12 Clement, *Care, Autonomy, and Justice*, pp. 69 *et seq.*, 89 *et seq.*
- 13 Joan Tronto, 'Women and Caring: What Can Feminists Learn about Morality from Caring?', in *Justice and Care*, ed. Held, pp. 101–15 (113).
- 14 Jaggar, 'Caring as a Feminist Practice', p. 189.
- 15 Marilyn Friedman, 'Liberating Care', in *What Are Friends For?*, pp. 142–83 (155).
- 16 It is in this respect that mostly feminist scholars have urged the introduction of parameters of justice within the ethic of care, in order to prevent the exploitation of those caring. Thus Joan Tronto contrasts a feminine with a feminist approach to caring and points out that this latter must include 'caring about what we care for' ('Women and Caring', p. 111; see also J. Tronto, 'Beyond Gender Difference to a Theory of Care', *Signs* 12 (1987): 644–63 (659 *et seq.*). Also in this line, see Baier, 'The Need for More than Justice', pp. 52 *et seq.*; Friedman, 'Beyond Caring', p. 68. Other scholars stress the danger of caring's sliding into paternalism, authoritarianism and dogmatism (see Jaggar, 'Caring as a Feminist Practice', p. 189; Virginia Held, 'The Meshing of Care and Justice', *Hypatia* 10 (1995): 128–32 (130); Uma Narayan, 'Colonialism and Its Others: Considerations On Rights and Care Discourses', *Hypatia* 10 (1995): 133–40; Anita Silvers, 'Reconciling Equality to Difference: Caring (f)or Justice for People with Disabilities', *Hypatia* 10 (1995): 30–55).
- 17 Noddings, *Caring*, p. 90.
- 18 'Reply', *Signs* 11 (1986): 324–33 (327), referring to Gilligan, *In a Different Voice*, p. 2.
- 19 See the studies cited in Friedman, 'Beyond Caring' (notes 6 and 7).
- 20 John M. Broughton, 'Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development', *Social Research* 50 (1983): 597–642 (609 *et seq.*); Debra Nails, 'Social-Scientific Sexism: Gilligan's Mismeasure of Man', *Social Research* 50 (1983): 343–64; Catherine G. Greeno and Eleanor E. Maccoby, 'How Different is the "Different Voice"?', *Signs* 11 (1986): 310–16; Zella Luria, 'A Methodological Critique', *Signs* 11 (1986): 316–21. Dancy, 'Caring about Justice', esp. at pp. 459 *et seq.*
- 21 For studies offering empirical support to the gender difference hypothesis, see Friedman, 'Beyond Caring' (note 6).
- 22 This is indeed the point overtly made by N. Chorodow's influential classic *The Reproduction of Mothering*. Extensively on this point see Seyla Benhabib, 'The Debate over Women and Moral Theory Revisited', in *Situating the Self: Gender Community and Postmodernism in*

- Contemporary Ethics* (New York: Routledge/Polity Press, 1992), pp. 178–202 (191 *et seq.*).
- 23 Catharine MacKinnon's contribution to 'Feminist Discourse, Moral Values and the Law – A Conversation', *Buffalo Law Review* 34 (1985): 11–87 (74–5).
 - 24 *ibid.*; James C. Walker, 'In a Diffident Voice: Cryptoseparatist Analysis of Female Moral Development', *Social Research* 50 (1983): 665–95 (esp. at 690 *et seq.*); Claudia Card, 'Women's Voices and Ethical Ideals: Must We Mean What We Say?', *Ethics* 99 (1988): 125–35; Card, 'Gender and Moral Luck', esp. at pp. 85 *et seq.*; Jaggar, 'Caring as a Feminist Practice', at pp. 193 *et seq.* In the same line, Mary Joe Frug warns against the dangers of a conservative reading of Gilligan's work in her 'Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?', *Harvard Women's Law Journal* 15 (1992): 37–64 (50 *et seq.*). Also Gilligan takes now the subtext of gender domination into account in her articulation of a feminist ethic of care based on self-assertion in relationships, and opposed to a feminine ethic of care built on selflessness or self-sacrifice. See Carol Gilligan, 'Hearing the Difference: Theorising the Connection', *Hypatia* 10 (1995): 120–7 (122 *et seq.*).
 - 25 Linda J. Nicholson, 'Women, Morality and History', *Social Research* 50 (1983): 514–36 (530 *et seq.*); Linda K. Kerber, 'Some Cautionary Words for Historians – On *In a Different Voice: An Interdisciplinary Forum*', *Signs* 11 (1986): 304–16; Carol B. Stack, 'The Culture of Gender: Women and Men of Color – On *In a Different Voice: An Interdisciplinary Forum*', *Signs* 11 (1986): 321–4; Tronto, 'Beyond Gender Difference': 649.
 - 26 Also in this sense, Friedman, 'Beyond Caring', p. 65.
 - 27 Clement, *Care, Autonomy and Justice*, p. 120.
 - 28 Habermas, 'Moralbewußtsein', p. 194.
 - 29 Jürgen Habermas, 'Gerechtigkeit und Solidarität. Zur Diskussion über "Stufe 6"', in *Erläuterungen zur Diskursethik* (Frankfurt: Suhrkamp, 1991), pp. 49–76 (69).
 - 30 Seyla Benhabib, 'Autonomy, Modernity and Community', in *Situating the Self*, pp. 68–88 (73 *et seq.*). Also in this sense Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991), esp. ch. 3 ('The Trajectory of the Self'), pp. 70–108.
 - 31 I develop this point further in 'Discourse Theory and the Addressees of Basic Rights', *Rechtstheorie* 32 (2001): 87–132.
 - 32 Habermas, 'Gerechtigkeit und Solidarität', in *Erläuterungen zur Diskursethik*, p. 70.
 - 33 Habermas, 'Moralbewußtsein', pp. 189–90.
 - 34 See Thomas McCarthy, 'Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions', *Cardozo Law Review* 17 (*Habermas on Law and Democracy: Critical Exchanges*) (1996): 1083–1125; Frank Michelman, 'Family Quarrel', *Cardozo Law Review* 17 (1996): 1163–77.
 - 35 See on this point Jonathan E. Adler, 'Abstraction is Uncooperative', *Journal for the Theory of Social Behaviour* 14 (1984): 165–81.
 - 36 J. Habermas, 'Gerechtigkeit und Solidarität', p. 73.
 - 37 Seyla Benhabib, 'Models of Public Space', in *Situating the Self*, pp. 89–120 (110).

- 38 Nancy Fraser, 'Toward a Discourse Ethic of Solidarity', *Praxis International* 5 (1986): 425 *et seq.*
- 39 Sara Ruddick, 'Remarks on the Sexual Politics of Reason', in *Women and Moral Theory*, ed. Eva Feder Kittay and Diane T. Meyers (Savage, MD: Rowman & Littlefield, 1987), pp. 237–68 (245).
- 40 Benhabib, 'Models', p. 99. See also Benhabib, 'Autonomy, Modernity and Community', pp. 71 *et seq.*; and Seyla Benhabib, 'The Debate over Women and Moral Theory Revisited', in *Situating the Self*, pp. 178–202 (185 *et seq.*).
- 41 See for all Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989).
- 42 See Habermas, 'Moralbewußtsein', p. 172.
- 43 J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp, 1994), p. 138 (emphasis added).
- 44 Habermas, 'Moralbewußtsein', pp. 193–4.
- 45 Seyla Benhabib, 'The Generalised and the Concrete Other', in *Situating the Self*, pp. 148–77 (168). Habermas, 'Gerechtigkeit und Solidarität', pp. 59 *et seq.*
- 46 Klaus Günther, *Der Sinn für Angemessenheit. Anwendungsdiskurse in Moral und Recht* (Frankfurt am Main: Suhrkamp, 1988). On the application of the distinction between justification and application discourses to the care/justice debate, see pp. 177 *et seq.* Jürgen Habermas also connects this distinction with the relation between justice and care ('Gerechtigkeit und Solidarität', p. 65 *et seq.*; 'Moralbewußtsein', p. 191). Yet he does so cursorily and in unexplained contradiction with his better-known view that care pertains to questions of the good life that do not belong to the field of deontology as defined by the discourse ethic.
- 47 See Lawrence Blum, 'Moral Perception and Particularity', *Ethics* 101 (1991): 701–25 (esp. at 712–13).
- 48 The condition of universal participation is somewhat different. What this condition requires from real discourse is that it remains open to all. This brings the conditions of correctness of real and ideal discourses very close together. Indeed, ideal discourse may not be built upon *actual* universal participation, not if this must be attained by force. It must rest instead upon *potential* universal participation, where everyone remains free to decide whether she wishes to participate in a given instance of discourse or would rather retreat from it. Ideal discourse, in other words, rests upon the openness of discourse to everyone. Thus openness is a feature of ideal discourse, the final aim for which real discourse must strive, and at the same time a requirement for the correctness of real discursive situations. The aim and the means to attain it conflate into one. (This responds to the criticism of Günther's construction developed by Robert Alexy in 'Justification and Application of Norms', *Ratio Juris* 6 (1993): 157–70 (159)). Nevertheless, ideal and real discourse do differ here in one respect. Under ideal conditions, who are the participants in the discourse-theoretical discussion of a given issue is clear from its commencement. This is so because individuals can already then foresee all the possible implications of the issue

being discussed and on the basis of this opt for or against participation. Under less than ideal conditions, on the other hand, participation can be decided only as discourse goes on and the consequences and implications of the issues under discussion gradually come to the fore.

- 49 Günther, *Der Sinn für Angemessenheit*, p. 25. From this perspective, norms can have two different structures, either as rules or as principles. Rules are norms the justification of which purports to comprehend all the situations to which they will apply. Their application is restricted to cases that are a semantic extension of the situations described in the norm. Discourses of application merely come to decide whether or not a specific case is such a semantic extension, eventually whether one rule excepts the application of another. The justification of principles, on the other hand, does not exhaust all the possibilities of their application. Rather, it allows for specification in application discourses, after considering all the circumstances of a specific case. The application of a principle then depends on its appropriateness to regulate a situation in coherence with all other applicable norms. At the level of their justification, therefore, rules bear an all-or-nothing relation to their application, whereas principles bear a prima facie relation.
- 50 This mode of proceeding could pose the danger of circularity in the selection of the relevant features of a situation and of the norms applicable to it. Yet this danger really arises only where discourses of application are conducted as monologues, or among participants who share one single point of view. The problem of circularity does not arise where participants in discourses of application regard the situation at issue from different perspectives, as is the case, for example, in judicial trials (Günther, *Der Sinn für Angemessenheit*, pp. 49 *et seq.*).
- 51 Günther, *Der Sinn für Angemessenheit*, pp. 303 *et seq.*
- 52 Also note that both justification and application discourses are at the service of impartiality. In justification impartiality consists in granting all an equal chance to participate in discourse. It does not amount to neutrality, to the view from nowhere propounded by the liberal tradition. Rather, and paradoxically, impartiality is achieved through partiality, by providing all (partial) views an equal chance to be debated. In the context of application discourses impartiality translates into non-arbitrariness. It requires unbiased consideration of the normative framework and of all the circumstances of the case being examined.
- 53 Carol Gilligan, 'Moral Orientation and Moral Development', in *Justice and Care*, ed. Held, pp. 31–46.
- 54 Sara Ruddick, 'Injustice in Families: Assault and Domination', in *Justice and Care*, ed. Held, pp. 203–23 (204).
- 55 See Lawrence Blum, 'Particularity and Responsiveness', in *The Emergence of Morality in Young Children*, ed. Jerome Kagan and Sharon Lamb (Chicago, IL: The University of Chicago Press, 1987), pp. 306–37 (esp. 311 *et seq.*, 318 *et seq.*). Blum, 'Moral Perception and Particularity'.
- 56 This responds to Alexy's criticism against the distinction between justification and application, in the sense that the application of norms entails elements of law creation that is in turn in want of justification ('Justification and Application of Norms').

- 57 The relevance for self-determination of the specific features of a given situation must be assessed on the basis of the internal logic of that situation at hand. On this point, see Rodríguez Ruiz, 'Discourse Theory and Addressees of Basic Rights', 121 *et seq.*; and Blanca R. Ruiz, 'The Right to Privacy: A Discourse-Theoretical Approach', *Ratio Juris* 11 (1998): 155–67
- 58 Blum, 'Moral Perception and Particularity', 721.
- 59 A similar insight can be found in Neera Kapur Badhwar, 'Friendship, Justice and Supererogation', *American Philosophical Quarterly* 22 (1985): 123–31 (128).
- 60 See Rodríguez Ruiz, 'Discourse Theory and the Addressees of Basic Rights', pp. 121 *et seq.*
- 61 Blanca R. Ruiz, 'The Right to Privacy. A Discourse-Theoretical Approach', (162) *et seq.*
- 62 See, for example, the works by Baier, Friedman, Jaggard and Narayan, cited in note 16 above.
- 63 Thus, for example, Held, 'The Meshing of Care and Justice', 131.
- 64 See Sandra Hardings, 'The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory', in *Women and Moral Theory*, ed. Kittay and Meyers, pp. 296–315; Chenyang Li, 'The Confucian Concept of Jen and the Feminist Ethics of Care: A Comparative Study', *Hypatia* 9 (1994): 70–89.
- 65 This is so independently of the criticisms of the disempowering effects of social programmes in welfare states, made from the perspective of discourse theory, which aims rather at enhancing individuals' self-determination.
- 66 A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1992).
- 67 Blum, 'Moral Perception and Particularity', 721.
- 68 Blum, 'Gilligan and Kohlberg', 475.
- 69 Ruddick, 'Injustice in Families', 215.
- 70 *ibid.*, pp. 216–17.
- 71 Thus also Michael Stocker, 'Values and Purposes: The Limits of Teleology and the Ends of Friendship', *The Journal of Philosophy* 78 (1981): 747–65 (759).
- 72 See Nancy Fraser, 'Foucault: A "Young Conservative"?', in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Minnesota: University of Minnesota Press, 1989), pp. 35–54 (49). The following quotations are also taken from this page.
- 73 Luce Irigaray, *The Way of Love* (London and New York: Continuum, 2002), p. 150. This is clearly so inasfar as one seeks temporary shelter within oneself. The case of the hermit, of the person who seeks definite retreat from society, is somewhat different. Certainly the discourse ethic accounts for individuals as communicative beings. Under this light, individuals who intend to retreat from communication in a definite manner thereby renounce the fulfilment of their human nature and would appear to fall beyond the scope of the discourse ethic. Nevertheless, a hermit can be faithful to her communicative nature in her relation with the natural world around her as she comes to understand and respond to the cues of

nature, most particularly as she manages to establish some communication with the animal world through embodied wilfulness. She can ultimately be in communication with her God (also in this sense Michael Sandel, *The Ethics of Authenticity* [Cambridge, MA: Harvard University Press, 1991], pp. 34–5). Though estranged from the human world, her life can thus conform to the requirements of the discourse ethic. (I am grateful to John Gardner for drawing my attention to the hermit case at the Oxford Jurisprudence Discussion Group.)

- 74 On the importance of reciprocity for acting according to moral dicta, see Laurence Thomas, 'Believes and the Motivations to be Just', *American Philosophical Quarterly* 22 (1985): 347–52.
- 75 John Hardwig, 'Should Women think in Terms of Rights?', *Ethics* 94 (1984): 441–55 (453).
- 76 In the words of Jacques Derrida, 'Speech ruins friendship; it corrupts by speaking, degrades, belittles, undoes the speech (*verredet*) of friendship'; and yet, continues Derrida, 'this evil is done to it on account of truth'. See *Politics of Friendship*, trans. George Collins (London: Verso, 1997), p. 54.
- 77 Niklas Luhmann, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie* (Berlin: Duncker & Humblot, 1999[1965]), pp. 63 *et seq.* See also Annette Baier, 'Trust and Antitrust', *Ethics* 96 (1985): 231–60.
- 78 In this line consult the work of Julia Kristeva. See her essays in *Desire in Language: A Semiotic Approach to Literature and Art*, ed. Leon Roudiez, trans. Thomas Gora, Alice Jardine and Leon S. Roudiez (New York: Columbia University Press, 1980), especially ch. 5, 'From One Identity to an Other', pp. 124–47.
- 79 See also Claudia Card, 'On Mercy', *The Philosophical Review* 81 (1972): 182–207, for an example of how criminal law relies on mercy to respond to mismatches between norms and real life.