This document is intended to assist law professors who wish to incorporate critical theory (in general) and Habermas (in particular) into their teaching. This document addresses just one essay by Habermas that is representative of his thought. It does not address other important areas of Habermasian theory such as the “public sphere” (a concept that the essay nevertheless implicates).

This document should provide some basic insights into Habermas that could be incorporated into a law school classroom. Contracts in particular would benefit from Habermasian analyses, which could just as constructively be applied to torts, evidence, constitutional law, or any course dealing with litigation and the courtroom. This document provides basic information. It does not tell law professors how to use the information. The use will require creativity.

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Fundamental to the paradigm of mutual understanding is ... the performative attitude of participants in interaction, who coordinate their plans for action by coming to an understanding about something in the world. When ego carries out a speech act and alter takes up a position with regard to it, the two parties enter into an interpersonal relationship. The latter is structured by the system of reciprocally interlocked perspectives among speakers, hearers, and non-participants who happen to be present at the time.

—Jürgen Habermas, “An Alternative Way Out of the Philosophy of the Subject”

In a way, “An Alternative Way Out of the Philosophy of the Subject” is a response to Foucault’s theories of subjectivity that treat subjects as produced by forces of power. Habermas seems to consider Foucault’s theories as so preoccupied with knowledge formation and structural preconditions for knowledge formation that they (the theories) become pseudoscience abstracted from practical realities. A Foucaultian paradigm centers on subjectivity trained by mechanical forces whereas a Habermasian paradigm explores communicative reason in the context of discourse enabled by the ideations of individual subjects articulating their positions to one another in mutually intelligible utterances.

Contra Foucault, Habermas submits that reason—articulated, assimilated, and mediated by language—must be understood as social. For social interaction to be meaningful, its interlocutors must believe that their articulations are objectively “true” or sincere (I place “true” in quotations because the “pragmatically expanded theory of meaning overcomes [the] fixation on the fact-mirroring function of language”). Speech must be governed by points of common understanding. These points are reached when “ego carries out a speech act and alter takes up a position with regard to it.” Ego, here, refers to a person’s conscious awareness that is capable of being conveyed in speech. “Alter” does not refer to alter ego, but to some agent outside the subjective world of cognition, intention, and belief. This “alter” is part of the external or objective world to which the ego can articulate feelings or thoughts, provided that ego and alter have in common a familiar discursive space (a lifeworld) for their subjective expressions. By this reading, alter has an ego, and ego can be an alter. The terms simply

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depend upon which subject is articulating his position in a given speech situation; the terms are merely descriptive.

To claim that we can comprehend events or things in the world is to suggest that we can *speak* about them. To speak about events or things in the world is to convey information about them from one party to another using shared vocabularies governed by rules that the parties accept unconditionally. The interpersonal relationship among or between parties, as Habermas suggests, is “structured by the system of reciprocally interlocked perspectives.” The study of this relationship brings Habermas further away from the Foucaultian paradigms of subjectivity and towards the paradigm of mutual understanding that has come to mark Habermasian thought.

The paradigm of mutual understanding is implicated when interactions among speakers result in concerted and shared efforts to organize and make sense of the speakers’ respective behaviors and actions. Quality and characteristics of speech are important to interactions among and between parties because intelligible utterances must satisfy certain conditions. In other words, if language is to work, it must be couched in utterances, syntaxes, and grammars that are categorically recognized by all parties utilizing the language with respect to one another. The ideal utterance is one that is reflexively accepted as valid by all interlocutors; the same can be said of a concept, which I take to be a more general category of discourse consisting of sets of utterances. At any rate, the focus of the paradigm of mutual understanding upon “the performative attitude of participants in interaction” leads Habermas to suggest that agents who enter into speech situations do so to coordinate actions and reach consensuses about external realities. Communicative activity depends upon interpretive relations between and among rational agents. Communication becomes part of community when it takes place in or possibly facilitates the lifeworld where various knowledge claims achieve a consensus-based unity that is understood by interlocutors prior to its articulation. In other words, in a lifeworld, interlocutors’ recognition of utterances (and the referents to which they refer) precedes speech, which constitutes an outward manifestation of subjective knowledge generally free from forces of power and disciplinary systems.
DISCUSSION POINTS AND KEY TERMS

1. **Contradictory self-thematizations**: The idea behind contradictory self-thematizations is to indicate a paradox arising when a philosopher (in this case, Foucault) claims to have introduced a new approach, but in so doing has relied upon the very approach from which he seeks to depart. Habermas says that Foucault’s theories attempt to “rise above” pseudoscience, but nevertheless become “caught all the more hopelessly in the trap of a presentist historiography,” which is to say, a historiography divorced from the contextual relationships and communicative interactions of people and groups as manifest in their historical moment. Foucault’s emphasis on the objective depends upon the subjective. His critique of reason depends upon the use of reason.

2. **The theory of power (Foucault)**: Habermas critiques Foucault’s theories of power on the grounds that Foucault attempts to invent a discourse outside of reason, but Foucault uses reason to do so. Habermas also sees Foucault’s theories of power as severely limited in their practical applications. These theories result in the conception of a subject mechanically produced and lacking in agency, or at least limited in agency because of the various interplays of systems of power. In Foucault’s theories of power, the subject is displaced by networks of discourse exceeding the control of any one actor and operating together to discipline subjects within systems of regulation. Habermas uses Foucault to introduce the themes of communicative reason. “[T]he theory of power,” Habermas says, “fails to provide a way out of the problematic situation” in which philosophers employ the very concept they seek to demolish, and therefore “it behooves us to retrace the path of the philosophical discourse of modernity back to its starting point—in order to examine once again the directions once suggested at the chief crossroads.” This statement is a direct criticism of the methodologies of genealogy emanating from Nietzsche.
3. The paradigm of mutual understanding:

What follows are the constituent elements of this paradigm:

a. Performative attitude of participants in interaction
   BRINGS ABOUT A

b. Coordination of plans for action
   WHICH PLANS COME FROM

c. A shared understanding about something in the world

Habermas defines the paradigm of mutual understanding as “the intersubjective relationship between individuals who are socialized through communication and reciprocally recognize one another.”
4. **The Common Lifeworld:** The figure below represents a common lifeworld. The shaded area represents a speech situation, or many speech situations, whereby certain understandings are taken for granted or presumed as immanently knowable, and whereby _particular_ totalities function in relation to one another.

![Diagram](image-url)
Habermas suggests that we gain insights into the lifeworld only “a tergo.” That is to say, unless we are initiated into or otherwise immersed in the discourse of a lifeworld, we cannot understand the social interactions, shared presuppositions, and commonly accepted practices and vocabularies that together enable meaningful communicative exchanges to take place within that lifeworld. As Habermas puts it, “we need a *theoretically constituted perspective* to be able to treat communicative action as the medium through which the lifeworld as a whole is reproduced.”

Habermas later explains, “As a totality that makes possible the identities and biographical projects of groups and individuals, [the lifeworld] is present only prereflectively.” The lifeworld, then, is neither a geographical space nor a state of mind, although geography and psychology inform and influence all lifeworlds. In fact, Habermas seems to suggest that participants in a lifeworld become socialized and *partially* determined by the discursive structures and alphabets within the lifeworld. The participants no longer appear, in his words, “as originators who master situations with the help of accountable actions, but as the products of the traditions on which they stand, of the solidarity groups to which they belong, and of the socialization processes within which they grow up.” The participants do not lack agency, but their agency is limited by social contexts.

Agent X must work with and through the knowledge and vocabulary available to him—how can he do otherwise?—and for Agent X to work *with* another agent, say, Agent Y, then Agent Y must to some extent share Agent X’s knowledge and vocabulary. In or through a lifeworld, Agent X and Agent Y would reflexively understand their shared knowledge and vocabulary. For an outsider to fully understand a knowledge-exchange in the lifeworld, he must gain a reflexive (as opposed to a reflective) comprehension of this exchange.
Does that mean that to achieve full understanding of the discourse of a lifeworld, or of the lifeworld as a discourse, the outsider must become an insider, which would entail total immersion in the lifeworld such that any search for meaning could no longer happen because the meaning itself would become so internalized that a search would be indistinguishable from the methods used for searching? After all, one cannot meaningfully search for an understanding that he already has. Or can he? On this score, it is worth quoting Habermas: “Whoever wants to become reflectively aware of the individual totality of any individual biography or of a particular way of life has to recur to the perspective of the participants, give up the intention of rational reconstruction, and simply proceed historically.”

One final note about the lifeworld. Simply because agents in the lifeworld recognize the conditions for speech that must be met to transmit information effectively does not mean that the information itself is indisputable or referential to truth and validity. “Participants,” Habermas explains, “draw from this lifeworld not just consensual patterns of interpretation (the background knowledge from which propositional contents are fed), but also normatively reliable patterns of social relations (the tacitly presupposed solidarities on which illocutionary acts are based) and the competences acquired in socialization processes (the background of the speaker’s intentions.)”

The law of contracts may help us to understand Habermas’s paradigm of mutual understanding. In particular, the doctrine known as “meeting of the minds” (“aggregatio mentium” or “assensio mentium”) addresses the mutual assent of parties to the formation of a contract. I do not mean to suggest a correspondence between “meeting of the minds” and the “paradigm of mutual understanding.” Rather, “meeting of the minds” serves as a useful analogy, and analogies deal with things similar enough to warrant comparison.

A contract represents the sort of shared comprehension to which Habermas refers: it is a mutual understanding between parties that exemplifies on a small scale the mutual understandings between discursive communities (Habermas does not use the term “discursive community,” which Stanley Fish coined, but I think the term is fitting). A contract is like a memorialized lifeworld.
Meeting of the minds is a subjective theory for determining whether parties have agreed upon terms, conditions, and subject matters. Because no judge or jury can access parties’ intentions, a meeting of the minds is determined by outward or objective manifestations of intent. For instance, a jury may determine that a meeting of the minds exists if both parties act as a reasonable person would not have acted unless he had a contract. If a reasonable person has formed a contract, this logic runs, he will act (or not act) in certain ways. Put differently, judges and jurors infer that a reasonable person will act only in certain ways, or refrain from acting in certain ways, if that person has formed a contract. Person X, a reasonable person, would not mow Person Y’s lawn once a week, for three hours, for an entire year, if Person X did not have a contract mandating such activity. So, if it can be said that a reasonable person would not have done something but for the existence of a contract, a jury may infer that a person doing that something must have formed a contract, which is to say, he must have assented to the terms that control his actions.

For a contract to be effective, all of its terms must be mutually assented to. The parties do not have to assent simultaneously or at the same location. If a material element of the contract does not appear in the contract, then the contract is not a contract at all—it is something else, an undefined document that is not enforceable under the law. For a contract to be valid, moreover, its terms of mutual assent cannot address just anything: they must pertain to items or activities implicating the doctrine of bargain-for-exchange. In other words, the parties must have bargained over the terms; therefore, both parties must benefit from some exchange that takes place because of the terms. That is another way of saying that both parties must give up something of value and gain something of value if they wish to form an operative contract. A contract is in this way an exercise in gain and loss for both parties. In short, a contract is the outward expression of the intents of parties establishing a mutual understanding and to some extent working towards a common purpose (fulfillment of the terms of the contract). A contract, then, is simply textual evidence of the will of two subjects to manifest a shared commitment.

How do these theories of contract formation pertain to Habermas’s theories of mutual understanding?
5. The diremption model of reason: Diremption refers to a violent separation or tearing apart. However, that meaning complicates Habermas’s conception of the diremption model of reason, which he prizes over the exclusion model. The diremption model of reason “distinguishes solidary social practice as the locus of a historically situated reason in which the threads of outer nature, inner nature, and society converge.” For Habermas, then, the diremption model is one of convergence, not partition. He seems to believe that speech cannot be divorced from the intents and purposes of the speaker because speech is the very expression of intents and purposes. He also seems to believe that reason is not, as poststructuralism generally implies, a tool used by some to exclude the voices of others and to deny privileges to others. Foucault (among many others) criticized reason as a socially constructed standard against which to evaluate the actions and motives of groups, and with which empowered groups seek to disenfranchise and disable disempowered groups.

Habermas has a different take on reason. He suggests that within every rational agent, reason remains a unified totality. By contrast, the exclusion model of reason, which Habermas rejects, and which seems to be rather Foucaultian, maintains that “the space opened up by utopian thought gets completely filled in with an irreconcilable reason reduced to bare power.” Habermas explains how reason is treated according to this exclusion model: “Here social practice only serves as the stage upon which disciplinary power finds ever new scenarios. It is haunted by a reason denied the power to gain access, without coercion, to what is prior to it. In its putative sovereignty, reason that has evaporated into subjectivity becomes the plaything of unmediated forces working upon it, as it were, mechanically—forces of the internal and external nature that have been excluded and rendered into objects.”
Habermas’s diremption model of reason seems to be a third-way between, on one hand, a model that would treat reason as the semantic production of forces of power, and, on the other hand, a model that would treat reason as an immanently knowable phenomenon serviceable to some grand teleology. Habermas is critical of thinkers like Foucault and Heidegger who use reason to critique reason. Habermas seeks to recover reason as a legitimate standard against which we might measure the rationality of political projects. In this respect, he seems to reawaken readers to the possibility of Enlightenment ideas with which Foucault (among many others) takes issue.
6. Linguistic functions of speech acts: What follows is an outline of the “clarification, in terms of speech act theory, of the complex linguistic functions of representation.”

- “Elementary speech acts display a structure in which three components are mutually combined”:
  1) “the propositional component for representing (or mentioning) states of affairs”; 
  2) “the illocutionary component for taking up interpersonal relationships”; and
  3) “the linguistic components that bring the intention of the speaker to expression.”

- “Each elementary speech act can be contested under three different aspects of validity”: 
  The hearer can reject the utterance of a speaker in toto by disputing either 
  1) “the truth of the proposition asserted in it (or of the existential presuppositions of its propositional content)”; or
  2) “the rightness of the speech act in view of the normative context of the utterance (or the legitimacy of the presupposed context itself)”; or
  3) “the truthfulness of the intention expressed by the speaker (that is, the agreement of what is meant with what is stated).”

- “Hence, the internal connection of meaning and validity holds for the entire spectrum of linguistic meanings—and not just for the meaning of expressions that can be expanded into assertoric sentences. It holds true not only for constative speech acts, but for any given speech act, that we understand its meaning when we know the conditions under which it can be accepted as valid.”
7. **Rationality:** Hamermas implicitly (sometimes explicitly) pits his ideas about rationality against Foucault’s ideas of subjectivity: “‘Rationality’ refers in the first instance to the disposition of speaking and acting subjects to acquire and use fallible knowledge. As long as the basic concepts of the philosophy of consciousness lead us to understand knowledge exclusively as knowledge of something in the objective world, rationality is assessed by how the isolated subject orients himself to representational and propositional contents. Subject-centered reason finds its criteria in standards of truth and success that govern the relationships of knowing and purposefully acting subjects to the world of possible objects or states of affairs. By contrast, as soon as we conceive of knowledge as communicatively mediated, rationality is assessed in terms of the capacity of responsible participants in interaction to orient themselves in relation to validity claims geared to intersubjective recognition. Communicative reason finds its criteria in the argumentative procedures for directly or indirectly redeeming claims to propositional truth, normative rightness, subjective truthfulness, and aesthetic harmony.” These notions of rationality lead Habermas to his theories of argumentation.

8. **Pragmatic logic of argumentation:** Pragmatics is not the same as pragmatism, even though it has much in common with ideas that carry the pragmatist label. Pragmatics analyzes speech performances from a linguistics perspective. In his pragmatic logic of argumentation, Habermas implicitly writes against the idea of “instrumental reason” that is prominent in the works of the Frankfurt School. The theory of instrumental reason generally maintains that reason, rather than being a fixed, ontologically knowable quality or object of the human mind, is a means to an ends (an instrument that can take on various forms in various contexts) that is used in theorized societies to gain, validate, or solidify hegemony and power. By contrast, Habermas attempts to locate pragmatics in the practical, everyday world (rather than in ahistorical and abstract theory) by seeking out the underlying connections between speech acts that bring about consensual exchanges among individuals.

Habermas describes the pragmatic logic of argumentation as follows: “This concept is richer than that of purposive rationality, which is tailored to the cognitive-instrumental dimension, because it integrates
the moral-practical as well as the aesthetic-expressive domains; it is an explication of the rational potential built into the validity basis of speech. This communicative rationality recalls older ideas of logos, inasmuch as it brings along with it the connotations of a noncoercively unifying, consensus-building force of a discourse in which the participants overcome their at first subjectively biased views in favor of a rationally motivated agreement.”

9. **Validity versus truth:** Has Habermas substituted “validity” for “truth” as a metaphysical category? If so, would “validity” refer to something like a contingent or fluid “truth” that maintains its “trueness” only so long as it exists in certain contexts across space and time? “Validity” presumes a status of meaning that is always subject to negotiation and interrogation even as it is used as an unquestioned reality of everyday life.