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# System and Lifeworld in Habermas's Theory of Law

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# SYSTEM AND LIFEWORLD IN HABERMAS'S THEORY OF LAW

*Hugh Baxter\**

## ABSTRACT

*Jürgen Habermas's recent work on law and democracy divides into two parts. With his "discourse theory of law and democracy," Habermas seeks to explain the conditions under which modern constitutional legal and political orders may claim legitimacy. Here Habermas's method is primarily philosophical and legal-theoretical. The second part of the project—the part on which this article focuses—develops what Habermas calls his "communication theory of society." Here Habermas seeks to "translate" the normative conclusions of his discourse theory into a substantive social-theoretical model. The idea is to determine whether the ambitious normative theory of democracy is plausible under contemporary conditions of social complexity.*

*Habermas's presentation of the "communication theory of society" is difficult to understand, partly because he invokes, without much explanation, the "two-level" theory of society that he developed in his work of the 1970s and 1980s. I return to that work to excavate the basic concepts of "communicative action," "system," and "lifeworld." I discuss the model of society developed in that earlier body of work—a model of "interchange" between the normatively rich "lifeworld" and the money- and power-driven economic and administrative systems. My account is critical. Each distinction on which Habermas relies to construct the "interchange" model is drawn too sharply, and the resulting model makes the normative ideal Habermas consistently has defended—radical democracy—literally inconceivable.*

*The more recent work on law professes continued loyalty to the*

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\* Associate Professor, Boston University School of Law. Thanks go to participants in faculty workshops at Northeastern University and Boston University, and to participants at the 2000 meeting of the Working Group on Law, Culture, and the Humanities. Special thanks to David Lyons, Phina Lahar, Manuel Utset, Daniela Caruso, and (most of all) Marina Leslie.

*system/lifeworld conception of society. But at the same time, it develops a different model—the “model of the circulation of power”—that is designed to show the possibilities for, and resistances, to radical democracy. I argue that the new model is irreconcilable with Habermas’s earlier and unretracted conceptions of “system” and system/lifeworld “interchange.” The unacknowledged amendments are significant improvements, I argue, but one effect is to leave the notion of social “systems” unclearly theorized. I suggest in the final part of the article that Habermas could shore up his “system” conception by selectively and critically appropriating insights from a more recent version of social systems theory—the “autopoietic” theory of Habermas’s longtime theoretical sparring partner, Niklas Luhmann.*



2002]	<i>SYSTEM AND LIFEWORLD</i>	475
I.	INTRODUCTION: AN OVERVIEW OF HABERMAS'S PROJECT .....	477
	A. The "Reconstructive" Theory of Law and Democracy .....	482
	B. The Communication Theory of Society: System and Lifeworld.....	490
II.	BASIC CONCEPTS IN HABERMAS'S THEORY OF SOCIETY ....	493
	A. Communicative and Strategic Action.....	494
	1. The Distinction Between Communicative and Strategic Action .....	495
	2. Communicative Rationality and Discourse.....	507
	B. Lifeworld.....	510
	1. The "Structural Components" of the Lifeworld.....	511
	2. The Symbolic Reproduction of the Lifeworld .....	515
	3. The Rationalization of the Lifeworld .....	520
	4. The Material Reproduction of the Lifeworld and the Limits of the Lifeworld Perspective .....	525
	C. System .....	532
	1. Open Systems Theory and Parsons's "Interchange Paradigm" .....	532
	2. "Steering Media" .....	537
	3. Uncoupling of System and Lifeworld .....	545
	D. The System/Lifeworld Model in <i>Theory of Communicative Action</i> .....	553
III.	SYSTEM, LIFEWORLD, AND HABERMAS'S "COMMUNICATION THEORY OF SOCIETY" .....	563
	A. The Official Account of "Lifeworld" and "System" ....	565
	B. The Model of the Circulation of Power .....	570
	1. The Political System's Center .....	572
	2. The Political System's Periphery .....	575

3. The Public Sphere and Civil Society .....	577
4. The Circulation of Power and the Possibility of Democracy .....	581
C. The Status of the System/Lifeworld Model .....	585
1. Mapping Center/Periphery Against System/ Lifeworld .....	585
2. The Two Models and Interchange Among Social Spheres.....	588
3. "System" Revisited .....	591
4. "Lifeworld" Revisited.....	594
IV. AUTOPOIETIC THEORY AND THE REFORMULATION OF HABERMAS'S SOCIAL-THEORETICAL MODEL .....	600

## I. INTRODUCTION: AN OVERVIEW OF HABERMAS'S PROJECT

By any standard, Jürgen Habermas has ranked among the very most prominent contemporary European philosophers and social theorists for more than thirty years. Only recently, however, has he gained a significant audience among American legal academics.<sup>1</sup> One reason for this delayed reception likely has been the notorious difficulty of Habermas's work, which synthesizes a variety of different disciplines and theoretical approaches—including, but not limited to, speech-act theory in the philosophy of language,<sup>2</sup> phenomenological sociology,<sup>3</sup> sociological systems theory,<sup>4</sup> the Frankfurt School tradition of critical theory, the works of canonical social theorists (Marx, Weber, Durkheim, Mead, and Parsons),<sup>5</sup> pragmatism,<sup>6</sup> hermeneutics,<sup>7</sup> psychoanalysis,<sup>8</sup>

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<sup>1</sup> As an index of his recent prominence: no fewer than three English-language symposia have been organized to consider Habermas's work on law. See *Exploring Habermas on Law and Democracy*, 76 DEN. U.L. REV. 927 (1999); *Habermas on Law and Democracy: Critical Exchanges*, 17 CARDOZO L. REV. 767 (1996); *Habermas, Modernity and Law*, 20 PHIL. & SOC. CRITICISM 1 (1994).

<sup>2</sup> See, e.g., Jürgen Habermas, *Moral Development and Ego Identity*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 69-94 (Thomas McCarthy trans., 1979) (1974), [hereinafter *Moral Development*]; Jürgen Habermas, *Historical Materialism and the Development of Normative Structures*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY, *supra*, at 95 [hereinafter *Historical Materialism*].

<sup>3</sup> See JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 119-35 (Thomas McCarthy trans., 1987) (1981) [hereinafter 2 THEORY OF COMMUNICATIVE ACTION].

<sup>4</sup> Habermas's interest in systems theory began with his debate with the important German sociologist, Niklas Luhmann. See JÜRGEN HABERMAS & NIKLAS LUHMANN, *THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE: WAS LEISTET DIE SYSTEMFORSCHUNG* (1971). Shortly thereafter, Habermas began to appropriate critically insights from systems theory. See JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy trans., 1975) (1973) [hereinafter *LEGITIMATION CRISIS*].

<sup>5</sup> Habermas develops the argument of his *magnum opus*, *The Theory of Communicative Action*, in dialogue with these theorists and with the neo-marxist thinkers from Lukacs to the Frankfurt School. See JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 143-271 (Thomas McCarthy trans., 1984) (1981) [hereinafter 1 THEORY OF COMMUNICATIVE ACTION] (discussing Weber); *id.* at 339-99 (discussing Lukacs and the Frankfurt School); 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 1-111 (discussing Durkheim and Mead); *id.* at 199-299 (discussing Parsons); *id.* at 301-403 (discussing Weber, Marx, Lukacs, and the Frankfurt School).

<sup>6</sup> See JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 81-139 (Jeremy J. Shapiro trans., 1971) (1968) [hereinafter *KNOWLEDGE AND HUMAN INTERESTS*] (on Peirce); Jürgen Habermas, *Peirce and Communication*, in POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 88 (William Mark Hohengarten trans., 1992) (1988) [hereinafter *POSTMETAPHYSICAL THINKING*].

<sup>7</sup> See JÜRGEN HABERMAS, *ON THE LOGIC OF THE SOCIAL SCIENCES* 143-70 (Shierry Weber Nichol森 & Jerry A. Stark trans., 1988) (1967) [hereinafter *ON THE LOGIC OF THE SOCIAL SCIENCES*] (discussing Gadamer); Jürgen Habermas, *Zu Gadamer's Wahrheit*

developmental psychology,<sup>9</sup> and neoevolutionary social theory.<sup>10</sup> A further and perhaps more important reason for Habermas's erstwhile neglect was that his work—while hardly indifferent to law<sup>11</sup>—did not speak directly to the issues that occupy most legal academics. Only in the late 1980s did legal issues become a focal point in Habermas's writing.<sup>12</sup> Since then, his growing interest in legal matters has culminated in his first book-length treatment of law: *Faktizität und Geltung*, translated under the title *Between Facts and Norms*. This book has moved Habermas, deservedly, toward the center of debates in American legal theory.<sup>13</sup>

Yet even by Habermas's standards, *Between Facts and Norms* is a difficult book. Those unfamiliar with Habermas's prior work will find some of the basic concepts—particularly “communicative action,” “system,” and “lifeworld”—only lightly explained. The book's scope, both substantive and methodological, is extraordinarily broad. As Habermas warns readers on the first page of his preface, his argument ranges across “moral theory, social theory, legal theory, and the sociology and history of law.”<sup>14</sup> The “theoretical objectives” Habermas pursues include conceptual analysis, interpretation, description, explanation, and social

*und Methode*, in HERMENEUTIK UND IDEOLOGIEKRITIK 45 (1971); Jürgen Habermas, *Der Universalitätsanspruch der Hermeneutik*, in HERMENEUTIK UND IDEOLOGIEKRITIK, *supra*, at 120; 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 107-37.

<sup>8</sup> See Jürgen Habermas, *On Systematically Distorted Communication*, INQUIRY, Summer 1970, at 205 [hereinafter *On Systematically Distorted Communication*]; ON THE LOGIC OF THE SOCIAL SCIENCES, *supra* note 7, at 180-86; JÜRGEN HABERMAS, *Introduction: Some Difficulties in the Attempt to Link Theory and Practice*, in THEORY AND PRACTICE 11-13 (John Viertel trans., 1973) (1971). The idea of systematically distorted communication developed from Habermas's earlier reading of Freud, see KNOWLEDGE AND HUMAN INTERESTS, *supra* note 6, at 214-90, with its suggestion that a critical social theory's methodology might be linked to the analysis of distorted communication. See *id.* at 281-89.

<sup>9</sup> See, e.g., *Moral Development*, *supra* note 2, at 69-94.

<sup>10</sup> See *Historical Materialism*, *supra* note 2, at 130-77; Jürgen Habermas, *History and Evolution*, TELOS, Spring 1979, at 5.

<sup>11</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 162-68, 174-75, 190-91, 199, 218-19, 243-71 (discussing critically Max Weber's account of the development and significance of modern law); 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 79-86, 107-09 (discussing critically Durkheim's and George Herbert Mead's understandings of law); *id.* at 155, 172-97 (developing a theory of social evolution in which the development of law and morality have a “pacemaker” role); *id.* at 309-11 (analyzing role of law in creating modern systems of economic and political action); *id.* at 356-73 (describing tendencies toward “juridification” and the ambivalence of modern social-welfare law).

<sup>12</sup> See Jürgen Habermas, *Law and Morality*, in 8 THE TANNER LECTURES ON HUMAN VALUES 217 (Sterling M. McMurrin ed., Kenneth Baynes trans., 1988) (1986).

<sup>13</sup> See *supra* note 1.

<sup>14</sup> JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: A DISCOURSE THEORY OF LAW AND DEMOCRACY* xxxix (William Rehg trans., 1996) [hereinafter *BETWEEN FACTS AND NORMS*].

criticism.<sup>15</sup> And the theory is multiperspectival. Echoing Dworkin's opening to *Law's Empire*, Habermas distinguishes between the "internal" or "participant's" perspectives of judges, politicians, legislators, and citizens, on one hand, and the "external" perspective of a sociological "observer," on the other.<sup>16</sup> But unlike Dworkin, Habermas systematically takes up each of those perspectives, not just the perspective of the appellate judge.<sup>17</sup> The multiplicity of methods, objects, purposes, and perspectives makes Habermas's argument unusually complex.

One way to penetrate the complexity is to begin with the rhetorical motif Habermas employs again and again: he first develops an opposition between two terms, then attempts to resolve or at least mediate the opposition. Much of Habermas's argument is, in form, a nesting of these mediated oppositions.<sup>18</sup>

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at xxxix. Dworkin distinguishes between the "internal" perspective of participants in legal argument and "the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others . . ." RONALD DWORIKIN, *LAW'S EMPIRE* 13 (1986). Among the various possible "internal" perspectives, Dworkin mentions those of judges, citizens, politicians, law teachers, policemen, district attorneys, welfare officers, school board chairmen, and other officials. *See id.* at 12, 14.

<sup>17</sup> Dworkin first pronounces both the "internal" and "external" perspectives "essential," adding that "each must embrace or take account of the other." *Id.* at 13-14. But he then suggests that theories that have adopted the "external" point of view have taken that point of view only, "ignor[ing] questions about the internal character of legal argument, so their explanations are impoverished and defective, like innumerate histories of mathematics." *Id.* at 14. According to Dworkin, Holmes epitomizes this "perverse" approach," and "the depressing history of social-theoretic jurisprudence in our century warns us how wrong he was." *Id.*

At this point, Dworkin seems to abandon the possibility of integrating "internal" and "external" approaches. *Law's Empire* "takes up the internal, participant's point of view," and (unless one counts the moral philosopher's point of view as "external") the "internal" point of view only. Further, to the extent Dworkin operates from any of the "internal" perspectives he has identified, *see supra* note 16, he proceeds predominantly "from the judge's viewpoint"—even as he allows that the other "internal" perspectives could serve as "paradigms," and even as he acknowledges that a theory that did so would be a "more complete study." *Id.* at 12-14 (conceding that his approach in *Law's Empire* is "narrow" and "partial").

For his part, Habermas notes that legal theory, for good reason, "privileges the judge's perspective." BETWEEN FACTS AND NORMS, *supra* note 14, at 196. "Legal theory," he says, "remains first of all a *theory of adjudication* and legal discourse." *Id.* at 197. But at the same time, for Habermas legal theory is not *just* a theory of adjudication. *See id.* (legal theory investigates other aspect of the legal system and perspectives other than the judicial perspective, e.g., those of "the political legislator and the administrator, or of private legal persons and citizens." And more important, as noted above in text, and as will become clear below, Habermas's account of law draws on social theory as well as legal theory.

<sup>18</sup> As will become clear below, however, Habermas also relies on parallel trichotomies, most evidently in his accounts of the "validity claims" presupposed in "communicative action," the "structures of the lifeworld" that operate as background to communicative action, and in the processes of "rationalization" these lifeworld structures undergo. *See*

The most basic such opposition appears in the book's German title. Modern law, according to Habermas, expresses in its internal structure a tension between "facticity"<sup>19</sup> and "validity."<sup>20</sup> On the side of "facticity," Habermas places modern law's positivity—its basis of authority in "changeable decisions of a political lawgiver,"<sup>21</sup> as well as its reliance on coercive state power for enforcement.<sup>22</sup> In that sense, law has the status of a social fact of which Holmes's "bad man" will take account in fashioning his plans of action.<sup>23</sup> This function of securing compliance is enhanced to the extent that law's operation is a predictable and certain social fact. On the side of "validity," by contrast, Habermas locates law's claim to legitimacy and "rational acceptability"<sup>24</sup>—that is, its claim to be normatively worthy of obedience. Modern law, according to Habermas, is legitimate only to the extent that its enactment and application can be justified convincingly. And on Habermas's premises, justification in a post-traditional and "post-metaphysical" society<sup>25</sup> can be convincing only through "discourse"—that is, through argumentation in which participants reciprocally offer reasons and criticisms.

For Habermas, then, law is neither just a social fact nor a realm of ideal validity. It must be sufficiently coercive, predictable, and certain if it is to secure compliance. But at the same time it must be legitimate if the legal order is to be stable. Both moments—facticity and validity—are essential, and so is the tension between them.<sup>26</sup>

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*infra* Part II.B. Here too, however, we find a basic figure that appears, in parallel form, elsewhere in the theory.

<sup>19</sup> The German title is *Faktizität und Geltung*. The German word "*Faktizität*" is not so unusual as the English equivalent "facticity." I would use "factuality" instead, but Habermas's translator, and the English-language literature, use "facticity." What Habermas means by *Faktizität* is something like "the quality of being a fact," or really, "the quality of being a (mere) fact."

<sup>20</sup> Habermas ultimately traces the tension between "facticity" and "validity" to the use of language, see, e.g., BETWEEN FACTS AND NORMS, *supra* note 14, at 15-17, 34-35, or more generally to "the symbolic infrastructure of sociocultural forms of life." *Id.* at 446.

<sup>21</sup> *Id.* at 447. For Habermas's association of "positivity" and "facticity," see *id.* at 38-39, 95, 137, 152, 447-48.

<sup>22</sup> See *id.* at 28, 29-30, 32, 198.

<sup>23</sup> See O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>24</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 38.

<sup>25</sup> Habermas uses the term "post-metaphysical" more comprehensively, see generally POSTMETAPHYSICAL THINKING, *supra* note 6, but in this context, what he means by a "post-traditional" and "post-metaphysical" society is that neither tradition nor comprehensive religious or metaphysical world-views can ground or legitimate social institutions. See BETWEEN FACTS AND NORMS, *supra* note 14, at 132. For Habermas's account of the "rationalization" processes that weakened the hold of religious and metaphysical worldviews, see *infra* Part II.B.3 (discussing the "rationalization of the lifeworld").

<sup>26</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 8, 39, 41, 42, 64, 65, 82, 95, 136,

With each term of the facticity/validity distinction, Habermas associates a methodological approach to law—each, in his view, a one-sided approach. The “philosophy of justice,” exemplified by Rawls, foregrounds questions of legitimacy. But according to Habermas, Rawls understates the “institutional” and coercive dimension of law,<sup>27</sup> as well as the “external tension” between law’s claim to legitimacy and the “facticity” of its relations to systems of power.<sup>28</sup> An opposing one-sided approach to law, according to Habermas, is Niklas Luhmann’s “autopoietic” version of social systems theory.<sup>29</sup> This approach, according to Habermas, “certainly makes a contribution” with its “keen observations of how the democratic process is hollowed out under the pressure of functional imperatives . . . .”<sup>30</sup> But autopoietic theory occupies only an “observer’s perspective,” and it is (at least predominantly) a descriptive or analytic theory, not a normative account. Accordingly, Habermas contends, it flattens out the tension between facticity and validity by refusing to engage law’s “normative self-understanding”—or at least refusing to engage it from a normative perspective.

These readings of Rawls and Luhmann are surely contestable.<sup>31</sup> The present point, however, is the methodological conclusion that Habermas draws. An adequate approach to law must be both “internal” and “external”—both normative and yet sociologically adequate to the complexity of modern societies. The two main parts of *Between Facts and Norms* divide along these lines. Habermas first develops his “discourse theory of law and democracy” by “reconstructing” the “normative self-understanding of constitutional democracies.”<sup>32</sup> He then develops

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152, 197, 288, 428, 444, 446.

<sup>27</sup> See *id.* at 64-65.

<sup>28</sup> See *id.* at 64 (Rawls’s method “foreshortens our perception of the external tension between the claim to the legitimacy of law and social facticity”); *id.* at 39 (referring to “the overpowering of the legal system by illegitimate power relations that contradict its normative self-understanding” as “an external relation between facticity and validity”).

<sup>29</sup> See Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 CARDOZO L. REV. 1987 (1998), for an account of Luhmann’s autopoietic theory of law which, though critical, is more sympathetic than Habermas’s account. See also Part IV, *infra*.

<sup>30</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 335.

<sup>31</sup> In Part IV, *infra*, I criticize Habermas’s polemics against autopoietic theory. For Habermas’s most recent polemics, see *Between Facts and Norms*, *supra* note 14, at 47-56, 74, 130-31, 330, 333, 334-36, 341-53, 461, 481. An earlier broadside against autopoietic theory is Jürgen Habermas, *Excursus on Luhmann’s Appropriation of the Philosophy of the Subject Through Systems Theory*, in THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES 368 (Frederick Lawrence trans., 1987) (1985) [hereinafter *Excursus on Luhmann’s Appropriation*].

<sup>32</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 94; see also *id.* at 65 (criticizing autopoietic theory for passing over the legal system’s “normative self-understanding,” and arguing that theories of law need to “combine external access with an internal

a “communication theory of society” that examines the ways in which this “normative self-understanding” is both vindicated and frustrated in complex modern societies.<sup>33</sup> The former theory is primarily philosophical and legal-theoretical. The latter is primarily sociological. Both parts of the project, Habermas maintains, are important.

I have criticized elsewhere, in a companion article to this one, the first part of Habermas’s project.<sup>34</sup> In the present Article, I focus on the second part: the “communications theory of society,” and in particular, the social-theoretical model of “system” and “lifeworld” that Habermas uses to organize that theory. My contentions will be: (1) this model of society is seriously flawed (Part II below); (2) *Between Facts and Norms* purports to retain it but necessarily subverts it with a refined model (Part III); and (3) the refined model needs further refinement (Part IV). A few words on the first part of the project, however, will be helpful by way of introduction.

#### A. *The “Reconstructive” Theory of Law and Democracy*

The aim of Habermas’s reconstructive theory is to discover the conditions under which modern legal and political orders count as legitimate. This part of Habermas’s project, I said, corresponds to the “validity” side of Habermas’s organizing distinction between facticity and validity. But here, as elsewhere, that distinction reappears, reinscribed within the reconstructive theory itself. And accordingly, Habermas’s reconstructive theory has two phases. He first examines the idea of legitimate law, as he finds it in philosophical writings on law and (to a lesser extent) in legal theory. He then considers the ways in which the principles he discovers are realized, even if imperfectly, in modern legal and political orders. The object of the first reconstructive investigation is (what Habermas calls) “the system of rights.” The object of the

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reconstruction”); *id.* at 69 (“reconstructive analysis undertaken from the participant’s perspective of the judge or client, legislator or citizen, aims at the normative self-understanding of the legal system, that is, at those ideas and values by which one can explain the claim to legitimacy . . . of a legal order (or of individual norms)”); *id.* at 288 (contrasting “the normative self-understanding of the constitutional state, as explained in discourse-theoretic terms” with “the social facticity of . . . [actual] political processes”).

<sup>33</sup> See *BETWEEN FACTS AND NORMS*, *supra* note 14, at 82-83 (introducing the “system of rights” by noting that “the concept of individual rights plays a central role in the modern of law”).

<sup>34</sup> See Hugh Baxter, *Habermas’s Discourse Theory of Law and Democracy*, 50 *BUFF. L. REV.* (forthcoming 2002).



second reconstructive investigation is the “constitutional state” [*Rechtsstaat*]<sup>35</sup> that is to secure those rights through law.

Habermas’s account of the system of rights follows his pattern of developing, then reconciling, a tension between pairs of terms. The “sole ideas that can justify modern law,” Habermas claims, are “human rights and the principle of popular sovereignty.”<sup>36</sup> Habermas traces the tension between these two justifying ideas in eighteenth- and nineteenth-century political and legal theory (particularly Kant and Rousseau),<sup>37</sup> but to see the tension one might think also of twentieth-century debates over the “countermajoritarian difficulty.” The reconciliation strategy Habermas pursues is to understand basic rights more abstractly—as general “categories” of rights that become concrete, legally enforceable rights only when enacted positively through democratic and discursive lawmaking.

The first three categories of rights Habermas identifies point toward “private autonomy”: (1) the right to the greatest possible measure of equal individual liberties, (2) membership rights in the legal community, and (3) rights to due process and equal protection.<sup>38</sup> Even in his definition of these categories, Habermas specifies that they generate concrete, enforceable legal rights only when positively enacted through a discursive lawmaking process.<sup>39</sup>

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<sup>35</sup> In some contexts, the term “*Rechtsstaat*” may be translated as “the rule of law.” See William H. Rehg, *Translator’s Introduction*, in BETWEEN FACTS AND NORMS, *supra* note 14, at ix, xxxiv-xxxv.

<sup>36</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 99.

<sup>37</sup> See *id.* at 92-104 (re Kant and Rousseau); see also *id.* at 84-89 (re German civil-law jurisprudence).

<sup>38</sup> The argument here has two steps. Any community’s law must define who is a member and who is not (second category), and it must specify who has which rights and how they may be protected (first and third categories). That much is inherent in “the legal form,” or, the very idea of law. The equality conditions Habermas builds into his first three categories—especially in the first and third—come, he claims, from application of “the discourse principle.” By “discourse principle” he means the idea that “[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.” *Id.* at 107. Habermas’s analysis of discourse requires an equality of opportunity to participate (by raising topics, arguments, criticisms, and so forth). See *infra* text accompanying notes 144-49.

<sup>39</sup> Habermas’s full definitions of these categories:

1. Basic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties.

...

2. Basic rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates under law.

3. Basic rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection.

BETWEEN FACTS AND NORMS, *supra* note 14, at 122.

That process is the topic of a further category: (4) the right to equal participation in a process that “generate[s] legitimate law.”<sup>40</sup> Because basic rights presuppose enactment through democratic institutions and procedures, Habermas claims, basic individual rights and democracy are “co-original” in the idea of legitimate law. Further, Habermas argues, realization of private autonomy presupposes citizens’ exercise of “civic autonomy” through participation in democratic lawmaking. And thus, Habermas concludes, basic rights are not a limit on popular sovereignty.<sup>41</sup>

One may well doubt that this strategy genuinely succeeds in reconciling the tension between basic rights and democracy—particularly in its homelier forms of expression, such as the “countermajoritarian difficulty.” That, however, is not my present concern.<sup>42</sup> What matters here is that Habermas is seeking an “internal” or conceptual link between legitimate law and democratic lawmaking. To the extent that the tensions he identifies can be reconciled, he maintains, it is through democratic lawmaking that genuinely engages the citizenry’s energies. Thus, Habermas’s stated aim of developing a “discourse theory of *law and democracy*.” And thus his need to account for the ways in which legitimate law and democracy mutually presuppose and reproduce one another.

Habermas’s “reconstruction” of the “principles of the constitutional state” [*Rechtsstaat*] elaborates on this connection between legitimate law and democratic politics. A central principle of the constitutional state, he maintains, is the reciprocal link between law and political power. Institutions for making and applying law are typically (though not always) state-organized, and the legal decisions of such institutions are enforced through state coercive power. Viewed from the other side, political power is legitimate only when exercised in legal form and according to legal procedures. Law and political power, Habermas maintains,

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<sup>40</sup> Habermas’s full definition of this fourth category: “Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.” *Id.* at 123.

<sup>41</sup> Habermas includes a fifth category of rights: “Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).” *Id.* These social welfare rights are thus only “relatively justified”—relative to the “absolutely justified” categories that directly define private and civic autonomy.

<sup>42</sup> For a negative judgment, see Robert Alexy, *Basic Rights and Democracy in Jürgen Habermas’s Procedural Paradigm of the Law*, 7 *RATIO JURIS* 227, 231-35 (1994); see also Baxter, *supra* note 34.

mutually presuppose one another.<sup>43</sup>

That, however, does not yet establish that lawmaking is legitimate only if democratic. Habermas must rely on what he calls “the discourse principle”—the central premise of his discourse theory of law and democracy.<sup>44</sup> With the transition to modernity, he argues, the justifying power of tradition has been broken. Claims count as true, and norms as right, only if they may be justified in discourse—that is, in argumentative speech in which participants are free to offer reasons and criticisms and accept the obligation to be bound by the force of the better argument. For Habermas, the discourse principle is a general principle of justification. It applies to legal norms, he maintains, in the more particularized form of the “principle of democracy.”

Understood at full strength, this principle is extraordinarily demanding: “the democratic principle states that only those [laws] may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted.”<sup>45</sup> Recognizing that the criterion of universal assent is excessively demanding for legal norms, Habermas includes the possibility of (procedurally fair) bargaining and compromise, where time constraints or irresolvable conflicts make universal agreement impossible.<sup>46</sup> It turns out that Habermas leaves considerable room for these options—to the point of contending that “compromises make up the bulk of political decision-

<sup>43</sup> For the argument sketched in this paragraph, see BETWEEN FACTS AND NORMS, *supra* note 14, at 133-51.

<sup>44</sup> Actually, the “discourse principle” is essential also to Habermas’s account of the “system of rights.” See BETWEEN FACTS AND NORMS, *supra* note 14, at 122 (explaining that the first three categories of rights “result simply from the application of the discourse principle to the medium of law as such”); *id.* at 124 (explaining that the idea or form of law presupposes the idea of legal liberties, but the right to the greatest possible measure of equal liberties requires application of the discourse principle); *id.* at 124-25 (explaining that the idea of the “legal code” requires demarcation between members and non-members, but the requirement of equal concern for all affected by membership rules requires “application of the discourse principle”); *id.* at 125 (due process and equal protection rights presuppose the discourse principle); *id.* at 127 (explaining the connection between participatory rights and the discourse principle).

<sup>45</sup> *Id.* at 110 (translation amended). In the quoted passage, Habermas’s translator renders “*juridische Gesetze*” (see JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 141 (1992)) as “statutes”; I have opted instead for “laws.” Habermas’s theory indeed sees the legislatively enacted statute as the “cornerstone” of the constitutional state. See BETWEEN FACTS AND NORMS, *supra* note 14, at 189 (describing the “concept of the legal statute” [*Gesetzesbegriff*] as the “cornerstone in the modern natural-law constructions of the bourgeois constitutional state,” and continuing to describe “approval of the people’s representatives” as the source of legal norms’ legitimacy more generally). But the term “*Gesetz*” can have a broader meaning, including all positive law, whether or not enacted by a legislature. That broader meaning seems appropriate here.

<sup>46</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 108.

making.”<sup>47</sup>

Habermas’s reconstruction of the constitutional state is designed to show how this democratic principle has been institutionalized, so that the system of rights he has “abstractly posited”<sup>48</sup> has been realized, at least in part, as a set of fully specified, enforceable legal rights. The centerpiece of his reconstruction is the notion of “communicative power,” which Habermas distinguishes from “administrative power.” Administrative power is essentially the power of official command. Communicative power, by contrast, is the “motivating force” of common convictions reached through unconstrained discussion.<sup>49</sup> This idea of communicative power is the basis for Habermas’s reinterpretation of the idea of popular sovereignty. According to Habermas’s discourse theory, popular sovereignty means not that “the people” constitute a single body with a general will, but instead, that “all [legitimate] political power derives from the communicative power of citizens.”<sup>50</sup> The idea of the constitutional state, Habermas maintains, is to bind the exercise of administrative power by state agencies to the “jurisgenerative” (i.e., law-generating) communicative power of discussions among citizens.

One precondition for this connection between communicative and administrative power is a robust “public sphere” of political discussion, and a “civil society” of voluntary associations. At this point in the development of Habermas’s theory, his account of the public sphere is largely negative: it must be “undeformed”<sup>51</sup> and “relatively undisturbed”<sup>52</sup> by administrative manipulation and “social power” (i.e., the power differentials arising from social and economic inequality).<sup>53</sup> Similarly, Habermas’s account of civil society is largely negative: it must be distinct from state institutions<sup>54</sup> and free from the influence of “class structures,” undistorted by administrative and social power.<sup>55</sup> Only in the second part of his overall project—the “communication theory of society”—does Habermas explain positively what he means by “the public sphere,” “civil society,” and the relation between them.

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<sup>47</sup> *Id.* at 282.

<sup>48</sup> *Id.* at 121.

<sup>49</sup> *Id.* at 147 (emphasis omitted).

<sup>50</sup> *Id.* at 170.

<sup>51</sup> *Id.* at 148.

<sup>52</sup> *Id.* at 182.

<sup>53</sup> *See id.* at 175 (defining “social power” as a “measure for the possibilities an actor has in social relationships to assert his own will and interests, even against the opposition of others”); *id.* at 182 (public-sphere discussion of citizens must be “relatively undisturbed by the effects of power”).

<sup>54</sup> *See, e.g., id.* at 175.

<sup>55</sup> *See id.*

A second set of preconditions concerns legal arrangements within and among state institutions. The sorts of arrangements Habermas mentions are the familiar techniques for constraining the official use of power: an independent and impartial judiciary bound by the rule of law, legal controls over the state administration, and the separation of powers. The innovation in Habermas's account is his interpretation of these familiar arrangements through a typology of different kinds of discourse.

Details of this typology are unnecessary for present purposes. Interesting, though, are two consequences of Habermas's separation-of-powers theory for the judiciary. Both consequences arise from Habermas's decision to take legislation, influenced by citizens' communicative power, as the paradigm for legitimate lawmaking.

First, because Habermas in this way conditions legal rules' legitimacy on their democratic pedigree,<sup>56</sup> common-law adjudication would seem to be illegitimate on his theory.<sup>57</sup> Oddly, particularly given his engagement with American legal theory,<sup>58</sup> Habermas does not remark upon this apparent consequence—he neither endorses it in the teeth of American practice nor explains why common-law adjudication in fact is (more or less) consistent with his theory.<sup>59</sup>

Second, Habermas's emphasis on democratic pedigree as the source of legal legitimacy introduces a tension into his theory of constitutional adjudication. On one hand, it leads him to criticize "value jurisprudence" in constitutional adjudication. Courts are not to act as "regent" for the absent people.<sup>60</sup> They are not to engage in "discourses of justification," in which they create new legal norms. Instead, courts are (generally) confined to "discourses of application," in which they determine which existing norm is "appropriate" to regulate the situation, as well as how that

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<sup>56</sup> See *id.* at 83 (legitimacy of legal rules derives "from a legislative procedure based for its part on the principle of popular sovereignty"); *id.* at 189 ("Democratic genesis, not a priori principles to which the content of norms would have to correspond, provides the statute with its justice . . ."); *id.* at 263 ("Only the *procedural conditions for the democratic genesis of legal statutes* secures the legitimacy of enacted law.").

<sup>57</sup> See Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DEN. U. L. REV. 961 (1999).

<sup>58</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 203-33 (discussing Dworkin's theory of "constructive interpretation," but without mentioning its application to common-law decisionmaking); *id.* at 251-53 (discussing Sunstein's theory of statutory interpretation); see also *id.* at 257-58 (discussing Michael Perry's theory of constitutional interpretation); *id.* at 257, 264-66; *id.* at 267-74, 277-78 (discussing Michelman's civic republicanism); *id.* at 274-77 (discussing Sunstein and deliberative politics); *id.* at 284 (discussing Sunstein and Madisonian Republicanism).

<sup>59</sup> I discuss this point further in Baxter, *supra* note 34.

<sup>60</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 278, 280.

norm applies to the facts of the case.<sup>61</sup> The main thrust of the theory, then, is directed against courts' constitutional activism in converting "values" into legal norms.<sup>62</sup>

And yet on the other hand, Habermas's linking of legitimacy to genuine democracy leads him to certain "activist" conclusions. Courts, Habermas says, are to "keep watch over" the "system of rights that makes citizens' private and public autonomy equally possible."<sup>63</sup> This task, Habermas allows, requires "a rather bold constitutional adjudication."<sup>64</sup> Securing "the implementation of democratic procedure and the deliberative form of political opinion- and will-formation,"<sup>65</sup> he suggests, requires checks not just on the administrative power of the state apparatus, but checks also on the "social power" generated by social inequality<sup>66</sup> and on the mass media's control over public discussion.<sup>67</sup> Habermas suggests, further, that political parties, though in principle

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<sup>61</sup> See *id.* at 162, 172, 192, 266 (distinguishing between discourses of justification and discourses of application, and confining judicial decisionmaking to the latter); see also *id.* at 217 (discussing the relevance of justification/application distinction for problem of indeterminacy in adjudication). *But cf. id.* at 196 (acknowledging that the legislative function "also involves the courts insofar as they interpret and develop law").

<sup>62</sup> See *id.* at 258-61 (using distinction between justification and application, and distinction between rights and values, to argue against "value jurisprudence" in constitutional adjudication); see also *id.* at 253 (cautioning against the possibility that constitutional courts might "engage in a politically inspired 'creation of law,' which, according to the logic of the separation of powers, should be reserved to the democratic legislature").

<sup>63</sup> *Id.* at 263.

<sup>64</sup> *Id.* at 280.

<sup>65</sup> *Id.*

<sup>66</sup> See *id.* at 263 (criticizing the "classical" separation-of-powers notion and noting that "basic rights must now do more than just protect private citizens from encroachment by the state apparatus"); *id.* at 39 (noting the danger that "legally uncontrolled social power" might "overpower[]" the "legal system" and thereby "contradict its normative self-understanding"); *id.* at 150 (the idea of the constitutional state presupposes that "the administrative system" must be "kept free of illegitimate interventions of social power"); *id.* at 150 ("the relation between social power and democracy is problematic"); *id.* at 263-64 ("Private autonomy is endangered today at least as much by positions of economic and social power, and it depends for its part on the manner and extent to which democratic citizens can effectively exercise their communicative and participatory rights."); *id.* at 308 (genuine democracy can develop "[o]nly in an egalitarian public of citizens that has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation"); *id.* at 364 (noting the dangers to democracy posed by the "social power" of "large and well-organized interest groups").

<sup>67</sup> See *id.* at 265 (judicial review must "start by examining the communication structures of a public sphere subverted by the power of the mass media"); *id.* at 442 (endorsing "a stronger constitutional regulation of the power of the media"); see also *id.* at 385 (noting the threat that the "social power" of large mass-media organizations poses to "the constitutionally regulated circulation of power"); *id.* at 442 (suggesting that genuine citizen participation in democratic processes requires "curbs on the power of the media"). *But cf. id.* at 368 (constitutional free-press guarantees help "constitut[e]" the public sphere of democratic discussion).

necessary for democracy,<sup>68</sup> have in some measure undermined democracy by becoming “arms of the state”<sup>69</sup> and cynical managers of public opinion. Habermas does not make clear just how far courts should go in the name of protecting genuine democracy. But his endorsement of this kind of judicial review is at least in tension with his criticism of constitutional “value jurisprudence.”<sup>70</sup>

Those are the general contours and claims of Habermas’s reconstruction of constitutional democracies’ “normative self-understanding.” Legitimate law and democracy are internally linked, such that the source of legitimacy is enactment through a genuinely democratic process in which citizens’ “communicative power,” formed through unconstrained public discussion, influences the establishment of legal norms and the exercise of “administrative power” by the state apparatus. Courts are decidedly secondary in this picture, limited to the elaboration of existing norms, not creation of new legal norms—although their role as guardian of the democratic process may require “bold” action.

Recall, however, that Habermas’s project is not purely reconstructive or normative. He has said that the theory of law and democracy must be sociologically adequate to the complexity of modern societies. In terms of his organizing distinction, Habermas must explore also the “*external* relation between facticity and validity”—that is, the “tension between the normative self-understanding of the constitutional state, as explained in discourse-theoretic terms, and the social facticity of . . . political processes” that do not necessarily conform to the normative model.<sup>71</sup> Otherwise, Habermas observes, the normative account might appear to be an impotent “ought” counterposed against the “is” of actual power politics.<sup>72</sup> Further, because Habermas claims

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<sup>68</sup> See, e.g., *id.* at 171 (“competition between different political parties” is necessary for “popular sovereignty”) (emphasis omitted); *id.* at 355 (noting that “party competition” is basic to “democratic opinion- and will-formation”); *id.* at 368 (noting role of parties in connecting state administrative apparatus to citizens’ discussion in political public sphere).

<sup>69</sup> See *id.* at 375 (“established political parties . . . have largely become arms of the political system”); *id.* at 434 (“parties have taken possession of the core areas of the political system without fitting into the functional separation of powers”); *id.* at 442 (discussing the need for “political parties that are not simply arms of the state”).

<sup>70</sup> I discuss this problem further in Baxter, *supra* note 34 (pagination not available).

<sup>71</sup> *Id.* at 288.

<sup>72</sup> See *id.* at 56, 65-66 (discussing the work of Rawls and Dworkin under the heading “The Return of Modern Natural Law and the ‘Impotence of the Ought,’” and concluding that normative theory must be connected with a particular kind of sociological analysis); see also Jürgen Habermas, *Reply to Symposium Participants*, *Benjamin N. Cardozo School of Law*, in *HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES* (Michel Rosenfeld & Andrew Arato eds., 1998), at 381, 444 (turn to social science is “meant to make it plausible that the reconstructed normative self-understanding of modern legal

that legitimate lawmaking requires an interaction between formal political institutions (especially legislatures) and informal communication among citizens in the political public sphere, he needs to develop an account of how these formal and informal circuits of communication are linked. For both of these tasks, Habermas explains, we must have recourse to social theory. And that brings us to the points this Article will address.

B. *The Communication Theory of Society: System and Lifeworld*

As Habermas makes clear at the outset of *Between Facts and Norms*, his social theory of choice is the one he developed most systematically in his 1981 magnum opus, *Theory of Communicative Action*.<sup>73</sup> Described most generally, that theory has two aims. One is methodological, and the other is substantive.

The methodological objective is to integrate the two dominant general approaches in social theory. One is the “interpretive” approach that begins with social actors—individual or collective—and tries to understand the social world as meaningful from that standpoint. The other is the approach of social systems theory, which takes the relation between “systems” and their “environments” to be the basic unit of analysis—where a “system” might be specified as (for example) the international order, a nation-state, a particular political system, or a business firm. According to Habermas, each of these approaches illuminates part of the social world, but each requires supplementation by the other.

The substantive objective of *Theory of Communicative Action* is to show that what Habermas calls “communicative rationality”—expressed in its purest form in “discourse,” or, rational argumentation—has been progressively but only partially realized in modern societies. In this aspect of the project, Habermas seeks to reinterpret Max Weber’s influential theory of cultural and societal “rationalization,” in a way that expresses more systematically the ambivalence with which Weber regarded those historical developments.

These two general objectives come together in the “system/lifeworld model” of modern societies that Habermas

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orders does not hang in mid-air,” but instead “connects with the social reality of highly complex societies”).

<sup>73</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 7 (“I pursue the dual goal of explaining how the theory of communicative action accords central importance to the category of law and why this theory in turn constitutes a suitable context for a discourse theory of law.”).



presents in *Theory of Communicative Action*. The interpretive theoretical perspective, which begins from the problematic of social action, sees society as the “lifeworld” of social actors. Habermas develops a concept of the three “structural components” of society seen as lifeworld: (1) “culture,” or the stock of knowledge and interpretive schemes that have developed historically and are transmitted (albeit differentially) to a society’s members; (2) “society,” or, the complex of basic institutions (especially political and legal), and (3) “personality,” or, the stock of personal dispositions, competences, and motivations (also distributed differentially) that make social action possible. Habermas’s reinterpretation of Weber’s theory of rationalization traces the realization of what Habermas calls “communicative rationality” in each of these dimensions. Particularly important for Habermas is the greater contingency of social institutions and relations in modern societies, as compared with traditional societies.

This greater contingency, Habermas maintains, creates both opportunity and danger. The opportunity is for rational discussion about what is to be done and for consensual action based on rational agreement. The danger is that conflicting interests, time limitations, and the like, will prevent this sort of rational agreement. And dissensus over questions of value is all the more likely to the extent that societies have become more pluralistic.

Thus the process of “communicative rationalization” creates the need for social mechanisms to deal with these failures to reach communicative agreement. Two such mechanisms, Habermas argues, are the market and bureaucratic organizations around which modern economic and administrative systems are centered. These systems operate through the “media” of money and power that circumvent the process of reaching consensus, through rational discussion, on questions of truth or moral rightness. The conditions Habermas calls the “rationalization of the lifeworld” are thus at the same time the conditions for the development of “systems” that operate independent of communicatively realized agreement.

Habermas describes the process by which these systems develop as an “uncoupling of system from lifeworld.”<sup>74</sup> This marks a revision of his conception of the lifeworld. No longer does that concept encompass society as a whole. Instead, the lifeworld comes to be defined as “not system”—as the spheres of informal, non-economic, non-bureaucratic relations and interaction.

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<sup>74</sup> That is the title of Part VI.2 in 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 153-97.

How, then, does Habermas combine these two methodological perspectives—"interpretive" theory and systems theory—and their associated substantive society concepts (lifeworld and system)? The answer is in Habermas's model of system/lifeworld interchange. Here the frame of reference is systems-theoretical. Borrowing from Talcott Parsons's concept of system interchange, Habermas presents a model in which systems and lifeworld, as separate social spheres, stand in a relation of input/output exchange. The relation is controlled by the "media" of money and power. This official model of system/lifeworld interchange grounds Habermas's diagnosis of crisis tendencies in modern societies. And that diagnosis is the ultimate aim of Habermas's project in *Theory of Communicative Action*.

The system/lifeworld model figures prominently in the theory of law developed in *Between Facts and Norms*. Law, Habermas tells us, "belongs to the societal component of the lifeworld,"<sup>75</sup> but at the same time, it accomplishes the "legal institutionalization of markets and bureaucratic organizations"<sup>76</sup> through which the economic and administrative "systems" function. Law, Habermas says, is integral to the "social integration" through which society as "lifeworld" reproduces itself, but at the same time, it operates as a mechanism of "system integration."<sup>77</sup> Or, to use some of Habermas's favorite metaphors: law is the "mediating function,"<sup>78</sup> "hinge,"<sup>79</sup> or "transformer"<sup>80</sup> between system and lifeworld.

Habermas's invocation of the system/lifeworld model in his work on law presents three problems. First, his explication of concepts basic to that model—communicative action, lifeworld, and system—is cryptic. Habermas sensibly assumes that social theorists will be familiar with the more extended treatment he has given those concepts in prior work, but for reasons stated in opening this article, that assumption is understandably questionable with respect to American legal theorists. For that reason, I spend considerable time with *Theory of Communicative Action* and other roughly contemporaneous writings in Part II, before turning specifically to Habermas's more recent work on law.

A second difficulty with Habermas's invocation of the system/lifeworld model—and an additional reason to spend time

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<sup>75</sup> *Id.* at 80.

<sup>76</sup> *Id.* at 75.

<sup>77</sup> *Id.* at 40.

<sup>78</sup> *Id.* at 56.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 56, 81, 354; *see also id.* at 176 (describing law as a "power transformer that reinforces the weakly integrating currents of a communicatively structured lifeworld").

with its original and more systematic development—is that the model is seriously flawed. Considered on its own terms, I argue throughout Part II, it has conceptual difficulties. I argue, further, that the model has additional difficulties given Habermas's longstanding intention—and the main theme of Habermas's work on law—to investigate the conditions under which radical democracy is possible under conditions of modern social complexity. I argue in Part II.D that the system/lifeworld model developed in *Theory of Communicative Action* makes such democracy literally inconceivable—ruled out by conceptual fiat.

Third, despite his professed loyalty to the system/lifeworld model he developed in *Theory of Communicative Action*, Habermas's analysis in his work on law tacitly reworks that model, even to the point of abandonment. His account of social “systems,” in particular, ultimately is inconsistent with the account he gave in *Theory of Communicative Action*. While this inconsistency is in my view an improvement, the unacknowledged shift in Habermas's recent work leaves the concept of “system” untheorized. The shift, also, makes unnecessary the concept of the “lifeworld” as distinct and partial social sphere.

Part III of this article is devoted to this last set of issues. Part III.A shows that *Between Facts and Norms* purports to retain the earlier conceptions of system and lifeworld. Part III.B outlines the “model of the circulation of power” that Habermas uses to “translate” his discourse theory of law and democracy into social-theoretically adequate terms. Part III.C argues that, notwithstanding Habermas's apparent belief to the contrary, the “circulation of power” model substantially reworks Habermas's notions of systems and system/lifeworld interchange. Part IV criticizes the “circulation of power” model and suggests a reformulation that borrows from, and at the same time revises, ideas from Habermas's longtime adversary, Niklas Luhmann.

## II. BASIC CONCEPTS IN HABERMAS'S THEORY OF SOCIETY

Habermas's system/lifeworld model, as presented in both *Theory of Communicative Action* and *Between Facts and Norms*, takes the notion of the “lifeworld” as the basic conception of society, to be amended or supplemented only for cause. And in both works, Habermas develops the notion of the lifeworld only after presenting the idea of “communicative action,” to which the idea of the lifeworld is in Habermas's view a “complementary concept.” For that reason, I begin first with Habermas's notion of

communicative action (Part II.A), then turn to his notion of the lifeworld (Part II.B) and system (Part II.C), before considering how Habermas puts the lifeworld and system concepts together in his model of system/lifeworld interchange (Part II.D).

My argument will be that in elaborating each of these basic concepts, Habermas tends toward polar distinctions that cannot be maintained. Communicative action is not so clearly demarcated from other forms of action as Habermas suggests, and because Habermas constructs his notion of the lifeworld around communicative action, the distinction between system and lifeworld similarly is too sharply drawn. This tendency toward stylized oppositions, I contend, ultimately undermines the system/lifeworld model Habermas develops in *Theory of Communicative Action*. And thus to the extent that Habermas relies on that model in *Between Facts and Norms*, his account of law is correspondingly weakened.<sup>81</sup>

#### A. *Communicative and Strategic Action*

Habermas distinguishes among three types of rational action:<sup>82</sup> instrumental action, strategic action, and communicative action. Typically he marks the differences among these types with a pair of crosscutting distinctions.<sup>83</sup> One distinction is between two “orientations” of action: toward “success,” or toward an “understanding” between the actor and others. The other distinction tracks Max Weber’s notions of “social” and “nonsocial” action—where “social action” means action in which the actor

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<sup>81</sup> The remainder of this part is a longer version of parallel analysis appearing in Baxter, *supra* note 34. Expanded here is the discussion in Parts II.B.4, II.C, and II.D.

<sup>82</sup> One might wonder why Habermas’s action theory focuses only on rational action. His explanation has two parts. First, he constructs his typology of action for purposes of social theory, not for other classificatory purposes. See 1 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 5, at 273-74 (distinguishing sociological or social-theoretical understandings of action from the “analytic action theory” of Anglo-American philosophy); see also *id.* at 278-79. And the particular project Habermas has pursued involves a reconstruction and reformulation of Max Weber’s theory of “occidental rationalism.” Habermas accordingly privileges rational action in his typology.

For a critique of Habermas’s decision to focus on rational action, see Hans Joas, *The Unhappy Marriage of Hermeneutics and Functionalism*, in *COMMUNICATIVE ACTION: ESSAYS ON HABERMAS’S THEORY OF COMMUNICATIVE ACTION* 97, 99-101 (Axel Honneth & Hans Joas eds., Jeremy Gains & Doris L. Jones trans., 1991) (1986) [hereinafter *COMMUNICATIVE ACTION: ESSAYS*].

<sup>83</sup> For examples of this strategy, see 1 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 5, at 285; Jürgen Habermas, *Reply to My Critics*, in *HABERMAS: CRITICAL DEBATES* 219, 263-64 (John B. Thompson & David Held eds., 1982) (1980) [hereinafter *Reply to My Critics*].

“takes account of the behavior of others” and orients her conduct accordingly.<sup>84</sup>

Both instrumental action and strategic action are oriented toward success rather than mutual understanding. They differ, however, along the lines of Habermas’s second distinction. Instrumental action is essentially the solitary performance of a task, according to “technical rules.” As such, instrumental action is “nonsocial,” in Habermas’s typology. Strategic action, by contrast, is designed to “influenc[e] the decisions of a rational opponent,” according to “rules of rational choice.”<sup>85</sup> Instrumental actions may be elements of a pattern of social action—either communicative or strategic—but they do not themselves comprise a distinct type of social action.<sup>86</sup>

### 1. The Distinction Between Communicative and Strategic Action

More difficult is the distinction between communicative and strategic action. The general distinction Habermas draws between these two forms of action—orientation toward success versus orientation toward understanding—is not by itself very helpful. As Habermas allows, communicative action as well as strategic action is goal-directed,<sup>87</sup> and the goals of communicative action are not necessarily reducible to the aim of reaching understanding.<sup>88</sup> Orientation to “success” versus orientation toward “understanding,” then, does not seem a promising basis for distinguishing between strategic and communicative action—at least not without additional explanation. Nor does the term “communicative” by itself mark the difference: Habermas acknowledges both that communicative action does not consist

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<sup>84</sup> MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 4 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1956).

<sup>85</sup> 1 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 5, at 285.

<sup>86</sup> *See id.*; *see also Reply to My Critics*, *supra* note 83, at 264, 268.

<sup>87</sup> *See* 1 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 5, at 101; *Reply to My Critics*, *supra* note 83, at 265; Jürgen Habermas, *Remarks on the Concept of Communicative Action*, in *SOCIAL ACTION* 154 (Gottfried Seebass & Raimo Tuomela eds., Ruth Stanley trans., 1984) (1982) [hereinafter *Remarks on the Concept of Communicative Action*]; Jürgen Habermas, *A Reply*, in *COMMUNICATIVE ACTION: ESSAYS*, *supra* note 82, at 164 [hereinafter *A Reply*].

<sup>88</sup> *See, e.g.*, 1 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 5, at 101 (“communicative action is *not exhausted* by the act of reaching understanding in an interpretive manner”).

wholly in speech acts,<sup>89</sup> and also that strategic action, too, may include the use of speech.<sup>90</sup>

The picture becomes clearer, however, when one considers the purpose of Habermas's typology. As a social theorist, Habermas is interested primarily in how individual actions can be coordinated into patterns of interaction.<sup>91</sup> For this reason, Habermas generally uses the terms "communicative" and "strategic" to refer to types of interaction rather than to discrete individual actions. The problem Habermas sets himself—and the basis for his distinction between communicative and strategic action—is to identify the mechanisms that coordinate these two types of interaction.<sup>92</sup>

This task Habermas approaches through his "formal pragmatics." With the term "pragmatics," Habermas signals his focus on language in use—on utterances or "speech acts"—as opposed to a semantic focus on the meaning of isolated sentences or propositions.<sup>93</sup> By "formal," Habermas means that he seeks not to describe and classify the "communicative practice of everyday life"<sup>94</sup> as it operates within a particular language<sup>95</sup>—that would be the approach Habermas calls "empirical" pragmatics—but instead, to "rationally reconstruct" the necessary presuppositions of communicative practice. What Habermas pursues in his formal pragmatics is a theory of the unreflectively mastered, pretheoretical communicative capacities of ordinary competent speakers.<sup>96</sup> This theory focuses, in particular, on the way speakers may use speech acts to establish, maintain, or transform social relationships with other persons.

The central idea in Habermas's formal pragmatics, and the

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<sup>89</sup> See *id.* ("the communicative model of action does not equate action with communication").

<sup>90</sup> See *Reply to My Critics*, *supra* note 83, at 264.

<sup>91</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 298 ("From the standpoint of a sociological theory of action, my primary interest has to be in making clear the mechanism relevant to the coordinating power of speech acts."); *id.* at 273-74 (criticizing "analytic action theory" for failing to "consider the mechanisms for coordinating action through which interpersonal relations come about"); *id.* at 282 ("Social actions can be distinguished according to the mechanisms for coordinating individual actions.").

<sup>92</sup> See *id.* at 101 ("Concepts of *social action* are distinguished . . . according to how they specify the *coordination* among the goal-directed actions of different participants.").

<sup>93</sup> This, at any rate, is how Habermas characterizes the difference between pragmatics and semantics.

<sup>94</sup> 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 328.

<sup>95</sup> See *id.* at 319-20 (describing J.L. Austin's project).

<sup>96</sup> For an excellent account of Habermas's method of reconstruction, see Michael K. Power, *Habermas and the Counterfactual Imagination*, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 207 (Michel Rosenfeld & Andrew Arato eds., 1998).

basis for his conception of communicative action, is the notion of a speech act's "validity." Habermas distinguishes among three forms of validity to which speech acts may lay claim: propositional truth,<sup>97</sup> normative rightness [*Richtigkeit*], and sincerity [*Wahrhaftigkeit*].<sup>98</sup> Typically, Habermas observes, just one of these validity claims is thematic in a particular speech act: in a confession, for example, the claim to sincerity is thematic, as is the

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<sup>97</sup> Or, at least the claim that the utterance's "existential presuppositions" are satisfied. See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 99, 306-07. This qualification is necessary to account for speech acts that do not directly assert matters of fact.

<sup>98</sup> See *id.* at 75, 99. One might ask: why these three and only these three forms of validity? While Habermas does not pretend to a transcendental deduction of the three categories of validity, see *id.* at 38, he does attempt to justify his choice systematically. Truth, rightness, and sincerity, he argues, correspond to the three "worlds" to which utterances may refer: the "objective" world of "existing states of affairs," the "social" world of norms, and the "subjective" world of "desires or feelings." See *id.* at 51, 91-92; see also *id.* at 70 (referring to "[t]he world concepts and the corresponding validity claims").

Habermas's terminology here is potentially misleading. It seems, first, to suggest that the theory of communicative action depends upon some deep ontological claim about the number and nature of "worlds." Further, the distinctions between the "objective world" and "subjective world," and among the various "subjective worlds" to which individual speakers have "privileged access," *id.* at 91, 100, could be thought to recreate what Habermas elsewhere criticizes as the "philosophy of consciousness," with its sharp division between subject and object, and among subjects. See *id.* at 386-99 (criticizing earlier critical theory for remaining trapped within the philosophy of consciousness, and distinguishing Habermas's own communications-theoretic approach).

In fact, however, formal pragmatics is a "rational reconstruction" of communicative practice, not a revelation of timeless ontological truths. As a rational reconstruction, Habermas tells us, it is hypothetical, revisable in principle, and subject to corroboration or disconfirmation through empirical application. See, e.g., Jürgen Habermas, *Reconstruction and Interpretation in the Social Sciences*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 32 (Christian Lenhardt & Shierry Weber Nicholson trans., 1990) (1983) [hereinafter *Reconstruction and Interpretation in the Social Sciences*]. Moreover, the theory has an explicitly historical cast: only in modern communicative practice, we are told, have the three worlds and three kinds of validity claims been distinguished clearly. See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 48-51, 235-36; 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 133, 159. Nor does Habermas conceive of communicating human beings as monadic subjects, isolated in their own "subjective worlds." Validity claims are raised, criticized, and defended publicly, with respect to shared standards and criteria.

Habermas's tripartite division of validity claims has received significant criticism. See MAEVE COOKE, LANGUAGE AND REASON: A STUDY OF HABERMAS'S PRAGMATICS 51-94 (1994). For purposes of this article, however, I am willing to accept Habermas's choice of truth, rightness and sincerity as plausible enough for an initial theoretical decision. The important question for my purposes is not whether Habermas has given a compelling argument for this initial theoretical decision, but whether, in the further development of his theory, Habermas's initial choice importantly impairs the analysis and specification of communicative practice. We are not yet in a position to answer that question.

It is worth noting, also, that while Habermas adheres to the basic three-part schema, he draws subdistinctions when necessary for explanatory purposes.

claim to truth in a factual assertion.<sup>99</sup> Habermas's formulation of the main categories of speech acts reflects this insight: in "constative," "regulative," and "expressive" utterances, the claims to truth, rightness, and sincerity are (respectively) thematic.<sup>100</sup>

Nonetheless, Habermas contends, any speech act in communicative action raises simultaneously all three claims, even if (ordinarily) the speaker raises only one directly or thematically.<sup>101</sup> Here perhaps Habermas stretches the notion of "raising a claim" too far. We would not ordinarily say, for example, that a speaker's request for a glass of water "raises a truth claim"—that she claims it to be true that a glass of water can be obtained and brought in a reasonable amount of time.<sup>102</sup> More likely we would say that she presupposes these factual circumstances. A weaker but more plausible formulation of Habermas's position might therefore be that every utterance constitutive for communicative action raises a claim to *or presupposes* validity in the three respects Habermas identifies. An alternative (and also weaker) formulation is that, at least in principle, any speech act can be *criticized* along any of the three dimensions of validity.<sup>103</sup> For example, a statement that the argument of a colleague's book depends upon five identified factual errors would be a constative speech act in which propositional truth is the thematic claim. But if one were to make such a statement at a party celebrating the book's publication, a hearer might respond by saying that such a criticism, even if true, is normatively inappropriate in the context of its utterance. Or the hearer might reply by challenging the speaker's sincerity—by, for example, suggesting that the criticism arises more from the

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<sup>99</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 308-09.

<sup>100</sup> See JÜRGEN HABERMAS, *Toward a Critique of Meaning*, in POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 77 (William Mark Hohengarten trans., 1992) (1988) [hereinafter *Toward a Critique of Meaning*] (describing these kinds of speech acts as the "three basic modes"); 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 325-26. Habermas distinguishes also "communicative" and "operative" speech acts, *see id.* at 326, but the definitions of those classes are unimportant for present purposes.

<sup>101</sup> See COOKE, *supra* note 98, at 59 (distinguishing between "direct" and "indirect" raising of validity claims).

<sup>102</sup> Cf. 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 306 (using this example).

<sup>103</sup> Compare *id.* at 99 (asserting that a communicative actor "must raise at least three validity claims with his utterance"), with *id.* at 306 (justifying this claim by noting that even if one claim is thematic, the other two may come into play with a hearer's criticism); *see also* *Toward a Critique of Meaning*, *supra* note 100, at 76, 77 (only one claim may be "thematically emphasized in any explicit speech act," but "[e]very speech act as a whole can always be criticized as invalid from three perspectives"). *See also* COOKE, *supra* note 98, at 60-61 ("The fact that any given speech act can be contested from more than one point of view supports Habermas's claim that every speech act raises three validity claims simultaneously.").



speaker's jealousy than from a serious evaluation of the book's merits. In this second revision of Habermas's thesis, every speech act constitutive for communicative action involves all three claims in that, in principle, a hearer can challenge the utterance in each of the three different ways.

Either of these two weaker versions of Habermas's thesis would suffice for his purposes. And the second of the two, emphasizing the role of a hearer's criticism, connects to an important theme in Habermas's notion of communicative action. Validity claims, Habermas maintains, are essentially criticizable.<sup>104</sup> By "criticizable," Habermas means that in communicative action the hearer may respond to the claims by taking a "yes or no position"—either accepting the speech act's claims or opposing them with criticism or requests for justification.<sup>105</sup> And at least to the extent that the interaction is to remain communicative,<sup>106</sup> the speaker assumes the obligation of providing such justification if necessary.<sup>107</sup> Further, particularly in the case of regulative speech acts (such as a promise), mutual acceptance of a validity claim may impose future obligations.<sup>108</sup> In these senses, acceptance of validity claims, or further discussion between speaker and hearer aimed at consensus concerning those claims, is the "mechanism of understanding [*Verständigung*]" that coordinates communicative action.

Because the point often has been misunderstood, it is worth underscoring that Habermas does not equate communicative action with the speech acts that coordinate it. In communicative action, as in all rational action, the participants pursue goals and plans of action, based on their interpretations of the situation.<sup>109</sup> But communicative action is action proceeding from or directed toward achieving a consensus. In communicative action, Habermas says, actors "coordinate their individual plans . . . on the basis of communicatively achieved agreement."<sup>110</sup>

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<sup>104</sup> See, e.g., 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 301 ("Validity claims are "internally connected with reasons and grounds"; they "can be rejected only by way of criticism and can be defended against a criticism only by refuting it").

<sup>105</sup> See, e.g., *id.* at 38-39, 101, 305-07.

<sup>106</sup> Habermas is not always careful to include this qualification expressly, but it follows from his position. The alternatives to providing a requested justification are either breaking off interaction or switching over to strategic action. See Jürgen Habermas, *What is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY, *supra* note 2, at 3-4 [hereinafter *What is Universal Pragmatics?*].

<sup>107</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 99.

<sup>108</sup> See *id.* at 303-04.

<sup>109</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 101; *A Reply*, *supra* note 87, at 241; *Remarks on the Concept of Communicative Action*, *supra* note 87, at 154.

<sup>110</sup> 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 305; see also *id.* at 86 (explaining that communicative action implies an "understanding" among the actors

The mechanism coordinating strategic action, on Habermas's scheme, is not "consensus"—mutual acceptance of validity claims—but "influence" [*Einflußnahme*].<sup>111</sup> The term "influence" requires explication. In one sense of the word, communicative actors may seek to influence each other. In discussing a problematic claim, one may try to persuade the other that his position is correct, and the other may try to convince the other of her criticism. But by "influence" [*Einflußnahme*], Habermas says, he means "exert a causal influence,"<sup>112</sup> independent of the convincing force of reasons that could support claims to validity. So far, however, the characterization of "influence," and thus the characterization of strategic action, is only negative—influence operates in some way other than mutual recognition of validity claims.

Habermas tries to characterize the mechanism of influence more precisely by distinguishing between two subtypes—"open" and "concealed" strategic action. Of these two subtypes, Habermas has given far more attention to concealed strategic action. The kind of "influence" characteristic of concealed strategic action is, in effect, deception<sup>113</sup>—primarily conscious deception.<sup>114</sup> The more technical criterion Habermas adopts for

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"about the action situation and their plans of action" that allows them to "coordinate their actions by way of agreement").

<sup>111</sup> See *id.* at 286 (distinguishing between "causally exerting an influence upon" one's partners in interaction and "coming to an understanding with" them"); *A Reply*, *supra* note 81, at 242 (distinguishing between "influencing one's opponent" and "reaching understanding"); JÜRGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 92, at 58 (distinguishing between exerting "influence" upon another with the threat or promise of sanctions and coordinating action plans "consensually"); JÜRGEN HABERMAS, *Erläuterungen zum Begriff des kommunikativen Handelns*, in VORSTUDIEN UND ERGÄNZUNGEN ZUR THEORIE DES KOMMUNIKATIVEN HANDELNS 571, 572-73 (1984) (1982) (distinguishing between "influence" [*Einflußnahme*] and "consensus" [*Einverständnis*] as mechanisms for coordinating interaction).

<sup>112</sup> See *Toward a Critique of Meaning*, *supra* note 100, at 79; *Remarks on the Concept of Communicative Action*, *supra* note 87, at 153.

<sup>113</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 332-33.

<sup>114</sup> He mentions also the possibility of unconscious deception, which he calls "systematically distorted communication." See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 332 (emphasis omitted). In this form of interaction, the parties believe that they are acting communicatively, but at least one party is in the grip of an individual psychopathology or powerful social ideology that distorts, and in distorting subverts, the process of reaching understanding about claims to validity. This notion once occupied a prominent place in Habermas's work, with a reconstructed version of psychoanalysis providing a methodological model for critical social theory. See *On Systematically Distorted Communication*, *supra* note 8; KNOWLEDGE AND HUMAN INTERESTS, *supra* note 6. With Habermas's turn in the mid-1970s toward substantive social theorizing, and away from epistemological concerns and ideology critique, the importance of this concept in Habermas's work has receded. The notion occupies a position in the typology of social action, see 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 333, but it now

concealed strategic action concerns the “avowability” of the parties’ intentions or aims. In concealed strategic interaction, at least one participant pursues aims that he knows could not be avowed without jeopardizing that participant’s success, while at least one participant assumes that all are acting communicatively. A simple example: one person requests a loan from another person without disclosing that the money will be used for a criminal purpose. Assuming that the person from whom the loan is requested has no reason to endorse the criminal purpose, the aim is nonavowable, in Habermas’s sense, because to declare it is to make tender of the loan unlikely. This kind of action is parasitic on communicative action, Habermas believes, because the success of the coordinating speech act depends upon the hearer’s belief that the speaker could redeem the claim to have spoken his intentions sincerely or truthfully.<sup>115</sup>

Habermas has given less attention to the notion of openly strategic action. From his general characterization of strategic action—that it operates through “influence” rather than “consensus”—we can assume that strategic actors do not presuppose or seek a consensus in plans or goals, or at least not one resting on mutual acceptance of validity claims. But how can it be characterized positively?

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receives comparatively little discussion. For a brief treatment in Habermas’s recent work, see *A Reply*, *supra* note 87, at 225-26.

<sup>115</sup> The discussion in text short-circuits Habermas’s usual characterization of concealed strategic action. Since 1981, in *The Theory of Communicative Action*, Habermas has explicated concealed strategic action by modifying the notion of “perlocutions,” borrowed from J.L. Austin’s speech-act theory. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 101-31 (1962) (on “perlocutions”); see also 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 288-95 (Habermas’s initial analysis of perlocutions and concealed strategic action). Habermas’s initial formulation attracted significant criticism, on two scores: Habermas’s analysis of “perlocution” bore little resemblance to what Austin meant by that term, and further, Austin’s notion of perlocution had little connection to what Habermas meant by concealed strategic action. See, e.g., Allen W. Wood, *Habermas’ Defense of Rationalism*, NEW GERMAN CRITIQUE, Spring/Summer 1985, at 157-62; Jonathan Culler, *Communicative Competence and Normative Force*, NEW GERMAN CRITIQUE, Spring/Summer 1985, at 136; Hugh Baxter, *System and Lifeworld in Habermas’s Theory of Communicative Action*, 16 THEORY AND SOC. 39, 41, 81 n.8 (1987); Ernst Tugendhat, *Habermas on Communicative Action*, in SOCIAL ACTION, *supra* note 87, at 179, 180. Habermas since has acknowledged that his usage of the term “perlocution” is idiosyncratic and “leads to misunderstandings.” *A Reply*, *supra* note 87, at 239. He has proposed a revised theory in which (this time explicitly) only some perlocutions count as constitutive for concealed strategic action. See *id.* at 239-40; see also COOKE, *supra* note 98, at 22-24 (analyzing Habermas’s present position).

We need not retrace Habermas’s journey. The criterion of concealed strategic action is essentially the same after as before Habermas’s revisions, see *A Reply*, *supra* note 87, at 240, and it can be explicated without reference to any conception of “perlocution.” See COOKE, *supra* note 98, at 23 (concluding with the avowability criterion outlined in text *supra*).

In *Theory of Communicative Action*, Habermas attempted to specify open strategic action with formal-pragmatic analysis. Focusing on the variant of open strategic action most difficult to distinguish from communicative action—the sort that, like communicative action, is coordinated by speech acts—Habermas assumed that the characteristic kind of coordinating speech act is the “simple” or “pure imperative.” By “simple” or “pure” imperative, Habermas meant a command that is a sheer assertion of power. To these simple imperatives Habermas contrasted speech acts that are similar in form—involving a command or order—but which, on Habermas’s analysis, belong to communicative action. These sorts of commands or orders Habermas called “normatively authorized requests.” Habermas’s example of such a request was a flight attendant’s instruction to a passenger to extinguish a cigarette.<sup>116</sup>

These two kinds of speech acts differ, Habermas argued, in their “acceptability conditions,”<sup>117</sup> by which Habermas meant the speaker’s basis for expecting compliance and the addressee’s basis for complying.<sup>118</sup> In the case of pure imperatives, the basis for compliance is only the addressee’s fear of negative sanctions (or interest in positive sanctions) over which the speaker has disposal. This motivation Habermas characterized as “merely empirical.”<sup>119</sup> In the case of normatively authorized requests, by contrast, the speaker expects compliance not just because she can deploy sanctions, but because compliance is normatively required. If the addressee accepts the speaker’s claim that compliance is normatively required—required, in Habermas’s example, by a valid safety regulation—then the interaction is coordinated by mutual acceptance of a claim to normative rightness.<sup>120</sup> Because the claim to normative validity is criticizable, Habermas argued, it must be supported or opposed with reasons, not simply with reference to potential sanctions. Accordingly, Habermas argued,

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<sup>116</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 300.

<sup>117</sup> Habermas constructs his formal-pragmatic analysis by analogy to formal semantics. A prominent approach in formal semantic theory analyzes the meaning of a sentence or proposition in terms of its truth conditions—the conditions under which the sentence or proposition would be true. Habermas analyzes the meaning of an utterance—the basic element of pragmatic theory—in terms of the conditions under which it would be acceptable. See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 297-98. “Acceptable” is broader than “true” in two senses. First, it covers claims to rightness and sincerity as well as claims to truth. Second, it addresses the issue whether the utterance is normatively appropriate when made in a particular context, not just the question whether it is abstractly valid.

<sup>118</sup> See *id.* at 300 (acceptability conditions pure imperatives), 301-02 (acceptability conditions for normatively authorized requests).

<sup>119</sup> *Id.* at 301.

<sup>120</sup> See *id.*

the hearer's acceptance of the speaker's claim may be motivated rationally, not just empirically.<sup>121</sup> Habermas thus characterized the opposition between communicative and open strategic action through a series of further oppositions: between normatively authorized requests and simple imperatives, between validity claims and power claims, between reasons and sanctions, and between rational and empirical motivation.

Habermas since has disavowed this way of distinguishing between communicative and open strategic action. In particular, he has acknowledged the untenability of any "sharp distinction between normatively authorized [requests] and simple imperatives."<sup>122</sup> Instead, Habermas now argues, from a sociological perspective we see a "continuum" between purely "*de facto*" power and "power transformed into normative authority."<sup>123</sup> While at one end of the continuum is the pure or simple imperative—his standard example is the bank robber's "Hands up" demand—Habermas now admits that such an imperative is only an "extreme case" or "limit case."<sup>124</sup> Rather than a "categorical" difference between pure imperatives and normatively authorized requests, Habermas maintains, there is only a "difference of degree."<sup>125</sup>

With this concession, Habermas must abandon the idea that pure imperatives exemplify open strategic action generally. If the bank robber's command were the paradigm case, then open strategic action would be a socially marginal form of action. And that would be inconsistent with the main line of Habermas's work. A prominent feature of modern societies, Habermas argues, is the development of "spheres of strategic action"—preeminently the market.<sup>126</sup> The category of open strategic action must be understood more broadly than the "pure imperative" model would suggest.<sup>127</sup>

Habermas has not much elaborated on how we are to conceive of open strategic action, if not along the lines of the pure imperative. But from Habermas's preliminary specification of

<sup>121</sup> See *id.* at 302.

<sup>122</sup> See Jürgen Habermas, *Reply to Skej*, INQUIRY, Mar. 1985, at 112.

<sup>123</sup> See *Toward a Critique of Meaning*, *supra* note 100, at 83.

<sup>124</sup> See *id.* at 84; *A Reply*, *supra* note 87, at 239.

<sup>125</sup> *A Reply*, *supra* note 87, at 239.

<sup>126</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 26 ("[T]he functionally necessary spheres of strategic action are growing . . . in modern economic societies."); see also *id.* at 27 ("[T]he core of modern law consists of private rights that mark out the legitimate scope of individual liberties and are thus tailored to the strategic pursuit of private interests.")

<sup>127</sup> But cf. COOKE, *supra* note 98, at 24 (mentioning the bank robber example and "certain kinds of insults or curses" as the ways in which "Habermas has clarified what the manifestly strategic use of language would look like").

strategic action, together with other remarks scattered throughout his work, we can construct at least a sketch. The paradigmatic case of open strategic action seems to be competition among rational opponents, each pursuing self-interested goals according to rules of rational choice. Each tries to influence or steer each other's choices, and each is aware that the other is operating in this way. The choices of each are conditioned by their respective predictions of the other's choices as well as by the consequences of their interaction. Game theory, rational choice theory, and decision theory, Habermas sometimes suggests, formalize this paradigmatic case of open strategic action.<sup>128</sup>

But even this paradigmatic case differs in important ways from the norm-free, purely power-driven form of action that the "pure imperative" model described. Strategic competition, Habermas acknowledges, typically takes place against a normative backdrop.<sup>129</sup> Strategic action in the marketplace, for example, presupposes general acceptance of a variety of legal norms—such as criminal-law norms that forbid some tactics or strategies and permit others, norms of property law that outfit some with more market power than their opponents, rules that define the possibilities for different kinds of transaction, and the like. These legal norms structure the participants' choices among strategies and tactics. Further, apart from state-enforced law, informal social norms may shape strategic interactions in particular spheres of economic activity. Even paradigmatic cases of strategic action, then, may involve the mutual recognition of legal and social norms.

Habermas's recognition that the pure imperative is only the "limit case" of open strategic action, not the paradigmatic case, has further consequences. In rejecting the "pure imperative" model, Habermas recognized a "continuum" along which power relations are more or less underwritten by social norms. This recognition suggests a corresponding continuum within the concept of strategic action, according to which instances of strategic action may be more or less structured and coordinated by binding social norms that the participants mutually recognize. If this is so, then strategic interaction may shade more or less toward communicative action. Open strategic action, in short, cannot be as "norm-free," or as sharply distinguished from communicative action, as the "pure

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<sup>128</sup> See, e.g., *A Reply*, *supra* note 87, at 242 (game theory as model for strategic action); *id.* at 243 (explaining game theory and decision theory as models, though actual strategic action usually falls short of the standards of rationality these models postulate).

<sup>129</sup> See, e.g., BETWEEN FACTS AND NORMS, *supra* note 14, at 25 ("Naturally, self-interested action has always been fused with, or limited by, a normative order.").

imperative” model suggested.

Similar observations apply on the other side of the communicative/strategic distinction. In many actual instances of communicative action, the sanctions Habermas considers characteristic of strategic action may be ready to hand. Habermas’s own example of the flight attendant’s “no smoking” request to the passenger illustrates this point. While this request raises a claim to normative validity, the passenger likely will not get far by treating that claim as if it were readily criticizable. The sanctions available to the flight attendant—even if never invoked, or even referred to—likely will limit the extent to which the normative claim, criticizable in principle, actually may be criticized. This is not to deny the difference between the flight attendant’s normatively authorized request and the bank robber’s demand. But it is to suggest that, just as actual instances of strategic action are not norm-free, so too are many actual instances of communicative action far from power- or sanction-free.<sup>130</sup> Habermas’s point about the continuum of power relations suggests a continuum between the “pure types” of communicative and strategic action.

Habermas appears to have come to this conclusion. He now describes interactions as “fall[ing] along a continuum” between purely communicative and purely strategic action,<sup>131</sup> with most actual situations presenting a “melange” of these types.<sup>132</sup> In fact, Habermas’s “discourse theory of law” preserves an important place for action that reflects elements of both pure types: regulated bargaining, and fair compromise. What Habermas insists upon is not an on-or-off distinction among actual interactions in the world, but a difference between two approaches to the dimensions of

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<sup>130</sup> Interactions in the workplace are a good example. As an instance of communicative action, Habermas uses an instruction, by older and longer-serving construction workers to a younger worker newly arrived at the site, to “fetch some beer.” 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 121. While there may be a “normative framework,” *id.*, authorizing such instructions to the less senior, that “framework” can be seen also as a relation of power, with sanctions of various kinds at the disposal of senior employees.

<sup>131</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 139. In this passage Habermas uses the terms “value-oriented” and “interest-governed” rather than “communicative” and “strategic.” But he associates the former pair of terms with the various concepts he uses to distinguish communicative and strategic action. He explicates “value-oriented” action in terms of an orientation toward reaching understanding, consensus, and the “performative attitude” (discussed below in text); he analyzes “interest-governed” action in terms of a balance of interests, “power positions,” “threat potentials,” and the “objectivating attitude.” See *id.* at 139-40. And just above he speaks of “mutual understanding” and “influence” as the relevant mechanisms by which action is coordinated. See *id.* at 139.

<sup>132</sup> *Id.* at 139.

validity he distinguishes. Habermas expresses this difference as one between the “performative” attitude, constitutive for communicative action, and the “objectivating” attitude that is constitutive for strategic action.

By “performative,” Habermas means (in this context) something like “oriented toward validity.” Within the performative attitude, social norms are criticizable and in need of justification.<sup>133</sup> By “objectivating,” Habermas means that social norms appear not so much as potentially justifiable or criticizable, but simply as social facts, with more or less calculable consequences attaching to their violation or obedience. Within this objectivating attitude, norms are primarily conditions for, or obstacles impeding, the success of the actor’s self-interested pursuits.<sup>134</sup> (Think here of Holmes’s “bad man.”<sup>135</sup>). Increasingly, Habermas has come to rely on this opposition between “performative” and “objectivating”—not just to distinguish between communicative and strategic action, but also to mark the difference between different methodological approaches to social theory.<sup>136</sup> And the opposition between the corresponding understandings of social norms—seen, respectively under the aspects of “validity” [*Geltung*] and “facticity” [*Faktizität*]<sup>137</sup>—underlies Habermas’s theory of law and democracy.<sup>137</sup>

This distinction between the performative and objectivating attitudes, like the other distinctions Habermas has invoked to differentiate communicative and open strategic action,<sup>138</sup> does not unequivocally and uncontroversially classify actual interactions as purely communicative or purely strategic. The existence of intermediate and borderline cases is unsurprising, however, and it does not pose a fatal objection to Habermas’s typology. The real questions are whether Habermas’s characterizations of communicative and strategic action mark an intelligible alternative—whether the pure types are sufficiently distinguishable—and more important, whether the distinction and

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<sup>133</sup> See *Toward a Critique of Meaning*, *supra* note 100, at 80.

<sup>134</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 524 n.18 (noting that strategic actors “encounter normative contexts, as well as other participants, only as social facts”); see also *id.* at 121, 448.

<sup>135</sup> See Holmes, *supra* note 23.

<sup>136</sup> See, e.g., *Reconstruction and Interpretation in the Social Sciences*, *supra* note 98, at 26-29.

<sup>137</sup> The title of Habermas’s recent book on law and democracy is *Faktizität und Geltung*—literally, “Facticity and Validity,” but rendered in the English translation as *Between Facts and Norms*.

<sup>138</sup> Those other distinctions include: consensus and influence, validity and power, reasons and sanctions, rational and empirical motivation, cooperation, and pursuit of self-interest.



typology mark useful differences for theoretical purposes.

This last question is the one I want to address. Habermas's typology of rational action is not just an abstract classificatory scheme for placing actual interactions in one box or the other, or between boxes (though Habermas insists that it must be able to do that too<sup>139</sup>). The distinction between communicative and strategic action is designed with further purposes of social theory in mind.

## 2. Communicative Rationality and Discourse

One such purpose is to provide an account of the ways modern societies manage conflict and dissensus. As will become more clear below, a central premise of Habermas's theory of modernity is that the risk of dissensus—disagreement as to plans of action or as to claims about the world—increased with the demise of traditional forms of authority and traditional world-views.<sup>140</sup> Habermas distinguishes three basic alternatives for handling dissensus in simple interactions: attempting to resolve the disagreement communicatively, continuing the interaction under premises of strategic action, and breaking off the interaction entirely.<sup>141</sup> Law, it will turn out, institutionalizes all three possibilities. It creates spheres of action in which individuals may pursue their interests without securing the agreement of others—whether by refusing to interact, or by opting to interact strategically. And law also establishes procedures through which disagreements can be resolved more or less communicatively. The mechanisms of action coordination Habermas distinguishes in his typology of social action find analogues in his social theory of law.

A second purpose of Habermas's action theory is to rethink and expand the idea of rationality. Most familiar accounts of rationality—such as those found in economic theory, game theory, decision theory and rational choice theory—are keyed toward the problematics of instrumental or strategic action. Beginning from the notion of communicative action, Habermas hopes to develop a new conception of rationality, which he calls, unsurprisingly, “communicative rationality.” The idea of communicative

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<sup>139</sup> See, e.g., *Toward a Critique of Meaning*, *supra* note 100, at 81 (categories are “not merely to be distinguished from each other analytically, but correspond to two different interaction types”).

<sup>140</sup> See, e.g., *BETWEEN FACTS AND NORMS*, at 25-27.

<sup>141</sup> See *What is Universal Pragmatics?*, *supra* note 106, at 3-4. Sometimes Habermas mentions other possibilities, such as “carrying out straightforward repair work,” or continuing the interaction but avoiding the controversial issue. See *BETWEEN FACTS AND NORMS*, *supra* note 14, at 21.

rationality, like the idea of communicative action, depends centrally upon the notion of *criticizability*. Claims to validity are essentially criticizable, and they may be supported or opposed with reasons and argument. The criticizability of validity claims creates the rational potential of communicative action—the possibility of communicative rationality.

One way to develop the dimensions of Habermas's notion of communicative rationality is to distinguish between everyday and more reflective forms of communicative action.<sup>142</sup> Habermas's example of the flight attendant's request to the passenger is an example of everyday communicative action. If the passenger responds to the request by demanding reasons, the flight attendant likely will invoke the relevant federal regulation and explain that he has authority to enforce it. Should the passenger demand more justification than that—by, for example, questioning the FAA's authority to pass such a regulation, or by invoking a putative constitutional right to smoke at will—the flight attendant likely will switch over to strategic action, mentioning the sanctions for failure to comply and, if necessary, deploying those sanctions. And so while the regulation offers a reason for compliance, and one not entirely reducible to the mere fact of potential sanctions, the role of rational criticism and justification is sharply circumscribed. The fact that a claim is criticizable in principle does not mean that criticisms and demands for justification always are in place. In everyday contexts, the pressures of action often limit the rational potential of communicative action.

When removed from the pressures of immediate action, however, this rational potential may be developed more fully. Habermas refers to various forms of "argumentation" or "discourse,"<sup>143</sup> in which participants pursue more methodically the task of criticizing and defending the claims to validity Habermas has identified. Here validity claims serve less as a means of coordinating participants' goal-directed plans of action—as in everyday communicative action—and more as an explicit theme of communication and debate.

Habermas introduces the idea of discourse through various

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<sup>142</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 25; Jürgen Habermas, *Moral Consciousness and Communicative Action*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 98, at 116, 158; see also *Reply to My Critics*, *supra* note 83, at 235 (distinguishing between "communicative action in the naive attitude" and "reflectively achieved understanding").

<sup>143</sup> Sometimes Habermas has given the term "discourse" a more narrow meaning than "argumentation." See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 23, 41-42. In more recent writings, however, the terms seem to be synonymous. See COOKE, *supra* note 98, at 31-32.

“idealizations.” Participants in discourse must have equal opportunities to raise topics, arguments, and criticisms.<sup>144</sup> The situation must exclude all force “except the force of the better argument,” and it must exclude “all motives except that of a cooperative search for the truth.”<sup>145</sup> Habermas sometimes has referred to these idealizations as describing an “ideal speech situation,”<sup>146</sup> or alternatively, an “ideal communication community.”<sup>147</sup> While Habermas describes these conditions as “general pragmatic presuppositions” of discourse,<sup>148</sup> he is aware that they are never completely fulfilled. Here it is a matter of more and less, and Habermas is willing to speak of “discourse” when these demanding conditions are “sufficiently fulfilled.”<sup>149</sup> The ideal conditions are “presupposed” in actual communicative practice to the extent that significant deviations are a *prima facie* reason to question an apparent consensus that is reached—though these deviations are of course not by themselves sufficient to refute a claim upon which the participants have reached agreement.

Discourses, Habermas says, are exceptional forms of communicative action—“islands in the sea of practice.”<sup>150</sup> Nonetheless, Habermas claims, the institutionalization of discursive practices—in contexts such as scientific research, democratic procedure, and legal procedure—is a characteristic feature of modern societies. These developments Habermas interprets as a progressive realization of the rational potential implicit in communicative action. In this way Habermas recasts Max Weber’s theory of “rationalization,” focusing on the realization—though only a partial and selective realization—of

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<sup>144</sup> See Jürgen Habermas, *Wahrheitstheorien*, in *VORSTUDIEN UND ERGÄNZUNGEN ZUR THEORIE DES KOMMUNIKATIVEN HANDELNS*, *supra* note 111, at 177 [hereinafter *Wahrheitstheorien*].

<sup>145</sup> 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 25. Habermas’s reference to “truth” should be read to consider the other “truth-analogous validity claims” he identifies.

<sup>146</sup> See, e.g., HABERMAS, *Wahrheitstheorien*, *supra* note 144, at 174-83; 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 25; JÜRGEN HABERMAS, *Richard Rorty’s Pragmatic Turn*, in *ON THE PRAGMATICS OF COMMUNICATION* 343, 365, 367 (Maeve Cooke ed., 1998) [hereinafter *Richard Rorty’s Pragmatic Turn*]; *BETWEEN FACTS AND NORMS*, *supra* note 14, at 322-23; JÜRGEN HABERMAS, *Remarks on Discourse Ethics*, in *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 50 (Ciaran P. Cronin trans., 1993).

<sup>147</sup> See, e.g., *Richard Rorty’s Pragmatic Turn*, *supra* note 146, at 365; *BETWEEN FACTS AND NORMS*, *supra* note 14, at 323 (describing “ideal speech situation” and “ideal communication community” as “equivalent”).

<sup>148</sup> 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 25.

<sup>149</sup> *Id.* at 25; *BETWEEN FACTS AND NORMS*, *supra* note 14, at 178.

<sup>150</sup> *Reply to My Critics*, *supra* note 83, at 235.

communicative rationality.

But for this task, Habermas needs a concept of society to supplement his typology of social action. The first “level” of his “two-level” theory presents society as the “lifeworld” of social groups and communicative actors.

### B. *Lifeworld*

One would not choose the ungainly term “lifeworld” unless one wanted to mark a contrast with some other way of understanding the world. The term originated in the later work of the philosopher Edmund Husserl,<sup>151</sup> who opposed it to the world as constructed by the “objective sciences.”<sup>152</sup> The lifeworld, for Husserl, was the everyday, pretheoretical world of taken-for-granted certainties. This “realm of original self-evidences”<sup>153</sup> provides the “grounding soil”<sup>154</sup> for all human activities, including the scientific activity of constructing the “objective-scientific” world.<sup>155</sup> Consistent with his method of transcendental phenomenology, Husserl sought to map the “formal,” “general,” and “invariant” structures of the lifeworld as such.<sup>156</sup>

This “ontology of the lifeworld,”<sup>157</sup> left largely unpublished at Husserl’s death in 1938,<sup>158</sup> speaks more directly to the concerns of transcendental phenomenology than to those of substantive social theorizing. But it offered a starting point for the work of Alfred Schutz, a social theorist and philosopher who was much influenced by Max Weber as well as Husserl.<sup>159</sup> Schutz, who was more interested than Husserl in the methodology of the social sciences—and better informed as well<sup>160</sup>—attempted to describe the general

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<sup>151</sup> Alfred Schutz, who made the concept fruitful for social-scientific inquiry, “accepted Husserl’s authorship of this conception.” HELMUT R. WAGNER, *ALFRED SCHUTZ: AN INTELLECTUAL BIOGRAPHY* 288 (1983).

<sup>152</sup> See EDMUND HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* (David Carr ed. & trans., 1970) (1937).

<sup>153</sup> *Id.* at 127.

<sup>154</sup> *Id.* at 131.

<sup>155</sup> *Id.* at 130. *See also id.* at 121-35.

<sup>156</sup> *See id.* at 135-89.

<sup>157</sup> *Id.* at 173.

<sup>158</sup> Husserl’s analysis of the lifeworld occupies Part III of *The Crisis of European Sciences*. This part remained unpublished until 1954, *see* David Carr, *Translator’s Introduction*, in HUSSERL, *supra* note 152, at xvi-xxi, though some scholars, including Schutz, had access to it before publication.

<sup>159</sup> *See* WAGNER, *supra* note 151, at 13-16, for a discussion of Weber’s early influence on Schutz.

<sup>160</sup> *See id.* at 29; *see generally id.* at 287-327 (describing Schutz’s critical appropriation and transformation of Husserl’s work).

structures of the everyday, prescientific world in a way that would be fruitful for social theory. Schutz, following Husserl, came to call this world of everyday action and experience the “lifeworld.”<sup>161</sup>

### 1. The “Structural Components” of the Lifeworld

Habermas’s initial presentation of the lifeworld concept largely tracks Schutz’s analysis.<sup>162</sup> The lifeworld is the unproblematic, taken-for-granted setting<sup>163</sup> in which actors are located spatially, temporally, and socially.<sup>164</sup> Actors encounter both an objective or natural world of things and a social world of other human beings.<sup>165</sup> Their encounters with those worlds are shaped by their past experiences.<sup>166</sup> But this lifeworld is essentially shared or “intersubjective,” not the creation or private preserve of individual subjects.<sup>167</sup> The “segment of the lifeworld” in which particular actions or interactions take place is the “situation” of action.<sup>168</sup> The situation is a “context of relevance”<sup>169</sup> circumscribed

<sup>161</sup> I say “came to call” because Schutz had published an important work that sounded many of the same themes before Husserl’s use of the term “lifeworld.” See ALFRED SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (George Walsh & Frederick Lehnert trans., 1967) (1932) (translation of *Der sinnhafte Aufbau der sozialen Welt*).

<sup>162</sup> Habermas seems to rely in particular on a work Schutz left unpublished at his death in 1959, entitled *Strukturen der Lebenswelt* [*Structures of the Lifeworld*]. Schutz’s student, Thomas Luckmann, has completed part of the work—using much of what Schutz had left behind, but deleting some of it and adding some of his own material. See THOMAS LUCKMANN, *Preface* to ALFRED SCHUTZ & THOMAS LUCKMANN, *THE STRUCTURES OF THE LIFEWORLD* xvii-xviii, xxi-xxiv (Richard M. Zaner & H. Tristram Engelhardt, Jr. trans., 1973). Luckmann writes that although the final version is “not even the book *I think* [Schutz] would have written,” it is “as faithful as possible to the basic intention of the project: the analysis of the structures of everyday life.” For reasons of convenience, I refer to “Schutz” rather than “Schutz and Luckmann” in the text.

I say Habermas “seems to rely” on this work because he cites it only after he has sketched the concept of the lifeworld in Schutzian terms. See 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 126. As I observe in text accompanying notes 178-84, Habermas reads Schutz’s account through his own theory of communicative action.

<sup>163</sup> See 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 124; SCHUTZ & LUCKMANN, *supra* note 162, at 3-6.

<sup>164</sup> See 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 123; SCHUTZ & LUCKMANN, *supra* note 162, at 19, 35-92.

<sup>165</sup> See 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 120, 122; SCHUTZ & LUCKMANN, *supra* note 162, at 5-6.

<sup>166</sup> See 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 121, 122 (describing examples of misunderstanding that could arise if participants do not sufficiently share common experiences); SCHUTZ & LUCKMANN, *supra* note 162, at 7-8.

<sup>167</sup> 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 125-26; SCHUTZ & LUCKMANN, *supra* note 162, at 4-5, 15.

<sup>168</sup> 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 123; SCHUTZ & LUCKMANN, *supra* note 162, at 113-18.

<sup>169</sup> 2 *THEORY OF COMMUNICATIVE ACTION*, *supra* note 3, at 122; SCHUTZ &

by a “horizon”<sup>170</sup> rather than by fixed boundaries: what is within the horizon of relevance, and thus included in the situation of action, depends upon the “theme”<sup>171</sup> of action and the actors’ “plans.”<sup>172</sup> Actors interpret and define their situation,<sup>173</sup> and formulate their plans, in reliance upon a “stock of knowledge”—socially conditioned and transmitted, and differentially distributed among a society’s members.<sup>174</sup> Action, on this view, is the “mastery of a situation,”<sup>175</sup> or, the realization of a plan.

But even in this preliminary sketch of the lifeworld concept, Habermas introduces an important variation on Schutz’s account. Schutz links the lifeworld to the problematic of action in general—in fact, to the problematic of “subjective experience” in general, including (for example) imagining, dreaming, and fantasy as well as action.<sup>176</sup> Habermas, by contrast, introduces the lifeworld as the background not to experience in general, or even to action in general, but as the background and “horizon” for specifically communicative action.<sup>177</sup> The concept of the lifeworld, Habermas says, is “complementary to that of communicative action.”<sup>178</sup>

Accordingly, Habermas develops his concept of the lifeworld in terms familiar from his theory of communicative action. In interpreting their situations and pursuing their plans, he says, actors in “lifeworld” situations proceed consensually. Their actions presuppose, or are directed toward establishing, “a common definition of the situation.”<sup>179</sup> On the basis of these common situation definitions, they seek to harmonize their plans

LUCKMANN, *supra* note 162, at 19; *id.* at 182-228 (discussing the “relevance structures” of the lifeworld).

<sup>170</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 121-23; SCHUTZ & LUCKMANN, *supra* note 162, at 114-15.

<sup>171</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 121-123; SCHUTZ & LUCKMANN, *supra* note 162, at 186-95 (on “thematic relevance”).

<sup>172</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 122-23; SCHUTZ & LUCKMANN, *supra* note 162, at 19, 116-18.

<sup>173</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 122-23; SCHUTZ & LUCKMANN, *supra* note 162, at 113-16.

<sup>174</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 124-25 (on the notion of a “stock of knowledge”); *id.* at 122 (describing an example of locally or occupationally shared custom unknown to an outsider); *id.* at 304-18 (distinguishing between “subjective” stocks of knowledge and the “social” stock of knowledge, and analyzing the nonuniform distribution of the social stock of knowledge).

<sup>175</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 135, 149; SCHUTZ & LUCKMANN, *supra* note 162, at 100, 113-18.

<sup>176</sup> On fantasy, see SCHUTZ & LUCKMANN, *supra* note 162, at 28-32; on dreaming, see *id.* at 32-35.

<sup>177</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 119 (explaining that the lifeworld is “the horizon within which communicative actions are ‘always already’ moving”).

<sup>178</sup> *Id.*; see also *id.* at 144, 204.

<sup>179</sup> *Id.* at 121, 127.

of action.<sup>180</sup> The mechanism for this cooperative process of interpretation and action is the mechanism of communicative action: mutual acceptance of claims to validity. With perhaps unnecessary flourish, Habermas describes the lifeworld as “so to speak, the transcendental site where speaker and hearer meet, where they can reciprocally raise claims . . . and where they can criticize and confirm those validity claims, settle their disagreements, and arrive at agreements.”<sup>181</sup>

This “communication-theoretical”<sup>182</sup> recasting of Schutz’s lifeworld concept leads Habermas to further revisions. A main target is Schutz’s notion of the “stock of knowledge,” which Habermas interprets as the “cultural patterns of interpretation, evaluation, and expression” on which communicative actors rely “to negotiate a common definition of a situation” and compatible plans of action.<sup>183</sup> Even understood in this communication-theoretical way, Habermas argues, the cultural “stock of knowledge” cannot be the only resource on which communicative actors rely. According to Habermas,

[t]he one-sidedness of the culturalistic concept of the lifeworld becomes clear when we consider that communicative action is not only a process of reaching understanding; in coming to an understanding about something in the world, actors are at the same time taking part in interactions through which they develop, confirm, and renew their memberships in social groups and their own identities. Communicative actions are not only processes of interpretation in which cultural knowledge is “tested against the world;” they are at the same time processes of social integration and of socialization.<sup>184</sup>

Thus, the lifeworld resources on which communicative actors rely, in interpreting their situations and harmonizing their plans, include group memberships and personal identities, as well as the cultural stock of knowledge.<sup>185</sup>

<sup>180</sup> See *id.* at 127.

<sup>181</sup> *Id.* at 126.

<sup>182</sup> *Id.* at 138.

<sup>183</sup> *Id.* at 134.

<sup>184</sup> *Id.* at 139; see also *id.* at 138 (Schutz’s account of the lifeworld’s resources is “abridged in a culturalistic fashion”).

<sup>185</sup> See *id.* at 135:

Action, or mastery of situations, presents itself as a circular process in which the actor is at once both the *initiator* of his accountable actions and the *product* of the [cultural] tradition in which he stands, of the solidary groups to which he belongs, of socialization and learning processes to which he is exposed.

The criticism of Schutz is not entirely fair. At the very least, he includes in the “stock of knowledge” many of the skills, competences, and know-hows that Habermas places under the heading of “personality.”

The items on this list are not drawn out of thin air. They correspond to the culture/society/personality schema that Talcott Parsons developed in American sociology.<sup>186</sup> According to Habermas, culture, society, and personality are “the structural components of the lifeworld.”<sup>187</sup> He defines these “components” as follows:

I use the term *culture* for the stock of knowledge from which participants in communication supply themselves with interpretations as they come to an understanding about something in the world. I use the term *society* for the legitimate orders through which participants regulate their memberships in social groups and thereby secure solidarity. By *personality* I understand the competences that make a subject capable of speaking and acting, that put him in a position to take part in processes of reaching understanding and thereby assert his own identity.<sup>188</sup>

These initial definitions require some explication. First, with respect to the “society” component, Habermas’s terminological choice is confusing. He is, at this point, analyzing society as lifeworld, and thus it is peculiar to use the term “society” to designate a mere component of the lifeworld. The term “institutional component”<sup>189</sup> might better express Habermas’s intention. The component “society,” Habermas says, is the system of social institutions<sup>190</sup> that define group memberships and coordinate interaction through binding norms and institutionalized values. Generally Habermas includes within the societal component items such as the constitutional framework of state offices and central “legal institutions” like contract and property,<sup>191</sup> as well as “the bases of constitutional law, the principles of criminal law and penal procedure, and all regulation of punishable

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<sup>186</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 158 (referring to the “customary (since Parsons) division into . . . society, . . . culture, and . . . personality”); see also 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 133-34 (attributing the schema to Durkheim).

<sup>187</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 134; see also *id.* at 135, 138, 145, 153, 255, 308, 356.

<sup>188</sup> *Id.* at 138.

<sup>189</sup> See *id.* at 366 (referring to the lifeworld’s “institutional components”).

<sup>190</sup> See *id.* at 134 (referring to the societal component as “institutional orders”); *id.* at 141 (suggesting that “institutions” constitute the societal component); *id.* at 146 (referring to the societal component as “the institutional system”); *id.* at 153; *id.* at 174 (referring to “the societal component of the lifeworld—the system of institutions”); *id.* at 262 (referring to the societal component as “institutional orders”); *id.* at 318 (referring to “the system of institutions, that is, . . . the societal components of the lifeworld”); *id.* at 366 (referring to “the institutional components of the lifeworld”).

<sup>191</sup> See *id.* at 266.



offenses close to morality.”<sup>192</sup> We will see, however, that for Habermas both the state and the law occupy a double status—he analyzes each in “system” as well as “lifeworld” terms.<sup>193</sup>

The “personality” component includes not just the speech- and action-related competences that Habermas mentions in the above definition, but also motivations.<sup>194</sup> Habermas, of course, is working at a high level of abstraction when he refers to competences and motivations as a structural component of the lifeworld, not just attributes of individual persons. What he has in mind is something like a social stock of typical personal competences and motivations, some subset of which individuals develop through processes of socialization and continuing social interaction. As with the distribution of knowledge, the distribution of these competences and motivations is far from uniform.

## 2. The Symbolic Reproduction of the Lifeworld

This account of culture, society, and personality as structural components of the lifeworld is not just an abstract classification of the resources on which communicative actors rely. Habermas uses it to address the basic social-theoretical question of how a society reproduces itself—how, that is, it maintains itself through time, despite (or rather, through) changes in the content of cultural tradition, institutional structure, and personal competences.<sup>195</sup> He distinguishes two aspects of social reproduction. The “symbolic reproduction” of society as lifeworld is the reproduction of the different components he has distinguished—culture, society, and personality. The “material reproduction” of society as lifeworld involves the “maintenance of the material substratum of the lifeworld.”<sup>196</sup> Material reproduction implicates the “purposive” aspect of communicative action—“goal-directed interventions into the objective world”<sup>197</sup>—while symbolic reproduction depends more upon the aspect of mutual understanding.<sup>198</sup>

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<sup>192</sup> *Id.* at 365.

<sup>193</sup> *See infra* text accompanying notes 426-37 (discussing THEORY OF COMMUNICATIVE ACTION); *infra* Part III.C (discussing the tension between Habermas’s system/lifeworld model and his more recent work on law and democracy).

<sup>194</sup> *See id.* at 183, 276.

<sup>195</sup> *See id.* at 136, 137 (stating that in order to develop a “theoretically fruitful” conception of the lifeworld, we must “explain the reproduction of the lifeworld itself”).

<sup>196</sup> *Id.* at 138.

<sup>197</sup> *Id.* at 232; *see also id.* at 138.

<sup>198</sup> *See id.* at 140 (emphasis omitted).

To each of the components of society-seen-as-lifeworld, Habermas attributes a particular function in symbolic reproduction. “Cultural reproduction” consists in the transmission and renewal of cultural knowledge, so as to “secure[] a continuity of tradition and coherence of knowledge sufficient for daily practice.”<sup>199</sup> “Social integration” establishes social solidarity through shared norms and institutionalized values. In so doing, it coordinates interaction and “stabilizes the identity of groups to an extent sufficient for everyday practice.”<sup>200</sup> “Socialization” operates to develop personal identities, “secur[ing] for succeeding generations the acquisition of generalized competences for action and see[ing] to it that individual life histories are in harmony with collective forms of life.”<sup>201</sup> Unsurprisingly—because Habermas defines the lifeworld as the background for communicative action—these reproductive processes operate primarily through communicative action.<sup>202</sup>

Habermas’s typology of reproductive processes makes clear that the lifeworld components he distinguishes—culture, society, and personality—are interrelated. The reproduction of any one component, he says, contributes to the reproduction of the other two as well.<sup>203</sup> And further, Habermas argues, any particular communicative interaction both draws on, and helps reproduce, each of the lifeworld’s components:

In coming to an understanding with one another about their situation, participants in interaction stand in a cultural tradition that they at once use and renew; in coordinating their actions by way of intersubjectively recognizing validity claims, they are at once relying on membership in social groups and strengthening the integration of those same groups; through participating in interactions with competently acting reference persons, the growing child internalizes the value orientations of his social group and acquires generalized capacities for action.<sup>204</sup>

Nothing guarantees that the reproduction of culture, society, and personality will be successful. For that reason, Habermas’s typology addresses also the “manifestations of crisis” that appear with “disturbances” in the various reproductive processes.<sup>205</sup> Here,

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<sup>199</sup> *Id.* (emphasis omitted).

<sup>200</sup> *Id.* at 141.

<sup>201</sup> *Id.*

<sup>202</sup> See *id.* at 86, 107, 137-38, 139, 142-43, 144 fig. 23, 232, 261, 266, 267, 288; see also *A Reply*, *supra* note 87, at 227, 234, 268, 281 (“[I]t is . . . a matter of definition that life-worlds can be integrated only through communicative action (and norms and values).”).

<sup>203</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 142 fig. 21.

<sup>204</sup> *Id.* at 137.

<sup>205</sup> *Id.* at 143 fig. 22.

too, Habermas sees the various lifeworld components as interrelated. Just as successful reproduction of one component contributes to the reproduction of the other two, Habermas argues, so does disturbance in any one of the reproductive processes impinge upon the other two.<sup>206</sup>

More important than the names Habermas assigns these nine crisis tendencies<sup>207</sup> is the place that they collectively occupy in his critical social theory. They operate as indices for the “pathological” developments he diagnoses in contemporary societies. As we will see, the general thesis of *Theory of Communicative Action* is that the “rationalization of the lifeworld”—the realization of communicative rationality in culture, society, and personality—makes possible and necessary the development of economic and administrative systems that are “uncoupled” from the action-coordinating, socially integrating mechanism of communicative action. The “hypertrophic” development of these systems, Habermas argues, causes “the penetration of forms of economic and administrative rationality”<sup>208</sup> into “communicatively structured areas of life,”<sup>209</sup> with resulting disturbances in cultural reproduction, social integration, and socialization. These crisis tendencies in the “symbolic reproduction of the lifeworld,” then, are the criteria by which Habermas identifies social pathologies.

In subsequent sections of this article, I will suggest difficulties in Habermas’s argument for this thesis. For now, it is enough to note why Habermas might be attracted to this strategy of argument. The thesis’s premises seem normatively minimalist: he appeals not to freedom or justice or democracy or autonomy or some other value, but to functional necessity.<sup>210</sup> And who can

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<sup>206</sup> See *id.*

<sup>207</sup> See *id.* for the list of names.

<sup>208</sup> *Id.* at 330.

<sup>209</sup> *Id.* at 304.

<sup>210</sup> See *id.* at 285 (referring to “the deformations that inevitably turn up when forms of economic and administrative rationality encroach upon areas of life whose internal communicative structures cannot be rationalized according to those criteria”); *id.* at 305 (“[I]n developed capitalist societies,” the “mechanisms of system integration encroach upon spheres of action that can fulfill their functions only under conditions of social integration.”); *id.* at 322 (system “media” of money and power “fail to work in domains of cultural reproduction, social integration, and socialization; they cannot replace the action-coordinating mechanism of mutual understanding in these functions”); *id.* at 369 (referring to lifeworld “contexts of action that by functional necessity are based on mutual understanding as a mechanism for coordinating action”); *id.* at 372-73 (if “areas of life that are functionally dependent on social integration through values, norms, and consensus . . . fall[] prey to the systemic imperatives of economic and administrative subsystems,” then they are “converted over . . . to a principle of sociation that is, for them, dysfunctional”); *id.* at 403 (referring to the threat to “the symbolic structures of the lifeworld” when

argue with functional necessity?

The answer is that everyone can. As Habermas pointed out more than thirty years ago, against then-dominant biological conceptions of social systems theory, it is extremely difficult to define, in an uncontroversial way, the equilibrium state and reproductive parameters for sociocultural systems.<sup>211</sup> This observation calls into question whether Habermas's strategy can be as normatively parsimonious as it first seems. To determine, for example, whether a process of cultural reproduction has been successful or pathological, one would have to decide (in Habermas's terms) whether "the transmission and renewal of cultural knowledge" has "secured a continuity of tradition and coherence of knowledge sufficient for daily practice." And to make this determination, one would have to take a position on some of the normative issues that, at first glance, were avoided by recourse to "functional necessity." For example: is a cultural tradition best "continued" when it has been preserved without

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"systemic imperatives" penetrate into "areas where the action-coordinating mechanism of reaching understanding is functionally necessary").

<sup>211</sup> After stating two "preconditions" prescribed for functional explanation—a sufficiently clear distinction between system and environment, and identification of the system's equilibrium state—Habermas wrote:

In biology, a functionalist explanation can generally satisfy the stated preconditions without difficulty. A biological organism is by nature a delimited system; and the state in which an organism reproduces its life can easily be identified through a series of important life processes (metabolism). In sociology, on the other hand, both preconditions are either difficult to fulfill or cannot be fulfilled at all. . . . [While the first difficulty might not be insuperable,] . . . [t]he other difficulty, the need for an adequately reliable identification of the equilibrium state, is fundamental in nature. The reproduction of social life is not determined through values that can be grasped descriptively, as is that of organic life. Physical survival is a necessary but in no instance sufficient condition for the maintenance of social systems. No one can find in social processes important life functions that suffice to define the maintenance of the system in a state of equilibrium, as is the case with organic functions in living creatures.

ON THE LOGIC OF THE SOCIAL SCIENCES, *supra* note 7, at 82-83.

Habermas made similar observations in his 1973 work, *Legitimation Crisis*, though this time referring to functionalist "systems theory" (Parsons, Luhmann) rather than simply to functionalism. See LEGITIMATION CRISIS, *supra* note 4, at 2-3. He goes on to say, of sociocultural rather than biological systems:

The same system modification can be conceived of equally well as a learning process and change or as a dissolution process and collapse of the system. It cannot be unambiguously determined whether a new system has been formed or the old one has merely regenerated itself.

*Id.* at 3. To the same effect are his remarks in *Theory of Communicative Action*:

From his perspective as an observer, the systems analyst can judge whether . . . disequilibria reach a critical point only if he can refer to clearly identifiable survival limits, as he can with organisms. There is no comparably clear-cut problem of death in the case of social systems.

2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 292.

substantial change, or when it has been subjected to rigorous critical examination and transformation? One's answer to this question will influence whether one sees, for example, revision of a prevailing literary canon as consistent with successful cultural reproduction or as pathological. Similarly, the question whether knowledge has been transmitted to a degree "sufficient for daily practice" may require the theorist to decide whose daily practice matters, or matters most, and what that daily practice should look like. How much does the ordinary citizen need to know about politics? About high culture? Whether one sees the present distribution of knowledge as normal or pathological is a matter of political controversy. Similar observations would apply to the other two reproductive processes Habermas identifies.<sup>212</sup>

Habermas, of course, is aware that diagnoses of social crisis cannot be uncontroversial. He would resist the suggestion, however, that the matter is simply a matter of the observing theorist's politics. Instead, he suggests, one can speak of crisis to the extent that—and only to the extent that—a society's members experience their situation as such.<sup>213</sup> As Habermas acknowledges, this question of how members of a society experience social change requires empirical research.<sup>214</sup> His own efforts, however, tend in a more strongly theoretical direction—toward formulating an hypothesis that could guide this empirical research.<sup>215</sup> The hypothesis is based on what he takes to be a tension between the requirements of a "rationalized lifeworld" and the "imperatives" of the economic and administrative "systems." Habermas's argument thus depends on how he specifies the "rationalization of the lifeworld."

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<sup>212</sup> With respect to social integration, for example, "liberals" and "republicans" would differ as to necessary breadth and depth of a consensus about values. With respect to socialization, egalitarians and elitists would differ as to the proper distribution of competences.

<sup>213</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 292 ("The social scientist can speak of crises only when relevant social groups *experience* systematically induced structural changes as critical to their continued existence and feel their identities threatened."); LEGITIMATION CRISIS, *supra* note 4, at 3 ("[O]nly when members of a society experience structural alterations as critical for continued existence and feel their social identity threatened can we speak of crises."); *cf.* ON THE LOGIC OF THE SOCIAL SCIENCES, *supra* note 7, at 82-83 ("[T]he criterion for historical life and survival is dependent on the interpretations that have validity in a social system.").

<sup>214</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 375-76 (stating the "assumption" (or rather, hypothesis) that crisis tendencies are to be expected "when systemic imperatives force their way into domains of cultural reproduction, social integration, and socialization," and noting that "this assumption needs to be tested empirically"); *id.* at 391 ("The analysis of lifeworld pathologies calls for an (unbiased) investigation of tendencies and contradictions.").

<sup>215</sup> See *id.* at 356 (to combat the danger of theoretical "overgeneralization," one "must be able to specify at least *the type* of empirical research that is appropriate").

### 3. The Rationalization of the Lifeworld

In the history of social theory,<sup>216</sup> the notion of “rationalization” is most closely associated with Max Weber. Weber’s introduction to his studies of the world religions<sup>217</sup> mentions the following historical developments under the heading of “Occidental rationalism”: modern empirical and experimental science; systematic theology; a systematized, formalized, and predictable law; various developments in music, including Western systems of harmony, written notation, and innovations in instrumentation; the Gothic vault and dome in architecture; the technique of perspective in painting; the development and market circulation of printed literature; the modern university; specifically Western forms of bureaucratic administration, with technically and legally trained officials; periodically elected parliaments connected to a party system; the capitalist enterprise with its rational organization of wage labor; rationalized forms of economic calculation and action; capital markets; technological employment of scientific knowledge; and a rational vocational ethic (the Protestant ethic).<sup>218</sup> The breadth of this list indicates the comprehensiveness of Weber’s notion of rationalization. But it raises questions as to how this list is to be ordered, and whether “rationalization” bears the same sense throughout.<sup>219</sup>

Habermas imposes order upon this “confusing”<sup>220</sup> list of developments by reading Weber through Parsons’s culture/society/personality schema<sup>221</sup>—the schema that organizes

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<sup>216</sup> As opposed to psychology, where the term “rationalization” has a very different sense.

<sup>217</sup> The essay appears as the *Author’s Introduction* in MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 13 (Talcott Parsons trans., 1958) (1902).

<sup>218</sup> See *id.* at 13-27.

<sup>219</sup> Weber himself raised this problem:

We have to remind ourselves in advance that ‘rationalism’ may mean very different things. It means one thing if we think of the kind of rationalization the systematic thinker performs on the image of the world: an increasing theoretical mastery of reality by means of increasingly precise and abstract concepts. Rationalism means another thing if we think of the methodical attainment of a definitely given and practical end by means of an increasingly precise calculation of adequate means. These types of rationalism are very different, in spite of the fact that ultimately they belong inseparately together . . . . The rationalization of life conduct with which we have to deal here can assume unusually varied forms.

MAX WEBER, *The Social Psychology of the World Religions*, in FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 267, 293 (H.H. Gerth & C. Wright Mills eds. and trans., 1946) (1915) [hereinafter FROM MAX WEBER].

<sup>220</sup> 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 158.

<sup>221</sup> *Id.*

Habermas's own account of the structures of society as lifeworld. He distinguishes, accordingly, among rationalization of the cultural tradition, rationalization of basic social institutions, and the rationality of personal motivations, competences, and dispositions.

Following Weber, Habermas sees the rationalization of culture as a process of differentiation among "spheres of value": science in the "cognitive" sphere, law and morality in the "evaluative" dimension, and autonomous art in the "expressive" dimension.<sup>222</sup> This conception of the different cultural spheres corresponds closely to Habermas's account of the various validity claims raised in communicative action. The correspondence is particularly apparent with respect to the cognitive and evaluative spheres: science, Habermas notes, focuses on questions of propositional truth, and law and morality focus on questions of normative rightness.<sup>223</sup> With respect to art, the fit is looser. Whereas the third validity-claim Habermas attributed to communicative action was "sincerity," the value-standard he connects to art is "authenticity."<sup>224</sup> By "authenticity," Habermas seems to mean authenticity in the expression of an artist's subjectivity.<sup>225</sup> In this way there is at least an analogical connection between the validity claims of "sincerity" and "authenticity." Further, and again following Weber, Habermas finds in each of these dimensions, at the transition to modernity, a "cultural system of action" that institutionalizes discourse with respect to the relevant claim. The "scientific enterprise," connected in large part with universities, professionalizes scientific inquiry. The "artistic enterprise" produces, distributes, and criticizes artistic and literary works. Religious associations specialize in questions of morality. Finally, with respect to legal questions, Habermas locates "the legal system," which he understands to include "specialized juridical training," professionalized scholarly discussion of legal issues,<sup>226</sup> as well as "public justice." In these ways, cultural rationalization realizes the rational potential in communicative action.

Habermas approaches more warily Weber's account of the rationalization of personality and society. For Weber, what a theory of rationalization must explain is the development of the modern bureaucratic state and capitalist economy, together with

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<sup>222</sup> *Id.* at 167 fig. 3.

<sup>223</sup> *See id.* at 180.

<sup>224</sup> *Id.*

<sup>225</sup> *See id.* at 161.

<sup>226</sup> He refers here to "scientific jurisprudence." The German word "*wissenschaftlich*," translated as "scientific," has a broader connotation than its English counterpart, meaning something like "systematic" and "professionalized."

the methodically rational pattern of life conduct—the Protestant ethic of labor in one’s calling—that served the rationalizing developments in state and economy. According to Habermas, this explanatory strategy focuses too narrowly on the path modernization actually took, and not enough on the rational potential left unexhausted. One reason Weber took this tack concerns his postulate of social-scientific value-freedom, which prevents him from giving systematic significance to his occasional comments that “rationalization,” as it actually has played out, has led to pathological and irrational consequences.<sup>227</sup> Habermas, as a critical social theorist, is not burdened by that postulate. The other reason, according to Habermas, concerns limitations in Weber’s theory of action, and accordingly, in his theory of rationality. Weber lacked a concept of communicative action and communicative rationality. Both of these features of Weber’s approach, Habermas claims, lead Weber to miss some of the senses in which modern societies have been rationalized and to pass over the question whether the project of rationalization, as it actually has unfolded, has been selective or incomplete.<sup>228</sup>

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<sup>227</sup> The classic instance is his closing to *The Protestant Ethic*:

The Puritan wanted to work in a calling; we are forced to do so. For when asceticism was carried out of monastic cells into everyday life, and began to dominate worldly morality, it did its part in building the tremendous cosmos of the modern economic order. This order is now bound to the technical and economic conditions of machine production which today determine the lives of all the individuals who are born into this mechanism, not only those directly concerned with economic acquisition, with irresistible force. Perhaps it will so determine them until the last ton of fossilized coal is burnt. In [the Puritan theologian] Baxter’s view the care for external goods should only lie on the shoulders of the ‘saint like a light cloak, which can be thrown aside at any moment.’ But fate decreed that the cloak should become an iron cage.

Since asceticism undertook to remodel the world and to work out its ideals in the world, material goods have gained an increasing and finally an inexorable power over the lives of men as at no previous period in history. Today the spirit of religious asceticism—whether finally, who knows?—has escaped from the cage. But victorious capitalism, since it rests on mechanical foundations, needs its support no longer. The rosy blush of its laughing heir, the Enlightenment, seems also to be irretrievably fading, and the idea of duty in one’s calling prowls about in our lives like the ghost of dead religious beliefs. . . .

No one knows who will live in this cage in the future, or whether at the end of this tremendous development entirely new prophets will arise, or there will be a great rebirth of old ideas and ideals, or, if neither, mechanized petrification, embellished with a sort of convulsive self-importance. For of the last stage of this cultural development, it might well be truly said: “Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved.”

But this brings us to the world of judgments of value and of faith, with which this purely historical discussion need not be burdened . . .

WEBER, *supra* note 211, at 181-82.

<sup>228</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 216-22.



Three conditions must be satisfied, according to Habermas, before the reproduction of the lifeworld can be called its rationalization. The first builds on the idea of differentiation with which Weber approached the problem of cultural rationalization. Habermas presents the initial point of this rationalization process as one in which a mythically based cultural tradition reigns supreme, not only underwriting the interpretive schemes of a society's members, but determining social roles and group memberships, fixing a relatively concrete moral code, prescribing procedures and standards for political institutions, fixing the division of labor and limiting the extent of individual economic initiative, and determining from the outset who will be able to acquire which competences and skills.<sup>229</sup> Just as the rationalization of culture involves the differentiation of three spheres of value, so the rationalization of the lifeworld as a whole involves the differentiation of the "components" culture, society, and personality. Society, or, the institutional order, differentiates itself from the cultural tradition through a "gradual uncoupling of the institutional system from worldviews," with the result that "formal procedures for positing and justifying norms," rather than mythic tradition, establishes the legitimacy of social institutions.<sup>230</sup> The differentiation of the personality component appears in the "extension of the scope of contingency for establishing interpersonal relations"—that is, the greater possibilities for individual initiative in establishing social relations and acquiring competences and motivations.<sup>231</sup> And to the extent that the cultural tradition is disentangled from the operation of social institutions, "the renewal of traditions depends more and more on individuals' readiness to criticize and their ability to innovate."<sup>232</sup> What Habermas means with this sketchy account is that the cultural tradition loses much of its prejudicial power over the course of social interaction:

These trends can establish themselves only insofar as the yes/no decisions that carry everyday communicative practice no longer go *back* to an ascribed normative consensus, but issue *from* the cooperative interpretation processes of participants themselves. Thus they signal a release of the rationality potential inherent in communicative action.<sup>233</sup>

The other two conditions Habermas sets for the

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<sup>229</sup> See *id.* at 156-59.

<sup>230</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 146.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

rationalization of the lifeworld—a differentiation between form and content, and an increasing “reflexivity” in the lifeworld’s symbolic reproduction—can be considered together in their effects on each of the three lifeworld components. For culture, the differentiation between form and content means that the “core, identity-securing traditions” lose the concreteness of mythical worldviews and develop into abstract basic values (such as autonomy, liberty, and the like), as well as formal procedures and structures for communication and argumentation.<sup>234</sup> The increased “reflexivity” of cultural reproduction arises with the institutionalization of the cultural systems of action Weber mentioned:<sup>235</sup> the academy and scientific laboratory, institutions of professional legal training and scholarship, religious associations, and the community of artistic creation and criticism. These institutions and practices subject the cultural tradition to ongoing criticism and revision. Culture is not merely reproduced, in the sense of being carried forward unchanged; it is critically appropriated and discursively transformed.

In the institutional order, the trend toward a differentiation between form and content brings general moral and legal principles that are “less and less tailored to concrete forms of life.”<sup>236</sup> Here Habermas might have in mind conceptions of the moral agent and legal person that increasingly abstract from particular characteristics, such as status, class, religious affiliation, ancestry, and eventually race and sex, as well as the sense that particular norms need to be justified not just traditionally but in terms of more general principles. Here, too, Habermas emphasizes the development of formal procedures for creating and justifying norms, with democratic procedures figuring as particularly important. With an implicit contrast to Weber’s more sober assessment of modern democracy,<sup>237</sup> Habermas writes:

Mead and Durkheim . . . stress the evolutionary significance of democracy: democratic forms of political will-formation are not only the result of a power shift in favor of the carrier strata of the capitalist economic system; *forms of discursive will-formation* are established in them. And these affect the quasi-naturalness of traditionally legitimated domination in a similar way, even as modern natural science, jurisprudence with

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Weber is said to have remarked of democracy: “In a democracy the people choose a leader in whom they trust. Then the chosen leader says, ‘Now shut up and obey me.’ People and party are no longer free to interfere in his business . . .” H.H. Gerth & C. Wright Mills, *Introduction*, in FROM MAX WEBER, *supra* note 219, at 3, 42.

specialized training, and autonomous art break down the quasi-naturalness of ecclesiastical traditions.<sup>238</sup>

The democratic process is “reflexive,” in two senses. First, the creation and justification of norms is itself normatively regulated. Second, the democratic institutionalization of political discourse allows for a reflective, or critical, attitude toward traditional norms and institutions.

In the “personality” component of the lifeworld, the separation between form and content brings an increasing emphasis on “formal competences.”<sup>239</sup> With the universalization of at least basic formal education, individuals acquire generalized competences—reading and quantitative skills, for example—that are applicable in many different settings, not just in a particular task or craft.<sup>240</sup> The professionalization of formal education, together with the development of social-scientific disciplines surrounding child-rearing and education, counts as an increased “reflexivity” in the socialization process. Here, too, traditional patterns increasingly are subjected to critical scrutiny and revision.<sup>241</sup>

In all these ways, according to Habermas, the symbolic reproduction of the lifeworld’s “structural components” has brought a communicative rationalization, or, the “release of the rationality potential in communicative action.”<sup>242</sup> Running through this account is an emphasis on three related points. First, with the communicative rationalization of the lifeworld, social interaction comes to depend more on communicatively achieved consensus, as opposed to consensus prescribed in advance by tradition. Second, this rationalization has meant an increasing importance of discourse, and not just naive or unreflective communicative action. Third, the rationalization of the lifeworld has brought the institutionalization of discourse, not just its episodic eruption.

#### 4. The Material Reproduction of the Lifeworld and the Limits of the Lifeworld Perspective

Habermas’s account of society as lifeworld is not yet

<sup>238</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 146-47.

<sup>239</sup> *Id.* at 146.

<sup>240</sup> *See id.* (“the cognitive structures acquired in the socialization process are increasingly detached from the content of cultural knowledge with which they were at first integrated,” and “[t]he objects in connection with which formal competences can be exercised become increasingly variable”).

<sup>241</sup> *See id.* at 147.

<sup>242</sup> *Id.* at 77; *see also id.* at 88, 146, 180, 288.

complete. The notion of communicative rationalization is part of the more general notion of the lifeworld's "symbolic reproduction." In introducing the notion of symbolic reproduction, however, I mentioned that Habermas distinguishes it from the "material reproduction" of society viewed as lifeworld. By the latter, Habermas means chiefly the organized production, distribution, and consumption of goods and services, as well as the society's external and internal defense.<sup>243</sup> He has argued that symbolic reproduction operates through communicative action, and particularly, through the "communicative acts" that coordinate communicative action—paradigmatically, speech acts that raise, criticize, defend, accept, or reject claims to truth, rightness, or truthfulness. Material reproduction, he says, implicates the "purposiveness"—the realization of plans through interventions in the world—that is the other aspect of communicative action, beyond reaching mutual understanding.<sup>244</sup> Material reproduction, then, may involve communicative action, particularly in the form of coordinated, cooperative social labor.<sup>245</sup> But not necessarily or exclusively. It may involve, also, the success-oriented conduct he called "strategic action."<sup>246</sup>

This connection between strategic action and material reproduction raises an obvious question. Habermas, we saw, has defined the lifeworld in terms of specifically communicative action.<sup>247</sup> Thus to the extent that material reproduction depends upon strategic action, it would seem to be inaccessible, as a matter of definition, from the "lifeworld" perspective Habermas has been developing.

Habermas, however, does not move quite so quickly. The theoretical approach that sees society as lifeworld does not "simply filter[] out" questions concerning material reproduction.<sup>248</sup> Further, despite Habermas's definition of the lifeworld in terms of communicative action, he allows in a number of passages—albeit usually in the form of an afterthought or an admission—that strategic action, too, can be analyzed in "lifeworld" terms.<sup>249</sup> The

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<sup>243</sup> See *id.* at 160.

<sup>244</sup> *Id.* at 232.

<sup>245</sup> See *id.* at 138.

<sup>246</sup> See *Remarks on the Concept of Communicative Action*, *supra* note 87, at 174 ("Both strategic and communicative actions participate in the material reproduction of the lifeworld which occurs via the medium of purposive activity.").

<sup>247</sup> See *supra* text accompanying notes 176-88.

<sup>248</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 151. However, in Mead's work, "[t]he material reproduction of society—securing its physical maintenance both externally and internally—is blended out of the picture of society understood as a communicatively structured lifeworld." *Id.* at 110.

<sup>249</sup> *Id.* at 148 ("From the internal perspective of the lifeworld, society is represented as a

concession is wise, although underplayed. Strategic action draws on the same “lifeworld” resources as does communicative action. As Habermas has acknowledged, except for the “limit case” of a criminal demand, even strategic interaction presupposes the parties’ acceptance of legal norms that exclude some strategies or tactics and permit others, and often strategic competitors recognize extralegal norms as well.<sup>250</sup> “[S]elf-interested action,” Habermas says, “has always been fused with, or limited by, a normative order”<sup>251</sup>—the normative order that Habermas calls the “societal component” of the lifeworld. Equally evident is the fact that in interpreting their situations and formulating their plans, strategic actors rely on the “stock of knowledge” that Habermas describes as the cultural tradition. Certainly, also, strategic action both relies upon and develops the competences and motivations Habermas analyzes under the heading of “personality.” None of this is surprising. As Schutz suggested, the “lifeworld perspective” refers us to the problematic of action in general—even if Habermas is right that communicative action carries the main burden in reproducing what he calls the symbolic structures of the lifeworld.

Habermas ultimately does conclude that the analysis of material reproduction calls for a different kind of approach, based on a modified version of Talcott Parsons’s social systems theory.<sup>252</sup> But the argument is not simply a matter of drawing a conclusion from a definition of the lifeworld that excludes strategic action. Habermas in fact presents two sets of arguments for why the “lifeworld” or action-theoretical perspective must be supplemented with a systems-theoretical approach. The first concerns what he calls the “fictions” of “hermeneutic idealism”;<sup>253</sup> the second (and more persuasive) addresses more directly the

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network of communicatively mediated cooperation, with strategic relations and ruptures inserted into it.”); *id.* at 150 (linking the “lifeworld” perspective to communicative action, but “leaving space, of course, for the alternative of acting strategically when consensus breaks down”); *id.* at 154 (“[a]ctors have always been able to she[a]r off from an orientation to mutual understanding, adopt a strategic attitude, and objectify normative contexts into something in the objective world”); BETWEEN FACTS AND NORMS, *supra* note 14, at 21 (possibility of strategic action in the context of the lifeworld when consensus breaks down); *id.* at 524 n.18 (strategic action is possible “in the lifeworld,” but the lifeworld “background” is here “neutralized in its normative force”); *cf.* 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 121 (referring to the possibility of “draw[ing] upon the means of strategic action, [though] with an orientation toward coming to a mutual understanding,” when participants in communicative action do not share sufficient assumptions to make direct communication possible in the first instance).

<sup>250</sup> See *supra* text accompanying notes 122-29.

<sup>251</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 25.

<sup>252</sup> See *infra* Parts II.C.1-2.

<sup>253</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 148, 149.

organization and operation of modern complex societies.

A theoretical approach that confines itself to the lifeworld concept, Habermas says, falls prey to three “fictions.” The first is the idea that actors are autonomous in a (very) strong sense: that they control their situations of action and the consequences of their actions. In this picture, society consists in relations fashioned “with the will and consciousness of adult members,” and fashioned in that way only.<sup>254</sup> The second fiction is that “culture is independent of external constraints.” From the perspective of a “member[]” of a lifeworld, Habermas says, culture is so fundamental to the interpretation of situations and the formulation of plans that “it is strictly meaningless . . . to inquire whether the culture in whose light they deal . . . is empirically dependent on anything *else*.”<sup>255</sup> The third fiction is that communicative actors “encounter one another in a horizon of unrestricted possibilities of mutual understanding,”<sup>256</sup> assuming necessarily “that they could, in principle, arrive at an understanding about anything and everything.”<sup>257</sup> From this perspective—“the internal perspective of participants [in] a sociocultural lifeworld”—the process of reaching understanding is “basically transparent,” and “no force can gain a footing.”<sup>258</sup> These three “fictions”—the autonomy of actors, the independence of culture, and the transparency of communication—are according to Habermas built into the self-understanding of both everyday actors and social theorists who examine the world from everyday actors’ perspective. And because they are fictions, some approach must be developed to supplement the action-theoretical analysis of society as lifeworld.

Perhaps these arguments might be telling against some versions of interpretive sociology, but not against the approach Habermas has developed. The idea that actors are purely autonomous and fashion their own world conflicts with Habermas’s initial account of the lifeworld as the taken-for-granted, pregiven background of action that remains largely invisible to social actors.<sup>259</sup> It conflicts also with his admissions elsewhere that we can comprehend unintended consequences within the “lifeworld” approach.<sup>260</sup> The idea that culture is

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<sup>254</sup> *Id.* at 149.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 150.

<sup>258</sup> *Id.*

<sup>259</sup> See *supra* text accompanying notes 162-65.

<sup>260</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 148 (Although the lifeworld perspective presents society “as a network of communicatively mediated

independent of everything else conflicts with Habermas's account of the way in which the three "structural components" of the lifeworld are interrelated, both in their capacity as resources for social action and in their reproduction.<sup>261</sup> And finally, the idea that communication is transparent and forceless conflicts with Habermas's account of strategic action—particularly his account of the deception or self-deception he classifies as concealed strategic action—together with his admission that strategic action is not excluded from the lifeworld.<sup>262</sup> Habermas's account of these "fictions of hermeneutic idealism" suggests a thinker eager to move on with a systems-theoretical approach—for reasons we still have not discovered—not real difficulties in the theoretical approach we have considered so far.

The other set of arguments for supplementing the lifeworld approach centers around the problem of social complexity. The communicative rationalization of the lifeworld is part of a trend toward greater complexity. If agreement is not secured in advance by tradition, but depends upon the interpretive and discursive achievements of participants, then the possibility of agreement becomes more burdensome and risky.<sup>263</sup> And the problem of coordinating action becomes more difficult. One way in which modern societies have managed this greater risk of dissensus, according to Habermas, is through the development of generalized "media" such as money and power.<sup>264</sup> The systems that develop around these media, Habermas argues, coordinate action and integrate society in a way fundamentally different from the way those functions are fulfilled through communicative action and consensus concerning validity claims.

The usual way Habermas introduces this difference is through the distinction between action orientations and action consequences.<sup>265</sup> Communicative action, with its "mechanism of mutual understanding[,] harmonizes the action *orientations* of participants."<sup>266</sup> By this he means that communicative actors are

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cooperation, with strategic relations and ruptures inserted into it[. . .]" "[t]his is not to say that every contingency, every unintended consequence, every unsuccessful coordination, every conflict is expunged from this view."); *A Reply*, *supra* note 87, at 253 ("The problem of unintended action consequences can, of course, . . . be treated from the perspective of the lifeworld."); *cf.* Thomas McCarthy, *Complexity and Democracy*, in COMMUNICATIVE ACTION: ESSAYS, *supra* note 82, at 137 ("We do not need the paraphernalia of social systems theory to identify unintended consequences.").

<sup>261</sup> See *supra* text accompanying notes 203-06.

<sup>262</sup> See *supra* text accompanying notes 111-39.

<sup>263</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 182-83, 262.

<sup>264</sup> See *id.* at 180-81, 183, 261-63, 272, 276, 281.

<sup>265</sup> See *id.* at 117, 150, 186-87.

<sup>266</sup> *Id.* at 150; see also *id.* at 233.

oriented toward reaching agreement with each other, or (if an agreement already has been reached) they are oriented toward that agreement. The interaction is coordinated through this agreement. And at a more encompassing level, society itself is integrated through a general consensus about institutionalized norms and values. So it appears, at least, from the perspective of a theory of communicative action.

According to Habermas, interactions steered by the “media” around which the economic and administrative systems develop—money and power—are coordinated through action *consequences*. By this he means that actors in, for example, a monetary transaction may be indifferent whether they share some mutual commitment to norms or values. Each participant is oriented toward her own success. In that sense, then, the actors’ orientations are not, as in the case of communicative action, congruent or even necessarily complementary. What coordinates interaction in this situation, and particularly what binds together a network of market transactions, is the “functional[] intermeshing [of] action consequences.”<sup>267</sup> Habermas calls this form of societal cohesion “system integration,” as opposed to the “social integration” that binds a social lifeworld together through normative consensus.<sup>268</sup> To understand the way in which system integration operates through “nonintended interconnections” of action,<sup>269</sup> Habermas argues, we need some version of systems theory.

Surely Habermas is right that we cannot understand the operations of a complex society if we see it entirely from the perspective of actors, their intentions, and their orientations. As he suggests, markets, and perhaps other mechanisms as well, coordinate interaction and integrate a society in a way irreducible to communicative agreement and a consensus about norms and values. Two difficulties remain, however.

First, even at this point, an abstractly polarizing tendency appears in Habermas’s conception of the relation between the lifeworld, on one hand, and the “media-steered” economic and administrative systems, on the other. He describes the market as “norm-free,”<sup>270</sup> as contrasted with the normatively dense contexts

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<sup>267</sup> *Id.*

<sup>268</sup> *See id.* at 117-18, 150-51, 186-87.

<sup>269</sup> *Id.* at 117.

<sup>270</sup> *Id.* at 150 (in the context of introducing the idea of system integration); *see also id.* (referring to “nonnormative steering”); *id.* at 154 (systems as “norm-free structures”); *id.* at 171 (economic system as “a block of more or less norm-free sociality”); *id.* at 172 (economy and administrative system as “norm-free subsystems”); *id.* at 173 (“norm-free sociality” of economic and administrative systems); *id.* at 185 (systems as “norm-free social



of the lifeworld. In the market, to be sure, one is free of various normative restrictions that would be binding in a friendship or family relation. But the idea that markets (and also, we will see, the “administrative system”) are norm-free is simply wrong—as Habermas implicitly acknowledges when he describes market relations, and the market as a sphere of interaction, as “first generated by”<sup>271</sup> or “first constituted in”<sup>272</sup> formal law. Habermas will try to incorporate this acknowledgement by arguing that the media of money and power must be “anchored in the lifeworld”—secured, that is, by positive law. But this solution understates the extent to which economic and political processes are not describable, on their own terms, as “norm-free.” This difficulty, I will argue, undermines Habermas’s model of the system/lifeworld relation that he takes to characterize modern societies.

Second, the fact that Habermas’s “lifeworld” model needs to be supplemented does not determine what approach should supplement it. It is hardly obvious that social systems theory, rather than more standard approaches in economic theory and political science, offers the key that can unlock the workings of the economic and administrative systems. For purposes of presenting Habermas’s basic concepts, however, I will concede that point. Still, this concession settles very little. Habermas sometimes understands the term “systems theory” very broadly, to the point of classifying Marx, Adam Smith, and even Hobbes as systems theorists.<sup>273</sup> Neither are matters settled if we focus on more contemporary versions of social systems theory. Habermas relies upon the version articulated by Talcott Parsons, the dominant figure in American sociology from at least the 1950s until his death in 1978. As I will suggest in the final section, however, another and more powerful variant of social systems theory recently has been developed—Niklas Luhmann’s “autopoietic” theory.<sup>274</sup> Habermas’s development of a systems-theoretical approach is thus

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structures”); *id.* at 242 (“norm-free sociality”); *id.* at 307 (systems as “formally organized domains of action” that “congeal into a kind of norm-free sociality”); *id.* at 327 (systems as “a norm-free reality beyond the horizon of the lifeworld”).

<sup>271</sup> *Id.* at 309 (emphasis omitted).

<sup>272</sup> *Id.* at 357; *see also id.* at 361 (economic system is “an area of action that is *already constituted by law*”); *id.* at 366 (economic and administrative systems are “directly constituted in the forms of bourgeois formal law”); *id.* at 367 (law as systems medium “is tailored to domains of action that are first constituted in legal forms of organization and that can be held together only by systemic mechanisms”); *id.* at 369 (“formally organized spheres of action,” i.e., the economic and administrative systems, are “already constituted in legal form”).

<sup>273</sup> *See id.* at 185, 313, 334-38 (re Marx); 358 (re Hobbes); BETWEEN FACTS AND NORMS, *supra* note 14, at 39-40 (re Smith).

<sup>274</sup> *See Baxter, supra* note 29, for an account of Luhmann’s autopoietic theory in its application to law.

selective, and I will argue in concluding this article that he could have avoided some of the difficulties in which his reliance on Parsons places him.

### C. System

#### 1. Open Systems Theory and Parsons's "Interchange Paradigm"

The best-known version of social systems theory—and the one from which Habermas borrows—is the “open systems” approach, first developed during the 1960s under the influence of advances in cybernetics and information theory. This approach conceives of systems as adaptive and open to their changing environments. System and environment are engaged in ongoing “exchange” or “interchange,”<sup>275</sup> through which the system receives inputs from its environment, processes them, and converts them into outputs that are fed back to the environment. Information about the outputs’ effects on the environment and the system flows back into the system, completing the “feedback loop.”<sup>276</sup>

This model becomes more complex when we consider that a system’s environment typically includes other organized systems. The functionalist sociological systems theories of the 1960s and early 1970s incorporated this insight, presenting modern societies as differentiated into a plurality of subsystems<sup>277</sup>—such as the political system or the economic system—each of which performs some particular social function. Accounting for the input and output relations among the various social subsystems has been a basic problem for functionalist systems theory.

The most highly developed and influential version of this approach appears in the later work of Talcott Parsons. Parsons argues that any system of action must fulfill precisely four functions: “adaptation” (A), “goal-attainment” (G), “integration” (I), and “latent pattern-maintenance” (L).<sup>278</sup> The functions listed in this “four-function paradigm,” or “AGIL” schema, correspond

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<sup>275</sup> See, e.g., DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 25-26 (1965); WALTER BUCKLEY, *SOCIOLOGY AND MODERN SYSTEMS THEORY* 50 (1967).

<sup>276</sup> See EASTON, *supra* note 275, at 29-32. The model becomes more complicated once one recognizes that a system has more than one “feedback loop.” See *id.* at 372-76.

<sup>277</sup> “Subsystem” is always a relative term, used to signal that the system under discussion is part of a larger system. Whether one speaks of “system” or “subsystem” depends upon the intended level of analysis.

<sup>278</sup> See TALCOTT PARSONS, *On Building Social System Theory*, in *SOCIAL SYSTEMS AND THE EVOLUTION OF ACTION THEORY* 43 & n.34 (1977) [hereinafter *On Building Social System Theory*].

to what Parsons's earlier work had characterized as the four basic elements of action: means or resources, goals, norms, and values, respectively.<sup>279</sup> To each of the four functions corresponds a social subsystem. The economy, on Parsons's account, serves the adaptive function (A); the "polity" serves the goal-attainment function (G); the "societal community" serves the integrative function (I); and (for lack of a better term) the "pattern maintenance subsystem" serves the function that its name suggests (L).<sup>280</sup>

Parsons's "interchange paradigm" addresses the issue of how these functional subsystems are interrelated. To each subsystem he attributes a "generalized medium of interchange"<sup>281</sup> that both structures the subsystem's "internal" operations and controls its input/output relations with other subsystems. Parsons's strategy was to begin with the idea of money as the medium for the economy. Then, working largely by analogy to the case of money, he identified media for the other three social subsystems: "power" for the polity, "influence" for the societal community, and "value-commitment" for the pattern-maintenance subsystem.<sup>282</sup> Each interchange between subsystems involves, according to Parsons, a "double" exchange, with an input and an output accomplished through each of the two system's respective media.<sup>283</sup> Thus, for example, the interchange between economy and polity involves four boundary-crossing inputs and outputs, two mediated by money and two by power.<sup>284</sup> The same pattern obtains with respect to the other five intersystem relations, generating a total of twenty-four media-controlled interchanges.<sup>285</sup>

This interchange model of functional subsystems and media-controlled exchange is not, to most, an intuitive way of looking at the social world. In particular, it is not a map of society, as if seen from the air, on which we could locate particular organizations or institutions by placing them securely in one subsystem or another. Particular organizations, like business firms, may be specialized with respect to one of the four functions. But none belongs exclusively to any one subsystem. As the Parsons-influenced

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<sup>279</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 235, 242, 243 fig. 32, 244 fig. 33.

<sup>280</sup> See TALCOTT PARSONS, *On the Concept of Political Power*, in SOCIOLOGICAL THEORY AND MODERN SOCIETY 348 (1967) [hereinafter *On the Concept of Political Power*].

<sup>281</sup> For Parsons's overview of this project, see TALCOTT PARSONS, SOCIAL SYSTEMS AND THE EVOLUTION OF ACTION THEORY, *supra* note 278, at 43-48, 59-60, 204-69 (1977).

<sup>282</sup> See *On the Concept of Political Power*, *supra* note 280, at 348.

<sup>283</sup> See *id.* at 349.

<sup>284</sup> See *id.* at 350 fig. 1, 351.

<sup>285</sup> See *id.* at 348 fig. 1, 350 fig. 2.

theorist Jeffrey Alexander puts it, “[t]here are economic aspects of churches and political aspects of factories.”<sup>286</sup> The same point holds at the level of the subsystems themselves. The political system, on Parsons’s scheme, is specialized with respect to the function of realizing collective goals.<sup>287</sup> But in fulfilling this function, it draws on “inputs” from the other social subsystems. What the interchange paradigm is designed to convey is the “dimensional pressures” that societies face and the functions they must fulfill. Understood in that way, Alexander concludes, the model “encompasses the full multidimensional complexity of real social causality” because “[t]he analysis of any single subsystem . . . cannot be isolated from the analysis of any other.”<sup>288</sup>

Parsons’s further development of the interchange model was still more ambitious in scope. The account considered so far covers only the interchange among subsystems of the social system. The social system, however, is itself a subsystem of a more encompassing system that Parsons calls the “general action system.” An obvious question is whether the same principles developed at the level of the social system apply at the level of the general action system. Parsons concludes that they do. According to Parsons, the four-function paradigm, connected as it is to the elements of action in general, applies to any system of action. In fact, Parsons generalizes the four-function paradigm still more ambitiously. Properly understood, he argues, a system of action is just a special case of a living system.<sup>289</sup> And according to Parsons, the four-function, “AGIL” paradigm is grounded in “the essential nature of living systems at all levels of organization and evolutionary development, from the unicellular organism to the highest human civilization.”<sup>290</sup> On that basis, Parsons came to consider the four-function paradigm, as well as the interchange paradigm that accompanies it, wholly general in its application.

Parsons and his followers set about applying the four-function paradigm at various levels of generality. The subsystems of the “general action system” include, besides the social system (I), the cultural system (L), the personality system (G), and the (oddly named) “behavioral organism” (A).<sup>291</sup> At this level, too, Parsons

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<sup>286</sup> 4 JEFFREY C. ALEXANDER, *THEORETICAL LOGIC IN SOCIOLOGY* 84 (1983).

<sup>287</sup> See *On the Concept of Political Power*, *supra* note 280, at 354.

<sup>288</sup> 4 ALEXANDER, *supra* note 286, at 82.

<sup>289</sup> See TALCOTT PARSONS, *Some Problems of General Theory in Sociology*, in *SOCIAL SYSTEMS AND THE EVOLUTION OF ACTION THEORY*, *supra* note 278, at 230 [hereinafter *Some Problems of General Theory*] (“Action systems . . . are a subclass of a broader set, which may be called *living systems* . . .”).

<sup>290</sup> *Id.* at 236.

<sup>291</sup> See *On Building Social Systems Theory*, *supra* note 278, at 46-48 (1977); *Some*

gave names to the various media, charted the various double interchanges, and blocked out the other categories that the four-function paradigm requires.<sup>292</sup> In his last years, Parsons ascended another level of generality to address the so-called “human condition,” where the general action system (I) takes its place alongside the “physico-chemical system” (A), the “human organic system” (G), and the (cryptically named) “telic system” (L).<sup>293</sup> Here too, Parsons named the media, charted the “double interchanges,” and so forth.<sup>294</sup> But if the four-function paradigm is wholly general in its application, then it must operate in the other direction as well—at the level of subsystems for the social system’s subsystems, and then at the level of the subsystems of those subsystems, and so on. The AGIL schema is endlessly self-replicating, and the project of naming functional subsystems, generalized interchange media, and media-controlled interchange relations could go on forever.<sup>295</sup> At some point, however, it becomes a senseless exercise—as even some of those strongly influenced by Parsons have concluded.<sup>296</sup> And one has to wonder about the formalism of a theory in which the same four-part differentiation appears, and the same principles apply, whatever the level of analysis.

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*Problems of General Theory*, *supra* note 289, at 244-45.

<sup>292</sup> See *Some Problems of General Theory*, *supra* note 289, at 262-69.

<sup>293</sup> See TALCOTT PARSONS, *ACTION THEORY AND THE HUMAN CONDITION* 361 (1978).

<sup>294</sup> See *id.* at 393 fig. 4, 407 fig. 5.

<sup>295</sup> A two-volume *Festschrift* for Parsons provides good examples of the way some of Parsons’s followers sought to deploy the AGIL schema at various levels of generality. See, e.g., Thomas J. Fararo, *Science as a Cultural System*, in 1 *EXPLORATIONS IN GENERAL THEORY IN SOCIAL SCIENCE* 182 (J. Loubser et al. eds., 1976) (applying the four-function paradigm to name 16 subsystems of the scientific system, four levels removed from Parsons’s original level of the social system); Victor Meyer Lidz, *Appendix* to Charles W. Lidz & Victor Meyer Lidz, *Piaget’s Psychology of Intelligence and the Theory of Action*, in 1 *EXPLORATIONS IN GENERAL THEORY IN SOCIAL SCIENCE*, *supra*, at 231-36 (naming generalized communications media for the “adaptive” subsystem of the general action system); Guy Rocher, *Toward a Psychosociological Theory of Aspirations*, in 1 *EXPLORATIONS IN GENERAL THEORY IN SOCIAL SCIENCE*, *supra*, at 404 (using the four-function paradigm to name 16 kinds of aspiration); Mark Gould, *Systems Analysis, Macrosociology, and the Generalized Media of Social Action*, in 2 *EXPLORATIONS IN GENERAL THEORY IN SOCIAL SCIENCE*, *supra*, at 470-78 (suggesting a “refined version of the interchange paradigm”).

<sup>296</sup> Niklas Luhmann, the prominent German systems theorist, has observed:

At every level of system-building there is a subsystem that displays the whole schema once again. . . . But how far can this process be repeated? Is there a point past which it gives out? Does it become senseless after the second repetition, like the process of reflection? And, especially, is this the way to represent the structure of functional differentiation? Does this theoretical schema yield not structural complexity but only structural complications?

NIKLAS LUHMANN, *Talcott Parsons: The Future of a Theory*, in *THE DIFFERENTIATION OF SOCIETY* 47, 58 (Stephen Holmes & Charles Larmore trans., 1982) (1979).

Habermas's response to Parsons's systems theory is generally critical. He has no particular use for the AGIL schema,<sup>297</sup> nor does he follow Parsons in his ascent from the social system to the general system of action—let alone the level of the “human condition.”<sup>298</sup> The problem with Parsons's “general system of action,” according to Habermas, is that it presents culture, society, and personality—Habermas's “structural components of the lifeworld”—as media-steered, boundary-maintaining systems, analogous in structure to state and economy. Parsons totalizes systems theory. Habermas argues that its explanatory potential is limited. The question for him is how to determine the relative rights of the systems-theoretical and “lifeworld” perspectives.

Habermas pursues this question by examining Parsons's theory of “generalized interchange media.” He focuses on Parsons's discussion of the four media at the level of the social system—money, power, influence, and value-commitment. Habermas follows Parsons in taking money to be the exemplary case of a medium, and in then considering whether the other proposed media are sufficiently similar in their structure and operation. For reasons we will soon explore, Habermas ultimately concludes that only money and power are genuine interchange media—or, to use his preferred (if peculiar) term, genuine “steering media” [*Steuungsmedien*].<sup>299</sup> For this reason, he will

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<sup>297</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 256 (referring to the “paradoxes” that the AGIL “cross-tabulation” technique creates).

<sup>298</sup> See *id.* at 250-56.

<sup>299</sup> The German word “*Steuerung*” can be translated either as “steering” or “control.” In some of Habermas's writings, the term *Steuungsmedium* has been rendered as either “steering medium” or “control medium.” See Thomas McCarthy, *Translator's Note*, in LEGITIMATION CRISIS, *supra* note 4, at 148 n.11. I prefer “control medium,” but in deference to McCarthy's choice in his translation of *Theory of Communicative Action*, and William Rehg's choice in his translation of *Between Facts and Norms*, I use “steering medium.”

So far as I have been able to see, Parsons does not use either term—“steering medium” or “control medium.” Habermas may have developed the term *Steuungsmedium* through his encounter in the early 1970s with the systems theorist Niklas Luhmann. (This encounter led to a joint book, *Theorie der Gesellschaft oder Sozialtechnologie*, *supra* note 4, and to much greater sympathy on Habermas's part for systems theory. For his part, Luhmann seems to have been unaffected by the encounter.) At that time, Luhmann, first trained in sociology by Parsons, was much under Parsons's influence. He was developing Parsons's notion of a “generalized interchange medium” into the concept of a “symbolically generalized communications medium.” Luhmann described such a medium as a way to “steer” or “control” [*steuern*] the selections of a rational counterpart in interaction. NIKLAS LUHMANN, *MACHT* 7, 9 (1975). Parsons, too, sees media as—from the point of view of actors—a means of exerting strategic influence over others.

One difficulty with this explanation is that both Parsons and Luhmann—until the early 1980s, after the publication of *Theory of Communicative Action*—also examine the operation of these “media” from the perspective of social subsystems, not just actors. Still,

conclude that only the economic and administrative systems are “media-steered” systems.

This will leave him with the question of how to understand the relation between the open, adaptive, media-steered, functionally differentiated economic and administrative systems, on one hand, and the lifeworld, on the other. That will be the most serious difficulty in Habermas’s “two-level” theory of society.

## 2. “Steering Media”

Parsons first developed the idea of money as the economy’s interchange medium in his collaborative work with Neil Smelser, *Economy and Society* (1956). In a series of essays published between 1963 and 1968, he extended the notion to the other three subsystems of the social system.<sup>300</sup> Throughout these essays, money remained the paradigmatic interchange medium, with language emerging as a point of further comparison. Habermas’s account of Parsons’s medium concept distills from these essays four aspects of the money medium that Parsons emphasizes: its “structural features,” its “structure of claim and redemption,” its “qualitative properties,” and its “system-forming effects.” Habermas takes these aspects of money to be defining criteria for his notion of a “steering medium”—his version of Parsons’s “generalized interchange medium.” For our immediate purposes, the first two features are most relevant.

By the “structural features” of a medium, Habermas is referring, in the first instance, to what Parsons calls the medium’s “code.” Parsons conceives of media codes by analogy to ordinary language: they allow the transmission of semantic content, governed by syntactical rules for the medium’s use.<sup>301</sup> In fact, Parsons says, money as a medium “is a very specialized language.”<sup>302</sup> A medium’s code symbolizes a “generalized value” that can be presumed meaningful for all who will deal with the

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one could speak of the economic system (and Habermas does) as “steering” or “controlling” itself through the medium of money.

<sup>300</sup> See *On the Concept of Political Power*, *supra* note 280, at 297; TALCOTT PARSONS, *On the Concept of Influence*, in *SOCIOLOGICAL THEORY AND MODERN SOCIETY*, *supra* note 280, at 355 [hereinafter *On the Concept of Influence*]; Talcott Parsons, *On the Concept of Value-Commitments*, 38 *SOCIOLOGICAL INQUIRY* 135 (1968), reprinted in TALCOTT PARSONS, *POLITICS AND SOCIAL STRUCTURE* 439 (1969).

<sup>301</sup> See *On the Concept of Influence*, *supra* note 300, at 357 (noting that “language is perhaps the prototype” for generalized media and distinguishing between “message transmission” and the “code” that is what gives meaning to the symbols in a message).

<sup>302</sup> *Id.*; see also *Some Problems of General Theory*, *supra* note 288, at 241.

medium in “*standard situations*.”<sup>303</sup> For money, the standard situation is the buying and selling of economic goods, with actors pursuing their own interests.<sup>304</sup> The generalized value, of which money is both expression and measure, is “utility.”<sup>305</sup> Parsons conceives of money’s circulation as the sending of “messages,” meaningful in terms of the medium’s code, that are designed to motivate the recipient to accept an “offer.” The motivating force is the prospect of sanctions, whether positive or negative, that will affect the recipient’s relevant interest. Money, Parsons says, operates through “inducement,”<sup>306</sup>—the prospect of positive sanctions connected to the generalized value of utility.<sup>307</sup>

Like ordinary language as a medium, Parsons observes, money as a medium has no intrinsic value.<sup>308</sup> Instead, it presents a “nominal” value (exchange-value) that can be “redeemed” for a “real” value or “intrinsic satisfier” (typically, the use-value of a good or service).<sup>309</sup> Ultimately the monetary medium is “backed by reserves”—whether by gold or other precious metals, as in bygone days, or by other means, as at present.<sup>310</sup> Similarly, Habermas notes, linguistic utterances may “express knowledge,” but they are not themselves “knowledge.” They are the medium through which participants reach communicative agreement, and the claims raised in utterances are the “measure” of achieved agreements.<sup>311</sup> Likewise, Habermas contends, communicative agreements are “backed by potential reasons”<sup>312</sup> that can be adduced, if necessary, to “redeem” claims raised in communicative action.<sup>313</sup>

<sup>303</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 264.

<sup>304</sup> *See id.*

<sup>305</sup> *On the Concept of Influence*, *supra* note 300, at 358.

<sup>306</sup> *See id.* at 363.

<sup>307</sup> *Id.* at 358, 363. That money operates through positive sanctions only is not obvious. Robert Hale describes the process of exchanging labor-power for wages, or money for goods, as a process of reciprocal coercion that involves threats to withhold the desired money or commodity. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, POL. SCI. Q. 470, 472-79 (1923). The process can be described in terms of either offers to provide or to withhold, and in terms of either positive or negative sanctions.

<sup>308</sup> *See* 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 265.

<sup>309</sup> *See id.* at 266.

<sup>310</sup> *Id.* The translation refers to “money or drawing rights on the world bank.” The term “*Geld*” in the original should have been rendered as “gold” rather than “money.” *See id.* at 274 fig. 37.

<sup>311</sup> *See id.* at 265-66.

<sup>312</sup> *Id.* at 266 (emphasis omitted).

<sup>313</sup> *Id.* at 265. The parallel is forced. Reasons—or at least particular reasons—do not “back” the medium of language itself, just particular claims. And certainly one does not wait for a communicative “panic” to ask for reasons in communicative action. Drawing on the “reserve” of reasons is not such an extraordinary occurrence in everyday



Habermas emphasizes, however, the differences between ordinary language and money as media. Two are particularly important for his further argument. First, the redemption of a claim in communicative action involves the giving of reasons that can withstand rational criticism. The redemption of a monetary claim or offer does not. The acceptance of a claim in communicative action, therefore, may be “rationally motivated”—in the sense of “communicatively rationally motivated”—whereas the acceptance of a claim or offer in a money-mediated interaction is motivated, in Habermas’s terminology, only “empirically,” by the desire for a positive sanction.<sup>314</sup> Money thus allows actors to circumvent the process of reaching agreement about contested claims to validity. Their interaction is coordinated not by communicative consensus, but by the consequences of their respective success-oriented calculations and their mutual strategic influence. Habermas relies on the distinction between rational and empirical motivation, and the notion of media as “replacing” the process of reaching understanding, as his main criteria for “steering medium” status. And the idea that steering media replace communicative consensus-formation will be part of his argument that system and lifeworld in modern societies are “uncoupled.”<sup>315</sup>

Second, as Parsons notes, money and the process of exchange must be “institutionalized” if they are to enjoy a secure basis of trust. The “backing” of the monetary medium itself occurs through the guarantees of national and international governmental and financial institutions. Contract law and property law institutionalize and regulate the process of exchange.<sup>316</sup> No such institutional or legal guarantees are necessary for the medium of ordinary language. Habermas sees this difference as indicating that while ordinary-language communication is always already located in a lifeworld context, the medium of money must be institutionally “anchored in the lifeworld”<sup>317</sup>—specifically in the institutional and legal complex Habermas calls the “society” component of the lifeworld. This point also will be significant to Habermas’s understanding of the relation between system and lifeworld.

The other “features” Habermas discerns in Parsons’s account

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communicative action, and it is established practice where discourse is institutionalized.

<sup>314</sup> See *supra* text accompanying notes 118-21.

<sup>315</sup> See *infra* text accompanying notes 348-49, 364-79.

<sup>316</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 266.

<sup>317</sup> *Id.* at 154, 309, 312, 344; see also *id.* at 266 (money must be “institutionally anchored” through “the basic institutions of civil law (property and contract)”).

of money concern its “qualitative properties” and its “system-building effects.” Money’s relevant qualitative properties are that it is precisely measurable, alienable in specific amounts, and capable of being stored. The first two properties allow money to operate as an objective, context-independent measure of value in rationally calculated action. Money’s alienability allows it to serve as a circulating medium.<sup>318</sup> Its capacity for being stored increases actors’ freedom to pursue their economic interests rationally by shopping around, waiting for favorable terms, and saving or investing.<sup>319</sup> Under the heading of “system-building effects,” Habermas has in mind Parsons’s remarks about media inflation and deflation—changes in the relation between nominal and real value—and money’s “self-referential extension,” in the form of markets for money (i.e. capital markets).<sup>320</sup>

The question Habermas now poses is whether, based on the model of money as medium, any of Parsons’s other candidates—power, influence, or value-commitment—qualify as genuine “steering media.” According to Habermas, power qualifies, but the others do not.

With the concept of power, as with the concept of money, Habermas follows Parsons’s lead in the first instance. Parsons sees parallels between power and money in terms of their “structural features.” Like the money code, the power code represents a “generalized value,” which Parsons calls “effectiveness” in attaining collective goals.<sup>321</sup> It operates in a “standard situation” of “following imperatives.” As with the parties to a monetary transaction, the issuer of the imperative and the person to whom it is directed are understood to take an “objectivating” or “success-oriented” attitude toward one another.<sup>322</sup> The “message” or “offer” associated with power is, as was the case with money, connected to a characteristic sanction that is to motivate alter in the interaction. The difference here is that while the sanction associated with money’s “inducement” was positive, the sanction associated with power’s “deterrence” is negative—the threat of unpleasant consequences in case of disobedience.<sup>323</sup>

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<sup>318</sup> See *id.* at 265.

<sup>319</sup> See *id.* at 427 n.56.

<sup>320</sup> *Id.* at 266.

<sup>321</sup> *Id.* at 268.

<sup>322</sup> *Id.*

<sup>323</sup> Here, as with Parsons’ account of money, *see supra* note 307, one could describe the relevant sanctions in the opposite way. Compliance with commands may bring pleasant consequences, particularly if the addressee is located in a bureaucratic organization that rewards dutiful order-followers. The main point here is that for Parsons, power-mediated interaction, as with money, is coordinated by potential sanctions rather than by agreement about validity claims.

Habermas sees parallels also in the “structure of claim and redemption” associated with the two media. Like money, Parsons says, power has no intrinsic value.<sup>324</sup> The real value for which the power code stands is the attainment of collective goals.<sup>325</sup> The ultimate “backing” for power is disposal over the means of force.<sup>326</sup> In these respects, Habermas claims, Parsons is right to see power and money as analogous.

In other respects, Habermas acknowledges dissimilarities between power and money. Power is less calculable than money. There simply is no power-related equivalent for the price system, and in fact, Habermas allows, “[i]t is not possible to quantify power.”<sup>327</sup> Although power can circulate, it “cannot circulate in so unrestricted a manner as money.”<sup>328</sup> Habermas thinks this is so because power, which in a modern political system is supposed to attach to offices rather than persons, nevertheless tends to “get bound up symbiotically with the person of the powerful”—thus, for example, the advantage of incumbency.<sup>329</sup> Actually, and more to the point, even if power attaches only to offices rather than persons, it is in that respect also considerably less alienable than money. Political power may not be sold or disposed of or given away, in the same way that one may sell a piece of property. Nor, Habermas points out, is there a reliable way to deposit power—even if we can interpret an election as, in some sense, a deposit of power from which the incoming administration may draw. Power cannot be stored, without use, to the same extent and with the same security as money.<sup>330</sup> Nor can one speak of power inflation or deflation to the same degree, or with the same precision, as with respect to the money medium.<sup>331</sup>

Habermas emphasizes, finally, a relevant difference between the ways in which money and power are, as he puts it, “anchored in the lifeworld.” Like money, power must be legally institutionalized, although through public law rather than private law.<sup>332</sup> Public law organizes a hierarchy of offices that prescribes

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<sup>324</sup> One might object that power often seems to be enjoyed for its own sake, or for other selfish purposes, rather than for its capacity to attain “collective goals.” Parsons’s point, which Habermas will amplify, *see infra* text accompanying notes 333-39, is that in modern societies (at least) a stable political system requires that power generally be directed toward collective goals.

<sup>325</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 268.

<sup>326</sup> See *id.* at 269.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* (emphasis omitted).

<sup>329</sup> *Id.*

<sup>330</sup> See *id.*

<sup>331</sup> See *id.* at 269-70.

<sup>332</sup> See *id.* at 271.

the terms of access to political power and channels the flow of political decisions. The difference, according to Habermas, is that for power, something more than this legal institutionalization and the “backing” of physical force is required. Power must be “legitimated,” and that means that its exercise remains connected to “the recognition of normative validity claims.”<sup>333</sup> This “anchoring” of the power medium is “more demanding” than the anchoring of money, which needs no legitimation beyond its legal institutionalization.<sup>334</sup>

The reason for this asymmetry in “normative anchoring,” according to Habermas, concerns a difference in the “standard situations” of the two media. In the case of money, parties in the “ideal-typical exchange relation”<sup>335</sup> meet each other on equal terms. Neither has the power of command over the other, and neither can insist upon the other’s participation. In the case of power, by contrast, the standard situation is one in which one party both commands and has disposal over the means necessary to enforce compliance.<sup>336</sup> Parsons sees that for power to serve as a stable medium, it must be directed toward collective goals. And yet, Habermas observes, if the powerholder is able to define “which goals are going to count as collective,” that determination must be contestable by those subject to power. Seemingly on the verge of declaring that the medium of power implies democracy, Habermas pulls back, allowing for the possibility that a tradition-based consensus rather than democratic procedures might provide the requisite legitimation.<sup>337</sup> Still, Habermas sees the significance of his insistence that power must be legitimated. He invokes the distinction between “simple imperatives” and “normatively authorized requests” that he made in differentiating communicative from strategic action.<sup>338</sup> And, aware that he has classified “normatively authorized requests” as cases of communicative action,<sup>339</sup> Habermas nevertheless suggests that “power as a medium evidently retains something of” the normatively authorized request. Here Habermas comes very close to describing “power-mediated” interaction as communicative

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 271.

<sup>335</sup> *Id.* (emphasis omitted).

<sup>336</sup> *See id.*

<sup>337</sup> *See id.* at 272 (stating that the question whether a goal is in the collective interest “calls for a consensus among the members of a collectivity, no matter whether this normative consensus is secured in advance by tradition or has first to be brought about by democratic processes of bargaining and reaching understanding.”).

<sup>338</sup> *See supra* text accompanying notes 116-21.

<sup>339</sup> *See supra* text accompanying note 116.

action.

But Habermas stops short of this description. And despite the fact that so many of his comparisons between money and power produce more differences than similarities, he pronounces power a “steering medium” alongside money.<sup>340</sup> This judgment is somewhat surprising. What it indicates is that the various factors Habermas mentions as criteria for media status are not equal in importance.

Habermas seems to rely most heavily on two general similarities between money and power. The first is that power, like money, needs to be legally institutionalized for the medium to enjoy a secure basis of trust. That factor was the reason he resisted describing language as a “medium” in the sense that money is a medium, and as noted below, it is one of the main reasons he rejects Parsons’s two other proposed media, influence and value-commitment.

The second parallel between money and power on which Habermas relies concerns the “standard situations” for each medium’s operation. In both cases, Habermas describes the standard situation as involving more or less calculating, success-oriented interaction that allows actors to circumvent the process of reaching consensus over contested validity claims. In the standard situation of power’s exercise, the directly relevant reasons for compliance are the potential sanctions over which the powerholder has disposal.<sup>341</sup> The fact that power ultimately refers back to a legitimating consensus does not mean that the motivation for compliance, in particular instances of power’s exercise, is “rational” rather than “empirical.” The system as a whole must be legitimate for power to be a stable medium. The actual exercise of power, however, often operates without detailed normative justification being given or requested.

Habermas’s classification of power as “steering medium” seems to me doubtful. But rather than belabor the similarities and differences between money and power, it makes sense to see what he can make of his decision to classify power as medium, and to see what effects his reservations about this decision have on his account of the system that develops around the power medium. These matters will become apparent when I turn to Habermas’s model of the relation between system and lifeworld.

Parsons’s remaining two media for the subsystems of the social system—influence and value-commitment can be handled more briefly. Habermas concedes that we can find names for

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<sup>340</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 272-73.

<sup>341</sup> See *id.* at 268.

these proposed media's "standard situations," "generalized values," "nominal claims," "real values," "reserve backing," and the like, that formally will parallel the account Parsons gives of money and power.<sup>342</sup> But the dissimilarities to money, and also to power, weigh against conceiving influence and value-commitment as "steering media." Both influence and value-commitment are less susceptible than either money or power to calculation, alienation, and storing.<sup>343</sup> Both "remain strongly tied to persons and particular contexts," and thus neither seems well described as a circulating medium.<sup>344</sup> Further, the "reserve backing" Parsons designates for these proposed media—cultural tradition and values—are, in Habermas's view, better understood from a "lifeworld" perspective than from a systems-theoretical angle.<sup>345</sup> Habermas, in fact, has classified the cultural tradition as a component of the lifeworld, and he has described values as relevant to both the culture and personality components of the lifeworld.<sup>346</sup> The same is true of the "real values" that Parsons nominates for influence and value commitment: "reasons for convictions" and "justifications for obligations."<sup>347</sup>

Habermas, in short, argues that both influence and value-commitment are better analyzed through a theory of communicative action rather than through systems theory. Unlike money and power, influence and value-commitment do not replace the coordinating mechanism of communicative consensus. Both influence and value-commitment, on Parsons's account, implicate reasons and justifications, not just sanctions, and thus for each we can speak of (communicatively) rational rather than empirical motivation. Finally, Habermas notes, the forms of institutionalization Parsons proposes—"prestige orderings" and "moral leadership"<sup>348</sup>—are not legally secured, and in fact, they are not really institutions at all.<sup>349</sup> For these reasons, Habermas

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<sup>342</sup> See *id.* at 273.

<sup>343</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note at 275-76.

<sup>344</sup> *Id.* at 275.

<sup>345</sup> See *id.* at 276-77.

<sup>346</sup> See *id.* at 276.

<sup>347</sup> *Id.* at 274 fig. 37.

<sup>348</sup> *Id.*

<sup>349</sup> See *id.* at 275:

Obviously we have no institutions that, in analogy to property and offices, would permit a well-circumscribed normative anchoring of influence or value commitment. The concepts invoked for that purpose—prestige ordering and moral leadership—are more an expression of embarrassment, for they scarcely allow a differentiation between the media themselves and their institutionalizations: "influence" can be more or less translated as "prestige" or "reputation," "value commitment" as "moral authority."

maintains, we have no reason to posit either influence or value-commitment as “steering media.”

Still, Habermas allows, both influence and value-commitment represent “special cases of consensus formation in language.”<sup>350</sup> In the standard situation of each—giving “advice” and “moral appeals,” respectively<sup>351</sup>—one party has special competence or authority. The other party trusts that the specially competent or authoritative party could provide reasons sufficient to justify the relevant claim, without demanding the reasons or subjecting them to criticism. In this way, “influence and value commitment are . . . forms of generalized communication that bring about a reduction in the expenditure of energy and in the risks attending mutual understanding.”<sup>352</sup> They do not replace mutual understanding in its coordinating role, “but only provide it with relief through abstraction from lifeworld complexity.”<sup>353</sup>

Such is Habermas’s account of “steering media.” Money and power, and these only, are media around which “systems,” in Habermas’s sense, can be differentiated. It should be clear, however, that we still do not know what “systems” are “in Habermas’s sense.” We need to know more about the “internal” structure of the systems he identifies, as well as much more about how Habermas hopes to link his “lifeworld” account of society and his systems-theoretical account. He addresses both issues in his account of the “uncoupling of system and lifeworld,” to which I now turn.

### 3. Uncoupling of System and Lifeworld

Each of the two methodological approaches I have considered so far describes the development of modern societies as a process of differentiation. From the perspective of the theory of communicative action, Habermas sees the differentiation of the lifeworld’s “structural components” as an essential aspect of the lifeworld’s rationalization. From the perspective of systems theory, Habermas describes the operation of two “steering media” around which the economic and administrative systems differentiate. But from what do these systems “differentiate,” other than from each other? Habermas describes the “anchoring” of the steering media “in the lifeworld,” and so presumably system

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<sup>350</sup> *See id.* at 276.

<sup>351</sup> *Id.* at 274 fig. 37.

<sup>352</sup> *Id.* at 276.

<sup>353</sup> *Id.* at 277.

and lifeworld are differentiated. But beyond this vague notion of “anchoring,” what relation might obtain between society seen as lifeworld and society seen from the point of view of systems theory?

So far I have presented the two methodological approaches almost entirely separately. Each, in Habermas’s view, accounts for some aspects of a modern society, but if we try to think of either as a model of society as a whole, we see that in each account Habermas leaves a blank spot that needs to be filled in by the other approach. The “lifeworld” perspective, Habermas says, is inadequate to account for society’s “material reproduction,” which he sees as carried out through the economic and administrative systems. To understand the structure and operation of these systems, Habermas claims, we need a systems-theoretical approach.<sup>354</sup> But that systems-theoretical approach, Habermas maintains, cannot adequately grasp the “symbolic structures of the lifeworld.” To understand those symbolic structures, we need the notion of communicative action and its complementary concept of the lifeworld. Habermas has set up his accounts of the two approaches so that they appear to be mutually complementing. With the notion of the “uncoupling of system and lifeworld,” he tries to bring them together into a single model of society.

Habermas describes the “uncoupling of system and lifeworld” as a “second-order process of differentiation.”<sup>355</sup> By this he means that his account of this uncoupling treats the differentiation of the economic and administrative systems, and the differentiation of the lifeworld’s structural components, as at the same time a further process of differentiation—the differentiation of *system from lifeworld*.<sup>356</sup> This notion of differentiation of system from lifeworld may seem an obvious consequence of characterizing state and economy as “systems” that, qua systems, are differentiated from their environments. And as I suggested, it seems to bring together two different but complementing theoretical paradigms. But what Habermas accomplishes through his notion of “uncoupling” is not so much the integration of the two paradigms as the marking of a boundary between system and lifeworld that gives each approach its own turf. To the systems-theoretical approach, Habermas assigns the domains he calls “systems”—the economy, and also the state administration. To the approach that is based in a theory of communicative action, he grants the domain that he calls “the lifeworld.” And finally, it will become clear, Habermas analyzes

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<sup>354</sup> See *supra* text accompanying notes 252-74.

<sup>355</sup> *Id.* at 155 (emphasis omitted).

<sup>356</sup> See *id.* at 153.



the relations between these domains within a systems-theoretical frame of reference.<sup>357</sup>

Habermas locates the uncoupling of system and lifeworld within an ambitious theory of social evolution. His sketch of this theory traces the development of exchange and power relations from simple “tribal” societies to modern societies.<sup>358</sup> At the initial point of this evolutionary process—“small, prestate societies,” in which kinship is “something like a total institution”<sup>359</sup>—Habermas discerns an “interweaving of system integration and social integration.”<sup>360</sup> As we travel along the social-evolutionary path, however, the two forms of integration pull apart. Described systems-theoretically, each stage is marked by a new “mechanism of system differentiation” that increases the society’s complexity.<sup>361</sup> Described in “lifeworld” terms, the transition to each stage depends upon the institutionalization of these mechanisms of systems differentiation.<sup>362</sup> Particularly important in this evolutionary process is the development of law and morality, which Habermas analyzes as a transition from “preconventional” to “conventional” to “post-conventional levels.”<sup>363</sup>

The details of this evolutionary theory are not important for my purposes. What matters is the account Habermas gives of modern society, in which, he claims, system and lifeworld are largely “uncoupled.” Two features of this account are particularly important. The first concerns the relations between systems, and the relations between system and lifeworld. The second concerns the “internal” structure of system and lifeworld.

Habermas has described the economic and administrative systems as differentiated out around the steering media of money

<sup>357</sup> See *infra* Part II.D.

<sup>358</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 156-97.

<sup>359</sup> *Id.* at 156, 157.

<sup>360</sup> *Id.* at 163.

<sup>361</sup> See *id.* at 156-72. The four mechanisms Habermas identifies are: (1) “segmentation,” or, the linking of similarly structured units (as in an association of equal families); (2) “stratification,” or, the ranking of similarly structured units (as in an association of families with different degrees of status); (3) “state organization,” or the development of a functionally specified political organization largely independent of the kinship system; and (4) “steering media,” through which first the capitalist economy, and then the modern bureaucratic state, are differentiated.

<sup>362</sup> See *id.* at 172-79.

<sup>363</sup> *Id.* at 173-79. The distinctions among “preconventional,” “conventional,” and “postconventional” come from Lawrence Kohlberg’s work in moral psychology. Habermas defines the three levels as “the preconventional level, on which only the consequences of action are judged, the conventional level, on which the orientation to norms and the intentional violation of them are already judged, and finally the postconventional level, on which norms themselves are judged in the light of principles.” *Id.* at 174; see also *id.* at 174-78 (applying Kohlberg’s schema to types of ethic and types of law).

and power. Following Parsons's account of a generalized interchange medium, Habermas takes steering media to operate in two ways: they both coordinate interaction within the relevant system and regulate the system's "external" interchange with its environments. Money and power were hardly unknown in precapitalist societies, Habermas allows, but neither operated as a genuine "steering medium."<sup>364</sup> What is decisive for the formation of "media-steered" subsystems, Habermas maintains, is that the medium comes to control the relations between system and environment.<sup>365</sup> In the case of money, Habermas argues, this occurred with the widespread institutionalization of wage labor and the development of markets for consumer goods. With these developments, the relations between the economic system and its environment of "private households" came to be mediated by money.<sup>366</sup> I point to Habermas's account of this relation because, for him, it is a relation between system and lifeworld: the "private household"—that is, the family, viewed from the perspective of the economic system<sup>367</sup>—belongs to the societal component of the lifeworld.<sup>368</sup>

This point has more general significance. Habermas's account of the "uncoupling of system and lifeworld" presents system and lifeworld as social spheres that are in actual interrelation with one another, not just as one-sided or partial constructions of society seen from two different theoretical perspectives. And the interrelation is regulated by steering media—at least from the side of the economic and administrative subsystems.<sup>369</sup> The framework in which Habermas locates this interchange between system and lifeworld is thus systems-theoretical. And within this framework the lifeworld becomes "one subsystem among others"—albeit the

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<sup>364</sup> See *id.* at 165 (re money); *id.* at 169-71, 167 fig. 25, 166 fig. 24 (re power).

<sup>365</sup> For Habermas's statement of this point with respect to money, see *id.* at 171:

Traditional societies already allow for internal and external markets; it is only with capitalism, however, that we have an economic system such that both the internal commerce among business enterprises and the interchange with noneconomic environments, private households, and the state are carried out through monetary channels . . . . Money has structure-forming effects only when it becomes an *intersystemic medium of interchange*. The economy can be constituted as a monetarily steered subsystem only to the degree that it regulates its interchanges with its social environments via the medium of money.

<sup>366</sup> *Id.* at 319.

<sup>367</sup> *Id.*

<sup>368</sup> See *id.* at 318-19 ("The institutional core" of lifeworld's "private sphere" is "the nuclear family," which "from the systemic perspective of the economy" appears as the "private household[]"); *id.* at 320 fig. 39 (identifying the "private sphere" as an "institutional order[] of the lifeworld").

<sup>369</sup> The structural components of the lifeworld do not have steering media. This difficulty appears in Habermas's general model of system/lifeworld interchange.

one in which “systemic mechanisms need to be anchored.”<sup>370</sup>

The second aspect of Habermas’s account of the uncoupling of system and lifeworld concerns the “internal” structure of both domains. Habermas has described money and power as media that address a basic problem created by the rationalization of society as lifeworld: the greater danger of dissensus, to the extent consensus is no longer prescribed in advance by tradition, and the resulting burden on interpretive energies required to reach agreement communicatively. Money and power, he has said, address this problem by circumventing the process of reaching communicative understanding.<sup>371</sup>

With his account of system and lifeworld as uncoupled, however, Habermas goes further. To his notion of steering media as regulators of systems’ internal operations, he adds the notion of “formal organizations.” By “formal organizations” Habermas means, essentially, bureaucratic organizations, whether governmental agencies or business firms, with hierarchical structures of command, defined roles and tasks, and defined behavioral expectations whose fulfillment is a condition for membership.<sup>372</sup> Formal organizations are first constituted in positive law.<sup>373</sup> Habermas speaks also of “formally organized domains of action [*Handlungsbereiche*],” by which he sometimes means “formal organizations” and sometimes means entire systems of action—the economic and administrative systems.<sup>374</sup> The two terms go together: he tends to conceive of the economic and administrative systems as networks of formal organizations.

Habermas presents formally organized domains of action as coordinated and integrated by money and power only. In these domains, Habermas claims, system and lifeworld are “uncoupled” not just in the sense that new mechanisms for coordinating action

<sup>370</sup> *Id.* at 154; *see also id.* at 173 (“In a differentiated social system the lifeworld seems to shrink to a subsystem.”).

<sup>371</sup> *See* text accompanying notes 263-64; *see also* 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 183.

<sup>372</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 172 (re conditions of membership).

<sup>373</sup> *See id.* at 309 (“[F]ormally organized” . . . social relations [are] “all social relations located in media-steered subsystems, so far as [they] are *first generated by positive law*,” including “exchange and power relations constituted by private and public law but going beyond the boundaries of organizations.”); *id.* at 357 (“The social relations we call ‘formally organized’ are those that are first constituted in forms of modern law.”); *id.* at 366 (referring to “formally organized domains of action that, as such, are directly constituted in the forms of bourgeois formal law”).

<sup>374</sup> *See id.* at 305 (state and economy as “formally organized domains of action”); *id.* at 307 (leaving unclear whether “formally organized domains of action” refers to systems, formal organizations, or both); *id.* at 318 (systems as “formally organized domains of action”).

develop that are irreducible to the mechanism of communicative understanding. Rather, system and lifeworld are uncoupled in the further sense that the lifeworld's resources become essentially irrelevant for the operation of the economic and administrative systems. These formally organized, media-steered subsystems, Habermas writes,

are consolidated and objectified into norm-free structures. Members behave toward formally organized action systems, steered via processes of exchange and power, as toward a block of quasi-natural reality; within these media-steered subsystems society congeals into a second nature. Actors have always been able to shear off from an orientation to mutual understanding, adopt a strategic attitude, and objectify normative contexts into something in the objective world, but in modern societies, economic and bureaucratic spheres emerge in which social relations are regulated only via money and power. Norm-conformative attitudes and identity-forming social memberships are neither necessary nor possible in these spheres; they are made peripheral instead.<sup>375</sup>

Habermas goes on to argue even more explicitly that “formal organizations” in both subsystems have become indifferent to each of the structures of the lifeworld—personality, culture, and society. Through their ability to prescribe membership conditions, formal organizations manage the personal dispositions, capacities, and motivations of their members.<sup>376</sup> Further, Habermas maintains, with more than a little hyperbole: “[j]ust as persons are, as members, stripped of personality structures and neutralized into bearers of certain performances, so too cultural traditions . . . are robbed of their binding power and converted into raw material for purposes of ideology planning, that is, for an administrative processing of meaning constellations.”<sup>377</sup> Finally, with respect to the society component, organizations “make themselves independent from lifeworld contexts” by “neutralizing the normative background of informal, customary, morally regulated contexts of action.”<sup>378</sup>

System and lifeworld are thus uncoupled in a radical sense. The development of money and power as media, together with the rise of formal organizations, fundamentally transforms the nature of interaction in the spheres of action that become differentiated economic and administrative systems. Habermas refers in this connection to “an uncoupling of interaction from lifeworld

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<sup>375</sup> *Id.* at 154.

<sup>376</sup> *See id.* at 308.

<sup>377</sup> *Id.* at 308-09.

<sup>378</sup> *Id.* at 309.

contexts.” In these formally organized, media-steered systems, “the lifeworld contexts in which processes of reaching understanding are always embedded are devalued in favor of media-steered interactions; the lifeworld is no longer needed for the coordination of action.”<sup>379</sup> Taken literally, this would mean that all of the lifeworld resources Habermas has identified—norms, values, institutions, interpretive schemes, personal competences and motivations—are irrelevant for the coordination of interaction in the economic and administrative spheres.

This claim is plainly false. I have argued above that strategic action, not just communicative action, draws on what Habermas calls the lifeworld’s resources. The same is true of the subtype of strategic action called “media-steered” interaction, and it is true also of interaction within formal organizations. Interaction in general, not just communicative action in particular, is informed and channeled by the interpretive schemes Habermas associates with culture, the legal (at least) institutions and norms he associates with society, and the personal competences and motivations he associates with personality. To be sure, monetary transactions, for example, are less moralized than interaction with one’s friends or family. And further, the norms and behavioral expectations imposed by formal organizations may be organization-specific, not general social norms. Finally, formal organizations may not permit discursive challenges to their rules or expectations. But only if we equate “norms” with “informal norms” and “moral norms”—excluding legal norms and organizationally imposed norms—do either of Habermas’s two systems, or formal organizations, appear to be norm-free.

In one sense, the problem is the same one I have been noting in analyzing each of Habermas’s basic concepts. His initial account of communicative action, before the amendments I discussed, tended toward an indefensibly sharp opposition between communicative and strategic action.<sup>380</sup> His account of “lifeworld” interaction focuses almost exclusively on communicative action, with strategic action appearing only as an afterthought.<sup>381</sup> And in the course of arguing that a systems-theoretical perspective must supplement his lifeworld perspective, he presented a polarizing account of the lifeworld as normatively dense and systems as “norm-free.” At these points, Habermas stylizes his distinctions between communicative and strategic, validity and power, lifeworld and system.

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<sup>379</sup> *Id.* at 183.

<sup>380</sup> See *supra* text accompanying notes 122-32.

<sup>381</sup> See *supra* text accompanying notes 247-51.

The problem becomes more acute, however, with Habermas's account of the uncoupling of system and lifeworld. There the notion of lifeworld as the resources on which actors rely shifts to a conception of the lifeworld as itself a *domain of action*—as the informally organized and communicatively structured contexts of action<sup>382</sup> that stand opposed to the formally organized and media-steered spheres of action Habermas calls “systems.” This shift in the concept of the lifeworld is essential to Habermas's “uncoupling” thesis, and it is the source of a good bit of his difficulties. It is a baffling shift as well. While perhaps the institutional complex at the core of the lifeworld's “societal” component can be seen as a domain of action, the cultural tradition and the social stock of motivations and competences cannot. Habermas simply does not explain how the lifeworld, with these “structural components,” constitutes a system or network of action that can be placed in a systems-theoretical interchange model opposite the economic and administrative systems. In his model of the system/lifeworld relation, Habermas implicitly acknowledges this point by presenting the interchange between system and lifeworld as channeled through the institutional component only.<sup>383</sup> As a result, however, he has no way to explain how interaction in the economic and administrative systems might draw upon the interpretive schemes of culture and the motivations and competences of personality. The ultimate consequence of Habermas's shifting conception of the lifeworld is an untenably stylized account: the lifeworld is the informal, customary, normatively rich home of communicative action, and systems are the strategic, calculating, formalized, normatively empty worlds of money and power.

In various passages of *Theory of Communicative Action* unrelated to the uncoupling thesis, Habermas recognizes the points I am making. For example, as I have noted, he

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<sup>382</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 185 (treating “communicatively structured contexts of action” as a synonym for “lifeworld”); *id.* at 309 (“spheres of action constituted as the lifeworld” are “communicatively structured”); *id.* (equating “lifeworld contexts” with “informal, customary, morally regulated contexts of action”); *id.* at 311 (“lifeworld contexts” as the “informal organization” underlying “formal organization”); *id.* at 333 (lifeworld as “communicatively structured life-contexts”); *id.* at 349 (lifeworld as “communicatively structured domains of action”); *id.* at 356 (lifeworld as “communicatively structured spheres of action”); *id.* at 366 (suggesting an equation between the lifeworld, on one hand, and “informally constituted domains of action” and “communicatively structured areas of action,” on the other); *id.* at 367 (discussing penetration of law as medium into “informal lifeworld contexts” and “communicatively structured areas of action”); *id.* at 368 (referring to “informally regulated spheres of the lifeworld”); *id.* at 371 (lifeworld as “communicatively structured areas of action”).

<sup>383</sup> See *id.* at 320.

acknowledges that the media of money and power must be institutionalized, and that means, in Habermas's terminology, a "recoupling" of system and lifeworld. The domains of economic and administrative action are legally constituted, and the processes of exchange and command are legally regulated through the basic "legal institutions" of private and public law. Formal organizations impose normative requirements and behavioral expectations on their members—not, perhaps, informal or moral requirements, but normative requirements notwithstanding. These points, of which Habermas is well aware, are obscured by the shift in his notion of the lifeworld and his hyperbolic notion of "uncoupling."

Further, Habermas acknowledges the stylization of his conception of formal organizations as steered only by money and power. Underneath the formal organization, he argues, is an informal organization,<sup>384</sup> and organizations could not attain their goals if communicative action were entirely set out of play.<sup>385</sup> This recognition is consistent with his statement that the "material reproduction of the lifeworld" is accomplished through communicative as well as strategic action.<sup>386</sup> The original reason for adopting a systems-theoretical perspective was not that interaction in the systems responsible for material reproduction is entirely strategic (or, by extension, media-steered). Instead, the reason had to do with the counterintuitive consequences of economic and administrative processes that are irreducible to the actor's intentions or plans, and inaccessible to a theory that confines itself to an interpretive perspective. Here, too, Habermas's decision to see system differentiation as an uncoupling from the lifeworld—and the polarizing sense he gives this notion of "uncoupling"—has obscured insights available elsewhere in his work.

Unfortunately, the model he develops to analyze the system/lifeworld relation reproduces the errors of his "uncoupling" analysis. That model is the topic of the next section.

#### D. *The System/Lifeworld Model in Theory of Communicative Action*

Habermas's working model of the relation between system

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<sup>384</sup> See *id.* at 311 (referring to "the informal organization upon which all formal organization relies").

<sup>385</sup> See *id.* at 310.

<sup>386</sup> See *supra* text accompanying notes 244-46.

and lifeworld is systems-theoretical: it presents media-steered interchange processes between the economic and administrative systems, on one side, and the lifeworld on the other. As I mentioned, Habermas conceives of this interchange as channeled, on the side of the lifeworld, through the institutional component. He distinguishes two “institutional orders” of the lifeworld that participate in this interchange. The “private sphere” is in interchange with the economic system, and the “public sphere” is in interchange with the administrative system. He presents these private and public spheres from a double perspective—first from the perspective of the lifeworld, and then from the perspective of the relevant system. (Below I present in tabular form most of the information contained in the next few paragraphs.)

According to Habermas, the “institutional core” of the private sphere is the “nuclear family.” Oddly, given its location in the societal component rather than personality, Habermas describes the primary function of the family as socialization.<sup>387</sup> From the perspective of the economic system, the family, as private-sphere environment, appears as the “private household.”<sup>388</sup> Habermas focuses on two “roles” that have “crystallized” around the interchange relation between private sphere and economic system: the roles of employee and consumer.<sup>389</sup> The employee role, he says, is “organization-dependent” and arises in legal form.<sup>390</sup> The consumer role is not legally constituted, and although it may be “defined with reference to formally organized domains of action,” it is not “dependent upon them.”<sup>391</sup> These are the channels through which the interchange between economy and private sphere operates.

Habermas follows this same pattern in describing the interchange between public sphere and administrative system. The “institutional core” of the public sphere consists in “communicative networks amplified by a cultural complex, a press, and later, mass media.”<sup>392</sup> Habermas notes that the public sphere is really two public spheres—an artistic/literary sphere and a political public sphere.<sup>393</sup> Only the latter enters the model. In this political public sphere, Habermas maintains, “a public of citizens” engages

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<sup>387</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 319. Habermas has attributed the socialization function to the personality component rather than the societal component of the lifeworld. See *supra* text accompanying notes 195-202.

<sup>388</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 319.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 319.

<sup>391</sup> *Id.* at 321 (emphasis omitted).

<sup>392</sup> *Id.* at 319.

<sup>393</sup> See *id.*



in political participation.<sup>394</sup> Viewed from the perspective of the administrative system, however, the public sphere is “the environment relevant to generating legitimation.” The relevant roles are “client” of government services and “citizen[] of the state.”<sup>395</sup> The client role, like the employee role, is “organization-dependent.” The citizen role, like the consumer role, is defined with respect to, but is not “dependent upon,” the formally organized domain of the state administration.<sup>396</sup>

Because Habermas has selected a systems-theoretical interchange model, he presents the relations between system and lifeworld as regulated by steering media. Parsons presented the relation between systems as involving a “double interchange,” mediated by both media proper to the related systems. Habermas, however, has to improvise here. The only media he has identified are money and power, and so the interchange between system and lifeworld can be regulated only by these two media. This puts Habermas in a difficult position. On one hand, he cannot consistently attribute either the money or the power medium to the lifeworld. On the other, hand, the model of interchange he borrows from Parsons requires him to do just that.

The interchange relations Habermas identifies are as follows. The private sphere, via the employee role and the power medium, contributes labor power to the economic system. In exchange, the economic system provides income via the money medium. The private sphere, via the consumer role and the money medium, contributes demand for goods and services. In exchange, the economic system provides those goods and services by the money medium.<sup>397</sup>

In the interchange between public sphere and administrative system, the public sphere, via the client role and the money medium, contributes taxes to the administrative system. In exchange, the administrative system provides “organizational accomplishments” via the power medium. The public sphere, via the citizen’s role and the power medium, contributes “mass loyalty” to the administrative system. In exchange that system provides political decisions via the power medium.<sup>398</sup>

The model,<sup>399</sup> presented schematically, looks like this:

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<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 321.

<sup>397</sup> *See id.* at 320 fig. 39.

<sup>398</sup> *See id.*

<sup>399</sup> *See id.* In the following table, “M” = money medium; “P” = power medium. The apostrophes following the “P” or “M” that designate contributions from the lifeworld are Habermas’s; they acknowledge that neither the money medium nor the power medium is

*Habermas's Model of System/Lifeworld Interchange*

Lifeworld "institutional order"	Lifeworld role	Factor/product	Medium	System
Private sphere	1) employee	Labor power	— P' →	Economic
	2) consumer	Income from employment	← M —	
		Goods and services	← M —	
	Demand	— M' →		
Public sphere	1a) client	Taxes	— M' →	Administrative
	2a) citizen	Organizational accomplishments	← P —	
		Political decisions	← P —	
		Mass loyalty	— P' →	

Habermas describes the process by which lifeworld processes become cognizable in terms of steering media as "real abstractions." This term, which Habermas attributes to Marx,<sup>400</sup> is significant in both its parts. With the word "abstraction," Habermas means to highlight a certain conversion process of concrete "lifeworld" values into abstract "system" values that will be comprehensible within the system's code. Following Marx, Habermas describes, as one of the processes of abstraction, the commodification of wage labor—the conversion of concrete, individual capacities for labor into quantities of abstract labor-power, comparable along the scale of money prices.<sup>401</sup> A similar process of abstraction operates through the consumer role, in the conversion of "use-value orientations" into abstract demand, expressed in terms of willingness and ability to pay.<sup>402</sup> So, too, with the conversion, in the citizen's role, of "publicly articulated opinions and collective expressions of will" into "mass loyalty."<sup>403</sup> By the word "real" in the expression "real abstractions," Habermas means to signal that these processes are not "abstractions" in a purely intellectual sense but are real social processes.

Habermas sees his project in *Theory of Communicative Action* as a reformulation of the critique of capitalist societies, as presented first by Marx, then by Georg Lukacs, and then by

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proper to the lifeworld.

<sup>400</sup> See *id.* at 322.

<sup>401</sup> See *id.* at 335-36.

<sup>402</sup> *Id.* at 322.

<sup>403</sup> *Id.*

Habermas's "Frankfurt School" predecessors (principally Max Horkheimer and Theodor Adorno).<sup>404</sup> One significant distinction between Habermas's approach and the approaches of his various predecessors is that Habermas believes these processes of "real abstraction" are not necessarily pathological. Neither the organization of media-steered subsystems as such, nor the processes of "abstraction" as such, count as social pathologies.<sup>405</sup> But Habermas designs his model as a framework for analyzing developments that would count as crises or social pathologies.

Habermas identifies a number of different types of crisis or social pathology. Two to which he pays little attention in *Theory of Communicative Action* are what he calls "steering crises"—"internal" crises of the two media-steered subsystems, whether in the form of "economic" crisis or "planning crisis."<sup>406</sup> In contrast to orthodox marxist approaches, Habermas maintains that, with welfare-state attempts to regulate the business cycle, tendencies toward economic crisis largely have been displaced into the administrative system.<sup>407</sup> Of greater interest to Habermas are crises in symbolic reproduction. He mentions the possibility that these may be "internally" induced: for example, the "cultural impoverishment of everyday communicative practice" may arise with the "elitist splitting-off of expert cultures from contexts of communicative action in daily life."<sup>408</sup> But he focuses more intensively on the crises of symbolic reproduction that are "externally" induced, through incompatibility between the forms of organization and rationality proper to system and lifeworld.

Habermas refers to this last kind of crisis as "inner

<sup>404</sup> See 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 399; 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 302. For Habermas's interpretation and critique of Lukacs and the Frankfurt School, see 1 THEORY OF COMMUNICATIVE ACTION, *supra* note 5, at 339-99; 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 332-34, 389-91.

<sup>405</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 322-23 (describing development of media-controlled relations between system and lifeworld as "real abstraction"); *id.* at 330-31 (uncoupling of system and lifeworld not necessarily pathological).

<sup>406</sup> *Id.* at 385. Habermas's brief discussion of this kind of crisis is not altogether clear. He seems first to suggest that serious "disequilibria" in either subsystem can constitute a "steering crisis," but then he suggests that systems disequilibria become "crises" only when system performance remains substandard *and*, as a consequence, the lifeworld's symbolic reproduction is impaired. See *id.* The latter formulation is more consistent with Habermas's usual position. See LEGITIMATION CRISIS, *supra* note 4, at 3 ("[O]nly when members of a society experience structural alterations as critical for continued existence and feel their social identity threatened can we speak of crises.").

<sup>407</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 385; see also LEGITIMATION CRISIS, *supra* note 4, at 61-68, 93.

<sup>408</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 330; see also *id.* at 327, 355.

colonization,” or, the “colonization of the lifeworld.”<sup>409</sup> This social pathology arises when crises in the economic and administrative systems “can be avoided only at the cost of disturbances in the symbolic reproduction of the lifeworld.”<sup>410</sup> Or, in Habermas’s more colorful description of this social pathology: “the imperatives of autonomous subsystems make their way into the lifeworld from the outside—like colonial masters coming into a tribal society—and force a process of assimilation upon it.”<sup>411</sup> Thus, the term “colonization.” Habermas’s idea is that “colonization” occurs when the informally organized, communicatively structured domains of action that Habermas has come to call the lifeworld—the domains of action that are primarily responsible for cultural reproduction, social integration, and socialization—are disrupted by the penetration of “alien,” systemic forms of organization and rationality.<sup>412</sup>

According to Habermas, tendencies toward colonization are channeled through the interchange relations his model has identified. The roles of employee, consumer, citizen, and client are the points of incursion.<sup>413</sup> Habermas is particularly interested in two of those roles: consumer and client. The reason for focusing on these roles, according to Habermas, is that with the pacification of class conflict and the depoliticization of the citizen’s role, the consumer and client roles are the more likely sites of conflict.<sup>414</sup> These roles, Habermas claims, have been “upgraded”<sup>415</sup> under recent conditions, as a sort of “compensation” for employees’ relative lack of power in the workplace and the “neutralized” citizen’s role.<sup>416</sup> And thus in these roles, Habermas maintains, the “privatized hopes for self-actualization and self-determination are primarily located.”<sup>417</sup>

Of these two roles, Habermas spends most of his energy on the “client” role. He calls the colonization tendency in the relation between administrative system and client of welfare-state services

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<sup>409</sup> Sometimes “colonization” appears in the translations as “colonialization.”

<sup>410</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 305. In an alternative and less clear formulation, Habermas writes that we can speak of colonization when “the destruction of traditional forms of life can no longer be offset by more effectively fulfilling the functions of society as a whole.” *Id.* at 322.

<sup>411</sup> *Id.* at 355.

<sup>412</sup> *See id.* at 330-31.

<sup>413</sup> *See id.* at 349.

<sup>414</sup> *See id.* at 348-51.

<sup>415</sup> *Id.* at 350.

<sup>416</sup> *Id.* at 349-50. Habermas is not altogether clear about the employee role. He notes that compensation and security against risk have improved, but that work remains “heteronomously determined.”

<sup>417</sup> *Id.* at 356.

“juridification”—the extension of formal law to areas previously regulated only informally, and the increasing density of legal regulation.<sup>418</sup> The term “juridification” does not by itself signify pathological tendencies, Habermas cautions. The development of the constitutional state (as in the nineteenth-century German *Rechtsstaat*), and the institution of the democratic constitutional state also count as “juridification,” and the institutions established then were, compared to their predecessor institutions, “unambiguously freedom-guaranteeing.”<sup>419</sup>

With respect to these criteria of “freedom-guaranteeing” and “freedom-depriving,” however, Habermas discerns an ambivalence in the most recent “wave” of juridification. On one hand, welfare-state programs compensate for risks by creating legal entitlements to income in case of need or inability to work. But on the other hand, this “historical progress”<sup>420</sup> has costs that Habermas emphasizes. The bureaucratic structure of the administrative system requires “a centralized and computerized handling of social exigencies by large, distant organizations.”<sup>421</sup> The individualizing and bureaucratic form in which assistance is offered affects the “self-image of the person concerned,” Habermas maintains, and the availability of governmental aid weakens the “readiness of solidaric communities to provide subsidiary assistance.”<sup>422</sup> Government-provided therapeutic procedures only reproduce “the contradictions of welfare-state intervention . . . at a higher level”: the bureaucratic form of aid, Habermas claims, is inconsistent with the therapeutic aim of establishing “independence and self-reliance.”<sup>423</sup> Habermas thus identifies a “*dilemmatic structure*” to welfare-state juridification:

[W]hile the welfare-state guarantees are intended to serve the goal of social integration, they nevertheless promote the disintegration of life-relations when these are separated, through legalized social intervention, from the consensual mechanisms that coordinate action and are transferred over to media such as power and money.<sup>424</sup>

Habermas sketches the lines of this thesis through examination of

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<sup>418</sup> *Id.* at 357.

<sup>419</sup> *But cf.* John Tweedy & Alan Hunt, *The Future of the Welfare State and Social Rights: Reflections on Habermas*, 21 J.L. & SOC. 288, 300, 307 (1994) (suggesting that the institutionalization of civil and social rights were not unambiguously freedom-guaranteeing because the former rights are connected with the development of a capitalist economy and the latter rights required state “surveillance and normalization”).

<sup>420</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 362.

<sup>421</sup> *Id.* at 363.

<sup>422</sup> *Id.* at 362.

<sup>423</sup> *Id.* at 363.

<sup>424</sup> *Id.* at 364.

(then) recent empirical research in social-welfare law, school law, and family law.<sup>425</sup>

This research, however, is by now dated, and it was directed more to a German than an American audience. And in any event, for present purposes the details of Habermas's argument are less interesting than the position he assigns to law in this process of juridification. A legally oriented reader will have detected that my account of Habermas's basic concepts, as they stood prior to Habermas's most recent work, says little directly about law. We know that developments in law are, for Habermas, important to the rationalization of the lifeworld and the development of media-steered systems. Law is one of the "cultural systems of action" established, in early modernity, with the rationalization of culture.<sup>426</sup> The basic "legal institutions" of private and public law institutionalize the media of money and power.<sup>427</sup> And the media-steered subsystems, as well as their constitutive "formal organizations," are created and regulated by law.<sup>428</sup> But law is, in Habermas's scheme, neither its own subsystem nor a structural component of the lifeworld. The position it occupies with respect to the system/lifeworld division is thus unclear.

In his account of "juridification," Habermas suggests that law may operate as a steering medium. In "[m]ost areas of economic, commercial, business, and administrative law," he says, "the law is combined with the media of power and money in such a way that it takes on the role of a steering medium itself."<sup>429</sup> Like the other steering media, he says, law-as-steering-medium must be secured by the basic "legal institutions" he has identified.<sup>430</sup> But because of its connection to the media of money and power, law as medium is "technicized and de-moralized," and it can be evaluated not substantively but only according to its functionality or instrumental success.<sup>431</sup> Further, as concerns the juridification thesis, Habermas argues that law, as a steering medium, has been an instrument of the welfare-state project of taming "modern relations of power and dependence that arose with the capitalist enterprise [and] the bureaucratic apparatus of domination."<sup>432</sup> His classification of law as a steering medium in this project, too, is part of his diagnosis that welfare-state interventionism has tended

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<sup>425</sup> See *id.* at 363-64, 368-73.

<sup>426</sup> See *supra* text accompanying note 226.

<sup>427</sup> See *supra* text accompanying notes 316-17.

<sup>428</sup> See *supra* text accompanying notes 372-74.

<sup>429</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 365.

<sup>430</sup> See *id.*

<sup>431</sup> *Id.* at 366.

<sup>432</sup> *Id.*

to disrupt the communicatively structured, informally organized domains it regulates.

Habermas did not work out the concept of law as a medium in the way that his system/lifeworld model would demand—with a separate system it steers, and an account of its code, standard situation, generalized value, and other medium-defining characteristics. And in his most recent work, Habermas repudiates the idea of law as steering medium.<sup>433</sup> We are still left, then, with the question of law's position in Habermas's system/lifeworld model. The account he has given suggests that law is relevant to both system and lifeworld, and that in that respect its significance is ambivalent. But law finds no particular place in Habermas's model. It appears, variously, as a "cultural system of action" alongside science and art,<sup>434</sup> as part of the societal component of the lifeworld (or, at least, the fundamental principles of private and public law appear there as "legal institutions"), and as a mechanism that regulates media-steered interaction in the economic and administrative systems. In Habermas's recent work on law, he retains the mood of ambivalence, but with a much fuller and more coherent treatment of law's structure and operation.

The problems in *Theory of Communicative Action's* treatment of law are paralleled in its treatment of politics. As with his account of law, Habermas's account of political institutions and processes stretches across the divide between system and lifeworld. One would think, at first, that the state would count as part of the "institutional complex" that Habermas calls the societal component of the lifeworld. And Habermas does describe the constitutionally established framework of state offices as part of the societal component—though he does not make clear whether he means the legal framework that organizes those offices, or the political framework of offices themselves. Habermas notes also that the exercise of political power must be legitimated, and by "legitimated" he means not only legally institutionalized but also normatively justified.<sup>435</sup> But once Habermas has introduced the systems-theoretical conception of political power, he analyzes what one might call the "political system" almost exclusively as the formally organized, media-steered "administrative system" that stands on the "system" side of the system/lifeworld divide.

No doubt this classification of political institutions as both system and lifeworld, like Habermas's similar treatment of law, reflects his ambivalence about the state. It reflects, also, his

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<sup>433</sup> See Between FACTS AND NORMS, *supra* note 14, at 562 n.48.

<sup>434</sup> See *supra* text accompanying notes 222-26.

<sup>435</sup> See *supra* text accompanying notes 332-39.

determination to think about democracy in a way that takes account of modern complexity. Yet Habermas's discussion of political institutions, rather than genuinely reconciling complexity and democracy, puts democracy on one side of the divide and complexity on the other. Habermas's account of the lifeworld's rationalization presents democracy, and the idea of the discursive production and justification of political and legal norms, as one of the West's foremost accomplishments. But his systems-theoretical account presents an administration that operates through the steering medium of power, with the "standard situation" of power's operation described as the "following of imperatives." And the model of the relation between public sphere and administrative system describes a process of abstraction—not necessarily pathological—in which democratic impulses are transformed, via the power medium, into "mass loyalty." Habermas's more recent work, we will see, relies on a more complex notion of power that is not reducible, in its entirety, to imperative command.<sup>436</sup> And this more recent work, also, is more attentive to what Habermas calls the political public sphere, as well as the relations between that sphere and formal governmental institutions. These changes mark a substantial improvement over the account given in *Theory of Communicative Action*.

I have suggested that Habermas's analysis of the uncoupling of system and lifeworld unnecessarily stylizes and polarizes what he wants to describe under the two aspects. The interchange model Habermas uses to bring together the two stylized accounts does not correct this problem. And the problem is not just that the model is incomplete—addressing, as Habermas acknowledges, only the relation between the societal component of the lifeworld and the two media-steered subsystems.<sup>437</sup> The problem is one of principle, not just coverage. The interchange model is systems-theoretical, not neutral between the systems and lifeworld perspectives. On that model's premises, the interchange among social spheres can be understood only as media-steered. Thus, Habermas's difficulty in accounting for the relation between system and lifeworld: the model demands media for the various lifeworld components, and Habermas denies that any are to be found. And thus, Habermas's unconvincing imputation of money

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<sup>436</sup> Habermas had developed the beginnings of this notion in an essay published in 1979. See Jürgen Habermas, *Hannah Arendt's Communications Concept of Power*, SOCIAL RESEARCH, Spring 1977, at 3. But in *Theory of Communicative Action*, published just four years later, this "communications concept of power" gives way to the concept of power as steering medium.

<sup>437</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 319.



and power to the public and private spheres in their interchange with the administrative and economic systems, respectively. This ad hoc solution leads Habermas to claim, for example, that the input of labor power to the economic system operates through the power medium. Power is the more plausible choice, given the alternative between money and power, but the sale of one's labor power is not best understood as the giving of a command. These apparently technical slips and inconsistencies are symptoms of a more serious problem: the failure to reconcile Habermas's "lifeworld" approach with his Parsons-inspired notions of systems theory.

In the following sections I turn to Habermas's recent work on law, with an emphasis on how he reformulates the system/lifeworld model to make it more useful in the understanding of law and politics.

### III. SYSTEM, LIFEWORLD, AND HABERMAS'S "COMMUNICATION THEORY OF SOCIETY"

At the very outset of *Between Facts and Norms*, Habermas declares that "the theory of communicative action . . . constitutes a suitable context for a discourse theory of law."<sup>438</sup> He does not so much explain the basic concepts of his earlier theory as invoke them. But as I explain in Part III.A below, such conceptual explication as he provides is generally consistent with the analysis provided in *Theory of Communicative Action*.

Still, in developing the "communication theory of society" in which his "discourse theory of law" is to be situated, Habermas departs from his earlier understanding of the relation between system and lifeworld. One reason is that Habermas, for the first time, is giving systematic attention to law, and it turns out that law does not fit neatly into either the "system" or "lifeworld" category. To some extent this was true even in *Theory of Communicative Action*—recall Habermas's distinction between "law as medium" (system) and "law as institution" (lifeworld).<sup>439</sup> But *Between Facts and Norms* repudiates that distinction. And in placing law on center stage, the question of law's relation to the system/lifeworld distinction becomes more pressing. Habermas's initial solution to

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<sup>438</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 7 ("I pursue the dual goal of explaining how the theory of communicative action accords central importance to the category of law and why this theory in turn constitutes a suitable context for a discourse theory of law.").

<sup>439</sup> See *supra* text accompanying notes 429-34.

this difficulty is a proliferation of metaphors: law, he says, “mediates” between system and lifeworld or operates as a “transformer” or “hinge” between system and lifeworld.

In Part III.B, I discuss Habermas’s attempt to give these metaphors more precise content. As I noted in introducing this Article, Habermas’s general aim in the “communication theory of society” is to explain how the “communicative power” developed in citizens’ public-sphere discussion might influence and check state “administrative power”—and also how it might not. The theoretical construction Habermas develops here is the “model of the circulation of political power.”<sup>440</sup>

To some extent, I argue, the model of the circulation of power can be understood as consistent with the distinction between system and lifeworld. The model provides greater detail concerning the political public sphere, the “lifeworld environment” to the administrative system in *Theory of Communicative Action*. It presents, also, the idea of “civil society” as an elaboration of the lifeworld’s “private sphere.” Many of the innovations in *Between Facts and Norms*, then, can be understood as attempts to flesh out, or to adjust, the framework presented in *Theory of Communicative Action*.

But despite Habermas’s continued allegiance to the system/lifeworld distinction, I argue in Part III.C, the model of the circulation of power in fact reworks the notions of system and lifeworld so substantially that Habermas’s official conceptions no longer apply. Power, even as it operates in the political system’s core, no longer can be understood as simply the “steering medium” Habermas described. The relation Habermas describes as one between “system” and “lifeworld” no longer is channeled exclusively through steering media, as the old interchange model prescribes. Law (or, the legal system) straddles the distinction that was supposed to constitute the theory’s axis. And on the “lifeworld” side, Habermas’s continued reference to the three “structural components” (culture, society, and personality) does no work for him. As the reader might guess, I think these developments in Habermas’s model of society are for the best, but in moving away from the older notions of system and lifeworld, Habermas leaves basic conceptions in his model essentially untheorized.

I argue that Habermas’s revised model can be shored up on both the “system” and “lifeworld” side of his basic distinction. On the system side, I suggest in Part IV that Habermas’s conception in

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<sup>440</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 341.

fact approaches the post-Parsons “autopoietic” systems theory of Niklas Luhmann—even as Habermas generally polemicizes against that theory. Further (but selective) appropriation of autopoietic concepts, I argue, would improve Habermas’s social theory. On the other side of Habermas’s basic distinction, I argue that the concept of lifeworld as separate social sphere should be rejected entirely.

#### A. *The Official Account of “Lifeworld” and “System”*

Habermas’s explication of the lifeworld concept, though abbreviated, tracks the account given in *Theory of Communicative Action*. As before, he presents the lifeworld first in Husserlian and Schutzian terms, as the unproblematic, taken-for-granted background of human action.<sup>441</sup> But also as before, the idea of the “rationalization of the lifeworld” leads Habermas quickly to a different conception. In the course of that rationalization, Habermas claims, the lifeworld’s “structural components,” still fused in “archaic” societies,<sup>442</sup> differentiate into culture, society, and personality.<sup>443</sup> And with that rationalization, social formations’ “symbolic reproduction”—cultural reproduction, social integration and socialization—comes to depend more heavily upon participants’ communicative achievements.<sup>444</sup>

This account, like the parallel account in *Theory of Communicative Action*, works two changes on the original phenomenological conception of the lifeworld. First, Habermas’s emphasis on communicative action as mechanism for symbolic reproduction leads him to see the lifeworld as centered around specifically *communicative* action, not so much as the background to *all* social action. “The lifeworld,” Habermas writes in *Between Facts and Norms*, “is constituted from a network of communicative actions. . . .”<sup>445</sup> Second, Habermas’s discussion of the lifeworld’s

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<sup>441</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 22, 23 (lifeworld as “unmediated certainty,” “all-penetrating yet latent and unnoticed presence,” “background knowledge,” and “resource” that resists being “thematized”).

<sup>442</sup> *Id.* at 23.

<sup>443</sup> See *id.* at 26 (referring to “differentiated . . . lifeworlds”); *id.* at 55 (“culture, society, personality structures” as “components” of the lifeworld). See also *id.* at 353 (noting the three components and their functions of symbolic reproduction).

<sup>444</sup> See *id.* at 324 (describing reproduction of modern lifeworlds as occurring “only through communicative action, and that means through processes of reaching understanding that depend on the actors’ responding with yes or no to criticizable validity claims”).

<sup>445</sup> *Id.* at 80. See also *id.* at 354 (“The lifeworld forms, as a whole, a network composed of communicative actions.”). Habermas allows that strategic action, not just

rationalization turns the notion into a *concept of society*—a concept that takes on substantive theoretical significance. Social formations, conceived as lifeworlds, have “structural components.”<sup>446</sup> In the course of historical development, they have been “rationalized,” in the sense that their cultural traditions, social institutions, and patterns of socialization have come to depend increasingly on specifically communicative action, and particularly on rational criticism. This revised conception of the lifeworld is, in the first instance, a conception of whole social formations as lifeworlds.

But again following the path marked in *Theory of Communicative Action*, the term “lifeworld” soon comes to refer not to whole social formations but to only certain social spheres. As before, this redefinition depends on two premises: the centering of the lifeworld concept around communicative action, and the idea that system and lifeworld have become uncoupled.

Habermas’s account of the uncoupling of system and lifeworld is consistent with his account in *Theory of Communicative Action*. With the rationalization of society as lifeworld, he argues, “the risk of dissension increases with the scope for taking yes/no positions on criticizable validity claims.”<sup>447</sup> At the same time, the potential for social conflict increases with the differentiation of interest positions and the “unshackl[ing]” of “self-interested pursuit of one’s own success.”<sup>448</sup> The burden of social integration, then, shifts to the achievements of communicative action, while at the same time that very integration is endangered by the strategic pursuit of individual interests.<sup>449</sup>

Money and power, Habermas confirms, operate as “steering media” that can relieve the burden on communicative action. They are mechanisms of “system integration,” not (as with “values, norms, and mutual understandings”) “social

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communicative action, is possible “in the lifeworld.” *Id.* at 524 n.18. But while the lifeworld provides a “background” for strategic action, it is “neutralized in its action-coordinating force.” *Id.* By this cryptic phrase Habermas means that to strategic actors, norms are just “social facts,” not normatively obligatory.

<sup>446</sup> Habermas’s continued use of the “components” idea is in tension with his claim that “[t]he communicative concept of the lifeworld breaks with the idea of a whole composed of parts.” *Id.* at 80. The discussion following this quotation, however, suggests that he means that the lifeworld’s “components” are not separate but interrelated, *see id.*, or as he puts it elsewhere, “intertwined.” *Id.* at 55.

The idea of culture, society, and personality as “components” is in tension, also, with Habermas’s statement that “[t]he lifeworld forms, as a whole, a network composed of communicative actions.” *Id.* at 354 (stating both ideas in the same paragraph).

<sup>447</sup> *Id.* at 25.

<sup>448</sup> *Id.*

<sup>449</sup> *See id.* at 26.

integration.”<sup>450</sup> These media deploy “special codes” that abstract from ordinary language<sup>451</sup> and permit users to circumvent the process of reaching communicative agreement (*i.e.*, consensus over claims to validity). Although Habermas omits the lengthy discussion of system differentiation he provided in *Theory of Communicative Action*,<sup>452</sup> he characterizes the end result of that process in the same terms. The economic and administrative system differentiate out from the lifeworld’s societal component<sup>453</sup> and “separate[] from the lifeworld.”<sup>454</sup> These systems, which operate through “markets and governmental bodies,” respectively,<sup>455</sup> “become “independent vis-à-vis socially integrated spheres of action, that is, spheres integrated through values, norms, and mutual understanding.”<sup>456</sup>

Thus for Habermas, the lifeworld concept ultimately is a partial conception of society, referring to “socially integrated spheres of action” that are distinct from the economic and administrative systems. As in *Theory of Communicative Action*, the methodological distinction between systems theory and action theory becomes a substantive distinction that divides the social turf. And as before, the question arises: what is the relation between system and lifeworld?

A complete answer to this question will require examination of Habermas’s “circulation of power” model. The preliminary answer, however, begins with Habermas’s claim, consistent with *Theory of Communicative Action*, that the “steering media” of money and power must be “anchored in the society component of the lifeworld” through “legal institutionalization.”<sup>457</sup> Habermas embellishes on this “anchoring” idea by describing law as a “hinge between system and lifeworld,”<sup>458</sup> or alternatively, as a “transformer in the society-wide communication circulating between system and lifeworld.”<sup>459</sup>

What Habermas means by these catchphrases is two things. First, modern law can be analyzed in both system and lifeworld

<sup>450</sup> *Id.* at 39. As before, the term Habermas uses to include both system and social integration is “societal integration”—*gesellschaftlich* rather than *sozial*.

<sup>451</sup> *See id.* at 56, 354.

<sup>452</sup> *See supra* text accompanying notes 356-79.

<sup>453</sup> *See BETWEEN FACTS AND NORMS, supra* note 14, at 55-56; *see also id.* at 354.

<sup>454</sup> *Id.* at 40.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at 354.

<sup>457</sup> *Id.*; *see also id.* at 40.

<sup>458</sup> *Id.* at 56.

<sup>459</sup> *Id.* at 81; *see also id.* at 56 (describing law as a “transformer” that first guarantees that the socially integrating network of communication stretched across society as a whole holds together”).

terms. Viewed from the “system” side of the system/lifeworld distinction, law institutionalizes the power medium by establishing the framework of offices and specifying rules of official command. It institutionalizes the money medium—not just in the sense of establishing a currency, but also in the sense of establishing and enforcing private-law rules for money-mediated transactions.<sup>460</sup> From the “lifeworld” side, legal rules and legal institutions “belong[] to the societal component of the lifeworld.”<sup>461</sup> In developing his “discourse theory of law,” with its emphasis on participatory democratic lawmaking as the source of legal legitimacy, Habermas makes clear that law, to the extent that it is accepted as legitimate, is a source of social integration.<sup>462</sup> The production and reproduction of legitimate law, then, is part of the symbolic reproduction of the lifeworld. Finally, in Habermas’s analysis of the democratic lawmaking process, the production of legitimate law connects the “communicative power” of citizens’ public-sphere discussion with the “administrative power” that operates within the differentiated administrative system. In these ways, law operates as “hinge” between system and lifeworld.

The second sense of Habermas’s metaphors is signaled more clearly in the “transformer” than the “hinge” metaphor. Habermas, both in *Theory of Communicative Action* and in *Between Facts and Norms*, presents the media of money and power as specialized languages, differentiated from ordinary language. To the extent that the democratic lawmaking process successfully produces valid law, Habermas suggests, it mediates between the ordinary-language communication of the political public sphere and the specialized languages of (administrative) power and money.<sup>463</sup> Habermas’s idea here is that legal validity has two sides. On one hand, modern law claims to be legitimate—that is, to be worthy of citizens’ rational assent—and to that extent it is related to the “[n]ormatively substantive messages” of citizens’ political communication in the public sphere.<sup>464</sup> On the other hand, modern law leaves open the possibility of a different attitude—obedience rooted not in normative conviction, but in the fear of sanctions for non-compliance. According to Habermas, this second aspect of legal validity is tailored to the strategic pursuit of economic

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<sup>460</sup> The account of this “institutionalization” is thin in *Between Facts and Norms*. He refers to the “legal institutionalization of markets,” *id.* at 75, but without further analysis.

<sup>461</sup> *Id.* at 80. Habermas adds that “legal symbolism,” as a body of knowledge, is “represented” in the cultural component, and that “competences acquired via legal socialization” are “represented” in the personality component. *Id.* at 81.

<sup>462</sup> *See id.* at 38-39, 386.

<sup>463</sup> *See id.* at 55-56, 81, 302, 354.

<sup>464</sup> *Id.* at 56.

interests and the exercise of administrative power (which is, essentially, the power of command). In this sense, Habermas claims, law “accepts” the normative “messages” that originate in lifeworld political communication among citizens and “puts these into a form that is comprehensible to the special codes of the power-steered administration and the money-steered economy.”<sup>465</sup> And thus “the language of law . . . can function as a transformer in the society-wide communication circulating between system and lifeworld.”<sup>466</sup>

I will consider in the next section Habermas’s attempt, with his “model of the circulation of power,” to give the “hinge” and “transformer” metaphors more precise content. For the moment, it’s enough to note that the image of law as “hinge” or “transformer” raises questions for Habermas’s understanding of the system/lifeworld relation. The first question concerns Habermas’s location of “legal institutions” in the lifeworld’s societal component. In *Theory of Communicative Action*, Habermas seemed to understand “legal institutions” as basic legal principles, especially those of contract and property law.<sup>467</sup> But what of “legal institutions” such as courts? How are they to be understood? Do they have a double status, such that they belong to both system and lifeworld? Or, as the “hinge” and “transformer” metaphors suggest, are they somehow intermediate between system and lifeworld, or astride the system/lifeworld distinction?

Second, how is it that a lifeworld sphere—the political public sphere—can send “normatively substantive messages” to the administrative system? The system/lifeworld model developed in *Theory of Communicative Action* required that interchange between system and lifeworld be channeled by system “steering media.” Habermas’s idea of “administrative power” conforms to the conception of a “steering medium,” but “communicative power” does not. How, then, does this communication between system and lifeworld occur? The question is difficult because Habermas’s conceptual explication of “lifeworld,” “system,” and “steering medium” tracks without explicitly revising the accounts given in *Theory of Communicative Action*.

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<sup>465</sup> *Id.*

<sup>466</sup> *Id.*; see also *id.* at 56 (describing law as a “‘transformer’ that first guarantees that the socially integrating network of communication stretched across society as a whole holds together”).

<sup>467</sup> See *supra* text accompanying notes 190-93, 314-17, 426-34.

### B. *The Model of the Circulation of Power*

In attempting to situate his discourse theory of democracy social-theoretically, Habermas introduces what he calls a model of the “constitutionally regulated circulation of power.”<sup>468</sup> In some ways, this model can be understood as specifying more precisely *Theory of Communicative Action*’s account of “interchange” between lifeworld and administrative system. Habermas prefaces his introduction of the model with a quick run-through of the distinction between system and lifeworld,<sup>469</sup> and he provides an expanded analysis of the public sphere and “private sphere”—the lifeworld environments to the administrative system in *Theory of Communicative Action*.

But Habermas borrows the model from Bernhard Peters,<sup>470</sup> and Peters is critical of the “dualistic conception of system and lifeworld.”<sup>471</sup> Unsurprisingly, then, the new model conceives of the “circulation of power” in a way that avoids some of the difficulties of Habermas’s earlier system/lifeworld model. The changes are necessary, given the objectives Habermas pursues in his work on law and democracy—objectives that are fundamentally different from those pursued in *Theory of Communicative Action*.

Habermas’s earlier system/lifeworld model was the centerpiece of a politically defensive crisis theory. Apparently skeptical about the possibility of genuine democracy, Habermas argued in *Theory of Communicative Action* that the “colonizing” tendencies of the economic and (especially) administrative systems face structural limits: limits rooted in the functional necessities of symbolic reproduction. *Between Facts and Norms*, by contrast, pursues a more “offensive” strategy. The “reconstructive” part of Habermas’s discourse theory of law and democracy investigates not so much the functional necessities of “symbolic reproduction” as the explicitly normative principles of the constitutional state. The leading principle, according to Habermas, is that the state’s exercise of “administrative power” must be linked to citizens’ articulation of communicative power in the political public sphere. And thus, rather than see the role of the political public sphere as the production of only “mass loyalty”—the picture developed in *Theory of Communicative Action*’s system/lifeworld interchange

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<sup>468</sup> The model is set out in *BETWEEN FACTS AND NORMS*, *supra* note 14, at 354-59.

<sup>469</sup> *See id.* at 353-54.

<sup>470</sup> *See id.* at 354 (citing BERNHARD PETERS, *DIE INTEGRATION MODERNER GESELLSCHAFTEN* (1993)).

<sup>471</sup> Bernhard Peters, *On Reconstructive Legal and Political Theory*, 20 *PHIL. & SOC. CRITICISM* 101, 125 (1994). For the full set of criticisms, see *id.* at 120-26.



model—Habermas now sees the political public sphere as normatively influencing the course of official decision and as productive of law. To be sure, the point of the “communication theory of society” is to discover the “inertial moments” that resist the realization of democratic ideals.<sup>472</sup> But the emphatically pro-democratic thrust of Habermas’s project makes the old system/lifeworld model inappropriate.

The idea of the new “circulation of power” model, then, is to show more precisely how citizens’ communicative power may be converted into administrative power—power as a steering medium—and how the latter can be checked by the former. At the very outset, four changes from the older system/lifeworld model are apparent (the significance of which will be discussed below). First, Habermas now refers to “the political system” rather than to “the administrative system.” Second, only the political system, and not the economic system, appears in the model. (To be sure, *Theory of Communicative Action* is not exactly exemplary in its analysis of the economic system,<sup>473</sup> but it does include that system in the model.) Third, Habermas presents the political system not as a single administrative apparatus, but as internally differentiated into regions of “center” (or “core”), “inner periphery,” and “outer periphery.”<sup>474</sup> And fourth, in his account of these regions, Habermas refers much more forthrightly to political institutions and associations—such as legislatures, courts, and political parties—in partial replacement of more shadowy references to anonymous workings of the system.

Habermas’s model is easiest to understand if we approach it first through the center/periphery map.

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<sup>472</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 321; *see also id.* at 326 (referring to “the unavoidable inertial features of societal complexity”); *id.* at 327-28 (contrasting “unavoidable inertial features” with “illegitimate power complexes”).

<sup>473</sup> The account of “colonization” focuses entirely on the relation between administrative system and lifeworld. *See supra* text accompanying notes 409-32. William Forbath has perceptively pointed out the deficiencies in Habermas’s analysis of the economic system, both in *Theory of Communicative Action* and in *Between Facts and Norms*. *See* William E. Forbath, *Habermas’s Constitution: A History, Guide, and Critique*, 23 L. & SOC. INQUIRY 969, 1001-07 (1998) [hereinafter Forbath, *Habermas’s Constitution*]; *see also* William E. Forbath, *Short-Circuit: A Critique of Habermas’s Understanding of Law, Politics, and Economic Life*, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 279-86 (Michael Rosenfeld and Andrew Arato eds., 1998) [hereinafter Forbath, *Short Circuit*].

<sup>474</sup> Likely Peters borrowed this center/periphery schema from the German systems theorist, Niklas Luhmann. For an account of how Luhmann uses the center/periphery schema to analyze the legal system, *see* Baxter, *supra* note 29, at 2014-24.

### 1. The Political System's Center

The "center" or "core area" of the political system, Habermas explains, is "formed by the familiar complexes of administration." Each of the three branches of government is represented here. Habermas mentions "the incumbent Government," by which presumably he means the executive branch. Included, also, are "parliamentary bodies," understood in their connection with a party system that organizes competition for election. More generally, Habermas refers here to "democratic opinion- and will-formation," which "includes" parliaments, elections, and party competition. Finally, Habermas includes the "judicial system" in the center or "core area" of the political system.<sup>475</sup>

Inclusion of the executive branch is unsurprising. Habermas's account of the other two branches, however, requires comment. First, Habermas's location of "democratic opinion- and will-formation," through processes of election and legislation, marks a significant change in his conception of "systems." One prominent characteristic of "systems," as defined in *Theory of Communicative Action*, was that their internal operations (as well as their relations to their environment) are steered by "media" that circumvent the process of reaching understanding through communicative action.<sup>476</sup> For the administrative system (now known as the political system), the medium was power, understood as command. But Habermas now speaks of "democratic opinion- and will-formation" in the "core area" of the political system. The political system's internal operations, then, seem to be communicatively organized and dependent upon the rational discourse that Habermas connects to communicative action. Already at this point, then, the distinction between system and lifeworld is attenuated in the new model.

The second aspect of the political system's center that requires comment is Habermas's inclusion of the judicial system. In some respects, this choice is not surprising. Courts are (at least typically) state-organized, staffed by state personnel, and (as Habermas notes in his general account of law) their decisions presuppose and rely on state enforcement.<sup>477</sup> Further, Habermas's earlier account of the lifeworld's "colonization" saw family and juvenile courts as part of the administrative system.<sup>478</sup>

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<sup>475</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 354-55.

<sup>476</sup> See *supra* text accompanying notes 364-76.

<sup>477</sup> See *supra* text accompanying notes 20-26.

<sup>478</sup> See *supra* text accompanying notes 420-25; see also 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 367-73.

But Habermas since has repudiated the idea of “law as medium” that underwrote his treatment of family and juvenile courts as part of the welfare-state bureaucracy. And various passages in *Between Facts and Norms* affirmatively suggest a distinction between legal and political systems. Some of these passages seem to use the term “legal system” to refer to what Habermas’s model calls “the political system.”<sup>479</sup> But others seem to point more strongly toward positing the legal system as a distinct system—though one linked to the operations of the political system.

In some of these passages, Habermas flirts with the ideas of Niklas Luhmann, the late (but still preeminent) systems theorist. This flirtation is surprising, given Habermas’s frequent polemics, in *Between Facts and Norms* and elsewhere, against Luhmann’s work. As Habermas notes, Luhmann’s brand of systems theory—the theory of “autopoietic” systems<sup>480</sup>—relies on the idea of a system’s “code” as the basis for the system’s identity and unity (and thus also the system’s distinction from its environment). A code, for Luhmann, is a binary distinction basic to the system’s communications—for the legal system, the distinction between legal and illegal.<sup>481</sup> Habermas picks up this idea of the binary legal code,<sup>482</sup> and he suggests also that the political system has its own binary code. While Habermas, like Luhmann, does not make entirely clear what this latter binary code is, it appears to be the

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<sup>479</sup> For example, in one passage Habermas defines “the legal system in the narrow sense” as including “all interactions that are not only oriented to law, but are also geared to produce new law and reproduce law as law.” *BETWEEN FACTS AND NORMS*, *supra* note 14, at 195 (emphasis omitted). He goes on to explain that courts, legislatures, “Government leaders,” and administrative agencies, as well as “political parties, [and] electorates,” are part of the process that produces and reproduces law. *Id.* at 195-96. That list corresponds to the list of players that Habermas’s model puts in the political system’s center.

<sup>480</sup> The term “autopoiesis” means “self-making,” “self-creation,” or “self-production.” The central idea is that modern societies are differentiated into different systems of communication—e.g., science, art, politics, law, economy—and that these systems are “self-referential” and “autonomous.” By “autonomous,” however, Luhmann does not mean “independent of ‘external’ influences,” and by “self-referential” he does not mean that systems do not refer to other systems. His claim, however, is that the conditions for their external reference are determined internally, through standards, criteria, and procedures produced in the referring system’s own communication.

The terms “autonomous” and “self-referential” have invited much criticism—and in my view, much confusion. One way of understanding what Luhmann plausibly could mean by “autonomous” is to think of “autonomy” as a methodological rather than a substantive principle: to understand the operation of a differentiated system of communication, begin “internally,” with the system’s own practices, procedures, and standards.

<sup>481</sup> See *id.* at 143; see also Baxter, *supra* note 29, at 2004-09 (introducing Luhmann’s general notion of binary coding and the legal system’s legal/illegal code in particular).

<sup>482</sup> See *BETWEEN FACTS AND NORMS*, *supra* note 14, at 143.

distinction between command and obedience.<sup>483</sup> Habermas's positing of separate system codes would seem to commit him to a distinction between the legal and political systems.<sup>484</sup>

Despite Habermas's flirtation with the idea of binary codes, however, he seems content to understand the judicial system as part of a more comprehensive political system.<sup>485</sup> One reason, likely, is that he still sees "systems" as defined through steering media, not so much through binary codes. And law, he has now decided, is not a steering medium. Further, Habermas's discourse theory of law accounts for the distinctiveness of judicial communication—its differences from legislative or administrative communication—through the notion of separation of powers. The different branches of government represented in the political system's "center," Habermas claims, have access to different kinds of reasons and are permitted different sorts of discourse.<sup>486</sup> Habermas, then, can place the judicial system within a more general "political system" without denying the differences that make argumentation in the judicial system distinctive. Finally—and this is a point yet to be developed—Habermas's "circulation of power" model distinguishes between center and periphery

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<sup>483</sup> See *id.* at 55, 143. This conception would fit Habermas's idea that the system's medium is "power," with power understood in terms of command. See *supra* text accompanying notes 322-23, 335-39. For his part, Luhmann equivocates, positing two different codes for the political system. See Baxter, *supra* note 29, at 2040, 2067-68 (describing and criticizing Luhmann's equivocation between "government/opposition" and "governing/governed" as the code).

<sup>484</sup> One might think that Habermas's discussion of how law and politics mutually establish one another's codes, see BETWEEN FACTS AND NORMS, *supra* note 14, at 143-44, together with his more general emphasis on the "internal connection" between law and political power, see *id.* at 133-51, would establish that law and politics are not separate systems. But Habermas's discussion tracks Luhmann's analysis of the functions that law and politics perform for one another, see Baxter, *supra* note 29, at 2039-45, and Luhmann concludes that law and politics are separate but "structurally coupled" systems. See Baxter, *supra* note 29, at 2036-45. Further, to describe law and politics as "internally linked" is simply to say that they are conceptually related, or that they mutually presuppose another. The term "link" implies a distinctness even as it implies relation. Compare BETWEEN FACTS AND NORMS, *supra* note 14, at 79 ("I would like to distinguish law and morality from the start"), with *id.* at 118 (stating that law and morality are "internally coupled").

<sup>485</sup> For example, Habermas relies on state organization and enforcement to suggest, in a passage separate from the "circulation of power" model, that the legal system, even if considered to be centered around courts, should be understood as part of the political system:

Because the specific features of a legal system first appear in state-sanctioned law, there is a certain plausibility to Weber's theoretical strategy of conceiving law as part of the political system. Less plausible is Luhmann's further step of taking modern law out of politics again and giving it independent status as its own subsystem alongside the administration, economy, family, and the like.

*Id.* at 74.

<sup>486</sup> See *id.* at 168-93, 238-86.

according to the degree of formal organization and institutionalization. The "center" of the political system is formally organized, i.e., created by positive law, and whether one looks at courts, legislatures or agencies, the center is the locus of official decision. Habermas identifies the periphery, by contrast, in terms of informal organization and separation from official channels of decision.

## 2. The Political System's Periphery

Beyond the political system's "center" of decisionmaking institutions, Habermas identifies an "inner periphery" and an "outer periphery."<sup>487</sup> The inner periphery, he suggests, includes self-governing institutions with "rights of self-governance or . . . other kinds of oversight and lawmaking functions delegated by the state" (e.g. "universities, public insurance systems, professional agencies and associations, charitable organizations, foundations, etc.").<sup>488</sup> This assemblage of groups is an odd collection. Public insurance systems would seem more naturally to fit into the state administration, particularly given Habermas's prior treatment of welfare bureaucracies as power-wielding, "lifeworld-colonizing" arms of the state apparatus.<sup>489</sup> At first glance, whether universities should be seen as exercising powers "delegated by the state" would seem to depend upon whether they are public or private institutions. Presumably, however, Habermas is thinking of, for example, the extensive government sponsorship of university-based scientific research, especially in the medical and defense sectors. And so even private universities might be seen as quasi-state institutions, though generally not ones that make official governmental decisions. Professional associations—such as, in this country, the AMA and ABA—perform regulatory functions that might well have been considered the province of official government institutions. While "charitable associations and foundations" fit less naturally into this picture, the "inner periphery" thus seems to consist mostly in institutions and associations that perform quasi-state functions without exercising official state decisionmaking power.

Habermas gives much more attention to the political system's "outer periphery." In classifying the organizations and associations one finds there, Habermas distinguishes between "customers" and "suppliers." By "customers," Habermas means

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<sup>487</sup> *Id.* at 355.

<sup>488</sup> *Id.*

<sup>489</sup> See *supra* text accompanying notes 418-32.

various organizations, such as “business associations, labor unions, [and] interest groups,” which are linked in a network of ongoing communication with “public agencies.”<sup>490</sup> Habermas seems to see these “customers” as representatives, of a sort, of the economic system.<sup>491</sup> With respect to the political system, their activity seems to consist largely in bargaining on behalf of their respective constituencies.<sup>492</sup> They are “customers” in the sense that their encounters with the political system are directed primarily toward obtaining governmental largesse and favors for their clients.

The “suppliers” are driven less by directly economic interests and more by ideological objectives. They are “associations, and organizations, that, before parliaments and through the courts, give voice to social problems, make broad demands, articulate public interests or needs, and thus attempt to influence the political process more from normative points of view than from the standpoint of particular interests.”<sup>493</sup> These groups include: (1) “organizations representing clearly defined group interests”; (2) associations with “goals recognizably defined by party politics”; (3) “cultural establishments” (such as “academics, writers’ associations, and ‘radical professionals’”); and (4) “public-interest groups” (e.g. environmentalist groups and animal-protection associations, but also “churches or charitable organizations”).<sup>494</sup>

As Habermas is aware, the distinction between customers and suppliers is not entirely easy to draw.<sup>495</sup> Labor unions and industry associations, for example, seem to be both customers and suppliers: they seek both to lobby official decisionmakers for economically favorable outcomes and also to participate more generally in public debate. But in any event, to the extent that a group counts as “supplier,” it appears in three places in

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<sup>490</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 355.

<sup>491</sup> Habermas says that these organizations “fulfill certain coordination functions in more or less opaque social sectors.” *Id.* “Opacity” sometimes is Habermas-code for “functional systems.” *See id.* at 321 (referring to “the complexity of opaque and recalcitrant functional systems”). Further, unions and trade associations both represent economic interests and (could be said to) “fulfill coordination functions” in the economic sphere.

<sup>492</sup> Habermas refers to “clientele bargaining.” *Id.* at 355.

<sup>493</sup> *Id.*

<sup>494</sup> *Id.* “Charitable organizations” thus appear both in the inner and outer periphery. Presumably this is not mere inadvertence on Habermas’s part; he must have a distinction in mind between different kinds of charities—one whose primary function is provision of welfare services, and the other whose primary function is advocacy. Or he may be recognizing that many charities perform both functions.

<sup>495</sup> *See id.* (referring to the outer periphery “that, roughly speaking, branches into ‘customers’ and suppliers”); *id.* at 356 (“[A]s the debate over corporatist bargaining shows, the distinction between output-oriented ‘customers’ and input-oriented ‘suppliers’ is not a sharp one.”).

Habermas's topography of the "circulation of power." Besides populating the political system's outer periphery, "suppliers" are key players in the public sphere of political discussion, and they help constitute the network of voluntary associations that Habermas calls "civil society."<sup>496</sup>

### 3. The Public Sphere and Civil Society

The public sphere, Habermas tells us, is not a system, institution, organization, or "framework of norms."<sup>497</sup> His positive descriptions tend to be highly metaphorical—and the metaphors sometimes mix indiscriminately. It is a "network"<sup>498</sup> of communications with respect to public issues. The political public sphere is a "sounding board for problems,"<sup>499</sup> a "warning system with sensors that, though unspecialized, are sensitive throughout society."<sup>500</sup> The political public sphere "filter[s],"<sup>501</sup> "synthesize[s],"<sup>502</sup> and "bundle[s]"<sup>503</sup> "streams of communication."<sup>504</sup> Reviewing the usual metaphors of space and stage and forum—"architectural metaphors of structured spaces"—Habermas argues that they do not adequately convey the nature of the political public sphere.<sup>505</sup> While these metaphors may describe limited publics, the political public sphere is detached from physical presence and simple interactions; it becomes "extend[ed] to the virtual presence of scattered readers, listeners, or viewers linked by public media."<sup>506</sup> And as detached from concrete presences and interactions, the political public sphere is, in Habermas's formulation, a circuit of "as it were, 'subjectless'

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<sup>496</sup> See *infra* text accompanying notes 516-29. Habermas notes that these "opinion-forming associations . . . belong to the civil-social infrastructure" of the public sphere. BETWEEN FACTS AND NORMS, *supra* note 14, at 354.

<sup>497</sup> *Id.* at 360.

<sup>498</sup> *Id.*; see also *id.* at 298 ("peripheral networks of the political public sphere," "communicative network of public spheres"); *id.* at 302 ("networks of the public sphere"); *id.* at 307 ("an open and inclusive network of overlapping, subcultural publics having fluid temporal, social, and substantive boundaries"); *id.* at 359 ("peripheral networks of the political public sphere"); *id.* at 373 ("highly complex network").

<sup>499</sup> *Id.* at 359; see also *id.* at 343 (criticizing autopoietic theory for failing to see the political public sphere as a "sounding board" for "society-wide problems").

<sup>500</sup> *Id.* at 359; see also *id.* at 300 (describing a "far-flung network of sensors that react to the pressure of society-wide problems and stimulate influential opinions").

<sup>501</sup> *Id.* at 360; see also *id.* at 302 (political public sphere and "deliberatively filtered political communications").

<sup>502</sup> *Id.* at 360.

<sup>503</sup> *Id.* at 362.

<sup>504</sup> *Id.* at 360.

<sup>505</sup> See *id.* at 361.

<sup>506</sup> *Id.*

forms of communication”<sup>507</sup>—or, in an alternative formulation, an “anonymous circuit[] of communication.”<sup>508</sup>

This array of metaphors may be daunting,<sup>509</sup> but what Habermas is trying to do with them can be made reasonably clear. One aim is to characterize the relation between the public sphere and the political system’s center—the sphere of official decisionmaking (and lawmaking in particular). The other is to account for the relation between the political public sphere and the “private sphere” of the lifeworld.

Consider, first, the relation between political public sphere and political center. The political public sphere is the source of citizens’ “communicative power”—the power of common convictions that arises through rational debate.<sup>510</sup> Deliberative decisionmaking in the political system’s “center” is another locus of communicative power. The idea of the constitutional state, Habermas has argued, is that citizens’ communicative power must influence the communicative power developed in officials’ deliberations. Or to use another of Habermas’s favorite metaphors: citizens’ communicative power must be able to pass through the “sluice” of official deliberative procedures and “penetrate[] the constitutionally organized political system.”<sup>511</sup>

Habermas’s reconstruction of the constitutional state notes that democracy cannot, under modern conditions, mean the assembly of all the citizens.<sup>512</sup> And thus the political public sphere, for Habermas, is not a physical space in which the citizenry as a whole is present and interacts. Instead, the political public sphere relies on mass-communications media that establish “virtual”

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<sup>507</sup> *Id.* at 136; *see also id.* at 299 (“subjectless communications”); *id.* at 301 (“subjectless forms of communication”).

<sup>508</sup> *Id.* at 171; *see also id.* at 136 (“anonymous form” of popular sovereignty through “subjectless” forms of communication”).

<sup>509</sup> Or one might think simply that they, or some of them, are ill-chosen and symptomatic of weaknesses in Habermas’s theory. William Forbath criticizes Habermas’s “electronics metaphors”—not just the “sensors” of the political public sphere, but also the “transformer” metaphor of law. Forbath reads these metaphors to be “anxious”—connected with a defensive politics aimed at preventing colonization of the lifeworld. *See* Forbath, *Habermas’s Constitution*, *supra* note 473, at 999; *see also* Forbath, *Short-Circuit*, *supra* note 473, at 276-77. I agree with Forbath that *Theory of Communicative Action* has that defensive quality, and I agree also that the system/lifeworld distinction both reflects and confirms Habermas’s defensiveness. *See* Forbath, *Habermas’s Constitution*, *supra* note 473, at 999; Forbath, *Short-Circuit*, *supra* note 473, at 276-77. My view, however, is that Habermas’s revised model moves away from the rigidity of the system/lifeworld conception, even if elsewhere in *Between Facts and Norms* Habermas recites his earlier formulations of “system” and “lifeworld.”

<sup>510</sup> *See supra* text accompanying notes 49-50.

<sup>511</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 327. For other uses of the “sluice” metaphor, *see id.* at 170, 300, 354, 356, 358.

<sup>512</sup> *See, e.g., id.* at 135-36.



presence—communication among those who never will meet face-to-face and know nothing or very little of one another's lives. That is the meaning of his emphasis on “anonymous” and “subjectless circuits of communication.”

The various contributions in these circuits of opinion influence official decisionmaking only if they are “bundled” to form what Habermas calls “public opinion.” Habermas resists the usual idea that public opinion is the statistical average of what people think. Nor does he simply weight the average to reflect the likelihood of voting, the degree of influence of the respective opinionholders, or anything of the sort. Oddly—since his concern here seems to be mainly whether public opinion will influence decisionmaking in the political system's center—Habermas insists on a qualitative appraisal of public opinion. And so opinion polls, on Habermas's view, reflect public opinion “only if they have been preceded by a focused public debate and a corresponding opinion-formation in a mobilized public sphere.”<sup>513</sup> Relevant factors here include the “discursive level of opinion-formation” and its inclusiveness—or, more generally, the “procedural properties of its process of generation.”<sup>514</sup>

As a descriptive definition of public opinion, or even the influence of public opinion, this conception seems inapt. But it may be more plausible if understood as a “basis for measuring the *legitimacy* of the influence that public opinion has on the political system.”<sup>515</sup> Viewed in this way, Habermas is suggesting that public discussion has an appropriate democratic influence only to the extent that the conditions of public debate meet certain discursive criteria. I will discuss below Habermas's account of the obstacles that may prevent the public sphere from producing the requisite “influence” on the political system's center.

The second aim of Habermas's account of the public sphere—captured in the “sounding board” and “sensors” metaphor—is to explain how problems and issues make it onto the agenda of public discussion. The connection is through the lifeworld sphere he calls “civil society.”

The appearance of civil society in Habermas's model is connected with the shift in his theoretical and political objectives since *Theory of Communicative Action*.<sup>516</sup> The place that civil

<sup>513</sup> *Id.* at 362.

<sup>514</sup> *Id.* (emphasis omitted).

<sup>515</sup> *Id.* (emphasis added).

<sup>516</sup> The term “civil society” is not new to Habermas's work, but he gives it a new meaning. In prior work, Habermas used the term “civil society” in more or less the same sense that Marx used it: “a sphere of legally domesticated, incessant competition between strategically acting private persons.” 2 *THEORY OF COMMUNICATIVE ACTION*, *supra*

society now occupies is the lifeworld's "private sphere."<sup>517</sup> In *Theory of Communicative Action*, Habermas saw the private sphere as centered around the nuclear family—or, from the perspective of the economic system, to which it was "lifeworld environment," centered around the "private household." The roles of "employee" and "consumer," Habermas said, were the relevant roles for money-steered interchange between the economic system and private sphere. Habermas did not consider in *Theory of Communicative Action* the relation between the private sphere and the political system.<sup>518</sup>

In *Between Facts and Norms*, by contrast, Habermas is interested precisely in the relation between private sphere and the political system. Habermas's focus on "civil society," rather than the employee and consumer roles, reflects this new interest. What he is investigating is the political significance of the private sphere. How, he asks, is it related to the public sphere of political discussion, and how in turn is it related to formal political decisionmaking?

Habermas's understanding of "civil society" is consistent with that term's common usage in recent political discussion. His most usual definition presents civil society as a "network of voluntary associations,"<sup>519</sup> although he includes also family relations.<sup>520</sup> The voluntary associations that constitute civil society, Habermas emphasizes, are "noneconomic,"<sup>521</sup> "informal,"<sup>522</sup> and generally egalitarian.<sup>523</sup> Civil society, so conceived, is thus distinct from both the economic and political systems.<sup>524</sup> Habermas makes clear that civil society is a "lifeworld" sphere.<sup>525</sup>

Civil society's "lifeworld" location is the source of its strategic role in Habermas's theory. The problems, concerns and issues of

note 3, at 178. In that sense, the term "civil society" referred essentially to the sphere of economic relations. Habermas now disavows that usage. See BETWEEN FACTS AND NORMS, *supra* note 14, at 366.

<sup>517</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 354 (civil society as "core private spheres of the lifeworld").

<sup>518</sup> See 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 320, fig.39.

<sup>519</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 175; see also *id.* at 358, 366-67.

<sup>520</sup> See *id.* at 354, 365; see also *id.* (mentioning friendships and neighborly relations).

<sup>521</sup> *Id.* at 366.

<sup>522</sup> See, e.g., *id.* at 352 (referring to "the informal contexts of communication found in . . . civil society").

<sup>523</sup> *Id.* at 367. Parent/child relations presumably do not count as fully egalitarian.

<sup>524</sup> See *id.* at 299 ("[C]ivil society, as the social basis of autonomous public spheres," is distinguished "from both the economic system and public administration."); *id.* at 301 (referring to "the associations of a civil society quite distinct from both state and economy alike"); *id.* at 366 (The "institutional core" of civil society "comprises . . . nongovernmental and non-economic connections and voluntary associations.").

<sup>525</sup> See *id.* at 302, 335, 352, 366-67, 382.

everyday life, he suggests, are discussed in civil-social associations before they become items of public-sphere discussion.<sup>526</sup> Participants in public-sphere discussion are, Habermas says, “recruited” from civil society’s voluntary associations.<sup>527</sup> And so these associations may “distill and transmit” responses to lifeworld problems “in amplified form to the public sphere.”<sup>528</sup> Civil society, to the extent that it is autonomous from both the state and political systems, is in this way a source of “counterknowledge”—counter, that is, to official conceptions in the political system’s formal decisionmaking institutions.<sup>529</sup>

Together, then, civil society and the political public sphere establish a link between system and lifeworld. This link, on Habermas’s view, is what makes genuine democracy possible. At the same time, Habermas emphasizes a number of preconditions.

#### 4. The Circulation of Power and the Possibility of Democracy

One set of preconditions for democracy, according to Habermas, has to do with the “culture” and “personality” components of the lifeworld—not just the “society” component in which voluntary associations are rooted. Democracy, he claims, presupposes “a liberal political culture supported by corresponding patterns of political socialization.”<sup>530</sup> In other words, the society in question must have a tradition of inclusive and broad political participation, and individuals must be both able and disposed to take advantage of the possibilities that the culture presents. “Otherwise,” Habermas suggests at one point, doubtless with an eye on Eastern Europe and Russia, “populist movements arise that blindly defend the frozen traditions of a lifeworld endangered by capitalist modernization.”<sup>531</sup> More generally: public debate otherwise would cordon off some topics from rational discussion, or it would fail to include all whose interests are potentially affected, or both. And either possibility

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<sup>526</sup> See, e.g., *id.* at 367 (“Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere.”).

<sup>527</sup> *Id.* at 354.

<sup>528</sup> *Id.* at 367.

<sup>529</sup> *Id.* at 372.

<sup>530</sup> *Id.* at 317; see also *id.* at 131 (“liberal political culture”); *id.* at 302 (“a liberal political culture . . . an enlightened political socialization”); *id.* at 371 (“liberal political culture and the corresponding patterns of socialization”); *id.* at 437 (“liberal political culture and corresponding socialization patterns”).

<sup>531</sup> *Id.* at 371.

would offend the principle of democracy, as Habermas understands it.

Second, both civil society and the political public sphere must be legally protected to ensure their autonomy. Basic rights of free speech, press, association, and assembly are necessary not just for the political public sphere, but for civil society as well.<sup>532</sup> In fact, Habermas claims, civil society is *constituted* through these basic rights, as well as through legal protections of “privacy”—where this last is understood as the protection of autonomous choice in matters of lifestyle and judgment.<sup>533</sup> These legal protections, if effective, safeguard both the political public sphere and civil society from state domination.<sup>534</sup>

Third, both civil society and the political public sphere must be insulated also from the effects of unequal “social power”—that is, unequal “possibilities . . . in social relationships to assert [one’s] own will and interests, even against the opposition of others.”<sup>535</sup> While the power to assert one’s will and interests is essential to political participation,<sup>536</sup> gross inequalities in the distribution of social power mean that some may “influence the political process in such a way that their interests acquire a priority not in accord with equal civil rights.”<sup>537</sup> Habermas suggests that the egalitarian structures of voluntary associations may, to some extent, “absorb and neutralize” differences in social power. But at the same time, the democratic potential of civil society itself depends upon a more or less equal distribution of power.<sup>538</sup> And so does the democratic potential of the political public sphere.<sup>539</sup> Of course the problem is that the redistribution of unequal social power is extraordinarily unlikely if that very inequality renders civil society and the political public sphere democratically ineffective. Perhaps in confession of the difficulty of this dilemma, Habermas suggests at one point that genuine democracy would be possible “[o]nly in an egalitarian public of citizens that has emerged from the confines of class and thrown off the millennia-old shackles of social

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<sup>532</sup> See *id.* at 368.

<sup>533</sup> *Id.*

<sup>534</sup> See *id.* at 368-69.

<sup>535</sup> *Id.* at 175.

<sup>536</sup> Habermas distinguishes between facilitative and restrictive effects of social power. In order to participate at all, one must be in a position to assert one’s will and interests. But a grossly unequal distribution of social power threatens to restrict the communicative freedom of the comparatively disempowered. See *id.* at 175.

<sup>537</sup> *Id.*

<sup>538</sup> See *id.* (noting that democracy requires, inter alia, a “civil society . . . and a political culture that are sufficiently detached from class structures”).

<sup>539</sup> See, e.g., *id.* at 307 (referring to the dangers that “unequally distributed social power” poses to the political public sphere).

stratification and exploitation."<sup>540</sup> That does not seem to be our situation.

Fourth, a precondition for modern democracy is an appropriate role for the mass communications media. As Habermas recognizes, the modern political public sphere requires these media, if political communication and debate is to extend beyond simple (and generally ineffective) face-to-face interaction. But at the same time, the expense of many forms of communication, together with dominance of print and television by powerful organizations, means a centralization of "control" over the selection of "topics, contributions, and authors into the mass-media-dominated public sphere."<sup>541</sup> Habermas notes also the economic incentives toward dumbing-down of political reporting and commentary<sup>542</sup> (or, for that matter, minimizing it in favor of purer forms of entertainment).

Habermas noted these dangers in 1992, and so he was unable to consider whether the Internet could, in some measure, counter the trends toward centralized control. (There is, of course, a literature on this subject that reaches varying conclusions.) The diagnosis he presents in *Between Facts and Norms* is three-fold. First, he notes studies that find readers not so passive as the sharpest media critics believe.<sup>543</sup> Second, he presents a normative argument that "the mass media ought to understand themselves as the mandatary of an enlightened public whose willingness to learn and capacity for criticism they at once presuppose, demand, and reinforce."<sup>544</sup> Third, he suggests that government regulate the mass media to require broader access and presentation of non-centrist points of view.<sup>545</sup> The obvious difficulty with this last idea—and one that Habermas acknowledges—is that using state administrative power to select among speakers raises substantial free-speech concerns.

Habermas notes, also, an additional obstacle to genuine democracy: the tendency of governmental institutions in the political system's center to shortcircuit the "official" or "constitutional" circulation of power. The "official" pattern of circulation, reconstructed in Habermas's discourse theory of democracy, prescribes that legislative initiatives are to come from the citizens' exercise of "communicative power." Set out social-

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<sup>540</sup> *Id.* at 308.

<sup>541</sup> *Id.* at 376.

<sup>542</sup> *See id.* at 378.

<sup>543</sup> *See id.*

<sup>544</sup> *Id.*

<sup>545</sup> *See id.*

theoretically, in terms of Habermas's center/periphery model of the political system, communicative power, emerging in the public sphere as a response to the impulses from civil society, must flow through the "sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex."<sup>546</sup> But in practice, Habermas acknowledges, much "normal business" crosscuts this official flow. And this, he says, is unavoidable. Most operations of the core "proceed according to routines" that are not necessarily linked to popular initiatives.

From a normative standpoint, the only decisive question concerns which power constellations these patterns reflect and how the latter can be *changed*. This in turn depends on whether the settled routines remain open to renovative impulses from the periphery. In cases of conflict, that is, processing matters according to the usual conventions is eclipsed by *another* mode of operation.<sup>547</sup>

Habermas calls this other mode "problematization." Here "the attention span of the citizenry enlarges," and "[t]he pressure of public opinion" compels the core institutions to switch over to "constitutional channels for the circulation of power."<sup>548</sup>

Habermas is not altogether optimistic about the possibilities here. "[U]nder certain circumstances," he says, "civil society can acquire influence in the public sphere, have an effect on the parliamentary complex (and the courts) through its own public opinions, and compel the political system to switch over to the official circulation of power."<sup>549</sup> But in addition to the obstacles noted above—the effects of unequal social power and the normalizing power of the mass media—Habermas acknowledges that political parties and leaders, too, have ways of managing public opinion.<sup>550</sup> While political parties are essential to the operation of the political system's center,<sup>551</sup> their function of recruiting and disciplining officeholders may well interfere with the development of sufficiently discursive public debate.<sup>552</sup>

Habermas does note, however, that many of the important movements in the last two decades—antinuclear movements, environmental movements, feminism, and multiculturalism, to

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<sup>546</sup> *Id.* at 356. Habermas writes "parliamentary complex or the courts," but at the moment my interest is only in the legislative process.

<sup>547</sup> *Id.* at 357.

<sup>548</sup> *Id.*

<sup>549</sup> *Id.* at 373 (emphasis omitted).

<sup>550</sup> *See id.* at 367, 443.

<sup>551</sup> *See id.* at 354-55.

<sup>552</sup> *See id.* at 367 (referring to "a public sphere . . . inundated by the public relations work, propaganda, and advertising of political parties and groups").

name a few of his examples—have originated in civil society, eventually making it onto the “agenda” of the public sphere. And only much later, after a long period of public opinion-formation, did they gain official attention.<sup>553</sup> Civil society, then, has for Habermas an innovating role in the democratic lawmaking process.

### C. *The Status of the System/Lifeworld Model*

With the above sketch of Habermas’s “circulation of power” model in mind, the question becomes: what has happened to the system/lifeworld model that Habermas defended earlier? As I showed in Part III.A above, *Between Facts and Norms* officially presents the concepts of system and lifeworld more or less as Habermas developed them in *Theory of Communicative Action*. But immediately after concluding one of these official presentations,<sup>554</sup> Habermas presents the “circulation of power” model, and that model on its face expresses differences from Habermas’s earlier system/lifeworld theory. In this part of the Article, I will be considering whether or not Habermas’s new model effectively abandons many of the central assumptions of the earlier system/lifeworld scheme. I look at this matter as someone who believes—as argued in Part II above—that the original system/lifeworld model is untenable.

#### 1. Mapping Center/Periphery Against System/Lifeworld

Habermas’s “circulation of power” model speaks more of the political system’s “center” and “periphery” than it speaks of system and lifeworld. Habermas does not make clear how the center/periphery schema maps out against the distinction between system and lifeworld. Does the periphery—especially the “outer periphery”—belong to system or lifeworld? And what effect does the notion of “periphery” have? If, as it seems, the concept of “periphery” blurs the boundary between system and lifeworld, then does the distinction between system and lifeworld still have significance?

The changes that the notion of “periphery” might effect are

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<sup>553</sup> See *id.* at 381.

<sup>554</sup> See *id.* at 354 (outlining the concepts of system and lifeworld, and explaining the “uncoupled but anchored” relation of system to lifeworld, but then turning to the new model).

easiest to see when one examines the position the two models assign to the political public sphere. Habermas's earlier system/lifeworld model made clear that the political public sphere belongs to the "societal component" of the lifeworld, as the administrative system's environment.<sup>555</sup> The public sphere was not "in" the administrative system; instead, it was related externally to that system through media-steered, input/output interchange relations.

The newer model, however, speaks of "the political system" rather than the administrative system, and it presents the relevant system as differentiated into center and periphery. One would think that the "center" of the political system might be the same as the old, undifferentiated administrative system. Not so. While "the incumbent Government" seems to correspond at least roughly to the old administrative system, Habermas includes at the political system's center legislative bodies and courts—institutions not clearly accounted for in the old system/lifeworld model, and difficult (as Habermas now acknowledges) to see entirely in terms of administrative power (or, the steering medium of "power as command"). Even the "center" of the new "political" system seems more expansive than the old administrative system, and Habermas makes clear that its workings cannot be accounted for solely in terms of "power as command."

Introduction of the political system's "periphery" complicates matters further. The term "periphery" is ambiguous. Does it include the public sphere? Civil society? Does it refer to the outer reaches of the political system—distant regions that still are within the system's boundaries? Or does it refer instead only to those "peripheral" regions that are beyond the system's perimeter?

Much of Habermas's initial account of the periphery is a list and description of the various players that populate that region—the quasi-state organizations and associations of the "inner periphery," and the "customers" and "suppliers" of the outer periphery.<sup>556</sup> The public sphere is emphatically not an organization, association, or system. For that reason, it is difficult to place on the system's "periphery." Habermas, however, states that the political public sphere is the political system's "real periphery."<sup>557</sup> Other statements are to similar effect.<sup>558</sup> Still other

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<sup>555</sup> See *supra* text accompanying notes 392-96.

<sup>556</sup> I leave aside here the question whether the public-spirited "suppliers" of the "outer periphery" are among the voluntary associations Habermas takes to constitute civil society. The answer seems to be "yes," unless Habermas is distinguishing between relatively informal associations (civil society) and the more formally organized organizations he calls "suppliers."

<sup>557</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 355-56 ("with its informal, highly



statements are more equivocal,<sup>559</sup> but on balance, Habermas seems to suggest that the political system's "periphery" includes the political public sphere. In fact, Habermas suggests that the political system's periphery includes also the sphere he calls "civil society."<sup>560</sup>

That leaves the question whether the periphery is part of the political system—i.e., within the system's boundaries—or whether, instead, it is a region "peripheral" to the system in the sense of lying beyond the system's outer limit. Habermas cannot avoid the question, because the system/lifeworld distinction, even as formulated in *Between Facts and Norms*, sees systems as differentiated and separate from their environments. Systems theory depends upon the distinction between system and environment. And so if systems-theoretical concepts still have meaning to Habermas—as he says they do—then he has to answer the "boundary" question.

Habermas does not make his answer altogether explicit, but if he is retaining his system/lifeworld distinction, the answer has to be that the periphery lies outside the political system's boundary.<sup>561</sup> The political public sphere, he says, is not organized as a system.<sup>562</sup> And further, Habermas makes clear that "civil society" belongs to

differentiated and cross-linked channels of communication, the public sphere" "forms the real periphery").

<sup>558</sup> See *id.* at 352 (referring to "the peripheral networks of the political public sphere and . . . the parliamentary complex"); see also *id.* at 356 (referring to "communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts"); *id.* at 357 (stating that the possibility of "official" or "constitutional" circulation of power depends upon "whether the settled routines remain open to renovative impulses from the periphery"); *id.* at 358 (stating that constitutional circulation of power requires that the "periphery must . . . introduce [problems] via parliamentary (or judicial) sluices into the political system in a way that *disrupts* the latter's routines"); *id.* at 442 (describing the political public sphere as "the impulse-generating periphery that *surrounds* the political center").

<sup>559</sup> See, e.g., *id.* at 298 (referring to "a political system tied into the peripheral networks of the political public sphere").

<sup>560</sup> *Id.* at 330 (stating that the possibility of democracy depends upon whether "civil society, through resonant and autonomous public spheres, develops impulses with enough vitality to bring conflicts from the periphery into the center of the political system"); see also *id.* at 381 (referring to the "civil-social periphery"); *id.* at 382 ("[E]ven in more or less power-ridden public spheres, the power relations shift as soon as the perception of relevant social problems evokes a *crisis consciousness* at the periphery," and this amounts to an "endogenous mobilization of the public sphere.").

<sup>561</sup> One passage in *Between Facts and Norms* seems to confirm this interpretation. Describing the way in which impulses from the periphery may affect official decisionmaking, Habermas writes: "[A]n activated periphery must then introduce [latent problems] via parliamentary (or judicial) sluices into the political system in a way that *disrupts* the latter's routines." *Id.* at 358. Here the periphery seems to be conceived as lying outside the political system.

<sup>562</sup> See *id.* at 360.

the lifeworld—with the usual specific address being the lifeworld’s “societal component.”<sup>563</sup> Thus the periphery, conceived as including both the political public sphere and civil society, must not be within the political system’s boundaries.

But while this answer resolves the “mapping” issue, it also raises further problems. One difficulty is at least terminological, and possibly conceptual. If the “periphery” is not properly part of the political system, then why does Habermas describe the political system as differentiated into center and periphery? Instead of referring to governmental decisionmaking institutions as the political system’s “center,” it would be enough to refer to them as, simply, “the political system.” Only if the periphery were part of the system would we need the distinction between center and periphery. Otherwise, we should speak more simply of system and environment, or system and not-system.

Two other difficulties will be the subject of separate sections. First, if the periphery is beyond the political system’s boundaries—lying in the domain Habermas calls the lifeworld—then Habermas must account for the interchange between system and lifeworld. The account he has given in *Between Facts and Norms* is full of terms like “influence,” “communication of normative messages,” and the like. These notions are impossible to square with the austere “media theory” announced in *Theory of Communicative Action*. Habermas’s “circulation of power” model, I will suggest, confirms the criticisms I made of the earlier “interchange model.”

A second difficulty is that the reasons why the public sphere and civil society cannot be part of the political system—why they must be assigned to the lifeworld—also suggest that the center is not a “system,” either. Very little of the Parsons-inspired systems theory actually animates Habermas’s current work—notwithstanding his formal allegiance to the earlier “systems” concept.

## 2. The Two Models and Interchange Among Social Spheres

The model of system/lifeworld interchange presented in *Theory of Communicative Action* is a systems-theoretical model. According to Habermas’s critical appropriation of Parsons’s media theory, interchange between systems operates through the media proper to the related systems. The media proper to the economic and political systems, Habermas claimed, are money and political

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<sup>563</sup> *Id.* at 366-67.

power. Habermas recognizes only money and power as “steering media.” As described in Part II.C.2 above, Habermas specifically rejects Parsons’s suggestions that “influence” and “value-commitment” qualify as media analogous to money. And as described in Part II.D, that makes the model of system/lifeworld interchange asymmetric. The lifeworld spheres that Habermas presents as operating in media-controlled interchange with the two systems—the public and private sphere—have no media of their own to contribute to the interchange. And so their “inputs” into the two systems must be assimilated to the media of money and power. The irony of this conceptual strategy is that, while designed to preserve the integrity of the lifeworld in all its normative richness, the strategy requires Habermas to conclude that the public sphere contributes only “taxes” and “mass loyalty” to the administrative system, in exchange for “organizational performances” and “binding decisions.” The system-theoretical frame of Habermas’s interchange model, together with the assumptions he makes about the nature of interchange and steering media, leads him in *Theory of Communicative Action* to a hollowed-out conception of democracy’s workings.

As I argued in Part II.D, Habermas likely chose this conceptual strategy in order to make his argument normatively minimalist. The argument of *Theory of Communicative Action* is not a normative exhortation for more democracy or greater economic justice. While Habermas’s account of the lifeworld’s “rationalization” is designed to demonstrate the unexhausted “rational potential” in modern societies—the only selective and partial realization of “communicative rationality”—his diagnosis of modern “social pathologies” takes the form of a crisis theory. Independent of the political will to resist the “colonizing” tendencies of economic and bureaucratic systems, he argues, those tendencies face unavoidable limits—limits rooted in the functional necessity of “symbolically reproducing” the lifeworld. The focus of Habermas’s system/lifeworld model, then, was on the effects that systems have upon the lifeworld, not so much the influence that the lifeworld might have on systems.

*Between Facts and Norms* is a very different project. The argument is much more strongly normative. Legal norms are legitimate, he claims, only if they conform to the principle of democracy. And that means that they must be able to “meet with the . . . assent of all citizens in a discursive process of legislation that in turn has been legally constituted”<sup>564</sup> (though, with due

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<sup>564</sup> *Id.* at 110.

regard for fair compromise).<sup>565</sup> Habermas's recourse to social theory is designed as a "translation" of the strongly normative principles of the discourse theory of democracy.<sup>566</sup> Accordingly, the "circulation of power" model focuses on the conditions necessary for the production of legitimate law: (1) a "vibrant" civil society<sup>567</sup> must transmit "impulses" to the political public sphere that express unresolved social problems that are susceptible of political solution; (2) a "robust"<sup>568</sup> and "unsubverted"<sup>569</sup> political public sphere must discursively process these impulses to generate "public opinion"; (3) this public opinion must "influence"<sup>570</sup> the deliberations of official decisionmakers (primarily legislative bodies) in the political system's center; and (4) the administration's exercise of "administrative power" must be bound by the normative premises of legal rules and principles whose existence ultimately depends upon citizens' "jurisgenerative" communicative power. The focus, then, is on how lifeworld structures peripheral to the political system—civil society and the public sphere—may "influence" the operation of the political system that is differentiated from the lifeworld.<sup>571</sup>

Notice the term "influence." Habermas's argument in *Between Facts and Norms* uses the idea of "influence" to characterize the relation between spheres constituted through communicative action—civil society and public sphere—and the "system" that, Habermas still claims, is *qua* system organized around a "steering medium." No longer must system and lifeworld be related only through money and power. Instead, the "input" from lifeworld to system operates through "influence," and *Theory of Communicative Action* specifically concludes that "influence" is not the name of a steering medium.<sup>572</sup> Without acknowledging the point, Habermas effectively has abandoned the premises of his systems-theoretical conception of "interchange" between system and lifeworld.

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<sup>565</sup> See *supra* text accompanying notes 45-47.

<sup>566</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 357-58, 373.

<sup>567</sup> *Id.* at 461.

<sup>568</sup> *Id.* at 280.

<sup>569</sup> *Id.* at 461.

<sup>570</sup> *Id.* at 362, 363.

<sup>571</sup> See, e.g., *id.* at 371 ("[I]nfluence" generated in public sphere must "pass[] through the filters of the institutionalized *procedures* of democratic opinion- and will-formation and enter[] through parliamentary debates into legitimate lawmaking.").

<sup>572</sup> See *supra* text accompanying notes 343-53. Habermas is aware that his use of the term recalls his rejection of Parsons's proposed "influence" medium. See BETWEEN FACTS AND NORMS, *supra* note 14, at 363 (discussing question of public opinion's "influence" on political system, then reviewing Parsons's conception of influence as medium); *id.* at 556 n.50 (note appended to above discussion, recalling his rejection in *Theory of Communicative Action* of Parsons's proposed "influence" medium).

My argument does not depend upon Habermas's having chosen the term "influence" to describe the effect of the political system's periphery (read: lifeworld) upon the system's center. The very premise of Habermas's project is to account for how informally organized spheres, constituted by and centered around communicative action, may send "normatively substantive messages" to spheres that, supposedly, are differentiated as "systems" that operate and communicate only through steering media. This conception is impossible to reconcile with the media theory that Habermas embraced in *Theory of Communicative Action*.

### 3. "System" Revisited

Habermas's media theory was supposed to account not just for the relations among systems, but for the "internal" operations of systems as well. Here, too, the concept of "steering medium" is central for Habermas. A defining characteristic of a steering medium is that it allows calculating, strategic actors to circumvent the process of reaching understanding over contested validity claims.<sup>573</sup> Habermas in effect defines "systems" as spheres of action in which steering media, not linguistic consensus, play the central coordinating role.<sup>574</sup> Habermas refers to systems as "media-steered," as opposed to "communicatively organized."

A second feature of *Theory of Communicative Action's* "system" conception is the notion of formal organization. By "formally organized," Habermas means "created by positive law." Habermas makes clear, first, that the economic and administrative systems as a whole are created by positive law: the media of money and power, he says, must be "legally institutionalized" for the media to operate as stable systems media. And further, Habermas extends the notion of formal organization to include the entities and associations that populate the economic and administrative systems. Here he is thinking of bureaucratic organizations—both business firms and government agencies—that are structured hierarchically and have defined expectations for membership that are enforced through command.

Combining these two features, I noted in Part II.C above, *Theory of Communicative Action* develops a hyperbolic conception of these systems as "norm-free structures" in which "the lifeworld"—understood as the cultural tradition, social norms,

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<sup>573</sup> See *supra* text accompanying notes 314-15.

<sup>574</sup> See *supra* text accompanying notes 371-79.

and personal competences and dispositions—is irrelevant for the coordination of action. I argued strenuously against this conception.<sup>575</sup>

In *Between Facts and Norms*, Habermas's explications of the "systems" concept do not explicitly revise his earlier account. While he does not repeat the more hyperbolic claims about "norm-free structures," he does make clear that a defining characteristic of a "system," and what renders it "independent" from the lifeworld, is its development of a steering medium that allows users to circumvent the process of communicative agreement.

That understanding of a "system" was what made clear—despite initial ambiguity—that the "peripheral" spheres of civil society and the public sphere could not be systems or part of the political system proper. They have no steering media of their own, operating instead through "influence"—which, again, is not a steering medium on Habermas's view. They reproduce themselves through communicative action and are "communicatively organized," which for Habermas indicates "lifeworld" rather than "system" status.

But now consider Habermas's account of the political system's center. Legislatures, he claims, operate deliberatively, and while they have special procedures that structure and (because of time constraints) sometimes terminate discourse,<sup>576</sup> they do not operate simply through the power of command. Instead, they are part of the process of "democratic opinion- and will-formation."<sup>577</sup> Similarly, Habermas understands the adjudicative structure as consistent with the "discourse principle," even if time and relevance constraints limit the scope of available arguments, and even if the participating lawyers—though not the judge—are expected to present arguments strategically.<sup>578</sup> And even the "administration" operates through discourse as well as through command.<sup>579</sup>

Communicative action and discourse, then, are not peculiar to the lifeworld. Habermas's expansion of the idea of political power to include communicative as well as administrative power, and his

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<sup>575</sup> See *supra* text accompanying notes 379-86, 433-37.

<sup>576</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 171 (stating that institutionalized parliamentary discourse may be regulated and structured, provided that the "necessary communicative presuppositions" of discourse are "sufficiently fulfilled"); *id.* at 179 (describing majority rule in "institutionalized deliberations" as a "caesura" rather than a termination of discourse).

<sup>577</sup> *Id.* at 354.

<sup>578</sup> See *id.* at 235-37.

<sup>579</sup> See *id.* at 192 (the administration is limited to "pragmatic discourses").

ready admission that communicative power is generated through discourse in the political system's center, suggest a move away from the earlier conception of "systems." The notion of a "steering medium"—power as command, in the case of the political system—is too crude a tool for Habermas's theory of democracy. And so although his official explications of the "system" concept still insist that systems are differentiated out around steering media, Habermas's actual analysis of the political system is more sophisticated. It had to be, given Habermas's objectives in *Between Facts and Norms*.

Here, as with the unacknowledged revisions of the "interchange" concept, the developments seem to me clear improvements. But in what sense is the political system now a "system"? And, with respect to the notion of interchange, are we limited to the "electronics metaphors"<sup>580</sup> of "impulse," "amplifier," "transformer," along with the water metaphor of "sluices"? Is Habermas's mixing of these metaphors the best theoretical (let alone literary) strategy?

In the concluding part of this Article, I will suggest that a better conception of social "systems," and a better account of the relations among social spheres, might be available through a selective appropriation of more recent systems theory. I have in mind here the "autopoietic" theory of the late Niklas Luhmann, Habermas's longtime partner in debate, and probably Habermas's equal in eminence among continental social theorists. As I have noted in passing already, Habermas's encounters with Luhmann's "autopoietic" theory are almost entirely polemical. I will argue in the conclusion that Habermas's interpretation of autopoietic theory is, for the most part, a caricature. And oddly, at the same time that Habermas blisters the idea of autopoiesis, he states offhandedly that the political and legal systems are "autopoietic."<sup>581</sup> Habermas appropriates the most dubious aspect of Luhmann's work—the idea of the binary code, discussed briefly above and somewhat more expansively below.<sup>582</sup> A more accurate reading of Luhmann's work, and a more judicious borrowing from it, could rehabilitate Habermas's collapsed notion of social

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<sup>580</sup> I take this phrase from William Forbath. See Forbath, *Habermas's Constitution*, *supra* note 473, at 999; see also Forbath, *Short-Circuit*, *supra* note 473, at 276-77.

<sup>581</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 354 ("The language of law brings ordinary communication from the public and private spheres and puts it into a form in which these messages can also be received by the special codes of autopoietic systems—and vice versa."). *But cf. id.* at 352 (calling it "impossible to conceive politics and law as autopoietically closed systems").

<sup>582</sup> See *supra* text accompanying notes 480-84; *infra* text accompanying notes 610, 616-19.

systems.

#### 4. "Lifeworld" Revisited

I have described the successive shifts in Habermas's notion of the lifeworld: from (1) the phenomenological concept of lifeworld as the unproblematic, naively relied upon set of resources on which social interaction draws, to (2) the idea that society as a whole can be conceived as "lifeworld," with the "structural components" of culture, society, and personality, to (3) the notion of the lifeworld as a separate (because communicatively organized) social sphere, involved in interchange with the systemically integrated economy and administration. These shifts are particularly apparent in *Theory and Communicative Action*, but they appear also in the official lifeworld-explicating passages of *Between Facts and Norms*.

In my view, both (2) and (3) above are problematic in principle, and neither idea fits well with the line of argument followed in *Between Facts and Norms*.

Consider, first, the "components" idea. This idea begins to emerge in *Theory of Communicative Action* when Habermas is criticizing, from within, the phenomenological conception of the lifeworld. If we understand the lifeworld as the background of social interaction, and as the stock of resources on which actors draw, then we see that actors rely on culturally transmitted knowledge, group memberships, and personal identities (including skills, dispositions, and motivations), not just the cultural "stock of knowledge" that Schutz emphasized.<sup>583</sup> As I pointed out, and as Habermas acknowledges, this list corresponds closely to Parsons's culture/society/personality schema.<sup>584</sup> These resources of action, however, become lifeworld "components" only when Habermas makes a methodological shift. He is interested, he says, in developing the "lifeworld" concept not just as a means for analyzing this or that particular context of action, or even the problematic of social action in general. Instead, his focus is on the lifeworld "as a whole,"<sup>585</sup> and in particular, how the lifeworld reproduces itself through time.<sup>586</sup> Not social action so much as society becomes his object of investigation. And at this point, we have the idea that society as a whole can be seen as lifeworld.

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<sup>583</sup> See *supra* text accompanying notes 176-88.

<sup>584</sup> See *supra* note 186 and accompanying text.

<sup>585</sup> 2 THEORY OF COMMUNICATIVE ACTION, *supra* note 3, at 136.

<sup>586</sup> See *id.* at 136-37.



Habermas quickly converts the resources of action—"culture," "society," and "personality"—into "structural components of the lifeworld," or rather, structural components of society seen as lifeworld.

This last move is puzzling. Why would we necessarily think that society has "components," if that term has the ordinary meaning of "parts"? And why would we assume that culture, society, and personality are the appropriate parts?

As Habermas has explained, his interest is in accounting for how societies reproduce themselves through time. Certainly he is right that a society's continued existence—as recognizably the same society—depends upon its ability to maintain, even through change, a cultural tradition. Clearly, also, a society needs to be able to maintain (again, even through change) its basic social institutions, and equally clearly, it needs to transmit appropriate skills, dispositions, and motivations to its members. What Habermas calls cultural reproduction, social integration, and socialization all seem to be necessary functions for a society's reproduction. But to say that is not to commit ourselves to the idea that the society has "components" and that the components are culture, society, and personality. We can speak of reproductive functions without localizing them in a particular "component" of society. Nor is the "component" idea necessary for Habermas's ultimate use of the "symbolic reproduction" schema—his account of systems' tendencies to "colonize" the lifeworld and thus to impair the symbolic reproductive functions. Here, too, we can speak of functions without localizing them in a "component." Similar arguments apply to Habermas's use of the "components" idea to organize and reformulate Weber's theory of "rationalization."<sup>587</sup>

In my view, the "components" idea is not just unnecessary but positively disadvantageous. It suggests that society has parts, and if the first-order division of life-world is into culture, society, and personality, then one naturally wonders where to place more particular social phenomena. The problem, though, is that one-to-

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<sup>587</sup> As described in Part II.B.3., *supra*, Habermas presents the lifeworld's rationalization as leading, first, to the differentiation of the various components from one another, and second, to the increased importance of discourse in reproducing each component. Here, too, I think the "component" idea is unnecessary. The idea that the "society" component has differentiated from the "culture" component can be expressed more directly: tradition is less likely to suffice by itself as justification for social institutions or norms. The differentiation of the "personality" component from the "culture" component amounts to the weakening of traditional role limitations that prescribed in advance who would acquire which skills, competences, and dispositions. Habermas's account of course is more complex than this, but the "component" idea seems to add nothing to the picture.

one assignment generally is impossible.

Consider, for example, Habermas's account of the "anchoring" of systems' steering media. Money and power, Habermas says repeatedly, must be "anchored in the lifeworld," by which he means "legally institutionalized." Money is "anchored" through basic principles of private law (especially property and contract), and power is "anchored" through public (especially constitutional) law.<sup>588</sup> But *where* in the lifeworld? Habermas picks the societal component, on the theory that these basic principles are "institutions," and he uses the term "institutional component" as a synonym for "societal component."<sup>589</sup> To me, it seems odd to describe legal principles as "institutions." Further, as Habermas points out in *Between Facts and Norms*, legal principles constitute bodies of knowledge, and so they could be considered part of the "culture" component.<sup>590</sup> Or, insofar as legal principles encourage the development of certain motivations, competences, and dispositions, they could be said to belong to the "personality" component.<sup>591</sup> Once one starts elaborating upon what it means for a medium to be "legally institutionalized," it becomes clear that very little is accomplished by selecting a "component" in which the medium is "anchored." A full explanation of how money and power are legally secured could use the terms "culture," "society," and "personality," but nothing more would be gained by claiming that the medium is "anchored in" "components of the lifeworld" that bear these names.

Or consider an organization such as a church. Is it located in the cultural component, the societal component, or the socialization component? Pretty clearly it performs all three functions that Habermas attributes to those "components": it transmits and reproduces a cultural tradition; it integrates the members of the church through shared norms and values, and through common experiences; and it socializes the members, encouraging them to develop their personal identities in particular ways. Showing how the church fulfills these reproductive functions would be a significant part of explaining the church's social significance. But claiming that the church is "in" a "component" called "culture," "society," or "personality"—or "in" all three—would add nothing to the explanation.

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<sup>588</sup> See *supra* text accompanying notes 316-17, 332-41, 369-70.

<sup>589</sup> See *supra* text accompanying notes 189-93.

<sup>590</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 80.

<sup>591</sup> *Id.* (Legal rules are "part of the societal component" but "are also represented in the other two lifeworld components, as legal symbolism and as competences acquired via legal socialization.").

Consider, finally, Habermas's notions of the political public sphere and civil society. In *Theory of Communicative Action*, Habermas tried to locate the public sphere within the societal component.<sup>592</sup> But as he acknowledges in *Between Facts and Norms*, the public sphere is not an "institution," "organization," or "framework of norms."<sup>593</sup> The public sphere, then, seems difficult to place in the "society" component. Probably for this reason, *Between Facts and Norms* does not specify a lifeworld "component" as the public sphere's location. Civil society, which appears only in *Between Facts and Norms*, generally is assigned an address in the "society" component. But the network of voluntary associations—more so, even than the particular association of a church—performs the functions of cultural reproduction and socialization that Habermas attributes to the "culture" and "personality" components, not just the "social integration" function he assigns to the "societal" component.

All this is to say that it is fruitless to try to place social phenomena in one or the other lifeworld "component." But Habermas himself seems to understand the component scheme as inviting that exercise. And if the "components" of the lifeworld are not to be understood as containing subparts, then their purpose is unclear. Habermas would do better simply to speak of the reproductive functions—cultural reproduction, social integration, and socialization—and not of the lifeworld "components" to which they ostensibly correspond.

This would be consistent with his suggestion in *Between Facts and Norms*—not always faithfully followed—that "[t]he communicative concept of the lifeworld breaks with the idea of a whole composed of parts."<sup>594</sup> It would be consistent, also, with the approach of his "circulation of power model." In that model, the elements of his explanation are civil society, the public sphere, and the various official decisionmaking political institutions. Only as an afterthought does Habermas connect civil society to one of the "components," and it does not occur to him to find a "component" to house the public sphere.

At the beginning of this section I identified as a second target of criticism Habermas's idea of the lifeworld as a separate sphere of society, differentiated from the economic and administrative systems. This conception is the effect of Habermas's distinction between system and lifeworld.

In Part II of this Article, I criticized the account of systems'

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<sup>592</sup> See *supra* Part II.D.

<sup>593</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 360.

<sup>594</sup> *Id.* at 80.

“uncoupling” from the lifeworld that Habermas gave in *Theory of Communicative Action*. In that work, Habermas understood “uncoupling” in a radical sense. It meant more than just that new mechanisms of societal integration had developed, allowing action to be coordinated without communicative agreement. Uncoupling meant, also, that the lifeworld’s resources were unnecessary in coordinating media-steered interaction, and that the differentiated systems were formally organized, “norm-free” contexts of action.<sup>595</sup> This stylized contrast between the normatively rich lifeworld and the normatively empty systems, I argued, is untenable.

As I have suggested in this section of the Article, *Between Facts and Norms* tacitly revises the system side of the system/lifeworld distinction. No longer is the political system, at least, “norm-free.”<sup>596</sup> In fact it is both the recipient of “normatively substantive messages” from the public sphere and also, in legislatures and courts, the generator of communicative power through institutionalized discourse. This revised conception of “system” suggests to me that the system/lifeworld distinction itself is unnecessary. The difference between “system” and “lifeworld”—between political center and periphery—now is not a sharp distinction between the presence and absence of communicative action (or even discourse). Instead, we can speak only of more or less reliance on communicative action versus reliance on command.<sup>597</sup>

I am not denying all distinctions between the political system, the economic system, and the rest of the social world. The question, however, is how to account for that rest of the social world. I have argued above against conceiving it as divided into the “structural components” of culture, society, and personality. My suggestion now is that the cover term, “lifeworld,” also should be dropped.

My argument is based, in the first instance, on the history of the term “lifeworld.” As I explained in Part II.B, the term

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<sup>595</sup> See *supra* text accompanying notes 379-86.

<sup>596</sup> *Between Facts and Norms* does not provide any significant analysis of the economic system.

<sup>597</sup> Cf. Peters, *supra* note 471, at 120-26 (criticizing the “dualistic conception of system and lifeworld,” *id.* at 125); *id.* at 127 (“[T]he important analytical distinction between social integration and system integration . . . should not be . . . trivialized as a contrast between a ‘living,’ informal, creative social world and ‘mechanical,’ entirely self-directing social systems.”). Peters suggests that Habermas’s analysis of law and democracy is difficult to locate in the system/lifeworld framework, see *id.* at 123, and he suggests that Habermas is moving away from a polar distinction between system and lifeworld. *Id.* at 123. As noted above, see *supra* note 470-71 and accompanying text, the “model of the circulation of power” that marks a shift in Habermas’s thinking was borrowed from Peters himself.

originated in Husserl's later work to mark a contrast between the world of everyday, pretheoretical, taken-for-granted certainties, on one hand, and the world as understood by "objectifying" sciences, on the other. Schutz continued this focus on the "mundane," everyday world, as subjectively experienced. Without that focus, and its implied contrast to other ways of apprehending the social world, it would be difficult to see why one would choose the term "lifeworld." Indeed, the term "lifeworld" seems to me linked to a particular methodological approach in the social sciences—one that investigates the ordinary, everyday world and how human beings experience it.

This approach can be practiced in any sort of setting. It need not be limited to an especially "informal" or "communicatively organized" setting. One could analyze the "lifeworld" of the New York diamond business, or a Mafia family, or floor traders on the New York Stock Exchange, or a conference among social systems theorists. Habermas is right that one would not fully understand the workings of an economy through the "lifeworld" perspective. But at the same time, the "lifeworld" perspective would disclose insights, relevant to the workings of an economy, that would be unavailable to social systems theory, or for that matter economic theory.

My guess is that the term "lifeworld" appealed to Habermas because it marked, sharply, the difference between the two theoretical methods he wanted to reconcile, and also the difference between the conceptions of social life that those methods disclose. These latter differences were rhetorically important for Habermas's "colonization" argument in *Theory of Communicative Action*: the mechanical systems, born of the living lifeworld, turn back on the parent to devour it.<sup>598</sup> As I have argued, that version of the system/lifeworld distinction was not defensible, and the story line of *Between Facts and Norms* requires a different conception: one in which "lifeworld" and "system" do not operate on utterly different premises and principles. The conception of the political system in *Between Facts and Norms* is not systems-theoretical in any sense that Habermas has introduced and defended, nor is the distinction between the "inside" and the "outside" of the political system dramatically different in the respects Habermas's distinction deems relevant. The term "lifeworld"—as a reference to a separate sphere of the social world rather than the name of a social-scientific approach—should in my view be dropped.

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<sup>598</sup> Cf. Peters, *supra* note 471, at 127 (quoted *supra*, note 597).

#### IV. AUTOPOIETIC THEORY AND THE REFORMULATION OF HABERMAS'S SOCIAL-THEORETICAL MODEL

In what follows, I proceed from the conclusions of the preceding parts of this Article: (1) *Theory of Communicative Action's* system-lifeworld interchange model is untenable, particularly when the objective is to develop a theory of law and democracy; (2) Habermas's model of the circulation of power is inconsistent with the interchange model, especially in its conception of "systems" and the relation between systems and their environments; and (3) the shift in Habermas's concept of "system" makes his notion of the lifeworld dispensable. But the collapse of Habermas's media-theoretical conception of systems raises the question: what exactly *is* Habermas's conception of a system? And further, how are systems related to their environments?

The first question arises because Habermas's "circulation of power" model introduces the idea of "the political system" casually. The political system, he says, is differentiated into center and periphery.<sup>599</sup> The characterizations of center and "inner periphery," however, have the quality of lists rather than concepts. Habermas's account of the center (or core area) is as follows:

The core area of the political system is formed by the familiar institutional complexes of administration (including the incumbent Government), judicial system, and democratic opinion- and will-formation (which includes parliamentary bodies, political elections, and party competition).<sup>600</sup>

The three branches of government all are represented here, but not in a parallel way. With the "administration" [*Verwaltung*], Habermas seems to include all the personnel who operate it ("the incumbent Government," or *Regierung*).<sup>601</sup> With the judicial system, he seems to mean just the system of courts, not necessarily the judges themselves. For the third branch, one would expect Habermas to say, simply, "legislatures" (or "parliamentary bodies"), or perhaps "legislatures (including the elected representatives)." Instead, he uses a term for a process rather than an institution—"democratic opinion- and will-formation"—and he explains that the process "includes" institutions ("parliamentary

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<sup>599</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 354.

<sup>600</sup> *Id.* at 354-55.

<sup>601</sup> *Id.* at 354. See JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 430 (1992), for the German terms. Translator William Rehg explains that *Verwaltung* refers to "the aspect or branch of the state as a bureaucratically organized implementing power," while *Regierung* "refer[s] to the leadership or party in office." Rehg, *supra* note 35, at xxxvi.

bodies”) and two mechanisms or procedures (“political elections, and party competition”).

Thus the “center” includes a mix of institutions, personnel, and procedures, all described generally (and misleadingly) as “familiar institutional complexes.” Not only are the items on the list not all of the same type; they do not all have the same function. Legislatures have a lawmaking function. Courts and the administration, Habermas’s “discourse theory” makes clear, have a law-applying function.<sup>602</sup> Nor are all the items on the list official state decisionmaking entities. Courts and the “administration” are, but “political elections” are decisions, or decision procedures, and selection is made by the people rather than by state officials. Similarly, “party competition” does not name a state decisionmaking entity. Obviously, such competition is *relevant* to the course of official decisionmaking—it organizes the electoral process and communication within legislative bodies—but it is not itself a state decisionmaking institution or procedure. In short, Habermas’s characterization of the political system’s center seems *ad hoc*—a listing of institutions, personnel, and procedures that bear upon official decisionmaking, but without a clear concept that adequately connects the items on the list.

Perhaps the above makes too much of the casual way Habermas first characterizes the political system’s “center.” But even if so, what makes the center, so described, a *system*? Habermas’s earlier conception of “system” emphasized that systems are characterized by steering media tailored to strategic action, with the mechanism of communicative agreement generally set aside as a basis for coordinating action. While Habermas still recites this official explication of “system,” the political system, for reasons explained above, does not conform to this conception. What, then, makes the political system’s center a “system”?

Similar observations apply to Habermas’s account of the periphery. The inner periphery consists in a collection of institutions and associations performing quasi-state functions.<sup>603</sup> There, at least, we have a common theme that connects the items on the list. At the outer periphery, we have first another collection of associations and institutions—“customers” and “suppliers,” who are linked in ongoing communication with state decisionmaking entities. We have, further, a network of voluntary associations called “civil society.” But the pattern is broken with Habermas’s inclusion of the political public sphere in the outer periphery.

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<sup>602</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 192 (stating that the judiciary engages in “a discourse of application aimed at decisions consistent over time”).

<sup>603</sup> See *supra* text accompanying notes 488-89.

That sphere, he says, is a network of communication, or a social space, not an association, institution, or collection of associations and institutions.

Habermas, then, has an inconsistent conception of the periphery. It is neither purely a network of communications nor purely a network or collection of associations. Nor are the associations he places at the outer periphery necessarily communicating in the (outer peripheral) public sphere. These associations, he says, are rooted in the “core private structures” of the “lifeworld,”<sup>604</sup> and whether they participate in the political public sphere is contingent.<sup>605</sup> The civic-social associations probably are better described, as Habermas sometimes does, as the “social basis” of the communication that occurs in the political public sphere.<sup>606</sup>

Habermas’s account of the outer periphery faces a second and more serious problem. As I noted above, Habermas does not make clear whether civil society and the political public sphere, as “peripheral” networks or sites of communication, are inside or outside the system’s borders. I suggested that his theory would require him to place both networks outside the system’s borders, but only because he stated both that the public sphere is not organized as a “system” and that civil society is a “lifeworld” sphere.<sup>607</sup> Once we see that Habermas’s model of the circulation of power undercuts his prior definitions of system and lifeworld, and in the process undermines the distinction between the two, the question is again open. Should the “peripheral” networks of political communication count as “inside” or “outside” the political system? Or should the term “political system” be taken to include only official decisionmaking channels (legislatures, courts, agencies, etc.)? Either way, what establishes the system’s boundaries? If we treat the periphery as “outside,” then the system’s boundaries are determined by whether the communication, or the communicating entity, has official

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<sup>604</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 354. I am inferring that Habermas would describe civil society as rooted in these “core private spheres” because (1) he goes on to say that “the public,” i.e., the participants in the public sphere, are “recruited” from “this private sphere,” and (2) he sees communication in the public sphere as an expression of problems discovered and discussed first in the voluntary associations of civil society.

<sup>605</sup> Bowling leagues, for example, are civil-social organizations that do not ordinarily contribute to discussion in the political public sphere.

<sup>606</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 299 (referring to “civil society, as the social basis of autonomous public spheres”); see also *id.* at 301 (referring to civil-social associations as the “basis” for the political public sphere); *id.* at 308 (referring to egalitarian relations as the necessary “societal basis” for a democratic political public sphere).

<sup>607</sup> See *supra* text accompanying notes 561-63.



decisionmaking power. If we treat the periphery as “inside” the political system, then the system’s boundaries are determined—for the most part—by the character of the communication. (Is it “political” communication or not?)

As Habermas notes, Niklas Luhmann’s theory of law as an “autopoietic” system addresses this question of a communicative system’s scope.<sup>608</sup> Luhmann’s answer is worth considering to see whether it might provide the beginning for a more rigorous conception of Habermas’s “systems.”

Luhmann defines social “systems” as networks of communication.<sup>609</sup> Communications, as the “elements” and “operations” of a system, establish the system’s boundaries. For Luhmann, then the legal system is the totality of all legal communications. By itself, of course, that does not explain what a “legal communication” is. For that purpose, Luhmann relies on the notion of a system’s code. As discussed briefly above, Luhmann sees a system code as a binary opposition between values—legal/illegal, in the case of the legal system.<sup>610</sup> And so for Luhmann, all communications that invoke the code values “legal” or “illegal” count as operations and elements of the legal system. That means, for example, that the utterance “get off my property,” made by one private citizen to another, would be a communication within the legal system to the extent that it asserts an owner’s legal right to exclude. So, too, does the writing of a will or the formation of a contract count as an operation of the legal system. Luhmann thus sees the boundaries of communicative systems expansively. Any communication that invokes the system’s code is an operation of that system.

But Luhmann quickly introduces two distinctions that make this conception of the legal system—the totality of all communication that invokes the legal code—more manageable. First, Luhmann distinguishes between communications that are “decisions” and those that are not. By “legal decisions” he means communications that “change the situation of the law.”<sup>611</sup> Court decisions are obvious examples, but the category of decisions includes also “statutes, treaties, administrative acts, wills, land registry entries,” and contracts.<sup>612</sup> Second, Luhmann sees the legal

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<sup>608</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 48-49 (distinguishing between Luhmann’s “broad” and “narrow” conceptions of the legal system).

<sup>609</sup> This paragraph draws on Baxter, *supra* note 29, at 2004-08.

<sup>610</sup> See *supra* text accompanying notes 480-84.

<sup>611</sup> Niklas Luhmann, *Legal Argumentation: An Analysis of Its Form*, 58 MOD. L. REV. 285, 286 (1997).

<sup>612</sup> *Id.* at 286; see also NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 320 (1993). Translations from this volume are my own.

system as internally differentiated. The axis of differentiation—as in Habermas’s analysis of the political system—is the distinction between center and periphery. Luhmann—as does Habermas, in those passages of *Between Facts and Norms* that speak of a separate “legal system”—places communication by and to courts at the legal system’s center.<sup>613</sup>

One parallel, then, is that both Luhmann and Habermas place the relevant decisionmaking institution at the system’s “center,” with system-relevant communication of other sorts at the periphery. A second parallel is in their respective treatments of the periphery. Habermas, we have seen, emphasizes the role of political and legal communication outside official state decisionmaking institutions—in the public sphere, and also in civil society. This “informal” communication is important to the system’s self-reproduction, according to Habermas’s model of the circulation of power. Civil society, as a source of “counterknowledge,” may stimulate discussion in the public sphere and generate ideas that, one day, may influence the course of lawmaking or other official decision. For his part, Luhmann emphasizes that the “peripheral” status of communication outside the courts—the most important forms of which are legislation and contract—does not mean that such communication is any less important to the system’s self-reproduction. Instead, the periphery is the source of the system’s “real dynamism.”<sup>614</sup> It is the “contact zone[] to other functional systems of society”—much as, for Habermas, the political public sphere is linked to civil society, and civil society is “attuned to how societal problems resonate in the private life spheres.”<sup>615</sup> “Peripheral” for both authors thus does not mean unimportant. Instead, it means potential openness to the world beyond the system’s boundaries.

Let me return to the two problems I raised with Habermas’s revised model. The first problem was that Habermas lacks a coherent concept of “system” once we reject, as both implausible and inconsistent with his present work, the earlier account with its focus on “steering media.” The second problem concerned the scope of a system’s boundaries. Do they extend beyond the

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<sup>613</sup> See, e.g., *BETWEEN FACTS AND NORMS*, *supra* note 14, at 196-97 (“Because all legal communications refer to actionable claims, court decisions provide the perspective from which the legal system is analyzed. The choice of this perspective implies only a *methodological* commitment, not a restriction of the analysis to processes of adjudication.”).

<sup>614</sup> Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDZO L. REV.* 1443, 1459 (1992). Teubner is an autopoietic theorist, and for reasons stated in text, Luhmann would have agreed with this statement.

<sup>615</sup> *BETWEEN FACTS AND NORMS*, *supra* note 14, at 367.

“central” decisionmaking body to include the “periphery”?

One way of reconstructing Habermas’s collapsed “system” concept would be to follow Luhmann. By “system,” we then would mean a network of communication, not (at least not in the first instance)<sup>616</sup> institutions or personnel. The political system then would include all system-relevant communication. For reasons I have explained in prior work (and here relegate to the margins),<sup>617</sup> I would not use Luhmann’s idea of the binary code as the means for identifying which communications count as system-relevant. Instead, I would select a communicative “theme” or “point” around which the system seems to center. With respect to the political system, Habermas emphasizes the centrality of political power, though in more than one sense. Some communication is about the production of legitimate law, a process he describes as the conversion of communicative power into administrative power. Some is about the exercise of administrative power. And some (particularly with respect to elections) is about access to offices with political decisionmaking power. A good criterion for the political system’s communication, then, might be: “communication related to the generation of, exercise of, or access to political power,”<sup>618</sup> where “political power” could be defined further along the lines of Habermas’s distinction between communicative and administrative power.<sup>619</sup> All such communication is within the political system’s boundaries, and other communication is not. This conception of the political

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<sup>616</sup> The qualification is necessary because Luhmann uses a society’s institutional framework to distinguish between center and periphery.

<sup>617</sup> See Baxter, *supra* note 29, at 2067-72. One problem with the idea of code as unity-establishing system mechanism is that Luhmann himself posits two codes for the political system and equivocates on the nature of the economic system’s code. His argument would suggest that the political system really is two systems—because the code is what establishes the system’s unity—and his uncertainty about the economic system’s code makes it difficult to believe that there is a code for that system so basic as to organize all communication. See *id.* at 2067-68. A second problem is that the emphasis on communication as allocation of code values flattens out the nature of communication. See *id.* at 2068-69 (with respect to the binary legal/illegal code and legal communication). A better idea for explaining a system’s unity is one Luhmann suggests elsewhere in his work—the idea of a “circulating symbol,” or (non-binary) communicative theme. “Legal validity” was Luhmann’s example of a “circulating symbol,” and it seems to me that communication oriented toward the notion of legal validity (or invalidity) could be said to be legal communication. See *id.* at 2070-72. I adopt this approach in text below.

<sup>618</sup> This “theme” actually corresponds to the two codes Luhmann posits for the political system, see LUHMANN, *supra* note 612, at 420-21, 436, although I state it as a theme rather than an opposition between binary “code values.” See *supra* note 617.

<sup>619</sup> Certainly one could define the organizing theme or point differently. Or one could choose different conceptions for different purposes of analysis. My idea of this organizing theme or point is not so “fundamentalist” as Luhmann’s notion of the binary code, according to which all system communication is about the allocation of opposed code values.

system's boundaries is expansive: it would include political discussion in the political public sphere, to the extent that it relates sufficiently to the theme of political power. Still, following Habermas's center/periphery scheme, this communication would be "peripheral," as compared to communication at the system's decisionmaking center.

On this understanding of the political system, however, most communication in what Habermas calls "civil society" would be beyond the system's boundaries. Likely, also, civil society would not count as a system—at least not a differentiated system with a unifying communicative theme—because its communication, as Habermas describes it, is too diffuse. In Luhmann's terms, civil-social communication would be in the political system's environment. But that raises the question: what is the nature of that system/environment relation? How is communication occurring in the voluntary associations of civil society relevant to the political system as we now are conceiving of it? The same sort of question arises also with respect to the political public sphere. If we see the political system as differentiated into center and periphery, how do the two spheres relate to one another?

This question of system/environment relations is the focus of Habermas's polemics against autopoietic theory. According to Habermas, by denying relations of input and output among the systems it distinguishes,<sup>620</sup> autopoietic theory sees each system as "narcissistically marginalized,"<sup>621</sup> "autis[tic],"<sup>622</sup> and autopoietically "encapsulate[d]" in "its own shell,"<sup>623</sup> speaking its own language and only to itself.<sup>624</sup> This "mutual indifference" among systems, Habermas says, is inconsistent with "empirically observed interdependencies."<sup>625</sup> And the postulated indifference of systems to their environments makes the democratic process inconceivable. On Luhmann's premises, says Habermas, "the

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<sup>620</sup> See BETWEEN FACTS AND NORMS, *supra* note 14, at 49, 51.

<sup>621</sup> *Id.* at 51. Habermas refers here to Luhmann's theory of law, but probably he understands the point as a general one.

<sup>622</sup> *Id.* at 335.

<sup>623</sup> *Id.* at 56.

<sup>624</sup> See *id.* at 54 (discussing Teubner's interpretation of autopoietic theory); see also *id.* at 335 (on autopoietic premises, systems develop "their own codes and their own semantics," mutually untranslatable, and thus can only observe one another rather than "communicate directly with one another"); *id.* at 343 (discussing autopoietic premises and noting that social subsystems have "their own specialized semantics" that . . . "break[] off a direct exchange of information with their corresponding environments"); *id.* at 346 ("[T]he problem of successful communication among independent and self-referentially operating units, each with its own perspective on the world, corresponds almost exactly to the familiar phenomenological problem of constructing an intersubjectively shared world from the egological achievements of transcendental monads.").

<sup>625</sup> *Id.* at 51.

political process, the public sphere, and political culture present environments whose language the legal system cannot understand.”<sup>626</sup>

This reading of Luhmann is the occasion for Habermas’s metaphors of law as “hinge” or “transformer” between system and lifeworld.<sup>627</sup> Law, he suggests, operates not as a special “code” or system language, as autopoietic theory would have it. Instead, law is the translator between the ordinary-language communication of the lifeworld and the system-specific codes of the economic and administrative systems.<sup>628</sup> Because law has the capacity to “communicate[] with the steering media of money and administrative power,” Habermas claims, it is capable of sending “[n]ormatively substantive messages” from lifeworld to system.<sup>629</sup>

Habermas’s account of autopoietic theory, however, is a caricature that exaggerates the distance between his views and Luhmann’s. The feature of autopoietic theory Habermas is reacting to is the idea of systems’ “operative closure.” This is the feature that makes systems “autopoietic,” or, self-producing, and in fact it is a tautological consequence of Luhmann’s notion of “system.” If a system’s operations consist in all and only those communications that invoke the system’s code, as Luhmann stipulates, then it is “closed” with respect to those operations. The system’s operations establish the system’s boundaries, and the system is in fact coextensive with its constituent operations.<sup>630</sup>

What Luhmann is rejecting here is the idea that information can cross system boundaries unproblematically. Communications have system-specific meaning, he says, and so a communication proper to one system is in the first instance just “noise” to another system.<sup>631</sup> Further, to the extent that systems “observe” each other—that is, to the extent that communication in one system refers to another system—the observation is framed by the standards and procedures of the observing system.<sup>632</sup> External reference is in that way at the same time self-reference.

These are the claims to which Habermas’s polemic attaches. Closure with respect to a code means, for Habermas, that each system is “encapsulated in its own shell,” with its own “semantics” and unintelligible to other systems. The impossibility of direct

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<sup>626</sup> *Id.*; see also *id.* at 343 (noting that for autopoietic theory, the political public sphere is “hitched to the power code and placated with symbolic politics”).

<sup>627</sup> See *id.* at 55-56.

<sup>628</sup> See *id.* at 54.

<sup>629</sup> *Id.* at 56.

<sup>630</sup> See Baxter, *supra* note 29, at 2004-05.

<sup>631</sup> See *id.* at 2005-06.

<sup>632</sup> See *id.* at 2009-10.

communication between systems means, for Habermas, that the systems are “autistic,” speaking only to themselves. The connection between self-reference and external reference means, for Habermas, means that systems are “narcissistically marginalized.” If operative closure, as described above, were the whole story for autopoietic theory, then Habermas’s reading might be justified.

But operative closure is only part of the story. With that idea Luhmann pairs the idea of “cognitive openness.” Systems are operatively closed, in the sense that their operations do not cross system boundaries—by definition, they *establish* the system’s boundaries, and the system is coextensive with the communications that are the system’s operations. But these communications may, and ordinarily do, refer to events, processes, etc. in the system’s environment. In that sense, systems are “cognitively open” to their environments. Luhmann thus does not deny the possibility of “external reference.” Instead, his point is simply that such reference is not a neutral mirroring of the world. To the extent that communicative systems have differentiated from one another, they have developed distinctive standards, criteria, and procedures, and thus distinctive ways of apprehending the world.<sup>633</sup> Law is not science, and science is not art. Luhmann’s point is simply that we cannot presume identity of meaning across system boundaries.

But how, on Luhmann’s view, is one system “cognitively open” to another, when in the first instance the systems’ respective streams of communication present not “information” to one another but just “noise”? Luhmann’s answer is in terms of the notions of “irritation” (or “perturbation”) and structural coupling.<sup>634</sup> Communication in one system may “irritate” another system’s communication to the extent that it “registers” or “resonates” in the irritated system’s structures, categories, or criteria. The meaning of the communication, however, will be different in the two systems. To the extent that the irritating communication can neither be screened out as irrelevant nor easily processed within the irritated system’s categories, Luhmann maintains, it may stimulate change in those categories. This possibility is the autopoietic equivalent for what more standard

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<sup>633</sup> Luhmann’s term for these standards, criteria, and procedures is “programming.” See *id.* at 2009-13 (discussing “programming,” with particular reference to law). I find the term “programming” unhelpful. See *id.* at 2068-69; see also *supra* note 617 (listing two reasons for rejecting the idea of the binary code, the second of which also applies to programming).

<sup>634</sup> What follows draws on Baxter, *supra* note 29, at 2036-39.

versions of social systems theory call “adaptation to the environment.” Autopoietic theory, however, emphasizes more strongly that the change is not simply induced from without but generated from within.

Through “structural coupling,” Luhmann says, this process of mutual irritation can be made more systematic and systems made more responsive to one another. One meaning Luhmann gives “structural coupling” is that one system “presupposes specific states or changes” in another system and “relies on them.”<sup>635</sup> Courts, for example, presuppose that their decisions will be enforced by the political system, and thus legal and political discourse are “structurally coupled” in this sense. This “coupling” seems consistent with Habermas’s notion of the reciprocal functions that law and political power perform for one another.<sup>636</sup> Another meaning Luhmann gives “structural coupling” is that a structure or central category might be common to, though understood differently in, two systems. For Luhmann, legislation is a mechanism that structurally couples the legal and political systems, with different “prehistories” and “possibilities for connection” in the two systems.<sup>637</sup> From the perspective of the political system, a statute’s “prehistory” is the political maneuvering that led to its enactment. By shifting (even if slightly) the balance of power between government and opposition, the statute’s enactment creates fresh possibilities for future political maneuvering. From the perspective of the legal system, by contrast, the statute’s “prehistory” is in the dutiful following (or not) of legally prescribed legislative procedures. As for new “possibilities for connection,” the statute’s enactment creates new valid law that changes the legal position for future cases.

Law is full of concepts and categories that have this sort of “double meaning”<sup>638</sup>—one meaning in legal communication, and a related but not identical meaning in the communication of another system. A good example is the idea of property. Probably the dominant legal conception of property is expressed in the familiar “bundle of rights” formula.<sup>639</sup> With the reference to “rights,” the formula refers “internally,” to the legal system’s own categories and procedures. But the rights in the bundle—to use, exclusive

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<sup>635</sup> Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *CARDOZO L. REV.* 1419, 1432 (1992).

<sup>636</sup> See *supra* text accompanying note 43.

<sup>637</sup> LUHMANN, *supra* note 612, at 435, 436.

<sup>638</sup> *Id.* at 455.

<sup>639</sup> On the dominance of the “bundle of rights” formulation, see J.E. Penner, *The ‘Bundle of Right’ Picture of Property*, 43 *UCLA L. REV.* 711, 712-15 (1996).

possession, disposition, and profit—correspond to economic interests. The legal concept of property thus also refers externally and allows (in Luhmann’s term) “observation” of the economic system. But despite the reference to economic “interests,” the legal meaning of property does not coincide with its economic meaning—as I have argued elsewhere, with reference to “takings” law.<sup>640</sup>

Consider two further examples of this kind of structural coupling. First, the concept of “insanity” in criminal law is informed by its counterpart in psychiatry. But as the Supreme Court has noted, the two concepts “vary substantially,” given the different senses of “individual responsibility and competency” with which the two disciplines operate.<sup>641</sup> Second, the use of experts in litigation allows incorporation of scientific knowledge into litigation, and part of the federal admissibility standard is whether the “reasoning or methodology underlying the testimony is scientifically valid.”<sup>642</sup> The other part of the standard, however, refers internally, to whether the information in question would “assist the trier of fact to understand or determine a fact in issue.”<sup>643</sup> In announcing this standard, the Supreme Court noted differences between legal and scientific inquiry—specifically, in finality or revisability of conclusions, time constraints on the proceedings, and the purposes for which knowledge is to be used.<sup>644</sup> To this list one might add the different standards of proof and the different capacities of the relevant inquirers.

The idea of structural coupling suggests an important set of problems. The goal of improving the system’s “openness”—its ability to incorporate insights from other systems of communication—must be accomplished through mechanisms, procedures, and standards of the “observing” system. These of course can be modified, but they are not infinitely plastic. Improving a system’s “external” reference always is, at the same time, a problem of the system’s self-reference.

Much more could be said about the idea of structural coupling, but this quick sketch will have to suffice.<sup>645</sup> It shows, I

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<sup>640</sup> See Baxter, *supra* note 29, at 2047-57.

<sup>641</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii, xxvii (4th ed. 1994)) (“The legal definitions of ‘insanity’ and ‘competency’ . . . vary substantially from their psychiatric counterparts. Legal definitions, . . . which must ‘take into account such issues as individual responsibility . . . and competency,’ need not mirror those advanced by the medical profession.”)

<sup>642</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993).

<sup>643</sup> *Id.* at 592.

<sup>644</sup> See *id.* at 596-97.

<sup>645</sup> In prior work I have suggested a number of other possible “structural couplings.”



think, that Habermas is wrong to dismiss autopoietic theory so quickly as a theory of “autistic,” “narcissistically marginalized” systems, “encapsulated in their own shells” and speaking only to themselves.

At the same time, however, I think there is substance to a criticism of autopoietic theory that Habermas made seven years before *Between Facts and Norms*: that Luhmann errs in conceiving of systems as observing, communicating subjects.<sup>646</sup> Habermas argues that autopoietic theory is, in effect, an appropriation of (what Habermas calls and condemns as) the “philosophy of the subject.”<sup>647</sup> Whether or not that is so, I agree that Luhmann is wrong to present systems—for example, the legal system—as unitary observers and communicators. In my view, the conception is inconsistent with Luhmann’s acknowledgement that systems like the legal system are themselves differentiated—in the case of the legal system, differentiated into “central” and “peripheral” circuits of communication. Further, in distinguishing between decision and argument, Luhmann understands legal communications to have different effects and different possibilities for connection to future communications. These differences among communications are flattened out by statements that present “the legal system” as communicator and observer.

Luhmann’s account of the center/periphery distinction suggests, further, that some of the totalizing claims he makes for systems theory need to be trimmed back. Like Habermas, Luhmann distinguishes between “center” and “periphery” by

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Many link the legal and economic systems. For example: the concept of negligence (particularly as elaborated economically), the idea of the corporation, “competition” in antitrust law, and the general idea of “liability.” Intellectual property law establishes links between law and both art and science. Administrative law couples the legal and political systems. The couplings are much more dense than Luhmann’s short list of examples suggests. See Baxter, *supra* note 29, at 2075-78. Further, Luhmann understates the coupling of systems through events rather than structures. As he acknowledges, a communication may be simultaneously (for example) legal and economic—as when a losing defendant pays a judgment, or when a lawyer presents an argument in court for a fee. See *id* at 2038, 2078-79. Further, Luhmann’s emphasis on structural coupling leads him to understate the importance of other kinds of “irritation” among systems—as when, for example, a legal event (e.g., a decision in the ongoing Microsoft litigation) registers in both the economic and political systems. See *id.* at 2079-80.

<sup>646</sup> See *Excursus on Luhmann’s Appropriation*, *supra* note 31.

<sup>647</sup> *Id.*; see also Thomas McCarthy, *Interaction, Indeterminacy, Normativity: Comments on Gumbrecht, Yablon, and Cornell*, 13 CARDOZO L. REV. 1625, 1625 (1992) (“[S]ystems theory actually reproduces almost the entire repertoire of the classical philosophy of the subject in a new medium.”); Günter Frankenberg, *Down By Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360, 381 (1989) (“[T]he old European project is here rethought: In place of the self-referential subject stands the self-referential system, the self-reference of system operations replaces the self-assurance of thinking, and instead of knowledge of the world we are now dealing with the observation of observations.”).

looking to communications' institutional site. Legal communication in the courts, he says, is central; communication in legislatures is peripheral. Courts and legislatures, however, are not elements of autopoietic theory. That theory conceives of society as the system of all communications; the legal system as the totality of all legal communications, and so forth. Only communications are elements and operations of a system. But when Luhmann begins to analyze the legal system, he needs more than elements and operations. He draws on a more conventional sort of social theory that speaks not just of systems and their elements but also of institutions—like legislatures and courts. Underneath the purity of autopoietic theory is a much more ordinary way of looking at the social world.

What I am suggesting is a double focus. The networks of communication that Luhmann calls "systems" present possibilities for ongoing communication. That network makes some possibilities more likely and tends to close off others. But which selections will be made depends upon the "place" in the system at which the communication occurs—by which I mean the social site of communication, as identified by a more conventional theory that speaks of agents and institutions. It depends also on the nature of those agents, individual or collective, who are communicating. This is not to say that "systems," as Luhmann conceives of them, are not both constraining and enabling. What one can say, and whether one will say it, is not simply a matter of purely free agency. But neither is it best described simply as an operation of the system.

Instead of systems, then, we might better speak of "discourses" (or, alternatively, "communicative networks"). And in addition to those "discourses," we need an account of both the sites of discourse and those who discourse. Luhmann probably would not have accepted these suggestions as friendly amendments. But they strike me as improvements.

Particularly as amended, this conception of systems as discourses is consistent with what Habermas is trying to accomplish with his model of the circulation of power and his idea of law as translator among discourses. The main goal of Habermas's "communications theory of society" is to show, in social-theoretical terms, how the "informal" discourses of the political public sphere can influence the institutionalized discourses of decision at the political system's center. The possibility of this influence, he says, depends in turn on the openness of the political public sphere to the "impulses" of civil society.

Autopoietic theory, particularly as revised, provides a way for Habermas to account for these connections among different circuits of communication. The “center” of the political system institutionalizes official discourses that are directed toward decision. Habermas distinguishes from that network of communication the political public sphere. This network of communication is “peripheral,” on Habermas’s account, but if we see his “political system” as a communicative network whose theme is political power, then discussions in the political public sphere are within the boundaries of the political system. “Civil society,” by contrast, does not name a circuit or network of communication that is closed by a single theme. Rather, “civil society” is the collective name for voluntary associations in which communication—but not communication of a particular sort—occurs. In autopoietic terms, it is an environment to the political system, though not one organized as a system or particular discourse.

What Habermas’s account of democracy prescribes is, in effect, irritation and structural coupling among the three communicative networks he distinguishes. Recall, first, his account of the relation between civil society and the political public sphere. The voluntary associations of civil society are “attuned to how societal problems resonated in private life spheres.”<sup>648</sup> Moreover, Habermas says, “[t]he great issues of the last decades” were first discussed in these voluntary associations—and as examples of these issues he mentions the nuclear-arms race, the risks of nuclear power and genetic engineering, ecological issues, the “dramatically progressing impoverishment of the Third World and problems of the world economic order,” feminism, immigration, and multiculturalism.<sup>649</sup> When first raised in civil-social organizations, none of these issues was on the agenda of the political public sphere. But the members of the “public”—by which Habermas means those who participate in the political public sphere—are “recruited”<sup>650</sup> from these voluntary associations. The process of getting general public attention to these issues required, both literally and in terms of autopoietic theory, *irritation*: “dramatize[d] presentations” that capture the attention of the mass media.<sup>651</sup> “Only through their controversial presentation in the media,” Habermas says, “do such topics reach the larger public and subsequently gain a place on the ‘public

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<sup>648</sup> BETWEEN FACTS AND NORMS, *supra* note 14, at 381.

<sup>649</sup> *Id.*

<sup>650</sup> *Id.* at 354.

<sup>651</sup> *Id.* at 381.

agenda.”<sup>652</sup>

This “irritation” of the political public sphere’s communicative network thus required strategic choices by concerned individuals and groups. For that reason, it is not readily explained simply as an operation of a “system”—autopoietic theory unamended. But unsatisfying, too, is the mixed metaphor Habermas uses to describe the process of agenda-making: civil-social organizations, he says, “distill and transmit” responses to social problems “in amplified form to the public sphere.”<sup>653</sup> What the metaphor obscures is what autopoietic theory suggests: a communicative network is capable of screening out, as “noise,” a communication that does not conform to generally prevailing standards and assumptions. Irritation may, but hardly is guaranteed to, transform the network’s prevailing patterns.

The relation between political public sphere (“periphery”) and decisionmaking institutions (“center”) is, from the point of view of autopoietic theory, a relation between subsystems of the political system.<sup>654</sup> In other words, the two communicative networks are distinct. Habermas would not disagree. He distinguishes between informal public discourse and institutionalized discourses of decisionmaking institutions. The problem is to ensure that the political public sphere “influences” the course of official decision.

Habermas’s reconstructive account of the “constitutional state” identifies a number of mechanisms that are designed to link the informal and formal discourses. These mechanisms are, in autopoietic terms, mechanisms of structural coupling. The most obvious is the requirement of periodic democratic elections. Like the other mechanisms of structural coupling, elections do not require that a particular communication have the same meaning in the communicative networks they link. Votes, if intended by voters as a statement of personal commitment, may “irritate” the official network of communication as threats to (or confirmations of) the balance of political power and the terms of access to power. Elections organize and focus these irritations and make outcomes legally binding.

Similarly, guarantees of free speech, association, press, and assembly, “provide a continuous influx”<sup>655</sup> of irritations into the communicative networks that operate through official

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<sup>652</sup> *Id.*

<sup>653</sup> *Id.* at 367.

<sup>654</sup> See Baxter, *supra* note 29, at 2014-16 (explaining Luhmann’s view that a center/periphery differentiation is a differentiation between or among subsystems).

<sup>655</sup> See Luhmann, *supra* note 635, at 1433.

decisionmaking institutions. So does the requirement that official debate and decisionmaking be public. And so do mechanisms that provide for public hearings and participation in administrative decisionmaking. None of these mechanisms guarantee that “normatively substantive messages” will resonate in official political decisionmaking just as they do in the political public sphere. But they do establish and organize the (partial) openness of the political “center” to its “periphery.”

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I think, in short, that Habermas’s new account of law and democracy has more in common with autopoietic theory than with his earlier conceptions of system and lifeworld. The peculiar thing about the “communication theory of society” is that Habermas ritually invokes those earlier conceptions, even as his “circulation of power” model implicitly transforms them. Given the flaws that the system/lifeworld model had from the start, and given its incompatibility with a normative theory of radical democracy, Habermas would do well to abandon it explicitly.

