

**FREEDOM OF COMMUNICATIVE ACTION:
A THEORY OF THE FIRST
AMENDMENT FREEDOM OF
SPEECH**

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| | |
|---|-----|
| I. Introduction | 55 |
| II. The First Amendment Freedom of Speech: A Hermeneutic Approach | 57 |
| A. Justice Black and Protestant Theology | 58 |
| B. Originalism and Schleiermacher's Hermeneutics | 60 |
| C. Gadamer's Hermeneutics and Law as Interpretation .. | 62 |
| D. Theory and Tradition: Habermas' Critique of Gadamer's Hermeneutics | 65 |
| III. The Quest for a Theory of Free Speech | 68 |
| A. The Search for Truth | 68 |
| B. Self-Government | 72 |
| C. Autonomy | 77 |
| D. Self-Realization | 79 |
| E. A Plurality of Principles | 82 |
| F. Some Lessons for a New Theory | 85 |
| IV. The Theory of Communicative Action | 86 |
| A. Speech and Communicative Action: The Theory of Speech Acts | 87 |
| B. The Distinction Between Communicative Action and Strategic Action | 91 |
| C. Discursive Justification: The Ideal Speech Situation .. | 92 |
| D. Communicative Ethics: Discursive Will Formation .. | 100 |
| E. Lifeworld and System | 104 |
| V. A Theory of Freedom of Communicative Action | 106 |

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| | |
|--|-----|
| A. Scope of the Freedom: Communicative Action and Not Strategic Action | 107 |
| B. Content of the Freedom: Three Principles | 111 |
| C. Problems Applying the Model of the Ideal Speech Situation | 114 |
| D. Justification Revisited: Integrating Existing Theories .. | 116 |
| VII. Application to Problems in First Amendment Doctrine .. | 118 |
| A. Distinguishing Communicative Action from Strategic Action | 119 |
| B. Realizing Equality of Communicative Opportunity | 127 |
| C. Tension Within the Theory: Libel of Public Figures .. | 130 |
| VII. Conclusion | 133 |
| A. Explaining First Amendment Decisions: Reconstructive Science and Judicial Intuition | 133 |
| B. Freedom of Communicative Action: The Tension Between Ideal Theory and Realization | 134 |
| C. Legal Thought As Social Theory: Implications for the Theory of Communicative Action | 134 |

Words are deeds.¹

I. INTRODUCTION

We are still searching for an adequate theory of the first amendment freedom of speech. Despite a plethora of judicial opinions and scholarly articles, there are fundamental conflicts over the meaning of the words "Congress shall make no law . . . abridging the freedom of speech."² This Article examines the possibility that recent developments in social theory can aid our understanding of the freedom of speech. My thesis is that Jürgen Habermas' theory of communicative action can serve as the basis for an interpretation of the first amendment that fits the general contours of existing first amendment doctrine and provides a coherent justification for the freedom of speech.

Habermas' theory takes as its point of departure the speech act theory developed through contemporary analytic philosophy and linguistics. The central theme of speech act theory is that speech is action; communication coordinates individual behavior through achieving rational understanding. An important corollary is the proposition that communication is intersubjective; speech acts involve both speakers and listeners. In addition, the theory of communicative action makes a distinction between communicative action—oriented to the coordination of behavior through rational agreement—and strategic behavior—the use of speech to manip-

¹ L. WITTGENSTEIN, CULTURE AND VALUE 46c (P. Winch trans. 1980) ("*Worte sind Taten*," 1969 at 46).

² U.S. CONST. amend. 1.

ulate, coerce, or deceive. I argue that a theory of free speech can incorporate this distinction to mark the boundaries of the right to free speech: freedom of speech is freedom to engage in communicative action, not strategic action. Another component of Habermas' theory is the ideal speech situation, in which rational agreement may be reached because distorting factors are excluded; this ideal situation serves as the basis of a principle of equality of communicative opportunity that can give the freedom of speech its fundamental content. Habermas' theory of communicative action provides the basis for my reinterpretation of the first amendment freedom of speech as the freedom of communicative action.

This Article has two aims. My first aim is to develop a theory of the meaning of the first amendment from the theory of communicative action. In pursuit of this first goal, the Article assumes a perspective that is internal to the practice of American constitutional law.³ I argue that Habermas' theory has substantial power to explain and justify first amendment doctrine. Indeed, it is my view that a theory of freedom of speech based on the theory of communicative action, more so than any other theory, provides the best justification for the first amendment while simultaneously providing the best fit with the existing case law.

In addition to the development of a theory of the first amendment, this Article has a second aim: From the point of view of the practice of social theory,⁴ the current Article is a "thought experiment" designed to test and elaborate Habermas' theory of communicative action. I explore various objections to and ambiguities in the theory of communicative action by taking up the attitude of a participant in the practice of legal interpretation who adopts the theory of communicative action as a practical principle for institutionalization of discourse in the public sphere. It is my hope that this thought experiment will have value in the enterprise of understanding, clarifying, and extending the theory of communicative action. For example, this Article responds to the suggestion that the theory of communicative action should be reformulated as a theory of institutionalized discourse "in the public sphere of a participatory

³ Thus, I take the point of view of judges, lawyers, and scholars engaged in the common enterprise of interpreting and applying the Constitution to actual legal disputes. Because the Article assumes the stance of a participant in the practice of law, it focuses on a particular legal text—the first amendment to the Constitution of the United States of America. Of course, the same stance could be taken with respect to other legal texts that embody a principle of freedom of speech. See, e.g., CAL. CONST. art. I, § 2(a); CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SCHEDULE B, CANADA ACT 1982 (U.K.), ch. 11; EUROPEAN CONVENTION ON HUMAN RIGHTS art. V; GRUNDGESETZ [G.G.] art. 5. For a comparativist analysis of some of these provisions, see E. BARENDT, *FREEDOM OF SPEECH* (1987).

⁴ The perspective of social theory is potentially external to the practice of law. The social theorist may bracket the normative claims of the legal system and assume the stance of an observer. Social theory may, however, incorporate the internal perspective. The social theorist may assume the stance of a participant who understands a given social practice through participation in it.

democracy."⁵

Part II of this Article begins with a hermeneutic approach to the problem of interpreting the first amendment. Part III explores and criticizes existing theories of the freedom of expression. The theory of communicative action is explicated in Part IV; the implications of that theory for the freedom of speech are explored in Part V. Finally, Part VI applies the results to specific problems in first amendment doctrine, and Part VII draws some conclusions about the implications of this exercise for both first amendment doctrine and the theory of communicative action.⁶

II. THE FIRST AMENDMENT FREEDOM OF SPEECH: A HERMENEUTIC APPROACH

This Part explores the problems associated with interpreting the first amendment to the Constitution of the United States. These problems in legal hermeneutics⁷ serve as a dual introduction to the relationship between the first amendment and the theory of communicative action. The discussion of legal interpretation both (1) establishes the need for a new theory of the freedom of speech and (2) introduces an important line of development in social theory that has its origins in theories of scriptural interpretation and runs through Hans-Georg Gadamer's philosophical hermeneutics to Habermas' theory of communicative action.

The major theme of this Article is the development of a theory of the first amendment freedom of speech from the theory of communicative action; in relationship to that theme, the aim of Part II is to counter three possible arguments for the proposition that no theory of the freedom of speech is required, or even legitimate.⁸ The first argument is that

⁵ See Ferrara, *A Critique of Habermas's Diskursethik*, 18 *TELOS* 45, 74 (1985).

⁶ This Article is addressed to a diverse audience, including social theorists and first amendment scholars; hence the essay does not assume that the reader has expert knowledge of either legal doctrine or of Habermas' theory. Readers familiar with the literature on the theory of the first amendment may wish to omit Part III on a first reading. Likewise, readers already familiar with Habermas' theory may wish to omit Part IV. Readers anxious for the core of my theory may wish to begin with Part V before returning to Part II.

⁷ As I use the term, legal hermeneutics is the enterprise of self-conscious reflection on the process of interpreting legal texts that is undertaken by adjudicators, lawyers, and legal scholars. The term "hermeneutics" has a variety of uses. See R. PALMER, *HERMENEUTICS* ch. 3 (1969) (discussing six modern definitions of "hermeneutics"). I have drawn on a variety of sources for my account of philosophical hermeneutics. See generally J. BLEICHER, *CONTEMPORARY HERMENEUTICS* (1980); H.-G. GADAMER, *TRUTH AND METHOD* 154 (1975); R. PALMER, *supra*; G. WARNKE, *GADAMER: HERMENEUTICS, TRADITION & REASON* (1987); *UNDERSTANDING AND SOCIAL INQUIRY* (F. Dallmayr & T. McCarthy eds. 1977). I owe special thanks to Eckart Förster, now of Stanford University, for his course, *Hermeneutics and Critical Theory*, given through the Department of Philosophy of Harvard University in the Spring of 1983.

⁸ Of course, even if a theory of the freedom of speech is not required for judicial interpretation of the first amendment, it does not follow that such a theory is not valuable. If it turned out that the first amendment does not institutionalize our best theory of the freedom of speech, we would still be

tics. This critique provides the metatheoretical foundation for my effort to develop a theory of free speech. This Section also has a secondary purpose: it recapitulates an important line of development in Habermas' thought which led to his theory of communicative action.

Gadamer argues that we always understand from within a tradition. There is no transcendental viewpoint (outside of any interpretive tradition) from which an interpretation can be seen as *the* correct and final interpretation. Gadamer's argument could be used as the basis for a metatheoretical objection to any claim to have produced *the* theory of the first amendment. There is no such entity as *the* theory that is true to the exclusion of all other theories, it might be argued. Instead, the argument continues, there are a plurality of theories, each of which is true for the tradition within which it was formed. Indeed, in our pluralistic culture, which is constituted by a multiplicity of traditions, there are a plurality of theories of free speech. Because there is no Archimedean standpoint outside of this plurality of interpretive traditions, there is no basis for forming a judgment that any one of the many theories is better than any other.

Habermas and Gadamer engaged in an extended debate over the implications of hermeneutics for social theory.⁴¹ In the course of this debate, Habermas developed a critique of Gadamer's hermeneutics.⁴² The brief summary which follows uses this critique as the basis for an answer to the metatheoretical argument against the very possibility of developing a single correct theory of free speech which was sketched above.

Habermas acknowledges the validity of much of Gadamer's theory of hermeneutics. He argues, however, that Gadamer's view of the role of tradition in producing understanding has a conservative bias. While Gadamer is correct to see understanding as arising from a traditional consensus on meaning, he overlooks the possibility that the traditional consensus is the irrational product of systematically distorted communication.⁴³ The argument that all traditions stand on an equal footing because no person stands outside of a tradition ignores the real difference between a tradition which achieves consensus through manipulation,

⁴¹ Social theories (such as neoclassical economics, Marxism, or critical theory) can be viewed as interpretations. Habermas' critique of Gadamer's hermeneutics is motivated by the implications of hermeneutics for social theory and not by Habermas' concern with the problem of textual exegesis.

⁴² For the primary texts in the debate available in English, see Habermas, *A Review of Gadamer's Truth and Method*, in UNDERSTANDING AND SOCIAL INQUIRY, *supra* note 7; H.-G. GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in PHILOSOPHICAL HERMENEUTICS (1987); Habermas, *The Hermeneutic Claim to Universality*, in J. BLEICHER, *supra* note 7. For commentary, see J. BLEICHER, *supra* note 7, at 152-64; T. MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* 162-93 (1981); G. WARNKE, *supra* note 7; McCarthy, *Rationality and Relativism: Habermas' Overcoming of Hermeneutics*, in HABERMAS: CRITICAL DEBATES (J. Thompson & D. Held eds. 1982).

⁴³ See G. WARNKE, *supra* note 7, at 112-13.

force, or coercion, and a tradition in which consensus is based on reasoned discourse. Not all traditions can make equal claims to truth and right.

In order to make good on this criticism of Gadamer's relativism, Habermas is required to offer a theory of rational consensus. The theory of communicative action which Habermas produced to fulfill this requirement is explored in depth in Part IV of this Article and is adumbrated in the following passage:

A critically enlightened hermeneutics that differentiates between insight and blindness incorporates metahermeneutic knowledge of the conditions of systematically distorted communication. It connects understanding to the principle of rational discourse, according to which truth would be guaranteed only by that consensus which was produced under idealized conditions of unconstrained communication free from domination and which could be maintained over time.⁴⁴

It is important to note that Habermas' notion that rational consensus can be achieved under conditions of unconstrained communication does not assume an Archimedean standpoint that is outside of any tradition. We begin the effort to forge a rational consensus from within our tradition and attempt to achieve a consensus with others who begin from within their traditions.⁴⁵ The point is that an agreement is rational only if it is not the product of force or deception.

In the context of my effort to develop a theory of the freedom of speech, the point is that rational discourse offers a method for differentiating between better and worse theories. If I can demonstrate through rational argument that existing theories are inadequate and that a superior theory exists, then the enterprise of theory construction is not doomed to failure by metatheoretical relativism. The relativist does not have an a priori argument that demonstrates the impossibility of producing the best theory of free speech.⁴⁶ Rather, theoretical relativists can prove their point only by entering into discourse about the various theories.

My effort to develop a theory of the first amendment begins with existing theories of the freedom of speech. Some of the theories that follow have played a direct role in the interpretation of the first amendment by the courts. Other theories have had a less direct influence on the judicial process or appear indirectly as implicit assumptions. Together the theories form an essential part of the legal tradition that is productive of

⁴⁴ Habermas, *The Hermeneutic Claim to Universality*, *supra* note 42, at 205.

⁴⁵ Gadamer refers to such a consensus between traditions as a "fusion of horizons." H.-G. GADAMER, *supra* note 7, at 271-73.

⁴⁶ Nor could such an argument be developed. The relativist is limited to arguments which are true relative to a particular tradition. An a priori relativist argument against all possible theories of the first amendment would be contradictory.

the subjects of the right to freedom of speech, speech acts in particular and communicative action in general.

IV. THE THEORY OF COMMUNICATIVE ACTION

In this Part, I outline Habermas' theory of communicative action.¹²¹ Habermas' theory ranges over a wide range of topics from philosophy of language to sociology. My presentation of Habermas' theory, which relies to some extent on Habermas' terminology, may be difficult for readers unfamiliar with the German philosophical and sociological tradition within which Habermas works.¹²² Moreover, because of the sheer breadth of Habermas' work, my presentation of his views is necessarily incomplete, emphasizing those aspects of the theory which are most relevant to the theory of free speech which I present in Part V. Habermas' theory has generated an enormous secondary literature criticizing, defending and elaborating on his themes.¹²³ In this Article, I can only touch on this debate. Again, I limit my discussion to those criticisms of the theory of communicative action which are most relevant to the freedom of speech or which resonate with current debates in Anglo-American legal theory. My sketch begins with a brief exploration of

121 A great deal of Habermas' work touches on the theory of communicative action. For the central texts in English, see J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (T. McCarthy trans. 1984 & 1987) (two volumes) [hereinafter volume one will be cited after its subtitle as *REASON AND THE RATIONALIZATION OF SOCIETY*, and volume two as *LIFEWORLD AND SYSTEM*]; J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (T. McCarthy trans. 1979). A number of Habermas' other texts touch on aspects of the theory. See J. HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (F. Lawrence trans. 1987); J. HABERMAS, *LEGITIMATION CRISIS* (T. McCarthy trans. 1975); J. HABERMAS, *THEORY AND PRACTICE* (J. Viertel trans. 1973); J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (J. Shapiro trans. 1971). Two important texts are not yet available in English. See J. HABERMAS, *MORALBEWUSSTSEIN UND KOMMUNIKATIVES HANDELN* (1983); Habermas, *Wahrheitstheorien in WIRKLICHKEIT UND REFLEXION* (H. Fahrenbach ed. 1973).

122 For a word on the problem of understanding Habermas' language, see M. PUSEY, *JÜRGEN HABERMAS* 11 (1986). For a study plan for approaching the corpus of his work in a systematic fashion, see *id.* at 124-25. For a brief and lucid introduction, see Bernstein, *Introduction*, in *HABERMAS AND MODERNITY* 1 (R. Bernstein ed. 1985).

123 Thomas McCarthy's commentary, *THE CRITICAL THEORY OF JÜRGEN HABERMAS*, is the best and most accurate introduction and guide to Habermas' thought, and I have relied on it substantially for my exposition of Habermas' theory. T. MCCARTHY, *supra* note 42. A lucid summary of Habermas' more recent work is found in S. WHITE, *THE RECENT WORK OF JÜRGEN HABERMAS* (1988). A short introduction to Habermas' theory, including the theory of communicative action, is provided by M. PUSEY, *supra* note 122. A representative sampling of the critical literature is contained in *HABERMAS: CRITICAL DEBATES*, *supra* note 42; see also D. INGRAM, *HABERMAS AND THE DIALECTIC OF REASON* (1987); S. BENHABIB, *CRITIQUE, NORM AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* (1986); R. GEUSS, *THE IDEA OF A CRITICAL THEORY* (1981); G. KORTIAN, *METACRITIQUE: THE PHILOSOPHICAL ARGUMENT OF JÜRGEN HABERMAS* (1980); *HABERMAS AND MODERNITY*, *supra* note 121. In addition, some periodicals have devoted special issues to Habermas. See *Special Issue on Jürgen Habermas*, *NEW GERMAN CRITIQUE*, Spring/Summer 1985; *Special Issue in Honor of Jürgen Habermas on the Occasion of His 50th Birthday*, *TELOS*, Spring 1979.

contemporary speech act theory; I then turn to the theory of communicative action.

A. Speech and Communicative Action: The Theory of Speech Acts

There are a number of possible starting points for an exploration of Habermas' theory of communicative action. I begin with speech act theory, one of Habermas' points of departure. I start with speech act theory because it provides some essential background for the application of the theory of communicative action to the theory of freedom of speech.

My summary of speech act theory begins with a very brief look at the historical emergence and rejection of message-centered theories of communication. The next move is to present the essential details of speech act theory as developed by J.L. Austin and John Searle. Speech act theory makes the crucial observation that speech acts can have illocutionary force, as actions, in addition to propositional content. This distinction serves to ground a further point, that speech acts can be divided among those that are strategic or manipulative and those that are based on the desire for consensual coordination of action. Finally, a typology of speech acts is presented, as an illustration of the variety of actions accomplished through speech and as the foundation for further analysis.

1. *Speech as Message.*—The first step toward an adequate theory of speech is the realization that speech is a form of communication. People rarely speak simply to exercise their vocal chords or to make interesting or pleasant sounds; rather, the speaker usually attempts to communicate with an audience.¹²⁴ One model of communication focuses on the transmission of messages. This view has been articulated as follows:

A has in his mind some sort of message (or idea), and he wishes B to form in his head the same message. This message is transformed ultimately into a series of neural impulses that are sent to the muscles responsible for the actual production of speech, which follows immediately. . . . The listener, B, must decode A's message by converting the sounds into a semantic representation.¹²⁵

The message centered model of communication is plausible, as far as it goes, but it is incomplete.¹²⁶ The most important omission stems from the assumption that communication is exclusively a matter of conveying information, based on the model of assertoric sentences (sentences that

124 See K. BACH & R. HARNISH, *supra* note 103, at 3.

125 H. CAIRNS & C. CAIRNS, *PSYCHOLINGUISTICS: A COGNITIVE VIEW OF LANGUAGE* 17-18 (1976).

126 See K. BACH & R. HARNISH, *supra* note 103, at xiv (The message centered model fails because: (1) It doesn't account for ambiguity; (2) The speaker may mean something other than what he literally says, hence listening may require more than decoding; (3) The model neglects the role of shared understandings in communication; (4) The model does not tell us what the messages are.); see also J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 277 (critique of message centered approach).

make assertions about a state of affairs).¹²⁷ The message centered model of communication reduces meaning to its semantic dimension: for example, the meaning of a sentence is reduced to its semantic content. This reductionist feature of the message centered account of communication is remedied by supplementing a semantic theory of meaning with a pragmatic theory. Communication does much more than merely convey information; knowing the full meaning of a sentence requires the hearer or reader to know more than its truth conditions.

A pragmatic theory of meaning can be introduced through the notion of a speech act. Austin demonstrated the variety of ways in which language can be used.¹²⁸ Making promises, giving orders, thanking someone, betting on a race, apologizing to someone, greeting someone—these are all instances of communication that are not easily explained as messages conveying information.¹²⁹ All these uses of language are illuminated if they are understood as *speech acts*.¹³⁰

2. *Speech as Action*.—Recognition that communication is a form of action is the basis for a more complete analysis of the speech act. Thus, the speech act can be viewed merely as an utterance, as the assertion of a proposition, as a purposive action, or as affecting the listener. Theorists following in the tradition of Austin and Searle have distinguished a number of constituent components of a speech act. One schema represents the components as follows:¹³¹

TABLE 1

| Component of Speech Act | Description |
|----------------------------------|---|
| Utterance Act | Speaker utters an expression to hearer in a given context |
| Propositional Act ¹³² | Speaker says something to hearer in a given context |
| Illocutionary Act | Speaker acts by speaking to hearer |
| Perlocutionary Act | Speaker affects hearer in a certain way |

¹²⁷ See K. BACH & R. HARNISH, *supra* note 103, at xiv; J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 277.

¹²⁸ J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975); see K. BACH & R. HARNISH, *supra* note 103, at xiv; J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 277.

¹²⁹ See, e.g., K. BACH & R. HARNISH, *supra* note 103, at 39-55.

¹³⁰ See J. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 16 (1969) ("[A]ll linguistic communication involves linguistic acts. The unit of linguistic communication is not, as has generally been supposed, the symbol, word, or sentence, or even the token of the symbol, word or sentence, but rather the production or issuance of the symbol or word or sentence in the performance of the speech act.").

¹³¹ See K. BACH & R. HARNISH, *supra* note 103, at 3. These distinctions were first articulated by Austin. See J.L. AUSTIN, *supra* note 128, at 110; see also J. SEARLE, *supra* note 130, at 23-25.

¹³² The propositional act is also called the locutionary act.

These components are closely related. In uttering an expression, the speaker says something to a hearer; in saying something to a hearer, the speaker does something; in doing something, the speaker affects the hearer.¹³³

The distinctions between the various components raise various difficulties. The utterance act is easiest to distinguish; the utterance refers to the sounds that are made or the words used, independent of their content. The propositional act refers to the propositional content or semantic meaning of the utterance. The illocutionary act is the action the speaker performs in saying something; for example, when I say, "I promise that I will return your car tomorrow," the illocutionary act is the making of the promise.¹³⁴

Illocutionary and perlocutionary acts are the most difficult to distinguish precisely. Perlocutionary effects arise from the embeddedness of illocutionary acts in social contexts of interaction. Some perlocutionary effects are unintended; my promise to return your car may have the unintended perlocutionary effect of disturbing you, because you had not yet considered the possibility that I wouldn't return the car when I made the promise. Habermas' theory of communicative action is more concerned with intended perlocutionary effects. Perlocutionary effects can be intentional because speech acts may be instrumental to strategic action (at this point strategic action can loosely be understood as manipulative social interaction) only contingently related to their meaning.¹³⁵ One can intend to frighten, to amuse, or to anger.

One proposed means for distinguishing illocutionary acts from perlocutionary acts is to ask whether the purpose of the speech act is identifiable from the semantic content; the hypothesis is that the purpose of an illocutionary act is self-identifying whereas the purpose of a perlocutionary act is not. The illocutionary act of asking you for the time announces its purpose—to find out what time it is. The perlocutionary act—of attempting to humiliate you by asking the time when I know you are too poor to afford a watch—does not announce itself in the same way.¹³⁶

Another related formulation of the criteria for distinguishing between illocutions and perlocutions has been proposed by Peter Strawson.¹³⁷ He contends that illocutionary acts can only be successful if expressed openly, whereas perlocutionary acts only succeed if their intentions are not announced. My attempt to embarrass you would be undermined if its purpose were revealed, but my attempt to find out what

¹³³ See K. BACH & R. HARNISH, *supra* note 103, at 3.

¹³⁴ See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 288-89.

¹³⁵ See *id.* at 289.

¹³⁶ See *id.* at 290.

¹³⁷ Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439 (1964).

time it is can succeed only if you know what I am driving at.¹³⁸

3. *Classifying Speech Acts*.—The theory of speech acts is now almost complete. The final element to be added is a system of classifying the various types of speech acts. Austin,¹³⁹ Searle,¹⁴⁰ and their followers in linguistics¹⁴¹ have produced a variety of classificatory schemes. Habermas proposes the following system of classification:

TABLE 2

| Category of Speech Act | Description |
|------------------------|--|
| Imperatives | Speaker refers to desired state in the objective world so as to get hearer to bring about this state. |
| Constatives | Speaker refers to something in the objective world so as to represent a state of affairs. |
| Regulatives | Speaker refers to something in a common social world so as to establish an interpersonal relationship recognized as legitimate. |
| Expressives | Speaker refers to something in his subjective world so as to reveal to a public an experience to which he has privileged access. |
| Communicatives | A subclass of regulatives that are in reflexive relation to the process of communication, either by organizing speech, (e.g., questioning, answering, addressing) or by referring to validity claims (e.g., affirming, denying, assuring). |
| Operatives | Speech acts, such as calculating, that signify the application of generative rules such as those of mathematics or logic. ¹⁴² |

This classification scheme has two principal uses as a tool for understanding the theory of communicative action in the course of developing a theory of the freedom of speech. First, the identification of a wide range of classes of speech acts serves to illustrate the earlier distinction between locutionary content and illocutionary act by calling our attention to the wide variety of actions that are associated with speech. Second, the classifications can illuminate some of the confusions

¹³⁸ See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 292-94. I am not sure that either criterion for distinguishing illocutionary and perlocutionary acts is successful, but I do not believe that the failure to draw a precise distinction undermines Habermas' theory. Although Habermas does use the illocutionary/perlocutionary distinction in developing the crucial distinction between communicative action and strategic behavior, the latter distinction is not identical to the former and can stand on its own merits.

¹³⁹ See J.L. AUSTIN, *supra* note 128, at 148-64.

¹⁴⁰ See J. SEARLE, *A Taxonomy of Illocutionary Acts*, in *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 1 (1979).

¹⁴¹ See K. BACH & R. HARNISH, *supra* note 103, at 39-59.

¹⁴² See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 325-26.

in current doctrine; Part V of this Article utilizes the classification scheme in the critique of attempts to ground free speech doctrine on a distinction between expression or speech on one hand and action on the other.¹⁴³ Having explicated the basic concept of a speech act and explored the purposes that speech acts can serve, I now introduce Habermas' distinction between communicative action and strategic behavior.

B. The Distinction Between Communicative Action and Strategic Action

1. *The Basic Distinction*.—Habermas uses speech act theory as the basis for several important components of his theory of communicative action. Austin's distinction between illocution and perlocution can serve as the basis for introducing Habermas' related distinction between those speech acts which are communicative action and those speech acts which involve strategic action. Habermas defines communicative action as follows:

I count as *communicative action* those linguistically mediated interactions in which all participants pursue illocutionary aims, and *only* illocutionary aims, with their mediating acts of communication. On the other hand, I regard as linguistically mediated *strategic action* those interactions in which at least one of the participants wants with his speech acts to produce perlocutionary effects on his opposite number.¹⁴⁴

The essential difference between strategic action and communicative action involves the orientation of the participants in the communication situation. If the participants adopt the attitude that they will attempt to achieve success without the rational agreement of those persons whose actions they seek to influence, then they are engaged in strategic action. If they are oriented to reaching understanding, they are engaged in communicative action.¹⁴⁵ Through communicative action, the participants "pursue illocutionary aims without reservation in order to arrive at an agreement that will provide the basis for a consensual coordination of individually pursued plans of action."¹⁴⁶

2. *Difficulties with the Distinction*.—The distinction between communicative action and strategic action is one of the most difficult elements of the theory of communicative action; critics have argued strongly against the viability of the distinction. I would like to consider the basic criticism that the distinction between communicative and strategic action cannot be made out and suggest a tentative answer.

¹⁴³ See *infra* Part V(A)(3) (text accompanying notes 206-08).

¹⁴⁴ J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 295 (emphasis added to *communicative action* and *strategic action*, remaining emphasis in original).

¹⁴⁵ *Id.* at 284-86.

¹⁴⁶ *Id.* at 295-96.

The criticism is that actual speech is rarely, if ever, pure communicative action or pure strategic action; rather the nature of actual speech is a mixture of both. Let me call this the *mixed nature objection*. The usefulness of these "ideal types"¹⁴⁷ as tools for understanding actual human communication is questioned on the basis that in practice it may be impossible to classify particular actions as communicative or strategic. For example, if I try to convince you to accept the thesis of this Article, I may rely in part on illocutionary acts—that is, on rational argumentation—but in part I may hope to persuade by making emotional appeals and using rhetorical ploys. When the setting is less academic, an election for example, the role of persuasion, based on emotion and rhetoric, becomes even more apparent.

Habermas can reply to the *mixed nature objection* in several ways. First, he can and should admit the basic thrust of the objection—many speech acts do have a mixed nature. By itself, the existence of hard cases does not deny that the distinction between communicative action and strategic behavior is a meaningful one. It is only somewhat oversimplified to note that the existence of purple does not make the distinction between red and blue meaningless.

Second, in many cases, a given action will be predominately communicative or predominately strategic. Even in a political election, it is possible to distinguish deliberate lies from honest disagreement about fundamental principles. Alternatively, a given recurring type of action may be usefully classified as usually communicative or usually strategic. For example, commercial advertisements which associate a product with sexually charged images are likely to rely on perlocutionary effect, even though there may be some illocutionary aspect to the advertisement.

Third, and perhaps most importantly, Habermas should object to the notion that persuasion that uses rhetoric or emotional appeal is necessarily strategic in nature. Indeed, expressive speech acts,¹⁴⁸ which reveal the subjective world of the speaker, including his emotions, are a normal component of communicative action. For example, the simple expressive, "I feel angry," does not ordinarily involve force or deception, even though it is possible to feign anger or use anger to create fear. Reciprocal consideration of emotional states is not inconsistent with communicative rationality. To the contrary, the honest disclosure of emotion in communication is essential in order to avoid systematically distorted communication.¹⁴⁹

In sum, Habermas can offer three responses to the *mixed nature*

¹⁴⁷ The characterization of strategic action and communicative action as "ideal types" is resisted by Habermas himself. See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 286.

¹⁴⁸ See *supra* Part IV(A)(3) (text accompanying notes 139-43).

¹⁴⁹ Thus, it is the concealing of emotions, rather than their disclosure, which is typically associated with strategic action.

objection: first, the fact that speech acts have a mixed nature does not logically undermine that distinction; second, it may be possible to identify individual speech acts and certain classes of speech acts as predominantly strategic or predominantly communicative; third, much of the force of the objection stems from confusing emotional and rhetorical appeals with strategic action. These responses, especially the second response, will be developed in greater detail in Parts V and VI.¹⁵⁰

C. Discursive Justification: The Ideal Speech Situation

1. *Validity Claims and Communicative Action.*—I begin my analysis with an examination of the conditions for success of communicative action. Recall that communicative action involves the coordination of individual action through acts that contribute to or that help create understanding.¹⁵¹ Thus, the success of communicative action requires that an agreement be reached. A communicatively achieved agreement cannot be imposed by one of the parties to communication; it must have a rational basis. The claim that a potential agreement would have a rational basis is a claim to validity—in Habermas' parlance, a validity claim.

Habermas argues that all communicative action implicitly raises a number of distinct validity claims. In a simple dialogic model, the speaker engaging in communicative action raises validity claims that the hearer can accept or reject.¹⁵² For example, consider the following exchanges between a speaker and a hearer:

TABLE 3

| Speaker | Hearer |
|-------------------------------------|------------------------|
| (1) I promise to come for dinner. | Yes, I'll count on it. |
| (2) Please open that window. | Yes, I'll open it. |
| (3) The road to San Diego is clear. | Yes, I'll go that way. |

¹⁵⁰ Thus, my answer to the argument that one cannot actually distinguish communicative action from strategic behavior will be developed in three stages. The first stage is in the text that immediately follows this note. The second stage is presented in Part V, in which I develop a theory of freedom of communicative action which incorporates this distinction. The third stage appears in Part VI when I consider the application of the distinction between communicative and strategic action to concrete problems in first amendment doctrine. This three-stage development of an answer to the *mixed nature objection* becomes progressively more concrete at each stage. As I observed in the introduction, one way of viewing this Article is as a thought experiment that tests and elaborates the theory of communicative action by applying the theory to problems in first amendment doctrine. The more concrete development of my answer to the *mixed nature objection* in Parts V and VI directly illustrates the value of the thought experiment.

¹⁵¹ See *supra* Part IV(B)(1) (text accompanying notes 139-41).

¹⁵² See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 287-88.

In each case, the speaker makes an offer, raising certain validity claims, that the hearer accepts. The speech act is successful if an interpersonal relationship is established that effectuates coordination.¹⁵³

Habermas contends that every communicative action implicitly raises three distinct validity claims. These claims can be illustrated by returning to exchange (2) in Table 3. We can imagine altering the exchange so that the communication action fails; that the speaker fails to gain agreement from the hearer. The hearer might offer any one of the following three reasons for failing to assent to the speaker's request:

TABLE 4

| Speaker | Hearer |
|------------------------------|--|
| (2) Please open that window. | (2A) No, you have no right to ask me to open the window. |
| | (2B) No, you're not serious. It's too cold for anyone to want the window open. |
| | (2C) No, that window doesn't open. |

The three reasons given by the hearer for denying the speaker's request correspond to three possible grounds for contesting the validity of any communicative action. The rightness of the speech act can be questioned (2A in Table 4), the sincerity of the speaker can be challenged (2B), or the truth of the existential presuppositions of the speech act can be denied (2C). These three grounds for rejection of a communicative action correspond to the three validity claims that implicitly are raised by any speech act; the three claims are rightness, sincerity, and truth.¹⁵⁴

Although every speech act implicitly raises all three validity claims, different classes of speech acts emphasize different validity claims. Thus, constative speech acts thematize¹⁵⁵ the claim to truth, regulative speech acts thematize the claim to rightness, and expressive speech acts thematize the claim to sincerity.¹⁵⁶ In everyday communication, participants may be unaware of one or more of the implicit validity claims, because one implicit validity claim may be overshadowed by another that is more explicit. For example, in Table 4, the speech act is a request to open the window. The claim to rightfulness may be most

¹⁵³ See *id.* at 296.

¹⁵⁴ See *id.* at 307-08.

¹⁵⁵ By saying that constative speech acts *thematize* claims to truth, I mean that the propositional content of a constative speech act ordinarily will take a truth value and that the truth of the proposition will depend on the state of the world. The truth claim is the theme of the speech act in the sense that it is both apparent and central.

¹⁵⁶ See J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 308-09, 325-26; see also *supra* Part IV(A)(3) (text accompanying notes 135-38).

apparent on the surface; the claim to truth—that the window can be opened—is not immediately apparent.

2. *Discursive Justification of Contested Validity Claims.*—Speech acts make claims to rightness, sincerity, and truth. What happens when such claims are not accepted? Take the example illustrated in Table 4: what happens after the listener responds to the request to open the window with the reply, "No, that window doesn't open." In Habermas' terminology, this response constitutes a rejection of a validity claim to truth. If the conversation goes no further, then this rejection halts the process of communication. As Habermas might put it: The rejection of one or more validity claims thwarts the achievement of a rationally motivated agreement—an agreement that is the end (*telos*) of communicative actions.

When such disagreement occurs, the participants in communication are presented with a number of options. First, communication may break off; the participants may simply abandon their attempt to coordinate their individual actions through communicative action. Thus, the speaker of Table 4 might say, "Oh, I'll do it myself." Second, one or more participants may switch from communicative to strategic action, attempting to gain agreement through force or manipulation where the attempt to achieve rational consensus has failed. Thus, our speaker might crudely threaten, "Open the window or I'll throw you out of it." In either case, the attempt to coordinate through communicative action is brought to an end.

There is a third possibility. The participants may attempt to reach agreement on a contested validity claim concerning truth or rightness by engaging in a debate or discussion—which Habermas calls rational discourse. We can imagine the following continuation of the dialogue in Table 4:

Speaker: Please open that window.

Listener: No, it doesn't open.

Speaker: Yes, it does. I opened it yesterday.

Listener: No, it doesn't. I tried this morning.

Speaker: Yes, but do you know the trick of thumping the latch?

Listener: No, I didn't. Let me try.

Under ordinary circumstances, the participants will share a common set of norms or facts to which appeal may be made in the course of argumentative discourse. Where there is disagreement about specific facts or norms, the participants may still agree on the appropriate standards or criteria by which controversial norms or facts may be judged. For example, in the continuation of the conversation begun in Table 4, the speaker and listener shared assumptions about the relationship between past experience with the window and the question whether it would open now.

In some situations, however, even the standards or criteria of truth and rightness are the subject of controversy; in such cases the continuation of the attempt to reach agreement demands a move to theoretic discourse.¹⁵⁷ Rational argumentation, thus, "can be conceived as a *reflective continuation, with different means, of [communicative] action oriented to reaching understanding.*"¹⁵⁸

The possibility that validity claims will be subject to discursive justification is essential if the agreement produced by communicative action is to retain its claim to rationality. If an agreement is rooted purely in contingent consensus, then the validity claims to truth or right—provisionally accepted in communicative interaction—are not capable of redemption through rational argumentation. But conscious acceptance of a claim to truth or right that is not capable of argumentative redemption is irrational and the agreement resulting from such acceptance is, thus, not rationally motivated.¹⁵⁹ By raising the possibility that agreement may not be rationally motivated, however, the investigation of discursive justification demands a theory that can distinguish a genuine consensus from a purely contingent one.

3. *The Ideal Speech Situation.*—Habermas argues that a genuine consensus is one that results purely from the force of the better arguments and not from constraints on communication. The absence of such a constraint can be elucidated in terms of the formal structure of the communicative situation. A communicative situation is structured without constraint only if it provides equal opportunity to engage in communication and only if the participants are motivated solely by a cooperative search for truth or right. These conditions are met in the ideal speech situation.¹⁶⁰

The ideal speech situation can be defined more precisely by identifying three rules. In the ideal speech situation,

- (1) *Rule of Participation.*—Each person capable of engaging in communication and action is allowed to participate;
- (2) *Rule of Equality of Communicative Opportunity.*—Each participant is given equal opportunity to communicate with respect to the following:
 - a. Each is allowed to call into question any proposal;
 - b. Each is allowed to introduce any proposal into the discourse;
 - c. Each is allowed to express attitudes, sincere beliefs, wishes and needs;
- (3) *Rule against Compulsion.*—No participant may be hindered by compulsion—whether arising from inside the discourse or outside of it—from

¹⁵⁷ See T. MCCARTHY, *supra* note 42, at 289.

¹⁵⁸ J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 25 (emphasis in original).

¹⁵⁹ See T. MCCARTHY, *supra* note 42, at 305-06.

¹⁶⁰ See *id.* at 306; J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 25.

making use of the rights secured under (1) and (2).¹⁶¹

Each component can be further elaborated. Thus, the *rule of participation* rules out the exclusion of any particular person or identifiable group of persons from the ideal speech situation. An agreement cannot count as rationally motivated if it can be demonstrated that it was only reached because someone who would have disagreed was excluded from the process of deliberation.

The *rule of equality of communicative opportunity* rules out communication where one participant or group of participants is not allowed to engage in the same quantity or quality of speech acts. Participants must have the same opportunities to initiate and perpetuate communication. They must have the same chance to employ each of the various classes of speech acts. Thus, each participant must have equal opportunity to assert or deny propositions about states of affairs (constative speech acts), to refer to the common social world so as to establish legitimate interpersonal relationships (regulative speech acts), to make public his private experiences (expressive speech acts), and to order the organizations of speech, through questioning, answering, and so forth (communicative speech acts). The discussion must provide adequate opportunity to subject every assertion, indeed every relevant speech act, to adequate scrutiny.¹⁶²

Finally, the *rule against compulsion* insures that agreement will not be reached on the basis of threats of force or deception. The discussion must be solely motivated by a cooperative search for truth and right. The ideal speech situation must be free from distorting influences. Open domination through the employment of threats or offers of reward is forbidden. Attempts to achieve agreement through strategic action—the employment of perlocutionary effects to reach an agreement not solely motivated by rational inquiry—must not be allowed. The ideal speech situation also excludes self-deception, such as neuroses or ideological distortions.¹⁶³

One immediate difficulty with the ideal speech situation is that its conditions are so stringent. Actual argumentative discourses are always limited in space and time. Perfect equality of opportunity is rare outside of formally-structured debates. In real speech situations, distorting influences are pervasive and self-deception is common. If the ideal speech situation is almost never realized, then what is its status?

Habermas conceives the ideal speech situation as the "pragmatic

¹⁶¹ This formulation is based on one suggested by Robert Alexy and adopted by Habermas. See J. HABERMAS, MORALBEWUSSTSEIN UND KOMMUNIKATIVES HANDELN, *supra* note 121, at 99; Alexy, *Eine Theorie des praktischen Diskurses*, in NORMENBEGRÜNDUNG UND NORMENDURCHFÜHRUNG 40-41 (W. Oelmlüller ed. 1978). An English translation is found in S. WHITE, *supra* note 123, at 56. The names given the three rules are of my devising.

¹⁶² See T. MCCARTHY, *supra* note 42, at 306-07.

¹⁶³ See *id.* at 306.

presuppositions of argumentation."¹⁶⁴ "In theoretical [and] practical discourse . . . the participants have to start from the (often counterfactual) presupposition that the conditions for an ideal speech situation are satisfied to a sufficient degree of approximation."¹⁶⁵ Evidence of this presupposition comes from the observation that if any feature of the ideal speech situation is absent, then doubt is cast on the rationality of the consensus, and hence on the truth or rightness of the agreed upon validity claims. Thus, the ideal speech situation can serve "as a guide for the institutionalization of discourse and as a critical standard against which every actually achieved consensus can be measured."¹⁶⁶

Perhaps the status of the ideal speech situation can be made clearer still by a comparison with John Rawls' conception of the original position. Rawls uses a hypothetical choice situation—the original position—as the basis for specifying the content of justice as fairness. The original position plays a role in Rawls' theory that is analogous to the role played by the state of nature in classical social contract theories. In outline, the structure of the original position is as follows. First, representative parties are to deliberate and unanimously choose the conception of justice that will govern the basic social structure. Second, the parties make that choice from a list of alternative conceptions of justice that includes utilitarianism and Rawls' own two principles of justice—the equal liberty principle and the difference principle. Third, they choose from behind a veil of ignorance which conceals from them any knowledge of their ac-

¹⁶⁴ See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 25.
¹⁶⁵ See *id.* at 42.

¹⁶⁶ See T. MCCARTHY, *supra* note 42, at 309. The following passage provides further insight into Habermas' view of the status of the ideal speech situation:

The ideal speech situation is neither an empirical phenomenon nor a mere construct, but rather an unavoidable supposition reciprocally made in discourse. This supposition can, but need not be, counterfactual; but even if it is made counterfactually, it is a fiction that is operatively effective in the process of communication. Therefore I prefer to speak of an anticipation of an ideal speech situation. . . . To this extent the concept of the ideal speech situation is not merely a regulative principle in Kant's sense; with the first step toward agreement . . . we must always in fact make this supposition. On the other hand, neither is it an existing concept in Hegel's sense; for no historical reality matches the form of life that we can in principle characterize by reference to the ideal speech situation. The ideal speech situation would best be compared with a transcendental illusion were it not for the fact that . . . [in contrast to] the application of the categories of the understanding beyond experience, this illusion is also the constitutive condition of rational speech. The anticipation of the ideal speech situation has . . . the significance of a constitutive illusion which is at the same time the appearance of a form of life. Of course, we cannot know a priori whether that appearance is a mere delusion—however unavoidable the suppositions from which it springs—or whether the empirical conditions for the realization (if only approximate) of the supposed form of life can practically be brought about. Viewed in this way, the fundamental norms of rational speech built into universal pragmatics contain a practical hypothesis.

Habermas, *Wahrheitstheorien*, *supra* note 121, translated in T. MCCARTHY, *supra* note 42, at 310. Thus, the ideal speech situation is a critical standard, a presupposition of discourse, the anticipation of a form of life, and a practical hypothesis. The ideal speech situation is like a Kantian ideal of reason in that an imagined construct is used to guide action, but it is more because as an anticipation, the ideal speech situation is foreseen as a real possibility that can ultimately be realized through action based upon its strictures.

tual station in life. The choice they make represents justice as fairness because the conditions of the original position exclude any unfair advantage.¹⁶⁷

There are important similarities between the ideal speech situation and the original position. Both the ideal speech situation and the original position attempt to define the conditions under which participants can reach a fair and rational agreement. Both provide standards by which an actual state of affairs can be evaluated. Both rule out an agreement based on threats or deception.

There are, however, important differences between the two. First, the veil of ignorance, a much criticized feature of the original position, has no counterpart in the ideal speech situation. Participants in the ideal speech situation are fully aware of their own beliefs and desires; in Rawls' terminology, they are aware of their conceptions of the good.

Second, the ideal speech situation is an "anticipation"—its conditions represent a possibility¹⁶⁸ which can serve as a standard for judging institutions. In Part VI, I use the ideal speech situation as a standard for evaluating judicial decisions interpreting the right to freedom of speech. By way of contrast, Rawls would not advocate the realization of the conditions of the original position. Not only would it be impossible to attempt to recreate the veil of ignorance in society, there would also be no point in doing so. The ideal speech situation is used to evaluate actual discourses; the original position is used only to generate a hypothetical discourse.

4. *The Discourse Theory of Truth.*—Even with the status of the ideal speech situation clarified, problems remain. Habermas' theory seems to be some version of the consensus theory of truth, but as we have already noted,¹⁶⁹ such theories present serious difficulties. As a theory of meaning, the consensus theory of truth appears to rest on a category mistake, confusing the meaning of truth with the methods for arriving at truth.¹⁷⁰ Habermas responds to such charges by contending that he does not equate the meaning of truth with methods of discovering truth, but rather analyzes truth in terms of the "universal pragmatic conditions of

¹⁶⁷ J. RAWLS, *supra* note 19, at 118-94.

¹⁶⁸ By possibility, I mean to say that the conditions of the ideal speech situation can be realized in the future. Expressed in the "possible worlds" talk of philosophers who investigate modal concepts such as possibility and necessity, my claim is that the ideal speech situation exists in a nomologically and historically accessible possible world. See D. LEWIS, *ON THE PLURALITY OF WORLDS* 20 (1986). A world in which conditions of the ideal speech situation exist is nomologically accessible in that it does not violate any of the laws of physical or social science; it is historically accessible in that a possible world in which the ideal speech situation exists could share the history of the actual world up to now.

¹⁶⁹ See *supra* Part III(A)(3) (text accompanying notes 60-67).

¹⁷⁰ See T. MCCARTHY, *supra* note 42, at 303.

discourse."¹⁷¹ Thus, it may be useful to distinguish Habermas' "discourse theory of truth" from a "consensus theory of truth."¹⁷² Thomas McCarthy elaborates Habermas' position:

From a pragmatic viewpoint, the object of analysis is "true" not as a predicate of statements but as the [validity] claim that I raise when I assert statements. What is at issue, then, is not the semantic meaning of a word but the pragmatic meaning of an act, claiming to be true. And the meaning of a claim has to be analyzed in terms of the mode of its redemption, the way in which it can be made good.¹⁷³

This interpretation of Habermas is still problematic. We lack an adequate account of what the "meaning" of a validity claim (as opposed to a word or a proposition) is, but McCarthy argues that Habermas' theory does not depend on this meaning-thesis. "One might grant that truth claims have to be justified discursively without granting that discursive justification is what is meant in claiming a statement to be true."¹⁷⁴

The second objection to the consensus theory of truth as an interpretation of the marketplace of ideas metaphor was that the success of an idea in the marketplace had no necessary relationship to truth. For example, the success of the Nazis in gaining a social consensus of sorts did not prove the truth of their theories.¹⁷⁵ Habermas' theory of the ideal speech situation answers this objection. The reason that success in the marketplace of ideas cannot serve as an adequate explanation for the meaning of truth is that the marketplace often fails to approximate the ideal speech situation. Indeed, one reason we suspect that the Nazi ideology was false is because the Nazis suppressed speech that was critical of their program. Thus, our second criticism of the consensus theory of truth is both explained and corrected by the conception of the ideal speech situation.¹⁷⁶

D. Communicative Ethics: Discursive Will Formation

The ideal speech situation has profound implications for ethics and politics. So far, my explication of the ideal speech situation has focused on the discursive redemption of truth claims—theoretical discourse. In

¹⁷¹ The phrase "universal pragmatic conditions of discourse" may be difficult for some readers. One key to unpacking Habermas' concept is to recall the distinction between semantic meaning and pragmatic meaning which was introduced above. See *supra* Part IV(A)(1) (text accompanying notes 124-30). Rather than analyzing the semantic meaning of truth, Habermas is analyzing the conditions under which one can engage in the act of making truth claims (pragmatic conditions), and he is investigating those conditions in so far as they hold for all cases of making truth claims (universal pragmatic conditions).

¹⁷² See T. MCCARTHY, *supra* note 42, at 303.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 304.

¹⁷⁵ See *supra* Part III(A)(3) (text accompanying notes 60-67); T. MCCARTHY, *supra* note 42, at 304.

¹⁷⁶ See T. MCCARTHY, *supra* note 42, at 304-06.

this Section, the emphasis shifts from truth to rightness—from theoretical discourse to practical discourse. In contrast to the noncognitivists, Habermas contends that normative questions have rational answers, but he attempts to avoid the naturalistic fallacy of conflating truth and rightness.¹⁷⁷ Thus, Habermas argues,

[C]lassical natural law theory . . . says that normative statements admit of truth in the same sense as descriptive statements; . . . nominalism and empiricism . . . [contend] that normative statements do not admit of truth at all. In my view, the assumptions underlying both views are false. I suspect that the justification of the validity claims contained in the recommendation of norms of action and of evaluation can be just as discursively tested as the justification of the validity claims implied in assertions.¹⁷⁸

Every speech act involves—at least implicitly—a validity claim to rightness,¹⁷⁹ this claim is explicitly thematized in regulative speech acts.¹⁸⁰

The aim of communicative action is to establish a rationally motivated agreement.¹⁸¹ When a validity claim to rightness is challenged, one alternative open to the participants in communication is to attempt to justify the challenged validity claim. Normally, the appeal will be to generally accepted norms and standards, but when such standards are challenged, the participants may engage in "practical discourse" in which they attempt to discursively justify the problematic claims.¹⁸²

Habermas contends that the argumentative support required for problematic norms is not the observational or experimental evidence used in theoretical discourse over problematic truth claims, but rather "the consequences and side-effects that the application of a proposed norm can be expected to have in regard to satisfaction or nonsatisfaction of generally accepted needs and wants."¹⁸³ The purpose of norms is to regulate the legitimate chances for satisfaction of wants and needs.¹⁸⁴ The principle of universalizability excludes from consideration those norms that are particular in nature, and hence cannot receive general recognition. Consensus in the ideal speech situation is a procedural realization of the principle of universalizability.¹⁸⁵

Habermas must meet the objection that wants and needs are purely particularistic. If all needs consist of competing self-interests, then the best that agreement can provide is a contingent compromise. In re-

¹⁷⁷ See *id.* at 310-11.

¹⁷⁸ Habermas, *Wahrheitstheorien*, *supra* note 121, at 226-27, translated in T. MCCARTHY, *supra* note 42, at 311.

¹⁷⁹ See *supra* Part IV(C)(1) (text accompanying notes 151-56).

¹⁸⁰ See *supra* Part IV(A)(3) (text accompanying notes 141-43).

¹⁸¹ See *supra* Part IV(B)(1) (text accompanying notes 144-46).

¹⁸² See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY*, *supra* note 121, at 23; MCCARTHY, *supra* note 42, at 312-13.

¹⁸³ See T. MCCARTHY, *supra* note 42, at 313.

¹⁸⁴ Habermas, *Wahrheitstheorien*, *supra* note 121, at 251, translated in T. MCCARTHY, *supra* note 42, at 313.

¹⁸⁵ See T. MCCARTHY, *supra* note 42, at 313-14.

sponse, Habermas argues that some interests are generalizable in that they can be "communicatively shared," as opposed to those interests that are particular in that they admit, at best, of a negotiated compromise. Generalizable interests are those that would be acknowledged by a "rationally motivated consensus." The view that wants and needs are purely particularistic seems to rest on the assumption that they are somehow inherently subjective and irrational. This view fails to account for the integration of needs into intersubjective structures of communication through the medium of language. Just as subjective perceptions can be expressed as objective assertions through the medium of languages, so too, desires and needs can be expressed as objective norms or evaluations. A consensus can be rationally motivated only if the language system makes possible a discourse in which needs and desires can be adequately expressed.¹⁸⁶

Relativism poses another challenge to Habermas' theory. One relativist argument would be that because ethical and political norms, as well as wants and desires, vary across cultures and times, there is no evidence of a consensus on generalizable interests that can justify normative validity claims. This ethical relativism does not, however, directly conflict with Habermas' position. Habermas does not intend to claim that consensus has actually been achieved under all the varying historical and cultural conditions; rather, his claim is that consensus could be achieved under the conditions of the ideal speech situation, and that such a consensus would be rationally motivated. A more sophisticated relativist argument, however, would challenge the discursive standard of rationality as the product of just one historically and culturally situated community. A response to such an argument is that the very act of arguing for the relativist thesis adopts the discursive attitude toward rationality.¹⁸⁷ Indeed, Habermas believes that this rejoinder to the relativist—which he calls the transcendental *tu quoque* ("you too")—is of broader significance:

The transcendental *tu quoque* argument attempts to convince anyone who inquires after the grounds for an argumentatively conceived principle of rationality that the intention behind his question, properly understood, is already based on this principle This argument can, I believe, be applied not only to someone who has (at least once) entered into argumentation, but to any subject capable of speech and action . . . by appealing to the intuitive knowledge which he, as a competent speaker, "already" has at his disposal Anyone who acts with an orientation toward reaching understanding, since he unavoidably raises truth and rightness claims, must have implicitly recognized that this action points to argumentation as the only way of continuing consensual action in case naively raised and factually recognized validity claims become problematic. As soon as we make ex-

¹⁸⁶ *Id.* at 315; Habermas, *A Postscript to Knowledge and Human Interests*, 3 *PHIL. OF SOC. SCI.* 157, 170-71 (1973).

¹⁸⁷ See T. MCCARTHY, *supra* note 42, at 317-24.

licit the meaning of discursively redeemable validity claims, we become aware that we presuppose the possibility of argumentation already in consensual action.¹⁸⁸

The most plausible interpretation of this argument is that it is conceptual and not psychological. The transcendental *tu quoque* has at its ground a reconstructive enterprise; the argument brings to light conceptual commitments implicit in the practice of communication. Such claims—that the full meaning of a practice is not fully understood by the participants, but can be reconstructed—are not unique to Habermas. An analogy can be made to the relationship between elementary steps in arithmetic and their reconstruction in mathematical logic.¹⁸⁹

Habermas argues that the theoretical understanding of communicative action has normative ramifications. "Communicative ethics" is based on the normative implications of the realization that communicative action aimed at producing rational agreement presupposes an ideal speech situation. An analogy can be made to Kantian ethics.¹⁹⁰ Kant's categorical imperative—"Act only according to that maxim through which you can at the same time will that it should become a universal law"¹⁹¹—provides a formal interpretation of morality. Habermas' theory of discursive justification can be seen as a modification of the categorical imperative. Wants and needs, as well as norms, are universally valid only insofar as they could be agreed upon under the conditions of the ideal speech situation:

[C]ommunicative ethics guarantees the generality of admissible norms and the autonomy of acting subjects solely through the discursive redeemability of the validity claims with which norms appear. That is, generality is guaranteed in that the only norms that may claim generality are those on which everyone affected agrees (or would agree) without constraint if they enter into (or were to enter into) a process of discursive will-formation

[C]ommunicative ethics guarantees autonomy (in that it carries on the process of the insertion of drive potentials into a communicative structure of action—the socialization process—"with will and consciousness."¹⁹²)

Unlike Kant's theory, Habermas' theory does not exclude individual wants and needs, nor does it define morality in opposition to "interest" (*willkur*). Autonomy does not demand that the inclinations be suppressed, but rather that they be interjected into communication free of distortion.¹⁹³

Consideration of the implications of the theory of communicative

¹⁸⁸ J. Habermas, *Zwei Bemerkungen zum praktischen Diskurs in Zur Reconstruction des Historischen Materialismus* 339-40 (1976), translated in T. MCCARTHY, *supra* note 42, at 323-24.

¹⁸⁹ See T. MCCARTHY, *supra* note 42, at 323-24.

¹⁹⁰ *Id.* at 325-26.

¹⁹¹ I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 88 (H. Paton trans. 1964).

¹⁹² J. HABERMAS, *LEGITIMATION CRISIS*, *supra* note 121, at 89.

¹⁹³ See T. MCCARTHY, *supra* note 42, at 388.

action for the state raises the possibility of a "communicative politics" corresponding to "communicative ethics." Habermas writes:

[B]ourgeois formal law . . . made it possible to release norm-contents from the dogmatism of mere tradition and to determine them intentionally. Positized legal norms were, on the one hand, uncoupled from the body of privatized moral norms; on the other hand, they needed to be produced (and justified) according to principles Since morality based on principles . . . is sanctioned only through the inner authority of conscience, its conflict with the public morality, still tied to the concrete citizen, is embedded in its claim to universality; the conflict is between the cosmopolitanism of the "human being" and the loyalties of the citizen [R]esolution of this conflict is conceivable only if . . . the opposition between morally and legally regulated areas is relativized, and the validity of all norms is tied to discursive will formation.¹⁹⁴

Not all interests, however, are generalizable; there will be some spheres where individuals pursue particular interests. The decision whether an interest belongs to the sphere of intersubjective validation or whether it belongs to the sphere of individual and particular interest itself can be made through discursive will formation.¹⁹⁵

Discursive will formation structures political organization through the principle of democracy. Habermas does not associate the democratic principle with any one form of government. Discursive will formation may conflict with functional imperatives, *i.e.*, with the need to maintain physical security or provide basic physical needs.¹⁹⁶ Moreover, the principle of discursive will formation does not require the direct translation of the conditions of the ideal speech situation into rules of social organization. Such rules must acknowledge the empirical limitations on the ability to reach rational consensus:

Because they are empirical processes, all discourses are subject to restrictions of space and time, psychological and social limitations . . . , etc. . . . These make regulations necessary . . . [as does] the need to organize a discussion, to secure and limit the flow of information, to separate themes and contributions, to order them, etc. . . . [R]egulations of this kind . . . are meant to make practical discourse possible under given empirical restrictions.¹⁹⁷

E. Lifeworld and System

I want to briefly explore one final element of the theory of communicative action, the distinction between *lifeworld* and *system*.¹⁹⁸ The

¹⁹⁴ J. HABERMAS, LEGITIMATION CRISIS, *supra* note 121, at 86-87 (emphasis in original).

¹⁹⁵ *Id.* at 89.

¹⁹⁶ See T. MCCARTHY, *supra* note 42, at 331-32.

¹⁹⁷ J. HABERMAS, *Die Utopie des guten Herrschers*, in KULTUR UND KRITIK 384-86 (1973), translated in T. MCCARTHY, *supra* note 42, at 332.

¹⁹⁸ See J. HABERMAS, LIFEWORLD AND SYSTEM, *supra* note 121, at 119-98; see also S. WHITE, *supra* note 123, at 92-123.

lifeworld is the realm of communicative action; loosely, it is the background of tradition, culture, and language that makes communicative action possible. By way of contrast, the system is the realm of strategic action; in modern western societies it is constituted by the market and the bureaucratic state.

For Habermas, the lifeworld must be understood hermeneutically. The lifeworld consists of a set of factual and normative assumptions that are usually unquestioned; these assumptions are the unspoken agreements that make communicative action possible. To use an elementary example, within an extended family there are basic unspoken agreements about each member's roles and legitimate expectations. Family members accept certain basic norms as binding on them; they do not treat other members in a purely instrumental fashion. The set of shared expectations and understandings enable family members to successfully make requests, give instructions, and so forth. In order for observers to understand the lifeworld of the family, they would be required to participate in the family life and interpret actions and utterances.

The system, however, is thoroughly rationalized. The market, for example, operates on a purely instrumentalist principle of profit maximization. The market system has a functional logic; for example, prices are the unintended consequences of a series of individual decisions to buy or sell. In such a systematized market, there is no rational agreement between buyers and sellers as to price; rather impersonal market forces dictate a price over which individual market participants have no direct control.

In addition to the market, law is a primary domain of the system. The bureaucratic structure of modern legal systems subjects whole areas of human conduct to a system of rules. Individual actors in the system, such as law enforcement officials, judges, litigants, are not free to agree among themselves as to the outcome of legal disputes.¹⁹⁹ Instead, a complex system of rules establishes procedures and sets limits on permissible outcomes.

Habermas uses the distinction between system and lifeworld as the focus for his critique of contemporary society. He argues that the system is colonizing the lifeworld. The family provides an example. In western societies, family relationships are increasingly governed by legal rules and market forces. Marriage is assimilated to contract; relationships that formerly were governed by informal agreement are more frequently the subject of legal rules. The result, says Habermas, is a loss of meaning.²⁰⁰ One result might be that members of society experience alienation, and lose the sense that their lives are meaningful.

¹⁹⁹ Habermas' theory assumes that the legal rules constrain legally acceptable outcomes, and, therefore, that the law is not radically indeterminate. Cf. Solum, *supra* note 13 (discussing indeterminacy).

²⁰⁰ See J. HABERMAS, SYSTEM AND LIFEWORLD, *supra* note 121, at 356-73.

Habermas has much more to say about the distinction between lifeworld and system. At this point, however, I close my discussion of the theory of communicative action and begin the task of applying that theory to the freedom of speech.

V. A THEORY OF FREEDOM OF COMMUNICATIVE ACTION

The theory of communicative action is rich with implications for interpretation of the freedom of speech.²⁰¹ In this Part, I outline the core of a theory of the freedom of speech that uses elements of Habermas' theory of communicative action. My basic strategy is to explore the notion that the freedom of speech should be and is best understood as the freedom to engage in communicative action, and the corollary notion that freedom of speech does not encompass the freedom to engage in strategic action. I develop this notion by using the rules which constitute the ideal speech situation as models for principles defining the freedom of speech. I argue that freedom of speech is best understood as an attempt to institutionalize the essential conditions of the ideal speech situation. Any society that wants to enable rational agreement through public discourse must provide for a right to free speech which allows all citizens the right to participate in communication on equal terms without the fear of compulsion.

Section A outlines the most basic implication of reconceptualizing the freedom of speech as the freedom of communicative action: communicative action is within the scope of protection; strategic action is not. Section B outlines the implication of considering the three rules that define the ideal speech situation²⁰² as a component principle of the right to freedom of speech. Section C explores two problems with applying the model of the ideal speech situation to the freedom of speech. The first problem stems from Habermas' distinction between pure discourse and normal communicative action. The second problem derives from the difficulty of precisely drawing the line between communicative action and strategic behavior. Section D reconsiders the question of justification by

²⁰¹ My approach to the development of a theory of the freedom of speech from Habermas' theory of communicative action has a number of precursors. Paul Chevigny's essay on the relationship between freedom of speech and philosophy of language undertakes a suggestive but brief exploration of Habermas' theory. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 192-94 (1980); see also P. CHEVIGNY, *MORE SPEECH* (1988). Judith Lichtenberg's recent essay on the freedom of the press develops some implications of Habermas' position. Lichtenberg, *Foundation and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329, 351 n.40 (1987). Kenneth Karst's essay on equality and freedom of speech anticipates the theme of equality of communicative opportunity. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-26 (1975). I have found C. Edwin Baker's work on the first amendment particularly suggestive. Baker, *supra* note 51. Kent Greenawalt's work on the application of speech act theory to the relationship between the first amendment and criminal law has been very helpful. Greenawalt, *Speech and Crime*, 1980 AM. BAR. FOUND. J. 645.

²⁰² See *supra* Part IV(C)(3) (text accompanying notes 160-68).

comparing the theory offered here with traditional theories of the freedom of speech.

A. Scope of the Freedom: Communicative Action and Not Strategic Action

In this Section, I argue that my reconceptualization of the freedom of speech as the freedom of communicative action offers a persuasive account of the basic contours of the legal doctrines that surround the first amendment freedom of speech. I begin with the problem faced by traditional theories in accounting for the exclusion from the right to free speech of certain behavior that is undoubtedly speech, but which surely should not be protected.

1. *The Exclusion of Strategic Action.*—One of the persistent problems of free speech theory has been formulation of a basic principle defining the scope of the freedom. The principle ought to meet the criteria of fit and justification, which were discussed in Part II.²⁰³ For example, many theories are unable to account for the existence of speech that is undeserving of protection. The classic example of the man who shouts "fire" in a crowded theater poses a challenge to theories of free expression: what principle allows government to control speech that is clearly undeserving of first amendment protection, but does not open the door to the suppression of expression that is deserving of protection? The problem is particularly acute for the "absolutist" who believes the constitutional text allows no government restriction on any "speech." The "clear and present danger" doctrine represents one response to this challenge.

Reconceptualizing the freedom of speech as freedom of communicative action offers a fresh approach to this persistent problem. The first step is the simple observation that not all speech acts involve communicative action. In Part IV, I noted that speech act theory distinguishes between illocutionary and perlocutionary acts. For an illocutionary act to be successful, the listener must understand the intention of the actor. Perlocutionary acts depend on the effect of speech and not on reaching understanding. The man who shouts "fire" in a crowded theater in order to induce panic depends on the perlocutionary effect of his speech and not on the illocutionary uptake. In Habermas' terms, shouting "fire" in a crowded theater is strategic action and is not communicative action. Of course, this analysis assumes a certain intention in shouting "fire." Indeed, if we vary the intention, as for example by assuming the man erroneously believed there was a fire, the justification for prohibition of this sort of speech act is no longer clear.²⁰⁴

²⁰³ See *supra* Part II(C)(3) (text accompanying notes 34-40).

²⁰⁴ This is not to say that there could be no justification for such a prohibition. It could be that even sincere acts of shouting "fire" in an actually burning crowded theater are undesirable because of

New York Times v. Sullivan itself, in *Gertz* the Court held that the stringent "actual malice" test is not applied. Instead the common law rule, which imposed strict liability for false statements, is tempered by a constitutional prohibition against the imposition of liability without "fault."²⁸³ The "fault" standard for the imposition of liability when the plaintiff is a private figure represents an attempt to approximate the conditions of the ideal speech situation when the threat to equality is minimal.

The latest wrinkle in the *New York Times v. Sullivan* doctrine is *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²⁸⁴ in which the Court held that a strict liability standard could be applied in cases in which the plaintiff was a private figure and the speech was not related to a matter of public concern.²⁸⁵ The context of the *Dun & Bradstreet* decision was commercial; *Dun & Bradstreet* released a confidential report that *Greenmoss* had filed a voluntary petition for bankruptcy to five subscribers. When *Greenmoss* informed *Dun & Bradstreet* of the error, the report was collected, but *Greenmoss* successfully brought an action for compensatory and punitive damages.

Although the decision in *Dun & Bradstreet* focused on the lack of public concern with the topic of the credit report, the decision may be illuminated by *Habermas'* distinction between the system and the lifeworld. The speech at issue was a product of market forces; the amount of care taken by credit reporting businesses before issuing reports will hinge on profit maximization concerns. Strict liability for erroneous reports will simply be one factor that will enter into the highly rationalized process of decisionmaking. The point is that this sort of speech is outside of the lifeworld, the domain of communicative action; rather, such market-governed speech is squarely within the system, where strategic action predominates. This reinterpretation of the *Dun & Bradstreet* decision finds support in Justice Powell's plurality opinion, which states that "this type of credit reporting" is "like advertising" in that it is "hardly and unlikely to be deterred by incidental state regulation."²⁸⁶

Outside the market, a strict liability rule would penalize the expression of viewpoints which are sincerely held, but later turn out to be mistaken. Such a rule might chill the expression of some viewpoints, violating the conditions of the ideal speech situation. On the other hand, extending the stringent protections of *New York Times* to this situation would provide little incentive for communicators to comply with the requirement that participants in the ideal speech situation be motivated by the search for truth. The "fault" standard for communication in the lifeworld provides a compromise between these extremes. Those who en-

²⁸³ *Id.* at 347.

²⁸⁴ 472 U.S. 749 (1985).

²⁸⁵ *Id.* at 758-59.

²⁸⁶ *Id.* at 762.

gage in communicative action will usually be free from liability; those who engage in strategic action will usually be liable.

The most interesting point that emerges from reconsideration of the libel cases in light of the theory of communicative action is that there is a real tension underlying the shifts in doctrine in this area. The conditions of the ideal speech situation cannot be perfectly realized if the power to punish strategic action can also be used to deny equality of communicative opportunity. *New York Times* attempts to craft a careful balance between the legitimate interest of the state in protecting against the harms of deliberate deception and the danger that libel actions could be used to stifle criticism of government.

As this brief sketch indicates, the theory of communicative action does more than simply account for the broad contours of first amendment doctrine. The application of the theory to the defamation area demonstrates that the theory can serve as a powerful explanation of the tensions and instability of certain areas of first amendment doctrine.

VII. CONCLUSION

A. Explaining First Amendment Decisions: Reconstructive Science and Judicial Intuition

If I have succeeded in my attempt to demonstrate that the theory of communicative action can ground a theory of the first amendment that both fits the existing law and provides a powerful justification for it, a puzzle remains. How is it that American judges have decided cases for decades in accordance with a theory recently proposed by a German philosopher? Most, if not all, of these judges are unaware of the theory of communicative action and its implications for first amendment doctrine.

The answer to this puzzle is, I believe, contained in the theory of communicative action itself. *Habermas* views the theory as "reconstructive science."²⁸⁷ That is, the elements of the theory of communicative action relied on in this Article are rational reconstructions of our actual communicative practice. Judges who decide first amendment cases in accord with precedent and their own intuitions of what justice requires in the particular case, as predicted by the theory, would produce doctrine which accords with the theory in light of the historical conditions that exist at the time the decision is made. Judges simply draw upon the knowledge of the ideal speech situation which is available to all competent speakers because it is built into the structure of communication.

Thus, the theory offered in this essay possesses (at least potentially) a sort of explanatory power that theories of legal doctrine rarely possess. The theory of communicative action can explain its own incorporation into legal doctrine.

²⁸⁷ See T. MCCARTHY, *supra* note 42, at 276-79.

B. Freedom of Communicative Action: The Tension Between Ideal Theory and Realization

Reconceptualizing the first amendment as the freedom of communicative action yields a powerful theory of free speech. The speech act theory provides an understanding of the relationship between speech and action and of the diverse functions of speech. The distinction between communicative and strategic action grounds the line between protected and unprotected speech. The principle of equality of communicative opportunity gives the right its fundamental content.

The ideal speech situation, on which the theory is modeled, is, however, an *ideal* of rational communication and not a model which describes all *real* or empirical speech situations. Viewing the first amendment as embodying an ideal—the freedom of speech—which has not yet been fully realized due to practical constraints, yields the following insight: first amendment doctrine will of necessity be in a state of flux and tension so long as practical constraints create tradeoffs between realization of the various conditions of the ideal situation. This point has been illustrated in this essay in the tensions in first amendment defamation doctrine.

Thus, one of the greatest virtues of the theory of communicative action as a theory of the freedom of speech is that it explains the tensions and instability of first amendment doctrine; in other words, the theory explains why the persistent hard cases of first amendment doctrine are truly hard.

C. Legal Thought as Social Theory: Implications for the Theory of Communicative Action

Finally, I return to the second purpose of this Article. The juxtaposition of the theory of communicative action with free speech doctrine can be viewed as a thought experiment aimed at testing the theory itself. Viewed in this light, some tentative suggestions about Habermas' theory can be made.

First, although the distinction between strategic and communicative action is difficult to draw, the mixed-nature objection is not conclusive. Habermas' contention that competent speakers have the ability to make such a distinction is supported by the legal data. First amendment doctrine requires judges and juries to distinguish between communicative and strategic action; in the case of the "actual malice" test the distinction is explicitly and formally incorporated into the law. The seeming ability of participants in the legal system to make this distinction is strong evidence that it can be made.

Second, the imperfect realization of the conditions of the ideal speech situation in first amendment doctrine provides support for Habermas' view that the ideal can be both a yardstick against which

practice can be measured and an "anticipation"—an ideal that is capable of progressive realization as practical constraints permit.

This Article has examined the possible ramifications of Habermas' theory of communicative action for interpretation of the freedom of speech. Habermas' theory of communicative action provides an elegant and powerful framework for developing a theory of the freedom of communicative action. The distinction between communicative action and strategic behavior and the principle of equality of communicative opportunity go a long way toward explaining and justifying the core of first amendment doctrine, but they also enable a reinterpretation of the freedom of speech that can serve as the basis for a comprehensive critique of existing doctrine. At the same time, I have tried to illuminate some of the difficulties in the theory of communicative action by exploring them in the relatively concrete context of first amendment doctrine. I hope that the result is a clearer understanding of both the theory of communicative action and the freedom of speech.