
REHABILITATING THE PERFORMATIVE

All beings in Flatland, animate or inanimate, no matter what their form, present to our view the same, or nearly the same, appearance, viz. that of a straight Line. How then can one be distinguished from another, where all appear the same?

— Edwin A. Abbott¹

INTRODUCTION

The First Amendment's Free Speech Clause is in need of an analytical framework. Justice White once wrote: "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."² And most (in)famously, Justice Stewart's attempt to define the category of pornography too obscene to fit within the coverage of the First Amendment was simply: "I know it when I see it."³ In the area of free speech, the feeling of groping for answers in the methodological darkness is inescapable.

Yet theoretical consensus is not forthcoming. The difficulty of defining the scope of the First Amendment's Free Speech Clause has spawned myriad theories that seek to explain the values undergirding free speech. For example, truth discovery theories maintain that speech should be protected if it furthers the recognition of truth.⁴ Dissent theories emphasize the social value of encouraging rather than restricting dissent.⁵ Democratic deliberation theories highlight the importance of open deliberation to self-government.⁶ Autonomy theories contend that the First Amendment should guarantee listeners the autonomy to decide what to believe⁷ or that the First Amendment should ensure speakers the right to manifest their autonomy through

¹ EDWIN A. ABBOTT, *FLATLAND* 17 (Dover Publ'ns, Inc. 7th ed. 1952) (1884) (emphasis omitted).

² *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁴ See, e.g., JOHN STUART MILL, *ON LIBERTY* 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); see also *Whitney v. California*, 274 U.S. 357, 372, 377 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁵ See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999); CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

⁶ See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁷ See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

expression.⁸ But no existing theory of free speech fully explains the Supreme Court's First Amendment jurisprudence.⁹ Truth discovery theories might have trouble explaining the coverage of art and literature; democratic deliberation theories might be unable to explain the protection of pornography; and speaker-based autonomy theories might struggle to explain the protection of commercial speech, non-commercial corporate speech, and harmful speech.¹⁰ Furthermore, while some scholars believe that a single principle explains the First Amendment,¹¹ others doubt that such an exclusive principle is possible.¹²

What the First Amendment needs is a framework that does for free speech what the tripartite scheme in Justice Jackson's *Steel Seizure*¹³ concurrence did for executive action — namely, to make clear what questions can be answered even while the answers to other questions remain uncertain. To that end, this Note builds upon a framework proposed by Professor Kent Greenawalt in *Speech, Crime, and the Uses of Language* that categorizes speech according to its communicative value. This Note modifies Professor Greenawalt's framework in order to make it more pluralist — that is, agnostic toward the substantive principle(s) that might underlie the First Amendment — by employing the approach of “defining out” rather than “defining in.” Further, to make the framework effective, this Note attempts to remedy the blurring of categories that occurs in Professor Greenawalt's work and those of earlier proponents of expression-conduct theories. Finally, this Note explains why a substantive theory that rejects any distinction between expression and conduct would be undesirable. Throughout, the goal of the analysis is to make clear what questions can be answered without reference to substantive principles of free speech.

⁸ See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

⁹ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1784–85 (2004); see also Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 859–60 (2000) (book review) (writing that “[d]espite an outpouring of scholarly effort, the consensus is that free speech theory has failed to realize th[e] imperial ambition” of producing “a set of consistent normative principles that would explain and justify First Amendment doctrine”).

¹⁰ See Schauer, *supra* note 9, at 1785–86.

¹¹ See, e.g., BAKER, *supra* note 8.

¹² See, e.g., Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 276–77 (1981); see also Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1197–98 (1983).

¹³ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

I. DEFINITIONS

A. Coverage Versus Protection

As a preliminary matter, it is important to make clear the distinction between “coverage” and “protection” in the context of constitutional rights and the First Amendment in particular. Determining the scope of a constitutional rule requires a two-step analysis that asks whether the conduct at issue is covered by the rule and, if so, whether the conduct is protected. A situation is covered by a constitutional rule if the situation is of the sort that mandates application of the tests that the rule requires.¹⁴ But the situation is protected by the rule only if those tests result in a determination that the conduct at issue should not be permitted.¹⁵ Consider, for example, the Fourth Amendment’s prohibition of unreasonable searches. The question of coverage asks whether an action constitutes a search, while the question of protection asks whether the search was unreasonable.¹⁶

Because the First Amendment protects “the freedom of speech,”¹⁷ the coverage of the First Amendment is determined by answering the question of what constitutes “speech.”¹⁸ For instance, under current doctrine, categories such as fighting words and obscenity are outside the coverage of the First Amendment — that is, they are not considered speech for the purposes of the amendment.¹⁹ When the Court determines that speech is not covered by the amendment, it does not apply any First Amendment test²⁰ to evaluate the government’s interest

¹⁴ See Schauer, *supra* note 9, at 1769.

¹⁵ See *id.*

¹⁶ *Id.* at 1772.

¹⁷ U.S. CONST. amend. I.

¹⁸ One response to this claim might be that the coverage of the First Amendment actually turns on the definition of “freedom of speech” rather than “speech.” As Professor Schauer explains, however, this response does not obviate the need to define what sort of speech is covered by the phrase “freedom of speech.” See Schauer, *supra* note 9, at 1773.

¹⁹ See *Miller v. California*, 413 U.S. 15, 23 (1973) (obscenity) (citing *Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957)); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (fighting words). Of course, even though the Court’s uncovered categories of speech may be regulated because of their content, viewpoint-based discrimination within such a category is still prohibited. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381–90 (1992).

²⁰ The Court articulated one example of such a in *United States v. O’Brien*, 391 U.S. 367 (1968):

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

in regulating the speech and to determine whether the regulation is overly restrictive.

The separation of the analysis into two distinct steps — the coverage and protection inquiries — is useful in order to prevent confusion. When speech is not ultimately protected, the reason may be because it does not implicate First Amendment values (noncoverage) or because, despite the implicated values, other interests, such as the need to avoid a riot, outweigh the First Amendment values (nonprotection). This Note deals with the question of coverage rather than protection.

In addition to its role in providing an analytical framework, the question of the First Amendment's coverage is of vital importance in practice. Indeed, given the strength of First Amendment protection, whether an utterance or conduct falls within the coverage of the First Amendment is often the crucial question. As Professor Frederick Schauer writes: "Once the First Amendment shows up, much of the game is over."²¹ The First Amendment is a powerful rhetorical tool, with significant pull for laymen, litigators, and judges alike.²²

The coverage of the First Amendment must be defined with reference to its purposes. Professor Schauer persuasively argues that it is unsatisfactory simply to use the dictionary definition of "speech" to determine the coverage of the First Amendment. A literalist account, which would deem all verbal utterances covered, would need either to water down the protection for categories of speech that currently enjoy strong protection, such as political speech, or to provide the same strong protection for utterances used to commit torts and crimes.²³ The literalist could avoid these extremes only by articulating some theory that explains which speech should receive greater protection by virtue of being closely tied to the purposes of free speech.²⁴ But that approach, of course, would be equivalent to determining which speech the First Amendment covers.²⁵

B. Defining In vs. Defining Out

If there were agreement regarding the justification of the First Amendment, then the coverage of free speech would need to be defined in terms of that justification. In that case, one could delineate the bounds of coverage by "defining in" rather than "defining out." "Defining in" means to determine what sorts of speech or conduct fall within the First Amendment by asking if they further the values of

²¹ Schauer, *supra* note 9, at 1767.

²² See *id.* at 1790–93.

²³ See Schauer, *supra* note 12, at 271–72.

²⁴ See *id.* at 272.

²⁵ See *id.*

some accepted justification of free speech.²⁶ For instance, if one subscribed to a truth discovery theory, one would pursue the defining-in approach by determining whether various forms of speech or conduct promote the discovery of truth. If they do, they are deemed covered; if they do not, they are uncovered. Such an approach is, however, impossible in the absence of an accepted justification of free speech. It would be possible to define in an underinclusive category by determining what speech would be covered under virtually any justification of free speech, but doing so might be undesirable because it would err on the side of underprotecting speech.²⁷

“Defining out,” in contrast, means to determine what speech or conduct almost certainly is not covered by the First Amendment, essentially constructing an overbroad category of coverage that includes anything that could possibly fall within a plausible principle of free speech. This approach is a sensible way of dealing with uncertainty regarding the justifications that must ultimately define the coverage of the First Amendment.²⁸

C. *Pluralism*

There are two ways to bring coherence to the field of First Amendment law: one could adopt a substantive principle — that is, a justifying purpose — of free speech and derive a theory from that starting point, or one could adopt a theoretical framework that is agnostic about the correct substantive principle(s) of free speech. Most free speech theories take the first tack, selecting an overarching norm and using supporting concepts to flesh it out. The alternative approach is to adopt a pluralist theory. Such a theory attempts to analyze speech in a way that is acceptable and coherent regardless of the particular principle of free speech to which one subscribes.

The approach in this Note is close to the pluralist end of the pluralist-substantive spectrum; it is for the most part agnostic toward the substantive principles of free speech. Nonetheless, it stops short of complete pluralism because, for reasons explained in Part V, it rejects as undesirable any substantive principle that does not recognize a line between expression and conduct. For the purpose of simplicity of exposition, this Note terms its framework pluralist; it is pluralist with respect to *nearly* any substantive principle of free speech.

²⁶ See *id.* at 279–80.

²⁷ See *id.* at 281.

²⁸ See *id.* at 280.

II. THE EXPRESSION-CONDUCT DISTINCTION

A. *The Progression of the Expression-Conduct Distinction*

Prior to Professor Greenawalt's framework,²⁹ the approach of distinguishing between expression and conduct was attempted most famously by Thomas Emerson and J.L. Austin. Emerson defined the scope of the First Amendment by distinguishing between "expression" and "action,"³⁰ and explained that "[t]he guiding principle must be to determine which element is predominant."³¹ Austin distinguished between what he called "constative" utterances and "performative" utterances.³² Constative utterances are, loosely speaking, statements that can be true or false.³³ Performative utterances, in contrast, are ways of doing something and cannot be true or false — for example, saying "I do" in a marriage ceremony.³⁴ It is important to note that Emerson and Austin are quite distinct theorists: Emerson's work dealt with the expression-action line in the context of the First Amendment, while Austin addressed the constative-performative line in the context of the philosophy of language. Professor Greenawalt's theory is a hybrid in the sense that it employs a modified version of Austin's framework, but like Emerson's theory it attempts to determine the coverage of the First Amendment.

Professor Greenawalt's theory makes an important advance with respect to both Emerson and Austin by sharpening the categories on the expression-conduct spectrum to minimize the blurring of the lines between them. Emerson's theory has been widely criticized on the ground that under his criteria it is too difficult to distinguish speech from conduct.³⁵ For similar reasons, some commentators view Aus-

²⁹ See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

³⁰ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17 (1970).

³¹ *Id.* at 80.

³² See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson ed., 1962); J.L. AUSTIN, *PHILOSOPHICAL PAPERS* 220–39 (J.O. Urmson & G.J. Warnock eds., 1961).

³³ See AUSTIN, *HOW TO DO THINGS WITH WORDS*, *supra* note 32, at 3.

³⁴ See *id.* at 5.

³⁵ See, e.g., BAKER, *supra* note 8, at 71 ("Common sense operates less to divide the world of behavior objectively between expression and action than to indicate the perspective of the person doing the dividing. . . . The observer can choose to focus on either what is done (other than expressing) or what is expressed. The choice of focus will usually be both purposeful and subjective. Either cultural or personal idiosyncrasy, values or whims or habits, or purposes of the description, but not logic or objective analysis, will determine the choice."); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) ("[B]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct. Attempts to determine which element 'predominates' will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected."); John P. Yacavone,

tin's categories of speech as being of limited usefulness for determining the coverage of the First Amendment.³⁶ Indeed, Austin himself ultimately came to doubt the integrity of the performative-constative distinction.³⁷ As a result, Professor Greenawalt expressly sets a goal of sharpening Austin's categories,³⁸ thereby avoiding the line-blurring that beset both Emerson and Austin.

Professor Greenawalt's theory also represents an advance with respect to Emerson's First Amendment analysis because it moves further in the direction of pluralism. Emerson defines expression and action in terms of the values underlying the First Amendment,³⁹ yet his approach was more pluralist than many theories of the First Amendment because it attempted to incorporate multiple free speech values rather than selecting a single substantive principle of free speech.⁴⁰ In some respects, Professor Greenawalt's approach is similar to Emerson's: it does not preference a single substantive principle of free speech,⁴¹ but it assumes that the First Amendment must be defined with reference to some substantive principles.⁴² As a result, Professor Greenawalt sets out a broad range of common justifications for free speech⁴³ and uses them to determine which speech is covered by the First Amend-

Emerson's Distinction, 6 CONN. L. REV. 49 (1973); see also Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 221 (referring to the distinction between speech and conduct as "long-discredited").

³⁶ See, e.g., Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1326 n.251 (2005) ("[Austin's] performative/constative line isn't immediately helpful to lawyers who are trying to distinguish protected speech from unprotected speech-as-conduct, even if it is helpful to philosophers who are trying to understand how people communicate.").

³⁷ See AUSTIN, PHILOSOPHICAL PAPERS, *supra* note 32, at 238.

³⁸ See GREENAWALT, *supra* note 29, at 58–59.

³⁹ See EMERSON, *supra* note 30, at 80 ("The guiding principle must be to determine which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental? The answer, to a great extent, must be based on a common-sense reaction, *made in light of the functions and operations of a system of freedom of expression*." (emphasis added)).

⁴⁰ Emerson explains:

Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as a means of maintaining the balance between stability and change in the society.

THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1963).

⁴¹ See GREENAWALT, *supra* note 29, at 339 ("The third sense in which my approach is modest is in not proposing any single *key* to First Amendment interpretation."); *id.* at 340 ("Anyone who supposes that the protection of the First Amendment can be reduced to one justification . . . is either deluded or willing to sacrifice a great deal in the interests of theoretical neatness and actual or apparent simplicity of administration.").

⁴² See *id.* at 42.

⁴³ See *id.* at 9–39.

ment.⁴⁴ Nonetheless, it moves closer to pluralism than did Emerson's theory by delineating a category of speech (situation-altering utterances) that is clearly not covered under most of the common justifications for free speech and a category (fact-value assertions) that is clearly covered to a large degree by most of them.

B. Greenawalt's Categories

Professor Greenawalt describes three categories of speech: fact-value assertions, weak imperatives, and situation-altering utterances. These categories are based on Austin's performative-constative distinction, but Professor Greenawalt modifies the terminology to make clear that they are not equivalent to Austin's categories.⁴⁵ According to Professor Greenawalt, assertions of fact and value — such as “The mayor has accepted a bribe” (fact) and “Bribery is immoral” (value) — should be mostly covered by the First Amendment under virtually any substantive principle.⁴⁶ These assertions, for example, further truth discovery by promoting debate regarding the truth of facts and the appropriateness of value judgments, promote listeners' autonomy by exposing them to facts and values that enable fully informed decision-making, and facilitate democratic deliberation by providing citizens with the information and ideas necessary to self-govern effectively.⁴⁷ In short, most principles of free speech — truth discovery, autonomy, dissent, democratic deliberation, and so on — require the coverage of a large subset of assertions of fact and value.⁴⁸ Because conduct that communicates facts and values implicates the same free speech principles as fact-value assertions — conduct that is dominantly intended to communicate a message and is understood as such — should be treated like a fact-value assertion.⁴⁹

Situation-altering utterances, in contrast, actually change the social context and are therefore “ways of doing things, not of asserting things.”⁵⁰ As a result, these utterances can be regulated in the same way as noncommunicative behavior.⁵¹ Mirroring Austin's category of performative utterances, Professor Greenawalt presents as paradigmatic examples of situation-altering utterances a bride or groom saying

⁴⁴ See, e.g., *id.* at 34 (“What all these perspectives do provide, however, is a set of considerations, a set of standards for the relation of government to citizens, which help to identify which interferences with expression are most worrisome and which operate as counters, sometimes powerful ones, in favor of freedom.”).

⁴⁵ See *id.* at 59.

⁴⁶ See *id.* at 43–44.

⁴⁷ See *id.* at 43.

⁴⁸ See *id.*

⁴⁹ See *id.* at 56.

⁵⁰ *Id.* at 58.

⁵¹ *Id.*

“I do” in a marriage ceremony and an umpire in a baseball game saying “You’re out.”⁵² The category of situation-altering utterances also includes agreements, promises, offers, permissions, orders, and manipulative threats and inducements.⁵³ Professor Greenawalt contends that for all situation-altering utterances it is the statement itself, rather than a change in the listener’s mind, that alters the social context.⁵⁴

Professor Greenawalt’s third category, weak imperatives, is a hybrid with characteristics of both fact-value assertions and situation-altering utterances. Requests and encouragements, such as “Please shut the door” or “Come on, don’t stop now,” are the paradigmatic examples of weak imperatives.⁵⁵ On the one hand, requests and encouragements do not alter the social context as significantly as situation-altering utterances.⁵⁶ Furthermore, there may be little difference between the request “Please shut the door” and the fact-value assertion “It would be good to have the door shut.”⁵⁷ On the other hand, the point of a request or encouragement is not solely to communicate a fact or value; rather, the point is to “inject[] the force of the speaker’s personality toward a particular result.”⁵⁸

III. THE NEED TO DEFINE OUT

This Part modifies Professor Greenawalt’s theory in order to create a roadmap for First Amendment inquiry. To that end, it first explains the benefits of a pluralist theory — one that is agnostic toward the substantive principles of free speech. It then argues that such a theory cannot remain logically coherent if it attempts to determine, as Professor Greenawalt’s theory does, whether or not every particular form of speech is covered. Rather, it must either define out or define in an underinclusive category of speech. This Note takes the former approach because it errs on the side of overprotecting speech.⁵⁹ Finally, this Part

⁵² *Id.* at 57.

⁵³ *Id.* at 63–68. This Note argues that manipulative threats and inducements are not properly situation altering and should be excised from the category of situation-altering utterances. *See infra* Part IV, pp. 2212–16.

⁵⁴ *See* GREENAWALT, *supra* note 29, at 61–62.

⁵⁵ *Id.* at 69.

⁵⁶ *Id.*

⁵⁷ *Id.* at 70. This Note leaves unresolved the question whether it is the form of the statement, the context, or the intent of the speaker that matters in determining how to distinguish weak imperatives from fact-value assertions. The relevant line for the approach advocated in this Note is not the distinction between weak imperatives and fact-value assertions, but rather that between situation-altering utterances and non-situation-altering utterances.

⁵⁸ *Id.*

⁵⁹ The approach in this Note is pluralist in the sense that, with the exception of theories that do not distinguish expression from conduct, it is agnostic toward the correct substantive principle of free speech. It does not mean that the Note makes no value judgments in its choice of method-

modifies Professor Greenawalt's framework by effacing the line between weak imperatives and fact-value assertions.

In the absence of consensus regarding a substantive principle of free speech, there is much to recommend a pluralist framework. Reaching such a consensus would be ideal from an analytic standpoint because it would allow theorists to determine the boundaries of First Amendment coverage by defining in. Unfortunately, however, there is no consensus regarding the correct principle(s) of free speech. This lack of consensus poses real practical problems because different substantive principles lead to different resolutions of concrete cases. For example, truth discovery and democratic deliberation theories might not deem pornography covered, while an autonomy theory might. A pluralist approach is attractive because it has the potential to structure First Amendment inquiry in the absence of a consensus regarding substantive principles that is not likely to be forthcoming. It has the potential to make clear what questions can be answered in the absence of such a consensus.

To avoid logical incoherence, a pluralist theory should take the approach of defining out rather than defining in. A pluralist theory simply cannot determine definitively which forms of speech are covered by the First Amendment. In order to determine whether pornography should be covered by the First Amendment, for example, one must select a substantive principle of free speech. Some truth discovery theories would hold that it should not be covered, while some autonomy-based theories of self-expression would hold the opposite. A pluralist theory resolving this point would be logically incoherent; one cannot posit an outcome consistent with both theories if the theories are themselves inconsistent on the question. As a result, a pluralist theory must either define out an underinclusive category of speech or define in an underinclusive category. Although either approach could be logically coherent, this Note takes the approach of defining out because it errs on the side of overprotecting speech, whereas defining in an underinclusive category would err on the side of underprotecting speech.⁶⁰ Furthermore, whereas the category of situation-altering utterances would be covered by virtually no acceptable principle of free speech, it is not necessarily true that virtually any principle of free speech would cover all fact-value assertions. For example, some principles of free speech might not cover falsehoods.

Whereas Professor Greenawalt's approach attempts to define in a category of speech that is neither under- nor overinclusive, this Note

ology. For example, the Note chooses to err on the side of over- rather than underprotecting speech.

⁶⁰ See Schauer, *supra* note 12, at 281.

moves closer to pluralism by defining out an underinclusive category. More specifically, it defines out the category of situation-altering utterances, while leaving fact-value assertions and weak imperatives presumptively covered. This approach differs from Professor Greenawalt's theory in that it does not consider weak imperatives on a case-by-case basis using substantive principles of free speech and leaves only one dividing line on the expression-conduct spectrum. Weak imperatives should not be defined out because they have significant communicative value and as a result cannot be easily defined out without reference to a pluralist theory other than one based on the expression-conduct distinction. On the other hand, situation-altering utterances should be defined out because, due to their lack of a significant communicative aspect, they do not implicate most principles of free speech. Moreover, as Part V explains, the consequences of adopting a principle of free speech that covers situation-altering utterances are likely to be unpalatable. Thus, under the approach in this Note, the two categories of speech for which coverage might vary under different substantive principles — fact-value assertions and weak imperatives — remain presumptively covered, whereas the category that nearly all principles would exclude — situation-altering utterances — is uncovered.

It is important to keep in mind that the process of defining out will result in an overbroad category of speech being presumptively covered by the First Amendment. It does not weaken the proposed approach, for instance, that falsehoods should not be covered by the First Amendment even though they are fact-value assertions.⁶¹ Showing the category of situation-altering utterances to be overbroad would be problematic for the proposed approach, but showing the category of fact-value assertions to be overbroad would not. If the category of situation-altering utterances were overbroad, then the attempt to define out speech clearly not covered by the First Amendment would have failed; in contrast, the category of fact-value assertions is almost certainly overbroad as a necessary byproduct of defining out rather than defining in.

The proposed framework can be illustrated with reference to the following diagrams. In both figures, the area between the two outer circles, which represents situation-altering utterances, is uncovered. In Figure 1, the area within the inner solid circle represents fact-value assertions and weak imperatives, which are presumptively covered under this theory. The dotted ovals represent speech that would be covered under substantive theories of free speech. The vertical one might

⁶¹ For Professor Greenawalt's discussion of the coverage of falsehoods, see GREENAWALT, *supra* note 29, at 48–51.

represent, for example, truth discovery theory and the horizontal one might represent autonomy theory. Part V explains why it would be undesirable for either of these dotted ovals to extend into the circle representing situation-altering utterances.⁶² Figure 2 illustrates the role that another pluralist theory could play. The gray area represents fact-value assertions and weak imperatives hypothetically defined out by some other pluralist theory. If the alternative pluralist theory is fully pluralist — that is, agnostic toward the correct substantive principles of free speech — then the gray area should not cover any part of the dotted ovals, which represent speech covered by substantive theories of the First Amendment. This is the situation reflected in the diagram. If the pluralist theory is not fully pluralist, then the gray area might cover some portion of the dotted ovals.

FIGURE 1:

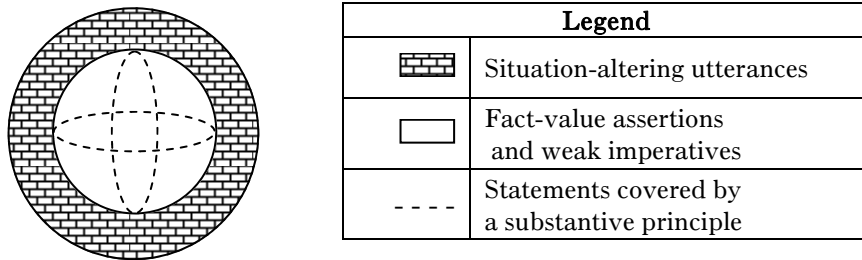
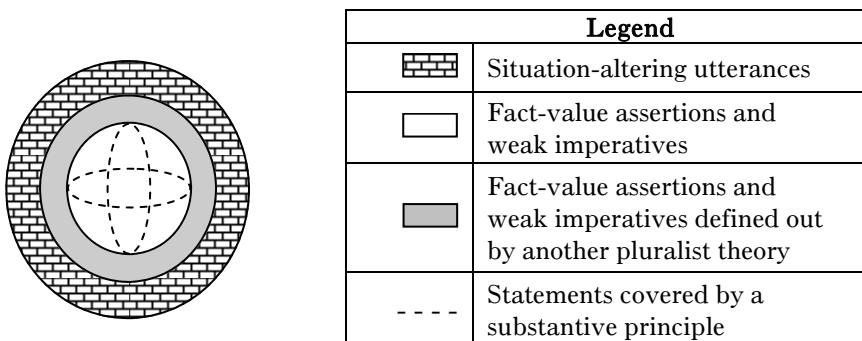


FIGURE 2:



⁶² See *infra* Part V, pp. 2216–20.

IV. NARROWING THE CATEGORY OF SITUATION-ALTERING UTTERANCES: MANIPULATIVE THREATS AND INDUCEMENTS

The success of the attempt to define out situation-altering utterances depends on the clarity of the criteria for inclusion within the category. The value of defining out lies in creating a roadmap that makes clear what questions can be answered even amidst widespread disagreement regarding the substantive principles of free speech. Such a roadmap, in turn, can provide a logical structure for First Amendment analysis. The blurrier the lines on the roadmap, the less effective the roadmap will be. Under this Note's defining-out approach, it is more important to define clearly the category of situation-altering utterances than it is to define the category of fact-value assertions.⁶³ With that in mind, this Part explains that manipulative threats and inducements should be excised from the category of situation-altering utterances in order to avoid the blurriness that befell Emerson and Austin.

To prevent line-blurring, situation-altering utterances should be defined as statements that alter legal or normative rights or obligations as a result of a quality of the statements independent of what they communicate. By defining the category in this way, the theory avoids the need to distinguish all speech from all conduct. Rather, it selects a clearly delineated subcategory of conduct-like speech to define out. An utterance that through some quality of the statement itself alters legal or normative obligations can be defined out of the First Amendment because it is not dominantly expressive. It alters the legal or normative context in a manner independent of any assertions of fact or value that the statement implies.

This insight seems to motivate most of Professor Greenawalt's examples of situation-altering utterances, but it fails to explain the inclusion of manipulative threats and inducements in that category. Agreements, promises, offers, permissions, and orders all effect a change in legal or normative rights or obligations; each represents a way of *doing* something through words rather than a way of *asserting* something. For example, while "I promise to do X" may imply the fact assertion "It is my current intention to do X," its dominant effect is to create a normative obligation. Similarly, when a party says, "I agree to do X," he is not simply stating the fact that he currently intends to do X. Rather, he is primarily doing something — namely, incurring a

⁶³ See GREENAWALT, *supra* note 29, at 62 ("Since the primary issue is the reach of the reasons for free speech and since these reasons largely concern assertions of facts and values, whether statements dominantly asserting facts and values are also situation-altering is much less important than whether dominantly situation-altering utterances assert facts and values.").

normative obligation to do *X*. Defining out situation-altering utterances would not inhibit the assertion of facts and values: any assertions implied in situation-altering utterances could always be restated as fact-value assertions that do not alter legal or normative obligations in the same way as the situation-altering utterance.⁶⁴

Manipulative threats and inducements, in contrast, may affect the world in a generalized sense, but they do not alter legal or normative rights or obligations in a way independent of the propositions they communicate. Professor Greenawalt distinguishes manipulative threats and inducements from warning threats, advisory inducements, and pure threats, characterizing only manipulative threats and inducements as situation altering. An example of a manipulative threat would be if Tammy told Victor she would stop doing business with him if he hired Judy.⁶⁵ It would cease to be a manipulative threat if Tammy's natural reaction to Victor's hiring Judy would be to stop doing business with Victor; in that case, it would be a warning threat.⁶⁶ Manipulative threats differ in that warning threats "requir[e] both threatened action which is a natural response to the behavior of the person threatened and a willingness to forgo that action which is also a natural response to hoped-for behavior by the person threatened."⁶⁷ The distinction between manipulative inducements and advisory inducements follows a similar pattern. If Tammy tells Victor that she will increase the volume of business she does with Victor if he hires Jim, then that is a manipulative inducement; however, if her natural reaction to Victor's hiring Jim would be to increase her business with Victor, then it is an advisory inducement.⁶⁸ By way of contrast, if Tammy simply tells Victor that she will stop doing business with him, stipulating no way in which Victor can avoid that result, Tammy has made a pure, or unconditional, threat.⁶⁹

To better understand Professor Greenawalt's view of manipulative threats, consider a hypothetical slightly different from the manipulative threat in the preceding paragraph. Imagine that Tom says to Victor, "I'll tell your wife about your adultery unless you hire me." Assume further that Tom's natural response to Victor's adultery would be to inform Victor's wife and that Tom would naturally forgo that response if he were hired. This would still be, on Professor Greenawalt's

⁶⁴ Professor Greenawalt writes that weak imperatives are different from fact-value assertions partly because "what they impliedly communicate about facts and values could be otherwise communicated." *Id.* at 71.

⁶⁵ *Id.* at 66.

⁶⁶ *Id.* at 67.

⁶⁷ *Id.* at 95.

⁶⁸ *Id.* at 66–67.

⁶⁹ *See id.* at 90–91.

view, a manipulative threat because the threat sets the precondition for the hiring.⁷⁰ Tom is not just informing Victor of his natural response to the adultery; rather, he is using the threat to set the precondition for a wholly unrelated course of conduct.

Professor Greenawalt's theory seems to characterize manipulative threats and inducements as situation altering because they set a precondition for some future action. In the case of Tammy's telling Victor that she will stop doing business with him if he hires Judy, the threat sets in place the precondition for the threatened consequence to occur.⁷¹ In the case of Tom's threat to tell Victor's wife of his infidelity unless Victor hires him, the threat sets in place the precondition not for the threatened consequence but rather for the effectuation of the threatener's desired end.⁷² Under Professor Greenawalt's framework, manipulative inducements would be situation altering for the same basic reason that manipulative threats would be.

However, Professor Greenawalt's focus on setting preconditions is problematic because it expands and muddies the criteria that can be used to define a statement as situation altering. Unlike other situation-altering utterances, manipulative threats and inducements do not affect normative or legal rights or obligations.⁷³ When they are not combined with an element of promise, they do not constitute a commitment to the addressee; even when they are combined with a promise, it is not the manipulative aspect of the utterance that engenders the commitment.⁷⁴ Because he includes manipulative threats and inducements in the category of situation-altering utterances, Professor

⁷⁰ See *id.* at 95.

⁷¹ See *id.* at 95–96 (“The future acts that she threatens have come into existence only as part of a plan to get Victor to act as she wishes. Only Tammy’s actual making of the threat sets in place the conditions for the threatened consequence to occur. The threat, therefore, is not a communication about what will occur in any event; it is a critical element in generating those occurrences.”).

⁷² See *id.* at 95 (“Tom is not protecting Victor because Victor *happens* also to be his prospective employer; he is protecting Victor *in exchange* for the job. The threat, thus, actually changes Victor’s situation, because Victor can now achieve something by hiring Tom that he could not have achieved without Tom’s communication to him.”).

⁷³ Professor Greenawalt rejects the possibility that threats alter legal or normative rights or obligations: “A threat does not involve a commitment *to* the person threatened. Tammy has no obligation to carry out the threat if Victor hires Judy.” *Id.* at 90–91 (footnote omitted). Similarly, the manipulative aspect of a manipulative inducement does not involve a commitment.

⁷⁴ Professor Greenawalt does explain that threats can imply a promise not to carry out the threatened action if the threatened party complies, *id.* at 94, and that many manipulative inducements amount to promises, *id.* at 67. In the case of manipulative threats, categorization is less challenging because the manipulative aspect clearly seems to predominate. The task is more difficult for manipulative inducements because the promise element may predominate more frequently. However, this Note leaves aside the task of drawing a precise line between manipulative threats and inducements on the one hand and promises on the other. It attempts only to categorize the basic forms of speech and brackets the categorization of hybrid forms.

Greenawalt cannot define situation-altering utterances with clarity or specificity. Instead, he writes: “[W]ith some roughness, we can speak of assertions of fact and value as making claims about what already exists in the listener’s world. Situation-altering utterances purport to change that world.”⁷⁵

By making the relevant criterion the extent to which an utterance changes the world, Professor Greenawalt opens his framework to the same line-blurring criticisms directed at the expression-conduct distinctions of Emerson and Austin. Professor Edwin Baker, for example, explains that the context surrounding any statement is so multifaceted — involving perceptions, expectations, emotions, and countless other aspects — that any statement, whether a fact-value assertion or a situation-altering utterance, will change some aspect of the situation.⁷⁶ Professor Baker characterizes Professor Greenawalt’s definition of situation-altering utterances as “strangely narrow” because it includes only some types of speech that alter situations.⁷⁷ However, Professor Greenawalt’s definition of situation-altering utterances could also be viewed as strangely broad. He explicitly sets a goal of *narrowing* the category of situation-altering utterances but includes forms of speech — manipulative threats and inducements — that render the category’s criteria broad and difficult to define.

The inclusion of manipulative threats and inducements does make sense when viewed in light of Austin’s performative-constative distinction. One could argue that manipulative threats and inducements are performative because they cannot be termed true or false, but rather alter the world by setting a precondition for further action. Professor Greenawalt’s inclusion of manipulative threats and inducements in the category of situation-altering utterances — which is based on Austin’s category of performative speech — and his focus on preconditions may be philosophically defensible, but for the purposes of practical application by judges it is simply too difficult to determine what sorts of preconditions render an utterance situation altering rather than an assertion of fact or value. A question that continues to engender such profound confusion among theorists would not be an ideal foundation for practical judging, at least not when it must be applied to particular cases.

One might respond that the framework advanced in this Note is also slippery, since even fact-value assertions alter legal or normative

⁷⁵ *Id.* at 59 (footnote omitted). Professor Greenawalt also writes: “The central idea about situation-altering utterances . . . is that they actually change the social world in which we live.” *Id.* at 58.

⁷⁶ See BAKER, *supra* note 8, at 63.

⁷⁷ *Id.* at 62.

rights or obligations in some sense.⁷⁸ Nonetheless, although there will undoubtedly be hard cases of application, this Note provides a clear definition for judges to apply. In contrast, Professor Greenawalt's account is unable to provide a clear definition for the category of situation-altering utterances. At points, his account seems to rely on the creation of legal or normative rights or obligations, and at other points it relies on the creation of differing sorts of preconditions for future action. As a result, the framework advanced in this Note will be significantly easier to implement with clarity than Professor Greenawalt's framework.⁷⁹

V. ENSURING PLURALISM: SYMMETRY BETWEEN SPEECH AND CONDUCT

A pluralist theory's attempt to define out a category from the coverage of the First Amendment rests on the assumption that the category in question can be defined such that it would not be covered under any substantive principle of free speech. One might argue that it surely must be possible to create a substantive theory that would extend the coverage of the First Amendment to situation-altering utterances. This Part seeks to demonstrate that, although it would be possible to create a logically coherent theory that covers situation-altering utterances, any such theory would be undesirable because it also would need to include broad swaths of minimally expressive conduct.

The choice of the defining-out method over the defining-in method is a pragmatic and prudential one. It is consistent with this pragmatic goal to define out speech when the alternative of covering that speech would lead to consequences that one is unwilling to accept. While one could, as a logical matter, accept a principle that covers situation-

⁷⁸ Professor Eugene Volokh seems to believe that limiting the category of situation-altering utterances to speech that alters legal or normative rights or obligations would not succeed in demarcating a clear category. He explains that even fact-value assertions alter the normative context by creating moral obligations. See Volokh, *supra* note 36, at 1330–32. For example, the moral duty to avoid hypocrisy requires the speaker to avoid later contradicting his fact-value assertion. See *id.* at 1331. However, this criticism misses the mark because such effects result from the meaning conveyed by the fact-value aspect of the speech. Situation-altering utterances, in contrast, do more than simply communicate facts or values that alter the normative context. Like “I do” in a marriage ceremony or “You’re out” in a baseball game, situation-altering utterances by their nature alter legal or normative rights or obligations for reasons independent of the propositions of fact or value they convey. Regarding Professor Volokh’s example, public condemnation on account of hypocrisy would result even if the listener read the speaker’s views in a newspaper rather than hearing them from the speaker himself.

⁷⁹ As Professor Schauer explains, there is no shame in “sacrific[ing] the advantages of dealing with the full variety of cases in optimum fashion in order to achieve learnability.” Schauer, *supra* note 12, at 306. It is often better to proceed piecemeal, defining out only a limited category of speech, with the understanding that more precision can be added to the theory later. See *id.* at 307.

altering utterances and therefore reject a pluralist framework that defines them out, one should do so with eyes wide open, recognizing that such a theory is also likely to require the conclusion that minimally expressive conduct should be covered by the First Amendment.

Consider Professor Baker's liberty theory, which would bring situation-altering utterances within the coverage of the First Amendment. Professor Baker identifies self-fulfillment and participation in change as the key First Amendment values⁸⁰ and views individual autonomy and liberty as fundamental to securing these values.⁸¹ He argues that the only sort of speech not covered by the First Amendment is coercive speech because such speech is inconsistent with individual autonomy.⁸² As a result, under Professor Baker's theory, noncoercive situation-altering utterances are covered while coercive situation-altering utterances are not.⁸³ This theory is notable for its decision not to draw a line at speech with a significant conduct element. Professor Baker refers to "the inadequacy of the categories of communicating something versus doing something,"⁸⁴ instead viewing even situation-altering utterances as expressive, and proposes extending First Amendment coverage to all noncoercive utterances irrespective of their conduct element.⁸⁵

Such a complete denial of the relevance of a conduct element in speech, however, implies that the conduct element of expressive conduct must be similarly irrelevant. If verbal utterances that amount to conduct must be covered because of their expressive element, then conduct must also be covered because of its expressive element. Furthermore, if the degree to which speech contains a conduct element is irrelevant, then the extent to which the conduct element of conduct outweighs its expressive element must be similarly irrelevant. If speech can never be too conduct-like to be covered by the First Amendment, then conduct can similarly never be too conduct-like.

Indeed, Professor Baker's discussion of the coverage of conduct bears out this prediction. Professor Baker contends that general pro-

⁸⁰ See BAKER, *supra* note 8, at 48.

⁸¹ *Id.* at 49–50.

⁸² *Id.* at 56. Professor Baker's definition of "coercive" departs from the everyday understanding of that term. Professor Baker explains: "[A] person coercively influences another if (1) she restricts the other to options that are worse than the other had a moral or legitimate right to expect or (2) she employs means that she had no right to use for changing the threatened person's options." *Id.*

⁸³ For the purposes of this Note, the details of Professor Baker's liberty theory are not relevant; after all, the goal here is to create a pluralist theory that would hold for any substantive principle of free speech, including an autonomy theory.

⁸⁴ *Id.* at 65.

⁸⁵ Professor Baker explains that he does not see a persuasive reason "why the added fact that the speech is situation altering should mean that . . . assertions of facts and values do not count under the rationale for protecting speech." *Id.* at 63.

hibitions on substantively valued, expressive conduct violate the First Amendment,⁸⁶ explaining that “[t]he expressive behavior serves the same values and operates in the same manner that justifies first amendment protection of verbal expression.”⁸⁷ By eschewing any distinction between speech and conduct, Professor Baker’s theory must include nearly all noncoercive, substantively valued conduct. Professor Baker explains, for instance, that a prohibition on extended families living together⁸⁸ or a prohibition on some type of sexual interaction between consenting adults⁸⁹ would constitute an unconstitutional abridgement of free speech. However, the First Amendment would become unfeasibly broad if absolutely all substantively valued noncoercive conduct were covered by the First Amendment. In contrast, protecting sexual interaction between consenting adults on the basis of due process, regardless of the substantive merits of such protection, would be practically feasible because it would not require that *all* substantively valued noncoercive conduct also be covered.

Of course, a theory that includes situation-altering utterances within the First Amendment could, with logical consistency, define out *all* conduct, expressive or otherwise, on the basis of its being conduct rather than verbal speech. However, rendering uncovered all expressive conduct — even flag burning and boycotting — might be just as undesirable as rendering all conduct covered.

Professor Baker’s liberty theory demonstrates the implications of completely rejecting the expression-conduct distinction. Although liberty theory is logically defensible, a rejection of the expression-conduct distinction with respect to verbal utterances implies a symmetrical rejection of the distinction with respect to conduct. If one does not believe that freedom of speech should cover nearly all substantively valued conduct, then the line between expression and conduct should be retained. Such a determination would weigh in favor of defining out situation-altering utterances.

This is not to deny that one could adhere to an expression-conduct distinction and also dispute the validity of the approach proposed in this Note. One could, for example, contend that situation-altering utterances are not conduct-like in the relevant sense — that is, that they are not sufficiently different from fact-value assertions. However, if one accepts that situation-altering utterances do in fact contain a large conduct element and a small expressive element, then their inclusion within the coverage of the First Amendment would necessitate the in-

⁸⁶ *Id.* at 79.

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *See id.* at 87.

clusion of broad swaths of nearly pure conduct, as it did for Professor Baker.

It is important to recognize that this debate — whether situation-altering utterances are really analogous to conduct — occurs on a dimension distinct from the debates concerning the various principles of free speech, such as truth discovery or autonomy theory. Regardless of one's preferred principle of free speech, one must still decide whether to draw an expression-conduct line. If one does not distinguish expression from conduct, the resulting theory mirrors Professor Baker's in its breadth. If one does draw such a line, as this Note does, the approach is narrower. In either case, the theory can remain pluralist because the analysis of whether to draw such a line does not depend on factors that determine which substantive principles of free speech to select.

The framework proposed in this Note is illustrated in Figure 3. The dotted lines represent distinctions between subsets of covered and uncovered categories. It is not important that these dotted lines reflect clear distinctions; in fact, it may not even matter whether the distinctions exist at all. The solid vertical lines separating covered conduct from uncovered conduct and covered speech from uncovered speech — labeled A and B, respectively — are the focus of Parts IV and V. Part IV aims to make the line between covered and uncovered speech sharper. Part V attempts to demonstrate that the two lines are linked, in the sense that moving one to the right or left, or effacing it completely, requires a symmetrical change in the other. If line A is moved to the left to the position represented by A_1 , then line B must correspondingly be moved to the right, to the position represented by B_1 . Figure 4 demonstrates that the linear representation in Figure 3 is an arbitrary one, used only for the sake of simplicity. The most accurate representation would be a circular relation as in Figure 4. Because fact-value assertions and expressive conduct are related in the same way that situation-altering utterances and pure conduct are related, they should be separated by a dotted line as well.⁹⁰

⁹⁰ A pluralist theory other than the one in this Note could be represented on the same diagram by excising some portion of the circle that currently represents covered speech.

FIGURE 3

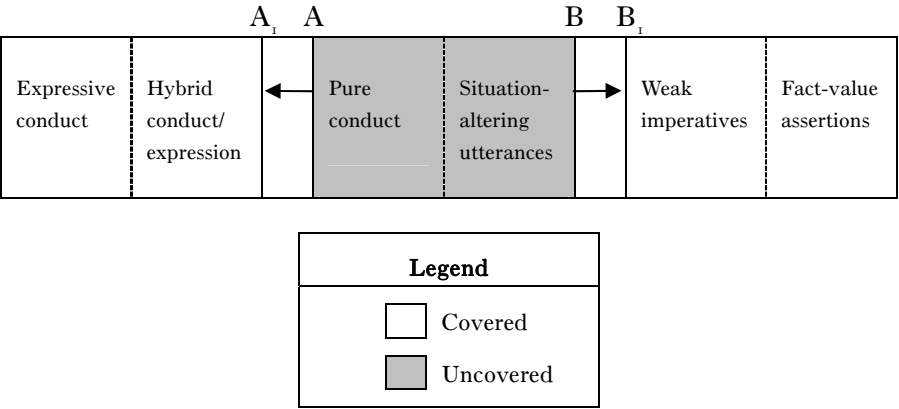
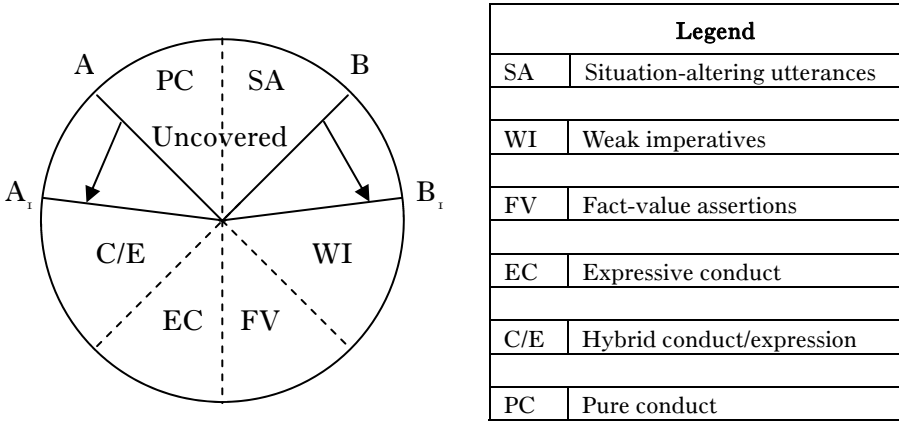


FIGURE 4



CONCLUSION

Professor Greenawalt built on Austin’s performative-constative distinction to create a theory that sharpened the line between expressive speech and conduct-like speech. In so doing, he overcame some of the line-blurring criticisms leveled at Emerson and Austin. Professor Greenawalt’s theory also moved closer to pluralism than had Emerson’s by delineating a category — situation-altering utterances — that is not covered by most substantive principles of free speech and a

category — fact-value assertions — that is covered to a large degree by nearly all substantive principles of free speech.

In both respects, Professor Greenawalt's account did not go far enough. First, his theory was ultimately susceptible to the same line-blurring criticisms that had befallen Austin and Emerson because it did not define the category of situation-altering utterances sharply enough. Second, it was not sufficiently pluralist because it took the approach of defining in rather than defining out, and as a result did not fully realize the potential of the expression-conduct distinction.

This Note attempts to show that the line-blurring problem can be ameliorated by excising manipulative threats from the category of situation-altering utterances and that Professor Greenawalt's approach can be made more pluralist by taking the approach of defining out rather than defining in. As a result, scholars who accept the common criticisms of Austin and Emerson should not dismiss too quickly Professor Greenawalt's version of the expression-conduct distinction. Modifying his theory, as this Note has, can provide an analytical framework for the First Amendment that explains what questions can be answered in the absence of consensus regarding the justifications of the First Amendment and that also illuminates the symmetrical relationship between speech and conduct.