Free speech is a blunt instrument; let's break it up

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Governments around the world have a long track-record of repressing things like protest, investigative journalism, whistleblowing, critical literature, and academic writing. Principles of free speech are meant to combat these repressive inclinations. But if these principles are going to do their job properly, we need to decide what range of communicative activities they apply to. Think of a doctor dispensing bogus medical advice, or someone making a contract they plan to breach, or a defendant lying under oath in court. These are all instances of what Schauer calls *patently uncovered speech*: communication that warrants no special protection against the law.[1] While all these things are 'speech' in a sense, we don't want any special obstacles, besides the normal checks and balances, to stand in the way of laws regulating them.

Once we extrapolate beyond these clear-cut cases, however, the question of exactly what should be covered by free speech becomes rather tricky. Consider search engines. Companies whose websites get buried by Google may have a case, in principle, for seeking redress through anti-competitive practice laws. But to date Google has dodged liability in this area by likening its search results to newspapers and arguing that, as with newspapers, free speech principles should block legally compelled changes to their content.[2, 3] Is this a case of free speech principles doing their proper work, or a case of free speech run amok, serving as cover for a libertarian agenda that unduly empowers corporations?

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[1] Frederick Schauer, "Out of Range: On Patently Uncovered Speech" (2015) 128 *Harv L Rev F* 346.

[2] Tim Wu, "Free Speech for Computers?", *New York Times*, 19th June 2012, http://www.nytimes.com/2012/06/20/opinion/free-speech-for-computers.html.

[3] Tim Cushing, *Court says Google has a First Amendment right to delist competitor's 'spammy' content*, TECHDIRT, Feb. 17, 2017, https://www.techdirt.com/articles/20170213/11440736701/court-says-google-has-first-amendment-right-to-delist-competitors-spammy-content.shtml

To answer this we need a general, principled account of what defines the communication that's covered by free speech. But there is probably no such account to be had. We can pick out cases on either side of the divide – "Protections for protest and journalism? Yes! For perjury and contracts? No." – but there's no natural criteria or underlying taxonomical distinction that divides *bona fide* speech from unprotected 'verbal conduct'.[4] On the contrary, as speech act theorists have told us since the 1960s, all communicative acts are *both* speech *and* conduct. And while some legal theorists – most notably, Kent Greenawalt – have proposed general criteria that aim to mark out the distinction we're seeking, their criteria end up being vague and open to competing interpretations, and hence of limited usefulness when we're looking beyond the cases in which our judgements are already settled.[5]

Some authors see this as fatal blow to the idea free speech. Stanley Fish argued that 'free speech' is nothing more than a rhetorically expedient label that people assign to their favoured forms of communication to try to guard them against interference.[6] There's a grain of truth in this, but it doesn't change the fact that governments still have a tendency to repress things like protest and whistleblowing, and that we have reason to impose institutional safeguards against this if possible. Another response would be to have these safeguards, but without trying to formally demarcate any special subset of communication-types that fall under the safeguards. This is roughly what we see in Canada, where the constitutional ideal of 'free expression' is interpreted very broadly, such that almost any kind of conduct can be counted as bringing the ideal into play.[7] The downside is that if *anything* can qualify as 'expressive' in the relevant sense, then we cannot categorically *privilege* expression. All we can do is ask lawmakers to factor in the expressive interests involved in a policy decision, and try to strike a good balance with all the other interests that are involved. And while this balancing act is the norm in Commonwealth legal systems, it has the unwelcome effect of making it easier for governments to manifest repressive tendencies. If laws cracking down on protest and whistleblowing face no special free-speech-based obstacles, then we should expect them to proliferate as governments exhibit their normal tendency towards stifling opposition.

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[4] 'Defining 'speech': subtraction, addition, and division', *Canadian Journal of Law and Jurisprudence* 29/2 (2016): 457-94, see Section 9.

[5] Ibid, see Sections 5-6.

[6] Stanley Fish, *There's No Such Thing as Free Speech, and it's a Good Thing Too* (Oxford: Oxford University Press, 1994) at 110.

[7] LW Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004), chapter 1.

There is an unconventional theoretical position that's able to acknowledge these problems in defining speech, but without undermining categorical protections for our most important types of communication. In short, we can discard the idea of free speech *per se*, and replace it with a series of more narrowly-targeted expressive liberties. Rather than locating things like protest and whistleblowing under broad principles of 'free speech', we could have specially-tailored principles – like a principle of free public protest, and a principle of protected whistleblowing – which identify and extend specially-tailored safeguards to these communicative activities, whose protection is essential to the aims of free speech in its traditional guise. Instead of using a broad shield for expressive liberties – one that's weakened by trying to cover so much at once – we could engineer custom-made suits of armour for just those types of communicative activity which we recognise as needing special protection against the forces of repression and silencing. We already do this when it comes to academic freedom and freedom of the press. In both cases we have specially-tailored principles, calling for special protections for important expressive practices that governments are likely to repress if left unchecked. The idea is to reconfigure all of our expressive liberties along these lines.

As well as sidestepping the problem of defining speech, as noted above, one advantage of this approach is that it focuses attention on the specific people and activities that really need protection. It is not the case that every viewpoint and mode of communication is equally vulnerable to the same forms of interference. As an example, consider the threat to academic freedom that comes from lobbying groups, like the pro-Israel lobby, trying to force universities not to employ scholars who criticise Israel's military practices. This kind of threat to academic research has a distinctive underlying causal mechanism. It's not as simple as lawmakers legislating against the speech that they dislike, although lawmakers can play a crucial role in either facilitating or counteracting this threat.[8] In any case, rather than treating all this as a specific manifestation of a generic free speech problem, policy-making around this issue is instead guided by specialised principles of academic freedom. These principles then underwrite special provisions – for instance, distinct constraints on the grounds for which academic researchers can be fired – which are tailor-made to guard against the particular kinds of threats that are used to obstruct and discourage academic research.[9]

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[8] Mearsheimer, John (2015), "Israel and Academic Freedom" in Akeel Bilgrami and Jonathan R. Cole (Eds.), *Who's Afraid of Academic Freedom?* (New York: Columbia University Press).

[9] van Alstyne, William (1972), "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty" in Edmund L. Pincoffs (Ed.), *The Concept of Academic Freedom* (Austin: University of Texas Press).

In a similar vein, there are distinct mechanisms at work in the ways that things like whistleblowing, or protest against major corporations, are subject to repressive interference. To protect corporate protest we need more than the doctrinal tenets of generic free speech principles, like the disallowing of viewpoint-based restrictions. We also need mechanisms that stand in the way of the proliferation of 'time, place, and manner' regulations on protest that are designed to make it prohibitively difficult to organize protests.[10] As with the specialised principles of academic freedom, we're in a better position to develop these specially-tailored safeguarding mechanisms if we're treating 'freedom of protest' as a distinct species of expressive liberty, instead of it just being one outworking of generic free speech principles.

This approach isn't going to magically resolve all of the genuinely controversial issues of free speech coverage, like the debate around search engines. It is a novel and as yet unresolved question whether search engine results really do merit special protection against government regulation, or whether they're more like the forms of uncovered speech that I noted in the opening. But there is still an advantage that comes with subdividing expressive liberties, in relation to these controversial cases. In short, this theoretical approach helps to ensure that the overriding priority of protecting things like protest and whistleblowing doesn't get obscured, in the midst of ongoing and potentially divisive debates about which novel communicative practices should or shouldn't be specially protected against regulation.

Finally, the theoretical advantages that come with a subdivision of our expressive liberties don't have to remain purely theoretical. Any time a country is instituting or revising a bill of rights, the question of how we should articulate special protections for communicative practices has to be considered afresh. Explicitly nominating the particular *species* of communication that we want to have specially protected – rather than just recommending protection for the overarching *genus* of 'free speech' – is an approach worth taking seriously.

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[10] Ashleigh Rapper, "NSW Government proposing new police powers to stop 'lock-on' mining protests", ABC Online, 7th March 2016, http://www.abc.net.au/news/2016-03-07/nsw-government-proposing-police-powers-against-mining-protests/7226548.