Composing Thoughts: Free Speech and the Importance of Thinking Aloud in Music and Images

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Abstract. Why should musical compositions and artistic images be included among the types of expression covered by free speech principles? One way to answer this question is to show how expression in nonverbal media can be functionally similar to other types of verbal expression. But this leaves us with an intuitively unsatisfying explanation of why free speech principles cover nonverbal creative expression that doesn't functionally emulate literal speech. In this paper, as an alternative justification, we develop and defend the idea that musical and pictorial expression can be – much like literal speech – media through which people *think aloud*, as opposed to mere tools for the transmission of thought. We use this proposal to provide a more robust justification for including nonverbal creative expression in the scope of free speech coverage, and we trace out some of the practical policy implications that come with adopting this justificatory strategy.

1. Introduction

It is widely accepted that some music and images should be covered by free speech principles.[2] But a problem arises in trying to defend this position. Mill says that freedom of

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[2] See e.g. Joshua Cohen, *Freedom of Expression*, 22 PHIL. PUBLIC AFF. 207 (1993), Timothy Macklem, INDEPENDENCE OF MIND (2006), Randall P. Bezanson, ART AND FREEDOM OF SPEECH (2009), Jonathan Gilmore, *Expression as Realization: Speakers' Interests in Freedom of Speech*, 30 LAW & PHIL. 517 (2011), Seana Valentine Shiffrin, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014), and Timothy Garton Ash, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD (2016). The idea that free speech should include music and images isn't confined to a full-blooded American brand of liberalism. The "freedom to seek, receive and impart information

speech is *practically inseparable* from freedom of thought.[3] In Daniel Jacobson's words, speech isn't merely "a handy way to express our thinking, but the medium in which we think".[4] It seems plausible that something like this relation obtains, and that it supplies part of the justification for free speech. But a natural explanation of why it obtains, invokes, like Jacobson does, a claim about language's special status as a vehicle for thinking.[5] Hence the issue: if our theory of free speech hinges on a claim about language's expressive utility, then why include non-linguistic expression within the scope of free speech norms?

One answer is to say that music and images convey viewpoints, much like literal speech. In this paper we develop a different and, we believe, improved answer. Language need not be understood as *the* singularly suitable medium for expressing thought. For some people, and at least some mental content, expression in a musical or pictorial format is a better way of capturing the content. Nonverbal media do not enable the particular type of articulacy that literal speech enables. But they are still, sometimes – for certain sorts of nebulous thoughts – the most suitable formats for thinking *through* expression.[6]

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and ideas of all kinds", as mandated in Article 19.2 of the International Covenant on Civil and Political Rights, applies to ideas that are expressed "either orally, in writing or in print, *in the form of art*, or through *any other media*" (our emphases). Moreover, note that in some jurisdictions the nonverbal arts are protected under special constitutional provisions, e.g. in Germany, where *Kunstfreiheit* (artistic freedom) is a fundamental civil right under Article 5 (3) of the Basic Law. Most jurisdictions don't assert rights of artistic expression so explicitly, but instead indirectly protect the nonverbal arts through exemptions on other legal offences. For example, in the UK under section 4.1 off the Obscene Publications Act (1959), an exemption is made for work that is "justified as being for the public good on the ground that it is in the interests of science, literature, art or learning". For an overview of the nature of legal protections for artistic expression in the US, the UK, and the EU, see Part IV of Paul Kearns, FREEDOM OF ARTISTIC EXPRESSION: ESSAYS ON CULTURE AND LEGAL CENSURE (2013).

[3] John Stuart Mill, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 17 (John Gray ed., 1991).

[4] Daniel Jacobson, *Mill on Liberty, Speech, and the Free Society*, 29 PHILOS. PUBLIC AFF. 276, 284 (2000).

[5] In more recent work, Jacobson defends the inseparability thesis by arguing that "many reasons [why] freedom of thought is a prerequisite for mental well-being", e.g., the deadening effects of social pressure and unthinking conformity, "also apply to freedom of speech"; Daniel Jacobson, *A Defense of Mill's Argument for the 'Practical Inseparability' of the Liberties of Conscience (and the Absolutism it Entails)*, 37 SOCIAL PHIL. & POL. 9, 27 (2020). It is theoretically possible, on this interpretation, to have freedom in thought but not in speech. The inseparability of these freedoms is a practical matter in a literal sense: illiberal cultural mores on either front undermine the moral purpose of both liberties.

[6] At several points we contrast linguistic expression's *articulacy* and *precision* with the expressive properties of nonverbal formats. We aren't thereby claiming that linguistic expression is always more precise, or more structured, than images or pieces of music. Consider a scored symphony, or a detailed painting of an historical scene, or Ikea's complex assembly diagrams. While it isn't clear how to compare or assess levels of precision or structured-ness, across different formats, it doesn't seem that propositional sentences are necessarily more precise or articulate than these nonverbal representations. For discussion of how images can encode meaning with a level of detail comparable to verbal expression, see e.g. Elisabeth Camp, *Thinking with Maps*, 21 PHIL. PERSPECTIVES 145 (2007); Gabriel Greenberg, *Semantics of Pictorial Space*, 1 REV. PHIL & PSYCH. 847 (2021). Our background understanding here is something like Nelson Goodman's account in LANGUAGES OF ART (1976), on which different symbol systems offer different expressive affordances, and different communicative potentials. Whereas musical notation is syntactically articulate, and natural language sentences are both syntactically and semantically articulate, pictures, which don't seem articulate in either of these ways, may offer precision via the qualitative density of their representations. What we are saying – consistent with all of this – is that nonverbal media lack the specific type of articulacy that verbal expression provides, in which referentially-precise tokens encode meanings that are syntactically ordered to convey logical, modal, or probabilistic information, along with attitudinal qualifiers. The issue isn't that language alone is precise or structured, then. It's that linguistic expression aids in the transmission of *propositional* content better than pictorial or musical formats, and that this disparity prompts doubts about the

We model the main elements of our positive proposal, in §2, on elements of Seana Shiffrin's thinker-based theory of free speech.[7] Like Shiffrin, we believe that expression in a representational format isn't always a manifestation of pre-existing mental content; rather, that it can sometimes be a way of actively constituting mental content – a form of *Thinking Aloud*. Shiffrin allows that this process of expressive realization can be carried out through nonverbal expressive media.[8] We build on her account by characterizing the kind of nebulous thoughts that lend themselves to being faithfully captured in nonverbal media, and by describing what this form of nonverbal Thinking Aloud is like.

In §3 we defend our position against a difficult objection, which gets us to the heart of what is theoretically interesting about this topic. In short: isn't the relationship between thought and language always bound to be tighter than the expressive relation/s that obtain between thinking and other media? Mill's inseparability thesis seems attractive, *prima facie*, because language captures mental states with an eloquence that isn't there in other forms of action. Isn't it speech alone, then – speech in a literal, linguistic sense – that has the requisite expressive richness to express the complex content of human minds?

We need to tread carefully in addressing this question. What is needed is an account that accommodates the plausible thesis in the vicinity of the above – i.e. one which accepts that Thinking Aloud in words *is* somehow distinctive, and distinctively powerful – but without, in that concession, ruling out the idea that nonverbal media can still sometimes be the best vehicles for expressing particular thoughts. This is what we aim to deliver on in §3.

In §4 we further explain how our proposal improves on existing theories about why musical and pictorial expression should receive free speech coverage. We discuss arguments which say that nonverbal media should be covered by free speech principles because of similarities in the social functions that are served by (some) verbal and (some) nonverbal expressive acts. We don't totally dismiss these claims about functional similarities. However, we think they generate a less attractive justification than our one, for including music and images in the scope of free speech. Our concern with these theories, in essence, is that they treat artworks and compositions as merely honorary beneficiaries of free speech coverage.

We finish in §§5-6 by explaining why our shift in justificatory strategy, for including nonverbal expression, makes a difference in how free speech principles get translated

latter's free-speech-covered status, given that free speech justifications so often emphasize and valorize the expression of propositional content.

[7] Shiffrin, SPEECH MATTERS (2014). Other authors whose free speech theories emphasize the importance of the relation between thinking and speaking include e.g. C. Edwin Baker, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989), Macklem, INDEPENDENCE OF MIND (2006), Gilmore, *Expression as Realization* (2011), and Leslie Kendrick, *Use Your Words: On the 'Speech' in 'Freedom of Speech'*, 116 MICH L. REV. 667 (2018).

[8] Shiffrin says her thinker-based justification for free speech protections isn't limited to "highly articulate discursive, interpersonal communication"; rather, it applies to "a variety of forms of nondiscursive communication, including art, music, and dance, and other avenues of emotional expression… not only implicit and explicit theoretical and practical reasoning but also… emotions, nondiscursive thoughts, images, sounds, and other perceptions and sensations, as well as the workings of the imagination"; SPEECH MATTERS 81 (2014).

into policy. We also discuss how to confine our account's implications, so that it doesn't entail, implausibly, that all nonverbal acts fall within the scope of free speech coverage.

One key thing to highlight and clarify, before proceeding, is that our interest is in questions of free speech *coverage*, in the sense defined by Schauer.[9] In saying that certain expressive acts are covered by free speech principles – or covered by the right to free speech – we aren't saying those acts necessarily end up being shielded against any legal restrictions, rather, "only that these acts have a facial claim to be considered, with reference to the reasons underlying the decision to put those acts within the coverage of right".[10] Some expressive acts surely don't have a claim to be considered as such. For example, as Schauer says, conspiracy, perjury, and extortion, "are all speech in the ordinary sense, yet are not speech under any conception of freedom of speech".[11]

Issues of coverage are only one part of a theory of free speech. Whether the expressive acts covered by free speech end up being protected against legal restriction depends on assorted considerations, both principled and pragmatic. Different forms of speech are more or less valuable, and more or less liable to cause harm; and different forms of speech-restrictions are, accordingly, more or less harmful or beneficial. So the thesis that musical and pictorial expression are covered by free speech principles – the view whose theoretical foundations we are trying to strengthen – will be compatible with a range of views about when and why these forms of expression may be subject to legal restrictions. Still, the question of whether music and images rightly fall within the ambit of free speech theory is prior to this, and as we will argue, existing answers to *that* question are unsatisfying. So, that is the question we are taking up. And it's a question that's very much in the spirit of Schauer's influential work on this topic. The policy-adjacent part of free speech theory focuses on the specifics of protection. But when it comes to the philosophical underpinnings of free speech, as Schauer, says, "it is necessary first to determine what activities are covered, and then determine how and to what extent those activities are protected".[12]

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[9] Frederick Schauer, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-92 (1982).

[10] Id. 90

[11] Id. 92; In free speech theory generally, the protected class of 'speech' is both broader and narrower than what *speech* refers to in ordinary discourse, i.e. verbal utterances and writing. As just noted, some verbal acts are not covered by free speech norms, e.g. people plotting a crime aren't legally protected by virtue of their using words to do so. Conversely, some nonverbal acts are covered, e.g. a right to protest extends equally to someone whose placard says "Nazis Get Out", and someone whose placard merely displays an image of crossed-out Swastika. Acts of symbolic protest are in, and acts of criminal conspiracy are out, because of their relation and non-relation, respectively, to the ideals (democratic, epistemic, or autonomy-related) for whose sake we privilege expressive acts in the first place. In short, *speech*, for the purposes of a free speech, isn't an everyday concept or a natural kind term, but a term of art that refers to just those expressive acts that merit special protections, in view of the ideals they promote or honor. In Schauer's words, the term *speech* is "defined by the purpose of a deep theory of freedom of speech"; FREE SPEECH 91 (1982).

[12] Id. 91.

2. Thinking aloud

How should we conceive of the inseparability of freedom of expression and thought, when considering the scope of a free speech principle? Here is a simple way to interpret this relation, as a starting point. You think a thought, fully, to completion, in the privacy of your mind, then you choose whether to verbalize it, and thus to make it available to others. This picture of thought and language looms large in philosophy of mind. Consider, for instance, Richard Kimberly Heck's sketch of what they call the *Naïve View of Communication*.

> When I communicate I am trying to bring it about that someone else should come (to have the opportunity) to share a belief with me: I do so by uttering a sentence whose content, on that occasion, is the same as that of the belief I am trying to communicate; it is because my addressee, being a competent speaker of my language, recognizes the content of my belief that she can come to believe what I do.[13]

The thought – in this instance, a belief – fully exists, prior to the speaker's attempt at communication. The content of the thought is externalized, intact, via an utterance. And finally, through an act of comprehending uptake, a listener re-internalizes the thought (again, intact), and thereby comes to entertain the same thought the speaker began with.

If this Naïve View is true, why would restrictions on speech practically restrict possibilities for thought? One answer is that under speech-restrictive social conditions, it gets harder to persuade, compel, object, contend, agree, etc. When we are able to do fewer things with our words, this in turn has a limiting effect on which thoughts we are inclined to think. This seems like a good reason, *prima facie*, to suppose that legal restrictions on speech acts have a practically limiting effect on which thoughts arise in a community of thinkers.

But although this seems reasonable enough, it only takes us so far. What it fails to capture is the way in which speech restrictions can practically impinge upon the development of a thought in itself, independently of whether and how it gets shared with others. Seana Shiffrin's thinker-based theory of free speech goes beyond the Naïve View in explaining this connection. Some of our incipient thoughts are too complicated, or too elusive, to be fully grasped via introspection. In these cases, verbalization enables us to realize the incipient thought. To paraphrase Shiffrin, speaking and writing help the thinker to externalize the relevant bits of her mind, and get some observational distance on them, in order to view them clearly, and then reflectively affirm or amend them. In speaking or

[13] Richard Kimberley Heck (2002), *Do Demonstratives Have Senses?*, 2 PHIL. IMPRINT 1, 7 (2002). In a similar vein, Michael Devitt says that linguistic competence "is the ability to use a sound of the language to express a thought with the meaning that the sound has in the language in the context of utterance; and the ability to assign to a sound a thought with the meaning that the sound has in the language in the context of utterance… the ability that matches token sounds and thoughts for meaning."; IGNORANCE OF LANGUAGE 129 (2006).

writing (or signing), the thinker gets a better grasp on what is actually there, albeit not yet fully-realized, in the thoughts she is trying to think.[14]

The achievement facilitated by this expressive process, in cases where mental content is not readily introspectively graspable, has two parts: (i) a realization of mental content, and (ii) a facilitation of the thinker's apprehension of that content. Let's call the expressive process that aims at these achievements, *Thinking Aloud*. If Thinking Aloud is a commonplace feature of human cognition, then, plausibly, the right to speak one's mind in public, protected against the threat of sanction for expressing views that other people object to, will generally be conducive to the realization and reflexive knowledge of people's mental states.[15]

Part of what makes this story attractive, with respect to Thinking Aloud in *language*, is language's impressive representational power. For any thought you might wish to realize or grasp, natural languages provide terms for referring to the entities, actions, processes, events, or qualities you have in mind, as well as ways of qualifying, quantifying, negating, or conditionalizing your statements. When we are trying to verbalize incipient thoughts, we may feel like we are taking indistinct parts of our consciousness, which somehow *want* to be made distinct or tangible, and then helping them become what they want to be. Languages provide rich and complex arrays of representational resources, which in principle seem capable of capturing almost any thinkable ideas. So it's natural that verbal expression often seems like the best tool for Thinking Aloud.

The question for our purposes, though, isn't whether language is often the best option, but whether it *always* is. We don't believe that it is. That is because – here is the crucial premise – accurately expressing a thought doesn't always mean expressing it in a semantically precisifying medium. While many thoughts are best realized by verbal Thinking Aloud, there are other thoughts whose accurate realization has to preserve a wordless fuzziness. Verbal expression isn't ideally suited to that task, for the same reason that it *is* well-suited to many other expressive tasks: because of its great compositional articulacy. For thoughts that are of their essence loose, imprecise, protean, or impressionistic, the process of realization and apprehension by way of external expression, as portrayed

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[14] Shiffrin, SPEECH MATTERS 89 (2014). This is in sympathy with Clark's claim that language facilitates thinking by providing it with structure, e.g. Andy Clark, *Word, Niche, and Super-niche: How Language Makes Minds Matter More*, 20 THEORIA 255 (2005). Also, while we are modelling our proposal on Shiffrin's thinker-based theory of free speech, we should acknowledge that Macklem and Gilmore have similar elements in their accounts (see note 2), specifically, in observations about how the process of finding a germane expressive medium for one's incipient thought can be crucial to the speaker's grasp of that thought's content. Moreover, there is a resemblance between all of these accounts of expression *per se*, and Collingwood's description of the expression of emotion. The expresser of emotion "is conscious of having an emotion, but not conscious of what this emotion is. All he is conscious of is a perturbation or excitement, which he feels going on within him, but of whose nature he is ignorant… all he can say about his emotion is: 'I feel… I don't know what I feel.' From this helpless and oppressed condition he extricates himself by speaking… As unexpressed, he feels it in what we have called a helpless and oppressed way; as expressed, he feels it in a way from which this sense of oppression has vanished"; R. G. Collingwood, THE PRINCIPLES OF ART 109 (1938).

[15] Naturally, there are many mental contents that aren't so elusive, and which can be introspected satisfactorily without Thinking Aloud. Our claims here don't apply to these more easily graspable thoughts.

above – i.e. the process of Thinking Aloud – can sometimes be better achieved in a nonverbal expressive medium.

It will be useful here to consider a vivid description of an instance of nonverbal expression, which conveys a sense of what it is like to express a nebulous thought in a nonprecisifying medium. Jenefer Robinson's work – in which she aims to account for the role of emotions in the creation and enjoyment of the arts – is helpful to this end. Robinson wants to say that musical compositions can capture emotion just as effectively as, and sometimes more effectively than, attempts to capture emotion in words. In defending this claim, she offers us a sketch of what this process involves in the example of Shostakovich's Tenth Symphony – a piece which, on Robinson's interpretation, expresses an ineffable sense of hope.

> To express the… emotion of hope or hopefulness, the music needs to be able to express some of the so-called 'cognitive content' of hope, especially the desires and thoughts characteristic of hope… the incremental changes in the hopeful theme that finally produce the cheerful main theme of the final movement convey a sense of effort and purposefulness as the persona strives to realize the hopeful future he envisages. Similarly, the recurrence of an early idyllic theme later in the symphony surrounded by darker material suggests a memory of – perhaps nostalgia for – a past happy time that contrasts with a threatening present.[16]

In Robinson's view, Shostakovich is using instrumental music to "articulate a specific cognitively complex emotion… roughly describable as 'hope'".[17] The term *articulation*, in Robinson's description, is crucial. There are manifest differences in how words and music articulate the content of our minds. Whereas the sentence "hope can endure, even in bad times" conveys a truth-apt proposition about how the world is, Shostakovich's expression of hope at most gestures towards a related feeling. But Shostakovich isn't thereby getting something wrong. He isn't using music to *say* – just in a fuzzier, stranger way – that "hope can endure." Rather, he is expressing a hope-related idea which is of its essence more impressionistic than this statement. His musical expression is an appropriately vague 'capturing' of the protean mental content that is occasioned in his expressive activity. (Naturally, we won't be able to use words, here, to precisely restate what that content is!)

In a similar vein, consider the thoughts that Picasso was trying to capture when he picked up his palette to produce *Guernica*. Imagine that, in trying to make his thoughts tangible, Picasso had uttered some descriptive remarks instead. What might have resulted from this? "The suffering wrought by the bombing was terrible." "It was frenzied; there were screams and mutilated bodies." To say that these remarks don't capture what is conveyed in *Guernica* is an understatement verging on a category mistake. The only words that are remotely up to the task, are words which themselves advert to the inadequacy of the verbal – something like "the bombing was an unspeakable atrocity". The power of Picasso's image owes to its success in conveying something of the unspeakable.

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[16] Jenefer Robinson, DEEPER THAN REASON: EMOTION AND ITS ROLE IN LITERATURE, MUSIC, AND ART 328 (2005).

[17] Id.

When someone is trying to express such thoughts, language's clarity and overtness can become liabilities.[18]

This example shouldn't be seen as suggesting that it is the unspeakability-qua-*enormity* of certain thoughts that makes language an unfit medium for expressing them. What is true for *Guernica*'s horror applies to the Tenth Symphony's hopefulness as well. It isn't morally problematic to try to put the hopefulness of Shostakovich's composition into words. The issue is just that this would involve some infidelity to the protean content which Shostakovich's Tenth conveys. If you have in mind a thought of hopefulness which is more impressionistic than ordinary *hope*-talk would suggest, there may not be any better – more faithful – medium for you to try to capture this content in, than a musical composition which, with its impressionistic qualities, expresses this hopefulness with its abiding traits intact.

Our interim contention, then, is that the accurate expression of a nebulous mental state is one that respects its nebulousness. So words aren't always the best tool for the job of Thinking Aloud, because for these thoughts, words aren't a very suitable tool for the job, period. Musical and pictorial formats are generally more suitable media for thinkers to externalize their thoughts in, in these cases, in order to get distance on their own minds (to paraphrase Shiffrin again), and thus, to better – that is to say, more faithfully – realize what is present, incipiently, in the thoughts that they are trying to think. In some cases, in order to capture what you are thinking, you need all of the expressive dexterity that language affords. But in other cases, you do better to limit your palette and paint in broader brush strokes.

The Shiffrin-style account of free speech's foundations, which we are adopting and building on, says, roughly, that the forms of expressive activity to be included in the domain of free speech are those which facilitate Thinking Aloud. To be clear, this account isn't meant to rule out appeals to other values or ideals that may be invoked to justify the protection of different forms of expression. Familiar normative theories of free speech – theories that see free speech as integral to the promotion of protection of democracy, say, or knowledge, or individual autonomy – are not meant to be invalidated by our Shiffrinian claims about the significance of Thinking Aloud. But, as Shiffrin rightly observes, these other normative theories of free speech seem to be premised on a common, normatively-inflected conception of the person, and of our fundamental interests *as* persons. What underwrites and unifies speech's importance, in relation to democracy,

[18] Our claims here resemble John Dewey's views in ART AS EXPERIENCE (1934). He argues that there are certain attitudes which we can best represent, and thus come to an understanding of, through musical or visual artistic expression. In a similar vein, Tushnet suggests that the ambiguity of non-representational art is what makes it an indispensable element in our larger toolkit for conveying our inner states. He reads this idea into William Carlos Williams's dictum, *no ideas but in things*. Tushnet's suggestion is that "ideas expressed in words can be polluted by the… features of their precise mode of expression", whereas expression through *things* (e.g. paintings, sculptures) convey "ideas fully fleshed out", which is to say, not shoehorned into precisifying lexical units; Mark V. Tushnet, Alan K. Chen, and Joseph Blocher, FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT 106 (2017). In a similar vein, again, Sloboda and Juslin argue that one reason why people tend to ascribe such powerful emotions to music, is because of music's semantically unresolved and ambiguous qualities. Music's inarticulacy matches the inarticulacy of emotion as such; John Sloboda and Patrik N. Juslin, *Psychological Perspectives on Music and Emotion*, in MUSIC AND EMOTION: THEORY AND RESEARCH 96 (Patrik N. Juslin and John Sloboda eds., 2001).

knowledge, and individual autonomy, is that speech facilitates the processes of self-understanding and communication that all of these goods rely upon, in different ways.[19] What we have been trying to do, in this section, is to explain why certain nebulous thoughts are most amenable to Thinking Aloud in nonverbal media, and to thus vindicate Shiffrin's claim that nonverbal expression can facilitate these same processes, despite nonverbal expression lacking the distinctive affordances that seem to underpin language's special utility in facilitating these processes.[20]

3. Language as the cut-off

In certain instances, Thinking Aloud – the process of realizing and apprehending thoughts, by expressing them – is better carried out via music or visual imagery. And this gives us the kernel of a justification for including (some) nonverbal expressive acts in the scope of free speech coverage. The notion that there is a practical inseparability between people's ability to think freely, and people's freedom to Think Aloud, can be understood such that this relation pertains in principle to both verbal and nonverbal expressive media.

But isn't this interim conclusion denying a plausible thesis about the relationship between language and thought? Isn't verbalization a more fundamental or potent way of expressing thought? Isn't it appropriate, then, to regard language as a cut-off point, when theoretically delimiting the range of media in which people are free to Think Aloud? As Peter Carruthers says, it's a commonsense notion that "inner verbalization is constitutive of our thinking… that we think by talking to ourselves in inner speech".[21]

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[19] As Shiffrin says, the various familiar normative theories of free speech "all presuppose, in one way or another, that there is a developed thinker behind the scenes – one who speaks, listens, or contributes to government, and whose self-expression, reactions to information and others' expression, and contributions to government are, at least potentially, of sufficient moment that they merit fundamental protection. Each contestant theory only makes sense if the individual mind and its free operation… is valued and treated with respect. If we did not regard the autonomy of the individual mind as important, it is hard to see why we would value its expression, its inputs, or its outputs in the way that each of these theories do"; SPEECH MATTERS 84 (2014).

[20] Of course Shiffrin's account of free speech's foundations is open to criticism, in particular, on the question of whether it can vindicate the plausible and widely-held view that the significance of free speech is closely tied to the functions of public discourse. Shiffrin's view arguably presses us to the conclusion that private and public speech are of equivalent value, in facilitating the speaker's thought, which is at minimum in tension with common views vis-à-vis the priority of public discourse; see e.g. Eric Barendt, *Thoughts on a Thinker-based Approach to Freedom of Speech*, 38 LAW & PHIL. 481 (2019). Moreover, while we are interpreting Shiffrin's thinker-based account as one that unifies – rather than vying with – the main normative theories of free speech (e.g. the democratic and epistemic theories), her account could be interpreted as a species of an individual-autonomy-based theory of free speech, i.e. one which says that speech must be free because of its special role in enabling or expressing individual autonomy, as in e.g. Baker, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989). And if her account is thus interpreted, it becomes vulnerable to a challenge pressed by Schauer, and Susan Brison, among others – that all human activities can play significant roles in enabling or expressing autonomy, and therefore that an account of speech's role in this process doesn't justify ascribing a privileged normative status to speech; see Frederick Schauer, *Must Speech Be Special?*, 78 NW. L. REV. 1284 (1984); Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312 (1998); Frederick Schauer, *Freedom of Thought?*, 37 SOC. PHIL & POL. 72 (2020); Susan J. Brison, *Free Speech Skepticism*, 31 KENNEDY INST. ETHICS J. 101 (2021). It would take us far afield to fully address all of these challenges, but we will return to the latter one in §6.

[21] Peter Carruthers, *The Cognitive Functions of Language*, 25 BEHAV. BRAIN SCI. 657 (2002).

If this is correct – if we already think in language – then there must be something special about the verbalization of thought.[22] Whether or not any content gets externalized, a thinker should be able to segue between introspection and expression with no change to the content as such. On this picture, competence in a given language just is, as Michael Devitt says, "the ability to *translate* back and forth between mental representations and sounds of the language".[23] What should our account of Thinking Aloud say to this challenge?

Granted, someone who sees linguistic Thinking Aloud as special may allow that nonlinguistic expression can be roughly similar to it. Maybe advanced musical prowess involves an ability to translate back-and-forth between mental sentences and some related – associatively rich or affectively insightful – musical expressions, which have a complex connection to the original thought? But still, if thought is essentially linguistically-structured, any nonverbal expression of thought *must* involve some kind of transformation – some reformatting of the thought's native syntactic form. Any nonverbal Thinking Aloud would, at best, result in a reformatted variant of the original mental content, rather than a faithful external facsimile, of the kind that verbalization can produce. Again, this would make verbal expression a sensible cut-off point, when delimiting the range of expressive media we see as vehicles for Thinking Aloud, and which qualify for free speech coverage on that basis. On this view, other nonverbal expression would always be *in some sense* inferior to Thinking Aloud verbally. And this would make our justification for privileging nonverbal expression more tenuous than what we want it to be. (We will return to this issue in §4.)

But is it right that verbalization is a more format-preserving means for expressing thought than any other expressive format? And if so, in what sense is this true, exactly?

It isn't clear how commonsense or introspection can answer this question. People's introspective sense of whether their thoughts are linguistically formatted is more variable than Carruthers appears to allow.[24] Partly for this reason, most philosophers of mind have relied on a family of abductive arguments (most associated with Jerry Fodor) to establish the thesis that we are entertaining.[25] Roughly, the argument is that (i) thought

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[22] As others in this literature do, we are speaking of a putative similarity of *format* between linguistic sentences and thoughts. But this talk of formats shouldn't be taken too literally, given that thoughts have a neural format, whereas sentences exist in the formats of sound, or gesture, or inscription. The 'common format' thesis we are engaging with here is just that thought shares its syntactic-semantic properties with natural language.

[23] Devitt, IGNORANCE OF LANGUAGE 148 (2006, emphasis in original).

[24] In empirical studies subjects don't report themselves as always thinking via inner speech. At most what introspection shows is that people are "frequently conscious of some form of inner speech, which may appear either in a condensed or expanded form", Fernando Martínez-Manrique and Agustin Vicente, *'What The…!' The Role of Inner Speech in Conscious Thought*, 17 J. CONSC. STUD. 141 (2010). But *frequently* of course implies *not always*. Moreover, what some of us encounter when we introspectively attend to the character of our own thinking, is that the episodes that involve inner speaking have a distinct character, precisely because they stand in contrast with other bits of thinking, which are too nebulous to be subvocally articulated.

[25] Jerry A. Fodor, THE LANGUAGE OF THOUGHT (1975); THE MODULARITY OF MIND (1983); *Why There Still Has to Be a Language of Thought*, in PSYCHOSEMANTICS (1987); LOT 2: THE LANGUAGE OF THOUGHT REVISITED (2008), and Jerry A. Fodor and Zenon W. Pylyshyn, *Connectionism and Cognitive Architecture*, 28 COGNITION 1 (1988).

has an identifiable set of functional properties, (ii) these same functional properties are characteristic of language, and (iii) the best explanation of this likeness is that thought has a linguistic format. It would lead us too far afield to fully unpack and address this argument, but we want to join ranks with others who find it to be subtly question-begging. We cannot assert a likeness that links the functional properties of language to the properties of thinking *per se*, unless we have some independent reason to suppose that thought innately possesses the specific complex of capacities that a system of language contains. And we don't see why there *is* any good reason to suppose this, unless one has already assumed the thesis whose truth is being debated, and taken the relevant supposition to be implied by that thesis.[26]

Rather than delving into that tangled web, we will offer another more straightforward argument against the idea that verbalization is the default, format-preserving way of expressing thought. As per our claims in §2, it seems highly plausible that Thinking Aloud in words – for thoughts which are elusive or complex, and hard to introspect – does offer cognitive assistance to the speaker, in realizing or grasping the content of her mind. But if thought is linguistically formatted – if what one does, in verbalizing a thought, is just to parlay mental states into an external vehicle, without any fundamental change to the structure or content of what gets externalized – then it is hard to understand why these benefits should obtain. The point we are making here is the flipside of our point above, about a thinker easily moving between the private realm of the mind and the public realm of linguistic articulation. If it is actually as easy as this, then why should external verbalization be an effective way of developing an incipient thought, or coming to apprehend its content?

By contrast, the conception of thought and expression that we have been proposing – which denies that thought is essentially linguistically formatted – better accommodates the notion that Thinking Aloud helps people realize and apprehend their (initially) difficult-to-grasp thoughts. Verbal Thinking Aloud, whether alone or in conversation, in

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[26] On the philosophy of mind side, the recent debate is often framed in Peter Carruthers' terms of the *cognitive* conception of language, i.e. the view that thought is linguistically formatted, and the *communicative* conception of language, i.e. the view that it isn't; see e.g. the papers Peter Carruthers and Jill Boucher (Eds), LANGUAGE AND THOUGHT: INTERDISCIPLINARY THEMES (1998), and Carruthers, *The Cognitive Functions of Language* (2002). See also Peter Carruthers, LANGUAGE, THOUGHT, AND CONSCIOUSNESS (1996), Michael Devitt, DESIGNATION (1981), and Michael Devitt, IGNORANCE OF LANGUAGE (2006), for defenses of the view that thought shares a syntax with natural language, both of which adapt Fodor's well-known arguments in defence of the "Language of Thought" hypothesis (see references at note 25). Recent philosophical works that challenge the claim that only linguistic representational formats have the putative syntactic features of thought *per se*, like systematicity and compositionality, include Camp, *Thinking with Maps* (2007), Kent Johnson, *Maps, Languages, and Manguages: Rival Cognitive Architectures?*, 28 PHIL. PSYCH. 815 (2015), Léa Salje, *Talking Our Way to Systematicity*, 176 PHIL. STUD. 2563 (2019), and Camp, *Priorities and Diversities in Language and Thought*, in LANGUAGE AND REALITY FROM A NATURALISTIC PERSPECTIVE FROM MICHAEL DEVITT (Andrea Bianchi ed., 2020). Older defenses of the view that humans think in natural language include Benjamin Lee Whorf, LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF, (John B. Carroll Ed., 1956), Gilbert Harman, THOUGHT (1973), Michael Dummett, FREGE AND OTHER PHILOSOPHERS (1991), and José Luiz Bermúdez, THINKING WITHOUT WORDS (2003). While Whorfian views have long been popular in social sciences – for discussion see Steven Pinker, THE LANGUAGE INSTINCT: THE NEW SCIENCE OF LANGUAGE AND MIND (1994) – on the cognitive science side, by contrast, most contemporary researchers reject the cognitive conception of language, largely on the grounds of it (i) assuming innate modularity of mind, and (ii) seeing language as a single innate module, see e.g., Fodor, THE MODULARITY OF MIND (1983); Noam Chomsky, LANGUAGE AND PROBLEMS OF KNOWLEDGE (1988); Pinker, THE LANGUAGE INSTINCT (1994); Carruthers, THE COGNITIVE FUNCTIONS OF LANGUAGE (2002).

fact isn't just a cosmetic process that publicizes some already-verbally-formatted mental stuff. Rather, Thinking Aloud is a way – often a highly effective way – of actualizing the inchoate content of the thought one is expressing. It is, itself, an active, constitutive process of thinking, i.e. of imparting tangible form to a inchoate mental state. The point of Thinking Aloud is to realize this state, by formatting it into an expressive vehicle that reveals one's anticipatory sense of the content that was waiting, latent, in the state. And this process of realization is essentially the same, we are claiming, in expressive image-making and music-making. The difference is just that these nonverbal media provide different expressive affordances, that are apt for expressing inchoate content that words would be at risk of unduly precisifying. Nevertheless, Thinking Aloud in any of these formats is the same expressive process: one of turning incipient mental content into externalized representations that make it tangible.

What about a simpler version of the worry? Maybe there is something special about the verbal expression of thought, not because speech and thought have essentially congruent formats, but just because language as a representational system has expressive features that make it more flexible for conveying thought than other expressive media?

There is something in this claim that it would be absurd to deny. If you are trying to offer a theoretical argument, or a detailed account of your family history, or some comments on your friend's draft of a novel, there are normally good reasons to express your thoughts in words, instead of turning them into an image or melody. Taken to a caricatural extreme, it might seem as if we are saying that the choice to verbalize a thought, instead of expressing it in an image or melody, is about as consequential – which is to say, not very – as a bilingual person's choice about whether to utter a sentence in German instead of English.

However, the account of Thinking Aloud that we are defending can evade these *reductiones ad absurdum*. We see it as uncontroversial that in many cases where a thinker has inchoate mental content that she wants to realize or apprehend, through Thinking Aloud, a verbal expression will strike her – and, normally, will correctly strike her – as the germane option. Abstract imagery usually isn't a useful way to realize one's thoughts in offering an apology, or making a philosophical argument, or formalizing an institutional code of conduct. Even thoughts about subtle emotions, whose ineffability we may casually pay lip service to, can end up better-expressed if we forge ahead and try to verbalize them, than if we turn to music or imagery. At any rate, that much seems true for most people, most of the time.

Language is a powerful medium for the expression of thought. We can use language to say anything we like, near-enough, and to say it with a distinctive kind of precision, especially in how we qualify or caveat our ideas. Language is genuinely distinctive among expressive formats, and it naturally recommends itself as an expressive medium for Thinking Aloud, for most of the thoughts that most of us have. But this is consistent with the main point we are pressing. When what you want to realize or grasp is a bit of mental content that's too nebulous to be faithfully rendered in words, language's special features are precisely what makes it an a unfit tool for the job. Such cases may be the exception,

not the norm. But *in* these cases, it makes good sense to Think Aloud in a nonverbal medium.

4. Functional similarity arguments

Our overall aim in the previous section has been to explain why we are justified in including musical and pictorial expression in the scope of free speech coverage, even though they don't share language's full distinctive suite of representational features. But there is arguably a more straightforward justification available, than the one we have offered. We could include nonverbal expressive acts in the scope of free speech coverage, if and when these acts are *functionally similar* to verbal expression, in respect of how they convey *viewpoints*.

Paradigmatic forms of protected speech – political dissent, journalism, scholarship, protest marches, religious expression, literature, street preaching – are all activities that publicize viewpoints, and thus help to realize the epistemic, democratic, and autonomy-based ideals that underpin free speech norms. Music and images should fall within the scope of speech, then – according to this account – if and when they too publicize viewpoints. Much like a crossed-out Swastika expresses a fairly clear viewpoint, an artistic image can be a way of publicizing an idea or attitude. Picasso's *Guernica* and Andres Serrano's *Piss Christ* express viewpoints on war and faith. Granted, they admit of multiple interpretations, as befits their status as artworks rather than unambiguous statements. But they aren't merely ornamental entities. They present a take on things. And so do some pieces of instrumental music. Sometimes this is due to conventional associations, e.g. when a piece acquires a religious or national meaning. In other cases the significations are less overt, e.g. the anti-establishment or cosmopolitan ethos attributed to some instances of avant-garde composition, and the resultant suppression of that music in authoritarian regimes.

In short, nonverbal creative expression can be functionally similar to paradigmatic speech, by virtue of its capacity to express viewpoints. Different authors in the free speech literature provide various points of emphasis, in advancing versions of this functional similarity thesis. For instance, Randall Bezanson says that nonverbal arts play an important role in sensitizing us to the elusive, borderline-ineffable viewpoints that ordinary descriptive language cannot easily capture. And this is of great value, Bezanson says, because human individuality and creativity are nourished by engaging with these kinds of viewpoints.

> Noncognitive expression that is transformative or re-representational of the reality before us, leading the audience to imagine or conceive something altogether new or different in perspective from that which logic or mere description can reveal, fosters free will, individual autonomy, and creativity. These qualities (among others) are what is essential to… a truly free social and political and economic order.[27]

[27] Bezanson, ART AND FREEDOM OF SPEECH 79 (2009).

Extrapolating a little, we might say that such images are functionally similar to unusually mind-expanding poetic or philosophical texts. They invite us to wrestle with ideas that stretch the limits of our cognitive powers, thereby spurring us to think for ourselves.

Another way of explicating the functional similarity thesis is to highlight the emotion-capturing power of nonverbal media. We can usually verbalize our emotions, well enough, but sometimes we find that words don't do them justice, and that imagistic or musical expression does better. In a reconstruction of Mill's view about the place of the arts in free speech, Rafael Cejudo argues that this – art's ability to "provide irreplaceable knowledge about the emotional dimension of human life" – is the key to the arts' importance.[28]

Mark Tushnet places the emphasis here too, in his account of free speech and non-representational art. He cites (approvingly) Justice Harlan's remarks in the US Supreme Court case *Cohen v. California* (1971), about how a jacket emblazoned with the words *Fuck the Draft* says more than one which uses the word *Abolish* in place of *Fuck*. "Much linguistic expression serves a dual communicative function", Harlan says; "it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well". Tushnet says that non-representational art can have a similar function to words that bear this duality. Like a well-placed swear word, a Jackson Pollock canvas captures emotions that would be blunted if one conveyed them in ordinary language.[29]

Another way of explicating a functional similarity thesis, due to Alan Chen, focuses on instrumental music, and how it can express a pro-attitude towards culturally-mediated values. In some instances this is due to formal properties, e.g. in cultures that produce music with distinctive rhythms, timbres, or instrumentation, which can become synecdoches for those cultures or their values.[30] In other cases, conventional associations emerge, linking cultural values and particular melodies. Whether it is rhythm, instrumentation, or melody at work, suppression of music that bears the culturally-resonant features can be tantamount to an attack on the relevant culture or its values. In these cases, with respect to a functional similarity thesis, compositions may be likened to verbal slogans, insofar as they encapsulate shared viewpoints that groups can rally around, and insofar as their suppression is tantamount to a suppression of those viewpoints. Indeed, as Chen observes, music's ability to stir emotion in a way that cuts across language barriers potentially makes it more powerful than slogans, in "connecting people within and between different communities".[31] Music can elicit a powerful feeling of affinity and shared values, even among people whose lack of a shared language would tend to thwart a slogan's power.

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[28] Rafael Cejudo, *J. S. Mill on Artistic Freedom and Censorship*, 33 UTILITAS 180, 191 (2021).

[29] Tushnet, Chen, and Blocher, FREE SPEECH BEYOND WORDS 104 (2017).

[30] Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L. J. 381 (2015).

[31] Tushnet, Chen, and Blocher, FREE SPEECH BEYOND WORDS 66 (2017).

Why not settle for these kinds of justifications? Our chief concern is they don't encompass enough of the expression we want to include in the protected sphere. They only explain the significance of a few instances of music and imagery – ones that are expressive in a way that's functionally akin to certain kinds of verbal expression, like *avant-garde* poetry, culturally-resonant slogans, or well-timed swearing. But there is a lot of artistic imagery that doesn't tick this functional similarity box, and the majority of instrumental music doesn't seem to do so either. Bezanson, Tushnet, and Chen are highlighting relatively unusual cases of musical or pictorial expression – cases where these things are unusually similar to verbal expression, in their expressive functionality. It is good to reflect on these cases, because they reveal something about the communicative potential of the nonverbal. But they aren't an ideal guide to what is ordinarily occurring (and what is ordinarily valuable) in nonverbal creative expression. The fact that a Pollock canvas can do something functionally akin to a deft bit of swearing (if it is a fact), doesn't mean the same thing is true for most non-representational art. Likewise, the fact that some musical compositions stand in a slogan-like relationship to cultural values (if it is a fact), doesn't mean that other compositions do something similar.

One might try to quash this concern by noting that for most types of expressive activity that we include in free speech's scope of coverage, many token instances of the activity fail to fulfil the valuable functions in relation to which that type of activity is deemed important. For example, while journalism generates important epistemic and democratic goods, most token instances of journalism make a nugatory contribution to these goods. Similarly, religious proselytizing is a morally significant exercise of autonomy, and it has a role to play in facilitating other people's autonomy as well. But most token instances of religious proselytization are of little value in these respects. Nevertheless, we include journalism and religious proselytization in the protected realm of free speech, because (roughly) the valuable token instances of them are very valuable indeed, and because if we tried to implement our protections at the level of token rather than type, the relevant authorities wouldn't be trustworthy or competent enough to identify and protect the protection-worthy tokens.

Thus, one might argue, what goes for journalism or religious proselytization should go for art and music. Although most art and music doesn't function in a way that is akin to verbal expression, it is normal for broad classes of expressive acts to be covered by free speech, for the sake of good-making features that only obtain in some token instances of the class.[32] So a functional similarity justification can – indirectly – justify covering all of the pictorial and musical expression whose coverage we were setting out to justify.

[32] E.g. as when Chen says that the recognition of instrumental music, as a form of speech, "ensures that government's efforts to establish a cultural orthodoxy… are thwarted. Instrumental music is therefore covered because *its protection* advances… the anti-orthodoxy principle"; Tushnet, Chen, and Blocher, FREE SPEECH BEYOND WORDS 66 (2017), our emphasis. The claim from Chen isn't that all – or even a significant proportion of – instrumental music advances the relevant ideal. Rather, the claim is that the protection of this type of expression advances the ideal, insofar as type-level protection is a good way of protecting the token instances of the type which are conducive to the ideal.

The problem is that this leaves us with an unsatisfactory story about why we are including the non-viewpoint-expressive images and music that get scooped-up into our strategically-expanded net of coverage. We are invited to see non-viewpoint-expressive instances of nonverbal expression as being valuable in the same way that bad journalism and proselytization are valuable: as inferior token instances of a type of expressive act whose superior instances are valuable. And this doesn't seem right. What we want to say is that music and artworks have a power to capture something expressively significant, even in cases that bear no functional resemblance to ordinary speech's viewpoint-conveying capabilities.

Imagine two artists making non-representational paintings. One of them, Krasner, makes images that can be functionally likened to a well-timed piece of swearing, as in the Pollock / "Fuck the Draft" example above. Her images have the sort of expressive duality that Tushnet was adverting to. They express a kind of viewpoint – some idea of individual defiance, say – while also conveying an ineffable mood, which complements the viewpoint-like content, but resists propositionalization in its own right. Krasner's work seems to tick the functional similarity box, then. By contrast, the other artist, Thomas, produces works that don't seem to carry even a pseudo-message, and thus don't seem to tick the functional similarity box. Some viewers may try to read viewpoints into the work, but the consensus take, over time, for critics and audiences (and for Thomas herself, let's say), is that her work just isn't viewpoint-expressive. It is interested in color, or optical effects, or what have you.

Now, someone might want to rank the expressive value of these two artists' oeuvres, prizing Krasner's work (by analogy: as if it were a meticulously-researched bit of investigative journalism by George Monbiot) and devaluing Thomas's work (by analogy: as if it were a feeble, soapbox-y David Brooks think-piece). This person might still want Thomas's oeuvre to be included in the scope of free speech, alongside Krasner's, the same way they want second-rate journalism to be covered alongside high-quality journalism. This is just how category-based principles of free speech work, they might say. But even if this does end up covering Thomas's work, it does so on grounds that should strike us as deficient. Thomas's artistic work is not expressively valuable because of its typological affinity with other work whose social function is similar to the function of particular types of verbal expression. Thomas's work is expressively valuable because of its own expressive qualities. It is a window, of sorts, into Thomas's mind – the very contents of her mind that words cannot capture.

In sum, nonverbal expressive media, like visual art and instrumental music, have significant, non-derivative value, in expressing the content of people's minds, even in cases where they don't functionally emulate linguistic expression.[33] Theories of free speech

[33] We take this to be a familiar view among artists working in these media. One composer, Bruce Adolphe, says "I have been composing as a way of thinking about less tangible things… [of trying] to convey the feeling of convergence zones, of bits and pieces coming together to form ideas which then reform"; Ann McCutchan, THE MUSE THAT SINGS: COMPOSERS SPEAK ABOUT THE CREATIVE PROCESS 193 (1999). Similarly, the painter Cherisse Alcantara says, in an artists' statement about her work, "what I seek are the ambiguities and the question marks in the imagery. It is the very act of… thinking through the paint, which allows for this reflection"; see www.vessel-gallery.com/artists#/cherisse-alcantara/. Some philosophers of mind have defended the in-principle admissibility of

should recognise this non-derivative value, when questions arise about why these forms of expression fall within the ambit of free speech. This is what makes our account of Thinking Aloud, in §§2-3, a better way of justifying free speech coverage for musical or pictorial expression, in comparison to the functional similarity justifications discussed in this section. The most faithful expression of some bit of protean mental content doesn't always involve its linguistic articulation. For some inherently nebulous bits of mental content, images or music enable more accurate expression, precisely because they offer expressive affordances that are more nebulousness-friendly than the precisifying affordances of language.

5. Implications and caveats

What are the implications of all this, for law and policy? Why would our proposed shift in justificatory strategy – from an approach that says "include music and images in free speech because they do things that are functionally akin to literal speech", to an approach that says "cover these things because they're windows into the contents of people's minds" – make a difference in how free speech principles translate into policy?

The first upshot is with respect to whether music and images are even under consideration for free speech protections in the first place. While many modern liberal societies do accord free speech protection to these forms of expression, still, as Tushnet, Chen, and Blocher rightly observe, "calls for control and regulation of instrumental music" – appealing e.g. to music's alleged degeneracy, carnality, or depravity – "have spanned millennia and have emerged from all parts of the world, from both government entities and other powerful institutions".[34] The same is true of calls for the restriction of provocative, obscene, or otherwise morally controversial visual art. The fears of distinctive dangers in nonverbal creative expression reflect a perennial Platonic anxiety, about the power of such expression to manipulate or subvert people's rational capacities.[35] It's a familiar theme in free speech theory that free speech honors and nurtures people's capacity to reason, insofar as it secures access to other people's ideas and opinions, and

such characterizations of non-linguistic thinking. Consider what Ryle says about musical thought, for instance. He acknowledges that thinking often involves silent inner speaking, but he says this "partially correct" point mustn't be universalized, since, after all, "Mozart's thinking results in something playable, not statable"; Gilbert Ryle, *Thinking and Saying*, in ON THINKING 128 (1979).

[34] Tushnet, Chen, and Blocher, FREE SPEECH BEYOND WORDS 27 (2017).

[35] In Book X of THE REPUBLIC (line 603b), Plato has Socrates assert that "painting, and mimetic art as a whole, produces work which is far from the truth; and far from wisdom too is the element within us with which it consorts as a mistress and beloved, for no sound or true purpose... As a base thing, then, liaising with a base element in us, mimetic art breeds base offspring." In other words, roughly, the creative arts subvert the rational part of the human personality, while enticing and nourishing our more base and appetitive tendencies. (This translation is from S. Halliwell, PLATO: REPUBLIC 10 (1988).)

hence to an important source of rational stimuli.[36] If Platonic anxieties are taken seriously, then protections for nonverbal arts may be perceived as a threat to these desiderata. It's nice for the painter or composer to get to project their ineffable mental stuff into public spaces. But if the effect of this, for audiences, is somehow rationally subversive, then the artist's interest in Thinking Aloud may well be outweighed by the audience's interest in avoiding that subversive impact.

Functional similarity justifications for including nonverbal expression in the scope of free speech are meant to help us push back against these Platonic worries. But they also go some way towards (inadvertently) validating them. If we say "protect music and artistic images because they do things that are functionally akin to literal speech", we reinforce the notion that literal speech's ordinary functionality is the yardstick for assessing all expression's significance and value. We invite a reductively rationalistic construal of the communicative interests that free speech serves, thus undermining the case for extending free speech coverage to nonverbal artistic media which, rather than verbally explicating viewpoints, operate in a communicative register of impressionistic gesture, or expressive effusion.

Our proposal avoids this. It offers an alternative perspective, both on the conception of the person that underpins our free speech principles, and on how nonverbal expressive media should be seen as supporting that person's cognitive and communicative interests. In covering nonverbal music and art in the scope of free speech because they are media that capture the nebulous contents of people's minds – irrespective of whether they emulate literal speech's affordances and functions – we are construing the communicative interests that free speech serves in a more pluralistic fashion. What matters most, for being like us, is that we have windows into each other's minds. It doesn't matter if some of what we find in each other's minds is hard to put into words, or to subject to verbally-mediated debate and inquiry. The goal is to vividly encounter other people's thinking, in all its complexity, including its hazy or impressionistic dimensions.[37] Under this strategy, we avoid the trap of arguing for the privileging of nonverbal expression using appeals which tacitly disparage some of the qualities of that same expression, and thus undermine its privileged status.

The second practical implication of this shift in our justificatory strategy is with respect to which token instances of music and imagery qualify as beneficiaries of these privileges. In jurisdictions where music and artworks enjoy free speech coverage, in principle,

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[36] In addition to this theme in Shiffrin's work, see e.g. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. PUBLIC AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUMBIA LAW REV. 334 (1991).

[37] Again, the substance of our view is aligned with Shiffrin's thinker-based theory of free speech. Shiffrin wants to extend protection to any expression that serves "the fundamental function of allowing an agent to transmit… the contents of her mind to others or to externalize her mental contents in order to attempt to identify, evaluate, and endorse or react to given contents as being authentically her own"; SPEECH MATTERS 93 (2014). And as she goes on to say, this agenda will entail protections for music and abstract art, among other kinds of expression (Id). The aim of our paper is to show which ways of conceptualizing the relation between thought and expressive formats, and which (associated) justificatory strategies, are well-placed to vindicate this position.

there will still be a process of determining which music and art merit protection, in practice, and with what degree of stringency. In certain jurisdictions, some of the protections for art and music operate via the special treatment of creative expression under the application of other policy instruments. Such protections operate, first, by certain creative works being identified as worthy of special treatment, and second, via judgements about the relative weight of artistic ideals relative to countervailing ideals. In addition to the aesthetic heuristics that may inform those judgements (e.g. "is this work beautiful?"), another natural heuristic is to ask whether creative works are valuable qua acts of communication. If our rationale for including music and images in free speech is that they do things that are functionally similar to literal speech, we are again encouraging a narrow understanding of what communicatively valuable nonverbal expression involves, and of what entitles it to a privileged legal status. We are inadvertently licensing a familiar species of philistinism: "this picture (or musical composition) shouldn't benefit from special artistic privileges, because apart from it not being beautiful, *it doesn't even have anything to say*".

Our alternative justificatory strategy – "protect nonverbal expression as a window into people's minds" – reframes the question, for the better. It isn't necessarily wrong to assess aesthetic or communicative qualities when deciding which creative works enjoy a privileged legal status. But these judgements must avoid conflating communicative utility *per se*, with the transmission of propositionally-structured information. Our story about the privilege-worthiness of music and images makes a difference here, since it suggests another heuristic for us to adopt, to guide these judgements, while discouraging the use of heuristics that lead arts-protective policies to withhold protection from instances of nonverbal expression that lack language's aura of rational specialness.[38] Granted, before this leads to concrete policy guidance, more needs to be said about how stringent free speech protections should be. But the contribution we are making to this issue is supposed to compatible with a range of views on that question. However stringent you believe free speech protections ought to be, you should want to ensure that

[38] European Court of Human Rights (ECtHR) jurisprudence is one context where these justificatory/policy dynamics exist. The free speech law that the court administers, Article 10 of the European Convention on Human Rights (1950), doesn't overtly protect artistic expression, and it permits limits on expressive liberty *per se* on several grounds including public safety and "the protection of health and morals". *Prima facie*, then, Article 10 doesn't offer strong protections for artistic speech. But judge-made norms of artistic freedom have materialized in 21st century ECtHR case law all the same; see Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, 16 HUM. RIGHTS LAW REV. 511 (2016). The issue for us is when ECtHR judges deem that token instances of artistic expression actually merit protection, under Article 10, and how such protections are weighted, for different works, against countervailing ideals like public morality or security. Several authors criticize the ECtHR's rulings, in respect of these issues, broadly, on the grounds that they have been too quick to dismiss controversial symbolic expression as mere provocation; see e.g. Paul Kearns, *The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights*, 1 IR. LAW J. 56 (2012); Andra Matei, *Art on Trial: Freedom of Artistic Expression and the European Court of Human Rights*, SOCIAL SCIENCE RESEARCH NETWORK, https://ssrn.com/abstract=3186599 (2018). Our argument above is that functional similarity justifications, which say that nonverbal creative expression's claim to protection owes to its ability to pragmatically emulate literal speech, encourage these illiberal and reductive patterns of judgement. What judges in these kinds of discretionary balancing contexts need to appreciate – what recent ECtHR rulings fail to appreciate – is the *sui generis* expressive value of nonverbal artistic expression, even when it lacks a clear message, and where it may therefore read, superficially, as a mere provocation.

those protections are not withheld from images and music that are expressively powerful, but which don't straightforwardly say things, the way that verbal expression typically does. Our account counsels against the use of evaluative heuristics that would lead to nonverbal expressive acts being misjudged in that fashion.

Notice that, with regards to both policy-related points, above, our attention has broadened, from mainly considering music and images from the speaker's perspective, to considering them from the audience perspective too. Our account in §§2-3 was arguing that nonverbal media can be vehicles for Thinking Aloud, but our reasons for caring about this relationship between thought and expression aren't exclusively linked to the speaker's interests in realizing or grasping her thoughts. They are also grounded in everyone's interests, qua audience/listener, in being able to engage with the realized products of other people's Thinking Aloud. These other interests have been off-stage in previous sections, but that isn't because we want to downplay their importance. The inseparability of freedom of thought and expression matters, morally, in relation to speaker and audience interests alike. Our focus has been on the former, only because our central puzzle – how thought is related to nonverbal expression – naturally focuses the spotlight of inquiry on those interests.

Another potential misinterpretation for us to note and clarify, is about the distinction between saying and doing – or in J. L. Austin's terminology, between locutionary action, on one hand, and illocutionary/perlocutionary action, on the other. Some free speech theory conceives of speech, and its value, primarily in terms of its being how we say things, while suggesting that the rationale for excluding other expression from free speech coverage, is precisely that it does more than mere locutionary saying – that it constitutes a harmful illocutionary action, like a threat or an incitement to violence.[39]

To clarify, then, our claim at the outset was that the case for free speech partly rests on the idea of speech as a privileged medium for conveying thought. We don't think of speech as being *limited* to locutionary action, or deny that speech does more than capturing and conveying thought. Nor are we siding with theories that tie free speech protection to sayings, while withholding protection from illocutionary or perlocutionary doings.[40] For our purposes, the issue of what disqualifies speech from free speech pro-

[39] As in, for example, Emerson's suggestion that we can classify acts of verbal expression as protected speech or unprotected verbal conduct, based on whether they partake of the essential qualities of expression or action; Thomas I. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 18 (1970); or canonically, in Mill's suggestion, as encapsulated in ON LIBERTY's famous corn dealer example. that protected expressions of opinion can, by virtue of their context, turn into unprotected verbal actions.

[40] An approach we find in e.g. Kent Greenawalt, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989). This approach has also been taken up by critics of liberal free speech orthodoxy, seeking to show, using tools from speech act theory, that certain acts of expression that enjoy free speech protection, in practice, constitute harmful illocutionary actions, in a way that casts doubt on the in-principle justifiability of their protected status; see e.g. Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. PUBLIC AFF. 293 (1993); Ishani Maitra and Mary Kate McGowan, (2007), *The Limits of Free Speech: Pornography and the Question of Coverage*, 13 LEGAL THEORY 41 (2007). We aren't taking a stand here on how stringent free speech rights should be, for instances of Thinking Aloud that are put to harmful illocutionary uses, like discriminatory harassment. We certainly don't claim that any instance of expression that is a result of Thinking Aloud is sure to be a harmless instance of 'mere thought'.

tection should be regarded as independent of anything linked to a 'saying v. doing' dichotomy. The normative significance of speech is not exclusively rooted in the fact that it is a vehicle for thought. We see this as one part – an important part, but not the only part – of a multifaceted explanation of why speech is a morally distinctive region of human activity, and of why we should recognize a separate cordon of principles constraining the governance of speech.

6. Does our account prove too much?

Returning to policy implications, we want to conclude by acknowledging and addressing a worry about the potentially over-broad scope of our account. The worry is this: if types of expression get included in the scope of free speech coverage whey or insofar as they facilitate Thinking Aloud, then what principled limits can we impose, on the range of activities that are covered by free speech? Our account might appear to imply a scope so large as to ultimately be vacuous. After all, couldn't *any* action, that thinking beings like ourselves do, serve as the externalisation or expression of someone's mental life – dropping litter, say, or trying a new recipe, or whistling a tune? Surely we don't want to say that all of these count as instances of self-expression, of the putatively special kind that we have been characterising as meriting free speech coverage. So where, then, are the boundaries?[41]

Our account can provide an answer to this challenge. There are many ways in which people's acts can be said to *express* their states of mind: your act of dropping litter; your act of donating money to one charity rather than another; your act of buying a four-wheel drive as an urban family car; your attempt to file your tax return with integrity; your prioritisation of your children's bedtime routine over a night out with friends; and on the list goes. In one way or another, each of these acts or patterns of behaviour expresses your mental life, reflecting your sense of identity, or the values by which you choose to live your life.

This is a perfectly respectable – and, potentially, theoretically rich – notion of expression, as far as it goes. But it is importantly different to our notion of Thinking Aloud. "In such a general sense of expression," as Jonathan Gilmore rightly observes, "there is no distinction between expressing one's thoughts and manifesting or revealing them".[42]

To count as an episode of Thinking Aloud, we have said, an expressive act must satisfy two conditions: (i) it has to *realize* some mental content, (ii) in a way that facilitates the actor's *apprehension* of that content. The kinds of everyday acts that we listed above

[41] The challenge we're raising is related to Brison's argument, that much free speech theory rests on an implausibly dualistic worldview, which associates speech and its effects with an immaterial mental realm, set up in contrast to the material realm of other (bodily) human acts. On Brison's view, though, even if we grant some kind of broad dualistic distinction between the mental and physical worlds, the equation of speech with the former is mistaken; speech, she suggests, "is neither wholly mental nor wholly physical, but resides in a realm as metaphysically mysterious as that of the pineal gland on Descartes' account"; Susan J. Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, 4 LEGAL THEORY 39, 60 (1998).

[42] Gilmore, *Expression as Realization* 528 (2011).

might *result* from entertaining mental content. They might in turn *cause* all sorts of contents to be entertained in the actor and others. They might even be performatively executed as a way of *signalling* certain aspects of someone's mental life to others. But, per Gilmore's point above, these are *expressions* of mental content only in that term's widely extended sense – not *in strictu senso*. Buying a car or filing taxes don't seem to be the kinds of expressive acts that allow for the realization of mental content in an epistemically illuminating way, in the same way that the creation of a visual artwork, the composition of a piece of music, or the utterance of a natural language sentence do. For an act to facilitate the realization and apprehension of mental content, it needs to not just be *caused* by that content, but also to represent the content back *to* the actor, in a way that makes it more legible than it had been in its incipient, pre-expressed state. It can't just be an actor exteriorizing her mental stuff; it must be an exteriorization whose representational richness, depth, and subtlety, enables the actor to see inside her own mind. And it would seem grossly reductive to supposed that any and every kind of action provides the actor with this sort of representational power. So it is these two conditions in our account – realization and apprehension – that set the boundaries on the scope of expressive acts that fall within the scope of free speech coverage.

Still, a related worry may be pressed. Our account tells us which expressive are in principle deserving of free speech coverage. But as stakeholders in these issues – artists, musicians, consumers of the arts, policy makers, law enforcers, and so on – we may still find it hard to *know* which types of expression meet this condition. Perhaps it's clear that littering or buying a car don't meet the realization and apprehension conditions on Thinking Aloud. But there are borderline cases that seem harder to adjudicate. What about architecture, or fashion, or gardening? Could there be token acts of self-expression in these domains that realize mental content in a way that allows the thinker to better grasp it?

This is a practical policy question, by our lights, rather than an underlying conceptual question for our account. Our answer to it is appropriately pragmatic – viz., that we do not need to make these adjudications *a priori*, in a cultural vacuum. Many cultures find music and images to be powerful vehicles for the expression of thought. Few cultures find the same to be true of vehicle purchasing, or dropping litter. Of course there are cultural contingencies in play in determining which nonverbal media come to be thought of as fruitful expressive media, for particular cultures and individuals. But there is no need to try to stand outside this contingency, and nominate a timeless, transcultural repertoire of nonverbal expressive media to extend free speech coverage to. This is a question for societies to continually wrestle with, via processes of cultural negotiation and expressive experimentation.

Musical and pictorial expression are already esteemed, in many cultures, as important media for the expression of people's mental lives. The problem in free speech theory is that we casually endorse certain ideas which make it seem, *prima facie*, as if these media lack the crucial feature – namely, linguistic articulacy – that bestows special expressive utility upon a given medium. We have tried to dispel this impression, by offering an expanded account of the process of Thinking Aloud, that works for verbal and nonverbal media alike. Sometimes we come to know what we are thinking by expressing ourselves

in language, sometimes through the creation of an art object. We have argued that it is *this* similarity, rather than any socio-functional similarity of the kind surveyed in §4, that should determine the scope of expressive acts falling within the coverage of free speech principles.

7. Conclusion

Why should musical compositions and artistic images be included among the types of expression covered by free speech principles? We have argued that these forms of expression are vehicles for *Thinking Aloud* – for realizing and apprehending incipient mental content, via acts of expression – and that, for mental content that is innately imprecise, these forms of expression are often better able to fulfil these expressive functions, compared to linguistic expression (see §§2-3). This account offers a better way to justify the inclusion of nonverbal expression in the scope of free speech, compared to explanations that advert to ways in which music and images can (sometimes) capture and convey viewpoints, and can in that respect functionally emulate verbal expression. Those accounts have trouble explaining why free speech principles should apply to music or artistic images that don't emulate literal speech in these ways (see §4). We have explained how this account makes a practical difference in policy judgements around free speech protections for art and music (see §5), and we have shown that it need not lead to a radically over-extended – and hence vacuous or implausible) – view, about which kinds of actions qualify as 'speech' (see §6).