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INTRODUCTION: THE MORAL DEMANDS OF COMMERCIAL SPEECH

Andrew Koppelman*

A pupil from whom nothing is ever demanded which he cannot do,
never does all he can.

—John Stuart Mill¹

When the Supreme Court and free speech scholars cite John Stuart Mill, they generally have in mind Chapter Two of *On Liberty*,² which argues that the clash of ideas will lead us to truth.³ As the Supreme Court paraphrased him: “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail[.]”⁴ But Mill also liked the way free speech demands that we exercise our faculties. Living in a world of free speech would force us to bring forth what was best in us.⁵

That argument for free speech, which focuses on its effect on character, has been neglected by many free speech theorists.⁶ But not by Martin Redish.

Redish argues that the intrinsic value of democracy, the one “achieved by the very existence of a democratic system[.]”⁷ is “the value of having individuals control their own destinies.”⁸ That entails the “development[] of an individual’s uniquely

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¹ JOHN STUART MILL, *AUTOBIOGRAPHY* 45 (John M. Robson ed., Penguin Books 1989) (1873).

² JOHN STUART MILL, *ON LIBERTY* 75–118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

³ *Id.*

⁴ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁵ Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 696–700 (2013).

⁶ It goes unmentioned in the accounts of speech as self-realization in DANIEL A. FARBER, *THE FIRST AMENDMENT* 3–5 (3d ed. 2010) and ERIC BARENDT, *FREEDOM OF SPEECH* 13–18 (2d ed. 2005). On the other hand, see generally JEREMY WALDRON, *Mill and the Value of Moral Distress*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 115 (1993); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 60 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988); Koppelman, *supra* note 5, at 707–15.

⁷ MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 20 (1984).

⁸ *Id.*

human faculties.”⁹ It follows that “any speech that may aid in the making of private self-governance decisions is deserving of [F]irst [A]mendment protection.”¹⁰ And that means protection of commercial speech.

Redish’s germinal 1971 article,¹¹ in which he first advocated protection of commercial speech, emphasizes the theme of self-development even more than his later work. “Recognition of the importance of the use of the mind logically implies the judgment that the mental powers should be developed to the fullest extent possible.”¹² Free speech does not leave the reader as it finds him. “The reader or listener . . . may have his intellectual prowess increased, for the mind develops when used, and communication which stimulates the reader or listener to think, reason, know, consider, appreciate, or imagine constitutes an exercise of this ability unique to man, and hence stimulates development of it.”¹³ It was on the basis of this picture of the individual that Redish built his enormously influential defense of First Amendment protection for commercial advertising. Commercial speech may not be regulated because people are not to be manipulated and infantilized by an overbearing state. Living in a world where they must adjudicate competing commercial claims will help develop their capacity to make more socially momentous decisions.

Redish’s argument has triumphed: The old notion that commercial speech was outside constitutional protection has been conclusively discarded.

But it is a partial victory. Legislatures are allowed to restrict commercial speech in ways that they cannot restrict other speech.

Notably, “misleading” commercial speech is unprotected.¹⁴ The Court has not explained what this means. It clearly cannot excuse some restrictions on commercial speech, such as the restriction of truthful information on the grounds that consumers will use it to make decisions that the government will not like.¹⁵ Misleading speech is a fuzzy category: All speech misleads some people. I am probably misleading someone who is reading this. The definition of misleading speech is a normative question: We have to decide how many misled people are too many.¹⁶ But when we have that

⁹ *Id.* at 21. He calls this purpose “instrumental,” *id.*, but that does not imply that it is less important than the intrinsic one. Redish explains that he applies this label “because it is a goal to which a democratic system is designed to lead, rather than the one that is attained definitionally by the adoption of a democratic system.” *Id.*

¹⁰ *Id.* at 80.

¹¹ Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

¹² *Id.* at 438.

¹³ *Id.* at 438–39 (footnote omitted).

¹⁴ See *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994).

¹⁵ See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹⁶ See Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1219 (1983). For a defense of this doctrine, see Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007).

conversation, we are already assuming a limit to citizens' capacity to judge speech for themselves.

The category of misleading speech is in tension with a core tenet of free speech law. Free speech doctrine pervasively assumes that citizens are competent and capable of processing information.¹⁷ Redish wants citizens to develop that competence.¹⁸ The only way to get them to develop it is to give them as much information as possible and let them make their own decisions. The diminished protection of commercial speech is in tension with that.¹⁹

Free speech law assumes that we are smarter than we are. By doing that, it helps to make us so, by forcing us to live in a world of contradictory claims and so to exercise our judgment.

Any defense of the reduced protection of commercial speech cannot deny that this speech is relevant to rational self-direction and that restrictions are sometimes manipulative. Rather, it must work within Redish's paradigm, arguing that various restrictions on speech can facilitate rather than impede self-realization. This is an argument *within* liberalism. As with so much post–New Deal theory, the question is whether government regulation can make us more free.

In fact, there is a limit to how smart we can be. Regulation of the professions, which pervasively involves restriction of speech, presumes that expertise is unevenly distributed²⁰ and that we are in some contexts unable to rise to the level of competence that Redish's vision demands.

Many theorists, including Redish, defend free speech as a requirement of democracy. This has elicited the objection that speech restrictions in the United States are themselves a result of democratic decision. The people may decide to control their destinies by enacting laws that restrict speech and so self-realization cuts both ways.²¹

The argument is overbroad because it would apply even to speech that criticizes the incumbent administration and so would thwart the democratic legitimation of

¹⁷ On the pervasiveness of this assumption, see Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579 (2004); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799; Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199 (1983) (reviewing FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* (1981)).

¹⁸ MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 54 (2001).

¹⁹ Redish reasons that because commercial speech should be entitled to the same protection as political speech, it should receive the protection of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964): False and misleading advertising should be actionable only if the speaker knows that it is false or publishes with reckless disregard of whether it is false or not. REDISH, *supra* note 18, at 55–56; Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433 (1990). For critique, see Koppelman, *supra* note 5, at 720–24.

²⁰ See, e.g., *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568 (4th Cir. 2013) (citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

²¹ FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 40–44 (1982).

laws.²² But some speech restrictions do facilitate agency both at the individual and collective level.²³ The restriction of misleading commercial speech is an example.²⁴

If persons are in fact capable of being misled, then speech restrictions do make us more free because self-realization is not promoted where the actual result is deception and misinformation. But it all depends on whether and when we are in fact capable of living up to Redish's demanding and attractive ideal.

The open question about the protection of commercial speech is which side of this line it belongs on. That is the conversation we need to be having. And thanks to Marty Redish's work, here we are.

²² On the breadth of a democratic defense of free speech, see Andrew Koppelman, *Madisonian Pornography or, the Importance of Jeffrey Sherman*, 84 CHI.-KENT L. REV. 597 (2009).

²³ See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 23 (2012). On the limitations of Post's efforts to explain where the line is drawn, see Koppelman, *supra* note 5, at 679; Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1347–48 (2009).

²⁴ See Koppelman, *supra* note 5, at 717–24.