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REDISH ON FREEDOM OF SPEECH

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ABSTRACT—My contribution to this Festschrift for Marty Redish looks at two of his most important articles on freedom of speech, both published in 1982. One article deals with free speech and advocacy of crime, while the other presents Marty's general justificatory theory of freedom of speech. Although I agree and disagree with various parts of Marty's analysis in the former, I am unpersuaded that Marty's general theory can succeed either positively or normatively. Marty Redish is an important scholar in several domains, displaying enviable versatility as well as depth. Although he is perhaps the leading contemporary expositor of the law of federal jurisdiction, he is almost as important a figure in the vastly more crowded field in which his and my scholarship overlap. *Redish on Freedom of Speech* is my modest contribution to this richly deserved Festschrift.

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I. REDISH ON FREEDOM OF SPEECH: THE BASIC POSITIONS

Marty Redish has written many articles and books on the topic of freedom of speech, but I believe his most important contributions to the topic were two contemporaneous articles that were published thirty years ago. In *The Value of Free Speech*,[1] published in the *University of Pennsylvania Law Review*, Redish sets forth his view of the basic justifying theory of the Free Speech Clause of the First Amendment. And in *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*,[2] published in the *California Law Review*, Redish recounts the history of the treatment of illegal advocacy under the First Amendment from *Schenck v. United States*[3] to *Brandenburg v. Ohio*[4] and offers his own view on what that treatment should be.

In the *Pennsylvania Law Review* article, Redish argues that the basic value underlying freedom of speech is that of individual self-realization.[5] It is the value that best explains First Amendment doctrine and best justifies the existence of that doctrine. According to Redish, all the values offered as alternatives to self-realization, such as democratic decisionmaking, ultimately derive from individual self-realization and thus presuppose it.[6] For example, the value of a democratic system of government rests ultimately on democracy's contribution to individual self-realization, both intrinsically in allowing individuals to control their destinies and instrumentally in developing human faculties that themselves further self-realization. Or so Redish argues.[7]

In the *California Law Review* article, Redish examines the important and historically significant corner of free speech doctrine dealing with advocacy of illegal conduct. As can be ascertained from the article's title, Redish endorses the clear and present danger test,[8] though not necessarily

[1] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[2] Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

[3] 249 U.S. 47 (1919).

[4] 395 U.S. 444 (1969) (per curiam).

[5] *See* Redish, *supra* note 1, at 593.

[6] *See id.* at 594.

[7] *See id.* at 602–04.

[8] That is, the speech advocating illegal conduct may be suppressed only when there exists a clear and present danger that unless the speech is suppressed, the illegal conduct will occur.

as it was first elaborated in *Schenck*[9] or later elaborated in *Brandenburg*.[10] For example, Redish rejects the implication in *Brandenburg* that the speaker must *intend* the illegal conduct that his words advocate to be validly convicted despite a First Amendment plea in his defense.[11] On the other hand, Redish would allow the speaker's conviction only if his words directly, as opposed to indirectly, advocate the illegal conduct, which may or may not be consistent with *Brandenburg*.[12] (I would argue that such a requirement is not a fair implication of *Brandenburg*.)[13]

I do not believe Redish succeeds in making his case in either article. Because the article on illegal advocacy is a more localized failure, I shall take it up first.

II. THE DILEMMA OF ADVOCACY OF ILLEGAL CONDUCT

There are three approaches the law might take to speech that could stir an audience to commit crimes. First, the law could focus exclusively on the audience, punishing it and only it for any crimes or attempted crimes it commits as a result of having been stirred to do so by the speaker's words.

Second, the law might attempt, through either the threat of punishment or outright muzzling, to prevent the speaker from uttering the words (or employing other symbols) that might stir the audience to illegality. This approach would supplement the normal sanctions and threats thereof applied to the audience itself. This approach might merely apply the normal criminal law rules regarding solicitation and complicity, but it might go well beyond them to prevent the communication of words that might stir the audience to illegality.

The first approach is obviously the most speech protective, while the second is not speech protective in the least. The third approach—or really family of approaches—would be to negotiate a course somewhere between the first and second approaches. That is where First Amendment doctrine has gone, from *Schenck* to *Brandenburg*, and Redish follows suit.

Like all theoretically "impure" positions, this intermediate approach, representing a compromise between freedom of speech and the prevention of crimes, draws lines that seem unprincipled. Nonetheless, the two "pure" approaches are too extreme to countenance. The first, holding only the audience and not the speaker liable for any harms caused as a result of the speech, not only rules out garden-variety crimes and torts, such as solicitation and inducement of contractual breach, but also fails to deal with

[9] Schenck v. United States, 249 U.S. 47, 52 (1919).

[10] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[11] Redish, *supra* note 2, at 1178.

[12] *Id.* at 1178–79. *But see id.* at 1189 (invoking Marc Antony's funeral oration to suggest that nonliteral advocacy be treated as "direct" advocacy).

[13] *See infra* notes 18–20 and accompanying text.

harms caused by audiences that cannot themselves be held responsible. That is so because any token of speech that might incite a legally and morally responsible person to commit a crime or tort might likewise incite a legally and morally nonresponsible person—for example, someone insane or below the age of responsibility. And the last position, which authorizes preventing all speech that might incite others to harmful actions, leaves freedom of speech completely impotent.

Thus, the impure compromise positions are the only viable candidates for a regime that contains a meaningful right of free speech but that is not suicidal. The clear and present danger test, in its various iterations from *Schenck* to *Brandenburg*, is the compromise the Supreme Court has adopted to deal with inciting speech under the First Amendment.

The *Brandenburg* test, which is the reigning test today and was when Redish wrote his article, is a one-sentence test with several components. The speech that is the potential basis for sanctioning the speaker must be "directed to" inciting unlawful acts.[14] "Directed" implies that the speaker must have as his purpose inciting those acts. In other words, it implies a *mens rea* of intent. This is the one part of the *Brandenburg* test that Redish rejects,[15] and he is right to do so. The criminal law is properly concerned with *mens rea*, but why should free speech law be concerned with it? Free speech law is concerned with the communication of ideas, not with retributive desert. Of course, eliminating *mens rea* altogether and focusing entirely on the causal potency of the speech might well have an *in terrorem* effect that chills too much valuable speech, but that can be largely avoided by requiring a *mens rea* of recklessness, an approach the Court itself took with respect to defamation of public officials.[16] Requiring a *mens rea* of purpose serves no obvious free speech value. Nor is it consistent with the Court's own approach to fighting words or to hostile audiences, neither of which require, as a precondition to sanctioning the speaker, that the speaker intend to provoke the audience to violence.[17]

So Redish is on solid ground in criticizing the requirement of an intention to incite lawlessness. However, he is on shaky and, I would argue, inconsistent ground when he argues that the speaker's words must directly advocate lawlessness as opposed to indirectly doing so.[18] Although the distinction Redish attempts to draw is not entirely clear to me, I take it he

[14] *Brandenburg*, 395 U.S. at 447.

[15] Redish, *supra* note 2, at 1178.

[16] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[17] *See* Feiner v. New York, 340 U.S. 315 (1951) (hostile audience); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (fighting words).

[18] Redish, *supra* note 2, at 1178–79.

means that to be sanctionable, the speaker's words must be *literally* words of incitement.[19] But if that is what Redish intends, he is wrong to do so.

The first point to stress is that language is a code, and like any code, its marks and sounds can symbolize anything. Of course, a successful code requires that the audience understand how to decode the marks and sounds so as to uncover the meaning that the author of the marks and sounds intended to convey. "Literal" meaning, if there is such a thing, can only refer to the meaning most audiences would attribute to a speaker who uses the terms whose meaning is in question. But if that is what literal meaning is, why should we care about it as opposed to the meaning the author intended, the meaning the audience would likely assume the author intended, or both?

For example, suppose there is a revolutionary cell poised to commit acts of violence as soon as its leader gives the signal. And suppose its leader broadcasts, "The red fish swims at dawn." In the code agreed to within the cell, "the red fish swims at dawn" translates into "blow up the hydroelectric plant today." Its literal meaning—that is, its meaning to those unaware of the cell and its code—has something to do with the aquatic habits of brightly colored sea animals. But if the clear and present danger test is a limitation on freedom of speech for the purpose of squelching calls to lawless conduct, then "the red fish swims at dawn" is precisely the kind of speech that should be punishable under such a test. So, too, for "Brutus is an honorable man"[20] and all other symbols that convey to an audience that the speaker is imploring them to commit unlawful acts. I doubt that the *Brandenburg* test requires that the speaker's words directly—that is, literally—advocate illegal conduct. And Redish is wrong to argue that it should, as his distinction between direct and indirect advocacy implies.

Brandenburg also requires that the speaker's words be "likely to incite" the lawless action.[21] Redish, too, endorses a likely to incite requirement.[22] There are two issues I would like to raise with respect to this likelihood, apart from the obvious issue of how likely is "likely."

First, "likely" seems to imply an invariant probability threshold. When the likelihood of inciting lawless activity exceeds that threshold, the speech is sanctionable. If it falls short of that threshold, it is not. Compare this

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[19] Redish's apparent definition of indirect advocacy is "a statement which does not *on its face* urge unlawful conduct." *Id.* at 1179 (emphasis added). Given that definition of indirect advocacy—and, by implication, of direct advocacy as well—I cannot see how Redish can reconcile his immunizing indirect advocacy with his quite correct analysis of the danger in immunizing Marc Antony's funeral oration. *Id.* at 1189.

[20] Words attributed to Marc Antony by William Shakespeare on the occasion of Antony's funeral oration at Julius Caesar's burial. As portrayed by Shakespeare, Antony is attempting to stir the audience against Brutus and the other killers of Caesar through sarcasm. *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

[21] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[22] Redish, *supra* note 2, at 1180.

invariant threshold approach with the Learned Hand approach taken by Justice Vinson in *Dennis v. United States*.[23] Hand's approach would require a lower probability for more serious harms than for less serious ones.[24] In other words, Hand advocates a sliding scale of probability of lawlessness, requiring only a slight probability for lawless acts that cause catastrophic harms. Is not Hand's approach the more sensible of the two?

The second issue with respect to likelihood is whether likelihood is supposed to be calculated taking into account the fact that the authorities are monitoring the speaker, and perhaps the audience, and are aware of the incitement. After all, in many of the situations where incitement is prosecuted, the actual likelihood of the incitement leading to lawlessness is essentially zero given the authorities' actions. So, are we to apply the test based on the actual likelihood that the speech will incite lawlessness? Or are we to do so based on how likely the speech was to incite violence had the authorities not been present?

Note that in many prosecutions for criminal solicitation, the solicitor contracted with an undercover cop rather than an actual hit man. In such cases, the actual probability that the solicitation of murder would result in a murder was zero. Should these prosecutions be thrown out under *Brandenburg*? (Defense attorneys representing defendants charged with soliciting undercover cops posing as hit men: Don't try a *Brandenburg* defense if you want to maintain credibility with the judge.)

Redish rejects Kent Greenawalt's attempt to distinguish, for First Amendment purposes, between ordinary criminal solicitations and more political incitements.[25] I agree with Redish on this point. But if nonpolitical criminal solicitation prosecutions are okay even when the solicitee is quite unlikely to commit the crime, the same should be true when the solicitation is political. If the defendant walks into what he believes is a primed-to-revolt meeting of radicals and shouts "Burn down the banks—now!," he should be validly subject to prosecution under *Brandenburg*, even if those in the meeting are not radicals, as the speaker believed, but a meeting of bank executives in casual attire.

I confess that I do not know how the *Brandenburg* Court meant for the likelihood component of its test to be applied—particularly, whether the likelihood threshold was to be invariant or was to vary with the harm feared, and whether the fact that the authorities are monitoring the situation is to be treated as an endogenous or as an exogenous factor in calculating the probability. Redish says little about this issue, but it is not one that can be elided in a theoretical account of the clear and present danger test.

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[23] 341 U.S. 494, 510 (1951) (plurality opinion).

[24] *See* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

[25] *See* Redish, *supra* note 2, at 1163–64 (criticizing Kent Greenawalt, *Speech and Crime*, 1980 AM. BAR FOUND. RES. J. 645, 748–49).

Likewise, Redish says little about *Brandenburg*'s "imminence" component.[26] I cannot see the relevance of imminence independent of its bearing on likelihood. Obviously, a speech that advocates lawless acts in the distant future is, others things being equal, less likely to lead to those acts than speech that advocates a lawless act in the next minute. That is not always true, of course, but it is generally true because the passage of time affords more opportunities to avert the lawless action and produces more changes in the circumstances that originally motivated the advocacy of that action. But if we hold the likelihood of lawless action constant, it is difficult to see why the fact that the lawless action will occur in the more rather than less distant future should matter. In other words, it is hard to see why imminence, as opposed to likelihood, matters at all.

III. FREE SPEECH AND SELF-REALIZATION

Redish claims that the principal value served by freedom of speech is individual self-realization.[27] In so claiming, Redish shifts the focus from the interests of speakers—the focus of Edwin Baker's free speech theory, for example[28]—to the interests of the audience.[29] I believe Redish is right to do so. For surely the right of freedom of speech is implicated whenever government acts to prevent an audience from gaining access to a message, even if the speaker is a foreign national unprotected by the First Amendment, or is long dead or even nonexistent—as would be the case were government to prevent people from looking at marks made by ocean waves that government feared the audience would take to be a subversive message from God.

But if freedom of speech is primarily a right of the audience, then why is it not violated when nongovernmental actors—private citizens—refuse to convey messages to the audience for the very same censorious reasons that free speech condemns when government is muzzling the speaker? Is not the audience's self-realization stymied equally by those who muzzle themselves as by the government's muzzling? On the other hand, we are always muzzling ourselves or, if speaking, editing what we say. A right of free speech against self-muzzlers is a complete nonstarter.

If audience self-realization runs into difficulties with self-muzzlers, its difficulties have only just begun. For as I have written elsewhere,[30] all incidental regulations of speech—all regulations that are not aimed at the messages being conveyed but only at the means and resources necessary

[26] What he does say is critical of any imminence requirement and implies that he would be sympathetic to my folding the temporal issue into the likelihood inquiry. *See id.* at 1180–82.

[27] Redish, *supra* note 1, at 593.

[28] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

[29] *See* Redish, *supra* note 1, at 620–21.

[30] LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 13–37 (2005).

for their conveyance—have speech effects. That is, all incidental regulations of speech affect what gets said, by whom, to whom, and with what effect. And such incidental regulations include not just time, place, and manner regulations of speech, but the laws of property, contracts, torts, labor, the environment, welfare, taxation, and crimes—all laws! For every part of the *corpus juris* has speech effects, and the entire *corpus juris* has immense, incalculable speech effects, dwarfing the speech effects of laws aimed specifically at the content of messages. That means, therefore, that the information any of us possesses to enable our self-realization is hostage to the state of the entire *corpus juris*. Moreover, any alternative *corpus juris* will have different but no less significant speech effects. And there is no Archimedean point from which to evaluate these alternative speech effects, even assuming we could calculate them. For any such evaluation would require the evaluator—the courts, an arm of the government—to decide what information people should have, *which is the antithesis of any conception of freedom of speech*.

If the value of self-realization were not sufficiently jeopardized by the impotency of a right of free speech that leaves self-muzzling and incidental regulations of speech untouched—as Redish appears to do—things get no better when the focus is narrowed to regulations based on the content of speech, the messages conveyed. Content regulations should be at the heart of any plausible free speech theory, but can the value of self-realization adequately justify plausible doctrines dealing with content regulations? I am extremely skeptical.

I like to divide content regulations into two broad categories based on how the message that government wishes to interdict can cause the harm that the government is concerned to prevent. In one large category are laws aimed at messages that cause harm in one step. That is, once the audience receives the message, either the harm has occurred or the harm will occur through processes that the government cannot control or prohibit. This category includes laws protecting secrets, privacy, confidentiality, property in messages (copyright, trademark), and reputation; laws protecting persons from deception, from threats and other forms of coercion, and from offense and emotional trauma; and laws aimed at messages that might incite nonresponsible actors (the insane, the young) to commit harmful acts.

Messages can, once received by an audience, cause these harms and others that at that point the government is powerless to prevent. How should the value of self-realization affect our attitude towards content regulations aimed at preventing these one-step harms? I cannot see how analysis of these laws is advanced by positing self-realization as the guiding value.

First, the value of self-realization is on both sides of the equation. If the law prevents me from knowing the content of, say, a lawyer–client confidential communication, my ability to intelligently assess and pursue my goals may be deleteriously affected. On the other hand, the failure to

legally protect the confidentiality of lawyer–client communications may deleteriously affect the self-realization of lawyers' clients. The same point can be made with respect to content regulations that protect privacy, reputation, or property. Indeed, the point applies to all these one-step-harm content regulations.

Second, given that self-realization appears on both sides of the equation, self-realization cannot generate a verdict on a content regulation without balancing its effects on both sides against each other. But such a balance will require the court—an arm of government—to decide just how valuable the tokens of proscribed speech are to the audience that the law deprives of those tokens. Just how important is it for members of the public to learn that a celebrity has a sixth toe, etc.? Such a query will thus require the government to violate evaluative neutrality, the heart of all conceptions of freedom of speech.

Redish does think that the value of self-realization can be "balanced" against the harms content regulations are meant to prevent.[31] But again, this seems to ignore that weighing competing self-realization interests will involve a court making judgments about various messages' value—the antithesis of the governmental evaluative neutrality at the heart of freedom of speech.

Matters get no better for self-realization when we turn to content regulations predicated on preventing harms that the messages produce in two steps. The first step is the communication of the message to the audience. The second is the audience committing proscribable harmful acts. The significant difference between one-step and two-step harms produced by the content of messages is that the government has the option with two-step harms of focusing entirely on the second step and leaving the first step, the communication of the message, entirely unregulated. This is not an option with one-step harms, when the government can only prevent the harms by preventing the communication of the messages.

Content regulations aimed at two-step harms, such as laws aimed at illegal solicitation and advocacy, fighting words, hostile audiences, criminal "cookbooks," and so on, are the domain that looks most fertile for a robust deontological right of free speech. Thomas Scanlon and David Strauss have produced free speech theories that focus on two-step harms.[32] Nonetheless, I have argued that such theories cannot succeed, not only because audiences for inciting speech will always include those too insane or too young to be held responsible,[33] but more fundamentally because no tenable line can be drawn between speech advocating wrongful acts and

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[31] *See* Redish, *supra* note 1, at 623–25.

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

[33] Which means that government can only prevent the harm by threatening the speaker, the audience being beyond government's ability legitimately to threaten.

speech that is harmfully deceptive—and there can be no right to deceive others.[34]

Redish himself, unlike Scanlon and Strauss, does not take an absolutist approach to inciting speech.[35] (Scanlon later abandoned his absolutist approach.)[36] But once an absolutist approach is off the table, we are left with balancing and the intractable problem of evaluative neutrality. Self-realization will not be helpful, as again, it is on both sides of the balance.

[34] If the advocate of law violation is urging a wrongful act but is claiming that the act is not wrongful, the advocate is being deceptive and is no different from one who makes false and defamatory statements. Any incorrect value claim will contain some incorrect factual claim, even if only by implication. The full argument for this can be found in ALEXANDER, *supra* note 30, at 70–79.

[35] *See* Redish, *supra* note 1, at 623–25.

[36] *See* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).