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Speech and Law in a Free Society

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SPEECH AND LAW IN A FREE SOCIETY. By *Franklyn S. Haiman*. Chicago: University of Chicago Press. 1981. Pp. x, 481. $22.50.

Franklyn S. Haiman's *Speech and Law In a Free Society* examines the interplay of forces that constrain and encourage "freedom of expression"[1] in American society. Haiman's book does not offer well-defined rules of law or clear indications of likely judicial outcomes in first amendment cases. Rather, it focuses on what the author believes the law should be. Haiman acknowledges the "lack of consensus in our society concerning the basic purposes and values underlying the First Amendment" (p. 5), and offers a thorough analysis of many current first amendment issues based upon his own values. Readers interested in democratic theory, as well as the uninitiated seeking exposure to first amendment issues will find Haiman's assertions of his values and principles useful catalysts in the precipitation of their own perspectives on the first amendment.

Haiman begins by outlining the values and principles underlying his theories. He then discusses a multitude of interests that compete with freedom of expression, analyzing them in light of the values he asserts. Haiman outlines the historical progression of court decisions relating to each issue, and then theorizes about what the law should be.

Haiman concludes his analysis by proposing four principles for resolving conflicts between freedom of expression and other competing interests (pp. 425-26): (1) the remedy for injury caused by speech should be more speech; (2) individuals in a free society are responsible for their own behavior, unless deprived of free choice by deception, physical coercion or mental impairment; (3) if the market place of ideas remains open, individuals are the best judges of their own interests; and (4) government must have a compelling justification whenever it requires unwilling communication or withholds information it possesses. Haiman admits that a society that honored these principles would not suit the "squeamish or apathetic" (p. 429).

In general, Haiman's concluding principles effectively synthesize both his own normative analysis and the principles of classic liberal political theory from which they derive.[2] Some of his more radical claims, however, conflict not only with widely held liberal values but with other portions of his argument as well.

Haiman concludes, for example, that the principle of repairing injury

1. Haiman chooses to consider "speech" and "the press" as "identical twins," deserving of the same constitutional protection. The word "expression" is used here to include both terms. Haiman does not concentrate on this point; he discusses the possible constitutional distinctions between the terms only briefly. He is quite prepared to accept "a bit of constitutional redundancy" (p. 15) to avoid any confusion that might exist if the terms were accorded different treatment. Former Justice Potter Stewart argues for separate treatment for speech and the press. *See* Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975); *see also* W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976).

2. Much of Haiman's thought can be traced to Mill, and the gist of many of his arguments for free expression to Milton's classic argument against the licensing of books. *See generally* J. S. MILL, ON LIBERTY, *in* XVIII WORKS 213 (J. Robson ed. 1977); J. MILTON, AREOPAGITICA (R. Jebb ed. 1918).

caused by free speech with more speech justifies a major retrenchment in the law of defamation (pp. 43-60). Haiman argues for conditioning defamation actions for damages on the defendant's refusal to retract or furnish a forum for reply, and for eliminating the "reckless disregard" element of the *New York Times* standard,[3] thus requiring proof of knowing falsity before a plaintiff could recover. Reliance on the right to reply assumes that replies by the defamed can restore their reputations, and that enforcement of the right will be less coercive than a damage remedy. Haiman concedes that certain libels may inflict irreparable injury, and that the denial of wrongdoing by the subject of suspicion is less credible than judgment of an impartial court to the same effect. He would retain the damage remedy for those cases (few in number, he believes) of irreparable injury, and trust the public's perception of the truth (as we do with politics and religion) to mitigate the need for judicial intervention. The defense, while admirable, is unconvincing.

The right to reply remedy is largely illusory. As a unanimous Supreme Court pointed out in *Tornillo*,[4] an enforced right to reply will chill and displace speech as readily as any other form of censorship. Conditioning libel suits on the denial of reply space or time by the defendant might pass the test of constitutionality under *Tornillo*, but only because the remedy could be rejected by the defendant. If the underlying reasoning of *Tornillo* is correct, as Haiman appears to concede, defendants will either categorically opt for a court contest (if the costs of litigation, including the risk of judgment, are less than the costs of publishing replies) or, more likely, simply avoid any communication that might provoke the demand for reply space (if the costs of reply exceed the benefits of controversial speech). The result would be either a uniform fall-back on current defamation law, or the serious restraint of vigorous debate on controversial issues implicating personal reputations. In the latter scenario, truth and falsehood would grapple only in the minds of cautious journalists, and the public would never get the chance to exercise its judgment.

As for modifying the *New York Times* standard, reckless disregard comes into play only given proof of actual falsity.[5] If knowingly false speech deserves no constitutional protection, as Haiman concedes, the constitutional case for reckless falsehood rests on little stronger ground. Whatever the motivation behind it, falsity cannot advance the search for truth, or expose actual political misconduct. Chilling reckless expression in general is costly only insofar as reckless expression leads to truth rather than to falsehood, and then only if the exercise of due care would *not also* lead to the truth — a rare coincidence. Given the nearly impossible burden of proving actual knowledge of falsity, that cost is more than justified.

Refusing to hold individuals liable for damages inflicted by defamatory falsehoods is also somewhat at odds with Haiman's second principle, that individuals should be responsible for their own behavior.[6] Requiring only

3. *See* New York Times Co. v. Sullivan, 376 U.S. 255 (1964).

4. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

5. *See* Garrison v. Louisiana, 379 U.S. 64, 78 ("the *New York Times* rule . . . absolutely prohibits punishment of truthful criticism").

6. Haiman develops his principle of individual responsibility in his discussion of audience

a right to reply would do little to bring reckless representatives of the media to account, and nothing at all to confront nonmedia defendants with the consequences of their actions. More profoundly, to the extent that the liberal tradition of free expression derives from the desire to restrain concentrated power, Haiman's belief in the power of solitary truth to counteract mass falsehood contradicts the fundamental premise of his argument. If communication has power to check government[7] it also has power to injure individuals. Restraints on private as well as public power can contribute to the individual autonomy Haiman views as fundamental.

Though Haiman's arguments sometimes lack any substance greater than Jeffersonian faith in the people, his book succeeds in its ultimate goal: it offers a careful analysis of some of the most troublesome issues involving freedom of expression. The book will aid readers in "crystallizing their own alternative [approaches] to those issues" (p. 6). One may benefit from the breadth and thoroughness of his analysis even if one differs fundamentally with Haiman's political starting point. Although many well-written publications[8] have focused on the first amendment, *Speech and Law in a Free Society* offers an up-to-date and unflinching approach to many of the most controversial challenges to freedom of expression facing the courts today. Haiman does not attempt a new or innovative approach to constitutional analysis, but he does present the issues clearly and coherently. He identifies and discusses many of the values of other first amendment scholars, but he does not seek to replace them. Instead, he proposes his own set of values to set, with the values of other scholars, among the "foundation stones of our First Amendment edifice" (p. 443 n.6). Haiman's perspective and convictions are thought-provoking at the very least, and may someday set the course for an American society better prepared to weather the "boisterous sea of liberty" (p. 429) which Haiman would have us sail.[9]

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violence in reaction to the ideas of a controversial speaker. He argues convincingly that the members of the audience who resort to violence should be held responsible for their actions, not the inciting speaker (pp. 252-83). He also does not argue that injury done by defamatory communication should be the responsibility of the communicator (pp. 87-99).

7. For this refinement of Meiklejohn's self-government rationale advanced in FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), see Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR. FEDN. RES. J. 521.

8. *See, e.g.*, W. BERNS, *supra* n.2; Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); L. LEVY, LEGACY OF SUPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

9. Haiman's book is also reviewed by Boylan, Book Review, 20 COLUM. JOURNALISM REV. 59 (1982); Cantor, Book Review, LIBRARY J., Dec. 15, 1982, at 2380.