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Speech and Law in a Free Society: Franklyn Haiman and the "Boisterous Sea of Liberty"

Dale A. Herbeck, Boston College

The idea for a panel honoring Franklyn Haiman was simple enough: each of the presenters would comment on one of Haiman's many scholarly contributions. Surprisingly enough, each of the participants selected a different work and that meant I was fortunate enough to lay claim to my favorite, *Speech and Law in a Free Society*.[1] This seemed an excellent choice at the time as my own research focuses on the freedom of speech and, to my way of thinking, this volume includes Haiman's most complete discussion of the subject. There was, moreover, a personal reason too. Shortly after he published *Speech and Law in a Free Society*, Haiman was a visiting professor at the University of Iowa. I was fortunate enough to be one of his students and the course, a doctoral seminar on freedom of expression, informed my decision to attempt a dissertation on systems of argumentation and seditious libel. More importantly, Haiman's scholarship convinced my committee, composed largely of rhetoricians, that this project was a worthy undertaking.

Over the three decades that followed, I have read and reread *Speech and Law in a Free Society*, used the book as a resource on countless occasions, and incorporated many of Haiman's ideas into my own thinking. Along the way, I played a small part in the scholarly conversation about the book, most notably as a participant on a panel celebrating the volume at the 1988 Speech Communication Association convention in New Orleans.[2] Given my familiarity with the Haiman's work, I was confident that I could use it as a text to fashion an appropriate tribute to the scholar who first introduced me to freedom of speech.

It was only when I sat down to prepare my remarks that I realized the flaw in my reasoning. Try as I might, it was impossible to do justice to *Speech and Law in a Free Society* in a ten minute presentation. In this remarkable work, Haiman explains the important function of freedom of speech in a democratic society and he develops a set of guiding principles for considering a host of speech-related problems. The result is a masterpiece that compares favorably with the classics of First Amendment law.[3] Peter Kane proclaimed Haiman's work was "arguably the most important book in the theory of communication law since Zechariah Chafee, Jr. published *Free Speech in the United States* in 1941."[4] Echoing this sentiment, Stephen A. Smith declared Haiman's work a "major contribution" destined to claim "an enduring place in free speech literature."[5] Ruth McGaffey hailed *Speech and Law in a Free Society* as a "landmark book" that should be "required reading for all freedom of speech teachers."[6] Tom Tedford and I featured Haiman—along with Chafee, Alexander Meiklejohn, Thomas I. Emerson, C. Edwin Baker, and Robert C. Post—among the six theorists featured in our undergraduate textbook, *Freedom of Speech in the United States*.[7]

Speech and Law in a Free Society transcended disciplinary boundaries and was reviewed in prominent law reviews by leading constitutional law professors such as Frederick Schauer and Daniel Farber.[8] While some challenged elements of Haiman's

argument, all of the commentators recognized the magnitude of the achievement in creating a book, as Schauer observed, that manages to "survey and integrate almost every area in which the first amendment restricts or should restrict the powers of the states and the federal government."[9] The *Harvard Civil Rights-Civil Liberties Law Review* predicted *Speech and Law in a Free Society* "may prove to be one of the most valuable works on free speech of the last thirty years."[10] In recognition of this notable accomplishment, Haiman was honored with a Golden Anniversary Award from the National Communication Association, a Silver Gavel Award from the American Bar Association, and the Hugh M. Hefner First Amendment Award.[11]

For those not familiar with this remarkable book, Haiman begins by setting out six fundamental premises that serve as the foundation for his conception of freedom of speech.[12] Building on these premises, Haiman works though many of the toughest free speech issues in four context-centered problem areas. These contexts, which form the parts of the book, include (1) communication about other people (defamation, invasion of privacy, stirring to group prejudice and hatred, and prejudicing a fair trial), (2) communication directed to other people (symbolic battery, objectionable messages, lies and misrepresentations, and intimidation and coercion), (3) communication and the social order (incitement to illegal action and conspiracies), and (4) government involvement in the communication marketplace (compelled speech, secrecy, and the government as communicator). In the final chapter, Haiman proposes a set of "guiding principles for the resolution of conflicts between freedom of expression and the competing interests with which it may clash—principles rooted in a keener understanding of the communication process and a more vigorous commitment to the values of a free society than have characterized the adjudication of theses issues in the past."[13]

Having concluded that a complete summary of the book was impossible, I considered narrowing my focus and highlighting one of the four problem areas. Toward that end, I thumbed through my well-worn copy of *Speech and Law in a Free Society*, carefully inspecting the dog-eared pages, rereading the underlined passages, and studying my notes in the margin. Given my scholarly interests, I quickly gravitated to the issues covered in the first part, communication about other people. These are provocative chapters, both because they challenge existing dogma and because the analysis has withstood the test of time. Haiman, for example, is critical of the Supreme Court's landmark decision in *New York Times v. Sullivan*. In that case, the Court held that a false statement made about the official conduct of an elected public officeholder may not be punished unless it can to proven to have been made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[14] While many have praised Justice William Brennan's majority opinion, Haiman suggests the "actual malice" standard might actually have a "chilling effect on the expression of those who are not sure whether charges they feel impelled to voice could be proven to the satisfaction of a court if suit were brought."[15] Long before scholars appreciated the threat posed by strategic lawsuits against public participation (SLAPPs) or libel tourism, Haiman warned about the use of libel law "as a tool of harassment by plaintiffs with dubious cases."[16] Rather than encouraging aggrieved parties to seek redress through the legal process, Haiman proposed "greater

access to the media for 'more speech.'"[17] Like Justice Louis Brandeis, Haiman believes "falsehoods and fallacies" are best exposed by encouraging speech, not enforcing silence.[18] "More speech" is the best remedy for a defamatory statement, Haiman argues, except in a handful of "emergency situations where the democratic process does not have time to function."[19]

While defamation law seeks to protect the reputation of an individual in "the eyes of others," an action for invasion of privacy seeks redress for an injury "to the feelings of the peace of mind of the one who is talked about."[20] Although defamation often leads to tangible harm, Haiman believes communication that invades one's privacy "may have no consequence beyond its being felt to be presumptuous, intrusive, or embarrassing by the target individual."[21] Such injured feelings are not, Haiman argues, sufficient grounds for restricting speech. To substantiate this claim, he critically assesses the four distinct privacy torts identified by William Prosser in an influential article on privacy published in the *California Law Review* in 1960.[22] Through a masterful critique of the torts, Haiman demonstrates that a robust commitment to free speech necessarily requires sacrificing some privacy. Rather than limiting speech to protect privacy, Haiman acknowledges that his "principles will sometimes work a hardship on particular individuals who will be paying more than their fair share of our society's costs for the maintenance of freedom of expression."[23] So long as the information at issue is legally obtained, Haiman concludes, law should not be used as a remedy to treat wounded feelings. As an alternative, he would rely on "the education of the tastes and the evaluation of the sensitivities of our citizenry, and on their voluntary respect for the privacy of others."[24]

There is another tort—the intentional infliction of emotional distress—that stands at the intersection of defamation and privacy law. Because of the "actual malice rule," it is all but impossible for those in public life to recover damages in libel and privacy suits. To win a defamation claim, a public figure would have to prove actual malice. There is little chance of winning a privacy lawsuit if the information disclosed is newsworthy. Some public figures have tried a different avenue for collecting damages, namely, the tort of intentional infliction of emotional distress. This tort has some of the same characteristics as false-light invasion of privacy (which creates shame and humiliation), for it concerns outrageous, extreme forms of expression deliberately intended to inflict emotional injury. To his credit, Haiman was one of the first scholars to consider the free speech concerns raised by the lawsuits based on the intentional infliction of emotional distress.[25] Writing before the Supreme Court's unanimous decision in *Hustler v. Falwell*,[26] *Speech and Law in a Free Society* sets out the dangers of punishing speech on the grounds that it is outrageous. "To subject people to punishment because they violate the 'changing sensitivities' of a particular community and a particular time," Haiman cautions, "is to place the freedom of expression on a precarious footing."[27]

Any of these subjects—defamation, privacy, or the intentional infliction of emotional distress—would have been a worthy topic. As I tried to discern which problem to highlight, I happened to attend a public debate on my campus involving *Brown v. Entertainment Merchant Association*, a case concerning a California law regulating violent video games then pending before the United States Supreme Court.[28] In the

debate, the affirmative team defended California Assembly Bill 1179, a controversial measure that made it illegal to "sell or rent a . . . violent video game" to anyone under the age of 18.[29] Under the law, a violent video game was defined as one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being."[30] As might be expected, the affirmative argued that such games were harmful to minors, that violent content was not protected by the First Amendment, and that the Supreme Court should uphold the California law.

In response, the negative team offered a blistering critique of the measure. One argument, in particular, caught my attention. The first negative speaker claimed that the evidence purporting to demonstrate the harms of violent video games was flawed. To prove this point, the negative speaker identified numerous methodological deficiencies in the social scientific research cited by the affirmative. Since there was no proof the video games were harmful, the argument continued, the games were clearly entitled to a full measure of constitutional protection. In other words, because the speech at issue was harmless, it deserved a full measure First Amendment protection.

This proved an effective argument as the negative team prevailed by a wide margin when the audience issued its decision by a show of hands. It also proved to be prophetic, as the Supreme Court struck down the California law on a 7-to-2 decision issued on June 27, 2011. Writing for the majority, Justice Scalia argued the California law cannot withstand traditional First Amendment analysis. "Because the Act imposes a restriction on the content of protected speech," he observed, "it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."[31] In this instance, the social scientific evidence was insufficient to demonstrate a compelling state interest. According to Justice Scalia, "These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). Instead, '[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.'"[32]

The methodological questions, however, were not on my mind as I reflected on the debate that evening. As I pondered the negative's claim that the First Amendment protected harmless speech, I could not help but to think about *Speech and Law in a Free Society*. While much might be said about this work, as a communication scholar, Haiman knows speech has real consequences. Rather than attempting to discount these harmful effects, Haiman embraces them. In the final chapter of the book, aptly titled "The Boisterous Sea of Liberty," Haiman concludes speech should be protected, not because it is innocuous or harmless, but rather because speech is how human beings express and fulfill themselves.[33]

Working from this premise, Haiman reassigns much of the responsibility for harmful speech.[34] Instead of blaming the speaker, Haiman would hold the individuals who comprise the audience accountable for their own behavior. These individuals "are not objects which can be *triggered* into action by symbolic stimuli," Haiman reasons, "but human beings who *decide* how they will respond to the communication

they see and hear."[35] As such, they are "liable for any violence or other illegal behavior to which they may be provoked or solicited, except in those circumstances where the inciting communicator coerces or deceives them into taking the action in question."[36]

The Supreme Court struck down the California law regulating the sale of video games to minors, in part because the state could not prove that video games were harmful. Haiman would likely approve of this result, albeit for an entirely different reason. To his way of thinking, the California law would be problematic because it sought to hold the speaker—the video game manufacturers—responsible for the behavior of the players. Rather than blaming the manufacturers, Haiman would hold the audience—the players—accountable for any antisocial or criminal acts. This may seem an inconsequential distinction, but it completely changes the role assigned to the government. Rather than attempting to purge allegedly harmful speech from the marketplace, Haiman believes government should create vibrant forums where social problems can be discussed. The most effective regulation, Haiman ultimately concludes, comes from oppositional speech and audience resistance, not from the heavy-hand of government.

Embracing the vision of free speech contained in *Speech and Law in a Free Society* is not one for the "squeamish or apathetic."[37] Haiman recognizes that he is privileging speech over other values and this means accepting costs (such as damaged reputations and the loss of personal privacy) that many may find objectionable. To emphasize the real price of this commitment to free speech, Haiman ends with a quote taken from a letter by Thomas Jefferson, written to an Italian friend in 1796, in which he complained about Federalist leaders, dismissively referring to them as "timid men who prefer the calm of despotism to the boisterous sea of liberty."[38]

In his classroom and through his scholarship, Haiman persuaded me that freedom of speech is an essential precondition for a healthy democratic society. Embracing this principle, to adopt Jefferson's imagery, necessarily makes for choppy water because Haiman's vision of the First Amendment creates ample space to accommodate a broad range of speech. Some of the resulting content will, as Haiman readily admits, challenge our sensibilities. He knows speech has the capacity to offend, to destroy reputations, and to incite lawless action. Although such speech necessarily roils the waters, I will always be grateful for my opportunity to spend some time sailing the seas with Franklyn Haiman.

ENDNOTES

[1]Franklyn S. Haiman, *Speech and Law in a Free Society* (Chicago: University of Chicago Press, 1981).

[2]I chaired the panel which became a forum, smartly edited by Stephen A. Smith, entitled "Franklyn S. Haiman's *Speech and Law in a Free Society*: Four Retrospective Critiques," published in the *Free Speech Yearbook*. The featured essays include Stephen A. Smith, "Of Sovereign Assumptions, Delegated Powers, and an Absolutist View of Freedom of Expression," *Free Speech Yearbook* 27 (1989), 106-114; William E. Bailey, "Haiman and the Ecology of Freedom of Speech," *Free Speech Yearbook* 27 (1989), 115-123; Paul Siegel, "Haiman's *Speech and Law in a Free Society*: Some

Self-Indulgent Queries for Professor Haiman," *Free Speech Yearbook* 27 (1989), 124-134; and Raymond S. Rogers, "Haiman's *Speech and Law in a Free Society*: A Jurisprudential Retrospective," *Free Speech Yearbook* 27 (1989), 135-145. Since *Speech and Law in a Free Society* embraces "more speech" as a remedy, the forum included space for a reply. See Franklyn S. Haiman, "Response to Retrospective Critiques of *Speech and Law in a Free Society*," *Free Speech Yearbook* 27 (1989), 146-150.

[3]See, for example, James A. Boylan, review of *Speech and Law in a Free Society*, by Franklyn S. Haiman, *Columbia Journalism Review*, January-February 1982, 59-61. Boylan compares *Speech and Law in a Free Society* to Thomas I. Emerson's influential work, *The System of Freedom of Expression*, published in 1970.

[4]Peter E. Kane, review of *Speech and Law in a Free Society*, by Franklyn S. Haiman, *Quarterly Journal of Speech* 71 (May 1985), 252.

[5]Smith, 106.

[6]Ruth McGaffey, review of *Speech and Law in a Free Society*, by Franklyn S. Haiman, *Communication Education* 31 (1982), 379.

[7]Unable to reduce Haiman's view to a short label, we ultimately settled on the phrase "communication context theory" to describe his contribution. Thomas L. Tedford and Dale A. Herbeck, *Freedom of Speech in the United States*, 6th ed. (State College, Pa: Strata, 2009), 431-450.

[8]See, for example, David S. Bogen, review of *Speech and Law in a Free Society*, by Franklyn S. Haiman, *New York University Law Review* 58 (1983), 714-732; Daniel A. Farber, "Recent Books on the First Amendment," *Northwestern University Law Review* 77 (1983), 729-736; Ira C. Lupu, "Speech Categories and the Future of Free Speech Law," *Cornell Law Review* 68 (1983), 394-407; Frederick Schauer, "Free Speech and the Assumption of Rationality," *Vanderbilt Law Review* 36 (1983), 199-210; and Steven Stark, review of *Speech and Law in a Free Society*, by Franklyn S. Haiman, *Harvard Civil Rights-Civil Liberties Law Review* 17 (1982), 271-281.

[9]Schauer, 200.

[10]Stark, 272.

[11]The awards are detailed in Stephen A. Smith, "Franklyn S. Haiman's *Speech and Law in a Free Society*: Four Retrospective Critiques," *Free Speech Yearbook* 27 (1989), 104-105.

[12]For a thoughtful critique of the six premises see Bogen, 714-732.

[13]Haiman, 425.

[14]*New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

[15]Haiman, 52.

[16]Haiman, 53. The SLAPP (strategic lawsuits against public participation) acronym was coined by George W. Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996), 8-9.

[17]Haiman, 48.

[18]See, for example, Justice Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927).

[19]Haiman, 60.

[20]Haiman, 61.

[21]Haiman, 61.

[22]William R. Prosser, "Privacy," *California Law Review* 48 (1960), 383-423.

[23]Haiman, 86.

[24]Haiman, 86.

[25]Schauer, 201.

[26]*Hustler v. Falwell*, 485 U.S. 46 (1988).

[27]Haiman, 152.

[28]*Brown v. Entertainment Merchant Association*, 131 S. Ct. 2729 (2011).

[29]131 S. Ct. 2729, 2732 (2011).

[30]131 S. Ct. 2729, 2732 (2011).
[31]131 S. Ct. 2729, 2738 (2011).
[32]131 S. Ct. 2729, 2739 (2011), quoting *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. Cal., 2009).
[33]Haiman, 425-429.
[34]For a different view of speaker responsibility see Schauer, 207-208.
[35]Haiman, 425-426.
[36]Haiman, 427.
[37]Haiman, 429.
[38]Haiman, 429.