

The Insight, Influence, and Inspiration of Franklyn S. Haiman

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Franklyn S. Haiman has made a greater contribution to understanding the First Amendment than any scholar in our discipline. His landmark book, *Speech and Law in a Free Society*,¹ made accessible for all a communication and rhetorical perspective to inform First Amendment jurisprudence and a clear presentation of the central assumptions that shape that approach. Matching the depth of this analysis in that work, one sees an equally impressive breadth of scholarship and thinking in his works collected in *Freedom, Democracy, and Responsibility*,² including the two articles most often cited by the courts, “The Rhetoric of the Streets: Some Legal and Ethical Considerations,”³ and “Speech v. Privacy: Is There A Right Not To Be Spoken To?”⁴

No one has done more to shape my own thinking on First Amendment issues. When I began my graduate work at Northwestern, Frank had already led the Speech Association of America to recognize the importance of understanding the constitutional protection necessary for the relevance of the discipline, helped found the Freedom of Speech Committee, published a popular free speech reader,⁵ brought forth the *Free Speech* newsletter and the *Free Speech Yearbook*, and personally litigated the successful defense of Henry Miller’s *Tropic of Cancer*.⁶ I was a student in his tripartite sequence of freedom of speech courses in 1974-1975, a propitious time to learn as he parsed the Burger Court’s about face on the decades-long expansion of First Amendment freedoms and wherein I first came to question Leonard Levy’s narrative of original meaning.

In addition to teaching freedom of speech classes for more than 40 years and touching thousands of students, it can be argued that Haiman’s greatest impact has been training and influencing two generations of scholars concerned with the communicative implications of the First Amendment and transmitting that discussion to their students across disciplines and the nation. When Northwestern University honored his more than four decades of teaching, research, and service upon his retirement with a national conference⁷ in 1991, those who attended and bore witness to his wide and enduring influence included both law and communication faculty from dozens of institutions, reflecting the scope of his influence and the continuing conversations in the larger academic community.

Frank Haiman’s retirement from the Northwestern faculty in no way meant the end of his scholarly productivity nor his contribution to the conversation. As courts and campuses struggled with responses to hate speech and restrictive speech codes, his 1993 book, *“Speech Acts” and the First Amendment*,⁸ staked out an important communication perspective in the emerging assault on freedom of expression by those like Catharine MacKinnon, who would try to erase the distinction between protected ideas and prohibited actions.⁹ Drawing on his earlier work grounded in communication theory, Haiman logically laid out the parameters of *symbolic and nonsymbolic transactions*, undermining the stance of those who would revive and extend

the moribund “fighting words” doctrine and effectively blocking the “word magic” of Kent Greenawalt and others who craft artificial and somewhat deceptive rules to remove the constitutional protection from the communication of ideas.¹⁰

In Haiman’s most recent book, *Religious Expression and the First Amendment*,¹¹ he goes beyond his vast knowledge of the speech clause and applies his assumptions and reasoning to the First Amendment’s religious clauses on free exercise and establishment. The book includes the grounding historical documents and the essential First Amendment case law explicating the religion clauses, leading one reviewer to call it “a friendly pony to ride through the twisted thickets of First Amendment theory, history, and case law [that could serve] either as a scholar’s reference or as a textbook for upper-level students.”¹² It is certainly more than that, and it was especially timely, coming during a period when politics and religion were frequently confused in the media narrative and individual reactions to the events of September 11, 2001, and thereafter.

Among the contemporary controversies involving the constitutional interface between church and state addressed in the volume are the questions regarding federal financial support to faith-based social service providers, the allowable extent of political activity by churches and other religious organizations that seek the tax advantages afforded by 501 (c) (3) of the Internal Revenue Code, and the ongoing religious objections to contraception and reproductive choices. These are handled with Haiman’s customary respect and gentleness and argued in a convincing Madisonian style, but those who would breach the wall of separation or who so want a historical narrative that could support their wish for a Christian America see it otherwise. One critic labeled Haiman “a secular fundamentalist” and called the book’s thesis “a battle-cry for a radically secular reading of the constitutional tradition,”¹³ as if that were a bad thing.

That Frank Haiman continues to contribute to “the conversation” is not at all surprising. He once told me that his abiding devotion to liberty of speech was first sparked when he was a graduate student in a class taught by James Milton O’Neill during the time that Professor O’Neill was working on a book about the establishment clause, *Religion and Education under the Constitution*.¹⁴

That O’Neill, the principal founder of what is now the National Communication Association, who is recognized as the “father of the modern speech movement,”¹⁵ would encourage Haiman, the principal founder of what is now the Commission on Freedom of Expression, who is recognized as the father of free speech studies in our discipline, is most appropriate. That the inspiration and influence of both men continue is worthy of our recognition and transmission to the next generation of scholars. Let us continue the conversation.

ENDNOTES

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

² Franklyn S. Haiman, *Freedom, Democracy, and Responsibility: The Selected Works of Franklyn S. Haiman*. (Cresskill, NJ: Hampton Press, 2000).

- ³ Franklyn S. Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations," *Quarterly Journal of Speech*, 53 (1967): 99-114.
- ⁴ Franklyn S. Haiman, "Speech v. Privacy: Is There a Right Not to be Spoken To?" *Northwestern University Law Review*, 67(1972): 153-199.
- ⁵ Franklyn S. Haiman, *Freedom of Speech: Issues and Cases* (New York: Random House, 1965).
- ⁶ *Haiman v. Morris* (No. 61 S 19718, Illinois Superior Court, Cook County, decided February 26, 1962; Illinois Supreme Court, June 18, 1964, No. 37276, vacated July 7, 1964).
- ⁷ *Freedom of Speech and the American Community : A Conference Honoring Franklyn S. Haiman on the Occasion of his Retirement and the 200th Anniversary of the First Amendment, May 3-5, 1991*. (Evanston: Northwestern University, 1991).
- ⁸ Franklyn S. Haiman, "*Speech Acts*" and the First Amendment (Carbondale: Southern Illinois University Press, 1993).
- ⁹ Catharine A. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993).
- ¹⁰ Kent Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford University Press USA, 1989).
- ¹¹ Franklyn S. Haiman, *Religious Expression and the First Amendment*, (East Lansing,: Michigan State University Press, 2003).
- ¹² Book review, John Shelton Lawrence, *Journal of American Culture*, 27.3 (2004): 350.
- ¹³ Book review, Charles J. Reid, Jr., *The Catholic Historical Review*, 91.4 (2005): 859-861.
- ¹⁴ James M. O'Neill, *Religion and Education under the Constitution* (New York: Harper, 1949).
- ¹⁵ Eugene F. Covelli, "James Milton O'Neill: Father of the Modern Speech Movement," *The Speech Teacher*, 13.3 (1964): 176-183.