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Free Speech and the Assumption of Rationality

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Book Review

Free Speech and the Assumption of Rationality

SPEECH AND LAW IN A FREE SOCIETY. By Franklyn S. Haiman. Chicago, Ill.: The University of Chicago Press, 1981. Pp. x, 499. $22.50.

*Reviewed by Frederick Schauer**

Thirty years ago legal scholars might not have considered impossible the task of writing a book that discussed virtually all aspects of the first amendment.[1] The theory underlying the first amendment was restricted largely to the standard platitudes about the marketplace of ideas,[2] and legal and constitutional doctrine was equally narrow in focus. With defamation, commercial speech, obscenity, abusive language, and the like kept safely away from the coverage of the first amendment,[3] courts and commentators had little with which to concern themselves except the extent to which communists and others of that ilk presented the kinds of dangers that might override free speech considerations.[4]

Today, however, legal scholars confront a much more complicated interpretation of the first amendment. Not only has the Supreme Court broadened the scope of the first amendment to cover

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1. *See, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

2. *See, e.g.*, Ahrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); IBEW, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950); J. MILTON, AREOPAGITICA (J. Suffolk ed. 1968).

3. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 253, 266 (1952) (excludes "libelous utterances" from "the area of constitutionally protected free speech"); Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (excludes commercial speech from first amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (excludes lewd, obscene, and profane language from first amendment protection); Attorney General v. Book Named "God's Little Acre," 326 Mass. 281, 285, 93 N.E.2d 819, 822 (1950) (excludes obscene speech from first amendment protection).

4. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

a wide range of speech previously interpreted to be untouched by first amendment considerations,[5] but courts and commentators also have added numerous doctrinal tools to deal with special settings and particular state interests.[6] First amendment doctrine is now both broad and complex, and the task of writing about all of it seems at least forbidding and perhaps impossible. Unthwarted by the magnitude of the mission, however, Franklyn Haiman has attempted, in *Speech and Law in a Free Society*,[7] to survey and to integrate almost every area in which the first amendment restricts or should restrict the powers of the states and the federal government.

Haiman's book is in some ways reminiscent of Thomas Emerson's *The System of Freedom of Expression*.[8] Like Emerson, Haiman devotes only a relatively brief introductory portion of his book to laying the philosophical foundations for a theory of free speech and establishing the doctrinal structure for making first amendment determinations.[9] He then devotes the bulk of the book to demonstrating the results that this approach would yield when applied to the full range of first amendment issues.[10] Also like Emerson, Haiman presents a very speech-protective view of the

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5. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-73 (1976) (commercial speech is protected by the first amendment); Gooding v. Wilson, 405 U.S. 518, 523-28 (1972) ("opprobrious" and "abusive" language, as distinguished from "fighting words," is protected by the first amendment); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ("a state cannot under the first and fourteenth amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves 'actual malice' "); Roth v. United States, 354 U.S. 476 (1957). Although *Roth* and its progeny have continued to treat obscenity as outside the coverage of the first amendment, *see* Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979), the standards for determination of obscenity now make that determination a constitutional question in a way that it was not prior to *Roth*.

6. *See e.g.*, New York v. Ferber, 102 S. Ct. 3348 (1982) (child pornography); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (zoning for speech within the first amendment); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (broadcasting not given full first amendment protection); Pickering v. Board of Educ., 391 U.S. 563 (1968) (public employees); Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1; Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978). The foregoing sample of special rules, principles, and doctrines that have emerged in relatively recent times does not purport to be even close to exhaustive.

7. F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981).

8. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

9. *Id.* at 3-20; F. HAIMAN, *supra* note 7, at 3-15.

10. Although this Review does not deal with the issues, Haiman's willinguess to consider such issues as "The Government as Communicator" and "Facilitation of Citizen Expression" demonstrates a praiseworthy breadth in his perception of the scope of free speech concerns.

first amendment, indeed one substantially more speech-protective than Emerson's. Further comparisons with Emerson's work, however, are not fruitful, and Haiman's book fully deserves to be evaluated in its own right.

Haiman devotes little space to fundamental free speech principles, either from a philosophical or an historical perspective. Rather, he directs his efforts toward an in depth treatment of distinct doctrinal areas. Haiman's treatment of these first amendment categories is lucid, and the depth and breadth of his research and documentation are quite impressive. Even apart from Haiman's thought-provoking argument, the book is valuable for its accurate and well-documented surveys of the major domains of first amendment doctrine; each discussion is replete with references to both the case law and academic commentary.

As one might expect in a work of this breadth, however, the treatment of legal doctrine is better in some parts of the book than in others. Haiman's treatment of offensive speech, intimidation and coercion, invasion of privacy, government secrecy, and intentional infiiction of emotional distress are particularly noteworthy for their comprehensiveness and insightful analysis.[11] Indeed, Haiman's exploration of the first amendment issues raised by the tort of intentional infliction of emotional distress is especially useful because the free speech implications of this well-established tort generally have been ignored.[12]

In other areas, however, Haiman's treatment of legal doctrine contains noticeable gaps. The discussion of symbolic speech,[13] for example, contains no mention of an approach whereby the Court looks to the government's purpose in regulating the speech to evaluate the constitutionality of that regulation.[14] Of course, the insights of Justice Harlan and Professors Ely and Tribe in urging that approach may be incorrect, but the approach is too important to be ignored in a supposedly comprehensive work.[15] Similarly,

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11. F. HAIMAN, *supra* note 7, at 61-86, 131-241.

12. *Id.* at 148-56. This is a general area of particular expertise for Haiman. *See* Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 NW. U.L. REV. 153 (1972).

13. F. HAIMAN, *supra* note 7, at 25-40.

14. *See* United States v. O'Brien, 391 U.S. 367 (1968); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-601 (1978).

15. Haiman's own approach to this issue seems singularly unpersuasive. By looking primarily at the amount of harm involved, F. HAIMAN, *supra* note 7, at 35, he seems unfairly

Haiman's treatment of obscenity does not mention the doctrinal structure of the existing "nonspeech" approach.[16] Again that approach may be faulty, but in a comprehensive study obscenity may not be dealt with by concentrating on arguments, such as those of Walter Berns[17] and Harry Clor,[18] that bear little resemblance to current constitutional doctrine.[19]

In addition to gaps of this type, Haiman makes occasional errors in his description of legal doctrine. For example, the conclusion that "reckless disregard of the truth" in the law of defamation is only a difference in degree from negligence[20] is simply a misstatement.[21] This error seems to flow from Haiman's occasional willingness to look only to the ordinary literal meaning of the words in a legal standard, rather than to a technical meaning of the words that can be gleaned only from the standard's elaboration and application in other cases.[22] Another example is Haiman's conclusion that the "incitement" element of *Brandenburg v. Ohio*[23] refers either to effect or to undisclosed mental intent[24] when in fact the technical meaning of "incitement" is relatively settled under the first amendment to require, in all but the most extreme cases, specific words of incitement recognizable as such on the face of the speaker's statement.[25]

I do not wish to suggest by these criticisms that Haiman's

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to disable society from dealing with people who may wish intentionally to violate laws against minor harms, such as littering, to make some point. *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 279 n.67 (1981). His trust in the courts to make delicate determinations in this area seems at odds with a distrust of judicial determinations that pervades much of the rest of the book.

16. F. HAIMAN, *supra* note 7, at 164-81. For a description of the "nonspeech" approach, see Roth v. United States, 354 U.S. 476 (1957).

17. *See* W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976).

18. *See* H. CLOR, OBSCENITY AND PUBLIC MORALITY (1969).

19. *See* Jenkins v. Georgia, 418 U.S. 153 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

20. F. HAIMAN, *supra* note 7, at 57-58.

21. St. Amant v. Thompson, 390 U.S. 727, 730-33 (1968), clearly requires that a defendant have specific doubts about the truth of the defamatory material to be held liable. The *St. Amant* standard is certainly more than merely an extreme form of negligence. *Id.* at 731.

22. *See* G. GOTTLIEB, THE LOGIC OF CHOICE (1968); H.L.A. HART, THE CONCEPT OF LAW (1961); Stone, *Ratiocination Not Rationalisation*, 74 MIND 463 (1965); *see also* E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

23. 395 U.S. 444 (1969) (per curiam).

24. F. HAIMAN, *supra* note 7, at 276-83.

25. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975).

book is characterized by error. On the contrary, the presentation of constitutional doctrine is for the most part accurate and insightful, and the presentation of an argument supported by so much careful research and documentation is refreshing. I mention the occasional technical gaps and errors primarily to underscore the fact that this book is most valuable for what it plainly is: an argument for a specific and extreme vision of the first amendment. Haiman presents his discussion of doctrine not for reference purposes, but to support his argument; and from that perspective one cannot fault his treatment of doctrine. The book gives the reader an accurate general picture of contemporary first amendment doctrine, a picture more than adequate to enable the reader to understand Haiman's arguments for restructuring that doctrine.

Because Haiman's book is primarily an argument, the most appropriate way to evaluate that argument would seem to be in terms of its major themes rather than its details. Nevertheless, mentioning some of Haiman's more specific recommendations will make the major themes appear more clearly. For example, he advocates a major restructuring of the law of defamation, limiting recovery for civil damages to those cases in which a publisher is unwilling to grant the opportunity to reply.[26] When a publisher is willing to permit a reply, the defamed individual is without other recourse, regardless of the falsity of the material, the harm caused by that falsity, the status of the plaintiff, or the motive with which the defendant published the false statement.[27] Similarly, Haiman would eliminate almost entirely remedies for invasion of privacy. He suggests that such remedies should remain only for those instances in which a defendant breaches a promise of confidentiality or commits a commercial or noncommercial "theft" of information.[28] Haiman also advocates virtually complete elimination of the notion of incitement, finding even the *Brandenburg* standard insufficiently speech-protective.[29] He also would eliminate control over all but intentional misrepresentations even in the commercial

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26. F. HAIMAN, *supra* note 7, at 43-60.

27. *Id.* Haiman argues that Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), probably does not bar his proposed remedy, because the defamer has a choice among retraction, publication of a reply, or contesting a suit for damages. F. HAIMAN, *supra* note 7, at 49. But such a choice might be impermissible if the consequences are to require relinquishment of one constitutional right in order to protect another. *See* Simmons v. United States, 390 U.S. 377, 394 (1968).

28. F. HAIMAN, *supra* note 7, at 61-86, 426. Haiman includes eavesdropping in the category of commercial and noncommercial "theft" of information. *Id.*

29. *Id.* at 276-77, 427.

speech context.[30] Furthermore, Haiman would provide a constitutionally based right of access to government secrets,[31] he would eliminate entirely the law of conspiracy,[32] and he would eliminate the tort of intentional infliction of emotional distress.[33] As these recommendations suggest, Haiman, a fortiori, disagrees with prevailing doctrine in areas such as obscenity, offensive speech, and nonverbal communication.[34]

Haiman constructs these specific recommendations by applying a number of pervasive premises that he sets out both in the introductory section of the book and in its conclusion.[35] These premises include a strong commitment to individual liberty as an end in itself, a belief in the marketplace of ideas, a faith in the ability of people to decide what is in their own best interests, and a substantial distrust in the ability of government to make determinations of the truth, value, or harm of communication.[36] Although Haiman seems correct in asserting that these premises are "very much in the mainstream of this country's political-philosophical tradition,"[37] that assertion, even if true, does not make the premises empirically sound or philosophically valid.[38] Moreover, these premises alone are insufficient to justify the substantial modifications in first amendment doctrine that Haiman advocates. For this step he must rely on what is probably the most central of his premises, the premise that:

> [t]he human condition is not predetermined. Individuals, within the limits of their intellectual and emotional development, their physical environment, and the restraints which may be imposed on them by other persons, are capable of free choice and are responsible for the behavior which they choose. The philosophy of free speech presumes the existence of the freedom to accept or reject the alternatives which are offered. Communication which does not allow for this autonomous decision making violates the integrity of those to whom it is addressed and thus does injury to them.[39]
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30. *Id.* at 196-203.
31. *Id.* at 382-88, 428-29.
32. *Id.* at 288-94.
33. *Id.* at 148-56.
34. *Id.* at 19-40, 157-81.
35. *Id.* at 6-7, 425-26.
36. *Id.*
37. *Id.* at 6. A book such as Haiman's, however, would seem the ideal place to consider whether some aspects of "this country's political-philosophical tradition" might not be wrong.
38. Haiman acknowledges that he presents his premises as assertions with which the reader may very well disagree. *Id.* at 6. Much of what follows is my response to his implicit invitation to evaluate these premises.
39. *Id.* at 6-7.

> Unless deprived of free choice by deception, physical coercion, or an impairment of normal capacities, individuals in a free society are responsible for their own behavior. They are not objects which can be *triggered* into action by symbolic stimuli but human beings who *decide* how they will respond to the communication they see and hear.[40]

Once we realize the full import of this premise, many of Haiman's conclusions follow naturally. The harm done by defamation is not primarily the fault of the defamer, but of those who draw conclusions based on incomplete information. The violent acts of a crowd stirred to action by an impassioned speaker are not the responsibility of the inciter, but of those who have *chosen* to act on the speaker's words. A person who acts on misleading commercial information has himself to blame for not checking further, and the person who is offended by someone swearing on a streetcar should look not to the swearer but to his own "cultural blinders" that prevent him from realizing that the swearer has done nothing more than utter a series of noises.[41]

In reaching these conclusions, Haiman thus relies on a broad assumption of rationality, with consequent responsibility, on the part of the population at large. If we assume this degree of rationality, then Haiman's conclusions follow. Yet one must ask whether we are justified in making that assumption.

Initially, we might wish to accept the assumption of rationality because it is true. Although assumptions are only assumptions, one reason for making them is the substantial but unverified possibility that they may be empirically correct. Although Haiman does not attempt to demonstrate the factual basis for his assumption of rationality, if that assumption is correct then we should take his recommendations very seriously.

Unfortunately for Haiman's argument, most of the areas of law that he would eliminate exist precisely because the assumption he makes has seemed throughout history to be empirically false. Incitement always has been considered a crime[42] because people *are* influenced to action in passionate moments by persuasive speakers. Defamation is a tort precisely because people believe what others tell them, even if full investigation might show the allegations to be false. Similarly, commercial misrepresentation is a tort because most people take at face value the labels they find on products. These and other examples compel the conclusion that

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40. *Id.* at 425-26 (emphasis in original).
41. *Id.* at 22.
42. *See* G. MARSHALL, CONSTITUTIONAL THEORY 161-62 (1971).

much of the law is based on an assumption diametrically opposed to Haiman's — an assumption that people are not always perfectly rational, that they are inclined to act on incomplete information, that the shortness of life often requires reliance on the statements of others, and that people often are swayed by passion as much as by reason.

The possibility exists of course that the common law is empirically wrong in its assumptions and that Haiman's assumption of rationality is truer to the facts, but that possibility seems unlikely. A sociological, anthropological, or historical treatise is not necessary to show that people quite often are unwilling or unable to listen to reason, and equally unwilling or unable to suspend judgment until all available information and opinion have been received. The dreams of the Enlightenment have not proved to be an accurate portrait of the behavior of the population, and history is studded with examples of the triumph of factual falsehoods and unsound ideas.[43] Although governmental authorities rejected Galileo's ideas, the absence of that governmental power in analogous cases has not ensured the triumph of scientific truth. As recent events have shown, for example, the lack of governmental suppression of Darwinism has not guaranteed its acceptance by the population at large, and indeed a resurgence of anti-Darwinism is taking place that in no way can be explained by censorship.[44]

I do not mean to suggest by these comments that censorship by government is a generally preferable method of arriving at truth. The people, for all their flaws, probably are more reliable than the actions of an often self-interested government.[45] This claim, however, is much more modest than an assumption of universal rationality. Moreover, it is plainly insufficient to generate a principle of free speech that will prevent the state from acting to sanction or to deter those utterances that common experience has

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43. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-34 (1982). Skepticism about the validity of the marketplace model seems to be increasing. *See* Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Kendall, *The "Open Society" and its Fallacies*, 54 AM. POL. SCI. REV. 972 (1960); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

44. *See* P. KITCHER, ABUSING SCIENCE: THE CASE AGAINST CREATIONISM (1982); Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL. 125 (1979); Symposium, *Creationism*, 68 ACADEME 6 (1982).

45. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521; *see also* F. SCHAUER, *supra* note 43, at 80-86.

shown to cause the very harms that governments traditionally have been trusted to prevent. Thus, Haiman's assumption of rationality is unproved at best and more likely it is simply false.

A close look at Haiman's assumption of rationality, however, reveals that it is not so much a factual assumption as a normative philosophical premise. He couches his assumption of rationality much less in terms of empirical observation than in terms of *responsibility*. Thus, Haiman's argument is that, in most cases, if *A* by his words induces *B* to act illegally, then society should hold *B* and not *A* responsible.[46] Similarly, if written or spoken words induce *A* to act to his own detriment, then *A* should be responsible for his own folly in not investigating further.[47]

From this perspective Haiman can base his argument on a theory of responsibility without relying on a tenuous assumption of existing rationality in an empirical sense. The first amendment thus becomes aspirational rather than empirical in character, with rationality representing an ideal and not an existing state of affairs. Yet even though rationality at first appears to be a worthy ideal, we must look a bit closer at Haiman's ideals.

Implicit in Haiman's view of listener responsibility is a lack of speaker responsibility, but lack of responsibility for what one says or prints does not seem quite such a worthy ideal. Strong reasons exist in many areas for holding that governmental intervention to impose speaker responsibility is likely to produce more harms than benefits, but this proposition is not the same as saying that speakers ought not to be responsible in a nonlegal sense for the consequences of their utterances. Speaking quite simply is not purely a self-regarding activity.[48] Although some people speak only because they like the sound of their own words, the vast majority of speech is calculated to be heard by others and to affect them.[49] Thus, the argument that society cannot hold speakers responsible for unpleasant consequences even though it holds people responsible for virtually every other form of human conduct seems presumptively anomalous.[50]

To Haiman the "glaring inconsistency" is between our reliance on the marketplace of ideas for establishing the truth of religious

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46. F. HAIMAN, *supra* note 7, at 277-78.

47. *Id.* at 205.

48. *See* F. SCHAUER, *supra* note 43, at 10-12; Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204 (1972).

49. *See, e.g.*, J. BENNETT, LINGUISTIC BEHAVIOR (1976); D. LEWIS, CONVENTION (1969).

50. *See* F. SCHAUBR, *supra* note 43; Scanlon, *supra* note 48.

or political propositions and our unwillingness to rely on that same marketplace for propositions about a person's reputation.[51] Yet an inconsistency also exists between our willingness to accept governmental regulation of a wide range of individual conduct and our unwillingness to accept this regulation in the case of speech. This inconsistency is explainable by reference to the particular inability of government, or, more accurately, governors, to make determinations about certain classes of propositions, especially political or religious propositions. No reason seems to exist, however, to explain why government is noticeably more inept than the marketplace of ideas in determining the truth or falsity of factual propositions, and in fact it most likely is not more inept. Thus, no "glaring inconsistency" exists in the assertion that government or the courts should intervene to protect against harm except in those cases in which courts or government are likely to do so with particular inability, bias, or inefficiency, as in the case of political or religious propositions.

Not only are there good philosophical reasons for the imposition of responsibility on people for their harmful acts, including their verbal acts, but good reasons also exist for not passing all of the responsibility on to the listeners. Language is the primary means by which a group of people become a society rather than a collection of isolated individuals, and language can function in this way only if people rely on the statements of others and are justified in that reliance. Without some degree of reliance, people scarcely can communicate or cooperate with each other. Language is public property, and there are strong reasons for encouraging people to rely on at least the factual assertions of others.[52] A healthy skepticism is important, but rampant skepticism of every assertion made by anyone seems hardly comprehensible.

The differences between Haiman's and my views of the first amendment arise from our fundamentally different perceptions of the function that language performs in society. To Haiman, language's symbolic nature makes it significantly different from other forms of conduct. To the extent that man reacts to symbols, his reactions are different in kind from his reactions to physical conduct.[53] Although Haiman offers some qualifications, he is willing to accept as a broad premise the notion that "[s]ticks and stones may

51. F. HAIMAN, *supra* note 7, at 49.
52. *See* P. JONES, PHILOSOPHY AND THE NOVEL 183-84 (1975).
53. F. HAIMAN, *supra* note 7, at 20-21.

break my bones, but names will never hurt me."[54]

This notion is quite simply untrue. Names often do hurt people, and they do so because a person's knowledge of the language is part and parcel of our existence. Haiman chides Chafee[55] for having "cultural blinders" in equating swearing on a streetcar with smoking on a streetcar.[56] Yet Chafee more likely was exhibiting cultural insight.[57] A person's reaction to symbols is as much a part of him as his reaction to many other stimuli, and to say that "words and pictures per se do not do injury"[58] is to define people as purely biological organisms and not as thinking creatures whose culture and language are as much a part of them as their arms and legs.[59] Not only is language as a force a phenomenon that we should not try to eliminate, but it is also a phenomenon that we could not eliminate even if we tried.

If Haiman's assumption of rationality is incorrect as a factual premise and confused as a normative ideal, however, how does one account for the fact that the first amendment is still in the Constitution? Have the founding fathers required us to accept the assumption of rationality, like it or not? Fortunately, there are plausible explanations for an independent principle of freedom of speech other than the assumption of rationality. The concept of freedom of speech is explicable in terms of the dangers of governmental control of certain kinds of speech,[60] and these explanations do not require the unrealistic assumptions about human nature that Haiman would have us adopt. This Review is not the place to discuss those alternative explanations, because my point is only that the mere existence of the first amendment does not compel Haiman's explanation. As a result, Haiman must rely on either the

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54. *Id.* at 21. *Cf.* Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106 (1979) ("Speech often hurts. It can offend, injure reputation, fan prejudice or passion, and ignite the world").

55. *See supra* note 1.

56. F. HAIMAN, *supra* note 7, at 22.

57. That knowledge of a language is a window to knowledge of a society is a prevalent theme in modern philosophy. *See, e.g.*, J.L. AUSTIN, PHILOSOPHICAL PAPERS (3d ed., J. Urmson & G. Warnock eds. 1979); S. CAVELL, MUST WE MEAN WHAT WE SAY? (1969); L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 1958).

58. F. HAIMAN, *supra* note 7, at 20.

59. *See supra* authorities cited in note 54.

60. *See* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Blasi, *supra* note 44; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

philosophical validity of his normative argument or the empirical soundness of his factual argument. Neither succeeds, and in this sense many of Haiman's recommendations fail for lack of sound premises.

The fact that Haiman forces the reader to think about issues such as those here discussed makes his book immensely valuable. I disagree with his premises and many of his conclusions, but he forces the reader to think about free speech in a way that more cautious books would not. By spelling out in detail the conclusions that follow from his premises, Haiman presents the deepest philosophical questions about freedom of speech in a way that is much more effective than merely repeating the standard arguments without exploring their implications. Haiman's extreme version of the first amendment will force almost every reader to confront the most difficult questions of free speech theory, and that effect alone is more than enough to guarantee the book an important place in the literature of the first amendment.