BOOK REVIEW

DECIDING WHEN SPEECH ISN'T SPEECH

"SPEECH ACTS" AND THE FIRST AMENDMENT By Franklyn S. Haiman. Carbondale and Edwardsville: Southern Illinois University Press, 1993. Pp. x, 103. N.p.

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In a brief and thoroughly unsatisfying examination of the issue last year, the Supreme Court upheld Wisconsin's hate crimes law against constitutional attack. The law at issue in *Wisconsin v. Mitchell*[1] provided an additional penalty for a defendant convicted of a crime where she "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ."[2]

In approaching the legal issues, the Court outlined two unremarkable and well-established premises. First, the Court said that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."[3] In doing so, the Court recognized the difference between, for example, those who might hang the President in effigy and those who attempt to make their political statement by actually hanging the President. Protection of the former conduct as expressive activity cannot conceivably be regarded as including protection of the latter conduct.[4]

Second, the Court reiterated that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."[5] This is, of course, an eminently sensible conclusion. To hold otherwise would institute a form of thought crime, permitting the state to punish an individual for having dangerous or morally reprehensible ideas. If the First Amendment has any reliable meaning, it must be that ideas, whether merely contemplated or actually expressed, should receive the highest level of protec-

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1. 113 S. Ct. 2194 (1993).

2. *Id.* at 2197 (quoting WIS. STAT. § 939.645(1)(b) (1989-90)).

3. *Id.* at 2199.

4. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").

5. *Mitchell*, 113 S. Ct. at 2200 (citing Dawson v. Delaware, 112 S. Ct. 1093 (1992)).

tion that the Constitution can afford.[6]

If we take the Court's observations in their most basic sense, a symbolic act, without adverse physical consequences to the person at whom the expression is directed, merely conveys a constitutionally protected idea. On the other hand, conduct that causes physical harm to the targeted listener goes beyond any protected form of expressing ideas and may be punished. In the gap between these two concepts, between the symbolic expression of ideas and physically harmful conduct, the great bulk of scholarly and practical dispute remains. This is perhaps the great modern battlefield over the meaning and limits of freedom of speech.

Confusion over when speech is speech and when it is conduct, which may be regulated, has plagued both scholars and jurists for many years.[7] Justice Oliver Wendell Holmes, to whom we owe so much of our First Amendment jurisprudence, demonstrated ambivalence on this question early on. In devising the very strict "clear and present danger test," Holmes nonetheless found, for a unanimous Court, that such a danger existed when socialists provided potential draftees with leaflets criticizing mandatory conscription during World War I.[8] Today, the leaflets would be regarded as core political expression subject to the greatest constitutional protection and posing no cognizable danger whatsoever. In *Cohen v. California*,[9] the Court considered whether wearing a jacket with the words "Fuck the Draft" on it in a Los Angeles courthouse could be regarded as disturbing the peace. It is undisputed that the expressed sentiment gave great discomfort to some of those whose eyes fell upon the words in that setting. Nevertheless, a six-three majority of the Court held the jacket's inscription to be protected speech and found that "[t]he only 'conduct' which the State sought to punish is the fact of communication."[10] Yet Justice Hugo Black, generally regarded as a First Amendment absolutist,[11] joined Justice Harry Blackmun's dissent, which characterized the wear-

6. *See* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.").

7. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 79-90 (1970); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 24-27 (1992); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159 (1982).

8. Schenck v. United States, 249 U.S. 47, 52 (1919).

9. 403 U.S. 15 (1971).

10. *Id.* at 18.

11. Black once described his view this way:

> I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. . . .
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> . . . I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it.

ing of such a jacket to be "mainly conduct and little speech."[12]

It is this region between speech and conduct that Franklyn Haiman examines in *"Speech Acts" and the First Amendment.* His thesis is that the attempt by some modern scholars and First Amendment critics to label certain forms of speech as acts (*speech acts*) is a deliberate and dangerous diversion from meaningful explorations about the limits of First Amendment protection.[13] In this slim yet thoughtful volume, Haiman picks apart the notion that speech is a manifestation of unequal treatment that society is obliged to prevent instead of expression that society is obligated to protect.

In contemplative prose that takes the arguments against his position seriously, even when his opponents are brutally dismissive of First Amendment values, Haiman carefully parses out the flaws in their analysis. The success of his argument depends wholly on treasuring the importance of a free society that is willing to tolerate large or small numbers of people who express vile and untoward thoughts. It is a theory that places individual responsibility on both speaker and listener. A speaker must take responsibility for her views and choose her words and sentiments accordingly. When the views expressed are offensive to the audience, the speaker expressing such views must suffer the consequences of public opprobrium for her contemptible convictions and risk being exposed as a bigot or sexist. A listener also has responsibilities. Words have the meaning and importance that we give them. One who hears hateful remarks must either dismiss the expressions as the ravings of a lunatic or take up the debate to convince others of the groundlessness of the opposing viewpoint.

In this respect, Haiman depends on the traditional "more speech" remedy[14] to appeal to what Madison called the "genius of the people,"[15] so that unwelcome ideas can be exposed and replaced with more desirable ones in the public discourse.[16] These arguments are not new and are not likely to convince those who have already set their minds against them. Haiman's thesis appears to be aimed at those new to the debate, those who have not already built up an immunity to this logic.

Perhaps unintentionally, though, Haiman's book demonstrates the fragility of First Amendment values. Supporting free speech often means defending the most base and despicable sentiments as well as righteous ideas. It often requires a strong stomach. Only criminal defense lawyers must as frequently argue that, without exception, constitutional rules protect even a particularly disgusting individual. It is most difficult to remain true to principle when

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Konigsberg v. State Bar of Cal., 366 U.S. 36, 61, 63 (1961) (Black, J., dissenting).

12. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

13. FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT at xi (1993).

14. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

15. THE FEDERALIST No. 39, at 189 (James Madison) (Bantam ed. 1982).

16. HAIMAN, *supra* note 13, at 34.

representing those who may be prima facie examples of the unprincipled. Even the most stalwart First Amendment advocates will find instances when their consciences are so shocked that they may redefine protected speech as unprotected conduct in order to regulate that particularly startling form of expression.

Haiman demonstrates that he too is human when he turns to examine the question of hate crimes and sentence enhancement. This area is undoubtedly the most difficult for free speech champions, and Haiman appears to stumble here. Presaging the Court's *Mitchell* decision, which was issued after the book was finished, Haiman reasons that "hate crimes pose a more serious danger to society"[17] than crimes not motivated by bias. This factor, in his view, justifies higher sentences.

He remains concerned, however, that the "only way" to know if a crime is indeed a hate crime is if "the perpetrators have revealed their motivation by expressing it verbally or symbolically,"[18] such as by painting a swastika on a synagogue or hurling an epithet at a person while beating her up. Haiman worries that, in the absence of a vocalized epithet, a similar crime might be punished less severely, which would mean that a greater punishment for a biased act would be the result of an expression of beliefs.[19]

In the end, however, Haiman decides that such punishments affect speech only incidentally and are actually meted out for the commission of more serious crimes.[20] These differences, he writes, are "comparable to the differences in punishment among first-degree murder, second-degree murder, and manslaughter, where the victim is just as dead, but the motivation or state of mind of the killer determines the gravity of the crime and the punishment."[21]

Yet, these acts are not necessarily conclusive proof of the actor's motivation. Imagine that two cars collide at an intersection. The drivers, members of different races, get into a heated argument about fault. One eventually assaults the other. As she attempts to injure the other driver, she voices a racial slur, calculated to compound the blows struck by her hands. It is possible that this epithet reflects her true racial attitudes, which may have caused this dispute to escalate to fisticuffs; it is also possible that the heat of battle produced an utterance that the speaker would condemn in calmer circumstances.

Should the expression of a reprehensible phrase transform a run-of-the-mill assault into a hate crime? Plainly, on these limited facts, it should not. Yet it is not unbelievable that such a charge might be filed as an attempt to punish someone solely for uttering otherwise unpunishable words. The charge might also be brought solely for strategic prosecutorial purposes; that is, the government could use it to encourage a plea bargain to the base charge of

17. *Id.* at 36.
18. *Id.*
19. *Id.* at 37.
20. *Id.* at 48.
21. *Id.* at 38.

assault. These possibilities should give pause to any who cavalierly dismiss the First Amendment's applicability to these situations.[22]

The Supreme Court followed the same logic as Haiman's in *Mitchell.* Todd Mitchell was convicted of aggravated battery, but his sentence was extended beyond what he might otherwise have received because he selected his victim on the basis of race.[23] Mitchell had directed a group of African American men and boys to beat a white youth unconscious and steal his tennis shoes. They left the youth in a coma.[24] The evidence established that the attack was racially motivated; the victim was unknown to the assailants and selected solely because he was white.[25] The Court concluded that enhancing Mitchell's punishment for the discriminatory selection of his victim was a legitimate sentencing consideration.[26] Deferring to the wisdom of Wisconsin's legislature and relying on *Dawson v. Delaware*[27] and *Barclay v. Florida*,[28] the Court found no distinction between a judge choosing the high end of a sentencing range when racial animus is a statutory aggravating factor and the newly popular approach of sentence enhancement.

The difference between aggravating factors within a sentencing range and sentence enhancement, however, is palpable. Only in sentencing enhancement schemes can a specific number of years be accurately attributed to thoughts otherwise immune from criminalization. On the other hand, in traditional sentencing schemes, there is no way to determine the extent to which such thoughts are responsible for a sentence. There, judges are afforded virtually unfettered discretion within a sentencing range and are permitted to rely on a wide variety of factors to determine whether a minimum or maximum sentence is appropriate. Without explaining the decision, a judge may choose the high end of a sentence, solely because, for example, the defendant was not standing erect in court. Thus, in the federal system, the Court has said, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[29]

22. In 1991, Michael Hamm, an African American, was arrested for assaulting his wife, a crime that carried a potential one-year sentence. Because he called the arresting officer a "white cracker," he was also charged with violating the Florida hate crimes law, potentially tripling his sentence even though the new charge was unrelated to the original criminal accusation. Larry Rohter, *Without Smiling, to Call Floridian a "Cracker" May Be a Crime*, N.Y. TIMES, Aug. 25, 1991, at A26.

23. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993).

24. *Id.* at 2196-97.

25. According to the opinion, Mitchell asked a group of black men and youths, "Do you all feel hyped up to move on some white people?" and, pointing to a white man walking by, added, "You all want to fuck somebody up? There goes a white boy; go get him." *Id.*

26. *Id.* at 2202.

27. 112 S. Ct. 1093, 1097-99 (1992) (holding that defendant's membership in white racist prison gang could be used to increase the defendant's sentence only where that association was relevant to defendant's dangerousness, bad character, or to other aggravating circumstances).

28. 463 U.S. 939, 949 (1983) (plurality opinion) (permitting a sentencing judge to consider racial animus toward the victim as an aggravating factor).

29. United States v. Tucker, 404 U.S. 443, 446 (1972).

These sentencing schemes are staggering delegations of discretion, particularly since no evidentiary hearing is required.[30] The judge may rely upon evidence that would otherwise be inadmissible in a trial.[31] Hearsay evidence, which cannot be used to convict a defendant,[32] can be used to enhance the sentence.[33] Even illegally seized evidence, subject to the exclusionary rule if offered at trial, may be admissible in the sentencing hearing, when the judge chooses to hold one.[34] There is little wonder that in this essentially standardless proceeding, where virtually anything and everything may be considered, the courts have seen nothing wrong with considering animus of the accused toward a particular group of which the victim is a member.

In most sentence enhancement statutes, however, an explicit finding that antigroup thought motivated a crime will increase a sentence by a specified length of time. An example may help illuminate the difference. Let us assume that A is convicted of assault, a crime that carries a sentence of one to three years. Let us also assume that during the course of the assault he uttered antigay remarks. In considering these remarks the judge may deem the assault a hate crime, which raises the potential sentence to a range of eight to ten years. If A then receives a sentence of eight years, five years of that term can be directly attributed to remarks that could not constitutionally be the subject of punishment standing alone. Hence, at least five years of A's sentence was handed down as punishment for his words alone, in direct violation of the guarantees of the First Amendment.

The hypothetical posed is hardly farfetched. In *State v. Stalder*,[35] the defendant was charged with simple misdemeanor battery for allegedly pushing another individual.[36] Because he also made derogatory ethnic remarks during the confrontation, the hate crimes law was invoked, and what had been a misdemeanor was elevated to third-degree felony.[37] The Florida Supreme Court found that the mere utterance of an epithet may have only a "tenuous nexus" to the crime amounting to "mere temporal coincidence" and may not be subject to punishment.[38] Nonetheless, it upheld the statute as applying only to instances where the commission of the crime, not any accompanying utterance, "evidence the prejudice" that is the subject of the enhanced punishment.[39]

30. *See, e.g.*, United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990) (holding that decision of whether to grant an evidentiary hearing in a sentencing proceeding lies within the discretion of the trial court).

31. *See* FED. R. EVID. 1101(d)(3); U.S. SENTENCING GUIDELINES § 6A1.3(a).

32. *See* FED. R. EVID. 802.

33. *See* 18 U.S.C. § 3661 (1988).

34. United States v. McCrory, 930 F.2d 63, 67-69 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992).

35. 630 So. 2d 1072 (Fla. 1994).

36. *Id.* at 1073.

37. *Id.*

38. *Id.* at 1076.

39. *Id.*

The fundamental First Amendment proposition at stake here is easily stated: expression that cannot constitutionally be made criminal when standing alone should not be made the cause of additional punishment simply because of its manifestation during the commission of a separate crime.[40] While not all forms of expression punishable under a hate crimes enhancement statute are within the First Amendment's ambit, some do receive that provision's guarantees.[41] The First Amendment's protection of ideas, speech, and associations—including those that society deems morally contemptible—should not be limited to preventing these thoughts and utterances from being the basis of a crime; it should also prevent them from being the basis of additional punishment.

The state simply cannot, consistent with the federal Constitution, exact a price from individuals for holding beliefs that are at odds with those of the larger society. Otherwise, the First Amendment's free speech guarantee would be a dead letter. There is no constitutionally cognizable distinction between making it a crime to hate and making hate the sole factor in determining whether a criminal defendant shall receive a higher sentence. In both instances, it is the individual's prejudice that is being punished and not any manifestation of it, since the manifestation is already being punished.

What the *Stalder* court attempted to do, and what neither Haiman nor the United States Supreme Court has done, is recognize a difference between odious motives and criminal intent. It is a tricky and difficult distinction to understand, but one crucial to hate crimes discourse.[42] Take the following example. If Jean Valjean is charged with mere theft, he will receive the same sentence whether he steals bread to feed his poor family or steals it to deny bread to another family. Clearly, the second motive is more reprehensible and logically could be regarded as a more serious crime. However, he faces the same punishment no matter what his underlying motive, for the requisite

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40. In an analogous situation, the Court noted,

> If, therefore, a state statute penalizes innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom.

Herndon v. Lowry, 301 U.S. 242 (1937) (footnote omitted).

41. Defacing a church, mosque, or synagogue cannot be considered protected expression, even though it conveys an idea. Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."). On the other hand, expressive activities whose harm lies largely in the offense that they arouse in others cannot be criminalized. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992) ("The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.").

42. *See, e.g.*, Susan Gellman, *"Brother, You Can't Go to Jail for What You're Thinking": Motives, Effects, and "Hate Crime" Laws*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 24; Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991).

mens rea is simply his intent to steal bread. On the other hand, if a statute made it a crime to steal food to deny sustenance to another, further inquiry into Valjean's intent would be appropriate. Valjean could have the requisite criminal intent and could consequently suffer the greater punishment that that penal law entails.

The impetus for hate crime laws is the effect caused when a criminal seeks to deprive persons of their legal rights or of the opportunity to participate in their community's political or social life simply because of their race, religion, gender, national origin, sexual orientation, or other group characteristic. Nonetheless, it is the criminal act itself, not any utterance or hatred behind it, that conveys the greatest threat to members of the targeted community. In treating motive and criminal intent as the same in *Mitchell*, the Court forgot what it previously recognized: "What is a threat must be distinguished from what is . . . protected speech."[43] The intent to make it more dangerous for members of certain groups to live in a community, essentially a constitutionally unprotected threat, might be subject to punishment. This is different from punishing crimes more severely when they are committed by those who operate from hatred born of group classification.

Unless such a distinction is observed, it is easy to disregard any logical need for a tight nexus between earlier expressions of group hatred and current actions. Such disregard appears to have occurred in one eye-opening case, *People v. Joshua H.*[44] Here, a juvenile was convicted of an assault motivated by bias against the victim's sexual orientation in violation of California Penal Code section 422.7. The court considered a statement made by the minor three years earlier that he "wanted to belong to an organization that was doing something about . . . the faggots taking over the world"[45] as evidence that his present assault was motivated, at least in part, by animus toward the victim's sexual orientation.[46] Even if one accepts the premise that the particular motivation—hate—merits additional punishment, this prosecution must be regarded as doing nothing less than punishing an odious attitude toward gays.

Joshua H. and similar cases belie Haiman's confidence that the introduction of irrelevant evidence is foreclosed.[47] The Supreme Court's recognition in *Dawson* that associational ties may be relevant to "future dangerousness"[48] is a loophole of enormous dimensions that should not give free speech champions much comfort.

Haiman defends his approach to hate crime statutes by likening them to civil rights laws that prohibit group-based discrimination.[49] This analogy, too,

43. Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam).

44. 17 Cal. Rptr. 291 (Cal. Ct. App. 1993).

45. *Id.* (unpublished portion of opinion addressing various evidentiary matters) (on file with author and the *New York University Review of Law & Social Change*).

46. *Id.*

47. HAIMAN, *supra* note 13, at 43.

48. Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992).

49. HAIMAN, *supra* note 13, at 46.

fails to make the necessary distinctions. What civil rights laws punish is not the manifestation of bigotry or the evil thoughts of the bigot, but the denial of service, housing, employment, etc., without a legitimating explanation. This is a critical difference, for it is the intentional act, not the underlying belief system, that is the subject of legal process. If it were otherwise, if the bigotry itself was illicit rather than the discriminatory conduct, then calling a football team the *Washington Redskins* could be said to violate civil rights laws by sending an implicit message that Native Americans are inferior and unwelcome, given the derogatory meaning of *Redskins* and the bigotry expressed in its use.

Most of what Haiman argues in his book rebels against the notion that speech can be regarded as conduct subject to governmental regulation or restriction. In every other section of his book, Haiman strongly asserts that speech has only the power that we give it. Utterances "accomplish nothing unless they are taken seriously and there are other forces at work beyond the words themselves to make them stick,"[50] he writes. When a racist spews forth an epithet, we can discount it as the ravings of a lout. But at some point, Haiman argues, speech may become so intimidating as to leave victims with choices that are "so unacceptable, and the possible consequences of rejection so destructive, that no one would dispute the validity of prohibiting" it.[51] This appears to be a valid truism, but it sidesteps the entire dispute over what speech in what contexts falls into this category of prohibitable speech.

Haiman nevertheless rejects the subjectivity that Professor Catharine MacKinnon or critical race theorists would probably bring to Haiman's unacceptable and destructive consequences equation.[52] He finds value in permitting offensive and antisocial messages, which serve both as a harbinger of problems that society must face and as an indicator of attitudes that cannot be overcome through suppression. If expression of group hatred is suppressed, people holding such attitudes may move underground, where their hatred may grow more violent. Those who remain on the surface can gain more publicity for themselves and, if prosecuted, become martyrs. The real solution, according to Haiman, is to foster educational measures that expose racist and other unenlightened sentiments for what they are.[53] Admittedly, sometimes the cul-

50. *Id.* at 11.

51. *Id.* at 16 (footnote omitted).

52. MacKinnon, for example, has advocated the suppression of dominant voices in order to enhance the rights of traditionally subjugated classes. She has written that schools ought to ban "academic books purporting to document women's biological inferiority to men or arguing that slavery of Africans should return." CATHARINE A. MACKINNON, ONLY WORDS 107 (1993). She goes on to say that the "legal distinction between screaming 'go kill that nigger' and advocating the view that African-Americans should be eliminated from parts of the United States needs to be seriously reconsidered, if real equality is ever to be achieved." *Id.* at 108. Haiman obviously means something quite different when he formulates his version of unnacceptability. HAIMAN, *supra* note 13, at 17 (suggesting that the test is whether "any normal person might reasonably perceive as menacing" the speech in question, an objective test).

53. HAIMAN, *supra* note 13, at 34.

tural changes that are required proceed only at a glacial pace. Still, Haiman asserts that this is part of the price of a free society.[54]

That conclusion is unsatisfactory to those who, like MacKinnon, see the common circulation of certain ideas to be an obstacle to equality. To MacKinnon, "materials that subordinate, degrade or dehumanize women" should be placed in yet another category of unprotected speech, for such materials are acts that oppress women.[55] Haiman answers this argument by asserting, correctly, that "[s]peech is not the same as action"[56] and concluding that to conflate the two in law is probably not socially productive.[57] Those unsatisfied with this answer are unlikely to be convinced by his conclusion, but then their dissatisfaction is really with the First Amendment.

It is easy enough to see that group generalizations can be damaging and long-lasting without conceding that censorship or punishment is an appropriate response. For centuries, lawyers have been portrayed as amoral parasites.[58] It is an image that persists and has even led some to suggest that hate crimes laws should cover speech directed at lawyers as well.[59] Yet no one, other than an occasional bar association president,[60] seriously believes that changing the portrayal of lawyers in the media or sanctioning those who tell lawyer jokes will make the profession more beloved. In fact, when leaders of the profession make such suggestions, they simply assure that their protests will become the brunt of new jokes on late-night television. Aggrieved lawyers cannot hope to change attitudes by pressing for new laws that restrict or punish antilawyer talk. To the extent they achieve any success in reversing popular opinion, it will be by engaging their critics in dialogue for the hearts and minds of the public.

Haiman wades into other sticky First Amendment issues that concern speech-act distinctions, such as copyright violations. For him, the unauthorized appropriation of someone else's expression raises the possibility that such a thing as a "speech act" could exist.[61] Haiman suggests that this category of speech should be accorded special treatment because the injury to "tangible assets of the victim is sufficiently great, and the free speech interest of the robber is sufficiently slight, to justify the invocation of social controls through the law."[62]

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54. *Id.* at 85-86.

55. *Id.* at 55 (quoting Catharine A. MacKinnon, *as quoted in* Tamar Lewin, *Canada Courts Say Pornography Harms Women and Can Be Barred*, N.Y. TIMES, Feb. 28, 1992, at B7).

56. *Id.* at 57.

57. *Id.* at 60-61.

58. *See generally* Robert C. Post, *On the Popular Image of Lawyers*, 75 Cal. L. Rev. 379, 379 (1987) (citing lawyer bashing in the New Testament, Shakespeare, and Sir Thomas More's *Utopia*, among other sources).

59. *See* David Margolick, *A Demand for Cease-Fire on Laywer-Bashing Puts a Bar President in the Line of Fire*, N.Y. TIMES, July 9, 1993, at B1.

60. *Id.*

61. HAIMAN, *supra* note 13, at 62.

62. *Id.* at 67.

This answer, however, falls into the same trap that plagues too much First Amendment discussion. It focuses on the low value of a particular kind of speech and engages in a balancing of interests between the value of the speech and its harm to another party. When interests are balanced, there is great danger that majority tastes will prevail every time and danger that the speech interest will not predominate. Freedom of speech is most important to those who are challenging the prevailing social order. Haiman fails to address fully the tension between the First Amendment and copyright law.[63] In fact, it can be persuasively argued that the idea of property in speech would have been foreclosed by the First Amendment had it not been for the Constitution's Copyright Clause.[64]

In the end, Haiman's defense of the First Amendment appears to rely on the lack of a moral consensus that certain speech ought to be proscribed.

> Even though a majority might wish it were so, there is clearly no consensus in our society that so-called obscene or pornographic material is immoral. There may be a broader consensus with respect to the general idea of expression that denigrates people on the basis of their race or religion, but when one gets down to particulars, like the telling of an ethnic joke to one's friends, or the unthinking utterance of a racial epithet in anger or frustration, that moral consensus soon disintegrates.[65]

While one may question Haiman's conclusion that no moral consensus exists on either question, that should not be the relevant inquiry. Taking into account his views on hate crime jurisprudence, Haiman's theory appears to be one of extreme majoritarianism. Speech censured by the majority may, according to Haiman, be the subject of constitutional prohibition. If this view is accepted, it would engender new disputes about what the relevant majority market is for the ideas being peddled. Can a small community silence a single dissenter who expresses views that his neighbors find immoral? In another community with a greater lack of consensus, would such expressions be protected? A scheme under which the answer to both questions is "yes" would cause the constitutional guarantee of freedom of speech to have different

63. *See generally* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 2.05[C][2], at 2-61 to 2-84 (1984) (balancing the conflicting ideals underlying the Copyright Clause and the First Amendment).

64. U.S. CONST. art. I, § 8. Obviously, a copyright holder relies on a government license to restrain others from duplicating the protected expression. This renders it somewhat less than free. Yet the Copyright Clause is considered an "engine of free expression," Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 558 (1985), by establishing a financial incentive for the originator of the creative work. For further discussion about these dichotomies, see Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel,'* 38 EMORY L.J. 393 (1989).

65. HAIMAN, *supra* note 13, at 83.

meanings depending on the geographic location of an utterance. This community standards approach, which the Supreme Court seemingly adopted in *Miller v. California*[66] for obscenity, but has not applied to other forms of expression, appears at odds with Haiman's other expressed views. He would presumably reject it as an appropriate way of determining moral consensus, but then again, no one (including Haiman) has ever offered an accurate way to determine such a thing.

Ultimately we rely on the constant testing and redefinition of what free speech means—in the courts, in the academy, and among the public. For free speech advocates, it is virtually impossible to rank certain forms of expression higher than others, depending on perceived moral or social worth. These people would agree with the Supreme Court's rejection of a New York law that attempted to restrict the distribution to minors of pulpy detective stories featuring tales of crime, bloodletting, and lust.[67] Even though the Justices saw "nothing of any possible value to society in these magazines," the Court held that "they are as much entitled to the protection of free speech as the best of literature."[68] That view will always be disputed and tested.

In *"Speech Acts"* Haiman contributes to the debate by refuting some challenges to the primacy of freedom of speech while raising new ones that others must address. With respect to hate crime laws, Haiman gives in to the understandable temptation to label some forms of expression simply unworthy of protection given the countervailing social interests. For a free speech advocate, however, such lapses serve only to weaken a First Amendment, at which a multitude of forces continue to chip away. They, too, must be resisted.

66. 413 U.S. 15 (1973).
67. Winters v. New York, 333 U.S. 507, 508 (1948).
68. *Id.* at 510.