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BOOK REVIEW

"SPEECH ACTS" AND THE FIRST AMENDMENT. By Franklyn S. Haiman. Carbondale and Edwardsville: Southern Illinois University Press 1993. pp. 103. \$17.50.

*Reviewed by Lawrence Friedman**

I. INTRODUCTION

Of the 1989 student protests in Beijing's Tiananmen Square, one image lingers still: a lone figure standing motionless before a column of tanks, an extreme act of self-expression in defense of the right to express oneself.¹ The makeshift Statue of Liberty erected by the students occupying the Square pointed to the country providing their inspiration. The foundations of that inspiration may in turn be traced to the handful of words—"Congress shall make no law . . . abridging the freedom of speech, or the press . . ."²—which have become synonymous with American-style democracy.³

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1. University students occupied Tiananmen Square in April 1989, demonstrating against the treatment of former Communist Party leader Hu Yaobang, as well as the economic and social conditions in the People's Republic of China. See Jeffrey A. McCredie, *Human Rights Concerns in the People's Republic of China: An Appraisal of Recent Events*, 3 TEMP. INT'L & COMP. L.J. 217, 217-18 (1989); Jeane Kirkpatrick, *The Beijing Spring*, WASH. POST, June 13, 1989, at A27.

2. U.S. CONST. amend. I.

3. As William Van Alstyne observed:

In reality, the First Amendment's free speech protections exist in two forms. The first is that idealized by the Chinese students in Tiananmen Square, a boundless, autonomous freedom of expression. The second is that of experience, for Erwin Griswold was surely correct when he argued that "no law' does *not* mean 'no law.'"⁴ The Supreme Court has stated time and again that certain actions may be proscribed so long as dampening expression is neither an aim nor a primary effect. Thus, where "speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."⁵

Because the governmental interest in regulating "nonspeech" must be unconnected to expression,⁶ a reviewing court faces the threshold question of whether particular action constitutes expressive conduct.⁷ While "[t]he First Amendment literally forbids the abridgement only of 'speech,'" the Supreme Court has

[A] good case can be made that the most vital clauses [of the United States Constitution] may be [A]rticle I, [S]ection 9's provision for habeas corpus and the [F]irst [A]mendment clause on free speech and free press. The first may enable one to be released from prison when wrongfully held. The second enables one freely to speak one's mind. Grant people guarantees such as these to live by and they may be able to move the world.

WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT CASES AND MATERIALS* 20 n.41 (1991). Justice Benjamin Cardozo remarked that the First Amendment is "the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Indeed, though the Constitution "as a whole was called a charter of liberty by the men who wrote and adopted it[,] it is the First Amendment that seems to come closest "to defining what it means to be an American today." WALTER F. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY*, at ix (1976).

4. Solicitor General Erwin Griswold's Oral Argument in *New York Times, Inc. v. United States*, 403 U.S. 713 (1971) in *MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955*, at 175 (Peter Irons & Stephanie Guitton eds., 1993) (alteration in the original).

5. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

6. *Texas v. Johnson*, 491 U.S. 397, 407 (1989). Indeed, if a law does target expression, it must survive the "most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). Such a law is justified only if the state demonstrates both a compelling governmental interest and that the law has been narrowly drawn to achieve that interest. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 509-11 (1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987).

7. See *Johnson*, 491 U.S. at 403.

"recognized that its protection does not end at the spoken or written word."⁸ Today, amidst debates on "political correctness," the battle has been joined over the interpretation of certain expressive conduct as "nonspeech" and consequently beyond First Amendment protection. Catharine MacKinnon, for example, advocates defining pornographic speech as sexually abusive conduct⁹ and cross-burning as "an act of terrorism,"¹⁰ thus removing both from the First Amendment's ambit.

Franklyn S. Haiman,¹¹ on the other hand, argues that Professor MacKinnon's theory is mere sophistry. He rails against the notion "that certain types of speech are really speech acts and should therefore be treated differently from 'pure' speech, that is subjected to the same scrutiny and possible regulation by society as other kinds of regulable action, behavior, or conduct."¹² Haiman reasons that efforts to distinguish action from expression are "a bit of word magic whereby the flapping of vocal chords, the scratching of a pen, . . . or the hoisting of a banner are transformed from symbolic to nonsymbolic behavior by an act of definition."¹³ He believes that a fundamental difference obtains between symbolic and nonsymbolic interactions and that the First Amendment is *always* implicated in the former and only occasionally in the latter."¹⁴ In *"Speech Acts" and the First Amendment*, Haiman explores this theme in reference to a variety of attempts from both inside and outside

8. *Id.* at 404. The Supreme Court has long appreciated the First Amendment's applicability to symbolic, nonverbal expression. *See, e.g.,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-34 (1943) (recognizing that a "flag salute is a form of utterance").

9. *See* CATHARINE MACKINNON, ONLY WORDS 45-68 (1993) (arguing that pornographic speech should be treated as an act rather than expression).

10. Anthony Lewis, *The First Amendment, Under Fire From the Left*, N.Y. TIMES, Mar. 13, 1994, § 6 (Magazine), at 40, 42 (quoting Catharine MacKinnon).

11. Franklyn S. Haiman is the John Evans Professor Emeritus of Communication Studies at Northwestern University and a vice president of the American Civil Liberties Union. He has written numerous articles and books on freedom of speech, including *Speech and Law in a Free Society* (1981).

12. FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 1-2 (1993). Haiman places the phrase "speech acts" in quotes to emphasize the concept as a "source of more mischief than enlightenment in our discourse about freedom of speech." *Id.* at xi.

13. *Id.* at 4.

14. *Id.* at 5.

academia to limit the extent to which conduct or action may constitute expression.

II. EXPRESSION AND ACTION

Throughout "*Speech Acts*," Haiman uses the values preserved by the First Amendment as touchstones.¹⁵ These values include the following: the ability to participate in self-government;¹⁶ the idea that a free and unfettered marketplace of ideas is the best avenue in which to search for the truth;¹⁷ the ability to express oneself;¹⁸ and, finally, "catharsis and the consequent maintenance of a balance in society between stability and change."¹⁹ To this list, Haiman adds another value: the uniquely human ability "to use, transmit, comprehend, and respond to symbols" that "sets us apart from all other earthly creatures."²⁰ He continues:

Although there are indications that chimpanzees, dolphins, and whales can learn to manipulate and respond to simple symbols and that dogs may dream, none of them have written history books nor told stories to their offspring that would enable those later generations to learn from the mistakes of their predecessors. Nor have they put paintings on cave walls. It often has been argued that the most defining characteristic of what it means to be human is this symbol-

15. Haiman acknowledges that Thomas Emerson initially catalogued the inventory of First Amendment values to which we commonly refer. See THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

16. See HAIMAN, *supra* note 12, at 7.

17. "[T]here is ordinarily a better chance of approximating the truth when ideas are challenged by competing ideas than when they are dogmatically asserted and accepted." *Id.*

18. The First Amendment provides "the healthful opportunity . . . for individuals to say what is on their minds and to express their creativity through literature, science, art, music, and so on." *Id.* Jason Talerman has noted that "[a]rtistic expression is protected not only due to the desire for a more aesthetically pleasing landscape, but also because it acts as a unique conduit for cultural edification." Jason Talerman, Note, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. THIRD WORLD L.J. 117, 123 (1994) (footnote omitted).

19. HAIMAN, *supra* note 12, at 7. "By letting people blow off steam, a society not only preserves its equilibrium in the short run, but is made aware of problems that need to be addressed if that stability is to be sustained in the long run." *Id.*

20. *Id.* at 8.

creating and symbol-transmitting capability. And if that is what being human is mainly about, what could be more important than a First Amendment that protects and nurtures it?²¹

The philosophical background thus established, Haiman turns to the simple assertion that "words are deeds."²² He suggests that "there is time and space between speech and action—sometimes only a moment and sometimes more, sometimes an inch and sometimes a continent—but there is always the opportunity for the audience to think about what has been said and decide what to do about it, and always the chance that what has been threatened may not ensue."²³ Expression, therefore, can only be assessed in context, and we should not abide "a theorist's a priori decision to classify *all* threatening utterances as speech acts that are categorically beyond the protection of the First Amendment."²⁴ The author advocates analyses that "take into account not only the symbolic stimulus, but the mental response of its audience, the relationship of the parties involved, and the context in which it occurs."²⁵

For Haiman, symbolic expression loses First Amendment protection when a direct relationship exists between the speech and, say, a threat of immediate violence. He acknowledges, however, that "there is still *some* time and space between the speech and the action that follows, time and space for the audience to absorb the speaker's message and decide (though it may be a split-second decision) what to do about it."²⁶ Thus, the problem with the speech act perspective is that it leaves human beings out of the equation: "[E]xcept for the noise they make, words [and symbols] are not like the sound of an alarm clock

21. *Id.* at 8-9.

22. *Id.* at 10 (quoting LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 46e (G.H. von Wright ed. & Peter Winch trans., 1980)).

23. *Id.* at 16.

24. *Id.* at 17.

25. *Id.* Haiman laments the fact that the Supreme Court test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), has been misunderstood by judges and others seeking to "apply it to instances of nonverbal, but symbolic, behavior because certain physical by-products or components lead them to believe that more than speech is involved." *Id.*

26. *Id.* at 23.

nor are they comparable to the shaking of someone to wake them up, where the awakening can be immediate and automatic."²⁷ The speech act perspective is especially prevalent with regard to so-called hate speech and hate crime laws.²⁸ As the Supreme Court has devoted some attention to these subjects, it is helpful to discuss Haiman's arguments in light of the Court's decisions.

III. HATE SPEECH

The United States Supreme Court addressed the issue of hate speech in *R.A.V. v. City of St. Paul*.²⁹ In the early morning hours of June 21, 1990, Robert Viktora ("R.A.V.") burned a cross in the yard of a home belonging to an African-American family.³⁰ The City of St. Paul charged Viktora with violating the city's hate speech ordinance. The ordinance provided that:

[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.³¹

Viktora challenged the ordinance on First Amendment grounds. However, the Supreme Court of Minnesota held that the ordinance applied only to fighting words—"those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias."³² Because "fighting words" are not protected by the First Amendment,³³

27. *Id.* at 24.

28. In "*Speech Acts*," Haiman also addresses "Sexist Speech," "Information and Communication Theft," and "Victimless Communicative Actions." See *id.* at 49-80.

29. 112 S. Ct. 2538 (1992).

30. See Ruth Marcus, *A Family's Nightmare: Cross-Burning in St. Paul*, WASH. POST, Dec. 1, 1991, at A23.

31. ST. PAUL, MINN. LEG. CODE § 292.02 (1990).

32. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev'd sub nom.* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

33. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that

neither was the conduct described in the St. Paul ordinance.

On appeal, a majority of the Court³⁴ held the St. Paul ordinance unconstitutional because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addressed,"³⁵ making it akin to a forbidden content-based regulation. The Court explained that fighting words may be regulated "because of their constitutionally proscribable content,"³⁶ and not because they represent specifically discernable categories of speech unrecognized by the Constitution. The unprotected features of the fighting words are, "despite their verbal character, essentially a 'non-speech' element of communication."³⁷ Nonetheless, the legitimate speech elements commingled with the unprotected features of fighting words remain entitled to full First Amendment protection.

In practice, then, a state may regulate constitutionally proscribable speech so long as "the basis for the content discrimination consists entirely of the very reason the entire class of speech . . . is proscribable."³⁸ For instance, a state may constitutionally proscribe obscenity involving only "the most lascivious displays of sexual activity" because its content is wholly obscene, but a state cannot constitutionally proscribe "only that obscenity which includes offensive *political* messages" because its content includes, in addition to obscenity, otherwise protected speech.³⁹ As Justice Scalia explained, especially intolerable modes of expression may be regulated, but expression *qua* expression may not.⁴⁰ In *R.A.V.*, the Court held that the city did not attempt to prohibit fighting words because of the threatening "mode" through which they were expressed, but instead sought to prohibit the expressive communication itself. Given the Court's conclusion that hateful fighting words cannot be proscribed, the possibility of regulating hate speech that does

"fighting words" are unprotected expression under the First Amendment).

34. Chief Justice Rehnquist and Justices Kennedy, Souter and Thomas joined in Justice Scalia's majority opinion. *R.A.V.*, 112 S. Ct. at 2541.

35. *Id.* at 2542.

36. *Id.* at 2543.

37. *Id.* at 2545.

38. *Id.*

39. *Id.* at 2546.

40. *Id.* at 2549.

not descend to the level of fighting words would seem to be presumptively foreclosed.

Like a majority of the Court, Haiman views hate speech laws generally as unconstitutional because on a fundamental level these laws impinge upon pure expression and not "speech acts."⁴¹ "It is not the same," he writes, "to refer to people as 'niggers' or to wear white robes at a Ku Klux Klan rally as it is to deny African-Americans equality of opportunity for jobs, education, or housing."⁴² According to the author, the former is expressive conduct, while the latter is simply action. The harms that flow from speech must be distinguished from harms suffered as the result of actions. Actions have definite and inevitable effects; the consequences of expression, on the other hand, are probabilities that may occur: "[n]one of them are [sic] automatic or inevitable. Like the responses to all pure speech, these consequences are mediated by what goes on in the victim's mind; and that will vary according to the past experiences, psychological and physical strength, status, needs, and goals of each particular target."⁴³ While Haiman is not insensitive to the emotional harms of hate speech,⁴⁴ he does not believe such harms justify prohibition in most cases:

Even if one were to concede . . . that the emotional distress some victims of hate speech experience is sufficiently serious, predictable, and verifiable to make legal remedies a feasible and justified response, questions remain whether

41. See HAIMAN, *supra* note 12, at 26-27.

42. *Id.* at 27.

43. *Id.* at 28. "Any time the mind processes a communication, it is acting as an intermediary between stimulus and response, and that means reflection is taking place, even if only for a split second and is *almost* automatic." *Id.* at 29.

44. See *id.* at 29-30. Hate speech, symbolic and otherwise, tends to subordinate and victimize individuals and groups. As Susan Gellman has observed, "[p]sychological responses [to hate speech] include humiliation, isolation and self-hatred. These responses may affect intergroup relations and even relationships within the group." 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, 340-41 (1991). See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989) (discussing the physical and psychological effects of hate speech).

such remedies are counterproductive and whether they are the most effective way of dealing with the problem.⁴⁵

Haiman suggests that prohibition does not dissipate hateful expression; rather, it tends to force such attitudes underground,⁴⁶ and experience dictates that once underground, suppressed views may flourish.⁴⁷ Moreover, hatred may then be expressed "in more indirect and sophisticated ways"⁴⁸ as the suppressed ideas become a "forbidden fruit," turning "advocates of racism into martyrs."⁴⁹

Let us return for a moment to the situation the Supreme Court faced in *R.A.V.* As Haiman insists, an instant of human thought and reflection often lies between pure speech and pure action. In finding that Robert Viktora's act in *R.A.V.* conveyed a "distinctive idea," the Court inferred the existence of such a moment.⁵⁰ But the Court's rigid formalism failed to take account of the actual context in which the act occurred. This is unfortunate because humans do not interact in a vacuum, and context—the circumstances, or setting, in which action occurs—offers a key to determining whether a moment of thought and reflection is truly possible.

Whether communication is protected speech or a nonspeech act depends upon the kind of conduct "combined with the factual context and environment in which it was undertaken."⁵¹ With this standard in mind, we can endeavor to separate certain pure action from pure speech without resorting to labeling conduct a "speech act." The actual context of *R.A.V.* illustrates the distinction: it seems extremely doubtful that a family waking in the middle of the night to a burning cross on their front

45. HAIMAN, *supra* note 12, at 32.

46. *See id.*

47. In the People's Republic of China, for instance, government-sponsored suppression of "dangerous" religious beliefs has resulted in the latent popularity of those same beliefs. *See* THOMAS HEBERER, CHINA AND ITS NATIONAL MINORITIES: AUTONOMY OR ASSIMILATION? 113 (1989).

48. HAIMAN, *supra* note 12, at 33.

49. *Id.*

50. *See R.A.V.*, 112 S. Ct. at 2548.

51. *Spence v. Washington*, 418 U.S. 405, 410 (1974). *See also Towne v. Eisner*, 245 U.S. 418, 425 (1918) (noting that speech "may vary greatly in color and content according to the circumstances and the time in which it is used").

lawn could objectively respond—even for an instant—in any way approximating reasoned reflection.⁵² Viewed in this light, Viktora's conduct looks more like MacKinnon's "act of terrorism" and less like an act of expression, and St. Paul's ordinance, at least so far as it concerned such acts, edges toward constitutionality.⁵³

Still, the Supreme Court has spoken, and subsequent judicial decisions reflect *R.A.V.*'s reasoning. Consider *State v. Sheldon*,⁵⁴ a post-*R.A.V.* Maryland case concerning Brandon Forrest Sheldon who ignited a cross on the property of a black family and Thomas Eugene Cole who burned a cross on state-owned property. Neither Sheldon nor Cole had notified the respective property owners of his intentions. Their actions violated a statute that made cross-burning on public or private property owned by another unlawful.⁵⁵ These defendants committed identical acts in different contexts, but given the constraints imposed by the statutory language, the Maryland Supreme Court had little choice but to conclude that both acts were "speech' in contemplation of the First Amendment."⁵⁶ Even if the statute had applied only to private property, the constraints imposed by *R.A.V.* would appear to have precluded meaningful examination of contextual considerations. Absent such examination, a question remains whether Sheldon's burning a cross on the property of a black family was expression or a simple act of violence deserving "no sanctuary in the First Amendment."⁵⁷

52. "[I]t is reasonable to distinguish between contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 837 (2d ed. 1988).

53. See Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 *HARV. L. REV.* 30, 115 (1993) (referring to the "rather concrete terrorist act of cross-burning on the lawn of a black family").

54. 629 A.2d 753 (Md. 1993).

55. *Id.* at 755-56.

56. *Id.* at 755.

57. *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring).

IV. HATE CRIMES

In *Wisconsin v. Mitchell*,⁵⁸ a decision delivered after the publication of Haiman's book, the Supreme Court turned its attention to hate crime statutes. On October 7, 1989, a group of young black men and boys, including Todd Mitchell, approached a white boy on the street in Kenosha, Wisconsin:

As the boy walked by, Mitchell said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell counted to three and pointed in the boy's direction. The group ran towards the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.⁵⁹

A jury convicted Mitchell of aggravated battery. Because the jury found that he had intentionally selected his victim based on the boy's race, Mitchell's sentence was increased from two to seven years of imprisonment under the hate crime statute.⁶⁰ The statute provided, in pertinent part, that if a person commits a crime such as battery and intentionally "selects the person against whom the crime . . . is committed . . . because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person," the maximum punishment may be increased.⁶¹ The Wisconsin Supreme Court held that the statute violated the First Amendment.⁶²

The United States Supreme Court reversed. The Court began by noting that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."⁶³ The Court concluded that enhancing punishment be-

58. 113 S. Ct. 2194 (1993).

59. *Id.* at 2196-97 (citations omitted).

60. *See id.*

61. WIS. STAT. ANN. § 939.645(1)(b) (West Supp. 1994).

62. *State v. Mitchell*, 485 N.W.2d 807, 811-12, 816-17 (Wis. 1992).

63. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993) (citing *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."); *NAACP v. Claiborne Hardware*

cause of the defendant's discriminatory motive in selecting a victim does not offend the First Amendment. While "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge,"⁶⁴ the judge may consider the defendant's motive when making sentencing decisions. In this respect, the Court likened the Wisconsin hate crime statute to Title VII of the Civil Rights Act of 1964, which "makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin.'"⁶⁵

The Court also distinguished the statute at hand from the ordinance struck down in *R.A.V. v. City of St. Paul*,⁶⁶ concluding that the latter "was explicitly directed at expression (i.e., 'speech' or 'messages')" while this statute was "aimed at conduct unprotected by the First Amendment."⁶⁷ The Court viewed the hate crime statute as a reflection of the state's desire to redress the particular individual and societal harms created by hate crimes. As such, the statute was not overbroad and did not "chill" speech; the Court thought it "too speculative a hypothesis" that a citizen might suppress his or her bigoted beliefs because they might someday be introduced at trial should he or she commit an offense under the statute.⁶⁸

In broadly asserting that Wisconsin's statute targets conduct and not speech, the Court declined to recognize the expressive elements of Mitchell's actions.⁶⁹ As Haiman explains, hate crimes do possess expressive elements; they are not "speech

Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").

64. *Mitchell*, 113 S. Ct. at 2200.

65. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (1988)).

66. 112 S. Ct. 2538 (1992).

67. *Mitchell*, 113 S. Ct. at 2201 (citation omitted).

68. *See id.*

69. The speech-conduct debate has long raged, and the distinction between the two is not so simple as the Court would have us believe: "[I]n the real world, communicative and non-communicative aspects of conduct are constantly intertwined. Any worthwhile system of free expression must be sufficiently sophisticated to deal with the reality that communication is almost always an admixture of 'speech' and 'conduct.'" RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 26 (1992). *Mitchell* and *R.A.V.* ably demonstrate the blurred line between speech and conduct. *See* Horwitz, *supra* note 53, at 115-16 (discussing the *Mitchell* opinion's "exceedingly fine distinction from *R.A.V.*").

acts," but "physical behaviors with speech ingredients, just the converse of an oration, which is speech behavior with the physical ingredients of noise."⁷⁰ He makes it clear that because hate crime statutes like Wisconsin's enhance sentences when the underlying crime is bias-related, these statutes do acknowledge the expression of beliefs and attitudes. On balance, though, Haiman agrees that hate crime statutes are constitutional.⁷¹ To ensure that punishment would be enhanced only when such conduct rises to the level of commission of a crime, he urges that these laws must "specify that the only offenses to be punished are those acts that would normally qualify as criminal behavior—assault and battery, arson, murder, and so on—and that enhanced penalties would be triggered only when those acts have been demonstrably motivated by group hatred."⁷²

Applying Haiman's standard requires a court to determine when an utterance is sufficient to evidence group hatred. In *State v. Stalder*,⁷³ the Florida Supreme Court, construing that state's hate crime statute, recognized that the commission of the crime must adduce the group hatred; "the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient."⁷⁴ Thus, where *A* beats *B* because *B* is a member of a particular racial group, "the selection of a victim . . . is an integral part of the underlying crime."⁷⁵ Such an instance may be distinguished from "offenses committed for some reason other than prejudice but that nevertheless show bias in their commission."⁷⁶ Where *A* beats *B* because of jealousy, but during the beating calls *B* a racial epithet, the expression and the action share only the same temporal framework. Without more than temporal and spatial proximity, *A* should not be subject to enhanced penalties, for such evidence

70. Haiman, *supra* note 12, at 35.

71. *See id.* at 48.

72. *Id.* at 45.

73. 630 So. 2d 1072 (Fla. 1994).

74. *Id.* at 1076-77 (quoting *Dobbins v. State*, 605 So. 2d 922, 923 (Fla. Dist. Ct. App. 1992)) (emphasis omitted). *Stalder* concerned the constitutionality of the Florida hate crimes statute requiring penalty enhancement as applied to the defendant, who assaulted the complainant and maligned his ethnicity. *See id.* at 1073.

75. *Id.* at 1076.

76. *Id.*

does not adequately demonstrate that *A* selected *B* as a victim based upon *B*'s race.⁷⁷

For some, even this analysis may not go far enough in explicating the First Amendment considerations inherent in penalty enhancement statutes. Robert S. Peck has taken both Haiman and the United States Supreme Court to task for insufficiently addressing his core concern, namely that "[t]he 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."⁷⁸ In Peck's view, "[t]he state simply cannot, consistent with the federal Constitution, exact a price from individuals for holding beliefs that are at odds with those of larger society."⁷⁹

It is true that if *A* beats *B* silently, *A* can be punished only for battery, even if *A* harbored bigoted thoughts toward *B*. But where *A* openly selects *B* for a beating based upon the latter's race, *A*'s sentence is greater not because of *A*'s beliefs, but because *A* committed a criminal act in furtherance of those beliefs.⁸⁰ The possibility of greater punishment does not force *A* to abandon prejudicial beliefs; it only deters *A* from expressing those beliefs through criminal action. Absent that criminal action, *A* would suffer no punishment whatsoever. Indeed, rath-

77. See *State v. Mitchell*, 485 N.W.2d 807, 818 (Wis. 1992) (Abrahamson, J., dissenting) (reasoning that the state "must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute").

78. Robert S. Peck, *Deciding When Speech Isn't Speech*, 20 N.Y.U. REV. L. & SOC. CHANGE 667, 673 (1993-94) (reviewing FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT (1993)). Peck believes 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 to weaken the First Amendment, at which a multitude of forces continue to chip away." *Id.* at 678.

79. *Id.* at 673.

80. See HAIMAN, *supra* note 12, at 45 (noting that penalties would be "bumped up" only where thought has led to criminal action). In effect, well-drafted hate crime laws would function like antidiscrimination laws which preclude the practice of discrimination, not the First Amendment right to hold discriminatory beliefs. See *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (concluding that freedom of expression and association do not prevent the application of Title VII to employment decisions).

er than curtailing expression, on an instrumental level, a penalty enhancement framework may actually function to enlarge the marketplace of ideas. The threat of enhanced punishment could compel *A* to consider expressing hatred of *B* in any number of ways, from placards to newspaper advertisements to bumper stickers. Thus, penalty enhancement statutes based upon Haiman's model may yet allow the state to play a role in channeling bias-motivated conduct away from threats and violence into more productive expressive avenues.⁸¹

V. CONCLUSION

By reminding us that calling expressive conduct a "speech act" does not eliminate First Amendment concerns, Franklyn S. Haiman has made a thoughtful contribution to debates over political correctness and hateful expression. Moreover, *Speech Acts and the First Amendment* offers some indication of the direction in which these debates must eventually turn. "If there is any hope of changing the attitudes of the haters," it will come not through speech regulations, but through exposing haters "to more enlightened ways of thinking and, in the long run, through alleviating the causes of their insecurity."⁸² It would be disingenuous to believe that the enactment of hate speech laws or penalty enhancement statutes would result in an end to intolerance. To confront hateful expression we must, as Patricia Williams advises, set aside talk of freedom of speech for a few minutes and do some hard thinking about our great investment "in the fashionability of hate."⁸³ Only after we address its true causes will we be able to reckon with the manifestations of hate which currently pervade our lives and preoccupy our free speech discourse.

81. Owen Fiss has more thoroughly explored the notion of an activist role for the state in the marketplace of ideas. See Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

82. HAIMAN, *supra* note 12, at 34.

83. Patricia J. Williams, *Hate Radio: Why we need to tune in to Limbaugh and Stern*, MS., Mar./Apr. 1994, at 25, 29.

