



Some Economics of Flag Burning and Jimi Hendrix

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President-elect Donald Trump caused consternation three weeks after his electoral upset when he tweeted that someone who burns the American flag should be imprisoned for a year or lose his citizenship.¹ Constitutional law scholars have written much about flag burning before and since the Supreme Court's 5-4 decision in 1989 in *Texas v. Johnson* finding that the First Amendment protects such activity.² President-elect Trump's comments will probably renew debate and legal scholarship over whether the Court's decision was properly decided, whether there is any regulation of flag burning that could survive constitutional scrutiny, and, if not, whether the United States should amend its Constitution to empower Congress to punish desecration of the flag. My purpose is not to wade into those controversies, but rather to explain an economic rationale for why this particular tempest illustrates why the Court should, as a general rule, interpret the First Amendment to protect speech to a greater extent than conduct. Virtually every rule has exceptions. My focus here concerns the general rule that words tend to be clearer than actions.

I. ARTICULATE SPEECH

My starting point is the economic theory of language. Judge Richard Posner—joined at times by William Landes—has shown how language manifests

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¹ See Charlie Savage, *Trump Calls for Revoking Flag Burners' Citizenship. Court Rulings Forbid It.*, N.Y. TIMES, Nov. 29, 2016.

² 491 U.S. 397 (1989). The Supreme Court revisited the question after Congress enacted legislation that attempted to comply with *Texas v. Johnson*, but the Court struck down that law as unconstitutional in another 5-4 decision. *United States v. Eichman*, 496 U.S. 310 (1990).

economic principles.³ The purpose of language is to communicate. One may regard communication as the process of transmitting an idea—a thought—from its sender to its intended recipient. We call this thing being transmitted the message. But there are countervailing forces at work.

Clarity and specificity of expression typically increase with the size of a language (in terms of the number of words) and with the number of words used to express an idea. “The goal (to which language is central) of a communications system,” observe Landes and Posner, “is to minimize the sum of the costs of avoiding misunderstanding and the costs of communicating.”⁴ But the tasks of learning a larger vocabulary and of writing (and reading) longer words and sentences both represent costs of using one language as opposed to some other language (English versus French, for example) or some other mode to convey the message (Euclidian geometry or differential calculus, for example). These costs are worth incurring only if they create a greater benefit in terms of reducing ambiguity in the message. As Landes and Posner put it, “the drive to make language simple is balanced by the desire to avoid ambiguities and confusions that result from lack of differentiation.”⁵

Within this framework it would seem that “expression” ought not to be the most highly protected interest of the First Amendment. Instead, *communication* ought to be. Expression does not necessarily imply that one is presenting an idea in a form understandable to another person in an unambiguous manner, or that that person uttering the idea even intends it to be understood clearly. If the First Amendment is a device for preserving and encouraging the communication of ideas by constraining the power of government to regulate and punish certain things, then it is improbable that those who drafted or ratified the Bill of Rights were indifferent between protecting messages communicated ambiguously and protecting messages communicated clearly. Nor should we the living be indifferent more than two centuries later.

Clarity advances the goal of communication. Ambiguity disserves it. When men and women rise to presenting their ideas in messages consisting of spoken words and written text, that mode of expression should be favored for communication over a mode of communication that is more susceptible to garbling the message. The public’s interest is in being able to understand the ideas that a person is communicating. We are all busy, and time is of the essence. So if a man has something to say, he should get on with it. The public’s interest is not in indulging inarticulate grunts or vague gestures. And certainly the purpose of the First Amendment is not to insulate from legal

³ See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (Harvard Univ. Press 1988); Richard A. Posner & William M. Landes, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

⁴ Posner & Landes, *supra* note 3, at 271.

⁵ *Id.* at 272.

consequence every conceivable action that one might choose to take to actualize his fifteen minutes of fame. It does not advance the rationale for limiting the power of government by the First Amendment to fail to recognize that the purpose of language—manifested in speech and written words—is to minimize confusion and ambiguity in the exchange of ideas that conduce to forming a more perfect union.

II. AMBIGUOUS EXPRESSION

We were all told that “actions speak louder than words.” But actions are a poor substitute for words when it comes to minimizing the social cost of communicating a thought free of ambiguity from sender to receiver. Expressive actions are more prone to ambiguity than words. When Jimi Hendrix at Woodstock in 1969 famously performed a distorted instrumental version of the *Star Spangled Banner*, what was his message? Was he desecrating the national anthem to protest the Vietnam War? Some said he was replicating the sounds of rockets and bombs.⁶ Or was Hendrix simply displaying his mastery of the feedback from a Fender Stratocaster played through overdriven Marshall amplifiers?⁷ According to one biographer, Hendrix explained three weeks later that his intended message was, “We’re all Americans . . . it was like ‘Go America!’”⁸

One might characterize the First Amendment as requiring that, if a person wishes to express an idea, he communicate it coherently and unambiguously before the Constitution will afford him the nearly absolute right to be free of government regulation of his expression of the idea. An inarticulate message creates a nuisance for its recipients because they cannot ascertain the message’s true meaning without incurring a cost. One way that a court might react to an ambiguous or inarticulate message is to characterize the claimed “speech” instead as frivolous. One example is Chief Justice Burger’s concurrence in *Clark v. Community for Creative Non-Violence*,⁹ which involved persons sleeping in Lafayette Park, across Pennsylvania Avenue from the White House, who maintained that their sleeping (in violation of Park Service regulations) constituted protected speech protesting the condition of the homeless. The Court disagreed, and the Chief Justice separately wrote that “the actions here claimed as speech entitled to the protections of the First Amendment simply are not speech; rather, they constitute conduct” that “trivialize the First Amendment.”¹⁰

⁶ See RICHIE UNTERBERGER, *THE ROUGH GUIDE TO JIMI HENDRIX* 101–03 (Rough Guides 2009); DAVE WHITEHILL, *HENDRIX: ARE YOU EXPERIENCED* 86 (Hal Leonard 1989).

⁷ See KEITH SHADWICK, *JIMI HENDRIX: MUSICIAN* 249 (Backbeat 2003).

⁸ CHARLES R. CROSS, *ROOM FULL OF MIRRORS: A BIOGRAPHY OF JIMI HENDRIX* 271 (Hyperion 2005).

⁹ 468 U.S. 288, 300 (1982) (Burger, C.J., concurring).

¹⁰ *Id.* at 301.

CONCLUSION

My argument is relative, not absolutist. I am not arguing either that the First Amendment absolutely protects flag burning or that it absolutely does not do so. Rather, I am arguing that, as a general rule, articulate speech cannot receive less protection under the First Amendment than conduct—such as flag burning—receives if we indeed believe that the purpose of the First Amendment is to protect and promote the communication of ideas. Precise communication is more valuable than ambiguous communication. If a citizen chooses to express an idea to others in a manner that is prone to ambiguity, he should not be so insulated from possible regulation as if he clearly conveyed that idea to its intended recipient.