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## Constitutional Law - United States - Desecration of the Flag

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A strong argument can be made for the permitting of interest on past due payments of interest by examining the consequences of a default. After interest has accrued and its payment is due, the interest is a contract debt and can be collected at law just as a default in an installment of principal.<sup>30</sup> Both are due the lender by the terms of the contract. As a result, it would seem perfectly proper to establish a rate of interest after maturity to be applied to both as a matter of compensatory damages for the wrongful detention of the sum due. This would not constitute compound interest, which is also prohibited under the usury statute,<sup>31</sup> as long as the interest after maturity was computed separately as to each defaulted installment of interest from the date it was due until paid.<sup>32</sup> Compound interest only results when interest is added to the principal and the combined sum is then made to bear additional interest.<sup>33</sup>

Any change in this area will have to come from the legislature. Interest and usury are statutory subjects which are dependent upon current economic conditions for their appropriateness and vitality of enforcement. A review of these statutes in view of current public policy by our legislature might reveal a need for change.

BRUCE E. BOHLMAN

CONSTITUTIONAL LAW—UNITED STATES—DESECRATION OF THE FLAG—Defendant was accused of desecrating the American flag by the contemptuous use of the flag in a display at his art gallery. The display contained thirteen three dimensional objects described as constructions. One of the objects was an American flag stuffed in a form suggesting a human body and suspended from a yellow noose. A second construction was a white cross with a bishop's mitre on the head piece, the arms wrapped in ecclesiastical flags, and a flag wrapped phallus made from an American flag. Defendant contends that this was merely an expression of opposition to church-condoned aggressive warfare in Vietnam and was protected under his constitutional right to free speech. Prosecution was brought under New York Penal Law §1425 subd. 16. HELD; statute prohibiting desecration of American flag does not violate freedom of speech guarantee. One member dissenting. *People v. Radeck*, 279 N.Y.S.2d 680, (1967).

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30. *Security Credit Co. v. Wieble*, *supra* note 26 at 751.

31. N.D. CENT. CODE § 47-14-09 (1960).

32. *See Hovey v. Edmison*, 3 Dak. 449, 22 N.W. 594 (1885).

33. N.D. CENT. CODE § 1-01-36 (1959).

The statute in question was enacted in its original form in 1909<sup>1</sup> and is similar to the Uniform Flag Act which was approved in 1917<sup>2</sup> and has been adopted by 17 states. These enactments were the result of the disrespect shown the national emblem in the elections of 1896. Since 1897 legislation to preserve the flag from desecration has been adopted by all of the 50 states.<sup>3</sup> It was not until 1967 that any of these laws were seriously questioned on the basis of contemptuous conduct and freedom of expression.<sup>4</sup>

The primary question raised by these cases is that of symbolic speech as protected under the First and Fourteenth Amendments to the United States Constitution.

There is no doubt that some symbolic acts will be given limited protection as a form of speech within the meaning of these amendments. Among these nonverbal expressions that have been protected are sit-ins,<sup>5</sup> picketing,<sup>6</sup> display of the red flag,<sup>7</sup> and refusal to salute the flag.<sup>8</sup>

The United States Supreme Court has rejected the idea that the same protection is given to those who would communicate ideas by conduct such as "patrolling, marching and picketing" as to those who would communicate their ideas by pure speech.<sup>9</sup> The fact that a course of conduct preceeding an act had its origin in the form of language "written, spoken or printed" does not prevent the state from making the act illegal.<sup>10</sup> A recent Supreme Court decision reaffirmed that freedom of expression does not give an individual a license to speak "whenever, however and wherever" he pleases.<sup>11</sup>

A state may, through its police powers, regulate or prescribe many forms of conduct which threaten the peace, security or well-being of its inhabitants, providing that such regulation is general and non-discriminatory.<sup>12</sup> The fact that some people would ascribe symbolic significance to an act does not remove it from the ambit of a state's police power.<sup>13</sup>

1. N.Y. PENAL LAW § 1452 (16) (d) (f) (McKinney 1967).

2. Uniform Flag Act (1966).

3. 113 CONG. REC. H7497 (daily ed. June 20, 1967).

4. *People v. Radich*, 279 N.Y.S.2d 680 (1967); *United States Flag Foundation, Inc. v. Radich*, 279 N.Y.S.2d 233 (1967); *People v. Street*, 20 N.Y.2d 231, 229 N.E.2d 187 (1967).

5. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

6. *Carlson v. California*, 310 U.S. 106, 112 (1940).

7. *Stromberg v. California*, 283 U.S. 359 (1931).

8. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1942).

9. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

10. *Gibney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1948).

11. *Adderly v. Florida*, 385 U.S. 39, 48 (1966).

12. *Id.*; *State v. Cox*, 224 La. 1087, 156 So.2d 448, 453 (1963); *Cox v. Louisiana*, *supra* note 9, at 558.

13. *People v. Penn*, 16 N.Y.2d 581, 260 N.Y.S.2d 847 (1965), [sit-in at construction site]; *People v. Martin*, 15 N.Y.2d 933, 259 N.Y.S.2d 152 (1965), [sit-in at school board meeting]; *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 739 (1963), [violation of ordinance prohibiting maintenance of clothesline in front or side yards abutting street].

The history of the flag acts indicates their purpose was the prevention of breaches of the peace resulting from improper use and disrespect to the flag.<sup>14</sup> It has been argued that such state legislation is invalid as regulatory of subject matter within a field occupied by congressional legislation. The argument has, however, fallen on deaf ears.<sup>15</sup> The federal statutes do not deal with the desecration of the flag with the exception of such acts occurring within the District of Columbia.<sup>16</sup> The other area provided for deals with the rules and customs for the use of the flag.<sup>17</sup>

Whether the state statutes will stand or fall seems to be predicated on the question of whether the act, which is sought to be prohibited, falls within the valid operation of the police power of the state. The United States Supreme Court has pointed out that a "clear and present danger of riot, disorder . . . or other threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious."<sup>18</sup> It was stated in the case of *Halter v. Nebraska*,<sup>19</sup> in upholding the flag desecration legislation, that "it has often occurred that insults to the flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."

The *Halter* case may, however, be distinguished by the fact that it was decided before the Fourteenth Amendment was made firmly applicable to the states and was answering the questions of due process and equal protections rather than freedom of speech.

The question of whether the New York statute and so many like it will stand or fall will have to be determined by the United States Supreme Court. The question to be answered is whether such symbolic speech is protected by the First and Fourteenth Amendments.

The case of *People v. Street*,<sup>20</sup> presently docketed in the Supreme Court will raise the question of the constitutionality of the flag acts. This case has a relatively weaker base upon which to test the validity of the flag acts. *Street* deals with the public burning of an American flag, an act which may more reasonably be prohibited by the police powers of the state than the aforementioned acts of defendant Radeck. It is important to note that a

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14. *People v. Von Rosen*, 13 Ill.2d 68, 147 N.E.2d 327, 329 (1958).

15. *Halter v. Nebraska*, 205 U.S. 34, 41 (1907).

16. *Flag and Seal*, 4 U.S.C. § 3 (1964).

17. *Patriotic Societies and Observances*, 36 U.S.C. § 173-178 (1964).

18. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Halter v. Nebraska*, *supra* note 15, at 41.

19. *Supra* note 15, at 41, [note, this case raised the question of due process and equal protection as opposed to freedom of speech].

20. *People v. Street*, 20 N.Y.2d 231, 229 N.E.2d 187 (1967). cert. granted, no. 688, 36 U.S.L.W. 3243 (U.S. Dec. 12, 1967).

decision which would strike down the New York statute would, in effect, strike down the Uniform Flag Act and the acts of the several states.

Unless these statutes are so repugnant to the ideals of free speech the Court must abide by long established and steadily followed principles of constitutional construction.<sup>21</sup> In the recent case of *United States v. O'Brien*,<sup>22</sup> Mr. Justice Black pointed out that we must distinguish between conduct and speech. It is now for the Court to say how far symbolic speech is to be extended. It is the opinion of this writer that the Court will uphold these statutes and not extend symbolic speech freedoms to the desecration of the national emblem.

EARLE R. MYERS, JR.

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21. *Supra* note 15, at 40.

22. *United States v. O'Brien*, *cert. granted*, Oct. 9, 1967, no. 232, 233, 36 U.S.L.W. 3301 (U.S. Jan. 30, 1968), report of argument before the Supreme Court.