NOTICE TO UNIVERSITY OFFICIALS AND LAW ENFORCEMENT

The distribution of political speech is a highly protected form of speech under the First Amendment. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981). In addition, "the government must hold open all government-owned or government-controlled property to all forms of speech." Hays County Guardian v. Supple, 969 F.2d 111, 116 (5th Cir. 1992)(citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800, 105 S.Ct. 3439, 3447 (1985)).

A speaker's right to access government property is determined by the nature of the property. Id. (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948 (1983)). Government property is a traditional public forum if it has been traditionally used by the public for purposes of assembly and debate. Perry Educ. Ass'n, 460 U.S. 37, 103 S.Ct. 948. "The government may also create public fora on property not traditionally used for public expression by intentionally opening it for public discourse." International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701, 2706 (1992).

> Government property *** does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on the government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction of speech.

> The Supreme Court has not adopted such circular reasoning.

Hays, 969 F.2d at 117.

In the case of a public university, "the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students." Hays, 969 F.2d at 116. The campus of a public university has many of the same characteristics as those of a traditional public forum. See Widmar v. Vincent, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 273 n. 5 (1981).

> The campus's function as the site of a community of full-time residents makes it "a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment," and suggests an intended role more akin to a public street or park than a non-public forum.

Hays, 969 F.2d at 117 (quoting Heffron, 452 U.S. at 651, 101 S.Ct. at 2566)(emphasis added).

The fact that an individual is not a student or employee of the university in question does not allow the university to prohibit him or her from distributing political literature. See Jones v. Board of Regents of the University of Arizona, 436 F.2d 618, 620 (9th Cir. 1970).[1] In Jones, an individual was forcibly

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[1] See also Brubaker v. Moelchert, 405 F.Supp. 837 (W.D.N.C. 1975). Regarding uninvited guests who wished to distribute literature on a university campus, the Brubaker court held:

> There was no evidence *** that such outsiders are more likely to cause disruption or refuse to obey reasonable restrictions on the time, place and manner of exercise of First Amendment rights than are the insiders. No reason appears for not giving plaintiffs the equal access to public University property

(continued...)

removed from the campus after refusing to stop distribution of handbills protesting the Viet Nam war. Id. at 619. Jones returned to the campus immediately and began again to pass out leaflets. Id. Eventually, two bystanders tore signs from his back and chest and destroyed them. Id. By that time, the crowd had grown to roughly twenty-five people, the police had arrived, and Jones, having distributed all of his leaflets, departed the area. Id. The following day, Jones appeared twice on campus and was removed by campus police. He then instituted a suit for an injunction, directing the Board of Regents of the University to cease interfering with the exercise of his right to speak "and enjoining the Board to afford him the protection reasonably necessary to insure that he could exercise that right on the campus." Id.

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[1](...continued)
which they seek.

Id. at 841. In Spartacus Youth League v. Board of Trustees of Illinois, 502 F.Supp. 789 (N.D. Ill. 1980), the court held:

> Once the state has determined that certain First Amendment activities are appropriate at a particular location, it may not arbitrarily decide that certain individuals may use its facilities while others may not.

Id. at 799 (citing Jones, 436 F.2d 618). The court went on to say:

> By broadly prohibiting all literature sale and distribution by outsiders without University affiliations, defendants have failed to draft their regulations with the *** precision required for rules impinging on First Amendment rights.

Id. at 800.

In Jones, the Ninth Circuit Court of Appeals rejected the University's argument that because the regulation allowed handbills related to authorized meetings to be distributed in rooms assigned to authorized meetings, the regulation was a valid time, place and manner regulation. Id. at 621. The court stated:

> While the regulation, in that aspect, may constitute a reasonable and permissible restraint on the use of areas, such as classrooms, which are not open to the public generally, ***it cannot justify the blanket prohibition of handbilling in areas open to the public generally.***

Id. The court arrived at this conclusion despite the fact that "any individual desiring to speak or to distribute literature on campus could probably secure a room in which to do so ***." Id. The court stated:

> [T]he possible availability of those classrooms would not save the regulation. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Id. at 622 (quoting Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151 (1939)). Accordingly, the Ninth Circuit instructed the trial court to issue an injunction, permanently restraining the board of regents ***"from interfering with Jones' right to speak and to distribute handbills on areas of the Tucson campus which are open to the public generally."*** Id.

Furthermore, the Ninth Circuit made it clear that a university in fact has an affirmative obligation to provide individuals the necessary police protection that will insure their ability to exercise their constitutional rights in public areas of the campus:

> We cannot assume that the campus police will not hereafter afford to Jones the same protection against violent or other unlawful acts as would be afforded to any other individual lawfully exercising his constitutional rights upon the public areas of the Tucson campus. Since the District Court will retain jurisdiction, it may *** modify its injunction so as to insure, insofar as is reasonably possible, that such will be the case.

Id. at 622.

Finally, a public university may not confine distribution of literature to areas that are less likely to be frequented by passer-bys:

> [W]hen a state body provides a citizen with an alternative forum for expression it should open up a forum that is ***accessible and where the intended audience is expected to pass.***

Students Against Apartheid Coalition v. O'Neil, 660 F.Supp. 333, 339 (W.D.Va. 1987).

The above cited case law demonstrates that an individual is entitled to distribute literature in the public areas of a public university campus, and that the university may not arbitrarily dictate the areas for such distribution. This document serves to put university officials on notice that any interference with such lawful activity is a violation of rights guaranteed by the First Amendment of the United States Constitution. Such intentional or negligent violations of an individual's constitutional rights by a public university, its agents or other state officials acting under color of state law, potentially subject the violator and its agents to applicable liabilities and sanctions provided for under Federal or State law.

Const. 90.1(1.1) 90.1(1.4) Schools

The judgment of conviction below is reversed for further proceedings not inconsistent herewith.

Reversed.

Ashton JONES, Appellant,

v.

BOARD OF REGENTS OF the UNIVERSITY OF ARIZONA et al., Appellee.

No. 24732.

United States Court of Appeals, Ninth Circuit.

Dec. 21, 1970.

Action to enjoin enforcement of state university regulation prohibiting handbilling on campus. The United States District Court for the District of Arizona, James A. Walsh, J., after remand at 397 F.2d 259, dismissed the complaint, and plaintiff appealed. The Court of Appeals, Ely, Circuit Judge, held that regulation constituting, in effect, complete prohibition of handbilling on campus grounds, even portions thereof open to public generally, was unrelated to any valid regulatory purpose when applied to public property open to public at large, and unconstitutional.

Reversed and remanded with directions.

1. Courts ⇐101

Statute limiting power to enjoin enforcement of state statute to a three-judge court did not apply where regulation under attack was not of general statewide application but limited in scope only to university campus. 28 U.S.C.A. § 2281.

2. Constitutional Law ⇐82

Once state has made public property generally available to public, it may not arbitrarily restrict freedom of individuals, lawfully on that property, to exercise their First Amendment rights. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90

Right to free speech is not so broad as to guarantee that anyone may address a group at any public place, at any time, and in all circumstances.

4. Constitutional Law ⇐90

State university regulation constituting, in effect, complete prohibition of handbilling on campus grounds, even portions thereof open to public generally, was unrelated to any valid regulatory purpose when applied to public property open to public at large, and unconstitutional. U.S.C.A.Const. Amend. 1.

5. Colleges and Universities ⇐5

State university regulations permitting handbilling related to authorized meetings in rooms assigned did not justify blanket prohibition of handbilling in areas open to public generally. U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90

State university regulation limiting avenue by which individual may communicate with students on campus, which has areas open to public, by requiring that individual secure approval for meeting in room, did not save blanket prohibition on handbilling from unconstitutionality, even if administration's approval was not dependent upon nature of ideas involved. U.S.C.A.Const. Amend. 1.

7. Injunction ⇐210

District court, upon issuance of injunction against enforcement of state university regulation prohibiting handbilling on public areas of campus, would retain jurisdiction to modify injunction so as to insure, so far as reasonably possible, that campus police will afford plaintiff same protection as would be afforded to any other individual lawfully exercising his constitutional rights upon public areas, upon such reasonable terms and conditions as may be deemed appropriate, such as requiring plaintiff to give advance notice of any appearance

on campus which might be reasonably expected to provoke or incite unlawful acts against him.

S. Leonard Scheff, Atty., Tucson, Ariz., for appellant.

Gary K. Nelson, Atty. Gen., Phoenix, Ariz., Paul F. Newell of May, Dees & Newell, Tucson, Ariz., for appellees.

Before JERTBERG, BROWNING, and ELY, Circuit Judges.

ELY, Circuit Judge:

Jones appeals from a judgment of the District Court dismissing a complaint alleging that certain of Jones' civil rights, conferred by the First and Fourteenth Amendments of the Constitution, were violated. 42 U.S.C. § 1983.

In November of 1965, Jones stationed himself near the Student Union building on the University of Arizona campus, at Tucson, donned a sandwich board sign which read "Help Stop Viet Nam war now. For Peace and Freedom." and began to distribute handbills, critical of the Viet Nam engagement, to those passers-by who would accept them. He was observed by two campus police officers who informed him of a university regulation prohibiting the distribution of all handbills not officially related to an authorized campus event and requested that he desist. Upon his refusal to do so, the officers forcibly removed him from the campus. Jones immediately returned, put on his signs, and began, once again, to pass out leaflets. A crowd of six to ten people then gathered round and conversation concerning the Viet Nam war ensued. Later, two bystanders approached Jones, tore his signs from his back and chest, and destroyed them. By this time the crowd had reached twenty-five to thirty persons, the police had arrived, and Jones, having passed out all his leaflets, departed the area. That afternoon and evening the campus police received several phone calls informing them that if they, the police, could not remove Jones from the campus, the callers would do so. On the following day Jones twice appeared on the campus and, on each occasion, was removed by the campus police. He then instituted this suit.

[1] In a part of his amended complaint Jones sought an injunction *pendente lite*, directing the Board of Regents of the University to cease interfering with the exercise of his right to speak and enjoining the Board to afford him the protection reasonably necessary to insure that he could exercise that right while on the campus. From the District Court's denial of that prayer, Jones pursued an interlocutory appeal to our court. We affirmed the court's denial of temporary relief but remanded with the suggestion that consideration be given to the applicability of the provisions of 28 U.S.C. § 2281. Jones v. Board of Regents, 397 F.2d 259 (9th Cir. 1968). On remand, and after oral argument, the parties submitted the general preliminary questions of the liability of appellees for damages and of Jones' right to a permanent injunction for decision. Because the university regulation in question was limited in scope only to the University of Arizona campus at Tucson, the court concluded that 28 U.S.C. § 2281 was inapplicable. Upon the basis of the determination that the regulation was not of general statewide application, we agree with that conclusion of the District Court. Moody v. Flowers, 387 U.S. 97, 101–102, 87 S. Ct. 1544, 18 L.Ed.2d 643 (1967). *Cf.* Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968), cert. denied, 393 U.S. 1092, 89 S. Ct. 854, 21 L.Ed.2d 783 (1969). The court then dismissed the complaint, finding that the regulation was valid and that Jones was properly and lawfully removed from the campus for having violated the regulation's terms.

The regulation on which the police based their eviction of Jones constitutes, in effect, a complete prohibition of handbilling on the campus grounds, even the portions thereof which, according to the District Court, are open to the pub-

lic generally. The regulation reads, in pertinent part:

> "No hand-out items, including handbills, may be distributed on the campus grounds or in campus buildings at any time, except programs and other informational items which are officially related to authorized meetings, and which are distributed in the room or rooms assigned to the event in question."

The question we thus face is whether a state university can constitutionally prohibit the distribution of all handbills on that part of its campus grounds which are open to the public generally.

[2, 3] We begin with the proposition that once a State has made public property generally available to the public, it may not arbitrarily restrict the freedom of individuals, lawfully on that property, to exercise their First Amendment rights. Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); Henry v. Rock Hill, 376 U.S. 776, 84 S.Ct. 1042, 12 L.Ed.2d 79 (1964); Fields v. South Carolina, 375 U.S. 44, 84 S.Ct. 149, 11 L.Ed.2d 107 (1963); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946); Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). In Jamison v. Texas, *supra*, for example, the Court invalidated a municipal ordinance barring the dissemination of information by handbills and recognized that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Id.*, 318 U.S. at 416, 63 S.Ct. at 672. Of course, it is clear that the right to free speech is not so broad as to guarantee that anyone may address a group at any public place, at any time, and in all circumstances. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

> "[W]here municipal or state property is open to the public generally the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. * * *
>
> "In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it."

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 320–321, 88 S.Ct. 1601, 1609, 20 L.Ed.2d 603 (1968).

[4] The regulation before us now, however, is neither designed, by its terms, only to prevent the disruption of the ordinary educational activities of the campus nor to insure that those seeking to occupy the public campus grounds for communicating ideas will not interfere with those seeking to occupy the public grounds for other legitimate purposes. These ends could be accomplished by the imposition of reasonable rules regulating the time, place, and manner of the exercise of First Amendment rights. *See, e. g.*, Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). But the challenged regulation completely prohibits the distribution of any handbills, at any time, in places open to the public generally. Such a blanket prohibition is clearly unrelated to any valid regulatory purpose when applied to public property generally open to the public at large. Jamison v. Texas, *supra*; Schneider v. State, *supra*; Hague v. CIO, *supra*; Lovell v. City of Griffin, *supra*.

We reject the appellees' contention that a complete prohibition is necessary because disputes might arise if handbilling were allowed. The Supreme Court dealt with just such an argument in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), wherein it rejected the District Court's conclusion that the action of certain high school authorities in banning the wearing of armbands was reasonable because it was based upon the authorities' fear of possible disturbances. The Court there stated:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."

Id. at 508–509, 89 S.Ct. at 737. Neither the regulation nor the police action in this particular case can be justified by the fact that two members of the crowd were moved to tear the sandwich boards from Jones' body or that certain unidentified members of the community had threatened to remove him from the campus if the police failed to do so. Jones was lawfully and nonviolently exercising rights guaranteed to him by the Constitution of the United States. It is clear to us that the police had the obligation of affording him the same protection they would have surely provided an innocent individual threatened, for example, by a hoodlum on the street. A politically motivated assault is no less illegal than assaults inspired by personal vengeance or by any other unlawful motive. Indeed, in this case, the action of the police was misdirected. It should have been exerted so as to prevent the infringement of Jones' constitutional right by those bent on stifling, even by violence, the peaceful expression of ideas or views with which they disagreed.

[5, 6] We similarly reject the argument that, since the regulation allows handbills "officially related to authorized meetings" to be distributed in rooms assigned to authorized meetings, the regulation is a valid "time, place and manner" regulation. While the regulation, in that aspect, may constitute a reasonable and permissible restraint on the use of areas, such as classrooms, which are not open to the public generally, it cannot justify the blanket prohibition of handbilling in areas open to the public generally. We so conclude despite the appellees' contention that any individual desiring to speak or to distribute literature on campus could probably secure a room in which to do so by acquiring student support, a faculty member's recommendation, and the administration's approval. When, only through such steps, can an avenue be opened by which an individual may communicate with students on a campus with areas open to the public, there is a scheme equivalent to "a statute providing a system of broad discretionary licensing power," Cox v. Louisiana, *supra*, 379 U.S. at 557, 85 S.Ct. at 466, and the scheme is constitutionally invalid. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." Tinker v. Des Moines School Dist., *supra*, 393 U.S. at 511, 89 S.Ct. at 739.

Even, however, if it were established that the university administration's approval was not dependent upon the nature of the ideas that might have been

sought to be expressed at on-campus meetings held in university classrooms, the possible availability of those classrooms would not save the regulation. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, *supra*, 308 U.S. at 163, 60 S.Ct. at 151.

Accordingly, the judgment of dismissal is vacated. Upon remand, the District Court will issue an injunction, permanently restraining the Board of Regents of the University and State Colleges of Arizona from interfering with Jones' right to speak and to distribute handbills on areas of the Tucson campus which are open to the public generally.

[7] On the record before us, we cannot assume that the campus police will not hereafter afford to Jones the same protection against violent or other unlawful acts as would be afforded to any other individual lawfully exercising his constitutional rights upon the public areas of the Tucson campus. Since the District Court will retain jurisdiction, it may, should future events establish a basis therefor, modify its injunction so as to insure, insofar as is reasonably possible, that such will be the case. *See* Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), cert. denied 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968). In such event, the District Court may, of course, include within its injunction such reasonable terms and conditions as it may then deem appropriate in order that its injunction not be unduly burdensome, either to the appellees or to Jones.[1]

The issues relating to Jones' claim for damages under the Civil Rights Act must, in the first instance, be resolved by trial in the District Court. We note, however, that since the police avowedly acted in reliance upon a university regulation in evicting Jones from the campus, it may be well for the trial court to determine at the outset whether on undisputed facts recovery is barred by the doctrine of Pierson v. Ray, 386 U.S. 547, 555–557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

Reversed and remanded, with directions.

1. For example, it would not seem unreasonable that the District Court might require Jones to give advance notice to the campus authorities of any appearance by him upon the campus which might be reasonably expected to provoke or incite unlawful acts against him. Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), cert. denied 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968).

INDEPENDENT SCHOOL DISTRICT NO. 93, POTTAWATOMIE COUNTY, OKLAHOMA, Plaintiff-Appellant,

v.

TRINITY UNIVERSAL INSURANCE COMPANY, Defendant-Appellee.

No. 268-70.

United States Court of Appeals, Tenth Circuit.

Dec. 30, 1970.

Action by school district to recover on treasurer's statutory official bond. The United States District Court for the Western District of Oklahoma, Frederick A. Daugherty, J., denied recovery and school district appealed. The Court of Appeals, Hill, Circuit Judge, held that evidence in action to recover on statutory official bond executed to secure faithful performance of independent school district treasurer failed to establish that treasurer's issuance of warrants and excessive appropriations occasioned loss to school district which was recoverable under conditions of bond.

Affirmed.

1. Judgment ⇐665

Findings of fact in another action by school district to recover from bond-