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CAMPUS PAMPHLETEERING: THE EMERGING CONSTITUTIONAL STANDARDS

I. INTRODUCTION

Beginning with *Lovell v. City of Griffin*,¹ the Supreme Court has consistently held the distribution of handbills to be a fundamental right under the first amendment.² Since *Lovell*, the Court has liberally construed the concept of a public forum where first amendment rights can be properly exercised.³ More recently, the Court has held that schools cannot arbitrarily or absolutely regulate students' constitutional rights of expression.⁴ These three principles would suggest great protection for handbilling rights on state university campuses.

A further analysis of case law indicates that broad free speech standards governing such rights exist and that the exercise of university regulatory power in this area is constitutionally suspect.⁵ The purpose of this article is to determine the nature and extent of these constitutional standards.⁶ Therefore, it is neces-

¹ 303 U.S. 444 (1938), where the Court overruled a city ordinance which banned the distribution of handbills without prior permission from the city manager.

² See *Schneider v. State*, 308 U.S. 147 (1939), discussed in note 26 *infra*; *Hague v. CIO*, 307 U.S. 496 (1939), where the Court invalidated a city ordinance banning distribution of literature; *Jamison v. Texas*, 318 U.S. 413 (1943), where the Court again overruled a municipal ordinance prohibiting all leafleting; *Marsh v. Alabama*, 326 U.S. 501 (1946), discussed in text accompanying note 7 *infra*; and *Talley v. California*, 362 U.S. 60 (1960), where the Court held unconstitutional a regulation banning the distribution of leaflets which did not contain the distributor's name and address.

³ See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968). But compare *Adderley v. Florida*, 385 U.S. 39 (1966). The above cases are all discussed in the text accompanying notes 7-12 *infra*.

⁴ See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

⁵ See *Jones v. Board of Regents*, 436 F.2d 618 (9th Cir. 1970), where the court struck down a university regulation prohibiting all handbilling on campus. Cf. *Norton v. Discipline Comm. of E. Tenn. State Univ.*, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970). In *Norton*, the court upheld university disciplinary action against students who distributed leaflets, even though the university had not adopted a prohibitory regulation. For a discussion of the *Norton* case, see Comment, 21 SYRACUSE L. REV. 1260 (1970).

Several state-supported institutions of varying sizes in different geographical areas of the nation responded to this writer's request for regulations controlling distribution of leaflets on their respective campuses. See note 52 *infra* for an evaluation of these regulations.

⁶ The content of handbills or leaflets is not considered here. The right of distribution is at all times the focal point of this article. For readers who find it difficult to disregard the content issue, a brief but thorough discussion of prior restraints based on content is present in Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1503-1509 (1970). See also O'Neil, *Reflections on the Academic Senate Resolution*, 54 CALIF. L. REV. 88, 98 (1966).

sary to consider the extent to which a state university is a public forum, the requisites of a constitutionally permissible regulation governing state campus handbilling, and finally, when a state university may bar handbilling regardless of the existence of or compliance with a regulation.

II. A PUBLIC FORUM ON A STATE UNIVERSITY CAMPUS

A. An Objective Test

Since *Marsh v. Alabama*,⁷ where the Court held that a privately-owned town with all the features of a public municipality was sufficiently "public" in appearance and nature to make a blanket ban on first amendment activities unconstitutional, both the Supreme Court and lower courts have wrestled with the problem of public forums. In *Edwards v. South Carolina*,⁸ the Court ruled that state capitol grounds were open to the public for freedom of assembly purposes. Next, public streets and sidewalks near a courthouse were deemed open to the public for purposes of an orderly demonstration in *Cox v. Louisiana*.⁹ Then in *Brown v. Louisiana*,¹⁰ four justices reasoned that a public library was a public forum. In that same term, the Court, in *Adderley v. Florida*,¹¹ distinguished a jail grounds from capitol grounds and the area adjacent to a courthouse. Jail grounds were declared not open to the public for the exercise of first amendment activities. Finally, in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*,¹² the Court found a privately-owned shopping center sufficiently public in nature to permit picketing against a member store's allegedly unfair labor practices.¹³ In each of these cases the Court relied upon the particular factual situation involved in order to reach its decision. Although many similar

⁷ 326 U.S. 501 (1946).

⁸ 372 U.S. 229 (1963).

⁹ 379 U.S. 536 (1965).

¹⁰ 383 U.S. 131 (1966). Justice White concurred but did not consider the public forum question.

¹¹ 385 U.S. 19 (1966).

¹² 391 U.S. 308 (1968).

¹³ However, in *Logan Valley*, the Court left open the question of whether first amendment activities had to be related to shopping center property uses in order to be protected. Nevertheless lower courts have held that a privately owned shopping center is a public forum for the exercise of the full range of first amendment activities. See *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968), where a petitioner's trespass convictions for political leafleting in a privately owned shopping center were reversed notwithstanding the fact that the leaflet's subject matter did not relate to the shopping center. For a similar result, see *Tanner v. Lloyd Corp.*, 308 F.Supp. 128 (D.Ore. 1970), where handbill distribution occurred in a Portland, Oregon, shopping center, and *Diamond v. Bland*, 91 Cal. Rptr. 501, 477 P.2d 733 (1970) where leafleting as well as gathering of signatures took place in a San Bernardino, California, shopping center.

factors were considered in reaching these decisions, the Court has yet to formulate an objective test for determining what constitutes a public forum.¹⁴

Certain areas on state university grounds are generally accessible to the public. There are, however, no explicit standards as to what areas may or may not be open to the public for the exercise of free speech rights.¹⁵ An objective test for determining what constitutes a public forum has been suggested by the Second Circuit in *Wolin v. Port of N.Y. Authority*.¹⁶ The *Wolin* dispute arose when individuals associated with two groups opposed to the Vietnam War entered the Port Authority bus terminal in New York City to distribute anti-war leaflets near several boarding gates. Both parties agreed that the conduct of the pamphleteers was peaceful and caused no interference with traffic.¹⁷ The *Wolin* court, in holding that the terminal was an appropriate public forum for handbilling and other related free speech activity, noted that in order to determine what constitutes a public forum a court should consider: (1) the character of the place in question, (2) the patterns of activity which usually occur in the area, (3) the essential purpose of the area, and (4) the number and classes of persons who use it. These four factors determine whether the place is a suitable forum for communication of views on politically and socially significant issues.¹⁸

B. Application of an Objective Test to a State University

In applying any public forum test to a campus, consideration should be given to the effect of the regulatory power of a state university over a particular area on its campus. A university might designate areas of its campus, or perhaps the entire campus, as off-limits to everyone except students or persons otherwise connected with the university. Denying the public the right to use such areas would prohibit normal first amendment access to non-students and individuals not affiliated with the university. In

¹⁴ For a more complete discussion of the public forum concept, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. Other cases in the public forum area where first amendment activity was ruled valid include: *Wolin v. Port of N.Y. Authority*, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) (New York Port Authority Terminal); *People v. St. Clair*, 288 N.Y.S. 2d 388, 56 Misc. 2d 326 (1968) (New York City Transit System—subway platform); *People v. Solomonow*, 291 N.Y.S. 2d 145, 56 Misc. 2d 1050 (1968) (New York streets in front of foreign embassies); *In re Hoffman*, 67 Cal. 2d 845, 64 Cal. Rptr. 97, 434 P.2d 353 (1967) (Los Angeles Union Railroad Station).

¹⁵ See Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 166-168 (1968).

¹⁶ 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968).

¹⁷ *Id.* at 85-86.

¹⁸ *Id.* at 89.

light of a university's public nature and the presence of areas generally accessible to the public, regulations of this type would seem constitutionally suspect.¹⁹

In general, a state university is not so unique that special considerations should determine the issue of a public forum for handbilling. If, in resolving this issue, the courts would examine factors similar to those suggested in *Wolin*, many university areas would be permissible public forums. Of course a university could still exclude some areas from the public forum category. For example, classrooms where teaching is occurring are inappropriate because not generally open to the public. On the other hand, the corridors adjacent to those classrooms might be valid areas for free speech. Student unions, streets, walks, and park areas would almost certainly fall into the public forum category. Likewise, where handbill distribution is prohibited in a specific campus area but is permissible directly across the street, there is no justification for disallowing the activity in one place but not the other if both areas are similarly accessible to the public.²⁰

While the nature of a university may not be so unique as to require special considerations to govern the issue of a public forum for handbilling, this is not to say that all first amendment activities on campus are entitled to the same degree of protection

¹⁹ A discussion of this issue and its ramifications is beyond the scope of this study. For a thorough discussion of the issues raised above, see Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, *supra* note 15, which discusses in detail CAL. PENAL CODE § 602.7 (West Supp. 1968), as amended CAL. PENAL CODE § 626.6 (West Supp. 1970), a law designed to stop interference with university activities. The statute was written and passed in response to the Free Speech Movement of 1964-65.

²⁰ With respect to these problems, see *Watchtower Bible & Tract Soc. v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E.2d 433 (1948), where the Court of Appeals of New York ruled that inner hallways in a large private apartment building complex were not public areas open to Jehovah's Witnesses for distribution of religious matter. The opinion noted that the group's right to distribute leaflets on the public (or private) sidewalks in the apartment complex was not infringed. *But see* Note, 48 COLUM. L. REV. 1105 (1948), which suggests the case may have been wrongly decided. The author argues that because of the enormous size of the complex the building's inner hallways were comparable to sidewalks in front of homes on public streets.

See also *Bowling Green v. Lodico*, 11 Ohio St.2d 135, 228 N.E.2d 325 (1967), where socialist magazines were being distributed on a public sidewalk on Bowling Green University's campus. The court assumed the sidewalk to be a public way and not a street of the university, before proceeding to overturn a city solicitation ordinance. However, under the proposed test, the "across the street" distinction would be invalid when public and university property have identical characteristics except that one area is within campus boundaries. See *Wolin v. Port of N.Y. Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). See also *In re Hoffman*, 67 Cal. 2d 845, 64 Cal. Rptr. 97, 434 P.2d 353 (1967), and *Tanner v. Lloyd Corp.*, 308 F.Supp. 128 (D. Ore. 1970), where courts specifically rejected the argument that the university's regulatory provision was valid because free speech activity could be carried on in nearby areas.

that should be afforded handbilling. Close attention must be paid to the nature and scope of the activity in question. In public forum cases, lower courts have distinguished leafleting from picketing or mass demonstrations, granting greater protection to the former activity.²¹

The reasons for this distinction can easily be illustrated. For example, for purposes of handling mass demonstrations, a university campus is often quite different from a town or city. On many campuses, security police can provide only limited control of mass demonstrations. To allow widespread areas on a university to become appropriate public forums for *all* freedom of expression purposes might create utter chaos.²² Distribution of literature, however, usually involves relatively few people who occupy only a limited area. Campus authorities should be able to control this activity in many, if not all, areas of a university.

III. TOWARD A CONSTITUTIONALLY PERMISSIBLE REGULATION

Given that handbilling is a favored first amendment right²³ and that many public forum areas do exist on state university campuses, the determination of what constitutes a permissible regulation

²¹ In *Farmer v. Moses*, 232 F.Supp 154 (S.D.M.Y. 1964), a federal district court ruled that the New York World's Fair Corporation could not prohibit handbill distribution inside the fair grounds, but that picketing could be proscribed. The court distinguished the two rights by noting that the fair was not like a street for picketing purposes since it constituted an enclosed area containing large numbers of persons. A more recent decision, *Tanner v. Lloyd Corp.*, 308 F.Supp. 128 (D. Ore. 1970), which concerned handbill distribution in a shopping center (*see* note 13, *supra*), stated that the distribution of leaflets is pure speech and a protected activity, whereas picketing may be enjoined.

²² In *Evers v. Birdsong*, 287 F.Supp. 900 (S.D. Miss. 1968), mass parades and demonstrations were attempted on the campus of Alcorn A & M College. The marches, led by Charles Evers, degenerated into near riots several times. They caused more than slight damage to university property and resulted in thefts of police equipment. In granting an injunction against further marches, the court noted at 905:

School campuses are not public in the sense of streets, courthouses, and public parks, open for expressions of free speech by the public. A college campus, particularly in an isolated area as is Alcorn, is vulnerable to the attentions occasioned by even the most orderly parade or assembly.

Note, however, that both the fact situation and language of *Evers* dealt only with parades and demonstrations, *not* leafleting.

²³ The Supreme Court has ruled, however, that free speech protections do not apply to commercial solicitation. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942), where a regulation proscribing handbill distribution only for commercial purposes was ruled valid. The Court noted that a legislature could regulate commercial distribution and solicitation. In *Breard v. City of Alexandria*, 341 U.S. 622 (1951), the Court reaffirmed a municipality's right to regulate commercial solicitation in upholding Alexandria's ordinance forbidding commercial canvassing door-to-door. However, the Court was careful in *Breard* to distinguish *Martin v. Struthers*, 319 U.S. 141 (1943), where the Court struck down a municipal ordinance barring all door-to-door handbill distribution regardless of the householder's wishes. In *Martin*, the statute was a blanket prohibition and not limited to commercial material.

becomes important. In the past, blanket prohibitions on handbill distribution generally have been invalidated by the courts as unconstitutional denials of free speech rights.²⁴ In certain rare instances, however, a state's interest has been held to override its citizens' first amendment rights and a blanket prohibition has been upheld.²⁵

Universities should strive to draft regulations which contain only reasonable and objective limitations on handbilling.²⁶ A recent decision, *Jones v. Board of Regents*,²⁷ suggests that a per-

In *People v. Bohnke*, 287 N.Y. 154, 38 N.E.2d 478 (1941), *cert. denied*, 316 U.S. 667 (1942), the New York Court of Appeals upheld an ordinance barring all handbill distribution on private property without the consent of the occupant. The saving factors of the statute in *Bohnke* evidently were the private property notion and the consent stipulation. These provisions would allow distribution of literature to some persons, thus avoiding the statute's being labelled a blanket prohibition.

²⁴ See *Lovell v. City of Griffin*, 303 U.S. 444 (1938), discussed in note 1 *supra*; *Jamison v. Texas*, 318 U.S. 413 (1943), and *Talley v. California*, 362 U.S. 60 (1960), both discussed in note 2 *supra*; *Martin v. Struthers*, 319 U.S. 141 (1943), discussed in note 23 *supra*; *Schneider v. State*, 308 U.S. 147 (1939), discussed in note 26 *infra*.

See, e.g., *People v. Davis*, 238 N.Y.S. 2d 981, 38 Misc. 2d 771 (1963), and *City of Elizabeth v. Sullivan*, 100 N.J. Super. 51, 241 A.2d 41 (1968) with respect to blanket prohibitions on handbilling. See also *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968) (picketing); *Hurwitz v. City of Oakland*, 247 F.Supp. 995 (N.D. Cal. 1965) (mass demonstration); *State v. Corbisiero*, 67 N.J. Super. 170, 170 A.2d 74 (1961) (mass meeting). The above citations are noted only as examples of the approaches taken by lower courts in holding statutes invalid and do not represent a comprehensive listing of all the cases in the area.

²⁵ In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court held a Massachusetts statute, which prohibited boys under twelve and girls under eighteen from selling periodicals on the streets, valid as applied to Jehovah's Witnesses. The state's interest in protecting children outweighed the claims of religious immunity. The Court held that the state's interest in protecting children from economic exploitation prevailed over the individual's right of freedom of the press. However, *Prince* may not be the law today. See 83 HARV. L. REV. 154, 158 (1969).

²⁶ One type of regulation generally considered to be a reasonable and objective limitation on distribution of handbills is a littering ordinance.

In *Chicago Park Dist. v. Lyons*, 39 Ill. 2d 584, 237 N.E.2d 519, *cert. denied*, 393 U.S. 939 (1968) the Illinois Supreme Court affirmed a minister's conviction for littering under the Chicago Park District Code. The cleric had distributed religious literature on a three thousand car parking lot by placing material on each car's windshield. Noting that a municipality can reasonably regulate first amendment activity, the court determined that the ordinance was a reasonable one, for it was intended only to prevent littering of the park district. However, littering ordinances which act as barriers against the communication of ideas are not constitutionally acceptable. In *Schneider v. State*, 308 U.S. 147 (1939), the Court stated at 163: "the public convenience in respect to cleanliness of the streets does not justify an extension of the police power which invades the free communication of information and opinion secured by the Constitution."

However, statutes which contain imprecise standards subject to broad discretionary decision-making power in an individual are inherently suspect throughout the first amendment area. In *Resistance v. Commissioners of Fair. P.*, 298 F.Supp. 961 (E.D. Pa. 1969), a district court judge overruled park regulations governing demonstrations. The court noted that there were no clear standards to guide the Park Commission Director's exercise of discretion in granting parade permits. In delineating what the standards ought to be in this situation, the court set guidelines which limited the *time* duration of the demonstration, the *number* of persons allowed to be in attendance, and the *manner* of conduct and control during and after the demonstration.

²⁷ 436 F.2d 618 (9th Cir. 1970). For the holding in *Jones*, see note 5 *supra* and the discussion in the text accompanying notes 41-43 *infra*.

missible regulation would be one designed to prevent disruption of ordinary educational activities on the campus as well as to insure non-interference with other persons legitimately occupying the school's public areas.²⁸ If regulations of this type impose only reasonable "time, place and manner" restrictions on the right to distribute handbills, they should be constitutionally permissible.²⁹ Nevertheless, a problem remains in determining what is reasonable.

*Wolin v. Port of N.Y. Authority*³⁰ offers assistance in formulating constitutionally permissible standards for valid handbilling regulations. The *Wolin* court directed that new standards be drawn up to protect against excessive disruption of normal activities. Its opinion noted that the character of the place, the number of persons passing through the area, and the forum's design are all relevant factors in determining the permissible degree of restriction on free speech activity.³¹

If factors similar to those examined in *Wolin* were applied to regulations governing handbill distribution on a university campus, the resulting limitations on the university's broad discretionary powers should be acceptable to both the university and the public.³² However, operating within a narrowly drawn regulation, a university might still be able greatly to limit handbill distribution by alleging that the area in question, although a public place, is too heavily congested and limited in space to allow free speech expressions for even a limited time. Thus, courts should place a heavy burden of proof on a university before allowing a restriction on handbill distribution, since this right is one which can be exercised without great inconvenience in almost all public areas.

IV. INTERFERENCE WITH A UNIVERSITY'S NORMAL ACTIVITIES

Irrespective of whether a regulation exists, sufficient interference with university activities will justify a prohibition on handbilling.³³ The test set out in *Tinker v. Des Moines School*

²⁸ *Id.* at 620.

²⁹ See *Cox v. New Hampshire*, 312 U.S. 569 (1941), where the Court upheld a New Hampshire statute regulating parades by narrowing the statute to include as necessary requirements for receipt of a parade permit only "time, place and manner."

³⁰ 392 F.2d 83 (2d Cir. 1968).

³¹ *Id.* at 93.

³² See O'Neil, *Reflections on the Academic Senate Resolution*, *supra* note 6, at 104 for a further discussion of the impact that a time, place, and manner regulation of free speech activities may have on a university campus.

³³ *Norton v. Discipline Comm. of E. Tenn. State Univ.*, 419 F.2d 195 (6th Cir. 1969),

*Dist.*³⁴ applies in determining whether there is sufficient interference with educational activities to allow prohibition of first amendment rights.³⁵ *Tinker* held that in order to prohibit the exercise of free speech rights there must be a showing of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."³⁶ Unfortunately, the *Tinker* standard is not easily applied in a university setting.³⁷

Lower courts have differed in their application of the standard. In *Norton v. Discipline Comm. of E. Tenn. State Univ.*³⁸ the Sixth Circuit upheld by a 2-1 vote university disciplinary action against students for distributing leaflets. The court determined that the *Tinker* test was satisfied by the college administrator's forecast of disturbances as a result of the distribution of leaflets asserting students' rights of expression on the campus.³⁹ Interestingly, there was no regulation involved in the *Norton* case; rather, the court ruled that the university had inherent authority to maintain discipline and could therefore punish the students responsible for the leafleting.⁴⁰

On the other hand, in *Jones v. Board of Regents*⁴¹ a Ninth Circuit panel unanimously decided that a non-student's pamphleteering was an insufficient interference with university activities to justify an order compelling him to cease his activities and leave the campus.⁴² In *Jones* actual disturbances occurred and the leafleting violated a university regulation prohibiting distribution of handbills.⁴³ In short, the Ninth Circuit's approach to the *Tinker* stan-

cert. denied, 399 U.S. 906 (1970); *Jones v. Board of Regents*, 436 F.2d 618 (9th Cir. 1970). For the holdings in these cases, see *supra* note 5.

³⁴ 393 U.S. 503 (1969), where the Court upheld secondary school students' first amendment rights. The students in *Tinker* wore black armbands to school in protest against the Vietnam War. The court concluded that this form of protest was appropriate first amendment expression.

³⁵ See in addition to *Jones, supra*, and *Norton, infra*, *Siegel v. Regents*, 308 F.Supp. 832, 836 (N.D. Cal. 1970); *Speaker v. Grantham*, 317 F.Supp. 1253, 1273-1274 (S.D. Miss. 1970); *Sill v. Pennsylvania State Univ.*, 318 F.Supp. 608, 615 (M.D. Penn. 1970); *American Civil Liberties Union v. Radford College*, 315 F.Supp. 893 (W.D. Va. 1970); *Pickings v. Bruce*, 430 F.2d 595 (8th Cir. 1970). These cases all employ the *Tinker* test. A good listing of cases involving challenges to university authority as infringing first amendment rights can be found in *American Civil Liberties Union, supra*, at 896-897.

³⁶ 393 U.S. at 514.

³⁷ As indicated in note 34 *supra*, *Tinker* concerned a public high school student's free speech rights, as did *Burnside v. Byars*, 363, F.2d 744 (5th Cir. 1966) from which *Tinker* adopted the material and substantial interference rule.

³⁸ 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

³⁹ *Id.* at 199, 201-204.

⁴⁰ *Id.* at 200.

⁴¹ 436 F.2d 618 (9th Cir. 1970).

⁴² *Id.* at 621.

⁴³ *Id.* at 619, 620.

dard with respect to leafleting on university campuses is far more favorable toward first amendment rights than is the Sixth Circuit's.

A solution to the conflict would be to disallow all arbitrary prohibitions on free speech activity. To restrict handbilling would then demand a realistic and dangerous threat of disturbance. Once the free speech activity falls outside the proscription of a constitutionally permissible regulation or, in the absence of such a regulation, once it is determined that the activity does not result in material interference with a university's operations, the activity would be protected. The long history of decisions protecting first amendment rights would then become applicable.⁴⁴

The importance of free speech on university campuses and the privilege to be free from danger and coercion while exercising that right cannot be overestimated.⁴⁵ Thus, when a handbilling regulation is at issue, close attention should be given to its nature and scope. As suggested previously, blanket prohibitions on handbilling are inherently suspect.⁴⁶ However, if the regulation does not impose a blanket prohibition and if there is no compliance with the regulation, then a different standard may govern the prevention of handbilling. Regulations narrowly drawn to limit, rather than to bar completely, handbill distribution can be expected to survive constitutional scrutiny.⁴⁷ The decisions general-

⁴⁴ *E.g.*, the Court held in *Terminiello v. Chicago*, 337 U.S. 1 (1949), that a function of free speech is to invite dispute. Free speech could be stopped only if it could be shown as likely to produce a "clear and present danger" of substantive evil rising above inconvenience, annoyance, or unrest. The Court thus echoed the "clear and present danger" test first established in *Schenck v. United States*, 249 U.S. 47 (1919), by Justice Holmes. The Court's past and present use of the test is, however, difficult to define. Indeed, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the concurring opinions of Justices Black and Douglas suggest the test has no place in the first amendment area, since it serves only to limit free expression. Although not an absolute right (*see* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), there exists a presumption in favor of the first amendment which accompanies free speech rights once the exercise is determined to be speech. A discussion of the "clear and present danger" test and its meaning today is beyond this discussion. It is important nonetheless to note the broad protection which the first amendment gives persons validly exercising free speech rights on university campuses.

⁴⁵ *See* in this regard: *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1131–1132 (1968); Schwartz, *The Student, the University and the First Amendment*, 31 OHIO ST. L.J. 635–686 (1970); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1037 (1969).

⁴⁶ In *Jones v. Board of Regents*, 436 F.2d 618 (9th Cir. 1970), the regulation was a blanket prohibition on handbilling which the court determined to be inherently suspect and invalidly applied. The overwhelming implication in *Jones* is that the statute is overbroad, but the court never explicitly invalidates it on such grounds. For a discussion of overbreadth in university regulations, *see* Comment, *Vagueness and Overbreadth in University Regulations*, 2 TEXAS TECH. L. REV. 255–269 (1971).

⁴⁷ *See* *Canon v. Justice Court*, 61 Cal. 2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964), involving a statute which limited the distribution of handbills dealing with election campaigning for particular candidates. Only those materials bearing the names of the publisher and persons for whom the leaflets were published could be distributed. The court dis-

ly employ a balancing approach which weighs the regulation's inhibitory effect on handbilling against its avowed purpose of safeguarding the public.⁴⁸

An identical test for determining what constitutes sufficient interference with university activities to allow prohibitions on leafleting might be used in all cases. The courts, however, do not seem inclined to follow this course. For example, in *Norton*⁴⁹ there was no regulation, and yet the court treated the situation as though a narrow regulation, that is, one which would only reasonably limit handbilling, existed. Thus the standard for determining interference with university activities was lowered and the leafleting was restricted by actually punishing those students engaged in the activity. In the court's opinion the students had exceeded their first amendment rights, even though no violation of a constitutionally permissible regulation had occurred.

In practical effect, a court is more likely to view prohibitions on leafleting favorably when imposed by a narrowly drawn regulation, drafted specifically to stop a particular interference with legitimate activities. In other words, the court would likely hold that a valid legislative determination had been made that the prohibited activity must be barred *because of* interference with legitimate activities.⁵⁰ Conversely, a court would more likely view pamphleteering as a protected activity on a campus where a regulation purports to bar all leaflet distribution.⁵¹

Unfortunately, irrespective of whether a broad, a narrow, or no

tinguished *Talley v. California*, 362 U.S. 60 (1960), as a case in which the statute involved barred all handbills distributed anonymously. The *Canon* court went on to hold that where a regulation is limited in scope, a balancing test, which would weigh the inhibitory effect on first amendment handbilling activities against the state's purpose in requiring disclosure of the distributors, should be used. The opinion also noted that this balancing could be discarded when the statute created an unlimited restriction. (The state's interests were held justifiable here, although the statute was held invalid on other grounds.) *But compare* *Zwickler v. Koota*, 290 F.Supp. 244 (E.D.N.Y. 1968), *rev'd on other grounds*, 394 U.S. 103 (1969), where a similar New York statute was held invalid by a three-judge district court panel in a lengthy opinion. The state's competing interests did not justify restricting free speech rights in *Zwickler*. For another case where balancing was employed, see *People v. Strauss*, 266 N.Y.S. 2d 431, 48 Misc. 2d 1006 (1965).

⁴⁸ See note 47 *supra*.

⁴⁹ 419 F.2d 195 (6th Cir. 1969). See text accompanying notes 38-40 *supra*.

⁵⁰ An interesting example of this reasoning is at work in the "Pentagon Papers" case, *New York Times Co. v. United States*, 39 U.S.L.W. 4879 (U.S. June 30, 1971), in which the Supreme Court overruled an injunction barring publication of a government study of the Vietnam War. The six members of the majority determined that the executive branch of the Government, pursuant to its inherent authority, could not prohibit publication. However, three members of the Court suggest that if a narrowly drawn statute which prohibited disclosure of certain vital government documents had existed, a different decision might have been reached. See the concurring opinions of Justices Brennan, Stewart, and White, 39 U.S.L.W. at 4882-4887.

⁵¹ There may be disagreement, however, as to when a regulation on its face bars all handbill distributions. See Mr. Justice Clark's dissenting opinion in *Talley v. California*, 362 U.S. 60, 67 (1960).

regulation is involved, the courts currently decide the issue of what constitutes sufficient interference with university activities to allow prohibition of handbilling on an ad hoc basis. However, in reaching their decision, the courts will be influenced significantly by the presence or absence of a regulation as well as by a regulation's scope and purpose. Courts ruling on handbilling rights should use no narrower standards of measuring interference with ordinary activities for exercise of free speech rights in state university public forums than in other public forums. Courts do attempt to determine what activity constitutes sufficient interference with the ordinary activities of a place (e.g., a railroad terminal or a bus station) to allow a prohibition of the activity in that forum. Whether these determinations employ standards more liberal than *Tinker's* "substantial disruption or material interference" with legitimate activities test before disallowing first amendment rights remains unclear. The first amendment should, however, keep its "preferred position" on university campuses.⁵²

⁵² Letters of inquiry regarding university regulations controlling handbill distribution were sent to thirty state universities and colleges of varying sizes. Twelve replies were received. Three schools have no regulations controlling leafleting; four schools have regulations which were arguably valid. Five institutions, however, have regulations clearly invalid under the standards proposed in this article. One regulations absolutely bars distribution by non-students, while another vests vague and broad discretionary powers over leafleting in university officials. The remaining three regulations are invalid since anonymous distribution of handbills is prohibited. See *Talley v. California*, discussed in note 2 *supra*. Eleven of the twelve replies offered no information on the issue of non-students' rights. Non-students' handbilling rights under the first amendment are not lost in public forum areas on state university campuses, however, and *Jones v. Board of Regents*, 436 F.2d 618 (9th Cir. 1970), supports this conclusion. See also Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, *supra* note 15.

Many of the schools responded additionally with their commercial solicitation regulations. Most universities have provisions designed to reach door-to-door selling in dormitories, "hawking" all over the campuses, etc. Lately, these commercial solicitation rules have been confronted with constitutional objections. They often are too extensive and infringe upon the right of freedom of the press. The University of Arkansas responded that its solicitation regulation is being challenged, as did Southern Illinois University. The Southern Illinois regulation was subsequently upheld in *Graham v. Davis*, Civil No. 69-64 (E.D. Ill., May 23, 1969). More recently, Texas Tech's prohibition on the sale of a campus newspaper was struck down by a district court ruling in *Channing Club v. Board of Regents*, 317 F.Supp. 688 (N.D. Tex. 1970). The court refused to rule on the school's regulations and overruled the ban on sale solely on constitutional grounds. University officials had barred sale of the paper on account of its language at a time when several other publications offered for sale at the university contained identical language. The court ruled that the first and fourteenth amendments (equal protection clause) protected the right to sell the paper.

A case involving similar facts is now before the Supreme Court. *Board of Regents v. New Left Education Project*, appeal docketed, 39 U.S.L.W. 3273 (U.S. Dec. 14, 1970) (No. 1100), involves rules promulgated by the University of Texas regents prohibiting commercial or noncommercial solicitation on University of Texas campuses. The lower court ruled against the regulations, finding them violative of first amendment rights. See also the Court's most recent handbilling decision, *Organization for a Better Austin v. Keefe*, 39 U.S.L.W. 4577 (U.S. May 17, 1971), where the Court ruled that distribution of literature critical of a real estate broker's policies in a racially troubled Chicago area could not be prohibited.

V. CONCLUSION: THE LARGER IMPLICATIONS

In view of the fact that a university fosters the development and discussion of ideas, it should be a more appropriate forum than public streets or parks for at least certain free speech activities.⁵³ Handbilling would easily be among the protected activities because of its limited inconvenience and its close relation to pure speech.

The emerging constitutional standards discussed throughout this article may affect leafleting on campuses of private as well as state universities and colleges. The distinction between a state university campus area (where state action is clear-cut) and a similar area on a private university campus has little significance if the area is open to the public generally.⁵⁴ When the concept of a university as an open forum for ideas and discussion is combined with a factual determination that a place is generally available for public use, a private university's campus may be as public as a state school's campus. The standards for determining whether a campus area should be a forum for public free speech activity would thus be equally applicable to a private university situation.⁵⁵ For example, libraries or student unions generally open to the public on both state and private university campuses would appear indistinguishable for first amendment purposes.

The inherent nature of a university may demand free speech access to certain areas which a private university has not made generally available to the public,⁵⁶ even though no clear authority exists for compelling a private university to allow public access to such areas. Once an area has been made available for public use, a private university would have difficulty in arbitrarily prohibiting constitutionally protected forms of expression.

This article suggests that the right to distribute handbills on campuses applies equally to students and non-students. To permit handbilling without prior restraint by all persons or groups on public areas of a university campus may create problems. However, even now when protests have degenerated into violence and tragedy on university campuses, the first amendment and its regu-

⁵³ See *Developments in the Law—Academic Freedom*, *supra* note 45, at 1054: "Because of its devotion to scholarship and academic inquiry, the university conforms to the 'marketplace of ideas' concept even more fully than the public forum."

⁵⁴ See, e.g., *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), discussed in text accompanying note 12 *supra*.

⁵⁵ See Part II, *supra* in text.

⁵⁶ One interpretation of *Logan Valley*, discussed *supra* in the text accompanying note 12, reasons that the inherent qualities of certain property render that area an appropriate public forum. Thus, availability for public use would not be the sole criteria.

lated privileges should take precedence over the fear of disturbance. In an angry dissent to the denial of certiorari in the *Norton* case, Justice Marshall, supported by Justices Brennan and Douglas wrote:

There is a tendency to lump together the burning of buildings and the peaceful but often unpleasantly sharp expression of discontent. It seems to me most important that the courts should distinguish between the two with particular care in these days, when officials under the pressure of events and public opinion are tempted to blur the distinction. Our system promises to college students as to everyone else that they may have their say, and when it breaks that promise it gives aid and comfort to those who say that it is a sham.⁵⁷

The concepts of free speech and academic freedom enjoy a symbiotic relationship. That relationship will grow and prosper to the extent that the courts accord campus pamphleteering its full measure of constitutional protection.

—*Morton M. Rosenfeld*

⁵⁷ 399 U.S. 906, 909 (1970).