

MEMORANDUM

Leafletting on Private Property and at Church Parking Lots

Life Legal Defense Foundation receives many calls about leafletting at church parking lots. Many of the callers are under the impression that it is their right to do so and usually they refer to a case called *Pruneyard*. Before you leaflet at the local church you should be apprised of the case of *Robins v. Pruneyard* and other relevant California law.

The first principle to understand is that there is no right to access to private property for speech purposes under federal constitutional law, i.e., the First Amendment. The U.S. Supreme Court toyed for a decade or two with the idea of there being such a right, but ultimately discarded it. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). However, various state supreme courts, interpreting their own state constitutions, have ruled that some private property which is open to the public is constitutionally required to be open for free speech and petition purposes as well.

Probably the most well-known of these cases is *Robins v. Pruneyard*, 23 Cal.3d 899 (1979). In that case, the California Supreme Court ruled that 1) because the modern shopping center had taken on many of the attributes of the traditional public downtown area where people congregate, and 2) because the activity did not interfere with normal business operations, and 3) because our state constitutional rights have been construed more broadly than corresponding federal constitutional rights, the state constitution protected the right to speak and petition in shopping centers even though they were privately owned.

As you can see already, saying the Pruneyard Shopping Center, which covered 21 acres and accommodated over 20,000 people daily, is open for speech and petition is a far cry from saying a church parking lot is similarly situated with

respect to the constitutional right to speak and petition. A church parking lot could hardly be said to be the equivalent of the town square of olden days, nor is it usually held open for people in general to meet and gather.

But the story doesn't stop there. For about ten years, *Pruneyard* was the standard. It was applied and interpreted in other cases to mean that any shopping center, not just large ones, and even other types of stand-alone commercial establishments, were fair game for speech and petition, as long as they were "open to the public." *Press v. Lucky Stores*, 34 Cal.3d 311 (1983); *Paradise Hills Associates v. Procel*, 235 Cal.App.3d 1528 (1991).

But *Pruneyard* finally met its match – the abortion issue. Pro-lifers were using *Pruneyard* to assert their right to be in the parking lots of individual and multi-tenant professional buildings which housed abortion clinics. In a series of cases in the early 1990's, the California courts ruled that *Pruneyard* did not extend to those situations. The court relied on a number of factors, such as the limited public invitations (most people came by appointment), the lack of retail business carried on, and, to a certain extent, the disruptive nature of the activity. Consequently the court held that these buildings and parking lots were not open to the public, that the owners maintained a greater expectation of privacy, and therefore *Pruneyard* did not apply. *Planned Parenthood v. Wilson*, 234 Cal.App.3d 1662 (1991); *Allred v. Shawley*, 232 Cal.App.3d 1489 (1991); *Allred v. Harris*, 14 Cal.App.4th 1386 (1993).

Those cases began the downfall of *Pruneyard*. After that, the courts began cutting back by approving of more and more "time, place, and manner" restrictions which shopping centers could impose on speech activity. More

importantly, in the last couple of years, there have been a few cases which show that, rather than reading *Pruneyard* expansively, courts are now limiting their holdings, relying strictly on *Pruneyard*'s original facts, a large shopping center to which the public is invited not only to shop but to browse, to eat, to meet with friends, etc. Specifically, at least three courts have ruled large retail outlets, such as Trader Joe's, Raley's and Waremart, may exclude individuals who are present for the purpose of speech and petition. *Waremart, Inc. v. Progressive Campaigns*, 85 Cal.App.4th 679 (2000); *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1999), *Young v. Raley's, Inc.*, 89 Cal.App.4th 476 (2001). The courts held that even establishments of this size do not meet *Pruneyard* "town center equivalent" criteria.

Based on the foregoing, it appears highly unlikely that a court would rule that a church parking lot is open to the public for the purpose of speech, even something as non-disruptive as leafletting cars. The only situation where a court might hold that a church parking lot is open to the public would be where the church was sponsoring a large carnival to which the public is invited, or the church was also an historic landmark to which the public was invited to drop in and stroll around. Even in those circumstances, the court may not be convinced of a *Pruneyard* situation, particularly in light of more recent cases.

Additionally, for those of you who do leaflet, you should be aware that under the California Penal Code, a trespass only occurs if you are entering the property for the purpose of interfering with the owner's business, or if you refuse to leave when asked to do so by the owner, or the owner's agent (including a police officer). Penal Code section 602 j, k, n. Thus, in the case of a peaceful attempt to distribute leaflets, unless you refuse to leave when

(CONT. ON BACK PAGE)

MEMORANDUM

BOARD OF DIRECTORS

John Streett, Chairman — *Novato*
Dana Cody, Executive Director — *Sacramento*
Catherine Short, Legal Director
Steve Lopez, Founder — *Lafayette*
Terry Thompson — *Alamo*
Anthony Wynne — *Palo Alto*
Mary Riley, Administrative Director

BOARD OF ADVISORS

The Hon. Steve Baldwin
California Assembly
The Rev. Michael R. Carey, OP, JD
Colorado / California
Daniel Cathcart, Esq.
Los Angeles, California
The Hon. William P. Clark
Paso Robles, California
Raymond Dennehy, PhD.
San Francisco, California
The Rev. Joseph D. Fessio, SJ
San Francisco, California
The Hon. Ray Haynes
California Senate
The Hon. Henry J. Hyde
*U.S. Congress**
The Hon. Howard Kaloogian
California Assembly
Anne Kindt, Esq.
California/New Jersey
Gary Kreep, Esq.
U.S.J.F. — San Diego, California
David Llewellyn, Esq.
Sacramento, California
Charles E. Rice, Esq.
South Bend, Indiana
The Hon. Christopher H. Smith
*U.S. Congress**
Ben Stein, Esq.
Hollywood, California
Andrew Zepeda, Esq.
Beverly Hills, California

*Honorary Members

LIFELINE MISSION STATEMENT

The mission of Life Legal Defense Foundation is to give innocent and helpless human beings of any age, and particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the courtrooms of our nation.

The purpose of LLDF is set forth in our mission statement above. To that end, *Lifeline* welcomes all ideas, opinions, research and comments, and all religious and political points of view, so long as not seen to be clearly divisive, and so long as fundamentally based upon the twin pillars of truth and charity.

Leafletting on Private Property and at Church Parking Lots

(CONTINUED FROM INSIDE)

asked to do so by someone in authority, you have not violated any law.

Please be advised that each case is specific to its own facts; therefore this

memorandum should not be construed as legal advice. Should you have any questions in this regard, please contact our administrative office in Napa, California at (707)224-6675.

**LIFE LEGAL
 DEFENSE FOUNDATION**
P.O. Box 2105
Napa, California 94558

Address Services Requested

Inside: Important information about leafletting for the upcoming election

Nonprofit Org. U.S. Postage PAID Brainerd, MN Permit N°472

LLDF Banquet November 3rd. Join Us.

Nat Hentoff, columnist for the *Village Voice* (New York) and the Washington Post, a tireless defender of life and liberty, and a noted expert on and champion of the First Amendment will speak at LLDF's Fall Banquet. November 3, 2001, Oakland, Calif. For tickets or further information, please contact the LLDF office (invitations will be coming by mail.)

Nat Hentoff is a prolific author. He has written many articles and books, many dealing with free speech and other civil rights, politics and jazz. He has also written novels and novels for children.

Mr. Hentoff's more recent books include *Speaking Freely: A Memoir*, and *Living The Bill of Rights: Knowing How to Be an Authentic American*, University of California Press, 1999.

Some of Mr. Hentoff's recent articles, including a description of denial of due process in proceedings at Columbia University as well as a thoughtful and provocative article about the recent reporting of Sen. Bob Kerrey's involvement in the Thanh Phong massacre are available online at www.villagevoice.com.