

THE OPEN SHOPPING CENTER

Jewish groups have won two different free-speech cases recently.

One of the cases started in a shopping center outside San Jose. The confirmation class of San Jose's Temple Emanu-El decided to gather signatures of protest against the Zionism-is-Racism resolution of the UN. They went to the Prune Yard shopping center because of its dense pedestrian traffic. The management told Michael Robins and David Marcus to leave because they were trespassing on private property.

Robins and Marcus, with help from the congregation and the Union of American Hebrew Congregations, took the case to court, saying that their constitutional right to free speech had been abridged. A Superior Court judge, and a district court of appeals both upheld the Prune Yard's contention that it could control the distribution of material on its own private property.

However, the California Supreme Court reversed that ruling -- and a few months ago the U.S. Supreme Court upheld the California Supreme Court and the Jewish students. The American Jewish Congress and the Synagogue Council had filed briefs before the Supreme Court, arguing that the shopping center is a kind of modern public forum, where free speech should be protected. After all, our founding fathers did not anticipate the shopping center -- which removes the public sidewalk as a place of access to pedestrians.. It was a landmark decision.

And a couple of weeks ago, a New York judge voided a nine year old injunction which had severely limited demonstrations at the Soviet UN mission. That suit was brought by the Student Struggle for Soviet Jewry. The injunction had originally been laid down by a court during Jewish demonstrations on the Leningrad trial, after a complaint by nearby tenants. An appeals court had upheld the injunction, which so reduced the numbers of demonstrators and the levels of permissible sound, as to make demonstrations minimally effective.

However, Judge Kenneth Shorter has now said that the Jewish youth involved are no longer just "thwarted picketers," but "symbolic defenders of the rights of freedom and assembly." Judge Shorter spoke sharply against imposing "prior restraint" on free speech: "Any argument which enables undefined irresponsible conduct of unidentified and perhaps yet unborn individuals to undermine the entire structure of free speech is frightening and unacceptable." He more than doubled the number of demonstrators, and lifted the ban on amplified sound, although maintaining a curfew on demonstrations between 6 p.m. and 9 a.m.

The genius of "rule by law" is that in neither case was the Court concerned with the *content* of the demonstration. It is not up to any court to decide whether the Zionism-is-Racism resolution is right or wrong; or whether the Soviet Union's emigration policy is right or wrong. The courts cannot argue with the belief of Jewish groups on those matters, or their desire to expose the public to those beliefs. The courts can only rule on whether *any* group can publicly express *any* political opinion under a given set of circumstances.

So, when the Jewish groups were winning these cases, they were necessarily winning them for everyone. Thus, if Arab groups now want to distribute leaflets in the Prune Yard saying that Zionism *is* racism, they cannot be stopped. You can't have it both ways under the law.

The underlying concept, of course, is what might be called "the open shopping center of ideas": the public will be convinced by the most compelling and reasonable ideas. If that underlying concept doesn't work, then we're lost in any case.

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The only alternative is rule by force. Under rule by force, the Jewish groups would have lost the Prune Yard case because the International Council of Shopping Centers, with a number of weighty corporations, fought on the other side. And in the case of the Soviet mission, the New York City Police Department and the entire U.S. government were pitted against the Jewish groups. The Jews in this country are outnumbered by about 49 to 1, but, generally speaking, we are equal under the law.

Freedom of speech often hurts; but it is finally the best protection against oppression.

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