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A Position on the Control of Obscenity

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By JOHN CORNELIUS LEVY*

The position on the control of obscenity which this article will sketch is as follows:

1) Obscene publications exert a substantial adverse effect on public morality and must, therefore, be controlled—either legally by the state, or extra-legally but not illegally by private agencies of society.

2) Legal control by the state is, and can reasonably be, only minimal.

3) For that very reason, extra-legal control by private agencies of society which are non-officiously concerned with the public welfare and which themselves act only within the law is necessary for the common good.

Obviously, many citizens disagree with this position. One of the most responsible groups which disagrees is the American Civil Liberties Union. As I understand its position, ACLU completely disagrees with my first proposition as to the necessity of control for two reasons: a) there is no workable, accepted definition of obscene publications; and b) even if there were, there

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1 In 1956, the late Samuel Cardinal Stritch asked the writer to enlist, and to serve as chairman of, a small group of Chicago lawyers to undertake and maintain a continuing study of the laws relating to obscenity. The group is still functioning with about half of the original personnel still active. There is not, and never was, any relationship between the group and the Archdiocese of Chicago; the lawyers have volunteered their services from a conviction of the social significance of their work.

In addition, since 1958, the writer has been a legal consultant to the National Office for Decent Literature, a service office established by the Catholic Bishops of the United States to offer to those who request it information respecting periodicals and paperbacks which are readily accessible to youth. On the basis of a careful screening by qualified volunteer personnel, the Office makes available a printed list of such publications, some of which it approves for youth, and some of which it deems objectionable for youth on the basis of its nine-point published code of decency.

These statements are made at the outset of this article to acquaint the reader with the experience, on the basis of which the writer has formulated the position on the control of obscenity which the article will sketch.

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is no sufficient evidence that such publications exert any adverse effect on the public welfare. Hence, ACLU, while agreeing with my second statement as far as it goes, really insists that, since all publications, including obscene publications, are within the protection of the first amendment (the Roth-Alberts decision to the contrary notwithstanding), there should be no legal control whatever save for the possible case within the "clear and present danger" doctrine. And, while disagreeing with my third proposition as to the necessity for private control, ACLU agrees that private agencies have the civil right to work for control of obscene publications so long as such agencies stay within the law in their efforts, but it disagrees as to the legality and prudence of certain specific means (e.g., boycotts) allegedly available to such agencies in such efforts.3

This article will explore these competing positions.

I A

Can obscene publications be reasonably defined and identified? The United States Supreme Court thinks so. After a five-year search for an adjective of fifth and fourteenth amendment constitutional definiteness, the Court found that the single, simple adjective "obscene," as defined and fleshed out with workable standards by American case law, filled the bill. Speaking through Mr. Justice Brennan in the combined cases of Roth v. United States and Alberts v. California,4 the Court said that "obscene material is material which deals with sex in a manner appealing to prurient interest." In a footnote appears the Model Penal Code's definition of "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."

By way of supplying standards to flesh out the definition, the Court said that the American cases established that the test of obscenity is whether, to the average person, applying contemporary community standards, the dominant theme of the questioned material, taken as a whole, appeals to prurient interest. In the later case of Manual Enterprises, Inc. v. Day,5 involving the alleged obscenity of magazines intended for male

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homosexuals, the Court added that, especially when the dominant prurient appeal was limited to a particular group in the community, there must be in addition the element of patent offensiveness to current community standards of decency, i.e., the basic indecency of the material for the community as a whole must be self-demonstrating. Moreover, since the issue arose under the federal postal statutes, the community involved was the nation as a whole. And in the interim case of Smith v California (a state criminal proceeding), as well as in the Manual Enterprises case (a federal non-criminal proceeding), the Court held that, as an essential element of guilt, the defendant must be proved to have had scienter, i.e., to have known (or to be reasonably chargeable with having known), not that the contents of the publication were obscene, but simply what those contents were.

The three cases, taken together, establish that the test of illegal obscenity for the whole community is whether, to the average person, applying contemporary community standards, the dominant theme of the questioned material (the contents of which the defendant either knows or is reasonably chargeable with having known), taken as a whole, appeals to prurient interest, and, especially when the prurient appeal is limited to a particular group in the community, is also patently offensive to the contemporary standards of the relevant community as a whole.

While this definition is still no doubt subject to further refinement (as, for example, in the matter of what constitutes the relevant community, and in the matter of the evidence admissible to establish the contemporary standards of the relevant community), and while there will be marginal cases wherein its application will be difficult, the writer submits that the Supreme Court's definition, complete with standards, is at least adequate as a basis for legal control.

The reader will also recall the significance of the Supreme Court's holding in the Roth-Alberts cases that the obscene publication, as thus defined, is not within the protection of the first amendment. That significance is this: Were obscene publications so protected, there would be but one way to justify their
legal control, and that would be by proving that they were causing a "clear and present danger" to the common good. But proof of "presentness" is seldom possible, because the "clear danger" to the common good from obscene publications lies in their long-run erosion of the public morals upon which the public welfare rests. Since, however, obscene publications are not within the protection of the first amendment, no such proof of "presentness" need be made in order to justify their legal control. A principal effort of ACLU is to sublimate this holding and directly or indirectly to require the "clear and present danger" test as a basis for any legal control of obscenity.\(^7\)

Still open is the issue of whether the Supreme Court's definition of obscenity can be adjusted to a particular "target audience" if the illegality involved is similarly restricted to the furnishing of the publications to that target audience only, rather than to the community at large. For example, if the act proscribed by a particular statute were the furnishing of male homosexual magazines to male homosexuals only, rather than to the community at large, it would seem that the factor of patent offensiveness to the contemporary standards of the relevant community as a whole would no longer be essential; the dominant prurient appeal to the target audience alone would suffice to sustain the proscription of furnishing such publications to that audience only. To put the matter another way, the test of dominant prurient appeal is to be made, not by reference to the average adult in the community, but by reference to the average male homosexual in the community when the proscribed act is the furnishing of such publications to male homosexuals only. This illustration is not particularly persuasive because the furnisher would, of course, have to know, or be reasonably chargeable with knowledge, that the person to whom he was furnishing such publications was a male homosexual.

But the significance of this suggestion lies in its applicability to youth. If the target audience is youth, why would not the dominant prurient appeal to an average seventeen-year-old member of the community be an appropriate standard by which to judge the obscenity of the publication for its intended audience under a statute which would proscribe merely the furnishing of

\(^7\) ACLU Policy Statement on Censorship, 1962.
such publications to youth.\textsuperscript{8} Indeed, if the proscription is thus restricted, why would not the same standard be appropriate for any publication, whether primarily intended for youth or not? A Chicago municipal ordinance,\textsuperscript{9} which is currently being litigated, has done just that, and a similar proposed Illinois statute is now before the Illinois legislature for enactment.\textsuperscript{10}

\textbf{I B}

Is there any sufficient evidence that obscene publications, as defined, adversely affect public morality and the common good? The \textit{best} evidence is the unanimous judgment of American state legislatures expressed by enacting public controls for obscene publications, plus the judgment of the Federal Congress similarly expressed from 1842 to date, plus the International Agreement for the Suppression of the Circulation of Obscene Publications, to which over fifty nations are signatories. As the United States Supreme Court said in the \textit{Roth-Alberts} decision, these legislative judgments represent a really universal agreement that obscene publications should be restrained as inimical to the common good and destructive of public morality. This is the best evidence both because of the universality of the legislative judgment and because, in an area of conflicting opinion (which even ACLU concedes this area to be), it is the function of the legislature, and of the legislature only, to determine public policy.

The executive departments of governments are equally firm in their judgment that obscene publications have a substantial adverse effect on the common good. Police and prosecuting officials have no doubt about the matter.

The judicial departments of governments have \textit{not} dissented from this judgment, and they understand quite well that, in such an area as this, it is not their function to dissent. But what very many of them have done is to find, under the state and federal constitutions and in respect of particular statutes, a superior value inextricably interwoven with the public value of suppressing obscene publications, and they cannot permit governments to achieve the inferior value at the expense of the superior value.

\textsuperscript{8} The restricted proscription would avoid the constitutional defect which invalidated a Michigan statute in \textit{Butler v. Michigan}, 352 U.S. 380 (1957).
\textsuperscript{9} §192-10.1, Municipal Code of Chicago.
\textsuperscript{10} H.B. 1072, 73rd Illinois General Assembly (1963).
What the judicial departments have really done is to return the whole ball of twine to the legislatures for unravelling by more carefully drafted statutes. Have the legislatures given up? They have not (as witness the wholesale re-enactment of obscenity statutes after the decision in *Smith v. California*), and their action is further best evidence of the strength of their judgment that obscene publications must be controlled by government in the public interest—a judgment which they have the primary right and duty to formulate.

In a few cases, even the United States Supreme Court has agreed, not only with the legislative judgment as to the public value of governmental suppression of obscene publications, but even that the usual superior value is either not involved or not significantly impaired: on the substantive side, that is the meaning of the *Roth-Alberts* decision; and on the adjective or methods side, that is the meaning of the decisions in *Kingsley Books, Inc. v Brown*11 and *Times Film Corp. v. City of Chicago*12—and that is still the meaning of those cases, despite their subsequent qualification by later decisions.

The conclusion is that the *best* evidence of the substantial adverse effect of obscene publications on the public welfare is the unanimous legislative judgments to that effect. Let those who contest that really universal judgment assume the burden of proof.

Moving *behind* the really universal legislative judgment, only Mr. Justice Douglas and Mr. Justice Black have ever even questioned the adequacy of the basis for it—and even they have done so only in the course of maintaining that the superior value of free expression is both *always* involved and moreover an *absolute* value in and of itself. Their comments disclose that they, along with ACLU, recognize a conflict of underlying evidence on the matter. That conflict exists in the area of *opinion* evidence. So they resolve the determination of public policy in this matter by deprecating the probative value of opinion evidence and by demanding that the legislatures support the legislative judgment by experimental and scientific evidence alone. Ignoring the primacy of the legislature in the determination of public policy

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on any but a completely arbitrary basis, and ignoring the attempt to switch the burden of proof, they postulate the necessity for this type of evidence, and this type alone, to support the legislative judgment, well aware that neither side has such evidence at its command.

The writer protests this effort to deny the probative value of opinion evidence, especially in the absence of the experimental evidence which the Justices demand. The probative value of opinion evidence, especially in the absence of experimental evidence, is always and properly relied on. The fact is that there is a universal judgment by ordinary men and women that there is a relationship between the dissemination of obscene publications and the positing of antisocial conduct and between such dissemination and the long-run erosion of public morals upon which the public welfare rests. This is the general experience of mankind and the common sense of the matter. In addition, men and women who have had greater occasion to observe than others generally concur in this judgment. For example, parents concur (1957 Trendex News Service Poll), psychologists and psychiatrists concur (e.g., Dr. Benjamin Karpman, chief psychotherapist at St. Elizabeth's Hospital in Washington D.C., Dr. Frederic Wertham, author of *The Seduction of the Innocent*; Dr. Ralph S. Banay, former research psychiatrist at Columbia University; Dr. George W Henry, professor of clinical psychiatry at Cornell University; Dr. Nicholas G. Frignito of Philadelphia), sociologists concur (e.g., Dr. Pitirim Sorokin, professor of sociology at Harvard University and author of *The American Sex Revolution*), juvenile judges concur (e.g., The National Council of Juvenile Court Judges), enforcement officials concur (e.g., Mr. J. Edgar Hoover, and The National Association of County and Prosecuting Attorneys) post-office and customs officials concur; clerics and religious counselors of all faiths concur. These concurrences are collected in testimony presented to the Gathings, Kefauver, and Granahan congressional committees, and in the Annual Reports of the New York State Joint Legislative Committee Studying the Publication and Dissemination of Obscene and Offensive Materials.

It will occur to someone to remind the writer that there was a time when there was a universal concurrence of opinion that
the earth was flat. Hence, this universal concurrence of opinion that obscene publications have a substantial adverse effect on the public welfare may be equally erroneous. The writer has two observations to make in this respect: (a) Those who contended that the earth was round accepted the burden of proof; and (b) that there can be universal ignorance of a physical fact is not surprising; on the other hand, universal ignorance of a social and moral fact would indeed be surprising in view of the essential nature of man as a social and moral being.

In conclusion, when the writer says that there is a universal agreement that obscene publications have a substantial adverse effect on the public welfare, what is the thrust of that observation? It is this: our American democratic way of life is based on public ideals of family integrity, parental authority, parental responsibility for the education of children, the institution of marriage as the basis for the family, and non-deviate sexual relations. It is these basic social and public institutions and practices which are eroded in the long run by obscene publications, which now constitute a mass media of communication, and which glorify and normalize sex perversions, disrespect for authority, ridicule for marital fidelity, and the fatuous notion that sex can be and is an end in itself. Listen to Dr. Sorokin in *The American Sex Revolution:*

> The sham literature of our age is designed for the commercial cultivation, propagation and exploitation of the most degraded forms of behavior. The world of this popular literature is a sort of human zoo, inhabited by raped, mutilated and murdered females and [by] he-males outmatching in bestiality any caveman and out-lusting the lusting animals. And what is especially symptomatic is that many of these human animals are made to luxuriate in this way of life.\(^\text{13}\)

II

The area for legal control of obscenity is, and reasonably can be, but minimal.

(a) That it is but minimal is clear from a survey of the principal United States Supreme Court decisions of the past decade. The writer has already published such a survey.\(^\text{14}\)

\(^{13}\) Sorokin, *The American Sex Revolution* 24 (1956).
\(^{14}\) *The Catholic Lawyer* 95-109 (1962).
1963 case of *Bantam Books v. Sullivan*\(^\text{15}\) merely confirms that conclusion, and the writer does not expect the two pending cases of *Ohio v. Jacobellis*\(^\text{16}\) and *Smith v. California*\(^\text{17}\) to upset that conclusion. Either on substantive or on objective grounds, all United States Supreme Court decisions of the past decade have been adverse to the legal control of obscenity except three: The *Roth-Alberts* decision,\(^\text{18}\) which established a constitutionally adequate definition of obscenity, plus the proposition that the obscene, as thus defined, did not enjoy the protection of the first amendment; *Kingsley Books, Inc. v. Brown*,\(^\text{19}\) which established the over-all constitutionality of the New York injunction method of control; and *Times Film Corp. v. City of Chicago*,\(^\text{20}\) which established the basic constitutionality of a municipal licensing system for the public exhibition of motion picture films. While it is true that each of these cases has already been restrictively refined by subsequent decisions either of the United States Supreme Court or of other courts, these three decisions still warrant the conclusion that there is today under the United States Constitution *some* legal protection against obscenity, but not very much.

(b) This narrow scope of legal control may well be all that can reasonably be expected of the law Personal freedoms, which are the key values in our society and which are carefully protected by the first amendment, are more secure from governmental interference; and the controls of community pressure, exerted through private citizens' groups acting extra-legally but not illegally, still remain available.

In this context the 1957 Annual Statement of the American Catholic Hierarchy on Censorship\(^\text{21}\) stands as a statement truly remarkable for its clarity, its moderation, and its perception. The statement pointed out that any governmental censorship necessarily impinges on the individual's freedom to communicate

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\(^{15}\) 83 Sup. Ct. 631 (1963).


\(^{17}\) Supra note 16.

\(^{18}\) 354 U.S. 476 (1957).

\(^{19}\) 354 U.S. 436 (1957).


\(^{21}\) 56 Catholic Mind 180 (1958).
(which stems from his basic right to know), and that this freedom is absolutely essential to the development not only of the individual but of the democratic state. This freedom to communicate, of course, has obvious social implications, which require that the freedom be exercised within the limitations imposed by the equal freedom of others in society and by the general welfare. It is inevitable, however, that legal restraints on individual freedoms can be but minimal; civil law will define any limitation on freedom as narrowly as possible, and the limitation must clearly be necessary for the common good. The American legal system has always been dedicated to the principle of minimal restraint—to curb less rather than more, to hold for liberty rather than for restraint. Thus do we best safeguard our basic freedoms. It follows that, owing to the exigencies of free speech and free press, a communication may not be legally punishable, but may yet defy the moral standards of the great majority of the community. Between the legally punishable and the morally evil, there is a great gap. To accept as morally inoffensive all that is legally unpunishable would be to lower greatly our moral standards. Civil legislation of itself is not an adequate standard of morality. It is for this reason that we need private agencies to evaluate communications on the basis of moral standards higher than those practicable for civil law, and then to publicize their evaluations and to seek by legal means the cooperation of like-minded persons in the vindication of their rights as parents and citizens. The right, by legal means, to speak out for good morals is not challengeable in our democracy.

The conclusion, then, is that governmental protection of community standards of decency can reasonably be but minimal, because freedom of expression is normally a superior public value and governments cannot be permitted to sacrifice the superior value for the inferior, even though the inferior is also a public value.

III

But the private citizen is not legally restricted to the same extent as is his government. He and his fellow citizens have made the judgment that obscene publications subvert the public welfare. As private citizens, they are constitutionally free to implement that judgment, provided that their implementing action
is itself within the law. And that judgment, be it noted, is in the area of public (not private) morality. They are acting, not because the obscene publications offend their private or personal moral codes or constitute occasions of sin, but because those publications adversely affect the public welfare.

Their right to make that judgment and their right, within the law, to implement that judgment are really aspects of their own basic constitutional right of freedom of expression. It is for that reason that the writer expects organizations such as ACLU, not only not to contest, but in fact to support, the right to judge and to act non-governmentally in this area. The writer is happy to acknowledge that ACLU has done so in its latest policy statement. And, as far as he knows, ACLU did not subscribe to the 1953 Westchester Statement of the American Library Association and the American Book Publishers Council that any approach other than that of governmental control was improper. While, therefore, ACLU does not agree that there is any necessity for private control of obscenity, it does agree that private agencies have the civil right to work for such control so long as such agencies stay within the law in their efforts.22

The area of disagreement here is whether certain specific methods of control ought to be used by private agencies. ACLU, for example, concedes the legality of specific primary boycotts, but opposes both general and secondary boycotts owing to their wider impact on the circulation of ideas and owing to their stronger coercive effect. It is not clear to the writer whether ACLU opposes general and secondary boycotts as illegal, or merely opposes them as unwise. While common law case authority is scant, the writer submits that it supports the legality of general and secondary boycotts where they are justified either by a lawful purpose or by a special relationship between the person or organization urging the boycott and the third-party members of the community sought to be induced, and where no unlawful means (such as misrepresentation, fraud, threats of criminal prosecution, or inducing breach of contract) are used.

To move into this area of the means by which an individual or a private group may legally implement the judgment that obscene publications adversely affect the public welfare of the

relevant community, the writer submits that:

a) The individual citizen-customer may lawfully formulate that judgment and may lawfully implement it by making his views known to dealers, distributors, and publishers, and by persuading them to recognize their responsibility for the public welfare, and by himself refusing to buy anything from them if they do not, and even by himself refusing to buy anything from their suppliers and advertisers.

b) The individual dealer, distributor, or publisher has no legal duty to publish, distribute, or retail any particular publication, even though his refusal to do so may impair the access of others to that publication. He is free to handle the item or not. He may decide not to handle the item for any of a variety of reasons, e.g., recognition of community responsibility, fear of community criticism, the fact that the item offends his private moral code, or the fact that handling the item may be economically unprofitable.

c) The individual citizen-customer may join with other citizen-customers of like mind in a civic or a religious group for a group judgment and group persuasion. For the guidance of its members and for the information of the community, the group may publish and distribute a list of publications which it deems subversive of the public welfare. Even the Executive Director of the American Book Publishers Council now concedes the propriety of such a list. Moreover, the group may be justified in undertaking a concerted refusal to deal in business with those who persist in ignoring the group judgment, where such action does not involve a breach of contract and where no other illegal means are involved.

d) Only when the group seeks the participation of non-member citizens in the community in its refusal to deal in business with those who ignore its judgment, does a boycott exist. As noted, ACLU agrees that a specific primary boycott is legal but opposes both general primary boycotts and secondary boycotts; again, as noted, it is not clear whether it opposes such boycotts as illegal or merely as unwise. If the latter, it is worth noticing that, as a

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23 Restatement, Torts §762. For the purposes of this position sketch, the writer is content to cite merely this secondary source, because he is not aware of any difference of opinion in respect of the text statements of the section.

24 Restatement, Torts §765 (see note 21 supra).
matter of policy, the National Office for Decent Literature also prohibits any use of its list of objectionable books in boycott actions.

Prescinding from the wisdom of employing such methods, the writer submits merely that such boycotts are legal where justified by a privilege so to act\(^{25}\) and where such action does not constitute or induce a breach of contract or involve any other illegal means.\(^{26}\) The essence of the privilege appears to be a non-officious and good faith responsibility for the welfare of the third persons in the community who are induced to refuse to deal in business with the alleged offender. This responsibility is often evidenced by a relationship which exists between the inducer and the persons whom he seeks so to induce, for example, a clergyman in respect of his congregation; an educator in respect of his students. The privileged person must believe that the welfare of his charges is threatened by the business relationship with which he seeks to interfere and must in good faith direct his interference to the protection of the welfare of his charges.\(^{27}\) Whether this statute is essential to the existence of the privilege or whether a simple lawful purpose without the status might suffice to establish the privilege, is not clear. It is clear that the purpose of the influencer is one factor in assessing the legality of boycotts, because the prima facie tort of intentional interference with reasonable business expectations may be justified by a lawful purpose where no other unlawful means are used.\(^{28}\)

Some cases establishing the status-based privilege follow In *Kuryer Publishing Co. v. Messler*,\(^{29}\) Roman Catholic Bishops ordered their congregation not to buy, possess, or read a secular newspaper, and their action was held not to be tortious. In *Watch Tower Bible and Tract Soc' y. v. Dougherty*,\(^{30}\) Roman Catholic Bishops induced their congregation to threaten not to patronize a department store unless the store, which owned and operated a radio station, used its influence to cause the Watch Tower So-

\(^{25}\) Restatement, Torts §766 (see note 21 supra).

\(^{26}\) Restatement, Torts §767 (see note 21 supra).

\(^{27}\) Restatement, Torts §770. The cases are cited in the following footnotes.

\(^{28}\) Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705 (1962). While the purpose for which Professor Coons treats the cases differs from the writer's purpose, Professor Coons article is the finest analysis of the cases, of which the writer knows.

\(^{29}\) 162 Wis. 565, 156 N.W 948 (1916).

\(^{30}\) 337 Pa. 286, 11 A. 2d 147 (1940).
society to cease broadcasting attacks on the Catholic Church over the radio station. As a direct result of this action of the Bishops, the department store refused to renew a broadcasting contract with the Society. The action of the Bishops was held not to be tortious. That laymen may enjoy the same privilege as the Bishops was held in *Rosman v. United Strictly Kosher Butchers*. In *Gott v. Berea College* and in *Jones v. Cody*, educators who ordered or induced their students not to deal in business with the respective plaintiffs were held to be privileged. In *Hutton v Watters*, however, the educator was not privileged because the court discerned a self-interest in his action, rather than a genuine concern for the welfare of his students. In dictum in *Gott v. Berea College*, the court also thought that a parent would be privileged in respect of his minor children.

Cases in which the influencer had no normally privileged relationship with those sought to be influenced, and where, therefore, the alleged privilege was based solely on a lawful purpose, are not clear as to the sufficiency of lawful purpose alone. Where the purpose for a Negro boycott of white businessmen was primarily a racial purpose directed against alleged discriminatory hiring practices, *A. S. Beck Shoe Corp. v. Johnson* held that such a purpose would not suffice, whereas *Green v. Samuelson*, *New Negro Alliance v. Sanitary Grocery Co.*, and *Hughes v. Superior Court* contained dictum that that purpose could make the boycott privileged. In *Julie Baking Co. v. Graymond*, an economic purpose was held sufficient to make the boycott privileged. And in *American Mercury, Inc. v. Chase*, the purpose of a non-officious concern for the public welfare might have sufficed, had not illegal means (in the form of threats of criminal prosecution) been used.

The "status cases" may be compared with the "lawful purpose cases" by means of the following hypothetical. In the status-

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32 156 Ky. 376, 161 S.W 204 (1913).
34 132 Tenn. 527, 179 S.W 134 (1915).
35 156 Ky. 376, 161 S.W 204 (1913).
38 92 F 2d 510 (1937); rev'd on other grounds, 303 U.S. 552 (1939).
41 13 F 2d 224 (1926).
based privilege cases (in which, as noted, the case authority is consistent for the privilege making the boycott legal, in the absence of inducement to breach of contract and of any other illegal means), the individual or individuals inducing the boycott directed the appeal to the persons for whose welfare he or they sustained a non-officious responsibility. Were the appeal to be extended to a broader group in the community (as, for example, were the educator to induce the entire community to cease business dealings with a merchant whose practices threatened the student welfare for which the educator was non-officiously responsible), the “status cases” would not appear to be in point. The purpose, however, would appear still to be lawful, and the “lawful purpose cases” might yet sustain the privilege.

It should also be noted that almost all the cases establishing the privilege to boycott involve general primary boycotts. Only the *Watch Tower* case involves a secondary boycott. The Watch Tower Society was the offender, but the general boycott was directed, not against it, but against its licensor—and against that licensor, not in its capacity as operator of a radio station, but in its capacity as operator of a department store.

It is submitted that the boycott, whether specific or general and whether primary or secondary, has been sustained as a legal method of private control where it does not involve inducing a breach of contract or the use of any other illegal means (such as fraud, misrepresentation, threats of criminal prosecution)—certainly where the individual or individuals inducing the boycott are directing their inducement to those for whose welfare they sustain a non-officious responsibility, and less certainly where the boycott has at least a lawful purpose.

In any event, private individuals and groups, free from the constitutional restrictions which narrowly confine the efforts of their governments to control obscene publications, may lawfully pursue their own extra-legal efforts to do so, so long as they remain themselves within the law in those efforts; and, under existing law, a broad range of permissible activity is open to them.