San Diego Law Review

Volume 22
Issue 2 *1985 Combined issue no.2&3*

Article 11

5-1-1985

Consumer Boycotts and Freedom of Association: A Comment on a Recently Proposed Theory

Maimon Schwarzschild

Lawrence A. Alexander

Consumer Boycotts and Freedom of Association: A Comment on a Recently Proposed Theory

LAWRENCE A. ALEXANDER*
MAIMON SCHWARZSCHILD**

Since boycotts often have political motives and objectives, does the United States Constitution guarantee a right to boycott? In a recent article Professor Michael Harper suggested that it does. The authors argue that there can be no unconditional right to boycott. They conclude, however, that constitutional values are properly invoked in defense of boycotts and that accordingly the government should have to articulate weightier countervailing values in order to suppress a particular boycott or class of boycotts.

INTRODUCTION

Do I as an individual have a constitutional right to refuse to buy Coors beer, not because I dislike its taste, not because it is more filling, carcinogenic, or expensive than other beers, but simply because I dislike Adolph Coors' politics? This question about the individual's right to boycott is prior to any argument about a group's right to boycott, and it is this first question that Professor Michael Harper has addressed in a recent and provocative article.[1] As Harper demonstrates, its answer does not come easily. For Harper — as for us, though more tentatively perhaps — the answer to the

* Professor of Law, University of San Diego School of Law. B.A. 1965, Williams College; LL.B. 1968, Yale University.
** Associate Professor of Law, University of San Diego School of Law. B.A. 1973, Columbia College; J.D. 1976, Columbia Law School.

1. Harper, *The Consumer's Emerging Right to Boycott*: NAACP v. Claiborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984) [hereinafter cited as Harper].

question is "yes." But Harper's "derivation" of his right to boycott is fundamentally question-begging, and his limitations on the right are patently *ad hoc.* Harper has neither securely established nor persuasively delimited the right to boycott. Indeed, Harper's treatment only creates scepticism about whether there can be any unconditional constitutional right to boycott, much less whether categorical constitutional protection can be derived for some species of boycotts and not for others. While Harper may be correct when he says about the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*[2] — a case affirming a right to boycott — that "hard cases do not always make bad law,"[3] he cannot escape the fact that hard cases do make hard cases.

The Derivation and Limitation of the Right to Boycott

Harper rejects four possible rationales for the right to boycott products. First, the right to boycott cannot be securely derived from the right to engage in expressive conduct, because the latter right can be limited whenever government has legitimate reasons unrelated to the content of the expression for banning or regulating the conduct, and the government may have legitimate economic reasons for banning boycotts.[4] Second, the right to boycott cannot be derived from a right of autonomy for essentially the same reason.[5] Third, the right to boycott cannot be derived from a right of association, because the latter can be limited when the state has legitimate reasons for doing so independently of its interest in suppressing the association.[6] Fourth, the right to boycott cannot be derived from a right to petition the government, in part because such a right entails a much more limited right to boycott than Harper wants to establish, but primarily again because there are legitimate governmental interests unrelated to the content of the expression for curtailing this particular means of petitioning.[7]

Finding each of these four arguments for the right to boycott insufficient to trump all possible countervailing governmental interests in prohibiting boycotts, Harper then proposes his own basis for the right. Essentially, Harper argues that a boycott, whether aimed at public or private decisionmaking, is a political act quite similar to voting — that is, a "means by which citizens can influence important social decisionmaking."[8]

---

2. 102 S.Ct. 3409 (1982).
3. Harper, *supra* note 1, at 409.
4. *Id.* at 413-15.
5. *Id.* at 415-16.
6. *Id.* at 416-17.
7. *Id.* at 417-20.
8. *Id.* at 422-23.

For Harper, the outstanding virtue of this rationale is that it secures the right from being defeated by the state interest in protecting persons from economic coercion, since economic coercion is the very means by which the influence on social decisionmaking is effected.[9] If there is a right ("privilege") to engage in boycotts as political acts, there cannot be a right (i.e., there must be "no right") to be free of such boycotts.[10]

Harper immediately turns from his four-page argument in favor of the right to boycott to a much lengthier discussion embellishing the right. Harper's readers, however, are justified in pausing before moving on to that discussion, for Harper's argument for the right to boycott is no argument at all.

Harper does nothing more than to assert that (1) we can conceptualize boycotts as political acts,[11] and that (2) boycotts might be particularly effective political acts.[12] Both assertions are correct. Both assertions are equally applicable to shooting merchants' families or torching their stores in order to influence their decisions.[13] Indeed, the ability to influence through shooting and torching is probably more equally distributed than the ability to influence through boycotting products, since a boycott by a rich consumer is liable to have more impact than a boycott by a poor one.

The right-to-boycott that Harper asserts, moreover, is a highly qualified right. First, he limits it to consumers and does not extend it to "producers," whom he defines to include employees.[14] Second, he limits it to boycotts aimed at affecting decisionmaking, and excludes those aimed at the status of the target.[15] There are other limitations and embellishments, but these two are the most important and the most problematic.

Harper wants to distinguish consumer from producer boycotts — the latter to include employee as well as employer boycotts — because there is more equality of influence among consumers *qua*

9. *Id.* at 424-26.

10. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING 35-36 (New Haven: Yale University Press, 1919).

11. Harper, *supra* note 1, at 422.

12. *Id.* at 422-24.

13. If there were a right to influence merchants' decisions by shooting their families or torching their stores, there would of course be no right of merchants not to have their families shot or their stores torched that the state could assert to deny the former rights: the former rights, if they exist, exclude rights that are logically inconsistent. *See* W. HOHFELD, *supra* note 10.

14. Harper, *supra* note 1, at 426-28.

15. *Id.* at 429-30.

consumers than among producers *qua* producers. Harper argues in support of his distinction that boycotts should be analogized to voting, where equality is prescribed, rather than to expenditures for candidates, where equality may not be governmentally imposed.[16]

But the argument is question-begging, simplistic, and self-defeating. It is question-begging because it is unclear why voting rather than campaign expenditure is the appropriate analogy to boycotting. The argument is simplistic because some (e.g., rich) consumers *qua* consumers have enormous leverage in a boycott whereas some producers *qua* producers do not. And the argument is self-defeating because it would suggest that government could appropriately limit even consumer boycotts to the level of influence exercisable by the least influential consumer in order to effectuate the implied maxim of "one consumer, one unit of boycott influence."

Moreover, Harper stipulates that consumer boycotts are legitimate only when they are undertaken to influence merchants to act in *legal* ways.[17] In many cases, this would allow the state to proscribe a boycott by taking the preliminary step of prohibiting the merchant from doing what the boycott seeks. For example, since many consumer boycotts are aimed at inducing producer boycotts, and since Harper would allow the state to deem the latter illegal, many consumer boycotts might soon end up being unprotected. Thus, a consumer boycott of supermarket chains that carry non-union lettuce might be proscribed once a law is enacted forbidding the chains from discriminating against non-union produce. To take another example, Harper would grant constitutional protection to boycotts designed to compel "affirmative action" by businesses. "Voluntary race-conscious affirmative action" is now legal, to be sure.[18] It is at least conceivable, however, that Congress might make it *illegal* if the Constitution were otherwise read to prohibit any regulation of boycotts designed to compel "race-consciousness" or "reverse discrimination."[19]

---

16. *Id.* at 427-28. In the area of boycotts connected with labor disputes, Harper's consumer-producer distinction leads to the following interesting result: a labor union may organize a secondary consumer boycott but not a secondary labor boycott, even if in both instances the boycotters are the employees of the secondary employer, and the aim of the boycott is to affect a labor dispute elsewhere. *See id.* at 438-53.

17. *Id.* at 430-32.

18. *See* United Steelworkers v. Weber, 443 U.S. 193, 200 (1979).

19. The more general question is whether Harper is correct in placing consumer boycotts aimed at compelling illegal action outside the ambit of the right to boycott. Even if a boycott meets the "imminency" and "likelihood" (of lawless action) parts of the *Brandenburg v. Ohio* test, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969), there is still a difference between "advocating" through words and "advocating" through withdrawal of economic patronage. Suppose there are two firms, A and B, with whom you can deal. The owner of firm A declares his intention not to pay taxes next year because of his opposition to military aid to El Salvador. The owner of firm B declares his intention to comply with the tax laws, despite a similar opposition to military aid, in order to stay out of prison. You declare that you will patronize firm A because you admire the

As for the consumer-producer distinction, we suspect Harper introduces it to avoid the slippery slope that leads to results that he would find unwelcome. If we can refuse to buy Coors because of the politics of the manufacturer, can the manufacturer refuse to buy malt from farmers whose politics or religion he dislikes, or refuse to hire workers whose politics or religion he dislikes? A non-absolute right to boycott would make such a producer boycott a hard case, and Harper would apparently rather forbid producer boycotts wholesale instead of requiring the courts to deal with them retail as hard cases. Yet Harper has no convincing argument why producers or workers should not be entitled to withhold their goods or services just as consumers may withhold their patronage, so the limitation appears to be totally *ad hoc*. If we can refuse to buy Coors because of the politics of the manufacturer, why can we not also refuse to work for him for the same reason?

The same *ad hoc* quality attends Harper's limitation of the right to boycott to those boycotts designed to affect decisionmaking, as opposed to those boycotts aimed at the status of the target. One has a right to boycott O'Brien's grocery store because O'Brien contributes to the Irish Republican Army, but one has no right to boycott the store merely because O'Brien is Irish, Catholic, contributed to the IRA in the past, or believes in an independent Ireland.[20] According to Harper, the limitation follows from the basis of the right to boycott, namely, a right to influence social decisionmaking.

The problems with this limitation should be obvious. If O'Brien contributes to the IRA because of his Catholicism or political beliefs, then the line between attacking beliefs and attacking social decisions is not only "difficult";[21] it may be illusory. O'Brien has a right to contribute to the IRA so long as there is no law against it. Indeed, the targets of consumer boycotts generally have the right to engage in the activities to which the boycotters object. If the targets' rights do not defeat the right to boycott, why should the beliefs or statutes — which after all give rise to the targets' exercises of their rights — be insulated from the right to boycott? If O'Brien's right to contribute to the IRA is conditioned by others' rights to retaliate through boycotts if he does so, why isn't his right to be Catholic or Irish Republican not also conditioned? It is true that if the

courage of its owner's stand on civil disobedience. Is it clear you have no right to base your patronage on that ground?

20. Harper, *supra* note 1, at 430.

21. *Id.*

legitimate purpose of a boycott is to influence decisionmaking, then a boycott based on the immutable characteristics of the target would be illegitimate. But one's religion and sometimes one's national affiliation are mutable in the sense that they are subject to choice. And once "chosen," they compel other "choices." It hardly makes sense to deem a boycott aimed at Orthodox Jews illegitimate while at the same time deeming a boycott aimed at the wearing of yarmulkes legitimate.

The anomalies produced by this limitation of the right to boycott go beyond those born of the close connection between status and choice. Harper would allow consumers to boycott merchants or manufacturers in order to pressure them into adopting hiring policies which are themselves based on status — for example, minority quotas — so long as those policies are legal. Put differently, this means that consumers cannot boycott based on status, but they can pressure producers to do so. (A decision to hire based on race or other similar characteristics is, after all, a sort of "boycott" based on the status of those who are not hired as a result).

Moreover, by putting consumer boycotts based on the "target's" status outside the constitutional pale, Harper implies that consumers have no right to make economic decisions based on "status" considerations (or immutable characteristics). Yet consumers and producers make a multitude of decisions every day regarding which products or services to purchase, or which persons to employ, all based on status. I choose to see a movie because I like Bo Derek's looks. I buy Oscar Mayer wieners because the company is (or appears to be) Jewish-owned. I hire Brooke Shields, a fashion model, because I think her name and her looks will sell magazines or dresses. I choose a surgeon because she's smart or dexterous, or because she's a woman or a black and I wish to boost the image of those groups, and so on. Without trying to plumb how many of the qualities we prize are inborn or immutable and how many are subject to choice, it is clear that status — in the sense of conditions beyond the ability of choice to affect — plays a large role in our individual economic decisions as both consumers and producers. Harper implies that we have no right to make, not just some of those decisions, but any of those decisions. That is, to put it bluntly, absurd.

Harper cites *NAACP v. Claiborne Hardware*[22] as a seminal Supreme Court case in support of the right to boycott. Yet the case illustrates an ironic twist to Harper's disqualification of boycotts based on status. In *Claiborne Hardware*, a consumer boycott was aimed at coercing influential merchants to affect local governmental policy. Harper argues that the case is a paradigm of a legitimate

22. 102 S.Ct. 3409 (1982).

boycott, since the boycott was by *consumers* and directed at target *decisionmaking*. Yet suppose the government of Claiborne County, Mississippi, had refused to capitulate to the boycotters' demands, despite pressure from the targeted merchants. And suppose the boycotters refused to stop the boycott until their demands were met. The targeted merchants could rightly claim that the boycott, while putatively aimed at their decisionmaking, was actually tantamount to a status boycott *because ending the boycott was beyond their (the target's) control.* Perhaps very few boycotts — including the boycott in *Claiborne Hardware* itself — are boycotts that fall within Harper's constitutional right to boycott. If so, perhaps it is Harper's rendition of the right to boycott that is in error.

Finally, it must be borne in mind that Harper's project is to establish an *individual's* right to refuse to deal. Even if, contrary to our arguments, he were successful in establishing such a right and its limitations, he would need to go further to establish the right of *groups* to engage in concerted refusal to deal. The latter are, after all, what we normally mean by boycotts and what was at issue in *Claiborne Hardware.* Some libertarians would contend that individuals have a right to join together and take any concerted action that consists of acts that as individuals they have a right to take, but American jurisprudence here as elsewhere has refused to accept libertarian premises. For example, the antitrust and labor laws distinguish between individual refusals to deal (permitted) and concerted refusals to deal (prohibited).[23] Harper does not base his individual right to boycott on a straightforward libertarian objection to forced transactions, and we assume he rejects such libertarianism. If so, then converting his individual right to boycott into a right to take concerted action would require an argument that Harper nowhere even hints at.[24]

Harper not only claims that his principle of "political participation" "secures" the right to boycott against countervailing public

23. In the case of the labor laws, at least, the individual's right to refuse to deal has strong constitutional overtones. *See* Dorchy v. Kansas, 272 U.S. 306 (1926); Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal,* 1970 DUKE L.J. 247. *See also* Alexander, *Speech in the Local Marketplace: Implications of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *for Local Regulatory Power,* 14 SAN DIEGO L. REV. 357, 376-77 (1977).

24. Even group refusals to deal premised on first amendment concerns, such as exclusion of women from an organization devoted to promoting, among other things, the political positions held by young men, are not necessarily constitutionally protected. *See* Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984); *infra* note 34.

interests;[25] he also suggests that the countervailing public interests might "vanish" in the face of his principle.[26] We feel that there is a qualified right to boycott, but we conclude that Harper has neither "secured" any such right nor adequately defined its scope. It is an intriguing, difficult subject. Unfortunately, it remains just as intriguing and difficult after Harper's article as it was beforehand.

A Conditional Right to Boycott?

How might we establish a constitutional right to boycott that cannot be outweighed by countervailing governmental interests? We might attempt to do so by analogy to, or by implication from, rights whose existence is relatively secure. For instance, it is fairly safe to say that we have a first amendment right to spend our money on speech activities, such as publishing a newspaper or taking out an ad on TV or buying space on a billboard — at least to this extent: the government may not ban such expenditures because it fears the messages thereby expressed will prove too influential.[27] If the expenditure of money on speech is protected, then spending it on speech rather than beer is protected. One might then argue that refusing to buy a product, when such refusal communicates a message, is not relevantly different from spending money on purchasing messages rather than on purchasing other products. Indeed, whether a consumer prefers Brand X over Brand Y because of price, taste, workmanship, or the politics of Y's producer, the consumer's expression of that preference by buying X and not Y is, in a free market economy, supposed to communicate a message to Y's producer, a message that may or may not influence Y's producer to change Y's price, style, or workmanship, or the producer's politics. Denying the right to boycott is really like forcing one to spend money on a product rather than on a message for fear that the message may prove too influential, which is like denying the right to spend money on messages, a right which, however, was stipulated from the outset.

The trouble with this argument is that it goes considerably further than have any decisions by the Supreme Court on the right to spend money on speech. In none of the Supreme Court cases did the government claim an interest in protecting people from economic harm stemming from the exercise by other people of their first amendment rights. In a boycott, the resources that are spent on the "message" would otherwise have gone to the target the message is intended to influence. Not so in the Supreme Court cases from which the right

25. Harper, *supra* note 1, at 424.
26. *Id.* at 454.
27. *See* Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976).

to boycott might be derived. Indeed, *Buckley v. Valeo*,[28] the leading case for the right to spend money on expression, can also be cited for the proposition that expenditures on expression can be legitimately curtailed by the government if they carry the risk of unduly influencing, not the targets of the message intellectually, but the recipients of the expenditures economically.[29] Similarly, *Abood v. Detroit Board of Education*,[30] which recognized the freedom-of-expression interest in not paying union dues, nonetheless upheld governmental compulsion of contributions to unions to support the unions' collective bargaining activities.[31] Finally, if one is sceptical — as we are[32] — of Harper's normative distinction between consumer and producer boycotts, then a number of Supreme Court cases dealing with secondary labor boycotts[33] stand in the way of establishing an absolute right to express positions and to influence decisions through the withdrawal of economic support.

There are other conceivable ways to derive a right to boycott, in addition to those Harper mentions and the derivation we outline in the immediately preceding paragraphs. For example, one might derive it from a more general right to privacy, a right protecting choice with respect to intimate matters such as what one consumes or with whom one associates on a close basis.[34] This right might protect some consumer boycotts but also some refusals by producers to hire particular employees and refusals by employees to work for particular employers. Thus, neither of the two limitations that Harper

28. 424 U.S. 1 (1976).
29. *Id.* at 23-38.
30. 431 U.S. 209 (1977).
31. *Id.* at 223-32.
32. *See supra* text accompanying notes 16-19.
33. *See* International Longshoremen's Ass'n v. Allied Int'l, 456 U.S. 212, 226 (1982).
34. *But cf.* Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984) (membership in the Jaycees is not an "intimate personal relationship"). The Court found that the Jaycees are an association that exists in part to exercise free speech in promoting the interests of young men, but the Court held that the corresponding freedom-of-association interest in excluding women is outweighed by a "compelling governmental interest" in eradicating sex discrimination. *See also* Runyon v. McCrary, 427 U.S. 160 (1976) ("freedom of association" does not confer on private schools any right to practice racial discrimination in excluding students).

Civil rights laws forbidding discrimination often do attempt to accommodate countervailing interests in "privacy" and freedom of association. See, e.g., the exemption in the public accommodations provisions of the Civil Rights Act of 1964 for guesthouses in which the proprietor lives and which offer five or fewer rooms for rent. Pub.L. 88-352, 78 Stat. 243, 42 U.S.C. § 2000a(b)(1)(1982). See also the exemption from Title VII of the Civil Rights Act of employers with fewer than fifteen employees. 42 U.S.C. § 2000e(b)(1982).

proposes on the right to boycott — namely ruling out producer boycotts and those based on the status of the victim of the boycott— would apply to the right to boycott derived from a right of privacy.

Still another way one might derive a right to boycott is from a general libertarian position against forced transactions. The right to boycott so derived would again contain neither of Harper's proposed limitations. It would protect a private employer's right to discriminate on the basis of race in employment and in choosing clientele, just as it would justify a consumer's right to boycott products. Needless to say, the courts have rejected constitutionalizing such pure libertarian principles.

For our part, we would draw on a number of values, including those that Harper rightly rejects as bases for an *absolute* right to boycott — values such as freedom of expression, freedom of association, autonomy, and privacy — to conclude that political boycotts deserve some, but not absolute, protection from government proscription. This approach has the virtue of articulating the values that might justify political boycotts, against which the government would have to articulate weightier countervailing values in order to prohibit a particular boycott or class of boycotts. In short, this approach recognizes that there is no "secure" right to boycott,[35] and that the courts must inevitably weigh competing values and interests when disputes over boycotts arise.

We have summarized — rather telescopically — some possible arguments for a right to boycott. The arguments we favor do not yield an unqualified constitutional right to boycott, nor do they render the hard cases easy. Accordingly, these are not Harper's arguments. Professor Harper, in search of a clincher, finds himself with no argument at all.

35. Harper, *supra* note 1, at 424.