

## Boycott and Divestment, Frequently Asked Legal Questions March, 2015

Increasing calls for boycott and divestment of Israeli institutions and U.S. companies that profit from the occupation of Palestine have triggered a backlash of threats including the allegation that this principled position is somehow “illegal.” This is part of a concerted campaign of legal repression designed to intimidate and silence critics of Israel. Palestine Solidarity Legal Support (PSLS) documents the escalating legal repression, which has included smear campaigns, frivolous lawsuits, unconstitutional legislative proposals, and other attempts to restrict speech critical of Israel. Individuals who advocate for or endorse boycott or divestment resolutions may face baseless legal threats, similar to those leveled against the American Studies Association, UAW 2865, and student groups.

*The following is general legal information, not specific legal advice. Do not rely on these materials without first seeking the advice of an attorney about your particular situation and facts. Only a licensed attorney, reviewing your individual facts, may render legal advice. This information is provided as a public resource for information purposes only. Nothing in this resource should be taken to create an attorney-client relationship between you and Palestine Solidarity Legal Support.*

### **1. Is a boycott like the academic boycott protected by the First Amendment of the US Constitution? *Yes.***

Boycotts have long played a significant role in U.S. history, and the Supreme Court has held that political and human rights boycotts are protected under the First Amendment. In the landmark civil rights case *NAACP v. Claiborne Hardware Co.*, a local branch of the NAACP boycotted white merchants in Claiborne County, Mississippi to pressure elected officials to adopt racial justice measures. The merchants fought back, suing NAACP for interference with business. Ultimately, the Supreme Court found that “the boycott clearly involved constitutionally protected activity” through which the NAACP “sought to bring about political, social, and economic change.” Justice Stevens concluded that the civil rights boycott constituted a political form of expression under the speech, assembly, association and petition clauses of the First Amendment.

This principle was recently applied to dismiss a lawsuit attempting to block a decision by the Olympia Food Coop to boycott Israeli goods. A court found the boycott to be protected by the First Amendment (or specifically, “free speech and petition in connection with an issue of public concern”).<sup>1</sup>

### **2. Do boycott or divestment initiatives constitute “national origin” discrimination? *No.***

The Palestinian civil society call for boycott, divestment and sanctions does not target individuals based on their Israeli nationality; it targets *Israeli institutions because of their ties to state policy, or corporations for their complicity in human rights violations.* The individuals who could be affected by academic boycotts, for example, are those who directly represent Israeli state institutions in an official capacity. There are many Israelis – the vast majority of the country’s citizens – who would not be subject to the academic boycott called for by Palestinian civil society and independently endorsed by US-based groups. To be especially clear: Israeli academics are *not* subject to boycott if they are not explicitly representing Israeli institutions. According to the

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<sup>1</sup> For more information, see the Center for Constitutional Rights, case page on *Davis v. Cox*, available at <http://ccrjustice.org/ourcases/current-cases/davis-v-cox>.

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Palestinian Boycott Committee, the coordinating body of Palestinian civil society who has called for the boycott, “Mere institutional affiliation to the Israeli academy is therefore not a sufficient condition for applying the boycott.”<sup>2</sup> For example, the American Studies Association (ASA), whose membership voted to endorse the academic boycott, invited Israeli academics to speak at its conference in November 2014.

### 3. Are boycott or divestment campaigns anti-Semitic or “religious discrimination”? *No.*

Detractors of BDS efforts allege that singling out Israeli human rights abuses amounts to anti-Semitism, that is, discrimination against Jewish people because of their religion or ethnic background. BDS does not target institutions or individuals based on their Jewish identity. In fact, proponents of boycott and divestment campaigns often express their opposition to all forms of racism, which includes anti-Semitism and anti-Arab racism.

To equate criticism of the Israeli state, or a BDS proposal targeting Israeli state institutions or corporations that aid and abet Israeli human rights abuses, with anti-Semitism is as absurd as calling criticism of or sanctions against the Iranian government anti-Muslim or anti-Persian, and as illogical as classifying criticism of the Chinese occupation of Tibet as hateful against people of Chinese ethnicity. Common sense makes clear the distinction between anti-Jewish bias (based on the race, ethnicity or religious identity of Jewish people as individuals or as a group) and criticism of Israeli state institutions. The Department of Education Office for Civil Rights also recognizes the distinction (See FAQ # 7, below).

### 4. Are boycotts “illegal” under federal anti-boycott laws? *No.*

You may hear the allegation that boycotts against Israeli institutions violate federal anti-boycott laws. This is an attempt to distract from the issue of Israeli human rights violations. Boycott campaigns that initiate from civil society – including an academic boycott – *were not covered* by what is known as the “federal anti-boycott law.”<sup>3</sup> That act of Congress in 1979 was a rider to legislation regulating US exports and it was intended to counter participation in the Arab League’s boycott of Israel. Specifically, the anti-boycott law prohibited participation in a boycott in cooperation *with a foreign country*. In no way did that legislation apply to boycotts undertaken as a matter of social, political or moral conscience; nor could it, under core First Amendment principles that protect boycotts undertaken to protest foreign or domestic governmental policies or actions.

### 5. Do First Amendment and academic freedom protections guarantee academics the right to support boycott or divestment without retribution? *Yes.*

A common tactic that has been used against those who support BDS involves pressure by off-campus organizations urging university administrators to condemn BDS and punish individuals who support it. *It is undisputed that the First Amendment protects individuals from disparate treatment and punishment by state actors (including*

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<sup>2</sup> Academic Boycott Guidelines, Boycott National Committee, See more at:

<http://www.bdsmovement.net/activecamps/academic-boycott#sthash.Zqx4kpWv.dpuf>

<sup>3</sup> Export Administration Act (“EAA”) of 1979. For more information, please see the memo from the National Lawyers Guild, [Impact of Federal Anti-Boycott and Other Laws On BDS Campaigns](#), October 2009, analyzing the application of anti-boycott law to BDS campaigns, *available at*

[http://palestinelegalsupport.org/download/bds/boycott/NLG\\_BDS\\_legal\\_memo.pdf](http://palestinelegalsupport.org/download/bds/boycott/NLG_BDS_legal_memo.pdf)

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*public universities) due to their support for BDS.* If public universities were to punish faculty or students for their support of BDS or other political expression, they would be subject to legal action for violating the First Amendment.

*It is also undisputed that academic freedom rights protect individuals from adverse employment consequences due to their support for the boycott.* Academic freedom rights are protected at every accredited college and university in the U.S.,<sup>4</sup> and the American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure.<sup>5</sup> If a university were to violate enshrined academic freedom principles in response to pressure campaigns to suppress speech favorable to Palestine, it could be subject to an academic freedom lawsuit.

## 6. What can an individual academic do to protect against backlash?

In this context of repression of views sympathetic to Palestinians, faculty and graduate instructors who are publicly supportive of boycott and divestment, or who teach classes in Middle East studies departments, could be targeted. Some intimidation tactics we have seen include negative teaching evaluations, complaints to faculty advisors or department chairs, accusations of misuse of state funds, or public smear campaigns. Supporters of boycott and divestment initiatives may take a few precautions to protect themselves.

Consider notifying a university administrator about any pressure you get from outside groups regarding your position on BDS, and about any harassing or threatening messages you get in response to your position on BDS. Document any such messages by saving or taking screenshots of emails, social media posts, and other communications. Request to be notified immediately of any complaints made against you or the body you represent. If you have a legal concern, contact a lawyer.

## 7. Do boycott and divestment campaigns create a “hostile environment” on campus? *No.*

Israel advocacy groups routinely allege that student campaigns for divestment create a “hostile environment” for Jewish students on campus. The U.S. Department of Education (DOE) has investigated and repeatedly rejected the claims made by the Brandeis Center and other Israel advocacy organizations alleging that advocacy for Palestinian rights subjects Jewish students to a hostile environment. The DOE has dismissed several claims under Title VI of the Civil Rights Act against UC Berkeley, UC Santa Cruz, UC Irvine, and Rutgers University. The DOE issued written letters explaining that the allegations were not actionable because the activities complained of (testimony in support of a divestment resolution, scholarly lectures, advocacy programming, mock check points, verbal disagreements about Israel and Palestine, and other similar activity) are constitutionally protected First Amendment expression. The DOE also recognized

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<sup>4</sup> For example, see the list of protections provided at the University of California in the Policies and Academic Personnel Manual, available at <http://senate.ucsc.edu/committees/caf-committee-on-academic-freedom/Academic-Freedom-Information/Appendix-BUCPolicyonAcademicFreedom.pdf>

<sup>5</sup> American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, available at, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

that the **speech and activities alleged to be anti-Semitic were in fact based on political viewpoint, not on race, ethnicity or national origin.**<sup>6</sup>

You may hear accusations that boycott and divestment campaigns make Jewish students feel “uncomfortable” or “unsafe.” These claims rely on the conflation of criticism of Israel with criticism of Judaism, and presuppose the close identification of all Jewish people with the state of Israel. In fact, many Jewish students support BDS campaigns and are critical of Israel. Criticism of the state policies of any government, no matter how sharp, is not to be confused with criticism of, or bias against the dominant religions or ethnicities of that country. (See, above, FAQ #3.) Criticism of Israel does not put anyone’s physical safety at risk, even if it puts his or her political beliefs in question.

Furthermore, the DOE has made it clear that it is not the responsibility of campus authorities to protect students from political speech they find to be offensive or hurtful to their own beliefs. In each dismissal, the DOE wrote, “In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.”

### **8. Are there any legal considerations specific to divestment?**

Divestment resolutions must respect what’s called fiduciary duty, which is the duty of trustees or managers of a fund to manage assets entrusted to them for the benefit of the assets’ owners and the intended beneficiaries of the fund. Unless divestment would deprive a fund of any possibility of investing in a broad universe of otherwise suitable investment alternatives, it is not a breach of this fiduciary duty to divest for human rights reasons. When making investment and divestment decisions, trust fund managers may consider reasons related to human rights in addition to considering profit, loss, and risk factors. Federal regulations, in fact, allow divestment based on socially responsible investing (SRI) criteria where alternative investments of equal value to the properties to be divested are available. There is also a good argument that fiduciaries are obligated to divest from companies profiting from the Israeli occupation because, due to increasing political pressure, such companies may be financially risky investments.

A divestment resolution does not disturb trustees’ fiduciary duty and discretion as long as: (1) there are alternative investments of equal value available to replace divested properties, as determined by fund trustees; and, (2) the resolution does not dictate to fund trustees when or how to divest or identify the specific replacement(s) for divested assets. Most divestment resolutions are naturally confined within these guidelines, given that the bodies recommending divestment do not have the power to dictate to the fiduciaries whether and how to divest its funds.

### **9. Regarding union BDS campaigns, does a BDS initiative take away from the union’s primary function? *No.***

Social justice unions can and do regularly engage their members in political solidarity with workers in other parts of the world. In this sense, political discussions around BDS is part of the core function of a social

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<sup>6</sup> For more information and to view DOE dismissal letters, see <http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech,-department-of-education-dismisses-complaints>.

justice union. But a BDS resolution does not limit or affect the representative functions of the union, including which grievances the union pursues and the union's position on tenure disputes, etc.

**10. Would a boycott or divestment resolution violate the New York State Human Rights Law? *No.***

This accusation arose when Shurat HaDin / Israel Law Center and others threatened to sue the American Studies Association (ASA) for its resolution in support of academic boycotts under the New York Human Rights Law, which prohibits boycotts in some circumstances. The constitutionality of that statute is questionable, but the bottom line is that the ASA boycott would not be prohibited under the New York law because the law specifically exempts a boycott to “protest unlawful discriminatory practices.” This would clearly exempt the ASA resolution, and similar boycotts in response to the call from Palestinian civil society, which are entirely designed to protest discriminatory practices of the Israeli government.

**11. Does a boycott against Israel violate the International Convention on the Elimination of All Forms of Racial Discrimination? *No.***

Cynically, Shurat HaDin has also cited the [International Convention on the Elimination of All Forms of Racial Discrimination \(ICERD\)](#)<sup>7</sup> as a supposed rationale for its legal threat against entities supporting boycott. A broad range of Israeli human rights advocacy groups, along with international tribunals, have accused their government of gross violations of ICERD, and it is exactly those violations that the proponents of boycotts aim to protest. As discussed above, the academic boycott is not discrimination based on race, religion, or national origin – but a political protest targeting Israeli institutions towards the goal of ending discriminatory state policy.

**12. Does a non-profit organization or academic association risk its tax-exempt status by supporting a boycott? *No.***

A non-profit organization that endorses a boycott remains fully compliant with IRS requirements for tax-exempt status. First, a nonprofit organization does not compromise its fundamental educational (and tax-exempt qualifying) purpose just because it expresses a political position on a controversial issue. Second, with respect to an academic boycott for the purposes of human rights accountability, even if it raises controversial issues related to academic freedom, is fundamentally an educational activity, consistent with an academic association's tax-exempt educational purpose. Third, the boycott is in line with U.S. public policy against racial discrimination in education. The boycott challenges the complicity of Israeli state educational institutions in actions that discriminate against Palestinians. Statements by tax-exempt organizations in support of BDS no more undermine tax-exempt status than statements issued by tax-exempt organizations in the 1980s and 1990s explaining why they had decided to boycott or divest from South Africa.

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<sup>7</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *available at*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

**13. Why are we seeing so many legal threats? *There is a concerted and growing national campaign to repress Palestinian human rights activism through legal intimidation.***

The legal arguments that opponents of BDS are making aim to distract and deflect the conversation away from Israeli human rights violations and the rights of the Palestinian people, and to intimidate those advocating for justice. Legal bullying has escalated in the United States as the movement for Palestinian rights has grown and as pro-Israel groups attempt to shift the focus to how criticism of Israeli policy impacts those who identify with and support Israel's policies against Palestinians. [Palestine Solidarity Legal Support](#) was formed in response to this escalating repression. The majority of more than 340 repression incidents and requests for legal assistance that PSLS has documented since we launched in 2013 have targeted academic discussion or political activity occurring on college campuses where Palestinian rights activism is focused.

**14. Who are some of the legal organizations making threats against BDS campaigns?**

In January 2014, the American Studies Association was threatened with a lawsuit by Shurat HaDin / Israel Law Center which calls itself a "civil rights organization" but regularly uses litigation to harass groups worldwide that criticize Israel's occupation and/or endorse boycott and divestment campaigns against corporations and institutions that support the occupation and other discriminatory policies.

This activity has coincided with declarations of concern by Israeli government bodies and closely affiliated institutions that boycott and divestment campaigns constitute a serious challenge to Israel's standing in world public opinion. It is therefore not surprising that according to U.S. diplomatic cables disclosed by Wikileaks, Shurat HaDin director Nitsana Darshan-Leitner [bragged](#) to Tel Aviv embassy staff in 2007 that the organization "took direction ... on which cases to pursue" and "receives evidence" from Israel's Mossad intelligence agency and the country's National Security Council.<sup>8</sup> In essence, it seems, Shurat HaDin adopts the more aggressive, legally dubious litigation strategies that the Israeli government, concerned with its respectability cannot pursue itself.

In November 2014, the American Center for Law and Justice (ACLJ) made baseless legal threats to intimidate the University of California graduate student union - Local 2865. The ACLJ threatened that support for Local 2865's BDS vote would subject members to "individual liability." The ACLJ held itself out to be a civil rights organization opposed to discrimination, but in fact, it is dedicated to anti-gay, anti-abortion and anti-Muslim causes. ACLJ is the legal arm of Christian Advocates Serving Evangelism, Inc., founded by the Southern Baptist minister Pat Robertson in 1990. Since that time, opposing same-sex marriage, outlawing abortion, and evangelizing an anti-homosexual agenda in Africa have dominated ACLJ's docket. ACLJ was on the frontlines protesting the plans for the Park 51 Islamic Community Center in New York City, arguing in a lawsuit that building it would be "deeply offensive to many Americans."

**15. What support is available to those who face legal threats?** If you have a specific concern about potential backlash against you, you may contact Palestine Solidarity Legal Support directly.

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<sup>8</sup> See Tom Griffin and David Miller, BDS campaigner targeted by law firm with links to Israeli intelligence, Spinwatch, Oct. 5, 2013, available at, <http://www.spinwatch.org/index.php/issues/more/item/5550-bds-campaigner-targeted-by-law-firm-with-links-to-israeli-intelligence>