

The Legality of Academic Boycott: Frequently Asked Questions¹

The vote by a majority of the American Studies Association (ASA) membership to endorse the boycott of Israeli academic institutions has triggered a backlash of threats against ASA, including the allegation that this principled position is somehow “illegal.” Legal threats in response to academic boycott are part of a pattern of legal repression designed to intimidate and silence critics of Israel. Palestine Solidarity Legal Support initiative (PSLS), in partnership with the Center for Constitutional Rights and in collaboration with the National Lawyers Guild, has been documenting this pattern of legal repression targeting solidarity campaigns and activists, including academics.

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

Boycotts have long played a significant role in U.S. struggles for democracy and equality. 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.

A boycott is still protected by the First Amendment even when it goes beyond symbolic political expression and takes the form of economic or political action. The argument that the First Amendment does not protect an academic boycott because it is “action” fails to grasp one of the most basic tenets of First Amendment doctrine that conduct is considered speech in many contexts. Boycotts to obtain human rights and equality are one of the canonical examples of expressive conduct protected by 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 (specifically, “free speech and petition in connection with an issue of public concern”).²

2. Does the academic boycott violate anti-discrimination laws? *No.*

Detractors of the academic boycott allege that singling out Israeli academic institutions amounts to anti-Semitism, that is, discrimination against Jewish people because of their religion or ethnic background. This allegation aims to deflect from the discrimination and racism that Israel practices by mislabeling those who advocate for justice for Palestinians as the offending parties. The academic boycott is *politically* motivated,

¹ The information presented here is not legal advice about a specific threat and may not apply in all situations, but is meant as a general response to common misstatements and threats. Should you or someone you know face legal claims or threats, please contact PSLS at info@palestinelegalsupport.org immediately.

² 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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targeting *institutions*. The individuals who could be affected by the boycott are those who directly represent Israeli state institutions in an official capacity. The boycott does not target institutions or individuals based on their Jewish identity or Israeli citizenship. To equate criticism of the Israeli state, or a boycott of Israeli state institutions, 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 law also recognizes the distinction.³

Nor does the academic boycott target individuals based on their Israeli nationality; it targets *institutions with direct relationships to the Israeli government*. The vast majority of Israel's citizens, including individual academics, would not be subject to the academic boycott called for by Palestinian civil society because they do not represent the Israeli government in an official capacity. Thus, any prohibitions on national origin discrimination are irrelevant to the academic boycott, as are other anti-discrimination laws.

3. Does the academic boycott violate the New York State Human Rights Law? *No*.

Shurat HaDin / Israel Law Center and others have threatened to sue the ASA under a 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.

4. Does the academic boycott violate the International Convention on the Elimination of All Forms of Racial Discrimination? *No*.

Cynically, Shurat HaDin also cites (while misnaming it) the [International Convention on the Elimination of All Forms of Racial Discrimination \(ICERD\)](#)⁴ as a supposed rationale for its legal threat. 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 academic boycott 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.

³ See, for example, recent letters by the U.S. Department of Education Office for Civil Rights dismissing several claims under Title VI of the Civil Rights Act alleging that campus activity critical of Israel created an anti-Semitic hostile environment. The letters explain that the allegations were not actionable because the activities complained of constitutionally protected First Amendment expression, and were based on political viewpoint, not race, ethnicity or national origin. For more information and to view the letters, see <http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech,-department-of-education-dismisses-complaints>.

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, *available at*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

5. Is the academic boycott “illegal” under federal anti-boycott laws? *No.*

The allegation that boycotts against Israeli institutions violate federal anti-boycott laws is an attempt to distract from criticism of Israeli human rights violations. Boycott campaigns initiated from civil society – including an academic boycott – *were not covered* by what is known as the “federal anti-boycott law.”⁵ The act of Congress that contained the federal anti-boycott provisions has expired and should not be enforceable unless it is reenacted by Congress. Regardless, the law is inapplicable. The federal anti-boycott provision prohibited an “unsanctioned” foreign boycott, and defined such a boycott as one that is “fostered or imposed by a foreign country against a country which is friendly to the United States.”⁶ Its primary target was the Arab League’s commercial boycott of Israel. Boycotts called by NGOs, a coalition of NGOs, a global movement of private organizations and individuals, or any U.S. organization, movement or individuals are all outside the plain language of the act, as none of these entities are “foreign countr[ies].”

Fundamentally, boycotts called to end human rights violations are protected by the First Amendment of the U.S. Constitution. (See above.) If the federal anti-boycott law were to be invoked to prohibit such boycotts, it would be subject to constitutional challenge.

6. Does an academic association risk its tax-exempt status by supporting a boycott? *No.*

An academic association that endorses an academic 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, 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. The ASA resolution no more undermines its 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.

7. Does academic freedom guarantee individual academics the right to support boycott of Israeli institutions without retribution? *Yes.*

Although there is a nuanced debate about whether an academic boycott of Israeli institutions promotes or restricts academic freedom overall, *there is no controversy as to whether academic freedom rights protect individuals from adverse employment consequences due to their support for boycott.* A common tactic that has also been used against the ASA is pressure by off-campus organizations urging university administrators to condemn the boycott and withdraw institutional membership in ASA. These pressure campaigns by implication are threatening to faculty who support the boycott, although we know of no instance where faculty have actually faced threats of adverse employment consequences. If an institution were to respond to such pressure

⁵ 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

⁶ 50 U.S.C. App. § 2407(a)(1)

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campaigns by punishing faculty for their support for boycott (or other political expression), that institution would be in violation of academic freedom rights and be subject to legal action.⁷ State or federal authorities violate the Constitution if they try to limit free expression at academic institutions by threatening to withdraw financial or other support from the institution.

8. Why are we seeing so many legal threats? *There is a concerted 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 seek to shift the discussion away from Palestinian rights to focus on how criticism of Israeli policy allegedly impacts those who identify with Israel. Palestine Solidarity Legal Support was formed in response to this escalating repression. The majority of more than 100 incidents that PSLS documented in 2013 targeted academic discussion or political activity occurring on college campuses, where Palestinian rights activism is focused.

Even frivolous legal threats and litigation have a harmful effect on the grassroots activists and academics that are undertaking principled political action against Israeli state human rights abuses. They not only distract activists from their advocacy, but also drain scarce resources and volunteer efforts.

9. Who is Shurat HaDin / Israel Law Center?

The ASA has been threatened with a lawsuit by Shurat HaDin / Israel Law Center (ILC) 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 was therefore not surprising to [read recently](#) that according to U.S. diplomatic cables disclosed by Wikileaks, ILC director Nitsana Darshan-Leitner bragged to Tel Aviv embassy staff in 2007 that ILC “took direction ... on which cases to pursue” and “receives evidence” from Israel’s Mossad intelligence agency and the country’s National Security Council.⁸ In essence, it seems, ILC adopts the more aggressive, legally dubious litigation strategies that the Israeli government, concerned with its respectability cannot pursue itself.

⁷ See Euben, *Academic Freedom of Individual Professors and Higher Education Institutions: The Current Landscape*, American Association of University Professors, May 2002, pp. 5, (Euben, 2002): <http://www.aaup.org/issues/academic-freedom/professors-and-institutions>.

⁸ 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>