

Campus Free Speech, Academic Freedom, *and the Problem of the* **BDS** Movement



Perspectives on Higher Education

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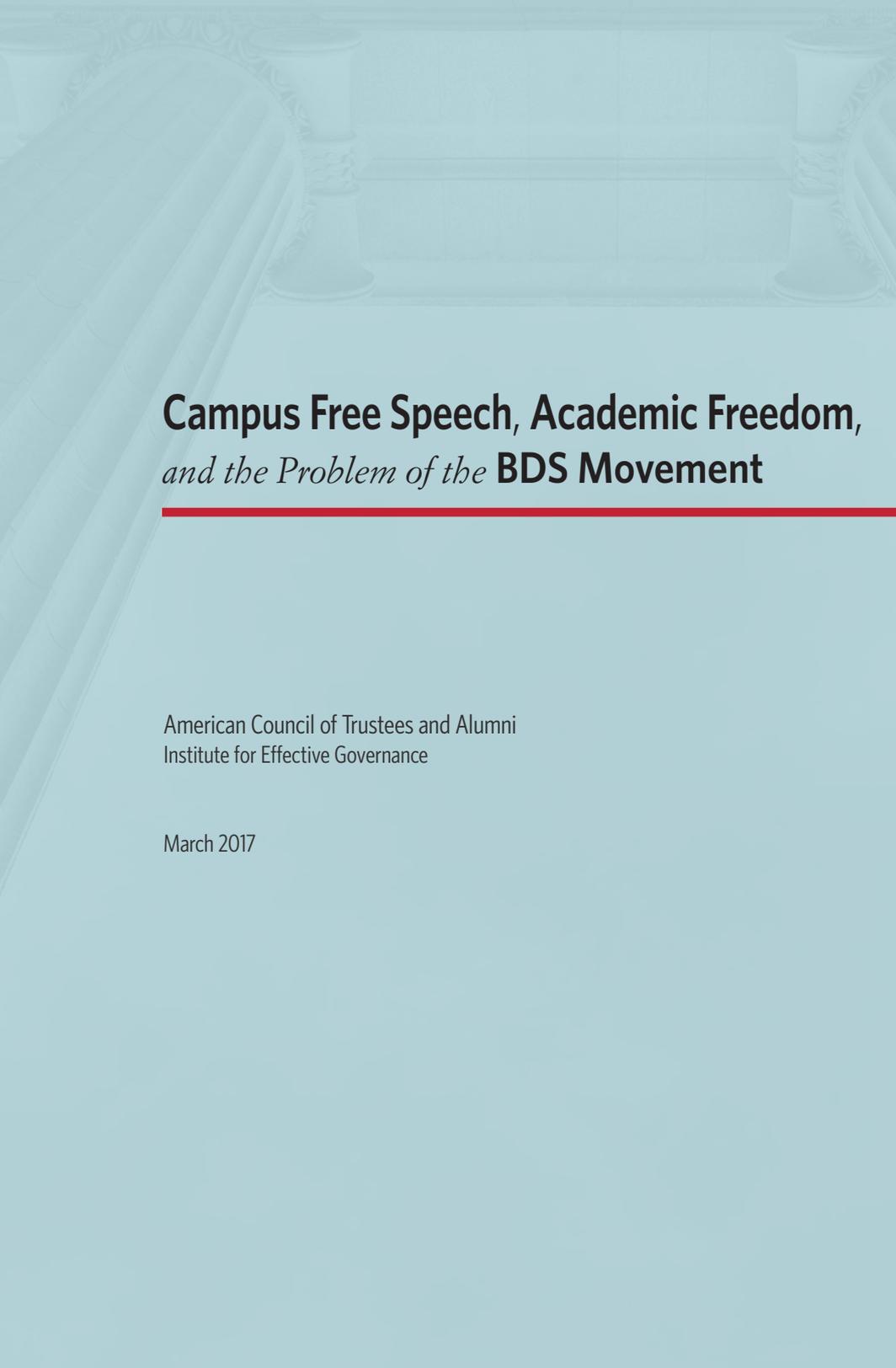


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SUMMARY

At the heart of America's long record of achievement in higher education is a deep commitment to academic freedom. Academic freedom, while sometimes uncomfortable and in tension with other important campus values, must be the paramount principle of higher education. Academic freedom, which depends on free speech and free expression, stimulates discourse, inquiry, and debate on campus and in the classroom. It ensures that students and educators alike are free to pose questions, and it protects the right of faculty to conduct research on controversial topics.

One of the greatest threats to academic freedom in the United States today is the Boycott, Divestment, Sanctions (BDS) movement, an international political effort designed to undermine economic and cultural exchange with the state of Israel. BDS supporters have shouted down pro-Israel speakers on campus and challenged the legitimacy of Israeli scholars of law and public policy to present their views. Several higher education professional organizations have taken up a political agenda outside their academic mission and voted in favor of boycott and sanction of Israel. There have been instances of overt politicization of academic programs to support an anti-Israel agenda and, most troubling of all, examples of BDS activists even engaging in anti-Semitic behaviors on campus. Anti-Israel groups have attempted to pressure boards of trustees into taking a side in the Israel-

Palestine dispute and shutting down relations with Israeli institutions, in violation of their institutional neutrality and responsibility to maintain academic freedom.

There are a few indications that the tide may be turning. Members of the American Historical Association and the Modern Language Association properly rejected recent attempts to pass sweeping boycott resolutions that would politicize these important disciplinary associations. A growing number of scholars, college presidents, and policymakers now voice their serious concerns about the BDS movement's violation of academic freedom and open dialogue, and state legislatures have taken steps to discourage contractors that receive state funding from joining the boycott. While remaining firmly neutral on such questions as the two-state solution or the settlements, this essay investigates the threat to academic freedom, civic discourse, and free speech posed by the BDS movement and other related initiatives that seek to squelch free expression.

Finally, and most importantly, this essay provides recommendations for actions trustees can take to protect academic freedom and individual rights, safeguard their institutional neutrality, and create a strong campus culture with diverse viewpoints.



Free Speech and Academic Freedom

Historically, the threats to academic freedom have come from many sources and in many forms. In the 21st century, the anti-Israel movement has encouraged an increasing number of flagrant violations of academic freedom and free expression. Both students and faculty feel its impact. This merits the careful attention of trustees, policymakers, and the academic community at large. At stake is nothing less than the integrity of American higher education.

Education is the engine that drives human progress, and academic freedom is the principle that enables and sustains education. Without academic freedom, colleges and universities can become places of stale

ideological conformity and indoctrination, rather than places of discovery and intellectual advancement.

For college and university faculty, academic freedom provides the opportunity to conduct research, to explore ideas and test hypotheses, and to gain perspective from colleagues, without the fear of obstacles or censure that comes from the bias of others. Professors enjoying academic freedom will not be silenced or sanctioned for challenging the prevailing opinions and beliefs of their profession. Their teaching and research can be shaped by their search for truth, not the winds of political fashion. For students, academic freedom gives them exposure to competing ideas and the space to express and debate viewpoints without fear that their grades will be lowered in reprisal or that their institutions will harass or punish them.

As the seminal report on this topic, issued in 1974 under the direction of Yale's Pulitzer Prize-winning historian C. Vann Woodward, stated:

The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views. . . .

Above all, every member of the university has an obligation to permit free expression in the university. No member has a right to prevent such expression. Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed.¹

The concept of academic freedom can be extended from individuals to the institution as a whole. In 1967, in the midst of the Vietnam War, a time of intense political discord, the University of Chicago's Kalven Committee declared that it would be antithetical to the mission of an institution of higher education for the university as a corporate body to take political positions.

There is no mechanism by which [the university] can reach a collective position without inhibiting that full freedom of dissent on which it thrives. It cannot insist that all of its members favor a given view of social policy . . . Our basic conviction is that a great university can perform greatly for the betterment of society. It should not, therefore, permit itself to be diverted from its mission into playing the role of a second-rate political force or influence.²

Freedom of speech and academic freedom naturally go hand in hand. The opportunity to learn and to explore is predicated upon the ability to share ideas and opinions in the open, to debate and to challenge them. Lawrence Summers expressed a crucial distinction in academic policy that he made during his time as president of Harvard University: “While the University’s obligations to protect its students from discrimination was absolute, its obligation to protect them from the discomfort of being offended was close to nonexistent.”³

The Anti-Israel Movement on Campus and the Threat to Academic Freedom

College campuses are home to a broad range of opinions and perspectives, often held with deep passion and conviction, and nowhere is this truer than on issues of foreign policy. The university is preeminently the appropriate place to raise and debate opinions on such contested issues as the two-state solution, the borders of the State of Israel, the status of Jerusalem, and the behavior of the nations in conflict. Both Jews and people of other faiths, and indeed citizens of Israel itself, legitimately can and should be able to voice their support or criticism of Israel’s policies and practices. All sides need to be willing to hear arguments that may well cause discomfort and even offense. Applying and, when necessary, enforcing America’s long-standing commitment to academic freedom and free expression on campus is the only way to ensure that open debate can take place and that teaching and learning can proceed without obstruction.

The Academic Engagement Network, representing some 400 faculty members, administrators, and staff at more than 170 campuses, appropriately calls for “more productive ways of addressing the Israeli-

Palestinian conflict” to replace “aggressive, antidemocratic tactics galvanizing deep inter-group suspicions.”⁴ The vigilance and, indeed, intervention of higher education leaders to control violations of academic freedom by the anti-Israel movement is, sad to say, long overdue. There have already been too many examples of overt violations of academic freedom under the banner of political opposition to Israel.

Here are a few:

- At the University of Minnesota, on November 3, 2015, two dozen protesters, with the support of Students for Justice in Palestine (SJP), attempted to shout down Moshe Halbertal, the Gruss Professor of Law at the NYU School of Law and a professor of Jewish thought and philosophy at Hebrew University. Professor Halbertal had been invited to deliver the Dewey Lecture in the Philosophy of Law. Police removed the demonstrators, arresting three of them. University of Minnesota Law School Dean David Wippman condemned the “efforts to silence free speech,” but, invoking student privacy, the University of Minnesota will not release information about the sanctions, if any, that the disruptive protesters faced.⁵
- At the University of Texas–Austin (UT), on November 13, 2015, twelve members of the Palestine Solidarity Committee (PSC), led by a UT law student, disrupted with chants and shouts a public event hosted by Professor Ami Pedahzur of UT’s Institute for Israeli Studies featuring Dr. Gil-Li Vardi, an invited speaker from Stanford University. The students who disrupted the event hired legal counsel and filed discrimination charges against Professor Pedahzur. On March 9, 2016, after investigation by its Office for Inclusion and Equity, the university dismissed the charges against Professor Pedahzur; it is unclear whether the university took action against the students who disrupted the event: The university cites federal privacy law in its refusal to disclose such information.⁶ What is clear is that free speech has fallen into serious peril at the Austin campus.

- In March of 2016 at the University of California–Davis, an Israeli-Arab scholar began the presentation of a lecture on “The Art of Middle East Diplomacy.” Minutes into the lecture, anti-Israel activists interrupted the event with shouts, chants, and a large banner.⁷
- At Syracuse University, a professor organizing a conference withdrew an invitation to the Israeli filmmaker Shimon Dotan, who created the widely acclaimed film, *The Settlers*, for fear of backlash from BDS supporters on her campus. Coverage of the disinvitation appeared in the *Atlantic*, and the provost and chancellor of the university reissued an invitation to Mr. Dotan.⁸
- At San Francisco State University in April 2016, dozens of anti-Israel activists stormed into a lecture by Jerusalem Mayor Nir Barkat. These protesters heckled and attempted to drown out his remarks. The university failed to remove the trespassers in a timely manner.⁹
- In February 2010, at the University of California–Irvine, a group of Muslim students shouted down Israeli ambassador Michael Oren as he attempted to speak. The attorney for the students argued that they were exercising their own free speech rights in shouting down the speaker. At their sentencing in a criminal trial one year later, however, District Attorney Tony Rackauckas stated, “History requires us to draw a line in the sand against this sort of organized thuggery.” This was not the last time UC–Irvine witnessed violations of free speech and expression. In 2016, a group of anti-Israel protesters chanting “Long live the intifada” blocked access to the screening of a film hosted by the group Students Supporting Israel. Campus police had to intervene. The group responsible for the disruption, Students for Justice in Palestine, received a sanction letter from Irvine’s Office of Student Conduct.¹⁰

Such incidents are hardly isolated. Behind these increasingly common violations of the core principles of the academic freedom that has defined American higher education are the BDS movement and a small number of groups, such as Students for Justice in Palestine, that are willing to violate

the liberties of faculty and their fellow students to advance their own political agenda.

What is the Boycott, Divestment, Sanctions Movement (BDS)?

The BDS movement attempts to reverse goodwill toward the State of Israel. Placing economic pressure on Israel through BDS is a secondary goal. Boycotts, divestments, and sanctions by colleges and corporations typically do relatively little damage to economic output, compared to the damage the discord does to the relationship between Israel and the rest of the world. In other words, the primary goal of BDS is *political*—to undercut the moral legitimacy of the State of Israel.

The modern-day BDS movement developed from the Palestinian Campaign for the Academic & Cultural Boycott of Israel (PACBI). According to its website, “PACBI urges academics, academic associations/unions, and academic—as well as other—institutions around the world, where possible and as relevant, to boycott and/or work towards the cancellation or annulment of events, activities, agreements, or projects involving Israeli academic institutions or that otherwise promote the normalization of Israel in the global academy, whitewash Israel’s violations of international law and Palestinian rights, or violate the BDS guidelines.” PACBI also says “international faculty should not accept to write recommendations for students hoping to pursue studies in Israel.”¹¹

Much of the intention of both PACBI and the BDS movement is evident in the statements of their shared co-founder Omar Barghouti: In a paper published on the *Electronic Intifada*, Barghouti wrote, “We are witnessing the rapid demise of Zionism, and nothing can be done to save it . . . I, for one, support *euthanasia*.” Further enunciating his profound hatred for the Jewish state, Barghouti further declared, “The two-state solution for the Palestinian-Israeli conflict is really dead. Good riddance! But someone has to issue an official death certificate before the rotting corpse is given a proper burial.”¹² Moreover, as it is a major platform for the BDS movement, the *Electronic Intifada* troublingly is not altogether careful in drawing a line between anti-Zionism and overt anti-Semitism. In late 2013, Rania Khalek,

publishing on the *Electronic Intifada*, argued that *The Nation*, a well-known progressive journal, is suspect because it has too many Jews on its staff.¹³

There are several groups that frequently seek to advance the BDS Movement. The official membership of the Palestinian BDS National Committee includes the Council of National and Islamic Forces in Palestine (CNIF).¹⁴ This entity includes representatives from Hamas and the Popular Front for the Liberation of Palestine, both terror organizations utilizing suicide bombers: According to the Anti-Defamation League, CNIF “helps plan and execute joint terror operations against Israel.”¹⁵

Radical Islamists also back BDS, including Sheikh Yusuf al-Qaradawi, a leading figure in the Muslim Brotherhood with ties to Hamas, who issued a fatwa against the purchase of Israeli goods. In his injunction, he stated, “We will not participate in making profits for our enemy. This boycott is a lesser resistance, which will help the greater resistance carried out by our brothers in the land of Messengers, and the fortified frontier of Jihad.”¹⁶

Students for Justice in Palestine (SJP) has been one of the primary organizers of BDS and related anti-Israel activities on campus. It has been frequently involved in the disruption of events it deems supportive of the State of Israel. SJP’s orientation is illuminated by the call of its co-founder, Hatem Bazian, for an intifada, or uprising, in the United States.¹⁷ That in itself is a warning sign, since the history of intifadas in Israel is one that left thousands of Israelis and Palestinians—both Jews and Arabs—dead or wounded.

SJP’s parent organization is American Muslims for Palestine (AMP), whose leadership, in turn, includes several persons formerly associated with the Holy Land Foundation (HLF), which was prosecuted by the U.S. Department of Justice for sending millions of dollars to the terrorist organization Hamas. In the end, a federal grand jury found HLF and all five HLF defendants guilty on all 108 counts brought against them. These crimes included transmitting more than \$12 million to Hamas following its designation as a terrorist entity by the U.S. government.¹⁸

Law-abiding organizations that respect academic freedom and freedom of expression must be welcomed on campus, and their controversial

viewpoints must not be a barrier to their participation in campus life. Groups with a history of disruptive behavior and that are connected with activities in violation of federal law, however, make it imperative, at the very least, for universities to apply heightened levels of oversight and monitoring of the activities of such organizations.



Divestment Pressure on Governing Boards

Although, as the University of Chicago's Kalven Committee concluded, a college or university should not as an institution adopt a political position, increasingly the BDS Movement calls on trustees and regents to divest from companies in Israel or who do business in Israel.

After supporting the students who attempted to silence Moshe Halbertal at the University of Minnesota, Students for Justice in Palestine attempted the following year to gain a resolution from the student government calling for divestment not only from Israeli companies, but also from companies like Raytheon and Caterpillar, which do business with Israel.¹⁹ Even before the student assembly voted on the resolution, University of Minnesota president Eric Kaler made clear the university's misgivings about such a boycott:

The University does not endorse measures advocated in the . . . [BDS] resolution. . . . The BDS Movement, while not directly mentioned in the resolution, has called for a comprehensive academic, cultural, economic and consumer boycott of Israel. In general, our university should be wary about such boycotts, given our core values of academic freedom . . . and concerns that we may be unfairly singling out one government and the citizens of the country in question. In this case, my concerns are heightened by the fact that the Global BDS movement does not seem to distinguish between opposition to the policies of the government of Israel and opposition to the existence of Israel.²⁰

The campaign to break business relations between American universities and Israeli companies can be both subtle and embarrassing for institutions. In December 2014, Harvard President Drew Faust discovered that, months earlier, Harvard's dining services had unilaterally bowed to pressure from students representing the College Palestine Solidarity Committee and the Harvard Islamic Society to remove SodaStream water machines, which are manufactured by an Israeli company located in the West Bank, and to replace them with American-made machines. President Faust reversed that decision; Provost Alan Garber issued a statement noting, "Harvard University's procurement decisions should not and will not be driven by individuals' views of highly contested matters of political controversy."²¹

In early 2016, well over 200 members of the Columbia University faculty signed a letter directed to the board of trustees urging them to reject calls to divest from companies that do business in Israel. Their stands are completely in keeping with the principles and wisdom of the Kalven Committee.²²

Lawrence Summers, who preceded Drew Faust as Harvard's president, had faced even more concerted pressure in the fall of 2002, when a petition gained more than 500 signatures from Harvard and MIT faculty and students calling on the universities to divest stock in companies that did business in Israel. He responded by noting that the issue was not merely that university involvement in a boycott is inappropriate—the boycott itself was anti-Semitic. He invoked the State Department's guidance: "While criticism of Israel cannot automatically be regarded as anti-Semitic, rhetoric that . . . applies double standards to Israel crosses the line of legitimate criticism."²³

These are hardly isolated attempts. In the 2014–2015 academic year alone, at least 19 resolutions or referendums were considered on college campuses. Although university boards are not bound by these resolutions (and sometimes the resolutions are overturned), a majority voted in favor of BDS in 12 of these instances. Student governments at Loyola University, DePaul University, and Northwestern University all voted in favor of the BDS proposal.²⁴ As a trustee, you will need to be ready to respond articulately and firmly to inappropriate pressure to

change the manner in which your school’s endowment is invested or the companies with which it conducts business.



The Politicization of Professional Associations

Several professional associations have adopted policies calling on members to boycott Israeli institutions of higher education. Such resolutions raise disquieting questions about the role and purpose of these academic associations, as well as the appropriateness of such bodies taking political positions when they enjoy tax-exempt status as academic associations.²⁵ It is also noteworthy that these associations have had little or nothing to say about egregious and well-documented violations of human rights and academic freedom in Egypt, Venezuela, Turkey, China, and elsewhere. This, as President Summers (see p. 10) observed, raises the specter of anti-Semitism by singling out Israel.

In recent years, several academic organizations have taken steps toward supporting the BDS movement. These include:

- American Anthropological Association (AAA): In June 2016, the AAA membership narrowly defeated a resolution (by a vote of 2,423 to 2,384) to honor the academic boycott against Israel. The resolution had overwhelmingly passed (by a vote of 1,040 to 136) during the organization’s Fall 2015 meeting. Despite the negative vote, AAA leadership weeks later decided to proceed in censuring Israel. In part, AAA claimed “Israeli government policies and practices . . . threaten academic freedom and human rights.”²⁶
- National Women’s Studies Association (NWSA): In 2015, with 35% of the membership voting, over 88% resolved to boycott “economic, military and cultural entities and projects sponsored by the state of Israel.” The resolution declares, “In the spirit of this intersectional perspective, we cannot overlook the injustice and violence, including sexual and gender-based violence, perpetrated

against Palestinians and other Arabs in the West Bank, Gaza Strip, within Israel and in the Golan Heights.”²⁷

- Association for Asian American Studies (AAAS): With 10% of its voting members present, AAAS unanimously passed a resolution calling for an academic boycott of Israel in April 2013. The AAAS president explained her organization “would discourage partnerships with Israeli academic institutions, whether they’re curriculum partnerships or study abroad partnerships.”²⁸

There has, however, been significant and growing opposition to the anti-Israel position these associations have taken.

When the American Studies Association (ASA) voted in favor of an anti-Israel boycott, more than 80 college and university presidents spoke up against the resolution. Bard College, Brandeis University, Indiana University, Kenyon College, and Pennsylvania State University—Harrisburg withdrew from membership in the American Studies Association.²⁹

Wesleyan President Michael Roth called the ASA boycott “a[n] attack on academic freedom, declaring institutions off-limits because of their national affiliation.”³⁰ Kenyon President Sean Decatur declared: “[A]s the president of a College with an unwavering commitment to the liberal arts and the concept of academic freedom, I reject the notion of a boycott of academic institutions as a geopolitical tool.”³¹

Three large and prestigious university associations—the Association of American Universities (AAU), the Association of Public and Land-grant Universities (APLU), and the American Association of University Professors (AAUP)—condemned the boycott. AAU’s Executive Committee wrote, “Restrictions imposed on the ability of scholars of any particular country to work with their fellow academics in other countries . . . violate academic freedom. . . . We urge American scholars and scholars around the world who believe in academic freedom to oppose this and other such academic boycotts.” APLU similarly observed, “Members of the academic community certainly have the right to express their views, but the call for a boycott in this case is severely misguided and wrongheaded.”³²

Promisingly, two major professional organizations have themselves now joined in the pushback against academic boycotts of Israel. In 2014, the Modern Language Association (MLA) delegate assembly had narrowly passed a resolution that condemned Israel that ultimately failed to gain the requisite support of MLA membership to become official policy.³³ In 2017, however, the delegate assembly voted down a proposal to join in an academic boycott of Israel. It then passed a resolution which may go on to the full membership opposing such a boycott on the grounds that it “contradicts the MLA’s purpose to promote teaching and research on language and literature.”³⁴ Concurrently, the American Historical Association also voted 111 to 51 to reject a resolution condemning Israel.³⁵



Anti-Semitism and the Threat to Academic Freedom

Academic freedom imposes a duty to defend the right of even highly objectionable views and prejudices to be heard. Objectionable as they are, that includes words and ideas that a reasonable person would view as racist or anti-Semitic. Actions, however, are different—academic freedom is not a license for acts of discrimination. And **actions by proponents of the BDS movement have frequently crossed boundaries of appropriate protest and demonstration into unacceptable acts of anti-Semitism.**

UCLA prelaw student Rachel Beyda, for example, was a sophomore running for student council when certain council members began haranguing her about her Jewishness. Undergraduates Students Association Council member Fabienne Roth asked her, “Given that you are a Jewish student and very active in the Jewish community, how do you see yourself being able to maintain an unbiased view?”³⁶ Forcing a Jewish student to prove she can form an unbiased decision about proposed university policies concerning Israel clearly attempts to attach responsibility for those national decisions to her based on her ethnic identification as a Jew—a clear exhibition of contemporary anti-Semitism. Indeed, the accusation leveled at Rachel Beyda—that she might be unable to uphold the interests of UCLA over those of the Jewish community—precisely epitomizes one of

the examples of anti-Semitism identified by the U.S. Department of State's Special Envoy to Monitor and Combat Anti-Semitism: "Accusing Jewish citizens of being more loyal to Israel or to the alleged priorities of Jews worldwide, than to the interest of their own nations."³⁷

And physical violence has been not only threatened, but inflicted. One startling instance occurred at Temple University, when individuals at a SJP information table punched and knocked down Jewish student Daniel Vessal. Verbal assaults hurled at him throughout the battery included "baby-killer," "racist," and "Zionist pig."³⁸ UC-Berkeley has seen graffiti including, "Zionists should be sent to the gas chamber," and San Diego State University, "SDSU Divest so we can get rid of the Jews."³⁹

The singling out of Israel as the only nation worthy of boycott and sanction, moreover, is anti-Semitic, according to the definition used by the U.S. State Department. As the State Department explains, manifestations of anti-Semitism include "applying double standards by requiring of it [Israel] a behavior not expected or demanded of any other democratic nation" and "multilateral organizations focusing on Israel only for peace or human rights investigations."⁴⁰

It is entirely appropriate for college leadership—governing boards, administrators, and faculty—to call out and denounce instances of anti-Semitism, just as they would do for instances of racism or other discrimination. In protecting the academic freedom of political activists, directors and officers of an institution do not forfeit their prerogative of voicing their opposition to such viewpoints and attitudes. Lawrence Summers articulated this point: "We should always respect the academic freedom of anyone to take any position. We should also recall that academic freedom does not include freedom from criticism. The only antidote to dangerous ideas is strong alternatives vigorously advocated."⁴¹

Columbia University President Lee Bollinger showed how university leadership can permit the purveyors of hate to speak while also condemning their hatred. During his introduction of Iranian President Mahmoud Ahmadinejad's visit to the university, Bollinger told Ahmadinejad, "You exhibit all the signs of a petty and cruel dictator." He further condemned Ahmadinejad's Holocaust denial as a defiance of "historical truth" and as

“either brazenly provocative or astonishingly uneducated.”⁴² A controversial and indeed sinister voice was permitted to speak, but level-headed leadership clearly countered the darkness.



Threats to Academic Integrity

A college campus is a place for education, not indoctrination, and it is appropriate for college leadership to insist on responsible academic procedures and the intellectual openness and objectivity expected of members of the academy.

In Middle East Studies programs, such scholarly objectivity too often falls victim to politics. Bernard Lewis, a preeminent scholar in the field, noted that Middle East Studies programs have been affected by “a degree of thought control and limitations of freedom of expression without parallel in the Western world since the 18th century.” He continued, “It seems to me it’s a very dangerous situation because it makes any kind of scholarly discussion of Islam, to say the least, dangerous. Islam and Islamic values now have a level of immunity from comment and criticism in the Western world that Christianity has lost and Judaism never had.”⁴³

In 2005, a film called *Columbia Unbecoming* brought embarrassment to Columbia University when it documented the indoctrination and intimidation Jewish students experienced in the Department of Middle East and Asian Languages and Cultures (MEALAC). Columbia President Lee Bollinger denounced the behavior of the professors responsible for creating an environment hostile to Jewish students as a violation of academic freedom. He criticized “the temptation to use the podium as an ideological platform, to indoctrinate a captive audience, to play favorites with the like-minded and silence the others.” President Bollinger established a new grievance policy that targeted “failure to show appropriate respect in an instructional setting for the rights of others to hold opinions differing from their own.” What President Bollinger addressed at Columbia, however, is not an isolated incident—it is a more widespread problem at American colleges and universities.⁴⁴

The City University of New York’s Brooklyn College, too, was embarrassed by the decision of its English Department to assign Moustafa Bayoumi’s *How Does It Feel to Be a Problem? Being Young and Arab in America* as common reading for all of the college’s incoming students. Brooklyn College Professor KC Johnson, as well as many from outside the school, objected to the text as inflammatory and containing questionable assertions of fact. The misstep of permitting the English Department unilaterally to select one of its own professor’s polemical books as the single, unchallenged orientation reading for all freshmen, however, fortunately led to a high-level commitment to a more inclusive faculty selection process.⁴⁵



Legal Exposure from Campus Anti-Semitism

Justice Oliver Wendell Holmes admonished: “If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”⁴⁶ Under the First Amendment, even hate speech is protected by law, and that means that public universities may not suppress or punish those who articulate ideas that would reasonably be deemed bigoted and hateful. Private institutions have more latitude to define acceptable campus conduct, but they too need to beware of creating a culture that silences unwelcome ideas.

Disorderly conduct, anti-Semitic vandalism, or physical assault are quite a different matter from expressing opinions, and they may expose a university to liability.

Title 34 of the Code of Federal Regulations articulates the guidelines under Title VI of the Civil Rights Act of 1964. Specifically, Title 34 states, “No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.”⁴⁷ The U.S. Department of Education’s Office for Civil Rights (OCR) clarifies, too, that Title VI itself “protects students of any religion from discrimination, including harassment, based on a student’s

actual or perceived shared ancestry or ethnic characteristics . . .”⁴⁸ Overtly discriminatory actions by institutions or university officials acting within the scope of their duties are not the only activities potentially exposing universities to legal liability or withdrawal of federal funds. The OCR notes, “The existence of racial incidents and harassment on the basis of race, color, or national origin against students is disturbing and of major concern to the Department. Racial harassment denies students the right to an education free of discrimination.” The OCR further explains that “the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of title VI.”⁴⁹

For this behavior to qualify as a violation of the Civil Rights Act under the standard of the OCR, the conduct must be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program to be in violation of federal regulations. Disorderly conduct (such as interrupting a lecture or blocking access to a sidewalk or roadway or using a bullhorn in proximity to a scheduled presentation) is not protected by the First Amendment, and when it targets Jewish events, it arguably does violate the Civil Rights Act. An institution that winks at such behavior not only compromises its values as a place open to the free exchange of ideas, but may well be in violation of the law. Reasonable and carefully defined time, place, and manner restrictions on speech are permissible under constitutional jurisprudence, and institutions must judiciously exercise such authority to prevent disruption of scheduled events.

Failure by federally-funded colleges and universities to correct a hostile environment created by BDS activists indeed exposes the institution to legal liability.



The Cost of BDS to Progress

In the last twelve years, Israeli scientists have won four Nobel Prizes in chemistry. Work of utmost importance for medical and technological

progress goes on at Israeli universities, and their faculties have a long tradition of collaboration with colleagues in the United States and other nations. Oded Shoseyov and the team at the Robert H. Smith Institute for Plant Genetics and Genetics in Agriculture at the Hebrew University of Jerusalem, for example, work with academic colleagues all over the world. Their projects include the application of nano biotechnology and protein engineering to improve medical implants and skin regeneration following trauma.⁵⁰ The BDS movement would disrupt such scholarly interactions. It is for this reason that the Association of Public and Land-grant Universities (APLU) concluded: “This boycott wrongly limits the ability of American and Israeli academic institutions and their faculty members to exchange ideas and collaborate on critical projects that advance humanity, develop new technologies, and improve health and well-being across the globe.”⁵¹ The injury that results from breaking such scholarly interactions would not only accrue to Israel’s institutions but also to research at American universities. Does any university really want to go down this path and inhibit the academic partnerships that are improving the quality of life worldwide?



State and National Legislative Initiatives Against the BDS Movement

A number of state legislatures have recognized the discriminatory aspects of the BDS movement and have taken legislative action to combat their spread. At last count, 14 states have enacted legislation in opposition to the BDS movement, restricting government contractors from participating in boycotts, with several other states considering measures.⁵² State universities, of course, function within state government, and at least two state legislatures have already debated legislation that would defund universities that participate in a boycott of Israel.⁵³ The state of Florida enacted legislation preventing state and local governments from entering contracts over \$1 million with companies participating in BDS against Israel and also

preventing the state pension fund from investing in such companies.⁵⁴ At the federal level, the Combating BDS Act of 2016 would have authorized a state or local government to divest from or prohibit investment in entities which target Israel for boycott, divestment, or sanctions.⁵⁵

Most recently, the United States Senate unanimously passed Senate Bill 10, the Anti-Semitism Awareness Act of 2016. While specifying, “Nothing in this bill shall be construed to diminish or infringe upon any right protected under the First Amendment to the Constitution,” this proposed legislation called for the U.S. Department of Education to apply the definition of anti-Semitism of the Special Envoy to Monitor and Combat Anti-Semitism of the Department of State when investigating alleged violations of Title VI of the Civil Rights Act.⁵⁶



Action Steps for Trustees

As a member of the governing board of your institution, you are a fiduciary, entrusted with the responsibility for the financial health, academic success, and quality of campus life of your institution.

As threats to academic freedom and the principles of an academic community increase, your institution looks to you to ensure that robust policies are in place to protect the core values of your school.

1. Establish clear First Amendment policies. Ensure that there are robust and highly publicized policies in place governing free speech. Define the boundaries between protest and disruption and establish severe sanctions for heckling invited speakers or preventing other students from attending scheduled events. The Academic Engagement Network's guide, *Academic Freedom, Freedom of Expression, and the BDS Movement*, provides detailed guidance, based on extensive administrative experience, on how to create and enforce an effective student code of conduct.⁵⁷
2. Look to national best practices concerning free expression. The Chicago Principles of freedom of expression, adopted by a growing list of institutions, provides an excellent template for safeguarding freedom of speech and expression on campus. Incorporate these principles into your institution's freshmen orientation materials, academic catalog, and student and faculty codes of conduct.⁵⁸
3. Protect your institution's political neutrality. Review with board colleagues the Kalven Committee report on the importance of institutional neutrality.
4. Review your institution's anti-discrimination policies. While scrupulously protecting freedom of speech, including what Justice Holmes called "freedom for the thought we hate," exercise your own freedom to condemn anti-Semitism and bigotry in all of its forms.

5. While respecting academic freedom, work with the president and provost to encourage departments and centers that address Middle Eastern affairs to ensure intellectually-diverse views across a range of scholarly opinion.

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The “Boycott, Divest, Sanction” movement is an especially sinister example of how colleges and universities are drawn into affirming certain political orthodoxies, to the detriment of the free exchange of ideas.

George F. Will, Author and Syndicated Columnist

ACTA illuminates a growing challenge to our basic freedom of expression. Denying others the right to express their ideas strikes at the heart of American freedom.

**The Honorable Hank Brown, U.S. Senator from Colorado, 1991-1997
Past President, University of Colorado**

The ACTA analysis of the BDS movement and academic freedom on university campuses is superb. The essay provides trustees and regents with the knowledge they need to understand the challenges to free speech and the troublesome underpinnings of the BDS movement. The authors also illuminate the legal context in which campus speech issues arise. This essay is a reliable reference work for governing boards.

**Mark G. Yudof, President Emeritus, University of California
Professor Emeritus, UC Berkeley School of Law
Former Chancellor, University of Texas System**

This is a timely and deeply disturbing document. The evidence you provide persuades us that campus anti-Semitism is an even greater menace to academic freedom than we had understood.

**Stephan Thernstrom, Winthrop Research Professor of History, Harvard University
Abigail Thernstrom, Author and former Vice-Chair, U.S. Commission on Civil Rights**

Simply agreeing to speak at an intellectual property law symposium at Tel Aviv University made me the target of emails from the BDS campaign demanding I withdraw. These emails were manifestly anti-Semitic in substance and tone. Such conduct threatens to undermine academic freedom in this nation, if not aggressively opposed by the presidents and governing bodies of our institutions of higher education.

Terence P. Ross, Partner, Katten Muchin Rosenman LLP



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