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Students for Justice in Palestine (SJP)

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“INHERENTLY EXPRESSIVE”: BDS ORGANIZING FOR PALESTINIAN LIBERATION AT CUNY SCHOOL OF LAW AND BEYOND

Students for Justice in Palestine (SJP) and the Jewish Law Students Association (JLSA), City University of New York (CUNY) School of Law

INTRODUCTION

The authors of this Article are law student members of the Students for Justice in Palestine (“SJP”) and the Jewish Law Students Association (“JLSA”) chapters at City University of New York School of Law (“CUNY Law”). While both SJP and JLSA organize events and campaigns in solidarity with Palestinians on the ground and in exile, JLSA is specifically an anti-zionist Jewish affinity organization. Although it is the only Jewish affinity student organization at CUNY Law, JLSA does not represent all Jewish students at CUNY Law. Students in both groups at CUNY Law successfully advocated for the student body to pass a boycott, divestment, and sanctions (“BDS”) resolution in December 2021. In May 2022, the CUNY Law faculty endorsed it through a vote of acclamation. The authors seek to illuminate the historical and legal context of BDS organizing at CUNY Law and more broadly.

Part I of this Article provides a brief history of the origins of and introduction to the BDS movement. While it has been a long-standing tradition amongst American lawmakers to support Israel since the Cold War,¹ BDS is a growing transnational movement of solidarity² that supports Palestinian self-determination. The Article argues that for ordinary people to boycott Israel in protest of Israel’s human rights abuses against Palestinians is not discriminatory. Such boycotts do not have the same state imprimatur (mark of approval) as the historic discriminatory boycotts by the Nazis of Jewish businesses because international law requires States to act against contemporary colonialism by engaging in non-recognition of the colonizing State (in this case, Israel). Part II shows

¹ Zack Beauchamp, *Why the US Has the Most Pro-Israel Foreign Policy in the World*, VOX (July 24, 2014, 9:00 AM), <https://perma.cc/Q664-VRWK>.

² See, e.g., *US: More Democrat Voters Support BDS than Oppose It, New Polls Show*, MIDDLE EAST EYE (Aug. 3, 2020 4:54 PM), <https://perma.cc/L23X-2BQA>; see also Yousef Munayyer, *5 Reasons BDS Is Actually Working*, NATION (July 9, 2015), <https://perma.cc/6ZDL-2B3A>.

how the global community selectively supports certain boycotts and calls for divestment without labeling them as discriminatory. The Article draws parallels between the boycotts against Russia after the invasion of Ukraine, South Africa during apartheid, and in Algeria in protest of French colonialism. Part III discusses the social justice organizing for Palestinian liberation at CUNY Law and how opponents of BDS have sought to label CUNY Law as anti-semitic to stifle these efforts. As reflected at CUNY Law, the movement for the liberation of Palestine experiences widespread repression and violence consistent with the suppression of other racial, social justice, and anti-colonial struggles. Part IV describes the proliferation of anti BDS laws at the state level. Finally, Part V provides a legal framework for boycott as free speech and expressive conduct that protects not only BDS, but boycotts across other First Amendment issues including the fossil fuel industry and Black Lives Matter.

I. ORIGINS OF BDS

When Israeli authorities established the State of Israel in 1948, they expelled over 700,000 Palestinians from their homes³—today, Palestinians remain one of the largest populations of stateless people in the world.⁴ Since 1948, Israel has engaged in settler colonialism,⁵ racial

³ See Hussein Ibish, *A 'Catastrophe' that Defines Palestinian Identity*, ATLANTIC (May 14, 2018), <https://perma.cc/ER9P-6QPA>; See BADIL RES. CTR. FOR PALESTINIAN RESIDENCY AND REFUGEE RTS., *Palestinians and the Search for Protection as Refugees and Stateless Persons*, EUROPEAN NETWORK ON STATELESSNESS 2 (June 2022), <https://perma.cc/MZR9-8VPZ>; see generally INST. ON STATELESSNESS & INCLUSION, *THE WORLD'S STATELESS* 127–32 (2014), <https://perma.cc/97V6-MTVZ> (describing the different categories of stateless Palestinians under the United Nations and international law following the 1948 Arab-Israeli conflict).

⁴ See BADIL RES. CTR. FOR PALESTINIAN RESIDENCY AND REFUGEE RTS. *supra* note 3; See generally INST. ON STATELESSNESS & INCLUSION, *supra* note 3.

⁵ Ronit Lentin, *Palestine/Israel and State Criminality: Exception, Settler Colonialism and Racialization*, 5 STATE CRIME J. 32, 39–42 (2016); see generally Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 Harv. Int'l L.J. 65 (2003) (examining the state of international humanitarian law in the occupied Palestinian territory and provides fresh insight into the role it has in governing relations between Israel and the millions who continue to live subject to its military rule); see generally Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 Berkeley J. Int'l L. 551 (2005) (exploring whether the 1967 occupation of Palestinian territory was illegal or legal).

discrimination,⁶ annexation of Palestinian lands,⁷ apartheid,⁸ occupation,⁹ and other ongoing violations of international law,¹⁰ including flagrant human rights violations.¹¹

Israeli leaders have consistently sought to deny Palestinian nationhood.¹² This includes efforts rooted in the Zionist founding myth of, “for a people without a land, a land without people,”¹³ which persists to this day,¹⁴ and the Jewish National Fund’s campaign covering up destroyed Palestinian villages with woodlands and agricultural projects.¹⁵ Hundreds of United Nations resolutions condemning Israel’s colonial and racist policies have not stopped its violations of international human rights and humanitarian law.¹⁶

On July 9, 2005, a coalition of approximately 170 Palestinian unions, political parties, and organizations issued an international call for boycott,

⁶ U.N. Off. of the High Comm’r, Comm. on the Elimination of Racial Discrimination, *In dialogue with Israel, Committee on the Elimination of Racial Discrimination Urges Greater Inclusion and Protection of Minorities and All Those Under Israeli Jurisdiction, Including in the Occupied Territories* (Dec. 5, 2019), <https://perma.cc/37MT-6DBS>.

⁷ Mohammed Hadad, *Palestine and Israel: Mapping an Annexation*, AL JAZEERA (June 26, 2020), <https://perma.cc/K325-WHQA>; see generally UN Special Rapporteur Michael Lynk, *Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, A/72/556 (Oct. 23, 2017), <https://perma.cc/58R9-VMP7>.

⁸ AMNESTY INT’L, *ISRAEL’S APARTHEID AGAINST PALESTINIANS: CRUEL SYSTEM OF DOMINATION AND CRIME AGAINST HUMANITY* 29-30 (2022), <https://perma.cc/6VF8-6226>.

⁹ See AMNESTY INT’L, *Israel’s Occupation: 50 Years of Dispossession*, <https://perma.cc/E382-ERMM>.

¹⁰ See Ayesha Kuwari, *Israel’s Violation of International Law in the Occupied Palestinian Territories*, HUM. RTS. PULSE, (May 31, 2021), <https://perma.cc/7J27-R4EY>.

¹¹ *Id.*; see AMNESTY INT’L, *Israel and Occupied Palestinian Territories 2021*, <https://perma.cc/NC8K-DHYZ>.

¹² See generally Noura Erakat, *Whiteness as Property in Israel: Revival, Rehabilitation, and Removal*, 31 HARV. J. RACIAL & ETHNIC JUST. 69 (2015) (describing that the only nationality recognized by Israel within its perceived borders is that of the Jewish people).

¹³ See Adam M. Garfinkle, *On the Origin, Meaning, Use and Abuse of a Phrase*, 27 MIDDLE E. STUD. 539, 539-50 (1991).

¹⁴ See Ted Belman, *Jordan is Palestine. Jordanians are Palestinian*, TIMES OF ISR.: THE BLOGS (May 1, 2022, 12:39 PM), <https://perma.cc/6JPZ-MLAD>.

¹⁵ See *Palestinian Villages Erased by the Jewish National Fund*, TRT WORLD (Jan. 26, 2002), <https://perma.cc/EN3C-SJBW>.

¹⁶ See United Nations Sec. Council, *The Question of Palestine and the Security Council*, <https://perma.cc/6TH4-5DXD>; e.g., Michael Schwartz & Chelsea J. Carter, *Netanyahu: ‘We will continue to build Israeli settlements’ in occupied territory*, CNN WIRE (Dec. 2, 2012) (on file with CUNY Law Review) (stating Israel Prime Minister Netanyahu refused to reconsider building Israeli settlements in occupied territories in response to the U.N. General Assembly’s recognition of Palestine as a non-member state, and said “the Israeli government rejects the decision taken by the General Assembly.”).

divestment, and sanctions (“BDS”) against Israel.¹⁷ This request came one year after the United Nations’ principal judicial structure, the International Court of Justice (“ICJ”), found that the wall Israel built in occupied Palestine was illegal, and that all States were under an obligation to ensure Israel’s compliance with international humanitarian law.¹⁸ The Advisory Opinion stated, “[t]he Court considers that construction of the wall and its associated régime [including illegal Israeli settlements in the occupied territory] create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.”¹⁹ Annexation is a colonial practice.²⁰ In the face of contemporary colonialism, States are under a duty of non-recognition, whereby they must withhold support for the colonizing State.²¹

While international condemnation of Israel’s actions is widespread, Israel still occupies a strong position in the global geopolitical order, thanks to the support of the United States and a developed economy with prominent industrial, defense, and technology sectors.²² Since the United States is Israel’s primary supporter, the authors of this Article focus on current civil society boycott and divestment efforts rather than less politically feasible government sanctions and States’ obligation to withdraw support of colonizing States.

A. *What is BDS?*

With far less international support compared to Israel and the complicity of many States in ongoing colonial practices in Palestine, Palestinian civil society called for BDS. BDS calls on international civil

¹⁷ PALESTINIAN CIV. SOC’Y., *Palestinian Civil Society Calls for Boycott, Divestment and Sanctions Against Israel Until it Complies with International Law and Universal Principles of Human Rights* (July 9, 2005), <https://perma.cc/6S54-2ELS>.

¹⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 138 (July 9, 2004); *see generally* *The Occupied Territories and International Law*, B’TSELEM - THE ISRAELI CTR. FOR HUM. RTS. IN THE OCCUPIED TERRITORIES (Nov. 11, 2017), <https://perma.cc/457L-XNAU> (discussing the applicability of international humanitarian law to Israel).

¹⁹ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 131 I.C.J. Rep. at 137, 140, 181 (July 9, 2004).

²⁰ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 32 (1999).

²¹ *See* U.N. Charter, art. 40, 41.

²² *See* CIA, *The World Factbook: Israel Introduction*, <https://perma.cc/CMD3-T89J> (last visited Feb. 2, 2023); CIA, *The World Factbook: Israel Economy*, <https://perma.cc/CMD3-T89J> (last visited Feb. 2, 2023); Noura Erakat, *No, Israel Does Not Have the Right to Self Defense in International Law Against Occupied Palestinian Territory*, JADALIYYA (July 11, 2014), <https://perma.cc/F2XJ-XWB9>; Jeremy M. Sharp, Cong. Rsch. Serv., RL33222, U.S. Foreign Aid to Israel (2022), <https://perma.cc/SF5B-7JRY>.

society organizations and people of conscience to enact boycott and divestment initiatives against Israel and to pressure States to impose embargoes and sanctions.²³ BDS represents “non-violent punitive measures” to employ until Israel complies with international humanitarian law by 1) ending its occupation and colonization, and dismantling the wall; 2) recognizing Arab-Palestinian citizens’ “full equality”; and 3) respecting Palestinian refugees’ right of return under UN resolution 194.²⁴ The BDS movement centers itself broadly on Palestinians’ basic human rights and ability to regain control of the occupied territory and does not advocate for a “one state” or a “two state” solution.²⁵

The call for boycott encompasses economic, academic, and cultural boycotts.²⁶ As such, the BDS movement pressures companies, academics, and artists to divest from Israel.²⁷ An academic boycott addresses the role Israeli universities play in the development of weapons used against the Palestinian people,²⁸ academic scholarship justifying Israel’s actions,²⁹ and Israeli academic institutions’ repression of Palestinian scholarship.³⁰ Numerous academic associations and unions worldwide have endorsed BDS and pledged to boycott Israeli institutions.³¹ The cultural boycott includes rejection of sponsorship from the Israeli government and a

²³ PALESTINIAN CIV. SOC’Y., *supra* note 17.

²⁴ PALESTINIAN CIV. SOC’Y., *supra* note 17.

²⁵ Sanya Mansoor, *The Trump Administration is Cracking Down on a Global Movement to Boycott Israel. Here’s What you Need to Know About BDS*, TIME (Dec. 4, 2020, 6:50 PM), <https://perma.cc/67L2-NH9D>.

²⁶ *Global Campaigns*, BDS MOVEMENT, <https://perma.cc/ZB7X-QQ58> (last visited Nov. 12, 2022); *see also id.*

²⁷ *Growth of a Movement* (illustration), VISUALIZING PALESTINE, <https://perma.cc/LN4V-PVEB> (last visited Dec. 8, 2022).

²⁸ SOAS PALESTINE SOC’Y., *Study: Tel Aviv University Part and Parcel of the Israeli Occupation*, ELEC. INTIFADA, (July 9, 2009), <https://perma.cc/M58R-EY46> (discussing Tel Aviv’s University’s institutional contributions to the military); *see also Lockheed Martin and Yissum Sign Long Term Research Collaboration Agreement*, BUS.WIRE (Oct. 6, 2014, 6:00 AM), <https://perma.cc/NWQ3-XJXW> (announcing Hebrew University’s development company signing a collaboration agreement with Lockheed Martin).

²⁹ *See* Marcy Jane Knopf-Newman, *The Fallacy of Academic Freedom and the Academic Boycott of Israel*, 8 CR: NEW CENTENNIAL REV. 87, 92-93 (2008).

³⁰ *See generally* URI EITAN ET AL., THE FAILING EAST JERUSALEM EDUCATION SYSTEM, IR AMIM & ASSN. CIV. RTS. IN ISR. (Aug. 2013), <https://perma.cc/8JAZ-D4PB> (discussing significant educational disparities between Arab and Jewish educational systems in Jerusalem).

³¹ *Endorsers*, U.S. CAMPAIGN FOR ACAD. & CULTURAL BOYCOTT OF ISR., <https://perma.cc/CM4H-BCJ3> (last visited Oct. 22, 2022).

refusal to perform in Israel.³² The boycott responds to Israel's propaganda that obfuscates and justifies illegal actions against Palestinians under international law.³³ Divestment advocates that banks, churches, universities, organizations, and other business entities withdraw investments from both companies that support Israel and the State of Israel itself.³⁴ Sanctions consist of severing military, economic, cultural, and diplomatic connections.³⁵

Social justice movements use boycotts as a tool to further liberation. “[E]very major social movement” has used boycotts “by leveraging political and economic mobilization to urge changes in government or private practices.”³⁶ Thus, like “demonstrations, picketing, strikes, and sit-ins,” boycott is a form of expressive conduct and the “politically expressive goals” of BDS are protected speech.³⁷

B. *BDS is Not Discriminatory*

The United Nations General Assembly created the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) in 1965 along with the Committee on the Elimination of Racial Discrimination, which is tasked with its implementation.³⁸ Opponents of BDS argue that boycotting Israel is anti-semitic and runs

³² *Cultural Boycott*, BDS MOVEMENT, <https://perma.cc/C6AY-V8BK> (last visited Aug. 7, 2022); see *Our Letter*, MUSICIANS FOR PALESTINE, <https://perma.cc/Q5EU-VC6H> (last visited Aug. 3, 2022).

³³ See Saffo Papantonopolou, “*Even a Freak Like You Would be Safe in Tel Aviv*”: *Transgender Subjects, Wounded Attachments, and the Zionist Economy of Gratitude*, 42 WOMEN’S STUD. Q. 278, 278-79 (2014) (discussing Brand Israel, a public relations campaign funded by the Israeli government and its focus on promulgating a narrative of queer and trans inclusion in comparison to neighboring states).

³⁴ See Yousef Munayyer, *BDS and Palestinian Rights: An Assessment*, ARAB CTR. WASH. D.C. (July 18, 2018), <https://perma.cc/3UVR-BYGY>.

³⁵ See *Sanctions and Governments*, BDS MOVEMENT, <https://perma.cc/H7BA-ZB6X> (last visited Oct. 22, 2022).

³⁶ Brief of Amici Curiae The Ctr. For Constitutional Rts. and Palestine Legal in Support of Plaintiff-Appellant and Reversal at 5, *Arkansas Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (No. 19-1378). For example, in fights over LGBTQ rights in the US, boycotts in 2017 successfully persuaded businesses such as PayPal and Adidas to abandon planned projects planned in North Carolina in response to a state law that mandated that people use restrooms corresponding with their gender as assigned at birth. See “*Bathroom Bill*” to Cost North Carolina \$3.76 Billion, CNBC (Mar. 27, 2017, 7:00 AM), <https://perma.cc/3D2X-4SPU>.

³⁷ Brief of Amici Curiae, *supra* note 36 at 5.

³⁸ *Boycott and Divestment, Frequently Asked Legal Questions*, PALESTINE SOLIDARITY LEGAL SUPPORT (Mar. 2015), <https://perma.cc/JTY7-BCUJ>.

³⁹ G.A. Res. 2106 (XX) (Dec. 21, 1965).

afoul of ICERD, which the United States ratified in 1994.³⁹ Opponents also argue that BDS violates U.S. anti-discrimination law, namely the Fourteenth and Fifth Amendments of the U.S. Constitution.⁴⁰ However, there is a vast difference between boycotts with the imprimatur of a genocidal State (like that of Nazi Germany) and those of a transnational social justice movement. Whereas in the pre-World War II Nazi boycott of businesses owned by Jews, the German “national government discriminat[ed] against a minority group,” the current BDS movement is made of “civil society campaigns [seeking to challenge the] oppression of and discrimination by a national government.”⁴¹ In this way, it is more akin to the 1955 Montgomery Bus boycotts of the civil rights era.⁴²

Additionally, these boycotts are a strategy to expose and confront injustice, not permanent bans on individuals, identities, cultures, and commerce. BDS is made up of concrete political demands meant to pressure Israel, while signaling that the international community condemns Israel’s oppression of Palestinians. “[The objective of the BDS [movement] is not to advocate for an arbitrary discrimination of Israeli citizens, but to target a deliberate State policy and to promote [. . .] the application of international law with the aim of ending Israeli violations [. . .].”⁴³

Still, there are ongoing and concerted efforts to label BDS as anti-semitic, which creates stigma around BDS and stifles and undermines organizing for Palestinian liberation. For example, former President Donald Trump’s Executive Order No. 13899 used federal authority to punish BDS activism by directing government agencies tasked with enforcing Title VI of the Civil Rights Act to use a definition of anti-semitism which conflated political criticism of Israel with anti-Jewish sentiment.⁴⁴ To date, President Biden has not revoked this order.⁴⁵

⁴⁰ LOUIS D. BRANDEIS CTR., *BDS and the First Amendment*, <https://perma.cc/MSQ9-MTZJ> (last visited Mar. 27, 2023).

⁴¹ G.A. Res. 2106 (XX) (Dec. 21, 1965). *See also* UNGA Res. 2105 (XX) (Dec. 20, 1965).

⁴² BOYCOTT (Just Vision 2023) at 57:02- 58:38 (depicting the U.S. Supreme Court’s decision to enforce the desegregation of the public buses in Montgomery, Alabama following over one year of Black commuters walking instead of riding on them while they were segregated).

⁴³ Andreina De Leo, *Baldassi and Others v. France: Criminal Convictions of BDS Activists Violate Freedom of Expression Under the European Convention on Human Rights*, OPINIOJURIS (June 16, 2020), <https://perma.cc/9DJD-KPV2>.

⁴⁴ Exec. Ord. No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019).

⁴⁵ *See* Exec. Ord. No. 13992, 86 Fed. Reg. 7049 (Jan. 20, 2021); *see also* Exec. Ord. from Joseph R. Biden Jr., Nat’l Archives: Fed. Reg., <https://perma.cc/4EPG-KM99> (follow hyperlinks for Joseph R. Biden).

II. CONTEXT OF BOYCOTT AND DIVESTMENT

A. *Supporting Ukraine: The Boycott of Companies that Operate in Russia*

The utility of boycott has long been acknowledged and implemented within the international community in the face of global human rights violations. A very recent example of a prominent boycott that united nearly the entire world, including the U.S., was the boycott of primary consumer goods following Russia's invasion of Ukraine in 2022. Many multinational corporations, like McDonalds, responded even without consumer advocacy, to halt operations in Russia and subsequently shut down McDonalds' locations in the country.⁴⁶ Companies that did not immediately halt business with Russia, like Nestle and Uniqlo, eventually withdrew operations with the country after immense consumer scrutiny to protest the Russian invasion.⁴⁷

After the invasion, the Yale School of Management began to track companies that boycotted Russia in response to the invasion of Ukraine.⁴⁸ They found, as of 2023, over 1,000 companies have cut back or totally halted operations in Russia.⁴⁹ Therefore, the global solidarity around the boycott of Russia illustrates how boycott is a longstanding tactic to hold States accountable for egregious violations of international law. Another example of this was the global and international movement to end apartheid in South Africa.

B. *American Higher Education Student Protests and Calls for Divestment over South African Apartheid*

History shows us that boycotts can be part of sustainable anti-colonial movements with a broad base of support. Current boycott and divestment efforts in solidarity with Palestine are grounded in a rich history of social movements that have frequently made use of the same

⁴⁶ Clint Rainey, *How McDonald's Won Russia - and Then Lost It All*, BLOOMBERG (Jan. 4, 2023, 12:01 AM), <https://perma.cc/U9FK-PQL4>.

⁴⁷ Megan Cerullo, *Uniqlo Bows to Public Pressure to Close Stores in Russia*, CBS NEWS (Mar. 10, 2022, 11:32 AM) <https://perma.cc/V59J-RD5L>; Rachel Treisman, *Major Food Company Nestle Will Limit its Sales in Russia after Zelenskyy's Criticism*, NPR (Mar. 23, 2022, 11:18 AM), <https://perma.cc/89G9-G4WW>. See NESTLE, *Update on Ukraine and Russia*, <https://perma.cc/7G3V-A92V> (last visited Mar. 17, 2023).

⁴⁸ Jeffrey Sonnenfeld & Steven Tian, *Some of the Biggest Brands Are Leaving Russia. Others Just Can't Quit Putin. Here's a List*, N.Y. TIMES (Apr. 7, 2022), <https://perma.cc/9GHL-BBFK>.

⁴⁹ CHIEF EXEC. LEADERSHIP INST., *Over 1,000 Companies Have Curtailed Operations in Russia - But Some Remain*, YALE SCH. MGMT. (Mar. 11, 2023), <https://perma.cc/6EG4-Z3QR>.

strategies.⁵⁰ In 1958, for example, the African National Congress (“ANC”) issued its original call for an academic and cultural boycott of the apartheid regime in South Africa at the All African People Conference in Ghana.⁵¹

The call for an academic and cultural boycott of South Africa in the face of apartheid began with Black student organizers, which in turn sparked support among students in colleges across the United States.⁵² October 11, 1985 became “National Anti-Apartheid Protest Day” at college campuses across the U.S. where students rallied to protest apartheid. In response, nearly 140 people were arrested among 4,000 demonstrations nationwide.⁵³ Today, many colleges view such protests as an important and righteous part of their history.⁵⁴ Black South African students brought international attention to the genocidal racism of the apartheid government, and with collective transnational symbolic action, the ANC-led boycott campaign deprived the apartheid system of cultural and economic sources of capital and played a significant role in the formal destruction of white minority rule in South Africa.⁵⁵

Due to the efforts of anti-apartheid activists, the UN also began to condemn apartheid. In 1965, the UN Security Council called upon “all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.”⁵⁶ In Namibia, the anti-colonial movement also struggled against the apartheid regime. There, “[f]ormer colonies and armed national liberation movements, and also the bodies those movements created—like

⁵⁰ See generally Richard A. Hawkins, *Boycotts, Buycotts and Consumer Activism in a Global Context: An Overview*, 5 MMT. & ORGANIZATIONAL HIST. 123 (2010) (describing, for example, the boycott by Quakers and free Black abolitionists of products produced under conditions of slavery); see LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA* (2009).

⁵¹ See generally S. AFR. HIST. ONLINE, *South Africa’s Academic and Cultural Boycott* (Sept. 2, 2021), <https://perma.cc/NL9L-RFDZ> (describing the history of how the movement for the academic and cultural boycott of South Africa began and highlighting the connection between this movement and the current BDS movement to boycott Israeli goods and cultural products).

⁵² Crystal Nix, *Many in U.S. Protest on South Africa*, N.Y. TIMES, Oct. 12, 1985 at 11, <https://perma.cc/FN6M-VE34>.

⁵³ Scott Williams, *Students Across Nation Rally to Protest Apartheid*, ASSOCIATED PRESS (Oct. 12, 1985), <https://perma.cc/E6KF-ZP76>.

⁵⁴ See generally UNI. OF N.C. LIBR., *Student Protest Movements of N.C. Chapel Hill: Anti-Apartheid Activism (1982-1987)*, <https://perma.cc/9K6D-HSTW> (last visited Mar. 27, 2023) (listing the successful efforts made by students in the mid-1980s at UNC-Chapel Hill in the anti-Apartheid movement on campus to successfully influence university administration to divest from companies operating in South Africa.)

⁵⁵ Chris McGreal, *Boycotts and Sanctions Helped Rid South Africa of Apartheid – is Israel Next in Line?* GUARDIAN (May 23, 2021, 2:00 PM), <https://perma.cc/KKP6-KTFP>.

⁵⁶ S.C. Res. 216, ¶ 2 (Nov. 12, 1965).

the Non-Aligned Movement and specialized committees within the United Nations—requested a series of advisory opinions from the International Court of Justice (ICJ) and influenced the Security Council to pass a string of binding resolutions addressing the illegality of South Africa’s presence [there].”⁵⁷ This organizing culminated in a 1980 resolution, wherein the United Nations General Assembly requested, “all states to prevent all cultural, academic, sporting and other exchanges with South Africa.”⁵⁸

As is evidenced in the recent boycotts of Russia and the role boycott, divestment, and sanctions played to end apartheid in South Africa, history has shown us time and time again, that boycotts are highly effective.⁵⁹

C. *Boycotts of French Educational Institutions during the Algerian Struggle Against Colonialism*

The role of boycott during Algeria’s fight for self-determination is particularly instructive. Indeed, the Algerian perspective demonstrates the moral and strategic significance of boycotts, which evolved over time to target various components of French colonial rule.

In the 19th century, a popular movement in Algeria called on members of all classes to boycott French schools.⁶⁰ This decades-long effort proved to be a sustainable and effective means of undermining the furtherance of French colonialism; by refusing to send their children to elite French schools, notable Algerian families demonstrated that they would not allow colonial pedagogy to indoctrinate successive generations.⁶¹ During Algeria’s decades of resistance against French occupiers, the strategy of boycott, namely of French schools, took on a number of forms, and eventually evolved and expanded as political dynamics shifted both within the country and around the world.⁶²

Within the context of growing anti-colonial consciousness, in 1956, Algerian students organized a permanent boycott, refusing to attend French universities.⁶³ This was significant since French colonial authorities viewed the dissemination of pro-French narratives in Algerian schools and universities as a critical component of their counter-

⁵⁷ NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE (2019) at 225.

⁵⁸ G.A. 35/206 Cultural, Academic and other Boycotts of South Africa, at 33 (1981).

⁵⁹ See, e.g., Keri Wiginton, *Major Boycotts That Changed History*, STACKER (Feb. 11, 2019), <http://perma.cc/2SP3-BQ2A>.

⁶⁰ See Malika Rahal, *Algeria: Nonviolent Resistance Against French Colonialism, 1830s-1950s* (HAL Open Sci., Working Paper, 2013), <https://perma.cc/88LK-HWMN>.

⁶¹ *Id.* at 9-11.

⁶² *Id.* at 11-26.

⁶³ *Id.* at 24-25.

insurgency strategy.⁶⁴ As such, the student boycott of 1956 acted as a countermeasure to French attempts to insert its military and political machinery into the Algerian educational system, which were escalating at the time.⁶⁵

While this acted as a forceful rejection of the colonial narratives espoused by French academic institutions, this mass movement also served to mobilize groups of students who had not yet been incorporated into the struggle and set the stage for further action.⁶⁶ The Armée de Libération Nationale (National Liberation Army (“ALN”))—the armed wing of the National Liberation Front (“FLN”)—benefitted from the influx of young people who had left lycées and universities in response to the FLN’s call for a boycott of the educational system. In addition to bolstering its fighting ranks, the ALN was able to recruit qualified nurses and women with medical experience into guerrilla units.⁶⁷ The 1956 boycott campaign, therefore, increased the scope of armed opposition to the French occupation and served to integrate women into areas of the struggle from which they had previously been largely excluded.⁶⁸

The student boycott also set the stage for the resistance’s subsequent use of complementary strategies, like strikes, mass demonstrations and armed struggle.⁶⁹ Indeed, the boycott of French schools and universities presaged the general strike of 1957, a turning point in the Algerian campaign for self-determination. Spearheaded by the FLN, the general strike was timed to coincide with a United Nations General Assembly debate on Algerian independence.⁷⁰ Though French paratroopers

⁶⁴ Alexis Artaud de la Ferrière, *Colonial Education and Political Violence in the Algerian War of Independence*, in *THE CONTESTED ROLE OF EDUCATION IN CONFLICT AND FRAGILITY* 171-183 (2015) (quoting a French intelligence officer: “Educating [Algerian communities] means giving them in-depth knowledge of the danger which the adversary represents and the methods he employs, and also making them recognize the greatness of Western values . . . This education, delivered from the outside by [schooling] . . . aims to bring populations to a voluntary adherence to the French cause”).

⁶⁵ J. Marshall Beier & Jana Tabak, *CHILDHOODS IN PEACE AND CONFLICT* 125-31 (2021).

⁶⁶ Anass Rahimi, *Algerian Students Retying the Knot of History*, in *DEFENCE OF MARXISM* (June 4, 2019), <https://perma.cc/6VYY-95DP>.

⁶⁷ Neil MacMaster, *The FLN and the Role of Women During the War*, in *BURNING THE VEIL: THE ALGERIAN WAR AND THE ‘EMANCIPATION’ OF MUSLIM WOMEN, 1954–62* at 315, 320 (2020).

⁶⁸ *See id.* at 320-21.

⁶⁹ Rahal, *supra* note 60 at 24-25. (“The [student boycott of 1956] in fact forced the intellectual elite and prominent families to get involved. It also politicized swathes of students available now for further, more extreme actions, and attracted new recruits for the National Liberation Army with new combatants.”).

⁷⁰ Rahal, *supra* note 60 at 25. (“The strike was followed in most large Algerian cities. The chosen date, 28 January coincided with the United Nations General Assembly (UNGA) session adopting a resolution in favor of Algerian independence.”).

managed to crush the strike⁷¹, the success of their bloody crackdown sparked outrage internationally.⁷²

In Algeria, organizing in this tradition persists to this day in response to corporate neocolonialism.⁷³ French financial capital continues to dominate the economic life of many of the countries within the degraded French empire.⁷⁴ In 2017, the organization SOS Pan-Africa initiated a multifaceted campaign of resistance against neocolonial economic practices, orchestrating protests in several European cities and calling for a boycott of French-made goods.⁷⁵

In 2021, meanwhile, the General Assembly of Algerian Contractors—an association comprising nearly 2,000 companies in the construction, public works, and irrigation sectors—announced a boycott of around 500 French import and export firms doing business in Algeria.⁷⁶ The association organized the boycott in response to remarks delivered by French President Emmanuel Macron, wherein he accused Algerians of harboring “a grudge against France.” At the same time, Macron asked rhetorically, “[w]as there an Algerian nation before French colonization?”⁷⁷ It is the authors’ opinion that this boycott of French businesses served to symbolically affirm Algeria’s economic and cultural sovereignty in the face of Macron’s attempted erasure of Algeria’s history prior to French colonial rule. It also threatened to exact material consequences on French firms, which benefited from trade with Algeria to the tune of over \$4 billion per year in exports in 2021.⁷⁸

For the BDS movement, the role of boycotts within Algeria’s long campaign of anti-colonial resistance provides a number of important

⁷¹ Dónal Hasset, *Striking Against Colonialism: The General Strike in the Irish and Algerian Revolutions*, IRISH STORY (Apr. 24, 2020), <https://perma.cc/B7QW-GTC2>.

⁷² See Martin Evans, *The Battle of Algiers: Historical Truth and Filmic Representation*, OPEN DEMOCRACY, (Dec. 18, 2012), <https://perma.cc/H3LH-XC2J> (“As the *Le Monde* journalist Jean Lacouture later admitted, France had won militarily but lost politically because the methods of victory turned international opinion against the French cause.”).

⁷³ See Ruth Maclean, ‘Down With France’: Former Colonies in Africa Demand a Reset, NY TIMES (Apr. 14, 2022) <https://perma.cc/SV3L-FTJB>; see also Isabelle King, *True Sovereignty? The CFA Franc and French Influence in West and Central Africa*, HARV. INT’L REV. (Mar. 18, 2022), <https://perma.cc/QS6M-7LSX>.

⁷⁴ See Ndongo Samba Sylla et al., *Africa: How France Continues to Dominate Its Former Colonies in Africa*, COMM. FOR THE ABOLITION OF ILLEGITIMATE DEBT (Apr. 26, 2021), <https://perma.cc/NKF6-RESB>.

⁷⁵ See generally King, *supra* note 73 (citing the 2017 NGO SOS Pan-Africa led protests against CFA franc).

⁷⁶ *Algeria Groups Boycott Imports of 500 French Companies*, MIDDLE EAST MONITOR (Oct. 11, 2021, 10:01 am), <https://perma.cc/N3JC-P687>.

⁷⁷ THE NEW ARAB STAFF, *France’s Macron Slammed by Arab Parliament for Algeria Criticism*, NEW ARAB (Oct. 21, 2021), <https://perma.cc/F343-R5KR>.

⁷⁸ *France Exports to Algeria*, TRADING ECON. (Oct. 2022), <https://perma.cc/7ECX-9VQ9>.

lessons. Like French academic institutions during the struggle for Algerian independence, Israeli academic institutions are a means of disseminating state-building propaganda.⁷⁹ They are the subject of the Palestinian Campaign for the Academic and Cultural Boycott of Israel (“PACBI”), which articulates that such institutions are “part and parcel of the ideological and institutional scaffolding of Israel’s regime” and are complicit in “whitewashing” the violation of Palestinian rights.⁸⁰ While those working to advance Israel’s colonial project often criticize BDS for its activism within the realm of education,⁸¹ Algeria’s struggle for self-determination demonstrates that successful resistance movements cannot allow an occupying power to freely disseminate propaganda in academic institutions.

In addition, the Algerian experience demonstrates that boycotts can contribute to the development of a sustainable social movements with strong support. Considering Israel’s entrenched economic and military power and its strong alignment with the imperialist interests of the U.S.,⁸² it is clear that the BDS movement will need to grow in ranks and employ diverse strategies. This can be done, in part, by continuing to challenge Israeli colonialist narratives as disseminated by educational institutions and by redoubling efforts to organize on college and university campuses. Though there is a difference between the boycott of French institutions in Algeria by Algerians and the boycott of Israel on university campuses outside Palestine, the transnational solidarity movement recognizes that demands from Palestinian civil society have been well articulated and that justice requires an international response. As was proven by the Algerian example, organizing for boycott within the context of the educational system provides ample grounds to grow social movements.

⁷⁹ See, e.g., *Israel Forcing High School Students to Pass Government Propaganda Course Before Going on Overseas Class Trips*, ADALAH - THE LEGAL CENT. FOR ARAB MINORITY RTS. ISR., (Apr. 7, 2019), <https://perma.cc/LG6V-KVU4>.

⁸⁰ PALESTINIAN CAMPAIGN FOR THE ACAD. AND CULTURAL BOYCOTT OF ISR. (PACBI), *PACBI Guidelines for the International Cultural Boycott of Israel* (July 16, 2014), <https://perma.cc/FLP7-53NR>.

⁸¹ See Mark Goldfeder, *BDS Has No Place in Schools*, MIRYAM INST. (June 21, 2021), <https://perma.cc/5WYZ-74MS>.

⁸² See Press Release, Joseph R. Biden, Jr., President of the U.S. & Yair Lapid, Prime Minister of the State of Isr., *The Jerusalem U.S.-Israel Strategic Partnership Joint Declaration* (July 14, 2022), <https://perma.cc/35A9-KA8Z>; Beauchamp supra note 1; JIM ZANOTTI, CONG. RSCH. SERV., R44245, *ISRAEL: BACKGROUND AND U.S. RELATIONS IN BRIEF* (2022).

III. THE BDS LANDSCAPE AT HIGHER EDUCATION INSTITUTIONS IN THE UNITED STATES

Within the context of higher education in the U.S., boycotts have leveraged the moral commitments of students to promote collaboration between diverse segments of society and bring about lasting change. For example, the Coalition of Immokalee Workers, “a worker-based human rights organization internationally recognized for its achievements in fighting human trafficking and gender-based violence at work,”⁸³ partnered with the Student/Farmworker Alliance, a national network of students and young people, to trace tomato supply chains.⁸⁴ One part of this ongoing effort is a campaign calling on individuals and institutions to boycott companies like Wendy’s, that buy from farms where modern slavery and gender-based violence are pervasive.⁸⁵ As a result of this sustained collaboration between students and farmworkers, the University of Michigan⁸⁶ and Florida Atlantic University⁸⁷ severed their respective financial ties with Wendy’s, while similar campaigns at several other large universities remain ongoing.⁸⁸

There is also a growing number of institutions of higher education that have endorsed BDS against Israel, beginning with the 2009 campaign at Hampshire College, where students advocated for their Board of Trustees to divest from companies complicit in Israel’s violations and human rights abuses.⁸⁹ Similarly, the Advisory Committee on Corporate Responsibility in Investment Policies at Brown University set aside the University President’s statement that Brown would not divest from companies that supported Israel and passed a resolution to divest

⁸³ COAL. IMMOKALEE WORKERS, *About CIW*, <https://perma.cc/Y6EE-JECC> (last visited Oct. 22, 2022).

⁸⁴ COAL. IMMOKALEE WORKERS, *PHOTO REPORT: Student/Farmworker Alliance Turns up the Heat on Wendy’s with National Week of Action!*, (Nov. 1, 2018) <https://perma.cc/2N9R-KE5L>.

⁸⁵ See Michael Sainato, *Why Wendy’s is the Source of Unrest Among US Farm Workers*, GUARDIAN, (Apr. 28, 2022, 5:00 AM), <https://perma.cc/JU2Q-3YFP>.

⁸⁶ Martin Slagter, *Wendy’s Won’t Return to University of Michigan When Michigan Union Reopens*, MLIVE, <https://perma.cc/GNM9-7CYW> (Feb. 1, 2019, 4:08 PM).

⁸⁷ COAL. IMMOKALEE WORKERS, *VICTORY! After Years-long Student Campaign, Wendy’s Will No Longer Have a Home at Florida Atlantic University . . .*, (May 3, 2022) <https://perma.cc/W3FB-KPRS>.

⁸⁸ *Boycott Wendy’s Resolutions*, GOOGLE MAPS, <https://perma.cc/AA66-RPBS> (last visited Oct. 22, 2022) (mapping cities and universities that have endorsed the boycott of Wendy’s, passed resolutions in favor of it, or both).

⁸⁹ See Palestine Diary, *To Know Is Not Enough*, YOUTUBE (Mar. 30, 2011), <https://www.youtube.com/watch?v=-ZRficRifpM>; STUDENTS FOR JUST. IN PALESTINE (HAMPSHIRE COLL.), *Hampshire College First in U.S. to Divest from Israel*, ELEC. INTIFADA (Feb. 12, 2009), <https://perma.cc/D5LH-ZMHQ>. The companies Hampshire divested from included Caterpillar and Motorola.

following a student body vote in 2019.⁹⁰ Most recently, the editorial board of the Harvard Crimson, Harvard University's student-run newspaper, whose last editorial board had previously been skeptical of BDS, passed a resolution in support. The passing of the resolution followed the organizing activities of the university's Palestine Solidarity Committee. The editorial board noted that:

We do not take this decision lightly. BDS remains a blunt approach, one with the potential to backfire or prompt collateral damage in the form of economic hurt. But the weight of this moment – of Israel's human rights and international law violations and of Palestine's cry for freedom – demands this step. As a board, we are proud to finally lend our support to both Palestinian liberation and BDS – and we call on everyone to do the same.⁹¹

The BDS movement's ability to provide tangible actions that students can take to express solidarity with the Palestinian liberation movement makes it an important means of student organizing on campuses such as CUNY Law in New York City.

A. *Case Study: Mischaracterizing City University of New York as "Anti-Semitic"*

Central to the BDS organizing in the CUNY system has been the underlying knowledge that criticizing Israel for flagrant human rights abuses against Palestinians is not anti-semitic. In the spring of 2021, JLSA and SJP at CUNY Law led a coalition of students and faculty from across CUNY campuses to defeat a resolution at the University Student Senate ("USS"), a student governing council representing the 243,000 students of the 25 CUNY campuses, which would have adopted the International Holocaust Remembrance Alliance ("IHRA") definition of anti-semitism. The USS resolution opposing the IHRA definition received overwhelming support, with only the sponsors of the IHRA resolution opposed.⁹²

⁹⁰ See Azad Essa, *US Ivy League School Advised to Divest from Firms Facilitating Israeli Occupation*, MIDDLE EAST EYE (Dec. 3, 2019), <https://perma.cc/2Y9P-QFSQ>.

⁹¹ CRIMSON ED. BD., *In Support of Boycott, Divest, Sanctions and a Free Palestine*, HARV. CRIMSON (Apr. 29, 2022), <https://perma.cc/FC9H-KXHG>.

⁹² Univ. Student Senate-CUNY, USS Plenary April 11th, at 4:50:38-4:58:44, Facebook (Apr. 11, 2021), <https://www.facebook.com/UniversityStudentSenate/videos/921004938661886/>; see also Resolution Condemning Anti-Semitism and Supporting the CUNY Jewish Community from Delegate Baruch College Yehuda Wexler & Vice-Chair of Fiscal Affairs Joel De La Cruz to USS Plenary, (Mar. 14, 2021), <https://perma.cc/FNN4-DEHS>; see Arno

The IHRA definition considers BDS anti-semitic for targeting the state of Israel for the perpetration of crimes against the Palestinian people. The IHRA states that “criticism of Israel similar to that leveled against any other country cannot be regarded as anti-semitic.” However, the definition conflates anti-zionism and anti-semitism.⁹³ In practice, the IHRA definition has chilled the BDS movement by protesting that other countries are not subjected to the same type of activism or criticism.⁹⁴ A view of anti-semitism that does not allow any criticism of Israel condones Israel’s human rights abuses of Palestinians and ignores the specific Palestinian civil society movement that called for BDS in the first place, endorsing BDS is one of the only tactics left to bring about accountability for genocide, colonialism, occupation, and apartheid specifically in the context of Israel.

Student organizers at CUNY Law have faced harsh consequences. Student and Palestinian organizer Nerdeen Kiswani was the target of cyberbullying and false accusations of anti-semitism.⁹⁵ At first, CUNY Law responded by releasing statements against Kiswani, which made her more vulnerable to the campaigns against her.⁹⁶ Only due to persistent student organizing on campus did CUNY Law finally state: “the Law School supports the free speech rights of Nerdeen Kiswani, other Palestinian students, and their Jewish and non-Jewish allies, who have been vilified for their activism.”⁹⁷

Despite the punishing environment for student organizing for Palestine, the SJP and JLSA chapters at CUNY Law successfully advocated for CUNY Law’s Student Government Association (“SGA”) to pass a BDS resolution in December 2021⁹⁸ that called on the CUNY system to cut all ties with institutions and organizations, and divest from

Rosenfeld, *‘It Was a Disaster’: Inside a Fierce Battle over Anti-Semitism at CUNY*, FORWARD (Apr. 15, 2021), <https://perma.cc/LDY2-TAXK>.

⁹³ See Rosenfeld *supra* note 92; see also Olivia Wood, *CUNY Student Senate Clashes over Palestinian Rights*, LEFT VOICE (Apr. 11, 2021), <https://perma.cc/3VPN-CUVB>; IHRA Out of CUNY! Toolkit, <https://perma.cc/ASZ2-JHCC> (last visited Nov. 4, 2022).

⁹⁴ *What Is Antisemitism? Non-Legally Binding Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://perma.cc/XK5Y-7YWZ> (last visited Nov. 4, 2022).

⁹⁵ *Palestinian CUNY Law Student Viciously Harassed*, PALESTINE LEGAL (Aug. 20, 2021), <https://perma.cc/9DLU-7L2E>.

⁹⁶ See E-mail of Mary Lu Bilek, Former Dean, CUNY Sch. of L., to All-Students@mail.law.cuny.edu (Sept. 22, 2020, 6:52 EST) (on file with author).

⁹⁷ Eduardo R.C. Capulong, *Statement on Palestinian Activism*, NEWS & EVENTS (June 30, 2021), <https://perma.cc/4E7H-3ZG8>; see also *CUNY Law Issues Historic Statement Condemning Harassment of Palestine Advocates on Campus*, PALESTINE LEGAL (July 15, 2021), <https://perma.cc/EMK2-AGQV>.

⁹⁸ Resolution from CUNY L. Students for Just. in Palestine & the Jewish L. Students Ass’n to CUNY L. Student Gov’t Ass’n. (Dec. 2, 2021), <https://perma.cc/9RGG-YK8H> [hereinafter *Resolution*].

corporations that are complicit in Israel's crimes against the Palestinian people.⁹⁹ In May 2022, after further student advocacy, the CUNY Law faculty passed a motion by acclamation supporting the SGA resolution.¹⁰⁰

The SGA resolution adapted CUNY's Doctoral Students' Council ("DSC") 2016 BDS resolution¹⁰¹ and sought to continue building momentum after a series of BDS victories across CUNY campuses. In June of 2021, the Delegate Assembly of the Professional Staff Congress ("PSC"), a union representing 30,000 members across the university system, passed a resolution that condemned Israeli apartheid, and called for a discussion of BDS within the PSC.¹⁰²

The December 2021 CUNY Law SGA BDS Resolution was sweeping and sought to meet the seriousness of Israel's human rights violations against Palestinians. For example, in Fiscal Year 2020-21, CUNY spent \$8.5 million¹⁰³ in contracts with companies that profit from Israeli colonization, occupation, and war crimes, including Dell,¹⁰⁴

⁹⁹ *Id.* at 6.

¹⁰⁰ See @cunyjlsa, TWITTER (May 13, 2022, 9:32 AM) <https://perma.cc/UJ89-F9YW>; *CUNY Law Faculty, Several Law Organizations, Endorse Students' BDS Resolution Against Israel*, ARAB AM. NEWS, <https://perma.cc/JRC6-HMTU> (May 18, 2022, 1:36 PM); *Resolution*, *supra* note 98, at 6.

¹⁰¹ See Resolution from Doctoral Students Council - CUNY, <https://perma.cc/YD3P-TL8L> (last visited Nov. 4, 2022).

¹⁰² *CUNY Union Condemns Israeli Apartheid Practices And Calls for Discussions of BDS*, MONDOWEISS (June 14, 2021), <https://perma.cc/4QAW-TPV4>; see also PSC-CUNY, *Resolution in Support of the Palestinian People* (June 10, 2021), <https://perma.cc/MQ57-FFQE>.

¹⁰³ See NYS Office of the State Comptroller, Bureau of Contracts, Procurement Stewardship Act Report 35, 37, 40-41, 48, 50, 54 (2021).

¹⁰⁴ Michael Dell, CEO of Dell Technologies, is an Israel backer who supported Texas governor Greg Abbott in passing HB 89, the anti-BDS law, which prohibits the state from doing business with any companies or individual contractors who boycott Israel. See Alex Kane & Nashwa Bawab, *God, Gas, and Cash: How Texas Fell In Love with Israel—And Then Trampled on the Constitution*, INTERCEPT (June 1, 2019), <https://perma.cc/9AHD-PGDF>.

IBM,¹⁰⁵ HP,¹⁰⁶ Lenovo,¹⁰⁷ Cisco,¹⁰⁸ and BMC Software.¹⁰⁹ The Resolution also called on CUNY to end its complicity in the ongoing censorship, harassment, and intimidation of Palestine solidarity activists,¹¹⁰ which the New York Police Department (“NYPD”) has perpetrated with oppressive surveillance tactics.¹¹¹ CUNY collaborates with the NYPD through a security Memorandum of Understanding¹¹² which includes guaranteed admission and up to 12 credits free tuition per semester to NYPD officers.¹¹³ CUNY also participates in academic collaborations and exchanges with Israeli institutions that develop military hardware and surveillance technologies and offer military training courses and posts for high-ranking military officers.¹¹⁴ The Resolution that SGA adopted and that faculty voted in support of demanded an end to all forms of CUNY’s partnerships and investments

¹⁰⁵ IBM runs the Israeli population registry, which includes biometric information about Palestinians that is used to systematically discriminate against them. Red Hat, a subsidiary of IBM, collaborates with the Israeli military by designing tech product that “increase the military’s lethality and effectiveness.” See *International Business Machines Corp.*, INVESTIGATE: AM. FRIENDS SERV. COMM., <https://perma.cc/46FJ-2W4Q> (last visited Nov. 6, 2022).

¹⁰⁶ HP-branded corporations maintain contracts with Israel for Itanium servers that facilitate Israel’s ID card system, which “forms a core part of the Israeli apartheid regime’s tiered system of citizenship and residency that privileges Israel’s Jewish population and gives inferior status and rights to Palestinians [...]” *Boycott HP*, BDS NAT’L COMM., <https://perma.cc/U2Z7-S3EG> (last visited Nov. 6, 2022).

¹⁰⁷ As recently as 2017, Lenovo acquired Israeli companies to establish new research and design labs in the country. See David Yin, *What Makes Israel’s Innovation Ecosystem So Successful*, FORBES (Jan. 9, 2017, 8:55 AM), <https://perma.cc/U6G6-N24E>.

¹⁰⁸ The “U.S.-based networking hardware company [] [e]stablished a network of ‘digital hubs’ in partnership with the Israeli government, some of them in occupied territories.” *Cisco Systems Inc.*, INVESTIGATE: AM. FRIENDS SERV. COMM., <https://perma.cc/WCV3-NKSV> (last visited Nov. 6, 2022).

¹⁰⁹ The Texas-based software company has a research and development R&D center in Israel and receives financial support from U.S.-Israel Binational Foundations. See *State-to-State Cooperation: Texas and Israel*, AM.-ISRAELI COOP. ENTER., <https://perma.cc/3GV6-MJYE> (last visited Nov. 6, 2022); Avi Krawitz, *BMC Looks to Build on \$1b. Israel Investment*, JERUSALEM POST (May 18, 2006, 6:43 AM), <https://perma.cc/L758-7EV3>.

¹¹⁰ *Resolution*, *supra* note 98, at 6.

¹¹¹ See Jeanne Theoharis, “*I Feel Like a Despised Insect*”: *Coming of Age Under Surveillance in New York*, INTERCEPT (Feb. 18, 2016, 11:04 AM), <https://perma.cc/5ATU-572X>.

¹¹² Memorandum of Understanding Regarding Police Response to Incidents and Events Occurring at the City University of New York (Mar. 6, 1992), <https://perma.cc/X9VF-W6NE>.

¹¹³ JOHN JAY SCH. CRIM. JUST., *NYPD Leadership Program*, <https://perma.cc/N9E3-2RMA> (last visited Nov. 4, 2022).

¹¹⁴ Baruch College, Brooklyn College, City College, Hunter College, Queens College, and College of Staten Island all received grant funding from US-Israel Binational Foundations. JEWISH VIRTUAL LIBR., *State-to-State Cooperation: New York and Israel*, AM.-ISRAELI COOP. ENTER., <https://perma.cc/QP2Q-7YWC> (last visited Nov. 4, 2022).

that directly and indirectly support Israel. CUNY Law's BDS Resolution received widespread support within the law school.¹¹⁵ Although some individual students opposed the resolution, the overwhelming majority of law students and student organizations supported it. This widespread support from within the law school meant that it passed with little controversy or fanfare. It was only after the resolution received coverage in local media that a narrative of opposition began to take hold.¹¹⁶

After local media coverage of the Resolution, public figures took positions that implicitly equate criticism of Israel with anti-semitism, and therefore do not allow any criticism of Israel.¹¹⁷ Although the CUNY Chancellor was critical of the Resolution and instead called for "elevating dialogue and building bridges," and forging "mutual understanding" in response to the Resolution.¹¹⁸ He never contacted SJP or JLSA to discuss the Resolution's contents or why students supported it, and he declined an invitation to attend a teach-in about Palestine at CUNY Law in April 2022.¹¹⁹ Such lack of engagement suggested to students that his opposition was intended to publicly appease an external audience, rather than meaningfully engage with the students who supported BDS directly.

Republican politicians in New York were also critical of the Resolution. Inna Vernikov, a Republican City Council Member and supporter of Donald Trump backed by Donald Trump Jr.,¹²⁰ circulated a letter among the City Council, which received 16 signatures, opposing the resolution.¹²¹ The letter described the Resolution's criticism of Israel's human rights crimes as "slandorous against the State of Israel, our ally" and "a dangerous document which will undoubtedly add fuel to the anti-Semitism that is already out of control on American campuses and in our

¹¹⁵ Twenty two campus student organizations (nearly all existing campus groups) endorsed the resolution. *See Resolution*, *supra* note 98. The resolution passed nearly unanimously, with 18 votes in favor, four abstentions, one vote in opposition, and 16 representatives not present. *See* Memorandum from CUNY Student Gov't. Ass'n. Endorsing BDS (Dec. 2, 2021) (on file with author).

¹¹⁶ Gabriel Sandoval, *CUNY Law Students' Call for Israeli Academic Boycott Ripples Through University Roiled by BDS Fight*, CITY (Dec. 13, 2021, 9:26 PM), <https://perma.cc/9V87-KNCJ>.

¹¹⁷ *See id.*

¹¹⁸ CUNY, Statement from Chancellor Matos Rodriguez on a Recent BDS Resolution Adopted by the CUNY School of Law Student Government Association, (Dec. 10, 2021), <https://perma.cc/XM2R-EN7S>.

¹¹⁹ E-mail from Laura Waldman, Jewish L. Students Ass'n Exec. Bd. Member, to Matos Rodriguez, Chancellor of The City Univ. of N.Y., (Apr. 13, 2022, 10:07 EST) (on file with author).

¹²⁰ Ben Brachfeld, *Republican Inna Vernikov Wins Southern Brooklyn Council Seat Amid Strong GOP Showing Citywide*, BROOKLYN PAPER (Nov. 3, 2021), <https://perma.cc/FWL5-3NTH>.

¹²¹ @InnaVernikov, TWITTER (Dec. 14, 2021, 6:30 PM), <https://perma.cc/Q86X-S4S8>.

government institutions.”¹²² No Councilmember reached out to engage with students who supported the Resolution about concerns over fostering anti-semitism against Jewish individuals.

Subsequently, Councilmember Vernikov withdrew \$50,000 in funding for CUNY Law’s Justice and Auxiliary Services¹²³ which provides pro bono legal services in her district.¹²⁴ Councilmember Vernikov never engaged with JLSA, the only Jewish student group on CUNY Law’s campus. Councilmember Vernikov redirected the funding to Legal Services NYC; however, UAW 2325, the union representing legal aid attorneys in New York City, voted to divest from Israel Bonds after her announcement.¹²⁵ At the time of writing this Article, Councilmember Vernikov has not leveled anti-semitism accusations at Legal Aid. The City Council subsequently called for a hearing about anti-semitism on higher education campuses.

The quantity of witnesses who alleged anti-semitism at CUNY at the City Council’s hearing did not match the pervasive scope of the “extremely hostile [anti-semitic] campus environment” that opponents of BDS have asserted about CUNY.¹²⁶ The June 30 hearing spanned almost seven hours¹²⁷ but three CUNY students testified about alleged anti-semitism¹²⁸ out of the about 243,000 students in the CUNY system. Because CUNY’s Chancellor was not at the hearing,¹²⁹ Councilmember Vernikov submitted a list of demands to the Chancellor, including a request that CUNY adopt the IHRA’s definition of anti-semitism in its anti-harassment training materials.¹³⁰

¹²² *Id.*

¹²³ Carl Campanile, *NYC’s Inna Vernikov Pulls CUNY Law School Funding over Israel Stance*, N.Y. POST, <https://perma.cc/Y92V-RA4F> (May 27, 2022, 4:53 PM).

¹²⁴ *Nonprofit Explorer – CUNY School of Law Justice & Auxiliary Services Corporation*, PROPUBLICA, <https://perma.cc/NZQ2-8DDT> (last visited Dec. 12, 2022).

¹²⁵ Press Release, UAW 2325 (Association of Legal Aid Attorneys) Votes to Divest from Israel Bonds. Labor for Palestine (July 26, 2022), <https://perma.cc/A8ZX-J4K2>.

¹²⁶ Carl Campanile & Cayla Bamberger, *NYC Council to Probe Alleged Anti Semitism at CUNY Schools After Israel Ban*, N.Y. POST (May 31, 2022, 7:51 PM), <https://perma.cc/7JPT-ALJ2>.

¹²⁷ N.Y.C. Council Comm. on Higher Educ., NEW YORK CITY COUNCIL (June 30, 2022 10:00 AM), <https://perma.cc/4EHR-WVAX>.

¹²⁸ Only three people identified as having ever attended CUNY School of Law. Oversight: Examining Anti Semitism on College Campuses, The N.Y.C. Council, <https://perma.cc/9YQJ-CH75> (click on “Hearing Transcript” to download).

¹²⁹ Jacob Henry, *CUNY Chancellor a No-show at City Council Hearing on Campus Antisemitism*, NY JEWISH WEEK (June 30, 2022, 5:03 PM), <https://perma.cc/5VFK-BSP3>.

¹³⁰ See @councilwoman_inna_vernikov, INSTAGRAM (Aug. 1, 2022), <https://perma.cc/4BMT-3MGT>; Jacob Henry, *Brooklyn City Council Member Meets with CUNY Chancellor to Discuss Campus Antisemitism*, NY JEWISH WEEK (July 13, 2022, 11:37 PM), <https://perma.cc/Y36Y-BWQ7>. The Chancellor has not officially announced any steps he plans to take in response to meeting with Councilmember Vernikov. See *Chancellor*

Despite such external backlash, Jewish, Palestinian, and other anti-zionist students at CUNY continue to organize in solidarity with Palestine because it is righteous. A new CUNY-wide organization of Jewish anti-zionist community members coalesced in response to the accusations of anti-semitism lobbied by the Higher Education Committee.¹³¹ CUNY4Palestine, a related group which has existed since 2014,¹³² continues to organize teach-ins¹³³ and other events and demonstrations¹³⁴ to challenge zionist programming¹³⁵ across many CUNY campuses. Additionally, students in SJP and JLSA at CUNY Law remain active in our work to uplift BDS, including through writing this Article. Although BDS organizing on CUNY Law's campus and other university campuses across the United States may be unpopular, censorship violates the First Amendment of the U.S. Constitution.

IV. ANTI-BDS LAWS AND BANS IN THE U.S.

The movement for liberation in Palestine by Palestinians experiences widespread repression and violence consistent with the suppression of other racial justice, social justice, and anti-colonial struggles, and international solidarity efforts are penalized. As Palestinian activists face increased repression for their resistance on the frontlines, international activists protesting in solidarity abroad face threats from their own governments as well. For example, in May 2022, German police arrested

Statements, CUNY, <https://perma.cc/8BN9-ZSKG> (last visited Dec. 17, 2022); *but see CUNY Partners with Hillel International on Initiative to Improve Experience for Jewish Students on Campuses*, CUNY (Sept. 23, 2022), <https://perma.cc/6XRV-Z9SZ>; Bernadette Hogan, *CUNY Commits \$1M to Tackle Anti-Semitism After Rise in Hate Crimes*, NY POST (Oct. 3, 2022 9:47 PM), <https://perma.cc/SLE5-W63D>.

¹³¹ @NIONCUNY, TWITTER, <https://perma.cc/BY7E-GS68> (last visited Dec. 11, 2022); *Not in Our Name Statement*, NOT IN OUR NAME: ANTI-ZIONIST JEWISH COAL. AT CUNY, <https://perma.cc/VD9P-W4ES> (last visited Dec. 11, 2022).

¹³² *See CUNY for Palestine*, FACEBOOK, <https://perma.cc/ZC4Y-3N5V> (last visited Dec. 12, 2022); *Cuny4Palestine*, LINKTREE, <https://perma.cc/D9FS-645Y> (last visited Nov. 19, 2022).

¹³³ Virtual Teach-in: IHRA and the Co-optation of the Struggle Against Antisemitism: Intersectional Palestine Organizing at CUNY and Beyond (Oct. 26, 2022), <https://perma.cc/G7R5-6WBZ>.

¹³⁴ *See @Cuny4P*, TWITTER (Dec. 8, 2022, 10:23pm), <https://perma.cc/6ZXJ-EUUK>; CUNY4PALESTINE, *A Conversation on CUNY's Ties to Zionism/Setter Colonialism/Apartheid*, <https://perma.cc/YFE7-ZDFJ> (last visited Dec. 17, 2022).

¹³⁵ *See, e.g., Israel Programming – Hillel Celebrates Israel, Hillel at Baruch Inc.*, HILLEL, <https://perma.cc/SCK8-WBVU> (describing the cross-campus Israel Programming and “unwavering commitment and support for Israel” of the Baruch College Hillel) (last visited Nov. 19, 2022); Tanger Hillel (@bchillel), INSTAGRAM, (Sep. 15, 2022), <https://perma.cc/4KF3-YYCR> (listing five Israel Learning Fellowships available to Brooklyn College Hillel students); *Events: A Conversation on the Language of the Israeli-Palestinian Conflict*, CUNY GRADUATE CTR., (Dec. 8, 2022) <https://perma.cc/H43L-KZUR>.

protesters for Palestinian rights as the government issued sweeping bans of their right to protest war crimes committed by Israeli forces.¹³⁶

Consistent with this criminalization and penalization of the movement is the negative targeting of BDS activism within the United States by Zionist advocacy groups and those in government who share their views. On June 10, 2016, then-New York State Governor Andrew Cuomo issued the following statement: “If you boycott Israel, New York will boycott you.”¹³⁷ Just a few days prior, Cuomo signed Executive Order No. 157, which directed the Commissioner to make a list of institutions and companies participating in BDS and compelled state agencies and departments to divest public funds from any entity on the list.¹³⁸ The purpose of the executive order was clear, “[W]hereas, the State of New York unequivocally rejects the BDS campaign and stands firmly with Israel.”¹³⁹ In signing this order, the Governor created a civil penalty for participation in a global solidarity movement for justice and human rights. Cuomo’s executive order was an example of a growing trend among state governments to respond to the BDS movement through statutes and now executive orders. It has since been extended by now-Governor Kathy Hochul, who issued a statement in June of 2022, stating that her administration acted to prevent Ben & Jerry’s ice cream from boycotting Israel.¹⁴⁰ After imposing a deadline by when Unilever (Ben & Jerry’s parent company) needed to prove that they were not engaging in BDS, she stated, “I am pleased that Unilever today informed us that they have reached an agreement to continue selling Ben & Jerry’s products throughout Israel and the West Bank.”¹⁴¹

BDS bans are also happening legislatively. As of August 2022, 34 states had legislation in effect which punished pro-BDS activism.¹⁴² Most state efforts to punish pro-BDS activism fall into two categories: (1) “contract-focused laws” which require government contractors to promise they will not boycott Israel; and (2) “investment-focused laws,” which require “public investment funds to divest from entities involved

¹³⁶ Ali Abunimah, *German Police Attack Palestine Supporters on Nakba Day*, ELEC. INTIFADA (May 16, 2022), <https://perma.cc/D24Q-9PMM>.

¹³⁷ Andrew Cuomo, *Gov. Andrew Cuomo: If you Boycott Israel, New York State will Boycott You*, WASH. POST (June 10, 2016), <https://perma.cc/J32C-J5SZ>.

¹³⁸ Exec. Ord. No. 157, 9 N.Y. COMP. CODES R. & REGS tit. 9, § 8.157 (2016).

¹³⁹ *Id.*

¹⁴⁰ Statement From Governor Kathy Hochul on Unilever Agreement in Israel (June 29, 2022), <https://perma.cc/EC5F-KA77>.

¹⁴¹ *Id.*

¹⁴² PALESTINE LEGAL, *Legislation Targeting Advocacy for Palestinian Rights*, PALESTINE LEGAL (last updated Oct. 19, 2022), <https://perma.cc/BVN3-2WZL>.

in boycotts of Israel.”¹⁴³ Twenty-eight of those states have contract-focused laws, and thirteen states have investment-focused laws, while seven states have both types of laws in effect.¹⁴⁴ Additionally, Florida, Iowa, South Carolina, Tennessee, and Texas have all redefined the term “anti-semitism” in recent years to include criticism of Israel in discrimination complaints or criminal investigations.¹⁴⁵

Attempts to pass similar legislation in Congress have been far less successful. For example, in 2018, Congress was unable to pass the Israel Anti-Boycott Act (“IABA”), under which then-President Donald Trump would have issued regulations prohibiting the boycott of Israel, due to ongoing pressure from organizers and activists.¹⁴⁶ Since 2014, dozens of measures targeting pro-BDS activism have been introduced in Congress, but there are only two foreign-policy focused laws targeting BDS at the federal level: H.R. 2146¹⁴⁷ and H.R. 644.¹⁴⁸ One issue unites both younger and older Americans as well as Democrats and Republicans alike: a

¹⁴³ Timothy Cuffman, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT’L L. 115 (2018).

¹⁴⁴ PALESTINE LEGAL, *supra* note 142.

¹⁴⁵ PALESTINE LEGAL, *supra* note 142. In 2018, after Airbnb announced it would remove listings on illegal Israeli settlements in the West Bank, Florida, Illinois, and Texas utilized anti-boycott laws and blacklisted the company. Moreover, the University of Texas at Austin prohibited employees and students from renting with Airbnb with university funds. In 2019, Airbnb “reversed its plans to remove settlement listings . . . after settling a civil suit brought by [Israeli] property owners” in the West Bank. Subsequently, all states removed Airbnb from their blacklists. *Types of Legislation*, PALESTINE LEGAL, <https://perma.cc/ZL4A-Y8R5> (last visited Nov. 19, 2022).

¹⁴⁶ Kate Ruane, *Congress, Laws Suppressing Boycotts of Israel Are Unconstitutional. Sincerely, Three Federal Courts.*, ACLU NEWS & COMMENT. (May 9, 2019), <https://perma.cc/MA6G-688D>.

¹⁴⁷ H.R. 2146 includes the Trade Promotion Authority or Bipartisan Congressional Trade Priorities and Accountability Act of 2015, which states that discouraging boycotts for Palestinian rights is a principal objective for the United States in negotiating with foreign countries in the Transatlantic Trade and Investment Partnership (“TTIP”). *See* Defending Public Safety Employees’ Retirement Act, Pub. L. No. 114-2619 § 102 (20); *see also How does the Trade Promotion Authority (TPA) Law Affect BDS?*, PALESTINE LEGAL (July 1, 2015), <https://perma.cc/H7TD-XNEG> (last visited Dec. 8, 2022).

¹⁴⁸ H.R. 644, the Trade Facilitation and Trade Enforcement Act of 2015, also states that discouraging boycotts for Palestinian rights is a principal U.S. objective in negotiating foreign trade agreements. Specifically, H.R. 644 directs the President of the U.S. to discourage other countries from burying trade with Israel or its settlements, and to report to Congress annually regarding these efforts. It also bars state and federal courts from recognizing or enforcing “any foreign judgment” against U.S. persons that are based on a finding that conducting business in Israel violates the law. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 909, 19 U.S.C. § 4452 (2016).

majority of American voters oppose laws that penalize people who boycott Israel.¹⁴⁹

The spread of many anti-BDS laws is directly traceable to the lobbying efforts of various advocacy groups which receive funding from the Israeli government, notably including the Israel Allies Foundation (“IAF”).¹⁵⁰ The IAF is an American non-profit that supports a network of pro-Israel legislators across the globe and has successfully lobbied for nearly-identical anti-BDS bills in over 25 states.¹⁵¹ The IAF has drafted model legislation “to lead the legislative battle against BDS in all [fifty] states.”¹⁵² Moreover, a two-year investigation from the Center of Public Integrity & USA Today, indicated that a handful of anti-boycott bills were crafted, often “word for word” by pro-Israel lobbyists.¹⁵³ Some lawmakers are introducing anti-BDS legislation without even consulting with local Jewish constituents,¹⁵⁴ as was the case in the anti-BDS law challenged in *Arkansas Times LP v. Mark Waldrip*.¹⁵⁵ In that case, the anti-BDS law was written by the American Legislative Exchange Council (“ALEC”), which promulgated nearly identical laws in over thirty other states and which is single-handedly responsible for a plethora of other anti-democracy laws on issues such as voter identification, Stand Your Ground, and the criminalization of protests against fossil fuel industry pipeline projects.¹⁵⁶ ALEC model legislation is drafted with the concept

¹⁴⁹ Shibley Telhami, *What Do Americans Think of the BDS Movement, Aimed at Israel?*, BROOKINGS (Jan. 8, 2020) <https://perma.cc/RQ4A-K3AZ> (reasoning that such laws “infringe on the constitutional right to free speech and peaceful protest.”).

¹⁵⁰ See Liz Essley Whyte, *How a Bill that Seeks to Shut Down Boycotts of Israel is Spreading State-to-State*, CTR. PUB. INTEGRITY (May 1, 2019), <https://perma.cc/CBS3-W65Z>. According to public records, the Israeli Ministry of Strategic Affairs has given at least \$6.6 million to 11 U.S. organizations, including the IAF, since 2018. See Aiden Pink, *U.S. Pro-Israel Groups Failed to Disclose Grants from Israeli Government*, FORWARD (Aug. 31, 2020), <https://perma.cc/X7L8-72FV>.

¹⁵¹ Aiden Pink, *supra* note 150.

¹⁵² *South Carolina Governor Signs Anti-Boycott Bill*, TOWER (June 5, 2015), <https://perma.cc/JJK7-QP34>.

¹⁵³ In Louisiana, emails indicated that that pro-Israel lobbyists “wrote the governor’s anti-boycott executive order and press release.” In Nev., pro-Israel advocates reviewed and approved statements from lawmakers in support of an anti-boycott bill. Liz Essley Whyte, *Newest Arena for the Israel-Palestinian Conflict: Your State?*, CTR. FOR PUB. INTEGRITY (May 1, 2019), <https://perma.cc/D9NU-X552>.

¹⁵⁴ *BOYCOTT* *supra* note 42 at 23:22 (Even the rabbi of the largest Jewish congregation in Texas).

¹⁵⁵ *Arkansas Times LP v. Waldrip as Tr. Of Univ. of Arkansas Bd. of Trustees*, 37 F. 4th 1386 (8th Cir. 2022).

¹⁵⁶ See “Free Speech Issue:” *Meet the Arkansas Publisher & ACLU Lawyer Asking SCOTUS to Overturn Anti-BDS Law*, DEMOCRACY NOW! (Oct. 24, 2022) <https://perma.cc/SK2S-F44P>; *New Report Details Impact of Secretive American Legislative Exchange Council on Communities of Color*, CTR. FOR CONST. RTS., (Dec. 3, 2019)

of creating templates that can be applicable across the 50 states¹⁵⁷ and the organization writes this legislation in closed-door meetings with Evangelical thought leaders and Republican lawmakers.¹⁵⁸

V. LEGAL FRAMING - CLAIBORNE HARDWARE AND ARKANSAS TIMES

a. *U.S. Law*

As the BDS movement continues to pressure companies, academics, institutions, and artists to divest from Israel,¹⁵⁹ its legal advocates have garnered wins in the courtroom. In the 2019 case *Amawi v. Pflugerville Independent School District*, a federal district court in Texas struck down H.B. 89, a contract-focused anti-BDS law that required employees to pledge that they would not boycott Israel on the grounds that it violated the First Amendment.¹⁶⁰ In *Amawi*, five plaintiffs who sought contract with the state, sued the Attorney General of Texas, Texan universities, and school districts, after they were forced to choose between promising not to boycott Israel or forgoing professional opportunities and losing income.¹⁶¹ United States District Judge Robert Pitman ruled that the law threatened “to suppress unpopular ideas” and “manipulate the public debate through coercion rather than persuasion” and that “no amount of narrowing its application will cure its constitutional infirmity.”¹⁶²

After the ruling, an amended anti-BDS law in Texas was passed, H.B. 793, which applied to companies with more than 10 employees, or contracts worth more than \$100,000.¹⁶³ However, this law also faced challenges after Rasmy Hassouna, an engineer born in Gaza, sued the state and won an injunction against the requirement to sign an anti-boycott pledge to contract with city governments.¹⁶⁴ In early 2022, a federal judge

<https://perma.cc/R2NW-DELW>; CTR. FOR CONST. RTS., ALEC ATTACKS: HOW EVANGELICALS AND CORPORATIONS CAPTURED STATE LAWMAKING TO SAFEGUARD WHITE SUPREMACY AND CORPORATE POWER (2018) <https://perma.cc/PVL9-PSKX> [hereinafter *ALEC ATTACKS*]; BOYCOTT, *supra* note 42 at 17:11-19:35.

¹⁵⁷ ALEC ATTACKS, *supra* note 156 (2018) at 6.

¹⁵⁸ *Id.* at 6, 7, 10, 23.

¹⁵⁹ *Growth of a Movement*, *supra* note 27.

¹⁶⁰ *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 765 (W.D. Tex. 2019).

¹⁶¹ *Id.* at 730 (“As a result of the State’s disapproval of the BDS movement, Plaintiffs allege that they have lost the benefit of public employment with the State of Texas, or fear losing such employment [. . .]”).

¹⁶² *Id.* at 763-64.

¹⁶³ H.B. 793, 86th Leg., Reg. Sess. (Tex. 2019).

¹⁶⁴ Nora Barrows-Friedman, *Texas Anti-BDS Measure Ruled Unconstitutional—Again*, ELEC. INTIFADA (Feb. 11, 2022), <https://perma.cc/J3CP-HWNT>; *see also* Memorandum of Petitioner at 3-4, *A & R Eng’r and Testing, Inc., v. City of Hous.*, 582 F. Supp. 3d 415 (S.D. Tex. 2022).

granted an injunction in favor of Hassouna to block the state from enforcing the law because Texas could not enforce its law against the company or the city without violating the First Amendment.¹⁶⁵

Other cases challenging anti-BDS laws in the U.S. are ongoing. In Georgia, a challenge to a contract based anti-BDS law was appealed to the Eleventh Circuit Court of Appeals after a judge rejected the state's request to dismiss the suit. There, journalist Abby Martin brought suit against Georgia Southern University after university officials terminated an agreement for her to speak at one of their 2019 events on the grounds that Martin refused to refrain from a boycott of Israel.¹⁶⁶ District Court Judge Mark Cohen held that the law "prohibit[ed] inherently expressive conduct protected by the First Amendment, [which] burden[ed] Martin's right to free speech, and is [then] not narrowly tailored to further a substantial state interest."¹⁶⁷

As is evidenced, as battles over the legality of anti-BDS laws proliferate in U.S. courts, a Supreme Court decision on the validity of these laws would determine whether individuals in the U.S. can be employed through state contracts without signing pledges in exchange that indicates they will refrain from participating in a boycott of Israel. Nevertheless, just recently, the Supreme Court declined to hear a case on the topic, choosing to affirm an Eighth Circuit Court decision which upheld the legality of anti-BDS legislation in Arkansas.¹⁶⁸ This has implications not just for the future of the BDS movement but for other First Amendment issues as well.¹⁶⁹ Despite the Eighth Circuit's decision, U.S. law already provides an authoritative framing for the interpretation of boycott as free speech as the right to boycott is grounded in the First Amendment of the U.S. Constitution.¹⁷⁰ The Supreme Court recognized this right in *NAACP v. Claiborne Hardware* in 1982.¹⁷¹

NAACP v. Claiborne Hardware is the Supreme Court precedent that protects the right to boycott as leverage for larger social change.¹⁷² In *Claiborne*, the Supreme Court rejected tort liability for a years-long boycott of white businesses in Claiborne County, Mississippi, and held

¹⁶⁵ *A & R Eng'r and Testing, Inc., v. City of Hous.*, 582 F. Supp. 3d 415, 438 (S.D. Tex. 2022).

¹⁶⁶ *See, e.g., Harper Neidig, Federal Judge Says Georgia's Anti-BDS Law Violates First Amendment*, HILL (May 24, 2021), <https://perma.cc/H9AN-VVX7>.

¹⁶⁷ *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1231 (N.D. Ga. 2021).

¹⁶⁸ Press Release, ACLU, Supreme Court Declines to Review Challenge to Law Restricting Israel Boycotts (Feb. 23, 2013, 11:13 AM), <https://perma.cc/Y3CS-H966>.

¹⁶⁹ Tariq Kenney-Shawa, *Israel Boycott Bans are Threatening our First Amendment Rights*, AL JAZEERA (Mar. 7, 2023), <https://perma.cc/ZXN3-TWHZ>.

¹⁷⁰ U.S. CONST. amend I.

¹⁷¹ *NAACP v. Claiborne Hardware*, 458 U.S. 866, 915 (1982).

¹⁷² *Id.* at 886.

that the NAACP's boycott was protected by the First Amendment.¹⁷³ The boycott started at a local branch of the NAACP, in a meeting where hundreds of Black members and other supporters crafted a boycott action around demands that white business owners pressure the government to advance civil rights, racial justice, and equality reforms.¹⁷⁴ In this way, the NAACP sought to use boycott as a tool to compel political leaders to meet members' demands.

The Court found that "the boycott clearly involved constitutionally protected activity—the established elements of speech, assembly, association, and petition 'though not identical, are inseparable.'"¹⁷⁵ *Claiborne* implicitly suggested that boycott was a fundamental right as it is embedded within our First Amendment enumerated right to free speech. As the Court states, because "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," the right to boycott should be protected.¹⁷⁶ *Claiborne* held that "the Court has consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization."¹⁷⁷

While the Court found that governmental regulation may have an effect on First Amendment freedoms, this is justified in narrowly, it did not "find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case [because] expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"¹⁷⁸ Furthermore, even the right of states to regulate economic activity was insufficient to prohibit a nonviolent boycott that sought to vindicate important "public issues."¹⁷⁹ The Court in *Claiborne* held that the boycott openly sought to influence government policy rather than crush other economic competition of business competitors. Therefore, the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change."¹⁸⁰

The most recent challenge to an anti-BDS law in the Eighth Circuit has undermined *Claiborne* and created a dangerous precedent that

¹⁷³ *Id.*

¹⁷⁴ Political Boycott Activity and the First Amendment, 91 HARV. L. REV. 659 (1978).

¹⁷⁵ *Claiborne*, 458 U.S. at 911.

¹⁷⁶ *Id.* at 908.

¹⁷⁷ *Id.* at 919.

¹⁷⁸ *Id.* at 913.

¹⁷⁹ *Id.* at 913 (quoting *Carey v. Brown*, 447 U.S. at 455, 467 (1980)).

¹⁸⁰ *Id.* at 914.

impacts First Amendment rights beyond BDS.¹⁸¹ In June 2022, the Eighth Circuit upheld an Arkansas anti-BDS law in *Arkansas Times LP v. Mark Waldrip*.¹⁸² Arkansas Act 710 prohibited state contractors from boycotting Israel. The *Arkansas Times*, a news outlet based in Little Rock that received payment from state agencies in exchange for advertising, sued the University of Arkansas Board of Trustees for requiring the newspaper to certify it would not boycott Israel, arguing that the law violated the First Amendment on the grounds of speech and association.¹⁸³ Because the *Arkansas Times* refused to sign a certification stating that the newspaper was not engaged in and would agree to not engage in a boycott of Israel to secure a new advertising contract, it faced a 20% loss of advertising payments and contract with a longtime state client.¹⁸⁴ As demonstrated in litigation challenging state anti-BDS laws against Israel, *Arkansas Times* and other government workers had to choose between their political opinion and the loss of government contracts or salaries as employees. The *Arkansas Times* did not actually intend to boycott Israel in any way, but Alan Leveritt, the founder and publisher of the news outlet wrote in the *New York Times* in 2021, “[w]e don’t take political positions in return for advertising. If we signed the pledge, I believe we’d be signing away our right to freedom of conscience. And as journalists, we would be unworthy of the protections granted us under the First Amendment.”¹⁸⁵

Nevertheless, the Eighth Circuit held that anti-BDS legislation does not follow under the purview of *Claiborne* because the act of boycott and divestment of Israel constitute non-expressive activity.¹⁸⁶ One of the principal arguments the university relied on was that a boycott itself was not speech, but rather the speech and assembly associated with the boycott.¹⁸⁷ The university argued that *Claiborne* did not apply because a

¹⁸¹ Adam Serwer, *Boycott Bans Are an Assault on Free Speech*, ATLANTIC (Mar. 9, 2023), <https://perma.cc/Y6UC-WWY4>.

¹⁸² *Arkansas Times LP v. Waldrip as Tr. Of Univ. Of Arkansas Bd. Of Trustees*, 37 F. 4th 1386, 1390 (8th Cir. 2022).

¹⁸³ *Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d 617 (E.D. Ark. 2019), rev’d and remanded, 988 F. 3d 453 (9th Cir. 2021), reh’g en banc granted, opinion vacated (June 10, 2021), on reh’g en banc sub nom. *Arkansas Times LP v. Waldrip as Tr. Of Univ. Of Arkansas Bd. Of Trustees*, 37 F. 4th 1386 (8th Cir. 2022).

¹⁸⁴ Petition for Writ of Certiorari, *Arkansas Times LP v. Waldrip as Tr. Of Univ. Of Arkansas Bd. Of Trustees* (No. 19-1378) at 5.

¹⁸⁵ Alan Leveritt, *We’re a Small Arkansas Newspaper. Why Is the State Making Us Sign a Pledge About Israel?* N.Y. TIMES (Nov. 22, 2021), <https://perma.cc/RL79-U97D>.

¹⁸⁶ *Arkansas Times LP v. Waldrip as Tr. Of Univ. Of Arkansas Bd. Of Trustees*, 37 F. 4th 1386, 1394 (8th Cir. 2022).

¹⁸⁷ See *id.* at 1392 (“Contrary to Arkansas Times’s argument, *Claiborne* only discussed protecting expressive activities accompanying a boycott, rather than the purchasing decisions at the heart of a boycott.”). See also *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907 (1982)

consumer boycott was not expressive speech under *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*.¹⁸⁸

The Eighth Circuit concurred with the university in which it relied on *Rumsfeld* in its opinion.¹⁸⁹ In *Rumsfeld*, in response to the “Don’t Ask Don’t Tell” policy, law schools began to bar militarily recruiters on campus.¹⁹⁰ This led to the passage of the Solomon Amendment, which specified that if an institution of higher education denied military recruiters access equal to what it provided other recruiters, the entire institution would lose federal funds.¹⁹¹ As a result, law schools brought suit against the government claiming the Solomon Amendment infringed their First Amendment freedoms of speech and association.¹⁹² The Supreme Court held that the choice by law schools to halt military recruitment on campus did not constitute protected speech and thus First Amendment protections did not apply, as the law schools in question participated in conduct that “was not inherently expressive.”¹⁹³ The court argued that “the question wasn’t whether someone *intended* to express an idea, but whether a neutral observer would *understand* that they’re expressing an idea.”¹⁹⁴ The court held that it was not clear to a neutral observer that law schools were expressly boycotting a policy. In that same vein, the Eighth Circuit in *Arkansas Times* posited that participation in BDS against Israel did not constitute expressive conduct and thus was not protected by the First Amendment.¹⁹⁵

(“The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause. Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.”).

¹⁸⁸ See *Arkansas Times* 37 F 4th, at 1392, 1394; *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, (FAIR) 547 U.S. 47 (2006) (FAIR). Some law schools barred military recruiters on campus in response to “Don’t Ask Don’t Tell.” The Solomon Amendment subsequently denied such higher education institutions their entire federal funds. As a result, law schools sued on the grounds that the Solomon Amendment infringed their First Amendment freedoms of speech and association.

¹⁸⁹ See *Arkansas Times* 37 F 4th at 1392, 1394; FAIR, 547 U.S. at 47.

¹⁹⁰ Jill Shotzberger, *A Victory in Defeat: The Implications of Rumsfeld v. Fair on ‘Don’t Ask, Don’t Tell’*, 4 TENN. J. OF L. AND POL’Y. 131, 131-33 (Mar. 2014).

¹⁹¹ *Id.*

¹⁹² FAIR, 547 U.S. at 47.

¹⁹³ *Id.* at 64-66.

¹⁹⁴ *Arkansas Times*, 37 F 4th at 1392.

¹⁹⁵ See *id.* at 1394; FAIR, 547 U.S. at 69. In FAIR, the court held that “to comply with the [Solomon Amendment], law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore ‘associate’ with military recruiters in the sense that they interact with them.” But because “recruiters are not part of the law school [they] are, by definition, outsiders who come onto campus for the limited purpose . . . not to become members of the school’s expressive association. This distinction is critical.” 547 U.S. at 69.

However, the Eighth Circuit's decision violates *Claiborne*. *Claiborne*'s affirmation of First Amendment protections of boycott should have applied to affirm the right of the *Arkansas Times* to not have to sign a pledge against the boycott of Israel. Critically, the Supreme Court in *Claiborne* did not separate a consumer boycott from speech and conduct within a boycott for First Amendment purposes.¹⁹⁶ As a result of the Eighth Circuit *en banc* decision, which affirmed the district court's order denying a preliminary injunction and dismissed the case, the *Arkansas Times* submitted a Writ of Certiorari to the Supreme Court.¹⁹⁷ However, in February 2023, the Supreme Court denied cert.¹⁹⁸ This sets a very dangerous precedent for First Amendment protections, nationwide as "[o]ne need not be a Palestinian rights advocate to understand that the state's conditioning people's livelihoods on the surrender of their right to protest is censorship."¹⁹⁹

In keeping with *Claiborne*, having to pledge not to boycott Israel is at odds with the First Amendment's freedom of association. Boycotts are a form of expressive activity that "every major social movement has at some point utilized [. . .] to raise awareness about a persistent social injustice, by leveraging political and economic mobilization to urge changes in government or private practices."²⁰⁰ Thus, like "demonstrations, picketing, strikes, and sit-ins," boycott is a form of expressive activity and the "politically expressive goals" of BDS are protected speech.²⁰¹ In order for BDS to fall within this scope, one needs to look no further than its political demands from Palestinian civil society: "the right of Palestinian refugees to return to their lands; and an end to Israel's military occupation, settlements, checkpoints, and 'apartheid Wall,' which force Palestinians in the West Bank to live in ghettos and those in Gaza to live in the largest open air prison in the world."²⁰²

Arkansas Times conflicts with other Supreme Court First Amendment precedent as well. Under the First Amendment, content-based regulations like the one upheld in *Arkansas Times* are presumptively invalid because the government may not restrict views based on approval or disapproval of the underlying message of the

¹⁹⁶ Petition *supra* note 184 at 14.

¹⁹⁷ Petition *supra* note 184.

¹⁹⁸ Press Statement, Knight First Amendment Inst. at Columbia Univ., Supreme Court Declines to Hear Challenge to Arkansas' Anti-Boycott Law (Feb. 21, 2023), <https://perma.cc/MJ4X-KE9L>.

¹⁹⁹ Serwer, *supra* note 181.

²⁰⁰ Brief of Amici Curiae, *supra* note 36 at 5.

²⁰¹ Brief of Amici Curiae, *supra* note 36 at 5.

²⁰² Brief of Amici Curiae, *supra* note 36 at 8.

speech.²⁰³ Doing so constitutes content discrimination and would permit the government to exclude the views it disapproves of from the marketplace of ideas.²⁰⁴ Content can be expressed through ideas, but also conduct.²⁰⁵ Expressive conduct must evince an intent to convey a particularized message and a likelihood that others who view the message would understand the message.²⁰⁶

Often, supporters of BDS bans conflate boycott of Israel with discrimination based on national origin.²⁰⁷ While anti-BDS laws require contractors to state they will refrain from boycotting business in Israel, they do not, explicitly “ban discrimination on the basis of national origin - non Israeli companies are protected and Israelis who have no business interests in Israel are not.”²⁰⁸ So in many ways, this argument is moot, as anti-BDS legislation is focused primarily on prohibiting boycotts of Israeli businesses and not the discrimination of Israelis. By conflating the two issues, anti-BDS legislation distracts from the entire purpose of the BDS movement. Finally, another popular argument in support of bans is the idea that BDS would undermine one’s liberty to contract and in turn could “undermine antidiscrimination laws of all kinds.”²⁰⁹ Nevertheless, this once again conflates economic discrimination with consumer protections. Proponents of anti-BDS argue that treating boycotts as free speech would allow, for example, a restaurant owner to refuse service to Black customers because the restaurant owner is a white supremacist.²¹⁰ But anti-discrimination laws are meant to ensure that businesses “serve, hire, rent, or sell to all comers. But a consumer’s decision not to buy from a particular business . . . is not the same as a landlord [who] refus[es] to rent an apartment to someone because of their race or religion.”²¹¹ Once

²⁰³ *R.A.V. v. City of Saint Paul*, 505 U.S. 377 at 378 (1992) (stating that the City of Saint Paul’s desire to prohibit “group hatred” and “bias-motivated speech” did not mean that it could engage in “selectively silencing speech on the basis of its content” as that would be unconstitutional under the First Amendment); *Ashcroft v. ACLU*, 542 U.S. 656 at 660 (2004) (stating that “the Constitution demands that content-based restrictions on speech been presumed invalid”).

²⁰⁴ *See R.A.V.*, 505 U.S. at 377.

²⁰⁵ *See generally* *Spence v. State of Washington*, 418 U.S. 405 (1974) (where the Supreme Court held that burning the American flag in protest was protected under the First Amendment).

²⁰⁶ *Id.* (pointing out that the act of burning a U.S. flag in the context of appellant’s “anguish [. . .] about the [. . .] domestic and foreign affairs of his government [. . .] was “[a]n intent to convey a particularized message [with great likelihood] that the message would be understood by those who viewed it”). *Id.* at 410-11.

²⁰⁷ Serwer, *supra* note 181.

²⁰⁸ Serwer, *supra* note 181.

²⁰⁹ Serwer, *supra* note 181.

²¹⁰ Serwer, *supra* note 181.

²¹¹ Serwer, *supra* note 181.

again this is a conflation that centers the business in lieu of the conduct and viewpoint of the consumer.

Moreover, at stake in whether the First Amendment right to engage in BDS against Israel is protected is the prospect of states who selectively suppress First Amendment rights of those who participate in boycotts based on content and viewpoint discrimination.²¹² Given the ease of using template bills and model legislation across multiple states legislatures, as was the case in the *Arkansas Times* law written by ALEC, anti-BDS laws easily implicate the ability of people to boycott and divest from other harmful actors as well, like the fossil fuel industry and groups that oppose gender-affirming care.²¹³ These types of conditions on contracts could also easily be swapped to prevent employees from supporting Black Lives Matter, Planned Parenthood, Greenpeace, or other movements and actors important in the racial justice, reproductive rights, environmental, and other political arenas.²¹⁴ This is already occurring—in 2021, Texas passed laws prohibiting the boycott of firearms and fossil fuels.²¹⁵

b. International Law

As previously mentioned, under international law, States have a duty to withhold support for other States engaged in colonization. The ICJ's 2005 Advisory Opinion on the wall Israel had built on occupied Palestinian territory states, "[t]he Court considers that that construction of the wall and its associated régime [including illegal Israeli settlements in the occupied territory] create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation."²¹⁶ De facto annexation is a contemporary term for

²¹² *Arkansas Times LP v. Waldrip as Tr. Of Univ. Of Arkansas Bd. Of Trustees*, 37 F.4th 1386, 1398 (8th Cir. 2022) (dissenting) "[Arkansas Act 710 appears to] 'leverage funding to regulate speech outside the contours of the program' . . . I would conclude that the Act prohibits the contractor from engaging in boycott activity outside the scope of the contractual relationship 'on its own time and dime.' Such a restriction violates the First Amendment."; *Arkansas Times v. Waldrip* 37 F.4th 1386 (8th Cir. 2022) (*en banc*).

²¹³ DEMOCRACY NOW!, *supra* note 156.

²¹⁴ BOYCOTT, *supra* note 42 at 56:31.

²¹⁵ BOYCOTT, *supra* note 42 at 69:32; Mitchell Ferman, *Texas Bans Local, State Government Entities from Doing Business with Firms that "Boycott" Fossil Fuels*, TEX. TRIBUNE (Aug. 24, 2022, 4 PM CT), <https://perma.cc/3UU9-GMY2>; Robert Reich, *How Texas Punishes Companies Who 'Discriminate' Against Gun Manufacturers*, GUARDIAN (June 6, 2022, 6:23 ET), <https://perma.cc/5HTV-BRX2>.

²¹⁶ Advisory Opinion, *supra* note 19.

colonization.²¹⁷ Thus, States have a duty of non-recognition of Israel as a colonial power over the Palestinian people, yet the global community is far from fulfilling that duty.²¹⁸ For example, the newly formed Israeli state was accepted into the United Nations General Assembly in 1949 as its mass expulsion of Palestinians from their homes was ongoing.²¹⁹ Additionally, the United States has since given billions of dollars per year to the Israeli military,²²⁰ which suggests that it has more interest in defending Israel than stopping Israeli violations of international law. Specifically on the issue of press freedom, the U.S. has recently avoided blaming the Israeli military for killing Palestinian journalist Shireen Abu Akleh²²¹ while she reported on an Israeli raid at the Jenin Refugee Camp in May 2022, despite overwhelming evidence implicating the Israeli military for her murder.²²² It is the authors' opinion that since the leaders within the BDS movement were under no illusion that non-recognition would be achieved overnight due to the complicity of States in the occupation and colonization of Palestine, it instead called upon institutions and people of conscience to carry out boycott, divestment, and (eventually) sanctions as a means of building toward non-recognition and with it, an end to apartheid in occupied Palestine. Thus, the BDS movement is crucial to achieving the non-recognition of Israel's colonial practices and fulfilling States' duties under international law.

There is also guidance in the international legal arena for how BDS can be upheld as protected speech. For example, the 2020 European Court of Human Rights case *Baldassi and Others v. France* echoes the assertion

²¹⁷ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999).

²¹⁸ UN Charter, *supra* note 21.

²¹⁹ U.N. GAOR, 3rd Sess., 207th plen. mtg. at 1, 6, U.N. Doc. A/PV.207 (May 18, 1949); BADIL RESOURCE CTR. FOR PALESTINIAN RESIDENCY & REFUGEE RTS., 9 SURVEY OF PALESTINIAN REFUGEE & INTERNALLY DISPLACED PERSONS, 2016-2018 (2020).

²²⁰ See SHARP, *supra* note 22; see generally Erakat, *supra* note 22 (arguing against the assertion that Israel has the right to self-defense, legal scholar Noura Erakat states, "A state cannot simultaneously exercise control over territory it occupies and militarily attack that territory on the claim that it is 'foreign' and poses an exogenous national security threat.").

²²¹ Press Statement, NED PRICE, U.S. DEP'T OF STATE, *On the Killing of Shireen Abu Akleh* (July 4, 2022), <https://perma.cc/83Z8-GHBJ>.

²²² See *Shireen Abu Akleh: The Extrajudicial Killing of a Journalist*, FORENSIC ARCHITECTURE (Sept. 20, 2020), <https://forensic-architecture.org/investigation/shireen-abu-akleh-the-targeted-killing-of-a-journalist>; Al Haq & Forensic Architecture, *Shireen Abu Akleh: The Extrajudicial Killing of a Journalist*, YOUTUBE (Sept. 20, 2022), <https://www.youtube.com/watch?v=BXjVDKILC3s>; Raja Abdulrahmin et al., *The Killing of Shireen Abu Akleh: Tracing a Bullet to an Israeli Convoy*, N.Y. TIMES, <https://perma.cc/N3Y5-85M8> (last updated June 28, 2022); Sarah Cahlan et al., *How Shireen Abu Akleh Was Killed*, WASH. POST (June 12, 2022), <https://perma.cc/W87Y-3735>.

that BDS is not antisemitic or discriminatory and is protected speech.²²³ In the case, BDS activists in France had gathered at a supermarket and staged an action where they removed Israeli products from the shelves, placed them in carts, and called for a boycott of those products by supermarket customers.²²⁴ The French state criminalized the activists for incitement to discrimination under section 24(8) of the French Law of July 29, 1881.²²⁵ After making its way through the French courts, the case was heard before the European Court of Human Rights (“ECHR”), which rendered a Chamber judgment in French on June 11, 2020.²²⁶ In the English press release, the Registrar of the Court explained that while boycott combines “the expression of a protest with incitement to differential treatment” and could in some circumstances amount to “incitement to discrimination against others, [. . .] incitement to differential treatment is not necessarily the same as incitement to discrimination.”²²⁷

The Court stated that the French government had failed to prove that the activists’ actions had fallen within the scope of the types of freedom of expression restricted under Article 10(2) of the European Convention and that therefore it had not demonstrated that the conviction of the activists “had been necessary in a democratic society to attain the legitimate aim pursued.” (Here, the “legitimate aim pursued” refers to “the rights of others”).²²⁸ In conclusion, the Court stressed that the activists’ actions were protected by the fact “there was little scope under Article 10(2) for restrictions on freedom of expression in the sphere of political speech or matters of public interest.”²²⁹ The statement by the ECHR that BDS targets “matters of public interest” is analogous with the interpretation in *Claiborne* that boycott is protected where it concerns racial discrimination as “public issues” and “public affairs.”²³⁰ The ECHR overturned the conviction of the activists.²³¹

²²³ Press Release, European Ct. Hum. Rts, Criminal Conviction of Activists Involved in the BDS campaign Boycotting Products Imported from Israel Had No Relevant and Sufficient Grounds and Violated Their Freedom of Expression (Nov. 6, 2020), <https://perma.cc/9NRW-7YXV>.

²²⁴ De Leo, *supra* note 43.

²²⁵ De Leo, *supra* note 43.

²²⁶ Press Release, *supra* note 223.

²²⁷ Press Release, *supra* note 223 at 3, 4.

²²⁸ Press Release, *supra* note 223 at 4.

²²⁹ Press Release, *supra* note 223, at 5.

²³⁰ NAACP v. Claiborne Hardware, 458 U.S. 886, 915 (1982).

²³¹ Press Release, *supra* note 223 (stating that their “conviction was not based on relevant and sufficient grounds” and that the “domestic court had [not] applied rules in keeping with the principles set out in Article 10 [. . .].”).

The right to freedom of speech and expression, including boycott, is protected by Article 19(2) of the International Covenant on Civil and Political Rights (“ICCPR”).²³² Nations party to the Covenant are obligated to uphold the rights described in the ICCPR, which was adopted by the United Nations General Assembly in 1966, came into force in 1976, and was ratified by the United States in 1992.²³³ The Supremacy Clause, Article VI of the United States Constitution, provides that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land,” which would mean that through ratifying the ICCPR, the United States agreed to enforce it as such.²³⁴

The ICCPR’s Human Rights Committee “has emphasized in detail how Article 19 is especially protective of political speech”²³⁵ and that BDS “has long been understood as a legitimate form of expression.”²³⁶ Part of the goal of the ICCPR at its drafting was to ensure that political debate would continue to be robust.²³⁷ For example, the U.S.’s “Strengthening America’s Security in the Middle East Act of 2019” (“Title IV”), which would have encouraged and permitted individual states in the United States to pass anti-BDS legislation,²³⁸ did not have a legitimate aim and failed to demonstrate how “restricting and penalizing BDS advocacy protects [. . .] the rights or reputations of others, national security, public order, or public health or morals.”²³⁹ Instead, Title IV carried such punitive measures against BDS activists that it would “chill political expression and protest,” with implications potentially well beyond BDS and in other forms of free expression.²⁴⁰

²³² UN General Assembly, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171. *See generally* 6 G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) (The convention was adopted in 1965 and entered into force in 1969. It remains the principal international human rights instrument defining and prohibiting racial discrimination in all sectors of private and public life).

²³³ *FAQ: The Covenant on Civil and Political Rights (ICCPR)*, ACLU (Apr. 2019), <https://perma.cc/FJP6-LUP9> (listing “the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial; right to family life and family unity; and minority rights).

²³⁴ *Id.*

²³⁵ Letter from David Kaye, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, to U.N. Sec’y-Gen., Palais Des Nations, (Feb 14, 2019), <https://perma.cc/6TAK-2BMJ3>.

²³⁶ *Id.* at 3.

²³⁷ *Id.* at 4.

²³⁸ *Id.* at 1.

²³⁹ *Id.* at 4.

²⁴⁰ *Id.* at 4.

Baldassi and the analysis of Title IV provide affirmation that boycott is protected speech under the ECHR and the ICCPR rather than “non-expressive economic” activity as stated by the 8th Circuit Court. Both provide support for the argument that the U.S. Supreme Court should have uphold its decision in *Claiborne* when ruling on *Arkansas Times* rather than, in denying to hear the case, overturn it in favor of a new, non-expressive interpretation of boycott.

V. CONCLUSION

Boycotts and divestment are and have been a viable means of showing solidarity with people resisting oppression across the world. Since 2005, the BDS movement targeting the State of Israel’s oppressive policies has gained traction as a way for the international community to support Palestinians and to condemn Israel’s brutal treatment towards the Palestinian people, with the eventual goal of non-recognition under international law. As anti-BDS legislation mounts, our freedom of speech and association continues to be put at risk, and as the founder and publisher of *Arkansas Times* believes, “these anti-boycott laws, allowing government to use money to punish dissent, will encourage the creation of ever more repressive laws that risk strangling free speech for years to come.”²⁴¹ However, despite frequent bans, the repression of BDS supporters, and overall backlash within the United States and other Western countries, BDS has been a successful tactic in the anti-colonial struggle against Israel, including some litigation victories within the U.S. court system. U.S. and international law provide a legal framework to protect BDS and its organizers under the doctrine of free speech, despite dangerous new definitions of boycott as “non-expressive,” which threaten not just BDS but social movements broadly. Thus, it is critical for the BDS movement to continue to be regarded as a legitimate expression of free speech and as an effective mechanism of opposing Israel’s colonial policies against Palestinians both within and outside of the legal arena. For these reasons, organizers at CUNY Law support Palestinians in their struggle for their liberation and continue to advance the BDS movement.

²⁴¹ Leveritt, *supra* note 185.