

Legality of Boycott and Divestment, Frequently Asked Questions

UAW 2865 Campaign, December 2014

Increasing calls for boycott and divestment of Israeli institutions and U.S. companies that profit from the occupation of Palestine have triggered a backlash of threats including the allegation that this principled position is somehow “illegal.” This is part of a concerted campaign of legal repression designed to intimidate and silence critics of Israel. Palestine Solidarity Legal Support (PSLS) documents the escalating legal repression, which has included smear campaigns, frivolous lawsuits, unconstitutional legislative proposals, and other attempts to restrict speech critical of Israel. As members of Local UAW 2865 prepare to vote on a boycott and divestment resolution, it is no surprise that the Union faces baseless legal threats, similar to those leveled against the American Studies Association and student groups.

The following addresses frequent accusations against BDS campaigns. This is general legal information, not specific legal advice. If you have specific questions about your campaign, please contact [Palestine Solidarity Legal Support](#).

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

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

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

2. Is the academic boycott “national origin” discrimination? *No.*

The academic boycott does not target individuals based on their Israeli nationality; it targets *Israeli institutions because of their ties to state policy*. The individuals who could be affected by the boycott are those who directly represent Israeli state institutions in an official capacity. There are many Israelis – the vast majority of the country’s citizens – who would not be subject to the academic boycott called for by Palestinian civil society and independently endorsed by US-based groups. To be especially clear: Israeli academics are *not* subject to boycott if they are not explicitly representing Israeli institutions. According to the Palestinian Boycott National Committee (BNC), the coordinating body of Palestinian civil society who has called for the boycott, “Mere institutional affiliation to the Israeli academy is therefore not a sufficient condition for

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

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applying the boycott.”² For example, the American Studies Association (ASA), whose membership voted to endorse the academic boycott, invited Israeli academics to speak at its conference in November 2014.

3. Is the academic boycott “religious discrimination”? *No.*

Detractors of the academic boycott allege that singling out Israeli academic institutions amounts to anti-Semitism, that is, discrimination against Jewish people because of their religion or ethnic background. The boycott does not target institutions or individuals based on their Jewish identity. The union’s stated motivation for academic boycott is to oppose all forms of racism, which includes anti-Semitism and anti-Arab racism. UAW 2865 has reiterated that while it condemns anti-Semitic and bigoted hate speech, criticism of Israeli state policy is not anti-Semitic.³

To equate criticism of the Israeli state, or a boycott of Israeli state institutions, with anti-Semitism is as absurd as calling criticism of or sanctions against the Iranian government anti-Muslim or anti-Persian, and as illogical as classifying criticism of the Chinese occupation of Tibet as hateful against people of Chinese ethnicity. Common sense makes clear the distinction between anti-Jewish bias (based on the race, ethnicity or religious identity of Jewish people as individuals or as a group) and criticism of Israeli state institutions. The Department of Education Office for Civil Rights also recognizes the distinction (See FAQ # 8, below).

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

You may hear the allegation that boycotts against Israeli institutions violate federal anti-boycott laws. This is an attempt to distract from the issue of Israeli human rights violations. Boycott campaigns that initiate from civil society – including an academic boycott – *were not covered* by what is known as the “federal anti-boycott law.”⁴ That act of Congress in 1979 was a rider to legislation regulating US exports and it was intended to counter participation in the Arab League’s boycott of Israel. Specifically, the anti-boycott law prohibited participation in a boycott in cooperation *with a foreign country*. In no way did that legislation apply to boycotts undertaken as a matter of social, political or moral conscience; nor could it, under core First Amendment principles that protect boycotts undertaken to protest foreign or domestic governmental policies or actions. Moreover and regardless, *that legislation expired more than twenty years ago* and should not be enforceable unless Congress reenacts it.

5. Does academic freedom guarantee Graduate Student Instructors the right to support boycott of Israeli institutions without retribution? *Yes.*

Even while there is debate about whether an academic boycott of Israeli institutions promotes or restricts academic freedom overall, *there is no controversy as to whether academic freedom rights protect individuals from*

² Academic Boycott Guidelines, Boycott National Committee, See more at:

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

³ UAW 2865 has repeatedly emphasized the difference between criticism of Israel and criticism of Jewish identity. See, for example, email to UAW 2865 Members, August 3, 2012, “Sign the Petition! Protect Free Speech Rights at the UC”.

⁴ Export Administration Act (“EAA”) of 1979. For more information, please see the memo from the National Lawyers Guild, *Impact of Federal Anti-Boycott and Other Laws On BDS Campaigns*, October 2009, analyzing the application of anti-boycott law to BDS campaigns, *available at*

http://palestinelegalsupport.org/download/bds/boycott/NLG_BDS_legal_memo.pdf

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adverse employment consequences due to their support for the boycott. A common tactic that has been used against academics who are supportive of BDS involves pressure by off-campus organizations urging university administrators to condemn BDS and punish individuals who support it. Academic freedom rights are protected by a [myriad of UC policies](#),⁵ and the American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure.⁶ If the UC were to violate these policies in response to pressure campaigns, it would be subject to legal action.

The UC would violate these policies if it were to punish faculty, graduate student teaching instructors, or students for their support for BDS (or other political expression). The UC would also violate these rights if it were to direct UAW members to avoid the subject of Israel and Palestine in the classroom.

6. Does UAW's boycott resolution violate the UC Course Content Policy? *No.*

The Brandeis Center, a right-wing Israel advocacy organization, has accused UAW 2865 of stating its intention to violate the UC Regents [Policy on Course Content](#)⁷ (also known as the Regents Policy on Academic Freedom) by encouraging members to teach about Palestine. The Brandeis Center, in a letter to President Napolitano, claimed that "Teaching undergraduate students one-sided propaganda" about Israel and Palestine does "not constitute education but unabashed political indoctrination, which is expressly forbidden by the UC Regents."⁸ Indeed, the UC policy prohibits "misuse of the classroom ... for political indoctrination," but this is interpreted by the UC to mean that the University, as a State instrumentality, cannot take a position in support of or opposition to a ballot measure or candidates for political office. In interpreting the Policy on Course Content, the UC continues to apply the 1970 guidance from UC President Charles J. Hitch, which stated, in pertinent part, "scholarly instruction and research on politics is not only appropriate but desirable."⁹

The UC cannot restrict speech in the classroom or elsewhere on campus based on the content of the views expressed under its own free speech policies, and under the U.S. and California constitutions. UAW

⁵ List of University of California Policies and Academic Personnel Manual provisions protecting student and faculty academic freedom rights, available at <http://senate.ucsc.edu/committees/caf-committee-on-academic-freedom/Academic-Freedom-Information/Appendix-BUCPolicyonAcademicFreedom.pdf>

⁶ American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, available at, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

⁷ University of California Board of Regents Policy 2301: Policy on Course Content, available at <http://regents.universityofcalifornia.edu/governance/policies/2301.html>.

⁸ Brandeis Center Joins AMCHA Criticism of UAW 2865's BDS Statement, August 13 2014, <http://brandeiscenter.com/blog/brandeis-center-joins-amcha-criticism-of-uaw-2865s-bds-statement/>

⁹ September 18, 1970 Policy Guidance from UC President Charles J. Hitch, Restrictions on the Use of University Resources and Facilities for Political Activities, page 4, available at, <http://policy.ucop.edu/doc/1200368/FacilPolitActiv>. The full passage reads, "There are well-recognized difficulties in interpreting what is political. In today's disturbed social climate, what is political at one time may not be political at another. Supporting or opposing candidates or propositions in elections is clearly political, but there are grey areas in relation to issues. A distinction must also be drawn between political activity on the one hand, and instruction and research on politically related subjects on the other; certainly, scholarly instruction and research on politics is not only appropriate but desirable. There must be an examination of all the facts and circumstances surrounding an activity and, in the last analysis, the campus administrator must be responsible for determining its appropriateness."

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members, like all graduate student instructors and other faculty, have academic freedom to teach about Palestine in the classroom when it is relevant to the course, to be critical of Israel, and to support boycott and divestment.

7. What should I do as an individual to enforce my academic freedom rights and protect myself against backlash?

In this context of repression of views sympathetic to Palestinians, supporters of UAW's boycott and divestment initiative may take a few precautions to inoculate themselves against potential backlash. The AMCHA initiative ominously published a list of UAW members who it alleges support the boycott and divestment initiative. AMCHA is a right-wing Israel advocacy organization in California known for public smear campaigns against individual academics that publicly support boycott and divestment or are perceived as critical of Israel or supportive of Palestinian rights. UAW members who are publicly supportive of the boycott and divestment initiative, or who teach classes in Middle East studies departments, could be targeted with negative teaching evaluations, complaints to faculty advisors or department chairs, or public smear campaigns.

Consider notifying your advisor, department chair, and any faculty for whom you work as an instructor about the BDS campaign. Let them know about your support for the initiative (or perceived support), and the context of repression. Request to be notified immediately of any complaints made against you. If you have a concern, contact your union representative or another lawyer.

8. Does the UAW Boycott Resolution create a “hostile environment”? No.

The Brandeis Center has also falsely accused UAW 2865 of creating a “hostile environment” for Jewish students on campus. The U.S. Department of Education (DOE) has investigated and repeatedly rejected the claims made by the Brandeis Center and other right wing Israel advocacy organizations alleging that advocacy for Palestinian rights subjects Jewish students to a hostile environment. The DOE has dismissed several claims under Title VI of the Civil Rights Act against UC Berkeley, UC Santa Cruz, UC Irvine, and Rutgers University. The DOE issued written letters explaining that the allegations were not actionable because the activities complained of (testimony in support of a divestment resolution, scholarly lectures, advocacy programming, mock check points, verbal disagreements about Israel and Palestine, and other similar activity) are constitutionally protected First Amendment expression. The DOE recognized that the speech and activities alleged to be anti-Semitic were in fact based on political viewpoint, not on race, ethnicity or national origin.¹⁰

You may hear accusations that UAW 2865's boycott and divestment proposal makes Jewish students feel “unsafe.” UAW 2865 has stated its strong opposition to all efforts to coerce, intimidate, or otherwise threaten the physical safety of any student. There have not been, nor does UAW 2865 expect that there will be, any threat to the safety of any students as a result of this proposal. These claims rely on the conflation of criticism of Israel with Judaism, and presuppose the close identification of all Jewish people with the state of Israel. In fact, many Jewish students and faculty at UC, including many UAW members urging adoption of this resolution, are critical of Israel. Criticism of the state policies of any government, no matter how sharp

¹⁰ For more information and to view DOE dismissal letters, see <http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech,-department-of-education-dismisses-complaints>.

the criticism, is not to be confused with criticism of, or bias against the dominant religions or ethnicities of that country. (See, above, FAQ #3.) Criticism of Israel does not put anyone's physical safety at risk, even if it puts his or her political beliefs in question.

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

9. Are there any legal considerations specific to divestment?

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

A divestment resolution does not disturb trustees' fiduciary duty and discretion as long as: (1) there are alternative investments of equal value available to replace divested properties, as determined by fund trustees; and, (2) the resolution does not dictate to fund trustees when or how to divest or identify the specific replacement(s) for divested assets. The UAW 2865 divestment proposal is naturally confined within these guidelines because UAW 2865 does not have the power to dictate to the UC Regents or the UAW International whether and how to divest its funds.

10. Does the BDS initiative take away from UAW 2865's primary function? *No.*

As a social justice union, UAW 2865 can and does regularly engage its members in political solidarity with workers in other parts of the world. In this sense, the political discussion is part of the core function of the union. That said, the BDS resolution does not in any way limit or affect the representative functions of the union, including which grievances the union pursues and the union's position on tenure disputes, etc.

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

The legal arguments that opponents of BDS are making aim to distract and deflect the conversation away from Israeli human rights violations and the rights of the Palestinian people, and to intimidate those advocating for justice. Legal bullying has escalated in the United States as the movement for Palestinian rights has grown and as pro-Israel groups seek to shift attention away from Palestinian rights to focus on how criticism of Israeli policy impacts those who identify with and support Israel's policies against Palestinians. [Palestine Solidarity Legal Support](#) was formed in response to this escalating repression. The majority of more

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than 250 repression incidents that PSLS has documented since we launched in 2013 have targeted academic discussion or political activity occurring on college campuses where Palestinian rights activism is focused.

12. What support is available to those who face legal threats?

If you have a specific concern you may [contact Palestine Solidarity Legal Support directly](#). If you are a member of UAW Local 2865, you may also contact the union, which has its own legal counsel.