When Freedom of Expression Says "No": The Case against Academic Boycott[*]

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I. Introduction

In the course of 2013, several academic associations in the United States adopted resolutions calling for the boycott of Israeli academic institutions as part of the BDS campaign. BDS, which stands for "boycott, divest, and sanction," is a propaganda campaign designed to undermine the legitimacy of the State of Israel. Opposition to BDS has rapidly grown stronger. While a core part of the public debates involves questions of Middle East politics, there is a simultaneous debate underway concerning boycotts as threats to academic freedom and the nature of the relationship between scholarship and politics.

The calls to boycott Israeli academic institutions quickly faced significant legal challenges, including attempts to promote anti-boycott legislation—e.g., in New York, Maryland, and Illinois—entitled "The Protect Academic Freedom Act."[1]

In general, such anti-boycott bills prohibit colleges from using state aid in order to fund academic entities and membership in such entities, had the latter undertaken an official action in boycotting certain countries or their higher education institutions.

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1. See Abdus-Sattar Ghazali, "Academic Freedom Act Threatens Academic Freedom?" National Lawyers Guild, February 16, 2014, http://www.nlg.org/news/in-the-media/academic-freedom-act-threatens-academic-freedom.

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Yet the anti-boycott bills were largely condemned by, among others, the Center for Constitutional Rights (CCR),[2] the National Lawyers Guild (NLG),[3] and the Council on American-Islamic Relations (CAIR).[4] Their argument has been that these bills violate the right to academic freedom.[5] In the same vein, they assert that boycotts aimed at bringing about political, social, and economic change are indeed protected by the First Amendment.[6] Already at the very early stages of the legislative discussion, they succeeded, to a great extent, in preventing anti-boycott legislation.[7]

2. The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. See the Center for Constitutional Rights website, http://ccrjustice.org/.

3. The National Lawyers Guild is dedicated to the need for basic change in the structure of political and economic system. See the National Lawyers Guild website, http://www.nlg.org/about.

4. The vision of the Council on American-Islamic Relations is to advocate for justice and mutual understanding, by enhancing "understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding." See the Council on American-Islamic Relations website, http://www.cair.com/about-us.html.

5. Bill Chambers, "Anti-Boycott Bills Threatening Academic Freedom Spread to Illinois," *Chicago Monitor*, March 13, 2014, http://chicagomonitor.com/2014/03/anti-boycott-bills-threatening-academic-freedom-spread-to-illinois/.

6. Consider the letters by the CCR and the NLG, sent to the New York Assembly Members of the Higher Education Committee, available at http://ccrjustice.org/files/1%2030%2014%20%20CCR%20NLG%20NYC%20Letter%20to%20NY%20Assembly%20Members%20FINAL.pdf and http://www.ccrjustice.org/files/PSLS_Letter-to-Assembly-re-A08392A-Silver-Amended-Bill_2-20-14.pdf. Consider also the letter by the CCR, the NLG, and the CAIR-USA, sent to the members of the House of Representatives Education and the Workforce Committee, available at http://www.ccrjustice.org/files/Letter-re-HR4009-Kline_2-11-14_CCR-NLG-CAIR.pdf. In addition, consider the letters by the CCR, sent to Illinois State Senators on the Higher Education Committee, and on the Judiciary Committee, available at http://www.ccrjustice.org/files/PSLS_Letter-re-IL-Boycott-Bill_3-4-14.pdf, http://ccrjustice.org/files/CCR_Letter-to-Judiciary-Committee-re-IL-Boycott-Bill_3-18-14.pdf, and http://ccrjustice.org/files/CCR_Letter-re-IL-Boycott-RES_3-31-14.pdf. Moreover, consider the letter by the CCR, the NLG, and the Defending Dissent Foundation (DDF) sent to Maryland Senators and Delegates, available at http://www.ccrjustice.org/files/PSLS_Letter-re-MD-Boycott-Bill%20_3-3-14.pdf. See also the Defending Dissent Foundation website, http://www.defendingdissent.org/now/about/.

7. It is remarkable that already on July 11, 2011, and in light of the BDS campaign, the Israeli Parliament (hereinafter, the Knesset) passed the "Law of Prevention of Damage to State of Israel Through Boycott," available in an unofficial English translation of the law at http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf. The Israeli anti-boycott law deems it a civil wrong to call for economic,

Supporters of the BDS campaign have invoked an important precedent, the *NAACP* case,[8] as granting constitutional protection under the First Amendment to calls for academic boycott.

The 1982 *NAACP* case involves a 1966 boycott of merchants in Claiborne County, Mississippi, launched at a meeting of a local ranch of the NAACP (National Association for the Advancement of Colored People), which was attended by several hundred black people The boycott aimed at securing compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. Alongside the boycott itself, speeches were delivered to encourage non-participants to join the common cause by nonviolent picketing. However, some acts and threats of violence did occur.

The *NAACP* case concerns a tort civil lawsuit, submitted in 1969, by white merchants, requiring injunctive relief and damages against, *inter alia*, the NAACP for their losses, arguably caused by the above-mentioned boycott. The Mississippi Chancery Court found the boycotters, jointly and severally, liable for all of the asserted loss. Based on the common law tort theory, the Mississippi Supreme Court upheld the imposition of liability, thus rejecting two theories of liability as endorsed by the Chancery Court.

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cultural, or academic boycott against Israel, and/or one of its institutions and/or an area under its control, if such calls may cause economic, cultural, or academic damage. The law has been highly criticized as violating the right to free expression, leading among others these have been the Attorney General of the State of Israel and the Knesset Legal Advisor, as well as the Speaker of the Knesset. See Tomer Zarchin, "Israel Attorney General Says Boycott Law Boarders on Unconstitutionality," *Haaretz*, July 13, 2011, http://www.haaretz.com/print-edition/news/israel-s-attorney-general-says-boycott-law-borders-on-unconstitutionality-1.372916; Jonathan Lis, "Israel Passes Law Banning Calls for Boycott," *Haaretz*, July 11, 2011, http://www.haaretz.com/news/diplomacy-defense/israel-passes-law-banning-calls-for-boycott-1.372711; Reuven Rivlin, "The Parliamentary Fists of the Majority," *Haaretz*, July 15, 2011, http://www.haaretz.com/weekend/week-s-end/the-parliamentary-fists-of-the-majority-1.373411. The constitutionality of the Israeli anti-boycott law has been challenged before the High Court of Justice, a panel of nine judges. See High Court of Justice (HCJ) 5239/11 et al., *Abneri et al. v. Israel's Knesset et al.*, last heard on February 16, 2014. In principle, the Court held that the anti-boycott law is constitutional, for it meets the conditions of the Limitation Clause, as incorporated in Article 8 of the Basic-Law: Human Dignity and Liberty. Namely, the asserted violation of otherwise protected constitutional rights, has been found proportionate, and therefore constitutional. Having said that, the Court has unanimously invalidated one sub-provision of the anti-boycott law, being unconstitutional, that which allows for a tort lawsuit, in this context, even in the absence of a legal proof of damages, proved to be caused by the calls for boycott. See http://elyon1.court.gov.il/files/11/390/052/k21/11052390.k21.htm (in Hebrew).

8. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

However, this has not been the case for the Supreme Court. Insofar as the First Amendment analysis is concerned, the latter decided that: *first*, nonviolent elements of petitioners' (*inter alia*, the NAACP) activities are entitled to the protection of the First Amendment; *second*, by exercising their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change; and *third*, while states have a broader power to regulate economic activities, there is no comparable right to prohibit peaceful political activities such as the petitioners' in this case.

In the context of the First Amendment, the Court in the *NAACP* case examined solely the question as to whether boycott constitutes an expressive conduct that, based on long-standing precedents, is protected by the First Amendment. It was the Court's presumption that calls for boycott constitute "speech" and are therefore protected by the First Amendment, especially due to their nonviolent nature, as well as to their purpose to reach political and social changes. However, the Court refrained from undertaking any conceptual analysis of the basic rationales of the right to free expression. This is particularly unfortunate because the matter before us now, a proposed academic freedom, has as its target the same free expression that the Court claimed to protect in 1969.

The question cannot only involve the issue of "violent versus nonviolent" activity. Not all speeches are constitutionally construed as a First Amendment right. Instead, constitutional legal thinking recognizes three levels of "right" analysis: *first*, recognizing a particular right as constitutionally protected; *second*, defining the ambit (or the scope) of the right at stake; and *third*, examining the limits that a state may impose on the right in question.[9]

The *first* level concerns the question regarding the recognition of a particular right as constitutionally protected. This analysis presumes that not all rights are recognized as entitled to constitutional protection. Insofar as the type of the rights is concerned, while most constitutions

9. Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton UP, 2006), p. 82. Cf. Andrew Ashworth, *Principles of Criminal Law*, 2nd ed (Oxford: Clarendon Press,1995), p. 2: "The contours of criminal liability may be considered under three headings: the range of the offences [in respect of]; the scope of criminal liability [circumstances]; and the conditions of criminal liability [the required degree of fault]."

protect civil and political rights,[10] only few countries (e.g., Scandinavian countries) protect social and economic rights.[11] In the same context, while most constitutional democracies extend their constitutional protection to individual rights, few others recognize collective rights as a set of rights granted to recognized-based minorities.[12] In addition, it should be noted that extending constitutional protection to a particular type of rights does not necessarily guarantee the inclusion of the utmost number of rights under such type within the framework of the particular constitution. These differences are due not only to historical, political, and cultural differences, but also to the different levels of importance that various countries prescribe to different rights. In the context of the right to free expression, the question becomes: Is the right to free expression explicitly protected by a formal written constitution, or otherwise implicitly protected as a means of judicial interpretation of a constitutional text? In the American context, this question has been easily resolved, since the right to free speech is expressly protected, as provided by the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble . . ."

The *second* level concerns the ambit of the right. It purports to answer the question as to whether a particular constitutionally protected right is inclusive or exclusive. Namely, what forms fall within the scope of the protected right and what forms fall outside its scope. In the context of the right to free expression, the query is: Does the right to free expression deem all speeches as constitutionally protected within its premises? Within the second level, a secondary level of scrutiny might be required insofar as certain rights are concerned. This we can find for instance in the context of the right to free expression. Once the "scope" question is determined, other sub-queries can be discussed, such as that which examines the extension of the constitutional protection to particular forms of speech,

10. E.g., the right to life, the right to physical integrity, the right to dignity, the right equality, the right to privacy, the right to property, the right to vote, the right to be elected, freedom of religion, freedom from religion, freedom of speech, the freedom of association, freedom of movement, and freedom of occupation. See also the UN's International Covenant on Civil and Political Rights (1966), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

11. E.g., the right to free education, the right to health, the right to social security, the right to work, the right to an adequate standard of living. See also the UN's International Covenant on Civil and Political Rights.

12. E.g., the Canadian French minority. Collective rights for such minorities include rights of language, self-determination, educational autonomy, and religious autonomy.

e.g., protest, assembly, and association, or other forms of expressive conduct perceived as symbolic speech.[13]

Finally, the *third* level presumes that rights, even if constitutionally protected, are limited in nature, namely, they are not absolute. There are recognized important public interests that deserve to be protected by the state, even at the price of limiting other protected constitutional rights, e.g., national security, public order, and public health. The formula by which such limitation might take place depends on each constitutional system, all the more so on the constitutional importance prescribed for each particular right. In the American context, limiting the right to free expression is allowed only to serve a compelling state interest that cannot be realized by less intrusive means.[14] This has not been the case for economic rights, which can be justifiably infringed solely if the infringement is reasonably related to a legitimate public interest.[15]

In the *NAACP* case, the Court failed to adequately discuss the "scope" question. Indeed, the Court examined whether boycott constitutes a form of expressive conduct that deserves to be constitutionally protection under the First Amendment. However, this is nothing but the secondary level of a constitutional "right" analysis under the above-mentioned second level of analysis. The Court should have been concerned, first and before all, with the scope of the right to free expression under the First Amendment. This question could have been easily and simply addressed, this way or the other, by inquiring into the classic rationales of the right to free expression. Obviously, had the Court reached a decision by which calls for boycott are not constitutionally protected under the First Amendment, then it would be unnecessary for the Court to examine the constitutionality of boycott, allegedly deemed as expressive conduct otherwise protected by the First Amendment. Let us then turn to discuss that which the Court failed to address.

13. For a thorough analysis concerning the notion of expressive-conduct, see Mohammed S. Wattad, "John Hart Ely: An Influential Constitutional Scholar—Protecting 'Flag Desecration' Under the First Amendment" *Barry Law Review* 17, no. 2 (2012): 163–77; Mohammed S. Wattad, "The Meaning of Wrongdoing: A Crime of Disrespecting the Flag: Grounds for Preserving 'National Unity'?" *San Diego International Law Journal* 10, no. 1 (2008): 5–62.

14. See, e.g., *Shapiro* v. *Thompson*, 294 U.S. 618 (1969). See also Kent Greenawalt, *Fighting Words, Individuals, Communities, and Liberties of Speech* (Princeton, NJ: Princeton UP, 1995), p. 16.

15. See, e.g., *Railway Express Agency Inc.* v. *New York*, 366 U.S. 106 (1949).

II. Romantics of Free Speech[16]

Constitutional democracies, leading among them the United States, grant the right to free expression a special normative status. In the clash between the right to free expression and other state interests, the former "trumps" the latter, unless, under rare circumstances, a compelling state interest is established, given that other less coercive means are not available.[17] So has been the case for the American Bill of Rights.[18]

The four classic rationales for protecting the right to free expression are: *first*, the desire to expose the truth; *second*, the need for human self-fulfillment; *third*, a prerequisite for democracy; and *fourth*, human dignity and equality (hereinafter: the classic rationales).[19] Therefore, it is crucial to understand that for a speech to be constitutionally protected, it must, first and foremost, meet the classic rationales.

First, freedom of expression must be ensured in order to allow for different views and ideas to compete with each other. From this competition—and not from the regime's dictate of a single truth—the truth shall surface and emerge.[20]

Second, the spiritual and intellectual development of man is based on his ability to freely formulate his worldviews.[21] The state must provide every person with the security to give expression to his personal characteristics and capabilities, to develop his ego to the fullest extent possible, and to state his mind, in order that life may appear to him worthwhile.[22]

Third, free voicing of opinions and the unrestricted exchange of ideas among people is a *conditio sine qua non* for the existence of a political and social regime, in which the citizen can weigh up, without fear, what is, to the best of his understanding, required for the benefit and welfare of both the public, as well as the individual, and how to ensure the continued

16. On the theory of romanticism, see Isaiah Berlin, *The Roots of Romanticism*, ed. Henry Hardy (Princeton, NJ: Princeton UP, 1999). In the context of the right to free speech, I provide the romanticism theory as binoculars by which I can view traditional and classic views on the rationales behind protecting the right to free expression, through modern ones.

17. See note 15 above. See also Wattad, *The Meaning of Wrongdoing*, pp. 24–25.

18. See *Schenk v. United States*, 249 U.S. 47 (1919).

19. See Wattad, *The Meaning of Wrongdoing*, pp. 21–24; Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience," *Harvard Law Review* 117, no. 6 (2004): 1785.

20. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Justice Oliver W. Holmes); *Dennis* v. *United States*, 341 U.S. 494 (1950).

21. *Cohen* v. *California*, 403 U.S. 15 (1971).

22. Ernest Barker, *Reflections on Government* (London: Oxford UP, 1941), pp. 14–19.

existence of the democratic regime and the political framework in which it operates.[23]

Fourth, the core meaning of dignity is that social order must reflect recognition of the equal worth of all persons.[24] Dignity expresses at least the basic meaning of equality.[25] Dominantly among other scholars, Ronald Dworkin, as well as Kent Greenawalt,[26] has argued that the government may not discriminate between citizens by permitting some views and denying others. Equality demands that everyone's opinion be given a chance for influence.[27]

III. Classics on Academic Freedom

The right to academic freedom is the right of academic institutions to engage in academic research and pedagogy. It provides academic institutions with the highest degree of protection against any intimidation in the wake of exercising their academic duties toward society in general and students in particular. Therefore, it grants academic institutions the required autonomy to act without fearing external influence on its academic life, especially not by the state and/or other institutions that might be financially supporting them. Consequently, the right to academic freedom is also the right of academics—either as individuals or as a collective—to secure their academic autonomy by being granted the required protected academic space, where they may act professionally without fearing the academic institution that employs them.[28]

However, insofar as their professions are concerned, academic freedom not only grants academics the required liberty to act within and/or

23. Thomas I. Emerson, "Toward A General Theory of the First Amendment," *Yale Law Journal* 72 (1963): 885–89.

24. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard UP, 1977), pp. 195–213; Frederick Schauer, "Speaking of Dignity," in *The Constitution of Rights: Human Dignity and American Values*, ed. Michael J. Mayer and William A. Parent, eds. (Ithaca, NY: Cornell UP, 1992), pp. 178–79.

25. George P. Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (Oxford: Oxford UP, 2001), pp. 106–7.

26. See ibid. See also Kent Greenawalt, "Free Speech Justifications," *Columbia Law Review* 89 (1989): 153; Kent Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford UP, 1989), pp. 27–28, 33–34.

27. See Dworkin, *Taking Rights Seriously*, p. 200. See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard UP, 1996), pp. 78, 200.

28. See Amnon Rubinstein, "Academic Freedom of Speech," *Mishpat Ve'Asakim* [Law and Business] 13 (2010): 12 (Hebrew).

outside their institution. It also imposes on them a duty to perform their professional work in compliance with the accepted academic professional criteria.

The right to academic freedom derives from the right to free expression. Within the spectrum of protected speech under the right to free expression, academic freedom should be protected, in my opinion, to the utmost level. This is especially due to the powerful professionalism that academics exercise. Academics are capable of influencing and crystallizing our society, thereby generating political, social, cultural, and economic changes.

Like free expression, academic freedom must comply with the rationales that justify protecting academic freedom at the highest constitutional level. These include the classic rationales for protecting free expression, as well as the particular rationales relevant to academic freedom. In addition, it is worth remembering that academic freedom, due to its powerful professionalism, must also comply with academic professional standards, to which academics are subject when engaged in their expertise.[29]

If protecting the right to free expression is urgently required because of the potential of revealing the truth—by creating a marketplace of ideas, where opposing views compete—this rationale is of more significance in the context of academic freedom. It is in academia that academics inquire into the truth, while also adhering to high professional academic standards of research. Such high standards require confronting different academic views, especially when they conflict, since the views of others may disprove one's own views. This is every academic's duty. Academics cannot simply assume that they are right and that others are wrong; they must be open to criticism from other academics. This can occur in good faith only if an adequate discourse is maintained between opposing scholars.

In addition, it is also by protecting academic freedom that an individual academic achieves fulfillment as an educated person, thus developing his arguments, freely and without suppression, through independent academic research aimed at generating changes in science, social life, law, educational system, economics, and other fields.

Furthermore, in a democratic system, and especially in constitutional democracies, it is of the utmost importance to protect not only the views of the majority but also those of the minority. This applies in the academic world as well. Minority opinions ought to be protected and thus should not be silenced.

29. Consider ibid., pp. 12–13, 18–20.

Because of their powerful professionalism, academics must be treated as ends. Their importance to the society is a meaningful interest that must be guaranteed by the state. They cannot, and should not, be treated merely as means to achieve other goals, regardless of how important these goals are. To this extent, academic freedom is dignified, thus demanding the treatment of academics in an equal manner, as well as refraining from discriminating between academics on the basis of irrelevant considerations, e.g., political views, nationality, ethnicity, religious beliefs, gender, sexual orientation, age, and other biased criteria.

Finally, it is my view that, like the right to free expression, the right to academic freedom cannot be limited outside of establishing a compelling state interest and in the absence of less coercive means. This approach has been adopted especially by the United States.[30]

IV. Against Calls for Academic Boycott

The First Amendment appears to speak in absolute terms.[31] The Court's interpretation of the First Amendment is that government can rarely—and only for the most compelling reasons—invoke its power to regulate speech. Not only does the U.S. Constitution expressly protect the right to free expression, but it also grants it the utmost constitutional protection. This is true as well in regard to the right to academic freedom, deemed as a special derivative right of the First Amendment.[32] However, as argued above, the question is not only one of recognition but also one of scope.

In this light, I proceed now to examine the compatibility of the calls for academic boycott against Israeli academic institutions in the context of the classic rationales of the right to free expression and to the peculiar rationales of the right to academic freedom.

A. Silenced Opinions and the Desire to Expose the Truth

Freedom of speech is about developing a dialogue between opposing opinions, wherein each claims to be the right one. Freedom of speech is

30. See William W. Van Alstyne, "The First Amendment and Academic Freedom in the Supreme Court: An Unhurried Historical Review," *Law & Contemporary Problems* 53, no. 3 (1990): 79.

31. John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 6th ed., (St. Paul, MN: West Group, 2000), p. 1063; Randall P. Bezanson, *Speech Stories: How Free Can Speech Be?* (New York: NYU Press, 1998), p. 1; Emerson, "Toward A General Theory of the First Amendment," p. 894.

32. See Van Alstyne, "The First Amendment and Academic Freedom."

not about favorably received opinions; for this, no need for freedom is prerequisite. As described earlier, freedom of speech is urgently required when offending, shocking, or disturbing opinions are at stake. Monologues could be misleading; they may create the illusion that they represent truth because they are not challenged.

The concept of an academic boycott stands in contradiction to the notion of dialogue. Academic boycott is nothing but the adherence to the boycotters' monologue. Monologues associated with boycott suggest the existence of a single indisputable truth. This is a story of a monopoly claim on truth, which eliminates possible competition, in particular any fair competition, over the truth.

Obviously, dialogues, unlike monologues, create a real chance for the truth to surface and emerge. At the end of the day, an academic boycott resembles an authoritarian regime's dictate of a single "truth." This is exactly why the right to freedom of expression benefits from the highest degree of constitutional protection.

Proponents of an academic boycott either believe that their argument is the only right one, or they are convinced that by constantly repeating their own argument and boycotting their opponent's, the former will prevail. In my view, either option is wrong, even if the boycotters honestly believe otherwise. Academic boycotters aspire to disseminating their own opinion while silencing opposing opinions. Yet following Mill in *On Liberty*,[33] I argue: *first*, a boycotted opinion might be true, and thus denying it assumes that the boycotters' opinion lays claim to infallibility; *second*, even if the boycotted opinion is to be found wrong, still there may be a portion of truth in it, as the boycotters' opinion is rarely if ever the whole truth, and therefore a confrontation between the two opinions is the only way to provide that truth has any chance of being reached; and *third*, even if the boycotters' opinion is the whole truth, unless it is suffered to be, and actually is, vigorously and earnestly confronted with the boycotted opinion, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or appreciation of its rational grounds.

Ultimately it is a marketplace of ideas that is at stake, in which the content of speech is not by the state.[34] Opinions in opposition both have

33. John Stuart Mill, *On Liberty*, ed. Edward Alexander (Peterborough, Ontario: Broadview Press, 1999), pp. 97–98.

34. Ronald J. Krotoszynski, Jr., *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (New York: NYU Press, 2006), pp. 14–15.

claims to legitimacy and the option of being expressed. In contrast, an academic boycott assumes that only the boycotters' views are legitimate, while the boycotted opinions are illegitimate and should therefore be excluded from any consideration.

This matter is equally important for the right to free expression as it is for the right to academic freedom. It would be extremely contradictory to the nature and the rationales of academic freedom to protect calls that silence other academics from exercising their academic freedom, especially by boycotting them.[35] Such a silencing tactic eradicates the boycotted academics' right to academic freedom, while protecting the boycotters' claims from the likelihood of any serious intellectual challenge. It would generally impoverish the character of scholarly and public exchange.

B. Academic Freedom and the Need for Self-Fulfillment

American constitutional jurisprudence suggests a spectrum of expression that enjoys the constitutional protection of the First Amendment.[36] The classic protected expression is political speech; others are, *inter alia*, commercial,[37] artistic, and symbolic expressions.[38] The degree of constitutional protection differs between types of speech, depending on the extent to which the speech is intrinsically related to the development and fulfillment of one's personal potential.

Academic freedom, like political speech, is highly related to the development and fulfillment of the academic's personal and professional potential. Therefore, the nature of academic freedom is not instrumental but rather significantly substantive. Protecting the right to academic freedom of the individual academic is necessary for him to fulfill himself as a researcher who respects academic standards exclusively rather than institutional mandates. The self-fulfillment of an individual academic takes place through his ability to convey messages that can compete against other

35. See Rubinstein, "Academic Freedom of Speech," pp. 45–48; Russell A. Berman, "Scholars against Scholarship: The Boycott as an Infringement of Academic Culture," in Cary Nelson and Gabriel Noah Brahm, eds., *The Case against Academic Boycotts of Israel* (Chicago: MLA Members for Scholars Rights, 2015), p. 49.

36. *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942); *Miller* v. *California*, 413 U.S. 15, 24 (1973); *New York* v. *Feber*, 458 U.S. 747, 758 (1982).

37. *Valentine* v. *Chrestenson*, 316 U.S. 52, (1942); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Bread* v. *Alexandria*, 341 U.S. 622 (1951).

38. David S. Bogen, *Bulwark of Liberty: The Court and the First Amendment* (Port Washington, NY: Associated Faculty Press, 1984), p. 88.

views. Therefore excluding calls for an academic boycott from the scope of the right to academic freedom represents a justifiable protection of the right of an academic to professional self-fulfillment.[39] The legitimate limitation on one's freedom involves the infringement on the freedom of others; yet precisely such infringement is at the heart of an academic boycott.

C. A Prerequisite for Democracy

It should be emphasized that the right to free expression is not merely about the right to talk; it also about the right to attempt to convince others of one's views. People do not need a right, nor do they need a freedom, in order simply to be able to talk. What they really need is to be protected from state repression and suppression when trying to reach others, thus confronting them with their oppositional views.

This desirable end can be achieved only within a constitutional, and not merely a formal or parliamentary, democracy. Formal democracy is the rule of the majority, but constitutional democracy considers the voice of the majority as one factor in determining that which is fair and just. In a formal democracy, what the legislature says the law is becomes binding law. In constitutional democracy, the legislature's actions are scrutinized for their compatibility with the fundamental principles of fairness, reason, justice, and the good. Formal democracy represents the rule of law, while constitutional democracy is driven by the rule of Law. There are two concepts of law that are clearly recognized in other languages but not in English. One term is "law" (*Gesetz* in German, *loi* French, *ley* Spanish, and *hoq* in Hebrew), which expresses the idea of laws enacted by, e.g., the legislature. The other term is "Law" with a capital "L" (*Recht* in German, *droit* in French, *pravo* in Russian, *derecho* in Spanish, and *mishpat* in Hebrew), which expresses a higher concept of Law as binding because it refers to the good and just law.[40]

As far as an academic boycott is concerned, even if I were to assume that a BDS supporter has the whole, and not only a part, of the truth on his side, constitutional democracy nonetheless provides a protection to the less favorable views, those which are boycotted, thus allowing them to

39. For a comprehensive comparative study on the right to academic freedom, see Rubinstein, "Academic Freedom of Speech."

40. Mohammed S. Wattad, *The Meaning of Criminal Law: Three Tenets on American and Comparative Constitutional Aspects of Substantive Criminal Law* (Saarbrücken: VDM Verlag, 2008), pp. 197–98.

compete over the truth and granting their proponents the opportunity to convince others of their views. Denying such an opportunity limits the possibility of political and social change.

D. Human Dignity and Equality

While the right to dignity does not appear in the U.S. Constitution, the concept of dignity is not strange to the American constitutional legacy. It has deep roots in the Equal Protection Clause of the Fourteenth Amendment,[41] as implicitly recognized by Justice Earl Warren, while addressing the constitutionality question of the "separate but equal" doctrine:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[42]

The meaning of human dignity depends on the context within which it is discussed. In society, human dignity requires more than guaranteeing the basic characteristics of humanity as created in God's image. Rather, it also requires that all individuals be treated as having equal worth. For such treatment to be achieved, individuals must be treated first and foremost as ends but not means. This is the basic meaning of human dignity, which, if denied, is a humiliation that cannot be morally and constitutionally justified.[43]

It has been the intention of all resolutions that endorsed the BDS campaign to boycott Israeli academic institutions in order to force Israel to comply with international law and to refrain from alleged violations of the Palestinians' human rights. This has been explicitly and clearly expressed through the language of these resolutions. To this extent, Israeli academic institutions have been treated as a means for the sake of reaching another end, as good and worthy as this end might be. This becomes more true in light of the boycotters' explicit assumption that all Israeli academics are guilty simply by virtue of their association with an Israeli academic institution.

41. Mohammed S. Wattad, *Revisiting Plessy and Brown: Why "Separate But Equal" Cannot Be Equal* (Toronto: Munk Centre for International Studies, University of Toronto, 2007).

42. See *Brown* v. *Board of Education of Topeka et al.*, 347 U.S. 483, 494 (1954).

43. See Wattad, *The Meaning of Criminal Law*, p. 198.

Calling for the boycott of Israeli academic institutions violates academic freedom by treating them exclusively as an object of the state's criticized policies. Yet none of the BDS resolutions has provided any compelling argument that associates Israeli academic institutions with any alleged state violation of international obligations and/or rights of the Palestinians inside and outside Israel. To the contrary, BDS proponents have failed to address the strong opposition to calls for academic boycott that have been expressed by leading Palestinian scholars,[44] just as they have denied productive academic collaborations between Israeli academic institutions and Palestinian academic institutions.[45]

To argue that the BDS campaign does not target individual Israeli academics but solely Israeli academic institutions, especially official academic representatives of these institutions, is an artificial assertion. Ultimately each individual academic is an official representative of his institution, since he is affiliated with his institution, he receives his salary from his institution, his research is mostly funded by his institution, and it is very likely that the expenses for his participation in international conferences, including his travel expenses, are funded by his institution. Beyond that, all Israeli universities are public institutions funded by the State of Israel.

Hence, allowing certain academics to call for an academic boycott unlawfully discriminates against those academics whose views are boycotted. They are been discriminated against solely because they are affiliated with Israeli academic institutions. Yet academic freedom demands the possibility of an equal contest between academics, not the privileging of one academic over another. Such discrimination is based on irrelevant considerations and thus treats academics as means rather than ends, as objects and not subjects. This is exactly what humiliation and subordination is all about; this is what violates the basic meaning of human dignity; and this is why appeals to an academic boycott represent a threat to free speech, as well as to academic freedom.

44. E.g., Prof. Sari Nusseibeh, President of the Palestinian Al-Quds University. See "Palestinian University President Comes out against Boycott of Israeli Academics," *Haaretz*, June 17, 2006, http://www.haaretz.com/news/palestinian-university-president-comes-out-against-boycott-of-israeli-academics-1.190585.

45. See, e.g., Walid Salem and Adi Kaufman, *Proposal for Principles Alignment for Israeli-Palestinian Academic Cooperation: Translating Our Co-Commitment to Academic Freedom* (2007), published by the Palestinian Center to the Distribution of Democracy and Community Development, and the Israeli Program on "Dialogue Between Civic Societies," under the auspices of UNISCO, available at http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/marach-shituf.pdf (Hebrew).

V. Conclusions

It is only rational, plausible, reasonable, logical, and proportionate to outlaw political parties that participate in the democratic game only in order to establish tyranny once they win a democratic election. This is the well-known and justified Western notion of "defensive democracy."[46]

The same holds for the right to free expression—including its other derivative rights, such as the right to academic freedom—as well as to any other constitutional right. The First Amendment is not a "suicide pact."[47] The constitutional protection of human rights has become one of the most meaningful concerns of Western democracies, especially in the aftermath of the World War II. However, human rights, as significant as they might be, are not absolute.[48] They do not protect practices that otherwise undermine their own existence.

This is the case for calls to support academic boycotts in general, and those directed at Israeli academic institutions in particular. To be clear, by suggesting that calls for academic boycott be excluded from the scope of the right to free expression, I am not therefore advocating the criminalization of calls for academic boycott,[49] nor do I propose subjecting those who support such calls to civil proceedings. There are less coercive disciplinary means through which such matters can be regulated and resolved with regard to the harm done to the fundamental exercise of academic freedom by others. In addition, the state cannot, and shall not, participate in the funding of any academic institution or association that supports calls for academic boycott. However, this matter goes beyond the scope of this article.

By opposing calls for academic boycott, I am not arguing that the boycotters may not express their views and assertions on the subject matter of their boycotts. Rather, it has been my contention that the discussion must be fair, as correctly viewed by Mill: "[T]he free expression of all opinions should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion."[50] Calls for academic boycott

46. See Wattad, *The Meaning of Criminal Law*, p. 191.

47. See *Terminiello* v. *Chicago*, 337 U.S. 1, 36 (1949) (Justice Robert Jackson).

48. The only absolute right I can think of is the right to life. See Mohammed S. Wattad, "The Constitutionalist Funeral of the American Death Penalty," *Uluslararasi Suçlar Ve Tarih* [Journal of International Crime and History] 7–8 (2009): 115–50.

49. For a comprehensive theory on this regard, see Wattad, "The Meaning of Wrongdoing."

50. See Mill, *On Liberty*, p. 98.

generate a call for the silencing of discussions, with the consequence that each side speaks only to itself, thus missing the goods and benefits that society would have otherwise gained by substantively comprehending and respecting the classic rationales of the right to free expression, as well as the peculiar rationales of the right to academic freedom.

It has been said that when the weapons speak, the muses fall silent. However, in my view, especially when the cannons roar, the brain must not stop functioning. I am well aware of the severe criticism with which I am charging American professional associations that have endorsed the BDS campaign. However, this has not been a political critique, but rather one of legal thought. It takes intelligence, reason, justice, and fairness to distinguish between right and wrong.

To conclude, it is worth noting that most of the American professional associations that endorsed the BDS campaign asserted that the United States has been an accomplice, directly and indirectly, with Israel in violating Palestinians' rights, as well as infringing other international obligations toward the Palestinians. Insofar as academic decency is concerned, if these associations were serious in calling for boycotts of Israeli academic institutions, one would plausibly have expected them to issue further resolutions calling for the boycott of American academic institutions. Why do not they do so? Indeed, this is when academic decency becomes academic hypocrisy.