

Starting a Conversation or Sending a Message: The Uses & Abuses of State Anti-BDS Speech

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“If you boycott against Israel, New York will boycott you,” declared New York Governor Andrew Cuomo as he announced an executive order this past June in response to the Boycott, Divestment, and Sanctions (BDS) movement¹ at New York City’s Harvard Club.² The audience, composed of Jewish leaders and legislators, responded with spirited applause.³ Cuomo’s order directs the Commissioner of the Office of General Services to compile a list of institutions and companies that participate in BDS activity and instructs state entities to divest their assets from any institution or company on the list.⁴ To some, this order “sends a strong message” that New York rejects economic warfare against Israel.⁵ To others, it represents an attack on First Amendment values—a form of unconstitutional “legal warfare” against a movement with an undeniable right to express itself in the form of political boycotts.⁶

While Cuomo is just one of two governors to have passed an executive order in opposition to the BDS movement,⁷ many states have passed anti-

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1. The BDS movement advocates for boycotts, divestment, and sanctions against Israel. See *infra* note 14 and accompanying text.

2. Jesse McKinley, *Cuomo to Halt State Business with Groups that Back Boycott of Israel*, N.Y. TIMES (June 5, 2016), http://www.nytimes.com/2016/06/06/nyregion/cuomo-new-york-israel-boycott-bds-movement.html?_r=0.

3. *Governor Cuomo Signs Executive Order No. 157*, SOUNDCLOUD (June 5, 2016), <https://soundcloud.com/nygovcuomo/governor-cuomo-signs-executive-order-no-157>.

4. N.Y. Exec., Order No. 157 (June 5, 2016), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf. The order defines BDS activity as “to engage in any activity, or to promote others to engage in any activity, that is intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel or persons doing business with Israel for purposes of coercing political action by, or imposing policy positions on, the government of Israel.” *Id.*

5. Alan Dershowitz, *New York Is Right to Counterboycott Anti-Israel Boycotters*, THE DAILY BEAST (June 6, 2016, 3:10 PM), <http://www.thedailybeast.com/articles/2016/06/06/new-york-is-right-to-blacklist-anti-israel-boycotters.html>.

6. McKinley, *supra* note 2 (quoting BDS movement founder Omar Barghouti). See also Yousef Munayyer, *Governor Cuomo, Put Me on Your BDS Blacklist*, BDSMOVEMENT.NET (June 10, 2016), <https://bdsmovement.net/news/governor-cuomo-put-me-your-bds-blacklist>; Jill Jacobs, Opinion, *Anti-BDS Law Can’t Be Pro-Israel if It Tramples on Free Speech*, JEWISH TELEGRAPHIC AGENCY (June 14, 2016, 12:10 PM), <http://www.jta.org/2016/06/14/news-opinion/opinion/anti-bds-law-cant-be-pro-israel-if-it-tramples-on-free-speech>.

7. In October 2017, Maryland Governor Larry Hogan signed an anti-BDS executive order. See

BDS laws,⁸ which has generated debate on their constitutionality.⁹ The focus of that debate should shift to the effects of state speech¹⁰ surrounding the laws. Although there are no constitutional limits on state speech in the BDS context,¹¹ state speakers have a social and civic duty to speak thoughtfully because their speech becomes inevitably and inextricably attached to anti-BDS laws and has a powerful stigmatizing effect. In these instances, what may otherwise be considered simply expressive state speech becomes intertwined with coercive state legislation.¹² In order to counter a pervasive lack of dialogue and resulting tensions in communities, state speech should welcome conversation rather than send a message. And when it does speak, the state should use its persuasive capacity by making reasoned arguments about the specific harms of BDS and why a strong relationship with Israel is important, rather than stigmatizing individuals and encouraging further division with “us vs. them” rhetoric.

Part I of this Note will introduce the BDS movement, outlining its origins, goals, practices, and effects. Part I will also consider various state-level legislative and executive responses to the BDS movement and examine the rhetoric of state speech surrounding anti-BDS laws. Part II of this Note will analyze the implications of such rhetoric and propose that

Md. Exec., Order No. 01.01.2017.25 (Oct. 23, 2017), https://content.govdelivery.com/attachments/MDGOV/2017/10/23/file_attachments/900819/Executive%2BOrder%2B01.01.2017.25.pdf. Other governors have expressed opposition to BDS. The American Jewish Committee circulated a letter denouncing BDS that, as of May 4, 2017, has been signed by the governors of all fifty states. *Governors United Against BDS*, AJC, https://www.ajc.org/sites/default/files/pdf/2017-09/GOVERNORS_AGAINST_BDS_STATEMENT.PDF (last visited Sept. 1, 2017).

8. See *infra* note 75 and accompanying text.

9. The constitutionality of state anti-BDS laws is outside the scope of this Note. See generally Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 (2016). For a discussion of the constitutionality of South Carolina’s anti-BDS law, see S.C. Code Ann. S 11-35-5300 (2015): *South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts*, 129 HARV. L. REV. 2029 (2016). For a discussion of the constitutionality of Cuomo’s order, see Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, THE NEW YORKER (June 16, 2016), <http://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott>.

10. As used in this Note, state speech is synonymous with government speech. Specifically, state speech refers to statements made by state legislators in their official capacity.

11. See *infra* note 107 and accompanying text.

12. See COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?* (2012) (differentiating between the state acting in its coercive capacity and expressive capacity).

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states improve their anti-BDS speech by avoiding two problematic tactics: “conversation stoppers”¹³ and aggressive, militarized language.

I. HISTORY

A. *The BDS Movement*

In 2005, Palestinian civil society organizations issued an open letter urging the international community to boycott, divest from, and sanction Israel.¹⁴ The BDS movement’s founders developed these “non-violent pressure” tactics¹⁵ to force Israel to end what the BDS movement calls “a regime of settler colonialism, apartheid and occupation over the Palestinian people.”¹⁶

The BDS movement defines itself as a “Palestinian-led movement for freedom, justice, and equality.”¹⁷ The movement’s stated goals are to “end international support for Israeli violations of international law by forcing companies, institutions and governments to change their policies,” to isolate Israeli companies and institutions so that “Israel will find it more difficult to oppress Palestinians,” and to “raise awareness about how Israel oppresses the Palestinian people.”¹⁸ To achieve these goals, the BDS movement endorses academic, cultural, and economic boycotts.¹⁹

The BDS movement advocates for broad boycotts of Israeli academic institutions.²⁰ “Events, activities, or situations” that violate an academic

13. See *infra* note 125 and accompanying text.

14. *What Is BDS?*, BDSMOVEMENT.NET, <https://bdsmovement.net/what-is-bds> (last visited Oct. 12, 2016); *Open Letter: Palestinian Civil Society Call for BDS*, BDSMOVEMENT.NET, <https://bdsmovement.net/call> (last visited Oct. 12, 2016).

15. These tactics are modeled on opposition to South African apartheid. *Open Letter: Palestinian Civil Society Call for BDS*, *supra* note 14.

16. *What Is BDS?*, *supra* note 14.

17. *What Is BDS?*, *supra* note 14.

18. *What Is BDS?*, *supra* note 14.

19. *What Is BDS?*, *supra* note 14.

20. *PACBI Guidelines for the International Academic Boycott of Israel*, PALESTINIAN CAMPAIGN FOR THE ACAD. & CULTURAL BOYCOTT OF ISR. (July 31, 2014), <http://www.pacbi.org/etemplate.php?id=1108> (“These institutions, all their activities, and all the activities they sponsor or support must be boycotted. Projects with all Israeli academic institutions should come to an end, as was the case with all South African academic institutions under apartheid.”). BDS’s academic and cultural boycott campaigns are overseen by the Palestinian Campaign for the Academic and Cultural Boycott of Israel (PACBI). *Id.*

boycott include study abroad programs housed at Israeli universities, academic projects funded by Israel or its lobby groups, and “normalization projects.”²¹ Normalization projects are defined as “projects . . . that are designed explicitly to bring together Palestinians/Arabs and Israelis so they can present their respective narratives or perspectives, or to work toward reconciliation without addressing the root causes of injustice and the requirements of justice.”²² Such “joint projects” are exempt from the boycott if “the project/activity is one of ‘co-resistance’ rather than co-existence.”²³ In December 2013, the American Studies Association (ASA), a group of scholars devoted to the interdisciplinary study of American culture and history, voted to support BDS’s academic boycott campaign.²⁴

Additionally, the BDS movement advocates for a broad boycott of Israeli cultural institutions, including “performing art companies, music groups, film organizations, writers’ unions and festivals.”²⁵ Guidelines for cultural boycott participants state that, as a general rule, Israeli cultural institutions are complicit in denying Palestinians basic rights, unless proven otherwise.²⁶ As such,

[I]nternational artists and cultural workers are urged not to extend recognition in any way to Israeli cultural organizations by exhibiting, presenting, and showcasing their work (e.g. films, installations, literary works); lecturing or performing at or in cooperation with complicit Israeli cultural institutions or events, and

21. *Id.*

22. *Id.*

23. *Id.*

24. Valerie Strauss, *U.S. Academic Group Votes to Boycott Israeli Universities*, WASH. POST: ANSWER SHEET (Dec. 16, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/16/u-s-academic-group-votes-to-boycott-israeli-universities/> (citing the ASA resolution) (“The [ASA] endorses and will honor the call of Palestinian civil society for a boycott of Israeli academic institutions.”). In April 2016, four members of the ASA filed suit, alleging that the boycott violates D.C. law pertaining to nonprofit corporations in that an academic boycott of a foreign country is beyond the scope of the ASA’s purpose as defined in its corporate charter. *Bronner v. Dugan*, No. 16-740 (D.D.C. filed Apr. 20, 2016). Defendants, council and committee members of the ASA, moved to dismiss on the ground that the complaint violates Defendants’ First Amendment rights. *Id.*

25. *PACBI Guidelines for the International Cultural Boycott of Israel*, PALESTINIAN CAMPAIGN FOR THE ACAD. & CULTURAL BOYCOTT OF ISR. (July 31, 2014), <http://www.pacbi.org/etemplate.php?id=1047>.

26. *Id.*

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granting permission for the publication, exhibition or screening of such work by such institutions.²⁷

In addition to academic and cultural boycotts, economic boycotts are a third component of the “B” in BDS. Economic boycotts “aim . . . to persuade private companies to end their participation in Israel’s crimes.”²⁸ BDS encourages “targeted consumer boycotts” of produce grown in Israel, Israeli exports such as Ahava cosmetics and SodaStream drink machines, and companies, such as Caterpillar and Hewlett Packard, that the movement alleges “play a clear and direct role in Israel’s crimes” against Palestinians.²⁹ In addition, BDS advocates for private banks and bodies, such as public pension funds and churches, to divest from Israeli companies.³⁰

BDS also calls for “student solidarity” campaigns on college campuses around the world.³¹ The BDS website encourages students to pass a resolution through student government in support of BDS, organize a petition calling for divestment from Israeli companies or international companies associated with Israel, or “build pressure” on their universities through issuing an open letter.³² On college campuses, BDS is spearheaded by Students for Justice in Palestine (SJP).³³ In addition to participating in the activities encouraged on the BDS movement’s website, SJP protests events organized by pro-Israel student organizations and hosts

27. *Id.*

28. *Economic Boycott*, BDSMOVEMENT.NET, <https://bdsmovement.net/economic-boycott> (last visited Oct. 12, 2016).

29. *Get Involved: Know What to Boycott*, BDSMOVEMENT.NET, <https://bdsmovement.net/get-involved/what-to-boycott> (last visited Nov. 22, 2017) (asserting “Caterpillar bulldozers are regularly used in the demolition of Palestinian homes and farms” and Sabra “operates a bottling plant in the Israeli-occupied Syrian Golan Heights”).

30. *Id.*

31. *Student Solidarity*, BDSMOVEMENT.NET, <https://bdsmovement.net/student-solidarity> (last visited Oct. 12, 2016).

32. *Id.*

33. ANTI-DEFAMATION LEAGUE, PROFILE: STUDENTS FOR JUSTICE IN PALESTINE (2015), <http://www.adl.org/assets/pdf/israel-international/sjp-2015-backgroundunder.pdf> (“SJP chapters throughout the U.S. routinely initiate [BDS] campaigns against corporations and individuals that do business with Israel and frequently organize events many of which accuse Israel of war crimes, ethnic cleansing, and genocide.”). As of March 2017, SJP had more than 189 chapters at universities in the United States. *Campuses With Chapters of Students for Justice in Palestine*, AMCHAINITATIVE.ORG, <https://amchainitiative.org/sjp-chapters> (last visited Nov. 22, 2017).

“Israel Apartheid/Palestine Awareness week.”³⁴

While the BDS movement celebrates its “growth and success,” announcing that more than thirty United States and eleven Canadian student associations have voted in favor of divestment resolutions,³⁵ campus watchdogs and civil rights groups express grave concerns about the consequences for Jews and pro-Israel students. The Anti-Defamation League (ADL) finds that “BDS campaigns give rise to tensions in communities—particularly on college campuses—that can result in harassment or intimidation of Jews and Israel supporters, including overt anti-Semitic expression and acts.”³⁶ One watchdog group, the AMCHA Initiative,³⁷ similarly reports that anti-Semitism becomes increasingly more prevalent as BDS activities on college campuses increase.³⁸ According to the Initiative’s co-founder, Tammi Rossman-Benjamin, “[d]ivestment resolutions and campaigns go hand-in-hand in creating a very hostile environment for Jewish students that manifests in many acts

34. *Controversial Groups*, CAMERA ON CAMPUS, http://www.cameraoncampus.org/resources/controversial-groups.html#_V_7NxpMrLBI (last visited Nov. 22, 2017). “Israeli Apartheid Week (IAW) is an international series of events that seeks to . . . build support for the growing [BDS] Movement.” *Israeli Apartheid Week*, APARTHEIDWEEK.ORG, <http://apartheidweek.org/> (last visited Nov. 22, 2017). During past Israel Apartheid Weeks, participants have erected mock “apartheid walls,” slipped mock eviction notices under dorm room doors, and set up mock Israeli checkpoints. *Israel Apartheid Week*, ZIONIST ORG. OF AM., <http://campus.zoa.org/israel-apartheid-week/> (last visited Nov. 2, 2016).

35. *What Is BDS?*, *supra* note 14.

36. ANTI-DEFAMATION LEAGUE, BDS: THE GLOBAL CAMPAIGN TO DELEGITIMIZE ISRAEL (2016), <http://www.adl.org/assets/pdf/israel-international/israel--middle-east/bds-global-campaign-to-delegitimize-israel.pdf>. The State Department’s definition of anti-Semitism includes demonizing, applying double standards for, and delegitimizing Israel. U.S. DEP’T OF STATE, FACT SHEET: SPECIAL ENVOY TO MONITOR AND COMBAT ANTI-SEMITISM (2010), <https://2009-2017.state.gov/documents/organization/156684.pdf>.

37. *See About AMCHA Initiative*, AMCHAINITIAIVE.ORG, <http://www.amchainitiative.org/about/> (last visited Feb. 7, 2017) (AMCHA is the Hebrew word meaning “your people” and also connotes “grassroots,” “the masses,” and “ordinary people.”).

The AMCHA Initiative “combats, monitors and documents antisemitism at institutions of higher education in America.” Lea Speyer, *Campus Watchdog: Jewish Students Single Largest Target of Systematic Suppression of Civil Rights at American Universities*, ALGEMEINER (July 26, 2016, 2:38 PM), <http://www.algemeiner.com/2016/07/26/campus-watchdog-jewish-students-single-largest-target-of-systematic-suppression-of-civil-rights-at-american-universities-interview/>.

38. Speyer, *supra* note 37 (reporting AMCHA Initiative’s finding that “almost all schools that had a dramatic increase in antisemitism that was statistically significant all had divestment resolutions happening during that time period”). *See also Antisemitism Tracker*, AMCHAINITIAIVE.ORG, <http://www.amchainitiative.org/antisemitism-tracker> (last updated Jan. 9, 2017).

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of antisemitism.”³⁹

The phrase “hostile environment” is more than just a description; it is a term of art with legal implications behind it. In June 2009, Rossman-Benjamin filed a complaint with the U.S. Department of Education’s Office of Civil Rights, alleging that anti-Israel activity at the University of California, Santa Cruz (“Santa Cruz”) created a hostile educational environment for Jewish students in violation of Title VI of the Civil Rights Act of 1964.⁴⁰ In recent years, a few off-campus organizations have filed similar complaints with the Department of Education or in federal court under Title VI.⁴¹ To prevail under a Title VI hostile environment claim, a plaintiff must demonstrate harassment “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁴² Hostile environment complaints have triggered at least four federal investigations, “all of which concluded that speech critical of the state of Israel is protected under the First Amendment.”⁴³

Though “hostile environment” claims have not been successful, there are instances of anti-Semitism clearly linked with BDS student solidarity campaigns. At Santa Cruz in November of 2015, for example, student council member Daniel Bernstein received a Facebook message from the council chair instructing him to “abstain from a vote on divestment from Israel because he was elected with a ‘Jewish agenda.’”⁴⁴ Similarly, at the University of California, Los Angeles in February of 2015, Jewish student

39. Speyer, *supra* note 37.

40. 42 U.S.C. § 2000d (1964); Yaman Salahi & Nasrina Bargzie, *Talking Israel and Palestine on Campus: How the U.S. Department of Education Can Uphold the Civil Rights Act and the First Amendment*, 12 HASTINGS RACE & POVERTY L.J. 155, 166 (2015).

41. Salahi & Bargzie, *supra* note 40, at 156 (rejecting the “central premise” of such complaints: “that students suffer from a hostile educational environment in violation of their civil rights when a particular country or government with which they may identify is subjected to vigorous critique or academic scrutiny”).

42. Salahi & Bargzie, *supra* note 40, at 162 (quoting Davis *ex rel.* LaShonda v. Monroe City Bd. of Educ., 526 U.S. 629, 633 (1999)).

43. Salahi & Bargzie, *supra* note 40, at 156. Complaints with universities have been more successful—in some cases, university investigations have led to the suspension of “student organizations that organize events and demonstrations critical of Israeli state policy and the treatment of Palestinians.” Salahi & Bargzie, *supra* note 40, at 155-56.

44. Anthony Berteaux, *In the Safe Spaces on Campus, No Jews Allowed*, THE TOWER (Feb. 2016), <http://www.thetower.org/article/in-the-safe-spaces-on-campus-no-jews-allowed/>.

Rachel Beyda was initially denied a position on the student council's judicial board after she was asked how she could maintain an unbiased view, considering she is Jewish and "very active in the Jewish community."⁴⁵

In addition to concerns about anti-Semitism, critics of BDS worry that the movement's policies and activists' implementation of those policies harm pro-Israel college students by suppressing their rights to freedom of speech, expression, and assembly.⁴⁶ In particular, critics condemn BDS's "anti-normalization" policy as an "attempt[] to shut down all expression about Israel" and SJP's practices of protesting and disrupting events.⁴⁷ For example, in April 2016 at San Francisco State University, a Jewish student group's event featuring Jerusalem Mayor Nir Barkat was shut down by protesters who "stormed into the hall and loudly chanted slogans such as, 'Get the hell off our campus,' 'Long live the Intifada,' and 'From the River to the Sea, Palestine Will be Free.'"⁴⁸

The AMCHA Initiative reports that BDS activists "physically block[] or hinder[] the movement of attendees of Jewish student events or engage[] in efforts to get those events canceled."⁴⁹ For example, student group UCL Friends of Israel had invited Hen Mazzig, a former Israel Defense Forces commander, to speak at University College London in October 2016 about his humanitarian work in the West Bank.⁵⁰ The event was initially cancelled, then reinstated, and the venue changed twice. Over 100 protestors gathered outside the lecture hall where Mazzig was speaking, drowning out his voice by loudly chanting "From the river to the sea, Palestine will be free" and "Shame."⁵¹ Event attendees barricaded

45. *Id.* The decision was later overturned, and the student leaders involved apologized. *Id.* See also Jared Sichel, *UCLA Judicial Board Nom Questioned for Jewish Background*, THE JEWISH J. (Feb. 24, 2015, 3:31 PM), http://www.jewishjournal.com/los_angeles/article/ucla_judicial_board_nominee_questioned_for_jewish_background_in_appointment.

46. See Speyer, *supra* note 37.

47. Speyer, *supra* note 37.

48. AMCHA INITIATIVE, REPORT ON ANTI-SEMITIC ACTIVITY DURING THE FIRST HALF OF 2016 AT U.S. COLLEGES AND UNIVERSITIES WITH THE LARGEST JEWISH UNDERGRADUATE POPULATIONS (2016), <http://www.amchainitiative.org/wp-content/uploads/2016/07/Report-on-Antisemitic-Activity-During-the-First-Half-of-2016.pdf>.

49. *Id.*

50. Alex Davis, *UCL to Investigate 'Violent' Anti-Israel Protest*, JEWISH NEWS (Oct. 28, 2016, 7:57 AM), <http://jewishnews.timesofisrael.com/ucl-violence-a/>.

51. *Id.*

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themselves inside as protestors banged on the doors.⁵² Eventually, three protestors broke into the room by pushing a window open.⁵³ Security personnel removed the protestors and later escorted Mazzig and event attendees to safety.⁵⁴

There is also evidence that BDS activities on some campuses create an atmosphere of intimidation and fear, which in turn has an indirect, chilling effect on speech.⁵⁵ At Syracuse University in June 2016, Israeli filmmaker Shimon Dotan’s invitation to attend a conference on religion was rescinded by Professor M. Gail Hamner, who feared retaliation by the “BDS faction on campus.”⁵⁶ Hamner wrote to Dotan that she felt “caught in an ideological matrix.”⁵⁷ Dotan responded, “[t]he forces that chill speech and action on college campuses are real and not of your making. At the same time . . . it seems wrong to me to disinvite someone from an academic conference because of political pressure.”⁵⁸ The Foundation for Individual Rights in Education (FIRE) commented, “[r]ather than shying away from politically charged films, professors should embrace such works and the ensuing discussions they raise.”⁵⁹ FIRE noted that it “eagerly awaits” an update to Syracuse University’s free speech policies—“ones we hope will encourage a culture of free expression on campus, and

52. *Id.*

53. *Id.*

54. *Id.* Following the event, at least one attendee filed a common assault allegation with the police, claiming one of the protestors pushed her against a door. *Id.*

55. See Conor Friedersdorf, *How Political Correctness Chills Speech on Campus*, THE ATLANTIC (Sept. 1, 2016), <http://www.theatlantic.com/politics/archive/2016/09/what-it-looks-like-when-political-correctness-chills-speech-on-campus/497387/>.

56. *Id.* One notable difference between this example and those previously mentioned is that SJP does not maintain a presence at Syracuse; “all boycott activity is faculty driven.” Lea Speyer, *Syracuse U Professor Slams ‘Hypocritical’ Colleagues for Rescinding Invitation to Israeli Academic/Filmmaker*, ALGEMEINER (Sept. 6, 2016, 7:17 AM), <http://www.algemeiner.com/2016/09/05/syracuse-u-professor-slams-hypocritical-colleagues-for-succumbing-to-bds-rescinding-invitation-to-israeli-academicfilmmaker-interview/>.

57. Friedersdorf, *supra* note 55.

58. Friedersdorf, *supra* note 55. Syracuse later announced that it plans to invite Dotan to screen his documentary at a future date, and a group of BDS supporters issued a statement online to affirm their support of academic freedom. Friedersdorf, *supra* note 55 (“We support the free exchange of ideas on our campus, an important tradition at Syracuse University and a basic tenant of academic principles, ideals, and practices.”).

59. Zach Greenberg, *Syracuse Will Update Free Speech Policies After Israeli Filmmaker Disinvited, Reinvited*, FIRE (Sept. 7, 2016), <https://www.thefire.org/syracuse-will-update-free-speech-policies-after-israeli-filmmaker-disinvited-reinvited/>.

ensure a disinclination like this one never happens again.”⁶⁰

FIRE and the American Association of University Professors (AAUP), among others, have condemned BDS boycotts as clashing with academic freedom.⁶¹ FIRE President and CEO Greg Lukianoff has noted, “while students and professors are entirely free to support and campaign for [BDS], some of the actual goals of that movement are seriously at odds with fundamental aspects of academic freedom.”⁶² In particular, Lukianoff views “[t]he idea that a college might ban its scholars from working with scholars of a particular nationality or who work in a particular country in the name of opposing that country’s government [as] incompatible with this liberal, open system.”⁶³ In 2005, the AAUP Committee on Academic Freedom and Tenure issued a statement taking a similar stance on academic boycotts: “We reject proposals that curtail the freedom of teachers and researchers to engage in work with academic colleagues, and we reaffirm the paramount importance of the freest possible international movement of scholars and ideas.”⁶⁴

Jill Schneiderman, an earth science professor at Vassar College, also views BDS activities as conflicting with academic freedom.⁶⁵ Schneiderman planned a field trip in Spring 2014 to Israel and Palestinian territories.⁶⁶ Her goal was to “impart knowledge and share experiences with [her] students that can be realized only by traveling to the regions [they] are examining.”⁶⁷ Leading up to the trip, BDS activists situated themselves outside of Schneiderman’s classroom and pressured her

60. *Id.*

61. See Greg Lukianoff, *More on Lawrence Summers’s Academic Freedom and BDS Speech*, FIRE (Feb. 6, 2015), <https://www.thefire.org/lawrence-summers-academic-freedom-bds-speech/>. Lukianoff defines academic freedom as “a vast and majestic idea that relies on open communication across lines of difference in a global system of checking, arguing, researching, collaborating, and competing to produce better ideas.” *Id.* Lukianoff views academic freedom as “a critical part of the way we come by new knowledge, creative solutions, and novel perspectives.” *Id.*

62. *Id.*

63. *Id.*

64. Strauss, *supra* note 24.

65. Jill Schneiderman, *Opinion, How Academic Efforts to Boycott Israel Harm Our Students*, WASH. POST (July 3, 2015), https://www.washingtonpost.com/opinions/academias-boycott-on-ideas/2015/07/03/a7e51d3a-138a-11e5-9ddc-e3353542100c_story.html?utm_term=.f055d64aead5.

66. *Id.*

67. *Id.* Schneiderman noted that when studying arid regions in particular, “it is difficult for students from places where water is relatively abundant to think about solutions to the problems that occur when local residents must share a meager supply.” *Id.*

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students to drop the course.⁶⁸ In addition, pro-BDS faculty members led a standing-room-only forum at the campus center, where Schneiderman says her “integrity was attacked.”⁶⁹ In the end, Schneiderman said she was glad she “decided to stick to [her] educational principles By learning on the ground from Palestinians, Israelis and Jordanians instead of just from texts, my students and I came to appreciate why water issues are central to the conflict in the region.”⁷⁰

According to Schneiderman, “instead of working to engage debate and refute contentious ideas, students and faculty are shutting down avenues of inquiry and blocking the attempts of others to examine difficult issues.”⁷¹ While Schneiderman believes protest does have a place on campus, she wished the protesters had come inside the classroom to “debate in full sentences,” rather than merely standing outside “chanting slogans.”⁷² She noted, “[h]ad they done so, I am sure we would have had some challenging and uncomfortable discussions. But we would have all grown from the exchange, and we would have come closer to fulfilling the mission of my college and educators everywhere.”⁷³

Others have expressed concerns about lack of dialogue in the BDS context, as well. In January 2017, Fordham University denied an application to form an SJP chapter on campus due in large part to its ties to the BDS movement. Keith Eldrige, dean of students at Fordham’s Manhattan campus, explained in an e-mail that the Israeli-Palestinian conflict is a topic “that often leads to polarization rather than dialogue. The purpose of [SJP] as stated in the proposed club constitution points toward that polarization. Specifically, the call for boycott, divestment and sanctions of Israel presents a barrier to open dialogue and mutual learning and understanding.”⁷⁴

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Elizabeth Redden, *Pro-Palestinian Group Banned on Political Grounds*, INSIDE HIGHER ED (Jan. 18, 2017), <https://www.insidehighered.com/news/2017/01/18/fordham-denies-student-palestinian-rights-group-approval-being-too-polarizing>. Despite its position on BDS, FIRE believes Fordham’s denial of SJP goes too far. *Id.* According to Ari Cohn, director of FIRE’s individual rights defense program, “the justification for denying SJP recognition is completely without merit and cannot

B. State Responses to the BDS Movement

In the wake of concerns about the harms of BDS, many states have responded by passing anti-BDS laws⁷⁵ and non-binding resolutions condemning BDS.⁷⁶ Other states are considering similar legislation.⁷⁷ Some of these laws exclude companies that boycott Israel or, more generally, the state's trading partners, from receiving or renewing state

stand at any university that proclaims that it values freedom of expression, which Fordham's written policies do." *Id.* See also Letter from Maria C. LaHood & Radhika Sainath, Palestine Legal and Ctr. for Constitutional Rights, to Rev. Joseph M. McShane, S.J., President, Fordham Univ. (Jan. 17, 2017), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/587e4a50d1758eda63669931/1484671570977/Letter+to+Fordham-Civil+Rights+Orgs+1-17-17+Public+BLOG.pdf> (demanding that Fordham "immediately approve SJP, apologize, and reaffirm Fordham's commitment to free speech, associational rights and academic freedom"); Letter from Sarah McLaughlin & Svetlana Mintcheva, Found. for Individual Rights in Educ. and Nat'l Coal. Against Censorship, to Rev. Joseph M. McShane, S.J., President, Fordham Univ. (Jan. 25, 2017), <https://www.thefire.org/fire-letter-to-fordham-university-january-2017/>.

75. States that have passed anti-BDS laws, in chronological order, include: South Carolina, Illinois, Florida, Arizona, Colorado, Indiana, Georgia, Iowa, Alabama, New Jersey, California, Pennsylvania, Ohio, Michigan, Rhode Island, Arkansas, Texas, Minnesota, Nevada, Kansas, and North Carolina. *Anti-BDS Legislation by State*, PALESTINE LEGAL, <http://palestinelegal.org/righttoboycott> (last visited Nov. 22, 2017). Israel Allies Foundation (IAF) has played a key role in drafting such legislation; as a result, many of the laws consist of similar language and provisions. See Press Release, Isr. Allies Found., Florida Passes Historic Anti-BDS Law, http://www.israelallies.org/usa/news_article/florida_passes_historic_anti-bds_law/ ("IAF is proud to have played a leading role in this victory. The passage of this law is the result of more than two years of legal research, policy development and educational resourcing by our experts.").

76. States that have passed non-binding resolutions, in chronological order, include: Tennessee, Alabama, Virginia, Florida, New York, and Pennsylvania. S.J. Res. 170, 109th Gen. Assemb. (Tenn. 2015), <http://www.capitol.tn.gov/Bills/109/Bill/SJR0170.pdf>; S.J. Res. 6, 2016 Reg. Sess. (Ala. 2016), <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2016rs/PrintFiles/SJR6-enr.pdf>; H.J. Res. 177, 2016 Gen. Assemb., Reg. Sess. (Va. 2016), <http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+HJ177ER+pdf>; H.R. 1001, 2016 Reg. Sess. (Fla. 2016), <http://flsenate.gov/Session/Bill/2016/1001/BillText/Filed/PDF/>; S. Res. K705, 2015 Assemb., (N.Y. 2015), <http://legislation.nysenate.gov/pdf/bills/2015/K705>; S. Res. 136, 2015 Gen. Assemb. (Penn. 2015), <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=S&billTyp=R&billNbr=0136&pn=0979>.

77. Anti-BDS resolutions are pending in Oklahoma, Washington, and Massachusetts. H.B. 1512, 56th Leg. Assemb. (Okla. 2017), http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20INT/hB/HB1512%20INT.PDF; H.J. Mem'l 4009, 65th Leg., Reg. Sess. (Wash. 2017), <http://lawfilesextd.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Joint%20Memorials/4009-BDS%20movement-Israel.pdf>; S.B. 1689, 190th Gen. Ct. (Mass. 2017), <https://malegislature.gov/Bills/190/S1689/BillHistory>.

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contracts;⁷⁸ mandate divestment of state funds from such companies;⁷⁹ and instruct state and local agencies to compile, maintain, and publish a list of companies boycotting Israel.⁸⁰

A wealth of state speech surrounds these laws in the form of statements, speeches, op-eds, social media posts, and symbolic declarations.⁸¹ Much of this state speech incorporates similar themes and language, such as the term “bigot” and the phrase “sending a message,” as well as militarized terms, such as “weapon,” “battle,” and “warfare.” This state rhetoric builds off of and fuels similar rhetoric in the private sector.

These themes and terms appear in the text of some anti-BDS resolutions. For example, Tennessee’s anti-BDS resolution opens, “WHEREAS, the citizens of the State of Tennessee have a history of standing against bigotry, oppression, discrimination, and injustice.”⁸²

78. See, e.g., S.C. Code Ann. § 11-35-5300 (2015). South Carolina’s law prohibits public entities from contracting with businesses participating in “the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade.” *Id.* Boycott is defined as “blacklist[ing], divest[ing] from, or otherwise refus[ing] to deal with a person or firm when the action is based on race, color, religion, gender, or national origin of the targeted person or entity.” *Id.*

79. See, e.g., S.B. 1761, 99th Gen. Assemb. (Ill. 2015), <http://www.ilga.gov/legislation/99/SB/PDF/09900SB1761lv.pdf> (requiring each state-funded retirement system to divest itself of holdings in companies that boycott Israel).

80. See, e.g., Fla. Stat. § 215.4725 (2016) (“[T]he public fund shall compile and make available the ‘Scrutinized Companies that Boycott Israel List.’”). Such lists are one of the most controversial features of anti-BDS laws. See Adam Steinbaugh, *New York Governor’s Blacklist of Pro-BDS Advocates Raises Concerns for Campus Speech*, FIRE (June 6, 2016), <https://www.thefire.org/new-york-governors-blacklist-of-pro-bds-advocates-raises-concerns-for-campus-speech/>. To support state anti-BDS laws, Senator Marco Rubio introduced to Congress a bill titled the Combating BDS Act of 2017. The bill would allow state and local governments to divest assets, prohibit investment of assets, and restrict contracting with entities participating in “commerce-related or investment-related [BDS] activity.” S. 170, 115th Cong. (2017).

81. Symbolic declarations include bestowing honors upon Israeli officials, dedicating certain days to showing support for Israel, and other official showings of support. For example, Ohio Speaker of the House Cliff Rosenberger gave the key to the State of Ohio to Member of Knesset (Israeli parliament) Hilik Bar. Lahav Harkov, *Ohio to Pass Anti-BDS Law*, JERUSALEM POST (Oct 11, 2015 4:04 PM), <http://www.jpost.com/Diaspora/Ohio-to-pass-anti-BDS-law-422594>. South Carolina issued a pro-Israel license plate. Rep. Alan Clemmons Statement on Enactment of H. 3583: *South Carolina Passes Law and Calls on Other States to Forbid Anti-Semitic Boycotts*, ALANCLEMMONS.COM (June 4, 2015), <http://alanclemmons.com/index.html> [<https://web.archive.org/web/20150812095414/http://alanclemmons.com/index.html>].

82. S.J. Res. 170, 109th Gen. Assemb. (Tenn. 2015), <http://www.capitol.tn.gov/Bills/109/Bill/SJR0170.pdf>.

Pennsylvania's anti-BDS resolution opens with identical language.⁸³

Variations of the term “bigot” and the phrase “sending a message” are even more prevalent in legislators’ statements following the passage of anti-BDS laws. For example, California state assemblyman Richard Bloom, who drafted California’s anti-BDS law, said “[t]he state of California sent a strong message that it does not tolerate discrimination, hate or bigotry.”⁸⁴ After signing Florida’s anti-BDS bill into law, Governor Rick Scott issued an official statement: “I am proud to sign this important bill into law and join the Florida Legislature in sending this message: . . . The [BDS] movement is fueled by anti-Semitism, and has no place in Florida or in any part of the world that values freedom and democracy.”⁸⁵ Florida senator Joe Negron’s statement had a similar sentiment: “I am proud that my fellow lawmakers came together to take a stand against bigotry and discrimination.”⁸⁶ Likewise, South Carolina representative Alan Clemmons used the word “bigotry” four times in his official statement on the enactment of South Carolina’s anti-BDS bill.⁸⁷

Similar themes and terms are also prevalent in commentary from the private sector. For example, Howie Beigelman, executive director of Ohio Jewish Communities, commented that Ohio’s anti-BDS bill “sends a very

83. S. Res. 136, 2015 Gen. Assemb. Reg. Sess. (Penn. 2015), <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=S&billType=R&billNbr=0136&pn=0979> (“WHEREAS, The citizens of the Commonwealth of Pennsylvania have a history of standing against bigotry, oppression, discrimination and injustice.”).

84. Rob Gloster, *Gov. Brown Makes California 13th State with Anti-BDS Law*, JEWISH NEWS OF N. CAL. (Sept. 29, 2016), <http://www.jweekly.com/article/full/78579/gov.-brown-makes-california-13th-state-with-anti-bds-law/>.

85. Press Release, Office of the Governor of Fla., Gov. Rick Scott Signs Legislation to Support Israel (Mar. 10, 2016), <http://www.flgov.com/2016/03/10/gov-rick-scott-signs-legislation-to-support-israel/>.

86. Press Release, Isr. Allies Found., *supra* note 75. Compare Governor Scott’s and Senator Negron’s statements with Representative Rich Workman’s statement: “Anyone in this state and any business in this state is welcomed to join the BDS movement. They can put on their website that they are boycotting and divesting themselves of Israel. . . . All we’re saying is we don’t want to invest in companies that tend to hurt our allies.” Sergio Carmona, *Florida Legislature Passes Anti-BDS Bill*, SUNSENTINEL (Mar. 7, 2016, 3:40 PM), <http://www.sun-sentinel.com/florida-jewish-journal/news/miami-dade/fl-jjdc-legislation-0309-20160307-story.html>.

87. *Rep. Alan Clemmons Statement on Enactment of H. 3583: South Carolina Passes Law and Calls on Other States to Forbid Anti-Semitic Boycotts*, *supra* note 81 (“Simply put, ‘BDS’ has become the formal name for national-origin discrimination against Israel. H. 3583 places BDS into the context of other forms of discrimination that likewise emanate from hatred and bigotry, where it is best understood.”).

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powerful message to everyone that the state of Ohio will not stand with bigots and that the state of Ohio will not let those they do business with discriminate.”⁸⁸ Jacob Millner, Midwest regional director for The Israel Project, commented, “[t]he U.S.-Israel relationship is based on shared values, and opposing bigotry in all its forms is fundamental to the people of both nations. Georgians don’t want their state supporting the anti-Semitic BDS efforts, and that’s why the legislature voted to prevent this insidious movement from gaining a foothold here.”⁸⁹ The Israel Project’s CEO and president Josh Block wrote, “Florida’s new [anti-BDS] law is a major blow against anti-Israel bigotry and discrimination.”⁹⁰ Legal scholar Alan Dershowitz wrote, “[n]o one, not even the most rabid BDS-activist, should face legal recriminations for expressing an opinion that is supportive of BDS, or for encouraging others to support BDS. Political speech—even bigoted, misguided political speech—is clearly protected by the constitution.”⁹¹ Peggy Shapiro, central region director of advocacy group StandWithUs wrote that Iowa’s anti-BDS law “sends a clear message against the bigotry and discrimination of the BDS movement.”⁹²

Another repeated theme in legislators’ statements and private commentary is the use of collective pronouns as a rhetorical device. Governor Cuomo’s statement is an example: “If you boycott against Israel, New York will boycott you.”⁹³ Similarly, an hour after Alabama’s anti-BDS bill passed the senate, Hilik Bar, Deputy Speaker of the Knesset (Israel’s parliament), addressed the state’s legislature, commenting that the

88. Kristen Mott, *Ohio Introduces Anti-BDS Bill*, CLEV. JEWISH NEWS (Mar. 2, 2016), http://www.clevelandjewishnews.com/news/local_news/ohio-introduces-anti-bds-bill/article_f2689942-e0a1-11e5-bf51-bffcb9f65f04.html.

89. *Georgia Passes Bill Banning State from Contracting with Entities that Boycott Israel*, THE TOWER (Mar. 28, 2016, 6:05 PM), <http://www.thetower.org/3150-georgia-passes-bill-banning-state-from-contracting-with-entities-that-boycott-israel/>.

90. *Applause for Scott’s Signing Law that Preserves Support of Israel*, ORLANDO SENTINEL (Apr. 12, 2016, 8:02 PM), <http://www.orlandosentinel.com/opinion/os-ed-boycott-israel-florida-law-041316-20160412-story.html>.

91. Alan Dershowitz, *Opinion, Combating BDS by Legislation: Different Approaches, Same Goal*, JERUSALEM POST (June 22, 2016, 9:25 PM), <http://www.jpost.com/Opinion/Combating-BDS-by-legislation-Different-approaches-same-goal-457507>.

92. Joshua Sharf, *Watching BDS Like a Hawkeye: Iowa Latest State to Stand Against Israel Boycotts*, JNS.ORG: JEWISH NEWS SERV. (Apr. 28, 2016), <http://www.jns.org/latest-articles/2016/4/28/watching-bds-like-a-hawkeye-iowa-latest-state-to-stand-against-israel-boycotts-1#.WC4IEOErlBI=>.

93. McKinley, *supra* note 2.

Alabama law's message is: "You boycott Israel, we boycott you. And that's a very brave thing to do."⁹⁴ Illinois representative Sara Feigenholtz used a slightly longer variation of Cuomo's phrase: "We, as a state, are making an affirmative statement that if you're going to boycott Israel, an ally of the United States, a democracy in the Middle East, then we are going to divest from you."⁹⁵ Her statement was quoted in an editorial titled "Boycott the Israel Boycotters?"⁹⁶ A commentator interpreting Illinois's law echoed this sentiment: "You are free to profit from our investment dollars. You are also free to boycott Israel. But in this state you will no longer be free to do both. If you choose the boycott avenue, we are free to cash in our investment."⁹⁷

Militarized language is also prevalent in state speech surrounding anti-BDS laws. In an op-ed in the Washington Post, Governor Cuomo compared BDS to terrorism and murder:

During a visit with a bipartisan delegation that August, I was shown a miles-long Hamas tunnel built to infiltrate Israel's southern communities and murder their residents. The tunnel was frightening because it was the manifestation of the single-minded obsession by Israel's enemies to destroy the Jewish state. And yet, in many ways it was not nearly as frightening as continued efforts to boycott, divest from and sanction Israel.⁹⁸

Later in the op-ed, Cuomo labeled BDS a "new brand of warfare" and called on his "fellow governors from states across the nation . . . to fight this movement on every front."⁹⁹ In response to Governor Rauner's

94. *Alabama Anti-BDS Bill Signed Into Law*, S. JEWISH LIFE (May 11, 2016), <http://www.sjlmag.com/2016/05/alabama-anti-bds-bill-signed-into-law.html>.

95. Editorial, *Boycott the Israel Boycotters?*, CHI. TRIB. (May 15, 2015, 6:40 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-israel-boycott-edit-0518-20150515-story.html>.

96. *Id.*

97. Jay Teath, Opinion, *Commentary: The High Cost of Boycotting Israel*, CHI. TRIB. (May 18, 2015, 3:41 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-israel-boycott-sara-feigenholtz-general-assembly-bruce-rauner-perspec-0519-20150518-story.html>.

98. Andrew Cuomo, Opinion, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html?utm_term=.85b8d43e94d4.

99. *Id.*

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signing of Illinois's anti-BDS bill, Representative Bob Dold issued a statement declaring, "BDS is a disgusting, misguided and hateful weapon used to delegitimize Israel and those who stand with her."¹⁰⁰ Senator Michael Baumgartner of Washington State, who introduced an anti-BDS bill specifically aimed at blocking universities from engaging in BDS activities,¹⁰¹ said in a local radio interview, "I want to prohibit [BDS] at the state legislator level and say it is illegal and that way I can just shut down these conversations and everybody can focus on teaching class and educating rather than being a politically-correct weapon."¹⁰² Representative Keith Baker, who introduced Pennsylvania's anti-BDS law, wrote that BDS participants are "doing nothing short of waging a war of economic genocide against the Jewish state."¹⁰³

Private speakers similarly employ militarized language. On November 16, 2016, law students, academics, and international law experts gathered at the United Nations headquarters in New York for an event titled "Legal Scholars Against BDS: Using Law & Legislation to Stop the BDS Movement."¹⁰⁴ The event's registration page included the following excerpt:

This was only the initial step in our fight against the global campaign of hate, demonization and delegitimization. Today we are moving this important battle to the legal arena. . . . By focusing on the legal tools and strategies needed to combat BDS we plan on

100. Press Release, Dold Statement on Historic Illinois Anti-BDS Law (July 23, 2015), <https://web.archive.org/web/20161230011850/http://dold.house.gov/press-releases?ID=F695CB70-C55F-4988-9F82-CBC0E6B25279>.

101. *Baumgartner Moves to Block Anti-Israel BDS Movement on Campuses*, SENATE REPUBLICAN CAUCUS (Dec. 29, 2016), <http://michaelbaumgartner.src.wastateleg.org/baumgartner-moves-block-anti-israel-bds-movement-campuses/>.

102. Dyer Oxley, *Senator: Colleges are being used as 'politically correct batons'*, MYNORTHWEST.COM (Jan. 2, 2017, 6:28 PM), <http://mynorthwest.com/500618/senator-baumgartner-bds-bill/>. See also *Baumgartner Moves to Block Anti-Israel BDS Movement on Campuses*, *supra* note 101 ("Our universities need to be solely focused on educating our students, not being distracted by political correctness run amuck with absurd and amateurish causes.").

103. *Penn. Gov. Signs Anti-Discrimination Law Barring State From Working With Israel Boycotters*, THE TOWER (Nov. 7, 2016, 12:18 PM), <http://www.thetower.org/4119-penn-gov-signs-anti-discrimination-law-barring-state-from-working-with-israel-boycotters/>.

104. *Legal Scholars Against BDS*, EVENTBRITE.COM, <https://www.eventbrite.com/e/legal-scholars-against-bds-tickets-28195497492#> (last visited Sept. 1, 2017).

making real progress in our battle against the boycott movement.¹⁰⁵

Mohammed Wattad, an Arab-Israeli professor at the Zefat College School of Law, commented with regards to the ASA's resolution to boycott Israel, "[t]he call for an academic boycott resembles an act of terrorism. You take innocent people, you impose fear on them, and you treat them as means in order to change the policies of the government."¹⁰⁶

C. *Restrictions on State Speech*

According to law professor Nelson Tebbe, "[j]udges and scholars typically assume that when the government speaks on its own account, it faces few restrictions. Officials may say almost anything they like without constitutional difficulty."¹⁰⁷ In *Pleasant Grove City v. Summum*,¹⁰⁸ the Supreme Court explained the "government speech doctrine," a rule holding that First Amendment's Free Speech Clause does not apply to government speech.¹⁰⁹ Under this doctrine, "officials may engage in viewpoint discrimination, favoring specific ideas without fear of committing a constitutional violation."¹¹⁰ Based on the Court's language, the one constitutional restriction on government speech seems to be the Establishment Clause.¹¹¹ Tebbe explains, "Congress could not pass a law declaring, for instance, 'America is a Christian nation,' but it could applaud democracy or denigrate smoking."¹¹²

Tebbe further explains that, among theorists, there are two

105. *Id.*

106. Anthony Weiss, *A Year After Passing Boycott, ASA Still Obsessed with Israel*, THE TIMES OF ISR. (Nov. 13, 2014, 9:05 PM), <http://www.timesofisrael.com/a-year-after-passing-boycott-asa-still-obsessed-with-israel/>.

107. Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 648 (2013) (arguing that, despite judicial and scholarly interpretations of a broad government speech doctrine, the Constitution imposes a broad "government nonendorsement" principle).

108. 555 U.S. 460, 481 (2009).

109. *Id.* at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.")

110. Tebbe, *supra* note 107, at 648. *See also* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) ("That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.")

111. Tebbe, *supra* note 107, at 648-49.

112. Tebbe, *supra* note 107, at 649.

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“paradigmatic conceptions” of the proper role of government.¹¹³ The first, framework democracy, “holds that American government should remain as neutral as possible with respect to conceptions of the good while stoutly defending a framework for supporting those conceptions”—a basic system of justice that centers on popular sovereignty and individual rights.¹¹⁴ The second, engaged democracy, “holds that the state can, does, and should take active positions on questions of profound values for many citizens.”¹¹⁵

Law professor Abner Greene promotes the engaged democracy paradigm.¹¹⁶ Greene focuses on four key virtues of government speech: 1) government speech aids the execution of law by “explaining and supporting” enacted laws, 2) government speech enhances public debate, 3) government speech can facilitate the production of art and information, and 4) “government speech often makes a distinctive contribution to public debate.”¹¹⁷ Greene asserts that these virtues persist when speech touches on controversial matters because “even in a contested arena government speech can help foster debate, fleshing out views, and leading to a more educated citizenry and a better chance of reaching the right answer.”¹¹⁸ Moreover, an elected majority has a moral duty to its citizens to express a message it believes to be true or good, rather than to remain silent.¹¹⁹

113. Tebbe, *supra* note 107, at 697.

114. Tebbe, *supra* note 107, at 697.

115. Tebbe, *supra* note 107, at 700.

116. See Abner Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2 (2000) (“[A]s a matter of political theory, government in a liberal democracy not only *may* promote contested views of the good, but *should* do so, as well.”).

117. *Id.* at 8-9.

118. *Id.* at 11.

119. *Id.* Greene explains, “[t]his is an extension of an argument about individual responsibility: if I believe X to be true or good, and I have a responsibility to another person on the subject, then arguing for X (when Y is a competing position) might be considered morally obligatory, and silence would be an error.” *Id.*

II. ANALYSIS

A. *Implications of “Sending a Message”*

In his book *Confident Pluralism*, law professor John Inazu encourages readers to go beyond what is constitutionally required and adopt certain civic practices “to reflect our aspirations for the law in the way we live.”¹²⁰ Inazu writes, “[t]he First Amendment’s free speech right allows us to say almost anything to almost anyone. But that freedom places a great deal of responsibility on us for what we choose to say.”¹²¹ Similarly, the government speech doctrine allows state speakers, as Tebbe puts it, to “say almost anything they like without constitutional difficulty,”¹²² and that freedom places a great deal of responsibility on states for what they choose to say. Perhaps more so than in the case of individual speakers, it is imperative that the state as a speaker does not underestimate the power and significance of its words, considering its legal power and ability to have a direct and immediate impact on the speech of its citizens.¹²³

Inazu identifies “conversation stoppers” as a “particularly destructive form[] of speech” that speakers should aspire to avoid.¹²⁴ Conversation stoppers are words like “close-minded” and “bigot” that “stigmatize people instead of critiquing ideas.”¹²⁵ In doing so, “[t]he conversation stopper says: ‘I don’t have to listen to you.’”¹²⁶ Unlike the label of “discrimination,” which, despite its negative undertones, has the merit of “connot[ing] an expressive action rather than attributing a specific motive,” the label of “bigot” “attributes a particular motive to an action . . . with rhetorical force.”¹²⁷

In a speech at the Columbia Center for Law and Liberty in January

120. JOHN INAZU, *CONFIDENT PLURALISM*, 10 (2016).

121. *Id.* at 11.

122. Tebbe, *supra* note 107, at 648.

123. See INAZU, *supra* note 120, at 101 (“We should not underestimate the power and significance of our words, or what is at stake in our language. Law professor James Boyd White suggests that ‘practically everything’ is at stake, ‘including both the integrity of the individual person and the quality of our larger culture and polity.’”).

124. INAZU, *supra* note 120, at 96.

125. INAZU, *supra* note 120, at 88-100.

126. INAZU, *supra* note 120, at 100.

127. INAZU, *supra* note 120, at 99.

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2015 titled “Academic Freedom and Anti-Semitism,” former Harvard President Lawrence Summers similarly noted the difference between attacking motives and describing acts.¹²⁸ Summers recalled remarks he made in 2002 following the circulation of a petition calling for divestiture from Israel; after describing the petition and academic boycotts, he had said, “serious and thoughtful people are advocating and taking actions that are anti-Semitic in their effect if not their intent.”¹²⁹ Looking back on that statement, Summers instructed listeners to note, “I did not label anyone an anti-Semite. I said instead that the effect of the actions they favored—singling out Israel for economic pressure—if carried out would be anti-Semitic—in other words, in opposition to the Jewish people.”¹³⁰

Currently, state speech surrounding anti-BDS laws is rife with conversation stoppers and attacks motives rather than acts. As demonstrated above, the term “bigot,” which Inazu identifies as “[o]ne of the most common examples of the conversation stopper today,”¹³¹ frequently appears in state legislators’ statements on anti-BDS laws. The phrase “sending a message” also suggests that states have no intentions of inviting conversation about BDS. Furthermore, state speakers’ use of collective pronouns works to sharpen divisions and reinforce an “us vs. them” mentality, encouraging monologues rather than dialogues.

Another concern is that instead of aiding the execution of anti-BDS laws by “explaining and supporting” them,¹³² state speech surrounding the laws may create uncertainty and mislead listeners into believing the laws are more expansive than they actually are. Such uncertainty could chill speech critical of Israel and generate uninformed opposition against anti-BDS laws. Cuomo’s declaration that New York will boycott Israel boycotters, for example, is dangerous because it is over simplistic and divisive but also short and memorable, leading to its reiteration in headlines and use as a pithy catchphrase.¹³³ Likely many more people will

128. Lawrence H. Summers, Remarks of Lawrence H. Summers at Columbia Center for Law and Liberty: Academic Freedom and Anti-Semitism (Jan. 29, 2015), http://larrysummers.com/wp-content/uploads/2015/01/AcademicFreedomAndAntiSemitism_FINAL1-2.pdf.

129. *Id.*

130. *Id.*

131. INAZU, *supra* note 120, at 98.

132. *See supra* note 116 and accompanying text.

133. *See supra* note 95-96 and accompanying text.

read headlines containing the phrase “boycotting the boycotters” than will actually look up anti-BDS laws and read them in their entirety. And even when people do read the text of the laws, where the laws themselves are vague, sweeping statements by state speakers could cause lay people to interpret the laws to have a more extensive impact.

Misconceptions about the laws could lead to a chilling effect on speech critical of Israel. FIRE explains that the language of Cuomo’s executive order is “unacceptably vague” and “may be read to encompass college student organizations or to chill academic speech on university campuses.”¹³⁴ Student governments considering endorsing BDS may be concerned that they will “wind up on Governor Cuomo’s blacklist.”¹³⁵ Or faculty members who endorse BDS may be concerned about funding for their department or university.¹³⁶

Misconceptions that anti-BDS laws suppress citizens’ First Amendment rights also may be generating uninformed opposition to these measures, as well as negative perceptions of the pro-Israel community. Rabbi Jill Jacobs writes, “[t]o some, our community’s willingness to tolerate and promote such strategies proves our unwillingness to hear any criticism of the State of Israel or of its current government.”¹³⁷

Another unintended effect of state anti-BDS speech is that it energizes and further mobilizes some BDS supporters. One activist wrote:

[I]f Governor Cuomo wants to create a list of those nonviolently demanding accountability for Israel’s denial of basic Palestinian rights, please sign me up. One day, when the imposed system of

134. Steinbaugh, *supra* note 80 (“Given how closely the BDS movement is related to campus speech, Cuomo would have done well to clarify how his executive order applies—or does not apply—on state campuses.”). This uncertainty was raised recently at Fordham, during deliberations on whether to accept SJP’s application to form a chapter on campus. *See* Redden, *supra* note 74. At a meeting between students interested in forming SJP and the United Student Government Operations Committee, Kayla Wolf, vice president of the Committee, “asked [Redacted] if Governor Cuomo’s executive order on BDS prevented the formation of SJP, since SJP supported BDS. She also asked if the recent New York City Council resolution condemning BDS means that SJP should not be permitted to form on campus.” Letter from Palestine Legal, *supra* note 74. In response, the students explained “that boycotts are protected speech activity” and referred Wolf to statements by the New York Civil Liberties Union and other legal experts. Letter from Palestine Legal, *supra* note 74.

135. *See* Steinbaugh, *supra* note 80.

136. *See* Steinbaugh, *supra* note 80.

137. Jacobs, *supra* note 6.

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inequality ends in Israel-Palestine, this resistance to it will be looked back on as a badge of honor.¹³⁸

He continued, adding in some divisive rhetoric of his own, “I, along with an ever-growing number of Americans, want to be counted among those who stood on the right side of history.”¹³⁹

B. Aspiring to Start a Conversation

In large part due to BDS’s anti-normalization policy, the “challenging and uncomfortable” conversations Schneiderman has called for¹⁴⁰ do not appear to be happening on a large scale. States should be working to remedy this pervasive lack of dialogue, or at the very least, should take care not to aggravate the situation. Additionally, if states are truly dedicated to effectively opposing the BDS movement, they should aid the execution of anti-BDS laws by making reasoned arguments to support them.

State speakers should work to counter lack of dialogue on the conflict underlying BDS by removing conversation stoppers and militarized language from their speech. State speakers aspiring to start a conversation have numerous examples of speech free from this divisive rhetoric to consider. For example, in contrast to Tennessee’s anti-BDS law described above,¹⁴¹ Virginia’s resolution opens, “WHEREAS, the Commonwealth of Virginia and the State of Israel have a long history of friendship based on economic, cultural, intellectual, and political cooperation and exchange.”¹⁴² While Tennessee’s opening, which labels BDS as a bigoted movement, shuts off dialogue before even getting to the substance of the resolution, Virginia’s resolution explains its goals up front and is much more effective in starting a conversation about why the state is taking a strong stance against BDS. The New York State Senate’s anti-BDS resolution is even more laudable because it underscores the importance of

138. Munayyer, *supra* note 6.

139. Munayyer, *supra* note 6.

140. *See supra* notes 65-73 and accompanying text.

141. *See supra* note 82 and accompanying text.

142. H.J. Res. 177, 2016 Gen. Assemb., Reg. Sess. (Va. 2016), <http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+HJ177ER+pdf>.

dialogue: “WHEREAS, The BDS movement’s policies and tactics negate and undermine the vibrant debate regarding the Israel-Palestinian relationship, which is based on a recognition of Israel’s right to exist as a Jewish State.”¹⁴³ The next clause provides further explanation: “WHEREAS, New Yorkers . . . recognize that punitive economic measures targeting Israel undermine dialogue, economic and political reconciliation between Israelis and Palestinians.”¹⁴⁴

Another example of state speech with less divisive rhetoric is the letter the American Jewish Committee circulated to governors in September 2016.¹⁴⁵ The letter focuses on specific goals of the BDS movement and why they are in conflict with states’ values: “They seek to isolate Israel—a pluralistic nation with deep cultural, familial, security, educational, scientific and commercial bonds with our state and with the United States as a whole—rather than recognize the profound mutual benefits of our engagement with it.”¹⁴⁶ The letter also focuses on the effects of BDS: “Significantly, the BDS movement would also undermine peacemaking by suggesting that economic and political pressure on Israel can replace real negotiation.”¹⁴⁷ While the letter does question motives and intentions, rather than limiting its critiques to effects,¹⁴⁸ it does so in a more measured way than the state speech reproduced above: “Israel’s policies, like the policies of any nation, may be subject to criticism and debate, but the BDS movement’s single-minded focus on the Jewish State raises serious questions about its motivations and intentions.”¹⁴⁹

One might challenge this proposal by arguing that BDS is not an appropriate topic for state speech—not that state anti-BDS speech should be altered, but that it should cease altogether. The rationale for such an argument would be similar to Fordham Dean of Students Keith Eldrige’s justification for the ban on SJP: the topic of the Israel-Palestinian conflict is a highly controversial topic that often leads to polarization.¹⁵⁰ Thus, the

143. S. Res. K705, 2015 Assemb., (N.Y. 2015), <http://legislation.nysenate.gov/pdf/bills/2015/K705>.

144. *Id.*

145. See *Anti-Semitism: Governors Against BDS*, *supra* note 8.

146. *Anti-Semitism: Governors Against BDS*, *supra* note 8.

147. *Anti-Semitism: Governors Against BDS*, *supra* note 8.

148. See *supra* text accompanying notes 127 and 128.

149. *Anti-Semitism: Governors Against BDS*, *supra* note 8.

150. See *supra* note 74 and accompanying text.

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argument would be that states should remain neutral rather than insert themselves into this contested arena.¹⁵¹ However, as Greene argues, the virtues of government speech “do not disappear if the speech is on a matter of current social contest.”¹⁵² If state anti-BDS speech were altered as proposed in this Note, it could generate debate, “leading to a more educated citizenry.”¹⁵³ Moreover, if state speakers believe that their message of strong support for Israel and against anti-Semitism, suppression of First Amendment rights, and violations of academic freedom is “true or good,” they have a duty to their citizens to speak up, rather than to remain silent.¹⁵⁴

CONCLUSION

Removing conversation stoppers and militarized language from state speech is an important, if only a preliminary, step toward countering a pervasive lack of dialogue on issues underlying the BDS movement. State speakers have a social and civic—though not a constitutional—duty to be conscious of the effects of their speech, particularly when they are speaking on areas as contentious as BDS and Middle East conflict. And citizens, including those in the pro-Israel community, should push back on divisive, stigmatizing rhetoric in state speech, even while encouraging and praising states that are speaking out about movements like BDS that generate discriminatory effects. Implementing the changes to state speech that I have proposed would remove barriers and open the door for dialogue, while simultaneously making state anti-BDS speech more effective.

151. Such an argument would be in line with the “framework democracy” paradigm. *See* Tebbe, *supra* note 107; *and supra* Part I.C.

152. Greene, *supra* note 116, at 69.

153. *See* Greene, *supra* note 116, at 11.

154. *See supra* note 119 and accompanying text.