

THE ISRAELI ANTI-BOYCOTT LAW: SHOULD ARTISTS BE WORRIED?♦

INTRODUCTION	752
I. THE ORIGIN AND SCOPE OF BOYCOTTS AGAINST ISRAEL	752
A. <i>The Arab League Boycott</i>	752
B. <i>The Palestinian BDS Movement: Combining the Goals of the Arab League, the Methods of the African National Congress, and the Rhetoric of Apartheid</i>	753
C. <i>International Manifestations of the Cultural Boycott on Israel</i>	756
D. <i>Domestic Manifestations of the Cultural Boycott on Israel</i>	759
II. LEGISLATIVE RESPONSE TO THE BDS CAMPAIGN: THE LAW FOR PREVENTION OF HARM TO THE STATE OF ISRAEL BY MEANS OF BOYCOTT.....	762
A. <i>Textual Analysis of the Anti-Boycott Law</i>	763
B. <i>Legislative History of the Anti-Boycott Law</i>	766
C. <i>Applicability of the Anti-Boycott Law to Foreign Nationals Located Abroad</i>	768
D. <i>Potential Domestic Israeli Application of the Anti-Boycott Law</i>	772
III. THE ISRAELI SUPREME COURT SHOULD FIND THE ANTI-BOYCOTT LAW UNCONSTITUTIONAL	775
A. <i>The Knesset's Own Legal Advisors Suggested the Law is Unconstitutional</i>	775
B. <i>The Anti-Boycott Law is Not Saved by the Section 8 Limitation Clause</i>	777
CONCLUSION.....	778

♦ Permission is hereby granted for noncommercial reproduction of this Note in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

INTRODUCTION

Though much has been written about the economic dimension of Arab boycotts against Israel, much less attention has been paid to the implications of wider calls for a cultural boycott against Israel. Part I of this note will outline the scope of Israel's boycott problem by looking to the history of the Palestinian Boycott, Divestment, and Sanctions ("BDS") movement, while focusing in particular on the cultural aspects of this boycott. It will then discuss the current dimensions of the domestic and international cultural boycott campaigns Israel faces. Part II will analyze the Israeli legislative response to the BDS movement through its controversial Law for the Prevention of Harm to the State of Israel by means of Boycott ("Anti-Boycott Law"). As part of its analysis, Part II will discuss the potential implications of the Anti-Boycott Law for Israeli and foreign artists who publicly promote the cultural boycott in Israel and abroad. Finally, Part III of the note will assess the merits of the petitions against the Anti-Boycott Law that are currently pending before the Israeli Supreme Court. Ultimately, this note will argue that the law should be struck down due to its chilling effect on freedom of speech, which is a value protected by Israel's Basic Law on Human Dignity and Liberty.

I. THE ORIGIN AND SCOPE OF BOYCOTTS AGAINST ISRAEL

A. *The Arab League Boycott*

The first boycott relating to Israel predates the state's existence. In 1946, two years before Israel declared independence, the Arab League instituted a boycott against Zionist produce in an attempt to prevent the Zionist movement from building a Jewish state in Palestine.¹ After Israel's declaration of independence in 1948 and the onslaught of the War of Independence, this boycott was expanded into a primary, secondary and tertiary economic boycott against the State of Israel.² When the fighting ended in 1949 with an armistice, but no peace treaty, the boycott took on a more central role in the Arab League's effort to prevent the development of a Jewish state on what it considered to be Arab land.³

Though the Arab League boycott was originally designed "to

¹ Donald S. Losman, *The Arab Boycott of Israel*, 3 INT'L I. MIDDLE EAST STUD. 99, 100 (1972) ("Products of Palestinian Jews are to be considered undesirable in Arab countries. They should be prohibited and refused as long as their production in Palestine might lead to the realization of Zionist political aims.") (quoting Arab League Resolution No. 16).

² See Kenneth Lasson, *Scholarly and Scientific Boycotts of Israel: Abusing the Academic Enterprise*, 21 TOURO L. REV. 989, 990-97 (2006); see also Chaim Freshtman & Neil Gandal, *The Effect of the Arab Boycott on Israel: The Automobile Market*, 29 RAND J. ECON. 193, 195 (1998) (explaining the mechanism of the secondary and tertiary boycott in more detail).

³ Losman, *supra* note 1.

accomplish what the military campaign had failed to achieve”⁴—namely, preventing the existence of a Jewish state in Palestine—its approach was narrower than the modern Palestinian BDS movement in that it was Arab-centric. The Arab League created a centralized, bureaucratic enforcement mechanism coordinated by the Central Boycott Office (“CBO”) in Damascus.⁵ The CBO’s boycott efforts were directed at preventing any goods tainted by association with Israel from entering Arab markets.⁶ The Arab League placed substantially less emphasis on preventing Israeli-related goods from being sold generally, outside the Arab world.⁷ Thus, the Arab League boycott sought to constrain the Israeli economy not by a grassroots, international, consumer-initiated boycott of Israeli products wherever they were sold—as the BDS movement is now attempting to do—but rather by a government-led bureaucratic regime that conditioned a company’s access to Arab markets on that company’s certification that it had virtually no economic ties with Israel.⁸

B. The Palestinian BDS Movement: Combining the Goals of the Arab League, the Methods of the African National Congress, and the Rhetoric of Apartheid

While the Palestinian BDS movement has incorporated some of the economic elements of the Arab League boycott, its overall strategy is more akin to, and was actually inspired by, the African National Congress’ (“ANC”) campaign to economically, culturally, and academically boycott the apartheid regime in South Africa.⁹ In the 1970s and 1980s, the ANC’s campaign helped turn the South African regime into an international pariah by encouraging foreign governments, international organizations, corporations, and various elements of international civil society to boycott the South African government.¹⁰ In addition to implementing an expansive domestic boycott of the South African government by black South Africans, the ANC advocated for both more traditional international boycott mechanisms, such as arms embargoes, financial sanctions, and visa restrictions on South African officials, as well as for less traditional boycott mechanisms, such as the boycott of South African cultural

⁴ *Id.*

⁵ Freshman & Gandal, *supra* note 2, at 195.

⁶ *Id.*

⁷ *Id.*

⁸ See Losman, *supra* note 1, at 107–10; see also Freshman & Gandal, *supra* note 2, at 197–98.

⁹ *Cultural Boycott*, BDS MOVEMENT, <http://www.bdsmovement.net/activecamps/cultural-boycott> (last visited Oct. 30, 2013) (“The cultural boycott campaign against apartheid South Africa has been a major source of inspiration in formulating the Palestinian boycott calls and their criteria.”).

¹⁰ Douglas Booth, *Hitting Apartheid for Six? The Politics of the South African Sports Boycott*, 38 J. CONTEMP. HIST. 477 (2003).

institutions and sports teams, and various grassroots consumer boycotts of South African produce and products.¹¹

The ANC-led international boycott of the South African apartheid regime proved successful in that it culminated in ANC leader Nelson Mandela's release from prison and his eventual victory in the first non-racial elections in South Africa.¹² These events marked the beginning of the end for the South African apartheid regime. The Palestinian BDS movement seeks to replicate the ANC's success by implementing a global grassroots approach in the boycott against Israel, and by comparing the Israeli government's policies vis-à-vis the Palestinians to the policies of apartheid South Africa.¹³

The term "apartheid" was coined by the Nationalist Party, which rose to power in South Africa in 1948.¹⁴ Apartheid has many meanings, but in its most general form the term means "separateness," and it was used to describe the Nationalist Party's policy of separating black and white South Africans into two distinct political classes in order to ensure the political domination of white Afrikaners.¹⁵ The process of incorporating the ignominious term "apartheid" into the Palestinian narrative was accomplished most successfully in the NGO forum at the UN World Conference Against Racism, which was appropriately held in Durban, South Africa. The final document produced by the forum "called 'for the reinstatement of the UN resolution equating Zionism with racism' and 'the complete and total isolation of Israel as an apartheid state.'"¹⁶ While this document did not have binding effect, and while its findings regarding Israel have been widely rejected,¹⁷ it nevertheless invigorated and lent credibility to those who argued that Israel was guilty of apartheid, and that Israel should therefore be subjected to the same sanctions that prevailed against the apartheid regime of South

¹¹ *Id.*

¹² *The Story of Africa: Collapse of Apartheid*, BBC, http://www.bbc.co.uk/worldservice/specials/1624_story_of_africa/page31.shtml (last visited Oct. 30, 2013).

¹³ Lasson, *supra* note 2, at 1020 ("The taboo has been shattered at last. From now on it will be acceptable to compare Israel's apartheid system to its South African predecessor.").

¹⁴ Margaret Roberts, *The Ending of Apartheid: Shifting Inequalities in South Africa*, 79 GEOGRAPHY 53, 54 (1994).

¹⁵ *See id.*

¹⁶ Anne Bayefsky, *The UN World Conference Against Racism: A Racist Anti-Racism Conference*, 94 AM. SOC'Y INT'L L. 65, 67 (2002).

¹⁷ *See* Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31 (2002) (according to former Democratic Congressman Tom Lantos of California, who served as a U.S. delegate to the UN conference, the conference's agenda was hijacked by the Organization of the Islamic Conference and other pro-Palestinian organizations that sought to use the UN forum to delegitimize Israel and the U.S. Lantos described the Durban conference on racism as a "diplomatic fiasco."); *See also* Robbie Sabel, *The Campaign to Delegitimize Israel with the False Charge of Apartheid*, 23 JEWISH POL. STU. REV. 18 (2011) (delineating the arguments made in favor of classifying Israel as an apartheid state, and refuting them one by one).

Africa.¹⁸

Building on the momentum generated by the UN conference in Durban, in the spring of 2002, at the height of the Second Intifada, and the corresponding upswing in media coverage of the Israeli-Palestinian conflict,¹⁹ a campaign was launched at a number of American academic institutions calling for divestment from Israel.²⁰ During this same period, professors in Britain began a campaign to boycott Israeli academic and cultural institutions.²¹ Meanwhile, a group of Palestinian academics in Ramallah reasserted themselves in the international boycott movement by forming the Palestinian Campaign for the Academic and Cultural Boycott of Israel (“PACBI”).²² Unlike the mostly economic based boycotts that were being advocated in the U.S., PACBI emphasized the importance of implementing an academic and *cultural* boycott to encourage Israel to meet Palestinian demands.²³

The boycott and divestment campaigns gained momentum after the controversial July 9, 2004 International Court of Justice (“ICJ”) Advisory Opinion that found Israel’s separation barrier illegal under international law.²⁴ On the one-year anniversary of the ICJ opinion, a broad coalition of Palestinian activists claiming to represent Palestinian refugees, Palestinians under occupation, and Palestinian citizens of Israel, published an open letter to the international community calling for “[b]oycott, [d]ivestment and [s]anctions against Israel [u]ntil it [c]omplies with [i]nternational [l]aw and [u]niversal [p]rinciples of

¹⁸ Sabel, *supra* note 17, at 20 (“The UN’s World Conference Against Racism . . . gave the Israel Apartheid calumny new force in international circles.”).

¹⁹ STEFANIE LEVIT, ISRAEL’S TOURISM INDUSTRY: RECOVERING FROM CRISES AND GENERATING GROWTH (2008), available at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1077&context=honorscollege_theses.

²⁰ See Sabel, *supra* note 17, at 21 (“The Durban NGO declaration set off a global campaign against Israel that included an ‘Israel Apartheid Week’ initiative across Canadian college campuses and at some U.S. universities as well.”); see also Lasson, *supra* note 2, at 990.

²¹ Lasson, *supra* note 2, at 991-92. Coincidentally, Britain is also where the term “boycott” was first coined in the Nineteenth Century. The term originated from press coverage of a land agent in Ireland by the name of Captain Charles Cunningham Boycott who refused to reduce his rents. When the community responded by avoiding doing business with him, the term “boycott” was born. *Id.* at 992-93.

²² *History*, PALESTINIAN CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (Dec. 21, 2008) <http://pacbi.org/etemplate.php?id=868>.

²³ *Id.* In a statement of principles issued in July 2004 and endorsed by numerous Palestinian institutions and organizations, PACBI urged the international community to:

comprehensively and consistently boycott all Israeli academic and *cultural* institutions until Israel withdraws from all the lands occupied in 1967, including East Jerusalem; removes all its colonies in those lands; agrees to United Nations resolutions relevant to the restitution of Palestinian refugees rights; and dismantles its system of apartheid.

Id. (emphasis added).

²⁴ Omar Barghouti, *Putting Palestine Back on the Map: Boycott as Civil Resistance*, 35 J. PALESTINE STUD. 51, 53 (2006) (Omar Barghouti is the founder of PACBI). Lasson, *supra* note 2, at 1020; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

[h]uman [r]ights.”²⁵ The movement born out of this call became known as the BDS movement and is currently spearheaded by the Palestinian BDS National Committee (“BNC”).²⁶

C. International Manifestations of the Cultural Boycott on Israel

Though there are numerous international manifestations of the Palestinian BDS movement’s boycott of Israel, this Note focuses on the more narrow issue of the cultural boycott. In particular, this Note is concerned with the potential legal implications of the BDS movement’s campaign to encourage well-known artists and entertainers from around the world to boycott Israel by refusing to perform in the country, exhibit their work in the country, or cooperate in any other way with the institutions of the country.²⁷ Citing the importance of the artist boycott of South Africa in the downfall of the apartheid regime, the Palestinian BDS movement has made a concerted effort to inundate artists with pleas not to perform in Israel, lest they be complicit in crimes against humanity.²⁸ This cultural aspect of the BDS movement’s boycott campaign can best be seen through two of its most vocal supporters: the British musician Roger Waters (lead singer and bassist of the band Pink Floyd), and American writer Alice Walker (best known for her novel *The Color Purple*).²⁹

²⁵ *Palestinian Civil Society Call for BDS*, BDS MOVEMENT (July 9, 2005), <http://www.bdsmovement.net/call>.

²⁶ *Introducing The BDS Movement*, BDS MOVEMENT, <http://www.bdsmovement.net/bdsintro>. The Palestinian BNC was established in 2007 for the purpose of implementing the BDS movement’s call for a complete economic, cultural, and academic boycott of Israel across the globe. *Id.*

²⁷ See *PACBI Guidelines for the International Cultural Boycott of Israel (Revised October 2010)*, PALESTINIAN CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (July 20, 2009), <http://www.pacbi.org/etemplate.php?id=1047> (“[I]nternational artists and cultural workers are urged not to exhibit, present, or showcase their work (e.g. films, installations, literary works) or lecture at complicit Israeli cultural institutions or events, or to grant permission for the publication or exhibition of such work by such institutions.”).

²⁸ See, e.g., *From Israeli Citizens to International Artists: Please Do Not Perform at the Yellow Submarine in Jerusalem*, BOYCOTT! SUPPORTING THE PALESTINIAN CALL FOR BDS FROM WITHIN, <http://boycottisrael.info/content/israeli-citizens-international-artists-please-do-not-perform-yellow-submarine-jerusalem> (last visited Oct. 30, 2013). BOYCOTT! warns international artists that “the Israeli government will endeavor to use [their performance] to legitimize and promote the current oppressive and racist order” and then it proceeds to quote the South African Archbishop Desmond Tutu:

International Boycotts, Divestment and Sanctions against the Apartheid regime . . . led to our victory . . . Just as we said during apartheid that it was inappropriate for international artists to perform in South Africa in a society founded on discriminatory laws and racial exclusivity, so it would be wrong . . . to perform in Israel.

Id.

²⁹ See, e.g., Roger Waters, *Tear Down This Israeli Wall*, THE GUARDIAN (Mar. 11, 2011), <http://www.guardian.co.uk/commentisfree/2011/mar/11/cultural-boycott-west-bank-wall> (“This is not an attack on the people of Israel. This is, however, a plea to my colleagues in the music industry, and also to artists in other disciplines, to join this cultural boycott.”); see also Alice Walker, *Letter from Alice Walker to Publishers at Yediot Books*, PALESTINIAN CAMPAIGN FOR

During a 2006 trip to perform in Israel, Roger Waters was convinced to tour the West Bank with Palestinian BDS advocates.³⁰ While on this tour, Waters was persuaded that the BDS movement's cultural boycott of Israel was appropriate and that he should join the movement.³¹ Waters ended up moving his concert from its contracted venue in Tel Aviv to a small Muslim, Christian, and Jewish agricultural community dedicated to fostering coexistence, and he has refused to play in Israel ever since.³² While some artists have merely tacitly cooperated with the cultural boycott,³³ Waters has become an outspoken BDS activist in recent years with his numerous public statements endorsing the BDS agenda and encouraging other artists to join the movement.³⁴

Like Roger Waters, Alice Walker has also become an outspoken advocate of the BDS movement. Walker made headlines in June 2011 when she attempted to participate in a flotilla that aimed to break Israel's blockade of Gaza.³⁵ She made headlines again in July, 2012 when she refused the request of the Israeli publisher, Yediot Books, to publish her novel, *The Color Purple*, in Hebrew.³⁶ Walker cited her past support for the cultural boycott of South Africa as well as her ongoing support for the cultural boycott of Israel as the reasons for her refusal to grant the publisher the rights to her book.³⁷ She also granted an exclusive interview to a major Israeli daily newspaper, in which she explained why she is boycotting Israel and why she thinks Israeli

THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (June 9, 2012), <http://www.pacbi.org/etemplate.php?id=1917> (quoting Walker in a reply to a letter refusing the request of an Israeli publishing house to publish her novel *The Color Purple*: "It is my hope that the non-violent BDS (Boycott, Divestment, Sanctions) movement, of which I am part, will have enough of an impact on Israeli civilian society to change the situation.").

³⁰ Walker, *supra* note 29.

³¹ *Id.*

³² *Id.*

³³ For example, Bruce Springsteen, Eric Clapton, U2, and Coldplay are artists who do not perform in Israel, and thus appear to be tacitly abiding by the cultural boycott, but they have not publicly stated their support for the boycott. DPAI, *2012 Summary of the Cultural Boycott of Israel*, REFRAIN PLAYING ISRAEL (Dec. 31, 2012), <http://refrainplayingisrael.blogspot.com/2012/12/2012-summary-of-cultural-boycott-of.html> ("Israeli TV uses the term 'refuseniks' to refer to Bruce Springsteen, Eric Clapton, U2 and Coldplay.").

³⁴ See, e.g., *supra* note 29 and accompanying text; see also *Open Letter from Artists to Carnegie Hall: Cancel the Israel Philharmonic Orchestra's Performance*, ADALAH-NY, <http://adalahny.org/web-action/1002/open-letter-artists-carnegie-hall-cancel-israel-philharmonic-orchestras-performance> (last visited, Oct. 30, 2013); see also *Roger Waters Endorses BDS and Speaks Against Israeli Anti-Boycott Law*, PULSEMEDIA (July 17, 2011), <http://pulsemedia.org/2011/07/17/roger-waters-endorses-bds-and-speaks-against-israeli-anti-boycott-law/> (showing a video of Roger Waters endorsing the BDS movement and condemning the Israeli Anti-Boycott Law.).

³⁵ Alice Walker, *Alice Walker: Why I'm Joining the Freedom Flotilla to Gaza*, GUARDIAN (June 24, 2011), <http://www.guardian.co.uk/world/2011/jun/25/alice-walker-gaza-freedom-flotilla>.

³⁶ Walker, *supra* note 29.

³⁷ *Id.*

citizens, and all people of conscience, should support the boycott.³⁸

While Roger Waters and Alice Walker have been two of the most outspoken advocates of the BDS movement, there are a considerable number of other international artists who support the cultural boycott less vociferously, or who may have been pressured into compliance.³⁹ According to at least one reported account by a music industry executive, it is becoming increasingly difficult to attract international artists to perform in Israel despite high levels of financial compensation.⁴⁰ The potential inability to draw top billed artists is detrimental in two ways: first, it damages the morale of Israeli citizens by signaling to them that their country is losing legitimacy in the international community, and second, it has a detrimental effect on Israel's legitimacy in the eyes of foreigners, which in turn can hurt the Israeli economy by making Israeli products less desirable abroad.⁴¹ The growth of this de-legitimization campaign was in the forefront of the minds of the legislators who proposed the Anti-Boycott Bill in 2010.⁴²

It is clear that outspoken artists such as Waters and Walker are not alone in boycotting Israel. There are numerous other artists and academics from a variety of fields who have either signed letters of support for the cultural boycott, who have cancelled performances in Israel, or who have refused to appear there in the first place.⁴³ But while these artists may have tacitly abided by the cultural boycott of Israel, or even publicly supported the boycott, few artists with the level of

³⁸ See Alice Walker, *Interview with Alice Walker after She Declines to Publish with Israeli Publisher*, PALESTINIAN CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (July 7, 2012), available at <http://pacbi.org/etemplate.php?id=1942>.

³⁹ See Isabel Kershner, *Artists' Boycott Strikes a Dissonant Note Inside Israel*, N.Y. TIMES (June 9, 2010), <http://www.nytimes.com/2010/06/10/world/middleeast/10concerts.html> (describing that well known artists, including The Pixies and Elvis Costello, have contracted to perform in Israel only to pull out at the last minute, due to apparent pressure from BDS activists. Elvis Costello even publicly justified his decision to perform in Israel, saying "it's like never appearing in the U.S. because you didn't like Bush's policies or boycotting England because of Margaret Thatcher." However, two weeks later he had a change of heart and cancelled the performances.).

⁴⁰ Vita Bekker, *Music Stars' Boycott Rocks Israel*, THE NATIONAL (May 22, 2010), <http://www.thenational.ae/news/world/middle-east/music-stars-boycott-rocks-israel> (citing unidentified music industry executive as saying he has "approached more than 15 performing artists with proposals to give concerts in Israel in return for 'high levels' of financial compensation, but none had agreed.").

⁴¹ See Kershner, *supra* note 39 ("For many here, though, such concerts were never just about the music. The more high-profile the artist, the more Israel felt like a normal country, less defined by conflict; each performance was taken as a sign of global acceptance that Israelis so crave."); see also Bekker, *supra* note 40 (citing Omar Barghouti, the founder of PACBI, for the proposition that "an escalation of the cultural boycott may eventually hurt the Israeli economy . . . [t]he logic of cultural boycotts is that they hurt the image of the oppressor state, making it and its products less appealing to the international public.").

⁴² Banning Boycotts Bill, 2010, 5052/81/5(Isr.).

⁴³ See *2012 Academic & Cultural Boycott of Israel Highlights*, PALESTINIAN CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (Jan. 5, 2013), <http://www.pacbi.org/etemplate.php?id=2094> (listing numerous artists and academics who participated in the boycott over the course of 2012).

prestige and fame of Roger Waters and Alice Walker have been as vocal about their support for the boycott, or as active in the BDS movement. This is important to note because mere participation in a boycott of Israel is not a violation of the Israeli Anti-Boycott Law.⁴⁴ A violation occurs only if one knowingly publishes a *call* for boycott against the State of Israel under circumstances where there is a “reasonable probability that the call will lead to a boycott,” and the individual was aware of that possibility.⁴⁵ So while many artists may abide the cultural boycott of Israel, it is only those artists who, like Waters and Walker, publicly and frequently *call on others* to boycott Israel, who could conceivably be reached by the Anti-Boycott Law.⁴⁶

D. *Domestic Manifestations of the Cultural Boycott on Israel*

Though originally envisioned as a tool to combat international manifestations of the Palestinian-led BDS movement, the Anti-Boycott Law was also expected to provide a legislative response to Israeli citizens who call for boycotts against Israel, whether they be economic, cultural or otherwise.⁴⁷ Given the fact that Israeli citizens living in Israel must interact with the government and with Israeli-owned businesses on a daily basis, a question arises as to how one boycotts their own country of residence. When asked in an interview what Israeli citizens who opposed their government’s policies in the West Bank should do in response, the American novelist and BDS advocate Alice Walker responded, “you can boycott anything that deserves it. Find a way.”⁴⁸

The Israeli pro-BDS organization BOYCOTT! Supporting the Palestinian BDS Call from Within (“Boycott from Within”) has found two central ways in which Israeli citizens can follow Walker’s advice and contribute to the Palestinian BDS movement. First, they can call on the international community to comply with the Palestinian calls for BDS as published on the BDS movement and PACBI websites.⁴⁹ Secondly, they can call for, and participate in a boycott against Israeli institutions and products closely associated with the “occupation industry.”⁵⁰

⁴⁴ See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

⁴⁵ *Id.*

⁴⁶ See *supra* note 29 and accompanying text.

⁴⁷ See Banning Boycotts Bill, 2010, 5052/81/5(Isr.).

⁴⁸ Walker, *supra* note 38.

⁴⁹ See *Call for Academic and Cultural Boycott of Israel*, PALESTINIAN CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (July 6, 2004), <http://pacbi.org/etemplate.php?id=869>; see also BDS MOVEMENT, *supra* note 25.

⁵⁰ *Frequently Asked Questions*, BOYCOTT! SUPPORTING THE PALESTINIAN CALL FOR BDS FROM WITHIN, <http://boycottisrael.info/content/frequently-asked-questions> (last visited Oct. 30,

One of the main efforts undertaken by Boycott from Within to further the first plank of its BDS strategy is its campaign to convince foreign artists not to perform in Israel.⁵¹ The organization's modus operandi is to send letters to well-known international acts with scheduled tour dates in Israel, including Lenny Kravitz and the Red Hot Chili Peppers, in an effort to dissuade them from performing.⁵² Boycott from Within then posts the letters on its website in order to increase public pressure on the artists to abide by the Palestinian BDS movement's cultural boycott.⁵³

While it is true that non-Israeli BDS activists engage in the same tactic,⁵⁴ Boycott from Within plays an important role in the global BDS movement by providing a Jewish Israeli voice in favor of boycotting Israel. Given that BDS activists are sometimes accused of being motivated by anti-Semitism, Boycott from Within sees one of its main functions as providing a credible defense against such accusations.⁵⁵

In addition to providing moral support and legitimacy for the international BDS movement, Boycott from Within, along with other domestic BDS organizations, encourages Israeli activists to take direct part in the BDS campaign by personally boycotting any institution

2012). Addressing Israeli citizens interested in supporting the BDS movement, the Israeli BDS activists write:

[m]ost importantly, support the BDS call and take a clear stand from within, in order to put pressure on the Israeli government. You could also boycott products which are identified as especially linked to the occupation industry (such as settlement products or products which exploit Palestinian captive labor . . .).

Id.

⁵¹ *Id.* ("Foreign artists should refrain from participating in any events that are organized by mainstream institutions, and also in 'ordinary' cultural events that are purely commercial."); see, e.g., *Lenny Kravitz – Please Don't Play Apartheid Israel*, BOYCOTT! SUPPORTING THE PALESTINIAN CALL FOR BDS FROM WITHIN, <http://boycottisrael.info/content/lenny-kravitz-%E2%80%93-please-dont-play-apartheid-israel> (last visited Oct. 30, 2013); *Israeli Citizens to Red Hot Chili Peppers: Please Cancel Your Tel-Aviv Gig*, BOYCOTT! SUPPORTING THE PALESTINIAN CALL FOR BDS FROM WITHIN (Apr. 2012), <http://boycottisrael.info/content/israeli-citizens-red-hot-chili-peppers-please-cancel-your-tel-aviv-gig>.

⁵² See, e.g., *supra* note 51 and accompanying text; see also *supra* notes 25 & 49 and accompanying text.

⁵³ See *supra* note 51 and accompanying text.

⁵⁴ *On Music, Politics and Ethical Responsibility*, PALESTINIAN CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL (Oct. 3, 2012), <http://www.pacbi.org/etemplate.php?id=2010>.

Earlier in September, in the lead up to a performance by the Red Hot Chili Peppers in apartheid Israel, a worldwide campaign calling on them to cancel their show gathered steam. Over the last several months, our South African, Lebanese, Indian, American, Israeli, and Italian partners, among others, had all written letters to RHCP, and a petition was set up that garnered over 7500 signatures, a first of its kind.

Id. (footnote omitted).

⁵⁵ *Frequently Asked Questions*, BOYCOTT! SUPPORTING THE PALESTINIAN CALL FOR BDS FROM WITHIN, <http://boycottisrael.info/content/frequently-asked-questions> (last visited Oct. 30, 2013). "[Israelis calling for BDS] can help the international campaign respond to accusations of practicing 'anti-Semitism' or 'the denial of Israel's right to exist'." *Id.*

closely associated with the “occupation industry.”⁵⁶ Part of this effort has included campaigns to boycott cultural institutions. In furtherance of this goal, an Israeli group by the name of Courage to Refuse, along with a coalition of Israeli stage actors, writers and directors, called for a boycott of the Ariel Regional Center for the Performing Arts, located in the West Bank settlement of Ariel.⁵⁷

While the Ariel Regional Center for the Performing Arts only opened its doors in November of 2010, it had been in the planning stages for nearly two decades and has drawn a lot of attention due to its location in a settlement beyond the Green Line.⁵⁸ Unlike the international artists who have been encouraged to boycott Israel *in toto*, the Israeli artists at the center of the Ariel boycott have merely refused to perform in Jewish settlements beyond the Green Line.⁵⁹ Those in opposition to the artist boycott have argued that it is discriminatory and illegitimate to boycott settlers (Israeli Jews living in towns beyond the Green Line) on the basis of their political beliefs.⁶⁰ However, the boycotters argue in response that they are not boycotting the settlers, but

⁵⁶ BOYCOTT!, *supra* note 50; see also *Theatre Professionals Refuse to Perform in Ariel, COURAGE TO REFUSE* (Aug. 27, 2010), <http://www.seruv.org.il/english/article.asp?msgid=282&type=news>.

⁵⁷ Harriet Sherwood, *Israeli Actors to Boycott New West Bank Theatre*, THE GUARDIAN (Aug. 29, 2010), <http://www.guardian.co.uk/world/2010/aug/29/actors-boycott-west-bank-theatre>; see also *supra* note 56.

⁵⁸ *The Ariel Regional Center for the Performing Arts*, ARIEL, <http://www.ariel.muni.il/?CategoryID=264&ArticleID=182> (last visited Oct. 30, 2013). Territory beyond the “Green Line” is land beyond the 1949 Armistice Demarcation Line that was negotiated at the conclusion of Israel’s War of Independence. Following the 1967 Six Day War, Israel conquered land beyond the Green Line, including the West Bank territory in which the settlement of Ariel is located. Yoram Dinstein, *Legal Dimensions of the Arab-Israeli Conflict*, in ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL’S 50TH ANNIVERSARY 138, 143–45 (Alfred E. Kellermann et al. eds., 1998).

⁵⁹ See Chaim Levinson, *Israeli Theater Actors Refuse to Perform at New West Bank Cultural Center*, HAARETZ (Aug. 26, 2010), <http://www.haaretz.com/news/national/israeli-theater-actors-refuse-to-perform-at-new-west-bank-cultural-center-1.310314>. Israel’s right to settle the territory beyond the Green Line is disputed by many and it is this settlement activity which the actors were protesting through their boycott of the Ariel Regional Center for the Performing Arts. Rami Heuberger, one of the boycotters, explained that “[a]s a stage actor it is a very, very problematic issue, and I think that so long as settlements are a controversial issue that will be discussed in any negotiations [with the Palestinians], I should not be there.” *Id.* See also Merav Yudilovitch, *Artists to Refuse to Perform in Ariel Culture Hall*, YNETNEWS (Aug. 27, 2010), <http://www.ynetnews.com/articles/0,7340,L-3944791,00.html> (describing how another of the boycott’s initiators “told Ynet on Friday, ‘Ariel is not a legitimate community, and as such, is against international law . . . [and] anyone performing there would be considered a criminal according to international law. . . . The moment we perform there, we are giving legitimization to this settlement’s existence.’”).

⁶⁰ See Atilla Somfalvi, *MK’s: Boycott Artists who Won’t Perform in Ariel*, YNETNEWS (Aug. 28, 2010), <http://www.ynetnews.com/articles/0,7340,L-3945030,00.html> (speaking of the boycott’s effect on the residents of Ariel, MK Alex Miller argued that “You can’t have innocent, law abiding, tax paying citizens suffer from ugly political discrimination that prevents them from having access to arts and culture. This is collective punishment and a dangerous precedent that calls for discrimination under the guise of ideology.”).

rather the government's settlement policy, which they believe is counter to international law.⁶¹

The actors' boycott of the Ariel cultural center was announced nearly three months before the center opened, and roughly one month after the first draft of the Anti-Boycott Law was introduced in the Knesset (Israel's parliament).⁶² This boycott was considered especially irksome by many right-wing Israeli politicians because most of the actors, writers, and directors participating in the boycott were members of theater companies that were directly subsidized by the State.⁶³ While the actors' boycott was not the first boycott instituted by Israeli citizens against an Israeli cultural institution, it was one of the more substantial and well-covered ones, and it was clearly in the minds of the politicians who later debated and passed the Anti-Boycott Law.⁶⁴ Accordingly, this law should be viewed in the context of, and as a legislative response to, the mounting cultural boycott campaign, be it against settlements in particular or against Israel generally, which many members of parliament saw as a substantial threat to the legitimacy of the state.⁶⁵

II. LEGISLATIVE RESPONSE TO THE BDS CAMPAIGN: THE LAW FOR PREVENTION OF HARM TO THE STATE OF ISRAEL BY MEANS OF BOYCOTT

In response to the previously discussed domestic and international calls to boycott Israel, a coalition of Knesset members introduced the far-reaching Ban on Boycotting Bill ("Anti-Boycott Bill") on July 15, 2010.⁶⁶ This bill was intended to deter boycotts against Israel by making public calls to boycott Israel a civil wrong (tort) that could result in compensatory and punitive damages.⁶⁷ Additionally, under the initial draft of the Anti-Boycott Bill, foreign offenders could be denied entry

⁶¹ See Boaz Fyler, *Yehoshua, Oz, Grossman Back Boycott of Ariel*, YNETNEWS (Aug. 30, 2010), <http://www.ynetnews.com/articles/0,7340,L-3946485,00.html>. The influential Israeli writer A.B. Yehoshua signed a letter supporting the boycotters and said: "I support [the actors] because they are protesting against a location, not against people. (Ariel) is a disputed place that does not belong to the State of Israel and may be evacuated soon." *Id.*

⁶² See Levinson, *supra* note 59. The boycott was reported as early as Aug. 26, 2010 while the cultural center was not scheduled to open until November of that year. *Id.* See also Draft Banning Boycotts Bill, 2010, HH (Isr.).

⁶³ See Sherwood, *supra* note 57. The mayor of Ariel said in reference to the boycotters: "[t]hese actors get salaries from the government, which is sponsoring their theatres. You cannot take the money from the government and then decide your own policies. . . . If they disagree [with performing in Ariel], they should resign." *Id.*

⁶⁴ See DK (2011) Protocol 416 (Isr.), available at <http://oknesset.org/committee/meeting/4211/> (Third debate of the Knesset Constitution, Law and Justice Committee on the Anti-Boycott Bill).

⁶⁵ *Id.*; see also Ronen Perry, *Tort and Insurance Law Yearbook*, 12 (Ken Oliphant & Barbara C. Steininger, eds., 2012), available at <http://ssrn.com/abstract=2163130>.

⁶⁶ See Draft Banning Boycotts Bill, 2010, HH (Isr.); see also Annette Groth & Tanja Tabbara, *De-democratization in Israel: Repressions Against Human Rights Defenders and the Need for Implementation of the EU Guidelines on the Protection of Human Rights Defenders*, 18 HUM. RTS. BRIEF. 7, 9 (2011).

⁶⁷ See Draft Banning Boycotts Bill, 2010, HH (Isr.).

visas to Israel for a period of no less than ten years, and foreign governments that boycotted Israel would be sanctioned.⁶⁸ However, the Anti-Boycott Bill was substantially amended and eventually passed into law in a more narrow formulation on July 13, 2011, under the name “Law Preventing Harm to the State of Israel by Means of Boycott.”⁶⁹ Since the law has yet to be tested in court, the following section will analyze the text of the Anti-Boycott Law, as well as its legislative history, in an effort to illuminate how the law could eventually operate: who it is meant to cover, what particular behavior it proscribes, and what remedies it makes available to plaintiffs.

A. Textual Analysis of the Anti-Boycott Law

The Anti-Boycott Law codifies a new tort under which a person can be sued for monetary damages and face administrative penalties if they intentionally make a public call to boycott “the State of Israel or territory under its control.”⁷⁰ Section 1 of the statute defines “Boycott against the State of Israel” as “deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage.”⁷¹ While the Anti-Boycott Law proscribes “public calls” to boycott, it does not reach the personal act of boycotting.

Section 2 of the statute defines what constitutes a “call” to boycott, and the extent of liability an individual who “calls” for a boycott could face.⁷² Section 2(a) defines the proscribed behavior as “knowingly”

⁶⁸ *Id.* at §§ 5–6.

⁶⁹ Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

⁷⁰ *Id.* Israel has a civil-law-based legal system. The Civil Wrongs Ordinance [new version] codifies Israel’s tort laws, including the Anti-Boycott Law.

⁷¹ *Id.*; see also Perry, *supra* note 65, at 12 (additional translation of Section 1 of the Anti-Boycott Law).

⁷² Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013). Section 2 of the statute provides:

(a) He who knowingly publishes a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is reasonable probability that the call will lead to a boycott, and he who published the call was aware of this possibility, will be considered to have committed a civil wrong to which the [Civil Wrongs Ordinance] [new version] is applicable.

(b) In regards to clause 62(a) of the [Civil Wrongs Ordinance] [new version], he who causes a binding legal agreement to be breached by calling for a boycott against the State of Israel will not be viewed as someone who acted with sufficiently justified cause.

(c) If the court will find that a civil wrong, as defined by this law, was deliberately carried out, it will be authorized to compel the person who committed the wrongdoing

publishing a call for boycott against the State of Israel under circumstances where there is a “reasonable probability that the call will lead to a boycott,” and the individual is aware of that possibility.⁷³

Section (2)(b) delineates the interaction of the new Anti-Boycott Law with the existing “tortious interference with contract” statute.⁷⁴ One of the statutory defenses to tortious interference is that the behavior at issue had a “sufficiently justified cause.”⁷⁵ According to Section (2)(b) of the Anti-Boycott Law, one who causes a contract to be breached through their call for a boycott will not be considered to have acted with “sufficiently justified cause” as a matter of law.⁷⁶ This Section denies judges any discretion in deciding whether a call to boycott the State of Israel in a particular circumstance may constitute a “sufficiently justified cause” under the tortious interference statute.⁷⁷ Some may ask why it was necessary for the Anti-Boycott Law to create a new category of tort if the legislators were aware that legal action could already be brought against boycotters under the tortious interference statute. The reason is that, unlike the tortious interference statute, the Anti-Boycott Law also covers situations in which no contract is at issue.

Moreover, unlike with the tortious interference statute, if the court finds that the defendant’s call for a boycott was *malicious*, the court is authorized under Section 2(c) of the Anti-Boycott Law to award punitive damages that are independent of any provable pecuniary damage caused by the boycott.⁷⁸ In calculating the punitive damages the court will consider, among other things, “the circumstances under which the wrong was carried out, its severity and its extent.”⁷⁹

to pay [punitive] damages that are independent of the actual damage caused; in calculating the sum of these damages, for example, the court will take into consideration, among other things, the circumstances under which the wrong was carried out, its severity and its extent.

Id. § 2.

⁷³ *Id.*

⁷⁴ *Id.* at 2(b).

⁷⁵ ISR. CIVIL WRONGS ORDINANCE (New Version), 5728-1968, SH No. 10 p. 266 (1968), translation available at <http://www.israelinsurancelaw.com/tort-laws/tort-ordinance-new-version.html>

⁷⁶ See *supra* note 72 and accompanying text.

⁷⁷ See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013). Section 2(b) of the anti-boycott law is necessary because without it a judge so inclined could avoid finding a boycotter liable for tortious interference by simply concluding the Government’s policies in the West Bank created a “justified cause” for interfering with a contract by calling for a boycott. *Id.*

⁷⁸ *Id.*; see also Perry, *supra* note 65, at 13 (interpreting Section 2(c) of the Anti-Boycott Law).

⁷⁹ Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

Sections 3 and 4 of the Anti-Boycott Law provide for administrative penalties against individuals and organizations that violate the statute. Section 3 gives the Finance Minister, upon consultation with the Justice Minister, the authority to institute regulations that would prevent a person or entity that is found to have called for a boycott from participating in government tenders.⁸⁰ Section 4 gives the Finance Minister, in consultation with the Justice Minister, and in some instances the Minister of Culture and Sports, the authority to revoke certain benefits from any organization that it deems to have called for a boycott. The possible sanctions include loss of status as a recognized public institution, loss of tax-exempt status, and the loss of eligibility for public funding.⁸¹

Since this note focuses on the cultural aspects of the boycott, and in particular the artist led boycott campaigns, it will focus on Sections 1

⁸⁰ *Id.* Section 3 of the anti-boycott statute provides:

The Finance Minister is authorized, with the agreement of the Justice Minister and the approval of the Knesset's Constitution, Law and Justice Committee, to set regulations that would limit the participation in a tender of he who knowingly published a public call for a boycott against the State of Israel, or who committed to take part in a boycott, including a commitment not to purchase goods and/or services produced and/or provided in Israel, by one of its institutions, or in an area under its control; in this clause, a "tender" is defined as any public tender that must be administered in accordance with the Mandatory Tenders Law – 1992.

Id.

⁸¹ *Id.* Section 4 of the anti-boycott statute provides:

A. The Finance Minister, upon consultation with the Justice Minister, may decide in the case of someone who knowingly published a public call for a boycott against the State of Israel or committed to take part in a boycott, that:

1. He will not be considered a public institution under clause 46 of the Income Tax Ordinance;
2. He will not be eligible to receive money from the Council to Regulate Sports Gambling under clause 9 of the Regulation of Sports Gambling Law – 1967; the authority to utilize this clause requires the agreement of the Minister of Culture and Sports;
3. He will not be considered a public institution under clause 3(A) of the Budget Foundations Law –1985, regarding the receipt of budgetary support under any budget line item; the authority to utilize this clause requires the agreement of the Minister appointed by the government as responsible for said budgetary line item, i.e. in accordance with clause 2 of the budget law, which defines "responsibility for implementing the budget line item";
4. He will not be eligible to utilize guarantors under the Guarantors on Behalf of the State Law – 1958.
5. He will not be eligible to enjoy benefits under the Encouragement of Capital Investment Law –1959, or under to the Encouragement of Research and Development in Industry Law – 1984; the authority to utilize this clause requires the agreement of the Minister of Industry, Commerce and Employment.

B. In exercising the authority granted to the Finance Minister according to subsection (a), the Minister of Finance will act in accordance with the regulations that will be established in this matter, with the agreement of the Minister of Justice, and with the approval of the Knesset's Constitution, Law and Justice Committee; however, if no such regulations have been established, this in no way diminishes the authority of the Minister under subsection (a).

Id.

and 2 of the Anti-Boycott Law, as they are most relevant to this type of boycott activity.

B. *Legislative History of the Anti-Boycott Law*

Given that the Anti-Boycott Law was ambiguously drafted and has yet to be authoritatively interpreted by any court, it is necessary to look to the statute's legislative history in addition to the statutory language in order to divine what implications the statute may have on Israeli and foreign artists' boycott activities. While the previous section of this note parsed the statute's language, this section will explore the legislative history of the Anti-Boycott Law in order to determine who the potential plaintiffs and defendants are in actions brought under this law and what remedies or penalties they should expect to encounter.

One of the means to interpret an ambiguous statute is to consider it in light of its legislative purpose. The purpose of the Anti-Boycott Law can be gleaned in the numerous Knesset committee debates discussing it and from its evolution through the amendment process. The Anti-Boycott Law got its start when, faced with a growing domestic and international campaign to delegitimize Israel through boycotts, MK Zeev Elkin introduced a bill on July 5, 2010 entitled "Bill Prohibiting Boycotts" ("Anti-Boycott Bill").⁸² The legislators supporting the bill noted that many liberal democracies, including the U.S., have anti-boycott statutes that in some instances were enacted largely to protect Israel from the Arab League Boycott.⁸³ Israel, on the other hand, had no such statute to protect itself.⁸⁴ This situation was deemed "absurd" by MK Elkin.⁸⁵ Accordingly, the initial iteration of the Anti-Boycott Bill was meant to provide Israeli citizens, as well as the Israeli government, with a legal tool that could combat both domestic and international manifestations of the boycott campaign facing the country.⁸⁶

Seeking to cover as much of the BDS movement's activities as possible, the preliminary draft of the Anti-Boycott Bill was much more ambitious than the version that eventually passed into law. For instance, Section 2 of the draft bill proscribed initiating a boycott against the State of Israel, encouraging participation in the boycott, and providing assistance or information in order to further the boycott.⁸⁷ This formulation is far broader and subjects far more behavior to potential liability than the formulation used in the final version, which merely proscribes making a *public call* to boycott Israel under circumstances

⁸² See Draft Banning Boycotts Bill, 2010, HH (Isr.).

⁸³ See DK (2011) Protocol 342 (Isr.), available at <http://oknesset.org/committee/meeting/3761/>.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See Draft Banning Boycotts Bill, 2010, HH (Isr.).

where such a call may lead to an actual boycott.⁸⁸

The draft bill was also more ambitious in the class of people it targeted. In addition to Israeli citizens and residents, the draft bill expressly targeted foreign nationals and foreign political entities.⁸⁹ While Israeli citizens and residents were subjected to civil liability, foreign nationals could have faced administrative sanctions such as the denial of entry into the country for a minimum of ten years and grave restrictions on the ability to transact business in Israel.⁹⁰ Foreign political entities also faced the specter of being prevented from performing any financial transactions that required government registration, and their assets in Israel could be frozen and used to satisfy judgments against them in cases brought under the Anti-Boycott Law.⁹¹ The early Knesset committee debates suggest that one of the main targets the legislators had in mind when drafting the section of the bill dealing with foreign political entities was the Palestinian Authority, which was promoting an international boycott against Israel while simultaneously receiving various funds from the State.⁹²

Despite the far-reaching draft bill, the actual Anti-Boycott Law

⁸⁸ See *id.* The final version of the Anti-Boycott Law does not proscribe all calls for boycott on Israel under all circumstances, as the draft bill does. Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013). Rather, the final version proscribes publishing a *public* call for boycott, made under circumstance where there is a *reasonable possibility that the call will lead to a boycott*, and the publisher is aware of that possibility. *Id.* This is much more narrowly tailored than the draft bill.

⁸⁹ See Draft Banning Boycotts Bill, 2010, HH (Isr.). (Sections 3 and 4 covered Israeli citizens and residents, Section 5 covered those who are not citizens or residents of Israel, and Section 6 covered foreign political entities.)

⁹⁰ See *id.* (stating that, under Section 5 of the draft bill, if the Interior Minister or a majority of ministers in the Government find that a person who is neither a resident nor a citizen of Israel has violated the Anti-Boycott Law, then the Interior Minister is authorized to initiate proceedings in the district court to have the person banned from Israel for a period of no less than ten years. If the district court accedes in the request to deny the person entry to Israel then the court will also prohibit the person from performing any action relating to an Israeli bank account, stocks traded in Israel, real property in Israel, or any other asset that requires registration in order to transfer title of it for the aforementioned period.)

⁹¹ See *id.* (stating that, under Section 6 of the draft bill, if a foreign political entity passes a law boycotting Israel, or if the majority of ministers in the Government decide that the entity has violated Section 2 of the bill, then the foreign entity and anyone working on its behalf will be barred from performing any action relating to an Israeli bank account, stocks traded in Israel, real property in Israel, or any other asset that requires registration in order to transfer title of it. The bill also prevents the transfer of funds from the State of Israel or any of its organs to any foreign political entity that has been found to have violated the anti-boycott law. Moreover, if an Israeli citizen or the State's treasurer has been injured by the foreign political entity's boycott they can sue for damages and the compensation can be furnished from the entity's frozen assets.)

⁹² See *supra* note 83 (showing that MK Yohanan Plesner, in his statements in opposition to the bill, argued that many of those MK's who supported the earlier draft bill did so because they foresaw the section relating to foreign political entities being used to punish the Palestinian Authority for its calls to boycott Israel. However, since that section of the bill were eliminated, he argued that the bill no longer served its original purpose and should be voted down.)

was considerably narrowed before it was passed. This narrowing was largely due to a deal struck between MK Elkin and the Ministerial Committee on Legislation.⁹³ As a result of that deal, the breadth of boycott-related behavior that was proscribed by the bill was substantially reduced and the sections of the bill that made specific reference to foreign nationals and foreign political entities were removed.⁹⁴

MK Arieh Eldad, who was among the chief supporters and drafters of the bill, noted that the removal of the sections dealing with foreign nationals and foreign political entities substantially weakened the bill, and contradicted the purpose for which the bill was originally created.⁹⁵ Moreover, MK Yohanan Plesner, who opposed the bill, argued that the members of his party who originally supported the bill largely did so because they thought it would strike a blow to the Palestinian Authority's boycott campaign against Israel.⁹⁶ It is evident from these statements that the original Anti-Boycott Bill's international scope was a main impetus for many of the legislators' support of the bill. This makes sense given that a large portion, if not the majority of the threat, posed by the BDS movement originates beyond Israel's borders.

The importance of the international elements of the Anti-Boycott Bill may explain why, in addition to removing the language referring to foreign nationals and foreign political entities, the drafters also removed the language in the bill limiting civil liability to "Israeli citizens or residents."⁹⁷ The removal of the language explicitly limiting civil liability to Israeli citizens and residents has created an open question as to the law's applicability to foreign nationals located abroad.

C. Applicability of the Anti-Boycott Law to Foreign Nationals Located Abroad

As previously mentioned, the original iteration of the Anti-Boycott Bill included provisions that were explicitly applicable to foreign individuals, governments, and institutions.⁹⁸ These provisions were

⁹³ See *id.* (stating that the cooperation of the Ministerial Committee on Legislation is usually necessary in order to garner enough support to pass legislation through the Knesset. MK Elkin agreed to limit the scope of the anti-boycott law in order to gain the support of that committee. The committee likely sought to narrow the law in order to avoid the complex foreign relations implications that could arise from sanctioning foreign nationals and foreign political entities under this controversial law.).

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See Draft Banning Boycotts Bill, 2010, HH (Isr.); *but see* Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

⁹⁸ See Draft Banning Boycotts Bill, 2010, HH (Isr.).

eliminated due to objections from the Ministers' Committee and from other relevant parties.⁹⁹ After the bill was amended to reflect the instructions of the Ministers' Committee, MK Elkin, the chief sponsor of the bill, stated that to the best of his knowledge the law would apply solely to people within Israel.¹⁰⁰ However, the statement of one legislator does not create law, and the actual statutory text is ambiguous on this issue.

In the final Constitution, Law and Justice Committee debate on the Anti-Boycott Bill, MK Nitzan Horowitz asked whether the proposed law could apply to foreign residents located abroad.¹⁰¹ The committee's chairman, MK David Rotem, responded at first that he did not believe the law would apply to foreigners located abroad.¹⁰² However, in the exchange that followed, the committee's legal advisor, Sigal Kogot, argued that in her estimation the law could be used to sue a foreign citizen located abroad since the action being brought is for a tort.¹⁰³ Chairman Rotem then corrected himself and said that a lawsuit against a foreign national located abroad could be brought in an Israeli court, as opposed to in a foreign court.¹⁰⁴ The Deputy Attorney General Raz Nezri, in his capacity as a legal advisor, declined to give a definitive answer on this controversy because his office did not deal with civil suits.¹⁰⁵ However, he implied that it would be up to the court to decide whether there is jurisdiction for such a suit.¹⁰⁶

In discerning how an Israeli court will deal with a lawsuit brought under the Anti-Boycott Law against a foreign national residing abroad, the first issue to contend with is jurisdiction. Before reaching the merits of such a case, the court will have to decide whether to extend extraterritorial jurisdiction over the foreign defendant. Jurisdiction over a defendant in an Israeli civil case is established through the service of summons.¹⁰⁷ The court has the discretionary power to allow a plaintiff to serve a defendant outside of Israel in certain circumstances outlined in Rule 500 of the Israeli Civil Procedure Regulations.¹⁰⁸ For purposes

⁹⁹ See *supra* note 83.

¹⁰⁰ *Id.*

¹⁰¹ See *supra* note 64 (describing how MK Horowitz asked specifically whether a foreign national located in Britain could be sued for damages for violating the proposed anti-boycott law.).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* It appears there may have been some confusion as to whether MK Horowitz was asking whether a foreign national could be sued in a foreign country for damages under the anti-boycott law, or whether that foreign national could be sued in Israel under the anti-boycott law. *Id.* In his initial response of "no", chairman Rotem appears to have been addressing the former question. *Id.* He then addressed the latter question when he said that suit could be brought in Israel. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ GRAHAM J. H. SMITH, INTERNET LAW AND REGULATION 594 (4th ed. 2007).

¹⁰⁸ *Id.*

of a potential civil suit under the Anti-Boycott Law, the most relevant part of Rule 500 is Section 7. Rule 500(7) allows the court to assume jurisdiction over a foreign defendant when “[t]he action is based on an act or omission within Israel.”¹⁰⁹

A relatively simple application of Rule 500(7) would be in a case where a foreign artist violated the Anti-Boycott Law while physically present in Israel, and then returned to his country of residence. For instance, let’s assume Roger Waters comes to Israel, as he did in 2006, and violates the Anti-Boycott Law by declaring on stage at a concert that everyone in the audience and all foreign artists should boycott Israel because of its apartheid policies. Assuming someone with a valid claim decides to file suit, the court would have the discretion to allow the plaintiff to serve process on Roger Waters abroad and hale him into an Israeli court because the tortious act clearly occurred within Israel.

However, foreign artists calling for boycotts of Israel are generally not physically present in Israel at the time they make such calls. Therefore, if this were the extent of the reach of the Anti-Boycott Law, it would prove a rather ineffective tool in the international arena. Fortunately for proponents of the Anti-Boycott Law, much of the boycott activity the Anti-Boycott Law seeks to target takes place online. Therefore, the court will eventually have to answer the more difficult question of whether a call to boycott Israel made online by a person located abroad can constitute an “act or omission within Israel” for the purposes of establishing jurisdiction under Rule 500(7).¹¹⁰ Because defamation is the closest analogue to the type of tort created by the Anti-Boycott Law, we can analyze the court’s likely approach to this question by looking to its approach in defamation suits involving the Internet.

The general rule in Israeli civil law with regards to the location of a tort is that of *Lex Loci Delicti*, rather than *Lex Loci Damni*.¹¹¹ In other words, it is the place where the tortious action occurred, rather than the place where the damage is felt, that determines the “location” of the tort for jurisdictional purposes. However, demarcating the geographical location of an action that occurs on the Internet can lead one down many a metaphysical blind alley. Therefore, it is unsurprising that the Israeli courts have been less than consistent on the question of the

¹⁰⁹ *Id.* at 595.

¹¹⁰ Yaad Rotem, *Just and Efficient Resolution of Private International Disputes: Israel’s New Theory of Jurisdiction*, 7 RICH. J. GLOBAL L. & BUS. 315, 319 (2008) (stating that the question of whether to extend jurisdiction over a foreign defendant who is accused of committing a tort online will have to be answered with reference to Rule 500(7) of the Israeli Civil Procedure Regulations).

¹¹¹ Iris Canor, *The Architecture of the Rule Governing Choice-of-Law of Cross-Border Torts in Israel – Theoretical Studies Following Uviner*, 51 HAPRAKLIT 3, 14 (2011), available at http://www.hapraklit.co.il/_Uploads/dbsAttachedFiles/yovinermeodkan.pdf (in Hebrew).

“location” of a defamatory act that takes place online.¹¹²

In the criminal defamation context, an Israeli appellate court has held that the publication of statements on a foreign website, without further connection to Israeli users, does not constitute defamation within Israel for the purposes of extending jurisdiction over foreign defendants.¹¹³ The court found that in order to be considered “published in Israel” there must be “a subscriber/information provider relationship, or similarly tangible connection between the foreign website operator and Israeli users.”¹¹⁴ While this approach would seem to rule out the extension of jurisdiction over the majority of foreign boycotters, it is still conceivable that even under this approach a foreign artist sitting abroad could be haled into court in Israel for publishing a public call to boycott Israel.

Alice Walker’s call to boycott Israel provides an illustration of the type of case that could conceivably supply a judge with a basis for extending extraterritorial jurisdiction over a foreign artist sitting abroad. In June of 2012, Alice Walker wrote a letter to an Israeli publisher in which she refused to grant the publisher the rights to publish her book, *The Color Purple*, in Hebrew.¹¹⁵ This letter explained that she refused the request because she was boycotting Israel due to its apartheid policies.¹¹⁶ It must be noted at this juncture that had the letter remained a private matter between Walker and the publisher, it would not qualify as a tort under the Anti-Boycott Law, since the law requires a *public* call for *others* to boycott Israel under circumstances where such a call could reasonably lead to a boycott.¹¹⁷ The act of personally taking part in a boycott does not create grounds for suit under the law. However, the letter did not remain private, as Walker proceeded to send the letter to PACBI and granted them permission to publish the letter on their website.¹¹⁸ Assuming that Alice Walker was not in Israel when she published the letter on the PACBI site, and that PACBI’s servers are not located in Israel, a court requiring a tangible relationship to Israeli users

¹¹² See SMITH, *supra* note 107, at 598–99 (explaining that the court has taken conflicting approaches to the question of the location of the tort of defamation for jurisdictional purposes when dealing with civil and criminal defamation cases.).

¹¹³ *Id.* at 599.

¹¹⁴ *Id.*

¹¹⁵ Walker, *supra* note 29.

¹¹⁶ *Id.* (discussing how Walker wrote “Israel is guilty of apartheid and persecution of the Palestinian people, both inside Israel and also in the Occupied Territories. . . . It is my hope that the non-violent BDS (Boycott, Divestment, Sanctions) movement, of which I am part, will have enough of an impact on Israeli civilian society to change the situation.”).

¹¹⁷ See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

¹¹⁸ Walker, *supra* note 29. PACBI wrote in reference to Alice Walker’s letter that “[t]his letter is published with author’s permission.” *Id.*

would have a difficult time exercising jurisdiction over such a case.

However, Alice Walker also gave an exclusive interview to an Israeli reporter that was published in Hebrew in the major Israeli newspaper *Yedioth Ahronot*.¹¹⁹ Walker provided the transcript of the interview's questions and answers to PACBI and wrote that she "accepted the invitation to be interviewed by an Israeli paper because [she felt] it is important to speak directly to the Israeli people."¹²⁰ During this interview, Walker was asked what Israelis who disagree with the occupation should do, since one cannot boycott one's own country.¹²¹ Walker responded: "But of course you can boycott anything that deserves it. Find a way."¹²² Whether this statement would ultimately be found to constitute a violation of the Anti-Boycott Law, there is at least a *prima facie* case to be made that it does violate that law. Moreover, while this statement was made abroad, it was made to a reporter from an Israeli daily newspaper with the express purpose of having it reach an Israeli audience.

This scenario provides an illustration of the type of case that could conceivably provide a judge with a reasonable basis for extending extraterritorial jurisdiction over a foreign artist who is sued under the Anti-Boycott Law. Whether a foreign court would agree to enforce such a judgment is another question that needs to be answered, but it is beyond the scope of this note.

D. Potential Domestic Israeli Application of the Anti-Boycott Law

The scenario described in the previous section focuses solely on potential defendants, as the goal of that section was to discern whether foreign artists could be haled into court under the Anti-Boycott Law for statements made while abroad. This section will try to envision what a domestic lawsuit involving the Anti-Boycott Law would look like. Taking the actors' boycott of the Ariel cultural center as an example,¹²³ we can explore who the potential plaintiffs and defendants would be in a suit brought under the Anti-Boycott Law, what sort of behavior would be sufficient to find liability, and what kind of damages the plaintiffs should expect to recover.

The most obvious plaintiff in the case of the Ariel cultural center boycott would be the municipality of Ariel, which runs the cultural center. In a civil case it is generally not sufficient to show that the defendant behaved wrongly. The plaintiff must also show that they were damaged by the defendant's actions. Assuming the Ariel municipality

¹¹⁹ See Walker, *supra* note 38.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *supra* Part I.C.

can show economic harm such as lost revenue due to cancelled shows, increased costs resulting from having to replace boycotting actors, or reduced attendance at performances as a result of the call for boycott, this would provide a basis to bring suit under the Anti-Boycott Law.

Additional potential plaintiffs are the residents of Ariel and its environs. The Anti-Boycott Law recognizes three types of harm: economic, cultural, and academic.¹²⁴ It is unclear what constitutes cultural harm, or how such harm will be translated into a monetary figure, but if the law is able to compensate for intangible things such as emotional harm, it stands to reason it may be able to compensate for cultural harm as well. Therefore, it is possible to imagine that a resident of Ariel may be able to bring suit under the Anti-Boycott Law in order to recoup for the harm of being denied access to plays, dance performances, musical performances and other aspects of culture.

An obvious group of defendants in the case of the Ariel cultural center boycott would be the actors and activists who called for the boycott. In order to successfully sue someone under the Anti-Boycott Law it must first be shown that the defendant called for a boycott against the State of Israel. In Section 1 of the Anti-Boycott Law, a boycott against the State of Israel is defined as “deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage.”¹²⁵ The performers who boycotted the Ariel cultural center were calling on all performers to deliberately avoid any ties with the cultural center solely because it was located in an area under Israeli control that they consider to be illegally occupied.¹²⁶ Moreover, their call had the potential to cause economic and cultural harm by causing shows to be cancelled and preventing the residents of Ariel and neighboring towns from enjoying cultural events in their locality. Thus, their actions would seem to meet the definition of boycotting set out in the law.

Additionally, it would need to be shown that the performers *knowingly* published a *public* call for a boycott against the State of Israel *or territory under its control*, where according to the content and circumstances of the publication there is a *reasonable probability* that the call will lead to a boycott, and they were *aware* of this possibility.¹²⁷ In the case of the Ariel boycott, the performers wrote an open letter

¹²⁴ See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

¹²⁵ *Id.*

¹²⁶ See Levinson, *supra* note 59.

¹²⁷ *Id.*

encouraging other performers to boycott the theater in Ariel and sent the letter to news agencies with the implicit purpose of having the letter made public.¹²⁸ Not only was this letter published under circumstances where there was a reasonable probability that it would lead to a boycott, but it actually did lead others to boycott the Ariel Theater, as a few days after it was published, 150 additional authors and academics joined the boycott.¹²⁹

Assuming that the plaintiffs establish the elements of the tort of boycotting, a question remains as to what remedy they can expect. There are two potential remedies available to plaintiffs under the Anti-Boycott Law: compensatory damages and punitive damages.¹³⁰ Given the largely intangible nature of the harm caused by boycotts, it seems likely that many of the potential plaintiffs would not be able to show sufficient pecuniary harm to make compensatory damages worth bringing suit over. This is likely why the drafters were so adamant about including the possibility of punitive damages, despite their very rare appearance in Israel's civil law system.¹³¹ If the court finds that the violation of the Anti-Boycott Law was done with *malice*, it is authorized to award punitive damages that are independent of any actual harm caused by the boycott.¹³² The "malice" requirement was included in the statute because the Knesset's legal advisors convinced legislators that without such a requirement punitive damages would not comport with Israel's civil law system.¹³³ However, if MK Elkin's view during the debate on the law is representative, this malice requirement may be mere window dressing, since all calls for boycott as defined by the statute could be deemed inherently malicious.¹³⁴ If the court ultimately decides to award punitive damages, it will take into account the circumstances under which the call for boycott was carried out, its severity, and its extent in order to determine the amount of punitive damages to award.¹³⁵

¹²⁸ See Ben Hartman, *Letter Calls on Israeli Artists Not to Perform in Ariel*, JERUSALEM POST (Nov. 6, 2010), <http://www.jpost.com/Israel/Article.aspx?ID=194199&R> (providing a partial translation of the performers' boycott letter.).

¹²⁹ See *id.*

¹³⁰ See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

¹³¹ See *supra* note 64.

¹³² See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

¹³³ See *supra* note 64.

¹³⁴ *Id.*

¹³⁵ See Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott*

III. THE ISRAELI SUPREME COURT SHOULD FIND THE ANTI-BOYCOTT LAW UNCONSTITUTIONAL

As the Ariel boycott illustrates, a person who calls for a boycott against the State of Israel or against the Settlements (which constitute “territory under Israeli control”) can face substantial liability under the Anti-Boycott Law. This reality has led numerous foreign governments, NGOs, and activists to designate the Anti-Boycott Law “undemocratic” and has led Israeli civil rights organizations to file petitions in Israel’s Supreme Court seeking to strike down the law.¹³⁶ The following section argues that the Israeli Supreme Court should strike down the law on the grounds that it violates freedom of speech as protected by the Basic Law: Human Dignity and Liberty.

A. The Knesset’s Own Legal Advisors Suggested the Law is Unconstitutional

When called to testify before the Knesset’s Constitution, Law and Justice Committee, Deputy Attorney General Raz Nezri contended that the Anti-Boycott Bill, as it was then formulated, was likely unconstitutional because it violated some of the provisions of Israel’s Basic Laws, namely Israel’s Basic Law: Human Dignity and Liberty.¹³⁷ He warned that if certain essential changes were not incorporated into the bill, it would be difficult for his office to defend the law in court.¹³⁸ Mr. Nezri went on to say that even if the recommended changes were adopted, the Anti-Boycott Law would still be borderline unconstitutional, but the Attorney General’s office would at least be prepared to defend the amended version in court, which it is currently doing.¹³⁹

Moreover, Sigal Kogot, the chief legal advisor to the Knesset’s Constitution, Law and Justice Committee, echoed the view that the bill was on the outer bounds of constitutionality.¹⁴⁰ She went on to add that the most problematic aspect of the bill from a constitutional perspective was the equivalence it drew between boycotts against “territories under Israeli control” and boycotts against the State of Israel.¹⁴¹ By defining

– 2011, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

¹³⁶ See Harriet Sherwood, *Israel’s Ban on Boycotts Faces Legal Challenge from Civil Rights Groups*, THE GUARDIAN (July 12, 2010), <http://www.guardian.co.uk/world/2011/jul/12/israel-ban-boycott-legal-challenge>.

¹³⁷ See *supra* note 64.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *id.*; see also Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 § 1 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 13, 2012).

the subject protected under this statute as “Israel and territories under Israeli control,” the law incorporated the Disputed Territories into the prohibition on boycotting.¹⁴² Since the fate of the West Bank and the Jewish settlements therein is one of the central political debates in Israeli society, the Anti-Boycott Law is proscribing a non-violent form of protest against a controversial government policy, which raises serious free speech concerns and may violate Israel’s Basic Laws.¹⁴³

Ms. Kogot argued that in order for a tort restricting freedom of speech to be justified, the speech being restricted must be viewed as so illegitimate that its utterance would justify an award of damages.¹⁴⁴ She went on to say that boycotting the State of Israel in such a manner that seeks to delegitimize it and threaten its existence is illegitimate and justifies awarding damages, but boycotting the Settlements can be part of a legitimate political protest that merely seeks to challenge a particular government policy rather than threaten the existence of the State.¹⁴⁵ Ms. Kogot concluded that attaching liability to calls for boycotting the Settlements may be an unjustifiable interference in freedom of speech because it removes a central political question from the sphere of legitimate political debate.¹⁴⁶

The legislators ultimately adopted some of the recommendations of their legal advisors, but did not change the troublesome definitional section discussed by Ms. Kogot.¹⁴⁷ As soon as the Anti-Boycott Bill was passed into law a number of petitions were submitted against it in the Israeli Supreme Court.¹⁴⁸ The main thrust of these petitions was that the law violates freedom of speech, which is protected under the Basic Law: Human Dignity and Liberty.¹⁴⁹

¹⁴² See *supra* note 64.

¹⁴³ Basic Law: Human Dignity and Liberty 5752-1992, SH No. 1391 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

¹⁴⁴ See *supra* note 64.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* note 64; see also Preventing Harm to the State of Israel by Means of Boycott Law, 5771-2011, SH No. 2304 p. 972 (Isr.), translated in *Law Preventing Harm to the State of Israel by Means of Boycott – 2011*, ACRI, <http://www.acri.org.il/en/wp-content/uploads/2011/07/Boycott-Law-Final-Version-ENG-120711.pdf> (last visited Oct. 30, 2013).

¹⁴⁸ Brief for Petitioner, H CJ 2072/12, Coalition of Women for Peace v. Treasury Minister (2011) (Isr.), available at <http://adalah.org/Up/Main/File/boycott%20petition.pdf>; see also Brief for Petitioner, H CJ 5239/11, Avneri v. Knesset of Israel (2011) (Isr.), available at <http://hamoked.org.il/files/2012/115331.pdf>.

¹⁴⁹ See Brief for Petitioner, *supra* note 148; see also Guy E. Carmi, “Dignitizing” Free Speech in Israel: The Impact of the Constitutional Revolution on Free Speech Protection, 57 MCGILL L.J. 791, 801–02 (2012) (explaining that the court has derived a constitutional protection for freedom of expression out of the Dignity portion of the Basic Law on Human Dignity and Liberty, and arguing for an increased reliance on the Liberty portion of the Basic Law instead.).

B. The Anti-Boycott Law is Not Saved by the Section 8 Limitation Clause

Justice Barak, a former Chief Justice of the Israeli Supreme Court, wrote in *Majority Camp v. Israel Police* that “a demonstration that has a political or social background is an expression of autonomy of the individual will, freedom of choice[,] and freedom of action that are included within the scope of human dignity as a constitutional right.”¹⁵⁰ Though not *all* forms of speech are protected by the Basic Law: Human Dignity and Liberty, *Majority Camp* ensures “the protection of political speech, which is perceived as the core of speech to which democracies afford protection.”¹⁵¹

The Anti-Boycott Law is clearly in conflict with the right to freedom of speech, which is protected by the “Human Dignity” branch of the Basic Law: Human Dignity and Liberty. When a right is protected under the Basic Law: Human Dignity and Liberty, according to Section 8 of the Basic Law, “[t]here shall be no violation of [that right] except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required.”¹⁵² The language of Section 8 reveals the high bar that a law infringing on a right protected by the Basic Law must pass in order to be upheld. The Anti-Boycott Law fails on all three of the criteria laid out in Section 8.

With regards to the first criteria—befitting the values of the State of Israel—the Supreme Court has held that “[t]he freedom of speech is numbered among the basic human freedoms in Israel. Its place is on the highest echelon of basic rights, since ‘without democracy there is no freedom of speech, and without freedom of speech[,] there is no democracy.’”¹⁵³ Democracy is a core value of the State of Israel, and Petitioners argue that the Anti-Boycott Law is inherently undemocratic.¹⁵⁴ They contend that the debate over the fate of the West Bank has been at the heart of Israeli political discourse for over forty years and the Anti-Boycott Law removes this issue from the sphere of legitimate public debate by creating sanctions against those who express an unpopular opinion.¹⁵⁵

With regards to the purpose of the law, if the goal were to protect the State of Israel and its citizens from boycotts based solely on their affiliation with Israel it would not include “territories under [Israeli] control” in the definition of boycott. The law includes that language because it also seeks to shield the government’s settlement policy in the

¹⁵⁰ HCJ 2557/05 *Majority Camp v. Israel Police*, (2) IsrLR 399, 410 [2006] (Isr.).

¹⁵¹ Carmi, *supra* note 149, at 812.

¹⁵² Basic Law: Human Dignity and Liberty 5752-1992, SH No. 1391 (Isr.).

¹⁵³ HCJ 2557/05 *Majority Camp v. Israel Police*, (2) IsrLR at 408.

¹⁵⁴ See Brief for Petitioner, *supra* note 148, at 8.

¹⁵⁵ See *id.*

West Bank from criticism by creating sanctions against those who use a particular form of speech (boycott) that is deemed legitimate in other spheres of public debate.¹⁵⁶ For instance, one can continue to call for a boycott of restaurants for not being Kosher, one can boycott artists for not serving in the military, one can boycott academic institutions for not playing the national anthem at graduation ceremonies, but one cannot call for a boycott of a West Bank theater because of their belief that the settlements are illegitimate.¹⁵⁷ The government is making an illegitimate, content-based distinction between the boycotts it allows and the boycotts it forbids for the improper purpose of shielding a government policy from free political debate.

Moreover, the Anti-Boycott Law does not conform to the Section 8 requirement that a law may only infringe on a protected right “to an extent no greater than required” to achieve a proper legislative purpose.¹⁵⁸ The State argues that boycotts can cause reputational harm, financial harm, cultural harm, and academic harm, and thus the purpose of the Anti-Boycott Law is to protect Israeli citizens from such harms.¹⁵⁹ However, the Anti-Boycott Law is overbroad in that it will allow some plaintiffs who cannot show pecuniary harm from the boycott to recover punitive damages from the boycotters. For example, a business owner in the West Bank could sue a person who made a public call to boycott the West Bank generally and recover punitive damages regardless of whether the plaintiff’s own business actually suffered monetarily. This situation is contrary to the principles of tort law, which is only supposed to compensate the injured party for their actual injuries, rather than punish the defendant.¹⁶⁰ More importantly, this situation is contrary to the constitutional protection of human dignity because it applies punitive damages to a legitimate political debate, thus chilling political speech and denigrating the dignity of the boycotters by creating the impression that society is so contemptuous of their behavior that those who engage in it should be punished.¹⁶¹

CONCLUSION

It is clear that the BDS movement poses a substantial and growing challenge to the Israeli government and many of its citizens. The government tried to address this threat by passing a law that would impose civil liability on those who called for boycotts against the State or territory under its control. While the final version of the law was

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See* Basic Law: Human Dignity and Liberty 5752-1992, SH No. 1391 (Isr.).

¹⁵⁹ *See* Brief for Petitioner, *supra* note 148, at 22.

¹⁶⁰ *See id.* at 24.

¹⁶¹ *Id.* at 24–25.

2014]

THE ISRAELI ANTI-BOYCOTT LAW

779

mainly intended to target Israeli citizens, the statute's ambiguous structure leaves open the possibility that foreign artists advocating for the cultural boycott against Israel could be sued in Israeli courts under the Anti-Boycott Law. Thus, if the law survives its constitutional challenges, foreign artists could find themselves being sued by Israeli citizens for supporting the BDS movement. However, no suit has been filed as of yet under the Anti-Boycott Law, and no such suit can be filed until the Supreme Court's temporary restraining order is lifted.¹⁶² This Note has argued that the Court should not lift the restraining order, but rather strike down the Anti-Boycott Law due to its infringement on free speech. The Anti-Boycott Law is an overbroad and counterproductive method of addressing the challenge of BDS, and the Supreme Court should end this legislative experiment before it further damages the Israeli Government's reputation both at home and abroad.

*Arie Peled**

¹⁶² Yonah Jeremy Bob, *Court Freezes Anti-Boycott Law After Petitions*, JERUSALEM POST (Dec. 12, 2012), <http://www.jpost.com/NationalNews/Article.aspx?id=295368>.

* J.D. Candidate, Benjamin N. Cardozo School of Law (2014); B.A., Political Economy of Industrial Societies, University of California, Berkeley (2007). I would like to sincerely thank the staff and editors of AELJ for their efforts in publishing this Note. © 2014 Arie Peled.