

CHASING SHADOWS: THE ECONOMIC AND NONECONOMIC THRUST OF BDS

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ABSTRACT

Proponents of the Boycott, Divestment and Sanctions (BDS) campaign, in combination with left-wing activists and progressive theorists, sustain themselves through perceived adversity with the mantra that the universe evolves toward justice, which, in turn, allows for a focused indignation on Israel for alleged abuses of the Palestinian people. In this account, Israel's conduct thwarts desirable human progress and deserves reproof. Alternatively, ire erupts because Israeli Jews are being, well, Jews. Despite persuasive evidence showing the contention that the Arabs of Palestine and the Land of Israel possess the same legal rights as the Jewish people contradicts principles of international law, this crusade strives to impose direct and indirect costs on Israel as well as on non-Israeli institutions that are implicated in ostensible human rights violations.

Still, a debate rages on whether or not domestic and international law principles, corporate fiduciary duties, investment fund managers' fiduciary duties, or the market itself are compatible with the BDS campaign. Nevertheless, this paper shows that it is doubtful that BDS proponents are consumed by the objective of imposing economic costs on Israel and hurting its economic interests in the short-run even though they surely welcome such effects. These observations about economic costs do not exhaust the goals, objectives, and effects of BDS. The real costs of BDS surfaces along a parallel track that travels in tandem with the pursuit of economic goals: the evisceration of Israel's reputational interests. In the globe's current postmodern moment, where law and politics issue forth from an atomized culture inscribed with virtue signaling, BDS concentrates its fire on Israel's character and status to delegitimize the Jewish nation's existence in a world that simultaneously privileges grievances and victimhood. To the extent that humankind is progressively drawn to Nietzsche's hypothesis—that truth is simply a mobile army of metaphors—the prospects that this strategy will eventually inflict long-term harm on Israel increase.

I. INTRODUCTION

Whether or not there is a moral arc that curves toward justice,¹

¹ Paul Crookston, *Eric Holder Rallies Liberal Lawyers Against Trump in San Fran: 'You Can't Just Curl Up in the Fetal Position,'* WASHINGTON FREE BEACON, Jul. 13, 2017,

disputes regarding rights, including human rights, legitimate grievances and victimhood, in the Middle East or elsewhere, are fashioned out of the contention that everyone possesses fundamental rights merely by virtue of being human.² It is plausible that human rights emerged through the invention of the individual coupled with, and advanced by, the rejection of antiquarian norms tied to the ancient family.³ This move gathered speed as Christian intuitions, of moral equality and reciprocity during the medieval age, gave rise to modern liberalism and secularism.⁴ Contemporary interrogatories on this issue, joined with contemporary political philosophy bounded by public reason as well as with colliding claims of liberty, rights, and freedom, may be doomed to futility for several reasons.⁵

Although this oscillating debate will not be settled here, nowhere is it more vital than within the realm of the Boycott, Sanctions, Divestment (BDS) movement. BDS strives to impose a suite of penalties on Israel and non-Israeli institution grounded in the contention that Israel and its Jewish residents are unlawful and unwelcome occupiers, despite persuasive evidence to the contrary showing that this nation and its people reside within borders that conform to the United Nations Mandate as well as the Allied Supreme Council draft decision on April 24, 1920.⁶

In harmony with international law norms, the United States government opposes as a matter of policy “politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel.”⁷ Notwithstanding U.S. policy or the norms of

<http://freebeacon.com/politics/eric-holder-rallies-liberal-lawyers-trump-san-fran-cant-just-curl-fetal-position/>.

² WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 3 (1st ed. 2004) (suggesting that rights-talk may be a historically-contingent Western invention). See also Harry G. Hutchison, *Hobby Lobby, Corporate Law, and Unsustainable Liberalism: A Reply to Chief Justice Strine*, 39 HARV. J.L. & PUB. POL’Y, 703, 703-705 (2016) [hereinafter *Corporate Law and Unsustainable Liberalism*].

³ See generally LARRY SIEDENTOP, INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM, 1-361 (2014).

⁴ *Id.* at 359.

⁵ See Patrick J. Deneen, *Unsustainable Liberalism*, FIRST THINGS, Aug. 2012, at 25, 25-26 [hereinafter *Unsustainable Liberalism*].

⁶ See, e.g., HOWARD GRIEF, THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW 18-19 (2008, 2013) [hereinafter, GRIEF, THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW].

⁷ U.S. Dep’t of State, Bureau of Near Eastern Affairs, Press Releases on Israel, (2009-2017), <https://2009-2017.state.gov/p/nea/ci/is/c5218.htm>; Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, 115th Cong. (2015) (“TFTEA”);-115, United States-Israel Trade and Commercial Enhancement Act § § (a)-(b), 19 U.S.C. §4452 (2017) (stating that “Israel is America’s dependable, democratic ally in the Middle East – an area of paramount strategic importance to the United States” and opposing as a matter of policy “politically motivated actions

international law, or the fact that questions touching upon the history of the ancient city of Jerusalem and its present international status are difficult and complex,⁸ BDS proponents accept the less than irenic conclusion that Israel is an illegal occupier in active pursuit of subordination and colonization.

This supposition rouses a call to resist oppression emblazoned on a shield of repeated claims of grievance and provokes a rich stew signifying that Israel may be the world's leading human rights violator. Moreover, if the analysis of Alan Johnson, a man of the left, is correct, such contentions, which are not new, are exacerbated because left-wing anti-Semitism never went away.⁹ Rather, such sentiments were transmuted into anti-Jewish "'anti-imperialism' . . . in the last third of the [twentieth] century, when vicious, well-funded and long-running anti-Zionist campaigns were conducted by the Stalinist states, in alliance with the authoritarian Arab states and parts of the Western New Left."¹⁰ On Johnson's account, these maneuvers laid the groundwork for anti-Semitic anti-Zionism.¹¹ If true, this account provides crucial background for understanding why BDS efforts—in both the economic and noneconomic realm—thrive in the domain of academia or wherever and whenever commentators presuppose the inevitability of human progress and truth's infinite malleability. These, less than self-evident propositions proffered by the left, advance wherever truth *qua* truth loses its gravitational pull.

Since the BDS campaign overflows with overlapping, if not conflicting, issues, implications, and concerns as well as possible constraints that limit its effectiveness, this article will necessarily feature overlapping analysis. Part I of this Article offers a brief introduction to the BDS movement. Part II explores the vexed question of whether BDS coincides with the emotive turn in Western culture leading to an aristocracy of grievance. Part III places BDS in the context of the globe's asymmetric pursuit of human rights. Part IV scrutinizes the endeavor by BDS proponents to link politics with economics as well as analyzes the breadth of BDS initiatives in our postmodern age, and supplies background including examples of BDS, as well as the connection between BDS and the decades-old Arab Boycott. It also explores potential constraints facing this endeavor. Part V offers a

that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel").

⁸ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015).

⁹ Alan Johnson, *The Left and the Jews: Time for a Rethink*, FATHOM REVIEW, (2015) [hereinafter Johnson, *The Left and the Jews*], <http://fathomjournal.org/wp-content/uploads/2016/01/SENT-TO-PRINTER-Fathom-Review-2015.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

tentative view regarding the measurable economic effects of BDS and fleshes out and re-emphasizes the hurdles facing the BDS movement. It also reviews evidence drawn from a RAND study of the cost of the Israeli-Palestinian conflict in combination with a look at the data associated with the boycott of pre-Mandela South Africa. Part VI offers some concluding observations, which indicate that a singular focus on law and legal concepts such as fiduciary duties, anti-BDS legislation, or the market may be insufficient to defeat BDS in the long-run. Instead, it is highly likely that a broader analysis and a more capacious understanding is required in order for Israel to sustain its capacity and to survive the ever-ramifying tentacles of the BDS campaign in a world that appears to be drawn to the contention that “Israel was born out of ethnic cleansing of a majority of the Palestinian people.”¹²

A. *Introducing the BDS Campaign*

The BDS campaign is grounded in a questionable understanding of the boundaries of Israel that denies international law¹³ but cannot deny

¹² OMAR BARGHOUTI, *BDS: BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS*, 231 (2011).

¹³ See, e.g., GRIEF, *THE LEGAL FOUNDATION AND BORDERS OF ISRAEL*, *supra* note 6 at 18-19 (showing that as a direct result of the Allied Supreme Council draft “decision on April 24, 1920, the title of sovereignty over Palestine was exclusively vested in the Jewish People and not in any other nation, state or entity, . . . [with] final approval at the very next session on April 25, 1920, . . . given unanimously by the four Powers who made up the Supreme Council”). It is manifest that “Jewish legal rights and title of sovereignty to the country of Palestine under international law were founded on three basic pillars of support, which consisted of: 1) the historical connection of the Jewish People with Palestine and the Land of Israel; 2) the principle of self-determination for the benefit of peoples and territories that were to be governed by the Mandates System under Article 22 of the Covenant of the League of Nations in the Treaty of Versailles; and 3) the designation of the Jewish People as the sole national beneficiary of the principle of self-determination in regard to the Mandate for Palestine.” *Id.* at 67. Historically, when Great Britain informed the U.N. in 1947 that it was going to withdraw its forces from “Palestine” in 1948, the U.N. General Assembly decided upon a plan to partition Palestine into an Arab state, a Jewish state, and an area under international control. G.A. Res. 181(II), *Future government of Palestine* (Nov. 29, 1947). Jewish Palestinians accepted the plan, whereas Arab Palestinians rejected it. Following the British withdrawal in 1948, the newly proclaimed Jewish Palestinian State, called Israel, was immediately attacked by its Arab neighbors. The war continued into 1949, when a series of armistice agreements was signed. General Armistice Agreement, Isr.-Syria, art. 5, ¶ 1, Jul. 20, 1949, 42 U.N.T.S. 327 (noting that the armistice line does not enshrine an ultimate territorial arrangement [“]”); General Armistice Agreement, Isr.-Jordan, art. 6, ¶ 9, Apr. 3, 1949, 42 U.N.T.S. 303 (noting that the armistice line is “without prejudice to future territorial settlements or boundary lines”); General Armistice Agreement, Isr.-Leb., art. 4, ¶ 2, March 23, 1949, 42 U.N.T.S. 287 (noting that the “basic purpose” of the armistice line: is to “delineate the lines beyond which the armed forces of the respective Parties shall not move”); General Armistice Agreement Isr.-Egypt, art. 5, ¶ 2, Feb. 24, 1949, 42 U.N.T.S. 251 (noting that the armistice line is “not to be construed . . . as a political or territorial boundary” and that the line is “delineated without prejudice” to the “ultimate settlement of the Palestine question”). To be sure,

human agency's contribution to the removal of Jews from the Land of Palestine. Without the Balfour Declaration, the San Remo Resolution on Palestine and decisions taken by the Principal Allied Powers in 1920, there would be no Mandate and no Jewish National Home¹⁴ and thus no border dispute, even though anti-Semitism would still be welcomed in some quarters. Grounded in a narrative designed to undermine the history behind the Jewish claim to Israel's borders under the doctrine of *uti possidetis juris*,¹⁵ an exclusionary viewpoint comes into being.

This viewpoint has been advanced by former President Obama's

the resulting 1949 armistice lines, which delimit the so-called West Bank and Gaza Strip (often referred to as the pre-1967 lines), have *never* been regarded as international boundaries. In fact, *it was at Arab insistence that the 1949 lines be designated as mere armistice lines, not international boundaries*, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel. From 1949 until 1967, the portions of Palestine not under the control of Israel remained under the military rule of Jordanian and Egyptian armed forces. No Arab Palestinian state was ever created in the West Bank or Gaza Strip between the 1948-49 and the 1967 Arab-Israeli wars, and no Arab Palestinian state has been created in any territory of Palestine since 1967, although Israeli leaders have expressed support for the position that an Arab Palestinian state may someday be created in parts of the West Bank and Gaza Strip pursuant to direct negotiations between Israeli and Palestinian authorities. Moreover, as a result of the 1967 Arab-Israeli war, Egyptian forces withdrew from the Gaza Strip, Jordanian forces withdrew from the West Bank, and Israel acquired control of both territories. (Israel also acquired control over the Sinai Peninsula and the Golan Heights). Following the 1967 war, the U.N. Security Council adopted Resolution 242. S.C. Res. 242, (Nov. 22, 1967). Any claim that the disputed Israeli settlements are in "occupied Palestinian Territory" ("OPT") is factually inaccurate and legally questionable because they do not violate Article 49 (6) of the Fourth Geneva Convention of 1949 since, among other things, the West Bank has not belonged to any state since the Ottoman Empire, whose successor state renounced all territorial claims thereto and Israel has legitimate claims to the West Bank territory and thus cannot be considered an occupier in any legitimate sense, and because Article 6 of the British Mandate permitted Jewish settlement throughout the territory of the Palestinian Mandate. *See, e.g.,* Mandate for Palestine, League of Nations *Official Journal*, vol.3, no.8, at 1007 (1922). Per Article 6, "the Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes" (emphasis added).

¹⁴ GRIEF, THE LEGAL FOUNDATION AND BORDERS OF ISRAEL, *supra* note 6, at 67. The notion of Israel's borders and Israel's unique intersection with the history of the Jews dates to the Israelite and Judean periods, which are recounted in the Hebrew Bible, known as the Tanakh, consisting of three separate sections, the Pentateuch, Prophets and Hagiographa (Holy Writings). *Id.*

¹⁵ *See, e.g.,* Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris and the Borders of Israel*, 58 ARIZ. L. REV. 633, 635, 681-92 (2016) (concluding that the doctrine is widely accepted as binding under customary international law and its straightforward application is consistent with Israel's territorial sovereignty over the disputed areas of the West Bank, the Gaza Strip, and East Jerusalem pending Israeli surrender of such claims through abandonment or cession). Evidently, the angriest arguments concern Jerusalem with many states denying Israeli claims to sovereignty in "East Jerusalem" (areas occupied by Jordan from 1948-1967 and incorporated thereafter by Israel into the Jerusalem municipality), while others, such as the United States, deny Israeli claims to sovereignty in any part of Jerusalem, East or "West."). *See also* Zivotofsky, *supra* note 8 (stating the current view of the U.S.).

recent decision to refuse to veto United Nations (UN) Security Council Resolution, 2334. The resolution insists that Jewish settlements, including the Jewish Quarter in Jerusalem—representing thousands of years of Jewish history—are occupied territory.¹⁶ This ahistorical approach was followed swiftly by a so-called Paris Mideast Peace Conference reiterating the vague claim that a negotiated two-state solution should meet the legitimate aspirations of both sides.¹⁷ Resolution 2334 was augmented by the issuance of a now-retracted UN report that Israel is an apartheid state¹⁸ and a blizzard of UNESCO activity calculated to erase Israeli history.¹⁹ Similar tactics continue apace despite the existence of proof such as the Arch of Titus in Rome depicting the plundering of Jerusalem in 70 C.E., and the Supreme Muslim Council’s statement in the “Brief Guide to al-Haram al Sharif,” that conceded the now-contested Temple Mount’s “identity with Solomon’s Temple is beyond dispute” dating “back as much as 5000 years.”²⁰

Although born out of the bloodstained battlefields and death camps of World War II, and established as the godfather of international peace and human rights,²¹ the UN has embraced the darkness by pursuing perfection in the human rights domain. This embrace ignores the lessons of history from the “age of social catastrophe,” an age in which various secular twentieth-century ideologies in a disastrous effort to attain

¹⁶ Harry G. Hutchison, *The Obama Administration Joins with the Jackals at the UN to Betray Israel*, THE AMERICAN CENTER FOR LAW AND JUSTICE (Dec. 27, 2016), <http://aclj.org/israel/the-obama-administration-joins-with-the-un-to-betray-israel> [hereinafter Hutchison, *The Obama Administration Joins with the Jackal at the UN*].

¹⁷ Toi Staff, *Full Text of Paris peace conference closing declaration*, THE TIMES OF ISRAEL (Jan. 26, 2017, 12:54 AM), <http://www.timesofisrael.com/full-text-of-paris-peace-conference-closing-declaration/>.

¹⁸ Ruth Eglash, *Is Israel an ‘apartheid’ state? This U.N. Report says yes*, THE WASHINGTON POST (March 16, 2017) https://www.washingtonpost.com/news/worldviews/wp/2017/03/16/is-israel-an-apartheid-state-this-u-n-report-says-yes/?utm_term=.3f9d4553899d (report issued by United Nations Economic and Social Commission for Western Asia) (since removed from its site) (see <https://www.unescwa.org/sites/www.unescwa.org/files/publications/files/israeli-practices-palestinian-people-apartheid-occupation-english.pdf>).

¹⁹ Harry G. Hutchison, *The Gathering Storm: The United Nations Continues its Barbaric Assault on Israel and Human History*, THE AMERICAN CENTER FOR LAW & JUSTICE (Jul. 11, 2017), <https://aclj.org/israel/the-gathering-storm-the-united-nations-continues-its-barbaric-assault-on-israel-and-human-history> [hereinafter Hutchison, *The UN Continues its Barbaric Assault*].

²⁰ Emily Jones, *UN Supports Islamist Denial of Jews’ Historical Connection to Jerusalem Sites*, THE FEDERALIST (Jul. 11, 2017), <https://thefederalist.com/2017/07/11/un-supports-islamist-denial-jews-historical-connection-jerusalem-sites/>.

²¹ *Id.* It is quite possible that, just like the insistent search for perfection during and after the Progressive Era in the United States turned dark, the UN has decided to follow the same pathway. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE 9* (2003).

perfection in the form of moral progress killed millions of human people.²² Refusing to learn any lesson from this terrifying epoch, a torrent of resolutions issue forth from the UN's present-day darkness, signifying that the modern state of Israel is the only country on earth that can commit human rights violations. Darkness or, its metonym, willful blindness, may have set the stage for BDS to flourish.

Combining constellations of issues (both public and private), the BDS Movement can be disaggregated into smaller shards of discrete tentacles that spill over into multiple domains. Attempts to fathom the diverse elements of the movement—involving boycotts (both primary and secondary),²³ divestment,²⁴ and sanctions, all of which are part of an effort to publicly chastise or inflict reputational injury on Israel²⁵—necessitates the deployment of distinct analytical tools and unique legal principles, plus a comprehension of the movement's genesis in, and its inescapable connection with, previous Arab boycott campaigns. The attempt also requires a dose of skepticism.

Tied inescapably to the Arab Boycott, and having similar exclusionary sentiments that have afflicted European countries for centuries,²⁶ BDS seeks financial compensation for alleged “illegal,

²² Harry G. Hutchison, *Metaphysical Univocity and the Immanent Frame: Defending Religious Liberty in a Secular Age?*, 45 SW. L. REV. 49, 57 (2015) [hereinafter Hutchison, *Metaphysical Univocity*].

²³ Boycotts aimed at private entities can be initiated by organized groups or NGOs that take direct action against economic agents and, whether initiated by activists' groups or NGOs, may issue forth from the pursuit of public politics or private politics by affecting public sentiment. David P. Baron, *Private Politics and Private Policy: A Theory of Boycotts*, STAN. GRADUATE SCH. OF BUS. 1, 2 (Mar. 19, 2003), <http://ssrn.com/abstract=367261>. Boycotts can be part of a larger campaign that seeks to damage an entity through demonstrations, public chastisements, and/or damage to the entity's reputation or brand. See *Id.* at 3. Understanding boycotts and their effects is difficult even though there is well researched literature on group boycotts, objectives and economic considerations particularly within the anti-trust arena. See, e.g., Jeffrey L. Harrison, *The Law of Group Boycotts and Related Economic Considerations*, LEVIN C. OF L. (Nov.13, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029684.

²⁴ Firms and investment funds choose private policies based on both internal and external considerations, some of which are independent of government and may reflect the outcome of external pressures that are the result of the conduct of private or public actors. See, e.g., Baron, *supra* note 23, at 2. Conceptually, divestiture is related to what has been labeled “socially responsible investment.” In recent times, some activists have sought to expand SRI to exclude companies that pollute or purportedly ignore human rights even though fiduciary duties may restrict managers from taking non-financial criteria into account. See Benjamin J. Richardson, *Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?*, 22 BANKING & FINANCE L. REV. 145, 147 (2007), <http://ssrn.com/abstract=970236> [hereinafter Richardson, *Do the Fiduciary Duties of Pension Funds Hinder SRI*]. Additional imprecision on the meaning of SRI arises because no authoritative or societal agreement exists on what constitutes SRI. *Id.*

²⁵ Baron, *supra* note 23, at 3.

²⁶ For instance, Spain expelled its Jews with the Alhambra Decree of 1492. See, e.g., Bret Stephens, *The Meaning of an Olympic Snub: The Arab world has a problem of the mind, and its name is anti-Semitism*, THE WALL STREET JOURNAL at 1, 2 (Aug. 15, 2016, 7:28 PM), <http://www.wsj.com/article/the-meaning-of-an-olympic-snub-1471303698> [hereinafter Stephens,

wanton, destruction” wreaked upon Palestinian society by the states, individuals, and groups that support Israel.²⁷ It has concentrated on the following goals and policy initiatives: (1) peace, justice and rights for Palestinians,²⁸ including a challenge to Israel’s rule,²⁹ (2) initiating an academic and cultural boycott of Israel and Israeli institutions,³⁰ and (3) a boycott, sanctions, divestment and blacklist program constructed to oppose and diminish Israel’s economic interests³¹ and shrink Israel’s borders.³²

The BDS program has been advanced by a blistering call for ethical corporate responsibility and socially responsible investing (protest divestment),³³ the demand for an immediate suspension of all free-trade agreements with Israel,³⁴ and a lobbying effort intended to convince local councils and regional governments to bar companies that are ostensibly complicit in alleged Israeli misconduct from public contracts.³⁵ Spawning a number of initiatives that may qualify as a form of lawfare, activists proffer litigation strategies³⁶ that include the threat to sue Great Britain over its issuance of the Balfour Declaration.³⁷ Calibrated to spur a distinctly Palestinian struggle, one that is ostensibly inspired by the South African anti-apartheid struggle and the U.S. civil rights movement, and endorsed by a global solidarity movement,³⁸ the campaign harries Israel as well as multinational entities that have participated in projects in Israel³⁹ through a program that is often

The Meaning of an Olympic Snub].

²⁷ Barghouti, *supra* note 12, at 230.

²⁸ *Id.* at 5-7 (elaborating on a campaign to end Israel’s ostensible occupation and colonization of all Arab lands, recognizing the fundamental rights of the Arab-Palestinian citizens, and promoting the rights of Palestinians to return to Israel pursuant to UN Resolution 194).

²⁹ *Id.* at 16-18 (arguing that the failure to embrace BDS amounts to complicity in Jewish extremism).

³⁰ *Id.* at 18-24 (embracing the Palestinian Campaign for the Academic and Cultural Boycott of Israel).

³¹ *Id.* at 24-30 (explicating BDS’s campaign to impose an economic price on Israel’s economic interests including its emphasis on university campus groups that lead to boycott and divestment efforts and lawfare).

³² Hutchison, *The Obama Administration Joins with the Jackals at the UN to Betray Israel*, *supra* note 16.

³³ Barghouti, *supra* note 12, at 229.

³⁴ *Id.* at 230.

³⁵ *Id.* at 229.

³⁶ See, e.g., Bassem Al-Tamimi v. Adelson, 1:16-CV-00445-TSC (D. D.C. Aug. 1, 2016).

³⁷ Ian Black, *Will Palestinians sue Britain over the Balfour declaration of 1917?* THE GUARDIAN (Jul. 27, 2016, 8:04), <https://www.theguardian.com/world/on-the-middle-east/2016/jul/27/will-palestinians-sue-britain-over-the-balfour-declaration-of-1917> (indicating that Mahmoud Abbas, president of the Palestinian Authority, threatens to sue Britain because of its issuance of “the famous letter which pledged to support the establishment of a ‘national home’ for the Jewish people in Palestine and is seen as a key milestone for the Zionist movement”).

³⁸ BARGHOUTI, *supra* note 12, at 33.

³⁹ See, e.g., *id.* at 27 (describing the campaign waged against two French conglomerates due

referred to as a “BDS Call,” an effort that garnered the support of more than 100 NGOs.⁴⁰

The present-day BDS campaign and its correlative economic and noneconomic consequences occur along a tragic but relevant timeline. This timeline includes a century of horrors ranging from communism, Nazism, and the uniqueness of the Shoah,⁴¹ to the emergence of Arab states staggering under the weight of a plutocracy and nepotism supported by bloated bureaucracies.⁴² With these developments, the globe has contemporaneously agonized over the contagious spread of one of the Arab world’s most conspicuous features: a culture of grievance that is defined less by what people aspire to than what they oppose, thus enabling the region’s dictators to distract public frustration toward external “enemies” and away from their own misrule.⁴³

to their involvement in the Jerusalem Light Rail program).

⁴⁰ *Id.* at 61 (stating that the BDS Call upholds civil and popular resistance to Israel’s occupation, colonization and apartheid and includes a broad coalition of the leading Palestinian political parties, unions, coalitions, and networks representing Palestinian refugees, Palestinians in the occupied West Bank and Gaza Strip and Palestinian citizens of Israel). *See also id.* at 239-247 (Appendix 2, which list the BDS Call’s principle goals, ones that have garnered the support of more than 100 NGOs). *See also* Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE•NOVO 112, 114 (2016) [hereinafter Greendorfer, *The Inapplicability of First Amendment Protections*] (This movement, publicly operating under the banner of promoting civil rights, seeks to destroy the State of Israel through coordinated international commercial and institutional attacks consisting, in part of, a boycott and divestment campaign against Israel).

⁴¹ ALAIN BESANÇON, A CENTURY OF HORRORS: COMMUNISM, NAZISM, AND THE UNIQUENESS OF THE SHOAH xvi-xvii (Ralph C. Hancock & Nathaniel H. Hancock, trans.) (2007) (showing that the uniqueness of the Shoah did not fully emerge into public consciousness until several years after the event and that, in order for the topic of the Shoah’s specificity as a unique event to attain general historical consciousness, a great event had to take place coupled with the necessity of a second event—the comparison between Nazism and communism—was also necessary). Within this vexed background, Nazism, in its quest for a perfect society, swapped the concept of people for the concept of race and then summarily excluded this particular “race” from mankind. *Id.* at xvii. Professor Phillip Rieff saw this horror as the therapeutic ideology of the gas chambers. PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 247, 249 (40th Anniversary ed., 2006) (describing Rieff). This historical process confirms that humanity’s worst crimes were made possible by technology. JOHN GRAY, STRAW DOGS 14 (2002, 2003) [hereinafter GRAY, STRAW DOGS]. As writer Jan Gross shows, this exclusionary process continued after the war, perhaps best illustrated by anti-Semitism in Poland after Auschwitz. JAN T. GROSS, FEAR: ANTI-SEMITISM IN POLAND AFTER AUSCHWITZ: AN ESSAY IN HISTORICAL INTERPRETATION 34 (2006) (showing that Jews in Poland were an endangered species after the war). These reflections cohere with the possibility that “barbarism is not a primitive form of life . . . but [rather] a pathological development of civilization.” JOHN GRAY, THE SILENCE OF ANIMALS: ON PROGRESS AND OTHER MODERN MYTHS 9-10 (2013) [hereinafter GRAY, SILENCE OF ANIMALS] (citing JOSEPH CONRAD, HEART OF DARKNESS (1902)).

⁴² Scott Anderson, *Fractured Lands: How the Arab World Came Apart*, NEW YORK TIMES at 1, 13 (Aug. 14, 2016), <https://www.nytimes.com/interactive/2016/08/11/magazine/isis-middle-east-arab-spring-fractured-lands.html>.

⁴³ *Id.* at 13. Public frustration is generated, *inter alia*, by a demographic upsurge that “has produced a generation with limited job opportunities; up to a third of the young people across

As a part of this cycle, “over the past 70 years the Arab world got rid of its Jews, some 900,000 people, while holding on to its hatred of them,” a course of conduct that preceded “the creation of the state of Israel and included bloody anti-Jewish pogroms in Palestine in 1929.”⁴⁴ Evidently these events were inspired by misdirected ideological obsessions and a perpetual search for scapegoats.⁴⁵

Nevertheless, BDS’s leading proponent, Omar Barghouti—despite the participation of Arab Palestinians in this richly exclusionary history culminating in pogroms if not worse—prefers to shield them from any blame by proclaiming that Palestinians and Arabs, more generally, bear no responsibility whatsoever for the Holocaust.⁴⁶ This distorted claim ignores the fact that Israel’s right to exist as a Jewish state originates from international law well before, not after, World War II just as Arabic exclusionary assaults on the Jews of Palestine commenced well before the formal establishment of the state of Israel.

Consistent with its fount of exclusionary animus, the Palestinian Authority (hereafter the PA) has pledged to engage in a root and branch effort to expel Israelis from Palestinian areas, once it establishes rule over territory controlled by the nation of Israel.⁴⁷ Concurrent with the PA’s pledge, and despite the BDS campaign’s stated goals—which putatively involve the restoration of human rights, the ending of Israel’s occupation and colonization of all Arab lands occupied in 1967, the veneration, protection, and promotion of the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194—it is possible that this campaign is really about one thing: the propagation and actualization of the idea that Israel, as a uniquely Jewish state, does not have a right to exist.⁴⁸

more than twenty Arab states are unemployed. Instability over the past six years has left [the] region in severe economic distress.” Robin Wright, *After the Islamic State: As the caliphate crumbles, rival movements struggle for the soul of Sunni jihadism*, THE NEW YORKER at 30. 32 (Dec. 12, 2016), <http://www.newyorker.com/magazine/2016/12/12/after-the-islamic-state>.

⁴⁴ Stephens, *The Meaning of an Olympic Snub*, *supra* note 26.

⁴⁵ *Id.*

⁴⁶ BARGHOUTI, *supra* note 12, at 231. Such inclinations are ironic considering evidence that the Palestinian Authority (PA), amid increasing terror attacks on Israelis by Palestinians, has engaged in explicit anti-Semitic activity. Rafael Medoff, *State Department Calls Palestinian Authority ‘Antisemitic,’* ALGEMEINER (Aug. 17, 2016, 6:23AM), <https://www.algemeiner.com/2016/08/17/state-department-calls-palestinian-authority-antisemitic/>. *But see* BARGHOUTI, *supra* note 12, at 149 (denying that BDS promotes Anti-Semitism because the movement targets Israeli apartheid and colonial rule).

⁴⁷ Stuart Winer, *Abbas pledges: There will be no Israelis in Palestine*, THE TIMES OF ISRAEL (Jul. 30, 2016, 10:39AM), <http://www.timesofisrael.com/abbas-says-there-will-be-no-israelis-in-palestine/>.

⁴⁸ Emily Budick, *When a Boycott is Not Moral Action but Social Conformity and the ‘Affectation of Love,’* in THE CASE AGAINST ACADEMIC BOYCOTTS OF ISRAEL 85, 86–87, 100 (Cary Nelson & Gabriel Noah Brahm eds., 2015).

Against this backdrop, it is still possible that many people support BDS “out of genuine sympathy for the suffering of Palestinians, which is no fantasy.”⁴⁹ This remains true even if BDS is promoted under a banner that may not be easy to defend.⁵⁰

Given a globe reverberating with cries of human suffering, which are often promoted by human frailty, and a cultural and philosophical milieu in which conflict but not consensus is at the heart of social structure,⁵¹ questions arise as to when boycotts and similar weaponry, ostensibly provoked by a state actor failing to comply with its obligations under international law, are legitimate tools of political and economic pressure.⁵² Beyond the answer to the question of legitimacy of its weaponry, it is important to note that BDS and its implications resonate and advance because many in the West, including its leaders, are in the throes of committing national and cultural suicide signified by the ongoing loss of faith in its beliefs, traditions, and legitimacy on the one hand, and a pathos, which reflects an existential civilizational angst of its own history, on the other.⁵³ This loss and its corresponding angst, advanced by shallow if not richly self-abnegating ideas,⁵⁴ rob the West of the moral resources necessary to resist contentions that may be impossible to reconcile with notions of truth and history, principled concepts that were seen previously as consistent with western traditions and values.

⁴⁹ *Id.* at 85. It is likely that any intelligible discussion of international human rights law must make two distinctions: (1) between universal and regional standards that nations observe in the treatment of their own citizens and (2) between those substantive rules of treatment and the procedural mechanisms for the enforcement of those rules. *See*, DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 93 (2001). Until the Second World War, international law was largely indifferent as to how nations treated their own citizens. So long as a government did not interfere with the rights of neighboring countries or its foreign nationals living within its territory, it could abuse its citizens in any way it wanted and never run afoul of international strictures. *Id.* Evidently the Second World War marked the transition of international law from a system dedicated to State sovereignty to one also devoted to the protection of human dignity, one that was recognized in the Charter of the United Nations signed by the Allied powers in 1945. *Id.* at 95. Charter Article 55(c) called for the “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” *Id.* This move was ratified in the form of the 1948 Universal Declaration of Human Rights, which provided an enunciation of civil and political rights including freedom from slavery and torture, the right to recognition and equality before the law, freedom from arbitrary arrest and the guarantee of fair criminal procedures, and respect for rights of worship and expression, as well as the right to participate in the political process. *Id.* at 95-96.

⁵⁰ Greendorfer, *The Inapplicability of First Amendment Protections supra* note 40, at 114.

⁵¹ ALASDAIR MACINTYRE, AFTER VIRTUE 235 (Am. ed. 1981) [hereinafter MACINTYRE, AFTER VIRTUE] (quoting Karl Marx).

⁵² Budick, *supra* note 48, at 85-86.

⁵³ DOUGLAS MURRAY, THE STRANGE DEATH OF EUROPE 1-3 (2017) (focusing largely on Europe).

⁵⁴ *See, e.g., id.* at 8 (referencing the Europeans).

Harmonious with the swelling appeal of BDS to Westerners, the boycott of Israel and its corresponding components recently received the support of dozens of Black Lives Matter (BLM) organizations within the United States. The wide-ranging BLM platform demands an end to federal aid for Israel and asserts that, by providing aid, the United States is “complicit” in the alleged genocide taking place against the Palestinian people.⁵⁵ While such claims appear to mirror the contestable allegation that Israel is committed to highly racialized if not eugenic oriented surveillance,⁵⁶ the existence of the BLM platform attests to the fact that the campaign to boycott Israel has influential adherents. It also implies that words, as part of our contemporary postmodern world, can demolish rather than sustain a consensus on history and the importance of truth.

The next section considers the emergence of BDS in a postmodern age that increasingly seems drawn to an aristocracy of grievance and a flight from truth. As Part II shows, BDS proponents have skillfully advanced their efforts by exploiting the emotive turn in the West.

II. CRAFTING AN ARISTOCRACY OF GRIEVANCE: THE EMOTIVE TURN IN WESTERN CULTURE?

A. *Building an Aristocracy of Grievance*

BDS is premised on a liturgy of oppression, repression, and inequality that has penetrated the subconscious realm of its proponents. Identification and classification efforts implicated by the multifaceted, if not encrypted, elements of BDS’s campaign⁵⁷ gives rise to difficulties

⁵⁵ Julie Zauzmer, *Jewish groups decry Black Lives Matter platform’s view on Israel*, THE WASHINGTON POST (Aug. 5, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/08/05/jewish-groups-decry-black-lives-matter-platform-view-on-israel/>.

⁵⁶ Ronit Lentin, *Race and Surveillance in the Settler Colony: The Case of Israeli Rule Over Palestine*, 3 PALGRAVE COMM. 1, 1–10 (Jul. 4, 2017), <http://www.palgrave-journals.com/articles/palcomms201756> (suggesting among other things that Zionism is simply a eugenic race project).

⁵⁷ Marc Greendorfer argues that the best source of information on the BDS movement is the manifesto published on its official website, www.bdsmovement.net. Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 22 (2017) [hereinafter Greendorfer, *The BDS Movement*] (among other things, the BDS movement urges greater participation by non-governmental organizations and a more refined media campaign, while acknowledging its origins in the Arab League Boycott and its current commitment to use the movement as a weapon against Israel as well as its rejection of the normalization process between Arab states and Israel). See also Jenna Lifhits, *Anti-BDS Measure Passes Senate Committee*, THE WEEKLY STANDARD (Jun. 30, 2016, 11:10 AM), <http://www.weeklystandard.com/anti-bds-measure-passes-senate-committee/article/2003092> (despite opposition from a group of Democrats, the Senate

because some analysts draw fine distinctions between the targets of boycotts and the notion of outright discrimination or, alternatively, between boycotts of Israeli products and kosher products.⁵⁸

The complexity level increases because accurate identification presupposes the capacity to comprehend the movement's paramount objective, as well as an ability to accurately forecast its immediate and long-term impact on the targeted institutions and individuals within the domain of finance, economics, politics, and culture. Salient but difficult to unravel complications surface because BDS has mastered the cultural factors intimately tied to human autonomy, self-determination, and the elevation of human rights in a world increasingly fractured over the cultural and political meaning of such terms.

Defenders of Israel's right to exist as a profoundly Jewish State must note that law and politics proceed from culture rather than the other way around.⁵⁹ "Jacques Maritain, the French scholar of Aquinas who helped draft the UN's Universal Declaration of Human Rights, noted that, although most people can agree on what universal human rights are, they can't agree on the foundation of those rights."⁶⁰ Today, this absence of agreement has worsened.

It follows that the lack of agreement implies Western cultural imperatives give rise to myriad understandings of what is, or is not, foundational and defensible within culture. The process produces multiple and conflicting conceptions regarding the substance of our ever-inflating lexicon of human rights. This move—as philosopher Alasdair MacIntyre rightly noted,⁶¹ and as political and social theorist Thomas Sowell has fittingly argued⁶²—signals that rights-talk is often up for grabs. This is so because our pursuit of justice reflects an intimidating range of questions and rival answers about what justice

Appropriations Committee passed a measure combating BDS that would grant state and local governments legal authority to divest taxpayer funds from pro-BDS companies).

⁵⁸ Robert A. Kahn, *The Overlapping of Fools? Drawing the Line Between Anti-Semitism and Anti-Zionism in the Wake of the 2014 Gaza Protest*, U. OF ST. THOMAS SCH. OF L. (2015), <http://ssrn.com/abstract=2594970>. See also Kenneth L. Marcus, *Is the Boycott, Divestment, and Sanctions Movement Anti-Semitic?*, in *THE CASE AGAINST ACADEMIC BOYCOTTS OF ISRAEL* 243, 245–258 (Cary Nelson & Gabriel Noah Brahm, eds., 2015).

⁵⁹ Charles Chaput, *Law and Morality in Public Discourse: How Christians Can Rebuild Our Culture*, PUBLIC DISCOURSE (August 7, 2014), <http://www.thepublicdiscourse.com/2014/08/13612/> (noting that “many thinkers, including St. John Paul II, have recognized, culture precedes politics and law”).

⁶⁰ *Id.*

⁶¹ MACINTYRE, AFTER VIRTUE, *supra* note 51, at 235 (discussing the unsettled nature of contemporary philosophical and moral debates).

⁶² THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY* 7 (1995) (showing that debates inflects around a constellation of divergent visions and that “[w]hat is intellectually interesting about visions are their assumptions and their reasoning, but what is socially crucial is the extent to which they are resistant to evidence”).

requires and permits,⁶³ thus producing divergent visions resistant to evidence.⁶⁴

Rights contestation implicates BDS because the campaign takes place against a background where modern elites insist on the perfectibility of man, nature, and society grounded in a secular trust in human ability and power, as part of a belief in amelioration without limit, of mutability without telos, of progress without boundary.⁶⁵ This ongoing belief is fostered, because modern rationality and reason have not been able to sustain themselves in the absence of agreement on foundations and principles.⁶⁶ In the process, the ability of Westerners to accurately classify the goals and objectives of many contemporary movements, including BDS, has floundered.

This insistent belief, part of the West's headlong dive into acedia, has groomed Westerners to believe in little (perhaps with the credulous exception that history bends inevitably toward justice)⁶⁷ yet fall for everything.⁶⁸ This maneuver impairs the West's ability to transmit and defend its own antecedent and deeply constructive cultural imperatives, a development that advances consistently with progressive and postmodern doctrinal presumptions that dictate the defense of one's own culture and way of life (today) implies the possibility that one culture may be superior to another.⁶⁹

Whereas the ancient cosmos of Greece and Rome, was premised on a perspective implying that the notion of reason, conveyed and reified hierarchical assumptions leading to natural inequality and subordination born of social status,⁷⁰ modern man from the twelfth century onward, rather than question the bases of the notion of individual rights, has provisionally accepted the equality of all individuals as a counterpoise to de facto inequalities.⁷¹ Equally

⁶³ ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 1 (2008) [hereinafter MACINTYRE, WHOSE JUSTICE?].

⁶⁴ SOWELL, *supra* note 62, at 7.

⁶⁵ PATRICK J. DENEEN, DEMOCRATIC FAITH XIV, 5 (2005) [hereinafter DENEEN, DEMOCRATIC FAITH].

⁶⁶ Harry G. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*: RICHARD SANDER & STUART Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*, 66 S. C. L. REV. 119, 122 (2014) [hereinafter Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*].

⁶⁷ Michael Barone, *The Arc of History Doesn't always bend toward Justice*, THE NATIONAL REVIEW (Nov. 24, 2016, 12:00 AM), <http://www.nationalreview.com/article/442454/barack-obamas-history-views-expect-justice-ignore-disappointing-results>.

⁶⁸ See, e.g., Megan G. Oprea, *Hollande Suggests France Will Finally Defend Its Culture Against ISIS*, THE FEDERALIST (Jul. 28, 2016), <http://thefederalist.com/2016/07/28/hollande-suggests-france-will-finally-defend-its-culture-against-isis/>.

⁶⁹ See, e.g., *Id.*

⁷⁰ SIEDENTOP, *supra* note 3, at 35–36.

⁷¹ *Id.* at 277, 359 (explaining society's gradual acceptance of equality a move that reached

manifest, post-moderns have expressly accepted the supremacy of tolerance (without limits) and implicitly the radical equality of all ideas and cultures.⁷² In ancient times, of course, superiority arose out of status, a viewpoint that was furthered by the intuition that hierarchy itself was preserved by, and grounded in, an aristocracy of knowledge.⁷³ Post-moderns have turned this syllogism on its head. Rejecting the notion of an aristocracy of knowledge, instead, they offer endlessly-ascending claims indicating superiority is attained through an aristocracy of grievance. This move places Israel in the crosshairs of UN and UNESCO resolutions⁷⁴ and exposes Israelis to contempt.

In considering why Israel is increasingly the subject of condemnation, meditate upon the following highly speculative hypothesis, which builds on Professor Siedentop's deft reading of history and, which may culminate in a paean to anti-imperialism. Siedentop offers the perceptive claim that humans (today) are conceptually seen as equal moral agents.⁷⁵ Following Martin Luther King Jr., if "the arc of the moral universe is long, but it bends toward justice"⁷⁶ it leads to consequences. This is because, if as a foundational matter, the notion of "Progress," inheres as an essential component of the process of bending the moral universe, then this idea coheres with the notion that justice commands any modern nation comprised of well-educated individuals and groups, having received progress's gifts, to surrender the defense of its culture and its erstwhile understanding of its history and boundaries to those who impute fresh or ancient grievances against such a country.

Why is this the case? First, because the mere existence of grievances (injustice) is inconsistent with demands of moral progress (particularly perfect moral progress). Second, because "Progress" implies that grievants who satisfy the conditions necessary to attain moral superiority command the moral high ground. The acceptance of this view frees grievants to employ disproportionate responses to ostensible grievances, including predacious violence, so long as such conduct is offered in pursuit of moral progress. The acceptance of this viewpoint likely counsels Israel to surrender to both the force of Palestinian grievances and self-abnegating contempt.

However speculative this hypothesis may be, it is corroborated in

full flower with Locke and Hobbes).

⁷² Bret Stephens, *Is Europe Helpless?*, THE WALL STREET JOURNAL (July 25, 2016, 7:18 PM), <https://www.wsj.com/articles/is-europe-helpless-1469488738> [hereinafter Stephens, *Is Europe Helpless?*].

⁷³ SIEDENTOP, *supra* note 3, at 51–52.

⁷⁴ See *infra* Part II-B.

⁷⁵ SIEDENTOP, *supra* note 3, at 68.

⁷⁶ Barone, *supra* note 67 (quoting Martin Luther King, Jr.).

deeply buried, perhaps unconscious, assumptions among leftist-Westerners and other Palestinian sympathizers about the dichotomous nature of Israelis and Palestinians, a perspective that warps their understanding of the conflict between Israel and its opponents.⁷⁷ This viewpoint presumes Palestinians as well as Arabs in general do not have agency and choice and so cannot be held accountable, whereas Israelis, the beneficiaries of advanced education can be called to account.⁷⁸ Evidence abounds that this clever ploy, bequeathing moral superiority to the Palestinians, continues to advance in the West.⁷⁹ This narrative presumes that because Israelis are fully equipped with agency and choice and superior access to education (one of the gifts of progress), they must yield to the command of moral progress embedded in the evolutionary universe.

This narrative apparently issues forth from Herbert Spencer's deduction that "[p]rogress is not an accident, but a necessity. Surely must evil and immorality disappear; surely must man become perfect."⁸⁰ This embryonic idea—reflecting a vast overconfidence in cultural progress itself⁸¹—when fully formed, signifies that Israel, facing existential threats that are premised on a distorted and ill-founded understanding of international law, ought to unilaterally disarm and await the disappearance of evil.

On the other hand, so the incipient narrative goes, Palestinians, including proponents of BDS are dominated by circumstances and emotion,⁸² thus providing justification for behaviors—under the banner of “tolerance,”—which would otherwise be seen as offensive or predatory. On Alan Johnson's account, the perception that good/innocent/authentic Palestinians are in a Manichean struggle against bad/guilty/inauthentic Israelis originated among left-wing groups after the 1960s as they proceeded to divide the world into two camps: Imperialism versus Anti-Imperialism.⁸³

Thus anyone (including of course BDS proponents) attacking

⁷⁷ Alan Johnson, *Blaming Israel for Palestinian Violence Is Racist: It denies that Arabs Are Moral Agents*, THE TELEGRAPH UK (Nov. 20, 2014) [hereinafter Johnson, *Blaming Israel for Palestinian Violence Is Racist*], <http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/11243168/Blaming-Israel-for-Palestinian-violence-is-racist-it-denies-that-Arabs-are-moral-agents.html>.

⁷⁸ *Id.*

⁷⁹ See JED L. BABBIN & HERBERT I. LONDON, *THE BDS WAR AGAINST ISRAEL: THE ORWELLIAN CAMPAIGN TO DESTROY ISRAEL THROUGH THE BOYCOTT, DIVESTMENT AND SANCTIONS MOVEMENT* 55–61 (2015) (cataloging the funding activities of many members of the European Union of NGOs that support BDS).

⁸⁰ RIEFF, *supra* note 41, at 5 (quoting Herbert Spencer).

⁸¹ *Id.*

⁸² Johnson, *Blaming Israel for Palestinian Violence Is Racist*, *supra* note 77.

⁸³ *Id.*

Imperialism (the U.S., the UK, Israel, or the Jews) is now considered, an honorable guardian of the anti-imperialist resistance.⁸⁴ This idea blazes a pathway populated by many who are sympathetic to the goals and objectives of BDS⁸⁵ to express their disapproval of Israel or Jews.⁸⁶ As the world flees from the idea that objects or nations should not merely *receive* our approval or disapproval but, instead, should *merit* certain responses, disapproval, however cognitively dissonant it may be, flourishes in a globe that increasingly mistakes emotion for reason.⁸⁷

This flight and these moves advance because BDS has been wrought in a crucible overheated by a distinctively Western and postmodern form of submission—one that discards traditions and values that have stood the test of time—meaning that many Westerners are now ready to unreflectively surrender to claims from BDS proponents. To do other than surrender, implies that Jewish culture prevailing in Israel, *merits* approval but the alternative cultural approaches prevailing in the Middle East do not. This implication—the inherent worth of Jewish culture—may lack transnational appeal among Western democracies and left-wing activists who reflexively conflate imperialism with Zionism. Western leaders and left-wing pundits have surrendered to a contagion of metaphors about the radical equality of all ideas, identities, values and cultures but the preeminence of ostensible progressive sensibilities that deny the existence of objective reality including the rise in anti-Semitic activity in Europe tied to a rise in attacks by young Muslims.⁸⁸

Modern progressives armed with modern indeterminacy and contingency, cannot help but contradict themselves as they defend or, alternatively, facilitate the defense of certain groups likely to commit atrocities against other groups defending themselves against unwarranted attacks. This untenable position is inextricably linked to philosopher Chantal Delsol's observation that "[o]ne of the particularities of our time consists of the fear of truth. We hold dearly to the good, but we are suspicious of truth."⁸⁹

In sharp contrast with the defensible metaphysical idea that

⁸⁴ *Id.*

⁸⁵ See BABBIN, *supra* note 79, at 55–61 (cataloging the funding activities of many members of the European Union of NGOs that support BDS).

⁸⁶ See MURRAY, *supra* note 53, at 142–143 (noting a European report on the upsurge in anti-Semitism was shelved when it found that anti-Semitic activity was linked to a rise in attacks on Jews by young Muslims).

⁸⁷ DOUGLAS GROOTHUIS, TRUTH DECAY: DEFENDING CHRISTIANITY AGAINST THE CHALLENGES OF POSTMODERNISM, 258 (2000).

⁸⁸ MURRAY, *supra* note 53, at 142.

⁸⁹ CHANTAL DELSOL, ICARUS FALLEN 45 (Robin Dick trans., 2003).

objective reality exists, regardless of whether anyone accepts it,⁹⁰ truth, on Delsol's account, is becoming a pervasive casualty of our age. Westerners including their leaders, by and large, have succumbed to the view that it is now impossible to achieve their previously held ideological certainties; having lost faith in such certainties and indeed faith in all ideologies except the inevitability of progress, they are intent on pursuing a corrupt, shallow kind of personal pleasure,⁹¹ that includes virtue signaling, the therapeutic benefits of a choice-driven marketplace⁹² and the attempt to ignore and thereby redefine reality.⁹³

B. *Truth as a Casualty in Our Therapeutic Age*

BDS advocates have compressed the slack space between unbending reality and what feels good, by mastering the modern lexicon of rights, discrimination inequality, occupation and dispossession so well that its many supporters “do not look for adequate reasoning” or truth as a predicate for their support for the movement.⁹⁴ Instead truth decay⁹⁵ coupled with the proclivity of Westerners to sweep away defense of their civilization's achievements in exchange for a blinkered belief in the rising tide of human progress⁹⁶ (a move that is not limited to proponents of BDS), assume center stage. This maneuver gives rise to what Rod Dreher calls postmodern barbarism that is spawned by the will to power.⁹⁷ In contrast with the ancient barbarians who overthrew Rome while dressed in animal pelts and carrying spears, or John Gray's apt description of ISIS,⁹⁸ our new barbarians, at the UN, or elsewhere, feature designer suits and smartphones⁹⁹ as they urge us to abandon reason, learning, and memory.¹⁰⁰ This development has two

⁹⁰ GROOTHUIS, *supra* note 87, at 134.

⁹¹ MURRAY, *supra* note 53, at 222.

⁹² *Id.* Of course, Phillip Rieff foretold this world some time ago as he speculated on the emergence of a world where all governments would be just, so long as they secure the consoling plentitude of option in which modern satisfaction really consists. RIEFF, *supra* note 41, at 20.

⁹³ See generally DAVID LYON, *POSTMODERNITY*, 95–100 (2d ed. 1999).

⁹⁴ Cary Nelson, *The Problem With Judith Butler: The Political Philosophy of the Movement to Boycott Israel*, in *THE CASE AGAINST ACADEMIC BOYCOTTS OF ISRAEL* 164, 165 (Cary Nelson & Gabriel Noah Brahm eds., 2015).

⁹⁵ My debt to Groothuis should be obvious. See GROOTHUIS, *supra* note 87, at 19–31.

⁹⁶ MURRAY, *supra* note 53, at 3.

⁹⁷ ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION*, 15 (2017).

⁹⁸ John Gray, *The Anomaly of Barbarism: The brutality of Islamist Terrorism has many precedents*, LAPHAM'S QUARTERLY, Mar. 2016, 1–10 (online pagination used) [hereinafter, Gray, *The Anomaly of Barbarism*], <http://www.laphamsquarterly.org/disaster/anomaly-barbarism>.

⁹⁹ DREHER, *supra* note 97, at 17.

¹⁰⁰ *Id.* at 93 (quoting Václav Benda's description of barbarism).

implications. First, it supports Gray's gloomy inference that "barbarism is not a primitive form of life . . . but [rather] a pathological development of civilization."¹⁰¹ Second, it coincides with attempts by Western leaders to hide the resurgence of anti-Jewish hatred in our midst¹⁰² a process that has included deliberate attempts to conflate the rise of nationalist parties in Europe and the reality that many European Muslim immigrants are inclined to chant "Hamas, Hamas, all Jews to the gas," "Jewish shit," "Destroy the Zionist Jews. Kill every last one of them."¹⁰³ This background exemplifies the West's ongoing flight from reality and illustrates the shallowness of the West's commitment to the values of diversity and tolerance. Equally manifest, it raises the likelihood that the BDS grievance imperium has surfaced within an accommodating environment enabling its proponents to push against an open door.

In this environment, attempts to determine the economic and noneconomic effects associated with BDS confront difficulties. For one, difficulties are bred by the logic of agnosticism toward the idea of objective reality. In addition, complexity arises because analysts must untangle thorny cultural and geopolitical trends that include the possible loss of America's political, moral, and military influence in the world as well as the loss of the West's capacity to appreciate history or a meaningful life which is not tied solely to pleasure and choice. Additional problems surface because western values have become suspect in an increasingly cosmopolitan and indeterminate world that glosses over the values associated with a principled conception of the *oikos*.¹⁰⁴ This possibility is reinforced because some Western elites, either through self-deception that stems from trauma supplanted by rage,¹⁰⁵ or willful blindness,¹⁰⁶ refuse to perceive BDS's ultimate objectives. These factors, taken together, may rupture the allegedly common interest between the West and Israel thus weakening Israel's international appeal. If so, the stout defense of Israel by Western powers

¹⁰¹ GRAY, SILENCE OF ANIMALS, *supra* note 41, at 9–10.

¹⁰² MURRAY, *supra* note 53, at 142–43.

¹⁰³ *Id.* at 143.

¹⁰⁴ PATRICK J. DENEEN, THE ODYSSEY OF POLITICAL THEORY: THE POLITICS OF DEPARTURE AND RETURN 15 (2000) [hereinafter DENEEN, THE ODYSSEY OF POLITICAL THEORY] (as thus understood, a return to *nostos*, or alternatively put, a return to *oikos*, implies boundaries in politics that of necessity "constrain the seemingly limitless capacity for optimism in progress").

¹⁰⁵ Nelson, *supra* note 94, at 165 (describing Judith Butler as the BDS movement premier philosopher and political theorist).

¹⁰⁶ *Id.* at 169 (showing that one example of willful blindness arises out of the unequivocal endorsement of the Palestinians' right of return by such leaders as Butler and Barghouti, who then insist that the movement itself currently has no "official" position on the matter and that the people who sign on to BDS petitions, or otherwise endorse the movement are free to adopt their own stands).

may crumble.

As part of this cultural foreground, analysts must address the cunning calculation of BDS proponents to equate their campaign to the past struggle to abolish apartheid.¹⁰⁷ This equation gives rise to a coded and emotionally attractive way to further their cause regardless of how much logic and Jewish history contradict their analogy. This emotive swing appropriates pre-Mandela South Africa as a trope, and coheres with Barghouti's pregnant hypothesis that Palestine's South Africa moment has arrived.¹⁰⁸ Archbishop Desmond Tutu proffers his own, less than winsome, hypothesis: "I think the West, quite rightly, is feeling contrite, penitent, for its awful connivance with the Holocaust. The penance is being paid by the Palestinians."¹⁰⁹

Disregarding thousands of years of history, and a century of international law principles, which taken together support Israel's right to exist as Jewish State, a right that preceded the Holocaust, BDS activists, including Mr. Tutu, deeply infused with emotive language, fuel an alluring "take" or conclusion that is not so much reasoned *to* as it is reasoned *from*.¹¹⁰

Nimbly equipped with such mental jujitsu, BDS activists feast on the oxygen supplied by the globe's postmodern age. They are thus equipped to taunt individuals and groups that violate anti-Israel boycotts with the dispiriting lexicon previously utilized to denounce individuals and entities that failed to boycott apartheid-era South Africa.¹¹¹ While BDS policy arguably promotes discrimination and its corollary, anti-Semitism, BDS efforts are often accompanied by a loud commitment to equality and peace. This commitment is deeply paradoxical because of it is commonly tied to inflammatory rhetoric and its ideological alignment with radical Islamist groups seeking the destruction of Israel.¹¹²

Despite these rich ironies, BDS's campaign has attained currency in the international community largely because of the West's surrender to a contemporary culture has led to a polity devoid of a binding public philosophy.¹¹³ Suggestive that the pursuit of justice has dissolved into a salvific quest for therapy's celebrated benefits—personal liberation as feeling good about oneself—this emotive development may implode despite global society's frequent invocation of the language of

¹⁰⁷ BARGHOUTI, *supra* note 12, at 3–5.

¹⁰⁸ *Id.* at 191–204.

¹⁰⁹ *Id.* at 2.

¹¹⁰ JAMES K. A. SMITH, HOW (NOT) TO BE SECULAR: READING CHARLES TAYLOR 96 (2014).

¹¹¹ BARGHOUTI, *supra* note 12, at 228.

¹¹² Greendorfer, *The BDS Movement*, *supra* note 57, at 39–40.

¹¹³ Elisabeth Lasch-Quinn, *Introduction*, in RIEFF, *supra* note 41, at vii, xix.

pluralism, democracy, and antidiscrimination.¹¹⁴ This is so because, in an increasingly fractured world, it is unlikely that modern disputes can be resolved without bloodshed, unless commonly agreed upon principles surface. The West's ongoing surrender allows BDS thought leaders to supply persuasive and pliable circumlocutions intimating that the pursuit of truth is no more than the deployment of clever words adopted to attain rhetorical and emotive effects. This maneuver is harmonious with the Western cultural validation of Nietzsche's thesis of truth as a mobile army of metaphors and metonyms.¹¹⁵

Influenced by postmodern gravitational twists and turns, the notion that humans are constitutively morally equal agents is subject to an increasingly contentious debate. Although members of the global community do not necessarily subscribe to the tenet of ancient thinking—the assumption of natural inequality rather than its modern converse, assumed equality,¹¹⁶—contemporary thinkers are predisposed to support the inference that Israel and its defenders are morally inferior in the face of the superior moral prerogatives earned by the grievants.

Although such views privilege Israel's opponents, they have not gone unanswered.¹¹⁷ Still, the stance of BDS proponents fosters a moral equivalence between the effort to defeat terror operations, for instance, by the Middle East's only democratically elected government and those who commit, condone or fail to condemn terror. Although there is small chance that the soft plaster of BDS's social-justice platform can withstand demolition by remorseless facts, a pertinent question reappears: If the proponents of modern anti-Semitism honor themselves as patrons of peace, justice, and human rights, what will preclude such claims and claimants from appealing to a consensus in a world that no longer elevates truth, a world that conflates conduct by a lawful democratic state with apartheid, a world prepared to subject Israel to disproportional scrutiny while actual human rights violations fade from view¹¹⁸ and a world that elevates emotion over the reality on the ground? If this change proceeds apace, it frees argumentation—

¹¹⁴ Harry G. Hutchison, *Moving Forward? Diversity as a Paradox? A Critical Race View*, 57 CATH. U. L. REV. 1059, 1061 (2008) [hereinafter Hutchison, *Diversity as a Paradox*].

¹¹⁵ SANDER L. GILMAN, FRIEDRICH NIETZSCHE ON RHETORIC AND LANGUAGE 250 (Sander L. Gilman et al. eds., trans., Oxford University Press 1989).

¹¹⁶ SIEDENTOP, *supra* note 3, at 51.

¹¹⁷ See generally BABBIN, *supra* note 79 (challenging the logic of the BDS movement); Anne Herzberg, *NGO "Lawfare": Exploitation of Courts in the Arab-Israeli Conflict* 1, 2 (Gerald M. Steinberg ed., 2008) (describing the initiation of legal actions, ostensibly to provide "justice" to "victims," as a form of "lawfare" as a substitute for traditional military means to achieve military objectives that are intended to punish Israel for its anti-terror operations as well as an effort to block future defensive actions all as part of a strategy to delegitimize Israel, a process that has its roots in the NGO Forum of 2001 held in Durban, South Africa).

¹¹⁸ See *infra* Part III.

extravagantly equipped with the vocabulary of oppression—to serve as a channel of manipulation.¹¹⁹ In a world that has become emotive, the distinction between truth and falsity is disarmed by a pursuit of therapeutic justice and its conforming correlate: the grievance imperium.

Before exploring the implications of this development further, it is important to provide some additional background. Per Philip Rieff's account, the Western populace rather than being defined by either a binding public philosophy or a transcendent principle has become increasingly defined by the emergence of the therapeutic sensibility, which can be understood as the replacement of the pursuit of agreed upon notions of "justice" with the idea or feeling of personal liberation.¹²⁰ As a substitute for an objective conception of justice, personal liberation may be seen as the ultimate postmodern goal, defined as the pursuit of liquid or experimental impulses.¹²¹ If this analysis is correct, it signals that Western society is imbued with the capacity to fall prey to self-interested thought-leaders, who offer political programs that advance their own unique self-interested manipulation of others.¹²²

Going forward, three significant implications surface from the pursuit of therapeutic justice and the grievance imperium. For one, masters of this pursuit acquire moral power and propel human acts through their capacity to manipulate others.

Second, it is doubtful that there can be any dispute regarding BDS's potential to be "consumptively" effective through its ability to add an alluringly emotive part to its campaign. A consumptively effective objective is one that is legitimated by the pursuit of the "good" and, therefore, is advanced by the pursuit of emotions (personal liberation) that correspond with the reification of an allegedly noble cause. Even in the absence of direct empirical economic evidence that corresponds with such consumptively emotive claims,¹²³ BDS may proceed without firm resistance because, consistent with therapy's aim and the exigencies of virtue signaling, participation assures many individuals that they will feel better about themselves, without the necessity of operating on the basis of some defensible principle.

Finally, and third, despite BDS's emotive advantages, at the end of the day, any attempt to eviscerate the distinction between truth and

119 SIEDENTOP, *supra* note 3, at 44 (describing reason from a Sophist perspective).

120 Lasch-Quinn, *supra* note 113, at xix–xx (describing Philip Rieff's analysis).

121 *Id.*

122 *Id.* at xx.

123 See *infra* Part V, B. for a discussion of the effectiveness of the South African Boycott campaign.

falsity must concede an undeniable reality: BDS poses an existential threat to Israel.

That said, as truth falls prey to the grievance imperium, it produces consequences. For instance, the United Nations Educational, Scientific and Cultural Organization (UNESCO) recently approved a resolution designed to erase the Jewish connection from the Temple Mount in Jerusalem. This act cannot be considered in isolation from other UN acts.¹²⁴ “Referring to this site revered by Jews, Christians, and Muslims by only its Arab name, UNESCO’s Executive Board simultaneously snubbed the fact that this site includes the Western Wall, a remnant of the biblical temple, and the fact that this is the holiest site where Jews can pray.”¹²⁵ By favoring Muslim claims to the Temple Mount, UNESCO exhibited deference to the moral superiority possessed by an allegedly oppressed group pursuing grievance redress despite 5,000 of years of human history, a history which has been affirmed by the Supreme Muslim Council during the 1920s, that verifies the opposite conclusion. UNESCO’s resolution represents a triumph of the contempt for history and a validation of anti-Semitism.¹²⁶ UNESCO’s capitulation glorifies the determination of BDS proponents to marginalize Israel¹²⁷ thus ratifying Western culture’s emotive turn. Moreover, “[t]his decision amounts to a victory for one of the world’s leading sponsors of terror, Hamas, a Gaza-based Islamic Militant group that has sworn its allegiance to a narrative,” premised on the destruction of Israel.¹²⁸

Part III scrutinizes the BDS effort to use human rights aspirations as a weapon against Israel in the mirror of the presumed commitment by the West to universal human rights. The record shows that this commitment appears to be honored in the breach.

III. PLACING BDS IN THE ASYMMETRIC CAULDRON OF HUMAN RIGHTS

Although BDS has a connection with the objectives of pre-existing Arab boycotts, and while its leaders are adept at generating moral

¹²⁴ See *supra* Part I.

¹²⁵ Harry Hutchison, *The United Nations Tries to Eradicate Jewish History*, AMERICAN CENTER FOR LAW & JUSTICE, Nov. 2, 2016 [hereinafter Hutchison, *The United Nations Tries to Eradicate Jewish History*], <http://aclj.org/israel/the-united-nations-tries-to-eradicate-jewish-history>.

¹²⁶ *The Week*, THE NATIONAL REVIEW, Nov. 7, 2016, 12 (2016), available at <https://www.nationalreview.com/magazine/2016-11-07-0000/week>.

¹²⁷ Hutchison, *The United Nations Tries to Eradicate Jewish History*, *supra* note 125.

¹²⁸ *Id.*

outrage among western audiences,¹²⁹ it has launched its current boycott with a subtlety, if not complexity, entwined with the pursuit of progress and universal human rights. Complications arise because the foundation for this pursuit and the meaning of human progress, lack a consensus and, then there is the existence of a terrible reality. For instance, while persecution is so extreme that “it could scarcely get any worse” in Afghanistan, Iraq (northern), Nigeria, North Korea, Saudi Arabia, Somalia and Syria and while “[a] virulent and extremist form of Islam emerged as the number one threat to religious freedom and was revealed as the primary cause of persecution in many of the worst cases,”¹³⁰ many state and non-state participants in BDS single out Israel for alleged human rights abuses.¹³¹ The myopic nature of the campaign subjecting the Middle East’s sole democracy and the world’s only Jewish state to obloquy functions in sharp contrast with the failure of activists and alleged human rights warriors to target Sudan, Syria, China, Russia or Iran for their own massive violations of human rights.¹³²

Disproportionateness signifies two things. For one, it shows that Western political elites both within and outside of the NGO arena have surrendered to the notion that modern history reflects a “progressive” metanarrative, one that presupposes that civilization moves ineluctably forward (whatever that may mean) in spite of moments of regression proffered by state actors and terrorists that remain painfully primitive.¹³³ Second, it indicates that for some, human rights has become a religion that is ill at ease with itself because it is uncertain of its moorings.¹³⁴ More and more uncertain of its language, its linguistic appeals become grander and grander, and its claims become ever more insistent as the whole system’s inability to do what it purportedly aspires to do becomes plainer for all to see.¹³⁵

Although it is unlikely that the current atrocities committed by Iran, Syria, Hamas, ISIS or other groups represent a momentary, painful, but essentially benign, relapse to the barbarism of the past,

¹²⁹ Nelson, *supra* note 94, at 165.

¹³⁰ Stoyan Zaimov, *Top 7 Nations with Worst Record of Christian Persecution: Report*, THE CHRISTIAN POST, Nov. 25, 2016, <http://www.christianpost.com/news/top-7-nations-where-persecution-christians-is-so-bad-it-can-scarcely-get-worse-report-171719/>.

¹³¹ *Impact of the Boycott, Divestment, and Sanctions Movement: Hearing Before the Subcomm. on Nat'l Sec. of the Comm. on Oversight and Government Reform*, 114th Cong. 6 (2015) (statement of Mark Dubowitz, Exec. Dir. of Foundation for Defense of Democracies) [hereinafter Dubowitz].

¹³² *Id.* at 4.

¹³³ See, e.g., Gray, *supra* note 98, at 1–10.

¹³⁴ MURRAY, *supra* note 53, at 213.

¹³⁵ *Id.*

some commentators judge Israel by “modern” and therefore higher aspirational standards. This appraisal embodies the West’s own surrender to an entirely new form of barbarism, one that turns traditional understandings of this term on its head. This cultural and morally subversive linguistic move to hold Israel to a higher standard echoes philosopher John Gray’s claim that modern brutality has many precedents.¹³⁶

For some, modernity with its continual scientific and technological innovation¹³⁷ signaled the onset of a new philosophy, an inevitable and enlightened civilizing process that ultimately bends history toward justice. This ahistorical universalizing conception of “justice,” one that is detached from any serious contextual challenges,¹³⁸ represents the dismissal of myth, tradition, teleology, and religion, a move that thus counsels modern civilized nations, such as Israel, to patiently engage in negotiations, if not capitulation, in response to the bad conduct from groups which pose an existential threat.

Proponents of this view, such as former U.S. Secretary of State John Kerry and members of the UN Security Council,¹³⁹ counsel endless concessions while believing Israel—rather than defend itself vigorously against all enemies—ought to give up its rightful boundary claims, or alternatively, its Jewish identity, and take comfort in the belief that history’s rather amorphous verdict clothed in the form of modern democracy provides sufficient security for all but the most unenlightened moderns among us.¹⁴⁰ Such advice and counsel, unattached to any principle, represents the senility of the postmodern mind.¹⁴¹ This counsel is highly resistant to evidence showing that Israel has suffered from repeated terrorists and preemptive military attacks by its enemies. It suffices to intuit that such highly compartmentalized

¹³⁶ Gray, *The Anomaly of Barbarism*, *supra* note 98, at 1-2 (showing that acts of barbarism have modern precedents including the use of sexual violence as a military strategy in Bosnia during the 1990s; during Bangladesh’s war of independence in 1971; in Nepal, Colombia, Sudan, the Democratic Republic of Congo and other places).

¹³⁷ *Id.* at 4.

¹³⁸ See, e.g., Nelson, *supra* note 94, at 173 (describing the approach taken by the BDS’s leading political theorist).

¹³⁹ See *supra* Part I (discussing UN Security Council Resolution 2334).

¹⁴⁰ See, e.g., Andrew McCarthy, *John Kerry Speech: Israel Can’t be both Jewish and Democratic*, THE NAT’L REV. (Dec. 28, 2016), <http://www.nationalreview.com/article/443390/john-kerry-speech-israel-cant-be-both-jewish-and-democratic> (noting Kerry’s hypocrisy and suggesting Kerry might want to review the constitutions of Iraq and Afghanistan, which the U.S. State Department helped draft before lecturing Israel, a move which illustrates the Obama Administration’s double standard subjecting Israel, as a modern state to criticism while avoiding criticizing Muslim and presumably less modern Afghanistan and Iraq).

¹⁴¹ My debt to John Gray should be obvious. See Gray, *The Anomaly of Barbarism*, *supra* note 98, at 10.

rights-talk, correlates with the West's descent into moral vacuity, which is entwined with supplying cover for, if not the cultivation and encouragement of actual, rather than simply figurative, barbarism by Israel's enemies.

Although the human rights campaign targeting Israel advances while ignoring vile human rights abuses that are endemic to the rest of the Middle East, this richly ironic and deeply disproportional escarpment has been pollinated by the contributions of the Palestinians themselves. This contention recently assumed center stage when PLO leaders, appealing to emotion and the lure of personal liberation instead of reason, called for a day of rage in response to the installation of metal detectors at the Temple Mount rather than in response to the terror attack itself, which left two Israelis dead and which led to the contested installation.¹⁴² However unbalanced the globe's focus on Israel may be, the next section turns its attention to the effort by BDS proponents to link politics and economics, before delineating the empirical data tied to the South African boycott/sanctions campaign¹⁴³ and fleshing out, in greater detail, illustrations of the wide range of BDS inspired boycott and divestiture activities.

IV. BDS'S CAMPAIGN TO LINK ECONOMICS AND POLITICS IN OUR POSTMODERN AGE

A. *Prolegomena*

Observant readers recognize that BDS—led by the largest coalition of Palestinian civil society inside “historic Palestine” and organizations in exile¹⁴⁴—is constructed on the contention that “*imperialism* presents the struggling peoples of the earth with the ‘ultimatum’ that they must ‘accept theft or death.’”¹⁴⁵ The BDS campaign often, but not always, hides its true goal: the elimination of the State of Israel. BDS encompasses a campaign that is largely focused on secondary boycotts, as opposed to primary ones,¹⁴⁶ or, alternatively,

¹⁴² Patrick Goodenough, *PLO Official Calls Jerusalem Metal Detectors ‘Intrusive and Dehumanizing,’* CNS NEWS (Jul. 19, 2017), <http://www.cnsnews.com/news/article/patrick-goodenough/plo-official-calls-jerusalem-metal-detectors-intrusive-and>.

¹⁴³ See, e.g., Alexander Laverty, *Impact of Economic and Political Sanctions on Apartheid*, THE AFRICAN FILE (June 7, 2007), <https://theafricanfile.com/politicshistory/impact-of-economic-and-political-sanctions-on-apartheid/>.

¹⁴⁴ BARGHOUTI, *supra* note 12, at 5.

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ Greendorfer, *The BDS Movement*, *supra* note 57, at 21. Within the parameters of the Arab League, to which BDS owes its origins, the primary boycott initiated by activists consist of the

divestiture that is intended to raise the cost of capital for Israeli firms or others. It cannot dodge similarities between its “Palestinian BDS National Committee” and its previous incarnation, the Arab League’s “Higher Arab Executive Committee.”¹⁴⁷ Understanding the political objectives of BDS is heightened by observing the campaign’s intellectual debt to the Durban I Conference.¹⁴⁸ Beyond dhimmitude, the objectives include the outright extinction, absorption or the de facto dissolution of Israel into a state wherein Palestinians hold a majority of the population.¹⁴⁹

Despite such clear objectives, the BDS Movement obfuscates for two reasons. First, BDS attempts to operate as an organization without a clear identifiable body as part of an attempt to avoid the reach of anti-boycott laws in the U. S. and elsewhere.¹⁵⁰ Second, it offers repeated demands for moral consistency and universal human rights operationalized by context sensitivity, gradualness, and sustainability.¹⁵¹ Such demands prime observers to become enraptured with BDS’s goals, despite the movement’s nexus with the Palestinian Authority’s position on negotiations with the Israeli government related to the ultimate dissolution of the State of Israel.¹⁵² Clarity may be obtained below:

“[p]erhaps the best source of information on the BDS Movement today is the manifesto published on its self-proclaimed official website, www.bdsmovement.net (BDS Manifesto). This unsigned document, which is attributed to an organization referred to as ‘Grassroots Palestinian Anti-Apartheid Wall Campaign’ (Wall Campaign) and titled ‘Towards a Global Movement: A Framework for Today’s Anti-Apartheid Activism,’ is a bit of a mystery in its origins.”¹⁵³

Arab League, its member states and individuals in the Arab states, who refused to engage in commerce with Israel. *Id.* n.73. The secondary boycott arose out of a collaborative effort to force the “institutions, organizations, merchants, commission agents and individuals” to comply with the primary boycott objectives of the Arab League. *Id.* Apparently, by the wording of its declaration, it appears that non-state actors were primarily tasked with spreading the secondary boycott such that other businesses and entities would refuse to deal with Israel and Israeli goods. *Id.*

¹⁴⁷ *Id.* at 21 (suggesting that such organizations, in name, in function, in tasks, in methodology and in goals, are one and the same, separated only by the passage of time).

¹⁴⁸ *See id.* at 15-19.

¹⁴⁹ Budick, *supra* note 48, at 101.

¹⁵⁰ Greendorfer, *The BDS Movement*, *supra* note 57, at 21.

¹⁵¹ BARGHOUTI, *supra* note 12, at 227.

¹⁵² Budick, *supra* note 48, at 85-86. Among other things this position promotes the right of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194. Full respect for this goal amounts to a call for the dissolution of the State of Israel as a homeland of the Jewish people as well as the dissolution of a fully constituted and recognized nation among nations that was established by an international vote at the United Nations. *Id.* at 86.

¹⁵³ Greendorfer, *The BDS Movement*, *supra* note 57, at 22 (citations omitted).

The document confirms the relationship between the BDS Manifesto, the Original BDS Manifesto, and the existing Arab League Boycott, all of which, at the end of day, may be inseparable.¹⁵⁴ Programmatically, BDS has instigated a struggle that, among other things, is calculated to induce greater participation by NGOs in combination with a more refined media campaign to rebrand and weaponize the Arab League Boycott.¹⁵⁵

Notwithstanding the fact that the BDS movement is the heir of the Arab League Boycott¹⁵⁶ and despite the intelligibility of the Arab League's goals, BDS advocates frequently shroud their long-term objectives in coded claims about grander and more fantastic human rights aspirations, all connected to the proposition that Israel thwarts Palestinian self-determination, freedom, justice, and unmitigated equality.¹⁵⁷ A critical examination of BDS shows that it is: (A) designed to single out Israel as a "racist" and "apartheid" state and calculated to advance a political war against Israel,¹⁵⁸ and (B) has been advanced by the creation of the International Criminal Court (ICC) and the proliferation of NGO superpowers.¹⁵⁹ In a particularly abstruse move, BDS proponents vaguely lobby and stress the grassroots involvement of, and the enforcement by, non-state actors of the re-radicalization of the Arab League Boycott and rejection of the 1993 Oslo Accords.¹⁶⁰ Despite its participation in Arab re-radicalization and opposition to normalizing relations with Israel, BDS hides its anti-Israeli pre-commitment by deploying the vocabulary of inequality and oppression as a powerful leitmotiv. Barghouti insists that this battle is the most vital form of resistance available to the clear majority of Palestinians.¹⁶¹ This narrative—based on the contention that BDS is part of a stirring struggle to resist the colonization of their land and minds,¹⁶²—ensues as a panoptic view designed to destroy the idea that the postmodern world

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 23 (outlining this effort and showing that weaponizing the Arab League's boycott and its progeny is advanced through the declaration that BDS expresses the aspirations of grassroots activists, who have seized the mantle of human rights).

¹⁵⁶ *Id.* at 21–22 (showing that the BDS movement is a component of the Arab League Boycott, which was not just a primary boycott, but a secondary boycott as well).

¹⁵⁷ BARGHOUTI, *supra* note 12, at 6.

¹⁵⁸ Herzberg, *supra* note 117, at 2 (describing various aspects of the "lawfare" initiated against Israel). It appears that BDS activity is often linked to anti-Jewish hostility. The U.S. Department of State defines anti-Semitism as a certain perception of Jews, which may be expressed as hatred toward Jews. *See, e.g.*, U.S. Department of State, *Defining Anti-Semitism* (Jan. 20, 2017), <https://www.state.gov/s/rga/resources/267538.htm>.

¹⁵⁹ Herzberg, *supra* note 117, at 2.

¹⁶⁰ Greendorfer, *The BDS Movement*, *supra* note 57, at 23.

¹⁶¹ BARGHOUTI, *supra* note 12, at 6.

¹⁶² *Id.*

owes any obligation to protect the only democracy in the Middle East from its enemies.

BDS offers a pedestal of lyrical ideas of freedom and identity with a budding proclivity to follow Nietzsche's example: the will to use power without moral restraint.¹⁶³ However indefensible this approach may be, if it succeeds without objection, it: (1) moots impartial inspections of the substantive merits of the campaign, (2) blocks attempts to defenestrate the procedural logic of the campaign, (3) thwarts recognition that some of the BDS program constitutes secondary boycotts previously declared illegitimate if not illegal,¹⁶⁴ and, (4) raises the possibility that some BDS efforts will escape detection.

The world ought to take the BDS campaign seriously since its focus suggests that Israel is merely the canary in a global coalmine.¹⁶⁵ The failure to grapple fully with the implications of lawfare, led by a confederation of BDS groups, foretells future infections for other countries viewed as supporters of Israel, including the United States. For example, although, lawfare cases, filed in the U.S. have not been successful,¹⁶⁶ the possibility of future infections in the U.S. exists, notwithstanding America's current posture in support of the rule of law and Israel's right to exist as a Jewish state, its current willingness to engage in military and economic collaboration with Israel reflecting American dominance, and importance as a guarantor of stability in the globe.¹⁶⁷

Advancing BDS's goal of linking politics and economics requires use of a variety of means. For the campaign to triumph, it must overcome legal and policy restrictions. The following subsection considers the origins and scope of BDS.

B. BDS: Its Origins and Scope

Starting in 2005, BDS calls on both Palestinians and the international community to "impose broad boycotts and implement divestment initiatives against Israel similar to those applied to South Africa in the apartheid era."¹⁶⁸ From its beginning, with its demand that Palestinians themselves boycott Israeli-produced goods, BDS spread

¹⁶³ See Hutchison, *Corporate Law, and Unsustainable Liberalism*, *supra* note 2, at 765.

¹⁶⁴ See *infra* Part V.

¹⁶⁵ Dubowitz, *supra* note 131, at 1.

¹⁶⁶ See, e.g. *Corrie v. Caterpillar, Inc.*, 503 F. 3d 974, 984 (9th Cir. 2007) (dismissing Alien Tort Statute case against Caterpillar for selling bulldozers to the Israeli army used to demolish Palestinian homes in the West Bank).

¹⁶⁷ Dubowitz, *supra* note 131.

¹⁶⁸ C. ANTHONY ROSS ET AL., *THE COSTS OF THE ISRAELI-PALESTINIAN CONFLICT* 26 (2015).

internationally and, slowly but steadily, developed support within the international academic, business, and celebrity communities.¹⁶⁹ Provoked by this campaign, in 2010, “the EU placed restrictions on imports of goods originating in the settlements and then, in 2013, it made all settlement-based entities ineligible to receive EU-funded grants, prizes, or financial instruments.”¹⁷⁰

Determining the precise size of the BDS movement is challenging, a problem that reinforces the difficulty of forecasting the impact of this campaign on Israel’s economy. The economic program spawned by BDS proponents embraces an extensive range of activities such as boycotts, blacklists, sanctions, and protest divestment programs. The economic literature on boycotts shows they occupy a wide range of possibilities including the classic boycott, in which competitors join to deny other actual or potential competitors access to upstream suppliers or to downstream customers¹⁷¹ or alternatively, simple horizontal agreements that pertain to terms of an exchange.¹⁷²

Boycotts against the Jewish people are nothing new and did not begin with the modern BDS movement. In fact, some historical predecessors to BDS were also aligned with more violent goals to destroy Israel as a recognized state or, alternatively, the expungement of Jews from world’s history. Spain led the way by expelling its Jews with the Alhambra Decree of 1492.¹⁷³ Consistent with this inclination, “[a]nti-Jewish boycotts emerged from the Enlightenment as a resistance to the legal equality that Jews received in France, following the French revolution and then throughout Western Europe.”¹⁷⁴ As a consequence, emancipation, in an era purportedly committed to the values of equality, liberty, and fraternity, was exposed as futile “when Europeans, *inter alia*, mounted ‘attempts to thrust [Jews] out of business’ that urged: ‘Don’t buy from Jews!’”¹⁷⁵

Similarly, Arabs have a long history of resisting the presence of Jews in the Middle East. “Before there was a BDS Movement, or even an Arab League or a State of Israel, there were boycotts against Jews, especially those advocating for the establishment of a modern state of Israel.”¹⁷⁶ Indeed, “[b]etween 1909 and 1939, at least 13 different Arab boycotts of Jewish concerns were implemented.”¹⁷⁷ A more permanent

169 *Id.*

170 *Id.* at 26-27.

171 *See, e.g.*, *E. States Retail Lumber Ass’n. v. United States*, 234 U.S. 600 (1914).

172 *See, e.g.*, *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

173 Stephens, *The Meaning of the Olympic Snub*, *supra* note 26.

174 MARCUS, *supra* note 58, at 245.

175 *Id.* (quoting Theodor Herzl).

176 Greendorfer, *The BDS Movement*, *supra* note 57, at 5.

177 *Id.* at 6.

boycott was founded immediately after World War II, contemporaneous with the establishment of a pan-Arab organization known as the Arab League.¹⁷⁸

Devised to politically and commercially suffocate Israel in order to preserve Arab purity and hegemony over the territory of Palestine and subsequently intended to complement Arab military attempts to destroy Israel, the boycott used the terms “Zionist” and “Jew” interchangeably.¹⁷⁹ The Arab League Boycott carried out its campaign through multiple and coordinated channels using state and non-state actors and involved primarily boycotts and actions by non-government organizations, individuals and groups all committed to a concerted propaganda effort to further the campaign.¹⁸⁰ This endeavor was reinforced by multiple acts targeting Jewish economic interests and enhanced globally through secondary and tertiary boycotts as well.¹⁸¹ The Arab League’s opposition to the sale and manufacture of Israeli products as well as Jewish-owned industry was eventually extended to a blacklist as well as opposition of companies having “Zionist sympathizers” in executive positions.¹⁸²

The campaign was fertile ground for future efforts, enabling the contemporary BDS movement to trace its roots in the Arab response to the establishment of the modern State of Israel.¹⁸³ Further evidence emerges showing that the Arab League Boycott has been something of a hydra whose appendages include the Arab world’s bigotry and the pursuit of dhimmitude where the Jewish minority continues to live its faith in exchange for the payment of a tax and capitulation to a second-class status within Arab society.¹⁸⁴ The pursuit of such suffocating policies, on one account, stems from the supposition that Israel—a geographically tiny nation—is not necessarily an existential threat to Arab nations but rather an affront to the dignity of the Arab ego.¹⁸⁵

Beyond boycotts, BDS favors protest divestment programs based on the idea of “ethical investment,” a concept with an eye-of-the-

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 7.

¹⁸⁰ *Id.* at 9.

¹⁸¹ *Id.*

¹⁸² *Id.* at 9-10. Apparently, the “Arab League Boycott blacklist has had extensive and crippling consequences . . . Among the first companies to succumb to the blacklist threat and comply with the Arab League Boycott by terminating business operations in Israel were American Express, Brown and Williamson, Shell Oil, British Petroleum, Stand Oil, Socony, Mobil, Texaco, British Airways, Japan Air Lines, Iberia, Qantas, Mitsubishi, Suzuki, Yamaha, Toyota, Honda and Nissan. *Id.* at 12. At its apex, the Arab League Boycott’s blacklist applied to over 6,300 entities from nearly 100 countries as well as over 600 cargo ships. *Id.*

¹⁸³ *Id.* at 19-21.

¹⁸⁴ *Id.* at 13.

¹⁸⁵ *Id.*

beholder element and one that abstains from stating inviolable principles but, equally true, may be less than voluntary in nature.¹⁸⁶ Divestiture campaigns, which are often inseparable from boycott efforts, are designed to increase the cost of capital for Israel, thus increasing the prospects for the nation's economic decline. Built on the anti-slavery campaigns of the Quakers in the 1700s and financial sanctions leveled against South Africa's apartheid regime more recently, the investment/corporate-virtue movement seeks to place investment decision-making on a pure ethical footing instead of a sole basis of financial rewards.¹⁸⁷

SRI¹⁸⁸—as a construct encouraging investors to make investment decisions combining financial objectives with their own social values—can be distinguished from the CSR movement designed to encourage corporate firms to ensure that the pursuit of profit is tempered by important societal objectives.¹⁸⁹ This distinction remains vital even though the goals associated with these arguably different approaches remain aligned. Increased interest in SRI has sparked an increased emphasis on CSR, and vice-versa. SRI and CSR provides latitude for the BDS divestment program to shrink the capital pool from which Israeli companies can draw. Quintessentially the BDS movement seeks to harm Israel's standing within the financial world.

Blacklists are made to impose a cost on non-Israeli multinationals trading goods and services to Israel. Such programs are engineered to shackle Jews by crippling the Israeli economy and crushing the nation's legitimacy. Blacklists often work in tandem with divestiture and boycott programs. Sanctions may be preferred by state actors, thereby ensuring that the force of law is available to expand the power of Israel's opponents. They are also often proposed in response

¹⁸⁶ See, e.g., Wesley Cragg & Benjamin J. Richardson, *Being Virtuous and Prosperous: SRI's Conflicting Goals* 1, 192 J. OF BUS. ETHICS, supp.1, 1, 2009, at 21. available at <https://ssrn.com/abstract=1463936>. [hereinafter *Being Virtuous*] (stating that the ethical case for socially responsible investments, presumes that investors and the companies they fund have ethical responsibilities that trump the pursuit of profits and the belief that investment decisions should be grounded on an ethical foundation; this new ethical approach justifies the institutionalization of new norms and governance standards, including the reformation of fiduciary duties and the rules for internal governance of financial organizations).

¹⁸⁷ *Id.*

¹⁸⁸ Socially Responsible Investment (SRI) can be defined as conduct that "exclude[es] [...] securities of certain otherwise attractive companies from an investor's portfolio because the companies are judged to be socially irresponsible, and include[es] includes the securities of certain otherwise unattractive companies because they are judged to be behaving in a socially laudable way. . . . Richard A. Posner & John H. Langbein, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 73 (1980).

¹⁸⁹ Edwin M. Epstein, *Corporate Good Citizenship and the Corporate Social Policy Process: A View from the United States*, 8 J. OF BUS. ETHICS 583, 585 (1989).

to new Israeli “settlement” activity.¹⁹⁰

Whatever the motivation and however enforced, boycotts, protest divestment, and other non-lethal weaponry have the following end: the destruction of Israel and the establishment of a Palestinian Arab state that supplants it.¹⁹¹ Context shows that the BDS Call and other initiatives deem Israeli policies a contemporary form of apartheid and, therefore, a crime against humanity.¹⁹² It reinforces the suspicion that neither BDS nor its affiliates accept the right of Israel to exist as a Jewish state or, otherwise support a two-state solution to the ongoing political impasse.¹⁹³ BDS, whatever its merits,¹⁹⁴ is a movement that calls upon the people of Palestine to confront their “oppressive reality,” and upon international civil society to shoulder the moral responsibility to fight Israeli “injustice.”¹⁹⁵

Many Westerners have responded to this call to shoulder their presumed moral responsibility. The next section provides illustrations of boycott/divestment/blacklist successes, primarily in the West.

C. *Examples of Boycotts and Protest Divestment Campaigns*

BDS appears to be remarkably diverse—and dynamic. Rather like a blastula of cells undergoing mitosis, BDS constantly proliferates new divisions and differentiations.¹⁹⁶ Examples of boycott and divestment decisions are commonplace.

For example, the Luxembourg government’s pension fund resolved to boycott five major Israeli banks as well as numerous Israeli private investment firms over the ongoing construction of settlements in the

¹⁹⁰ See, e.g., *Palestinians Demand Sanctions Against Israel Over New Settlement*, EURONEWS (Mar. 31, 2017), <http://www.euronews.com/2017/03/31/palestinians-demand-sanctions-against-israel-over-new-settlement>.

¹⁹¹ Greendorfer, *The BDS Movement*, *supra* note 57, at 13.

¹⁹² For an excellent exposition of the Arab boycott movement including BDS see *id.* at 1-35. Greendorfer sets forth a number of paradoxes that include the example of the Durban Conference (Durban I, 2001), an event that was a conference against racism but its primary focus was the actual promulgation of racism against Israel and Jews, a focus that included the claim that “Zionism is racism.” at 16-17. The NGO Durban Conference I witnessed the official unveiling of a new tactic designed to defeat Israel: the attempt to institutionalize anti-apartheid language against Israel. *Id.* at 89.

¹⁹³ *Id.* at 89 (indicating that BDS shares the same position on a two-state solution with Hamas, a recognized terrorist group).

¹⁹⁴ Merits may be difficult to find, considering the fact that the BDS Movement was apparently birthed out of anti-Israel venom that descended into anti-Jewish hate. *Id.* at 18.

¹⁹⁵ BARGHOUTI, *supra* note 12, at 225.

¹⁹⁶ My debt to Peter Schuck should be obvious. See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 3 (2003).

West Bank.¹⁹⁷ It also excludes the U.S. firm Motorola Solutions because of its association with “human rights violations in occupied [Palestinian] territories.”¹⁹⁸ These decisions follow the New Zealand Superannuation Fund’s judgment to exclude three Israeli companies from its investment portfolio on ethical grounds because of their alleged involvement in “illegal settlements and the security wall.”¹⁹⁹

BDS has spawned a variety of campaigns, including the Ireland Palestine Solidarity Campaign, designed to target Israel’s “blood diamonds;” the inception of statewide ballot initiatives that call for public retirement systems to divest from corporations doing business in Israel; and the “Palestinian Queers for BDS initiative,” which calls upon LGBT activists to avoid “pink-washing Israeli crimes,” if Israel’s respect for gay rights allows the country to be seen as a tolerant nation.²⁰⁰ These tactics have been joined by state-level sanctions against Israel including the decision by Venezuela and Bolivia to sever diplomatic relations with Israel, as well as the judgment by the Chilean parliament to boycott Israeli products originating in “settlement” areas.²⁰¹

Countless illustrations of voluntary participation by non-state actors—including business entities or the investment arms of religious institutions²⁰²—in BDS’s various campaigns—surface within the economic arena. Mark Dubowitz, Executive Director of the Center on Sanctions and Illicit Finance, part of the Foundation for Defense of Democracies, in an effort complemented by the vigilance of others²⁰³

¹⁹⁷ Les Neuhaus, *Luxembourg Pension Fund Pulls out of Israeli Banks*, MINTPRESS NEWS (Mar. 3, 2014) <http://www.mintpressnews.com/luxembourg-pension-fund-pulls-israeli-banks/180849/>.

¹⁹⁸ *Id.*

¹⁹⁹ *NZ Super Fund excludes three Israeli firms on ethical grounds*, NZ HERALD (Dec. 12, 2012, 5:08pm), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10853624.

²⁰⁰ BARGHOUTI, *supra* note 12, at 27–28.

²⁰¹ *Id.* at 28.

²⁰² See generally Dubowitz, *supra* note 131.

²⁰³ See, e.g., *Fighting BDS In the Courts*, SHURAT HADIN (Jan 4, 2017), <http://israellawcenter.org/war-zones/fighting-bds/>. C/ ataloking. The firm’s numerous efforts to combat BDS, for instance: Shurat HaDin has issued a submission to the IRS challenging the tax-exempt status of the Presbyterian Church (US) for engaging in conduct that includes meeting with and endorsing Hezbollah, a U.S.-designated terrorist entity responsible for the murder of Americans in addition to engaging in anti-Semitic acts and statements as well as agreeing to certain divestment measures against American companies operating in Israel. See *Memorandum from Shurat HaDin to the Internal Revenue Service under the Tax Whistleblower Law (26 U.S.C. §7623(b))*, Presbyterian Church (USA) Violates Its Tax-Exempt Status and Revocation of its §501(c)(3) Tax-Exempt Status is required (2014), available at <https://www.scribd.com/document/266497544/IRS-Complaint-v-Presbyterian-Church>. See also BABBIN *supra* note 79, at 55–61 (listing NGOs most actively supporting the BDS movement such as (A) the Coalition of Women for Peace, which is funded by the European Union and stating

offers a useful list of participants in the anti-Israel economic campaign.

The catalog includes for-profit entities, labor unions, and investment funds (some affiliated with religious institutions).²⁰⁴ Examples include European, American, and Latin American entities participation in divestment decisions based on SRI, blacklists aimed at Israeli military contractors, and other efforts to punish Israel.²⁰⁵ Dubowitz also places religious institutions in the crosshairs of his inspection of the economic and financial pressure on Israel, Israeli firms, and the multinational enterprises that do business with Israel.²⁰⁶ Governments have engaged in similar activity. They, either through their pension funds or their contracting arms, have responded to BDS by boycotting, divesting, or otherwise excluding Israeli firms, or firms that do business in Israel.²⁰⁷ BDS has enlisted voluntary cooperation of private firms, private investment entities, religiously affiliated

categorically that many European nations fund the BDS movement generously, (B) the Swedish NGO Diakonia, which has adopted “lawfare” and is funded largely by the Swedish government, and C) the Applied Research Institute of Jerusalem, which is another NGO that endorses the BDS movement, while being funded by Spain, the United Kingdom and DanChurchAID in Denmark).

²⁰⁴ See, e.g., Dubowitz, *supra* note 131, at 4.

²⁰⁵ Wide ranging examples include (1) the 2006 decision by a Dutch bank to divest its holdings in Jerusalem light rail, while citing the Israeli settlements as a precipitating factor; (2) the 2009 decision by Scandinavian financial institutions to blacklist or divest from Elbit, an Israeli military firm; (3) the 2009 move by TIAA-CREF, one of America’s largest pension funds, to divest from a firm based in Israel; (4) the 2010 decision by a Dutch pension fund to divest from all of the Israeli companies in its portfolio; (5) the 2011 decision by Deutsche Bahn, a German railways and logistics company, which pulled out of the AI train project designed to connect Jerusalem and Tel Aviv; (6) the 2014 decision by Denmark’s largest bank to blacklist Israel’s Hapoalim bank due to its participation in settlement construction; and (7) the 2015 decision by a Norwegian insurer, KLP, to divest from the German company HeidelbergCement and the Mexican company Comex for exploiting natural resources in “occupied territory” in the West Bank. See *id.* at 4–6.

²⁰⁶ See *id.* 7–8. In 2014, for instance, the United Methodist Church’s pension board agreed to divest from G4S because of its concerns that the firm was involved in “human rights violations in the Israeli prison system and the military occupation of Palestinian territories.” *Id.* at 8. In 2015, the United Church of Christ (UCC) voted to divest from companies that operate in the West Bank, a maneuver that instructs the UCC pension board and other church funds to unload their holdings in Caterpillar, Motorola Solutions, Hewlett-Packard, G4S and Veolia. *Id.* at 7–8. This vote was matched by the UCC’s request that its members boycott products made in West Bank settlements. *Id.* at 8. Additional momentum favoring BDS surfaced from the Presbyterian Church USA’s passage of a series of resolutions in support of the BDS movement. See *Presbyterian Church USA “Curses” Israel with Pro-BDS, Anti-Settlement Resolutions*, BREAKING ISRAEL NEWS (June 28, 2016, 8:30 AM), <http://www.breakingisraelnews.com/70691/presbyterian-church-usa-curses-israel-pro-bds-anti-settlement-resolutions/#tA31WlcWk2PzfH.97>.

²⁰⁷ See Dubowitz, *supra* note 131, at 8–9 (showing that a Dutch pension fund sold its \$2.7 million shares in Elbit Systems; discussing how this action was reinforced by the fund’s decision to exclude Aryt Industries Ltd. and Ashot Ashkelon from its portfolio, which was complemented by the 2009 decision of AP7, the Swedish National Pension Fund, to exclude a French transportation giant from its investment portfolio because of its involvement in “Israel’s occupation of Palestinian land” and a 2015 Brazilian government decision to debar an Israeli security company from participating in a \$2.2 billion contract for the 2016 Olympics).

institutional investors, and governments, particularly European governments, have advanced this process as well.

These developments are consistent with the objectives associated with ESG, which focuses on environmental, social, and governance issues.²⁰⁸ BDS proponents apply various forms of pressure to companies, investment funds, and other entities in order to prompt them to terminate ties with Israel.²⁰⁹ Targeting major Israeli financial institutions and companies providing goods and services to the West Bank and east Jerusalem through local branches or distributors,²¹⁰ the campaign possesses the capability of multiplying as Israel's opponents ratchet up their economic and financial warfare campaign. The campaign includes an attempt to persuade EU banking regulators to expel Israeli financial institutions from SWIFT's financial messaging system, a move that would deal a crippling blow to Israel's economic survival.²¹¹

BDS activity by European and American entities represents only a partial list of the kinds of conduct which advance the BDS campaign. The next two subsections flesh out the protest divestment and boycott components, which, of course, overlap. These subsections also explore the possibility that the market itself, fiduciary duties applicable to investment managers and corporate directors, and legal rules constrain the effectiveness of BDS.

D. Boycotts

Commercial boycotts, particularly within the bounds of American law have a storied history²¹² and face the prospect of legal limits. Boycott activity, whether labeled a group boycott or a refusal to deal, prompts an inspection of concerted activity that targets specific firms, suppliers, or customers.²¹³ The term, "concerted" "denotes an agreement

²⁰⁸ See, e.g., RORY SULLIVAN, ET AL., FIDUCIARY DUTY IN THE 21ST CENTURY 9 (2015) (issued by the PRI, United Nations Global Compact and the UNEP Finance Initiative) (defining ESG as a focus on environmental, social and governance issues) http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf.

²⁰⁹ See BARGHOUTI, *supra* note 12, at 34 (quoting Edward Said).

²¹⁰ See Dubowitz, *supra* note 131, at 9.

²¹¹ See *Id.* at 10-11. Dubowitz describes several successful exclusionary campaigns including the U.S. attempt to bring pressure on Iran, the response of China to the Sino-Japanese dispute over fishing waters which led to ban on exports of rare earth minerals critical to several Japan's industries, and Russia's use of its energy exports to intimidate the Ukraine and threaten Eastern and Central European countries.

²¹² See Greendorfer, *The BDS Movement*, *supra* note 57, at 2.

²¹³ See Harrison, *supra* note 23, at 1.

between or among competitors.”²¹⁴ Agreements among competitors within the domain of U.S. law are often reviewed under Section 1 of the Sherman Act.²¹⁵ From a purely economic perspective, the so-called classic boycott originates in the desire to harm a direct competitor by denying access to suppliers or customers.²¹⁶ Concerted action either increases or decreases consumer welfare.²¹⁷ Boycotts are often intended to eliminate actual or potential competitors or suppliers.²¹⁸ Boycotts are led by a variety of initiators including governments, NGOs, or members of the public.

A challenge by activists to a specific firm’s behavior involves several elements: identification of the issue, choice of the activist’s objective, the activist’s choice of public or private politics, selection of a strategy (e.g., boycott, litigation, lobbying, etc.), selection of a target firm, communication to the public, and bargaining and resolution.²¹⁹ Activists inflamed by abusive working conditions in other countries, for example, could choose to lead a boycott coupled with a public rebuke of a targeted firm and its products.²²⁰ Some boycotts simply result from individual actions taken by citizens in their role as consumers.²²¹ Other boycotts, led by activists, apply pressure on state actors or others, as a vehicle to pressure private actors who are engaged in doubtful behavior or policies.

The United States has long condemned secondary boycott programs such as the Arab League’s secondary boycott of Israel.²²² The history of boycotts in the U.S. has triggered serious questions relating to

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 2.

²¹⁷ *Id.* at 3. (increases in consumer welfare from boycotts result from three possible effects: (1) increases in efficiency, (2) the introduction of a new product, or (3) a decrease in consumer transaction or search costs *whereas* a decrease in consumer welfare results (a) from higher prices, (b) lower output, or (c) fewer choices).

²¹⁸ *Id.* at 27.

²¹⁹ See Baron, *supra* note 23, at 5.

²²⁰ *Id.* at 5–6.

²²¹ *Id.* at 6.

²²² Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT’L. 905, 907 (2009). Meyer notes that many commentators assume that secondary sanctions are illegal extraterritorially and therefore exceed the proper bounds of U.S. jurisdictional authority under customary international law. See *Id.* Still, Meyer advances two points: (a) that secondary sanctions cannot be categorically dismissed as improperly extraterritorial, and (b) since secondary sanctions are not categorically invalidated merely because their purpose is to change extraterritorial conduct, then it may be the case that at least some forms of secondary sanctions measures can be justified, if consistent with, traditional principles of prescriptive jurisdiction. *Id.* at 907-908. Accordingly, Meyer asserts that “[w]hen secondary sanctions are territorially restricted to the regulation of U.S. nationals with respect to their non-governmental acts within the United States,” then these sanctions could be permitted as matter of customary jurisdictional law. *Id.* at 967.

whether, and under what circumstances, speech might lose First Amendment protection on grounds that has been transmuted into conduct²²³ or because harm flows from its content.²²⁴ Professor Volokh observed that three principal categories of arguments operate to transform speech conduct for purpose of legal analysis. For one, “some people think speech should be treated as conduct when it has the same effects as harmful conduct and it is covered by a generally applicable law that restricts.”²²⁵ Examples include publishing a news story that reveals the existence of a wiretap, which helps the target escape.²²⁶ Second, speech may be treated as conduct, where it publishes bomb-making information, because such information is integral to the commission of a crime.²²⁷ Based on this rule, U.S. courts have limited the reach of political boycotts. Third, the speech as conduct argument has been used with regard to certain offers or agreements that constitute certain situation-altering utterances.²²⁸

To be sure, boycotts can be viewed as a “. . . ringing affirmation of the constitutional right of all citizens to organize . . . to achieve political, economic and social change,”²²⁹ but this right, as with any other right, is not without limitation.²³⁰ In *NAACP v. Claiborne Hardware Co.*, the Supreme Court held that “[a] nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions.”²³¹ Hence, the Court “recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association.”²³² Although “the obvious inquiry is where the line between permissible restrictions and impermissible infringements on First Amendment rights resides,”²³³ the lawful ability of “business entities to ‘associate’ to suppress competition may be curtailed [under certain conditions]. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions [for

²²³ For a useful discussion of these issues, see Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1277–1348, (2005).

²²⁴ *Id.* at 1278.

²²⁵ *Id.* at 1279.

²²⁶ *Id.*

²²⁷ *Id.* at 1282.

²²⁸ *Id.* at 1283–84.

²²⁹ Greendorfer, *supra* note 57, at 2.

²³⁰ *Id.*

²³¹ *Claiborne*, 458 U.S. at 912. The Court found the primary boycotts in *Claiborne* to be protected but in validating such boycotts, the court reiterated that the situation would have been dramatically different if the government had interposed a compelling rationale for limiting the right to boycott, such as the right of “consumers to remain free from coerced participation in industrial strife.” Greendorfer, *The BDS Movement*, *supra* note 57, at 3.

²³² *Claiborne*, 458 U.S. at 912.

²³³ Greendorfer, *The BDS Movement*, *supra* note 57, at 3.

example] may be prohibited”²³⁴ Similar sentiments have animated European courts despite the existence of countervailing freedom of expression contentions.²³⁵ Responding to threatened boycott pressures, Israeli Public Security Minister Gilad Erdan argues that BDS advocates inside Israel must pay a price.²³⁶ Currently, he is working to draft “legislation that would do just that.”²³⁷

Boycott campaigns including BDS raise ancillary issues beyond their legality. As a political and self-declared human rights campaign, BDS appears, at first blush, not to be a form of odious discrimination. However, “the line between political movements and psychological prejudice may be more permeable . . .” and possibly anti-Semitic.²³⁸ If boycotts and related weaponry fall prey to this intolerant tendency, there is a need to examine such campaigns and ask whether BDS’s “proponents are consciously motivated by anti-Jewish bigotry, driven by unconscious anti-Semitism, immersed in a climate of opinion that is increasingly hostile to Jewish people, or engaged in irrational ethnic trait discrimination.”²³⁹ An affirmative answer to any of these questions may necessitate the issuance of additional rules limiting boycotts.

E. Protest Divestment

Beyond boycotts, the divestment arena commands attention. While it may be doubtful that boycotts and divestment efforts can be truly separated from one another, it is likely that developments within the divestment domain provide scope for BDS campaigners to strategize and improve the force of their efforts. This remains true despite the possibility that campaigns, which involve either SRI or CSR face limits arising out fiduciary duties that apply to investment manager or corporate directors.²⁴⁰ SRI is part of a strategy that pursues an

²³⁴ *Claiborne*, 458 U.S. at 912.

²³⁵ See, e.g., Herb Keinon, *European Court: Israel Boycotts are Unlawful Discrimination*, JERUSALEM POST (Jul. 20, 2009), <http://www.jpost.com/International/European-court-Israel-boycotts-are-unlawful-discrimination> (deciding that a town’s decision to boycott Israel was illegal under French law).

²³⁶ Michael Schaeffer Omer-Man, *Senior Israeli minister: Make BDS activists in Israel ‘pay a price,’* 972 MAG. (June 16, 2016), <http://972mag.com/senior-israeli-minister-says-working-to-make-bds-activists-in-israel-pay-a-price/120084/>.

²³⁷ *Id.* (stating that the Israeli government is currently advancing legislation that targets the funding of human rights organizations and other groups associated with the anti-occupation left in Israel).

²³⁸ MARCUS, *supra* note 58, at 243.

²³⁹ *Id.* at 244.

²⁴⁰ For example, the Model Business Corporation Act sets forth the fiduciary duty as twofold: (1) the obligation of acting in good faith and (2) acting in a way in which he/she reasonably believes is in the best interest of the corporation. MODEL BUS. CORP. ACT §8.30 (AM. BAR.

investment portfolio largely or exclusively comprised of corporations that practice CSR, although any two firms may have very different definitions of the values that define social responsibility and, in turn, ethical investing. Socially responsible investing has grown to where one out of every eight dollars placed in the hands of professional money managers in the United States, is devoted to such investments.²⁴¹ There are currently some 50,000 multinational enterprises along with 450,000 affiliates, which employ more than 200 million people around the world.²⁴² If all firms adapted their behavior to the requirements of CSR, then it is possible that corporate social responsible investing could have an impressive impact on the world. CSR conversations arise both with respect to the internal conduct of such firms, as well as with regard to the foreign direct investment (FDI) component of firms, which may or may not be committed to CSR.²⁴³ Proponents of ethical investing believe many firms do not fully internalize their social costs, thereby creating negative externalities for society.²⁴⁴ Accordingly, such firms ought to be non-preferred by investors (as well as consumers), whereas firms that fully internalize their social costs are preferred investment vehicles.²⁴⁵ Complicating things still further is the emergence of government driven portfolio investment activity, a development that has given rise to the question of how governments themselves may pursue CSR and SRI and thus advance international law principles via shareholder activism.²⁴⁶

Social activism in the form of socially responsible investing has a long history among individuals and private institutional investors.²⁴⁷ The potential scope of protest divestment campaigns, such as BDS, surfaces from a recent report, based on an analysis of investment practices and fiduciary duty²⁴⁸ in eight countries including Australia,

ASS'N 2010).

²⁴¹ W. S. Laufer, *Social Screening of Investments: An Introduction*, 43 (3) J. OF BUS. ETHICS, 163 163–65 (2003).

²⁴² Salar Ghahramani, *Sovereigns, Socially Responsible Investing, and the Enforcement of International Law Through Portfolio Investment and Shareholder Activism: The Three Models*, 35 UNI. PA. J. OF INT'L L. 1073 (2014).

²⁴³ *Id.*

²⁴⁴ Alex Bryan, *The Benefits and Costs of Socially Responsible Investing*, MORNINGSTAR, (Jan. 7, 2015), <http://news.morningstar.com/articlenet/article.aspx?id=679225>.

²⁴⁵ *Id.* (Showing how consumers and investors respond positively to firms that avoid negative social and environmental issues, and as a consequence, these socially-responsible moves may be consistent with long-term profit maximization.)

²⁴⁶ See Ghahramani, *supra* note 242, at 1074 (explaining that sovereign-driven portfolio investment can be distinguished from FDI because the former involves the purchase of highly liquid assets whereas the latter often involves the investor's purchase of physical infrastructure that cannot be easily sold). *Id.* at 1074.

²⁴⁷ *Id.* at 1075.

²⁴⁸ See, e.g., SULLIVAN, FIDUCIARY DUTY IN THE 21ST CENTURY, *supra* note 208, at 11.

Brazil, Canada, Germany, Japan, South Africa, the United Kingdom, and the United States. Many countries have introduced regulations and codes requiring institutional investors to take account of ESG issues in their decision-making. Investment codes are tied to the contention that a failure to include social or other issues in an investment funds' analysis, amounts to a failure of fiduciary duty.²⁴⁹ Using fiduciary duties *offensively to require* investment firms to consider non-financial criteria provides scope for divestiture efforts (whether related to BDS or not) to flourish. Although the report, at issue, begs several questions including the authors' presuppositions,²⁵⁰ its starting point²⁵¹ and the question of what constitutes responsible investing, it verifies the claim that skillful interlocutors may be able to find a way within the responsible investing domain for empathy with BDS as a basis for imposing SRI on investment funds. A corresponding response by firms could lead to the embrace of CSR by corporate firms.

Nonetheless, American corporate law, as a rule, constrains such moves. U.S. law "does not mandate corporate social responsibility. Instead, the question becomes whether the law even permits CSR. Phrased differently, to what extent do the fiduciary duties of corporate directors permit them to consider non-shareholder interests when making corporate decisions?"²⁵²

Professor Bainbridge questions whether U.S. law permits directors to consider the goals of nonshareholders. If his suspicions are correct, the scope for institutional fund managers to emphasize SRI and thereby advance the divestiture goals of social activists²⁵³ is sharply restricted. This is so because it may not be within the lawful power of a corporation's board of directors to respond affirmatively to social activism because it lacks the authority to shape the affairs of the firm for

(defining the following duties as (1) loyalty: fiduciaries should act in good faith in the interests of their beneficiaries and should impartially balance the conflicting interests of different beneficiaries while avoiding conflicts of interests and refraining from acting for the benefit of themselves or a third party; (2) prudence: fiduciaries should act with due care, skill and diligence and invest as an ordinary prudent person would do).

²⁴⁹ See, e.g., *id.* at 9.

²⁵⁰ See, e.g., *id.* at 11. (concentrating on a series of questions, including whether investors should consider ESG; should investors encourage higher standards of ESG in the companies in which they invest; do investors have responsibility to support the integrity and stability of the financial system; and should investors respond to wider systemic risks—and opportunities—such as those presented by climate change).

²⁵¹ See, e.g., *id.* (asserting that the report's research began with the question of whether there is a need to reframe or redefine fiduciary duty in a way that is relevant for twenty-first century investors).

²⁵² STEPHEN M. BAINBRIDGE, CORPORATE LAW 220 (Foundation Press, 2d ed. 2009) [hereinafter BAINBRIDGE, CORPORATE LAW].

²⁵³ See also *id.* (showing that the law's basic position on corporate social responsibility was articulated in *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919)).

the *primary* purpose of benefitting others.²⁵⁴

On the other hand, more than thirty states have addressed the corporate social responsibility debate by adopting so-called nonshareholder constituency statutes (NCS); doubtlessly skillful pro-BDS lawyers are available to assert that the plight of the Palestinians demands the institution of CSR and SRI. Typically, NCS amend the existing statutory statement of directors' duty of care. Nonshareholder statutes authorize the board of directors, in discharging its duty of care, to consider the impact its decision will have on nonshareholder constituencies.²⁵⁵ Despite such statutory innovation, BDS may have limited scope for its divestiture campaigns because fiduciary duties constrain *both* corporate directors and investment fund managers. Regarding investment funds, this claim is particularly true for managers who do not operate the so-called socially responsible funds.

BDS and other social activist programs seek to influence this debate while disputing Professor Adolf Berle's iconic claim that a corporation should operate for the sole benefit of shareholders, a contention that is reinforced by the parallel judgment that firms ought to maximize shareholder wealth.²⁵⁶ BDS's divestiture goals find indirect support in Professor Ian Lee's analysis that corporate law should not preclude so-called ethical behavior by management even if it diminishes the goal of maximizing profits.²⁵⁷ Surfacing from a protest divestment movement, which operates in tension with fiduciary duties applicable to most corporations and many investment funds,²⁵⁸ BDS proponents have enlisted trade unions, faith-based organizations, local councils, private investment funds, and national pension funds in a SRI calculus, which supplies negative screening²⁵⁹ to firms that lend aid and support to Israel. If this effort succeeds, it will shrink Israel's capital pool.

SRI, as a goal, is premised on ethical considerations that attempt to reframe corporations as public actors with public goals like those that

²⁵⁴ *Id.* (quoting *Dodge* and noting that despite the court's rhetoric, *Dodge* does not stand for the proposition that directors will be held liable for considering the social consequences of corporate actions; discussing how the court found that Ford Motor had failed to pursue shareholder wealth maximization and thus ordered the firm to resume paying its substantial special dividends). *Id.*

²⁵⁵ *Id.* at 223.

²⁵⁶ Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 972 (1992) (focusing on how courts should treat nonshareholder constituency statutes) [hereinafter Bainbridge, *Interpreting Nonshareholder Constituency Statutes*].

²⁵⁷ Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J. L. BUS. & FIN. 31, 61 (2005).

²⁵⁸ William Sanders, *Resolving the Conflict Between Fiduciary Duties and Socially Responsible Investing*, 35 PACE L. REV. 535, 537 (2014); see also *id.* n.9 and accompanying text.

²⁵⁹ See JOAKIM SANDBERG, *THE ETHICS OF INVESTING: MAKING MONEY OR MAKING A DIFFERENCE?* 28–30 (Apr. 5, 2008) (published doctoral thesis, University of Gothenburg).

attended the formation of firms such as the Crown's creation of the Hudson's Bay Company in 1670.²⁶⁰ Challenging the scholarly analysis advanced by data showing corporate firms are properly seen as the voluntary creation of private actors arising out of contractarian principles,²⁶¹ the SRI movement believes that corporations ought to be made into public actors subordinating private orderings to sundry conceptualizations of the public good. This approach provides a fulcrum on which CSR can expand its footprint, grounded in the contention that there is a fiduciary duty to consider human rights, a perspective that disputes the consensus view that a corporation's primary and possibly exclusive goal is to maximize shareholder wealth.²⁶² Despite the fact that (1) there is no single model of corporate governance²⁶³ and (2) for-profit corporations arise out of a default-rule paradigm that elevates the value of human voluntary choice²⁶⁴ rather than ethics, BDS campaigners strive to saddle Israeli government entities, companies, and financial institutions as well as other entities with condemnation. Whether extra-financial screening by investment fund managers contributes to beneficial financial performance is debatable.²⁶⁵ As more completely shown in what follows,²⁶⁶ the market often curbs the effectiveness of the protest divestment programs. On the other hand, BDS activists appear indifferent to the outcome of the financial performance debate. Rather, their attention is focused elsewhere.

²⁶⁰ See *Royal Charter of the Hudson's Bay Company*, HUDSON'S BAY CO. HIST. FOUND., <http://www.hbcheritage.ca/hbcheritage/collections/archival/charter/charter> (last visited Sept. 1, 2017).

²⁶¹ See, e.g., Vincent S. J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 504 (2016) (noting that the United States Supreme Court's corporate-rights jurisprudence, taken together "can be understood to reflect to a surprising degree the contractarian premises of transaction-and agency-cost economics").

²⁶² See, e.g., Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 75–76 (2005) (claiming that as a matter of doctrine the business judgment rule gives boards wide discretion to made decisions that advance other stakeholder interests even at the expense of shareholders).

²⁶³ Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRAs Persons*, 127 HARV. L. REV. F. 273, 287 (2014).

²⁶⁴ Harry G. Hutchison, *Religious Liberty for Employers as Corporations, Natural Persons or Mythical Beings? A Reply to Gans*, 120 PENN. ST. L. REV. 537, 559 (2015) [hereinafter Hutchison, *Religious Liberty for Employers*].

²⁶⁵ For two views on whether financial performance designed to comply with SRI enhances or subtracts from fund financial performance, compare Ronald Paul Hill, Thomas Ainscough, Todd Shank & Daryl Manullang, *Corporate Social Responsibility and Socially Responsible Investing: A Global Perspective*, 70 J. BUS. ETHICS 165, 165–74 (2007) (answering this question in the affirmative), with Gunther Capelle-Blancard & Stéphanie Monjon, *The Performance of Socially Responsible Funds: Does the Screening Process Matter* (Fin. & Corp. Governance Conference, Working Paper No. 2011-12, 2011) (answering this question by suggesting the results are either insignificant or negative).

²⁶⁶ See *infra* Part V. B. (discussing Posner and Langbein's analysis).

If marketplace actors are seen as complicit in the maintenance of “Israel’s occupation, denial of Palestinian refugee rights, or apartheid system of racial discrimination against the indigenous Palestinian citizens of Israel,”²⁶⁷ divestiture efforts propelled by such grievances may constitute reparative therapy from the perspective of BDS proponents. BDS dictates that Israeli or international firms purportedly implicated in “Israel’s violations of international law and human rights”²⁶⁸ be the subject of countervailing action. This approach heralds an effort to take Israel off the “lofty pedestal on which it has been placed by . . . Western powers”²⁶⁹ and includes wide-ranging action by BDS activists to expel Israel and its “complicit institutions from international and interstate academic, cultural, sporting . . . environmental, financial, trade and other forums . . .”²⁷⁰ It calls for the suspension of all free trade and other preferential trade agreements with Israel.²⁷¹ BDS also supports the placement of sanctions on Israel. Still, the activists may be more concerned with degrading the political and cultural reputation of Israel than they are with the immediate effect of their policy choices on the immediate economic health of Israel.

F. Constraining Barghouti’s tools

The foregoing background indicates that BDS’s economic campaign to impose an economic price on Israel is subject to limits.²⁷²

²⁶⁷ BARGHOUTI, *supra* note 12, at 228–29.

²⁶⁸ *Id.* at 229.

²⁶⁹ *Id.* at 230–31.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 30.

²⁷² Limitations on boycotts arise from several sources that include statutory and constitutional boundaries. *See, e.g.,* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (suggesting that constitutional freedom for speech and press does not extend its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute). Examples of statutory rules include the anti-boycott provisions contained in the Export Administration Act of 1979. 50 U.S.C.A. §4601 et seq. (West, Westlaw through Pub. L. No. 115-43). This law’s primary statutory focus is the Arab League’s boycott of Israel. *See id.* By its terms, the Act precludes participation in an unsanctioned foreign boycott defined as one that is “fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.” 50 U.S.C.A. §4607. A boycott against the state of Israel or an Israeli company or concern would arguably only be prohibited under the EAA if the boycott were specifically intended to support or comply with boycotts initiated by foreign countries. The phrase “foreign country” refers to the official government of the country and does not necessarily encompass NGOs. In addition to the anti-boycott limitation in the EAA, Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally assisted programs and activities based on race, color, or nation origin. Civil Rights Act of 1964, 42 U.S.C.A. §2000d (West, Westlaw through Pub. L. No. 115-52). Under the *Marcus Policy* initiated in 2004, Jewish people are now expressly recognized

Limits include those that: (1) are connected to the conclusion that speech can be tied to conduct,²⁷³ (2) arise because BDS related conduct collides with judicial or statutory rules, or alternatively, (3) surface out of fiduciary duties, which apply to either the corporate arena or the domain of investment funds.

As the next section shows, the market itself may constrain the effectiveness of BDS because it has the capacity to weaken the effectiveness of both sanctions regimes,²⁷⁴ which often require state action, as well voluntary or mandatory divestment campaigns. Taken as whole, the economic elements of BDS confront non-trivial limits, including emerging anti-BDS legislation that constrains the effectiveness of its program.²⁷⁵ Whatever the limits may be, BDS, in proper context, reveals itself as merely one part of the ongoing political impasse that has given birth to lawfare and other weapons designed to hurt Israel. Lawfare is basically an attempt to engage in non-lethal warfare against one's avowed military enemy through litigation and other battles in the legal and policy sphere. Whether legal restrictions, fiduciary duties, or the market can serve to effectively check BDS or not, prior evidence drawn from boycott/sanctions/divestment efforts gives rise to inconclusive, if not trifling empirical results.²⁷⁶ It is possible that such results apply to the entire BDS arena as well.

V. THE POTENTIAL AND ACTUAL EFFECTIVENESS OF BDS?

To be clear, the effectiveness of BDS is impaired by the existence of constraints that involve the application of anti-boycott

as protected under Title VI. See U.S. Dep't of Educ., Opinion Letter on Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>. In addition, although Title VI does not use the word "religion," Jewish students are protected from discrimination based on their perceived ethnic, racial or ancestral background. *Id.* In response to a Resolution endorsing the Boycott of Israeli Academic Institutions adopted by the Doctoral Students Council at CUNY in 2015, the American Center for Law and Justice drafted a letter to the University reminding the President and the Trustee that the school has an obligation to act to return the CUNY campuses to a safe, non-harassing, non-discriminatory environment for students and employees alike. Letter from Jay Alan Sekulow, Chief Counsel, Am. Ctr. for Law & Justice, to James B. Milliken, Chancellor, The City Univ. of N.Y. (May 4, 2016) (on file with author).

²⁷³ See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F. 3d 233, 244 (4th Cir. 1997) (treating "speech brigaded with action" as equivalent to "speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct").

²⁷⁴ See *infra* Part V-A (discussing the RAND study).

²⁷⁵ See *infra* Part V for a fuller discussion of the hurdles BDS's economic program faces.

²⁷⁶ Baron, *supra* note 23, at 3 and accompanying note (finding that several event studies have found that announcement of a boycott among the public prompted a negative market reaction but also noting that one study of the effect of the boycott of South Africa on both U.S. firms and on shares traded on the Johannesburg Stock Exchange found no significant effect).

provisions of United States laws. These constraints include the anti-boycott provision of the EAA,²⁷⁷ the enactment of the pro-Israel, anti-BDS provisions of the Trade Facilitation and Trade Enforcement Act of 2015,²⁷⁸ the utilization of international law and policy designed to prevent foreign interference with domestic commercial affairs,²⁷⁹ as well as enforceable fiduciary duties within the corporate governance realm²⁸⁰ which diminishes the divestiture program's ability to impose measurable effects. Although the question of whether U.S. law applies to the BDS movement is debatable,²⁸¹ estimates of the effectiveness of

²⁷⁷ Among the U.S. laws that constrain boycotts include an amendment to the 1976 Tax Reform Act known as the Ribicoff Amendment and the EAA Anti-Boycott law. Greendorfer, *The BDS Movement*, *supra* note 57, at 38–43. The EAA Anti-Boycott Law as enacted directs the President to issue any regulation that would effectuate its provisions, which include the prohibition of any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking action with the intent to comply with or further any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation, and refusing or requiring any other person to refuse to do business with, or, in the boycotted country, refusing or requiring any other person to refuse to employ or otherwise discriminating against any U.S. person. *See id* at 43–44. “The EAA Anti-Boycott Law has survived a number of legal challenges including claims that its application violates First and Fifth Amendment rights.” *Id.* at 45.

²⁷⁸ *See generally* The Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. §4301 et seq. (West, Westlaw through Pub. L. 115-43). *See also* 19 U.S.C.A. §4452 (finding that Israel is America's most dependable, democratic ally in the Middle East; observing that the United States-Israel Free Trade Agreement formed the modern foundation of the bilateral commercial relationship between the two countries; further observing that this act has been instrumental in expanding commerce and the strategic relationship between the United States and Israel; further observing that more than \$45 billion in goods and services is traded annually between the two countries; further observing that the United States continues to look for and find new opportunities to enhance cooperation with Israel, including through the enactment of the U.S.-Israel Enhanced Security Cooperation Act of 2012; further observing that it has been the policy of the United States to combat all elements of the Arab League Boycott of Israel as well as opposing politically motivated actions that penalize or otherwise limit commercial relations with Israel such as boycotts of, divestment from, or sanctions against Israel; and further defining the boycott of, divestment from and sanctions against Israel to include actions by states, nonmember states of the United Nations, international organizations, or affiliated agencies of international organization that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in any territory controlled by Israel).

²⁷⁹ Greendorfer, *The BDS Movement*, *supra* note 57, at 40–41. Among other things, Article 2, Paragraph 7 of the United Nations Charter informs this debate by stating that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” U.N. Charter art. 2, ¶ 7. This provision has been interpreted to preclude any state from interfering in the domestic affairs of another state by use of economic coercion. *See* Greendorfer, *supra* note 57, at 40–41 n.145 and accompanying text.

²⁸⁰ *See, e.g.*, MODEL BUS. CORP. ACT §8.30 (AM. BAR ASS'N 2002) (stating that corporate directors must act in good faith and in the best of interest of the corporation).

²⁸¹ *See, e.g.*, Greendorfer, *The BDS Movement*, *supra* note 57, at 99 (answering this question in the affirmative and concluding that, because of the BDS movement's historical basis in the Arab League Boycott and its current ideological alignment with radical Islamists, it threatens U.S.

boycott, divestment and sanctions activities must brave a range of empirical data showing, at best, a mixed picture that leads to doubt regarding the economic consequences of BDS.

A. Tentative Data

A preliminary effort to catalog the scope and the economic and financial costs of BDS is found within a recent RAND Corporation study. The study shows that the multi-dimensional conflict between Israelis and Palestinians affects all aspects of the lives of both groups, including economics and security.²⁸² RAND's investigators indicate that the cost of conflict surfaces from missed opportunities for greater economic productivity (opportunity costs) as well as from unproductive expenditures.²⁸³ Parenthetically, the ability of analysts to estimate the long-term effects of the BDS campaign, should vary with the size and scope of the movement itself. Responding to this hypothesis and striving to ensure the movement's metastasis, BDS proponents have attempted to overwhelm more and more nation-states, college campuses, and private firms with the logic and breadth of their objectives. Quantifying the effectiveness of boycotts, divestments and blacklists on the Israeli economy requires analysts to separate out distinctly endogenous (internal) factors that affect the nation's economy or financial markets from the discernible effects caused by exogenous factors associated with boycotts or other components of BDS.²⁸⁴ Whether voluntary, mandatory or some combination of each, boycotts, divestments and sanctions could conceivably inflict negative effects on the Israeli economy in tandem with the imposition of negative consequences on Palestinian prospects in both the short-run and long-term.

Although evidence derived from the RAND study indicates the measurable effect of sanctions, the effect of other measures imposed on Israel is an open question. Conclusions are implied by the following account that concentrates on the economic effects of sanctions within the global arena *rather* than the adverse effects tied to sanctions specifically aimed at Israel. Within the trade arena, there is some evidence that only *extensive* sanctions regimes are likely to have a

vital interests).

²⁸² C. ANTHONY ROSS ET AL., *supra* note 168, at 57.

²⁸³ *Id.*

²⁸⁴ See, e.g., Siew Hong Teoh et al., *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. OF BUS. 35, 37-40 (1999), https://www.middlebury.edu/media/view/443860/original/effects_of_socially_activist_investment_policies.pdf. e.g.,

negative impact in terms of trade.²⁸⁵ That is, thus far, no significant evidence has emerged showing sanctions regimes have had a meaningful impact on a country's net foreign direct investment (FDI) though there is some evidence that U.S.-supported sanctions reduced FDI from the United States.²⁸⁶

Still, the market works. Thus, the diminution of FDI inflows because of compliance by one country with sanctions may be replaced by FDI inflows from other countries.²⁸⁷ Beyond doubts about the effectiveness of sanctions regimes, particularly when led by NGOs, there is evidence that some sanctions could have meaningful economic impacts. For example, the record shows that financial sanction measures—typically including delaying or denying credits or grants—reduce the sanctioned country's gross national product by 1.7 percent, on average.²⁸⁸

Some understanding of the effectiveness of BDS is achieved by noting that Israel's chamber of commerce estimates that the ongoing Arab Boycott first enacted in 1945 may have cost the Israeli economy \$45 billion.²⁸⁹ Such inferences are consistent with evidence showing the Arab embargo, after the 1973 Yom Kippur War, imposed substantial adverse effects on the United States, Europe, and Japan.²⁹⁰ Israel's finance minister has indicated that the BDS movement may negatively affect the Israeli economy by more than one percent of the nation's GDP on an annualized basis.²⁹¹ There is also support for the proposition that this estimate undervalues the potential impact of the movement.²⁹² To be fair, BDS is merely one prong of a larger multi-pronged strategy that has been frequently advanced by Palestinian leaders and sympathizers and which may be difficult to separate from other Palestinian resistance efforts. Consistent with this proposition, the authors of the RAND study concede that Palestinian actions to place international pressure on Israelis, including efforts taking place at the UN and in the International Criminal Court coupled with boycotts of Israeli products as part of a resistance campaign, could cause Israeli GDP to fall by \$15 billion, a reduction of 3.4 percent per capita.²⁹³

Explaining the possible decline in Israel's economy, the study

285 C. ANTHONY ROSS ET AL., *supra* note 168, at 27.

286 *Id.*

287 *Id.*

288 *Id.*

289 Dubowitz, *supra* note 131, at 1.

290 *Id.* at 1-2 (showing that the Arab embargo caused a 4.7 percent decline in America's GDP and a 7 percent and 2.5 percent decline in Japan's and Europe's GDPs, respectively).

291 C. ANTHONY ROSS ET AL., *supra* note 168, at 28.

292 *Id.*

293 *Id.* at 165.

indicates that a reduction in “GDP results primarily from reduced international investment and tourism because of perceived instability in the region and the effects of an [increasingly active] BDS movement in Europe.”²⁹⁴

BDS has been most effective in adversely affecting Israel’s economic relationship with Europe, a development that tracks with the European Union’s cultural embrace of both postmodern presumptions and BDS. One estimation forecasts that a possible 20-percent drop in European imports of Israeli goods and a halt in European foreign direct investment in Israel would lead to a \$3.2 billion drop in Israeli GDP.²⁹⁵ Assuming the accuracy of these forecasts, BDS as one component of a larger Palestinian policy strategy may, in due course, weaken Israel economically, socially, and militarily.

B. Evidence from the South African Boycott Program

Tracing the effects of BDS may be an exercise in herding shadows for a variety of reasons including the fact that the campaign, as envisioned by its proponents, has not been fully implemented. Still, a balanced perspective on the prospective effectiveness of BDS within the realm of business, finance and trade is achieved by assessing the most comprehensively studied boycott, the South African boycott/divestment/sanctions program. Comprehending the capacity of BDS to harm Israel is enhanced by sifting through the empirical and non-empirical evidence from investigations of prior boycott and divestment activity connected to the South African campaign.²⁹⁶ Beyond its measurable economic effects, data drawn from the South African effort indicate that BDS may give rise to incalculable non-financial implications such as reputational costs designed to delegitimize and undermine support for Israel within the international community. The South African campaign, which drew support from the United States and Western Europe, became part of a global SRI program, a movement that first began by embracing a wide agenda including concern for human rights, the Vietnam War, and then, subsequently, South Africa’s apartheid regime.²⁹⁷

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 70–1.

²⁹⁶ See, e.g., Teoh, *supra* note 284, at 35–78 (confirming that the potential lost economic opportunities through the boycott were too small to be statistically or economically significant; and determining that the South African boycott (divestment) had little effect on stock values).

²⁹⁷ See Benjamin J. Richardson, *Climate Finance and Its Governance: Moving to a Low Carbon Economy Through Socially Responsible Financing*, 58 INT’L & COMP. L. Q. 597, 601 n.19 (2009) [hereinafter Richardson, *Climate Finance and its Governance*] and accompanying

Empirical appraisals of previous sanctions programs, including those targeting pre-Mandela South Africa, lend substance to doubtful views regarding the efficacy of sanctions, divestment, and boycott regimes, despite Greendorfer's observation that the adverse effects of the Arab League Boycott were enormous and disruptive to trade involving American companies.²⁹⁸ The South African story is critically important because the end of the sanctions regime coincided with a change in policy. Whether the boycotts, sanctions, and divestiture moves *caused* a change in policy is quite another question. F. W. de Klerk, the former State President of South Africa, writing in his autobiography, states "Obviously, sanctions . . . did serious damage to the country."²⁹⁹ This appraisal is less nuanced than the more restrained views offered by empiricists looking at quantifiable facts.

Observers concentrating on the effects of the South African boycott/sanctions movement with its SRI and divestiture component find that the weight of empirical authority favors an inference that the South African boycott campaign had a negligible financial/economic effect on targeted companies' cost of capital in doing business in South Africa.³⁰⁰ If this view is correct, it means the market diminishes the impact of the divestiture component of any sanctions regime. Although the anti-apartheid movement may have had collateral consequences beyond economics and finance in the domain of politics,³⁰¹ the economic impact of sanctions, divestiture, and boycotts seems insubstantial. For instance, the widespread divestment from the South African tobacco industry appears to have had minimal impact on their stock prices.³⁰² Tobacco industry evidence tracks with other research from a number of jurisdictions, suggesting a short-term impact on the stock prices of targeted companies tainted by either environmental

text (citing Russel Sparkes, *A Historical Perspective on the Growth of Socially Responsible Investment*, RESPONSIBLE INVESTING 39 (Rory Sullivan & Craig Mackenzie eds., 2006).

²⁹⁸ Greendorfer, *The BDS Movement*, *supra* note 57, at 45.

²⁹⁹ Laverty, *supra* note 143, at 5 (stating that de Klerk's appraisal corroborates the findings made by the IMF).

³⁰⁰ Richardson, *Climate Finance and Its Governance*, *supra* note 297, at 611 n.83 and accompanying text (citing Teoh et al., *supra* note 284, at 35; see also Benjamin J. Richardson, *Reforming Climate Finance Through Investment Codes of Conduct*, 27 WIS. INT'L L. J. 483, 494 (2009) [hereinafter Richardson, *Reforming Climate Change Finance*]. But see Gregory Gethard, *Protest Divestment and the End of Apartheid*, INVESTOPEDIA, <http://www.investopedia.com/articles/economics/08/protest-divestment-south-africa.asp> (last visited Sept. 1, 2017) (asserting that his exploration of protest divestment shows how the simple act of selling stock can bring about real social change).

³⁰¹ Laverty, *supra* note 143, at 5.

³⁰² See Richardson, *Climate Finance and Its Governance*, *supra* note 297, at 611 n.84 and accompanying text (citing T. Burroughs, *Ethical Investors Losing Out as Tobacco Stocks Burn Up Britain's Equity Markets*, THE BUSINESS (Feb. 24, 2007); see also Richardson, *Reforming Climate Change Finance*, *supra* note 300, at 494).

scandal or pollution fines.³⁰³ Reasons to doubt the effectiveness of SRI campaigns surface because such campaigns, prospectively understood, can never amount to more than a losing bet and, as a consequence, the only value of SRI efforts, is “consumptive,” that is the emotional satisfaction in having promoted a noble cause.³⁰⁴

Evidence that such satisfaction—which postmoderns crave—may be the only benefit emerging within the bounds of the campaign against South Africa;³⁰⁵ according to Professors Langbein and Posner, the South African boycott was a futile exercise because, in order to be effective, “[n]ot only would firms with offices in South Africa have to be excluded, but also AT&T because it has phone lines there, and banks that honor South African checks, and any other business providing goods or services to that country, even indirectly.”³⁰⁶ Such skepticism regarding the impact of SRI on South Africa is consistent with Professor Knoll’s inference that “it is impossible for nonfinancial screening to change corporate behavior *while remaining costless* to the investor. In an efficient market, meaning one where the prices of securities accurately reflect their value, screening will prevent diversification and thus increase the investor’s risk.”³⁰⁷ Likewise if the market is inefficient, then “screening increases the risk that the investor will exclude an undervalued security, thereby missing an opportunity for profit.”³⁰⁸

The research of scholars such as Langbein, Posner, and Knoll, shows the demand curve for individual stocks to be horizontal, implying that the screening out a stock on the basis of ethics is unlikely to affect its demand because other investors will simply flow into the market and purchase the shares that the SRI screening investor declined to buy.³⁰⁹ Consistent with this intuition, human history shows that screening by some investors provides opportunities for others. This deduction is substantiated by the Vice Fund, which intentionally invests in companies that SRI funds screen out.³¹⁰ It follows that the South African boycott and its protest divestment component likely had little or no economic impact on the campaign to repeal apartheid.³¹¹

³⁰³ See Richardson, *Climate Finance and Its Governance*, *supra* note 297, at 611 n.85 (and accompany text citing various authors).

³⁰⁴ Sanders, *Resolving the Conflict Between Fiduciary Duties and Socially Responsible Investing*, *supra* note 258, at 542.

³⁰⁵ *Id.* at 543.

³⁰⁶ *Id.* (citing Langbein & Posner).

³⁰⁷ *Id.* (emphasis added) (citing Knoll).

³⁰⁸ *Id.* (citing Knoll).

³⁰⁹ *Id.*

³¹⁰ See *id.* at 543 n.50 and accompanying text.

³¹¹ *Id.* at 543.

Nonetheless, it is possible to be somewhat more sanguine about SRI campaigns generally—even those which do not necessarily correlate with social change—because ethical screening may not necessarily harmful to the investment funds either.³¹²

Complicating the picture further is the possibility that sanctions campaigns backfire. Focusing on the political side of the anti-apartheid movement in South Africa, de Klerk believes that the National Party (the political party that was initially entrenched by apartheid) owed some of its electoral success to sanctions because, without sanctions, the National Party could not have appealed to the resentment and siege mentality that many white South Africans felt when confronted with Western sanctions.³¹³ Proving that politics cannot be divorced from economics, de Klerk states that while sanctions adversely affected South Africa's economic growth, political change would have come sooner than it actually did in the absence of sanctions.³¹⁴ If true, the boycott/divestment/sanctions campaign was counter-productive showing the possible weakness of the anti-apartheid effort. This evidence indicates that BDS sanctions, blacklisting, divestment, and boycott activity may strengthen the resolve of Israelis to resist rather than accommodate the demands of BDS proponents.

Nevertheless, since there is increasingly broad scholarly support for what has come to be known as ethical investment, it is useful to offer a focused analysis of the divestment component of boycott campaigns in order to appreciate the limitations this component faces. Although BDS proponents have often concentrated their anti-Israel crusade within the divestment arena and while such campaigns have often found fertile ground on university campuses as well as within governments and religious organizations, it is evident that such programs must surmount legal hurdles before imposing measurable costs on Israel. The next subsection explores such issues.

C. *Protest Divestment in the Mirror of Legal and Policy Hurdles*

Beyond the possibility that BDS bolsters resistance efforts within Israel, and beyond the likelihood that the market diminishes the effectiveness of protest divestment campaigns, professed ethical investment programs face additional hurdles before they can become effective. This is so despite the existence of situations where SRI may

³¹² *Id.* at 544.

³¹³ Laverty, *supra* note 143.

³¹⁴ *Id.* at 143.

be useful and perhaps even necessary.³¹⁵ Legal authority exists suggesting that, unless protest divestment measures, such as BDS, have been taken under the authority of certain legal doctrines, fiduciary duties absolutely preclude the practice of screening investments according to environmental, social, moral and ethical criteria.³¹⁶ This view resonates within the finance arena, even if some commentators believe that, within the corporate governance domain, corporate law should not preclude ethical behavior by management that diminishes the goal of maximizing profits.³¹⁷

Concentrating on CSR within the parameters of corporate governance law, it is notable that a public corporation is managed by directors who owe fiduciary duties to the corporation itself and its shareholders.³¹⁸ Despite the iconic status accorded this rule, some commentators argue that corporate law is unclear regarding departures from the goal of profit maximization in response to corporate social responsibility overtures. Professor Lee, for instance, contends that, in practice, the law allows corporate social responsibility goals to become paramount, a view which conceivably could benefit BDS campaigners.³¹⁹ Equally possible, BDS campaigners may convince multi-national corporations that their corporate “brand” could be enhanced by compliance with BDS goals and objectives. This possibility opens the door to virtue signaling by firms wishing to increase the value of their brand within the corporate arena.

Stressing SRI rather than CSR, the National Lawyers Guild (NLG), a vociferous proponent of BDS, insists that challenges to BDS-sponsored divestiture campaigns may be problematic. The NLG maintains this position even where institutional investment fund managers have an obligation, as fiduciaries, to fund beneficiaries to maximize economic returns and even when fund managers face anti-boycott laws. The NLG responds to arguments, which might otherwise constrain protest divestment, by asserting that authority exists for the proposition that a purchase or sale of stock or investment or divestment

³¹⁵ Sanders, *supra* note 258, at 536.

³¹⁶ *Id.* at 536.

³¹⁷ Lee, *supra* note 257, at 62. Professor Lee argues that an eligible shareholder under Rule 14a-8 of the Exchange Act of 1934 is entitled to require that management of a corporation include in the annual proxy circular sent to shareholders a “proposal” submitted by the shareholder together with a brief support statement; *Id.* at 62. On the other hand, shareholder social proposals come in for strong criticism by many economic theorists of corporate law. *See id.* (citing Roberta Romano, Henry Manne, Frank Easterbrook and Daniel Fischel). Some scholars propose that the SEC adopt rules requiring “social disclosure” by public corporations including compliance with domestic and foreign law and the earnings of income from so-called controversial products. *See id.* at 65–66.

³¹⁸ *See, e.g.,* Revlon v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173, 179 (Del. 1986).

³¹⁹ Lee, *supra* note 257, at 72.

of an interest in a business is beyond the reach of the anti-boycott laws. The fact is, as a general rule, such laws are limited to activity involving “a sale, purchase or transfer of goods and services.”³²⁰ It is possible that financial entrepreneurs could create investment funds that have as their objective the disavowal of any investment activity contrary to the goals and objectives of BDS. If correct, it becomes doubtful that fiduciary duties, as applied to fund managers in this setting, would necessarily prevent managers from complying with their contractual obligations to disavow investments in Israel.

Despite such claims, in the absence of a statute specifically allowing or mandating SRI, legal scholars generally insist that SRI violates fiduciary duties for most investment funds.³²¹ Dissatisfied with this view, in 2005 the United Nations Environment Program Finance Initiative, commissioned the law firm of Freshfields, Bruckhaus and Deringer to determine whether the law prohibits, permits, or requires SRI. The Freshfields report said that SRI is necessary in two situations: (1) when social factors materially impact the financial performance of an investment; or (2) when there is a consensus among the fund’s beneficiaries that social factors should have a role in investment decisions.³²² Further, trustees may use SRI as a tie-breaker when all other criteria involved in an investment decision are equal.³²³

That said, scholar William Sanders disputes the Freshfields report. He contends that its conclusions were based on a misunderstanding of SRI and a misreading of case law.³²⁴ He argues that a close reading of the cases Freshfields cited in support of “its conclusion that SRI does not violate fiduciary duties shows that the opposite is the truth. Trustees cannot lawfully engage in SRI because their fiduciary duty of care, which holds them to the Prudent Investor Rule, and their fiduciary duty of loyalty, which requires them to invest only for the benefit of the beneficiaries. Both rules prevent SRI. Advisers and broker-dealers acting as advisers cannot engage in SRI because of their fiduciary duty to act in the best interest of the client and to ensure appropriateness.”³²⁵

Admittedly, “fiduciary duties are contractual in nature and subject to agreement. Therefore, SRI will not violate fiduciary duties as long as the settlor stipulates it or the parties agree to it.”³²⁶ This can be

320 NAT’L LAW. GUILD INT’L COMMITTEE, IMPACT OF FEDERAL ANTI-BOYCOTT AND OTHER LAWS ON BDS CAMPAIGNS, 2 (Oct. 29, 2009), http://www.nlginternational.org/report/NLG_BDS_legal_memo.pdf.

321 Sanders, *supra* note 258, at 567.

322 *Id.* at 567.

323 *Id.* at 567.

324 *Id.* at 568.

325 *Id.* at 568.

326 *Id.* at 568.

accomplished through the doctrine of authorization or, in some cases, through ratification or exculpation clauses.³²⁷ Although SRI of the kind that the BDS favors has existed for centuries, and while its popularity has increased in the past few decades, it is manifest that the motivation for SRI has moved from adherence to one's own moral code to the grander notion of changing the behavior of others through law or some other form of preclusive pressure.³²⁸

Though economics and statistics show that SRI has little influence over society at large, as the foregoing discussion indicates, any movement toward voluntary or mandatory SRI including investing that is consistent with BDS principles must overcome legal hurdles posed by fiduciary duties.³²⁹ Despite the possibility that the legal doctrines of authorization and ratification as well as the utilization of exculpation clauses could allow trustees to practice SRI,³³⁰ individuals entrusted with managing other people's money must remember whose money it is and act accordingly. This fact likely poses an impermeable barrier to some, but certainly not all, BDS sponsored divestment programs.³³¹ Overall, such barriers, in conjunction with the market, constrain the ability of BDS to inflict harm on Israel, Israeli institutions and businesses, thus making it difficult to forecast if BDS's protest divestment program is likely to generate measurable economic effects. Similar qualifications likely attend the boycott or blacklist component of BDS. But this may not be the full story.

D. BDS's Indeterminate Reach in our Postmodern Age

Despite the lack of data showing that the economic thrust of BDS has succeeded or is likely to succeed, by imposing significant adverse effects on Israel and Israeli companies, evidence surfaces that BDS continues to enlarge its reach in the academic and political arena. Although this reach is currently indeterminate, the force of this reach may precipitate a gathering storm that echoes contemporary concatenations surfacing from the West's ongoing loss of faith in its beliefs, traditions, and legitimacy. As cultural and moral losses fester, they may eventually consume previously shared ideas of history and truth.

Given such losses, BDS efforts may culminate in the infliction of

³²⁷ *Id.* at 572–73.

³²⁸ *Id.* at 578.

³²⁹ *Id.* at 578–79.

³³⁰ *Id.* at 579.

³³¹ *Id.*

dire results on Israel in the future. The possible expansion of future effects is provoked by the admonition that the people of Palestine must emerge from their oppressive reality and demand that international civil society assume its moral responsibility to fight Israeli “injustice,”³³² rather than fight against existential threats to Israel’s existence. This intellectually dishonest demand should remain worrisome for all defenders of Israel’s right to exist as a Jewish state, even if BDS proponents are inclined to overstate the direct economic effects of their program. Reasons for disquiet become clear by examining scholarly contributions showing that even failed divestment initiatives can blaze a pathway toward success as part of a longer-term strategy of delegitimation.³³³

Although scholarship, for example, shows that student-led movements to boycott Israeli products, or, alternatively, to get universities to divest from either Israeli companies or multi-national companies doing business with Israel have not been successful in the U.S.,³³⁴ authority exists showing that winning legal cases and succeeding in divestment and boycott efforts are not the end goal of the BDS movement. The goal is much broader and potentially more insidious.

Properly appreciated, beyond the goal of Palestinian hegemony, many BDS proponents are motivated by the ambition of changing the opinions of young Westerners about Israel.³³⁵ This move is consistent with the desire to erode support for Israel within an international community nominally committed to what philosopher Ryszard Legutko calls liberal-democratic principles.³³⁶

Nominal proponents of such principles in recent decades across the United States and, in particular, American university campuses, having lost their moral and spiritual anchorage tied to a defensible telos, remain stoutly utopian and historicist in outlook as they propagate the fiction that history is moving in their direction.³³⁷ They are engaged in a consuming struggle against the ostensible enemies of society (tradition,

³³² BARGHOUTI, *supra* note 12, at 225.

³³³ Samuel M. Edelman and Carol F. S. Edelman, *When Failure Succeeds: Divestment as Delegitimation*, in *THE CASE AGAINST ACADEMIC BOYCOTTS OF ISRAEL* 235, 235–242 (Cary Nelson & Gabriel Noah Brahm, eds., 2015) (examining the movement by student legislative bodies at universities across the U.S., Canada and Europe to consider resolutions calling for universities to divest from Israel).

³³⁴ *Id.* at 235 (showing that during the 2013-2014 academic year, 15 divestment resolutions were introduced at universities in the U.S. but only two passed).

³³⁵ *Id.* at 236.

³³⁶ John O’Sullivan, *FOREWARD*, in RYSZARD LEGUTKO, *THE DEMON IN DEMOCRACY: TOTALITARIAN TEMPTATIONS IN FREE SOCIETIES*, at vi (Teresa Adelson trans., 2016).

³³⁷ *Id.*

intolerance, discrimination, xenophobia, and racism), while like Marxism before it, their putative “liberal-democratic” views increasingly become an all-encompassing ideology.³³⁸ This ideology is poised to resist both biblical and global history and accept the ahistorical claims of Mr. Barghouti. This means that in the name of tolerance and nondiscrimination, they are primed to accept the discriminatory and intolerant animus systematically embedded in the BDS movement. If this is true, however unsuccessful divestment initiatives, boycotts and blacklists may be, and no matter how many laws preclude boycotts, and the like, BDS’s programmatic efforts on campuses and within the domain of public opinion must be viewed as part of a potentially successful element of its campaign.

Exemplifying the cleverness of this scheme and exploiting a morally compelling message anchored in equality, freedom, universal human rights, and compliance with international law and reinforced by a massive civil society coalition,³³⁹ the Oberlin College’s Students for Free Palestine campaign shows how failure is constitutive of success. After waging a divestment campaign preceded by years of work in portraying Israel in a negative light with speakers, panels, films, seven editorials published in the Oberlin Review supporting divestment and demonizing Israel coupled through an ongoing program called Divestment 101—the student resolution passed with a majority vote.³⁴⁰ Although the resolution itself was non-binding and ultimately ignored by the college investment committee, and while several states have recently enacted legislation prohibiting protest divestment,³⁴¹ the Oberlin divestment effort can be viewed as a thundering success despite its failure.

To wit, it’s clear that Oberlin’s BDS campaign did not fail at constantly attacking Israel for weeks, months, and years as part of a long-term struggle to portray Israel as a pariah nation, an occupier, a human rights violator, and a racist nation.³⁴² The goal of the BDS Call is not always or necessarily intended to foment opposition to specific policies of Israel’s government in the short-run but, rather, ensues as both an objurgation of Israel’s defenders and an exceptionless challenge to Israel’s right to exist in its current form even while simultaneously upholding Palestinian rights within the framework of international law

³³⁸ *Id.*

³³⁹ BARGHOUTI, *supra* note 12, at 226.

³⁴⁰ Edelman & Edelman, *supra* note 333, at 239.

³⁴¹ See, e.g., Danielle Ziri, *NJ Governor Chris Christie Signs Anti-BDS Bill Into Law*, THE JERUSALEM POST (Aug. 16, 2016, 8:10 PM), <http://www.jpost.com/Diaspora/NJ-governor-Chris-Christie-signs-anti-BDS-bill-into-law-464260> (noting that New Jersey joins over a dozen U.S. states which have adopted anti-BDS legislation this year).

³⁴² Edelman & Edelman, *supra* note 333, at 240.

and universal principles of human rights.³⁴³ Barghouti observes that such claims are intentionally calibrated to appeal to liberals and progressives of diverse ideological backgrounds, religious and secular alike.³⁴⁴ Such claims resonate and acquire greater heft in the post-modern West because well-educated individuals have replaced an identity grounded in the idea of living life as pilgrims towards a definite destination in exchange for an identity grounded to the idea of being a tourist living for new experiences.³⁴⁵

This process desacralizes memory, denudes history, and fertilizes the ground for BDS to spread vertiginously throughout the globe. Within such a highly experimental world, identity is no longer bound by permanent values built on steel and concrete³⁴⁶ but bound only by liquid, infinitely malleable and emotive concepts such as respect, tolerance, diversity, nondiscrimination and universal human rights even though such concepts become meaningless and without content in a world without principle. If this represents reality, then defenders of Israel ought to be deeply concerned about both the ever-ramifying economic and noneconomic effects of BDS.

VI. CONCLUDING OBSERVATIONS: THE EVER-RAMIFYING IMPLICATIONS OF BDS

Neither protest, divestment, or the other components of the suite of penalties that BDS seeks to impose on Israel may be economically viable because: (A) investment fund managers and corporate directors face constraints on their discretion arising out of their fiduciary duties, (B) legal injunctions exist precluding boycotts, or (C) the market has an intrinsic capacity to adapt thus lessening the financial impact of BDS's initiatives. Constant with such claims, the evidence amassed so far indicates that it is doubtful that BDS imposes significant costs on Israel in the short-run. Still, such analyses may overlook the actual consequences of this scheme: its growing ability to soak Israel, Israeli companies, and multinational entities doing business in Israel in a scalding crucible of condemnation. This cauldron has the potential to inflict permanent damage on Israel's reputation. This cauldron has the potential to inflict permanent damage on Israel's reputation, disregard

³⁴³ BARGHOUTI, *supra* note 12, at 32.

³⁴⁴ *Id.* at 227.

³⁴⁵ See generally Zygmunt Bauman, *From Pilgrim to Tourist—or a Short History of Identity*, in QUESTIONS OF CULTURAL IDENTITY 18, 18–36 (Stuart Hall & Paul du Gay eds., 2011), http://pages.mtu.edu/~jdslack/readings/CSReadings/Bauman_From_Pilgrim_to_Tourist.pdf.

³⁴⁶ *Id.* at 18.

the fact that Israel's right to exist is stoutly grounded in international law principles *preceding* the Shoah, and overlook exclusionary sentiments existing, the world-over, by suggesting that emergence of Israel as a nation state is grounded in misplaced guilt.³⁴⁷ This venomous bunk, masquerading as a fount of principle, vitiates Israel's origins and its viability as a Jewish state.

BDS is built upon the common misrepresentation of the Jewish State of Israel as an occupier. This falsification constitutes an attempt to alter the past, including the uncontested history of unprovoked Arab and Palestinian aggression. In the process, this mendacious contention lends credence to the delegitimization and demonization of the Jewish State of Israel as part of a strategy that disavows the sovereignty of the Jewish people to the land of Israel and Palestine under international law principles.³⁴⁸

To repeat, the rights of the Jewish people to possess present-day Israel were realized in the global, political and legal settlement conceived during World War I and executed in the post-war years between 1919 and 1923.³⁴⁹ Authority exists for the proposition that the term "Palestinians" properly referred to Jews in the first place.³⁵⁰ Consequently, the contention that the Arabs of Palestine and the Land of Israel have the same legal rights as the Jewish people *violates* international law principles issuing forth from the San Remo Resolution, the Mandate and the 1920 Franco-British Convention.³⁵¹

Nonetheless, Barghouti and others maintain allegiance to the position that "Israel was born out of the ethnic cleansing of a majority of the Palestinian people and the systematic destruction of the indigenous Palestinian society."³⁵² BDS surfaces from such splenetic contentions and thus pursues a multi-pronged strategy³⁵³ aimed at converting the West's alleged "complicity" into "moral responsibility."³⁵⁴ Beyond transmuting Palestinian grievances into a plea for Western self-abnegation, these claims are intended to induce a transformation of public opinion in the U.S. and the European Union. One that ultimately ensures that Israel's alleged oppression against the

347 BARGHOUTI, *supra* note 12, at 231.

348 Howard Grief, *Legal Rights and Title of Sovereignty of the Jewish People to the Land of Israel and Palestine Under International Law*, 2 NATIV ONLINE: A J. OF POLITICS AND THE ARTS 1, 1–12 (2004) <http://www.acpr.org.il/english-nativ/02-issue/grief-2.htm>.

349 *Id.* at 1.

350 *Id.* at 11.

351 *Id.* at 12.

352 BARGHOUTI, *supra* note 13, at 188.

353 *Id.* at 228–30 (outlining a twelve-point plan of action that places Israel and others in the cross-hairs of an international movement).

354 *Id.* at 232–33.

Palestinian people becomes morally untenable³⁵⁵ and thus, transforms its very existence as a nation-state into a hate crime. The United Nations in various fora and American leaders, such as John Kerry, have, at times, embraced such sentiments with barely disguised glee.

Although more and more nations and American states have adopted anti-BDS legislation,³⁵⁶ Barghouti's aspirations may, nonetheless, have salience, since Western citizens currently live in a postmodern society that appears to be falling apart,³⁵⁷ a world where people are waiting but do not know what they are waiting for.³⁵⁸ Simultaneously the BDS Call has been deftly wielded in the court of public opinion to take advantage of modern man's preference for the "good" rather than the "true."³⁵⁹ These two cultural forces may join and thus inflict an all-too-real wound: (1) the cultivation of indifference to the fate of the Jewish people, and (2) the vitiation of economic, political, and cultural support for Israel by Western democracies.³⁶⁰

Though BDS proponents know that they cannot defeat Israel militarily in the short-run, they insist, like ancient Sophists, that commonly accepted understandings of law and justice reflect little more than the rule of the strongest. Offering their own, imaginative, understanding of law and justice in a world that is rife with disagreement over such terms, BDS aims to strip Israel and its defenders of their moral resistance.

BDS emerges as another concussive coda in a long-running movement intended to encroach on Israel's reputational interest as prelude to future impingements. Slight encroachments today "create new boundaries from which legions of power can seek new territory to capture"³⁶¹ in the future. Hence, contemporary indifference induced by postmodernism's tenets, including agnosticism toward objective reality, could culminate in the potential future loss of Western moral support of, and economic and military collaboration with, Israel; meaning that

³⁵⁵ *Id.* at 232–33.

³⁵⁶ See, e.g., *Ohio Legislature Passes Bill Barring State from Working with Israel Boycotters*, THE TOWER (Dec. 09, 2016, 12:05 PM), <http://www.thetower.org/4271-ohio-legislature-passes-bill-barring-state-from-working-with-israel-boycotters/> (noting the passage of a bill to prevent taxpayer funds from being used to support entities that participate in discriminatory boycotts of Israel and also noting that the bill's passage follows the passage of similar measures nationwide including Pennsylvania, Illinois, South Carolina, Tennessee, Arizona, Georgia, Colorado, Florida, Alabama, California, New Jersey and New York (by executive order) as well as the nation of Germany).

³⁵⁷ See Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197 (2005).

³⁵⁸ DELSOL, *supra* note 89, at xxvii.

³⁵⁹ *Id.* at 45.

³⁶⁰ BARGHOUTI, *supra* note 12, at 232.

³⁶¹ *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion).

things will, sooner or later, fall apart as the forces that sustain Israel cannot hold, unleashing anarchy upon the historic homeland of the Jewish people.³⁶² Together, this process poses a long-term threat to Israel's survival.

This is not to say that this threat remains unalterable. Rather, defenders of Israel's right to exist ought to take these encroachments, however slight, seriously for three reasons. For one, BDS advances by transforming those that face an existential threat into alleged advocates of injustice.³⁶³ If this cycle, riven with the demonization of the Jews—exemplified by Jan Gross's superb investigation of post-World War II Poland examining the opportunistic behavior by the neighbors of Poland's Jews³⁶⁴—multiplies in response to the issuance of the BDS Call, mortal difficulties may well ensue. Second, if BDS, properly seen as a self-perpetuating falsifying extension of the Arab League boycott, gathers momentum, it has the capacity to transform the declaration, “*never again*,” into a fashionable weapon enabling BDS proponents to spread rather than shrink anti-Semitism, on a worldwide basis.³⁶⁵ If this paradox gains currency within the international community under the banner of equality and universal human rights—as the globe loses narrative coherence and emotivism becomes the null hypothesis³⁶⁶—it would transmute John Gray's hypothesis that barbarism is a pathological development of postmodern society³⁶⁷ into a terrorizing reality.

Finally, history provides great moral lessons including that identity—including Israel's identity as a Jewish state—can be a great preserver of liberty, a view enhanced by observing free societies cannot survive progressive accommodations of barbarians.³⁶⁸ This remains true, whether the barbarians are predatory terrorists driven by purported grievances or elites dressed in designer suits at the United Nations Security Council.

³⁶² My debt to William Butler Yeats should be obvious. See William Butler Yeats, *The Second Coming*, THE POETRY FOUNDATION, <https://www.poetryfoundation.org/poems-and-poets/poems/detail/43290> (last visited Sept. 1, 2017).

³⁶³ See, e.g., Jimmy Powdrell Campbell, *World Council of Churches Slams Israeli Injustice in Palestine*, SCOTTISH PALESTINE SOLIDARITY CAMPAIGN (July 7, 2016), <http://www.scottishpsc.org.uk/churches/world-council-of-churches-slams-israeli-injustice-in-palestine>.

³⁶⁴ GROSS, *supra* note 41, at 247 (finding that virulent postwar anti-Semitism in Poland was embedded in its society's opportunistic wartime behavior).

³⁶⁵ BARGHOUTI, *supra* note 12, at 231 (suggesting that “never again” is useful as a weapon against Israel's existence).

³⁶⁶ Hutchison, *Metaphysical Univocity*, *supra* note 22, at 103.

³⁶⁷ GRAY, *supra* note 41, at 9–10 (suggesting barbarism is a pathological development of civilization).

³⁶⁸ Stephens, *Is Europe Helpless?*, *supra* note 72.

Israelis, to survive, must refuse to accommodate BDS's claims, however revanchist they may be, because such claims are intended to diminish Israel's identity. Accommodating such claims would be a self-annihilating move, because it would deprive Israel of the moral resources to press on, to never give in. A comprehensive examination of the economic and noneconomic thrust and implications of the BDS Call, including a forecast of this movement's measurable and collateral effects, implies that it would be a grave error to misjudge the capability of BDS to place the long-term sustainability of Israel at risk. This forecast remains spot-on regardless of the extent of, or the difficulty in estimating, the direct economic impact of BDS.

It follows, that defenders of Israel—as a singular Jewish state organized consistently with international law norms—must broaden their resistance both defensively and offensively. To be sure, they must mount a vigorous defensive effort that embraces legal strategies to obstruct the short-term and long-term goals of BDS's campaign of continually imposing current and prospective economic and reputational losses on Israel. Defensive responses should, of course, include the advancement of anti-BDS legislation.

At the same time, opponents of BDS ought to fashion strategies designed to (1) inflict retaliatory financial and economic wounds on complicit Western institutions engaged in acts, which impair Israel's right to exist, an approach that ought to be calibrated to inflict discomfort on PA officials and leaders who condone BDS's programmatic objectives, and (2) gauged to create a lexicon, directly contesting the emotive and therapeutic cultural turn unmoored from ideas of truth that is commonplace on university campuses and other centers of power in the West.

Given that the globe has taken a barbarous turn in its understanding of human rights,³⁶⁹ and even though any attempt to precisely catalog the effects of BDS may amount to an exercise in chasing shadows, defenders of Israel must join this fight with verve, vigor, and originality and eyes wide open. As Moshe Dayan, has observed, “To aim and hit, you need one eye only, and one good finger.”³⁷⁰ Prompted by this observation, and impelled by the declaration that every square inch of the universe is shorn of neutral ground,³⁷¹ pugnacious defenders of

³⁶⁹ Hutchison, *The UN Continues its Barbaric Assault*, *supra* note 19.

³⁷⁰ AZ Quotes, *Moshe Dayan Quotes*, http://www.azquotes.com/author/3767-Moshe_Dayan (last visited Sept. 1, 2017).

³⁷¹ My debt to C. S. Lewis should be obvious. *See, e.g., C.S. Lewis Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/there_is_no_neutral_ground_in_the_universe-every/179250.html (last visited Sep. 1, 2017) (“There is no neutral ground in the universe; every square inch, every split second, is claimed by God and counter-claimed by Satan”).

Israel must be prepared to pull the trigger.

Any other approach runs the risk of facilitating Israel's national suicide and a corresponding evisceration of Jewish culture. This would leave the world—for Jews and non-Jews alike—a much poorer place.