

## Academic Freedom Encompasses the Right to Boycott: Why the AAUP Should Support the Palestinian Call for the Academic Boycott of Israel

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In its 2006 report elaborating on its reasons for rejecting academic boycotts, specifically the boycott of Israeli academic institutions, the AAUP wrote, “In view of the Association’s long-standing commitment to the free exchange of ideas, we oppose academic boycotts.” It is not at all clear, however, that opposing the boycott of academic institutions that play central roles in the violation of human rights furthers the free exchange of ideas. I argue here that the AAUP should reassess its blanket opposition to academic boycotts, and that its position should be informed by its own conceptualization of academic freedom and human rights.

The AAUP, courts, and academics alike all acknowledge that academic freedom is not absolute.<sup>1</sup> To the extent that the freedom to speak in an academic setting is aimed at ensuring a free and vigorous democracy and human rights, there are certain extrinsic principles that justify the restriction of certain types of speech, among them being the rights of *others*.

The AAUP has taken an appropriately strong stance urging protection of the right of academic institutions to decline to participate in particular types of speech. In one case, the

AAUP joined Yale University in contesting the government's denial to Yale of federal funds because the Yale Law School faculty restricted the US military from recruiting activities on campus on the grounds that the military discriminated against individuals based on sexual orientation. The AAUP endorsed the boycott of the military as itself constituting a form of speech, emphasizing that "our institutions are judged by our actions as well as our utterances" and recognizing "the importance of the faculty's role in constructing an appropriate educational environment."<sup>2</sup>

"The First Amendment," according to the AAUP, does not "permit the government to use the power of the federal purse to intrude on academic freedom by coercing educators to abandon their chosen pedagogical practices" and offer their official career services programs to employers who discriminate.<sup>3</sup> For the government to force Yale to allow recruiters access to students would be to impair Yale's "constitutional right to determine *for itself* the appropriate means or method of expression."<sup>4</sup>

The US Supreme Court ultimately was not persuaded to protect faculty members' right to send a message about the military's discrimination policy through disassociation; in its 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights*, the Court found that law school's exclusion of military recruiters was not sufficiently expressive to warrant First Amendment protection, and that the government's "substantial" interest in recruiting for the military prevailed over the university's desire to disassociate from a discriminatory employer.<sup>5</sup> But although the Court did not deem the law school's conduct expressive in that instance, it has repeatedly reaffirmed that there are circumstances in which disassociation and boycott constitute constitutionally protected speech, even when they entail some restriction of speech.<sup>6</sup> For example, the Supreme Court held that when black citizens banded together and collectively expressed "dissatisfaction with a social structure that had denied them rights to equal treatment and respect, . . . the boycott clearly involved constitutionally protected activity."<sup>7</sup> The Court explained that through the boycott, the activists "sought to bring about political, social, and economic change."<sup>8</sup> The First Circuit Court of Appeals elaborated:

If constitutional protections are effectively to protect private expression, they must do so, to some extent, even when the expression (or lack thereof) of one private person threatens to interfere with the expression of another. The freedom of mediating institutions, newspapers, universities, political associations, and artistic organizations and individuals themselves to pick and choose among ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if “free speech” is to prove meaningful.<sup>9</sup>

But the right to boycott protects more than merely expressive rights. Although the AAUP’s argument in the Yale case was mainly framed in terms of protecting universities’ right to control the messages they send, another value implicit in its argument was protecting of the right to enforce the principle of nondiscrimination itself. The universities’ ability to disassociate from the military was important to protect not only their right to *express* disapproval of discrimination based on sexual orientation but also their right to try to pressure the government into ending its discriminatory practices. The existence of discrimination on the basis of sexual orientation “raise[s] serious constitutional concerns and conflict[s] with AAUP’s policies on academic freedom and nondiscrimination.”<sup>10</sup> The AAUP emphasized that the *type* of speech at issue was particularly central to the values the First Amendment sought to protect— ““expression of dissatisfaction with the policies of this country”” and ““the right to differ as to things that touch the heart of the existing order.””<sup>11</sup> The implication, therefore, is that it was especially important to protect law schools’ right to expression not only for its own sake but because it could affect issues central to the policies of the country and the world.

Along similar lines, it is inherent in the conception of academic freedom in international law, and to some extent in US jurisprudence concerning freedom of speech, that academic freedom is fundamental to our social order partly because of its relationship to other fundamental rights and values.<sup>12</sup> The Supreme Court has declared free academic expression “fundamental to the functioning of our society.”<sup>13</sup> The International Covenant on Economic, Social, and Cultural Rights provides that “education shall enable all persons to participate effectively in a free society.” As stated by the California Supreme Court, “education is the

lifeline of both the individual and society. . . . At a minimum, education makes more meaningful the casting of a ballot.”<sup>14</sup> The conception of academic freedom as a right that facilitates other human rights can extend not just to individuals’ realization of their own civil and human rights but also to human rights in the broader society. As Balakrishnan Rajagopal put it, “academic freedom is not only an end . . . . It is also the means for realizing other important ends, including individual freedoms that go beyond expressive freedoms to encompass all freedoms such as nondiscrimination.”<sup>15</sup> The National Lawyers Guild stated, in its amicus brief to the Supreme Court on the topic of the right of law schools to ban employers who discriminate, that academics “are in the process of rethinking not only the predominant conceptions of equality but what actions a professional ought to take when confronting a situation that she or he believes is inconsistent with principles of equality. This process is at the core of what the First Amendment protects.”<sup>16</sup> Scholars should be encouraged to exercise their own academic freedom in a manner that promotes the rights of others, even if that freedom entails the choice not to academically collaborate with an academic institution.

The AAUP views the academic strike as an appropriate tool to bring about social change under certain circumstances. It explains that sometimes “resort to economic pressure through strikes or other work actions may be a necessary and unavoidable means of dispute resolution,” even when it involves actions targeting academic speech, such as asking outside speakers not to come to a campus during a strike.<sup>17</sup> In furtherance of the civil and educational rights of faculty members and others, the AAUP has supported strikes aimed at securing fair working conditions,<sup>18</sup> faculty governance,<sup>19</sup> health-insurance plans,<sup>20</sup> curricular enrichment,<sup>21</sup> and, particularly relevant to the case of Israel/Palestine, an end to administrative practices that increase racial segregation.<sup>22</sup> In those cases, other means could certainly have been employed to achieve the same ends, such as public condemnation or debate about the administrative policies the faculty members were opposing. But the memberships determined that other means had failed or had proven insufficient, and that a strike was the best available means of pressure, despite the fact that this would temporarily restrict academic discourse.

In contrast to its support of strikes, the AAUP in 2006 summarized its position on boycotts as follows:

Members of the academic community should feel no obligation to support or contribute to institutions that are not free or that sail under false colors, that is, claim to be free but in fact suppress freedom. Such institutions should not be boycotted. Rather, they should be exposed for what they are, and, wherever possible, the continued exchange of ideas should be actively encouraged. The need is always for more academic freedom, not less.<sup>23</sup>

There is a contradiction, however, between acknowledging the right to choose whom to support or engage and denying the right to boycott. As the AAUP itself acknowledged in its amicus brief to the Supreme Court in *Rumsfeld v. Forum for Academic and Institutional Rights*, “academic freedom ‘thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.’”<sup>24</sup> Just as law schools should have been permitted not to facilitate the speech of a discriminatory employer, and just as faculty unions have the right to bring about better academic conditions through strikes, academics working toward freedom in Israel/Palestine should not be confined to the method of merely “expos[ing]” oppressive institutions “for what they are.”

The AAUP distinguishes economic boycotts such as strikes from academic boycotts, arguing that whereas “economic boycotts seek to bring pressure to bear on the regime responsible for violations of rights,” academic boycotts “strike directly at the free exchange of ideas even as they are aimed at university administrations or . . . political parties in power.”<sup>25</sup> When the “regime[s] responsible for violations of rights” are academic institutions, though, there is no reason to treat academic boycotts differently from academic strikes. That is not to say that the AAUP must deem academic boycotts (or economic strikes) appropriate in *all* instances but simply that it does not make sense to oppose the boycott method as a matter of policy. It could apply a similar principle to an assessment of the boycott method in any particular instance, as it does with the strike method: “The Association recognizes the right of faculty members to

conduct economic strikes and to urge others to support their cause. We believe, however, that in each instance those engaged in a strike at an academic institution should seek to minimize the impact of the strike on academic freedom." Such a position would allow professors to exercise their own academic freedom to further their own rights and those of others, but to do so in a manner that minimizes the impact on the freedom of others and on the exchange of ideas.

In discouraging the establishment of a campus in a country with laws that violate human rights, the AAUP suggests that the use of the academic boycott is not only a right but an obligation. The AAUP recently sent a letter to Yale University reiterating concerns about its collaboration with Singapore's government in establishing a campus in that country.<sup>26</sup> It asked that Yale take a number of steps to ensure that academic freedom and human rights were not undermined by the collaboration, and it even suggested total withdrawal from the partnership might be necessary.<sup>27</sup> Its concerns stemmed partly from a worry that the academic freedom of the faculty and students at the Singapore campus would not be honored, but they extended beyond that: the establishment of the campus, the AAUP worried, might bring about unwanted "political implications" because it would entail indirectly "assist[ing] the Singapore government in achieving greater financial strength and cultural legitimacy."<sup>28</sup> For the AAUP, Yale has not only the right but the obligation to ensure that it does not collaborate with and legitimize countries with "odious" laws, such as laws that criminalize sexual orientation, even if that entails restricting academic speech in Singapore.<sup>29</sup>

The question remains whether the AAUP will apply these principles in Israel/Palestine, where it stands to influence global human rights to a much greater degree, given the much more extensive US political, economic, and cultural engagement there.

Although the goal of this essay is not to detail the conditions in Israel/Palestine that justify the boycott strategy, something others (including Israeli professors) have done extensively and will continue to do,<sup>30</sup> I will briefly highlight some of the features that could help the AAUP assess whether the boycott is an appropriate tool for opposing Israeli apartheid. The initial call, issued by the Palestinian Campaign for the Academic and Cultural Boycott of Israel (PACBI),

asks for several specific forms of boycott, including refraining from academic collaboration with Israeli institutions, suspending funding and subsidies to Israeli institutions, and refraining from requiring Palestinian academic and cultural institutions to partner with Israeli counterparts as a condition for support.<sup>31</sup>

The statement identifies a number of reasons for extending the general boycott call to Israeli academic institutions. One is that the institutions themselves participate in denial of basic human rights to Palestinians and of academic freedom to the universities' own professors. The AAUP's concern that "boycotts are not in themselves matters of principle but tactical weapons in political struggles"<sup>32</sup> therefore does not apply.

Another justification for the boycott is that "all forms of international intervention" to end indiscriminate killing, political imprisonment without due process, an apartheid wall, and other abuses have not worked, despite the fact that these different means of intervention have been employed for decades. These abuses have included suppression of education and academic freedom, from the restriction of movement of students and professors; to the siege, closure, and bombing of Palestinian schools and universities; to a prohibition against teaching the Nakba (the dispossession, massacre, and expulsion of Palestinians in 1947-48) and denying the "Jewish and democratic" nature of Israel.<sup>33</sup>

As any responsible social justice movement should, PACBI continually engages in dialogue and reexamination about the appropriate bounds of the boycott to avoid unnecessary restrictions of academic freedom. For example, in July 2009, after working for five years with international partners to scrutinize tens of cultural projects in order to assess the applicability of the boycott criteria to them, PACBI issued specific guidelines governing the scope of its boycott call. One of the limitations it placed on the boycott was that "in the absence of official Israeli sponsorship, the individual product of an Israeli cultural worker per se is not boycottable, regardless of its content or merit."<sup>34</sup> PACBI has also clarified that the boycott call does not entail the boycott of individuals based on national origin or viewpoint; the targets are Israeli government institutions.<sup>35</sup>

I call on the AAUP to respect the decision of Palestinian and Israeli academics, as well as their colleagues and supporters around the world, to adhere to PACBI's boycott call, not merely to further the human rights of Palestinian Arabs, dissident Jewish Israelis, and their supporters, but also to further the fundamental American values the AAUP was created to safeguard, including the freedom to disassociate from institutions that violate human rights.

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## Notes

<sup>1</sup> *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799–800 (1985) ("Even protected speech is not equally permissible in all places and at all times").

<sup>2</sup> Brief of *Amici Curiae* American Association of University Professors (AAUP) and Nobel Laureates in Support of Plaintiffs, *Student Members of SAME (Student/Faculty Alliance for Military Equality), et al., v. Donald Rumsfeld*, Civil Action No. 3:03CV01867, 2.

<sup>3</sup> *Ibid.*, 4.

<sup>4</sup> *Ibid.*, 13 (emphasis in original) (citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 [2000]).

<sup>5</sup> *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006).

<sup>6</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (recognizing the "right of expressive association"); *Buckley v. Valeo*, 424 U.S. 1 (1976) (contributing money can be a form of speech).

<sup>7</sup> *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

<sup>8</sup> *Ibid.*, 911–12.

<sup>9</sup> *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 904 (1st Cir. 1988).

<sup>10</sup> *SAME v. Rumsfeld*, 2.

<sup>11</sup> *Ibid.*, 15 (internal citations removed).

<sup>12</sup> Rima Kapitan, "Academic Freedom as a Fundamental Human Right in American Jurisprudence and the Imposition of 'Balance' on Academic Discourse about the Palestinian-Israeli Conflict," *Arab Studies Quarterly* 33.3–4 (Summer–Fall 2011): 268–81.

- <sup>13</sup> *Rust v. Sullivan* 500 U.S. 173, 200 (1991) (citing *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605–6 [1967]).
- <sup>14</sup> *Serrano v. Priest*, 5 Cal.3d 584, 605–8 (Cal. 1971).
- <sup>15</sup> Balakrishnan Rajagopal, “Academic Freedom as a Human Right: An Internationalist Perspective,” *Academe* 89 (May–June 2003): 25–28.
- <sup>16</sup> Zachary Wolfe, “Brief of Amicus Curiae National Lawyers Guild in Support of Respondents,” *Rumsfeld v. Forum for Academic and Institutional Rights*, September 21, 2005.
- <sup>17</sup> AAUP, “On Academic Boycotts,” *Academe* 92 (September–October 2006): 40.
- <sup>18</sup> AAUP, “Cincinnati State Faculty Strike,” *AAUP Updates*, September 29, 2011.
- <sup>19</sup> Bryan G. Pfeifer, “Faculty Strike at Detroit-Area University, Protesting Cuts amid Surplus,” *Labor Notes*, September 8, 2009, <http://www.labornotes.org/node/2414>.
- <sup>20</sup> Audrey Williams June, “Faculty Strike Shuts Down Michigan’s Oakland U,” *Chronicle of Higher Education*, September 3, 2009.
- <sup>21</sup> AAUP Collective Bargaining Congress, “The AAUP Stands with the Chicago Teachers Union,” *AAUP Updates*, September 7, 2012, <http://www.aaup.org/news/aaup-stands-chicago-teachers-union>.
- <sup>22</sup> *Ibid.*
- <sup>23</sup> AAUP, “On Academic Boycotts,” 42.
- <sup>24</sup> Donna Euben, Ann Springer and David Rabban, Robert Post, “Brief for Amicus Curiae the American Association of University Professors in Support of Respondents,” *Rumsfeld v. Forum for Academic and Institutional Rights* (September 21, 2005) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n.12 (1985)).
- <sup>25</sup> *Ibid.*, 41.
- <sup>26</sup> AAUP Committee A on Academic Freedom and Tenure, “An Open Letter from the AAUP to the Yale Community,” n.d., <http://www.aaup.org/news/2012/open-letter-aaup-yale-community>.
- <sup>27</sup> *Ibid.*
- <sup>28</sup> *Ibid.*
- <sup>29</sup> *Ibid.*
- <sup>30</sup> See., e.g., Audrea Lim, ed., *The Case for Sanctions against Israel* (Brooklyn: Verso, 2012); Omar Barghouti, *BDS: Boycott, Divestment, Sanctions – The Global Struggle for Palestinian Rights* (Chicago: Haymarket, 2011); Kehaulani Kauanui, “Educators of Conscience Call for an Academic Boycott of Israel,” *The Academy Speaks*, February 13, 2009, <http://diverseeducation.wordpress.com/2009/02/13/educators-of-conscience-call-for-an-academic-boycott-of-israel/>; Omar Barghouti and Lisa Taraki, “The AUT Boycott: Freedom vs. Academic Freedom,” *Electronic Intifada*, May 31, 2005, <http://electronicintifada.net/content/aut-boycott-freedom-vs-academic-freedom/5609>; SOAS Palestine Society, “Tel Aviv University—A Leading Israeli Military Research Centre,” *Tel Aviv University Review* (Winter 2008–09), <http://www.monabaker.com/documents/TelAvivUniInvolvementinMilitaryResearch.pdf>; Tanya Reinhart, “Why the World Should Boycott Israeli Academic Institutions,” January 29, 2003, [http://www.monabaker.com/pMachine/more.php?id=96\\_0\\_1\\_12\\_M5](http://www.monabaker.com/pMachine/more.php?id=96_0_1_12_M5); Mohammed Abed, “Defending Boycotts,” *Dissent* (Fall 2007), <http://www.usacbi.org/defending-boycotts/>.
- <sup>31</sup> Barghouti, *BDS*, 234–35.
- <sup>32</sup> AAUP, “On Academic Boycotts,” 41.

- <sup>33</sup> Birzeit University-Palestine, The Right to Education Campaign & News Center, "Studies & Research," n.d., <http://right2edu.birzeit.edu/news/catindex22>; Birzeit University-Palestine, The Right to Education Campaign & News Center, "Closure of Institutions," n.d., <http://right2edu.birzeit.edu/news/catindex30>; "148 Irish Academics Call for EU to Cut Links with Israel," *Irish Times*, January 23, 2001, <http://right2edu.birzeit.edu/news/printer723>; Ilan Pappé, "Academic Freedom under Assault in Israel," *Counterpunch*, May 23–25, 2003, <http://www.counterpunch.org/2003/05/23/academic-freedom-under-assault-in-israel/>; Rania Masri and Marcy Newman, "Why American Academics Must Join Boycott of Israel," *Electronic Intifada*, January 18, 2009, <http://electronicintifada.net/content/why-american-academics-must-join-boycott-israel/7997>; Noam Yuran, Tali Frastai, and Uri Eran, "Israeli Academics, Sign a Petition at Your Own Risk," *Haaretz*, December 18, 2012, <http://www.haaretz.com/news/features/israeli-academics-sign-a-petition-at-your-own-risk.premium-1.485553#>; Cary Nelson, "Neve Gordon's Academic Freedom," *Inside Higher Ed*, September 15, 2009, <http://www.insidehighered.com/views/2009/09/15/nelson>; British Committee for the Universities of Palestine, "Why Boycott?," January 20, 2012, <http://www.bricup.org.uk/why.html>; Adalah: The Legal Center for Arab Minority Rights in Israel, "New Discriminatory Laws and Bills in Israel," issued June 2011, updated October 2012, [http://adalah.org/Public/files/English/Legal\\_Advocacy/Discriminatory\\_Laws/Discriminatory-Laws-in-Israel-October-2012-Update.pdf](http://adalah.org/Public/files/English/Legal_Advocacy/Discriminatory_Laws/Discriminatory-Laws-in-Israel-October-2012-Update.pdf).
- <sup>34</sup> PACBI, "Guidelines for Applying the International Cultural Boycott of Israel," July 20, 2009, <http://www.pacbi.org/etemplate.php?id=1045>.
- <sup>35</sup> PACBI, "The Palestinian Call for Academic Boycott Revised: Adjusting the Parameters of the Debate," January 28, 2006, <http://pacbi.org/etemplate.php?id=117&key=adjusting-the-parameters-of-the-debate>.