

# An Update on Anti-BDS Laws

*by Adam J. Sheppard*

The BDS movement calls for boycotts, divestment, and sanctions against Israel based on the movement's allegation that Israel violates Palestinians' rights under international law. The "boycotts" are of Israeli products, Israeli companies, Israeli artists, athletes, and other associations with ties to Israel; "divestment" urges banks and pension funds to stop investing in Israeli companies; "sanctions" refer to a campaign to pressure other governments to cease free-trade with Israel and block Israel's participation in international forums. BDS proponents argue that Israel is occupying Palestinian land and discriminating against Palestinian citizens who reside in Israel. They label Israel an "apartheid" government. BDS advocates couch their movement as a human rights issue (protecting Palestinians' rights). The movement's clear effect, however, has been to incite those attracted to the age-old virulent strain of anti-Semitism which attacks Jews as exerting undue influence in world affairs.

In response to the BDS movement, our country's lawmakers have passed anti-BDS legislation – laws that punish groups that boycott Israel. 32 states have enacted legislation that economically sanction companies that participate in the BDS movement. In 2015, Illinois became the first state in the country to enact such legislation (40 ILCS 5/1-110.16). In 2015, Cook County also passed a resolution which calls on the county pension fund to divest from foreign companies that choose to boycott Israel. Resolution No. 15-4701. In 2015, the Chicago City Council passed a similar resolution calling for the Municipal Employees' Annuity and Benefit Fund of Chicago to divest from companies boycotting Israel. R. 2015569.

Federal anti-BDS legislation has also been proposed. "In 2017, Congress considered the Israel Anti-Boycott Act (IABA), which would have criminalized supporting anti-Israel boycotts fostered by international governmental organizations. In 2019, the Senate passed the Combatting BDS Act to clarify that state anti-BDS bills are not preempted by federal law, while the House passed a resolution condemning BDS and 'all efforts to delegitimize the State of Israel.'"

<https://harvardlawreview.org/2020/02/wielding-antidiscrimination-law-to-suppress-the-movement-for-palestinian-rights/>. In 2019, a presidential directive also ordered federal agencies to consider a broad definition of anti-Semitism (promulgated by the International Holocaust Remembrance Alliance) which could render many BDS activities anti-Semitic, and thus, a civil-rights violation.

Despite the above-described legal actions, the public remains confused on the BDS issue. In 2019, a University of Maryland Critical Issues Poll,<sup>1</sup> included questions about BDS, starting with: "How much have you heard about BDS, or the Boycott, Divestment, and Sanctions movement aimed at Israel?" Nearly half of respondents (49%) said they have heard about BDS at least "a little." A plurality, 48%, then said they supported the movement, while only 15% said they opposed it. Id. 72% also opposed laws that penalize those who boycott Israel. Id. Additionally, a number of courts have recently struck down anti-BDS laws as unconstitutional (infringing on freedom of speech). *See e.g., Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020).<sup>2</sup> Coupling a lack of public education on anti-BDS laws with judicial reluctance to enforce these laws should serve as an alarm for lawyers – more must be done to educate the public on BDS and craft laws which effectively counterbalance the BDS movement.

*Adam Sheppard is a partner at Sheppard Law Firm, P.C. which concentrates in defense of criminal and Title IX cases. Mr. Sheppard is a long-standing member of the Decalogue Society's board of managers; he formerly served on the CBA's board of managers; he serves on the editorial board of the CBA and Decalogue. He has been repeatedly published in various legal periodicals.*

<sup>1</sup> Results are described by the Brookings Institute at <https://www.brookings.edu/blog/order-from-chaos/2020/01/08/what-do-americans-think-of-the-bds-movement-aimed-at-israel/>.

<sup>2</sup> Some courts have held that a boycott of Israel is neither speech nor inherently expressive conduct, *see e.g., Ark. Times LP v. Waldrip*, 362 F. Supp. 3d 617, 623 (E.D. Ark. 2019), but some of those cases are on appeal, *see e.g. id.*, and appeals courts have generally struck down anti-BDS legislation.