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# THE ISRAELI ANTI-BOYCOTT LAW: BALANCING THE NEED FOR NATIONAL LEGITIMACY AGAINST THE RIGHTS OF DISSENTING INDIVIDUALS

## INTRODUCTION

On July 11, 2011, the Israeli Parliament—the Knesset—approved the controversial Law for Prevention of Damage to the State of Israel through Boycott (“Anti-Boycott Law”, or “ABL”) which instituted civil penalties for Israeli citizens who organize or publicly endorse boycotts against the country.<sup>1</sup> The immediate, polarizing impact of the legislation resulted in a charged Israeli populace, and rhetoric on both sides grew increasingly extreme.<sup>2</sup> Critics slam the ABL as an impermissible strike against the fundamental rights of free speech and free expression.<sup>3</sup> To infringe on such basic rights, they argue, is to strike a blow against democracy and to take a step along the path toward fascism.<sup>4</sup> Conversely, supporters defend the ABL as a mechanism to combat damaging economic protests against

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1. Law Preventing Harm to the State of Israel by Means of Boycott, 5771-2011, S.H. No. 2304 p. 1 (Isr.). [hereinafter ABL]; Edmund Sanders, *Israel Law Targets Boycott Campaigns*, L.A. TIMES (July 12, 2011), <http://articles.latimes.com/2011/jul/12/world/la-fg-israel-boycott-20110712> (reporting that the ABL was approved by a 47-38 vote); Lahav Harkov, *Anti-boycott bill becomes law after passing Knesset*, JERUSALEM POST (July 11, 2011), <http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=228896>.

2. See Bradley Burston, *Israel's boycott law: the quiet sound of going fascist*, HA'ARETZ (July 12, 2011), <http://www.haaretz.com/blogs/a-special-place-in-hell/israel-s-boycott-law-the-quiet-sound-of-going-fascist-1.372881>; but see, Harriet Sherwood, *Israel's boycott ban draws fire from law professors*, THE GUARDIAN (July 14, 2011), <http://www.guardian.co.uk/world/2011/jul/14/israel-boycott-ban-criticised> (quoting Prime Minister Netanyahu as saying that the criticisms of the ABL were “reckless, irresponsible attacks against the legitimate attempt by a democracy on the defensive to draw a line between what is acceptable and what is not.”).

3. Editorial, *Not Befitting a Democracy*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/opinion/18mon2.html> (quoting the Anti-Defamation League warning that the ABL “impinged on the basic democratic rights of Israelis to freedom of speech and freedom of expression,” and Ha’Aretz that the ABL was “undemocratic.”).

4. See Burston, *supra* note 2.

Israel's policies regarding the settlements in the West Bank.<sup>5</sup> To these supporters, protests against the state of Israel from within its own population risks the de-legitimization of the Israeli government in the eyes of the world.<sup>6</sup> These supporters are quickly reminded by ABL opponents, though, that some major international entities have already expressed dismay over the ABL, criticizing the un-democratic nature of the law.<sup>7</sup>

With both sides of the ABL debate firmly entrenched, the Israeli Supreme Court ("Supreme Court")<sup>8</sup> will have to render a decisive interpretation, determining if the ABL is a valid exercise of the Knesset's legislative authority.<sup>9</sup> Despite what may seem like a clear-cut violation of traditionally protected individual rights, the outcome of a challenge to the ABL is far from certain. Israel has no formal constitution, and lacks codified protection for the values of free speech and free expression.<sup>10</sup> Therefore, in order to strike down the ABL, the Supreme Court must construe these protections from Israeli legal tradition, without the benefit of being able to point to a statute codifying free expression.<sup>11</sup> Yet, given the body of Israeli free speech and

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5. It is common practice for groups critical of Israeli policy to undertake "boycotts, disinvestment and sanctions" ("BDS") against Israel. *Not Befitting a Democracy*, *supra* note 3. Left-wing activists have embraced such tactics, even within Israel, as a method to protest the more right-leaning government. *Israeli Lawmakers Pass West Bank Settlement Boycott Law*, BBC NEWS – MIDDLE EAST (July 11, 2011), <http://www.bbc.co.uk/news/world-middle-east-14111925>.

6. See M.J. Rosenberg, Op-Ed, *Delegitimization is Just a Distraction*, L.A. TIMES (July 17, 2011), <http://articles.latimes.com/2011/jul/17/opinion/la-oe-rosenberg-israel-20110717>.

7. See, e.g. Jonathan Lis & Danna Harman, *European Union expresses concern over Israel's new boycott law*, HA'ARETZ (July 13, 2011), <http://www.haaretz.com/news/diplomacy-defense/european-union-expresses-concern-over-israel-s-boycott-law-1.373076>; Natasha Mozgovaya & Shlomo Shamir, *U.S. on Israeli boycott law: Freedom to protest is basic democratic right*, HA'ARETZ (July 12, 2011), <http://www.haaretz.com/news/diplomacy-defense/u-s-on-israeli-boycott-law-freedom-to-protest-is-a-basic-democratic-right-1.372884>.

8. For the purposes of this Note, "Supreme Court" refers to the highest court of Israel unless otherwise noted.

9. E.g., Edmund Sanders, *Israel Struggles with Free-Speech Rights*, L.A. TIMES (July 21, 2011), <http://articles.latimes.com/2011/jul/31/world/la-fg-israel-free-speech-20110731>.

10. See *infra* notes 12–15.

11. Israeli legal tradition—that is, the potential sources of law to which the Supreme Court can look when making their decisions—include Israeli

free expression jurisprudence, as well as international norms and policy concerns, the Israeli Supreme Court should overturn the ABL as an impermissible intrusion on fundamental rights.

Part I of this note provides some background information on the Israeli legal system and the authority of the Supreme Court. Part II examines the ABL itself, the political climate in which the law was passed, and the reaction thereto. Part III examines the relevant precedent regarding the protection of free speech and free expression, first under Israeli legal tradition and then under both foreign and Jewish traditions. Finally, Part IV explains why those precedents reviewed in Part III, combined with relevant policy concerns, mandate that the Supreme Court invalidate the ABL.

## I. THE ISRAELI LEGAL SYSTEM

Any arguments for or against the validity of the ABL must be evaluated in light of the constraints and policies of the Israeli legal system. Section A of this Part will discuss the constitutional history of Israel and how the country has evolved to compensate for the lack of a formal written instrument. Section B will examine the power of the Supreme Court within Israel's quasi-constitutional framework and also the interaction between the Supreme Court and the Knesset. By the end of this Part it will be clear that if the ABL is violative of Israeli law, the Supreme Court has the power to strike it down.

### A. *Israeli Constitutional Law*

Unlike America, Israel lacks a formal constitution to provide direction in answering potential questions regarding basic human rights protections.<sup>12</sup> Upon achieving statehood in 1948, the Israeli Declaration of Independence “stipulated that a constitution would be drafted,” but no such document was ever

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statutes, Israeli common law, international precedent (including American) and the teachings and values of Judaism (“Jewish law”). *See generally* Daniel Friedmann, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 ISR. L. REV. 192 (1975); Uriel Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1955).

12. Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325 (1999); *See also* SUZIE NAVOT, *THE CONSTITUTIONAL LAW OF ISRAEL* 35 (2007) (“Israel has no one official document known as ‘the constitution.’”).

produced.<sup>13</sup> Over time, in place of a unified constitution, the Knesset passed a series of eleven mostly procedural regulations called the "Basic Laws," which outlined the organization framework of the Israeli legal system and provided protection for some fundamental human rights.<sup>14</sup> Taken together, the Basic Laws comprise a de facto constitution that distills the essence of Israeli "constitutional principles."<sup>15</sup>

### B. *The Israeli Supreme Court*

The Supreme Court has two different functions. First, it serves as the final court for appeals coming from the lower levels of the Israeli court system. Second, it acts as the High Court of Justice, with original jurisdiction to hear "matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court."<sup>16</sup> In practice, the role of the High Court of Justice has often been to resolve pending constitutional or administrative issues.<sup>17</sup> However, unlike the American Supremacy Clause, Israeli law contained no expression of the Basic Laws' supremacy over other national legislation,<sup>18</sup> resulting, for many years, in the Supreme Court's inability to invalidate legislation with any clear

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13. Maya Tarr, *Regulating the Airwaves in Israeli's Burgeoning Democracy: Why the Israeli High Court of Justice Should Have Acknowledged Free Speech in the Case of Artuz Seven*, 18 CARDOZO J. INT'L & COMP. L. 687, 691-92 (2010). The inability to pass a formal constitution is likely due to "divergent views" on constitutional principles within Israel's "heterogeneous" society. *Id.* at 692; see also Ruth Gavison, *Law, Adjudication, Human Rights, and Society*, 40 ISR. L. REV. 31, 50 (2007).

14. NAVOT, *supra* note 12, at 36-37. The eleven basic laws are *The Knesset* (1958); *Israeli Lands* (1960); *The President of the State* (1964); *The Government* (1968); *The State Economy* (1975); *Jerusalem, the Capital of Israel* (1980); *The Judiciary* (1984); *The State Comptroller* (1986); *Freedom of Occupation* (1992); and *Human Dignity and Liberty* (1992). *Id.* at 37.

15. Asher Maoz, *Constitutional Law*, in THE LAW OF ISRAEL: GENERAL SURVEYS at 6 (Itzhak Zamir & Sylvain Colombo eds., 1995).

16. See Basic Law: The Judiciary, 5744-1984, 38 LSI 101, §15 (1984) (Isr.), available at [http://www.knesset.gov.il/laws/special/eng/basic8\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm).

17. Tarr, *supra* note 13, at 696.

18. Compare Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12, 17 (2006), with Bradford R. Clark, *Symposium: Separation of Powers as a Safeguard of Federalism: Article: Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422 (2008) (noting that the Supremacy Clause provides order the hierarchy of American law by naming the Constitution as part of the "supreme Law of the Land.").

authority.<sup>19</sup> This hesitancy changed in 1995, with the landmark Supreme Court decision in *United Mizrahi Bank v. Migdal Agricultural Cooperative*,<sup>20</sup> in which the Supreme Court decided that two of the Basic Laws,<sup>21</sup> Human Dignity and Freedom of Occupation (“Human Rights Basic Laws”), would constitute an Israeli “Bill of Rights,” supreme to other legislation.<sup>22</sup> The Supreme Court reasoned that the Human Rights Basic Laws grant the power of judicial review over “the failure of a regular law to meet [the Human Rights Basic Laws] requirements . . . such a law is constitutionally flawed and the Court may declare it void.”<sup>23</sup> Since *Migdal*, the Supreme Court has been far more aggressive in invalidating legislation that conflicts with the Human Rights Basic Laws.<sup>24</sup> Thus, having granted itself the power of judicial review, the Supreme Court has established its own authority to strike down the ABL should it find that the ABL conflicts with the protections of the Human Rights Basic Laws.<sup>25</sup>

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19. Tarr, *supra* note 13, at 691. Tarr notes the lack of a law addressing the superiority of the Basic Laws over other legislation as a possible source for the Supreme Court’s historical hesitance to exercise Judicial Review over the decisions of the Knesset. *Id.* at 692.

20. CA 6821/93 *United Mizrahi Bank v. Migdal Agricultural Collective* 49(4) PD 221 [1995] (Isr.).

21. Prior to 1992, the Basic Laws were purely organizational and lacked “meaningful safeguarding of substantive values.” Tarr, *supra* note 13, at 692. The passage of the Human Rights Basic Laws has been called Israel’s “constitutional revolution” for its recognition and codification of protected civil rights and its role in providing for judicial review. Barak, *supra* note 18, at 18.

22. CA 6821/93 *Migdal Agricultural Collective*, at 139–40.

23. *Id.* at 139. *Migdal* has been described as “the Israeli equivalent of *Marbury v. Madison*.” Tarr, *supra* note 13, at 695.

24. Barak, *supra* note 18, at 21.

25. See *supra* notes 19–23. However, currently pending before the Supreme Court (presented in April 2012) is a proposed Basic Law that would provide the Knesset with the authority to override a Supreme Court veto by vote of a sixty-five member super majority (out of 120). Lahav Harkov, Joanna Paraszczuk, *Rivlin Voices Support for Basic Law on Legislation*, JERUSALEM POST (Apr. 8, 2012), <http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=265290>. Under the proposed Basic Law: Legislation, the Knesset would have the power to enact legislation in spite of the Supreme Court’s opposition, potentially stripping the Supreme Court of its deciding vote on the ABL. See *id.* Supporters of the new Basic Law view it as protection against the whims of the branch of government least accountable to the general public, while critics worry that

## II. THE ABL

After establishing the proper authority for evaluating the validity of the ABL, the focus of the following Part turns to the ABL itself. Section A of this Part will address the history underlying the ABL and the political motivations of each side of the debate. Section B will examine the actual terms of the ABL and how they could affect individuals. Section C will address both the negative and positive reactions to the passage of the ABL. By the end of this Part, the reader will better understand the political motivations weighing on each side of the ABL discussion.

### A. *Origins of the Conflict*

Israel occupies a precarious geographical place near the center of the Muslim world, surrounded by potentially hostile nations.<sup>26</sup> Since its inception in 1948, Israel has fought numerous wars for its very survival and its right to exist as a nation.<sup>27</sup> Even when not faced with imminent, traditional warfare, protestors still threaten Israel's legitimacy through economic warfare, specifically the practice of boycotts, disinvestment, and sanctions ("BDS")<sup>28</sup> meant to weaken Israel's economy.<sup>29</sup> Today, Israel's policies regarding the West Bank settlements are increasingly controversial<sup>30</sup> and, in protest, opponents of Israeli policy have participated in international movements advocat-

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the Knesset is simply removing the last remaining check on its growing power. See Nathan Jeffay, *Israel in Power Struggle with Top Court*, JEWISH DAILY FORWARD (Apr. 29, 2012), <http://forward.com/articles/155370/israel-in-power-struggle-with-top-court/>.

26. See, e.g., Samuel W. Lewis, *United States and Israel: the Evolution of an Unwritten Alliance*, 53 MIDDLE EAST JOURNAL 364, 373–78 (1999).

27. See *id.* at 364–75.

28. See Rosenberg, *supra* note 6.

29. See, e.g., MARTIN A. WEISS, CONG. RESEARCH SERV., RS 22424, THE ARAB LEAGUE BOYCOTT OF ISRAEL (2006) ("The Arab League has maintained an official boycott of Israeli companies and Israeli-made goods since the founding of Israel in 1948.").

30. Ethan Bronner, *Amid Statehood Bid, Tensions Simmer in West Bank*, N.Y. TIMES (Sept. 23, 2011), <http://www.nytimes.com/2011/09/24/world/middleeast/west-bank-tensions-simmer-amid-palestinian-united-nations-statehood-bid.html?pagewanted=all>.

ing the use of BDS tactics.<sup>31</sup> Such tactics have been advocated by a diverse group of supporters ranging from “international, radical pro-Palestine campaigners, Western liberals, and Israeli leftists.”<sup>32</sup> It is this third group (Israeli leftists) that seems to have particularly caught the attention of Israeli lawmakers such as Knesset member Zeev Elkin, the sponsor of the ABL, who noted that he was concerned that the boycotts have “increasingly come from within our own midst.”<sup>33</sup> In 2011, some Israelis began calling for boycotts of products with links to the West Bank settlements.<sup>34</sup> In response, Elkin, a member of Prime Minister Benjamin Netanyahu’s Likud party, proposed the ABL as a way to alleviate the damage felt by West Bank businesses as a result of the boycott campaigns.<sup>35</sup> The Knesset passed the ABL by a margin of forty-seven to thirty-eight.<sup>36</sup>

### B. *The Provisions of the ABL*

The ABL defines a boycott as “deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage.”<sup>37</sup> Under the ABL, it is a civil offense to:

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31. Natalie Rothschild, Op-Ed, *Criticism of Boycott Bill by BDS Supporters in Israel and Abroad Rings Hollow*, YNET NEWS (July 13, 2011), <http://www.ynetnews.com/articles/0,7340,L-4094647,00.html>.

32. *Id.*; see also, Peter Beinart, *To Save Israel, Boycott the Settlements*, NY TIMES (Mar. 18, 2012), [http://www.nytimes.com/2012/03/19/opinion/to-save-israel-boycott-the-settlements.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2012/03/19/opinion/to-save-israel-boycott-the-settlements.html?_r=2&pagewanted=all); Jacob Edelist, *Major British Supermarket Chain Tightens Boycott of Israeli Goods, Companies*, JEWISH PRESS (Apr. 29, 2012), <http://www.jewishpress.com/news/israel/major-british-supermarket-chain-tightens-boycott-of-israeli-goods-companies/2012/04/29/>.

33. *Not Befitting a Democracy*, *supra* note 3.

34. Joel Greenberg, *Israeli Anti-Boycott Law Stirs Debate on Settlement Products*, WASH. POST (July 22, 2011), [http://www.washingtonpost.com/world/middle-east/israeli-anti-boycott-law-stirs-debate-on-settlement-products/2011/07/20/gIQA91LyTI\\_story.html](http://www.washingtonpost.com/world/middle-east/israeli-anti-boycott-law-stirs-debate-on-settlement-products/2011/07/20/gIQA91LyTI_story.html).

Elkin stated that he sponsored the ABL in order to “provide legal recourse to people harmed by boycott campaigns that targeted them because of where they happen to live.” *Id.*

35. *Id.*

36. Harkov, *supra* note 1.

37. ABL, *supra* note 1, at 1–2.



knowingly publish[] a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is reasonable probability that the call will lead to a boycott, and he who published the call was aware of this possibility.<sup>38</sup>

Should an individual deliberately call for a boycott in violation of this provision, then that individual may be liable for “[punitive] damages that are independent of the [amount of] actual damage caused.”<sup>39</sup>

### C. *Response to the ABL*

Response to the passage of the ABL was immediate and vigorous; supporters defended the bill passionately, while opponents petitioned the Supreme Court to overturn it within days of its passage.<sup>40</sup> Supporters of the ABL view the law as a protection against the threat boycotts pose to the very legitimacy of the Israeli government,<sup>41</sup> as well as protection against the economic and social prejudices these boycotts place upon Israeli businesses.<sup>42</sup> The threat to legitimacy posed by BDS actions is especially problematic for Israel because such actions shift discussion from questions about Israel’s policies to questions over

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38. *Id.*

39. *Id.* “In calculating the sum of these damages, for example, the court will take into consideration, among other things, the circumstances under which the wrong was carried out, its severity and its extent.” *Id.*

40. See *Boycott Law May Backfire on Israel*, RUSSIA TODAY (July 14, 2011), <http://www.rt.com/news/boycott-law-israel-backfire/>; see also Burstson, *supra* note 2. But see, Karni Eldad, *Israel’s Boycott Law is Constitutional*, (July 18, 2001), <http://www.haaretz.com/print-edition/opinion/israel-s-boycott-law-is-constitutional-1.373800>. The state of Israel filed its defense of the ABL with the Supreme Court in January, 2012. See Joanna Paraszczuk, *Boycott Law Constitutional Despite Difficulties*, JERUSALEM POST (Jan. 18, 2012), <http://www.jpost.com/NationalNews/Article.aspx?id=254084>. Indeed, Ahmed Tibi, a member of Knesset, has gone so far as to directly challenge the ABL, publicly calling for a Canadian boycott of Israeli goods. Lahav Harkov, *MK Tibi Break Boycott Law on Trip to Canada*, JERUSALEM POST (Apr. 17, 2012), <http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=266368>.

41. In South Africa, the threat of a boycott caused a massive exodus of foreign investment, which in turn put heavy economic pressure on the South African government. See Jennifer Frankel, Note, *The Legal and Regulatory Climate for Investment in Post-Apartheid South Africa: A Historical Overview*, 6 CARDOZO J. INT’L & COMP. L. 183, 191–93 (1998).

42. See Eldad, *supra* note 40; Greenberg, *supra* note 34.

Israel's very economic viability.<sup>43</sup> Supporters argue that, given such a clear threat, the ABL presents a reasonable and proportional restriction on the freedom of expression when balanced against the interest of state security.<sup>44</sup> Alternatively, opponents of the ABL argue that delegitimization is not an appropriate fear given Israel's relative strength and prosperity,<sup>45</sup> and that the public's interest in maintaining the basic right of political speech is far too important to be abridged for such a nebulous and long-term threat.<sup>46</sup>

### III. ANALYSIS

Freedom of expression<sup>47</sup> and democracy are inextricably linked.<sup>48</sup> Free expression rights "facilitate individuals in forming and joining groups for advocacy and action," which serve as "indispensable features" of modern society.<sup>49</sup> Given the importance of expressive rights, many countries have provided explicit guarantees of the freedom of expression.<sup>50</sup> Israel is no exception, as it legally recognizes "all human rights that characterize modern democracy,"<sup>51</sup> among which it counts the freedom of expression. Therefore, the following sections will look at the history of freedom of expression law in Israel, as well as internationally, to determine whether the ABL falls within the scope of the protection granted to this particular right.

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43. Working Group Report, Co-Chairs Mitchell Bard & Gil Troy, *Delegitimization of Israel: Boycotts, Divestment and Sanctions*, GLOBAL FORUM FOR COMBATING ANTI-SEMITISM (2009), <http://www.gfantisemitism.org/Conference2009/WorkingGroups/Pages/WorkingGroupReports.aspx>.

44. Eldad, *supra* note 40 (noting that the ABL is limited only to the sort of public calls for boycott that could actually threaten the state, still allowing every Israeli "to buy whatever he wants.").

45. Rosenberg, *supra* note 6.

46. See Burston, *supra* note 2.

47. For the purposes of this Note, freedom of expression will be used as a "catch-all" term incorporating any protected political right, including speech, assembly, participation, and association.

48. See Henry J. Steiner, *Two Sides of the Same Coin?: Democracy and International Human Rights*, 41 ISR. L. REV. 445, 446–47 (2008).

49. *Id.* at 447.

50. See, e.g., *infra* Part III.B.1.

51. Barak, *supra* note 18, at 13.

*A. Israeli Freedom of Expression*

For years, protection of political expression existed in the Israeli common law without "statutory support."<sup>52</sup> In 1992, the Knesset passed the Human Rights Basic Laws, giving this protection a textual home and providing the Supreme Court with an avenue for invalidating legislation that challenged it.<sup>53</sup> The Human Rights Basic Laws provide explicit protection from deprivation of the right to "human dignity, liberty, property, privacy, freedom of occupation, and freedom from detention, imprisonment, and extradition."<sup>54</sup> However, this protection is limited, making exceptions for violations of the Human Rights Basic Laws made (1) in response to a valid threat to the State of Israel and (2) narrowly tailored to meeting only the desired end.<sup>55</sup> Accordingly, any violation of a protected right must be evaluated in terms of its justification and proportionality to meeting that end.<sup>56</sup>

Freedom of expression is not explicitly provided for in the Human Rights Basic Laws,<sup>57</sup> so in order to receive the same protections listed above, the Supreme Court must interpret the law to find that expression is implicitly included.<sup>58</sup> The Supreme Court has consistently done so by reading freedom of expression into the explicit guarantee of human dignity provided for in the text of the Human Rights Basic Laws.<sup>59</sup> Despite

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52. *Id.*

53. *See supra* Part II.A.

54. Barak, *supra* note 18 at 16.

55. *See* Basic Law: Human Dignity, 5754-1994, SH No. 1454, §8 (1994) (Isr.) ("No violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."); *see also* Barak, *supra* note 18, at 16.

56. *See* NAVOT, *supra* note 12, at 41-42.

57. HCJ 2557/05 Majority Camp v. Israel Police (2) IsrLR 399, 409 [2006] (Isr.).

58. Tarr, *supra* note 13, at 695.

59. Barak, *supra* note 18, at 12, 16; Zaharah R. Markoe, Note, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L & COMP. L. 319 (2000). This construction of the Human Rights Basic Law has become the accepted standard for the breadth of protection provided by the Basic Laws. *See, e.g.* HCJ 4804/94 Station Film Co. Ltd. v. Film Review Board IsrLR 1, 13 [1997] (Isr.); PPA 4463/94 Golan v. Prison Service IsrLR 1, 18, 58 [1995-1996] (Isr.) ("Even without an express provision, freedom of speech is included in human dignity, according to the meaning thereof in sections 2 and 4 of the Basic Law. For what is human dignity without the basic liberty of an individual to hear the speech of others and to utter his own speech.").

the constant security threats facing Israel,<sup>60</sup> the Supreme Court's integration of free expression into the fabric of the Basic Laws is also consistent with the attitudes of the Israeli populace, who have indicated support for "abstract democratic principles" on a level consistent with that of the American populace.<sup>61</sup> Since free expression is entitled to the protection of the Supreme Court under the Human Rights Basic Laws, any violation thereof can only be justified if legislation in question is: (1) in response to a valid threat to the State of Israel and (2) narrowly tailored to meeting only the desired end.<sup>62</sup>

Free expression jurisprudence in Israel dates back to the landmark decision in *Kol Ha-Am v. Minister of the Interior*,<sup>63</sup> in which the Supreme Court held free expression to be a supreme right, well before the passage of the Basic Law: Human Dignity.<sup>64</sup> In *Kol Ha-Am*, the Israeli Interior Minister had shut down an Israeli newspaper, which had criticized Israel for its support of military action in Korea, because he saw it as a potential threat to the state's safety.<sup>65</sup> The Supreme Court held that because free expression was such a "fundamental right,"<sup>66</sup> it cannot be abridged without being able to forecast serious danger "almost to a certainty."<sup>67</sup> In this case, Supreme Court found

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60. See *supra* Part II.A.

61. JULIE L. ANDSAGER ET AL., FREE EXPRESSION IN 5 DEMOCRATIC PUBLICS 122 (2004).

62. See *supra* Part II.A; Basic Law: Human Dignity, *supra* note 55, at §8.

63. HCJ 75/53 *Kol Ha-Am v. Minister of the Interior* 7 PD 871 [1953] (Isr.).

64. See *id.*

65. *Id.*

66. The right to free expression is fundamental because

[d]emocracy consists, first and foremost, of government by consent, the opposite of government maintained by the power of the mailed fist; and the democratic process, therefore, is one of selection of the common aims of the people and the means of achieving them, through the public form of negotiation and discussion, that is to say, by open debate and the free exchange of ideas on matters of public interest [] 'Public opinion' plays a vital part in that discussion, carried on through the political institutions of the state, such as parties, general elections and debates in the legislature - and it plays that part not only when the citizen goes to the polls, but at all times and in all seasons.

*Id.* at 7 (citation omitted).

67. *Id.* at 27 ("In the light of circumstances, that the publication makes it possible, amounting almost to a certainty, that serious harm will be caused to

that the threat alleged by the Interior Minister, that of decreased confidence in the Israeli government, was insufficient.<sup>68</sup>

After the passage of the Human Rights Basic Laws, the *Kol Ha-Am* near certainty standard was approved legislatively in the Basic Law: Human Dignity.<sup>69</sup> Just a few years after the codification of this rule, the Supreme Court took to expanding on the "near certainty" standard for modern application. In *Station Film Co. Ltd. v. Film Review Board*, the Supreme Court held that free expression rights (in this case, the ability to exhibit a provocative film) were not limitless, and could be abridged "in order to advance societal goals, such as ensuring the country's very existence and democratic nature, as well as protecting the integrity of the judicial system, as well as public peace and security."<sup>70</sup> However, the Supreme Court clarified that in order to justify abridging free expression the perceived threats must be nearly certain.<sup>71</sup> Drawing on the *Kol Ha-Am* near certainty test, the Supreme Court explained the appropriate balance as follows:

Freedom of expression may be impaired if the following two conditions are satisfied. First the harm the expression causes to the public peace must be *serious, grave, and severe*. The harm must exceed the "level of tolerance" acceptable in a democratic society and shake that society to its very foundation. Second, the probability of such an injury to public peace occurring must be *nearly certain*. It is insufficient to say that the harm be only possible and probable.<sup>72</sup>

In practice, the Supreme Court need not always follow this test verbatim, but instead has the discretion to "adopt a suitable test, while considering the substance and importance of competing principles . . . with respect to their *relative priority* and the measure of protection which we would like to grant each principle or interest."<sup>73</sup> For artistic censorship cases, like

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the public peace, then there is nothing to prevent him from exercising the power.").

68. See generally *id.*

69. Compare *id.*, with Basic Law: Human Dignity, *supra* note 55, at §8.

70. HCJ 4804/94 *Station Film* at 15.

71. *Id.* at 17.

72. *Id.* (emphasis added) (internal quotation marks omitted).

73. HCJ 448/85 *Daher v. Minister of the Interior* 40(2) IsrSC 701, 708 [1985] (emphasis in original).

*Station Film*, the Supreme Court has typically allowed for punctures in the cloak of free expression protection.<sup>74</sup> For example, in *Israel Film Studios v. Levi Geri*, the Supreme Court determined that a newsreel that presented an obviously biased and misleading picture of a political topic did not need to be protected because of “the newsreel’s unique ability to affect the audience through its visual medium.”<sup>75</sup> However, in cases where the act of expression is not pure fiction, like *Station Film*, or heavily biased (like *Israel Film Studios*), the Supreme Court has been much more hesitant to restrict expression, even if that expression is critical of Israeli policy.<sup>76</sup> This hesitancy was on full display when the Supreme Court held, in *Bakri v. Israel Film Council*, that a documentary portraying Palestinian reactions to Israeli terrorist activities merited the court’s protection even though it may have been anti-Israel and “offensive.”<sup>77</sup>

Beyond the context of artistic expression, the Supreme Court’s application of the *Kol Ha-am* near certainty test has skewed even more heavily toward protection of the rights of individuals.<sup>78</sup> In *Majority Camp v. Israel Police*, the Supreme Court ruled that an interest group seeking to stage a rally in support of a particular government action had the fundamental right to demonstrate publicly.<sup>79</sup> Similarly, in *Levi v. Southern District Police Commander*, the Supreme Court held that the Israeli Police did not have the ability to deny protestors the right to demonstrate unless the police could show “substantial evidence” of harm to public security.<sup>80</sup> In *Levi*, the Committee against the War in Lebanon, an anti-war advocacy group, had applied for a permit to stage a march against political vio-

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74. See, e.g., HCJ 4804/94 *Station Film*; HCJ 243/62 *Israel Film Studios v. Levi Geri* 16 PD 2407 [1962] (Isr.).

75. Markoe, *supra* note 59, at 335.

76. See HCJ 316/03 *Bakri v. Israel Film Council* 58(1) PD 249[2003] (Isr.); see also HCJ 680/88 *Schnitzer v. Chief Military Censor* 42(4) PD 617 [1989] (Isr.).

77. See HCJ 316/03 *Bakri* at 30.

78. See, e.g., HCJ 2557/05 *Majority Camp* at 409.

79. “A demonstration that has a political or social background is an expression of the autonomy of the individual will, freedom of choice, and freedom of action that are included within the scope of human dignity as a constitutional right.” HCJ 2557/05 *Majority Camp* at 411.

80. HCJ 153/83 *Levi v. S. Dist. Police Commander*, 38(2) PD 393, 416 [1984] (Isr.).

lence.<sup>81</sup> The Israeli police denied the permit application on the grounds that it was being planned for the anniversary of the murder of a leader in the peace movement and the police feared that the protest would incite violence and threaten public safety.<sup>82</sup> The Supreme Court found the police's "serious apprehension over a grave threat to public order and security" was not enough for the Court to allow them to suspend the protestors' right to express themselves under the clear probability test.<sup>83</sup>

However, the Supreme Court does not rule in favor of free expression in every instance. For example, in *State of Israel v. Kahanae*, the Supreme Court allowed for a revocation of free expression rights in the case of a radical politician, Binyamin Kahanae, who had been convicted of sedition for voicing anti-government rhetoric.<sup>84</sup> Kahanae had been distributing pamphlets, in response to terrorist attacks, advocating for government-sanctioned violence against Arab villages within Israel.<sup>85</sup> After a series of reversals,<sup>86</sup> the Supreme Court (using the familiar language of the *Hol Ha-Am* test) found a "near certainty" that the defendant's continued discourse would harm the government "structure."<sup>87</sup> The Supreme Court also explained that the law of sedition was designed to protect the value of "social cohesiveness," and Kahanae's actions posed a direct threat to this value.<sup>88</sup> Furthermore, the Supreme Court determined that a violation of social cohesiveness presented potentially dire consequences for the state of Israel.<sup>89</sup> Taken togeth-

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81. *Id.*

82. *Id.*; Markoe, *supra* note 59, at 341.

83. HCJ 153/83 *Levi* at 418–19; Markoe, *supra* note 59, at 340–41.

84. CrimFH 1789/98 *State of Israel v. Kahane* 54(5) PD 193, 232, 233 [2000] (Isr.). Sedition in Israeli law is defined as "promot[ing] feelings of ill-will and enmity between different sections of the population." Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, 13 DUKE J. COMP. & INT'L L. 155, 162–63 (2003).

85. CrimFH 1789/98 *Kahane* at 197.

86. The trial court initially acquitted Kahane, but the appellate court convicted him on appeal. Gur-Arye, *supra* note 84, at 168–72. The Supreme Court overturned Kahane's conviction then finally reinstated it upon rehearing. *Id.*; CrimFH 1789/98 *Kahane*.

87. *Id.* at 199, 225.

88. *Id.* at 213–15; Gur-Arye, *supra* note 84, at 170.

89. Justice Or noted that the value of social cohesiveness "is of special importance against the background of a society with a varied social mosaic like the state of Israel, in which minorities, and members of different religious sects, live side by side and in which the differences among the various popu-

er, the probability and severity of the harm threatened by Kahanae's actions was enough for the Supreme Court to uphold Kahanae's conviction and to quash his freedom of expression.<sup>90</sup>

The final category of expression discussed by the Supreme Court, although far less conclusively, is commercial expression.<sup>91</sup> In *Kidum Yazmuth U'Molut v. Broadcasting Authority*, the Supreme Court examined the issue of whether an advertiser had the right to display controversial advertisements.<sup>92</sup> The advertisement in question was the slogan of Kidum, which in fact meant "Go Excel," but also "provoked the connotation" of a Hebrew curse word.<sup>93</sup> The Israeli Broadcasting Authority decided to prohibit the display of this advertisement on the grounds that it "includes an offense to good taste or contradicts public order or harms the public." Kidum filed suit, alleging an infringement of their right to free expression.<sup>94</sup> The Supreme Court agreed with Kidum, finding that the actions of the Broadcasting Authority were a violation of Israeli free expression tradition.<sup>95</sup> The Supreme Court cautioned, though, that while free expression is a "superlative right" entitled to the highest protection of the Court, purely commercial expression does not threaten political or democratic participation like other types of expression and may therefore be subject to lesser protection.<sup>96</sup> However, the Supreme Court stopped short of categorizing Kidum's advertisement as falling outside of this lesser protection, invalidating the Broadcasting Authority's deci-

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lation groups that live in it are significant. Its value is in ensuring the existence of a multi-cultural, pluralistic society, and in preventing the disintegration of the social fabric." CrimFH 1789/98 *Kahane*, at 214; Gur-Arye, *supra* note 84, at 170–71.

90. See CrimFH 1789/98 *Kahane*; Gur-Arye, *supra* note 84, at 170–71.

91. See RAPHAEL COHEN ALMAGOR, THE SCOPE OF TOLERANCE: STUDIES ON THE COSTS OF FREE EXPRESSION AND FREEDOM OF THE PRESS 94–99 (2006) (describing in detail H.C.J. 606/93 *Kidum Yazmuth U'Molut v. Broadcasting Authority* 48 (2) PD 8 [1995] (Isr.)).

92. *Id.*

93. "Go Excel in Hebrew is lech titzayen. Go Fuck Yourself is lech tizdayen." *Id.* at 94 n.35

94. *Id.* at 94.

95. *Id.*

96. See *id.*; see also Amit M. Schejter, *Art Thou for Us, or for Our Adversaries? Communicative Action and the Regulation of Product Placement: A Comparative Study and a Tool for Analysis*, 15 TUL. J. INT'L & COMP. L. 89, 111 (2006).



sion because the commercial expression in question did not "seriously offend public sensibilities."<sup>97</sup>

Taken as a whole, Israeli law provides strong protection for the rights of individuals to express themselves, so long as that expression does not immediately threaten the public order with serious harm.<sup>98</sup> Given Israel's precarious political reality,<sup>99</sup> maintaining the proper balance point for Israeli society is a difficult task.<sup>100</sup> However, the Supreme Court has generally protected the rights of the minority to express themselves, particularly in the political context without evidence of truly extreme danger.<sup>101</sup>

### *B. Foreign Freedom of Expression*

#### 1. American Free Expression

Aside from Israeli law, the Supreme Court often relies on foreign precedent to provide guidance on thorny issues of first impression.<sup>102</sup> Chief among the bodies of foreign precedent considered by the Supreme Court is American law, to which the Supreme Court turns with frequency.<sup>103</sup> Both evolving from the British common law model,<sup>104</sup> Israeli law and American law share many of the same foundational principles and "reasoning."<sup>105</sup>

American law distinguishes between political and commercial expression in determining the appropriate level of government intervention.<sup>106</sup> Regarding political expression, American law requires that "the government must show an imminent threat

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97. ALMAGOR, *supra* note 91, at 94.

98. *See supra* notes 64–83.

99. *See supra* notes 26–36.

100. *See id.*

101. *See supra* notes 64–90.

102. Gorney, *supra* note 11, at 1210.

103. *Id.* ("... American [law] occupies a 'prominent place' [in Israeli jurisprudence].").

104. *Id.* Like America, Israel emerged from British rule and began to fashion its legal system from the existing British common law model. *See generally* NAVOT, *supra* note 12, at 35–37; Gorney, *supra* note 11, at 1210.

105. *Id.* at 1210.

106. *See* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984).

of harm before regulating [expression].”<sup>107</sup> Indeed, the American concept of “clear and present danger” served as the model for the “substantially similar” near certainty test developed by the Supreme Court to evaluate violations of the freedom of expression.<sup>108</sup> Within the political expression context, U.S. courts have consistently found that the right of citizens to boycott domestic business is unquestionably protected by the First Amendment of the U.S. Constitution.<sup>109</sup> In *NAACP v. Claiborne Hardware Co.*, the United States Supreme Court ruled that participants in a damaging boycott of white-owned business could not be held liable for damages sustained by local businesses, because the value of the expression was more important than the potential harm.<sup>110</sup> Commercial expression, on the other hand, does not receive the broad constitutional protection received by political speech in America.<sup>111</sup>

However, constitutional protection for boycott expression does not extend universally to all potential boycotts. In 1979, in response to the Arab boycott of Israel, Congress passed the Export Administration Act (“EAA”) which prohibited “any United States person” from taking action “with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States.”<sup>112</sup> The seemingly broad reach of the EAA is actually far narrower than it first appears.<sup>113</sup> The EAA was passed to combat the practice of “secondary boycotts,” whereby the Arab countries that were boycotting Israel (the “primary boycott”)

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107. Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 977 (2010). The imminence Gey refers to is described as the “clear and present danger standard.” *Id.* at n.27.

108. See HCJ 75/53 *Kol Ha-Am*; Tarr, *supra* note 13, at 695.

109. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); Michael C. Harper, *The Consumer’s Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984).

110. *Claiborne Hardware*, 458 U.S. 886.

111. See *Briggs & Stratton Corp.*, 728 F.2d 915.

112. 50 U.S.C. App. §2407 (1979). Action, in terms of the EAA includes a wide variety of activities including refusing to do business with the boycotted country or furnishing information about a company’s relationship with the boycotted country. *Id.*; Nina J. Lahoud, *Federal and New York State Anti-Boycott Legislation: The Preemption Issue*, 14 N.Y.U. J. INT’L L. & POL. 371, 372 (1981).

113. See Lahoud, *supra* note 112, at 373.

would boycott any U.S. companies that participated in trade with Israel.<sup>114</sup>

The United States Court of Appeals for the Seventh Circuit addressed the constitutionality of the EAA in *Briggs & Stratton Corp. v. Baldridge*.<sup>115</sup> There, Briggs & Stratton, a major American corporation claimed that the EAA violated their free expression rights because they could not respond to questionnaires<sup>116</sup> from Arab companies who were participating in the Arab boycott of Israel.<sup>117</sup> The Seventh Circuit rejected the corporation's claims and upheld the provisions of the EAA, distinguishing between those strict protections afforded to political expression and the lesser protection available for commercial expression.<sup>118</sup> Specifically, the Seventh Circuit decided that Briggs & Stratton's participation in the Arab questionnaires was not political speech because "[Briggs & Stratton] do not seek to answer the questionnaire in order to influence the Arabs decision to conduct or enforce a trade boycott with Israel."<sup>119</sup> Instead, filling out the questionnaire was merely commercial speech because Briggs & Stratton's motivation in filling out the questionnaires was simply that "they wish[ed] . . . to show that the boycott's sanctions should not be applied to them . . . ."<sup>120</sup> In further defending the constitutionality of the EAA, the Seventh Circuit noted that Briggs and Stratton were, "free to communicate their views about the relative merits of the Arabs' political decisions," and it was only the secondary participation in a foreign boycott that was prohibited.

American law thus clearly defines the boundaries of expression regulation. Political expression is afforded the heightened protection of an imminent danger standard, while commercial expression can be infringed at the government's discretion. In the boycott context, the law is similarly clear. Primary boycott-

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114. *Id.* at 378-79. Indeed, the United States recognized the right of the Arab countries to engage in the primary boycott of Israel, just not the secondary boycott. *Id.*

115. *Briggs & Stratton Corp.*, 728 F.2d 915.

116. In conjunction with their boycott of Israel, Arab countries would send questionnaires to U.S. businesses to gauge their degree of trade with Israel, and then if the questionnaire revealed trade with Israel, they would initiate secondary boycotts of the responding company. *Id.* at 916.

117. *Id.*

118. *Id.* at 917-18.

119. *Id.* at 917.

120. *Id.*

ing, that is, direct expressions of political will through economic measures, is entitled to full free expression protection. Secondary boycotts, commercial in nature, do not merit similar protection. The link between the boycott standard and the general expression standard is clear. Where a restriction on expression or boycott threatens an individual's ability to participate in democracy (i.e. political speech or a primary boycott), this restriction is impermissible.<sup>121</sup> However, where the individual's interests at stake are something less central than democratic rights (i.e. economic rights, secondary boycott participation), regulation is permitted much more freely.<sup>122</sup>

## 2. International Free Expression

The international legal community has paid increasing attention to issues of human rights, particularly with respect to participation in the political process.<sup>123</sup> Members of that community agree that, "everyone has the right to take part in the government of his country,"<sup>124</sup> and that "every citizen [has a right] to 'take part' in the 'conduct of public affairs.'"<sup>125</sup> The U.N. further expanded these guarantees in 1996 when they explained that it lies implicit in the guarantee of participation in public affairs that every citizen have the opportunity to "exert[] influence through public debate, conduct[] a dialogue with their representatives, and exercis[e] their capacity to 'organize themselves.'"<sup>126</sup> Such guarantees speak to the high level of importance placed on free expression, especially political expression, by the international community.

As for the ABL, its provisions clearly limit the ability for Israeli citizens to "organize themselves" by forming boycotts of Israeli products or businesses.<sup>127</sup> Furthermore, boycotts certainly represent the ability of individuals to attempt to take

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121. See, e.g., *Claiborne Hardware*, 458 U.S. 886.

122. See, e.g., *Briggs & Stratton Corp.*, 728 F.2d 915.

123. Steiner, *supra* note 48, at 450–52.

124. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, ¶ 21, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

125. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 art. 25.

126. U.N. High Comm'r for Human Rights, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, ¶8, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

127. ABL, *supra* note 1, at 1–2.

part in government by influencing their countries policies. Therefore, the ABL is out of step with the protections for political freedom of expression rights advanced by the international community with increasing frequency.

### 3. Jewish Freedom of Expression

A central part of Israel's identity is its status as the "state of the Jewish people."<sup>128</sup> Accordingly, the teachings and values of Judaism have played a major role in shaping Israel's legal system.<sup>129</sup> As a preliminary matter, Israel has established a series of religious courts, separate from the secular court system, to adjudicate religious issues that may arise.<sup>130</sup> For secular courts, including the Supreme Court, the precise value of Jewish law as precedent is uncertain.<sup>131</sup> What is certain, however, is that Jewish law serves, at the very least, as a guideline for the moral principles of the state of Israel to which the Supreme Court may turn when informing their decisions on difficult issues.<sup>132</sup>

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128. See NAVOT, *supra* note 12, at 309.

129. IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL JUSTICE SYSTEM 111 (1975). ("Religious institutions... are interlocked with the state's legal system.").

130. NAVOT, *supra*, note 12, at 144–45.

131. David Wermuth, Note, *Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions*, 32 U. PA. J. INT'L L. 1101, 1102 (2011). Wermuth notes that Jewish law is used primarily as "decoration," and that "decisions incorporating Jewish law account for a relatively minor proportion of [Supreme Court] decisions." *Id.* (quoting CJJ 390/79 Dwaikat v. State of Israel 34(1) IsrSC 1, 17 [1980] (Isr.)). But see Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221, 241 (1985) ("[T]he laws of the state have absorbed many Jewish legal principles . . . . [T]he decisions of Israel's courts, particularly those of the Supreme Court, frequently cite Jewish law both for the sake of comparison with other legal systems and as a source of decision.").

132. The Knesset acknowledged Jewish law as an important piece of judicial decision-making in passing the "Foundations of the Law Act", which read: "where a court, faced with a legal question requiring decision, finds no answer to it in statute law, or case law or by analogy, it shall decide the issue in the light of the principles of freedom, justice, equity and peace of the Jewish heritage." NAVOT, *supra*, note 12, at 73; See also Nahum Rakover, *Modern Application of Jewish Law* 209, 210, Vol. I, Jewish Legal Heritage Society (1992) ("The justice that we are obliged and endeavour to do will be more certain and more solidly grounded if it finds support in our legal tradition and in the righteous wisdom of our forebears.") (quoting El. A. 2/84 Neiman v.

In Jewish tradition, freedom of expression has long existed as an implied right within some of Judaism's oldest and most central tenets.<sup>133</sup> The foundation of biblical human rights protection is the central tenet that men were created in the "very image of God," and therefore each individual is deserving of equal respect in relation to every other person.<sup>134</sup> From this idea, Jewish tradition evolved to protect the ability of individuals to express themselves, even when they are in an unpopular minority, as the thoughts and words of all those created in God's image are entitled to equal respect.<sup>135</sup> An early example of free expression principles comes from examination of the writings of the biblical prophets.<sup>136</sup> Despite the fact that every prophet claimed to be espousing God's word, the writings of the prophets were all quite different and often in conflict with one another.<sup>137</sup> However, the fact that "all [prophets] were permitted to function and indeed, as the pages of the Bible bear witness, to preserve considerable sections of their literary activity for posterity," speaks to the importance that early Jewish society placed on the ability to express differing viewpoints.<sup>138</sup> Similarly, in a dispute between two important Rabbis, the Sanhedrin (an ancient high court of Jewish law)<sup>139</sup> decided to allow both to continue teaching because Judaism thrives on the differing interpretations that come from allowing everyone to express their own views.<sup>140</sup>

Beyond allowing the existence of disparate and often conflicting viewpoints, Jewish law clearly points to protecting the

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Chairman of the Central Elections Committee of the Eleventh Knesset P.D. 225 [1985] (Isr.)).

133. Robert Gordis, *Judaism: Freedom of Expression and the Right to Knowledge in the Jewish Tradition*, 54 COLUMBIA L. REV. 676, 680 (1954).

134. Shimon Shetreet, *International Protection of Human Rights in Israeli Law*, in ISRAELI REPORTS TO THE XII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 307, 308, (Stephen Goldstein ed., 1986).

135. See, e.g., Gordis, *supra* note 133, at 680.

136. *Id.*

137. *Id.*

138. *Id.* at 682. See also Rakover, *supra* note 132, at 210. ("Pluralism is ... the essence of [Jewish law].").

139. "The Sanhedrin, consisting of 70–72 individuals, was the highest judicial authority in the ancient nation of Israel. It ceased to function as a legal authority about the time the Talmud was finished." Seth E. Lipner, *Methods of Dispute Resolution: Torah to Talmud to Today*, 16 AM. REV. INT'L ARB. 315, 317 n.4 (2005).

140. *Id.*

rights of individuals on a broader level.<sup>141</sup> The Book of Leviticus lays the groundwork for the fundamental protection of individual liberty in stating, "thou shalt proclaim liberty throughout the land, unto all the inhabitants thereof."<sup>142</sup> By extension, the Torah's discussion of liberty can be extended to individual freedoms, including the freedom of expression.<sup>143</sup> Another core Judaic concept that speaks to a broad protection of individual rights is Rabbi Hillel's classic exhortation, "Do not do to another what you would not wish to be done to you – that is the whole of Jewish law, everything else is but commentary and elaboration."<sup>144</sup> Similarly, "Rabbi Akiba [citing a biblical phrase] stated, . . . 'thou shalt love thy neighbor as thyself.'"<sup>145</sup> Together, these quotes reflect the idea that, "[o]ne of the fundamental principles in Jewish law is that there should be no discrimination between individuals, who all alike are created in the image of God."<sup>146</sup> Limiting the free expression rights of a particular class of individuals is precisely the type of discrimination prohibited under these tenets because to distinguish between the value of the expression of different people is to distinguish between people who were created in the image of God.<sup>147</sup> Therefore any government action that seeks to discriminate between groups of individuals on the basis of their right to express themselves stands in conflict with Jewish legal tradition.

### C. Policy Concerns

Aside from legal concerns, Israel must also consider the political and financial repercussions of the ABL's passage. First, Israel receives an enormous amount of money from its allied countries.<sup>148</sup> Chief among those allies is the United States.<sup>149</sup> The United States and other members of the international

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141. See generally Shetreet, *supra* note 134, at 307–12.

142. *Id.* at 309 (quoting *Leviticus* 25:10).

143. See Shetreet, *supra* note 134, at 309.

144. *Id.* (citing Justice Haim Cohn, *The Spirit of Israel Law*, 9 Is. L.R. 456,461 (1974)).

145. *Id.* at 310.

146. *Id.*

147. See *id.*

148. See JEREMY SHARP, CONG. RESEARCH SERV., RL 33222, U.S. FOREIGN AID TO ISRAEL (2008).

149. See *id.*

community have voiced their extreme displeasure with the ABL.<sup>150</sup> Therefore, Israel may risk losing some, indeed perhaps a significant portion, of its financial support should it fail to strike down the ABL. Second, given the politically charged atmosphere in Israel and the Middle East,<sup>151</sup> and in light of recent accusations of substandard human rights protections in its dealings with the Palestinians,<sup>152</sup> Israel risks further damage to its own public image. These accusations of human rights violations have led to international backlash, and mounting anger, against Israeli policy, and Israel may lose precious political capital and alienate some of its most loyal allies by affirming the ABL.<sup>153</sup> Such a delicate political climate speaks to the importance of Israel maintaining a positive public image in the international community in order to continue fiscal stability and political viability as an independent nation.

#### IV. SYNTHESIS

Regardless of the prism through which it is viewed, be it Israeli law, foreign law, or religious law, the ABL is an impermissible violation of the right to free expression. Beginning with Israeli law, the Supreme Court allows for restrictions in violation of the right to free expression only where the government can show *both* severe harm to the public and a near certainty that severe is harm flowing from the expression in question.<sup>154</sup> In contrast with the severity of harm that has been deemed sufficiently dangerous to impinge of free expression rights, the harm addressed by the ABL is relatively minor. In *Kahanae*, the Supreme Court found that the harm posed by a seditious individual who was advocating for the extermination of entire villages of Arab-Israelis was sufficiently severe to jus-

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150. See *supra* Part II.C. See also Harkov, *supra* note 1.

151. See *supra* notes 26–32.

152. See, e.g., Annual Report 2010, PALESTINIAN CENTRE FOR HUMAN RIGHTS, available at <http://www.pchrgaza.org/files/2011/Annual%202010%20E.pdf>. (“The human rights situation in the [Occupied Territories] continued to deteriorate throughout 2010; Israeli forces continued to perpetrate grave breaches of international human rights law and international humanitarian law, and committed more crimes against Palestinian civilians and their property.”).

153. See Burston, *supra* note 2. See also Lis, *supra* note 7; Mozgovaya, *supra* note 7.

154. See HCJ 4804/94 *Station Film* at 17.



tify infringing on that individual's right to free expression.<sup>155</sup> Further defining the boundary of free expression, in *Bakri*, the Supreme Court held that the harm posed by the exhibition of a film critical of Israel, such as delegitimization and public order, was insufficient to meet the severity of harm requirement.<sup>156</sup> Looking at *Kahanae* and *Bakri*, the Supreme Court has clearly distinguished between physical harm and other more intangible harms, finding that only when the public faced physical danger was the government justified in limiting the freedom of expression.<sup>157</sup> In the case at hand, the harm that the ABL purports to prevent is much more analogous to *Bakri* than to *Kahanae*. The West Bank boycotts pose no direct threat to human safety, amounting only to potential pecuniary damages or delegitimization of the government.<sup>158</sup> Therefore, the degree of harm purported to be protected by the ABL is insufficient to require an exemption from the protection of freedom of expression.<sup>159</sup>

The ABL also fails to meet the *Kol Ha-Am* near certainty standard because its harms are far too remote. The Supreme Court has established an extremely high bar for the certainty with which harm must flow from a particular expression to justify that expression's suppression.<sup>160</sup> In *Kahanae*, the Supreme Court determined that an active call for violence was sufficiently certain to cause harm to the public, and therefore interference with free expression rights was justified.<sup>161</sup> However, in *Levi*, the Supreme Court determined that even the police's "serious apprehension over a grave threat to public order and security" was not enough certainty to justify restriction.<sup>162</sup> Together, *Kahanae* and *Levi* reflect the exacting nature of this near certainty standard.<sup>163</sup> Indeed, the Supreme Court seems to have cumulatively stated that an actual call to violence and the threat of violence, even when verified by the local police, is

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155. See CrimFH 1789/98 *Kahane*.

156. See HCJ 316/03 *Bakri*.

157. Compare CrimFH 1789/98 *Kahane*, with HCJ 316/03 *Bakri*.

158. See *supra* Part II.B; see also ABL, *supra* note 1.

159. See HCJ 316/03 *Bakri*.

160. Compare HCJ 153/83 *Levi*, at 416, with CrimFH 1789/98 *Kahane*.

161. CrimFH 1789/98 *Kahane*.

162. HCJ 153/83 *Levi*, at 419.

163. Compare HCJ 153/83 *Levi*, with CrimFH 1789/98 *Kahane*.

not enough to meet the standard.<sup>164</sup> In the present case, the ABL falls well short of this high bar. Unlike a call to violence, the effects of a boycott are quite remote.<sup>165</sup> Indeed, it is likely that the economic consequences of any boycott on the country as a whole would not be felt for some time.<sup>166</sup> Applying the high bar set by the Supreme Court, the ABL clearly lacks adequate justification under the probability prong of the *Kol-Ha-Am* near certainty test.

Alternatively, supporters of the ABL could argue that, as discussed in *Kidum*, the ABL addresses commercial expression (boycotts being economic in nature), and therefore may be subject to a less strict standard.<sup>167</sup> After all, the Supreme Court has been more lenient in allowing restrictions in the realm of film censorship (a commercial activity), as noted in Part III. A of this Note.<sup>168</sup> Indeed, the argument continues, the expression in those cases is most similar to the ABL because they each regard offensive expressions that threaten the public order.

However, such an argument misses the mark. First, the Supreme Court has refrained from actually deciding that commercial expression receives a lower standard, instead merely suggesting that it might.<sup>169</sup> Second, even if commercial expression were entitled to a lower standard, the ABL does not deal with commercial expression because the Supreme Court distinguished commercial expression on the grounds that purely commercial expression does not implicate the democratic rights of the expressing individual.<sup>170</sup> For censorship cases like *Station Film* and *Israeli Film Studios*, this distinction holds true.<sup>171</sup> An inability to exhibit one's creative work does not infringe on one's ability to participate in the political process, only one's ability to make money. By contrast, the ABL strikes at the very heart of an individual's right to participate in the democratic process. The boycotts targeted under the ABL are clear examples of political expression aimed at the policies of

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164. *Id.*

165. See Rosenberg, *supra* note 6.

166. *Id.*

167. See ALMAGOR, *supra* note 91.

168. See HCJ 4804/94 *Station Film*; HC 243/62 *Israel Film Studios*.

169. See ALMAGOR, *supra* note 91.

170. See *id.*

171. See HCJ 4804/94 *Station Film*; HC 243/62 *Israel Film Studios*.

the Israeli government.<sup>172</sup> To prevent individuals from participating in political discourse in this way is precisely the type of violation of a "supreme right" that the Supreme Court distinguished in *Kidum*.

Jewish law will, additionally, advise the Supreme Court that the ABL is an invalid exercise of legislative discretion.<sup>173</sup> Cumulatively, the totality of Jewish legal tradition speaks to the protection of the rights of individuals<sup>174</sup> and the Torah provides for individuals to be treated freely and without discrimination.<sup>175</sup> The ABL stands in direct conflict with these principles. Primarily, by limiting the expression of those unhappy with the direction of the Israeli government, the Knesset is running afoul of the Jewish tradition of protecting the voices of dissident elements of society.<sup>176</sup> Moreover, the ABL restricts the "liberty" of those who seek to engage in boycotts, in direct violation of the provisions of Leviticus.<sup>177</sup>

American law, despite stemming from origins similar to Israeli law, also provides no support for the ABL. Recall that, as a preliminary matter, American law distinguishes between political speech (strictly protected) and commercial speech (less protected).<sup>178</sup> The boycotts targeted by the ABL are not commercial expression, but are instead clear examples of political expression, representing protests of Israeli policies.<sup>179</sup> Therefore, through the lens of American law, the ABL would still fail as it is entitled to the same strict, "near certainty" standard applied in Israeli law.<sup>180</sup>

However, even under American law's more permissive commercial expression standard, the ABL cannot pass muster. As noted in Part III.B, United States courts have permitted government prohibition on boycott participation, but only where the boycotts in question are secondary, and not related to the

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172. See *supra* Part II.C.

173. See *supra* Part III.B.3.

174. See *id.*

175. See *id.*

176. See *id.*

177. See *id.*; Leviticus 25:10.

178. See *supra* Part III.B.1.

179. See Burston, *supra* note 2. See also Lis, *supra* note 7; Mozgovaya, *supra* note 7.

180. See *supra* note 101.

individual's political rights.<sup>181</sup> Similar to the ABL, the EAA presents the possibility of enforcing pecuniary penalties on parties advocating for a boycott.<sup>182</sup> However, the ABL and American anti-boycott legislation are easily distinguishable. Crucially, the ABL is a ban on domestic boycotting of domestic business (primary), while the American regulations concern participation in foreign boycotts (secondary).<sup>183</sup> Primary boycotts merit a court's protection far more than participation in a secondary boycott because domestic boycotts are an avenue for participation in one's own government, a practice firmly established as a fundamental right.<sup>184</sup> However, participation in a secondary boycott has been established as a non-political expression.<sup>185</sup> Therefore, while America does have anti-boycott regulations in force, they would not justify a law analogous to Israel's ABL.

Nor does International law provide justification for the ABL. Similar to both Israeli and American law, international law has provided for the fundamental right to participate in one's government.<sup>186</sup> As described above, the ABL represents an impermissible violation of an individual's right to participate in democracy.<sup>187</sup> The ABL thus runs afoul of the principles of international law and cannot be justified as an appropriate restriction of the Israeli populace's right to express themselves.

#### CONCLUSION

The ABL is a violation of the right to free expression, whether analyzed from an Israeli, American, Jewish, or international perspective. To impinge on such a fundamental human right, particularly as it pertains to participation in the political process, is an impermissible blow to the power of the individual. Furthermore, given that the ABL lacks support from the inter-

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181. See *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984).

182. See U.S. DEPARTMENT OF COMMERCE, COMPLIANCE AND ENFORCEMENT: BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm> (last visited Oct. 12, 2012). In fact, these regulations allow for criminal penalties for violators, which the ABL does not even contemplate. *Id.*

183. See *supra* Part III.B.1.

184. See *Briggs & Stratton Corp.*, 728 F.2d 915.

185. *Id.*

186. See *supra* Part III.B.2.

187. See *supra* note 172.

national community upon whom Israel relies for financial contributions, continued adherence to the ABL could have disastrous effects on Israel as a whole. Therefore, when considering the legal and practical concerns posed by the ABL,<sup>188</sup> it is clear that the Supreme Court should strike down the law as unconstitutional.

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188. *See supra* Part III.C.

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