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BALANCING CLASHING SCHOLARS' ACADEMIC FREEDOMS

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ABSTRACT

The paper analyzes the scope of scholars' academic freedom and maintains that it is composed of two pillars. First, inclusion, which is subject to capacity, equality, and the provision of a pro-educational academic environment. Second, academic expression, which refers to teaching and research, freedom of opinion, political participation outside academia and freedom to receive academic materials. Scholars' academic freedom is limited by professional standards and is subject to the respect of the rights of fellow scholars.

The paper argues that scholars' academic freedom is not confined to a scholar-state relation but is also relevant to scholar-scholar relations. Hence, scholars' academic freedom can be breached by peers, for instance, by firing them on the basis of gender. The paper proposes three tests for balancing clashing scholars' academic freedoms. First, the closer in nature the activity is to academia, the greater its weight (the relevance test). Second, "seclusion v. exclusion" test. According to this test, a "seclusive" exercise of

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academic freedom, namely one that does not interfere with peers' rights, should override an "exclusionary" exercise of academic freedom, namely one that interferes with peers' rights. Third, within academia, activities promoting pluralistic notions should override contrary endeavors (the virtue test).

Finally, the paper applies its conclusions to a test case—the Campaign against Israeli academia, also known as the academic boycott of Israel. It concludes that teaching and research activities, performed in a seclusive manner that does not advance discriminatory notions should take priority over non-academic political activities.

I. INTRODUCTION

Academic freedom is a pivotal notion in the proper functioning of higher education institutions. It concerns several parties: scholars, academic institutions, students, and the general public, all of whom benefit from the fruits of academia. The literature concerning academic freedom focuses primarily on scholars' and institutions' academic freedom vis-à-vis state interference, while the interrelations between scholars' clashing academic freedoms are mostly overlooked. For instance, Robert Post notes that "[s]cholars rarely need to defend this autonomy from each other."¹ Yet, some instances do raise questions regarding the scope of scholars' academic freedom and clashing scholars' rights. For example, this tension is manifested with regard to the Israeli-Palestinian conflict, which has infiltrated academia as part of a political campaign against Israeli academia ("Campaign").²

This paper questions the scope of scholars' academic freedom and its limits with relation to opposing academic freedoms in general and with regard to The Campaign, in particular. The article is divided into two parts. In Part One, we analyze academic freedom and conclude that the notion of scholars' academic freedom is composed of two pillars—inclusion within academia and academic expression. We maintain that scholars' academic freedom is not confined to a scholar-state relation but is also relevant to scholar-scholar relations and we advance and suggest three balancing tests for weighing clashing scholars' academic freedoms. In Part Two we apply the conclusions concerning academic freedom to The Campaign. We review The Campaign and its manifestations, discuss its legitimacy in view of the clashing academic freedoms and apply the balancing tests to the Campaign.

Our thesis is that generally, clashing scholars' academic freedoms should be weighed against each other using three suggested balancing tests that are advanced by us. First, the relevance test, according to which, the closer in nature the activity is to academia, the

¹ Robert Post, *Why Bother with Academic Freedom?*, 9 FLA. INT'L U.L. REV. 9, 12 (2013).

² *Palestinian Campaign for the Academic and Cultural Boycott of Israel*, BOYCOTT, DIVESTMENT, SANCTIONS, <https://bdsmovement.net/pacbi> (last visited Aug. 26, 2021).

greater its weight. Second, “seclusion v. exclusion” test. According to this test, a “seclusive” exercise of academic freedom, namely one which does not interfere with the rights of others, should take priority over an “exclusionary” exercise of academic freedom, namely one that does interfere with peers’ rights. Third, the virtue test, according to which within academia, activities and expressions promoting democratic and pluralistic notions should take priority over activities encouraging contrary principles. Applying these proposed balancing tests to the Campaign, we conclude that teaching and research activities, performed in a seclusive manner and advancing democratic notions, should take priority over non-academic political activities.

This paper offers a novel perspective of the scope and limits of scholars’ academic freedom—a notion that so far has not received ample notional consideration. It also provides three novel tests for balancing clashing civil rights and, in particular, clashing scholars’ academic freedoms. Finally, it assists in better confronting the Campaign from an ethical and legal perspective.

Some preliminary remarks are required. First, the paper focuses on the scope of scholars’ academic freedom. Clearly, when dealing with similar disputes, more rights and interests are relevant, such as freedom of expression, freedom of religion, and the right to equality. Yet, the paper is confined to analyzing scholars’ academic freedom. As part of this analysis other connected rights are considered, such as academic expression and academic political activism.

Second, a clash between scholars’ rights may arise all over the world. Therefore, the paper analyzes the issue mainly from a theoretical perspective, by implementing international legal instruments, rather than national law. Yet, references to landmark cases are provided.

Third, this paper has three primary goals: to assist scholars in determining the ethical-legal scope of their rights within academia; to assist academic institutions in applying a normative code of behavior; and to assist the courts in adjudicating future disputes arising between scholars.

II. PART ONE- THE SCOPE OF ACADEMIC FREEDOM

This part examines the relevant scope of academic freedom. It reviews academic freedom,³ explores scholars' academic freedom,⁴ discusses the scope of scholars' academic freedom, and introduces three tests for balancing clashing scholars' academic freedoms.⁵

A. Academic Freedom—General

This Section investigates the nature of academic freedom by referring to international legal instruments, literature, statements of academic freedom and landmark cases.

We refer to three types of international instruments as a source for academic freedom. First, conventions: The International Covenant on Economic, Social and Cultural Rights ("The Covenant"),⁶ and the United Nations Educational Scientific and Cultural Organization ("U.N.E.S.C.O.") Convention against Discrimination in Education.⁷ Second, the U.N.E.S.C.O. Recommendation Concerning the Status of Higher-Education Teaching Personnel.⁸ Third, declarations, some of which are general, while others deal exclusively with academic

³ See *infra* Part I.A.

⁴ See *infra* Part I.B.

⁵ See *infra* Part I.C.

⁶ See Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, art. 15(1) (entered into force Jan. 3, 1976) (displaying that The Covenant was ratified by 160 countries).

⁷ Convention against Discrimination in Education, Dec. 15, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962) (explaining that it was accepted by dozens of countries, excluding the U.S.A.).

⁸ U.N. Educ. Sci. & Cultural Org. [UNESCO], *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO Doc. 29 C/Res. 11 (1997), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/normativeinstrument/wcms_493315.pdf [hereinafter UNESCO Recommendation]. See also Michele Olivier, *The Relevance of Soft Law as a Source of International Human Rights*, 35 COMP. & INT'L L.J. S. AFR. 289, 292-93 (2002) (noting that recommendations are multilaterally agreed and set common standards).

freedom:⁹ The Universal Declaration of Human Rights;¹⁰ the European Convention of Human Rights (“E.C.H.R.”);¹¹ The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, instituted by the World University Service;¹² the U.N. World Declaration on Higher Education for the Twenty-First Century: Vision and Action;¹³ the Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors,¹⁴ and its earlier version—the American Association of University Professors’ 1915 Statement;¹⁵ the Canadian Association of University Teachers policy statement (2011); and the Magna Charta Universitatum, all of which were signed by European rectors.¹⁶

Although some of the aspects of academic freedom are specifically protected by several international law instruments, it generally is not regarded as a human right *per se*. Rather, it is mainly perceived as a “secondary” right of freedom of education,¹⁷ incorporating some aspects of freedom of expression.¹⁸ The right to education is usually referred to as the right “to take part in cultural life” and “enjoy the benefits of scientific progress.”¹⁹ The obvious understanding of the right to higher education refers to students’ rights. Yet, it can be broadly interpreted as to also encompass scholars’ academic freedom.

⁹ Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 751 (2014). Declarations are usually adopted by international bodies, such as universities; although declaratory and not binding, they serve as soft law, expressing guiding principles. *Id.*

¹⁰ G.A. Res. 217 A (III), art. 27(1), Universal Declaration of Human Rights (Dec. 10, 1948).

¹¹ European Convention on Human Rights, *opened for signature* Nov. 4, 1950, E.T.S. 5 (entered into force Sept. 3, 1953) (amended Aug. 1, 2021).

¹² World Univ. Servs., *The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education*, (Sept. 1988) [hereinafter *The Lima Declaration*].

¹³ World Declaration on Higher Education, *Higher Education for the Twenty-First Century: Vision and Action*, *4, U.N. Doc. ED/2005/ME/H/1 (Oct. 9, 1998).

¹⁴ 1940 *Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS AND REPORTS 3 (AAUP eds., 1984).

¹⁵ Am. Ass’n of Univ. Professors, 1915 Declaration of Principles on Academic Freedom and Tenure, 1 AAUP 291.

¹⁶ *Magna Charta Universitatum*, OBSERVATORY (Sept. 18, 1988), <http://www.magna-charta.org/resources/files/the-magna-charta/english>.

¹⁷ *The Lima Declaration*, *supra* note 12.

¹⁸ Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

¹⁹ Covenant on Economic, Social and Cultural Rights, *supra* note 6, at art. 15(1); *see also* Universal Declaration of Human Rights, *supra* note 10.

John Dewey, an early supporter of academic freedom, indicated that the idea of the university is to search for the truth, to verify facts in a critical way and to reach conclusions by the best existing methods in order to pass this truth to students.²⁰ Scholars are in a constant quest to enhance their knowledge and participate in the cultural life of the community. Scholarship includes the sharing of scientific advancement and, therefore, incorporates education and the quest for knowledge and truth. The conclusion that the right to education also appertains to scholars may also be inferred from the Preamble of the U.N.E.S.C.O. Recommendation that specifically recalls Article 13(1) of the Convention against Discrimination in Education, referring to States Parties' recognition of the right to education, as its source of inspiration.²¹

Education is regarded as a fundamental notion of human rights, democracy, and development.²² It is aimed at enabling people to participate effectively in a free society, strengthen respect for human rights, promote understanding, tolerance, and friendship among nations, racial or religious groups and further global peace.²³

B. Scholars' Academic Freedom

This Section reviews and analyzes the normative sources concerning academic freedom and concludes that scholars' academic freedom is composed of two pillars—inclusion and expression.

1. *The First Pillar of Academic Freedom—Inclusion*

The notion of academic inclusion refers to the right to participate in the cultural life of the community in terms of research, education, attending classes, teaching, and writing and membership in

²⁰ JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 122 (Free Press et al. eds., 1944).

²¹ Convention against Discrimination in Education, *supra* note 7.

²² World Declaration on Higher Education, *supra* note 13; *see also* UNESCO Recommendation, *supra* note 8, at art. 10(a)(b).

²³ Universal Declaration of Human Rights, *supra* note 10, at art. 26(2).

professional or representative academic bodies. Therefore, international co-operation is granted additional weight in academia.²⁴

The principle of inclusion is composed of three elements: capacity, equality, and the provision of a pro-educational academic environment. First, access to higher education is subject to capacity.²⁵ While everyone has the right to education,²⁶ the right to higher education is accessible to all, based on merits.²⁷ Capacity is assessed by expertise and experience.²⁸ Capacity includes effort and perseverance,²⁹ that is “evaluat[ed] on academic grounds and primarily by peers.”³⁰

Second, there is no room for discrimination in granting access to higher education positions and in academic life. Any non-inclusive decision that is based on race, religion, politics, national or on social origin is discriminatory.³¹ The nondiscriminatory aspects of academic freedom are not limited to the admission of teaching and research positions.³² Firing on the grounds of nationality or religion is equally discriminatory. Thus, for instance, article 46 of the U.N.E.S.C.O. Recommendation states: “Teachers should be adequately protected against arbitrary action affecting their professional standing or career.”³³ Arbitrary employment clearly also refers to discriminatory one.

²⁴ Covenant on Economic, Social and Cultural Rights, *supra* note 6, at art. 15(4) (listing the benefits of encouraging developing international contacts); *see also* UNESCO Recommendation, *supra* note 8, at 53-4.

²⁵ *See* Covenant on Economic, Social and Cultural Rights, *supra* note 6, at art. 13(2)(c); *see also* Convention against Discrimination in Education, *supra* note 7, at art. 4(a).

²⁶ Covenant on Economic, Social and Cultural Rights, *supra* note 6, at art. 13; *see also* European Convention on Human Rights, *supra* note 11.

²⁷ Universal Declaration of Human Rights, *supra* note 10, at art. 26(1).

²⁸ U.N. Comm. on Economic, Social and Cultural Rights, CESCR General Comment No. 13: The Right to Education (Art. 13), Adopted at the Twenty-First Session, UN Doc. E/C.12/1999/10 (Dec. 8, 1999).

²⁹ *See* World Declaration on Higher Education, *supra* note 13, at art. 3(a); *see also* UNESCO Recommendation, *supra* note 8, at 58 (specifically addressing scholars’ right of access to education).

³⁰ J. Peter Byrne, *The Social Value of Academic Freedom Defended*, 91 IND. L.J. 5, 6 (2015).

³¹ UNESCO Recommendation, *supra* note 8, at art. 1(a); *see also* Universal Declaration of Human Rights, *supra* note 10, at art. 26.

³² UNESCO Recommendation, *supra* note 8, at art. 27.

³³ *Id.* § 46.

Third, a pro-educational environment. A welcoming academic environment provides an atmosphere promoting speculation and experiment, as indicated by Judge Powell (majority) in *Regents of University of California v. Bakke*.³⁴ As such, academics cannot work effectively in a hostile learning environment. Further, wisdom and scientific progress cannot be achieved in a menacing environment or in an atmosphere of suspicion and mistrust.³⁵ Teaching personnel have the “right to fulfil their functions without fear . . . of repression from the State, or from any other source.”³⁶ This may include students carrying guns,³⁷ political entities that are external to the academic institutions and student associations.

2. *The Second Pillar of Academic Freedom—Freedom of Expression*

Academic expression is granted special protection from censorship due to its importance to the development of culture and science.³⁸ The *ad hoc* protection that is given to academic expression is meant to encourage diverse and unorthodox thinking.³⁹ Academia should facilitate an environment conducive to novel and controversial ideas and where theories can flourish. Diversity, pluralism, and openness are essential aspects of academic freedom of opinion.

Freedom of speech is a long-protected constitutional right.⁴⁰ Yet, academic freedom of expression differs from general freedom of expression in two respects. While general freedom of expression is of greater applicability, as it is not subject to academic scrutiny and not generally limited in its substance, it is not deserving of special *ad hoc*

³⁴ 438 U.S. 265, 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

³⁵ *Sweezy*, 354 U.S. at 250-63.

³⁶ UNESCO Recommendation, *supra* note 8, at art. 27.

³⁷ Aurora Temple Barnes, *Guns and Academic Freedom*, 53 GONZ. L. REV. 45, 80-81 (2017) (“[I]f professors do not feel safe conducting uninhibited discussions within their classrooms, their academic freedom is being infringed.”).

³⁸ UNESCO Recommendation, *supra* note 8, at art. 12.

³⁹ See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (ruling that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”).

⁴⁰ Declaration of the Rights of Man, art. 11 (France 1789); see also U.S. CONST. amend. I; see also Universal Declaration of Human Rights, *supra* note 10, at art. 19; see also European Convention on Human Rights, *supra* note 11, at art. 10(1).

protection from censorship.⁴¹ Academic freedom of expression is of a narrower application and scope.

As explored below, academic freedom of expression is a multifaceted concept, composed of four interrelated notions: freedom of expression in teaching and in research, freedom of opinion, political participation, and freedom to receive academic materials.⁴² Furthermore, the idea of academic freedom of expression is subject to certain limitations.⁴³

i. Free Expression in Teaching and Research

Academic professional expression is manifested in teaching, discussions, and scholarship,⁴⁴ publishing the results of research and in expressing opinions about the institution.⁴⁵

Freedom of academic expression prevents silencing the expression of opinions. Scholars' freedom of opinion is specifically protected under the Convention against Discrimination in Education,⁴⁶ and by the International Covenant on Economic, Social and Cultural

⁴¹ UNESCO Recommendation, *supra* note 8, at art. 26 (referring to the protection of scholars' general rights as citizens); *see also*, *Magna Charta Universitatum*, *supra* note 16 (referring to academic freedom in teaching).

⁴² *Infra* Part I.B.2.(a)-(d).

⁴³ *Infra* Part I.B.2.(e).

⁴⁴ Byrne, *supra* note 30, at 8. Byrne concluded that there is a "sharp distinction between the protections offered by the First Amendment to a faculty member's speech outside their scholarship, and the role of academic freedom in protecting the truth values of scholarship." *Id.*

⁴⁵ UNESCO Recommendation, *supra* note 8, at art. 27, 29; *see also* NELLY P. STROMQUIST, TWENTY YEARS LATER: INTERNATIONAL EFFORTS TO PROTECT THE RIGHTS OF HIGHER EDUCATION TEACHING PERSONNEL REMAIN INSUFFICIENT, EDUCATION INTERNATIONAL RESEARCH, 12 (2017). Stromquist reads the UNESCO Recommendation as referring to four pillars:

(1) The right to teach; (2) the right to engage in research and disseminate their work [including the right to write and teach ideas considered of relevance to society]; (3) the right to engage in service to the profession and the institution, including the right to criticize the institution and the system in which one works (intramural speech); and (4) the right to exercise one's civil liberties without institutional reprisal or censorship.

Id.

⁴⁶ Convention against Discrimination in Education, *supra* note 7, at art. 1(1)(a).

Rights, which requires neutrality towards the content of academic expression.⁴⁷

ii. Freedom of Opinion in Academia

Academic freedom of expression encompasses the right to hold opinions, an earlier stage of expression. Questioning, exploring new ideas, and diversity of thought and opinion are essential elements of academic inquiry. Freedom of opinion includes the right to hold a controversial idea without fear of punishment, shaming or discrimination.

There is a substantial body of judicial decisions indicating that academic freedom includes the freedom to participate in academia regardless of opinions. In *Healy v. James*,⁴⁸ the Court ruled that, “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional grounds in reaffirming this Nation’s dedication to safeguarding academic freedom.”⁴⁹ Similarly, in *Keyishian v. Board of Regents*,⁵⁰ it was held that, “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”⁵¹ In *Sweezy v. New Hampshire*,⁵² the plurality ruled that exposing past political associations and questioning the content of university lectures through compulsory disclosure violated the right to due process and constituted an invasion of liberty in academic freedom and political expression.⁵³

Provided that it adheres to professional standards, an academic opinion, even if controversial, may not serve as an entrance barrier to academia. This stance is true, both to academic and general opinions. One may hold political, religious, or other ideas, and they should not interfere with one’s academic freedom.

⁴⁷ Covenant on Economic, Social and Cultural Rights, *supra* note 6, at art. 2(2); *contra*, UNESCO Recommendation, *supra* note 8, at art. 26 (referring to freedom of opinion as a general human right to be preserved).

⁴⁸ 408 U.S. 169 (1972).

⁴⁹ *Id.* at 180-81.

⁵⁰ 385 U.S. 589 (1967).

⁵¹ *Id.* at 603.

⁵² 354 U.S. 234 (1957).

⁵³ *Id.* at 250.

iii. Political Participation

The international instruments dealing specifically with political freedom of academics address the notion of nondiscrimination of scholars based on political opinions.⁵⁴ The U.N.E.S.C.O. Recommendation deals with the right to have a political position outside of academia (“political participation”)⁵⁵ and with scholars’ rights to undertake professional activities outside their employment for the application of their knowledge to the community’s problems.⁵⁶

The World Declaration on Higher Education encourages academic activism by “disseminat[ing] universally accepted values, including peace, justice, freedom, [and] equality.”⁵⁷ It grants the right to enjoy academic autonomy and freedom, conceived as a set of rights and duties, while being held accountable to society.⁵⁸ It further grants the right to participate in issues affecting the well-being of nations.⁵⁹

iv. The Right to Seek and Receive Academic Materials

Academic freedom of expression includes the right to seek and receive information. Several covenants and declarations refer to this right, as part of freedom of expression.⁶⁰ In particular the American Association of University Professors addresses the need to deal with the sources of knowledge.⁶¹

The right to receive information is associated with freedom of opinion. An essential element of forming an opinion is access to information and exposure to ideas and scholars’ fruits of knowledge.

⁵⁴ Convention against Discrimination in Education, *supra* note 7, at art. 1(1)(a).

⁵⁵ UNESCO Recommendation, *supra* note 8, at art. 26 (“Higher-education teaching personnel, like all other groups and individuals, should enjoy those internationally recognized civil, political, social and cultural rights applicable to all citizens.”).

⁵⁶ *Id.* at art. 30.

⁵⁷ World Declaration on Higher Education, *supra* note 13, at art. 2(d).

⁵⁸ *Id.* at art. 2(e).

⁵⁹ *Id.* at art. 2(f).

⁶⁰ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, art. 19(2) (entered into force Mar. 23, 1976); Universal Declaration of Human Rights, *supra* note 10, at art. 19; European Convention on Human Rights, *supra* note 11, at art. 10.

⁶¹ 1915 Declaration of Principles on Academic Freedom and Tenure, *supra* note 15.

Sweezy refers to this notion as the right of inquiry, “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”⁶²

In order to fulfill their right of inquiry, scholars need access to papers, books, fruits of research, and attend conferences. This includes information generated in classrooms, libraries, research institutes, databases, substances, and materials. Access to open-source information and material must also be granted to all scholars.⁶³ The information should not be censored. Regard should also be given to access the fruits of scholarship.⁶⁴

v. **Limits to Academic Freedom of Expression**

Despite its great importance, the special academic freedom of expression is restricted in several ways. First, it is confined to academia such as classroom, laboratory, publication, and research. It is therefore intramural rather than extramural. Lawrence White noted that the courts are more willing to protect claims of academic freedom when they arise in intra-mural circumstances, than when they do not relate to teaching and research.⁶⁵ Second, the special protection afforded to academic expression is limited to professional expression, as it is subject to scrutiny, professional standards, intellectual rigor, scientific inquiry, and research ethics.⁶⁶ This notion means that academic publishing rights are not automatic, they are subject to peer review, for instance. Byrne points out that academic freedom of expression differs from that of the general public, as faculty can be penalized when peers judge their scholarship or teaching for falling below professional standards.⁶⁷ Further, teaching is subject to scientific evaluations. Truly, the scope of scholars’ freedom of academic speech is not a clear-cut notion. White noted that academic freedom remains ill-defined as a jurisprudential principle guiding

⁶² *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁶³ UNESCO Recommendation, *supra* note 8, at art. 22.

⁶⁴ *Id.*

⁶⁵ Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J. COLL. & UNIV. L. 791, 828 (2010).

⁶⁶ UNESCO Recommendation, *supra* note 8, at art. 29.

⁶⁷ Byrne, *supra* note 30, at 6-7.

courts in the adjudication of disputes between faculty members and academic institutions.⁶⁸ Yet there is a clear difference between general freedom of expression and academic freedom of expression—the latter being restricted to professional expertise. Hence, academic freedom of expression does not cover political utterances or incivilities.⁶⁹ In this regard, academic freedom of expression is a shield, not a sword. It is not a safe harbor for general political or other non-professional expressions.

Third, regard should also be given to limits on academic freedom of expression when this right interferes with the rights of other scholars. Academic freedom of expression is subject to the respect of the rights of fellow scholars and to the duty to ensure respect for contrary views.⁷⁰

3. *The Scope of Scholars' Academic Freedom—Conclusions*

The review of the normative sources concerning academic freedom leads to the conclusion that academic freedom is composed of two pillars. The first pillar concerns inclusion. Universities are the marketplace of ideas. In order to facilitate an interchange of thoughts and findings, academic freedom must be interpreted as a means to keeping the gates of academia inclusive. The notion of academic inclusion is composed of three elements. First, academic capacity, rather than irrelevant admission factors. Second, equality rather than racial or national discrimination. Third, the provision of a pro-educational academic environment, rather than a hostile teaching environment. The second pillar of academic freedom concerns academic expression, referring to freedom of expression in teaching and research, freedom of opinion, political participation outside academia and freedom to receive academic materials.

⁶⁸ See White, *supra* note 65, at 842.

⁶⁹ See Sharona Aharoni-Goldenberg et al., *Repercussions of Incivility and Hostile Expressions in Academia: A legal Perspective*, 12 INDUS. & ORGANIZATIONAL PSYC. 385, 387 (2019).

⁷⁰ See UNESCO Recommendation, *supra* note 8, at 60 (“Higher-education teaching personnel should recognize that the exercise of rights carries with it special duties and responsibilities, including the obligation to respect the academic freedom of other members of the academic community and to ensure the fair discussion of contrary views.”).

We further conclude that academic freedom is denied when scholars are socially shunned, boycotted or intimidated for irrelevant reasons, such as race, religion, or political opinions by fellow scholars or the academic institutions. At times, a single act will not constitute a barrier to academic access. However, the cumulative effect of certain individual activities may result in a breach of academic freedom. We hold that for example, the systematic shunning or frightening of certain scholars may amount to a breach of their academic freedom as they *de facto* impede freedom of opinion.

The various sources discussed above lead to the conclusion that academic freedom confers special rights upon scholars but also comes with obligations and is not unlimited. Academic freedom is thus restricted by several considerations. First, academic expression is limited by professional standards, does not cover political utterances or incivilities, and applies intramurally. Second, it is subject to the respect of the rights of fellow scholars and to the duty of ensuring respect for contrary views. Third, it is also limited by basic principles and considerations of equality and nondiscrimination referring to fellow scholars.

C. Clashing Scholars' Academic Freedom— Discussion

This Section discusses the scope of scholars' academic freedom, reviews its various beneficiaries, explores the diversity of potential entities interfering with it, and proposes balancing tests for dealing with clashing scholars' academic freedoms.

1. *The Secondary Beneficiaries of Scholars' Academic Freedom*

The goal of academia is not confined to the personal development of the scholar at hand. In *Sweezy*, it was stressed that academic freedom is meant to benefit the general public, and that interference with academic freedom might “imperil the future of our Nation.”⁷¹ Similarly, Justice Brennan noted in *Keyishian* that, “[o]ur Nation is deeply committed to safeguarding academic freedom, which

⁷¹ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

is of transcendent value to all of us”⁷² Academic freedom concerns several parties: scholars, the academic institution, students, and the general public whose interest it is to enjoy the fruits of academia. The interpretation of the scope of academic freedom should therefore take into consideration the goals of academic freedom and the rights and interests of all parties concerned, including the benefit to the general public.

The public has a right to receive the fruits of knowledge that is a derivative of the research and teaching of any scholar, regardless of personal, economic, or political aspirations of the people involved. Similarly, when external factors interfere with scholars’ academic freedom, the prestige and the well-functioning of an academic institution is also breached. Students’ academic freedom and interests may also be compromised if their access to the results of certain studies or certain teachers is denied or restricted.

2. *The Diversity of Potential Entities Interfering with Scholars’ Academic Freedom*

A breach of scholars’ academic freedom can have multiple sources. The state might intervene with a scholar’s academic freedom by restricting the subject of his or her research. Academic institutions might breach a scholar’s right to equality by denying an academic’s position because she is a woman. Students might breach scholars’ academic freedom by class disturbances.⁷³ Political entities might intervene with scholars’ academic freedom by indirectly (through students, the institution, or fellow scholars) imposing racist admission rules. Religious entities might interfere with academic freedom by forcing certain research conclusions.

Suissa and Sullivan point out, for instance, that “[a]ttempts to remove academics from their posts can take the form of coordinated campaigns of (often anonymous) complaints to university administrators, which [] . . . may fail in the goal of getting the target fired.”⁷⁴ They add that another tactic is to launch a petition calling for

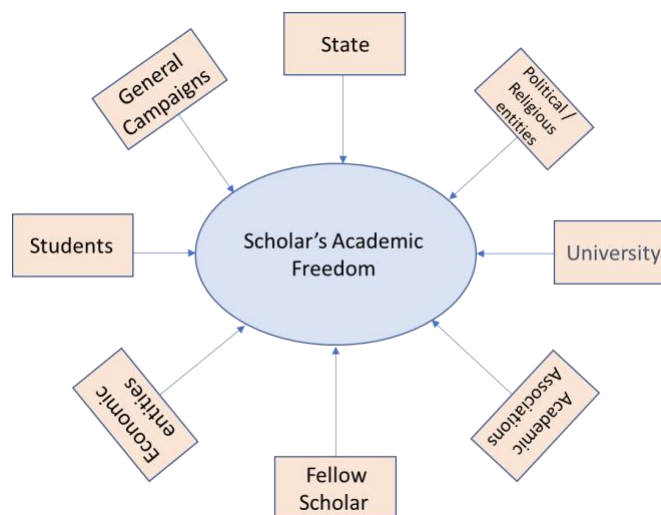
⁷² See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁷³ Judith Suissa & Alice Sullivan, *The Gender Wars, Academic Freedom and Education*, 55 J. PHIL. EDUC. 1, 62 (2021) (referring, for instance, to a case whereby several academics have faced attempts to get them sacked by student activists angered by their gender concepts).

⁷⁴ *Id.* at 61.

an academic with dissenting views to be fired. Hence, general campaigns may be launched by anonymous or vague entities in order to breach academic rights. Finally, scholars might also intervene with peers' academic freedom by refusing to review a colleague's draft paper, for instance, because of the scholar's religion.⁷⁵ Suissa and Sullivan claim that, after expressing concern about the alleged harassment of fellow academics, their colleagues refused to work with them.⁷⁶ The idea of a variety of intervening factors with scholars' academic freedom is represented by figure 1 below.

Figure 1.



Hence, scholars' academic freedom serves as a shield protecting them from a wide variety of intervening factors, such as the state, students, academic institutions, religious, political, and economic entities, academic associations, and fellow scholars.

⁷⁵ See *id.* at 61.

⁷⁶ *Id.* at 62.

3. *Clashing Scholars' Rights—Suggested Balancing Tests*

Basic human rights are not absolute. They can be balanced against other competing rights, values, and interests. However, the literature is relatively scarce with regard to clashes between clashing scholars' academic freedoms.

Clashes between scholars' rights vary in nature and intensity. Depending on the facts and context, different breaches of academic freedom by fellow peers will entail different courses of action. Some may entail philosophical, moral, and ethical consequences but *de facto* amount to *damnum absque injuria*,⁷⁷ namely, a breach of a right that does not give rise to a cause of action. While other breaches of academic rights will call for judicial intervention, some will be confined to a personal-ethical level and entail a “corridor conversation,” and others to an informal dean-scholar talk, or to disciplinary proceedings. The most severe ones will give rise to a judicial injunction. Yet, all cases require a balancing mechanism to assist in deciding how to cope with the clash, be it on an ethical, disciplinary, or legal basis.

We suggest that, when a conflict between opposing academic freedoms arises, the following reasoning should be implemented. First, regard should be given to whether the activities in question are indeed covered by academic freedom. Second, regard should be paid to whether academic freedom is compromised. Third, if there are conflicting academic freedoms, those rights should be weighed against each other, incorporating the following suggested three normative prioritizing tests (balancing tests). We therefore suggest applying three balancing tests in order to deal with conflicting academic rights. The relevance test, the “*seclusive*” v. “*exclusive*” exercise of rights test, and the virtue test.

i. The Relevance Test

We hold that in evaluating two clashing academic rights, regards should also be given to the nature of the activities in hand and to their proximity to academia and research. The closer in nature the

⁷⁷ Patrick D. Halligan, *Freedom of Expression and Employment Security in the Public Service: Different Rights with Different Remedies*, 21 CAL. W. L. REV. 47, 84 n.182 (1984) (translating *damnum absque injuria* as a loss without injury).

activity is to the substance of promoting research, education, and culture, the greater its weight. Conversely, the more remote the activity is from the essence of academia, the lower its weight. The relevance test is therefore applied using professional tools. Are we dealing with a methodological activity or is it driven by personal, political, or economic interests? Does the activity at hand verify facts in a critical way? Does it reach conclusions by the best existing methods? Is it aimed at passing the truth to students?⁷⁸ Hence, for instance, lesser impact should be given to disturbing political activities over professional symposia.

We maintain that, in applying the relevance test, the interests of the four beneficiaries of academic freedom should also be considered: scholars, students, academic institutions, and the general public.

ii. “Seclusion” v. “Exclusion” Test

The following analysis examines the mode of realization of the clashing rights, rather than their content. We hold that in reviewing the way in which a right is exercised, one may distinguish between two notions: a “seclusive” exercise of a right and an “exclusionary” exercise of a right.

In our view, the notion of a seclusive exercise of a right comes from the term “seclusion,” namely private. It refers to an exercise of a right that does not harm others and does not breach their respective rights. Conversely, an exclusionary exercise of a right refers to an action which excludes the rights of others—trespasses and breaches them. Logically, seclusive rights should take priority over exclusionary ones, as the liberty of the one cannot come at the expense of the other. Generally, fairness requires that the unharmed exercise of a right, that does not trespass and breach the rights of others, will take priority over a trespassing one. To put it in Abraham Lincoln’s words:

The world has never had a good definition of the word liberty With some, the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word

⁷⁸ See JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 122 (1944).

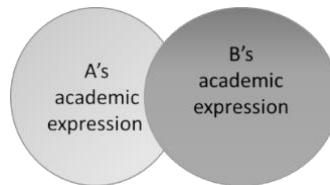
may mean for some men to do as they please with other men Here are two . . . incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.⁷⁹

For instance, can driver A claim to have freedom of movement and thus crash into a driver B's car? In such a case there is a clash between equal rights that differ in their exercise. Driver A exercises his freedom of movement in an exclusionary way, by breaching driver B's right to property, which is exercised in a seclusive way. Therefore, the seclusive exercise of the right to property should take priority, as it does not breach the right of another. Generally, it is best for an exclusionary exercise of a right to be accompanied by a judicial writ for it to take priority over a seclusive one. The judicial intervention should be rare and justified. It should be granted upon evidence showing that the alleged seclusive rights are in fact exclusionary.

The same reasoning applies in academia. Academic freedom confers special rights upon scholars but also comes with obligations and is not unlimited. The exercise of academic freedom is subject to the respect of the rights of fellow scholars and to the duty to ensure respect for contrary views. Hence, we maintain that when there is a clash between scholars' academic freedoms, regard should be paid to the mode of realization of the two rights. An exclusionary exercise of academic freedom interfering with peers' rights, is of lesser weight in comparison to a seclusive exercise of academic freedom. Take for instance, a case where scholar A is invited to give a speech at a conference and scholar B continually interrupts her by shouting at her. In such a case there is a clash between academic freedom of expression of the two scholars. Yet, scholar A's exercise of academic freedom is seclusive and therefore takes priority over scholar B's right to academic expression as represented in Figure 2.

⁷⁹ ERIC FONER, *GIVE ME LIBERTY!: AN AMERICAN HISTORY BRIEF* (2004).

Figure 2. Representation of Academic B's overlapping the exercise of Academic A's academic expression.



iii. The Virtue Test

Human rights are of immense importance and yet, they are not equal in weight. We hold that in prioritizing clashing human rights, regard should be given to the nature of the right at hand, to its virtue and to the agenda behind the exercise of the right in question. This balancing process entails a normative vertical analysis that is based on humanistic, liberal, and democratic values. For instance, when a restaurant's owner bars a black client's admission to his restaurant, there is a clash between the owner's right to property and autonomy, and the client's right to equality. Applying the suggested normative mechanism, generally, greater weight should be attached to the right of equality than to the right to property, as it promotes democratic and humanistic values.

A similar conclusion can be inspired by the Convention for the Protection of Human Rights and Fundamental Freedoms that protects several fundamental rights.⁸⁰ Article 17 thereof restricts the exploitation of these rights, not only by the state, but also by individuals and groups.⁸¹ In applying Article 17, the European Court of Human Rights ("E.C.H.R.") inquires, *inter alia*, as to whether the applicant belongs to a group with totalitarian aspirations. The E.C.H.R. especially employs Article 17 in relation to anti-Semitism.

⁸⁰ European Convention on Human Rights, *supra* note 11.

⁸¹ *Id.* at art. 17 ("Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.").

For instance, it has completely removed holocaust denial from the protection of freedom of expression by the application of Article 17. In *Lehideux v. France*⁸² it was ruled that the denial of well-established historical facts, such as the Holocaust, undermines the values against which racism and anti-Semitism are based and constitutes a serious threat to social order; such actions are incompatible with democracy and human rights because they violate the rights of others; the supporters of these activities have aspirations that fall within the category of prohibited purposes under Article 17 of the Convention.⁸³ Clearly, this line of reasoning is restricted to the European Union. Yet, when dealing with universities' institutional autonomy, this balance of two clashing rights is not restrictively formal and it could serve as a normative source of inspiration.

Moving from the general to the specific, in dealing with conflicting academic rights and applying the suggested normative test, regard should be paid to the virtue and substance of the rights involved. Greater weight should be attached to exercise of academic freedom that enhances humanistic, liberal, and democratic values, as opposed to racist or totalitarian manifestations.

Conversely, Michiel Bot claims that the right to call for a boycott follows from the fundamental right to freedom of speech, which is, "a *political* right to aim to affect . . . public opinion . . . which outweighs private rights when the expression is not aimed at private but at public purposes."⁸⁴ The severity of this notion can be detected from Bot's reasoning, which attempts to bleach the Nazi boycott of Jews at the beginning of World War II:

[A]lthough there had been Nazi boycotts of Jewish stores before, the most notorious Nazi boycott of Jewish businesses on 1 April 1933 was a reaction against a transnational anti-Nazi boycott of German merchandise to protest Nazi anti-Semitism . . . Although the anti-Nazi boycott movement was strongest in the United States, it also included Jewish organizations in England[] [and] France. . . . Some

⁸² *Lehideux v. France*, Case No. 55/1997/839/1045, App. No. 24662/94 (Eur. Ct. H.R. 1998).

⁸³ *Id.* at 20.

⁸⁴ Michiel Bot, *The Right to Boycott: BDS, Law, and Politics in a Global Context*, 10 TRANSNAT'L LEGAL THEORY 421, 432 (2019).

historians have argued that this transnational boycott movement remained very limited, but the Nazis repeatedly claimed that it was hurting their economic interests. Hitler himself . . . criticized the boycott . . .⁸⁵

In other words, in Bot's view, the Nazis boycotted Jews on a discriminatory basis and in return, organizations boycotted the Nazi regime, which was troubled by this and increased the anti-Jewish boycott. In a disturbing fashion, Bot seems to justify the Nazi boycott of Jewish stores (and teachers and academics—we add), because it was a retaliation to a transnational general boycott of the Nazi discriminatory regime and the result of a counter-boycott of Jewish organizations of the Nazi regime. Bot declined to mention how the discriminatory boycott against Jews ended.

According to his line of thought, if the goal of a political expression concerns the general public, it outweighs private rights of individuals who may get harmed in the process. This is an alarming notion according to which the (public) end of political activities justifies the means, namely breach of human rights. Arguing that the end justifies the means puts its claimant in three roles—legislator, judge, and executioner. This line of reasoning might lead to alarming results. We hold that in a democratic society, political aspirations, be they personal or public, cannot come at the expense of others. The aim does not justify the means if the means involve a breach of human rights.

The same reasoning applies in academia. In *Keyishian*, Justice Brennan (majority) noted that a legitimate purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.⁸⁶

4. *The Scope of Scholars' Academic Freedom—Conclusions*

In this Part we have discussed the scope of scholars' academic freedom and its limits. We advanced three tests for dealing with conflicting academic rights. Scholars' academic freedom is composed of two pillars. The first pillar concerns inclusion. The second pillar concerns academic expression in teaching and research, freedom of

⁸⁵ *Id.* at 427.

⁸⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

opinion, political participation outside academia and freedom to receive academic materials. Academic freedom is limited by professional standards and is applicable intramurally. It is subject to the respect of the rights of fellow scholars' rights to equality.

When a dispute arises between scholars the following scheme should be adopted in evaluating it. Firstly, regard should be given to whether the activities in question are indeed covered by academic freedom. Secondly, regard should be paid to whether academic freedom is compromised. Thirdly, if there are two conflicting academic freedoms, we suggest adopting the following three prioritization tests. First, the virtue test, incorporates a substantive analysis of the clashing rights to academic freedom. According to this test, the closer in nature the activity is to academia, the greater its weight. Second, "seclusion" v. "exclusion" test. An exclusionary exercise of academic freedom interfering with peers' rights is of lesser weight than a seclusive exercise of academic freedom. Third, according to the virtue test, greater weight should be attached to activities promoting humanistic, liberal, and democratic values.

III. PART TWO- CLASHING SCHOLARS' ACADEMIC FREEDOMS AND THE CAMPAIGN

The Campaign entails the possible conflict between scholars' academic freedoms. On the one hand, Israeli scholars' academic freedom and on the other hand, the academic freedom of faculty participating in the Campaign (hereinafter: Campaigning Scholars or Campaigners), protesting against the political reality in the Middle East. This is a general classification, but one that is required for the sake of an abstract analysis.

This Part applies the normative conclusions concerning the scope of academic freedom and the suggested balancing tests of clashing scholars' academic freedoms to issues arising from the Campaign. Section D reviews the Campaign, its roots, and its ideological platform. Section E analyzes Israeli scholars' academic freedom and its possible infringement by the Campaign. Section F reviews Campaigning Scholars' academic freedom and its scope. Finally, Section G applies the suggested balancing tests to the Campaign.

A. The Campaign—General

This Section reviews and analyzes the sources of the Campaign, its background and its initiatives against Israeli scholars and institutions.

1. *The Campaign—Background and Ideology*

Boycott, Divestment and Sanctions (“B.D.S.” or the “Movement”) is a political movement created in 2002.⁸⁷ The B.D.S. site urges “nonviolent pressure on Israel” until it meets three demands. First: “Ending its occupation and colonization of all Arab lands and dismantling the Wall.”⁸⁸ Second: “Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality.”⁸⁹ Third: Promoting the rights of more than seven million Palestinian refugees and their descendants to return to Israel.⁹⁰ The B.D.S. website issues a triple call. First, “boycott”—withdrawing support from Israel’s regime. Second, “divestment”—withdrawing investments from the State of Israel and Israeli companies. Third, “sanctions”—pressuring governments to fulfil their legal obligations to end “Israeli apartheid.”⁹¹ The B.D.S. leader and co-founder is Omar Barghouti. He referred to the “Jews” who live in Israel as wrongdoers and indicated his aspiration that, in the future state that will substitute for Israel, they will be “settlers.”⁹² There are considerable indications that ties exist between some B.D.S. leaders and terror.⁹³

An assembly of Palestinian academics and intellectuals launched the Palestinian Campaign for the Academic and Cultural

⁸⁷ Alex Joffe, *Palestinians and Internationalization: Means and Ends*, BEGIN–SADAT CTR. STRATEGIC STUDS. (Nov. 26, 2017), <https://besacenter.org/perspectives-papers/palestinians-internationalization-means-ends>.

⁸⁸ *What is BDS?*, BDS NAT’L COMM., <https://bdsmovement.net/what-is-bds> (last visited Jan. 19, 2020).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Terrorists in Suits – The Ties between NGOs Promoting BDS and Terrorist Organizations*, STATE ISRAEL MINISTRY OF STRATEGIC AFFS. & PUB. DIPL., Feb. 2019, at 5, 5-6.

Boycott of Israel (“P.A.C.B.I.”) in 2004.⁹⁴ P.A.C.B.I.’s co-founder, Omar Barghouti, is also the co-founder of the B.D.S.⁹⁵ P.A.C.B.I. is not a registered entity, but rather a campaign comprised primarily of scholars from across the Palestinian Authority.⁹⁶ P.A.C.B.I. acts as the cultural and academic arm of the B.D.S. National Committee (“B.N.C.”).⁹⁷

P.A.C.B.I. generally claims that, “[a]ll Israeli academic institutions, unless proven otherwise, are complicit in maintaining the Israeli occupation and denial of basic Palestinian rights.”⁹⁸ It further argues that, “these institutions are deeply complicit in the Israeli system of oppression that has denied Palestinians their basic rights guaranteed by international law, or has hampered their exercise of these rights, including academic freedom and the right to education.”⁹⁹ P.A.C.B.I. urges academics, academic associations/unions, and academic institutions to “boycott and/or work towards the cancellation or annulment of events, activities, agreements, or projects involving Israeli academic institutions or that otherwise promote the normalization of Israel in the global academy, whitewash Israel’s violations of international law and Palestinian rights, or violate the B.D.S. guidelines.”¹⁰⁰

The Movement calls, not only for boycott, a passive form of behavior, but also for action, to “work towards the cancellation or annulment of events.”¹⁰¹ The call is not limited towards academic institutions, but more generally refers to “agreements, or projects . . . that otherwise promote the normalization of Israel in the global academy.”¹⁰² The call also targets Israeli academics. P.A.C.B.I.’s

⁹⁴ *Palestinian Campaign for the Academic and Cultural Boycott of Israel*, *supra* note 2.

⁹⁵ Omar Barghouti, CANARY MISSION, https://canarymission.org/individual/Omar_Barghouti (last visited Jan. 20, 2020).

⁹⁶ Dan Diker & Adam Shay, *The PACBI Deception: Unmasked—Terror Links and Political Warfare Masquerading as Human Rights*, JERUSALEM CTR. PUB. AFFS., 2019, at 5, 7.

⁹⁷ *Id.* at 5.

⁹⁸ *PACBI Issues Guidelines for Applying Academic Boycott of Israel*, BOYCOTT, DIVESTMENT, SANCTIONS (Oct. 6, 2009), <https://bdsmovement.net/pacbi/academic-boycott-guidelines>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

guideline six refers to, “[s]pecial academic honors or recognition granted to Israeli officials, representatives of Israeli academic institutions.”¹⁰³ Guideline ten, disallows reviewing dissertations and writing letters of recommendations for Israeli faculty.¹⁰⁴

2. *Initiatives against Israeli Scholars and Institutions*

This Section analyses the nature of the Campaign. It describes the targeted entities and perpetrators, and refers to its manifestations.

i. *The Targeted Entities*

In some instances, the Campaign targets academic institutions. In 2005, the Council of the Association of University Teachers (“A.U.T.”) voted to boycott Bar-Ilan University because of its connection with Ariel University, located on the West Bank, and Haifa University—allegedly because it had wrongly disciplined a lecturer for supporting a student who wrote about attacks on Palestinians during the founding of the State of Israel.¹⁰⁵ The A.U.T. reversed the decision.¹⁰⁶

In other instances, individual scholars are the direct targets of the Campaign. For example, the research of Hadassah Medical Center in Jerusalem requested that a researcher of Oslo University send genetic material to aid Palestinian victims of a blood disorder.¹⁰⁷ The latter refused, “due to the present situation in the Middle East.”¹⁰⁸ Similarly, the organizers of the European Association of Israel Studies (“E.A.I.S.”) at the University of London, informed Ariel University’s

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Palestinian Academic Call for International Academic Boycott of Israel*, RIGHT TO EDUC.: ACTIVISM NEWS (July 7, 2004), <https://web.archive.org/web/20050518033015/http://right2edu.birzeit.edu/news/article178>; *To boldly go*, GUARDIAN (Apr. 20, 2005), <https://www.theguardian.com/education/2005/apr/20/highereducation.uk3>.

¹⁰⁶ *Academics Vote Against Israeli Boycott*, GUARDIAN (May 26, 2021), <https://www.theguardian.com/education/2005/may/26/highereducation.uk1>.

¹⁰⁷ Manfred Gerstenfeld, *The Academic Boycott Against Israel*, 15 JERUSALEM CTR. PUB. AFFS. 9, 50 (2003).

¹⁰⁸ *Id.*

scholars that they could not represent their university because it is in the West Bank; the two withdrew from the conference.¹⁰⁹

ii. The Campaigners

Generally, the perpetrators of the Campaign are individual scholars. Only rarely do official academic institutions formally join in the initiative. In 2019, the University of Cape Town (“U.C.T.”) Senate adopted a resolution that “UCT [will] not enter into any formal relationships with Israeli academic institutions enabling gross human rights violations in the occupied Palestinian Territories.”¹¹⁰ The resolution was finally rejected.¹¹¹ Some academic associations have discussed calls to boycott Israeli scholars and institutions. Most of the proposed resolutions of these associations have been rescinded or rejected.¹¹²

iii. The Manifestations of the Campaign

The steps taken against Israeli scholars vary in nature;¹¹³ some set forth entry barriers to academia. For instance, in 2013, a professor at Sydney University denied fellowship to a professor at the Hebrew

¹⁰⁹ *British Conference Tries to Force Israeli Scholars to Hide University Affiliations*, ALGEMEINER (Oct. 3, 2014, 10:10 AM), <https://www.algemeiner.com/2014/10/03/british-conference-tries-to-force-israeli-scholars-to-hide-university-affiliation>.

¹¹⁰ *South Africa University Refused Support for Israel Boycott*, MIDDLE E. MONITOR (Nov. 28, 2019, 10:57 AM), <https://www.middleeastmonitor.com/20191128-south-africa-university-refuses-support-for-israel-boycott>. See also Ilanit Chernick, *Africa’s Top University Nixes Motion to Boycott Israel*, JERUSALEM POST (Nov. 25, 2019, 8:45 PM), <https://www.jpost.com/Diaspora/Africas-top-university-rescinds-motion-to-academically-boycott-Israel-608871>.

¹¹¹ See sources cited *supra* note 110.

¹¹² Maya Shwayder, *US Scholars’ Group Votes in Favor of Academic Boycott of Israel*, JERUSALEM POST (Dec. 16, 2013), <https://www.jpost.com/International/US-scholars-group-votes-in-favor-of-academic-boycott-of-Israel-335178> (noting that in 2013, the Association for Asian American voted to boycott Israeli academic institutions); see also Valerie Strauss, *U.S. Academic Group Votes to Boycott Israeli Universities*, WASH. POST (Dec. 16, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/16/u-s-academic-group-votes-to-boycott-israeli-universities/?noredirect=on&utm_term=.bd3ff2307b6b (noting that the American Studies Association (“A.S.A.”) voted to join the campaign).

¹¹³ Out of respect for the scholars concerned, we omit to specify their names.

University, so as not to support institutions with ties to the Israeli military and the West Bank occupation.¹¹⁴ Not sharing academic materials also bars entry to academia. For example, a French scholar refused to provide an Israeli researcher with an antiserum, explaining, “as long as I see no serious effort made by your home country to achieve peace . . . I will not send you the antisera.”¹¹⁵

Other activities amount to actual exclusion from academia. For example, a then Professor of Manchester University and Editor-In-Chief of two journals, fired two Israeli professors from the editorial board, stating: “My decision is political, not personal . . . but I do not wish to continue an official association with any Israeli.”¹¹⁶ One of the two responded, “I would appreciate it if the announcement made it clear that . . . ‘he [that is, I] was appointed as a scholar and unappointed as an Israeli.’”¹¹⁷ Class disturbances and interruptions of lectures also amount to exclusionary steps. For example, two dozen protesters shouted down a Professor at New York University and the Hebrew University of Jerusalem, at the University of Minnesota.¹¹⁸

In conclusion, the Campaign’s source is B.D.S. and P.A.C.B.I. movements calling to work against Israeli academia and headed by political, rather than academic, figures some of whom have questionable ties to terror.¹¹⁹ The Campaign is mostly implemented

¹¹⁴ Dan Goldberg, *BDS Case Splits Australia’s Pro-Israel Lobby*, HAARETZ (June 6, 2014), <https://www.haaretz.com/jewish/premium-bds-case-splits-oz-pro-israel-lobby-1.5250823>.

¹¹⁵ The authors thank Professor Zvi Zigler of the Technion for providing the correspondence.

¹¹⁶ Email from Mona Baker, Professor of Translation Stud., Univ. Manchester Inst. Sci. & Tech., to Gideon Toury, Professor, Tel Aviv Univ. (Aug. 6, 2002, 8:02 PM).

¹¹⁷ *Id.* (alteration in original).

¹¹⁸ Dale Carpenter, *Israeli Academic Shouted Down in Lecture at University of Minnesota*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/04/israeli-academic-shouted-down-in-lecture-at-university-of-minnesota/?noredirect=on&utm_term=.c140ccab8e00.

¹¹⁹ See Haidar Eid et al., *Looking for a Leadership with a Strategy*, AL SHABAKA (Mar. 19, 2012), <https://al-shabaka.org/roundtables/looking-for-a-leadership-with-a-strategy>; ISRAELI MINISTRY OF STRATEGIC AFFAIRS, TERRORISTS IN SUITS: THE TIES BETWEEN NGOS PROMOTING BDS AND TERRORIST ORGANIZATIONS 5-6 (2019). The report is based on a variety of sources: online sites, social media, the Israel Security Agency, judicial decisions and others. *Id.* at 5. See also Toi Staff, *Israel Shatters 30 BDS Fundraising Accounts by Revealing Alleged Terror Ties*, TIMES OF

from within academia by Campaigning Scholars. It is manifested, *inter alia*, by nationality-based hiring and firing of scholars and is not only directed against Israeli academic institutions, but rather at particular Israeli scholars. *De facto*, the Campaign's manifestations exceed P.A.C.B.I.'s guidelines.

B. The Campaign and Israeli Scholars' Academic Freedom

This Section examines the nature and the extent of the Campaign's interference with Israeli scholars' academic freedom and applies the two pillars of academic freedom to various aspects of the Campaign. It focuses on the steps taken by Campaigning Scholars, and not on the activity of political organizations external to academia. The starting point of this review is that Israeli scholars, like any other teacher, have a right to enjoy to the fullest extent their academic freedom in all its aspects—inclusion and expression.

1. Interference with Scholars' Right to Academic Inclusion

The first pillar of scholars' academic freedom is inclusion. We maintain that like any other scholar, Israeli scholars, have the right to participate in research, teaching, writing and become a member of professional academic bodies. This key notion has several aspects: meritocracy, equality, and the provision of a pro-educational academic environment. This Section explores whether the Campaign compromises this freedom and, if so, to what extent.

i. The Campaign and Capacity

Scholars' access to academia may mainly be subject to capacity and evaluated on academic and professional grounds primarily by peers. If the reasons for exclusions from academia are not professional—but rather political, they breach academic freedom.

However, the Campaign advances disregard to scholars' capacity, aspirations, motivation, rigor, publications, research, and

ISRAEL (June 11, 2019, 5:42 AM), <https://www.timesofisrael.com/campaign-shutters-30-bds-fundraising-accounts-by-revealing-ties-to-terrorism>.

teaching skills and thus breaches academic freedom. There is no claim by the Campaign's supporters that the writing or teaching of Israeli scholars are inadequate. The claim that can be inferred from the Campaign is that they are not worthy of taking part in academia for other, unprofessional, and political reasons. Moreover, the Campaign *de facto* brings about the evaluation of teaching and research of Israeli scholars—not by peers, but rather by political activists.

Hence, the Campaign substitutes a professional entry-barrier to academia with politically motivated admission requirements. Substituting meritocracy with irrelevant political ideology, not only disrupts Israeli scholars' academic freedom, but also undermines the very essence of academia. It disregards the interest of students, academic institutions, and the general public to enjoy the fruits of academic expertise, experience, effort, and perseverance.

ii. The Campaign and Equality

Respect for human dignity calls for equal treatment in academia. There is no room for discrimination in granting access to higher education positions and in academic life. Mistreating a scholar because he or she is black, Muslim, Jewish or Israeli is discriminatory and unacceptable in the workplace—and certainly in academia.

Israeli scholars, like every other human being, have the right to equal treatment whatever their religion, nationality or academic affiliation. However, it seems to us that the Campaign tries to condition academic participation upon belonging to the “right” nationality, culture, race, religion, residence, or political affiliation, rather than merits. No real “culpability” of Israeli universities is claimed and proved by P.A.C.B.I. The Campaign targets Israeli scholars for being Israeli and advances mistreating a scholar because he or she is Jewish, or Israeli.

The Campaign has therefore been criticized for its discriminatory nature. For instance, former Harvard president, Professor Lawrence Summers, noted that Israel was being unfairly “singled out” when other countries human rights records were far worse.¹²⁰ He called Israel-boycott efforts “anti-Semitic in their effect

¹²⁰ Paras D. Bhayani, *Summers Says British Boycott of Israeli Academic is Intentionally 'Anti-Semitic'*, HARV. CRIMSON (June 2, 2006), <https://www.thecrimson.com/article/2006/6/2/summers-says-british-boycott-of->

if not their intent.”¹²¹ In *Avneri*, Judge Amit ruled that: “The academic-cultural boycott is . . . a crude device that targets the entire academic community and the institution itself, without distinction, and as such, in flagrant contradiction to academic freedom, and it is worthy only of contempt.”¹²²

C. The Campaign and Pro-educational Academic Environment

Academic inclusion requires the provision of a safe and welcoming academic environment. A campus environment should be welcoming towards faculty members of all religions and nationalities, otherwise, it would *de facto* serve as an impediment to academic inclusion. However, the Campaign brings about an unsafe campus environment ostracizing Israeli scholars.

The Campaign, accompanied by violent demonstrations and the exclusion of academics from open and civilized discourse, does not allow room for speculation and experiment. Moreover, campus B.D.S. activities, such as “Apartheid Weeks” or turbulent anti-Israeli rallies, might intimidate Israeli scholars and even worse—Jewish students.¹²³

Hostility is not only manifested by violent anti-Israeli activities. A “cold” environment can serve as an unfair barrier as well. For instance, a faculty in which scholars abstain from talking to an Israeli peer due to his or her nationality equally interferes with academic freedom. Furthermore, the mere knowledge that a colleague actively supports the Campaign, having ties to terrorism, may impair academic collaborations. We thus contend that Israeli scholars’ academic freedom is restricted by the Campaign on campuses that

israeli. Professor Anthony Julius and Professor Alan Dershowitz have each argued that the boycotts are intrinsically anti-Semitic employing anti-Zionism as a cover for “Jew-hatred.” Anthony Julius & Alan Dershowitz, *The Contemporary Fight Against Anti-Semitism*, TIMES ONLINE (June 13, 2007), https://web.archive.org/web/20090826051726/http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article1928865.ece.

¹²¹ Bhayani, *supra* note 120.

¹²² *Opinions of the Supreme Court of Israel: A Project of Cardozo Law*, VERSA, <https://versa.cardozo.yu.edu/topics/torts> (last visited Jan. 4, 2022); *see also* HCJ 5239/11 *Avneri v. Knesset OD* (2015) (Isr.) (in Hebrew).

¹²³ Matt Lebovic, ‘Apartheid Week’ Really Does Threaten Israel, Some Experts Warn, TIMES OF ISRAEL (Mar. 18, 2016), <https://www.timesofisrael.com/apartheid-week-really-does-threaten-israel-some-experts-warn>.

allow for the existence of a systematic hostile environment, whereby academics may be socially shunned, boycotted, or intimidated.

1. Interference with Scholars' Academic Freedom of Expression

The second pillar of Israeli scholars' academic freedom concerns academic freedom of expression, which consists of several aspects: freedom of expression in teaching and research, freedom of opinion, and the right to seek and receive academic information.¹²⁴ This Section explores whether the Campaign compromises academic freedom of expression and to what extent.

i. The Campaign and Freedom of Expression in Teaching and in Research

Academic freedom of expression means participating in academic dialogue. A university community, including its faculty, staff, administrators, and students, ought to cultivate a norm of respect for free speech that goes beyond ensuring mere First Amendment compliance. The academic community is vulnerable to political pressures, as it could undermine academic freedom and distort the free exchange of ideas.¹²⁵ Academic freedom of expression refers to freedom of expression in teaching and in research that is meant to cultivate dialogue. Members of a university community ought to consider opposing viewpoints and/or at least allow others to do so.

The Campaign is the antithesis of dialogue. It represents a dogmatic view of one group's truth and regards a dispute having its roots in biblical times as having only one position for solution. Wattad argued that

[a]cademic boycott stands in contradiction to the notion of dialogue. Academic boycott is nothing but the adherence to the boycotters' monologue. Monologues associated with boycotts suggest the existence of a

¹²⁴ See *infra* Part II.C.1.(c).

¹²⁵ UNESCO Recommendation, *supra* note 8, at 48 (“Expressing concern regarding the vulnerability of the academic community to untoward political pressures which could undermine academic freedom . . .”).

single indisputable truth. This is a story of a monopoly claim on truth, which eliminates possible competition . . . over the truth. Obviously, dialogues, unlike monologues, create a real chance for the truth to surface and emerge. At the end of the day, an academic boycott resembles an authoritarian regime's dictate of a single "truth."¹²⁶

Wattad further observed that academic boycotters aspire to disseminate their own opinion while silencing opposing opinions.¹²⁷

The Campaign's all-or-nothing view poses a threat to academic freedom and undermines the very idea of a university. Garasic and Keinan contend that boycotting Israeli academics is a form of censorship, as it prevents dialogue and is antithetical to the mission of the academy.¹²⁸ Similarly, in *Avneri*, Justice Amit noted that

[a]n academic-cultural boycott muzzles expression in the plain meaning of the term. Granting a monopoly to one stand in the marketplace of ideas is the absolute antithesis of freedom of expression and the idea of a free marketplace of opinions. The cultural-academic boycott of Israel is intended to paralyze and silence political expression, impose one opinion and one "truth" Voltaire was ready to fight for an opponent's freedom of expression, but surely would not have been willing to shed his own last drop of blood to defend that opponent's right to silence him.¹²⁹

In *Sweezy*, it was stressed that "[n]o field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes."¹³⁰ Yet, most of the Campaign's manifestations are to be found in these fields.

¹²⁶ Mohammed Saif-Alden Wattad, *When Freedom of Expression Says "No": The Case against Academic Boycott*, 171 TELOS 76, 86 (2015).

¹²⁷ *Id.*

¹²⁸ See generally Mirko D. Garasic & Shay Keinan, *Boycotting Israeli Academia: Is its Implementation Anti-Semitic?*, 15 INT'L J. DISCRIM. L. 189 (2015).

¹²⁹ *Opinions of the Supreme Court of Israel: A Project of Cardozo Law*, *supra* note 122; see also H CJ 5239/11 *Avneri v. Knesset OD* (2015) (Isr.) (in Hebrew).

¹³⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Academic censorship in this regard can take several forms. The obvious manifestation of this stance is in disruptive demonstrations held at lectures given by Israeli scholars, which constitutes a *de facto* breach of academic expression.¹³¹ There are more subtle ways to interfere with academic expression. This can occur before a speech by having the speaker “disinvited” to the podium, by not inviting a relevant scholar to a conference, or not accepting a paper worthy of review for publication.

ii. The Campaign and Academic Freedom of Opinion

As discussed above, academic freedom means freedom to participate in the academic arena regardless of opinions.¹³² Questioning and exploring new ideas, and diversity of thought are essential elements of academic inquiry.

However, the Campaign interferes with academic freedom of opinion. First, living or working in Israel might stand to mean a support of the State of Israel. Campaigning Scholars’ *de facto* “punish” Israeli scholars for their association with the State of Israel and assumed political opinions, thus acting as thought police. Provided Israeli scholars adhere to professional standards, their political opinions should not be used as an entrance barrier to academia. This stance is true, not only regarding academic opinions, but also to general opinions.

Second, freedom of opinion means autonomous decision making that is free from coercion.¹³³ However, the Campaign employs coercive means and adopts actual pressure on scholars to ostracize Israeli researchers from academic forums. A renowned scholar, for example, agreed to participate in a conference in Israel but was pressured to rescind attendance by non-governmental entities, and

¹³¹ See Carpenter, *supra* note 118 (discussing a lecturer who was shouted down by two dozen protesters as he tried to begin a lecture before about 100 students and faculty at the University of Minnesota).

¹³² *Infra* Part II.B.1.

¹³³ See World Declaration on Higher Education, *supra* note 13 (referring to the right to enjoy academic autonomy and freedom).

possible fellow scholars.¹³⁴ Recently, another allegedly coercive aspect of the Campaign seems to have arisen. A professor of history at the University of New South Wales, Australia, was being jointly awarded the Dan David prize for her work on the history of health and medicine along with two others.¹³⁵ She was “urged to turn down this highly lucrative Israeli award in an open letter signed by circa 250 academics,” which stated that “it serves to legitimise and normalise Israel’s colonial violence and apartheid.”¹³⁶

Mann criticized the Campaign for being coercive: “The B.D.S. movement professes nonviolence . . . [and] aims to trigger political change not by winning the hearts and minds of Jewish Israelis, but through financial and symbolic pressure.”¹³⁷ We maintain that depending on its nature and intensity, such pressures may amount to an undue interference with a scholar’s academic freedom. While writing a protest letter seems to be a legitimate way of expressing oneself, systematic badgering may amount to coercion and interference with academic freedom of opinion.

iii. The Campaign and the Right to Seek and Receive Academic Information

The third aspect of academic freedom of expression concerns the right to seek and receive academic materials and fruits of knowledge. All scholars, no matter their religion and nationality, have the right to acquire documentary material and access databases in all formats “regardless of national frontiers.”¹³⁸ Denying an academic colleague access to the fruits of research is a denial of freedom of expression.

¹³⁴ Judy Maltz, *A Brief History of Stephen Hawking’s Complicated Relationship With Israel*, HAARETZ (Mar. 16, 2018), <https://www.haaretz.com/israel-news/stephen-hawking-s-complicated-relationship-with-israel-1.5906160>.

¹³⁵ MEE Staff, *Australian Historian Urged to Return Israeli Health Prize by 250 Academics*, MIDDLE E. EYE (Feb. 25, 2021), <https://www.middleeasteye.net/news/israel-palestine-alison-bashford-dan-david-prize-call-reject>.

¹³⁶ *Id.*

¹³⁷ Itamar Mann, *On the Law, Politics, and Ethics of BDS*, 114 S. ATL. Q. 671, 675 (2015).

¹³⁸ Universal Declaration of Human Rights, *supra* note 10, at art. 19.

2. *The Campaign and the Interference with Scholars' Academic Freedom—Conclusions*

While some Campaigners' activities seem to be a legitimate expression of opinion, other activities seem to interfere with two pillars of Israeli Scholars' academic freedom, consisting of inclusion within academia and of academic freedom of expression, thus, breaching the very fundamentals of academic freedom. First, inclusion. The Campaign substitutes political ideology and national origin for professional capacity as an admission barrier to academia.¹³⁹ The Campaign infringes on the right to equality as it discriminates between scholars of different nationalities, instead of supporting international cooperation. The Campaign further disrupts the aspiration to achieve a pro-educational academic environment, as it creates an atmosphere of hostility, fear, and mistrust. Most notorious is the "coloring" or discrimination of scholars based on their nationality, rather than on their writing and teaching.¹⁴⁰

Second, the Campaign seems to interfere with academic freedom of expression as it aspires to prevent dialogue by censorship, and to enforce a singular view. It also breaches academic freedom of opinion, manifested by shunning scholars who have expressed their political views through their connection to certain universities or living in a given country. Further, freedom of opinion means autonomous decision making that is free from coercion. However, at times, the Campaign employs coercive means to influence its ideology.

D. Campaigners' Right to Academic Freedom

This Section explores the scope of Campaigners' academic freedom by referring to their freedom of expression, political rights and to whether their end may justify their means.

1. *Involvement in the Campaign and Academic Freedom*

Academic freedom protects freedom of opinion and academic expression, whatever that opinion may be.¹⁴¹ It could be claimed that

¹³⁹ See *infra* Part II.B.1.

¹⁴⁰ See *infra* Part I.B.1.

¹⁴¹ See *infra* Part I.B.2.

academic freedom protects scholars' participation in the Campaign. In this regard, the Campaign is seen as an expression of Campaigning scholars' opinions and should therefore be seen as legitimate.

Clearly, scholars may further personal, economic, or political aspirations. However, academic freedom, as opposed to general freedom of expression, is confined to the academic arena, teaching and research, and the quest for truth. This idea is echoed in Jaspers' understanding of the role of the university: "The university . . . is an institution uniting people professionally dedicated to the quest and transmission of truth"¹⁴² This quest for the truth must adhere to professional standards, such as equality and meritocracy—all of which are not answered by the Campaign. On the contrary, the Campaign is designed to achieve a political goal that contradicts the essence of academia.

2. *Academic Political Freedom*

The analysis of academic political rights distinguishes between two notions: the right to hold political opinions, and the right to be actively engaged in politics.¹⁴³ Campaigning Scholars' right to have political opinions is undisputed. They could thus claim that they are political activists addressing the wellbeing of nations and that their political freedom permits disagreement with Israeli government policy. This notion is echoed, to some extent, in Judge Danziger's minority opinion in *Avneri*, an Israeli case dealing with the constitutionality of a legislation defining a call to boycott Israel as a tort. A faculty person may certainly hold a political agenda and exercise his political rights and act to achieve this goal. Therefore, all higher-education teaching personnel should not be hindered or impeded in exercising their civil rights as citizens, including the right to contribute to social change through freely expressing their opinion of state policies and of policies affecting higher education.¹⁴⁴

We do not doubt the right of a faculty person to hold political opinions. A scholar may certainly support the Campaign as part of his or her right to political opinions. Campaigners also have participatory

¹⁴² KARL JASPERS, *THE IDEA OF THE UNIVERSITY* 21 (1965).

¹⁴³ See discussion *supra* Part I.B.2.(a)-(e).

¹⁴⁴ HCJ 5239/11 *Avneri v. Knesset OD* (2015) (Isr.) (in Hebrew); see also *Opinions of the Supreme Court of Israel: A Project of Cardozo Law*, *supra* note 122.

political rights and may engage in parliamentary and similar political activities outside the university. Furthermore, Campaigning Scholars have the right to play a role in helping to identify and address issues affecting the well-being of nations.¹⁴⁵ However, we do question the extent and relevance of such rights to be involved with the Campaign within academia. The core question is whether these academic political rights cover active participation in the Campaign, within one's academic professional capacity. This question will be examined in the following subsections:

i. Intramural v. Extramural Political Activities

When dealing with academic political rights, there is an important distinction between intramural (that is, held within the boundaries of academy) and extramural activities (namely, outside the walls of an academic institution).¹⁴⁶ The exercise of a faculty person's political rights must be outside of his or her employment. The extramural political activity cannot interfere with educational roles and duties.

Can Campaigners use institutional facilities and their academic powers in order to further their political ideology? The very name or brand of the "*academic*" Campaign (also referred to as the academic boycott of Israel), is associated with the academic, rather than the personal, extramural arena. The Campaign takes place within the boundaries of the academic environment, and not in the scholar's private life. The Campaign includes firing from and not hiring to academic positions, rejecting papers from journals, not inviting to conferences, not writing recommendation letters for promotion, or not shaking hands with Israeli faculty persons. All such manifestations are not extramural events, but rather intramural.

¹⁴⁵ World Declaration on Higher Education, *supra* note 13, at art. 2.

¹⁴⁶ UNESCO Recommendation, *supra* note 8, at art. 30 (emphasis added) ("Higher-education teaching personnel have a right to undertake professional activities *outside of their employment*, particularly those that enhance their professional skills or allow for the application of knowledge to the problems of the community, *provided such activities do not interfere with their primary commitments to their home institutions in accordance with institutional policies and regulations or national laws and practice where they exist.*").

Generally, an academic may employ his or her expertise to “improve the world.” For example, writing a professional paper on a political issue is a legitimate intramural professional activity. Yet, every intramural activity must comply with institutional policies and regulations¹⁴⁷ and be subject to professional academic standards. Conversely, the Campaign is exercised within the framework of academic employment, as de facto it is manifested by the treatment of fellow faculty, using the facilities, powers, and resources of the university.¹⁴⁸ This intramural activity does not adhere to academic professional standards and is not covered by recognized academic political rights.

Participating in the Campaign is a form of political activism that does not further the goals of academia in disseminating knowledge, as it hinders international cooperation and diversity. It only helps in achieving the Campaigners’ personal objectives. Using an academic institution to further one’s political agenda, rather than the common good, is an abuse of power.

Academic activities taking place outside academic institutions, such as in academic societies, require a more elaborate evaluation. We hold that such activities do not fall categorically under intramural activity, as they take place outside the confines of the university. We maintain that there is a relationship between external academic institutions supporting academic functions and intramural activities. We further maintain that publishers, laboratory equipment manufacturers, and academic associations are all academia related. When faculty persons act outside their institution in a manner negatively affecting their academic institution, their activity should be regarded as intramural. For example, in our view, a nationality-based dismissal of Israeli scholars effected by a faculty person, while holding her position as Editor-In-Chief in a privately-owned academic journal, amounts to extended intra-mural activity.

¹⁴⁷ UNESCO Recommendation, *supra* note 8, at art. 30.

¹⁴⁸ EINAV YOGEV AND GALLIA LINDENSTRAUSS, THE DELEGITIMIZATION PHENOMENON: CHALLENGES AND RESPONSES, No. 169, at 15 (Sept. 2017).

ii. The Expression of Political Opinions

However, the sources discussed above¹⁴⁹ demonstrate that academic freedom does not serve as a safe harbor for political activities. It is a shield and not a sword, used to gain influence on matters not of academic concern. Teaching, researching, participating in conferences, appertaining to a certain academic institution, and holding opinions are all covered by academic freedom, but political activism is not. Hence, we maintain that participating in the Campaign is an expression of political opinion and activism that is not protected fully covered by academic freedom.

We thus conclude that on the one hand, Israeli scholars' academic freedom is infringed by the Campaign, and on the other hand, Campaigning Scholars' academic freedom does not entirely cover their participation in the Campaign.

E. Balancing Clashing Academic Rights and the Campaign

The tension between the conflicting scholars' rights manifested in the Campaign concerns non-governmental actions performed by "private" (non-State) actors, namely Israeli scholars and the Campaigners. For instance, a Campaigning scholar might claim that his academic freedom of expression allows him to use incivilities against his fellow Israeli scholar. Conversely, the Israeli scholar might claim that her right to academic freedom includes teaching in a pro-educational and safe campus environment and that this right is thus infringed by the incivilities.

In this Section, we investigate how to balance conflicting academic rights with regard to the Campaign by applying the proposed three balancing tests to the tension manifested by the Campaign.¹⁵⁰ We will start by applying the relevance test, move on to apply the "seclusive" v. "exclusionary" exercise of rights test and finally, the virtue test.

¹⁴⁹ See discussion *supra* Part I.B.2.(b), (c), (e).

¹⁵⁰ See *infra* Part I.C.4.

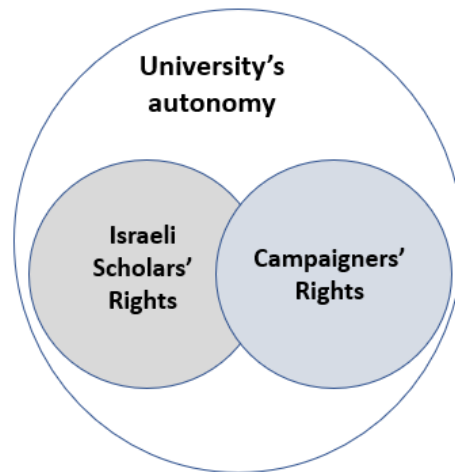
1. *The Relevance Test*

The relevance test that was suggested above examines the proximity of the activities in question to academia. According to this test, the closer in nature the activity is to academia, the greater its weight. However, we maintain that the nature of the Campaign is not close to academia. It is rather antithetical to academia. The term “Academic Campaign” is actually an oxymoron. It does not aim at the truth but rather has a political goal. The Campaign’s mission is not about benefiting the general public or students, but rather political entities, namely the B.D.S. Movement. The Campaign does not adhere to professional standards, but rather advances bigotry and discrimination, as it distinguishes between scholars basing on their nationality by forwarding a different attitude towards scholars of Israeli nationality. It does not advance education, as it calls to boycott and sanction academic institutions.

2. *“Seclusive” v. “Exclusionary” Exercise of Rights and the Campaign*

The second suggested test for balancing clashing academic rights examines the mode of realization of academic freedoms. According to this test, a seclusive exercise of a right, namely one that does not harm others, outweighs an exclusionary one, as the liberty of one cannot come at the expense of the other.

The application of the seclusive exercise of rights overriding exclusionary exercise of rights is relevant to the Campaign. On the one hand, Israeli scholars usually exercise their academic freedom in a seclusive manner. They teach, lecture, write, and research, but they do not personally breach the rights of others. On the other hand, Campaigners’ rights are exercised in an exclusionary manner, interfering with their peers’ rights. Dismissing a person from an editorial board for being Israeli is not an act of liberty—it is academic tyranny. This notion is represented in Figure 3.

Figure 3.

Campaigners' rights override the circle representing Israeli Scholars' rights, resulting in an unjustified breach of academic freedom. It seems to us that generally, while Israeli scholars exercise their academic freedom in a seclusive way, Campaigners interfere with their peers' rights. In Lincoln's words: "Here are two . . . incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny."¹⁵¹

3. *The Virtue Analysis of Clashing Academic Freedoms*

The third suggested test for balancing clashing academic freedoms is the virtue test. According to this test, increased weight should be attached to the exercise of academic freedom that enhances humanistic, liberal, and democratic values, as opposed to racist or totalitarian aspirations. Applying the virtue test to the Campaign's activities, we conclude that the Campaign "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."¹⁵² We hold that the exercise of

¹⁵¹ Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland, in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 301, 302 (Roy P. Basler ed., 1953) (1864).

¹⁵² *Keyishian v. Bd. of Regents*, 385 U.S. 589, 602 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Israeli scholars' and Campaigners' rights is not equivalent in virtue in all matters that relate to the Campaign. While the purely academic nature of the teaching and research of Israeli scholars is undisputed, Campaigning scholars apply a discriminatory agenda, that is based on peers' nationality, rather than equality. Moreover, this agenda is related to the B.D.S. movement that has dubious ties to terror.

4. *The Balancing Tests Applied to the Campaign- Conclusions*

Applying the suggested balancing tests to the Campaign, we conclude that the Campaign obstructs Israeli scholars' academic freedom, and that in many instances, academic freedom does not fully protect involvement within the Campaign. On the one hand, Israeli academics' teaching and research activities are strictly relevant to academia, they are performed in a seclusive manner, namely not breaching fellow scholars' rights, and they adhere to democratic values. On the other hand, Campaigners' rights are exercised in an exclusionary manner, interfering with their peers' rights to academic expression and meritocratic inclusion. Therefore, Israeli scholars' academic freedom should take precedence over conflicting rights in participating in the Campaign.

IV. CONCLUSION

Scholars' academic freedom is composed of two pillars. First, inclusion—requiring capacity, equality, and the provision of a pro-educational academic environment. Second, academic expression—referring to teaching and research, freedom of opinion, political participation outside academia, and freedom to receive academic materials. Academic freedom is limited by professional standards and the respect of fellow scholars. It is generally confined to academia and applies intramurally. Scholars' academic freedom serves as a shield from undue interference of numerous entities: state, students, academic institutions, political, religious and economic entities, and fellow scholars. In order to deal with conflicting scholars' rights to academic freedom, we have proposed three tests: the relevance test, the “*seclusive*” v. “*exclusionary*” exercise of rights test, and the virtue test.

These conclusions can be applied to the Campaign. The Campaign against Israeli academia has opened the door to a whole new level of assault on academic freedom. There are those who desire to force their political take on all members of academia. The result is the attempt to create a one-stop-shop instead of a marketplace of ideas to which scholars of all nationalities are invited.

De facto, the differentiating standards that are incorporated against Israeli scholars lead to the conclusion that the Campaign conditions admission to academia on a nationality-basis rather than on merit, turning academia into a nationality-based forum. In a metaphoric way, it could be thus concluded that the Campaign requires an entrance “visa” to academia and turns Campaigners into passport controllers. Where academic freedom is restricted or limited, a researchers’ ability to produce and employ knowledge is impeded. The Campaign creates an atmosphere of fear and mistrust, functioning as a barrier to academic inclusion. Further, the Campaign brings about a breach of scholars’ right to expression in research and teaching and their right to hold political opinions.

Campaigners’ academic freedom is confined to the academic arena and cannot serve as a safe harbor for political activities that contradict the very essence of academia. Campaigning scholars may certainly engage in political activities using their knowledge to “improve the world” if they meet academic standards. However, this right comes with responsibilities. The Campaign does not further the goals of academia in disseminating knowledge, as it hinders international cooperation and diversity. It only helps in achieving the Campaigners’ personal objectives. Hence, using an academic institution to further one’s political agenda, rather than the common good, is an abuse of power.

It could be claimed that the Campaign gives rise to two clashing academic freedoms: the Campaigners’ and Israelis’. The paper has suggested three normative tests for balancing and prioritizing them and reached the conclusion that the Campaign should be given lesser weight than the strict academic activities of Israeli scholars. In applying the relevance test, we have asserted that the Campaign is hardly academically related. Additionally, while Israeli scholars exercise their academic freedom in a seclusive way, Campaigners interfere with their peers’ rights. When applying the virtue test, the right to equality takes priority over discriminatory political academic rights.