

New Jersey anti-BDS bill is an affront to the first amendment and basic human rights

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On May 9, 2016, the New Jersey State Senate approved by a vote of 39-0 S1923, a bill prohibiting the investment of state pension and annuity funds in companies that boycott Israel or Israeli businesses. One of the bill's sponsors was liberal stalwart and Democratic Majority Leader Loretta Weinberg. Among the co-sponsors were Democratic Senate President Stephen Sweeney and Republican Minority Leader Tom Kean Jr. There is a similar bill in the Assembly, A925, still in committee. [Update: The bill was released by the Assembly committee on May 19, 2016.] Both bills are an affront to basic principles of human rights that many NJ liberals seem to support everywhere else in the world except when it comes to Israel-Palestine. And both bills are an affront as well to the First Amendment.

What follows are excerpts from S1923, along with an analysis.

The State is deeply concerned about the Boycott, Divestment and Sanctions (BDS) effort to boycott Israeli goods, products, and businesses which is contrary to federal policy articulated in numerous laws.

In fact, however, there are no federal laws that prohibit Americans from boycotting the goods of any country. If there were such laws, then this bill would be pointless, since it would bar investment of NJ pension funds in companies that are already breaking the law and therefore already illegal.

...the elected representatives of New Jersey recognize and support Israel's right to exist as a Jewish state.

What is the meaning of the right to exist "as a Jewish state"? Do other states have the right to exist "as a Christian state" or "as a Hindu state"? In a Jewish state, what happens to the 20 percent of the population that is non-Jewish?

If a Jewish state gives automatic citizenship rights to a Jew who lives in the United States and whose family has lived in the United States for more than a century, but denies citizenship to a non-Jew who was born in Haifa and whose family previously lived there for more than a century, to what extent are the values of that Jewish state consistent with what the bill refers to as the shared U.S.-Israeli "values of freedom, democracy, and equal rights"?

Poll data show that 79% of Israeli Jews believe that Jews deserve preferential treatment and half of Israeli Jews believe that Arabs should be expelled or transferred out of the country. Are these views consistent with what the bill refers to as the shared U.S.-Israeli "values of freedom, democracy, and equal rights"?

A bunch of NJ legislators recently went on a trip to Israel arranged for them by the New Jersey

Association for Jewish Federations, which also paid their ground costs. Several members of Jewish Voice for Peace wrote to Nia Gill, their State Senator, suggesting that while in Israel she might want to visit Adalah, the Legal Center for Arab Minority Rights in Israel, which has documented more than 50 Israeli laws that have directly or indirectly discriminated against Palestinian citizens of Israel in all areas of life, including their rights to political participation, access to land, education, state budget resources, and criminal procedures. She didn't reply, but apparently felt no qualms voting for a bill that celebrates the shared U.S.-Israeli "values of freedom, democracy, and equal rights."

There is debate in Israel about whether Israel can be both a democratic and a Jewish state, but revealingly, this bill recognizes and supports only Israel's right to be a Jewish state.

The bill also carefully avoids saying anything about Palestinians having a right to a state of their own. It is, of course, well-known that Israeli Prime Minister Netanyahu and his rightwing Likud party have often rejected the idea of a Palestinian state, but why would liberal Democrats support a bill that fails to even pay lip service to what the U.S. government under both George W. Bush and Barack Obama has nominally endorsed?

Boycotts, divestments, and sanctions place economic and political pressure on business entities, and other organizations and institutions to influence their behavior against Israel.

Those who advocate boycotts, divestment, and sanctions want to change behavior not against *Israel*, but against *Israeli policies*. In the same way, Americans who demonstrated or protested against Jim Crow laws or the Vietnam war or police brutality were not anti-American, but critics of American policies. People engage in all sorts of nonviolent activities designed to encourage or discourage particular government policies — usually that is called civic responsibility. Why only in the case of trying to influence Israeli government policy is such activity to be penalized?

The Israel Lobby often claims that Israel is singled out. It is singled out, but for favoritism, rather than criticism. Is there any country in the world other than Israel whose violations of international law cannot be the proper subject of boycotts?

The clause above lists "sanctions" as one of the things designed to influence Israeli behavior. But sanctions are not imposed by individuals or companies, but by governments and international bodies (as defined on p. 4 of the bill, lines 37-40). So this clause has only two possible targets. It might be aimed at governments who sanction Israel. But sanctioning Israel is hardly a radical idea. Among the U.S. presidents who have sanctioned Israel by withholding or delaying aid are Eisenhower, Reagan, and George H. W. Bush.

The other possible target of this clause is individuals or companies who urge governments to impose sanctions. (For example, Amnesty International, which has called for the suspension of military aid to Israel because of its human rights violations.) But if so, then the bill is targeting advocacy. One would have thought that people have the right to advocate any policy they choose, no matter how ill-conceived others might consider it. But apparently the one thing that cannot be advocated according to Senator Weinberg and her colleagues are sanctions against Israel.

That liberal Democratic politicians would want to vilify advocacy of sanctions against Israel is particularly objectionable given the results of a recent poll done by the Brookings Institution. Those who identified as Democrats were asked how the U.S. should react to new settlement construction by Israel in the occupied territories. Thirty seven percent favored the imposition of sanctions by the U.S. government or by the UN and another twelve percent wanted to take even more serious action. So the views that S1923 considers beyond the pale are endorsed by half of the nation's Democrats.

Shall we punish all of them?

Boycotts, such as those against Israel, do not make for effective business decision making, prevent a business from making the best use of the resources available to it and should be opposed as an impairment to the soundness of commercial contracting performance.

This clause says that "Boycotts...should be opposed as an impairment to the soundness of commercial contracting performance."

This would have prohibited the boycott of South Africa during apartheid, of grapes during the farmworkers' strike in the 1960s, of Sudan while it committed massacres in Darfur, of Myanmar during the rule of its military junta, or of U.S. states that discriminate against people on the basis of sexual orientation. Business interests should not be all that matters, and certainly not when human rights are at stake.

Note that the New Jersey legislature does not actually think that boycotts should be opposed for impairing sound business. We know this because the legislature itself has imposed boycotts. It has banned contracts with companies doing business in Northern Ireland — a part of one of Washington's closest allies — unless they complied with certain human rights standards (NJ Rev Stat § 52:34-12.2 [2015]).

It might be claimed that this clause in S1923 does not oppose *all* boycotts, only boycotts "such as those against Israel." But then what is it that characterizes boycotts against Israel? Only those that are aimed at countries that stand in violation of numerous UN Security Council resolutions? Only those that are aimed at countries who stand in violation of decisions of the International Court of Justice?

But why would the NJ legislature possibly want to prohibit people from any nonviolent action designed to encourage compliance with Security Council resolutions or with ICJ rulings?

Some claim that Security Council resolutions simply reflect the views of a biased, anti-Semitic body. But the United States has veto power in the Council. This means that any resolution adopted by the Security Council criticizing Israel could not have been opposed by the U.S. government. Washington has exercised its veto on behalf of Israel dozens of times, but even with this protection Israel is still one of the world's leading violators of Security Council Resolutions.

Nationality-based boycott actions are often veiled discrimination, and it is against the public policy of New Jersey to support such discrimination.

A lot of things are "often" true, but we only pass laws based on what is actually true in the particular case that is the focus of the legislation. It is also true that passing legislation to protect an illegal occupation — as this bill does — is "often veiled discrimination" against the victims of that occupation and it should be "against the public policy of New Jersey to support such discrimination."

In her public comments supporting the bill, Senator Weinberg has avoided the hedging and explicitly declared that "New Jersey cannot support such biased practices as those of the BDS against our sister state" and this bill "will send a clear message that we stand against this kind of veiled discrimination." But asserting discrimination does not make it so.

A boycott of companies based in Israel because of their complicity with violations of international law or human rights is not "nationality-based" discrimination any more than are the boycotts authorized by the State of New Jersey against investments in Sudan, Iran, or Northern Ireland.

...no assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury, or its successor, shall be invested in any company that boycotts the goods, products, or businesses of Israel, boycotts those doing business with Israel, or boycotts companies operating in Israel or Israeli-controlled territory.

The last phrase of this clause indicates that this bill would penalize anyone who didn't want to do business with Israeli-companies operated in the Occupied Palestinian Territories. So a U.S. company that heeded the call of Human Rights Watch for corporations to cease their complicity in violations of international law in the occupied territories would be penalized by the State of New Jersey.

When Human Rights Watch called on companies to stop supporting human rights violations by purchasing diamonds from Zimbabwe or oil products from Sudan or logging products from Myanmar, human rights defenders cheered. But when Human Rights Watch makes similar recommendations regarding the Israeli occupation, the authors of this bill try to punish any who wish to comply. Of all the human rights abusers in the world, this bill would single out Israel for special protection.

So where does this bill prohibit New Jersey from investing its pension and annuity funds? Here are some possibilities one can imagine:

- a. The State of Israel. The Israeli government has banned the sale in Jerusalem of some dairy and food products produced by five Palestinian companies. These Palestinian companies are based in the occupied territories. Thus, the Israeli government is boycotting "companies operating in Israel or Israeli-controlled territory." But of course this is not what the bill's authors intend. Boycotts against Palestinians are fine; it's only boycotts against an illegal occupation that trigger S1923.
- b. G4S Security, one of the world's largest security firms. G4S, which provided support to Israel's prison system, ended its operations in Israel, following a vigorous political campaign against it.
- c. Veolia, a French-based transnational specializing in utility and transportation services. Targeted by activists for its construction of the rail link tying West Jerusalem to the illegal settlements, Veolia announced in 2015 that it was selling its stake in Israel.
- d. Any other company that has withdrawn from the Israeli market or, indeed, failed to enter the Israeli market.

Now it might be objected that this bill does not apply to entities or companies that do not do business with Israel for business reasons, but only to those that are *boycotting* Israel. But how can one tell the difference? The bill defines "boycott" as "engaging in actions that are politically motivated" (p. 4, line 32). But this means that the bill is not penalizing actions, but is judging political motivation. For the government (the State of New Jersey) to penalize someone for their political motivation violates basic First Amendment rights.

If two companies engage in the exact same behavior, and the only difference is that one has political motives that the government approves of and the other does not, then to penalize one but not the other is an impermissible use of government power. Imagine if a Republican legislature passed a law saying that the State could only invest funds in companies whose officers endorsed the Republican platform. Clearly that would be improper.

The Supreme Court in its 1982 *NAACP v. Claiborne Hardware Co.* decision recognized boycotts as a First Amendment-protected form of political speech. This means that if it would be wrong for the

State of New Jersey to penalize people for engaging in political speech (whether the legislature approves of that speech or not) then it would be equally wrong for the State of New Jersey to penalize people for engaging in a boycott (whether the legislature approves of that boycott or not).

And if having the State of New Jersey assessing our political motivations isn't problem enough, the bill provides that the State's efforts to identify boycotters shall include "retaining an independent research firm to identify companies that boycott Israel." (Now that's a great use of New Jersey's scarce revenues.) So this bill would authorize the establishment of a data base of companies' political views. This represents a serious threat to civil liberties.

This bill doesn't just penalize those companies that are boycotting Israel, but those that are boycotting Israeli companies, even a single Israeli company. So if a socially responsible investment firm in the United States chose not to invest in weapons manufacturers and some of the weapons manufacturers in which it chose not to invest were Israeli companies (Israel was the 8th largest arms exporter in the world in 2015), then it would be subject to this bill.

Supporters of the bill might say, no, this socially responsible investment firm is not subject to the bill because its refusal to invest in an Israeli arms manufacturer is not because the company is Israeli, but because it's an arms manufacturer. But many BDS supporters could say the same thing: their refusal to invest in Israeli companies is not *because* those companies are Israeli, but because they contribute in some way to violations of international law or human rights. Those who call for the boycott of or divestment from Caterpillar do so not because it does business in Israel, but because it provides equipment that demolishes Palestinian homes in violation of, among other things, the Fourth Geneva Convention and Security Council Resolution 1544 (2004).

Apparently, the sponsors of this bill have no problem with our investing so as to avoid tobacco products, or guns, or hydrocarbons, or blood diamonds — those are all fine. The only thing they won't permit us to do is screen our investments in such a way as to avoid supporting the continued Israeli oppression of Palestinians.

One other danger of this bill is that it will contribute to anti-Arab and anti-Muslim bigotry in the United States. Imagine an Arab-owned company in New Jersey. It imports various products from, say, Jordan. But was its decision to import from Jordan rather than Israel a purely business decision or was it based on a motivation to boycott Israel? Are the State Investment Council and the Director of the Division of Investment and the "independent research firm" retained by them now going to try to determine why the company imported Jordanian rather than Israeli figs?

Some Jewish-Americans chose not to buy Volkswagens because of past German crimes. Some Korean-Americans, believing that Tokyo has not properly atoned for its crimes against "comfort women," may shun Japanese products. They have every right to do this, and no one investigates them for it. But if any Palestinian-American-owned companies feel uncomfortable investing in or buying from Israel, a country whose oppression of their people was not just in the past, S1923 would authorize examining their motives and punishing them.

There is nothing New Jersey needs less than investigations into the business decisions of its Arab and Muslim population.

This bill violates our First Amendment rights. It threatens to exacerbate Islamophobia and anti-Arab sentiment. And it aligns itself against the cause of human rights in Israel-Palestine.

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