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REALPOLITIK OF ACADEMIC FREEDOM: THE STEVEN SALAITA CASE

This essay will explore the academic freedom aspects of the case of Steven Salaita and the University of Illinois at Urbana-Champaign (UIUC). I will first present the facts of the case, then a sketch of the legal issues. I will then outline some elements of the history of academic freedom relative to extramural political speech, and then add some remarks on what the Salaita case teaches us when seen through a Realpolitik view of academic freedom. From this perspective, the success of claims to academic freedom depend on the force of individual legal actions and collective faculty pressure that are brought to bear against administrators and trustees. I conclude with some speculations as to changes the Salaita case might bring to current practices of university administration relative to faculty extramural speech.

Two prefatory remarks are in order. First, in the interest of full disclosure, I became involved in the case in support of Salaita the day the story went national, writing an Open Letter on my blog (Protevi 2014a), and then two days after that, I offered my services as organizer of the philosophy profession's boycott of UIUC, an effort that gathered 550 signatories by September 2, 2014 (Protevi 2014b). Second, I won't analyze Salaita's political speech here relative to the limits of academic freedom. Instead I will take a proceduralist view. While in principle some faculty extramural speech might disqualify a person from a faculty post due to the speech's calling into question the person's professional qualifications, the proper body to examine whether Salaita's speech did so in this case would have been a UIUC faculty panel that, per American Association of University Professors (AAUP) guidelines, took his statements in the context of the entirety of Salaita's scholarly output and teaching record.[1] The actions of UIUC Chancellor Phyllis Wise and University of Illinois (UI) Board of Trustees President Robert Kennedy and others are thus procedurally objectionable by their taking onto themselves faculty rights to be the judge of disqualifying speech. In this view, academic freedom and faculty governance go hand-in-hand, but that also brings us to face some harsh truths about faculty ability to enforce claims to their proper role in judging academic freedom cases.

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[1] The UIUC Committee on Academic Freedom and Tenure report (CAFT 2014) recommended such a faculty panel but the AAUP report (2015) states it would have been unwarranted: "While the CAFT report raises questions about Professor Salaita's fitness with respect to his scholarship, recommending further investigation by a faculty committee, this subcommittee sees no reason to address or explore that scholarship. Chancellor Wise did not explicitly raise any concerns about Professor Salaita's scholarly work as the initial reason for refusing to forward his appointment to the board, nor did she retrospectively offer such a concern as a reason during her meeting with the subcommittee. It would therefore be presumptuous for this subcommittee to construe the chancellor's reasons for her actions against Professor Salaita in a way that she has not stated herself or to consider any reasons beyond those that she has cited" (AAUP 2015, 14).

FACTS OF THE CASE

Steven Salaita's career narrative and the early events of his hiring at UIUC are mundane; I take the main points here from the AAUP report on his case (AAUP 2015). None of these facts are in dispute (what was disputed by UIUC was that Salaita had a binding contract with them, given the need for formal board approval). Salaita received his PhD in 2003 from the University of Oklahoma in American Indian Studies. He then worked at the University of Wisconsin-Whitewater from 2003 to 2006, when he was hired at Virginia Tech University for its English Department, receiving promotion to Associate Professor with tenure in 2009.

In February 2013, Salaita was the unanimous choice of the faculty in the Program of American Indian Studies (AIS) at UIUC for an Associate Professor position. The month of September 2013 sees approvals of the hire by the UIUC administration, including Chancellor Phyllis Wise and Provost Ilesanmi Adesida. On October 3, the Interim Dean writes an offer letter to Salaita, which, in the words of the AAUP report, notes "the presumably standard formality—that the appointment was contingent on approval by the board of trustees." On October 9 Salaita accepts the UIUC offer, asking for a start date of August 2014. During the October 2013 to July 2014 period Salaita "was given teaching assignments and asked to submit course syllabi, which he did. Arrangements were made to pay for his moving expenses and to see to his computer needs" (AAUP 2015).

The context for the next steps is Salaita's political activity. The author of *Israel's Dead Soul* (Salaita 2011), Salaita was most likely not unknown to those opposed to the Boycott, Sanctions, Divestment (BDS) movement. His prominence there most likely rose in 2013 due to his role in supporting the American Studies Association resolution supporting a boycott of Israeli institutions. In defense of that resolution's passage he wrote several blogposts in December 2013 at *Mondoweiss* (Salaita 2013a) and *Electronic Intifada* (Salaita 2013b). Then, during July 2014, Salaita's tweet line included tweets highly critical of the Israeli prosecution of Operation Protective Edge in Gaza. The tweets used vulgarity and vivid imagery; some of them, it was claimed by many of Salaita's opponents – and conceded by some of his supporters, either genuinely or for the sake of argument – skirted close to, played on, or simply employed anti-Semitic tropes. (Salaita 2015 shows that his tweet line also contained tweets expressing opposition to anti-Semitism, empathy with Israeli citizens harmed in conflict, and solidarity with Jewish critics of the Israeli operations in Gaza [8-9].)[2]

We now see the story wend its way up the media chain, following the current trend

[2] The question of the proper unit of analysis for tweets – the individual tweet, the set of tweets on the same topic, the entire tweet line – has no easy answer.

whereby mainstream media outlets allow themselves to comment on issues they would otherwise not bother with, because lower-level outlets have previously made an issue of it. This practice provides them a sort of plausible deniability, in that they can say "we're just reporting on the fact of the scandal, and abstaining from judging the charges that the original actions deserve to be seen as scandalous." Sometimes accompanied by a sort of tut-tutting at the lower reaches of the web, the mainstream can have its cake and eat it too, leveraging scandal for viewers while maintaining their reputation for probity.

At the beginning of the story is William Jacobson, a clinical law professor at Cornell University Law School, who writes a post at his blog, *Legal Insurrection*, on July 19, 2014, concerning Salaita's tweets (Jacobson 2014). Two days later, on July 21, the *Daily Caller*, a relatively prominent conservative website, reported on the Jacobson blogpost (Owens, 2014). Then the break into the mainstream media occurs the next day with the Champaign-Urbana *News-Gazette*, reporting that Salaita "has drawn the ire of a conservative website" (Garennes 2014).

It's during this time that Chancellor Wise learned of Salaita's tweets. After several days of communication between Wise and community members and donors (see Document 10 in CAFT 2014), Wise, without consulting AIS program officers, the College Dean, or the Provost, wrote to Salaita on August 1 that she had decided not to submit the appointment to the board as "an affirmative Board vote confirming [his] appointment" was "unlikely" (AAUP 2015). The news of Wise's decision, and the Salaita case in general, went national with an August 6, 2014 article in *Inside Higher Education* (Jaschik 2014).

From then until the Board decision on September 11, there was an unrelenting stream of blogposts, tweets and Facebook posts, with heated debates in comments, as well as petitions, op-eds, boycott news, cancellations of appearances, and denunciations of the Wise decision by professional organizations (Protevi 2014d). Thousands of emails were sent to UIUC (a small sample: Panagia and Martel 2014). In a move that sparked even more controversy, and to which we will return later, Chancellor Wise sent a mass email to UIUC community on August 22, "The Principles On Which We Stand," which, together with an accompanying Board note, invoke "civility" as a touchstone for acceptable faculty speech. Response from the UIUC community itself during this time was divided. A number of departments issued statements of no confidence is Wise's leadership (Protevi 2014c), but there were also op-eds, petitions, and newspaper ads in support of Wise (Wurth 2014).

Sometime in early September Chancellor Wise decided to forward Salaita's appointment to the Board, which, in its September 11 meeting, voted down Salaita's position, 8-1. In December, the UIUC Committee on Academic Freedom and Tenure report (CAFT 2014), issued a report recommending Salaita's fitness be examined by a UIUC faculty panel, only to have the report rejected by UIUC administration in

January 2015. Then on January 29, 2015, Salaita announced a lawsuit for damages on contract law and free speech grounds (a FOIA suit for release of UIUC emails was also filed). The big break in the case occurred on August 6, 2015, when a Federal District Court ruled against key portions of a UIUC motion to dismiss Salaita's suit, allowing his suit on contract and free speech grounds to proceed. Finally, on November 12, 2015 a settlement is announced between Salaita and UIUC for $875,000 (of which $600,000 to Salaita and $275,000 legal fees).

The final chapter so far is Salaita at American University of Beirut (AUB). In July 2015, he is hired by in a visiting capacity as Edward Said Chair of American Studies. In early 2016 Salaita was offered a permanent position as director of the Center for American Studies and Research. However, on March 30 AUB President Fadlo Khuri invalidates the Salaita offer. A student petition circulated on April 13 claimed outside pressure was brought to bear. The next day Khuri responds, citing on the basis of "procedural irregularities" in the search / offer process (Jaschik 2016). Then, on April 20, a student "town hall" saw people make claims of calls by the US Senators from Illinois to Khuri in summer 2015 about the initial one-year Salaita hire (Students for Salaita 2016).

LEGAL ISSUES

Salaita filed two suits in 2015 (legal documents and press releases from Salaita's lawyers are available at CCR 2015b). One was a Freedom of Information Act suit, seeking release of emails relevant to his case. This seemed a routine matter until it later came out that Chancellor Wise and others had tried to conceal their correspondence by using private email accounts (UIUC 2015a). When those efforts failed and further emails were released (UIUC 2015b), Wise resigned. (There was a round of negotiations as to Wise's post-Chancellor role and a performance bonus, but they needn't overly concern us here; for details see Cohen 2015.)

The important suit for our concerns was filed by Salaita in January 2015, seeking "equitable and monetary relief for violations of his constitutional rights, including free speech and due process, and for breach of contract, promissory estoppel,[3] tortious interference with contractual and business relations, intentional infliction of emotional distress, and spoliation" (CCR 2015a, 4-5). As is common, the defendants challenged Salaita's suit. And as we noted above, the most important legal event was a Federal court ruling by Judge Harry Leinenweber in August 2015 allowing some parts to go forward (Salaita v Kennedy et al., No. 1:2015cv00924 - Document 59 (N.D. Ill. 2015); Palumbo-Liu 2015 is a good non-technical discussion.)

[3] "Promissory estoppel" means, in lay terms, that the university would be liable for expenses incurred by Salaita acting on the university's promise of employment, even if, strictly speaking, a valid contract did not exist until Board approval. Salaita could not collect on both breach of contract and promissory estoppel, but if the former claim failed he would still have been able to pursue the latter. Dorf 2014 briefly covers the topic.

In ruling on a motion to dismiss, the judge must weigh the evidence in favor of the plaintiff (in this case, Salaita) so that all the plaintiff must have shown in the original suit is that a trial is needed to resolve the dispute.

The university won a major victory in that the court dismissed the tortious interference, and lesser victories on the emotional distress, and spoliation (destruction of evidence) claims. Regarding the interference claim, the judge protected the donors as exercising their free speech in complaining of Salaita's hire. Had the tortious interference claim gone forward, pressure from donors to settle quickly might have come up, to prevent disclosure proceedings. Not being able to wield that threat however meant Salaita lost some leverage in the timing and amount of the eventual settlement.

However, Salaita won major victories in both employment law and free speech areas from the judge. Of particular interest to us, of course, is the free speech issue, but the employment issue does have some bearing in a discussion of academic freedom. The university wanted to claim there was no contract with Salaita so that it could claim Salaita was not yet an employee, which would have meant, in its interpretation, that its own Statutes limiting unilateral administrative action in academic freedom cases would not have covered Salaita (more on this in the following section). Even if it won on the breach of contract claim (by showing no contract existed), it would have been exposed on the "promissory estoppel" claim, but would have been saved the embarrassment of having been shown to have violated its own rules.

The most salient academic freedom issue here, however, is UIUC's claim that it objected to the tone and not the content of Salaita's speech. It had to make such a claim as UIUC is a public school, which means it has First Amendment obligations to not practice "viewpoint discrimination" in hiring and firing decision. The administration's strategy was to claim that the tone of Salaita's tweets meant that he would not be able to discharge his duties of fair teaching; this goes to the "Pickering balancing test" issue, to which we now turn.

First amendment protection for academic freedom has two basic restrictions: *Pickering* and *Garcetti* (see Squires 2015 for analysis of both rulings). Under the "Pickering balancing test," the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" can be taken into account against "the interests of the teacher, as a citizen, in commenting upon matters of public concern." And *Garcetti* said that speech by a public employee under his or her "official duties" wasn't protected; although the Court did mention academic freedom as warranting special concern, it did not resolve it.

On the first amendment issue, the court rejected the "tone rather than content" claim by UIUC:

> The University's attempt to draw a line between the profanity and incivility in Dr. Salaita's tweets and the views those tweets presented is unavailing; the Supreme Court did not draw such a line when it found Cohen's "Fuck the Draft" jacket protected by the First Amendment. Cohen v. California, 403 U.S. 15, 26 (1971). The tweets' contents were certainly a matter of public concern, and the topic of Israeli-Palestinian relations often brings passionate emotions to the surface. Under these circumstances, it would be nearly impossible to separate the tone of tweets on this issue with the content and views they express. And the Supreme Court has warned of the dangers inherent in punishing public speech on public matters because of the particular words or tone of the speech. (Salaita v. Kennedy et al, No. 1:2015cv00924 - Document 59 (N.D. Ill. 2015) at 26; cited in Palumbo-Liu 2015)

Hence, UIUC, as a public institution, faced exposure on First Amendment grounds for its actions in denying Salaita employment, as the court ruled its distinction of tone and content, forming part of its *Pickering* claim, would not hold as grounds to dismiss Salaita's lawsuit. Had the case gone to trial, the university and Board might have won against the breach of contract claim, by showing that the Board approval was necessary for a full contract, but it seems quite unlikely it would have prevailed against the promissory estoppel claim, which then would have kicked in (Dorf 2014). Whether they would have won the free speech claim via a *Pickering* balancing test is difficult to say; it most likely would have been, at best, an uphill battle for them (Leiter 2014). Thus exposed on both employment law grounds (either for breach of contract or for promissory estoppel) and on free speech grounds, the university found it in its interest to settle with Salaita before the case went to trial. The calculation of a settlement seems to have involved the following factors: the low probability of winning the free speech claim; the amount they would pay on either employment issue; the desire to limit further damage to their reputation; and the desire to limit further legal costs.

ACADEMIC FREEDOM RELEVANT TO SALAITA CASE

The 19th century in Germany saw the development of two linked concepts of academic freedom: *Lernfreiheit*, the freedom for students to pick courses, to live free of overt administrative control, and to judge for themselves the truth of professorial statements, and *Lehrfreiheit*, the freedom for professors to research and teach (Hofstadter and Metzger 1955, 386-388). However, extramural speech was generally not thought by the Germans to be covered by *Lehrfreiheit*: "it was generally assumed that professors as civil servants were bound to be circumspect and loyal, and that participation in partisan politics spoiled the habits of scholarship" (Hofstadter and Metzger 1955, 389).

In the American context, the early AAUP efforts downplayed student freedom and emphasized teacher neutrality in the classroom; the assumption was student impressionability. This might have been a holdover from earlier struggles over doctrinal control of teaching in religious colleges (Hofstadter and Metzger 1955, 410-411). After several high-profile instances of firings of professors for political speech (of which the Ross case at Stanford is widely discussed; see Veysey 1965, 400-407), American activists for academic freedom added extramural statements to the protections in the landmark 1915 AAUP "Report on Academic Freedom" (Hofstadter and Metzger 1955, 396; 407-412).

The guiding idea of the early academic freedom statements is that universities serve the public, and so professors, administrators, and trustees must protect academic freedom as it allows robust debate, which was seen as essential to knowledge production and testing. Now early 19th century American college debates about academic freedom concerned freedom of theological speculation and freedom of natural science from religious dogma, while later 19th century American university debates concerned how production and dissemination of social scientific knowledge claims in the political and social realm can upset economic interests. At the turn of the century, then, it was thought that if it were in the long-term public interest to have a society with vigorous natural and social scientific debate, it falls to administrators and trustees to shield professors from short-term public opinion, susceptible as it is to moral frenzy and calls for economic reprisals against those promoting unpopular views.

The AAUP has long emphasized the interrelation of academic freedom, tenure, and faculty governance. Tenured professors could claim immunity from summary dismissal and instead demand due process in the form of a faculty-led hearing with the opportunity to contest evidence. Extramural statements could only be introduced as grounds for dismissal if they demonstrated scholarly incompetence in the faculty member's expertise, and any such attempt must place the extramural statements in the context of the entire work output of the faculty member. While neutrality in extramural statement was not required, as it was in classroom behavior, decorum remained an important issue however. The 1915 report claimed that "it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression" (discussed at Hofstadter and Metzger 1955, 411).

In an important article, John K. Wilson (2015) clarifies changes in the position of AAUP with regard the "obligation" of a dignity standard as it relates to extramural statements. Ironically enough, the changes were prompted by the UIUC firing of Professor Leo Koch in 1960. In 1940, the AAUP spoke of the status of professor as one that *imposes* "special obligations" to be accurate, restrained, and respectful of the opinions of others, even as professors "*should be* free from institutional censorship or discipline" for exercising their free speech rights as citizens

(emphases added). By 1964 the AAUP had weakened the former and strengthened the latter. In Wilson's words, the 1964 position amounts to an affirmation of "a fundamental right of faculty to speak and a special obligation that rests on the conscience of individual faculty members rather than being imposed by the institution" (Wilson 2015). More changes were in store however. A set of "Interpretive Comments" from 1970 "suggested that the proper place for addressing extramural utterances was in the realm of professional ethics, not institutional enforcement" (Wilson 2015).

Finally, Wilson's article is useful to us here in noting that the governing Statutes of the University of Illinois follow AAUP guidelines and place "accuracy, forthrightness, and dignity" as something of which a professor should be "mindful." In cases in which the administration feels a faculty member has failed to keep those qualities in mind while speaking as a citizen, unilateral administrative actions are limited to the following remedy: "the president may publicly disassociate the Board of Trustees and the University from and express their disapproval of such objectionable expressions." This limitation on unilateral action does not preclude the administration from convening a faculty panel to examine whether extramural speech calls into question the professional qualifications of a faculty member due to its disregard for fact, logic, or fair treatment of opponents (CAFT 2014).

CIVILITY STANDARD

We now turn to the implication of having Wise and the UI Board introduce "civility" as a limit to academic freedom. In so doing, I will pass over the history of "civility" as a trope in putting down resistance to colonial occupation in order to focus on its use by Wise and the Board; however, the resonance of its colonial and its administrative use in being employed against a faculty member hired in AIS and writing on comparative indigenous resistance to settler colonialism is a theme in CAFT 2014, Salaita 2015, and elsewhere.

Before we turn to Wise's August 22, 2014 email, we should deal with her later attempts at damage control. An undated follow-up to the email reads in part:

> As I have said many times since its release, this massmail message was not intended to establish a policy on speech or a campus speech code. I believe any such code would be an unacceptable restriction on the academic freedom of our faculty. It was not my intention to make our campus a focal point for the complicated, nuanced and ongoing national debate on the nature of civility and higher education, and I sincerely regret that my message did so. (Wise 2014)

It may not have been her intention to make UIUC a focal point of debate on "civility," but her email, and the accompanying statement by the Board (see Wilson 2014b for analysis) had precisely that effect. And while Wise's email is a wooly-headed mess, we shouldn't think it isn't characteristic of administrative blather on the issue, simultaneously affirming platitudes about academic freedom while eviscerating it in practice by unilateral action that cuts out the faculty review safeguard, and by sloppy thinking that conflates what needs to be distinguished. As for charity in interpretation and acknowledgment that the email was written in the heat of the moment and under extreme pressure, well, the fact that Wise was not up to the task of defending her actions means that she shouldn't have undertaken them.[4]

The text of the email:

> What we cannot and will not tolerate at the University of Illinois are personal and disrespectful words or actions that demean and abuse either viewpoints themselves or those who express them. We have a particular duty to our students to ensure that they live in a community of scholarship that challenges their assumptions about the world but that also respects their rights as individuals.
>
> As chancellor, it is my responsibility to ensure that all perspectives are welcome and that our discourse, regardless of subject matter or viewpoint, allows new concepts and differing points of view to be discussed in and outside the classroom in a scholarly, civil and productive manner.
>
> A Jewish student, a Palestinian student, or any student of any faith or background must feel confident that personal views can be expressed and that philosophical disagreements with a faculty member can be debated in a civil, thoughtful and mutually respectful manner. Most important, every student must know that every instructor recognizes and values that student as a human being. If we have lost that, we have lost much more than our standing as a world-class institution of higher education.

The first problem with the email is the expansion of protection from disrespect from persons to "viewpoints themselves." It's prima facie nonsensical to talk about "personal and disrespectful words or actions that demean and abuse either viewpoints themselves or those that express them" since viewpoints, not being persons, cannot be subject to personal disrespect. Even on a charitable reading that

[4] The precise relation of Wise to the Board remains a matter of dispute. Was she made to carry water for them and then got thrown under the bus, as she later claimed in FOIA-released emails? (Meisel 2015). That might go to increasing personal sympathy for her, but I don't see how being bureaucratically outmaneuvered decreases her responsibility for the damages she did to Salaita's career and the dangers her ill-considered words pose to academic freedom for others.

restricts "personal" to "those that express" you still have an unacceptable restriction to "respectful" speech directed to viewpoints.

As I see it, there is both a procedural and a normative problem with Wise invoking "disrespectful words or actions" as falling beyond the protection of academic freedom and hence justifying her action against Salaita. Procedurally, the problem is endowing harried university administrators, in a milieu in which they must try to placate donors, with the power to unilaterally invoke some "I know it when I see it" standard for "disrespect." Even if one were to grant that a university community has an interest in addressing extramural cases of disrespect by faculty members against those holding opposing views, the proper venue for that discussion is among faculty members. And that, I think, both for prudential reasons – they are less likely to cave to outside pressure – and cognitive reasons – they are closer to the action and have a better sense of the difference between vigorous criticism, or even scornful dismissal, and "disrespect." The normative problem is deciding whether disrespect warrants punishment, and if so, how severe? I would argue that the punishment should never exceed censure; economic reprisal should never be considered for cases of "disrespectful words or actions" in extramural speech.

The next problem with Wise's email is the unmotivated hauling in of a concern for students: "We have a particular duty to our students to ensure that they live in a community of scholarship that challenges their assumptions about the world but that also respects their rights as individuals." It's unclear what "rights" Wise is addressing, but even if it were the case that she means a Title IX notion of the rights of students to an education free of a hostile environment, what was at issue is Salaita's extramural speech. By what means does that violate student rights to a non-hostile environment, that is, how does that show problems in Salaita's classroom, advising, and other intramural activities? Wise must have known from vetting his application dossier that there was no evidence of classroom trouble on the part of Salaita at Virginia Tech.

As there was no evidence of past misconduct, Wise then shifts to guessing as to potential problems with student "confidence": "A Jewish student, a Palestinian student, or any student of any faith or background must feel confident that personal views can be expressed and that philosophical disagreements with a faculty member can be debated in a civil, thoughtful and mutually respectful manner." It's at best unclear how one is to measure threats to future student confidence, but even if such access were possible, we are then back to the faculty governance issue: it's highly unlikely that a single administrator is in position to judge that better than a relevant faculty panel would be, especially when the administrator has a STEM background and the relevant classroom experience would be held by humanities faculty members. And in any case, the time for that is in pre-hire vetting, not in ex post facto attempts to justify a firing (or even "de-hiring" if one insists).

A final twist, brought out later and by others, but still relevant here, is Salaita didn't have any problems with students at Virginia Tech because those that would have been offended avoided his classes. And from this past hypothetical, some felt empowered to speculate that some students would avoid Salaita's classes were he to have been allowed to at UIUC. One commenter in the *Journal of Academic Freedom* put it like this:

> No doubt arguments would be made to the committee that the offending tweets were taken out of context and that there is no evidence that Salaita has ever punished opposing viewpoints in the classroom. But now that Salaita has made his statements, one can assume that his classroom will be a much different place. *I imagine that* if Professor Salaita were (re)instated to the UIUC faculty some students would avoid him … (Eron 2015; emphasis added).

If academic freedom is to hang on the ability of people to imagine that even the probable lack of future complaints (the induction base here being Salaita's past teaching record) would be due to students avoiding courses, then not only are we concluding from past negatives, we are concluding from future ones as well. What we see here is nothing less than the weaponization of hypothetical student feelings to punish a faculty member with a good teaching record; this is doubly objectionable as it takes advantage of decades of struggle by students against real classroom hostile environments of isolation and belittling, in both the "microagression" and blatant attack modes.

The statement from President Easter and the Board accompanying Wise's email is a similar mishmash, and needn't detain us long, but the excoriating reply in Wilson 2014b deserves some attention.

> The Board of Trustees argues that they represent a "university community that values civility as much as scholarship." Consider what this means: in hiring faculty, the Board of Trustees is announcing that qualifications should be 50% based on niceness, and 50% based on quality of scholarship (teaching ability is apparently not important at all to the Board). This is the recipe for a university of polite half-wits….

A POST-SALAITA REALPOLITIK OF ACADEMIC FREEDOM

Academic freedom is a field of contestation for many actors, but let us focus on administrators and faculty members. We can define it as "freedom from threats to employment for research, teaching, and extramural activities."

While the founders of the AAUP promoted academic freedom as part of a substantive liberal notion of civic improvement, the realist position would say that, once academic administrators came to accept the idea of it, the offer of academic freedom became for them primarily a recruitment and retention tool in searching for tenured and tenure track faculty members (see Tiede 2015 on the early history of the AAUP). (In practice academic freedom is extended only to tenure track faculty members, and it is probably only trusted, if then, by tenured professors.) The relative ubiquity of claims to support academic (very few higher education institutions do not at least claim to protect academic freedom), however, means its marginal contribution to the bottom line of tuition revenue, corporate and alumni donations, and grants, for any one institution is negligible (parents and children deciding what school to go to will rarely take academic freedom claims at school X into account for it's a background condition: all schools make that claim so nothing sets X apart from Y or Z).

For faculty members, a reputation for a robust defense of academic freedom by an administration will be of minimal effect for all but a few stars: in a heavily-weighted buyer's market the marginal attractiveness of a reputation for protecting academic freedom (or at least not attacking it) is going to be quite small for entry-level people with few other TT offers, or for mid-level people looking for improved salary and teaching conditions.

Moreover, faculty members know that administrators must balance these potential positives of academic freedom against potential drawbacks: protecting a faculty member's claim to academic freedom might jeopardize an institution's reputation in public opinion as measured by newspapers, blogs, television stations; might increase complaints from stakeholders such as citizens, parents and students, alumni; and above all might draw threats of punishment from those with leverage over finances: politicians and donors.

Once hired, faculty members will take an administration's plausible claim to defend academic freedom into decisions about research, teaching, and extramural actions: a high-risk / high reward strategy of overturning and / or publicizing conventional wisdom benefitting corporate or political actors could only be rationally undertaken when the faculty member is confident of administrative support for them under the banner of academic freedom. Here then is the social utility argument for academic freedom, as it enables uncomfortable truths to be found and publicized.

On a Realpolitik view, taking the position that rights are enforceable claims (James 2003), then academics possess the right to academic freedom only to the extent that we can enforce claims to it. The most we can say is that "the right to academic freedom" serves as an ideal to which faculty aspire, one that might restrain administrative action if backed by faculty sanctions.

We can see the aspirational status of academic freedom in the Salaita case. UIUC had contract law exposure and First Amendment exposure if its Pickering balancing claim failed, but no constitutional legal "academic freedom" exposure. As there is no constitutional legal right to academic freedom, and contractual rights to academic freedom vary, then enforcement of academic freedom claims rest with the ability of professors and their public actor friends to exert pressure on the reputation of a university accused of violating academic freedom. That pressure can take the concrete form of public statements, of boycotts by invited speakers, and of the refusal to apply for jobs or to accept job offers.

Boycotts and public statements (blog posts, open letters, op-eds, and so on) attempt to pressure administrators by shaming them with various audiences (public, alumni, other administrators, faculty members) by contrasting their performance with their statements committing the institution to academic freedom. Boycotts in particular hope to encourage faculty at an institution to challenge their administration by providing evidence of the harm the administration has done to the reputation of the university.

While university administrators faced with boycotts would keep "reputation" in mind, they are also concerned with public reputation as well as with academic reputation, and they might very well concretize the former as donations, as it seems Wise did in the Salaita case. Thus a potential administration calculation would be the net effect on donations by one course of action or another, pitted against the legal costs possibly incurred by one action or another, as well as costs of potential payouts. A large factor in the latter though is the financial situation of a faculty member bringing suit: how long can they hold out based on their income and expenses?

In the case of refusals to apply for jobs or to accept job offers, the ability to enforce claims to academic freedom is entangled with market forces. While senior faculty members might very well have some leeway in refusing to apply for or to accept a job offer, with a buyer's market for junior faculty searches, administrations may be tempted to bet that desperate junior professionals would not be able to keep from applying for or accepting job offers, regardless of a university having been revealed as having a weak commitment to academic freedom.

We mentioned above the social utility justification of academic freedom so that administrators and trustees must look to the long-term public interest of a robust public sphere, and in so doing protect faculty members from volatile public opinion, which is susceptible to moral panic and manipulation by political and economic interests. The problem of course is that trustees are very often aligned with well-established economic and political interests, and that administrators can perceive the well-being of the institution – and / or of their own careers – as more important than protecting the academic freedom of any one particular troublesome professor.

That's the problem with the way abstract ideals and concrete cases interact; almost all cases of administrators and trustees firing professors are accompanied by paeans to academic freedom; it turns out you can support academic freedom in principle and as an ideal, and just happen to think this case exceeds its protections. From the perspective of faculty of course, the "just this case" exception for administrators often seems to fall upon cases in which a faculty panel would have found otherwise. That brings us around to the realist viewpoint that academic freedom claims find enforcement only in individual legal action, but against rich universities, is even a $2 million hit as in Salaita all that troubling? As far as collective faculty action goes, how long can a boycott really last? What happens when administrators just ignore AAUP censure? Will would-be faculty applicants, in a severely tilted buyer's marker, really factor in AAUP censure against the chance for a tenure-track position?

SOME PREDICTIONS FOR POST-SALAITA EFFECTS

About the best we can hope for is that Board approval timelines will be regularized; otherwise, it would be foolhardy for a professor to leave a tenured position pending Board approval; that would have to be in hand before notice is given to the current university.

It is possible that university social media policies will be adopted, along the lines of the Kansas model (Kansas 2014). Originally released, and heavily criticized, in December 2013 (see AAUP 2013), the May 2014 revision added the customary paeans to academic freedom language as a figleaf, but kept the essentials. The Kansas policy notes the *Garcetti* restriction for "official duties," and *Pickering* balancing, which it glosses as "interferes with the regular operation of the employer, or otherwise adversely affects the employer's ability to efficiently provide services," balanced against "the employee's right as a citizen to speak on matters of public concern." But "regular operation of the employer" is extremely vague and also unacceptable leeway for administrative judgment (we can easily imagine a dean saying "making me review this case and write this memo is interfering with the regular operation of the school"). A further issue brought up by the Kansas policy is brand management, which was certainly on the mind of Board member Helen Van Etten on the occasion of the May 2014 revision: "I think we will see more and more other universities start to have these same policies," she said. "We don't want to damage their brand and we don't also want their universities to impair their academic freedom" (Summers 2014). "Damaging the brand" is similarly vague and threatening to academic freedom.

A dystopic future would include real-time monitoring, as mooted in Steinberg 2015.

> Imagine for a moment that a team of social media experts, cybersecurity and privacy pros, lawyers aware of relevant laws, and human resources

> managers had crafted clear, detailed social media usage rules for employees at the University of Illinois, that the school had required all new hires to accept them as a condition of employment, and that the school had provided Salatia with technology that warned him at the time that he was tweeting that what he was doing was against school policy. Might he have refrained from making the tweets? Might he have toned them down a bit? And had he continued and posted them as he did, would the school have had a much stronger case–thereby eliminating the incentive for attorneys to take Salatia's case? Or giving the school grounds to countersue? Or, maybe, on the other hand, if the professionals had crafted a policy that had allowed him to express his views as he did–for example, if the experts believed that the University had no right to demand that employees not make such posts–would the school have refrained from rescinding its offer, and instead responded to his tweets in a different fashion? . . ."

Now of course the "different fashion" is, as we have seen, UIUC policy: the president will condemn and disassociate the university from the statements, but that's it.

Even if we are to avoid vague and threatening social media policies and real-time monitoring, it seems likely the social media history of prospective hires will be scrutinized, and that someone in the Dean / Provost / Chancellor line will nix "controversial" hires before the contract is offered. With sufficient care by administrators not to mention speech (content or tone) but just to invoke scholarship standards, candidates would lose the ability to claim free speech infringement. Protesting a nixed search would then remain an internal matter, with the burden falling on university faculty to make internal complaints. But then, should they be punished for that, any suit would have a hard time convincing a judge that such internal speech would merit protection, given *Garcetti*, as their internal speech about university matters might be seen as pursuant to their official duties. So we are back to the relatively thin reed of collective faculty action elsewhere looking to harm university reputation; but bringing a case to faculty attention elsewhere might also expose the affected university's faculty members to *Garcetti*-exempted punishment. This logic will be clear to department search committees who will not bother with proposing "controversial" candidates. This logic will also be clear to faculty members looking to move, incentivizing them away from "controversial" extramural speech. Thus *Garcetti* plus social media analysis will have a chilling effect on extramural statements by faculty members looking to move. Hence it's not just tenured professors who might feel protected in their extramural statements, but tenured professors satisfied with their current position.

As has been the case for the past 100 years, faculty members will struggle to preserve and strengthen academic freedom safeguards. For professors at private schools, that means rigorous contract language. For professors at public schools, we must get out from underneath a *Pickering* and *Garcetti* bound legal status of

academic freedom. With regard to *Pickering*, Squires 2015 argues that "efficiency" is not a core university value, even if we don't want to condone wasteful inefficiency. There are obviously huge issues here, but even if in some sense one of our functions is to provide credentials, that's bound up with time-consuming and often unquantifiable contributions to teaching and research in such a way that we don't just provide a "service" like dispensing driver's licenses, the efficiency of which is easily measured. When it comes to university values, "debate" has to be higher than "efficiency" for us, and, as argued above, allowing unilateral administrative judgments as to "civility" – or even allowing faculty-led punishments more than censure, in my opinion – would take a terrible toll on debate. With regard to *Garcetti*, I think we should push for a legal ruling that would protect our speech, even under an expanded view such that it can sometimes be in the nature of professorial "official duties" to make public comment on public matters. If we are to be seen as serving a public good, then we need freedom from sanction to comment on public matters as part of our "official duties" as scholars (though not as representatives of the university). We also need to address the problems *Garcetti* poses to intramural speech, something not directly relevant to the Salaita case (pace Eron 2015), but something certainly relevant to any robust notion of academic freedom. If, say, Faculty Senate service can be labeled as falling under "official duties" qua "shared governance," then a Faculty Senate debate or resolution critical of the administration might be seen as falling prey to punishment allowed by *Garcetti*.

And finally, if I may end on a prescription rather than a prediction, public and private university professors must struggle to extend academic freedom rights – and that means increase our power to enforce claims – to all academics, regardless of tenure status.

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