

Inquiring Minds
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Howard Pachman, Moderator

Discussion questions follow the papers.

INSIDE HIGHER ED

Oregon: Professor in Blackface Violated Anti-Harassment Policy

University releases report on actions of law professor that stunned campus and prompted calls for her dismissal. Professor -- and others -- object to findings.

By [Scott Jaschik](#) January 3, 2017

A review commissioned by the University of Oregon has found that a law professor who wore blackface to a Halloween party violated the university's policies against racial harassment.

News that the professor, Nancy Shurtz, wore blackface at the party stunned the campus as word of the incident spread and photos surfaced on social media. She apologized and said that she was trying to dress as a book, Damon Tweedy's memoir about a black man starting his medical career, *Black Man in a White Coat*. And the report commissioned by the university doesn't challenge her stated intent, which was to draw attention to the book and its anti-racist message.

But the report notes the history of blackface as a tool to demean and insult black people.

And the report includes some context about the party that may be relevant to those whose initial reaction was that what a professor does in her own home and at her own party is not anyone else's business. The report notes that she invited all of the students in two of her classes to attend -- extending invitations in class and via class email lists. The report -- based on interviews with those students -- also notes that some (but not all) students felt that it was wise for their relationships with the professor to attend the party.

"The fact that the event was off campus at Shurtz's home distinguishes it from the standard classroom environment in which the students can be considered a 'captive audience,' unable to just 'avert their eyes' from something that offends them. However, several students said they felt like they could not leave when they wanted to, despite being offended and uncomfortable, for the same reason they felt obligated to attend, and some said this was because Shurtz had papers of theirs still waiting to be graded."

The report -- by a Portland law firm -- also noted that the university is committed to academic freedom and First Amendment principles. But the report said that these rights are not absolute for faculty members, and that it is appropriate to consider the "disruptive" impacts some speech could have in some circumstances. Specifically, it noted that speech that takes the form of harassment is not protected.

"Actual impacts that we heard from those interviewed included shock, anger, surprise, anxiety, disappointment and discomfort with remaining at the event. Given the number of students who were present for the event, the publicity surrounding the incident, the severity of the costume choice and the level of offense, and the significant and ongoing impacts upon both the attendees as well as the student body, it is clear that Shurtz's costume was substantially disruptive to the educational environment," the report says.

The report added: "Outcomes and impacts upon the broader student body have been described at length above, but a summary of such impacts includes outright hostility and division between the students, the environment being described by some as 'toxic,' class time being spent on discussing the event and the students' reactions, the open forum, minority students feeling that they have become burdened with educating other students about racial issues and racial sensitivity, students using other offensive racially based terminology during class times in the context of discussing this event and broader racial issues, feelings of anxiety and mistrust towards other professors beyond just Shurtz, students now avoiding spending time on campus as a result, and some students who are attempting to transfer to a different law school."

These impacts were key to the finding that "the effects of Shurtz's costume constitute disruption to the university significant enough to outweigh Shurtz's interests in academic freedom and freedom of speech in the type of speech at issue. In addition, the resulting hostile learning environment and impact upon the academic process renders this particular speech to be speech that the university has a strong interest in preventing."

Two caveats offered by the report concerned factors over which Shurtz had no direct control: concern over a lack of diversity in the law school, and frustrations over the reactions of some students to the incident, which were perceived as insensitive.

Shurtz issued a statement criticizing the report, which she said shouldn't have been released. "This release violated rights of employees to confidentiality guaranteed by law. In addition, the report contains numerous mistakes, errors and omissions that if corrected would have put matters in a different light," the statement said. "For example, it ignored the anonymous grading process, the presence of many nonstudents as guests and the deceptive emails that created a firestorm in the law school." The statement added that the university was aware that Shurtz was preparing a response, but the provost's office opted not to wait for the response, but "cynically decided to try to publicly shame me instead."

Scott Coltrane, provost at Oregon, issued a statement in which he said that he normally would not have released such a report, but did so because of the intense interest in the case and because Shurtz has already identified herself as the professor involved.

As to the next steps in this case, he said, "In all cases where the university is advised that an employee violated university policy, the matter is reviewed under the appropriate disciplinary process. I have read the report and accept its conclusion. Any resulting disciplinary action remains confidential under university policy."

Concerns About Free Speech

In the days since the Oregon report was released, some commentators who write about free speech issues have raised concerns about the university's findings.

A blog post by the Foundation for Individual Rights in Education said in part, "Students and professors are in trouble if they are at risk for punishment any time their expression motivates rigorous debate on campus. UO's actions and the report on this incident make clear that that risk is real, and this could play out in any number of disturbing ways. For instance, public discussion of significant current events might well dominate classroom discussions and social media. The outcome in Shurtz's case means that if someone expresses their opinion on any race- or sex-related controversy in a way that others deem offensive, that person will be held responsible for all subsequent discomfort and disruption -- even if that discomfort is a natural consequence of constitutionally protected speech, and even if the disruption is plainly someone else's responsibility."

Eugene Volokh, a professor of law at the University of California, Los Angeles, wrote in *The Washington Post* that Oregon's stance endangered arguments that have been used to defend higher education.

"For a long time, universities have argued that the public has to tolerate the views of professors, even when those views sharply depart from established moral and political orthodoxy, and even when the views create offense and upset (which indirectly often create disruption). That's how universities have tried to maintain public support, including financial support from legislators and from donors, in the face of such offensive professor views," Volokh wrote. "It looks like the University of Oregon is abandoning that position, most clearly as to certain speech on certain topics, but the logic of the abandonment applies far more broadly. And this makes it hard to see why the public should continue to support the university when it sees professors expressing many other views that members of the public find offensive."

THE WASHINGTON POST

[The Volokh Conspiracy](#)

Opinion

Silencing professor speech to prevent students from being offended — or from fearing discrimination by the professors

By [Eugene Volokh](#) December 30, 2016

People often support disciplining and even firing professors who say things that are perceived as racist on the grounds that 1) those professors can't be trusted to evaluate minority students fairly, 2) students will be afraid that they won't be judged fairly, or 3) students will more broadly lose confidence in the professors (or just couldn't stand to be in the room with them) or even in the institution, and won't learn as effectively. I've seen these arguments made often, most recently as to the University of Oregon controversy. One response to my Oregon post, for instance — a tweet by @TimothyWright3, "What does the institution say to students of color by allowing [Prof. Nancy] Shurtz back into a classroom?" — seems to be implicitly making these arguments (though it seems to focus most clearly on No. 3. But, again, this is just one example among many.

I appreciate the force of these arguments, and indeed, if all you care about is maximum teaching effectiveness and reliability, you might take such a view. But, if accepted, these arguments really will be the end of freedom of expression — both casual and more formally academic — on university professors' part, because they reach far beyond black makeup in Halloween costumes.

Imagine, for instance, a professor who says — at a party, in an op-ed, at a debate, in a scholarly article, or wherever — that she thinks that Catholicism is a foolish and evil religion, because it oppresses women and gays.

Presumably many devoutly Catholic students will be quite upset about that statement, which expressly derogates the faith that is such an important part of their identity. Indeed, they may worry that a professor who is militantly anti-Catholicism might discriminate against students who are known to be Catholic. (Many students might publicly self-identify as Catholic, for instance by prominently participating in Catholic campus programs, or mentioning their Catholicism when relevant to in-class discussions. They may also wear broader Christian symbols, such as crosses on chains or ashes on their foreheads on Ash Wednesday; if the students' last names or accents also identify them as people likely to come from a Catholic culture, some observers

might infer that the students are likely practicing Catholics.) They may lose respect for the professor, because they feel the professor lacks respect for them.

True, anti-Catholicism doesn't always mean hostility to all individual Catholics; but wearing black makeup likewise doesn't always mean hostility to blacks. The argument against Shurtz is that wearing black makeup was offensive even if it wasn't motivated by hostility to people — likewise, sharply anti-Catholicism statements can be offensive to Catholics, too, even if they are motivated by disapproval of the religion and not specifically of the religious. People might well ask, "What does the institution say to [Catholic students] by allowing [the professor] back into a classroom?" Is such a question then reason to suspend or even dismiss professors who condemn Catholicism?

Or say a professor says that President-elect Donald Trump is a charlatan and a bigot and that Trump voters were therefore either fools or bigots themselves. Again, this could be in a conversation at a party where students may be present, or in an op-ed, or in a scholarly article.

Many Trump supporters might be upset at the statement, which directly insults them. And they may worry that the professor might discriminate (deliberately or unconsciously) against students who have publicly expressed their support for Trump. (Federal and state statutes generally don't ban discrimination against students based on their votes or political party membership, but the First Amendment does ban such discrimination by public universities, and certainly university rules and ethical principles ban professors from grading students worse just because of whom the students voted for.) People might well ask, "What does the institution say to [pro-Trump students] by allowing [the professor] back into a classroom?" Is such a question then reason to suspend or even dismiss professors who condemn Trump voters?

Likewise, say a professor sharply condemns certain streams of Islam (e.g., Wahhabism), or for that matter just posts the Muhammad cartoons on his office door or when writing about them on his blog. Some Wahhabi students may be offended by the former. Many Muslim students of various denominations may be offended by the latter. All might worry that the professor may discriminate against them. "What does the institution say to [Muslim students] by allowing [professors who post the Muhammad cartoons] back into a classroom?"

Or say a professor publicly identifies as a hard-line Marxist, who thinks that the capitalist class has blood on its hands from its oppression of the workers. The professor might have praised Marxist mass murderers, such as Stalin or Mao, and talked of the justifiability of violent revolution. Or he might have just been seen wearing a Che Guevara T-shirt.

Students whose families belong to the capitalist class — the class that was targeted for oppression and murder by the people the professor praises — might be offended by this and might worry that the professor will be prejudiced against them. Cuban American students whose parents may have fled Guevara and his partners in crime might be

especially offended and worried. Maybe some of them had family members who were killed by Che's firing squads. "What does the institution say to [Cuban American students] by allowing [the Che-shirt-wearing professor] back into a classroom?"

And the list could go on: The same arguments could be made against professors who say that homosexuality is immoral, or even just publicly say that they believe in the teachings of a certain church, if those teachings condemn homosexuality. They could be made against professors who express doubt that gender identity should be defined by a person's self-perception, as opposed to a person's anatomical sex. They could be made against professors who argue that the military is a shameful career; many antidiscrimination policies (including at the University of Oregon) apply to discrimination based on veteran status as well as based on race, religion, sexual orientation and so on.

They could be made against professors who broadly condemn whites as racists or men as rapists (even if they only argue that this is just a strong tendency among those groups, and not a universal certainty). They could be made against professors who sharply condemn Israel and Israelis, or the Palestinian Authority and Palestinians. Indeed, they could even be made against professors who make all these statements mildly and thoughtfully. Say, for instance, that a professor's condemnation of, say, Catholicism — or evangelical Christianity or Mormonism or Islam or capitalism or Socialism or Trump or Clinton or gun rights supporters or abortion opponents — calmly and politely argues that those beliefs are evil, and that rank-and-file adherents of the religious or political belief system are morally responsible for the evil that the belief system produces.

Could students reasonably worry that the professor — however polite — will be subconsciously (or intentionally) biased against people who, he has just said, are responsible for such evil? Could students reasonably worry that the professor will grade them more harshly (or discriminate against them in other ways, even if the grading is anonymous)? Could they feel unwanted in class, and in turn not want to take the class? Could they feel the loss of the perceived mutual respect that is often so useful to learning, especially in small classes or in one-on-one projects? The answer in all these cases has to be "yes," I think, to one or another degree.

Yet I take it that universities' (especially public universities') general answer to the student who complains about a professor who made anti-Trump-voter or anti-Catholicism or anti-capitalist or anti-American statements at a party or in a blog post will be, more or less, "tough." Professors are entitled to express their views, including controversial ones; indeed, they're supposed to express such views, however controversial, as part of their scholarship and their public commentary. And that applies to condemnation of religions, economic classes and political belief systems, as well as debate on less heated topics. "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom." If you disagree with the professor, express that disagreement, the universities would say; but we won't shut the professor up in order to prevent you from feeling offended or alienated.

Now discrimination by professors against students is a serious concern. It's wrong for professors to grade students down because they are black or white or pro-Trump or anti-Trump or Catholic or Muslim or atheist. It's wrong even when the professors aren't deliberately saying "bwahaha, here's my chance to strike back against privileged whites or terrorist-loving Muslims or Trump yahoos or Palestinian-oppressing Israelis," but are just subconsciously undervaluing the work of those groups for which they have contempt — regrettably, a common human tendency.

And such discrimination by professors is also bad because the fear of such discrimination can drive students into the closet: It can discourage them from revealing that they're gay, or Christian, or Muslim, or Trump supporters, or abortion opponents, or whatever else. And that can undermine the quality of public debate as well.

Yet, again, I take it that the university's response to such complaints about professors who made anti-Trump-voter, anti-Catholicism, anti-capitalist or anti-American statements at parties or blog posts would still be some version of "tough." "You need to be confident that our professors will judge you fairly," the university would presumably say (however credibly). "And we can't just shut up our professors on all these subjects; they're supposed to express themselves on controversial topics. The university is all about learning from people who sharply disagree with you, even when those disagreements go to important parts of your identity."

I think that, on balance, this university approach, with its traditional support for freedom of expression, is the better one, if universities are to be places for fostering debate and inquiry. But if professors like Shurtz are barred from the classroom for their speech, then *all* this speech will be threatened. To the extent that any would be protected, it would be protected only when those who are in power — some mix of university administrators, state legislators, faculty senates, student majorities, student activists and wealthy donors — happen to agree with the potentially offensive speech.

There would be no principle to which dissenting voices could appeal for protection. Once a professor's public speech — or even speech in a relatively private setting, so long as some students are there or some students hear about it — is seen as sufficiently offensive to enough students, that would be seen as justification for suspending or firing the professor.

And the lack of this principle would be felt not just by Shurtz but also by those who talk about alleged white privilege, the evils of Catholicism, the folly or bigotry of Trump voters, the immorality of choosing the military as a profession, or the depravity of capitalists or Israelis — as well as those who post Muhammad cartoons, criticize homosexuality or transgender rights theories, or discuss possible biological differences between male and female cognition and temperament. Indeed, as groups see that claims of group-based offense can be tools to fire professors they dislike (or pressure those professors into silence), the result would be more and more such claims of offense: Behavior that gets rewarded gets repeated.

Again, maybe some may support all this, on the theory that any such controversial statements undermine classroom instruction (and perhaps even grading fairness), and that maximally effective classroom instruction on those topics and with those viewpoints that the university administration chooses should be our main goal. That is more or less the view in the military, for instance (to oversimplify somewhat), because the military understandably prizes effectiveness above self-expression or open debate (except insofar as debate is needed to better accomplish specifically military goals).

But if people do endorse this view, they should endorse it with their eyes open, realizing what a vast range of academic speech — left, right and otherwise — it would potentially affect.

Questions for discussion:

Do professors have free speech rights, both in the classroom and outside the classroom?

Do professors have an obligation to be “neutral” on all subjects? Or merely to be transparent about their beliefs?

Is there a danger that censorship of teachers for problematic speech could lead to censorship of books in the classroom with problematic themes or ideas?

Did a professor ever turn your way of thinking upside down or provoke a discussion in a way that today might be considered provocative or offensive?

Are there certain things – like dressing in blackface or certain figures of speech – that are so offensive that they should always be off limits, even in the context of an academic setting or where a person is trying to combat racist actions and thoughts?

Who’s Really Placing Limits on Free Speech? <http://nyti.ms/2i9jpPa>

