

A setback for free speech at University of Oregon - Oregonian, The (Portland, OR) - December 31, 2016 - page 11

December 31, 2016 | Oregonian, The (Portland, OR) | Ofer Raban | Page 11

Last week, the University of Oregon released and adopted a report regarding a law professor who donned a Halloween costume representing an African-American doctor. University leaders suspended the professor and commissioned the report from a Portland law firm, which worked under the "direction and guidance" of university lawyers.

The report recognized that the professor donned the costume at a party at her home in order to honor an African-American author and call attention to the scarcity of African-Americans in medical schools. The report also noted that she was shocked at the negative reactions to her costume and promptly apologized. But the report concluded that the costume constituted racial discrimination and harassment in violation of university rules. It goes on to claim that the professor's expression is not shielded by university rules protecting free speech and academic freedom, nor by the Constitution's freedom of speech.

This is a deeply flawed report. The university has made a legal and moral mistake in adopting it.

The report fails to address the fact that the costume was worn to advocate for racial equality. While the report concedes as much, its legal analysis fails to take it into account. The report not only concludes that a costume intended to advocate for racial equality constitutes racial discrimination, it also makes no attempt to justify this counterintuitive conclusion.

The report recognizes that the professor's expression regarded a matter of "public concern," which the First Amendment guards with particular rigor. But it concludes that the university's interest in preventing disruption to its educational operations outweighs the professor's rights of free speech and academic freedom.

The report also fails to mention or analyze the Oregon Constitution's free speech provision, which Oregon courts ordinarily address even before the First Amendment since it provides greater free speech protections.

Why were university administrators so keen to adopt this flawed report? Perhaps because the administration itself was responsible for much of the resulting disruption, including student outrage, damage to the law school's reputation and a toxic law school atmosphere.

Administrators had repeatedly failed to inform students of the actual intent behind the costume or of the professor's record as a defender of minority rights. And when these facts surfaced, officials doubled down by claiming that her intent did not matter.

The report contains student testimony showing the administration's responsibility for some of the ensuing damage, including:

“communications sent out by administration may have served to anger or confuse some students,” that the “law school’s response has...polarized the situation”;

“the administration’s response was...very inciting...” and “made [the professor] easy to vilify...”;

“the administration had not been fair, because the response was a blatant mischaracterization of [the professor’s action].”

The report draws no conclusions from this damning information, dismissing the testimonies with the note that, “It is unlikely that any investigation would be able to meaningfully evaluate how much of the resulting impact was caused directly by [the professor] and how much of the impact is connected to these other factors.” But that “resulting impact” is the basis for the report’s conclusion that the professor’s speech is constitutionally unprotected.

Why was the administration’s response so conducive to inflaming rather than calming emotions? Some administrators may actually have believed the professor’s intent in donning the costume simply didn’t matter. But we should also note that the professor in question was one of seven law school professors who had complained to university officials about the managerial performance of the law school dean. Isn’t it often the case that the settling of personal scores underlie ideological purification campaigns?

According to the university, a professor is guilty of racial discrimination and harassment for donning a costume that sought to advocate for racial equality. And that act of political expression is not protected by the rights to free speech nor by academic freedom. This is a sad day for freedom of speech and expression at the University of Oregon.

Ofer Raban is a professor of law at the University of Oregon."

Copyright (c) 2016 Oregonian Publishing Co.