

I. INTRODUCTION

Is it wrong for professors to quote epithets—especially “nigger”—in class or other educational settings? This question has often been in the news in recent years. In law schools, it has arisen when a First Amendment law professor quoted the defendants’ speech from a leading First Amendment case (*Brandenburg v. Ohio*);<sup>1</sup> another First Amendment law professor (one of us) quoted the facts in a rare example of a hate speech prosecution;<sup>2</sup> a torts professor quoted the facts of a case involving claims of intentional infliction of emotional distress and wrongful discharge;<sup>3</sup> a professor teaching a legal history class quoted a statement attributed to Patrick Henry;<sup>4</sup> a criminal law professor posed a hypothetical about provocation and self-defense;<sup>5</sup> and a guest lecturer in a class on tobacco regulation displayed and quoting copies of racist advertising.<sup>6</sup>

In other departments, the question has arisen when a political science professor quoted a passage from Martin Luther King, Jr.’s *Letter from Birmingham Jail*;<sup>7</sup> a history professor quoted a 1920 statement by U.S. Senator James Reed explaining his opposition to the League of Nations;<sup>8</sup> a history professor quoted James Baldwin’s *The*

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<sup>1</sup> *Professor at Wake Forest University Apologizes for Reading the N-Word Aloud in Class*, J. BLACKS IN HIGHER ED., Apr. 7, 2020, <https://www.jbhe.com/2020/04/professor-at-wake-forest-university-apologizes-for-reading-the-n-word-aloud-in-class/>.

<sup>2</sup> Eugene Volokh, *UCLA Law Dean Apologizes for My Having Accurately Quoted the Word “Nigger” in Discussing a Case*, VOLOKH CONSPIRACY, Apr. 14, 2020, <https://reason.com/2020/04/14/ucla-law-dean-apologizes-for-my-having-accurately-quoted-the-word-nigger-in-discussing-a-case/>.

<sup>3</sup> Am. Ass’n of Univ. Profs., Letter to Provost McBride, July 10, 2019, [https://drive.google.com/file/d/0B\\_bcq0WcWuxWbEMyelhaOFNLbkJmQU5EQzdnbDMtUUINeTZJ/view](https://drive.google.com/file/d/0B_bcq0WcWuxWbEMyelhaOFNLbkJmQU5EQzdnbDMtUUINeTZJ/view); Hayley Mason, *Emory Professor Speaks out After Being Suspended for Using N-Word During Lecture on Civil Rights*, CBS46, Aug. 29, 2018, [https://www.cbs46.com/news/emory-professor-speaks-out-after-being-suspended-for-using-n-word-during-lecture-on-civil/article\\_f473d997-9145-5bd8-81d6-e4bd8d0f06ed.html](https://www.cbs46.com/news/emory-professor-speaks-out-after-being-suspended-for-using-n-word-during-lecture-on-civil/article_f473d997-9145-5bd8-81d6-e4bd8d0f06ed.html).

<sup>4</sup> There is some controversy about whether Henry actually made the statement (purportedly warning the Virginia Ratifying Convention that the federal government will “free your niggers”); the main source is 1 HUGH BLAIR GRIGSBY, *THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION* 157 n.142 (1890), which claims to be based on a first-hand account to the author (born 1806) from someone who was at the Convention.

<sup>5</sup> Mitch Dudek, *DePaul Law Professor Subject of Complaints Over Use of ‘N-Word’ in Class Lecture*, CHI. SUN-TIMES, Feb. 28, 2018.

<sup>6</sup> Ella Booker, *Professor’s Use of Racial Slur in Lecture Sparks Backlash at Law School*, STANFORD DAILY, Dec. 10, 2019, <https://www.stanforddaily.com/2019/12/10/professors-use-of-racial-slur-in-lecture-sparks-backlash-at-law-school/>.

<sup>7</sup> Letter from Found. for Indiv. Rts. in Ed. to UCLA, July 2, 2020, <https://www.thefire.org/fire-letter-to-the-university-of-california-los-angeles-july-2-2020/>.

<sup>8</sup> Emma Keith, *Students, Administrators Deal with Latest Racism Case at OU*, NORMAN DAILY, Feb. 25, 2020; the statement was likely the one reported in THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 25 (2001), which seemed to use the word in a way that is unusually ecumenical to modern ears: “Think of

*Fire Next Time*;<sup>9</sup> a creative writing professor discussed another statement by James Baldwin;<sup>10</sup> an African-American Literature professor quoted *The Narrative of the Life of Frederick Douglass*;<sup>11</sup> a Stanford art history professor quoted a line from N.W.A.'s *Cop Killer* and wrote the group's full name (*Niggas Wit Attitudes*);<sup>12</sup> a journalism professor teaching a media law class quoted a leading campus speech code case that involved a basketball coach using the word in a pep talk;<sup>13</sup> and a Princeton anthropology professor offered the word as an example of what the class would be exploring in a study of taboos.<sup>14</sup>

The main reason why voicing “nigger” occasions anxiety is that it is a notorious slur that has long been used to demean, insult, intimidate, and terrorize African Americans. It often accompanies horrific racist violence; Rodney King testified that the police said it when beating him,<sup>15</sup> Abner Louima reported that the police said it when brutally sodomizing him,<sup>16</sup> and those are the tip of the iceberg.<sup>17</sup> The slur has been put to other uses. But it is abhorrence towards the classic racist deployment of “nigger” that occasions calls for putting it behind a wall of silence.

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submitting questions involving the very life of the United States to a tribunal on which a nigger from Liberia, a nigger from Honduras, a nigger from India . . . each have votes equal to that of the great United States.”

<sup>9</sup> Randall Kennedy, *How a Dispute Over the N-Word Became a Dispiriting Farce*, CHRON. OF HIGHER ED., Feb. 8, 2019, <https://www.chronicle.com/article/How-a-Dispute-Over-the-N-Word/245655>.

<sup>10</sup> John McWhorter, *The Idea That Whites Can't Refer to the N-Word*, ATLANTIC, Aug. 27, 2019.

<sup>11</sup> Moss Brennan & Justin Lundy, *English Department Responds to Use of N-Word in Class*, APPALACHIAN, Feb. 29, 2020.

<sup>12</sup> Stanford Undergraduate Senate, *Resolution To Support Ethnic Studies Student Demands And Condemn Classroom Racism And Anti-Blackness*, Resolution No. UGS-S2020-56, <https://docs.google.com/document/d/12JGUyU3AIDfKMkvFr5Zj-Ztk1KidIHStarub29Pps/edit>.

<sup>13</sup> Courtney Pedersen, *Alumna Releases Video of Journalism Department Chair Using Racial Slur in Lecture*, CENT. MICH. LIFE, July 7, 2020, <http://www.cm-life.com/article/2020/07/journalism-department-chair-on-paid-administrative-leave>.

<sup>14</sup> Colleen Flaherty, *The N-Word in the Classroom*, INSIDE HIGHER ED., Feb. 12, 2018, <https://www.insidehighered.com/news/2018/02/12/two-professors-different-campus-used-n-word-last-week-one-was-suspended-and-one>.

<sup>15</sup> Seth Mydans, *Rodney King Testifies on Beating: 'I Was Just Trying to Stay Alive'*, N.Y. TIMES, Mar. 10, 1993 (“As jurors leaned forward in the hushed courtroom, Mr. King imitated in a sing-song voice what he said were the taunts of the officers while he was being beaten: ‘What’s up, killer? How you feel, killer? What’s up, nigger? How you feel, killer? They were just chanting it.’”).

<sup>16</sup> Maria Hinojosa, *NYC Officer Arrested in Alleged Sexual Attack on Suspect*, CNN, Aug. 14, 1997.

<sup>17</sup> See, e.g., *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601 (6th Cir. 2014) (allowing case to go forward based on allegations that “police officers blindly deployed tasers into Plaintiffs’ occupied home while shouting racial epithets, shocked and beat Aaron Hayward while calling him a ‘black nigger,’ and then threatened an innocent, elderly couple with physical violence—all because of a few minor traffic violations”); *Brown v. City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994) (holding that trial judge erred in excluding a tape recording that “reveals that Officer Mugarra shouted, ‘Did you get that, nigger?’, after which Mugarra can be heard shouting, ‘Kill him, kill him, kill him, get him, get him, kill him,’ and then, ‘Kill that son-of-a-bitch.’ After these words, another voice can be heard pleading, ‘No, no, please, please, please,’ after which, the tape is inaudible.”).

Moved by a recognition that the prevalence of “nigger” in American life is an indication of how common hatred of blacks has been and continues to be, and apprehensive about the slur’s toxicity even in the classroom, some students, professors, and administrators maintain that any enunciation of it is wrongful no matter the context or the intention of the speaker. They maintain that giving voice to that epithet is so hurtful to some that no pedagogical aim is worth the pain inflicted. Thus, some teachers never vocalize the term, either talking around it or substituting a euphemism such as “the n-word.” Some law professors do not even write the word.

There are, however, other words with toxic associations: KKK. Lynching. Nazi. Auschwitz. Genocide. Rape. They aren’t epithets, but much in life is worse than epithets. Indeed, one reason sometimes given for eschewing any vocalizing of the word “nigger” is precisely its association with lynching and other forms of racial violence. The words we just mentioned are just as clearly associated with the cruelest forms of violence. Yet they are routinely discussed without expurgation or euphemism, especially in the university (and in our own department, law).

We believe the same should be true for epithets. The academy, we believe, should be a place where people discuss the facts—whether of a controversy, a historical document, or a precedent—as they have actually occurred. “Nigger” is a part of the lexicon of American culture about which people, especially lawyers, need to be aware. Omitting it veils or mutes an ugliness that, for maximum educational impact, and indeed for maximum candor, ought to be seen or heard directly. And omitting it sends the message to students that they should talk around offensive facts, rather than confronting them squarely: a particularly dangerous message for future lawyers, who (as in the famous example of Johnnie Cochran in the O.J. Simpson trial) may need to be ready to themselves quote the word when necessary to serve their clients.<sup>18</sup>

We respect, even as we disagree with, the pedagogical choices of others who refrain from ever voicing the infamous N-word. We believe in pedagogical pluralism. But we think that those who choose to accurately quote the word should receive the same consideration, the same deference to pluralism.

To us, enunciating slurs such as “nigger” for pedagogical purposes is not simply defensible. We think that, used properly, such teaching helps teach and reinforce important academic and professional norms of accuracy and precision in use of sources. Accurate quotation is particularly proper in law teaching because grappling with unredacted facts is a professional requirement among jurists, one for which law students ought to be prepared. But the same, we think, should apply in history classes, devotion to accurate recounting of sources being a fundamental part of the historical method; in classes on literature, film, music, and comedy, where analysis often requires careful attention to all the meanings, shadings, and even sounds of particular words; and in other subjects as well.<sup>19</sup>

To be sure, we recognize that what is accurate is itself often contested. The controversy about the Patrick Henry quote in the Stanford legal history class, for instance,

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<sup>18</sup> See *infra* notes 41–43 and accompanying text.

<sup>19</sup> We think that it is also legitimate to use such words in hypotheticals, rather than quotes, though we agree that there the need to do so may be less pressing. On the other hand, others may take a different view when it comes to their pedagogical choices: Prof. Geoffrey Stone, for instance, has for himself chosen to shift away from using it in hypotheticals, though he reserves judgment on what he would do when the word arises within a case that he is teaching about. E-mail from Geoffrey Stone to Eugene Volokh, Aug. 2, 2020, 5:25 pm.

turned in part on whether he actually said the word during the Virginia Ratifying Convention.<sup>20</sup> Likewise, court cases involving an epithet routinely turn on whether some defendant or employee who denies having said the epithet is telling the truth. But to resolve those disputes we again need to grapple with unredacted facts about what people claim was said.

The legal system follows what philosophers of language call the “use-mention distinction”: a sharp divide between using a term to insult someone (which the legal system rightly condemns), and mentioning it, usually in quoting some person or document (which is routine in the legal system). We think law professors should do the same, or at least be entitled to do the same if they so choose. We think the same is true for professors in other subjects, but we are particularly concerned about our own field of learning and training.

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Both of us take this view, but one of us (Randall Kennedy) has this to add:

My remarks are not the result of a transient, ethereal concern. They stem from a deep well of experience, study, and practice. I am an African-American man born in Columbia, South Carolina in 1954. My parents of blessed memory were refugees from Jim Crow oppression. They were branded as “niggers.” And I have been called “nigger” too.

I am well aware that racism suffuses American life, sometimes in forms that are frighteningly lethal. I believe that racism is a huge, destructive, looming force that we must resist. Vigilance is essential. But so, too, is a capacity and willingness to draw crucial distinctions. There is a world of difference that separates the racist use of “nigger” from the vocalizing of “nigger” for pedagogical reasons aimed at enabling students to attain essential knowledge.

## II. THE USE-MENTION DISTINCTION IN THE LEGAL PROFESSION

### A. *What Judges, Lawyers, and Academic Legal Writers Do*

The question of how legal discussions should deal with fact patterns that include epithets is not, of course, original to law schools. Rather, it has long arisen in the profession for which law schools train their students. We might, then, ask: How do lawyers and judges deal with this question?

The answer, it turns out, is that they routinely quote the epithets literally and precisely, without euphemisms or expurgation. A Westlaw query for *nigger & date(aft 1/1/2000)* finds over 9,500 Westlaw-accessible opinions (including cases, trial court orders, and administrative decisions). And that doesn’t include the nearly 5,000 such opinions from before 2000, plus whatever is present in the vast set of trial court orders that don’t appear on Westlaw.

Nor is this a reflection of some special callousness towards this one epithet. Courts also accurately quote other epithets. To give just one illustration, the word “cunt” appears in over 1500 Westlaw-accessible opinions, over 3500 appellate briefs and trial court filings, and 600 law review articles. Unsurprisingly, these documents are written by both male and female authors; just to take as a sample the dozen most recent authored appellate opinions containing this word, five were written by women and seven

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<sup>20</sup> See *supra* note 4 and accompanying text; Michele Dauber, Open Letter, TWITTER @MLDAUBER, May 30, 2020, at 4:26 pm, <https://twitter.com/mldauber/status/1266873770255413248>.

by men.<sup>21</sup> This is not a sign, we think, that judges are generally vulgar or sexist; we expect many of them would never write the word as an epithet, but when the word is part of the record, they quote it. They insist on accuracy much more than do newspapers: Searching through Lexis's Major U.S. Newspapers database (which archives articles in 48 major newspapers) reveals exactly one quotation of "cunt," in a 2009 article from the music calendar section of the *San Antonio Express News*, as part of the name of a "hardcore death metal band."<sup>22</sup>

We see the same for other vulgarisms of the sort that newspapers view as "unprintable."<sup>23</sup> Consider this for comparison: The word "motherfucker" and its variants have never appeared in the print editions of 38 out of the 48 major U.S. newspapers; in the remaining ten, it appeared only sixteen times put together. But it has appeared in over 10,000 Westlaw-accessible opinions before 2019,<sup>24</sup> including six from the U.S. Supreme Court (dating back to 1974) and over 500 from the U.S. Courts of Appeals. Accurate quoting appears to be something that judges value.

Turning back to "nigger," who are these judges who are willing to quote the word, knowing that many lawyers and law students are a captive audience who will have to read their opinions? They include Justices Sotomayor, Thomas, O'Connor, Ginsburg, and a six-Justice per curiam signed on to by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

On the Ninth Circuit, they include Judges Nguyen, Murguia, Pregerson, Christen, Berzon, Fisher, Tashima, W. Fletcher, Graber, Thomas, Tallman, Rawlinson, among others—and that's just back to 2008. On the California Supreme Court, they include Justices Kruger, Liu, Cantil-Sakauye, Kennard, Chin, Moreno, and more, and that too is just back to 2008. On the D.C. Circuit, they include Judges Millett, Tatel, Rogers, Wald, and Edwards. One of the incidents that we cited in the Introduction involved a media law teacher being put on administrative leave for mentioning the word twice,<sup>25</sup>

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<sup>21</sup> *United States v. Waggy*, 936 F.3d 1014 (9th Cir. 2019); *Chinery v. Am. Airlines*, 778 F. App'x 142 (3d Cir. 2019); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019); *Campbell v. Hawaii Dep't of Educ.*, 892 F.3d 1005 (9th Cir. 2018); *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018); *United States v. Salinas-Acevedo*, 863 F.3d 13 (1st Cir. 2017); *United States v. Roy*, 855 F.3d 1133 (11th Cir. 2017); *United States v. Analetto*, 807 F.3d 423 (1st Cir. 2015); *Watson v. Heartland Health Labs., Inc.*, 790 F.3d 856 (8th Cir. 2015); *Kyzar v. Ryan*, 780 F.3d 940 (9th Cir. 2015); *United States v. Hardrick*, 766 F.3d 1051 (9th Cir. 2014); *United States v. Roy*, 761 F.3d 1285 (11th Cir.), *reh'g en banc granted, opinion vacated*, 580 F. App'x 715 (11th Cir. 2014), *and on reh'g en banc*, 855 F.3d 1133 (11th Cir. 2017). This 5:7 ratio is not far removed from the general female/male ratio on the federal appellate bench.

<sup>22</sup> There are also four other references that appear from context to either be typos in the original or mistranscriptions by Lexis.

<sup>23</sup> As readers might gather, we do not think those vulgarisms should indeed be unprintable in newspapers. See Jesse Sheidlower, *The Case for Profanity in Print*, N.Y. TIMES, Mar. 30, 2014 (arguing that newspapers should accurately quote both vulgarisms and epithets). Indeed, one of us, whose blog was hosted by the *Washington Post* from 2014 to 2017, left the *Post* in large part because the *Post* insisted on expurgating quoted vulgarisms in his posts, and he insisted on being able to accurately report facts from the cases that he was writing about. See Eugene Volokh, *Our Move to (Paywall-Free!) Reason from The Washington Post*, VOLOKH CONSPIRACY (REASON), Dec. 13, 2017, 9:00 am, <https://reason.com/2017/12/13/weve-moved-to-reason/>. But in any event, we think that universities should aspire to an even higher level of accuracy and candor than newspapers.

<sup>24</sup> They date back to 1906, though there's only a smattering until 1964.

<sup>25</sup> See *supra* note 13.

while quoting a Sixth Circuit opinion that mentioned the word 19 times<sup>26</sup> (which was written by the trailblazing African-American Sixth Circuit Judge Damon Keith).

Judges sometimes do the same in their occasional out-of-court writings as well. Judge Mark W. Bennett (N.D. Iowa), Chief Judge of that district in 2000–07, wrote a series of posts about writing and judging on a criminal defense lawyer’s blog (Simple Justice); one post, which was about letters sent to judges, began with an example of a missive he once received: “Dear Judge Bennett, I hope you nigger loving anti-American communist Jew lover have a nice Christmas.”<sup>27</sup> Other judges have quoted the word in treatise chapters and law review articles.

These are serious, thoughtful judges, many of them liberal luminaries. It is worth considering that they might have made a sound decision in quoting the word accurately.

Now the judges rarely explain why they made such a decision, but we think we can plausibly infer two things:

1. As we suggested, they likely concluded that, in legal matters, accurate reporting of the facts is a very important facet of rendering justice, even when an expurgated version would convey much the same information. To quote a rare situation where a court does offer an explanation, see Colorado Supreme Court Justice Monica Marquez’s unanimous 2020 opinion in *People in Interest of R.D.*, that says, “We reluctantly reproduce this racial slur and other pejorative terms from the record to give an uncensored account of the facts.”<sup>28</sup>

Judges seem to prefer uncensored accounts of the facts, and lawyers must thus sometimes set forth such accounts. To be sure, sometimes lawyers may find censored accounts more valuable for tactical reasons—but they need to be ready to offer either version, as their clients’ needs dictate.<sup>29</sup>

2. The judges also appear to adopt what philosophers and linguists call the “use-mention” distinction.<sup>30</sup> Though they doubtless think that using the word as an insult is wrong, they apparently see it as quite proper to mention it as a fact from the record or in a quote from a precedent (and see it as no serious burden on their audience).

To give just one example, consider this sentence from a 2020 opinion by Ninth Circuit Judge Jacqueline Nguyen, joined by Chief Judge Sidney Thomas and Judge Mary Murguia: “We have considerable difficulty accepting . . . that, at this time in our

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<sup>26</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>27</sup> Mark W. Bennett, *Bennett: The Art of Submitting Letters in Support*, SIMPLE JUSTICE: A CRIMINAL DEFENSE BLOG, Oct. 9, 2017, <https://blog.simplejustice.us/2017/10/09/bennett-the-art-of-submitting-letters-of-support/>

<sup>28</sup> 464 P.3d 717, 722 n.6 (2020). The court here was quoting the word “nigga,” which appears in over 2,200 post-2000 opinions; but the other search results we cite in this Part all relate to the spelling “nigger.”

<sup>29</sup> Occasionally attempts to use euphemism in the courtroom can be confusing, though we expect that’s rare. *See, e.g.*, *Baptistas Bakery, Inc. & Teamsters Local Union No. 344 Sales & Serv. Indus., Affiliated with the Int’l Bhd. of Teamsters*, 352 NLRB 547, \*\*32 n.71 (2008) (“It’s not clear from the record if McCall here, used the actual slur ‘nigger,’ or used the euphemism, ‘the N-word.’ I had asked the witnesses not to burden the record by continuously using the slur after the first use, and it’s unclear whether Blanquel, in his testimony, was simply following my instructions or accurately quoting McCall.”).

<sup>30</sup> *The Use-Mention Distinction* ¶ 2.2, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/quotation/>; Bill Poser, *Political Correctness and the Use/Mention Distinction*, Language Log, <http://itre.cis.upenn.edu/~myl/languageelog/archives/005349.html>.

history, people who use the word ‘nigger’ are not racially biased.”<sup>31</sup> Surely that’s right, but surely the judges didn’t think this makes *them* racially biased for including the word, or for quoting it in six other instances elsewhere in the opinion. Rather, the judges are distinguishing mentioning the word (which they apparently view as quite proper) from using it (which they recognize is strong evidence of racial bias).

Some judges do prefer “n-word” or “n\*\*\*\*r” or “n---r.” But such opinions are distinctly rarer than the ones with the accurate quote: Since 2000, the number of opinions containing truncations is about 1/3 of the 9500 that spell the word out.<sup>32</sup> And lawyers likewise seem to generally think that judges expect accuracy here: Appellate briefs in Westlaw (not even counting trial court filings) show over 10,000 full spellings of the word since 2000, but fewer than 3,000 expurgated versions. This includes briefs from the NAACP, the ACLU, LAMBDA, and many other organizations.<sup>33</sup>

Looking just at the post-2000 federal appellate and U.S. Supreme Court cases, the ratio in favor of the accurate quote over any of the expurgated versions is about 4½ to 1. In the California Supreme Court, the ratio is 27 to 1, and the one case that contains “n-word” (five times, apparently quoting testimony) also quotes the full word 14 times.<sup>34</sup>

What about oral exchanges? Here we have much less information, since appellate argument and trial transcripts available on Westlaw account only for a small fraction of all cases, by our best estimate under 2% of the sorts of cases that might end up as written opinions. Very few jurisdictions’ transcripts are included,<sup>35</sup> and even there the coverage is spotty; for instance, only about 12% of all California Court of Appeal arguments since 2000 are in the database. The oral arguments database contains 54 references to the word in appellate arguments since 2000, or 200 if you include trial and pretrial transcripts. Here too the preference is in favor of saying the word rather than using a euphemism: Its ratio over “n-word” (again, since 2000) is 2 to 1. For a bit more of a perspective, of the 54 federal appellate argument transcripts that include the

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<sup>31</sup> *Ellis v. Harrison*, 947 F.3d 955, 964 (9th Cir. 2000) (en banc) (Nguyen, J., concurring).

<sup>32</sup> Some judges have likewise preferred to expurgate vulgarities. *See, e.g.*, *Panish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 668 (1974) (per curiam, written by Powell, J.) (“M—f—”); *Rosenfeld v. New Jersey*, 408 U.S. 901, 909–10 (1972) (Powell, J., dissenting) (same); *Lewis v. New Orleans*, 408 U.S. 913, 913 (1992) (Powell, J., concurring in the result) (same). But here too, expurgated versions are much less common than the fully spelled-out ones.

<sup>33</sup> *See, e.g.*, Appellant’s Abstract, Brief, and Addendum, *Reams v. State*, No. CR 17-654, 2017 WL 10399074 (Ark. Nov. 8, 2017) (filed by NAACP Legal Defense & Education Fund) (quoting the word 11 times, chiefly in trial excerpts); Plaintiffs-Appellants’ Opening Brief, *M.D. v. School Bd. of the City of Richmond*, No. 13-1813, 2013 WL 4725092 (4th Cir. Sept. 3, 2013) (filed by Lambda Legal Defense & Education Fund) (quoting the word 8 times); Amicus Brief of Washington Employment Lawyers Association & ACLU-Washington, *Int’l Union of Operating Engrs., Local 286 v. Port of Seattle*, No. 86739-9, 2012 WL 5415066 (Wash. Oct. 12, 2012) (cofiled by the ACLU-Washington) (quoting the word 5 times); Brief of the Defendant-Appellant, *State v. Matthews*, No. 2012-299-C.A., 2014 WL 10295554 (R.I. Mar. 17, 2014) (filed by the public defender’s office) (quoting the word 14 times).

<sup>34</sup> *People v. Nunez*, 302 P.3d 981 (Cal. 2013).

<sup>35</sup> Oral argument transcripts are available on Westlaw, in any significant numbers, only from the U.S. Supreme Court, five federal circuits (the Seventh, Eighth, and Ninth Circuits plus a smattering from the First and Fifth), high courts in eight states (Alaska, Colorado, Delaware, Florida, Massachusetts, New Jersey, New York, and Texas), and a few intermediate appellate courts in two states (California Second, Third, and Sixth District Courts of Appeal, and the Texas Eighth Court of Appeals).

phrase “racial harassment,”<sup>9</sup> also included the full word, and only one entirely omitted it in favor of “n-word.”

Working from the 2% coverage estimate, we can estimate that the word has likely been used over 2500 times since 2000 in all appellate arguments—and again that doesn’t count federal and state court trials and pretrial hearings.<sup>36</sup> Likewise, searching in Westlaw for *(testif! testimony) +p nigger & date(aft 1/1/2000)* yields over 3000 results; and though a few are false positives, there are doubtless vastly more cases in which the word is spoken during testimony but the court has no occasion to mention it in its opinion (or no opinion is written).

This of course fits well with the use-mention distinction. We suspect that virtually no judge or lawyer would write a racial epithet in an opinion to use it as an insult (e.g., of a party or a witness). We are all literate folk, and we all know the power of the written word.<sup>37</sup> But judges and lawyers routinely write such epithets to mention them, usually in a reference to the record or to a precedent. Likewise, judges and lawyers wouldn’t orally use an epithet to insult someone in court, but they do mention them when they are relevant parts of the record in oral argument.

And every written opinion is the product of much writing and talking. Any fact quoted by a judge had to be written by a lawyer first. Lawyers generally had to learn the facts in oral conversations with clients and witnesses. They likely had to discuss the facts with colleagues. Judges who wrote opinions had to discuss them with clerks who were assigned to draft the opinions. No doubt many of these conversations mentioned the full version of the word, as the final written opinion did (and as the briefs likely did).

Law professors likewise routinely quote the word, as a search through Westlaw’s articles database reflects, with more than 1900 references since 2000 (many more than the euphemized versions). More than 60 mention the word more than 10 times each—unsurprising, since they, like this article, deal with epithets or with racism, and quote it whenever it is relevant to the discussion. Many of these articles are by authors with unimpeachable credentials as supporters of racial equality.

These authors generally send out their articles to dozens of law journals, to be read by dozens of law review editors—as part of the editors’ jobs—and then (with luck) by more law students, lawyers, law clerks, judges, and law professors who form the articles’ audience. Yet the authors seem to generally adhere to the distinction between using epithets as insults (improper) and quoting them as facts (quite proper). They do not seem to think that forcing the readers to encounter the word is a horrible imposition.

Branching out beyond the legal profession, we should note that even the NAACP’s 2014 resolution condemning the use of the word (“NAACP Official Position on the Use of the Word ‘Nigger’ and the ‘N’ Word”) sharply distinguishes casual use from at least

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<sup>36</sup> See, e.g., Oral Arg., *Reynaga v. Roseburg Forest Prods.*, No. 14-35028 (9th Cir. July 5, 2016) (Pregerson, J.) (starting at around 3:43), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000009903](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009903).

<sup>37</sup> See, e.g., *Reid v. Dalco Nonwovens, LLC*, 154 F. Supp. 3d 273, 291 (W.D.N.C. 2016) (allowing hostile environment harassment claim to go forward based in part on a text message to the plaintiff calling him “nigger”); RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD \_\_ (2002) [Kindle ed. following n.46] (discussing the “Dear Nigger” letters sent to Hank Aaron when he was about to break Babe Ruth’s home run record).



certain kinds of mention.<sup>38</sup> Though the resolution begins by disapproving of “us[ing] the N-word in any capacity, or in any artistic endeavor,” it expressly sets aside mentions that “allude to the historical context of the word, or . . . highlight the prejudicial nature of the word.”<sup>39</sup> Though we might not draw the line quite the same way the NAACP did, we think the NAACP was right to make clear that mentioning the word is generally proper when discussing its prejudiced uses by third parties, or when framing it in its historical context. And of course the NAACP’s use of the word in the title of its own resolution helps highlight the propriety of mentioning the word when it is the word itself that is being discussed.

### B. *Not Mispreparing Law Students for the Profession*

We think that the way that courts routinely handle the epithet “nigger” is correct and that law schools should deal with the facts of racial life with similar directness. Indeed, perhaps law professors should aspire to even higher standards of accuracy. We should certainly reject a rule, or even a social norm, that mentions of epithets that are proper for judges and lawyers in court opinions, briefs, and arguments are prohibited in legal academic settings.

In their professional dealings, lawyers will need to be prepared to participate in cases that involve offensive words. To represent clients with maximal efficacy they may even have to write and say such words themselves. A quick search through Westlaw’s Briefs database since 2000 for cases filed with lawyers with “defender” in the attorney affiliation—overwhelmingly public defenders—found more than 1000 appellate briefs in which the full word was mentioned; “n-word” comes up only 1/10 as often. These 1000 are a small fraction, we expect, of all the briefs that contain the full word, since Westlaw includes only a small fraction of all appellate briefs; and the number doesn’t count criminal trial court filings, of which only a tiny fraction are available.

These lawyers have undoubtedly made the judgment that quoting the full word is needed for them to effectively advocate on behalf of their clients.<sup>40</sup> Indeed, being prepared to quote such words is often especially useful to lawyers who are arguing that

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<sup>38</sup> See NAACP, *NAACP Official Position on the Use of the Word “Nigger” and the “N” Word*, [https://www.naacp.org/wp-content/uploads/2018/07/2014\\_Resolutions\\_Results.pdf](https://www.naacp.org/wp-content/uploads/2018/07/2014_Resolutions_Results.pdf) (“the National Association for the Advancement of Colored People shall not condone, award, or engage any person that uses the N-word in any capacity, or in any artistic endeavor that does not allude to the historical context of the word, or that does not highlight the prejudicial nature of the word”).

<sup>39</sup> *Id.*

<sup>40</sup> In constitutional law the classic example is Professor Melville Nimmer’s argument before the Supreme Court in *Cohen v. California*, 403 U.S. 15 (1971). The issue was whether police had violated Cohen’s First Amendment rights by arresting him for supposedly disturbing the peace solely by wearing in a courthouse a jacket emblazoned with the words “Fuck the Draft.” At the argument, Chief Justice Warren Burger hinted that he would prefer for counsel to forgo enunciating the vulgarism. “Back then, the so-called ‘F-word’ was analogous to the so-called ‘N-word’ today: so taboo that polite people were loath to utter it for any purpose, even to criticize it, or even, as in the Cohen case, to defend the right to say it. For example, Justice Black’s law clerks said that even this staunch First Amendment absolutist was horrified at the possibility that his wife, Elizabeth, would be confronted with ‘that word’ in a courthouse corridor.” Nadine Strossen, *Justice Harlan’s Enduring Importance for Current Civil Liberties Issues, from Marriage Equality to Dagnet NSA Surveillance*, 61 N.Y.L. SCH. L. REV. 331, 337–38 (2016). Nonetheless, Professor Nimmer quickly spoke the word out loud. “Nimmer was convinced that he had to use ‘fuck,’ and

their clients were victimized by racists—Johnnie Cochran’s enunciation of the word repeatedly in the O.J. Simpson murder case, quoting the infamous police officer Mark Fuhrman, in the presence of the jury, is just the most famous example.<sup>41</sup>

Many appellate cases have made clear that lawyers are entitled to play recordings containing the word,<sup>42</sup> or have witnesses testify about use of the word.<sup>43</sup> Though sometimes such epithets may be inadmissible, for instance because they are not seen as relevant enough,<sup>44</sup> they can often be central to one or the other side’s case, and lawyers advocating for their clients will need to get them introduced.

The legal system recognizes that conveying precisely what was said to jurors—even when it is extremely offensive, and when the statements being quoted were originally said in an environment of hatred and violence—is often important to the jurors’ fully grasping what had happened. Indeed, it is precisely the association of racial epithets with horrific acts that makes it important that jurors (and judges) be able to hear what actually happened.

Jurors may be deciding (as in the O.J. case) whether to believe an allegedly racist police officer. Or they may be deciding whether the defendants should be held liable for conspiring to organize racist violence in Charlottesville in 2017.<sup>45</sup> Or a judge may be deciding how to sentence someone convicted of a racist hate crime<sup>46</sup>—or whether to

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not some euphemism, in his oral argument. If Nimmer had acquiesced to Burger’s word taboo, he would have conceded that there were places where ‘fuck’ shouldn’t be said, like the sanctified courthouse. The case would have been lost.” BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* \_\_ (1979).

<sup>41</sup> Officer Fuhrman, a key witness for the prosecution was discovered to have referred to blacks as “niggers” on audiotape. Lawyers for the state tried desperately to prevent that evidence from reaching the jury. Prosecutor Christopher Darden declared that, because “nigger” is “the filthiest, nastiest word in the English language, references to it would distract and indeed blind the jury.” “It will blind them to the truth. . . It will effect their judgment. It will impair their ability to be fair and impartial.” Cochran argued in response that it was “demeaning” to suggest that black jurors—“African Americans [whose forbears] have lived under oppression for two hundred-plus years in this country,” and who themselves had lived with “offensive words, offensive looks, [and] offensive treatment every day of their lives”—would be unable to deliberate fairly if they were made aware of a witness’s racial sentiments as evidenced in part by his linguistic habits. *See* KENNEDY, *supra* note 37, at 85–86; *see generally* JEFFREY TOOBIN, *RUN OF HIS LIFE: “THE PEOPLE V. O. J. SIMPSON”* (1996).

<sup>42</sup> *See, e.g.,* *Brown v. City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994) (holding that trial judge erred in excluding a tape recording that “reveals that Officer Mugarra shouted, ‘Did you get that, nigger?’, after which Mugarra can be heard shouting, ‘Kill him, kill him, kill him, get him, get him, kill him’ and then, ‘Kill that son-of-a-bitch.’ After these words, another voice can be heard pleading, ‘No, no, please, please, please,’ after which, the tape is inaudible.”).

<sup>43</sup> *See, e.g.,* *United States v. Barrentine*, Nos. 93-2077, -2078, 1994 WL 601339, \*2–\*3 (6th Cir. 1994); *State v. Lipka*, 413 P.3d 993, 994–96 (Or. Ct. App. 2018); *State v. Mitchell*, 343 S.W.3d 381, 389–90 (Tenn. 2011).

<sup>44</sup> *See, e.g.,* *People v. Young*, 445 P.3d 591, 624–26 (Cal. 2019).

<sup>45</sup> *See* *Sines v. Kessler*, 324 F. Supp. 3d 765 (W.D. Va. 2018) (allowing the case to go forward and quoting “nigger” 7 times from the Amended Complaint); Transcript of Motion to Dismiss Hearing, ECF No. 321, *id.*, at 73 (May 24, 2018) (quoting the lawyer saying the word in the hearing). The case has not yet gone to trial, but it seems likely that plaintiffs’ lawyers will want to quote the word to the jury just as they found it useful to quote it to the judge.

<sup>46</sup> *See, e.g.,* Transcript of Sentencing Hearing, ECF No. 69, *United States v. Lecroy*, no. 8:18-cr-00480-BHH, at 11 (D.S.C. June 11, 2019) (quoting prosecutor as arguing, “Mr. Lecroy says,

reduce a prisoner's sentence, over the prosecution's objection that the prisoner is involved in a dangerous racist prison gang.<sup>47</sup>

Or jurors may be deciding whether the defendant was reasonably afraid of injury or even death from someone who had used the slur and was therefore justified in using force in self-defense.<sup>48</sup> Or they may be considering whether coworkers had created a racially hostile environment for the plaintiff.<sup>49</sup> Or they may be evaluating the magnitude of the emotional distress suffered by an employee who was called "nigger," or deciding whether a defendant was guilty of using "fighting words"<sup>50</sup> or saying something that in context should be understood as a constitutionally unprotected true threat.

The law recognizes that the jurors often need to make that decision based on the unexpurgated evidence. If, for instance, "it is for the jury to determine the meaning and outrageousness of Bautista's reference to Spikener as 'this nigga,'" and in particular whether they should distinguish "the terms 'nigga' and 'nigger'" "and view the former as less offensive,"<sup>51</sup> it's hard to imagine how the jury would do that without hearing the actual words. Likewise, if a black defendant in a homicide case is claiming that he acted in reasonable self-defense, he needs to be able to testify that the deceased had said things like, "look at that nigger there" and "[n]ow I'm going to knock your nigger head off," since that may be critical in deciding whether the defendant reasonably feared that the deceased would attack him, and in deciding whether the deceased likely engaged in other threatening acts. And the prosecutor needs to be able to introduce contrary evidence from the deceased's friend:

Q Okay. And why do you say you call each other nigga and not nigger? Explain that to us. What's the difference in your mind between nigga and nigger?

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quote, Oh fucking well. That's just a dead nigger to me, end quote, as if this is a vermin that you're exterminating from your barn, instead of a human being who lives next door to you").

<sup>47</sup> See, e.g., Government's Memorandum in Opposition to Defendant's Motion to Reduce Sentencing, ECF No. 503, No. 6:03-cr-06033-DGL, at 10, 12, 14 (W.D.N.Y. Aug. 23, 2019); Transcript, ECF No. 526, *id.* at 93 (Dec. 17, 2019) ("Q. You indicated earlier . . . that the Dirty White Boys is a group that targets gay people and minorities? . . . Q. Okay. And would you say that somebody who has referred to 'niggers' and 'Spics' in correspondence with others might very well share those values as being pro white and anti-minority?").

<sup>48</sup> See, e.g., *People v. King*, No. A137858, 2014 WL 3388555, \*3 (Cal. Ct. App. July 11, 2014) (noting that the defendant "relied on a self-defense claim during trial," based in part on the alleged victims' "calling M.W. [defendant's friend] a 'nigger' and threatening to beat him," and "'big white guys' approaching at a fast pace and yelling, 'We're going to fuck you niggers' and 'We're going to kill you'").

<sup>49</sup> See, e.g., Transcript, ECF No. 45, *Johnson v. Stein*, No. 12 CV 4660(HB) (S.D.N.Y. Aug. 26, 2013) (quoting the plaintiff's lawyer as telling the jury, "On the first and only instance that she recorded Mr. Carmona, you will hear evidence that Mr. Carmona called her a nigger eight times, said that she acted like a nigger, that she was dumb as shit, and she was a nigger.").

<sup>50</sup> Cf. e.g., Transcript of Proceedings, ECF No. 65, *Hernandez v. Hernandez*, No. 1:13-cv-00153, at 135-36 (N.D. Ill. June 13, 2014) (quoting testimony before a jury about plaintiff's standing "with his fists balled shouting, 'Mother-fucking niggers. Mother-fucking niggers,'" where the legal issue was whether defendant police officers had reasonable suspicion to perform a *Terry* stop of plaintiff).

<sup>51</sup> *Spikener v. United Parcel Serv., Inc.*, No. A154689, 2020 WL 1452989, 2020 IER Cases 108,149, \*13 (Cal. Ct. App. Mar. 24, 2020).

A A nigga to me is my home boy, my friend, my acquaintance, someone associated with me. You know, that's—it's no different than my dude or my home boy or saying different, same exact meaning.

....

Q How about the word nigger?

A That's not a cool word. That's a totally racially motivated word as far as I'm concerned.<sup>52</sup>

The jury could of course disbelieve the deceased's friend, or disbelieve the defendant, or for that matter disbelieve both—but the jury needs to be able to hear them testify about what they had heard or said. And what can be heard by jurors (and by lawyers and bailiffs and court reporters and clerks and onlookers) can also be heard by law students discussing such a case in class.

Being ready to deal with such words is especially important for lawyers who go into fields like criminal law, juvenile justice, employment law, civil rights law, voting rights law, education law, prison law, and First Amendment law, where such words end up being quoted especially often. But it could be true even for graduates who, say, go into business law at a big firm but then end up working on a pro bono civil rights or habeas case. And recall again that they will have to deal with it not because of the occasional failures of the profession—the way that people may have to deal with occasional abusive bosses—but because of a norm of the profession followed by thoughtful judges and lawyers left, right, and center.

“Practice like you play, because you will play like you practice,” goes the advice both from coaches and from experts on education.<sup>53</sup> Law students should learn in class how to approach law as they may have to when they are working as lawyers. And even if some teachers may choose to soften some of the harsh realities that students may have to face in the profession, we should certainly refrain from teaching students *the opposite* of the rules of the profession.

In particular, we should avoid teaching students, in effect, “You are entitled to be shielded from even hearing quotations of epithets”—leading them to expect and demand, as the only possible decent solution, the opposite of the normal way that respected and respectable lawyers and judges deal with this particular problem. The late Prof. Terry Smith put it bluntly but well, in defending a colleague at the DePaul College of Law who was being criticized for quoting the word in a class discussion,

“Increasingly, we are dumbing down legal education for students. And increasingly they are ill-prepared to go out and represent clients. They will encounter this terminology and worse in practice. What will they do then?” Smith said. . . .

“[The professor] and I pulled up more than 5,500 federal cases that use the word n-- [expurgation presumably by the newspaper—ed.] and did not substitute the word with the ‘N-word,’” Smith said. “If these students are preparing to become lawyers, how can it be objectionable for a professor, in the proper teaching context, to use the word?”<sup>54</sup>

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<sup>52</sup> State v. Chambers, 387 P.3d 1108, 1115 (Wash. Ct. App. 2016).

<sup>53</sup> PETER C. BROWN, HENRY L. ROEDIGER, MARK A. MCDANIEL, MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING \_\_ (2014).

<sup>54</sup> Dudek, *supra* note 5. Prof. Smith ultimately left DePaul after suing it for race discrimination (related to other incidents). Complaint, Smith v. Rosato Perea, No. 1:18-cv-01513 (N.D. Ill. filed. Feb. 28, 2018); Benjamin Conboy, *Following Civil Rights Suit, Law Professor Leaves DePaul*, DEPAULIA, Nov. 5, 2018.

Prof. Smith may well have been influenced by his experience working with voting rights, a field where the statements containing the word are routinely quoted by voting rights supporters as evidence of legislator racism.<sup>55</sup>

Indeed, our sense is that some students of all races have been counterproductively taught to be unduly disturbed by quotations of epithets. Following one of the law school incidents we mentioned in the Introduction, a white student wrote the professor:

When you used the n-word in class, I was totally caught off guard. I felt a rush of adrenaline and turned to ask my friend for a stress ball to squeeze in order to keep myself from jumping out of my seat. I'm a white woman and don't internalize the history of slavery and racism in my body the way that my fellow black students do. But I still had a physical reaction that was difficult to control.

The problem was not the shock of hearing of the n-word—I hear it all the time in songs, movies, etc. It was your use of it that threw me off. As the professor, you are the one who holds power in the classroom. . . .

The student viewed her reaction as a point in favor of expurgating, but we think it shows the opposite. When the student graduates and goes to court, she could hear the word from the judge, or from a lawyer. She will certainly read it routinely in the work product of judges and lawyers, at least if she works in fields where it often appears (such as the field corresponding to the class in which the incident occurred).

If she clerks for a judge who is planning on quoting the word in an opinion, she could hear it in conversation in chambers; she might even have to write it herself in the draft opinion. When talking to a peer (or a superior) at her law firm about the facts of a case or a precedent, she could hear it, too. Or she could hear it from opposing counsel describing such facts, as well as from clients who are relating what happened to them, witnesses reporting on what was said, high-level managers explaining that they fired an employee for saying the word, and more.

In all those situations, a lawyer's goal should be to *avoid* being caught off guard or upended, and instead simply to take the word as just one unpleasant fact that is being discussed. To the extent that some law students have come to have “a physical reaction that [is] difficult to control” simply from hearing such commonplace mentions in professional settings, we should try to educate them to avoid or at least rigorously manage such reactions. Insisting on the principle that “mentioning” is very different from “using” is an important part of that education.

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<sup>55</sup> See, e.g., *Shelby County v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012) (giving two such quotes), *rev'd*, 570 U.S. 529 (2013); En Banc Brief of Plaintiffs-Appellants, *Lewis v. Alabama*, No. 17-11009, 2019 WL 1379996 (11th Cir. 2019).

## III. THE RACE OF THE SPEAKER

Should the speaker’s race make a difference here, cloaking one of us, for instance, with more leeway than the other?<sup>56</sup> We think not: To take such a position would be a profound violation of sound scholarly principles.<sup>57</sup>

All professors and students should be equally free, without regard to race, to discuss cases, historical incidents, novels, films, songs, comedy routines, or anything else. It would be a terrible thing for the academy—and for American culture more broadly—to erect a race line with respect to who can say what in discussing facts.

Of course, words sometimes mean different things in different contexts. Indeed, the importance of context is key to our argument that “mentioning” a word isn’t the same as “using” it. And we agree that the speaker’s identity can be a part of the context in which an ambiguous statement is interpreted.

Consider ethnic jokes. People often enjoy jokes that laugh at their own group’s familiar foibles, but only if they think the joke is said with affection rather than hostility. If a Jewish speaker tells a typical Jewish joke to someone who knows the speaker is Jewish, it’s unlikely to be perceived as anti-Semitic. (Of course, much depends on the joke.) But if the speaker isn’t known to be Jewish, listeners, especially Jews, might wonder whether the purported joke is a cover for antagonism (again, depending on the joke and depending on how well they know the speaker). The same is likely true of people using pejoratives to greet each other.<sup>58</sup>

And what is true of verbal communication is true as well of written communication. Indeed, the identity of the speaker could be even more important in interpreting an ambiguous statement in writing because some of the other contextual factors that might convey the speaker’s intentions (is it said with a smile?) are missing.

Ambiguity, however, does not shade the issue in dispute here. In none of the cases mentioned in the Introduction is there an allegation that the speakers—all of whom were white—intended to demean, insult, or terrorize blacks. In no instance is there an allegation that a speaker was “using” “nigger” in the ugly, harrowing, racist way that rightly attracts opprobrium. In no instance is there evidence that a speaker was trying

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<sup>56</sup> In one example that we’ve seen of this argument, some law student groups at a law school distributed a flyer with the heading “Can I say the n-word?,” and responded,

- if you’re “black or mixed with black,” “Do what you want,” but
- if you’re “white” or “a person of color but not black,” “Nope[,] never.”

See Open Letter, <http://reappropriate.co/2020/04/open-letter-ucla-laws-apilsa-responds-to-professor-stephen-bainbridge/> (quoting that flyer). Or, in the words of Above The Law Executive Editor Elie Mystal, “I can say it, you can’t, fuck you if that bothers you.” Elie Mystal, *If One More White Person Tells Me About the Use-Mention Distinction to Justify Saying the N-Word, I’m Going to Vomit*, ABOVE THE LAW, Aug. 30, 2018, at 2:17 pm, <https://abovethelaw.com/2018/08/if-one-more-white-person-tells-me-about-the-use-mention-distinction-to-justify-saying-the-n-word-im-going-to-vomit/>; John Turner, *N-Word Has No Place in Educational Settings*, THE ITHACAN, Sept. 19, 2019 (“The word ‘nigger’ has never had a positive connotation. . . . No matter its origins, the N-word is never appropriate for a white person to say. It is not appropriate while in the privacy of your home, while teaching students in a classroom, while reading a novel or while singing along to a rap song.”).

<sup>57</sup> See KENNEDY, *supra* note 9, at \_\_ (Kindle ed. ch. 1, following n. 106, ch.3, near nn. 34-36).

<sup>58</sup> See *id.* at 105–08 (“When we call each other ‘nigger’ it means no harm,’ [rapper] Ice Cube remarks. ‘But if a white person uses it, it’s something different, it’s a racist word.’”).

to pull a fast one over on his or her audience by deploying the academic setting as a pretext for voicing “nigger.”

Rather, every case involves a speaker who was excoriated simply because—so it is argued—a white person ought never enunciate the term “nigger” under any circumstances. While ambiguity lurks virtually everywhere, here its presence is spectral. We are discussing an unusually clear-cut issue: whether it should be deemed unacceptable for “nigger” to be enunciated by a white instructor (or, more generally, a non-black instructor<sup>59</sup>) no matter the circumstance, no matter the preferred pedagogical strategy, no matter the amount of evidence that, viewed fairly, should rebut any suggestion of malevolence or negligence.<sup>60</sup>

Requiring or permitting differing standards of expression depending on the putative race of the speaker might well impel or encourage students and instructors to use different words in the same conversation depending on their race. Black participants would be able to discuss candidly the nitty-gritty details. All others would have to settle for euphemism, expurgation, bowdlerization. A pernicious result, it seems to us.

And if such a race-based approach were implemented as policy by a university, or some other employer, it would be illegal under state and federal antidiscrimination statutes and constitutional provisions.<sup>61</sup> Those rules ban treating people differently, including as to the “terms, conditions, or privileges of employment” and not just as to hiring or firing,<sup>62</sup> based on race. (Though these rules leave some latitude for affirmative action programs that treat race as a factor in, say, hiring or promotion or university admissions, requiring different racial groups to speak differently would not qualify as a permissible program.) The one court that has squarely considered the question has held that “an employer [can] be held liable under Title VII for enforcing or condoning the social norm that it is acceptable for African Americans to say ‘nigger’ but not whites”:

To conclude that [a defendant] may act in accordance with the social norm that it is permissible for African Americans to use the word but not whites would require a determination that this is a “good” race-based social norm that justifies a departure from the text of Title VII. Neither the text of Title VII, the legislative history, nor the caselaw permits such a departure from Title VII’s command that employers refrain from “discriminat[ing] against any individual . . . because of such individual’s race.”<sup>63</sup>

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<sup>59</sup> See *supra* note 56.

<sup>60</sup> Mystal, *supra* note 56, argues that “I suspect that these white people who want so desperately to *mention* the n-word, in public, are the very same ones who enjoy *using* the n-word, in private,” though he acknowledges that he “can’t prove that.” We do not find his suspicion compelling: We very much doubt that, for instance, Justice Ginsburg or Judge Pregerson or Judge Tatel or any of the other judges who have mentioned the word in their opinions, see Part II.A, indeed enjoyed calling people using such epithets in private—any more than we would infer that a historian or filmmaker whose works depict a Nazi swastika secretly enjoys painting swastika graffiti on synagogues.

<sup>61</sup> These include Title VII of the Civil Rights Act of 1964 for employees, Title VI for students, state laws banning discrimination in employment and education, and, in a public university, the rules under the Equal Protection Clause.

<sup>62</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

<sup>63</sup> *Burlington v. News Corp.*, 759 F. Supp. 2d 580, 597 (E.D. Pa. 2010) (emphasis added).

## IV. TRAUMA AND HURT

Some who argue for prohibiting enunciation of “nigger” maintain that having to hear (or perhaps even read) the word is traumatizing: the term is so hurtful to some students that airing it undermines their ability to function.<sup>64</sup> We aren’t aware of any studies that purport to demonstrate this, but we acknowledge that some people are indeed offended by the term, even in quotes of documents or court opinions. And doubtless the word reminds some students of times they were insulted using the word—or threatened or even violently attacked by someone shouting the word—much as even references to rape or other crimes might remind some students of how they had been victimized by such crimes in the past. This may understandably lead to the desire to avoid “talk of rope in the hanged man’s house,” as the old proverb goes.<sup>65</sup>

But a law school’s central task is to prepare students of all races and with all sorts of experiences to become lawyers. Requiring silence, avoidance, or bowdlerization because a subset of students so insists would undermine that task: A lawyer traumatized every time a witness, an opposing counsel, or a judge mentions an epithet drawn from a record is a lawyer in trouble, bereft of the professional posture required by vulnerable clients.

A medical student may be understandably disturbed by blood, or by death.<sup>66</sup> A student preparing to be a psychiatrist may be understandably disturbed by patients’ dark fantasies or suicidal ideas or violent sexual impulses, or even just by patients’ recounting of abuse that they had experienced themselves. But the job of a professional school is not to shield students from such matters, but to train students to “retain a state of equanimity” when dealing with these matters as calmly as possible—something that “can only be achieved through careful and supported deliberate ‘exposure’ to potentially traumatic material.”<sup>67</sup> “Ultimately, clinical students [in health care training programs] need to learn how to tolerate traumatic material and work effectively with trauma survivors in treatment,” even when the students are themselves

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<sup>64</sup> See, e.g., Tatyana Tandanpolie, *Encountering Trauma in the Classroom*, WASH. SQUARE NEWS, Apr. 20, 2020; Terrence Chambley Jr, *Augsburg is Excluding Students Under the Guise of Academic Freedom*, AUGSBURG ECHO, Nov. 16, 2018.

<sup>65</sup> The proverb can be traced back at least to MIGUEL DE CERVANTES SAAVEDRA, *THE HISTORY OF DON QUIXOTE DE LA MANCHA* \_\_ (1605) (Tom Lathrop trans. 2011), and we suspect it was ancient even then. There is a version in the Talmud, which dates back at least about 1500 years: “If there is a case of hanging in a man’s family record, say not to him, ‘Hang this fish up for me.’” BABYLONIAN TALMUD, BAVA METZIA 59b. See also FRANCOIS MICHELOUD, *PASSPORT SWITZERLAND* 85 (3d ed. 2009) (listing it as a Swiss proverb); VALERIY M. MOKIENKO, *THE LARGE DICTIONARY OF RUSSIAN PROVERBS* 291 (2010) (Russian).

<sup>66</sup> See, e.g., Am. Ass’n of Med. Colleges, *Nerves of Steel, Shaky Stomachs*, <https://www.aamc.org/news-insights/nerves-steel-shaky-stomachs>. One of our colleagues draws the same analogy in a slightly different context: “Imagine a medical student who is training to be a surgeon but who fears that he’ll become distressed if he sees or handles blood. What should his instructors do? Criminal-law teachers face a similar question with law students who are afraid to study rape law.” Jeannie Suk Gersen, *The Trouble with Teaching Rape Law*, NEW YORKER, Dec. 15, 2014.

<sup>67</sup> Menka Tsantefski et al., *Trauma-Informed Tertiary Learning and Teaching Practice Framework* 19 (Griffith Univ. 2020), [https://www.griffith.edu.au/data/assets/pdf\\_file/0020/1052309/FRAMEWORK.pdf](https://www.griffith.edu.au/data/assets/pdf_file/0020/1052309/FRAMEWORK.pdf).



survivors of similar trauma.<sup>68</sup> Professors should think about how best to present potentially distressing material.<sup>69</sup> But trying to insulate students from such material is a dubious enterprise. The same applies to the education of law students.

Fortunately, feelings of hurt are not unchangeable givens, untouched and untouchable by the ways in which their expression is received. Such feelings are, at least in part, affected by the responses of observers. The more that schools validate the idea that feeling hurt simply by hearing certain facts is justified in these circumstances, the more the feeling will be embraced, and the more there will be calls to respect that reported distress by requiring the avoidance of that which is said to trigger it. On the other hand, if we tell students that, in the circumstances pertinent here—circumstances in which a term is being mentioned for the sake of accuracy, just as respected judges routinely mention it in their opinions for the sake of accuracy—there is no good reason to feel hurt, we can better help train them to deal with these and other difficult facts calmly in the fashion one expects of effective counsel.

Indeed, we expect various other professionals to acquire such training, formally or otherwise. In many jurisdictions, for instance, insults said to police officers generally don't qualify as "fighting words" because "trained police officer[s]" are expected to have learned to "exercise restraint" even when they are directly personally insulted.<sup>70</sup> People whose jobs bring them in contact with clients who are dealing with stressful situations are similarly trained to try to ignore occasional lashing out by the clients.<sup>71</sup> We should likewise reasonably expect trained lawyers to learn not to be unduly distressed when they simply hear how a word was used to personally insult someone else. And we should therefore expect law students to have been trained this way before law school, or to acquire it in law school.

Some have argued that mentioning the word in the classroom improperly "places a burden on Black students that other students do not face."<sup>72</sup> We are skeptical about the magnitude of the burden; indeed, we doubt that it is materially greater than the normal burdens that students may face in some situations. Any reference, using what-

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<sup>68</sup> Patricia J. Shannon et al., *Exploring the Experiences of Survivor Students in a Course on Trauma Treatment*, 6 PSYCH. TRAUMA S107, S114 (2014).

<sup>69</sup> "Trigger warnings" are sometimes recommended as a tool for making potentially distressing material easier for students to process; but recent research suggests that they are not helpful. Mevagh Sanson, Deryn Strange & Maryanne Garry, *Trigger Warnings Are Trivially Helpful at Reducing Negative Affect, Intrusive Thoughts, and Avoidance*, 7 CLIN. PSYCH. SCI. 778 (2019).

<sup>70</sup> *State v. Wade*, 667 P.2d 459, 461 (N.M. Ct. App. 1983); *City of Alamogordo v. Ohlrich*, 625 P.2d 1242, 1243 (N.M. Ct. App. 1981); see also, e.g., *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990); *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring); *City of Houston v. Hill*, 482 U.S. 451, 462 (1987) (quoting Justice Powell's opinion favorably). But see, e.g., *State v. Read*, 680 A.2d 944, 949 (Vt. 1996) (rejecting the view that words said to the police should be excluded from "fighting words" statutes). Naturally and unfortunately, such training doesn't always stick.

<sup>71</sup> See, e.g., Mallory Moench, *PG&E Workers, Families Fear Public Anger Amid Outages; It's 'Nerve-Racking'*, S.F. CHRON., Nov. 1, 2019 (noting that workers are "trained to ignore insults" from upset customers); Steve Whitehead, *6 Ways to Defend Yourself Against Verbal Abuse*, EMS 1, Apr. 23, 2020, <https://www.ems1.com/safety/articles/6-ways-to-defend-yourself-against-verbal-abuse-FfcPuuZg5x9w4ALT/>.

<sup>72</sup> Law Review Editors, *Statement by the Undersigned Editors of Volume 97*, 97 WASH. U. L. REV. \_\_ (2020).

ever words, to slavery or lynching or racist police abuse may be more upsetting or distracting to black students than to white students. Any reference to rape may be more upsetting or distracting to female students than to males.

Any reference to child molestation may be more upsetting or distracting to students who had themselves been molested as children. Any reference to Hamas may be especially upsetting to students of Israeli extraction whose families have been victims of that terrorist group; any reference to Israel may be especially upsetting to students of Palestinian extraction whose families have been mistreated by the Israeli government—yet we do not think that any of this would be a basis for expurgating such matters from the classroom. But in any event, if it is true that black law students are particularly upset by even a mention of the word, then the school especially owes it to those students (and to any other students who are upset) to prepare them for legal practice, in which they may come across those words under circumstances where much more is at stake than in a typical classroom.

We appreciate that students pay a good deal of money to attend law school. They are customers and expect good customer service. University education, though, is one area where the customer is not always king. Independence from the customer is partly reflected in the concept of academic freedom, which entails liberty from restrictions imposed not just by legislatures or chancellors or donors but also students. But such independence also stems from the central purpose of the university, which is to prompt students to question and reexamine their reactions—both their intellectual reactions and their emotional ones—rather than merely taking those reactions as immutable.<sup>73</sup>

## V. OTHER OFFENSIVE WORDS

Rejecting the use-mention distinction as to one offensive word is also likely lead to calls for expurgation of other presumptively offensive words. This has already begun. At Brandeis, a professor was disciplined simply for saying that “wetback” is a pejorative for Mexican immigrants, and criticizing those who use it.<sup>74</sup> At a college in Kentucky, an adjunct who was lecturing on “how language is used to marginalize minorities and other oppressed groups in society” had his contract ended both because he discussed the word “nigger” in class and because he discussed the word “bitch.”<sup>75</sup> Students have likewise stated that professors ought not quote the “f-word” (meaning “fag,” as in *Snyder v. Phelps*).<sup>76</sup>

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<sup>73</sup> See Carolyn Rouse, *Letter to the Editor*, PRINCETONIAN, Feb. 8, 2018, <https://www.dailypincetonian.com/article/2018/02/in-defense-of-rosen> (arguing that a professor’s mention of “nigger” in a course about hate speech was aimed at leading students “to recognize their emotional response to cultural symbols,” so that they can become “able to argue why hate speech should or should not be protected using an argument other than ‘because it made me feel bad’”).

<sup>74</sup> See Robin Wilson, *Brandeis Professor in Trouble for Classroom Comments Gets Faculty Panel’s Support*, CHRON. OF HIGHER ED., Nov. 30, 2007, <https://www.chronicle.com/article/Brandeis-Professor-in-Trouble/121989>.

<sup>75</sup> *Hardy v. Jefferson Comm. Coll.*, 260 F.3d 671, 675 (6th Cir. 2001). “Bitch” appears in Westlaw-accessible decisions even more often than “nigger,” with nearly 9500 references in cases, trial court orders, and administrative decisions just since 2015.

<sup>76</sup> See Anon., *An Email to the Professor in Support of Black Students*, *Support Black Students - 4/22/20 - 2*, Apr. 23, 2020 (condemning all quoting of “racial, homophobic or any other slurs” by professors), <http://uclalawprotectblackstudents.com/blog/post/58140/support-black-students-4-20-20-2>; Anon., *An Email to the Professor in Support of Black Students*, *Support*

At Columbia and at the University of York (England), professors have been faulted for quoting the word “negro.”<sup>77</sup> A Smith College newspaper’s transcript of a panel on “Challenging the Ideological Echo Chamber: Free Speech, Civil Discourse and the Liberal Arts”—a panel which drew controversy because Wendy Kaminer, a noted author on free speech, mentioned the word “nigger” when discussing the controversy about the word—not only expurgated that word but also replaced the word “crazy” with the text “[ableist slur].”<sup>78</sup> And this was in an otherwise complete transcript of the panel, not in the newspaper’s own pages, where editorial judgments would normally be common.

For some religious people, blasphemy can be as upsetting as insults, and can indeed be seen as a form of insult. For instance, in January 2015, shortly after the Charlie Hebdo murders, several University of Minnesota professors put together a panel called *Can One Laugh at Everything? Satire and Free Speech After Charlie*. The flier for the panel contained the now-iconic post-murder *Charlie Hebdo* cover depicting a cartoon of the Moslem holy figure Mohammed. The university’s Office of Equal Opportunity and Affirmative Action (EOAA) ordered staff to take down copies of the flier because some people were offended by its depiction of Mohammed.<sup>79</sup>

Of course, many other words bring up evil associations as well, including associations with murder. “Nazi” certainly would for people whose families were murdered in the Holocaust; so would “Auschwitz” and the like.<sup>80</sup> The Holocaust may be decades in the past, but anti-Semitic violence is not. And there are other more recent genocides and terrorist campaigns. Some of our students may themselves be refugees from bitter ethnic conflicts or outright genocides. Many terms, whether pejoratives or the names of murderous organizations, may be understandably offensive to them, and even discussion of the genocide may be upsetting.<sup>81</sup>

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*Black Students - 4/20/20 - 2*, Apr. 23, 2020, <http://uclalawprotectblackstudents.com/blog/post/58140/support-black-students-4-20-20-2>.

<sup>77</sup> Khadija Hussain, *When Professors Make Racially Insensitive Remarks, Whose Job Is It to Confront Them?*, COLUMBIA SPECTATOR, Apr. 5, 2018, <https://www.columbiaspectator.com/news/2018/04/05/lack-of-mandatory-training-leaves-faculty-unequipped-to-talk-about-race-and-identity-in-the-classroom/>; Julie Henry, *The University of York Apologises for Saying ‘Negro’ in Lecture on Civil Rights Hero’s Book Called the Philadelphia Negro*, DAILY MAIL (UK), Dec. 21, 2019, <https://www.dailymail.co.uk/news/2019/12/21/university-of-york-apologises-for-saying-negro-in-lecture-on-civil-rights-hero-s-book-called-the-philadelphia-negro.html>.

<sup>78</sup> Sophian, *Transcription of ‘Challenging the Ideological Echo Chamber: Free Speech, Civil Discourse and the Liberal Arts’*, SMITH SOPHIAN, Oct. 13, 2014, <https://web.archive.org/web/20141108020712/http://www.thesmithsophian.com/2014/10/13/transcription-of-challenging-the-ideological-echo-chamber-free-speech-civil-discourse-and-the-liberal-arts/>.

<sup>79</sup> Maura Lerner, *Poster for Free-Speech Forum Sets off Debate at University of Minnesota*, MINN. STAR-TRIB., May 5, 2015.

<sup>80</sup> See Janice Carello & Lisa D. Butler, *Potentially Perilous Pedagogies: Teaching Trauma Is Not the Same as Trauma-Informed Teaching*, 15 J. TRAUMA & DISSOCIATION 153, 159 (2014) (discussing how upsetting viewing interviews with Holocaust survivors can be for students).

<sup>81</sup> Cf. e.g., Agence France Press, *Rwanda Mourns The Dead, 25 Years Since Genocide Began*, Apr. 7, 2019, <https://www.outlookindia.com/newscroll/rwanda-mourns-the-dead-25-years-since-genocide-began/1510905> (“In past years, ceremonies [commemorating the dead of the Rwandan genocide] have triggered painful flashbacks for some in the audience, with crying, shaking, screaming and fainting amid otherwise quiet vigils.”); Francesca Trianni & Diane Tsai, *Scars and the Smell of Grass: One Survivor’s Lasting Reminders of Genocide*, TIME, Apr. 9, 2015; Jean Damascene Kabakambira et al., *Burden of Post-Traumatic Stress Disorder Acute Exacerbations During the Commemorations of the Genocide Against Tutsis in Rwanda: A Cross-Sectional Study*, 30 PAN. AFR. MED. J. 216 (2018).

Indeed, at Indiana University, a janitor was found guilty of racial harassment simply for “openly reading the book related to a historically and racially abhorrent subject in the presence of your Black co-workers”—the book being *Notre Dame vs. The Klan: How the Fighting Irish Defied the KKK*.<sup>82</sup> (The decision was reversed after the story went public, and the University was sharply condemned in the national media.<sup>83</sup>) At Washington College in Maryland, the administration canceled planned student performances of an award-winning anti-racist play (Larry Shue’s *The Foreigner*) because the play contained characters dressed in Klan robes, being defeated by the play’s “disfranchised protagonists.”<sup>84</sup>

Likewise, some years ago four administrators at a law school told students designing a closed-research moot court problem to remove one of the precedents from the readings. The problem was about the First Amendment and threats, and the case that they were told to remove was the most important precedent in the field, *Virginia v. Black*. The reason given to remove the case: the precedent involved cross-burning, which might be seen as too traumatic for black students. (The decision was eventually reversed, after a faculty member complained to other administrators.)

Others have faulted professors who “expose Black students to images and videos of brutalized Black bodies . . . and explore texts that detail Black suffering” alongside those who “say the n-word without hesitation” (in quoting materials such as “white LGBTQ activist Carl Wittman’s ‘A Gay Manifesto’”).<sup>85</sup> Likewise, the Oxford University student union adopted a policy called “Protection of Transgender, Non-binary, Disabled, Working-class, and Women\* Students from Hatred in University Contexts,” demanding the removal of “ableist, misogynistic, classist or transphobic” “hate speech” from any course reading materials.<sup>86</sup>

The word “rape” similarly refers to a crime that is a constant threat to women (including of course women law students). Another prominent law professor reports that she was faulted for even using the word “rape” in a university class.<sup>87</sup> One of our colleagues has written that, “Some students have even suggested that rape law should not be taught because of its potential to cause distress.”<sup>88</sup> Indeed, she noted that, “One teacher I know was recently asked by a student not to use the word ‘violate’ in class—as in ‘Does this conduct violate the law?’—because the word was triggering.”<sup>89</sup>

## VI. CONCLUSION

Several professors caught up in these controversies have said that, going forward, they will no longer vocalize “nigger,” because of the protests that such speech has

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<sup>82</sup> *University Says Sorry to Janitor over KKK Book*, AP, July 15, 2008, [http://www.nbcnews.com/id/25680655/ns/us\\_news-life/t/university-says-sorry-janitor-over-kkk-book/](http://www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book/).

<sup>83</sup> *Id.*

<sup>84</sup> Cassy Sottile, “*The Foreigner*” Senior Thesis Canceled by Washington College, THE ELM, Nov. 18, 2019. The objections were that the mere depiction of the Klan on stage would be offensive or traumatizing. *Id.*

<sup>85</sup> Tandanpolie, *supra* note 64.

<sup>86</sup> Emily Charley, *Remove “Hateful Material” From Mandatory Teaching, Says SU Council*, OXFORD STUDENT, May 1, 2020, <https://www.oxfordstudent.com/2020/05/01/remove-hateful-material-from-mandatory-teaching-says-su-council/>.

<sup>87</sup> Sherry Colb, *Why I Do Not Give Trigger Warnings*, JUSTIA VERDICT, Aug. 29, 2018.

<sup>88</sup> Gersen, *supra* note 66.

<sup>89</sup> *Id.*

drawn and because they are convinced that their pedagogical strategy of enunciating the word is not worth the distraction, the hurt feelings, and the complaints. We know some of these professors. We respect them and the decision they have made. But we disagree with it. It defers to the notion that the protest against all mentioning of a word should overcome a considered pedagogical judgment that learning would be enhanced by accurately airing the American language's paradigmatic racial slur—and the judgment that learning for law students would be enhanced by applying the use-mention distinction that so many judges and lawyers follow.

Perhaps there is something to be said as a matter of prudence for adopting those professors' position. We note, though, that it seems often to fail to obtain the settlement that its initiators undoubtedly sought to obtain as the gesture is scorned. Instead of being seen as a sign of good will, the gesture has been seized upon as a confession of error and deployed as an additional basis for attacking reputations unjustifiably.

We think, moreover, that this position ultimately undermines education more than advancing it. Precedent and analogy are powerful forces. Acceding to demands to prohibit enunciation of “nigger” encourages related demands (such as those reported in Part V) that will generate a spate of words that are deemed automatically, unconditionally, undebatably unmentionable, without regard for context or meaning.

Human nature being what it is, making one word taboo is likely to lead people to seek similar taboos for words that they find particularly offensive. Why isn't my group's pain treated as sensitively as this other group's pain, people might ask (whether consciously or subconsciously)? If the willingness to use “n-word” as a euphemism is viewed as a symbol of acknowledgment of the wrongs done to blacks, why shouldn't the wrongs done to my group also be acknowledged?

By way of analogy, we've seen a few opinions that contain quotes such as “f\*\*\*, nigger”<sup>90</sup> or “f\*\*\*\*\* faggot,”<sup>91</sup> and that doesn't sit well with us: It signals that the word “fuck” is somehow offensive in a way that the slurs are not. We likewise don't relish the prospect of explaining to, say, a gay student why the *Brandenburg* phrase is being recast as “the n-word should be returned to Africa” but the *Snyder v. Phelps* “God Hates Fags” doesn't get the similar treatment. The categorical principle we urge—that any word can be quoted in an academic discussion of the facts—obviates this difficulty.

And it seems to us that giving in to this pressure to ban one word, and then others, would badly impoverish discussion in university classrooms. Imagine a First Amendment class in which a professor discussing *Snyder* would have to quote one of the signs in that case as “God Hates F-words” (or is it “God Hates Fa-words”<sup>92</sup>). Imagine a class discussion of the disputes about the use of “nigger,” “nigga,” and “negro”—a subject on which there is actually a good deal of caselaw<sup>93</sup>—in which the professor would presumably have to talk about “the n-r word,” “the n-a word,” and “the n-o word.” Or imagine

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<sup>90</sup> *Compare, e.g., Hernandez v. Jones*, No. 16-80566-CIV, 2017 WL 11485811, \*3 (S.D. Fla. Nov. 29, 2017), with Appendix, ECF No. 14-1, *id.*, at 369 (transcript quoting the witness as having said the full words, though apologizing for “that ‘F’ words” but not for any other word).

<sup>91</sup> *Compare, e.g., Chappell v. Miles*, No. CA 2:12-303-MBS, 2012 WL 1570020, \*1 (D.S.C. May 3, 2012), with Complaint, ECF No. 1, *id.*, at 3 (quoting the full words).

<sup>92</sup> Linton Weeks, *The Fa-Word: An Insulting Slur In the Spotlight*, NPR, May 28, 2011, <https://www.npr.org/2011/05/28/136722113/the-fa-word-an-insulting-slur-in-the-spotlight>.

<sup>93</sup> This is especially so on the “nigger”-“nigga” question, see KENNEDY, *supra* note 9, at 4 (discussing claims that “nigger” should be seen as exclusively offensive and “nigga” as “capable

a film class discussion of how the depiction of epithets has changed over the decades; presumably, the line from *Bad News Bears* would have to be quoted as “All we got on this team . . . is a bunch of Jews, sp-words, n-words, pa-words [or perhaps spelled out letter by letter as p-a-n-s-i-e-s?] . . . and a booger-eating moron.”<sup>94</sup> This process turns universities from places at which anything and everything is subject to examination into places for creating and reproducing taboos.

The demand for erasure or euphemism in the classroom, backed up by administrative threat or widespread ostracism, is part of a larger effort, animated by solicitude for oppressed groups, to impose a program of purportedly “progressive” decency upon cultural institutions. We appreciate the impulse behind the effort, but we cannot endorse this particular means used to implement it. We think the demand to restrict classroom speech—even as to a limited attempt to expurgate one particular word—sacrifices core principles of academic freedom and academic candor that have been immeasurably valuable for all groups, including the very groups that it seeks to advance.

Responding properly to this larger effort will require an uncompromising insistence upon keeping free forums of expression, research, and teaching. Vigilance will be especially needed when censorship is advanced on behalf of rightly esteemed and thus

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of signaling a friendly salutation”); *Spikener v. United Parcel Serv., Inc.*, No. A154689, 2020 WL 1452989, 2020 IER Cases 108,149, \*13 (Cal. Ct. App. Mar. 24, 2020); *KB Enterprises, LLC v. Montana Human Rights Comm’n*, 443 P.3d 498, 502–03 (Mont. 2019); *Daniel v. Wayans*, 213 Cal. Rptr. 3d 865, 885 n.7 (Ct. App. 2017), *reaffirmed on other grounds on reconsideration*, 2020 WL 502623 (Jan. 31); *Dapkus v. Chipotle Mexican Grill, Inc.*, No. 15 C 6395, 2017 WL 36448, \*3 n.3 (N.D. Ill. Jan. 4, 2017); *State v. Chambers*, 387 P.3d 1108, 1115 (Wash. Ct. App. 2016); *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1230 (10th Cir. 2015); *Griffin v. Harrisburg Property Servs., Inc.*, No. 1:cv-08-1655, 2009 WL 4061229 (M.D. Pa. Nov. 23, 2009); *Johnson v. Grady Way Station, LLC*, No. C08-1651RAJ, 2009 WL 3380641 (W.D. Wash. Oct. 16, 2009); *Fair v. Basic Metals, Inc.*, No. 06-C-1072, 2007 WL 1847282, \*7 (E.D. Wisc. June 26, 2007); *Freeman v. Spencer Gifts, Inc.*, 333 F. Supp. 2d 1114, 1118 (D. Kan. 2004). But some cases also discuss on how “negro” (used in the modern era, when it is generally no longer viewed as common or respectful) compares to “nigger.” *In re Geiger*, No. A-1409-13T2, 2015 WL 7261458, \*10 n.14 (N.J. Super. Ct. App. Div. Nov. 18, 2015); *Halliburton v. River Rouge Sch. Dist. Bd. of Educ.*, No. 312561, 2014 WL 547616, \*7 (Mich. Ct. App. Feb. 11, 2014); *LaCroix v. City of New Haven*, No. 3:06CV481 (JBA), 2008 WL 11473268, \*2 (D. Conn. Feb. 19, 2008).

The latter question is complicated by the fact that Spanish speakers often use “negro” as a neutral adjective for “black,” *Bolton v. Potter*, No. 8:03-CV-2205-T-27EAJ, 2006 WL 118286, \*2 n.4 (M.D. Fla. Jan. 13, 2006), *aff’d*, 198 F. App’x 914 (11th Cir. 2006), and sometimes “El Negro” as a way to refer to a black man, with no pejorative intent. “El Negro” is also sometimes used as a nonpejorative nickname for blacks—similarly to how “El Chino” is sometimes used to refer to Asians, whether or not of Chinese extraction, as with Peruvian politician Alberto Fujimori, who was nicknamed “El Chino” during his first presidential campaign, back in his pre-dictatorial years—as well as for others. See Carlos Watson, *The Improbable Life of Alberto Fujimori*, OZY, Jan. 11, 2014, <https://www.ozy.com/true-and-stories/the-improbable-life-of-alberto-fujimori/4786/>; Ezequiel Adamovsky, *Ethnic Nicknaming: ‘Negro’ as a Term of Endearment and Vicarious Blackness in Argentina*, 12 J. LAT. AM. & CARIB. STUDIES 273 (2017) (discussing how “negro” is sometimes used in a derogatory sense, but sometimes as a nickname “with no offense intended or taken”); Felix Contreras, *Horacio “El Negro” Hernandez*, JAZZ TIMES, Apr. 25, 2019 (discussing a noted Cuban musician, who does not appear to be black). Whether or not Spanish speakers would be wise to avoid this term in English-language environments (much as one of us, when he came to the U.S. from Russia, was taught that “negr”—the polite term in Russian—was best avoided in America, even when one is speaking Russian), the term is sometimes used in ways that end up appearing in litigation.

<sup>94</sup> *Bad News Bears Script—Dialogue Transcript*, <http://www.script-o-rama.com/movie-scripts/b/bad-news-bears-script-transcript.html>.

morally weighty values such as racial justice: The nobler the end, the greater the danger that it will be seen as justifying even improper means.

The struggle will be long, indeed, never ending. For now, we simply assert the position that vocalizing any word for a legitimate pedagogical purpose—and in particular to accurately report the facts of an incident—should not be made taboo. Due regard for intellectual pluralism prompts us to respect alternative choices made by others with whom we disagree. Due regard for intellectual pluralism should also prompt respect for a decision to eschew silence, avoidance, or bowdlerization in our classrooms.