THE NEW TABOO: QUOTING EPITHETS IN THE CLASSROOM AND BEYOND

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I. INTRODUCTION

Is it wrong for professors to quote epithets in class or in other educational settings? In law schools, this question has arisen as to "nigger" when a professor quoted the defendants' speech from a leading First Amendment case (*Brandenburg v. Ohio*) in a First Amendment class;[1] a professor (one of us) quoted the facts in a rare example of a hate speech prosecution, also in a First Amendment class;[2] a professor teaching a class on legal problem-solving quoted the word in a discussion of Facebook's implementation of its "hate speech" policy;[3] a professor teaching a torts class quoted the facts of a case involving emotional distress and wrongful

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[1] *Professor at Wake Forest University Apologizes for Reading the N-Word Aloud in Class*, J. BLACKS IN HIGHER EDUC. (Apr. 7, 2020), https://www.jbhe.com/2020/04/professor-at-wake-forest-university-apologizes-for-reading-the-n-word-aloud-in-class/ [https://perma.cc/VG9Y-RXF9].

[2] Eugene Volokh, *UCLA Law Dean Apologizes for My Having Accurately Quoted the Word "Nigger" in Discussing a Case*, REASON: VOLOKH CONSPIRACY (Apr. 14, 2020, 5:14 PM), https://reason.com/2020/04/14/ucla-law-dean-apologizes-for-my-having-accurately-quoted-the-word-nigger-in-discussing-a-case/ [https://perma.cc/7VAE-FPS6].

[3] Kathryn Rubino, *Professor At Top Law School Uses N-Word and Won't Apologize For It*, ABOVE THE LAW (Aug. 28, 2020, 1:44 PM), https://abovethelaw.com/2020/08/professor-at-top-law-school-uses-n-word-and-wont-apologize-for-it/; *UCI Law Professor Criticized for Saying the N Word*, REDDIT (Aug. 26, 2020), https://www.reddit.com/r/LawSchool/comments/ihahfj/uci_law_professor_criticized_for_saying_the_n_word/ [https://perma.cc/N9HX-EBN9]; Andrew Koppelman, *Free Speech, Meriwether, and Menkel-Meadow*, BALKINIZATION (Sept. 15, 2020), https://balkin.blogspot.com/2020/09/free-speech-meriwether-and-menkel-meadow.html [https://perma.cc/ACA7-LSNG]. The class discussion focused on an item in the readings, Simon Van Zuylen-Wood, *"Men Are Scum": Inside Facebook's War on Hate Speech*, VANITY FAIR (Feb. 26, 2019), https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech [https://perma.cc/28TV-DUBN].

discharge claims;[4] a professor teaching a class about legal history quoted a statement attributed to Patrick Henry;[5] a professor posed a hypothetical about provocation and self-defense in a criminal law class;[6] a guest lecturer in a class on tobacco regulation displayed and quoted copies of racist advertising;[7] and a professor at Emory University, in discussing discrimination against Native Americans, mentioned that "red nigger" and "sand nigger" had been used as slurs against them.[8]

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[4] Letter from Gregory F. Scholtz, Dir., Dep't of Acad. Freedom, Tenure, & Governance, Am. Ass'n of Univ. Professors, to Dr. Dwight A. McBride, Provost & Exec. Vice President for Acad. Affairs, Emory Univ. (July 10, 2019), https://drive.google.com/file/d/0B_bcq0WcWuxWbEMyelhaOFNLbkJmQU5EQzdnbDMtUUlNeTZJ/view [https://perma.cc/EB77-RAPL]; 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://perma.cc/T863-BZHJ].

[5] Nick Anderson, *A Stanford Law Professor Read a Quote with the N-Word to His Class, Stirring Outrage at the School*, WASH. POST (June 3, 2020, 7:24 PM), https://www.washingtonpost.com/education/2020/06/03/stanford-law-professor-read-quote-with-n-word-his-class-stirring-outrage-school/ [https://perma.cc/EK78-896F]. 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 OF 1788 157 n.142 (R.A. Brock ed., 1890), which claims to be based on an account to the author (born 1806) from someone who was at the Convention.

[6] Mitch Dudek, *DePaul Law Professor Subject of Complaints Over Use of 'N-Word' in Class Lecture*, CHI. SUN-TIMES (Feb. 28, 2018, 10:14 PM), https://chicago.suntimes.com/2018/2/28/18339921/depaul-law-professor-subject-of-complaints-over-use-of-n-word-in-class-lecture [https://perma.cc/F6HU-WUVE]. This was an example of the mention of the word in a hypothetical, rather than a direct quote, though ultimately we are unpersuaded that the distinction should make a difference. For a famous real-world case involving such a provocation defense—and Justice Frankfurter's eloquent dissent supporting the defendant—see *Fisher v. United States*, 328 U.S. 463, 479, 480, 485 (1946) (Frankfurter, J., dissenting) (quoting the word three times).

[7] 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/ [https://perma.cc/R8YJ-U5CC].

[8] Eric Stirgus, *Is Racially Charged Language Ever Appropriate for College Classrooms?*, ATLANTA J.-CONST. (Sept. 19, 2019), https://www.ajc.com/news/colleges-grapple-with-

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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*;[9] a history professor quoted a 1920 statement by United States Senator James Reed opposing the League of Nations;[10] a history professor quoted James Baldwin's *The Fire Next Time*;[11] a creative writing professor discussed another statement by James Baldwin;[12] an African-American Literature professor quoted *The Narrative of the Life of Frederick Douglass*;[13] an anthropology professor discussed "a video of an incident on a New York subway where a white man repeatedly yelled" the word at black passengers;[14] an art history professor quoted a line from N.W.A.'s *Fuck tha Police* and wrote the group's full name (*Niggaz Wit Attitudes*);[15] an Africana Studies professor discussing Tupac Shakur wrote

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faculty-using-epithets-campus/w5K59LXayHjtIWMO7UuoaL/ [https://perma.cc/WAW9-MM62]; Isaiah Poritz, *Two Law Professors Accused of Using the N-Word in Class*, EMORY WHEEL (Sept. 18, 2019), https://emorywheel.com/two-law-professors-accused-of-using-the-n-word-in-class/ [https://perma.cc/S3V2-EBV9].

[9] Letter from Adam Steinbaugh, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ. to Charles F. Robinson, Gen. Counsel & Vice President of Legal Affairs, Univ. of Cal. (July 2, 2020), https://www.thefire.org/fire-letter-to-the-university-of-california-los-angeles-july-2-2020/ [https://perma.cc/BH6H-MKSS].

[10] Emma Keith, *Students, Administrators Deal with Latest Racism Case at OU*, NORMAN TRANSCRIPT (Feb. 25, 2020), https://www.normantranscript.com/news/local_news/students-administrators-deal-with-latest-racism-case-at-ou/article_3293869d-f064-504e-b01d-68eb2de69bae.html [https://perma.cc/Z5FK-4QLG].

[11] Randall Kennedy, *How a Dispute Over the N-Word Became a Dispiriting Farce*, CHRON. HIGHER EDUC. (Feb. 8, 2019), https://www.chronicle.com/article/how-a-dispute-over-the-n-word-became-a-dispiriting-farce/ [https://perma.cc/AV4P-JT62].

[12] John McWhorter, *The Idea That Whites Can't Refer to the N-Word*, ATLANTIC (Aug. 27, 2019), https://www.theatlantic.com/ideas/archive/2019/08/whites-refer-to-the-n-word/596872/ [https://perma.cc/5767-2R5Q].

[13] Moss Brennan & Justin Lundy, *English Department Responds to Use of N-Word in Class*, APPALACHIAN (Feb. 29, 2020), https://theappalachianonline.com/english-department-responds-to-use-of-n-word-in-class/ [https://perma.cc/9G5K-KRNX].

[14] Esther Chong & Stella Harvey, *No Sanctions for Anthropology Instructor Who Used Slur in Lecture*, WESTERN FRONT (Feb. 6, 2019), https://www.westernfrontonline.com/2019/02/06/no-sanctions-for-anthropology-instructor-who-used-slur-in-lecture/ [https://perma.cc/WF3J-FL7F].

[15] Memorandum from the Stanford Univ. Undergraduate Senate on Condemning Classroom Racism and Anti-Blackness 1 (May 3, 2020),

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the name of Tupac's song called "N.I.G.G.A. (Never Ignorant About Getting Goals Accomplished)" on the whiteboard;[16] a Princeton anthropology professor offered the word as an example of what the class would be exploring in a study of taboos;[17] a philosophy professor discussing the Washington Redskins' team name analogized it to "having a team called like, uh, the Florida [N-words]";[18] a history and art theory professor gave the

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https://docs.google.com/document/d/12JGUvUh3AlDfKMkvFr5Zj-Ztkt1KidIHStarub29Pps/edit [https://perma.cc/L2PS-KZJJ].

[16] TUPAC SHAKUR, LOYAL TO THE GAME (Amaru Entertainment 2004); *see* Madison (@Madisonmwoods), TWITTER (Feb. 3, 2021, 3:47 PM), https://twitter.com/madisonmwoods/status/1357068194721202178 (reproducing what appears to be a photograph of the writing); Alivia Harris, *UT Student Organizations Call for Termination of Professor Accused of Writing Racial Slur on Whiteboard*, WVLT-TV (Feb. 7, 2021, 12:08 PM), https://www.wvlt.tv/2021/02/07/ut-student-organizations-call-for-termination-of-professor-accused-of-writing-racial-slur-on-whiteboard; Lilah Burke, *U of Tennessee Africana Program Apologizes for Classroom Use of Slur*, INSIDE HIGHER ED. (Feb. 8, 2021); https://www.insidehighered.com/quicktakes/2021/02/08/u-tennessee-africana-program-apologizes-classroom-use-slur [https://perma.cc/5KMY-Y8LC]. The professor wrote it as "NIGGA" followed by "Never Ignorant Getting Goals Accomplished," but the objection was not to the imprecise rendering.

[17] Colleen Flaherty, *The N-Word in the Classroom*, INSIDE HIGHER EDUC. (Feb. 12, 2018), https://www.insidehighered.com/news/2018/02/12/two-professors-different-campuses-used-n-word-last-week-one-was-suspended-and-one [https://perma.cc/99XG-FSUQ].

[18] Danielle Gehr, *Simpson College Students Demand Action After Professor Uses Racial Slur*, DES MOINES REG. (Nov. 16, 2019, 9:44 PM), https://www.desmoinesregister.com/story/news/2019/11/16/simpson-college-students-demand-action-after-professor-uses-slur/4205805002/ [https://perma.cc/37AJ-CVUQ] (expurgation in the article, though presumably not in the professor's statement). The same analogy had been drawn by others in the past. *See, e.g.*, Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080 (TTAB 2014) (quoting a letter making this argument); Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 476, 478–79 (E.D. Va. 2015) (likewise, and also discussing the analogy between the two words in five other places), *vacated*, 709 F. App'x 182 (4th Cir. 2018); Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7, 7 (1994) (making the same argument). *See also* Brief for the Fred T. Korematsu Center for Law and Equality, Hispanic National Bar Association, National Asian Pacific American Bar Association, National Bar Association, National LGBT Bar Association, and National Native American Bar Association as Amici Curiae in Support of Petitioner at 24, Lee v. Tam, No. 15-1293, 2016 WL 6833411 (similarly analogizing "redskin" to "nigger" in discussing

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word "as an example of a word that a community has reclaimed";[19] a music history professor quoted the word when discussing racist songs in 1800s musical theater;[20] and a dean quoted the name of comedian civil rights activist Dick Gregory's autobiography.[21]

Unsurprisingly, these controversies have arisen as to the word "fag" as well.[22] One university fired a tenured media law professor (and department chair) for quoting both words, one when discussing a leading campus speech code case and the other when teaching *Snyder v. Phelps* (the case which upheld protesters' rights to picket on the occasion of a military funeral, including with signs saying "God Hates Fags").[23] Another professor's

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football team names, and mentioning the latter word 12 times in the course of the brief, which deals with epithets as trademarks more broadly); Testimony of David Barnhardt at 177–78, Pro-Football, Inc. v. Blackhorse, No. 114CV01043, 1997 WL 35385496 (counsel asking expert witness about this analogy, in the Washington Redskins trademark cancellation case).

[19] Benjamin Shingler, *Quebec Premier Warns of 'Censorship Police' After Ottawa Professor Suspended For Saying N-Word*, CBC NEWS (Oct. 20, 2020, 1:27 PM), https://www.cbc.ca/news/canada/montreal/quebec-university-of-ottawa-professor-1.5767737 [https://perma.cc/C847-ZJVK].

[20] Rose Esfandiari, *USG Cultural Organizations Denounce USC's Transparency on Marshall Professor's Temporary Suspension*, DAILY TROJAN (Sept. 25, 2020), https://blastzone.info/2020/09/25/usg-cultural-organizations-denounce-uscs-transparency-on-marshall-professors-temporary-suspension/ [https://perma.cc/UN23-6TFR].

[21] Scott Jaschik, *Under Fire, a Dean Departs*, INSIDE HIGHER ED (July 25, 2016), https://www.insidehighered.com/news/2016/07/25/dean-seattle-u-subject-protests-seeking-her-ouster-and-defending-her-retires [https://perma.cc/L3XT-7PWV]; Dick Gregory, *Language, Racism and a Protest*, INSIDE HIGHER ED (May 26, 2016), https://www.insidehighered.com/views/2016/05/26/dick-gregory-writes-student-protesters-about-which-battles-matter-most-essay [https://perma.cc/4PHR-DEGC]; Ansel Herz, *Go Read 'N*gger,' Seattle University Humanities Dean Told Black Student Who Complained About Curriculum*, STRANGER (May 13, 2016, 1:22 PM), https://www.thestranger.com/slog/2016/05/13/24081531/go-read-ngger-seattle-university-humanities-dean-told-black-student-who-complained-about-curriculum [https://perma.cc/C8X9-UFA7].

[22] In our discussion here, we will use "fag" to cover both itself and "faggot." There may be a subtle difference between them, especially in some contexts, but on balance they are comparable, and our sense is that the calls to ban mentioning them apply to both.

[23] Courtney Pedersen, *Alumna Releases Video of Journalism Department Chair Using Racial Slur in Lecture*, CENT. MICH. LIFE (July 7, 2020, 6:49 PM), https://www.cm-life.com/article/2020/07/journalism-department-chair-on-paid-administrative-leave

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quoting the word in a discussion of *Snyder*, in a class at a law school, led to student complaints and demands that the word be expurgated in the future.[24] Some students at another law school have likewise demanded that professors not quote the "f-word" (meaning "fag").[25]

An open letter from administrators at UC Irvine School of Law, prompted by a recent controversy, "condemn[ed] without qualification the classroom utterance of terms, such as the N-word, that are loaded with histories of pain and oppression"[26]—the "such as" suggesting that other terms are to be condemned as well, with "fag" being the likeliest plausible example. Another letter signed by several law professors at another school condemned "repeated utterances of the 'n-word,' the 'f-word' and the 'c-word'" in faculty colloquium talks.[27] This expansion of demands for expurgation is unsurprising; many have come to embrace the view articulated by Professor Melvin Boozer, president of the D.C. Gay Activists Alliance, when addressing the 1980 Democratic National Convention: "I know what it means to be called a nigger, and I know what it means to be called a faggot, and I can sum up the difference in one word: none."[28] And if one thinks quotation of a slur is to be forbidden, and not just its use as an insult, the logic of categorical expurgation would apply equally to both terms.

The main reason why "nigger" yields such responses 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:

[https://perma.cc/ZJ2U-2C4U]; Courtney Pedersen, *Journalism Department Chair 'No Longer Employed by the University'*, CENT. MICH. LIFE (Sept. 2, 2020, 8:02 PM), https://www.cm-life.com/article/2020/09/journalism-department-chair-no-longer-employed-by-cmu [https://perma.cc/JZU9-PGLM]; CENT. MICH. UNIV., FINAL INVESTIGATORY REPORT: INVESTIGATION I-1914 at 6, 18 (Aug. 17, 2020); Snyder v. Phelps, 562 U.S. 443 (2011).

[24] E-mail (confidential) (on file with authors).

[25] *See Support Black Students: 4/22/20 – 2*, UCLA L. SUPPORT BLACK STUDENTS (Apr. 23, 2020), https://uclalawprotectblackstudents.com/blog/post/58151/support-black-students-4-22-20-2 [https://perma.cc/2QVW-4F9G] (condemning all quoting of "racial, homophobic or any other slurs" by professors).

[26] *See* Rubino, *supra* note 3.

[27] Presumably the "f-word" here referred to "fag," and the "c-word" to "cunt."

[28] *See* Richard Pearson, *Homosexual Rights Activist Melvin Boozer Dies at 41*, WASH. POST (Mar. 10, 1987), *quoted approvingly in* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 38 (D.C. 1987).

Rodney King testified that the police said it when beating him;[29] Abner Louima reported that the police said it when brutally sodomizing him;[30] an investigator testified that Ahmaud Arbery's killer said it while Arbery was on the ground;[31] and those are the tip of the iceberg.[32] The slur has been put to other uses. But it is abhorrence towards the classic racist deployment of the slur that occasions calls for putting it behind a wall of silence. "Fag" is similarly associated with homophobic violence.[33]

Moved by a recognition that the prevalence of the slurs in American life is an indication of how common hatred of blacks and gays has been and continues to be, and apprehensive about the slurs' toxicity even in the classroom, some students, professors, and administrators maintain that any enunciation of them is wrongful no matter the context or the intention of the

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[29] Seth Mydans, *Rodney King Testifies on Beating: 'I Was Just Trying to Stay Alive'*, N.Y. TIMES, Mar. 10, 1993, at A1 ("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.'").

[30] Maria Hinojosa, *NYC Officer Arrested in Alleged Sexual Attack on Suspect*, CNN (Aug. 14, 1997), http://www.cnn.com/US/9708/14/police.torture/ [https://perma.cc/2MW7-9KXH].

[31] *Ahmaud Arbery Trial Transcript: June 4 Preliminary Hearings*, REV (June 4, 2020), https://www.rev.com/blog/transcripts/ahmaud-arbery-trial-transcript-june-4-preliminary-hearings [https://perma.cc/8VWQ-GBXU] (testimony of Richard Dial at 1:13:48); Complaint ¶¶ 1, 47, 52, Cooper v. McMichael, No. 2:21-cv-00020-LGW-BWC (S.D. Ga. Feb. 23, 2021) (lawsuit filed by Arbery's estate) (quoting the word).

[32] *See, e.g.*, Hayward v. Cleveland Clinic Found., 759 F.3d 601, 620 (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, 1434 (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."); Tinsley v. Town of Framingham, 152 N.E.3d 713, 724 (Mass. 2020) ("Tinsley may base his civil claims on what he alleges occurred after the police officers forcibly removed him from his vehicle—when the police officers allegedly continued to hit him, kicked him, and called him a 'fucking nigger' . . . .").

[33] *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 452 (7th Cir. 1996).

speaker. They maintain that giving voice to those epithets is so hurtful to some that no pedagogical aim is worth the pain inflicted. Thus, some teachers never vocalize the terms, either talking around them or substituting a euphemism such as "the n-word."

Some professors do not even write the words.[34] Indeed, one law review has totally banned the word "nigger" from its pages; it stated that "the N-word should never be written unredacted" in legal academic work, "condemn[ed] the use of racial epithets in any setting," and took the view that "[t]he N-word . . . has no place in academia or the legal profession"[35]—with "or the legal profession" presumably covering quotes in briefs and court opinions as well. And the context suggests that the law review editors were indeed sharply condemning all mentions of the word by professors (and presumably by lawyers and judges), rather than just setting up a house style for what is to be published in their own pages.[36]

There are, however, other words with toxic associations: KKK.[37] Lynching. Nazi. Auschwitz. Genocide. Rape.[38] They are not epithets, but much in life is worse than epithets. Indeed, one reason sometimes given for eschewing any vocalizing of epithets is precisely their association with bigoted violence.[39] The words we just mentioned are at least as clearly

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[34] *See, e.g.*, ELIZABETH STORDEUR PRYOR, COLORED TRAVELERS: MOBILITY AND THE FIGHT FOR CITIZENSHIP BEFORE THE CIVIL WAR [unnumbered page before Table of Contents] (2020).

[35] *See infra* note 101 and accompanying text.

[36] The law review wrote this in the course of publicly condemning a professor—one of us—for mentioning the word in a discussion at his home law school. The professor had a forthcoming article in the law review, which the law review had committed to publish as part of a symposium; the article itself did not mention the word, since it was on a topic where the word did not come up.

[37] *See infra* note 200 and accompanying text.

[38] *See infra* note 205–207 and accompanying text.

[39] *Cf.* Tatyana Tandanpolie, *Encountering Trauma in the Classroom*, WASH. SQUARE NEWS (Apr. 20, 2020), https://nyunews.com/uta/features/2020/04/20/racial-trauma-in-classroom/ [https://perma.cc/E57K-YBK7] (stating that hearing the slur in class can trigger "traumatization," as can seeing "graphic images" of violence against blacks, or "learning about racist acts, Black suffering and 'race-related danger'"); Gabby Manna, *To the Lecturer Who Read the N-Word Aloud in Class*, ODYSSEY ONLINE (Oct. 2, 2017), https://www.theodysseyonline.com/lecturer-read-word-aloud-class [https://perma.cc/8VR5-7WL8] ("You forced these students, without warning, to hear a word stirring up memories of slavery, violence, murder, rape—the history of violent racism that continues today for black people in this country.").

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.

Epithets are part of the lexicon of American culture about which people, especially lawyers, need to be aware. Omitting them veils or mutes an ugliness that, for maximum educational impact, and indeed for maximum candor, ought to be seen or heard directly. And omitting them 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.[40]

We respect, even as we disagree with, the pedagogical choices of others who refrain from ever voicing the infamous "N-word" or the increasingly taboo "Fa-word."[41] 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 for pedagogical purposes is not simply defensible. We think that, used properly, such teaching helps convey 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.[42]

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[40] *See infra* Part II.B.

[41] Linton Weeks, *The Fa-Word: An Insulting Slur In the Spotlight*, NPR (May 28, 2011, 4:13 PM), https://www.npr.org/2011/05/28/136722113/the-fa-word-an-insulting-slur-in-the-spotlight [https://perma.cc/ENZ9-8A92].

[42] 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: Professor Geoffrey

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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, turned in part on whether he actually said the word during the Virginia Ratifying Convention.[43] 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. We think that professors in other disciplines should follow suit, though we are particularly concerned about our own field of learning and training. Indeed, the use-mention distinction is familiar and usually broadly accepted: We expect that many professors would quote the word "fuck" in class (for instance, when discussing the "Fuck the Draft" jacket in *Cohen v. California*[44]), even though they wouldn't use the word in class to express their own sentiments about something they dislike. We just think this distinction between using and mentioning should apply to bigoted slurs as is does to vulgarities.[45]

Stone, for instance, has for himself chosen to shift away from using slurs in hypotheticals, though he reserves judgment on what he would do when epithets arise within a case that he is teaching. E-mail from Geoffrey Stone, Professor, Univ. of Chi. Law Sch., to Eugene Volokh, Professor, UCLA Sch. of Law (Aug. 2, 2020, 17:25 PST) (on file with author).

[43] *See* Anderson, *supra* note 5 and accompanying text; Michele Dauber (@mldauber), TWITTER (May 30, 2020, 7:26 PM), https://twitter.com/mldauber/status/1266873770255413248.

[44] 403 U.S. 15, 16 (1971).

[45] Luvell Anderson & Ernie Lepore, *Slurring Words*, 47 NOÛS 25, 37, 38 (2013), and Luvell Anderson & Ernie Lepore, *What Did You Call Me? Slurs as Prohibited Words*, 54 ANALYTIC PHIL. 350, 354 (2013), may appear to reject the use-mention distinction; but those articles aim to describe what they see as a particular approach to slurs among some members of the public, rather than dealing with "[t]he appropriateness of mentioning slurs, even in pedagogical contexts, [which] is a separate question from the one we were engaging." E-mail from Luvell E. Anderson to Eugene Volokh (Feb. 9, 2021, 4:35 PM) (on file with authors). And that is consistent with the articles themselves quoting slurs, including "nigger," many times.

Note that we are not making an argument here specifically about First Amendment law.[46] Nor do we just appeal to broad principles of academic freedom. Rather, we are arguing that accurately and directly quoting source material is sound pedagogy—not just something we have a right to do, but itself the right thing to do. This means that such quoting is fully consistent with proper professional standards, which is relevant to applying academic freedom principles.[47] But it goes beyond just reliance on those principles.

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[46] The leading First Amendment academic freedom case on this score is *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001), which held that a public college professor's mentioning epithets (there, "nigger" and "bitch") in class discussions was generally constitutionally protected, when "germane to the subject matter of his lecture," *id.* at 675, 679. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), did not resolve whether professors' speech in "classroom instruction" is presumptively constitutionally protected against employer punishment, *id.* at 425. The Fourth and the Ninth Circuits have held that it is. Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011); Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014). The Sixth and Eighth Circuits have reserved judgment on the question. Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 343–44 (6th Cir. 2010); Lyons v. Vaught, 875 F.3d 1168, 1176 n.4 (8th Cir. 2017). *See generally* Mark Strasser, *Pickering, Garcetti, & Academic Freedom*, 83 BROOK. L. REV. 579, 606–12 (2018); B. Jessie Hill, *The Identity of the Public University*, 17 RUTGERS J. L. & RELIGION 429, 446 (2016). The rules may be different for K-12 teachers, who lack the same academic freedom rights as do college and university faculties. *See* Brown v. Chi. Bd. of Educ., 824 F.3d 713, 714–16 (7th Cir. 2016) (upholding a categorical never-mention rule, as "'stupid but constitutional'").

[47] The leading discussion of academic freedom (as opposed to the First Amendment) and the freedom to teach is likely the American Association of University Professors 2007 *Freedom in the Classroom* report, which reaffirms that "teachers are entitled to freedom in the classroom in discussing their subject," subject to sound professional standards of proper classroom conduct. AM. ASS'N OF UNIV. PROFESSORS, FREEDOM IN THE CLASSROOM 54 (2007), https://www.aaup.org/report/freedom-classroom [https://perma.cc/4GBJ-X5DP]; *see also, e.g.*, UNIV. OF CAL., GENERAL UNIVERSITY POLICY REGARDING ACADEMIC APPOINTEES: ACADEMIC FREEDOM, APM-010, at 1 (2003), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-010.pdf [https://perma.cc/78MP-ZYUE] (recognizing faculty "freedom of teaching," subject to "professional standards"); Letter from Gregory F. Scholtz, Dir., Am. Ass'n of Univ. Professors, to Dr. Claire E. Sterk, President, Emory Univ. 3 (May 15, 2019), https://www.aaup.org/sites/default/files/Emory_University-Zwier-Letter_to_President-Summary_Suspension-15May2019.pdf [https://perma.cc/3Z6A-F7K4] (concluding that academic freedom protects professors' choice to mention epithets when "germane to the subject matter"); UCLA ACAD. SENATE COMM. ON ACAD. FREEDOM, (*continued*)

* * *

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. Much the same is true of homophobia. 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 or anti-gay uses of the slurs from vocalizing them 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).[48] And that does not 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.[49] A search for *(nigga niggaz) & date(aft 1/1/2000)* finds over

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STATEMENT ON QUOTING OFFENSIVE SOURCE MATERIALS IN CLASS DISCUSSIONS (Dec. 4, 2020), https://ucla.app.box.com/s/w2ip4ofe4rqtl8x8ul29q6e8vvr87r4t [https://perma.cc/SRX7-7393] (concluding likewise).

[48] Search Results for *nigger & date(aft 1/1/2000)*, WESTLAW (enter phrase in search bar; then press search button for results; number of source material on left hand side of webpage; Westlaw is a continually updating search engine and results may vary by the time this article is published) (last visited Feb. 5, 2021).

[49] *Id.* (Search Results for *nigger & date(bef 1/1/2000)*).

2,300 opinions.[50] A similar search for "fag" yields over 3,000 references, though a few of those are false positives.[51]

Nor is this a reflection of some special callousness towards these two epithets; courts also accurately quote other epithets. To give just one illustration, the word "cunt" appears in over 1,500 Westlaw-accessible opinions, over 3,500 appellate briefs and trial court filings, and over 650 law review articles.[52] Unsurprisingly, these documents are written by both male and female authors; just to take as a sample the dozen most recent authored federal appellate opinions containing this word, five were written by women and seven by men—not far removed from the general female/male ratio on the federal appellate bench.[53]

This is not a sign, we think, that judges are generally vulgar or sexist. We expect many of them would never use the word as an epithet themselves, orally or in writing; but when the word is part of the record, they quote it. They insist on accuracy and directness 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

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[50] Though some view "nigga" as less offensive than "nigger," *see infra* note 216, it too is viewed as taboo by many of those who condemn all mention of "nigger," as two of the incidents we cite and the UC Davis Law Review policy show, *see supra* notes 15 and 16 and accompanying text; E-mail from UC Davis Law Review Executive Board to Eugene Volokh & Randall Kennedy (Jan. 8, 2021) (on file with authors).

[51] To diminish the false positives, we searched for *(#fag #fags #faggot #faggots) & date(aft 1/1/2000) % ("fag bearings" "fag italia" "fag u.k." "fag kugelfischer" "fag yiming")*, to exclude references to cases involving several foreign companies with FAG in their name. (The companies appear to be related to a German ball bearing manufacturer, the name of which is an abbreviation for Fischer's Automatische Gussstahlkugelfabrik.)

[52] *Id.* (Search Results for *cunt*).

[53] *See* 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. Haw. 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. 2014), *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).

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."[54]

We see the same for other vulgarisms of the sort that newspapers view as "unprintable."[55] Consider this for comparison: the word "motherfucker" and its variants have never appeared in the print editions of 38 out of the 48 major United States newspapers; in the remaining ten, it appeared only sixteen times put together.[56] But it has appeared in over 10,000 Westlaw-accessible opinions, including six from the United States Supreme Court (dating back to 1974) and over 500 from federal appellate courts.[57] Judges seem to value direct and accurate quoting.

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.[58]

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[54] Search Results for *cunt*, under Major U.S. Newspapers database, LEXIS, https://plus.lexis.com (select "Content" tab and follow "News" hyperlink; then follow "Major U.S. Newspapers" hyperlink and enter query term in search box). The results yield *7Days*, SAN ANTONIO EXPRESS NEWS, Apr. 29, 2009, at 14T, plus four other references that appear from context to either be typos in the original or mistranscriptions by Lexis.

[55] 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, at A21 (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*, REASON: THE VOLOKH CONSPIRACY (Dec. 13, 2017, 9:00 AM), https://reason.com/2017/12/13/weve-moved-to-reason/ [https://perma.cc/XVV6-AKBN]. But in any event, we think that universities should aspire to an even higher level of accuracy and candor than newspapers.

[56] *See* LEXIS, *supra* note 54 (search results for *motherfucker*, under Major U.S. Newspapers database).

[57] *See* WESTLAW, *supra* note 48 (search results for *motherfucker*). They date back to 1906, though there's only a smattering until 1964.

[58] *See, e.g.*, Tharpe v. Ford, 139 S. Ct. 911, 911 (2019) (Sotomayor, J., respecting denial of certiorari); Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018) (per curiam); *id.* at 547 (Thomas, J., dissenting); Virginia v. Black, 538 U.S. 343 (2003) (O'Connor, J.); Miller v. Johnson, 515 U.S. 900 (1995) (Ginsburg, J., dissenting).

On the Ninth Circuit, they include Judges Wardlaw, Nguyen, Murguia, Pregerson, Christen, Berzon, Fisher, Tashima, W. Fletcher, Graber, Thomas, Tallman, Rawlinson, among others—and that is just back to 2008.[59] 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.[60] On the D.C. Circuit, they include Judges Millett, Tatel, Rogers, Wald, and Edwards.[61] One of the incidents that we cited in the Introduction involved a tenured department chair being fired for mentioning the word twice in a media law class,[62] while teaching a Sixth Circuit opinion that mentioned the word 19 times—an opinion written by the trailblazing African-American Sixth Circuit Judge Damon Keith. [63] "Fag," being less common, appears in few U.S. Supreme Court opinions, but in plenty of lower court opinions, such as by Ninth Circuit Judges Murguia, Wardlaw, W. Fletcher, Nguyen, Paez (just to focus on one court), and in nine cases since 2000 on the California Supreme Court, written by a broad mix of Justices.

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

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[59] *See* Ellis v. Harrison, 947 F.3d 555, 556 (9th Cir. 2020); Detrich v. Ryan, 740 F.3d 1237, 1253, 1271 (9th Cir. 2013) (Graber, J., dissenting); Andrews v. Davis, 944 F.3d 1092, 1103 (9th Cir. 2019); Reynaga v. Roseburg Forest Prod., 847 F.3d 678, 683 (9th Cir. 2017); Mays v. Clark, 807 F.3d 968, 974 (9th Cir. 2015); United States v. Black, 733 F.3d 294, 300 (9th Cir. 2013); United Steel Workers Local 12-369 v. United Steel Workers Int'l, 728 F.3d 1107, 1111 (9th Cir. 2013); Starr v. Baca, 652 F.3d 1202, 1204 (9th Cir. 2011); Fairbank v. Ayers, 650 F.3d 1243, 1250 (9th Cir. 2011); United States v. Armstrong, 620 F.3d 1172, 1174 (9th Cir. 2010); Al-Mousa v. Mukasey, 294 F. App'x 277, 280 (9th Cir. 2008) (Rawlinson, J., dissenting); Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 926 (9th Cir. 2003).

[60] *See* People v. Young, 445 P.3d 591, 600 (Cal. 2019); People v. Hardy, 418 P.3d 309, 319, 333, 342 (Cal. 2018); People v. Powell, 422 P.3d 973, 995 (Cal. 2018); People v. Nunez, 302 P.3d 981, 988 (Cal. 2013); People v. Williams, 315 P.3d 1, 12 (Cal. 2013); People v. Lindberg, 190 P.3d 664, 677–78 (Cal. 2008).

[61] *See* Consol. Commc'ns, Inc. v. N.L.R.B., 837 F.3d 1, 21–22 (D.C. Cir. 2016) (Millett, J., concurring); Toolasprashad v. Bureau of Prisons, 286 F.3d 576, 581 (D.C. Cir. 2002); United States v. Wilson, 160 F.3d 732, 743 (D.C. Cir. 1998); United States v. Mitchell, 49 F.3d 769, 780 (D.C. Cir. 1995); Edmond v. U.S. Postal Serv. Gen. Counsel, 949 F.2d 415, 418 (D.C. Cir. 1991).

[62] *See* Pedersen, *Journalism Department Chair 'No Longer Employed by the University'*, *supra* note 23.

[63] Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995).

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."[64] Other judges have quoted the word in treatise chapters and law review articles.[65]

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 words fully and accurately.[66]

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[64] Mark W. Bennett, *Bennett: The Art of Submitting Letters of 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/ [https://perma.cc/E7A8-G5MW].

[65] As to "nigger," *see, e.g.*, Judges David M. Borden & David P. Gold, 10 CONN. PRAC. § 53a-181; Judge Diana E. Murphy, *Diversity Within the Eighth Circuit*, 17 J. GENDER RACE & JUST. 435, 440 (2014); Judge Paul L. Brady, *Commencement Address 2004*, 42 WASHBURN L.J. 769, 771 (2004). As to "fag," *see, e.g.*, Judge Karen Morris & Nicole L. Black, CRIMINAL LAW IN NEW YORK § 42:7 (hate crimes); Hon. Paula J. Hepner, *Blueprint for Respect: Creating an Affirming Environment in the Courts for the Lesbian, Gay, Bisexual, and Transgender Communities*, 41 WM. MITCHELL L. REV. 4, 6 (2015)

[66] A reader asked whether we would likewise think it proper to display pornography when it is relevant to the subject matter. We think it would be, for instance in classes such as Cinema and the Sex Act (taught at one point at UC Berkeley) or Pornography in Popular Culture (University of Iowa). *See, e.g.*, Lisa Takeuchi Cullen, *Sex in the Syllabus*, TIME (Mar. 26, 2006), http://content.time.com/time/magazine/article/0,9171,1176976,00.html [https://perma.cc/9MUK-ZLZY]. The same may be so in law school classes where the dispute in a case has to do with the content of certain material. (The leading modern Supreme Court obscenity cases involve facial challenges to statutes, where the facts of the case are not relevant; but a few cases—such as *Jenkins v. Georgia*, 418 U.S. 153 (1974), which reversed an obscenity conviction based on a showing of the Oscar-winning film *Carnal Knowledge* (1971)—do indeed turn on the content of a particular work.)

This having been said, whether because judges and lawyers do distinguish pornography from other things, or because opinions and briefs almost exclusively focus on text rather than on images (sexual or otherwise), we know of zero opinions and briefs that actually contain truly pornographic content. *But see* Replacement Brief of Appellee [State of Utah] at Add. B, State v. Butt, No. 20090655-SC (Utah Dec. 22, 2010) (including the two hand-drawings that the state was arguing constituted obscene-as-to-minors material, albeit drawings that the Utah Supreme Court eventually concluded weren't really pornographic at all, *Butt v. State*, 2017 UT 33, 398 P.3d 1024). So to the extent that law professors are trying to follow the norms of the legal profession, those norms seem not to include quoting of pornography, but very much include quoting of offensive words, whether vulgarities or epithets.

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

1. They likely concluded that, in legal matters, direct and accurate reporting of the facts is a key facet of rendering justice, even when an expurgated version or an indirect description would convey much the same information. Thus, for instance, Colorado Supreme Court Justice Monica Marquez's unanimous 2020 opinion in *People in Interest of R.D.* notes, "We reluctantly reproduce this racial slur and other pejorative terms from the record to give an uncensored account of the facts."[67]

Likewise, as to sex-based slurs, insults, and vulgarities, a 2020 Nevada Court of Appeals opinion explains, "Although highly vulgar, we repeat the State's transcription of Kernan's purported declaration because the content is essential to be able to analyze the issue in this case."[68] Or, to quote Tenth Circuit Judge Scott Matheson's unanimous 2019 opinion in *United States v. Porter*, a hate crime case:

> We avoid inclusion of obscenities, racial slurs, and other offensive language in our opinions unless the word or phrase is central to our analysis and is a quotation from one of the parties. In this appeal, Mr. Porter challenges whether the evidence was sufficient for the jury to find improper

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[67] People *ex rel.* R.D., 2020 CO 44, ¶ 7 n.6, 464 P.3d 717, 722 n.6. The court here was quoting the word "nigga," but the other search results we cite in this Part all relate to the spelling "nigger," unless otherwise specified.

[68] Kernan v. State, No. 78428-COA, 2020 WL 1847643, at *1 n.2 (Nev. App. Apr. 9, 2020). *See also* Davis v. Lakeside Motor Co., No. 3:10-CV-405 JD, 2014 WL 6606044, at *4 (N.D. Ind. Nov. 20, 2014) ("In Defendant's motion, it seeks to exclude any use of the words 'nigger' or 'nigga' at trial, and asks the Court to instruct counsel and every witness to only use the term 'N word' instead. As written, this motion is frivolous, as what words were said and in what manner are squarely at issue in this case, as are the effect those words actually had on Plaintiff and the effect those words would have had on a reasonable person, so the inflammatory nature of these words is probative of disputes that are central to this case."); State v. Kantorowski, 72 A.3d 1228, 1233 n.1 (Conn. App. Ct. 2013) ("Although this court ordinarily does not repeat such profanity, the language employed by the defendant is pertinent to a proper evaluation of his behavior and the inquiry into whether he intended to harass, annoy, alarm or terrorize the victim, as charged."); Moter v. Commonwealth, 737 S.E.2d 538, 540 n.2 (Va. Ct. App. 2013) ("[B]ecause of the nature of Moter's convictions [for computer harassment], we regrettably must repeat his statements verbatim without sanitizing his profanities."); Oesau v. Rogers Group, Inc., 42 FMSHRC [Fed. Mine Safety & Health Rev. Comm'n] 625, 631 n.5 (2020) (likewise).

> racial motivation for his conduct. For the reader to understand the verdict and how we resolve this issue, we quote his obscenities and racial epithets that were presented to the jury.[69]

And from a 2015 Rhode Island Supreme Court case:

> We note that, in the testimony of both troopers, the various epithets allegedly uttered by defendant on the night of his arrest were transcribed without redaction. We have chosen to reproduce their testimony in this opinion in a similarly unbowdlerized fashion because what defendant is alleged to have actually said is so central to the issues on appeal. Unfortunately, many of the words in question are likely to cause real offense to some readers, but we are convinced

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[69] 928 F.3d 947, 951 n.2 (10th Cir. 2019). The opinion quotes "nigger" 17 times, mostly in quoting statements originally made at trial; those statements reported on what defendant had said, and we imagine that they were immensely important at trial in proving defendant's racial motivation. *See also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1059 n.1 (7th Cir. 2003) ("Many of the comments made in connection with Hamm's complaints contain vulgar and offensive language, but we believe direct quotes of the language used are required in order to accurately describe Hamm's allegations."), *overruled on other grounds by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017); Canada v. Samuel Grossi & Sons, Inc., No. CV 19-1790, 2020 WL 4436855, at *2 n.3 (E.D. Pa. Aug. 3, 2020) (noting that, "[w]here possible, the Court will not repeat this slur," but nonetheless quoting it eight times, presumably because the judge thought it was necessary to include it in those passages), *appeal filed*; Fennell v. Marion Indep. Sch. Dist., 963 F. Supp. 2d 623, 629 n.1 (W.D. Tex. 2013) ("The Court repeats these racial epithets herein only because they are essential to an understanding of the Plaintiffs' claims."); Whittlesey v. Labor & Indus. Review Comm'n, No. 2018AP2164, 2020 WL 1887838, at *2 n.5 (Wis. Ct. App. Apr. 16, 2020) ("Pertinent events in this case center around the use by employees of what the parties and this court agree is an offensive racial epithet. In order to have a clear record of those events for our analysis, the Background section of this opinion [but not the remainder of the opinion] reproduces verbatim the words that the Commission found were actually uttered by employees, while recognizing that this language is offensive and racist."); City of Columbus v. Fabich, No. 19AP-441, 2020-Ohio-7011, ¶ 2 n.1 (Ohio Ct. App. Dec. 31, 2020) (noting that "[b]ecause the impact of this word is a question within this case, where it appears as a portion of a direct quote, we shall repeat the word as it was said," and indeed quoting the word 17 times, but using "n-word" when the word is not part of a direct quote).

> that an unflinching examination of defendant's speech is critical to a just analysis of his arguments.[70]

In all these cases, of course, the judges could have avoided including the full slurs by giving an expurgated version or talking around the matter. But as in the thousands of other cases we have referred to, they preferred uncensored and straightforward accounts of the important facts.[71]

Likewise, lawyers must sometimes articulate offensive terms to suitably represent their clients. Sometimes, they may find euphemisms or indirection more valuable for tactical reasons.[72] But they need to be ready to offer either the full or the expurgated version, whichever most helps their clients in a particular context.[73]

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[70] State v. Matthews, 111 A.3d 390, 392 n.3 (R.I. 2015).

[71] *See, e.g.*, T.E. v. Pine Bush Cent. Sch. Dist., 58 F. Supp. 3d 332, 339 n.5 (S.D.N.Y. 2014) ("The Court recognizes that some of the language that Plaintiffs allege to have been directed against them is undeniably offensive and may be painful for some readers. Nonetheless, the Court does not see fit to censor or euphemize Plaintiffs' allegations in this Opinion. As Plaintiffs' counsel stated at oral argument, 'the language matters in this case, and there's a way in which, by not articulating some of these things, they lose their force.'"), *disagreed with on unrelated grounds by* Agosto v. N.Y.C. Dep't of Educ., 982 F.3d 86, 100 n.7 (2d Cir. 2020).

[72] Consider, for instance, *King v. Super Serv., Inc.*, 68 F. App'x 659, 661 n.2 (6th Cir. 2003), where Judge Batchelder's opinion for the court expressly remarked that, "Unlike King's appellate counsel who, for the edification of the court, spent a significant portion of his time at oral argument reciting verbatim the crass comments made by Ricks and Cundiff which had already been documented thoroughly in the briefs and the record, we see no need to traverse the litany of vulgar language and boorish insults that forms the basis of King's sexual harassment complaint." (The vulgarities and insults were likely "derogatory terms for 'homosexual'" and "express[ions] to [plaintiff of] their professed belief that he wanted to perform oral sex on them." *Id.* at 660.) As always, persuading a judge or jury requires exercising judgment, including reading the audience's facial expressions, and knowing that, even if a little is good, a lot might not be better. But a lawyer has to be prepared to make either choice, as the situation calls for; Judge Batchelder herself, for instance, has apparently concluded that expressly quoting the word "faggot" from the record is sometimes important, *see* Ondo v. City of Cleveland, 795 F.3d 597, 602, 606–07 (6th Cir. 2015).

[73] Occasionally, attempts to use euphemism or to talk around the subject can be confusing. *See, e.g.*, Bell v. Alvord Unified Sch. Dist., No. EDCV 19-875 JGB (KKx), 2020 WL 5093084, at *2 n.1 (C.D. Cal. June 10, 2020) ("It appears that Plaintiff's mother assumed that her son's reference to 'n-word' was his attempt to avoid repeating the offensive racial slur. Months after the [Complaint] was filed, defense counsel informed Plaintiff's counsel

(*continued*)

2. The judges also appear to adopt the use-mention distinction (which we discussed at p. 10).[74] Though they doubtless think that using an epithet 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).

This is well-established as to vulgarities: Though "courts condemn counsel's use of profanity in the courtroom," "courts generally find it permissible for a prosecutor to repeat profanity in argument when the profanity is part of the evidence presented at trial."[75] Similarly, consider *In*

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that the word used was 'n-word' and not 'nigga.' Plaintiff then clarified that he was not using 'n-word' to avoid saying the word but was repeating what was actually said."); Dapkus v. Chipotle Mexican Grill, Inc., No. 15 C 6395, 2017 WL 36448, at *5 (N.D. Ill. Jan. 4, 2017) ("In addition, Chipotle's inability to point to uncontroverted evidence that Dapkus used the term 'nigger,' and not only 'nigga,' is significant given the parties' agreement that the former term, regardless of situation, carries an extremely negative connotation because of its history. Rather, much of the evidence that Chipotle relies upon is testimony from other employees that Dapkus used the 'N' word. However, the employees are never asked to specify which term the 'N word' refers to . . . ."); Horn v. Mesa Well Servicing, L.P., No. 15-CV-0329 SMV/CG, 2016 WL 9777359, at *6 (D.N.M. June 8, 2016) (noting the ambiguity created by a question such as "'[Do] the people around you use that kind of language,' without making clear exactly what 'that kind of language' referred to"); Barrow v. Living Word Church, No. 3:15-CV-341, 2016 WL 2619754, at *4 (S.D. Ohio May 5, 2016) (noting that plaintiff's allegation that coworkers had described Al Sharpton "with a racial epithet" were ambiguous, because it is unclear "what the racial epithet spoken of Reverend Sharpton was"); Verified Petition Exhibit B, Gordon v. City of New York, No. 1:15-cv-05761-KAM-RER, at 12 (E.D.N.Y. Oct. 6, 2015) (noting that "[t]here is confusion about exactly what the Respondent said," partly "generated by the use of the euphemisms 'f-word' and 'n-word'"); Baptistas Bakery, Inc. & Teamsters Local Union No. 344 Sales & Serv. Indus., 352 NLRB 547, at **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.").

[74] *See* Herman Cappelen et al., *Quotation*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.2 (Feb. 8, 2019), https://plato.stanford.edu/entries/quotation/ [https://perma.cc/KHS6-VZW7]; Bill Poser, *Political Correctness and the Use/Mention Distinction*, LANGUAGE LOG (Jan. 25, 2008), http://itre.cis.upenn.edu/~myl/languagelog/archives/005349.html [https://perma.cc/MHQ5-A9PJ].

[75] Bogard v. State, 449 P.3d 315, 331 (Wyo. 2019); *id.* at n.15 (citing other such cases); *see also* Paul Ginsberg, *Recorded Evidence*, 43-MAR PROSECUTOR 34, 41 (2019) ("You

(*continued*)

the Matter of Cullins, where the Kansas Supreme Court suspended a trial judge for using vulgarities and epithets—"fuck," "bitch," and "cunt"—and in the process itself quoted the words forty-four, nine, and nine times, respectively, indeed without apologizing for or even remarking on its quotations.[76] The court was apparently drawing a sharp line between a judge saying offensive things, which it was punishing, and a judge quoting the words in discussing the facts of the case.

And courts follow the same pattern as to racial slurs. To give one example, consider this sentence from a 2020 opinion by Ninth Circuit Judge Jacqueline Nguyen, joined by Chief Judge Sidney Thomas and Judge Mary

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might consider apologizing to the judge and jury when quoting profanities from the transcript while you question a witness, but the quote should be accurately read to the witness."); People v. Gonzalez, No. B296206, 2020 WL 1815073, at *2 n.1, *4 n.3 (Cal. Ct. App. Apr. 10, 2020) (quoting various offensive terms, such as "nigga," "bitch," and "fuck" and noting, "[b]y quoting these messages, we do not condone the vulgar and derogatory language in the messages"). For a similar distinction drawn as to testimony by witnesses, see *In re B.N.M.*, No. COA16-1012, 2017 WL 1650143, at *5 (N.C. Ct. App. May 2, 2017) (distinguishing respondent's "quot[ing] profane-out-of-court statements" in his testimony from "us[ing] profane statements" in that testimony to describe himself and his son).

Of course, a judge has considerable authority to set rules of decorum in the courtroom, and especially to prevent arguments or testimony seen as too likely to yield jury verdicts based on passion or prejudice, and different judges may exercise that authority differently in different circumstances. *See, e.g.*, Harang v. Schwartz, No. CV 13-0058, 2014 WL 12724985, at *7 (E.D. La. June 4, 2014) (concluding that, in a case "where any racial bias or insensitivity on the part of Defendant is [not] at issue (in contrast to, for example, an employment discrimination case), any probative value from the use of the word 'Nigger' would be substantially outweighed by the danger of unfair prejudice," and that therefore "[a]ll parties are instructed to refer to the 'N-word'" instead, under such circumstances); State v. Ellis, No. 1 CA-CR 09-0257, 2010 WL 2299007, at *3 (Ariz. Ct. App. June 8, 2010) ("[T]he trial court specifically restricted the state to the number of profane statements that it could quote, thus balancing the probative value of the evidence against any potentially prejudicial effects"). Here, we just note that many courts do follow the use/mention distinction in their decorum rules. And even when a judge does conclude certain epithets should be excluded to avoid inflaming jurors, the judge may think those epithets perfectly permissible to quote in other circumstances. *See, e.g.*, Crawford v. Cty. of Orange, No. SA CV 16-1503-DOC (DFMx), 2018 WL 4959809, at *5–6 (C.D. Cal. June 28, 2018) (granting a motion for new trial on these grounds as to quoting the word "cunt," but quoting the word eight times in the opinion); *id.* at *3–4 (quoting transcript in which the judge had quoted the word himself, in a colloquy with counsel).

[76] __ P. 3d __, 2021 WL 762072 (Kan. Feb. 26, 2021).

Murguia: "We have considerable difficulty accepting . . . that, at this time in our history, people who use the word 'nigger' are not racially biased."[77] Surely that's right, but surely the judges did not think this makes *them* racially biased for including the word, or for quoting it six other times in the opinion. Rather, the judges are again distinguishing *mentioning* the word (which they apparently view as quite proper) from *using* it (which they recognize is strong evidence of racial bias).[78]

Likewise, consider this passage from a 2007 Seventh Circuit opinion in a case where plaintiff alleged race discrimination:

> The only evidence that could possibly hint that Thomas's race was considered is that Kivett used the word "nigger" in repeating Thomas's alleged threat to hurt Marteisha. Although we have said that the use of racial slurs can be strong evidence of racial animus, *DeWalt v. Carter*, 224 F.3d 607, 612 n.3 (7th Cir.2000), Kivett was reporting verbatim what Marteisha had told her. That indirect use of the slur, standing alone, is simply not enough evidence to support an inference of discriminatory intent.[79]

Using a racial slur is generally racist, the panel reasons—but quoting it in "reporting verbatim" what happened is not. And the panel's quoting it in further discussing the facts (which the opinion does in this passage and in one other) is even more clearly seen as proper by the panel.[80]

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[77] Ellis v. Harrison, 947 F.3d 555, 564 (9th Cir. 2020) (en banc) (Nguyen, J., concurring, joined by Thomas, C.J., and Murguia, J.).

[78] *See also* Scaife v. U.S. Dep't of Veterans Affairs, No. 1:18-cv-02853-TWP-TAB, 2020 WL 7028042, at *7 (S.D. Ind. Nov. 30, 2020) ("Put mildly, 'the word "nigger" can have a highly disturbing impact on the listener.' 'There is no better proof of its enduring toxicity than the fact that, in polite society, it is spoken and written only in its euphemistic shorthand—"the n-word"—than its full, spelled-out form.'"). Presumably, the judge did not think that she was herself acting in a "toxic[]" way or not being part of "polite society." Rather, she implicitly took the view that it was proper for courts to include the word when quoting precedents or record documents (where she used the full version five times, though she used "n-word" when not quoting).

[79] Thomas v. Evansville-Vanderburgh Sch. Corp., 258 F. App'x 50, 53 (7th Cir. 2007) (Ripple, Manion & Wood, JJ.).

[80] *See also* Lumpkins v. City of Louisville, 157 S.W.3d 601, 606 (Ky. 2005) (rejecting City's argument that Lumpkins' lawyer improperly "repeated[ly] use[d] . . . the word 'nigger'" in his argument: "The use of the racial epithet was a recitation of the evidence by

(*continued*)

Or consider this passage from an opinion by Fourth Circuit Judge Pamela Harris, holding that a prosecutor did not create a hostile environment for a black police officer by reading out loud—at a trial preparation meeting—evidence containing many instances of the word "nigga."[81] The court acknowledged that "the racial slur read by Oglesby is particularly odious, and 'pure anathema to African-Americans,'" but added:

> [C]ontext matters, . . . and the question is whether use of a racial epithet has created a "racially *hostile*" work environment. And while the employer in [a prior case] used racial epithets in his own voice and to express his own insults, . . . this case is decidedly different. On the facts as alleged by Savage, Oglesby was not aiming racial epithets at Savage, or, for that matter, at anyone else, or using slurs to give voice to his own views. Instead, he was reading the word "Nigga" aloud from letters written by criminal suspects, presented to him by a police officer in the course of a trial-preparation meeting. In that distinct context and without more, no inference of a racially hostile environment can be drawn, and it would not be reasonable to believe that a Title VII violation had occurred.[82]

And, unsurprisingly, Judge Harris and her colleagues viewed the context of the court opinion to also be one in which slurs could be quoted; they quoted "nigga" five times, and "nigger" once.[83]

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counsel. Clearly, the word is offensive but it was conceded that it was used by the direct supervisor."); Appellants' Reply in Support of Direct Appeal and Response to City of Louisville's Cross-Appeal at 18, *id.*, 2004 WL 6237140 ("The City correctly notes that Plaintiffs' counsel utter[ed] the word 'nigger' multiple times during trial. The City is also correct that this epithet is 'ugly' and 'offensive.' But as the trial court recognized, the word, specifically its use by Appellants' direct supervisor, was also part of the evidence in this case. However unfortunate or ill-used the word may have been, it was counsel's right, and indeed his obligation, to comment upon it.").

[81] Savage v. Maryland, 896 F.3d 260, 277 (4th Cir. 2018) (Harris, J., joined by Wynn & Floyd, JJ.) (citations omitted).

[82] *Id.*; *see also In re* Stocks, No. CSV 10699-09, 2011 WL 1601168, at *4 (N.J. Adm. Apr. 18, 2011) ("[A]ppellant did use the words 'head nigger in charge' . . . but he was quoting what someone else said [apparently in the context of discussing the credibility of that person], and, as such, he did not violate the City's Anti-Discrimination Policy, nor engage in conduct that is unbecoming a City employee").

[83] *Savage*, 896 F.3d at 266, 269, 277.

Some judges prefer writing "n-word" or "n****r" or "n----r" or "f[*]g" or "f****t," just as some judges prefer to expurgate vulgarities.[84] But such opinions are distinctly rarer than the ones with the accurate quote: Since 2000, the number of opinions containing "n-word, "n****r," and the like is about 1/3 of the 9,500 that spell the word out;[85] the expurgations of "fag" are even rarer.[86] 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.[87]

Lawyers seem generally to think that judges expect accuracy here: searching appellate briefs in Westlaw (not even counting trial court filings) finds over 10,000 that fully spell out the word since 2000, and likely about 1/3 that number that expurgate.[88] The full spelling appears in briefs from

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[84] *See, e.g.*, Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 668 (1973) (per curiam) (Powell, J.) ("M-----f-----"); Rosenfeld v. New Jersey, 408 U.S. 901, 910 (1972) (Rehnquist, J., dissenting) ("m----- f-----"); Lewis v. City of New Orleans, 408 U.S. 913, 913 (1972) (Powell, J., concurring in the result) ("g-- d--- m----- f-----"). Here too, expurgated versions are much less common than the fully spelled-out ones. A search for *"you motherfucker" & date(aft 1/1/2000)* finds nearly three times more cases as *"you m f" "you m.f." "you motherf!" & date(aft 1/1/2000).*

[85] Some expurgations, chiefly "n*****" and "n-----," are hard to search for in Westlaw, since Westlaw ignores special characters. To deal with this, we searched cases and administrative decisions for *"called him" +2 (n ni nig nigg nigge) & date(aft 1/1/2000)*—which would capture "n-word," "n****r," "n*****," "n-----," and the like—and compared the results to *"called him" +2 nigger & date(aft 1/1/2000)*. This of course captured only a subset of all mentions, because of the restriction to phrases that start with "called him," but it should offer a generalizable sense of the expurgated-to-unexpurgated proportion. The queries yielded 186 opinions with expurgations to 540 opinions without, which is to say a ratio of about 1/3. Of course, some of these might not have been deliberate expurgations by the judges, but might be quotations of documents in which the word had already been expurgated.

[86] Following the method laid out in the previous footnote, searching for *"him a fag" "him a faggot" & date(aft 1/1/2000)* finds over 300 items, but searching for *"him a f" "him a fa" "him an f word" & date(aft 1/1/2000)* and then excluding the many false positives (chiefly with "f" being used in an expurgation of "fuck" or its derivatives) yields only 12 items.

[87] People v. Nunez, 302 P.3d 981 (Cal. 2013).

[88] The query discussed in note 85 yields an expurgated-to-unexpurgated ratio of about 30%. Search Results for that query, WESTLAW (enter phrase in search bar; then click search button for results; then filter content type to briefs on left side) (last visited Feb. 5, 2021).

the NAACP, the ACLU, Lambda, and many other respected organizations,[89] as well as 27 briefs signed by then-California-Attorney-General Kamala Harris. "Fag" likewise appears many times in briefs from the the ACLU, Lambda, the Leadership Conference on Civil and Human Rights, and more.

What about oral exchanges? Here we have much less information, since appellate transcripts available on Westlaw account only for a small fraction of all appellate cases, by our best estimate about 5% of the sorts of cases that might end up as written opinions. (The transcripts come from very few courts,[90] and only a small fraction of all cases even in those courts.[91]) Likewise, the trial court transcripts appear to represent only a tiny fraction of all trials and hearings.[92]

That limited oral arguments database contains 54 references to "nigger" in appellate arguments since 2000, or 200 if you include trial and pretrial transcripts. Working from the 5% coverage estimate, we can estimate that

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[89] *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 Curiae Brief by Washington Employment Lawyers Association ACLU, Int'l Union of Operating Engrs., Local 286 v. Port of Seattle, No. 86739-9, 2012 WL 5415066 (Wash. Oct. 12, 2012) (co-filed 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).

[90] 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).

[91] The database contains only about 14% of all federal appellate arguments since 2000, only about 12% of all California Court of Appeal arguments since 2000, and fewer than 350 arguments on average per year since 2000 from all other courts put together. Put together, the database contains about 38,500 oral argument transcripts from 2000 to 2019, or under 2,000 per year; during the same years, federal courts heard a total of 157,000 oral arguments, and state courts (extrapolating from California data we have for 2000 to 2019) likely heard about 600,000 oral arguments; 38,500/(157,000+600,000) is about 5%.

[92] There appear to be an average of about 3,000–11,000 documents in the trial court transcripts database from each year from 2000 to 2019, a small portion of all hearings that happen in trial courts throughout the country.

the word has likely been used over 1,000 times since 2000 in all appellate arguments—plus likely many thousands more times in testimony and argument in federal and state court trials and pretrial hearings,[93] including even in jury instructions[94] or jury questioning.[95] (References to "fag" and

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[93] *See, e.g.*, Oral Argument at 3:45, Reynaga v. Roseburg Forest Prods., 847 F.3d 678 (9th Cir. 2017) (No. 14-35028) (Pregerson, J.), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009903; Oral Argument at 9:55, Johnson v. Riverside Healthcare Sys., LP, No. 09-56871, 2011 WL 3515880 (9th Cir. May 6, 2011), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000007450 ("Isn't it correct that he had to continue working with Dr. Vlasak? . . . Okay. Somebody who is threatened physically and call them a nigger."); *id.* at 11:50 ("Why don't you just repeat what was said to Dr. Johnson? Let the people—let the people in the audience know what really happened here. [Counsel]: The comment by Dr. Vlasak or the comment by—[Judge]: Yeah. What he—what he said when he called him a nigger, you know. [Counsel]: Dr. Vlasak called him a fucking nigger and—and Dr. Baxter made a comment to him about black physicians need to essentially [inaudible] . . . ."); Oral Argument at 21:15, United States v. Porter, Nos. 18-4081, 18-4099 (10th Cir. May 8, 2019), https://www.ca10.uscourts.gov/oralarguments/18/18-4081.MP3.

[94] *See, e.g.*, People v. Howard, No. H041426, 2016 WL 1179061, at *5 (Cal. Ct. App. Mar. 25, 2016) ("Subsequently, however, the court informed the jury that the parties had stipulated that Officer Lott, one of the university police officers Brandon contacted at Starbucks, would testify that Brandon 'stated the following: He saw a black knife in [defendant] Howard's right hand and Howard was yelling quote, you fucking nigger. I'm going [to] kill you. Close quote.'").

[95] *See* Brief for Appellee United States at *49, United States v. Nikparvar-Fard, No. 18-1720, 2018 WL 6248428 (3d Cir. Nov. 28, 2018) (quoting trial judge questioning jury, "The case involves a threat allegedly made by the defendant. The language used by the defendant included profanity and racist and homophobic words, including the words, and I'm quoting, 'nigger' and 'faggot,' quoting. That language is included in the evidence to be presented in order for you, the jury, to determine the defendant's intent when he allegedly made the threat. I will instruct you during the trial that you cannot convict the defendant of a crime solely because he used profanity or racist or homophobic language. Now, my questions: Are there any members of the jury panel who would not be able to follow my instruction that you cannot convict the defendant of a crime, solely because he used profanity or racist or homophobic language?"); United States v. Nikparvar-Fard, 782 F. App'x 160, 162–63 (3d Cir. 2019) (concluding that "[t]he district court also did not abuse its discretion in declining to redact Nikparvar-Fard's use of racial and homophobic slurs from the transcript of Nikparvar-Fard's conversation with the Marshals," in part because "the district court mitigated any potential prejudice by very specific questioning of potential jurors in voir dire

(*continued*)

"faggot" are likely about 25–30% those of "nigger," roughly comparable to the ratio for print uses.[96]) Likewise, searching in Westlaw for *(testif! testimony) +p nigger & date(aft 1/1/2000)* yields over 3,000 results;[97] 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).

And in oral arguments 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 phrase "racial harassment," 9 also included the full word, and only one entirely omitted it in favor of "n-word."[98]

This of course fits well with the use-mention distinction. We suspect that very few judges or lawyers would write a racial epithet in an opinion or

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and the court dismissed jurors who stated they could not be objective in light of the language" and by giving "a limiting instruction that specified the only acceptable reason to consider the slurs was in determining whether Nikparvar-Fard intended the statements to be a threat or whether the statements were objectively threatening"); 1 ROBERT S. HUNTER ET AL., TRIAL HANDBOOK FOR ILLINOIS LAWYERS—CIVIL § 7:16 (8th ed. 2020) (suggesting that, "when the offensive language" in recordings that would be played at trial—including "use of [a] pejorative to describe members of racial or religious minorities"—"has significant probative value, the trial court should question the venire panel using the actual language that the jury will later hear. Directly confronting the panel with offensive language may well decrease the risk of unfair prejudice at trial."); 1 ROBERT S. HUNTER, MARK A. SCHUERING & JULIE SCHUERING SCHUETZ, TRIAL HANDBOOK FOR ILLINOIS LAWYERS—CRIMINAL § 3:27 (9th ed. 2020) (likewise); STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK CIVIL § 9:44 (4th ed. 2020) (likewise); 1 STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 2:20 (4th ed. 2020) (likewise); CRAIG D. JOHNSTON, VA. PRAC. TRIAL HANDBOOK § 2:29 (2020) (likewise); United States v. Frasch, 818 F.2d 631, 633–34 (7th Cir. 1987) (likewise). Each of the handbooks quoted above was written or cowritten by an active or retired judge.

[96] A search through oral argument transcripts on Westlaw for *(fag faggot) & date(aft 1/1/2000)* yields 16 results, excluding duplicates and false positives.

[97] Searching for *(testif! testimony) +p (#fag #fags #faggot #faggots) & date(aft 1/1/2000) % ("fag bearings"* "*fag italia" "fag u.k." "fag kugelfischer" "fag yiming")* yields over 700 references, about 20–25% of the amount for "nigger."

[98] Search Results for *racial harassment*, *nigger*, and *n-word*, WESTLAW (enter phrase *nigger & date(aft 1/1/2000)* in search bar; then filter content to *Trial Transcripts & Oral Arguments* and filter jurisdiction to *Federal* on left side; click search button for results; search *racial harassment* within results; then search *nigger* within results; then repeat, replacing *nigger* with *n-word*) (last visited Feb. 5, 2021).

a brief to use it as an insult (e.g., of a party or a witness). We are all literate people, who know the power of the written word.[99] But judges and lawyers routinely write such epithets to mention them, usually in a reference to the record or to a precedent. Likewise, few judges and lawyers would orally use an epithet to insult someone in court, but they do mention epithets when they are relevant parts of the record in oral argument.

Conversely, the logic of those who reject the use-mention distinction for oral references would also mean that written references should be expurgated, too.[100] As we mentioned in the Introduction, a law review has

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[99] *See, e.g.*, McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1110–11, 1115, 1116 (9th Cir. 2004) (allowing hostile environment harassment claim to go forward based in part on graffiti); Tademy v. Union Pac. Corp., 614 F.3d 1132, 1147 (10th Cir. 2008) (likewise); Reid v. Dalco Nonwovens, LLC, 154 F. Supp. 3d 273, 290 (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 63 (2002) (discussing the "Dear Nigger" letters sent to Hank Aaron when he was about to break Babe Ruth's home run record).

[100] *See, e.g.*, Stanford Univ. Undergraduate Senate, *supra* note 15 (condemning a professor's writing the rap group name "Niggaz Wit Attitudes" in a class discussion post); Richard Thompson Ford, *Racial Epithets and Racial Etiquette*, 49 CAP. U. L. REV. (forthcoming 2021) (defending that professor's actions, but without drawing a distinction between written material and oral material); *supra* note 16 (likewise discussing condemnation of a different professor for material written on a class white board); Margaret Sullivan, *Some Journalists Are Debating When It's Okay to Use the N-Word. But This One Should Be Easy*, WASH. POST (Feb. 25, 2021, 5:00 AM), https://www.washingtonpost.com/lifestyle/media/mike-pesca-donald-mcneil-n-word-media/2021/02/24/fe89d010-76a1-11eb-8115-9ad5e9c02117_story.html [https://perma.cc/QY7X-UFU7] (discussing "the pain it causes for a Black person to have to hear or read that hateful word"); *see also K.C. Mom Wants 'Mice and Men' Removed*, UPI (Sept. 23, 2008, 3:52 PM), https://www.upi.com/Top_News/2008/09/23/KC-mom-wants-Mice-and-Men-removed/19201222199575/ [https://perma.cc/32QH-E9JJ] (discussing call to remove John Steinbeck's "Of Mice and Men" from class readings because of its "'violent' and 'profuse' use of a racial epithet"); Matthew Torres, *MNPS Teacher Placed on Leave for Homework About the N-Word*, NEWSCHANNEL5 NASHVILLE (Nov. 22, 2019, 1:20 PM), https://www.newschannel5.com/news/mnps-teacher-placed-on-leave-for-homework-about-the-n-word (noting that the assignment, which asked students "to write a one-page paper on the derogatory term 'n-word' and answer several questions including how the word is racist and how it is used," "spelled out" "the term," and that the class was discussing a play that "uses the language frequently"); Robby Soave (@robbysoave), TWITTER (Sept. 7, 2020,

(*continued*)

committed itself to categorically banning all instances of the word: "We prescribe that, as an editing convention in legal scholarship, the N-word should never be written unredacted."[101] Indeed, its editors say they "condemn the use of racial epithets in any setting," and take the view that "[t]he N-word . . . has no place in academia or the legal profession"[102]—which presumably means that they are committing never to mention it in any briefs they write as lawyers, either. Likewise, a written reference to "n_____" and "b____" in a fact pattern on a law school exam—with the underlines, and not fully spelled out—was condemned by a dean (who is also the president of the American Association of Law Schools) and by students as "deeply offensive," "caus[ing] hurt and distress," and producing "mental trauma" and "demonstrat[ing] a lack of respect, decency, and civility."[103]

1:55 PM), https://twitter.com/robbysoave/status/1303029039645552641 (quoting e-mail asking him to expurgate the word in his magazine articles); Heated Law Professor Moment (@arguendope), TWITTER (Mar. 31, 2020, 4:37 PM), https://twitter.com/arguendope/status/1245087805165928452 (faulting one of the coauthors of this article for a blog post that quoted the word; the blog post, about the *Brandenburg v. Ohio* quote incident, *supra* note 1, made some of the same points that this article makes); Jacquie Miller, *Ottawa's Largest School Board Bans Any Use of N-Word at School, Including in Class Discussions*, OTTAWA CITIZEN (Dec. 1, 2020), https://ottawacitizen.com/news/local-news/ottawas-largest-school-board-bans-any-use-of-n-word-at-school-including-in-class-discussions [https://perma.cc/H5T8-V76M] (discussing how controversy over a professor quoting the word orally in a university class led Ottawa's largest K-12 school district to ban all "uttering *or writing* or use of racial or other slurs or epithets by staff (e.g. the n-word, pejorative terms used to describe Indigenous peoples, racial, ethnic, religious, sex, gender, sexual orientation, and/or disability attributes etc.)" (emphasis added)); Bob Christie, *Arizona's Only Black Legislators Chastised After Race Talk*, AP (Apr. 25, 2018), https://apnews.com/article/726e32e2cdd64205a04135ada0802f23 (quoting legislator as saying, "It's not acceptable to us[e] a racial slur even if that slur is used as a quote," in faulting a colleague for quoting a Kendrick Lamar lyric in an op-ed about Lamar's lyrics).

[101] *Statement*, 54 UC DAVIS L. REV. __ (2021).

[102] *Id.*

[103] Kathryn Rubino, *Law School N-Word Controversy Is More Complicated Than It Appears At First Glance*, ABOVE THE LAW (Jan. 13, 2021, 4:53 PM), https://abovethelaw.com/2021/01/law-school-n-word-controversy-is-more-complicated-than-it-appears-at-first-glance/ (quoting Dean's statement and student petition). Whether certain topics—not just words—should be avoided on exams because they are too distracting to some students, and are thus likely to interfere with accurate measurement of performance,

(*continued*)

Every written judicial opinion, moreover, is the product of much writing and talking. Most facts quoted by judges are written by lawyers first. Lawyers generally learn facts in conversations with clients and witnesses. They typically discuss the facts with colleagues. Judges discuss facts with law clerks. No doubt many of these conversations mention the full version of the word, as final written opinions do. And in some trial courts, decisions are generally rendered orally before being transcribed and thus made available in writing.[104]

Here is a recent example: *State v. Liebenguth*, a 2020 decision from the Connecticut Supreme Court considering whether a defendant's calling a parking enforcement officer a "fucking nigger" constituted fighting words.[105] The answer was yes, but the matter was complicated, largely because of recent Connecticut Supreme Court cases that had sharply limited the fighting words exception. The case yielded three opinions, each of which sharply condemned the use of slurs and remarked on the notorious offensiveness of this particular epithet. But all the opinions also spelled out the slur in full, a total of 52 times.[106] Nor was the word omitted during oral argument; two Justices mentioned it there, a total of six times.

As it happens, the lawyers in *Liebenguth* seemed to balk at mentioning the word in the oral argument—it was the Chief Justice who brought it up,[107] and another Justice who quoted it later.[108] And the defense lawyer's failure

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is an interesting question; exams have a different pedagogical function than lectures, class discussions, or readings. But the Dean and the student asserted that the written, expurgated versions were offensive, traumatic, and disrespectful, and not just distracting; the same assertions would presumably apply to similar uses in class.

[104] *See, e.g.*, State v. Sienkiewich, No. 76058-1-I, 2018 WL 2949130, at *4 (Wash. Ct. App. June 11, 2018) (quoting trial judge's oral decision); *id.* at *3 (judge's colloquy with lawyer in pretrial hearing); Transcript of Proceedings at 12, O'Neal v. Haley Mansion, Inc., No. 13 C 5029 (N.D. Ill. Apr. 7, 2015) (judge's statement of decision).

[105] No. SC 20145, __ A.3d __, 2020 WL 5094669 (Conn. Aug. 27, 2020).

[106] The lower court opinions mentioned the word 30 times.

[107] Oral Argument at 1:38, State v. Liebenguth, No. SC 24015 (Conn. Mar. 29, 2019), https://jud.ct.gov/Supremecourt/Audio/PlayAudio.aspx?ID=78?redirectPage=PlayAudio.aspx?ID=78&secondsToWait=5 ("I'm actually going to say the word—it's an offensive word, but it's a word that was used here. There's a character in Huckleberry Finn, Nigger Jim. And that word is in there, I don't know how many times, probably hundreds of times, and so let's say I'm on the steps to library reading Huckleberry Finn, and I say 'Nigger Jim,' and someone gets offended by that and calls the police, can I be effectively successfully charged and convicted for saying the word 'nigger'?"); *see also id.* at 37:18, 40:40.

[108] *Id.* at 41:30.

to mention the word may have been counterproductive: The Chief Justice noted the omission, and suggested that it might be evidence that the word really is so offensive that it could be constitutionally punishable.[109] (The Chief Justice was not opposing quoting the word; indeed, he quoted it himself in his question.[110])

Law professors likewise routinely quote such epithets, as a search through Westlaw's articles database reflects, with more than 1,900 articles mentioning "nigger" since 2000 (many more than the euphemized versions),[111] and more than 1,500 mentioning "fag."[112] More than 80 articles mention one of the words at least 10 times each—unsurprising, since they, like this article, deal with epithets or with bigotry, and quote the epithet whenever it is relevant to the discussion.[113] Many of these articles are by authors with unimpeachable credentials as supporters of social justice. Indeed, even professors who criticize the use-mention distinction in some of the debates about quoting epithets themselves rely on it in their work.[114]

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[109] *Id.* at 37:18 ("The thing I'm noticing even as we sit here talking about this, we keep saying 'the N word' or 'the word that shall not be named.' He called him a nigger, correct? That word is so extremely offensive, that we're having problems even mentioning it in this courtroom. It's just an observation. There's something unique about that word and about the history of this country and about race.").

[110] *Id.*

[111] Search Results for *nigger & date(aft 1/1/2000)*, WESTLAW (enter phrase in search bar; then filter content to *Secondary Sources*; click *Publication Type* on left side and select *Law Reviews & Journals*) (last visited Feb. 5, 2021).

[112] Search Results for *(#fag #fags #faggot #faggots) & date(aft 1/1/2000) % ("fag bearings" "fag italia" "fag u.k." "fag kugelfischer" "fag yiming")*, WESTLAW (enter phrase in search bar; then filter content to *Secondary Sources*; click *Publication Type* on left side and select *Law Reviews & Journals*) (last visited Feb. 5, 2021).

[113] Search Results for *(ATLEAST10(#fag) atleast10(#fags) atleast10(#faggot) atleast10(#faggots) ATLEAST10(nigger)) & date(aft 1/1/2000) % ("fag bearings" "fag italia" "fag u.k." "fag kugelfischer" "fag yiming")*, WESTLAW (enter phrase in search bar; then filter content to *Secondary Sources*; click *Publication Type* on left side and select *Law Reviews & Journals*) (last visited Feb. 5, 2021).

[114] Professor Richard Thompson Ford, for instance, in his draft response to this article, seems to be skeptical of the use-mention distinction. Ford, *supra* note 100, at 3–4. Yet he quotes slurs repeatedly in his books. *See* RICHARD THOMPSON FORD, DRESS CODES: HOW THE LAWS OF FASHION MADE HISTORY 166, 167 (2021); RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 198, 255 (2011); RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS 3, (*continued*)

These authors generally send their articles to dozens of law journals, to be read by dozens of law review editors (as part of their editorial duties), and then (with luck) by more law students, lawyers, law clerks, judges, and law professors who form the articles' audience. These authors adhere to the distinction between using epithets as insults (improper) and quoting them as facts (quite proper). The authors do not seem to think that forcing readers to encounter slurs in this context 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 certain kinds of mention.[115] 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."[116] We might not draw the line quite the same way the NAACP did, but 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.

This also helps offer some perspective, we think, on some of the analogies drawn by critics of the quoting of epithets. Professor Richard Thompson Ford, for instance, analogizes quoting an epithet in discussing the facts of a case to "drop[ping one's] trousers and expos[ing] [one]self to the class."[117] Would we say, though, that Justices Ginsburg and Sotomayor and all the other judges we cite were engaging in the print equivalent of indecent exposure—perhaps something analogous to including a photograph of themselves naked in an opinion about public nudity?

317, 336 (2008). Surely he wouldn't have *used* slurs in his books to refer to people he condemns; he is thus (correctly) distinguishing mentions from uses.

[115] *See* NAACP, 2014 NAACP RESOLUTIONS RESULTS 1 (2014) https://www.naacp.org/wp-content/uploads/2018/07/2014_Resolutions_Results.pdf [https://perma.cc/J2LR-AYAJ] ("[T]he 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 . . . .").

[116] *Id.*

[117] Ford, *supra* note 100, at 1.

Would we say that the thousands of cases in which epithets were quoted in oral argument, at trial, or in deposition, by judges, lawyers, or witnesses, were tantamount to the speakers indecently exposing themselves to everyone present? Would we say that the scholars who quoted the epithet in their articles or books were doing the equivalent of sending nude photos of themselves to the editors and other readers who had to read the work?

We very much doubt that: Rather, it appears that the people we quote do not agree that personal "public exposure" while discussing the facts of a nudity case is "comparable in important respects" with quoting of epithets while discussing the facts of a case that involves epithets.[118] Our profession has sharply distinguished indecent exposure of judges, lawyers, or professors as reenactment of public nudity—which to our knowledge never happens in any courtrooms, opinions, briefs, law review articles, or academic books—from accurate quotations of words (offensive as they may be). That distinction strikes us as sound; and we haven't seen an explanation for why all the sources we refer to got this wrong.

B. Preparing Law Students for the Profession

We think that the way that courts routinely handle the epithets is correct and that law schools should deal with the facts of life with at least an equivalent level of directness. We should certainly reject a rule that words that are routinely mentioned in courtrooms, opinions, and briefs are taboo in legal academic settings. Promulgating such a norm would be wrongfully repressive regardless of its professional consequences for students. But promulgating such a norm would also misprepare law students for the profession that they will shortly enter.

In their professional dealings, lawyers will need to be ready 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 1,000 appellate briefs in which the full word "nigger" was mentioned; "n-word" comes up only 1/10 as often.[119] These 1,000 are a small fraction, we expect,

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[118] Ford, *supra* note 100, at 1.

[119] Search results for *defender*, *nigger*, and *n-word*, WESTLAW (filter content to *Briefs*; then enter the phrases *at(defender) & date(aft 1/1/2000) & nigger* in search bar; then replace *nigger* with *n-word* to compare) (last visited Feb. 5, 2021). Relative to that, the references to *fag* were consistent with the 20–30% ratio we observed as to the other datasets, with a total

(*continued*)

of all the briefs that contain the full word, since Westlaw includes only a small fraction of all appellate briefs; and the number does not 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.[120] Indeed, being prepared to quote such words is often especially useful to lawyers who are arguing that their clients were victimized by racists—Johnnie Cochran's enunciating the word repeatedly in the O.J. Simpson murder case, quoting police officer Mark Fuhrman in the presence of the jury, is just the most famous example.[121]

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of 245 (search for *(#fag #fags #faggot #faggots) & at(defender) & date(aft 1/1/2000) % ("fag bearings" "fag italia" "fag u.k." "fag kugelfischer" "fag yiming")*).

[120] In constitutional law, the classic example is Professor Melville Nimmer's argument before the Supreme Court in *Cohen v. California*, 403 U.S. 15, 21 (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 Dragnet NSA Surveillance*, 61 N.Y. L. SCH. L. REV. 331, 337 (2016).

Nonetheless, Professor Nimmer quickly spoke the word out loud. "Nimmer was convinced that he had to use 'fuck,' and 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." CHRISTOPHER M. FAIRMAN, FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES 109 (2009). *See also* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 153–54 (1979).

[121] 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 affect 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

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Many appellate cases have made clear that lawyers are entitled to play recordings containing the word,[122] or to elicit testimony about use of the word.[123] Though sometimes such epithets may be inadmissible, for instance because they are seen as insufficiently relevant,[124] 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.[125]

The legal system recognizes that conveying to jurors precisely what was said—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 epithets with horrific acts that makes it important that jurors (and judges) be able to hear what actually happened. In the words of one Florida case dealing with an assault and battery claim,

> A trial court has discretion to control the use of inflammatory language in the courtroom, and indeed should control such language, but the exclusion of the word "nigger" abused that discretion in the instant case. Obviously, the word is inflammatory. [Defendant] uttered it only because it was inflammatory. It is relevant to this case and in particular to [defendant's] intent only because it

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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. KENNEDY, *supra* note 99, at 85–86; JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O. J. SIMPSON 293–94 (1996).

[122] *See, e.g.*, Brown v. City of Hialeah, 30 F.3d 1433, 1434 (11th Cir. 1994); *see also* City of Columbus v. Fabich, No. 19AP-441, 2020-Ohio-7011, ¶ 6 (Ohio Ct. App. Dec. 31, 2020) (discussing the playing of such a recording).

[123] *See, e.g.*, United States v. Barrentine, Nos. 93-2077, 93-2078, 1994 WL 601339, at *2–3 (6th Cir. Nov. 2, 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).

[124] *See, e.g.*, People v. Young, 445 P.3d 591, 624–26 (Cal. 2019).

[125] "Courts have routinely held that the admission of racially offensive language, when race is at issue (i.e. when a civil rights statute is involved), is admissible because its probative value outweighs the danger of unfair prejudice." United States v. Bowen, No. CR-18-01013-001-TUC-CKJ (DTF), 2019 WL 3238469, at *4 (D. Ariz. July 18, 2019); *see also* Commonwealth v. Cruzado, 103 N.E.3d 732, 737 (Mass. 2018).

> is inflammatory. The witnesses should be allowed to repeat [defendant's] statements exactly as they recall them.[126]

Jurors may be deciding (as in the O.J. Simpson case)[127] 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.[128] Or they may be deciding whether a defendant was motivated by racial hatred.[129] Or a judge may be deciding how to sentence someone for a racist hate crime,[130] or whether to reduce an

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[126] Lay v. Kremer, 411 So. 2d 1347, 1349 (Fla. Dist. Ct. App. 1982). The judge in that case had required witnesses to quote the defendant as saying "black" rather than "nigger," and apparently did not offer the option of saying something like "n-word." But the court's rationale—"[t]he witnesses should be allowed to repeat Kremer's statements exactly as they recall them"—applies more broadly.

[127] *See* Toobin, *supra* note 121, at 292–93.

[128] *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 at 73, *id.* (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.

[129] *See, e.g.*, Turner v. Baker, No. 3:17-CV-00139-MMD-WGC, 2020 WL 886939, at *7 (D. Nev. Feb. 24, 2020) (quoting Transcripts of Trial, ECF No. 12-10, at 273, & ECF No. 12-12, at 76–77), *cert. of appealability denied*, 2020 WL 8816799 (9th Cir. Oct. 2, 2020).

[130] *See, e.g.*, Transcript of Sentencing Hearing at 11, United States v. Lecroy, No. 8:18-cr-00480-BHH (D.S.C. 2019) (quoting prosecutor's argument) ("Mr. Lecroy says, 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"). *Cf. Ahmaud Arbery Trial Transcript: June 4 Preliminary Hearings*, *supra* note 31.

allegedly racist prisoner's sentence,[131] or whether to reduce the sentence of someone who was provoked to violence by a slur.[132]

Or jurors may be deciding whether a defendant was justified in using force in self-defense, because he was reasonably afraid of injury or even death from someone who had used the slur.[133] Or they may be considering

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[131] *See, e.g.*, Government's Memorandum in Opposition to Defendant's Motion to Reduce Sentencing at 10, 12, 14, Marks v. United States, No. 6:03-cr-06033-DGL (W.D.N.Y. Aug. 23, 2019), ECF No. 503; Transcript at 93, *id.* (Dec. 17, 2019), ECF No. 526 ("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?"). *See also* Transcript of Detention Hearing at 57–58, United States v. Bogard, No. 5:19-CR-106(1)-DAE (W.D. Tex Feb. 21, 2019), ECF No. 28 (prosecutor trying to prove defendant's dangerousness by eliciting witness testimony about how the defendant had produced a video in which he racked a shotgun and asked, "Is that a nigger in my neighborhood?").

[132] *See, e.g.*, Reply Brief of Appellant [Defendant] at 7–8, Robinson v. State, No. 09A04-0902-CR-00098, 2009 WL 2237970 (Ind. Ct. App. May 26, 2009) ("It is true that a person in Robinson's position could have considered Smith's boorish behavior closed when he left the bar. But this possibility is questionable considering the type of racial slur used . . . Of all the words in the American English lexicon, there is perhaps one of all others whose usage conjures more explicit and implicit personal, political, social, cultural meanings and messages than all others, the word 'nigger.' . . . The State fails to appreciate the inflammatory nature of this racial slur . . . ."); Fisher v. United States, 328 U.S. 463, 479, 480, 485 (1946) (Frankfurter, J., dissenting) (making a similar argument); Letter from Felix Frankfurter to Stanley Reed (June 4, 1946) (disagreeing with Justice Reed's suggestion that Justice Frankfurter "follow the example of the trial court and sterilize the inciting 'black nigger,' with its vital bearing on the decisive issue of first-degree murder premeditation . . . Very, very, very, [sic] few people get understanding through abstractions . . . [For most,] grasp of a generalization and the capacity to apply it can come, and only very slowly, through concreteness."), *reprinted in* David M. Siegel, *Felix Frankfurter, Charles Hamilton Houston and the "N-Word": A Case Study in the Evolution of Judicial Attitudes Toward Race*, 7 S. CAL. INTERDISC. L.J. 317, 363–64 (1998).

[133] *See, e.g.*, People v. King, No. A137858, 2014 WL 3388555, at *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'").

whether coworkers had created a hostile environment for a plaintiff,[134] or whether an employee's discipline stemmed from racial bias.[135] Or they may be evaluating the magnitude of the emotional distress suffered by an employee who was subjected to an epithet, or deciding whether a defendant was guilty of using "fighting words"[136] 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"[137]—it is hard to imagine how the jury would do that without hearing the actual words. More broadly,

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[134] *See, e.g.*, Transcript, Johnson v. Stein, No. 12 CV 4660(HB) (S.D.N.Y. Aug. 26, 2013), ECF No. 45 (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."); Hope v. Cal. Youth Auth., 36 Cal. Rptr. 3d 154, 164–65 (Cal. Ct. App. 2005) (in section on "Severity and Pervasiveness of Harassment," stating that "Hope testified [before the jury] that Ortiz called him a number of derogatory terms. Ortiz called him a 'faggot ass bitch' so often it became commonplace. Ortiz called him a 'faggot ass motherfucker' around 150 times.").

[135] "Prior to his election to the Town Council/Safety Board, on February 28, 2013, Chuck Stranahan served as Water Superintendent for West Terre Haute. At that same time, plaintiff was the only African-American police officer on active duty for the Town. Chuck Stranahan made comments in the presence of Chief of Police, Don Lark, about killing 'a whole village of niggers' in a video game. When Chief Lark admonished him for his language, Chuck Stranahan told him he would run for the Town Council and tell everybody he would 'fire the fucking nigger' that worked for Chief Lark." Stevens v. Town of West Terre Haute, No. 84D01-1901-CT-000355, 2019 WL 11278773, at *1 (Ind. Super. Ct. Oct. 23, 2019) (concluding that Stranahan's participation as a panel member in a disciplinary hearing for plaintiff violated plaintiff's due process rights because of Stranahan's "abhorrent, racist remarks he directed at plaintiff").

[136] *Cf. e,g.*, Transcript of Proceedings at 135–36, Hernandez v. Hernandez, No. 1:13-cv-00153 (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).

[137] Spikener v. United Parcel Serv., Inc., No. A154689, 2020 WL 1452989, at *13, 2020 IER Cases 108, 149 (Cal. Ct. App. Mar. 24, 2020).

> a lawyer representing a client may actually compromise the client's interests by minimizing the impact of such offensive language when the language itself is critical to the source of injury. This may be particularly true in hostile environment employment discrimination cases where the very source of the hostility may lie in the offensive use of language by supervisors or coworkers.[138]

The same would generally apply to homophobic slurs as well.

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.[139] 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?
>
> 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.[140]

The jury could of course disbelieve the deceased's friend, the defendant, or 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) should also be heard by law students discussing such a case in class. Treating epithets in class openly and directly will help law students deal with such words effectively

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[138] J. Thomas Sullivan, *Lethal Discrimination*, 26 HARV. J. RACIAL & ETHNIC JUST. 69, 79 n.45 (2010).

[139] State v. Chambers, 387 P.3d 1108, 1115 (Wash. Ct. App. 2016).

[140] *Id.*

in practice. Treating epithets as taboo in the classroom, as occasions for shock, petitions, and denunciations, will ill prepare students for practice.[141]

Being ready to deal with such words is especially important for lawyers who go into fields where such words end up being quoted especially often: criminal law, employment law, juvenile justice, civil rights law, prisoner rights law, voting rights law, education law, child welfare and child custody law, immigration law, and First Amendment law. All sorts of attorneys, however, are subject to encountering controversies in which slurs figure importantly.

Business lawyers run into cases involving epithets at the workplace,[142] and insurance lawyers run into cases involving epithets in harassment claims and police abuse claims.[143] Lawyers who deal with e-discovery may need to deal with discovery demands related to cases in which racial epithets are alleged.[144] Bankruptcy lawyers may need to deal with estate assets that

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[141] One reader of this Article suggested that students might be taught to deal effectively with epithets through a discussion of the subject, with the epithets themselves never being mentioned in that class (or presumably in other classes). But we doubt that this would work: Instead, it would likely counterproductively reinforce the very assumption that we think should be dispelled—the assumption that lawyers should treat hearing such mentions as something that is disablingly shocking.

[142] *See, e.g.*, Defendants' Answer to First Amended Complaint ¶ 25, Wilson v. Int'l Truck & Engine Corp., No. 06 C 3655, 2006 WL 3886396 (N.D. Ill. Nov. 7, 2006). That case involved a firm that is not known for specializing in employment law. Naturally, big firms that do specialize in employment law run into these words even more often; a Westlaw search for *at("littler mendelson" "jackson lewis" "ogletree deakins" "seyfarth shaw" "morgan lewis") & nigger & date(aft 1/1/2000)*, just to select five prominent employment firms, found over 1,000 opinions, briefs, and trial court documents—and of course there will be many other such documents, especially at the trial level, that never appear in Westlaw (plus witness interviews and conversations with clients or colleagues in which the word is spoken).

[143] *See, e.g.*, Essex Ins. Co. v. Harris, No. 4:09CV2071 TIA, 2011 WL 4600689, at *3 (E.D. Mo. Sept. 30, 2011); Middlesex Ins. Co. v. Mara, 699 F. Supp. 2d 439, 451 n.15 (D. Conn. 2010).

[144] *See, e.g.*, Subpoena to Testify at a Deposition in a Civil Action at 3–7, *In re* Application of Kate O'Keeffe for Assistance Before a Foreign Tribunal, No. 2:14-cv-05835-WJM-MF (D.N.J. Sept. 19, 2014), ECF No. 1-1 (subpoena to PriceWaterhouseCoopersLLP for a deposition at the offices of Davis Wright Tremaine LLP, in libel case against noted businessman Sheldon G. Adelson, where part of the claims had to do with whether he had used various epithets and vulgarities).

relate to race discrimination claims.[145] Even in financial fraud cases of the sort handled by white-shoe law firms, a witness's or a defendant's racist statements could be used as evidence of that person's intentions or attitudes.[146]

Graduates who go into business law at a big firm may end up working on a pro bono civil rights or habeas case.[147] They may get involved in high-profile investigations of alleged racist misconduct.[148] They may take a few years off to work at a U.S. Attorney's office to build their trial advocacy skills, or do cases part-time by assignment at a local public defender's

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[145] *See, e.g.*, *In re* Gilmore, 590 B.R. 819, 826 (Bankr. N.D. Ill. 2018); Babin v. Nat'l Vision, Inc., 500 F. App'x 298, 299 (5th Cir. 2012).

[146] *See, e.g.*, Complaint at 1–2, Heritage Pharm. Inc. v. Glazer, No. 3:16-cv-08483-PGS-TJB (D.N.J. Nov. 10, 2016), ECF No. 1 (corporate lawsuit against its former "two most senior executives" for misappropriation and embezzlement, where a defendant's message, "Fuck these sand niggers," was given as evidence of his "overt contempt for his fellow Heritage board members, who are from India"); First Amended Complaint ¶¶ 14, 67, Terpin v. Pinsky, No. 7:20-cv-3557-CS (S.D.N.Y. Oct. 25, 2020), ECF No. 37 (lawsuit over an alleged multi-million dollar cyberfraud, citing defendant's racist statements to an acquaintance as evidence of his arrogance); Genesis Telecomms., LLC v. Moore, No. 8:08-1715-JMC-BHH, 2010 WL 6407918, at *5 (D.S.C. Oct. 18, 2010) (interference with contract lawsuit, citing slurs by defendant's employee as evidence of intentional interference), *report and recommendation adopted as modified*, No. 8:08-cv-01715-JMC, 2011 WL 1233302, at *2 (D.S.C. Mar. 30, 2011).

[147] *See, e.g.*, Appellant's Additional Brief at 5, 7–8, Ellison v. Lester, No. 07-10366-C, 2007 WL 4204046 (11th Cir. Nov. 13, 2007); First Amended Complaint ¶¶ 3, 6, 50, 53, 56, 62, 67, 69, 76, 78, Jessica K. v. Eureka City Sch. Dist., No. 3:13-cv-05854-WHA (N.D. Cal. Mar. 24, 2014); Second Amended Complaint ¶¶ 33, 99–100, Community Action League v. City of Palmdale, No. 2:11-cv-04817-ODW-VBK (C.D. Cal. Feb. 9, 2012), ECF No. 70.

[148] *E.g.*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS (Feb. 14, 2014), *filed in* NFL Mgmt. Council v. NFL Players Ass'n, 125 F. Supp. 3d 449 (S.D.N.Y. 2015) (reporting on racist abuse, quoting the word "nigger" 39 times). The report noted, "We caution at the outset that the language we describe is extremely vulgar. We have not used euphemisms, or toned down racist, sexually explicit, misogynistic or homophobic references. The actual words must speak for themselves, for they are crucial in understanding how the players and others interacted, and they show why we concluded that some of the behavior of Martin's teammates exceeded the bounds of common decency, even in an environment that often features profanity and mental and physical intimidation." *Id.* at 11. Given the number of times the word appears in the report, imagine how often the lawyers must have heard it in their investigation and in their drafting process.

office.[149] And they may otherwise run into cases from other fields: Lawyers waiting in an appellate courtroom for their wills and trusts case to be heard may hear an argument in a very different case scheduled before theirs; lawyers at a bench and bar event may come across a panel on racial harassment or police abuse cases.

And recall again that lawyers will have to deal with such mentions of epithets not because of the occasional failures of the profession, the way that people may have to deal with occasional abusive bosses or occasional sexual harassment. Rather, they will be exposed to the mentions because of a norm of the profession followed by thoughtful judges and lawyers left, right, and center. Sexual harassment at law firms is a tort (and sometimes a crime) that the legal system condemns; there is a right to be free from sexual harassment in employment (and in various other contexts).[150] Quoting even offensive words from a court record or a precedent, on the other hand, is a routine practice in which the legal system itself publicly engages; it does not constitute workplace harassment;[151] and no lawyer has a right not to be exposed to offensive facts—neither do law students.

"Practice like you play, because you will play like you practice," goes the advice both from coaches and from experts on education.[152] 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. (One law review has indeed "condemn[ed] the use of racial epithets in any setting," including in writing,

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[149] Consider, for instance, the Assigned Public Defender program in Maryland courts, which often involves lawyers who work at prominent law firms. *See, e.g.*, Brief of Appellant at 6, Davenport v. State, No. 407, 2019 WL 3244229 (Md. Ct. Spec. App. Mar. 7, 2019); Appellant's Reply Brief at 6–7, Doucett v. State, No. 889, 2018 WL 2759372 (Md. Ct. Spec. App. Mar. 14, 2018).

[150] Likewise for indecent exposure, the example given by Richard Thompson Ford, *see supra* text accompanying note 117.

[151] *See supra* note 81 and accompanying text.

[152] PETER C. BROWN ET AL., MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING 130 (2014).

both in academic works and in "the legal profession."[153]) The late Professor Terry Smith put the point bluntly in defending a colleague 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?
>
> . . . .
>
> [The professor] and I pulled up more than 5,500 federal cases that use the word n----- [expurgation presumably by the newspaper] and did not substitute the word with the 'N-word' . . . . "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?"[154]

Professor Smith may well have been influenced by his experience working with voting rights, a field where statements containing slurs are routinely quoted as evidence of legislator racism.[155]

We believe that all too often students of all races and sexual orientations are counterproductively taught to be unduly disturbed by quotations of epithets. Following one of the law school incidents we mentioned in the Introduction,[156] 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

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[153] *Statement*, *supra* note 101.

[154] Dudek, *supra* note 6. Professor Smith ultimately left DePaul after suing it for race discrimination (related to other incidents). *See* Complaint & Jury Demand, Smith v. Rosato Perea, No. 1:18-cv-01513 (N.D. Ill. Feb. 28, 2018); Benjamin Conboy, *Following Civil Rights Suit, Law Professor Leaves DePaul*, DEPAULIA (Nov. 5, 2018), https://depauliaonline.com/37504/news/following-civil-rights-suit-law-professor-leaves-depaul [https://perma.cc/QT3H-2ST3].

[155] *See, e.g.*, Shelby Cty. 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 at *24, Lewis v. Alabama, No. 17-11009, 2019 WL 1379996 (11th Cir. Apr. 24, 2019).

[156] *See supra* Part I.

> 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. . . .[157]

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; interpreters accurately reporting what a witness stated;[158] 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"[159] or

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[157] E-mail from student, UCLA Sch. of Law, to Eugene Volokh, Professor, UCLA Sch. of Law (Apr. 4, 2020) (on file with author). *See also* John McWhorter, *Black Fragility?*, SUBSTACK (Jan. 27, 2021), https://johnmcwhorter.substack.com/p/black-fragility [https://perma.cc/S65Z-D4QP] (discussing incident where student who saw an expurgated racial slur in a fact pattern on a law school exam "claimed that they experienced heart palpitations upon reading the words"); Andrew Koppelman, *Is This Law Professor Really a Homicidal Threat?*, CHRON. OF HIGHER ED. (Jan. 19, 2021), https://www.chronicle.com/article/is-this-law-professor-really-a-homicidal-threat [https://perma.cc/8RPC-22BC] (discussing the same incident).

[158] *See, e.g.*, Naranjo v. Coleman, No. CV 13-7383, 2017 WL 10832103, at *5 (E.D. Pa. Aug. 10, 2017), *report and recommendation adopted*, 2019 WL 632137 (E.D. Pa. Feb. 14, 2019).

[159] E-mail from student, *supra* note 157.

"experience[] heart palpitations"[160] 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.

C. What If Norms Change?

To be sure, it is possible that the legal norm we describe may fall away. Until 1967 the word "fuck" had appeared only about 20 times in Westlaw-accessible judicial or administrative opinions,[161] and "shit" only about 50. Now both are routinely quoted, with over 1,000 references to each word in 2019 alone. Perhaps the opposite will happen with epithets, and they will become vanishingly rare in new opinions and briefs (though they will still remain in tens of thousands of existing precedents).

If that happens, then professors may need to decide whether to adhere to a norm of accurate quotation (the general rule for almost all words, especially in the academy), or to model for students the hypothetical new norm of expurgation. But for now this is purely a hypothetical: Today legal norms point in favor of accurate and direct quotation of epithets along with other words.

III. THE RACE OR SEXUAL ORIENTATION OF THE SPEAKER

Should the speaker's race make a difference, cloaking one of us, for instance, with more leeway than the other?[162] What about sexual

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[160] *See supra* note 157.

[161] The word itself is of course known to have long existed by then, with the Oxford English Dictionary showing references back to the 1500s; and the one 1800s case that quotes it, *Edgar v. McCutchen*, 9 Mo. 768, 768 (1846), makes clear that, despite the "modesty of lexicographers" who had omitted it from dictionaries, it was an "English word[] . . . understood by those who hear [it]."

[162] In one example that we have 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 are "black or mixed with black," "Do what you want," but if you are "white" or "a person of color but not black," "Nope[,] never." *See* UCLA APILSA Bd., *Open Letter: UCLA Law's APILSA Responds to Prof. Stephen Bainbridge's "Egregious" Tweets*, REAPPROPRIATE (Apr. 13, 2020), http://reappropriate.co/2020/04/open-letter-ucla-laws-apilsa-responds-to-professor-stephen-bainbridge/ [https://perma.cc/JE69-8W69] (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*

(*continued*)

orientation? We think not: to take such a position would profoundly violate sound scholarly principles.[163] All professors and students should be equally free, without regard to race, religion, national origin, sexual orientation, or any other identity attribute, to discuss cases, historical incidents, novels, films, songs, comedy routines, or anything else pertinent to the mission of education. It would be a terrible thing for the academy—and for American culture more broadly—to erect identity-based boundaries 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, for instance, a Jewish speaker tells a typical Jewish

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Distinction to Justify Saying the N-Word, I'm Going to Vomit, ABOVE THE LAW (Aug. 30, 2018, 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/ [https://perma.cc/YW4S-5KDU]; John Turner, *N-Word Has No Place in Educational Settings*, ITHACAN (Sept. 19, 2019) ("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."); Yulia Nakagome, *USC Professor Placed on Leave After Speaking Chinese Should Be Reinstated*, DAILY TROJAN (Sept. 22, 2020), https://dailytrojan.com/2020/09/22/usc-professor-placed-on-leave-after-speaking-chinese-should-be-reinstated/ [https://perma.cc/HCR9-WVJC] ("[There is] no question that non-Black people should not say the n-word. So, had [Prof.] Patton said the n-word [in a class discussion], it would be grounds for his immediate dismissal from the University."); Sullivan, *supra* note 100 ("[H]ere's the obvious answer to the problem: White people should just never say the word.").

Another commentator likewise suggested that the Mandarin word "neige"—a filler word that literally means "that" but is often used as "um" or "er"—could be given as an example in class by black professors or Asian professors (apparently whether or not they are ethnically Chinese), but not by white professors who speak Mandarin. Esfandiari, *supra* note 20 (quoting student organization leader as defending the removal from class of a professor who had been teaching about filler words in conversation, and had used "neige" as an example: "I am not going to say I necessarily feel bad for [Patton] getting suspended because it wasn't like he had to use [the word], he isn't a part of either of these cultures where it was OK for him to use it in the sense of him using it appropriately or in the sense of him trying to offend another culture—he's a white man, he's not Black or Asian.").

[163] *See* KENNEDY, *supra* note 99, at 87–88.

joke to someone who knows the speaker is Jewish, it is unlikely to be perceived as anti-Semitic (though of course, much depends on the joke). But if the speaker is not known to be Jewish, listeners, especially Jews, might wonder whether the purported joke is a cover for antagonism—again, depending on the joke and on how well they know the speaker. The same is likely true of people using pejoratives to greet each other.[164]

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 a credible allegation that the speakers intended to demean, insult, or terrorize blacks.[165] In no instance is there a credible 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 to pull a fast one over on the audience by deploying the academic setting as a pretext for trying to insult.

Rather, in the academic cases noted above, professors were condemned under the claim that a non-black person ought never enunciate the term "nigger" under any circumstances (and likewise, presumably, as to straights and the term "fag"). 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 the infamous N-word to be enunciated by a non-black instructor,[166] no matter the circumstance, no matter the

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[164] *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.'"). Note how Prof. Ford's response, under the heading "The Race of the Speaker is Unavoidably Relevant," gives an example of "numerous comedy sketches in which someone unfamiliar with American slang and race relations hears a group of Black people using the N-word to address each other and unwisely decides to use it himself when approaching them." Ford, *supra* note 100, at 5. That's indeed true if he decides "to use it" as an attempt at a friendly greeting. But Prof. Ford's analysis doesn't explain why someone who sees (for instance) a black law professor quoting the facts of a court case should be barred from participating in the discussion on the same terms by quoting the facts in the same way. In such quotations, where two law professors or lawyers or judges are discussing the same facts, we do not think that "the race of the speaker is a part of the context of the utterance and affects its meaning," *id.*, in any material way.

[165] *See supra* Part I.

[166] *See* UCLA APILSA Bd., *supra* note 162.

preferred pedagogical strategy, no matter the amount of evidence that, viewed fairly, rebuts any suggestion of malevolence or negligence.[167]

Requiring differing standards for assessing teaching depending on the speaker's race or sexual orientation might also lead different students and instructors to be subject to different standards in the same conversation depending on their identity. Black or gay participants would be able to discuss candidly 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- or sexual-orientation-based approach were implemented as policy by a university, or some other employer, it would be illegal under state and federal anti-discrimination statutes and constitutional requirements.[168] Those provisions ban treating people differently based on race or sexual orientation not just as to hiring or firing but also as to the "terms, conditions, or privileges of employment."[169] Though these rules leave some latitude for affirmative action programs that treat race as a factor in, say, hiring or promotion or university admissions, demanding different identity groups to speak differently would almost certainly fall afoul of the legal requirements. Indeed, 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

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[167] *See* Mystal, *supra* note 162, which 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 supra* 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.

[168] 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. *See* U.S. CONST. amend. XIV, § 1; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (2018); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2018).

[169] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2018).

> 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."[170]

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.[171] Indeed, in one recent controversy, a letter purporting to be from

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[170] Burlington v. News Corp., 759 F. Supp. 2d 580, 597 (E.D. Pa. 2010).

[171] *See, e.g.*, Univ. of Tenn., Africana Studies Program, *The Pejorative Meaning of an Epithet*, https://africana.utk.edu/news/epithet.php [https://perma.cc/HVL6-W76R] (referring to a professor's writing an epithet on a class whiteboard—part of the name of a Tupac Shakur song—as "(re-)traumatization"); Tatyana Tandanpolie, *Encountering Trauma in the Classroom*, WASH. SQUARE NEWS (Apr. 20, 2020), https://nyunews.com/uta/features/2020/04/20/racial-trauma-in-classroom/ [https://perma.cc/E57K-YBK7]; Terrence Shambley Jr., *Augsburg Is Excluding Students Under Guise of Academic Freedom*, AUGSBURG ECHO (Nov. 16, 2018), https://augsburgecho.com/2018/11/16/augsburg-is-excluding-students-under-guise-of-academic-freedom/ [https://perma.cc/CT5H-URJE] ("a slur of that magnitude can trigger a black student's racial trauma"); Lexi Gee & Sarah Wood, *A Collaborative Dialogue on the N-Word in a University Classroom*, 28 TRANSFORMATIONS 210, 210 (2018) (discussing "a problematic incident in a university literature classroom about the vocalization of the n-word quoted from a novel"—a novel by a black author, Ann Petry's *The Street* (1946)—and "how this problematic word evoked racial trauma in one student"); Marc Ethier, *USC Marshall Prof Replaced After Using a Chinese Term That Sounds Similar to the N-Word*, POETS & QUANTS (Sept. 4, 2020), https://poetsandquants.com/2020/09/04/usc-marshall-prof-suspended-after-using-a-chinese-term-that-is-similar-to-the-n-word/2/ [https://perma.cc/NL2Z-6KNM] (quoting e-mail from USC Business School dean saying that "this disturbing episode that has caused such anguish and trauma"); Georgetown BLSA (@GeorgetownBLSA), TWITTER (Sept. 8, 2020, 12:43 PM), https://twitter.com/GeorgetownBLSA/status/1303373411306135557 (asserting that black students at UC Irvine law school were so "traumatized by the events [of a UC Irvine law professor quoting the word in a class discussion] that they were unable to attend classes last week"); *see also* Rubino, *supra* note 3 (discussing similar claim of "trauma"). We have not seen explicit arguments along these lines as to "fag" and gay students, but presumably there is some similar claim behind the demands that this particular word be expurgated.

black students said that a USC Business School professor's saying the Mandarin word "neige"[172]—a filler word, equivalent to the English "um" or "er"—in an example of filler words in foreign languages "affected" their "mental health," caused "emotional exhaustion," and "impacted [their] ability to focus adequately on [their] studies."[173] The Dean of the Business School seemed to agree, suggesting that saying the Mandarin word "harm[s] the psychological safety of our students."[174] The letter led the professor to be removed from the class, and be replaced by a different teacher.[175]

We aren't aware of any studies that purport to demonstrate that simply hearing the word actually causes "trauma," damages "mental health," or causes "emotional exhaustion." And we think that such medicalized claims disserve the interests of black professionals by suggesting that they are unable to handle situations that are said to be traumatizing for them. If hearing ordinary Chinese conversation really affects black business school students' "mental health," would an employer with many Chinese-speaking clients, employees, or contractors be eager to hire such candidates? If hearing racial slurs quoted in depositions or courtrooms really causes "trauma" to black law students, would a party in a case where the word is part of the facts really want to hire an advocate with such an increased risk of professional disability?

Likewise, even the more modest claim that adult students can't learn as well when they encounter the term strike us as both improbable and counterproductive. Clients expect lawyers to work at full effectiveness even when they encounter unpleasant material, whether in documents or witness interviews or courtroom arguments; law schools should train law students to do the same.

We acknowledge that some people are indeed offended by the term, even in quotes from documents or court opinions. And doubtless the word

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[172] "Neige" is of course just a transliteration of the Mandarin word, but it is indeed apparently often pronounced in Mandarin in a way similar to the English slur, and was so pronounced by the professor.

[173] Ethier, *supra* note 171 (quoting students' complaint). *See also* Shardaa Gray, *OU Students Speak out After Second Professor Used N-Word in Classroom*, FOX 25 (Feb. 25, 2020), https://okcfox.com/news/local/ou-students-speak-out-after-professor-used-n-word-classroom [https://perma.cc/2J3B-4HEQ] ("Students impacted by the incident will have the opportunity to meet Tuesday night for Black History Bingo Night," set up "to inform students about resources for mental health").

[174] Victor Mair, *"That, That, That . . .", Part 2*, LANGUAGE LOG (Aug. 28, 2020, 6:53 PM), https://languagelog.ldc.upenn.edu/nll/?p=48302 [https://perma.cc/5THE-B6EL].

[175] *Id.*

(or even words that sound like it) reminds some students of times they were insulted using the word—or threatened or even violently attacked by someone shouting the word—much as references to rape or other crimes might remind some students of how they had been victimized by such crimes in the past.[176] This may understandably lead to the desire to avoid "talk of rope in the hanged man's house," as the old proverb goes.[177] But a law school's central task is to prepare students of all groups 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.

Furthermore, to avoid language that would be pedagogically advantageous to confront out of fear of upsetting students is, in our view, unwise. It amounts to deliberately deciding to leave a weakness unaddressed.

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.[178] A student preparing to be a psychiatrist may be understandably disturbed by patients' dark fantasies or suicidal ideas or violent sexual impulses or recountings of abuse. 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

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[176] *See* Steph Montgomery, *I Wish People Would Stop Using the Phrase "Birth Rape"*, ROMPER (Nov. 2, 2018), https://www.romper.com/p/the-phrase-birth-rape-is-hurting-sexual-assault-survivors-like-me-13025720 [https://perma.cc/F8VN-GLMC] ("Reading the word 'rape' triggers memories of my assaults.").

[177] The proverb in those words can be traced back at least to *Don Quixote*, first published in 1605, but there is a version in the Talmud, which dates back at least about 1500 years. 2 THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Bava Metzia* 59b (Schottenstein ed., 2007).

[178] *See, e.g.*, Lindsay Kalter, *Nerves of Steel, Shaky Stomachs*, AAMC [Ass'n of Am. Medical Colleges], https://www.aamc.org/news-insights/nerves-steel-shaky-stomachs [https://perma.cc/7GTA-JTBZ]. 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), https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law [https://perma.cc/FHV6-7N4T].

be achieved through careful and supported deliberate 'exposure' to potentially traumatic material."[179]

"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 survivors of similar trauma.[180] Professors should think about how best to present potentially distressing material.[181] 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 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, then we can better help train them to deal with these and other difficult facts calmly in the fashion one expects of effective counsel.

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[179] MENKA TSANTEFSKI ET AL., TRAUMA-INFORMED TERTIARY LEARNING AND TEACHING PRACTICE FRAMEWORK 19 (2020), https://www.griffith.edu.au/__data/assets/pdf_file/0020/1052309/FRAMEWORK.pdf [https://perma.cc/CRG5-V9QD].

[180] Patricia J. Shannon et al., *Exploring the Experiences of Survivor Students in a Course on Trauma Treatment*, 6 PSYCHOL. TRAUMA S107, S114 (2014).

[181] "Trigger warnings" are sometimes recommended as a tool for making potentially distressing material easier for students to process, *e.g.*, Ford, *supra* note 100, at 4; but recent research suggests that they are not materially helpful. Mevagh Sanson et al., *Trigger Warnings Are Trivially Helpful at Reducing Negative Affect, Intrusive Thoughts, and Avoidance*, 7 CLINICAL PSYCHOL. SCI. 778 (2019). Indeed, they may even "cause small adverse side effects," Payton J. Jones et al., *Helping or Harming? The Effect of Trigger Warnings on Individuals With Trauma Histories*, 8 CLINICAL PSYCHOL. SCI. 905 (2020), such as by increasing "risk for developing PTSD in the event of trauma, and disability-related stigma around trauma survivors," and "increas[ing] immediate anxiety responsefor a subset of individuals whose beliefs predispose them to such a response." Benjamin W. Bellet et al., *Trigger Warning: Empirical Evidence Ahead*, 61 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 134, 140 (2018).

We know that some people take a contrary view. Consider this statement criticizing the professor who offered the Mandarin word "neige" as an example of a foreign-language filler word (comparable to the English "uh" or "um"): "Can you expect a student to focus or feel safe after hearing a word that sounds like a racial slur? To tell my black classmates that they shouldn't be offended by something is objectively wrong . . . ."[182]

But, as we suggested above, that approach is likely to hurt the very people it aims to help. Employers in China doubtless do expect all their employees to continue "to focus" after they hear a word that is heard dozens of times a day in Mandarin-speaking environments. Likewise for employers elsewhere who have many Mandarin-speaking clients, employees, or contractors. To prosper in those environments, black students need to learn precisely "that they shouldn't be offended"—as blacks who learn Mandarin routinely do, to our knowledge without great difficulty.[183]

Indeed, we expect various other professionals to acquire such training, formally or otherwise. In many jurisdictions, for instance, insults said to police officers generally do not qualify as "fighting words," because "trained police officer[s]" are expected to have learned to "exercise restraint" even when they are directly personally insulted (and not just when they hear quoted insults, for instance in interviewing witnesses).[184] People whose jobs bring them into contact with clients who are dealing with stressful situations

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[182] Conor Friedersdorf, *The Fight Against Words That Sound Like, But Are Not, Slurs*, ATLANTIC (Sept. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/09/fight-against-words-sound-like-are-not-slurs/616404/ [https://perma.cc/48AD-FPL5].

[183] *See* Vic Marsh (@vicmarsh), TWITTER (Sept. 4, 2020, 1:00 PM), https://twitter.com/vicmarsh/status/1301928063865729024 ("#BlackMandarin-speaker here. . . . [U]se of the filler phrases [such as 'neige'] is CRITICAL for fluid Chinese conversation. Take adeep breath, USC, and give the linguist back pay."); Black China Caucus (@BLKChinaCaucus), TWITTER (Sept. 4, 2020, 1:13 PM), https://twitter.com/BLKChinaCaucus/status/1301931390917840898 ("The BCC is shocked by how @USC mishandled this situation! Not only would a quick Mandarin lesson reveal that "nèi ge" is a common pronoun, but USC's reaction cheapens and degrades substantive conversations surrounding real DEI challenges on college campuses!").

[184] State v. Wade, 667 P.2d 459, 462 (N.M. Ct. App. 1983); City of Alamogordo v. Ohlrich, 625 P.2d 1242, 1243 (N.M. Ct. App. 1981). *See also, e.g.*, 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 concurring opinion favorably); Buffkins v. City of Omaha, 922 F.2d 465, 472 (8th Cir. 1990). *But see, e.g.*, State v. Read, 680 A.2d 944, 950 (Vt. 1996) (rejecting the view that words said to the police should be excluded from "fighting words" statutes). Naturally and unfortunately, such training does not always work.

are similarly trained to ignore occasional lashing out by the clients.[185] We should likewise reasonably expect trained lawyers to learn to avoid becoming distressed upon hearing quoted slurs.

Some have argued that mentioning an anti-black slur in the classroom improperly "places a burden on Black students that other students do not face."[186] 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 many situations.

Any reference, using whatever 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 group. Any reference to Israel may be especially upsetting to students of Palestinian extraction whose families have been mistreated by the Israeli government. In none of these instances is there a sound basis for expurgating material that a professor has reasonably identified as a source for instruction.

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

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[185] *See, e.g.*, Mallory Moench, *PG&E Workers, Families Fear Public Anger Amid Outages; It's 'Nerve-Racking'*, S.F. CHRON. (Nov. 1, 2019, 7:25 PM), https://www.sfchronicle.com/california-wildfires/article/PG-E-workers-families-fear-public-anger-amid-14725106.php [https://perma.cc/FVS3-3YW4] (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/ [https://perma.cc/UB46-GVXK] (offering advice to emergency medical technicians about how to deal with insults from patients).

[186] Law Review Editors of Volume 97, *Statement by the Undersigned Editors of Volume 97*, 97 WASH. U. L. REV. i, i (2020).

their intellectual reactions and their emotional ones—rather than merely taking those reactions as immutable.[187]

V. OTHER OFFENSIVE WORDS—AND IDEAS

Rejecting the use-mention distinction as to "nigger" and "fag" is likely to 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.[188] Professor Ford, responding to this article, likewise speaks broadly (and largely disapprovingly) of quoting "racial epithets" and not just one particular epithet.[189] Nor is this limited to racial or ethnic epithets: 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 not just because he discussed the word "nigger" in class, but also because he discussed the word "bitch."[190]

At Columbia University, Columbia College Chicago, and the University of York (England), professors have been faulted for quoting the word "Negro."[191] A Smith College newspaper's transcript of a panel on

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[187] *See* Carolyn Rouse, *Letter to the Editor: In Defense of Rosen*, DAILY PRINCETONIAN (Feb. 8, 2018, 9:25 PM), https://www.dailyprincetonian.com/article/2018/02/in-defense-of-rosen [https://perma.cc/5P23-AQ6Z] (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'").

[188] *See* Robin Wilson, *Brandeis Professor in Trouble for Classroom Comments Gets Faculty Panel's Support*, CHRON. HIGHER EDUC. (Nov. 30, 2007), https://www.chronicle.com/article/brandeis-professor-in-trouble-for-classroom-comments-gets-faculty-panels-support-121989/ [https://perma.cc/8GC9-E3UR].

[189] Ford, *supra* note 100, at 1.

[190] Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 674–75 (6th Cir. 2001). "Bitch" appears in Westlaw-accessible decisions even more often than "nigger," with nearly 9,500 references in cases, trial court orders, and administrative decisions just since 2015. Search Results for *bitch & date(aft 01/01/2015)*, WESTLAW (enter phrase in search bar; then click search button for results) (last visited Dec. 18, 2020).

[191] Khadija Hussain, *When Professors Make Racially Insensitive Remarks, Whose Job Is It to Confront Them?*, COLUM. DAILY SPECTATOR (Apr. 5, 2018, 3:48 AM), https://www.columbiaspectator.com/news/2018/04/05/lack-of-mandatory-training-leaves-faculty-unequipped-to-talk-about-race-and-identity-in-the-classroom/ [https://perma.cc/39DL-2HQX]; Julie Henry, *The University of York Apologises for Saying*

(*continued*)

"Challenging the Ideological Echo Chamber: Free Speech, Civil Discourse and the Liberal Arts" replaced the word "crazy" with the text "[ableist slur]."[192] This was in an otherwise complete transcript of the panel, not in the newspaper's own pages, where editorial judgments would normally be common. A New York Times reporter likewise publicly condemned someone for quoting the word "retard" (which the reporter rendered as "the r-slur") when discussing how members of a certain online forum called themselves "retard revolution."[193] And at one law school, students told a classmate not to quote the words "illegal alien" and "illegal immigrant" from *United States v. Brignoni-Ponce*, the Fourth Amendment border checkpoint case that the class was discussing.[194]

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

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'Negro' in Lecture on Civil Rights Hero's Book Called the Philadelphia Negro, DAILY MAIL (UK) (Dec. 21, 2019, 6:31 PM), https://www.dailymail.co.uk/news/article-7817647/The-University-York-forced-apologise-saying-negro-lecture-civil-rights-heros-book.html.

[192] Wendy Kaminer, Nina Shea, Jaime Estrada & Lauren Duncan, Panel on Challenging the Ideological Echo Chamber: Free Speech, Civil Discourse and the Liberal Arts (Sept. 22, 2014) (transcript available at 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/). This panel also drew controversy because Wendy Kaminer, a noted author on free speech, mentioned the word "nigger" when discussing the controversy about the word.

[193] Glenn Greenwald, *The Journalistic Tattletale and Censorship Industry Suffers Several Well-Deserved Blows*, GLENN GREENWALD (Feb. 7, 2021), https://greenwald.substack.com/p/the-journalistic-tattletale-and-censorship [https://perma.cc/5XKE-W3T3]. The reporter's initial Tweet stated that a tech businessman was "openly using the r-slur on Clubhouse tonight and not one other person in the room called him on it or saying anything." It then emerged that the businessman had not said the word, but that another participant had quoted it in "explain[ing] that the Redditors [the members of an online forum] call themselves 'retard revolution.'" The reporter then followed up by standing by her criticism (though acknowledging that it had been directed at the wrong person), and saying "I hope you can understand how some people in the room felt hearing it"; the reporter was thus continuing to criticize the mere mention of the word, rather than its use as a slur. The term "mentally retarded" and its variants appear in tens of thousands of cases and in many statutes (though some states have changed their statutes recently to use other terms, such as "intellectually disabled").

[194] E-mail from student [name confidential] to Eugene Volokh (Mar. 17, 2021) (on file with authors) (including text of statements from the objecting students).

put together a panel called *Can One Laugh at Everything? Satire and Free Speech After Charlie*.[195] The flier for the panel contained the now-iconic post-murder *Charlie Hebdo* cover depicting a cartoon of the Moslem holy figure Mohammed.[196] 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.[197]

And of course people can and do complain about people discussing offensive events and concepts (even when they do not endorse the concepts), and not just offensive words. Viewing interviews with Holocaust survivors can be upsetting for students;[198] the Holocaust may be decades in the past, but anti-Semitic violence is not. And some students may themselves be refugees from other genocides, or at least bitter ethnic conflicts. 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.[199]

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[195] Eugene Volokh, *More on the University of Minnesota Charlie Hebdo Controversy: 'There Are Limits on Free Speech'*, WASH. POST: VOLOKH CONSPIRACY (May 6, 2015, 2:48 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/06/more-on-the-university-of-minnesota-charlie-hebdo-controversy-there-are-limits-on-free-speech/ [https://perma.cc/N425-TTYF].

[196] *Id.*

[197] Maura Lerner, *Poster for Free-Speech Forum Sets off Debate at University of Minnesota*, MINN. STAR TRIB. (May 5, 2015, 9:23 PM), https://www.startribune.com/poster-for-free-speech-forum-sets-off-debate-at-university-of-minnesota/302689691/ [https://perma.cc/73AG-MPX2].

[198] *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).

[199] *Cf, e.g.*, 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*, PAN AFR. MED. J., July 2018, at 1; *Rwanda Mourns the Dead, 25 Years Since Genocide Began*, OUTLOOK INDIA (Apr. 7, 2019, 12:22 PM), https://www.outlookindia.com/newsscroll/rwanda-mourns-the-dead-25-years-since-genocide-began/1510905 [https://perma.cc/E329-XCXR] ("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, 7:00 AM), (*continued*)

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 coworkers"—the book being *Notre Dame vs. The Klan: How the Fighting Irish Defied the KKK*.[200] 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 "disenfranchised protagonists."[201]

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.[202])

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'").[203] 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,"

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https://time.com/74113/rwanda-genocide-survivor-lasting-reminders/ [https://perma.cc/M3WN-6AJZ].

[200] Associated Press, *University Says Sorry to Janitor over KKK Book*, NBC NEWS (July 15, 2008, 7:49 AM), http://www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book/ [https://perma.cc/6EEB-K9FB]. The decision was only reversed after the story went public, and the University was sharply condemned in the national media. *Id.*

[201] Cassy Sottile, *"The Foreigner" Senior Thesis Canceled by Washington College*, THE ELM (Nov. 18, 2019), https://blog.washcoll.edu/wordpress/theelm/2019/11/the-foreigner-senior-thesis-canceled-by-washington-college/ [https://perma.cc/Z829-ZMRQ] (reporting that people objected that the mere depiction of the Klan on stage would be offensive).

[202] We omit the name of the school, given that it ultimately did the right thing, and the story never made the news.

[203] Tandanpolie, *supra* note 171.

demanding the removal of "ableist, misogynistic, classist or transphobic" "hate speech" from any course reading materials.[204]

The word "rape" similarly refers to a crime that is a constant threat to women (including of course women law students). A prominent law professor reports that she was faulted for even using the word "rape" in a university class.[205] One of our colleagues has likewise written that, "Some students have even suggested that rape law should not be taught because of its potential to cause distress."[206] 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."[207]

VI. CONCLUSION

Several professors caught up in these controversies have said that, going forward, they will no longer vocalize "nigger" (and, we suspect, similar slurs) because of the protests that such speech has drawn and because they are convinced that their pedagogical strategy of full enunciation 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 hurt feelings should overcome a considered pedagogical judgment that learning would be enhanced by accurately airing epithets, more specifically 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 seek to obtain, as the gesture is scorned. Instead of being seen as a sign of good will, the

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[204] 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/ [https://perma.cc/Q7EB-NHAR].

[205] Sherry F. Colb, *Why I Do Not Give Trigger Warnings*, JUSTIA: VERDICT (Aug. 29, 2018), https://verdict.justia.com/2018/08/29/why-i-do-not-give-trigger-warnings [https://perma.cc/NDY7-WFMU].

[206] Gersen, *supra* note 178.

[207] *Id*.

gesture has been seized upon as a confession of error and deployed as an additional basis for attacking reputations unjustifiably.[208]

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 words—any words—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.

Human nature being what it is, making "nigger" and "fag" taboo is likely to lead people to seek similar taboos for words that they find particularly offensive. Why is my group's pain not 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 should the wrongs done to my group not also be acknowledged?

By way of analogy, we have seen a few opinions that contain quotes such as "f***, nigger"[209] or "f****** faggot."[210] That practice does not sit well with us: It signals, dubiously, that the word "fuck" is somehow more offensive and thus more properly subject to erasure than the slurs.[211]

We likewise do not relish the prospect of explaining to, say, a Japanese-American student why the *Brandenburg*[212] phrase is being recast

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[208] *Cf.* Friedersdorf, *supra* note 182 (describing views of psychologist Peter Kim) ("[I]f a transgression is seen as intentional, 'an apology can be quite harmful[.]' . . . [R]ather than find [a professor's] apology appropriate, [students] saw it 'as confirmation of their belief that he's done wrong and he's got character flaws.'").

[209] *Compare, e.g.*, Hernandez v. Jones, No. 16-80566-Civ-MARRA, 2017 WL 11485811, at *3 (S.D. Fla. Nov. 29, 2017), *with* Appendix at 369, *id.*, ECF No. 14 (transcript quoting the witness as having said the full words, though apologizing for "that 'F' word[]" but not for any other word).

[210] *Compare, e.g.*, Chappell v. Miles, No. 2:12-303-MBS, 2012 WL 1570020, at *1 (D.S.C. May 3, 2012), *with* Complaint at 3, *id.*, ECF No. 1 (quoting the full words).

[211] *See, e.g.*, Sullivan, *supra* note 138, at 78 n.40 (faulting what the author perceived as the double standard in some courts' expurgating vulgarity but quoting epithets); *id.* at 79 n.45 (taking the view that epithets should be quoted without expurgation); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 179 n.61 (1991) ("[I]f an author is going to use expurgative dashes, at least he should be consistent, unlike Representative Henry Hyde and his legislative counsel who meticulously use dashes so as not to spell out profane words, but have no problem spelling out racial epithets.").

[212] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

as "the n-word should be returned to Africa" but references in *Korematsu v. United States* to "Japs"[213] do not get similar treatment.[214] Likewise, we would not want to have to explain to Native American or Middle Eastern students why some slurs against them can freely be quoted, but "red nigger" or "sand nigger" cannot be.[215]

Indeed, if banning one racial slur is seen as important to protecting students of that racial group from trauma and offense, then refusing to ban other slurs (and thus refusing to supposedly protect members of those racial groups) might itself be seen as a form of racial discrimination. The categorical principle we urge—that any word can be quoted in a good-faith academic discussion of the facts—obviates this difficulty.

And it seems to us that giving in to this pressure to ban one or two words, and then others, would badly impoverish discussion in university classrooms. 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[216]—in which the professor would presumably have to talk

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[213] 323 U.S. 214, 239 n.12 (1944) (Murphy, J., dissenting); *see also* Oyama v. California, 332 U.S. 633, 652 n.2 (1948) (mentioning the slur in a case that struck down a limit on land ownership based on race); Ellis v. Harrison, 947 F.3d 555, 556, 557 (9th Cir. 2020) (en banc) (Nguyen, J., concurring) (quoting lawyer's use of the slur in a more modern case).

[214] *See also* Ann E. Tweedy, *"[H]ostile Indian Tribes . . . Outlaws, Wolves . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 4 CRIT 1, 29, n.135 (2011) (faulting courts for quoting past opinions that refer to Indians as "savages," on the grounds that "unlike the situation for tribes and Indians, racial epithets used to demean African-Americans tend to be recognized as such and thus may be avoided by courts, even in quotations," and citing two cases that used the euphemism "N-word").

[215] *See supra* note 8 and accompanying text (discussing condemnation of a law professor who mentioned these two epithets in an example of slurs against Native Americans).

[216] This is especially so on the "nigger"-"nigga" question, *see* KENNEDY, *supra* note 99, at 4 (discussing claims that "nigger" should be seen as exclusively offensive and "nigga" as "capable of signaling a friendly salutation"); Bennett v. Metropolitan Government of Nashville & Davidson County, 977 F.3d 530, 543 nn.6 & 7, 545 n.9 (6th Cir. 2020) (discussing in n.6 the possibility that "niggaz" is less offensive, but then analogizing its use to cases involving "nigger" in nn. 7 & 9); Lounds v. Lincare, Inc., 812 F.3d 1208, 1230 (10th Cir. 2015); Stafford v. Avenal Cmty. Health Ctr., No. F078826, 2021 WL 299316, at *8 (Cal. Ct. App. Jan. 29, 2021). *See also* Mark Anthony Neal, *It's Your Nigger Problem Not Hip-Hop's*, COUNTERCURRENTS (Dec. 8, 2006), http://www.countercurrents.org/hr-neal081206.htm [https://perma.cc/NT5Y-2QHV] (discussing distinction between the words).

(*continued*)

For more examples of cases dealing with this question, even limiting ourselves just to 2017–20, *see* Noel v. Carite of Garden City, No. 19-11493, 2020 WL 5891591, at *1 (E.D. Mich. Oct. 5, 2020); Beaman-Bates v. Acme Mkts., Inc., No. CV 17-5581, 2020 WL 3287128, at *5 (D.N.J. June 18, 2020); Bruner v. City of Phoenix, No. CV-18-00664-PHX-DJH, 2020 WL 554387, at *3 n.4, *4 (D. Ariz. Feb. 4, 2020); Transcript of Motion Hearing/Evidentiary Hearing at 16–20, 111, *id.* (Sept. 11, 2019), ECF No. 120; Hale v. Emporia State Univ., No. 16-4182-DDC, 2019 WL 3202240, at *6 (D. Kan. July 16, 2019), *reconsideration denied*, No. 16-4182-DDC-TJJ, 2019 WL 6134495 (D. Kan. Nov. 19, 2019); Ellis v. Hobbs Police Dep't, No. CV 17-1011 WJ/GBW, 2018 WL 5044233, at *1 (D.N.M. Oct. 17, 2018); Dapkus v. Chipotle Mexican Grill, Inc., No. 15 C 6395, 2017 WL 36448, at *3 n.3 (N.D. Ill. Jan. 4, 2017); Spikener v. United Parcel Serv., Inc., No. A154689, 2020 WL 1452989, at *13, 2020 IER Cases 108, 149 (Cal. Ct. App. Mar. 24, 2020); 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, 2020); KB Enters., LLC v. Mont. Human Rights Comm'n, 2019 MT 131, ¶ 12, 443 P.3d 498; Norfolk State Univ., No. 11200, 2018 WL 9868652, at *8 (Va. Dep't Emp. Disp. Res. Sept. 30, 2018). *See also* People v. Batticks, No. 41, 2020 WL 6136306, at *9 n.6 (N.Y. Oct. 20, 2020) (Wilson, J., dissenting) (discussing whether "nigger" and "nigga" might have been confused for each other in trial transcripts).

The controversy also comes up as to the distinction between "nigger" and "nicca," *Bruner*, 2020 WL 554387, at *4; Transcript of Motion Hearing/Evidentiary Hearing at 69–72, *Bruner* (D. Ariz. Sept. 11, 2019), ECF No. 120. And some cases also discuss how "negro" (used in the modern era, when it is generally no longer viewed as common or respectful) compares to "nigger." LaCroix v. City of New Haven, No. 3:06CV481 (JBA), 2008 WL 11473268, at *2 (D. Conn. Feb. 19, 2008); Halliburton v. River Rouge Sch. Dist. Bd. of Educ., No. 312561, 2014 WL 547616, at *7 (Mich. Ct. App. Feb. 11, 2014); *In re* Geiger, No. A-1409-13T2, 2015 WL 7261458, at *10 n.14 (N.J. Super. Ct. App. Div. Nov. 18, 2015); Middleton v. State, 64 N.E.3d 895, 901 (Ind. Ct. App. 2016); *id.* at 902 (Pyle, J., concurring in the judgment).

about "the n-r word," "the n-a word," "the n-o word,"[217] "the n-ra word,"[218] or even the "n-ito/n-ita word,"[219] "n-t word,"[220] or "w-word."[221] Imagine a

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[217] Indeed, one recent incident, *see supra* note 3 and accompanying text, discussed a source that was specifically focused on the nigger/nigga distinction, and that would thus have been especially hard to discuss in an expurgated way: "'The [Facebook] policy had drawn a distinction between 'nigger' and 'nigga,'' . . . . The first was banned, the second was allowed. Makes sense. 'But then we found that in Africa many use 'nigger' the same way people in America use 'nigga.'" Van Zuylen-Wood, *supra* note 3.

[218] "Negra," the Spanish feminine version of "negro." *See, e.g.*, Rivera Sanchez v. Ranger Am. of Puerto Rico, No. 03-2033(SEC), 2008 WL 11502080, at *6 (D.P.R. June 30, 2008); Portee v. Deutsche Bank, No. 03 CIV. 9380 (PKC), 2006 WL 559448, at *13 (S.D.N.Y. Mar. 8, 2006); Webb v. R & B Holding Co., 992 F. Supp. 1382, 1389 (S.D. Fla. 1998); News Release, EEOC, *EEOC Sues Glaser Organic Farms for Discrimination Based on National Origin and Color* (Sept. 30, 2015), 2015 WL 5721586.

[219] "Negrito" and "negrita" are sometimes perceived as slurs but sometimes as affectionate nicknames, given to people without regard to race; the meaning seems to depend on context, and may also turn in part on the particular Spanish-influenced culture in which it is used. *See, e.g.*, Perdomo-Rosa v. Corning Cable Sys., No. 02-2114, 2006 WL 695818, at *5 n.2 (D.P.R. Mar. 15, 2006); Gonzalez v. Suiza Dairy Corp., No. 03-1755-cv, 2005 WL 2275882, at* 13, *15 (D.P.R. Sept. 14, 2005); Serrano-Nova v. Banco Popular de P.R., Inc., 254 F. Supp. 2d 251, 256 & n.1 (D.P.R. 2003); Bermudez-Vazquez v. Centennial de P.R., 278 F. Supp. 2d 174, 184–85 (D.P.R. 2003), *aff'd*, 97 F. App'x 337 (1st Cir. 2004); Allen v. Bake-Line Prod., Inc., No. 98 C 1119, 2001 WL 883693, at *2 (N.D. Ill. Aug. 6, 2001) (quoting witness affidavit) ("Many Spanish words when used as slang or in the context can be racial slurs that would not normally translate as such. The term 'negrita' can mean a black girl or nigger, depending on the body language of who was using it and about or to whom. The term 'negro' can mean a black person or nigger, depending on the body language of who was using it and about or to whom."); *see also* Agence France Presse, *Uruguay Language Academy Irate Over Cavani 'Negrito' Sanction*, BARRON'S (Jan. 1, 2021) (discussing controversy over whether an Uruguayan player in England was properly sanctioned for calling a friend "negrito" in an Instagram message), https://www.barrons.com/news/uruguay-language-academy-irate-over-cavani-negrito-sanction-01609531803 [https://perma.cc/Z7DC-MTRE]; AP, *Uruguay Players' Union Backs Cavani, Blasts English FA for 'Ignorance' Over Ban*, SPORTS ILLUSTRATED (Jan. 4, 2021), https://www.si.com/soccer/2021/01/04/edinson-cavani-ban-uruguay-players-union-england-fa-racism [https://perma.cc/4PFU-3WD6]; Madeleine Marr, *'Just No': JLo Just Dropped a Song with Maluma. It Didn't Go Over Well with Everyone*, MIAMI HERALD (Oct. 20, 2020), https://www.miamiherald.com/miami-com/miami-com-news/article246577893.html

(*continued*)

class discussion of law professor Jody Armour's "Nigga Theory."[222] Imagine a class discussion of how multilingual workplaces should deal with Spanish-speaking employees using the Spanish word "negro" to refer to people—a matter that has already come to court.[223]

(discussing controversy about a song in which Jennifer Lopez refers to herself as "tu negrita del Bronx").

Various cases also mention people with the nickname El Negrito, for example, State v. Soto, No. 103321, 2016 WL 6298844, at *2 (Ohio Ct. App. Oct. 27, 2016), as well as people, companies, products, ships, and places named Negrito or Negrita. Negrito is also sometimes a term used for certain indigenous Southeast Asian and Austronesian ethnic groups. *See, e.g.*, Zaleha Kamaruddin et al., *Malaysia: General Introduction*, *in* INT'L ENCYCLOPEDIA OF LAWS: FAMILY & SUCCESSION LAWS 17 (2020) ("In Peninsular Malaysia, the earliest inhabitants, known as Orang Asli who were the ancestors of the present Negritoes or Senoi, arrived in the Middle Stone Age.").

[220] *See, e.g.*, Williams v. Port Huron Sch. Dist., 455 F. App'x 612, 617 (6th Cir. 2012) ("nigglet") (one of about a dozen cases quoting this version of the epithet).

[221] *See, e.g.*, People v. Evans, No. C083690, 2018 WL 4501124, at *3 n.2 (Cal. Ct. App. Sept. 20, 2018) ("wigger," defined as "[a] white person, usually a teenager or young adult, who adopts the fashions, the tastes, and often the mannerisms considered typical of urban black youth.") (one of about 30 cases quoting this version of the epithet).

[222] *See* Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9 (2014) (which, unsurprisingly, extensively mentions and discusses both "nigga" and "nigger"); NIGGA THEORY: A BRIEF EXPLORATION (2019) (short film directed by Khinmay Lwin van der Mee).

[223] Spanish speakers often use "negro" as a neutral adjective for "black," *e.g.*, Montgomery v. Brickell Place Condo. Ass'n, Inc., No. 11-24316-CIV, 2012 WL 13036792, at *5 n.5 (S.D. Fla. Dec. 5, 2012); Bolton v. Potter, No. 8:03-CV-2205-T-27EAJ, 2006 WL 118286, at *2 n.4 (M.D. Fla. Jan. 13, 2006), *aff'd*, 198 F. App'x 914 (11th Cir. 2006), and sometimes use "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 particular black people, and sometimes as a nonpejorative nickname for non-blacks. *See* Ezequiel Adamovsky, *Ethnic Nicknaming: 'Negro' as a Term of Endearment and Vicarious Blackness in Argentina*, 12 LATIN AM. & CARIBBEAN ETHNIC STUD. 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), https://jazztimes.com/archives/horacio-el-negro-hernandez/ [https://perma.cc/TND2-H48L] (discussing a noted Cuban musician, who does not appear to be black). A quick Westlaw search for "el negro" yields over 140 cases and administrative decisions; the overwhelming majority of those simply refer to people whose nicknames were El Negro, though a few do seem to involve insulting uses of the phrase.

Or imagine 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 "[a]ll 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 [m-word?]."[224] 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 much of the impulse behind the effort, but criticize its insufficient attentiveness to other imperatives. The demand to restrict classroom speech—even as to only a few vicious epithets—sacrifices features of academic freedom and scholarly and professional candor that have been immeasurably socially valuable.

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

The struggle on behalf of scholarly freedom will be long, indeed, never ending. For now, we simply assert that vocalizing any word for a legitimate pedagogical purpose—and in particular to accurately report facts —should not be made taboo. We respect the teaching 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.

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[224] *Bad News Bears Script—Dialogue Transcript*, SCRIPT-O-RAMA, http://www.script-o-rama.com/movie_scripts/b/bad-news-bears-script-transcript.html [https://perma.cc/X3SC-E7Y5] (last visited Dec. 20, 2020).