I. INTRODUCTION

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

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


5 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 HUGH BLAIR GRIGSBY, THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION 157 n.142 (1890), which claims to be based on a first-hand account to the author (born 1806) from someone who was at the Convention.


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*;8 a history professor quoted a 1920 statement by U.S. Senator James Reed explaining his opposition to the League of Nations;9 a history professor quoted James Baldwin’s *The Fire Next Time*;10 a creative writing professor discussed another statement by James Baldwin;11 an African-American Literature professor quoted The *Narrative of the Life of Frederick Douglass*;12 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;13 a Stanford art history professor quoted a line from N.W.A.’s *Fuck tha Police* and wrote the group’s full name (*Niggas Wit Attitudes*);14 a tenured journalism professor (and department chair) teaching a media law class was fired for quoting a leading campus speech code case that involved a basketball coach using the word in a pep talk;15 a Princeton anthropology professor offered the word as an example of what the class would be exploring in a study of taboos;16 a philosophy professor discussing the Washington Redskins’ team name analogized it to “having a team called like, uh, the Florida [N-words]”;17 and a Georgetown professor said the word “while reading aloud from a

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17 Danielle Gehr, *Simpson College Students Demand Action After Professor Uses Racial Slur*, DES MOINES REG., Nov. 16, 2019 (expurgation in the article, though presumably not in the professor’s statement). 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. 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), vacated, 709 F. App’x 182 (4th Cir. 2018) (likewise, and also discussing the analogy between the two words in five other places); 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
course textbook,” though press accounts are vague on the context (perhaps because some view the context as irrelevant). In response to one such controversy, the University of Waterloo (Canada) issued a statement stating, “The University of Waterloo unequivocally believes that there is no place for the use of the n-word in class, on campus or in our community,” but later withdrew the statement on academic freedom grounds.

The main reason why voicing “nigger” occasions anxiety is that it is a notorious slur that has long been used to demean, insult, intimidate, and terrorize African Americans. It often accompanies horrific racist violence; Rodney King testified that the police said it when beating him, Abner Louima reported that the police said it when brutally sodomizing him, and those are the tip of the iceberg. The slur has been put

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, Lee v. Tam, 2016 WL 6833411, at 24 (similarly analogizing “redskin” to “nigger” in discussing football team names, and mentioning the latter word 12 times in the course of the brief, which deals with epithets as trademarks more broadly); Partial Testimony of David K. Barnhart, Pro-Football, Inc. v. Blackhorse, No. 114CV01043, 1997 WL 35385486 (counsel asking expert witness about this analogy, in the Washington Redskins trademark cancellation case).

18 Caroline Hamilton, University Investigates Racist Comments by Sociology Professor, GEORGETOWN VOICE, Aug. 10, 2020 (quoting the university’s “Vice President for Diversity, Equity and Inclusion” as “explaining that it was not acceptable for him to use the word, even in a supposedly pedagogical context”).


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


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

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

There are, however, other words with toxic associations: KKK, lynching. Nazi. Auschwitz. Genocide. Rape. Indeed, one reason sometimes given for eschewing any vocalizing of the word “is precisely its association with lynching and other forms of racial violence. The words we just mentioned are just as clearly associated with the cruelest forms of violence. Yet they are routinely discussed without expurgation or euphemism, especially in the university (and in our own department, law).

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

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

To us, enunciating slurs for pedagogical purposes is not simply defensible. We think that, used properly, such teaching helps teach and reinforce important academic and professional norms of accuracy and precision in use of sources. Accurate quotation is particularly proper in law teaching because grappling with unredacted facts is a professional requirement among jurists, one for which law students ought to be prepared. But the same, we think, should apply in history classes, devotion to accurate recounting of sources being a fundamental part of the historical method; in classes on

23 See infra note 126 and accompanying text.
24 See infra note 131–133 and accompanying text.
25 Cf. Tatyana Tandanpolie, Encountering Trauma in the Classroom, WASH. SQUARE [NYU] NEWS, Apr. 20, 2020 (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 (“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.”).
26 See infra Part II.B.
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. 27

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

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.28 Likewise, court cases involving an epithet routinely turn on whether some defendant or employee who denies having said the epithet is telling the truth. But to resolve those disputes we again need to grapple with unredacted facts about what people claim was said.

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

Note that we are not making an argument here specifically about First Amendment law.29 Nor do we just appeal to broad principles of academic freedom. Rather, we are arguing that accurately quoting source material is sound pedagogy—not just something we have a right to do, but itself the right thing to do (or at least one plausible right thing). This means that such quoting is fully consistent with proper professional standards, which is relevant to applying academic freedom principles. 30 But it goes beyond just reliance on those principles.


29 The leading First Amendment academic freedom case on this score is Hardy v. Jefferson Comm. Coll., 260 F.3d 671, 675 (6th Cir. 2001), which held that a public college professor’s mentioning epithets (there, “nigger” and “bitch”) in class discussions was generally protected, when “germane to the subject matter of his lecture.” Id. at 679. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006), did not resolve whether professors’ speech in “classroom instruction” is presumptively constitutionally protected against employer punishment. 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 550, 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).

30 The leading discussion of academic freedom (as opposed to the First Amendment) and the freedom to teach is likely the American Associate of University Professors 2007 Freedom in the
Both of us take this view, but one of us (Randall Kennedy) has this to add:

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

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

II. THE USE-MENTION DISTINCTION IN THE LEGAL PROFESSION

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

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

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

Nor is this a reflection of some special callousness towards this one epithet. Courts also accurately quote other epithets. To give just one illustration, the word “cunt” appears in over 1500 Westlaw-accessible opinions, over 3500 appellate briefs and trial court filings, and 600 law review articles. Unsurprisingly, these documents are written by both male and female authors; just to take as a sample the dozen most recent authored appellate opinions containing this word, five were written by women and seven by men— not far removed from the general female/male ratio on the federal appellate bench.31

31 United States v. Waggy, 936 F.3d 1014 (9th Cir. 2019); Chinery v. Am. Airlines, 778 F. App’x 142 (3d Cir. 2019); Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019); Campbell v. Hawaii Dep’t of Educ., 892 F.3d 1005 (9th Cir. 2018); Franchina v. City of Providence, 881 F.3d 32 (1st Cir. 2018); United States v. Salinas-Acevedo, 863 F.3d 13 (1st Cir. 2017); United States v. Roy, 855 F.3d 1133 (11th Cir. 2017); United States v. Anletto, 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.
This is not a sign, we think, that judges are generally vulgar or sexist. We expect many of them would never write the word as an epithet, but when the word is part of the record, they quote it. They insist on accuracy much more than do newspapers: Searching through Lexis’s Major U.S. Newspapers database (which archives articles in 48 major newspapers) reveals exactly one quotation of “cunt,” in a 2009 article from the music calendar section of the San Antonio Express News, as part of the name of a “hardcore death metal band.”

We see the same for other vulgarisms of the sort that newspapers view as “unprintable.” Consider this for comparison: The word “motherfucker” and its variants have never appeared in the print editions of 38 out of the 48 major U.S. newspapers; in the remaining ten, it appeared only sixteen times put together. But it has appeared in over 10,000 Westlaw-accessible opinions before 2019, including six from the U.S. Supreme Court (dating back to 1974) and over 500 from the U.S. Courts of Appeals. Judges seem to value 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-Judge per curiam signed on to by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

On the Ninth Circuit, they include Judges Nguyen, Murguia, Pregerson, Christen, Berzon, Fisher, Tashima, W. Fletcher, Graber, Thomas, Tallman, Rawlinson, among others—and that’s just back to 2008. On the California Supreme Court, they include Justices Kruger, Liu, Cantil-Sakauye, Kennard, Chin, Moreno, and more, and that too is just back to 2008. On the D.C. Circuit, they include Judges Millett, Tatel, Rogers, Wald, and Edwards. One of the incidents that we cited in the Introduction involved a tenured department chair being fired for mentioning the word twice in teaching a media law class, while quoting a Sixth Circuit opinion that mentioned the word 19 times—an opinion written by the trailblazing African-American Sixth Circuit Judge Damon Keith.

Roy, 761 F.3d 1285 (11th Cir.), reh’g en banc granted, opinion vacated, 580 F. App’x 715 (11th Cir. 2014), and on reh’g en banc, 855 F.3d 1133 (11th Cir. 2017).

32 There are also four other references that appear from context to either be typos in the original or mistranscriptions by Lexis.

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

34 They date back to 1906, though there’s only a smattering until 1964.

35 See also Cruz v. Coach Stores, Inc., 202 F.3d 560, 568, 570, 571 (2d Cir. 2000), superseded on other grounds.

36 See supra note 15.

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

Other judges have quoted the word in treatise chapters and law review articles.

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

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

1. As we suggested, they likely concluded that, in legal matters, accurate reporting of the facts is a key facet of rendering justice, even when an expurgated version 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.”

2. 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.” 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 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.

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40 464 P.3d 717, 722 n.6 (2020). The court here was quoting the word “nigga,” which appears in over 2,200 post-2000 opinions; but the other search results we cite in this Part all relate to the spelling “nigger,” unless otherwise specified.

41 Kernan v. State, 460 P.3d 998 (Nev. App. 2020); see also 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) (“Because of the nature of Moter’s convictions [for computer harassment], we regrettably must repeat his statements verbatim without sanitizing his profanities.”).

42 928 F.3d 947, 950 (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 Fennell v. Marion Indep. Sch. Dist., 963 F. Supp. 2d 623, 629 n.1 (W.D. Tex. 2013)
In all these cases, of course, the judges could have avoided including the full slurs by giving an expurgated version. But as in the thousands of other cases we referred to, they preferred uncensored accounts of the important facts.

Likewise, lawyers must thus sometimes set forth such accounts to persuade such judges. To be sure, sometimes lawyers may find censored accounts more valuable for tactical reasons. But they need to be ready to offer either version, as their clients’ needs dictate.

2. The judges also appear to adopt what philosophers and linguists call the “use-mention” distinction. Though they doubtless think that using the word as an insult is wrong, they apparently see it as quite proper to mention it as a fact from the record.45

(“The Court repeats these racial epithets herein only because they are essential to an understanding of the Plaintiffs’ claims.”); Hamm v. Weyauwega Milk Prod., 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 Indiana, 853 F.3d 339 (7th Cir. 2017); see also Whittlesey v. Labor & Indus. Review Comm’n, No. 2018AP2164, 2020 WL 1887838, *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.”); Canada v. Samuel Grossi & Sons, Inc., No. CV 19-1790, 2020 WL 4436855, *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.

43 Consider, for instance, King v. Super Serv., Inc., 68 F. App'x 658, 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 likely being “derogatory terms for ‘homosexual’” and “express[ing] to [plaintiff] their professed belief that he wanted to perform oral sex on them,” id. at 661. As always, persuading a judge or jury requires exercising judgment, including reading the audience’s facial expression, 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, apparently concluded that expressly quoting the word “faggot” from the record is sometimes important, see Ondu v. City of Cleveland, 795 F.3d 597, 602, 606–07 (6th Cir. 2015).

44 Occasionally, attempts to use euphemism can be confusing, though we expect that’s rare. See, e.g., Baptistas Bakery, Inc. & Teamsters Local Union No. 344 Sales & Serv. Indus., Affiliated with the Int'l Bhd. of Teamsters, 352 NLRB 547, **32 n.71 (2008) (“It’s not clear from the record if McCall here, used the actual slur ‘nigger,’ or used the euphemism, ‘the N-word.’ I had asked the witnesses not to burden the record by continuously using the slur after the first use, and it’s unclear whether Blanquel, in his testimony, was simply following my instructions or accurately quoting McCall.”); Barrow v. Living Word Church, No. 3:15-CV-341, 2016 WL 2619754, *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”).

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.”46 And courts follow the same pattern as to 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 Murguia: “We have considerable difficulty accepting . . . that, at this time in our history, people who use the word ‘nigger’ are not racially biased.”47 Surely that’s right, but surely the judges didn’t think this makes them racially biased for including the word, or for quoting it six other times in the opinion. Rather, the judges are distinguishing mentioning the word (which they apparently view as quite proper) from using it (which they recognize is strong evidence of racial bias).

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.48 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.

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.”49 The court acknowledged that “the racial slur read by Oglesby is particularly odious, and ‘pure anathema to African-Americans,’” but added:

46 Bogard v. State, 449 P.3d 315, 331 (Wyo. 2019); id. at n.15 (citing other such cases); see also People v. Gonzalez, No. B296206, 2020 WL 1815073, *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 Matter of B.N.M., 2017 WL 1650143, *5 (N.C. Ct. App. 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 that is 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., State v. Ellis, No. 1 CA-CR 09-0257, 2010 WL 2299007 (Ariz. Ct. App. June 8, 2010) (“the 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 effect”). Here, we just note that many courts do follow the use/mention distinction in their decorum rules.


48 Thomas v. Evansville-Vanderburgh School Corp., 258 F. App’x 50, 52, 53 (7th Cir. 2007) (Ripple, Manion & Wood, JJ.).

Context 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.50

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.

Some judges do prefer “n-word” or “n****r” or “n----r,” just as some judges prefer to expurgate vulgarities.51 But such opinions are distinctly rarer than the ones with the accurate quote: Since 2000, the number of opinions containing such expurgated versions is about 1/3 of the 9500 that spell the word out.52 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.53

And lawyers likewise seem to generally 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.54 The full spelling appears in briefs from the NAACP, the ACLU, LAMBDA, and many other organizations,55 as well as 27 briefs signed by then-California-Attorney-General Kamala Harris.

50 Id.; see also In re Stocks, No. 2010, 2011 WL 1601168, *4 (EFPS Apr. 18, 2011) (finding “that appellant 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”).


52 Some expurgations, chiefly “n*****” and “n-----,” are hard to search for in Westlaw, since Westlaw ignores special characters. To deal with this, we searched 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.)


54 The query discussed in note 52 yields an expurgated-to-unexpurgated ratio of about 30%.

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, and only a small fraction of all cases even in those courts.) Likewise, the trial court transcripts appear to represent only a tiny fraction of all trials and hearings.

That limited oral arguments database contains 54 references to the word in appellate arguments since 2000, or 200 if you include trial and pretrial transcripts. Working from the 5% coverage estimate, we can estimate that the word has likely been used over 1000 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, including even in jury instructions. Likewise, searching in Westlaw for the word 11 times, chiefly in trial excerpts: Plaintiffs-Appellants’ Opening Brief, M.D. v. School Bd. of the City of Richmond, No. 13-1813, 2013 WL 4725092 (4th Cir. Sept. 3, 2013) (filed by Lambda Legal Defense & Education Fund) (quoting the word 8 times); Amicus Brief of Washington Employment Lawyers Association & ACLU-Washington, Int’l Union of Operating Engrs., Local 286 v. Port of Seattle, No. 86739-9, 2012 WL 5415066 (Wash. Oct. 12, 2012) (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).

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).

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 2000-19, or under 2000 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 2000-19) likely heard about 610,000 oral arguments; 38,500/(157,000+610,000) is about 5%.

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.


See, e.g., Brief of United States, United States v. Nikparvar-Fard, No. 18-1720, 2018 WL 6248428, *49 (3d Cir. Nov. 28, 2018) (quoting trial judge instructing 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 “The district court also did not abuse its discretion in declining to redact Nikparvar-Fard’s use of racial and homophobic
(testif! testimony) +p nigger & date(aft 1/1/2000) yields over 3000 results; and though a few are false positives, there are doubtless vastly more cases in which the word is spoken during testimony but the court has no occasion to mention it in its opinion (or no opinion is written).

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.”

This of course fits well with the use-mention distinction. We suspect that virtually no judge or lawyer would write a racial epithet in an opinion to use it as an insult (e.g., of a party or a witness). We are all literate folk, and we all know the power of the written word.61 But judges and lawyers routinely write such epithets to mention them, usually in a reference to the record or to a precedent. Likewise, judges and lawyers wouldn’t orally use an epithet to insult someone in court, but they do mention them when they are relevant parts of the record in oral argument. Conversely, the logic of those who reject the use/mention distinction for oral references would also mean that written references should be expurgated, too.62

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

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 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”).

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

62 See, e.g., Stanford Undergraduate Senate, supra note 14 (condemning a professor’s writing the rap group name “Niggaz Wit Attitudes” in a class discussion post); see also UPI, K.C. Mom Wants ‘Mice and Men’ Removed, Sept. 23, 2008 (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, Tenn.), Nov. 19, 2019, https://www.newscallchannel5.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), Sept. 7, 2020, https://twitter.com/robbysoave/status/1303029039645552641 (quoting e-mail asking him to expurgate the word in his magazine articles); @Arguendope, Mar. 31, 2020, 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).
Here is a recent example: *State v. Liebenguth*, a 2020 decision from the Connecticut Supreme Court considering whether defendant’s calling a parking enforcement officer a “fucking nigger” constituted fighting words. 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, amounting to over 20,000 words. All the opinions, of course, sharply condemned the use of epithets like this, and in particular remarked on the offensiveness of this particular epithet.

But all the opinions also did not hesitate to mention the word, indeed a total of 52 times. (For whatever it’s worth, two of the seven Justices are black, and though they did not write any of the opinions, they signed on to the majority, which mentioned the word the most.) Nor was the word omitted during oral argument; two Justices mentioned it there, a total of six times. Naturally, this is an unusually high number of mentions, but that’s just because the word was so integral to both the facts of the case and the legal dispute; attenuated versions of this play out in court all the time, as the evidence gathered above shows.

As it happens, the lawyers in *Liebenguth* seemed to deliberately balk at mentioning the word in the oral argument—it was the Chief Justice who brought it up, and another Justice who quoted it later. And the defense lawyer’s failure 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. (The Chief Justice was not opposing quoting the word; indeed, he quoted it himself in his question.)

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

These authors generally send out their articles to dozens of law journals, to be read by dozens of law review editors—as part of the editors’ jobs—and then (with luck) by

62 __ _A.3d__ (Conn. 2000).

64 The lower court opinions, which were a bit under 10,000 words long, mentioned the word 30 times.

65 Oral Arg. at 1:38, *State v. Liebenguth*, No. SC 24015 (Mar. 29, 2019) (“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.

66 Id. at 41:30.

67 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.”).

68 Id.
more law students, lawyers, law clerks, judges, and law professors who form the articles’ audience. Yet the authors seem to generally adhere to the distinction between using epithets as insults (improper) and quoting them as facts (quite proper). They do not seem to think that forcing the readers to encounter the word is a horrible imposition.

Branching out beyond the legal profession, we should note that even the NAACP’s 2014 resolution condemning the use of the word (“NAACP Official Position on the Use of the Word ‘Nigger’ and the ‘N’ Word”) sharply distinguishes casual use from at least certain kinds of mention. 69 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.”70 Though we might not draw the line quite the same way the NAACP did, we think the NAACP was right to make clear that mentioning the word is generally proper when discussing its prejudiced uses by third parties, or when framing it in its historical context. And of course the NAACP’s use of the word in the title of its own resolution helps highlight the propriety of mentioning the word when it is the word itself that is being discussed.

B. Not Mispreparing Law Students for the Profession

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

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

These lawyers have undoubtedly made the judgment that quoting the full word is needed for them to effectively advocate on behalf of their clients.71 Indeed, being prepared to quote such words is often especially useful to lawyers who are arguing that

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

70 Id.

71 In constitutional law the classic example is Professor Melville Nimmer’s argument before the Supreme Court in Cohen v. California, 403 U.S. 15 (1971). The issue was whether police had violated Cohen’s First Amendment rights by arresting him for supposedly disturbing the peace solely by wearing in a courthouse a jacket emblazoned with the words “Fuck the Draft.” At the
their clients were victimized by racists—Johnnie Cochran’s enunciation of the word repeatedly in the O.J. Simpson murder case, quoting the infamous police officer Mark Fuhrman, in the presence of the jury, is just the most famous example.72

Many appellate cases have made clear that lawyers are entitled to play recordings containing the word,73 or have witnesses testify about use of the word.74 Though sometimes such epithets may be inadmissible, for instance because they are not seen as relevant enough,75 they can often be central to one or the other side’s case, and lawyers advocating for their clients will need to get them introduced.

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

Jurors may be deciding (as in the O.J. case) whether to believe an allegedly racist police officer. Or they may be deciding whether the defendants should be held liable for conspiring to organize racist violence in Charlottesville in 2017.76 Or a judge may argument, Chief Justice Warren Burger hinted that he would prefer for counsel to forgo enunciating the vulgarity. “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, 337–38 (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.” BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN __ (1979).

72 Officer Fuhrman, a key witness for the prosecution was discovered to have referred to blacks as “niggers” on audiotape. Lawyers for the state tried desperately to prevent that evidence from reaching the jury. Prosecutor Christopher Darden declared that, because “nigger” is “the filthiest, nastiest word in the English language, references to it would distract and indeed blind the jury.” “It will blind them to the truth. . . It will effect their judgment. It will impair their ability to be fair and impartial.” Cochran argued in response that it was “demeaning” to suggest that black jurors—“African Americans [whose forbears] have lived under oppression for two hundred-plus years in this country,” and who themselves had lived with “offensive words, offensive looks, [and] offensive treatment every day of their lives”—would be unable to deliberate fairly if they were made aware of a witness’s racial sentiments as evidenced in part by his linguistic habits. See KENNEDY, supra note 61, at 85–86; see generally JEFFREY TOOBIN, RUN OF HIS LIFE: “THE PEOPLE V. O. J. SIMPSON” (1996).

73 See, e.g., Brown v. City of Hialeah, 30 F.3d 1433, 1436 (11th Cir. 1994).


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

76 See Sines v. Kessler, 324 F. Supp. 3d 765 (W.D. Va. 2018) (allowing the case to go forward and quoting “nigger” 7 times from the Amended Complaint); Transcript of Motion to Dismiss Hearing, ECF No. 321, id., at 73 (May 24, 2018) (quoting the lawyer saying the word in the
be deciding how to sentence someone convicted of a racist hate crime,77 or whether to reduce an allegedly racist prisoner’s sentence,78 or whether to reduce the sentence of someone who was provoked to violence by the target’s racist slur.79

Or jurors may be deciding whether the defendant was reasonably afraid of injury or even death from someone who had used the slur and was therefore justified in using force in self-defense.80 Or they may be considering whether coworkers had created a racially hostile environment for the plaintiff.81 Or they may be evaluating the magnitude of the emotional distress suffered by an employee who was called “nigger,” or deciding whether a defendant was guilty of using “fighting words”82 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

77 See, e.g., Transcript of Sentencing Hearing, ECF No. 69, United States v. Lecroy, no. 8:18-cr-00480-BHH, at 11 (D.S.C. June 11, 2019) (quoting prosecutor’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”).

78 See, e.g., Government’s Memorandum in Opposition to Defendant’s Motion to Reduce Sentencing, ECF No. 503, No. 6:03-cr-06033-DGL, at 10, 12, 14 (W.D.N.Y. Aug. 23, 2019); Transcript, ECF No. 526, id. at 93 (Dec. 17, 2019) (“Q. You indicated earlier . . . that the Dirty White Boys is a group that targets gay people and minorities? . . . Q. Okay. And would you say that somebody who has referred to ‘niggers’ and ‘Spics’ in correspondence with others might very well share those values as being pro white and anti-minority?”); see also Transcript of Detention Hearing, ECF No. 28, United States v. Bogard, No. 5:19-CR-106(1)-DAE, at 57–58 (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?”).

79 See, e.g., Reply Brief of Appellant [Defendant], Robinson v. State, No. 09A04-0902-CR-0009, 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 . . . . ”).


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

82 Cf., e.g., Transcript, ECF No. 65, Hernandez v. Hernandez, No. 1:13-cv-00153, at 135–36 (N.D. Ill. June 13, 2014) (quoting testimony before a jury about plaintiff’s standing “with his fists balled shouting, ‘Mother-fucking niggers. Mother-fucking niggers,’ where the legal issue was whether defendant police officers had reasonable suspicion to perform a Terry stop of plaintiff).
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,” it’s hard to imagine how the jury would do that without hearing the actual words.

Likewise, if a black defendant in a homicide case is claiming that he acted in reasonable self-defense, he needs to be able to testify that the deceased had said things like, “look at that nigger there” and “[n]ow I’m going to knock your nigger head off,” since that may be critical in deciding whether the defendant reasonably feared that the deceased would attack him, and in deciding whether the deceased likely engaged in other threatening acts. And the prosecutor needs to be able to introduce contrary evidence from the deceased’s friend:

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

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.

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

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

“Practice like you play, because you will play like you practice,” goes the advice both from coaches and from experts on education. 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.

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

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

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

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

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

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

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

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

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

In all those situations, a lawyer’s goal should be to avoid being caught off guard or upended, and instead simply to take the word as just one unpleasant fact that is being discussed. To the extent that some law students have come to have “a physical reaction

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that [is] difficult to control” simply from hearing such commonplace mentions in professional settings, we should try to educate them to avoid or at least rigorously manage such reactions. Insisting on the principle that “mentioning” is very different from “using” is an important part of that education.

III. THE RACE OF THE SPEAKER

Should the speaker’s race make a difference here, cloaking one of us, for instance, with more leeway than the other?89 We think not: To take such a position would be a profound violation of sound scholarly principles.90

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

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

Consider ethnic jokes. People often enjoy jokes that laugh at their own group’s familiar foibles, but only if they think the joke is said with affection rather than hostility. If a Jewish speaker tells a typical Jewish joke to someone who knows the speaker is Jewish, it’s unlikely to be perceived as anti-Semitic. (Of course, much depends on the joke.) But if the speaker isn’t known to be Jewish, listeners, especially Jews, might wonder whether the purported joke is a cover for antagonism (again, depending on the joke and depending on how well they know the speaker). The same is likely true of people using pejoratives to greet each other.91

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

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

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

See Open Letter, http://reappropriate.co/2020/04/open-letter-ucla-laws-apilsa-responde-to-professor-stephen-bainbridge/ (quoting that flyer). Or, in the words of Above The Law Executive Editor Elie Mystal, “I can say it, you can’t, fuck you if that bothers you.” Elie Mystal, If One More White Person Tells Me About the Use-Mention Distinction to Justify Saying the N-Word, I’m Going to Vomit, ABOVE THE LAW, Aug. 30, 2018, at 2:17 pm, https://abovethelaw.com/2018/08/if-one-more-white-person-tells-me-about-the-use-mention-distinction-to-justify-saying-the-n-word-im-going-to-vomit/; John Turner, N-Word Has No Place in Educational Settings, THE ITHACAN, Sept. 19, 2019 (“The word ‘nigger’ has never had a positive connotation. . . . No matter its origins, the N-word is never appropriate for a white person to say. It is not appropriate while in the privacy of your home, while teaching students in a classroom, while reading a novel or while singing along to a rap song.”); Yulia Nakagome, USC Professor Placed on Leave After Speaking Chinese Should Be Reinstated, DAILY TROJAN, Sept. 22, 2020 (“[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.”).

90 See KENNEDY, supra note 10, at __ (Kindle ed. ch. 1, following n. 106, ch.3, near nn.34-36).

91 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.’”).
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 evidence that the speakers—all of whom were white—intended to demean, insult, or terrorize blacks. In no instance is there evidence 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 his or her audience by deploying the academic setting as a pretext for trying to insult.

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

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

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

To conclude that [a defendant] may act in accordance with the social norm that it is permissible for African Americans to use the word but not whites would require a determination that this is a “good” race-based social norm that justifies a departure from

92 See supra note 89.

93 Mystal, supra note 89, argues that “I suspect that these white people who want so desperately to mention the n-word, in public, are the very same ones who enjoy using the n-word, in private,” though he acknowledges that he “can’t prove that.” We do not find his suspicion compelling: We very much doubt that, for instance, Justice Ginsburg or Judge Pregerson or Judge Tatel or any of the other judges who have mentioned the word in their opinions, see Part II.A, indeed enjoyed calling people using such epithets in private—any more than we would infer that a historian or filmmaker whose works depict a Nazi swastika secretly enjoys painting swastika graffiti on synagogues.

94 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.

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.”

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. Indeed, in one recent controversy, a letter purporting to be from black students said that a USC Business School professor’s saying the Mandarin word “neige”—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.” The Dean of the Business School seemed to agree, suggesting that saying the Mandarin word “harm[s] the psychological safety of our students.” The letter led the professor to be removed from the class, and replaced by a different teacher.

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 students: Employers who believe such claims may well be reluctant to hire black employees. If hearing ordinary Chinese conversation really affects black business school graduates’ “mental health,” would an employer with many Chinese-speaking clients, employees, or contractors be eager to hire such graduates? If hearing racial slurs


97 See, e.g., Tandanpolie, Encountering Trauma in the Classroom, supra note 25 (stating that hearing the slur in class can trigger “traumatization”); Terrence Chambley Jr., Augsburg is Excluding Students Under the Guise of Academic Freedom, AUGSBURG ECHO, Nov. 16, 2018 (“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: J. OF INCLUSIVE SCHOLARSHIP & PEDAGOGY 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://poetsandquant.com/2020/09/04/usc-marshall-prof-suspended-after-using-a-chinese-term-that-is-similar-to-the-n-word/ (quoting e-mail from USC Business School dean saying that “this disturbing episode that has caused such anguish and trauma”); Georgetown Univ. Law Center Black Law Students’ Ass’n (@GeorgetownBLSA), Sept. 8, 2020, 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”).

98 “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.

99 Id. (quoting students’ complaint). See also Shardaa Gray, OU Students Speak out After Second Professor Used N-Word in Classroom, NEWS4SA (San Antonio), Feb. 25, 2020 (“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”).


101 Id.
quoted in depositions or courtrooms really causes “trauma” to black lawyers, would a party in a case where the word is part of the facts really want to hire such a lawyer?

Still, we acknowledge that some people are indeed offended by the term, even in quotes from documents or court opinions. And doubtless the word (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. This may understandably lead to the desire to avoid “talk of rope in the hanged man’s house,” as the old proverb goes.

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

A medical student may be understandably disturbed by blood, or by death. A student preparing to be a psychiatrist may be understandably disturbed by patients’ dark fantasies or suicidal ideas or violent sexual impulses, or even just by patients’ recounting of abuse that they had experienced themselves. But the job of a professional school is not to shield students from such matters, but to train students to “retain a state of equanimity” when dealing with these matters as calmly as possible—something that “can only be achieved through careful and supported deliberate ‘exposure’ to potentially traumatic material.” “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.

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103 The proverb in those words can be traced back at least to MIGUEL DE CERVANTES SAAVEDRA, THE HISTORY OF DON QUIXOTE DE LA MANCHA __ (1605) (Tom Lathrop trans. 2011), but there is a version in the Talmud, which dates back at least about 1500 years. BABYLONIAN TALMUD, BAVA METZIA 59b.

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


106 Patricia J. Shannon et al., Exploring the Experiences of Survivor Students in a Course on Trauma Treatment, 6 PSYCH. TRAUMA S107, S114 (2014).
Professors should think about how best to present potentially distressing material. But trying to insulate students from such material is a dubious enterprise. The same applies to the education of law students.

Fortunately, feelings of hurt are not unchangeable givens, untouched and untouchable by the ways in which their expression is received. Such feelings are, at least in part, affected by the responses of observers.

The more that schools validate the idea that feeling hurt simply by hearing certain facts is justified in these circumstances, the more the feeling will be embraced, and the more there will be calls to respect that reported distress by requiring the avoidance of that which is said to trigger it. On the other hand, if we tell students that, in the circumstances pertinent here—circumstances in which a term is being mentioned for the sake of accuracy, just as respected judges routinely mention it in their opinions for the sake of accuracy—there is no good reason to feel hurt, we can better help train them to deal with these and other difficult facts calmly in the fashion one expects of effective counsel.

Of course, we know that some people take the contrary view; consider this quote from someone who was criticizing a USC professor for giving 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 . . . .”

But, as we suggested above, this approach is likely to hurt the very people it aims to help. Employers in China doubtless 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.

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107 “Trigger warnings” are sometimes recommended as a tool for making potentially distressing material easier for students to process; but recent research suggests that they are not helpful. Mevagh Sanson, Deryn Strange & Maryanne Garry, Trigger Warnings Are Trivially Helpful at Reducing Negative Affect, Intrusive Thoughts, and Avoidance, 7 CLIN. PSYCH. SCI. 778 (2019), or even “cause small adverse side effects,” Payton J. Jones, Benjamin W. Bellet, Richard J. McNally, Helping or Harming? The Effect of Trigger Warnings on Individuals With Trauma Histories, 8 CLIN. PSYCH. SCI. 905 (2020), such as by increasing “risk for developing PTSD in the event of trauma, and disability-related stigma around trauma survivors,” and “increasing immediate anxiety response for a subset of individuals whose beliefs predispose them to such a response,” Benjamin W. Bellet, Payton J. Jones, Richard J. McNally, Trigger Warning: Empirical Evidence Ahead, 61 J. BEH. THERAPY & EXP. PSYCHIATRY 134 (2018).


109 See Vic Marsh (@vicmarsh), TWITTER, Sept. 4, 2020, 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 deep breath, USC, and give the linguist back pay.”); Black China Caucus (@BLKChinaCaucus), TWITTER, Sept. 4, 2020 (“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!” (quoting favorably a post stressing that “nèi ge” is a standard, commonly learned facet of Mandarin)).
Indeed, we expect various other professionals to acquire such training, formally or otherwise. In many jurisdictions, for instance, insults said to police officers generally don’t qualify as “fighting words” because “trained police officer[s]” are expected to have learned to “exercise restraint” even when they are directly personally insulted (and not just when they hear quoted insults, for instance in interviewing witnesses). People whose jobs bring them in contact with clients who are dealing with stressful situations are similarly trained to try to ignore occasional lashing out by the clients. We should likewise reasonably expect trained lawyers to learn not to be unduly distressed when they simply hear how a word was used to personally insult someone else. And we should therefore expect law students to have been trained this way before law school, or to acquire it in law school.

Some have argued that mentioning the word in the classroom improperly “places a burden on Black students that other students do not face.” We are skeptical about the magnitude of the burden; indeed, we doubt that it is materially greater than the normal burdens that students may face in some situations. Any reference, using 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 terrorist group; any reference to Israel may be especially upsetting to students of Palestinian extraction whose families have been mistreated by the Israeli government—yet we do not think that any of this would be a basis for expurgating such matters from the classroom. But in any event, if it is true that black law students are particularly upset by even a mention of the word, then the school especially owes it to those students (and to any other students who are upset) to prepare them for legal practice, in which they may come across those words under circumstances where much more is at stake than in a typical classroom.

We appreciate that students pay a good deal of money to attend law school. They are customers and expect good customer service. University education, though, is one area where the customer is not always king. Independence from the customer is partly reflected in the concept of academic freedom, which entails liberty from restrictions imposed not just by legislatures or chancellors or donors but also students. But such

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111 See, e.g., Mallory Moench, PG&E Workers, Families Fear Public Anger Amid Outages; It’s ‘Nerve-Racking’, S.F. CHRON., Nov. 1, 2019 (noting that utility workers are “trained to ignore insults” from upset customers); Steve Whitehead, 6 Ways to Defend Yourself Against Verbal Abuse, EMS 1, Apr. 23, 2020 (article aimed at emergency medical service providers), https://www.ems1.com/safety/articles/6-ways-to-defend-yourself-against-verbal-abuse-FpPuuZg5x9w4ALT/.

independence also stems from the central purpose of the university, which is to prompt students to question and reexamine their reactions—both their intellectual reactions and their emotional ones—rather than merely taking those reactions as immutable.113

V. OTHER OFFENSIVE WORDS

Rejecting the use-mention distinction as to one offensive word is also 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.114 At a college in Kentucky, an adjunct who was lecturing on “how language is used to marginalize minorities and other oppressed groups in society” had his contract ended both because he discussed the word “nigger” in class and because he discussed the word “bitch.”115

Students have likewise stated that professors ought not quote the “f-word” (meaning “fag,” as in Snyder v. Phelps).116 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”117—the “such as” suggests that other terms are to be condemned as well (with “fag” being one plausible example). And one university indeed condemned a professor not just for quoting the word “nigger” from a precedent he was discussing, but also for quoting “fag” in teaching Snyder v. Phelps.118

At Columbia University, Columbia College Chicago, and the University of York (England), professors have been faulted for quoting the word “negro.”119 A Smith College newspaper’s transcript of a panel on “Challenging the Ideological Echo Chamber:

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


117 See Rubino, supra note 3.

118 We were asked to keep the identity of the university confidential, but we have been told that our public records request for an unrestricted version of the report will be filled shortly.

Free Speech, Civil Discourse and the Liberal Arts”—a panel which drew controversy because Wendy Kaminer, a noted author on free speech, mentioned the word “nigger” when discussing the controversy about the word—not only expurgated that word but also replaced the word “crazy” with the text “[ableist slur].” 120 (This was in an otherwise complete transcript of the panel, not in the newspaper’s own pages, where editorial judgments would normally be common.)

At USC, as we noted above, a business school professor and specialist on China was removed temporarily from teaching his class, because, in discussing filler words such as “er” and “um”—in English and in other languages—he gave as an example the Mandarin word that’s sometimes transliterated as “neige” (meaning roughly “that”) and sounding very roughly like “nigger.” 121 And well before that, a student at the University of Wisconsin testified before the Faculty Senate, when that body was considering a proposed speech code, faulting a professor for mentioning Chaucer’s use of the word “niggar” “and . . . continu[ing] to use it even after she told him that she was offended.” “I was in tears, shaking,” she told the faculty. ‘It’s not up to the rest of the class to decide whether my feelings are valid.” 122

For some religious people, blasphemy can be as upsetting as insults, and can indeed be seen as a form of insult. For instance, in January 2015, shortly after the Charlie Hebdo murders, several University of Minnesota professors put together a panel called Can One Laugh at Everything? Satire and Free Speech After Charlie. The flier for the panel contained the now-iconic post-murder Charlie Hebdo cover depicting a cartoon of the Moslem holy figure Mohammed. The university’s Office of Equal Opportunity and Affirmative Action (EOAA) ordered staff to take down copies of the flier because some people were offended by its depiction of Mohammed. 123
Of course, many other words bring up evil associations as well, including associations with murder. "Nazi" certainly would for people whose families were murdered in the Holocaust; so would "Auschwitz" and the like. The Holocaust may be decades in the past, but anti-Semitic violence is not. And there are other more recent genocides and terrorist campaigns. Some of our students may themselves be refugees from bitter ethnic conflicts or outright genocides. Many terms, whether pejoratives or the names of murderous organizations, may be understandably offensive to them, and even discussion of the genocide may be upsetting.

Indeed, at Indiana University, a janitor was found guilty of racial harassment simply for “openly reading the book related to a historically and racially abhorrent subject in the presence of your Black co-workers”—the book being Notre Dame vs. The Klan: How the Fighting Irish Defied the KKK. (The decision was reversed after the story went public, and the University was sharply condemned in the national media.) 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.”

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

Others have faulted professors who “expose Black students to images and videos of brutalized Black bodies . . . and explore texts that detail Black suffering” alongside those who “say the n-word without hesitation” (in quoting materials such as “white LGBTQ activist Carl Wittman’s ‘A Gay Manifesto’”). Likewise, the Oxford University student union adopted a policy called “Protection of Transgender, Non-binary, Dis-

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124 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).


127 Id.

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

129 Tandanpolie, supra note 25.
abled, Working-class, and Women* Students from Hatred in University Contexts,” demand- 
ing the removal of “ableist, misogynistic, classist or transphobic” “hate speech” from any course reading materials.\footnote{Emily Charley, Remove “Hateful Material” From Mandatory Teaching, Says SU Council, OXFORD STUDENT, May 1, 2020, \url{https://www.oxfordstudent.com/2020/05/01/remove-hateful-material-from-mandatory-teaching-says-su-council/}.}

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.\footnote{Sherry Colb, Why I Do Not Give Trigger Warnings, JUSTIA VERDICT, Aug. 29, 2018.} 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.”\footnote{Gersen, supra note 104.} 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.”\footnote{Id.}

VI. CONCLUSION

Several professors caught up in these controversies have said that, going forward, they will no longer vocalize “nigger,” because of the protests that such speech has drawn and because they are convinced that their pedagogical strategy of enunciating the word is not worth the distraction, the hurt feelings, and the complaints. We know some of these professors. We respect them and the decision they have made. But we disagree with it. It defers to the notion that the protest against all mentioning of a word should overcome a considered pedagogical judgment that learning would be enhanced by accurately airing the American language’s paradigmatic racial slur—and the judgment that learning for law students would be enhanced by applying the use-mention distinction that so many judges and lawyers follow.

Perhaps there is something to be said as a matter of prudence for adopting those professors’ position. We note, though, that it seems often to fail to obtain the settlement that its initiators undoubtedly sought to obtain as the gesture is scorned. Instead of being seen as a sign of good will, the gesture has been seized upon as a confession of error and deployed as an additional basis for attacking reputations unjustifiably.\footnote{Cf. Conor Friedersdorf, The Fight Against Words That Sound Like, but Are Not, Slurs, ATLANTIC, Sept. 21, 2020 (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, they saw it ‘as confirmation of their belief that he’s done wrong and he’s got character flaws.’”).}

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 this word encourages related demands (such as those reported in Part) that will generate a spate of words that are deemed automatically, unconditionally, undebatably unmentionable, without regard for context or meaning.

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

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

And it seems to us that giving in to this pressure to ban one word, and then others, would badly impoverish discussion in university classrooms. Imagine a First Amendment class in which a professor discussing Snyder would have to quote one of the signs in that case as “God Hates F-words” (or is it “God Hates Fa-words”?). Imagine a class discussion of the disputes about the use of “nigger,” “nigga,” and “negro”—a subject on

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


137 Certainly some gay men view the two slurs as equally insulting when said to them as an insult. See Richard Pearson, Homosexual Rights Activist Melvin Boozer Dies at 41, WASH. POST, Mar. 10, 1987, at B6, col. 1 (quoting address by Prof. Melvin Boozer, president of the D.C. Gay Activists Alliance, to 1980 Democratic National Convention in which he said, “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”), quoted approvingly in Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 38 (D.C. 1987). And if merely quoting one word is concluded to also be taboo, then people could quite understandably be upset that quoting the other is still allowed. 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 THE CRIT: CRITICAL STUD. J. 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”).

which there is actually a good deal of caselaw—in which the professor would presumably have to talk about “the n-r word,” “the n-a word,” and “the n-o word.” Or imagine a film class discussion of how the depiction of epithets has changed over the decades; presumably, the line from Bad News Bears would have to be quoted as “All


The latter question is complicated by the fact that 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, *5 n.5 (S.D. Fla. Dec. 5, 2012); Bolton v. Potter, No. 8:03-CV-2205-T-27EAJ, 2006 WL 118286, *2 n.4 (M.D. Fla. Jan. 13, 2006), aff’d, 198 F. App’x 914 (11th Cir. 2006), and sometimes 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 blacks—similarly to how “El Chino” is sometimes used to refer to Asians, whether or not of Chinese extraction, as with Peruvian politician Alberto Fujimori being nicknamed “El Chino” during his first presidential campaign, back in his pre-dictatorial years—and sometimes as a nonpejorative nickname for non-blacks. See Carlos Watson, The Improbable Life of Alberto Fujimori, OZY, Jan. 11, 2014, https://www.ozy.com/true-and-stories/the-improbable-life-of-alberto-fujimori/4786/; Ezequiel Adamovski, Ethnic Nicknaming: ‘Negro’ as a Term of Endearment and Vicarious Blackness in Argentina, 12 J. LAT. AM. & CARIB. STUDIES 273 (2017) (discussing how “negro” is sometimes used in a derogatory sense, but sometimes as a nickname “with no offense intended or taken”); Felix Contreras, Horacio “El Negro” Hernandez, JAZZ TIMES, Apr. 25, 2019 (discussing a noted Cuban musician, who does not appear to be black). Whether or not Spanish speakers would be wise to avoid casually using “El Negro” in English-language environments (much as one of us, when he came to the U.S. from Russia, was taught that “negr”—the polite term in Russian, Stefan Vanli, Why Russian-Speakers Call Black People ‘Negry,’ THE CONVERSATION, Jan. 11, 2018, https://www.the-dialogue.com/en/en83-why-russian-speakers-call-black-people-negry/—was best avoided in America, even when speaking Russian), the term “negro” is sometimes used in ways that end up appearing in litigation.

140 Indeed, one recent incident, see 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.
we got on this team . . . is a bunch of Jews, sp-words, n-words, pa-words [or perhaps spelt out letter by letter as p-a-n-s-i-e-s?]. . . . and a booger-eating moron.”

This process turns universities from places at which anything and everything is subject to examination into places for creating and reproducing taboos.

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

Responding properly to this larger effort will require an uncompromising insistence upon keeping free forums of expression, research, and teaching. Vigilance will be especially needed when censorship is advanced on behalf of rightly esteemed and thus morally weighty values such as racial justice: The nobler the end, the greater the danger that it will be seen as justifying even improper means.

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

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