

SCHOLARSHIP, TEACHING, AND PROTEST

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The preceding protest stems from Professor Michael McConnell’s use of an unredacted historical quote containing the N-word in one of his classes at Stanford Law School.¹ Professor McConnell began the quote with a warning and followed it with a condemnation. He intended to show how this nation’s founders were not unblemished heroes but also embodied deeply racist attitudes that have been part of our country’s history since its inception.² In other words, Professor McConnell was making an anti-racist teaching point. After talking with concerned students at Stanford, he has said that he will not use the N-word again.³

Some members of this *Law Review* determined this should not be the end of the matter, and this protest ensued.⁴ Parts of the protest statement highlight a desire to address racial inequities at our law school and within the *Law Review*. I applaud that desire. I hope that the protesters—and the rest of us—will hold our leaders accountable to recent commitments to pursue racial equity and racial justice.⁵ These commitments are achievable with time, money, and focus on specific initiatives.⁶ But they will be

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1. See Statement by the Undersigned Editors of Volume 97.

2. See Statement by Michael McConnell.

3. *Id.*; see also Erin Woo, *Law Professor Criticized After Reading Racial Slur in Class*, STANFORD DAILY (May 30, 2020), <https://www.stanforddaily.com/2020/05/30/law-professor-criticized-after-reading-racial-slur-in-class/>.

4. Some of the protesters originally wanted the *Law Review* to withdraw its publication offer to Professor McConnell. Washington University School of Law Dean Nancy Staudt prevented this action after consulting with the university’s general counsel but authorized this protest statement instead. The protesters note that they are “members of the first legal journal to publish Professor McConnell” since his May 27 classroom use of the N-word while reading a quote to make an anti-racist teaching point. Nevertheless, since May 27, Professor McConnell has been published by the *New York Times* and cited in opinions authored or joined by all nine justices of the United States Supreme Court. Michael W. McConnell, Opinion, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html>; *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267, 2020 WL 3808420, at *8 n.9 (July 8, 2020) (citing Professor McConnell); *id.* at *23 (Sotomayor, J., dissenting) (citing Professor McConnell); *Espinoza v. Mont. Dep’t of Revenue*, No. 18–1195, 2020 WL 3518364, at *8 (June 30, 2020) (citing Professor McConnell); *id.* at *13, *15 (Thomas, J., concurring) (citing Professor McConnell); *id.* at *22 (Gorsuch, J., concurring) (citing Professor McConnell).

5. Dean Staudt recently asserted that “[o]ur WashULaw community must stand together against racial injustice” and pledged “a commitment to action.” Email from Nancy Staudt, Dean and Howard & Caroline Cayne Distinguished Professor of Law, Wash. Univ. Sch. of Law, to Law School Community (June 17, 2020).

6. For example, this law school could establish an exoneration clinic or strengthen a long-term partnership with Arch City Defenders. We could hire more faculty of color—we can, as our own sociology department has demonstrated, have both excellence and diversity. See Adia Harvey Wingfield,

difficult to attain without a clearly defined purpose, something that most institutions of higher education struggle to name with particularity.⁷ If this law school wants to commit to addressing systemic and structural racial injustice, then it should say so, and it should do so.

While I stand with the protesters in their desire to address racial injustice, as the faculty editor of the symposium that follows, I object to this protest for four reasons. First, the protest does not belong in a symposium on law and religion. Second, there is disagreement as to whether Professor McConnell actually violated an academic norm. Third, the protest creates ambiguities for current and future classroom norms. Finally, because Professor McConnell has already committed to changes in line with what the protesters presumably demand of him, the protest appears more punitive than change-oriented.

1. This protest has nothing to do with the symposium's intellectual content.

I respectfully disagree with Dean Nancy Staudt's appeal to "free speech and the open exchange of ideas" in authorizing this protest.⁸ A commitment to free speech does not mean that every venue welcomes all viewpoints on all subjects. The *Law Review* is not a public forum. It is a for-credit academic enterprise that routinely makes decisions based on content and viewpoint in furtherance of its academic mission and therefore is expressly *not* designed to facilitate the open exchange of ideas.⁹ Dean Staudt has authorized a protest over classroom norms, not the robust exchange of ideas,

We Built a Diverse Academic Department in 5 Years. Here's How., HARV. BUS. REV. (July 1, 2020), <https://hbr.org/2020/07/we-built-a-diverse-academic-department-in-5-years-heres-how>. We could support more interdisciplinary initiatives with colleagues whose skill sets and expertise on matters of racial equity bring indispensable insights to our study and teaching of law. *See, e.g.*, Susan Killenberg McGinn, *University Creates Center for the Study of Race, Ethnicity & Equity*, WASH. U. ST. LOUIS: SOURCE (Feb. 20, 2019), <https://source.wustl.edu/2019/02/university-launches-center-for-the-study-of-race-ethnicity-equity/>; Neil Schoenherr, *Class Explores Intersection of Law, Race and Design*, WASH. U. ST. LOUIS: SOURCE (Apr. 2, 2020), <https://source.wustl.edu/2020/04/class-explores-intersection-of-law-race-and-design/>.

7. *See* John Inazu, *The Purpose (and Limits) of the University*, 2018 UTAH L. REV. 943. In the days following the killing of George Floyd, Dean Staudt wrote that "in painful times, such as these, it becomes even more important to reaffirm our core values." Email from Nancy Staudt, Dean and Howard & Caroline Cayne Distinguished Professor of Law, Wash. Univ. Sch. of Law, to Law School Community (May 31, 2020, 12:08 PM). But it's not clear to me what "our core values" are. The law school's website invites students to "Pursue Excellence," "Inspire Global Change," and "Work Toward a More Just Society." *See* WASH. UNIV. SCH. OF LAW, <https://law.wustl.edu/> (last visited July 12, 2020). But excellence in what? What kind of change? And what kind of justice?

8. *See* Preface to Statement by the Undersigned Editors of Volume 97.

9. For more on the difference between an academic enterprise and a public forum, *see* Inazu, *supra* note 7, at 962–63.

and an academic symposium on law and religion is not the proper venue for such a protest.¹⁰

2. *The pedagogical use of the N-word in reading a quote to make an anti-racist teaching point is a matter over which thoughtful scholars and teachers disagree.*

I would not use the N-word for pedagogical purposes. Others disagree. For example, Professor Randall Kennedy at Harvard Law School has asserted that reading unredacted quotes containing the N-word in a classroom setting is necessary to show this country's ugly history.¹¹ It may one day become clear by academic norms that the N-word is never appropriate. But that has not yet happened, and unless and until it does, our profession depends upon preserving the possibility of good-faith disagreement in an academic setting.

There is also a meaningful difference between Professor McConnell's classroom use and someone who utters a racial slur against another human being. The latter happens all too frequently in our society. When I hear those stories, I think about a lifetime of malformed character that cannot be explained away by a mere apology. I think of the ongoing racial hatred and white supremacy in this country. I do not think of Professor McConnell or this incident. Lawyers and future lawyers must be able to distinguish between Professor McConnell's use of a historical quote to make an anti-racist teaching point on the one hand, and those who spout racial slurs at other human beings, on the other.

10. Other contributors to this symposium have also objected to the protest. See Email from Stephanie Barclay, Associate Professor of Law, BYU J. Reuben Clark Law Sch., to Editor-in-Chief, Wash. Univ. Law Review (June 21, 2020) ("I am writing to respectfully request that you consider not including such a statement in the symposium. I echo concerns . . . about both the venue and the target of this statement."); Email from Ashutosh Bhagwat, U.C. Davis Sch. of Law, Martin Luther King Jr. Professor of Law, to Editor-in-Chief, Wash. Univ. Law Review (June 28, 2020) ("I simply do not see why the *Washington University Law Review* should be inserting itself in a dispute that does not touch upon it at all. I know that we live in exciting times in which issues of racial justice are finally getting the attention they deserve. I personally am enormously glad that this awakening is finally occurring. However, your protest statement does not strike me as an appropriate or meaningful way to engage these issues."); Email from Marc DeGirolami, Cary Fields Professor of Law, St. Johns Sch. of Law, to Editor-in-Chief, Wash. Univ. Law Review (June 21, 2020) ("I ask that you consider not including this statement in the symposium. . . . In my view, this is not the right venue for the statement.").

11. See Eugene Volokh, *Prof. Randall Kennedy (Harvard Law) on Accurately Quoting Racial Epithets*, VOLOKH CONSPIRACY (June 11, 2020, 8:02 AM), <https://reason.com/2020/06/11/prof-randall-kennedy-harvard-law-on-accurately-quoting-racial-epithets/> (providing full text of Professor Kennedy's letter). Professor Kennedy is also the author of an important book on the First Amendment, the title of which is the unredacted N-word. Because I am genuinely unsure of the *Law Review's* shifting norms and red lines regarding this matter, I am forgoing the usual scholarly convention of providing a citation to this work.

3. *This protest creates ambiguities for current and future classroom norms.*

This protest functionally delegates pedagogical norm-setting to an informal group of students.¹² To be sure, nobody is prohibiting faculty from reading a quote that uses the unredacted N-word in class to make an anti-racist teaching point. But the action against Professor McConnell establishes a red line at this law school. Faculty whose reputations and voices rely heavily on publications in law reviews are unlikely to risk a protest memorialized in the pages of our own flagship journal. Although student concerns should not be dismissed out of blind adherence to the status quo, I am concerned about the process by which this norm has been established. What amounts to de facto censorship of future classroom teaching has occurred without any input from the faculty charged with that teaching.

This protest and its new red line also raise difficult line-drawing questions. Much of the uncertainty arises from unclear norms within legal education generally and this law school in particular. The protest statement asserts that “the use of this word in the classroom is unacceptable and unnecessary, as it significantly disrupts the learning environment and places a burden on Black students that other students do not face.”¹³ Left without any further context, the word “use” could mean either “spoken aloud” (if construed narrowly) or “presented in any form” (if construed broadly). Both of these definitions are themselves ambiguous.

Beginning with the former, it is unclear if faculty will be sanctioned by the *Law Review* for showing a movie clip or playing an audio recording where the N-word is spoken. If they will be sanctioned, does the *Law Review* require any culpable *mens rea*, or is this a strict-liability offense such that a faculty member who forgets that a movie contains the word will be subjected to a protest? What is a faculty member supposed to do if a *student* utters the word in class while reading a quote to make an anti-racist statement? Does the *Law Review*’s standard impose a form of omission liability on the faculty member who fails to make an appropriate response? And who defines the standard of what counts as an appropriate response?

The broader interpretation of “use” is even more complicated. Can a faculty member who assigns a text containing an unredacted use of the N-word be sanctioned by the *Law Review*?¹⁴ Is the faculty member under an

12. The protest statement makes clear that it does not represent the official views of the student body or the *Law Review*. See Statement by the Undersigned Editors of Volume 97.

13. *Id.* at i.

14. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (seminal Second Amendment case using unredacted N-word); *Virginia v. Black*, 538 U.S. 343 (2003) (key case on cross burning and

affirmative obligation to redact the word in original texts before assigning them in class? What about a faculty member who publishes a book or article that contains quotes using the unredacted N-word?¹⁵ As the example of Professor McConnell illustrates, the motive for using the unredacted word does not matter—using the word in a quote to make an anti-racist teaching point does not create a safe harbor.

Then there are questions about what other words may or may not be subject to sanction and protest by the *Law Review*. My Japanese-American grandparents were subjected to awful racist slurs as they were sent to prison camps by the United States government.¹⁶ Many of those slurs continue today and appear unredacted in scholarly work and judicial opinions. To my mind, the N-word retains an especially ugly and cruel meaning that sets it apart—even from other slurs that are themselves ugly or cruel. But it’s not clear to me if the *Law Review*’s red line adopts this distinction.¹⁷

There may well be important distinctions that limit the precedent of this student protest. But neither the *Law Review* nor the faculty of this law school have decided or even discussed any of them. And I am unsure what standards this journal will apply to future authors who seek to publish in its pages.

4. *Professor McConnell has already committed to the change that this protest ostensibly seeks.*

The absence of any room for redemption and restoration in this protest leads to a final objection. Protests (and related actions) can be directed against institutions, institutional leaders, or other individuals.¹⁸ The best protests seek change: they pressure institutions to adopt new practices (or

hate speech using unredacted N-word); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (key civil rights case on secondary boycotts using the unredacted N-word); Brandenburg v. Ohio, 395 U.S. 444 (1969) (seminal First Amendment case establishing “incitement” standard and using the unredacted N-word); Scales v. United States, 367 U.S. 203 (1961) (important freedom of association case using the unredacted N-word); Terminiello v. City of Chicago, 337 U.S. 1 (1949) (landmark “fighting words” case using unredacted N-word).

15. See *supra* note 11 (referring to Professor Kennedy’s book). There are also unanswered questions of scope, such as whether this sanction applies to all pedagogical settings or only to classroom settings, all classes or only required classes, and all faculty or only white (or non-black) faculty. The student protest, however, at least makes clear that the sanction applies to faculty of any school, not just Washington University.

16. See JOHN INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 26–28 (2016) (describing the internment of my grandparents at Manzanar and Tule Lake and the corresponding loss of their house, jobs, and freedom).

17. There may also be non-racial slurs or words that “significantly disrupt[] the learning environment and place[] a burden on [some] students that other students do not face.” Statement by the Undersigned Editors of Volume 97, at i.

18. See INAZU, *supra* note 16, at 104–15 (discussing protests, boycotts, and strikes).

abandon old ones),¹⁹ or they pressure institutional leaders to change course or hand over control to a new leader. Protests directed against individuals can also create institutional change, but they necessarily apply stigmatizing pressure against the individuals on whom they focus.²⁰ Sometimes, this pressure is meant to coerce individual change. But in this case, Professor McConnell had already committed to precisely the change that this protest endeavors to create. Other than to punish him for his past actions, it is unclear exactly what the protesters are seeking from Professor McConnell.²¹

Bryan Stevenson writes in *Just Mercy* that “each of us is more than the worst thing we’ve ever done.”²² Because the broader legal academy has not yet clearly established norms regarding Professor McConnell’s classroom decision, this particular situation may fall altogether outside of Stevenson’s description of being “the worst thing.” But even those who find Professor McConnell’s decision to be clearly wrong might still have taken into account his commitment to change his classroom practices. A decent society ought to allow for the possibility of redemption and restoration.

A decent society should also be committed to racial justice. That work remains an urgent matter for this country and for this law school, and I hope that the zeal behind this expressive protest carries over into concrete action to alleviate inequities and injustices.²³ But I also hope that this kind of

19. See e.g., *President Eisgruber’s Message to Community on Removal of Woodrow Wilson Name from Public Policy School and Wilson College*, PRINCETON U. (June 27, 2020, 12:31 PM), <https://www.princeton.edu/news/2020/06/27/president-eisgrubers-message-community-removal-woodrow-wilson-name-public-policy>; Des Bieler, *Star Mississippi State RB Threatens to Leave Program Unless State Changes Its Flag*, WASH. POST (June 23, 2020, 5:16 AM), <https://www.washingtonpost.com/sports/2020/06/23/star-mississippi-state-rb-threatens-leave-program-unless-state-changes-its-flag/>.

20. On the role of stigma and its effects on individuals, see generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). Goffman defines stigma as a “deeply discrediting” social construct and that often “[w]e tend to impute a wide range of imperfections on the basis of the original one.” *Id.* at 5. Eventually, “[t]hose who have dealings with [the stigmatized person] fail to accord him the respect and regard which the uncontaminated aspects of his social identity have led them to anticipate extending.” *Id.* at 9. It is also evident that this same kind of stigma has helped to perpetuate centuries of racial injustice toward African Americans across every area of life. But stigmatizing Professor McConnell for his classroom use of the N-word to make an anti-racist statement strikes me as an imperfect and misguided effort to remedy past injustices.

21. To be sure, this protest against Professor McConnell has led to de facto institutional change at Washington University School of Law by establishing a new classroom norm (although, as discussed earlier in this response, the precise contours of this norm remain unclear). But the protest did not have to target Professor McConnell to achieve that end. For example, the protesters could have instead targeted the *Law Review*, the faculty of this law school, or the school’s administration to insist upon a policy against classroom use of the N-word applied prospectively. Instead, they have chosen an ex post facto sanction against a faculty member of another law school.

22. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2014).

23. Whether this protest action on balance furthers the cause of racial justice is a separate—and contestable—question. On the one hand, the students behind the protest are signaling solidarity and

punitive protest—and the lack of grace for those with whom we work, and from whom we learn—will soon pass.

making an expressive statement that they believe furthers racial justice. But the overall effects of this particular protest remain unclear. The potential chilling effects on classroom teaching will likely be felt most acutely by faculty who lack the protections of tenure, some of whom might otherwise have pushed race-conscious pedagogies. It may also be that this kind of expressive protest stifles longer-term partnerships toward the cause of racial justice. *See, e.g.,* Yascha Mounk, *Stop Firing the Innocent*, ATLANTIC (June 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/stop-firing-innocent/613615/> (warning of the danger of growing cynicism toward anti-racist efforts that punish indiscriminately).