

THE DAVID C. BAUM LECTURE: “NIGGER!” AS A PROBLEM IN THE LAW†

Randall L. Kennedy*

In this essay, originally delivered as part of the David C. Baum Memorial Lecture Series on Civil Liberties and Civil Rights at the University of Illinois College of Law, Professor Randall L. Kennedy examines the use of the word “nigger” as a problem in the law.

He argues that while use of the “N-word” should be limited, it should not be eradicated. He believes that “erasing it altogether would, among other things, destroy a significant part of our cultural heritage that is used in positive as well as negative ways.” Finally, Professor Kennedy posits that “nigger” may be undergoing a transformation to a “term of derision . . . [affixed] to targets regardless of race.”

“To be culturally literate,” E.D. Hirsch tells us, “is to possess the basic information needed to thrive in the modern world.”¹ To thrive in the United States one needs to know the word “nigger.” The American language is (and has long been) rife with terms of ethnic, racial, and national insult: kike, mick, wop, nip, gook, honkie, wetback, chink, et cetera.² Wielded with malevolence, any of these terms can be devastating weapons that harm individuals. The editors of the *Random House Webster’s College Dictionary* are correct in stating, however, that “nigger is now probably the most offensive word in English.”³ It is the epithet that generates epithets. That is why Arabs are called “sand niggers” and Indians “timber niggers”; why Irish have been called the “niggers of Europe” and Palestinians the “niggers of the middle east”; why a black bowling ball has been called a “nigger egg,” a game of craps “nigger

† This lecture is part of a work-in-progress on the history, usages, and effects of the term “nigger” in American culture. It builds upon my Tanner Lecture delivered at Stanford University in 1999.

* Randall L. Kennedy, Professor, Harvard Law School. B.A., Princeton; J.D., Yale Law School.

1. E.D. HIRSCH JR., *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW*, at xiii (1987).

2. See H.L. MENCKEN, *THE AMERICAN LANGUAGE: AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* 367–89 (1977).

3. *RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY* 894 (2d rev. & updated ed. 2000).

golf,” a watermelon “nigger ham,” heavy boots “nigger stompers,” a roll of one dollar bills a “nigger roll,” and gossip “nigger news.”⁴

A number of observers have agreed with the *Random House Dictionary*'s assessment of the primacy of “nigger” as a racial insult. Farai Chideya calls “nigger” “the nuclear bomb of racial epithets.”⁵ In the most highly publicized murder trial in American history, the prosecutor Christopher Darden famously described nigger as the “filthiest, dirtiest, nastiest word in the English language.”⁶ Judge Stephen Reinhardt characterized “nigger” as “the most noxious racial epithet in the contemporary American lexicon.”⁷

A vivid dramatization of this view is found in a sketch written by Paul Mooney for the television show *Saturday Night Live*. In this sketch, a white man played by Chevy Chase interviews a black man played by Richard Pryor for a job as a janitor and administers to him a word-association test that goes like this:

“White,” says Chase.

“Black,” Pryor replies.

“Bean.”

“Pod.”

“Negro.”

“Whitey,” Pryor replies lightly.

“Tarbaby.”

“What did you say,” Pryor asks, puzzled.

“Tarbaby,” Chase repeats, monotone.

“Ofay,” Pryor says sharply.

“Colored.”

“Redneck!”

“Junglebunny!”

“Peckerwood,” Pryor yells.

“Burrhead!”

“Cracker.”

“Spearchucker!”

“White Trash!”

“Junglebunny!”

“Honky!”

“Spade!”

“Honky, Honky!”

4. 2 RANDOM HOUSE HISTORICAL DICTIONARY OF AMERICAN SLANG 656–65 (Jonathan E. Lighter ed., 1997).

5. FARAI CHIDEYA, *THE COLOR OF THE FUTURE* 9 (1999).

6. Quoted in Margaret M. Russell, *Representing Race: Beyond “Sellouts” and “Race Cards”*: *Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 787 (1997).

7. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998).

“Nigger,” says Chase smugly, [aware that, when pushed, he can use that trump card].

“Dead Honky!” Pryor growls, [resorting to a threat of violence now that he has been topped in the verbal game of racial insult].⁸

The term “nigger,” however, is remarkably protean. It can mean many things. It confirms Justice Oliver Wendell Holmes’s celebrated remark that “[a] word is not a crystal, transparent and unchanged,” but is instead “the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”⁹ A weapon of racist oppression, “nigger” can also be a weapon of antiracist resistance as in Dick Gregory’s autobiography entitled *Nigger*,¹⁰ or H. Rap Brown’s polemic *Die Nigger Die!*¹¹ An expression of deadening contempt, use of the N-word can also be an assertion of enlivened wit as in Richard Pryor’s trenchant album of stand up comedy *That Nigger’s Crazy*.¹² A term of belittlement, “nigger” can also be a term of respect as in “James Brown is a sho nuff nigger.”¹³ An insult, “nigger” can also be a compliment as in “he played like a nigger.”¹⁴ A term of hostility, nigger can also be a term of endearment as in “this is my main nigger”—i.e., my best friend.¹⁵ Noting appreciation for the linguistic and political complexity of “nigger,” the journalist Jarvis Deberry maintains that the N-word is “beautiful in its multiplicity of functions . . . to convey so many contradictory emotions.”¹⁶ It might just be, he writes, “the most versatile and most widely applied intensifier in the English language.”¹⁷

Any person in the United States should be aware of the N-word. Ignorance could be very costly. Failing to recognize it as the signal of danger that it often is could well lead to injury, just as using it unaware of its effects and consequences could well cost a person his reputation, his job, or even his life.

Like every other significant force in American life—slavery, cigarettes, handguns, pornography, the gay liberation movement, abortion—the N-word is thoroughly enmeshed in litigation. According to Lexis, as of September 17, 2000, “nigger” appeared in the text of twenty-three reported Federal Supreme Courts decisions, 524 decisions of the federal

8. JOSEPH BOSKIN, *REBELLIOUS LAUGHTER* 161–62 (1997); MEL WATKINS, *ON THE REAL SIDE: A HISTORY OF AFRICAN AMERICAN COMEDY* (1999).

9. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

10. DICK GREGORY WITH ROBERT LIPSYTE, *NIGGER: AN AUTOBIOGRAPHY* (1964).

11. H. RAP BROWN (Jamil Al-Amin), *DIE, NIGGER, DIE!* (1969).

12. RICHARD PRYOR, *THAT NIGGER’S CRAZY* (1974, re-released by Warner Brothers 1990).

13. GENEVA SMITHERMAN, *BLACK TALK: WORDS AND PHRASES FROM THE HOOD TO THE AMEN CORNER* 210 (rev. ed. 2000). Smitherman notes that when used in a positive sense by blacks “nigger” is often yelled and pronounced “nigga.” *Id.* at 211.

14. See *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

15. SMITHERMAN, *supra* note 13, at 210.

16. Jarvis Deberry, *Keeping a Hateful Word Inside a Dictionary*, *THE NEW ORLEANS TIMES-PICAYUNE*, June 23, 1998, at B5.

17. *Id.*

appellate courts, 1,010 reported decisions of the federal district courts, and 2,414 reported decisions from various levels of the state courts. In many cases, the N-word is in the background, a passive piece of verbal furniture, a feature of conversation, for instance, picked up by a government wiretap. In some cases, however, the N-word occupies center stage as an active force that compels lawyers, judges, jurors, and others to grapple with difficult legal problems: Under what circumstances is evidence that a police officer uses the word “nigger” more probative than prejudicial when that officer is offered as a witness for the prosecution in a murder trial?¹⁸ May a person who assaults or even kills another have the severity of his crime reduced because his victim taunted him with the N-word?¹⁹ May public school authorities require a student to read *The Adventures of Huckleberry Finn* even though the presence of “nigger” in the text offends the sensibilities of the child and her parents who allege that harassment increases after students are introduced to the novel?²⁰ Does use of the N-word by a supervisor who makes a decision adverse to the interest of a black employee constitute direct evidence that the decision was racial in character?²¹ Does a waitress become liable for the tort of intentional infliction of emotional distress by angrily referring to a family of customers as “niggers”?²² To what extent does the First Amendment to the Federal Constitution and other limitations on governmental and private power properly constrain efforts to eradicate or punish use of the N-word?²³

Following the term “nigger” in the case law of our federal and state courts has been, for me, a useful venture in sociology and law that has facilitated encounters with cases and issues, decisions and dilemmas that I might otherwise have missed. Consider the following cases, all of which involve usage of the N-word by lawyers, judges, or jurors. *Hance v. Zant* involved the conviction and sentencing to death of one William Henry Hance.²⁴ After the trial two jurors revealed that they had heard fellow jurors make racially derogatory remarks about the defendant. More specifically they maintained that during deliberations other jurors referred to Hance as a “typical nigger” and “just one more sorry nigger that no one would miss.” Prior to Hance’s execution no court examined the accuracy of the jurors’ allegation.

18. E.g., Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—or, Rationales of the Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747 (1996).

19. *State v. Watson*, 214 S.E.2d 85, 89 (N.C. 1975).

20. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026–32 (9th Cir. 1998).

21. *Brown v. East Miss. Elec. Power Ass’n*, 989 F.2d 858, 861 (5th Cir. 1993).

22. *Wiggs v. Courshon*, 355 F. Supp. 206, 210 (S.D. Fla. 1973).

23. E.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 511 (1991); Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L.Q. 531, 561 (1980).

24. 981 F.2d 1180 (11th Cir.), *reh’g denied*, 988 F.2d 1220 (11th Cir. 1993) (denying application for stay of execution); see also Bob Herbert, *Mr. Hance’s ‘Perfect Punishment’*, N.Y. TIMES, Mar. 27, 1994, § 4, at 17.

Any defendant who seeks to challenge his conviction or sentence on the basis of posttrial revelations made by a juror is very unlikely to prevail. First, federal and state rules of evidence stringently exclude juror testimony that impeaches a jury's verdict.²⁵ Second, many jurisdictions require defendants to show actual prejudice on account of juror misconduct.²⁶

It is understandable that the legal system would want to promote finality, protect jurors from harassment, and shield the privacy and independence of jury deliberations. Still, it is chilling to think that a person could be sentenced to death pursuant to deliberations tainted by derogatory use of the word "nigger." The presence of that word raises concern not only about the attitudes of the jurors using it. The presence of "nigger" also raises concern regarding the attitudes of those who heard its use. In 1985, Jeff Greenberg and Tom Pyszczynski performed an experiment aimed at determining the effect upon listeners of overhearing racial slurs.²⁷ They asked groups of white college students to judge debates between white and black contestants. Immediately after the debates persons working in concert with the experimenters either derogatorily referred to the black contestants as "niggers," criticized them in a nonracist manner, or made no comment. What Greenberg and Pyszczynski found was a marked tendency on the part of some observers who overheard the insult to lower their evaluation of the slurred black debaters. This suggests, the researchers argue, that racial slurs "can indeed cue prejudiced behavior in those who are exposed to [such slurs]" and that this phenomenon might well have practical significance in such settings as "parole board meetings, promotion committee meetings, and jury deliberations, in which [racial] slurs may be expressed by one member of a group, be overheard, and then affect the evaluations of the target by other members of the group."²⁸ "Nigger," Greenberg and Pyszczynski concluded, is not merely a symptom of prejudice, but a carrier of the disease.²⁹ The risk in *Hance*, therefore, was not simply that the manifest racial prejudice of two jurors may have eroded *their* ability to determine fairly the guilt of the defendant or whether the state could rightly kill him. The risk was also that the use of "nigger" might have transmitted

25. *E.g.*, FED. R. EVID. 606(b):

[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict . . . except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Id.

26. *E.g.*, *Spencer v. State*, 398 S.E.2d 179 (Ga. 1990).

27. See Jeff Greenberg & Tom Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 61, 61 (1985).

28. *Id.* at 69–70.

29. See *id.* at 69–70.

their prejudice to other jurors, awakening latent biases or establishing racial animus where none previously existed.

Judges, too, use the N-word. In the late 1960s, H. Rap Brown (now Jamil Al-Amin), the former head of the Student Non-Violent Coordinating Committee (SNCC) was convicted of a firearms violation.³⁰ After the conviction, a lawyer stepped forward and informed Brown's attorneys that at a convention he had attended, the judge who had presided over the trial, had casually mentioned in a poolside conversation referring to Brown that he was "going to get that nigger."³¹ Before a different judge a hearing was held to examine the lawyer's allegation and determine what should be done in light of it. The new judge found the lawyer's statement to be credible but decided nonetheless to affirm the conviction and sentence, ruling that notwithstanding the initial judge's unfortunate comment the defendant had received a fair trial.³² The Court of Appeals reversed, vacating the conviction.³³ It relied upon a federal statute that requires the mandatory disqualification of a judge "'in any proceeding in which his impartiality might reasonably be questioned' or 'where he has a personal bias or prejudice concerning a party.'"³⁴ The Court of Appeals emphasized not only the virtue of actual impartiality but also the virtue of the appearance of impartiality.³⁵

Compared to *Hance*, *Brown* represents a great leap forward towards racial justice. At the same time, it must be noted that the *Brown* court's decision did not prevent the offending trial judge from presiding over other cases in which the liberty, property, and lives of other black litigants were at stake.

Should derogatory usage of the N-word disqualify a person from occupying public positions in law enforcement in which officials wield virtually unreviewable, discretionary powers? One confronts a part of that broad question in the case of *In re Jerry L. Spivey, District Attorney*.³⁶ In the early morning hours of June 30, 1995, Jerry C. Spivey, the elected District Attorney of the Fifth Prosecutorial District of North Carolina, became inebriated in a Wrightsville Beach, N.C., bar and was heard to say with respect to another patron, "Look at that nigger hitting on my wife." The patron to whom he referred was Ray Jacobs, a professional football player with the Denver Broncos who had previously been a college star in North Carolina. A bit later, when Spivey's wife sought to introduce the two men and did so by asking her husband whether he recognized Jacobs, the District Attorney responded by saying: "He looks like a nigger to me." That comment was followed by others in which

30. See *United States v. Brown*, 539 F.2d 467, 468 & n.1 (5th Cir. 1976).

31. *Id.* at 468.

32. See *id.* at 468-69.

33. See *id.* at 470.

34. *Id.* at 470-71 (citing 28 U.S.C. § 455 (1994)).

35. See *id.* at 469-70.

36. 480 S.E.2d 693 (N.C. 1997).

District Attorney Spivey, with an increasing degree of drunken agitation, repeatedly referred to Jacobs as a “nigger.” This episode ended when the bartender ejected the District Attorney.³⁷

Soon thereafter, several attorneys petitioned a judge to remove the District Attorney from his post pursuant to a state law that authorizes such an action in the event of misconduct that is prejudicial to the administration of justice and that brings an office into disrepute. During a hearing, expert testimony was elicited from the distinguished historian John Hope Franklin on the history and meaning of the word “nigger.” The judge also heard testimony from other members of the community who told the court about experiences they had had with the N-word, the effect that it had upon them, and their perception of the District Attorney in light of his racial language. One man recounted the following painful memory from his days in the Air Force in the 1950s:

I was coming in from an overseas assignment and I stopped in Arkansas to get some gas and a sandwich. Three kids with me. We walked up, put the gas in the car. Stopped at the side window to get a sandwich and from the inside we were told, “We don’t serve niggers here.” I said, “We simply want to get a sandwich.” He took my money for the gas and we turned and walked about. My little kid asked me, “Daddy, what’s a nigger?”³⁸

Asked about the effect of that incident, the man responded tearfully that he had never stopped hurting. Asked to reveal his reaction to the District Attorney’s use of the N-word, the man replied: “[T]o me it says that it doesn’t matter what you have accomplished in life . . . if you have a black face . . . you are less than a person.”³⁹

The judge removed Spivey from office. The former district attorney appealed, arguing among other things that his federal First Amendment rights had been violated. There is some irony in his claim that the state wrongfully punished him for giving voice to protected expression because he simultaneously maintained that what he had said did not at all express his sentiments or beliefs. “I am sorry,” he testified, that “I used the word nigger. . . . That word occupies no place in my day-to-day vocabulary, and that word in no way reflects my beliefs about, or feelings and attitude toward, people of African American heritage.”⁴⁰ While in one breath, Spivey complained of being a victim of censorship based on the substance of disfavored remarks, in the next he asserted that his out-

37. This account of the incident is consistent with the account offered by the Supreme Court of North Carolina. *Id.* at 695. More detail is provided by the transcript of the hearing presided over by the trial judge whose decision to remove District Attorney Spivey was reviewed by the Supreme Court. Transcript Volume I at 32–34, *In re Spivey*. Mr. Roger W. Smith who represented Mr. Spivey generously gave me a copy of the transcript, which is now available at the Harvard Law School Library. Mr. Asa L. Bell who represented parties seeking the ouster of Mr. Spivey also shared materials with me that illuminated this fascinating, sobering, ultimately tragic case.

38. Transcript Volume II at 159–60, *In re Spivey*.

39. *Id.* at 161.

40. *Id.* at 197.

burst consisted of nothing more than a verbal belch—rude but substantively meaningless.

The North Carolina Supreme Court affirmed Spivey's removal and in the course of doing so rebuffed his First Amendment challenge, ruling that Spivey's language fit within the fighting-words exception to the First Amendment. Quoting from *Chaplinsky v. New Hampshire*,⁴¹ the 1942 case that established the fighting-words doctrine, the North Carolina Court observed:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.⁴²

According to the North Carolina Court, Spivey's outburst constituted a "classic" case of unprotected fighting words.⁴³ Elaborate hearings, the Court maintained, were unneeded to determine the effects of "nigger" on black targets. "No fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate."⁴⁴

Although the ultimate outcome of the *Spivey* case should be applauded, there is good reason to reject the fighting-words rationale. Although *Chaplinsky* offers two bases on which language may be deemed fighting words, subsequent case law makes clear that the primary and perhaps the exclusive grounds for declining to give First Amendment protection to so-called fighting words is that, under certain circumstances, such language incites or is likely to incite an immediate breach of the peace by a target who impulsively responds with violence. Faced with an offensive speaker and a violent target, the fighting words doctrine favors the target. Rather than insisting that the target of the speech control himself, the doctrine tells the offensive speaker to shut up. This is odd and objectionable. It allows "speech to be [regulated] . . . when directed at someone who would react violently to a verbal assault, but *not* [regulated] . . . when directed at someone with a more pacific bent."⁴⁵

41. 315 U.S. 568 (1942).

42. *In re Spivey*, 480 S.E.2d at 698.

43. *Id.* at 699.

44. *Id.*

45. Wendy B. Reilly, *Fighting the Fighting Words Standard: A Call for Its Destruction*, 52 Rutgers L. Rev. 947, 956 (2000); see also KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 47–64 (1995) (distinguishing between "targeted vilification" and other forms of insults or epithets).

This gives more leeway to insult a nun than a prizefighter because she is less likely to retaliate.⁴⁶

The fighting-words doctrine is in tension with the dominant (and good) rule in criminal law that prevents “mere words standing alone, . . . no matter how insulting, offensive, and abusive” from constituting the predicate for a provocation excuse.⁴⁷ To illustrate the mere-words doctrine, let’s return to the state of North Carolina and return as well to case law generated by “nigger.” In 1975 the state judiciary faced a case in which a black inmate killed a white inmate.⁴⁸ According to the defendant, the killing was prompted by the other person’s taunting reference to him as a “nigger.” At trial, the defendant’s attorney argued that in light of this verbal provocation, the jury should be given instructions that would allow it to decide that he committed manslaughter as opposed to murder. The trial judge, however, instructed the jury that the mere-words doctrine governed: “[W]ords and gestures alone, . . . regardless of how insulting or inflammatory those words or gestures may be, does not constitute adequate provocation for the taking of a human life.”⁴⁹ In those jurisdictions that abide by the mere-words doctrine, legal authority instructs everyone to discipline themselves even in the face of inflammatory taunts. The fighting-words doctrine weakens that salutary message.

In *Spivey*, the North Carolina Supreme Court maintained that the District Attorney’s “use of the word ‘nigger’ . . . did not in any way involve an expression of his viewpoint on any local or national policy.”⁵⁰ But clearly those who petitioned for his removal did believe that his use of the N-word revealed something—something very disturbing—about his view of blacks. They would not have moved for his ouster had he merely called Jacobs an “asshole.” That, too, would have been rude and abusive and indicative of a lack of self-discipline and decorum that would have reflected badly on the office of the District Attorney. “Asshole,” however, does not bring with it the ideological baggage that trails the term “nigger.” During the U.S. Presidential campaign of 2000, George W. Bush was overheard describing a reporter for the *New York Times* as “an asshole.”⁵¹ That he did so raised a few eyebrows, but does not appear to have cost him much, if at all, in public esteem. Had he been overheard describing a reporter (or anyone else) as a “nigger,” however, his candidacy would have been doomed. That is because, in the mouths

46. Cf. Kathleen M. Sullivan, *The First Amendment Wars*, NEW REPUBLIC, Sept. 28, 1992, at 40 (complaining that fighting words doctrine gives “more license to insult Mother Teresa than Sean Penn just because she is not likely to throw a punch”).

47. *United States v. Alexander*, 471 F.2d 923, 941 n.48 (D.C. Cir. 1972).

48. *State v. Watson*, 214 S.E.2d 85, 87 (N.C. 1975).

49. *Id.* at 89.

50. *In re Spivey*, 480 S.E.2d 693, 699 (1997).

51. Howard Kurtz, *The Shot Heard Round the Media; Bush’s Off-Mike Crack Could Cut Both Ways*, WASH. POST, Sept. 6, 2000, at C1; Rob Hiagsen, *The Truth? Adults Use Bad Words*, BALTIMORE SUN, Sept. 6, 2000, at E1.

of whites, except perhaps in very special circumstances,⁵² “nigger” is still widely used and perceived as a watchword for white supremacy. It is precisely because “nigger” is thought to indicate the presence of racist beliefs or sentiments that many people take such strong objection to it—including the people who demanded Spivey’s ouster.

The real reason and the better justification for removing Spivey is that his outburst made him unfit to fulfill his public responsibility. That responsibility entails allegiance to a certain orthodoxy—the idea that all people, regardless of race, should be treated equally and with respect before the bar of justice. The First Amendment should protect private individuals who espouse racist beliefs from many forms of governmental censorship. The First Amendment, however, should not be read to protect a public prosecutor from being removed because of his racist speech. That Spivey used the N-word does not mean necessarily that he harbors racist views or would fail to apply the law evenhandedly. Perhaps his remarks were aberrational. Still, his words cast a pall over him and raise reasonable doubts in the minds of people, especially black people, that he would treat all individuals equally, regardless of race. As the District Attorney, after all, he wielded massive, discretionary authority—for instance whether or not to seek capital punishment in a given case—that is effectively beyond judicial review. In light of that power, and of reasonable doubts raised regarding Spivey’s ability to wield it effectively and fairly in the aftermath of his N-word remarks, the North Carolina judiciary did just the right thing in removing him from office.⁵³

What should be and what will be the future of the N-word in American culture and case law? With respect to what *should* happen, there are several camps of opinion. In one are people who want the N-word to have no future. They want to eliminate it wholly from the American scene. “Everyone should refrain from [using the N-word],” Helford H. Fairchild writes in the *Los Angeles Times*, “and provide negative sanctions on its use by others.”⁵⁴ Similarly in a column in the *Orlando Sentinel* revealingly titled “N Word Just as Vile When Uttered by Blacks,” E.R. Shipp declares that the N-word should have “no place in contemporary life or language.”⁵⁵

In a second camp are those who want to defang “nigger” by removing its aura as tabooed expression. They believe that its status as an unmentionable only enhances its seductive power and therefore urge a

52. Some whites believe that they are sufficiently intimate with blacks to use “nigger” in their presence in the nonderogatory senses in which blacks often use the term amongst themselves. This is a risky practice. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); see also the comedy album by CHRIS ROCK, *ROLL WITH THE NEW* (Dreamworks SKG 1997).

53. Cf. *Rankin v. McPherson*, 483 U.S. 378 (1987).

54. Halford H. Fairchild, *N Word Should Be Odious from Anyone*, L.A. TIMES, Sept. 16, 1987, at 5.

55. ORLANDO SENTINEL, Jan. 21, 1998; at A15; see also Mary A. Mitchell, *N-word O.K. for Blacks but Not for Whites?*, CHI. SUN TIMES, Dec. 28, 1997, at 20; Ron Nelson, *The Word Nigga Is Only for Slaves and Sambos*, J. BLACKS HIGHER EDUC., Autumn 1998, at 117.

strategy of subversion through overuse. The great satirist Lenny Bruce propounded this thesis with characteristic verve in the 1960s. According to Lenny Bruce:

If President Kennedy got on television and said, “Tonight I’d like to introduce the niggers in my cabinet,” and he yelled “niggernigger-niggerniggerniggerniggernigger” at every nigger he saw . . . ‘till nigger didn’t mean anything any more, ‘till nigger lost its meaning—you’d never hear any four-year-old nigger cry when he came home from school.⁵⁶

Thirty years later, a black man in California sought to put into operation Bruce’s theory by naming himself “Mysteri Nigger.” In his unsuccessful petition for legal recognition of this name, he wrote that he was seeking to “steal the stinging degradation” from the term.⁵⁷

I decline to join either of these camps. I sympathize with the Lenny Bruce faction but fear that its prediction is wrong. I worry that encouraging the use of the N-word would do more to spread its toxic effects than to attenuate its toxicity. I also believe that the ostracism that envelopes those who casually or derogatorily use the N-word is a good development that has improved American society. For several reasons, including the threat of stigmatization, most people who cherish respectability *think* before using the N-word in public. That is as it should be.

In contrast to the eradicationists, however, I believe that there are good reasons to permit continued usage of “nigger.” First, we should always be on guard against the dangers of overweening power. Tolerating expression we deplore inculcates a habit of self-discipline, which is useful in a diverse, contentious democracy like ours. Second, there is value in knowing in detail the rhetoric of racial abuse and knowing, too, that until relatively recently this rhetoric was deployed openly by influential persons. Third, and most controversially, I oppose the eradicationists because I enjoy and sometimes admire cultural artifacts in which the N-word is embedded. I find pleasure in the routines of Lenny Bruce, Richard Pryor, Chris Rock, and the comedians that animate Def Comedy Jam—comedians that artfully deploy “nigger” in all of its various meanings. Moreover, to eliminate “nigger” from the American cultural landscape would require bowdlerizing many valuable pages in some of the classics of American literature including Ralph Ellison’s *Invisible Man*, Flannery O’Connor’s *The Artificial Nigger and Other Tales*, Harper Lee’s *To Kill a Mockingbird*, Richard Wright’s *Native Son*, Malcolm X’s *Autobiography*, and Mark Twain’s *The Adventures of Huckleberry Finn*. Some are willing to pay that price.⁵⁸ I

56. THE ESSENTIAL LENNY BRUCE 16 (John Cohen ed., 1967).

57. Lee v. Ventura County, 11 Cal. Rptr. 2d 763, 764 (Ct. App. 1992).

58. John Wallace is an educator who opposes using unexpurgated version of *Huckleberry Finn* in secondary school because of the widespread presence in it of the term “nigger.” He has produced a version of the novel in which the words “nigger” (and “hell”) are removed. SATIRE OR EVASION? BLACK PERSPECTIVES ON HUCKLEBERRY FINN 274 (James S. Leonard et al. eds., 1992). Wallace’s

am not. Using “nigger” as a term of racial abuse perpetuates hurtful injustice. But erasing it altogether would, among other things, destroy a significant part of our cultural heritage that is used in positive as well as negative ways. Therefore, we should make “nigger” accessible but require through the subtle and malleable force of public opinion that the term be handled carefully. The playwright and actor Eric Bogosian was right when he remarked that because “[n]igger is a heavy-duty word,” one “better have a good reason for using it.”⁵⁹

I anticipate “nigger” remaining a salient feature in our culture for the foreseeable future and, indeed, for as long as America exists. It is simply too deeply embedded to be plucked out and cast away. The term will likely change in ways that will have legal consequences. If “nigger” becomes a more openly and widely used term, for example, it might become more difficult to claim victimization by the tort of intentional infliction of emotional distress. Establishing outrageousness is essential in such actions. But how outrageous can a word be if it is heard day in and day out on radio, television, and film? In some circles, people are using nigger as a term of derision that they affix to targets regardless of race. If that tendency becomes popular, the N-word may no longer be properly presumed to constitute direct evidence of racial animus. These and similar possibilities, if actualized, will add new chapters to the history of “nigger,” a key word in American language and law that mirrors vividly the complexities of American race relations.

Orwellian “cure” is far more destructive of intellectual and human values than the problem he seeks to address.

59. Eric Bogosian, *Chris Rock Has No Time for Your Ignorance*, N.Y. TIMES MAGAZINE, Oct. 5, 1997, at 56.