THE PEDAGOGY OF THE FIRST AMENDMENT: WHY TEACHING ABOUT FREEDOM OF SPEECH RAISES UNIQUE (AND PERHAPS INSURMOUNTABLE) PROBLEMS FOR CONSCIENTIOUS TEACHERS AND THEIR STUDENTS

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Each year, the UCLA School of Law hosts the Melville B. Nimmer Memorial Lecture. Since 1986, the lecture series has served as a forum for leading scholars in the fields of copyright and First Amendment law. In recent years, the lecture has been presented by such distinguished scholars as Lawrence Lessig, Robert Post, Mark Rose, Kathleen Sullivan, and David Nimmer. The UCLA Law Review *has published each of these lectures and proudly continues that tradition by publishing an Essay by this year's presenter, Professor Sanford Levinson.*

Although it should go without saying, I will say anyway that I was utterly delighted and flattered to have been invited to deliver a lecture commemorating the illustrious career (and person) of Melville Nimmer, a truly distinguished scholar of the First Amendment. My delight was tempered a bit by the anxiety attached to following the distinguished speakers who have preceded me in this series, not least because as I confessed to Norman Abrams when he invited me to deliver the lecture, I have long ceased teaching a course that I used to offer on "Freedom of Speech."[1] In the

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1. Although, as a matter of fact, I do teach quite a bit about the implications for freedom of speech of conditional funding in courses that I teach on the Constitution and the welfare state. Still, these cases involve only indirectly the kinds of issues that I address in this Essay.

course of our conversation, though, it occurred to me that it might be worth discussing exactly *why* I found (and continue to find) teaching a course on freedom of speech so problematic.

Indeed, I think that such a course presents quite literally unique—and, in some respects, insurmountable—pedagogical problems. My comments therefore have relatively little to say about the doctrines of freedom of speech or the philosophical issues involved in giving sense to the concept. Instead, I want to address what I call the "pedagogy of free speech." Perhaps it is relevant to note that a member of the audience suggested that what I am really illustrating is the "chilling effect" of contemporary academic mores regarding the kinds of speech that necessarily comprise the subject matter of a "free speech course," inasmuch as it is indeed true that one reason I ceased teaching the course involves my inability to resolve the dilemmas that I will discuss below.

Perhaps this is an appropriate point to address an obvious issue with regard to the lecture, both as delivered orally at UCLA and as reprinted in this Essay. The issue is best described by Professor Kent Greenawalt when introducing his chapter on "Insults, Epithets, and 'Hate Speech,'" in his book *Fighting Words*: "A setting like this book presents a problem: how much to risk offending readers by repeating upsetting words and phrases; how much to risk failure to come to terms with the real issues by avoiding the words that shock."[2] Professor Greenawalt's solution was to "indicate briefly the sorts of remarks I am considering, and then use them sparingly."[3] Perhaps the central thesis of my Nimmer Lecture is that one on occasion may have a duty "to risk offending readers." Teachers in particular may be guilty of evading part of their own pedagogical responsibilities if they become too fastidious in "avoiding . . . words that shock." Although I would regret if readers in fact took offense at aspects of this Essay, it would probably be hypocritical to apologize for giving offense inasmuch as there are circumstances in which running the risks of giving offense is inextricably connected with performing one's role, whether as a lawyer, a professor of law, or as in this case, a lecturer or writer about law.

I can do no better in introducing my topic than to recall a famous episode in Professor Nimmer's own career, when he was, on behalf of the American Civil Liberties Union, representing Paul Cohen in an argument before the United States Supreme Court.[4] As Professor Nimmer rose to present his argument on behalf of Cohen, Chief Justice Warren Burger told him

2. KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 47 (1995).

3. *Id.*

4. *See* Cohen v. California, 403 U.S. 15 (1971).

that "the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you . . . to dwell on the facts."[5] Professor Nimmer's response was a wonderful example both of lawyering and of pedagogy: "At Mr. Chief Justice's suggestion, I certainly will keep very brief the statement of facts . . . What this young man did was to walk through a courthouse corridor . . . wearing a jacket on which were inscribed the words 'Fuck the Draft.'"[6] In *The Brethren*, Bob Woodward and Scott Armstrong note Burger's "irritation"; moreover, they write, "[t]he Justices avoided using the word *fuck* in their questioning of the lawyers, referring instead to 'that word.'"[7] At the Court's conference discussing *Cohen*, Burger apparently referred to the "screw the draft" case.[8] Not surprisingly, he voted to uphold Cohen's conviction for disturbing the peace, because his own peace was so obviously disturbed by an encounter with *fuck*. Fortunately, the Chief Justice was in dissent, along with Justice Hugo Black. It is perhaps more surprising that Black was unwilling to protect Cohen, given Black's commitment over three decades of service on the Court to an "absolutist" view of the First Amendment that easily protected sedition, pornography, and libel.[9] Paul Cohen apparently presented a greater danger to the republic than did Communist leader Eugene Dennis whose conviction for advocating the violent overthrow of the U.S. government Black had scathingly denounced.[10] With regard to Cohen's jacket, however, Black apparently asked, "What if Elizabeth [my wife] were in that corridor? . . . Why should she have to see that word?"[11] Still, he had a jurisprudence to protect. Therefore, Black chose to denominate Cohen's wearing of the jacket as "conduct" rather than protected "speech."

Justice John Marshall Harlan, usually regarded as one of the more staid justices, wrote the opinion for the majority reversing the conviction. Interestingly enough, he apparently told his clerks that "I wouldn't mind telling my wife, or your wife, or anyone's wife, about the slogan."[12] (The key issue in this case, as a practical matter, seems to have been what speech was suitable for the tender ears of women. Men presumably were capable of hearing just about anything.) Harlan delivered his opinion on June 7, 1971, and Burger's anger—and concern for the dignity of the sacred precincts of the Supreme

5. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 129 (1979).
6. *Id.*
7. *Id.*
8. *Id.* at 130.
9. *Id.*
10. *See* Dennis v. United States, 341 U.S. 494, 579 (1951) (Black, J., dissenting).
11. WOODWARD & ARMSTRONG, *supra* note 5, at 131.
12. *Id.*

Court—had not significantly abated. "John," he asked Harlan, "you're not going to use 'that word' in delivering the opinion, are you? . . . It would be the end of the Court if you use it, John."[13] Although Harlan's opinion sets out the full facts of the case, he did refrain from saying *fuck* during his verbal summary of the case, though one doubts that it is because he shared Burger's preposterous fear. In any event, the Court appears to have survived *Cohen*.

This episode conveys the remarkable significance attached to the use of certain words—*fuck* perhaps offering the paradigm case—regardless of context. So one major question that I want to consider during our time together is how we should understand Professor Nimmer's action. And, incidentally, nobody should doubt that his speech in this instance was a profound *act*. It simply is not the case that "words cannot hurt," even if they do not directly break any bones, and one can well believe that the Chief Justice suffered physical pain, perhaps in his stomach, at hearing the Court's sacred chambers invaded by the word *fuck*. After all, Charles Lawrence has described racial slurs as "assaultive" and "a form of violence by speech" equivalent to being slapped in the face.[14] If we accept this phenomenological reaction to hearing a word like *nigger*, then surely we should credit a similar perception on the part of Chief Justice Burger. So maybe Justice Black can be defended in his otherwise surprising view, given his general willingness to defend any and all speech,[15] that Cohen's jacket was conduct instead of speech. The problem for someone with Black's view (at least in *Cohen*) then becomes explaining why any stomach-churning speech doesn't similarly count as conduct that would justify suppression by the state.

Even if we put to one side the possible physical consequences attached to hearing the word *fuck*, at least in 1971, one might understand Chief Justice Burger's request as simply asking Professor Nimmer to show "good manners" appropriate to the particular kind of place the Supreme Court is. After all, the Court is literally built to convey the image of a sacred temple of American civil religion,[16] and one normally doesn't use such "low" language in such a

13. *Id.* at 133.

14. *See* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 79 (2002) (quoting Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452).

15. Thus, Justice Black had told an audience at New York University that "[i]t is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" Charles L. Black, Jr., *Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63.

16. It is impossible to view the Supreme Court as anything other than a concrete (or marble) manifestation of our "constitutional faith." *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). When laying the cornerstone for the new building on October 13, 1932, Chief Justice Charles Evans Hughes emphasized that "[t]he Republic endures and this [i.e., the new

"high" place. It is possible, of course, that Chief Justice Burger would have been offended by the use of *fuck* in any and all contexts, but one can well imagine that his taking offense was rooted in the particular intersection of word and place. There is a place for pigs, after all; it simply is not in the parlor.[17]

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building] is the symbol of its faith." *See* National Park Service, U.S. Supreme Court, *at* http://www.cr.nps.gov/nr/travel/wash/dc78.htm. Any doubt about the Supreme Court as a temple certainly is removed by reading a description of the building:

> The building was designed on a scale in keeping with the importance and dignity of the Court and the Judiciary as a coequal, independent branch of the Federal government and as a symbol of "the national ideal of justice in the highest sphere of activity." Sixteen marble columns at the main west entrance support the portico and on the architrave above is incised, "Equal Justice Under the Law." Capping the entrance is the pediment filled with a sculpture group by Robert Aitken, representing Liberty Enthroned Guarded by Order and Authority. Cast in bronze, the west entrance doors sculpted by John Donnelly, Jr., depict historic scenes in the development of the law. The east entrance's architrave bears the legend, "Justice the Guardian of Liberty." A sculpture group by Herman A. McNeil is located above the east entrance that represents great lawgivers, Moses, Confucius, and Solon, flanked by symbolic groups representing Means of Enforcing the Law, Tempering Justice with Mercy, Carrying on Civilization, and Settlement of Disputes Between States.

Id.

17. See Justice Stevens's conclusion to his plurality opinion in FCC *v. Pacifica Foundation*, 438 U.S. 726, 750–51 (1978), upholding the FCC's power in effect to censor radio broadcasts that included what the Commission viewed as "indecent" speech:

> As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

Id. (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1927)). Consider the rules for legislative debate set out by Thomas Jefferson, *A Manual of Parliamentary Practice*, § 17-9, at 27 (U.S. Gov't Printing Office 1993) (1801) (citations omitted), which states that "[n]o one is to speak impertinently or beside the question, superfluously or tediously." The immediately subsequent rule states that "[n]o person is to use indecent language against the proceedings of the house." *Id.* at § 17-10, at 27 (citations omitted). These injunctions are reflected in the current decorum and debate rules of the U.S. House of Representatives:

> Members should refrain from using profanity or vulgarity in debate. . . . Members should refrain from discussing the President's personal character. . . .
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> . . . .
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> This clause has also been interpreted to proscribe the wearing of badges by Members to communicate a message, since Members must rise and address the Speaker to deliver any matter to the House.

107TH CONGRESS HOUSE RULES MANUAL § 17, at 720 (citations omitted), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_house_rules_manual&docid=hrulest-74 (I am grateful to Robert Post for this reference).

Consider as well the contretemps on July 24, 2004 between Vermont Senator Patrick Leahy and Vice President Dick Cheney. *See* CNN, *Sources: Cheney Curses Senator Over Halliburton Criticism* (June 25, 2004), *available at* http://www.cnn.com/2004/ALLPOLITICS/06/24/cheney.leahy/. Apparently, Cheney scolded Leahy for having criticized the Vice President's relationship with Halliburton, of which Cheney had been chief executive before becoming vice president. Leahy responded by "remind[ing] Cheney that the vice president had once accused him of being a bad Catholic, to which Cheney replied either 'f— off' or go 'f— yourself.'" *Id.* The exchange took

Societies are, of course, remarkably complex structures that require the ability to work in common enterprises with all sorts of people, some of whom we know well, some of whom are absolute strangers. Vital to working together is the manifestation of certain levels of respect for one another. One of the ways we show respect for people in common enterprises is to engage in what I referred to a moment ago as "good manners." I think it altogether relevant to mention what my colleague Willy Forbath, who taught at UCLA before coming to the University of Texas, said when I asked whether he knew Professor Nimmer and what he was like. Without the slightest prompting from me, Willy described Professor Nimmer as "courtly and well-mannered." He was precisely *not* the kind of person who would use vulgar language in public (or, perhaps, anywhere else).

"Vulgar language," of course, is a social construct. So, too, are the euphemisms that we often use to avoid saying what our culture regards as unacceptable. An easy example is the substitution, during the Victorian era, of "white meat" as a euphemism for "breast" when dining in polite company. This currently might appear amusing to us, given our sense of historical distance from that era, but no one should doubt that we all euphemize in similar ways all the time. I shall speak later of such euphemisms, including "the F-word"[18] and "the N-word."[19]

Perhaps, then, Chief Justice Burger perceived Professor Nimmer as an ill-mannered lout who insisted on bringing a verbal pig into a sanctified parlor. Yet for me—and, I suspect, for many of you—he remains a hero, even though I never had the privilege of meeting him personally. What explains the difference in perception? Is it that I reject what might be called a general duty to display good manners? I certainly hope this is not the reason. When I gave the Nimmer Lecture, I wore a suit in order to convey my respect for

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place during the official photograph of the Senate. CNN notes that "[u]sing profanity on the Senate floor while the Senate is [in] session is against the rules. But the Senate was technically not in session at the time and the normal rules did not apply." *Id.*

I will have more to say below about the use of such typography as "f—." Fred Schauer, to whom I am grateful for reminding me about this episode, notes that the *New York Times*, which styles itself the "paper of record," was considerably more discreet than CNN in reporting the story. In comments on an earlier draft of this Essay, Schauer asks:

> [W]hy does the mainstream media get such a free pass whenever this topic is discussed? If Warren Burger is the villain of your opening story, why any less than Arthur Sulzberger (the publisher of the New York Times) and Abe Rosenthal (the managing editor of the New York Times in June 1971, when the paper published a story on Cohen without specifying the language that was at issue in the case)?

E-mail from Fred Schauer to Sanford Levinson (Dec. 29, 2004) (on file with author).

18. *See* THE F WORD (Jesse Sheidlower ed., 1995).

19. *See, e.g.*, KENNEDY, *supra* note 14, at 3–55.

the magnitude of a public lecture at a distinguished university. Furthermore, you can rest assured that I did not engage in what the great sociologist Erving Goffman called the "breaking of frame"[20] by performing certain acts that I would feel perfectly free to perform in the privacy of my own home or even while attending public events such as rock or jazz concerts. It has been said that a "gentleman" works hard never to give offense, except when he consciously intends to, and I certainly hope that I fit that definition. If I ever had been invited to dine with Chief Justice Burger, I surely would have "watched my language," as it were, as I am sure is true for (almost) all readers.

But, of course, Professor Nimmer was not breaking bread with the Chief Justice at a social occasion. Instead, he was engaged in the shared enterprise of trying to figure out the sometimes mysterious words of the First Amendment with regard to the latitude of speech that will in fact be tolerated in our often rambunctious, even ill-mannered, society. Imagine that Professor Nimmer had accepted the Chief Justice's invitation to remain silent about the facts of the case that he was arguing, merely because the Justices had, of course, read the briefs. That would have translated into Paul Cohen's lawyer conceding, at the very beginning of his argument, that *fuck* quite literally *could not* be said within the sacred precincts of the United States Supreme Court. Having conceded that, it would be difficult to argue that California did not have a right to punish Cohen for wearing his jacket in the corridors of the local California court, where he was initially arrested.

Consider a quite different case from a few years later, also involving ostensibly vulgar language.[21] This case is famous among professors, and especially students, as the "seven dirty words" case brought by the Federal Communications Commission against the Pacifica Foundation following its broadcast of a routine by the comedian George Carlin. In arguing the case, the FCC's lawyer, who went first because the Commission was appealing a lower court decision that protected Pacifica, no doubt was delighted to accept the Chief Justice's similar suggestion that he need not lay out the specific language at issue. (Those of you who are curious can find Carlin's routine in an "Appendix" to the Supreme Court's opinion.[22]) The delight would have followed from the fact that it was exactly the Commission's position that Carlin's language was socially unacceptable and needed to be confined to late-night radio where no child might inadvertently tune into the program. The FCC won its case.

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20. *See* ERVING GOFFMANN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 345–77 (1974).

21. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

22. *Id.* at 751.

In *Cohen*, Professor Nimmer was in an entirely different position. Had he made the implicit concession demanded of him by the Chief Justice, it probably would not have constituted malpractice; lawyers make unwise concessions all the time for which their clients pay. Professor Nimmer, on the other hand, taught all of us what "professional responsibility"—a subject that I taught for many years—really means. His overarching responsibility was to defend his client, Paul Cohen. He enacted that responsibility by an act of pedagogy, teaching every member of the Supreme Court—and of the onlooking audience, both within the building and those outside, who quickly became aware of what had taken place—that even the most august of American institutions was more than robust enough to survive Paul Cohen's use of *fuck* to manifest the degree of his opposition to the draft during the Vietnam War.

My primary focus will be on more traditional pedagogy—that of the classroom. But the overarching topic is that captured in my reading of the encounter between Chief Justice Burger and Professor Nimmer. That is, what constitutes "good manners" in teaching? What should we as teachers, as professors (people who profess), feel free to say to our students? I suppose I should recognize explicitly that part of my topic is what one feels free to say in a public lecture, because Professor Nimmer so importantly taught us that pedagogy, accompanied by its problems, takes place in all sorts of contexts, including an academic lecture. I assure you that one of the things I have been thinking about since accepting the invitation is quite literally "what to say" and "how to say it" to the audience attending the Nimmer Lecture. Should my answer be substantially different from the one I would give if you were my students in the classroom instead of people—including, it is important to note, some of my own friends and family, as well as friends and family of Professor Nimmer—who were kind enough to take their scarce time to attend the lecture? One of my central arguments, though, is that one literally cannot teach a course on freedom of speech without oneself engaging in all sorts of presumptively problematic speech for which one must take personal responsibility. The same is true, I believe, of lecturing on certain issues raised by the notion of "free speech."

When I first started thinking about what I would say, I thought I would offer a fairly simple contrast between most of the topics treated in a general constitutional law course, my major teaching responsibility, and the topics that necessarily arise in a course on free speech. What I thought I would say, for example, is that one easily can discuss the issue of abortion without performing an abortion in class. Perhaps more to the point, most of us do not

find it necessary or proper to bring into the classroom vivid and disturbing pictures of aborted fetuses or women who suffered through abortions-by-coathanger. Or take another topic I have become much interested in recently, torture; the Oxford University Press has recently published a collection of essays that I edited on that topic.[23] This collection in fact includes on its cover a grim picture of a "torture chair," and inside the book are two pictures from the sixteenth and eighteenth centuries illustrating the practice of torture.[24] Yet, for better and possibly for worse, I included no contemporary pictures. Nor are there the vivid and sometimes stomach-churning transcripts that one finds in Mark Danner's book *Torture and Truth*, of people describing their own mistreatment at the hands of American forces in Iraq.[25] Danner's book also includes the now infamous photographs taken at Abu Ghraib.[26]

Yet, one should always remain aware that there is a more-than-defensible pedagogical theory that any serious discussion about truly important topics—especially when they concern matters of life and death—*should* require confrontation with any such pictures or other quite literally painful materials. Perry Miller, the great historian of Puritanism, once wrote what for me is a literally unforgettable essay about the rhetorical practices of Jonathan Edwards.[27] Edwards almost certainly is best known for a remarkable sermon, "Sinners in the Hands of an Angry God."[28] Probably the most famous sentence of that sermon featured the image of

> [t]he God that holds you over the pit of hell, much as one holds a spider, or some loathsome insect over the fire, abhors you, and is dreadfully provoked: his wrath towards you burns like fire; he looks upon you as worthy of nothing else, but to be cast into the fire; he is of purer eyes than to bear to have you in his sight; you are ten thousand times more abominable in his eyes, than the most hateful venomous serpent is in ours.[29]

This sermon was designed to terrify and, no doubt, did.

Miller aptly entitled his essay *The Rhetoric of Sensation*.[30] For me, it stands for the proposition that any serious teacher must wrestle with the way that words (and perhaps pictures) can operate as what Edwards called "a bare

23. TORTURE: A COLLECTION (Sanford Levinson ed., 2004).
24. *Id.* at iii, 92.
25. MARK DANNER, TORTURE AND TRUTH 225–48 (2004).
26. *Id.* at 217–24.
27. PERRY MILLER, ERRAND INTO THE WILDERNESS 167–83 (1956).
28. Jonathan Edwards, *Sinners in the Hands of an Angry God* (July 8, 1741), *available at* http://www.jonathanedwards.com/sermons/Warnings/sinners.htm.
29. *Id.*
30. MILLER, *supra* note 27, at 167–83.

and brutal engine against the brain."[31] Or, as Edwards argued, "[O]ur people do not so much need to have their heads stored, as to have their hearts touched; and they stand in the greatest need of that sort of preaching, that has the greatest tendency to do this."[32]

One might, of course, cavil at the idea that there should be any relation between "teaching" and "preaching." But consider the possibility that a given professor agrees with George W. Bush at least to the extent that she believes that there really exists in the world what can be called "evil"—and that the integrity of one's life, even if one is thoroughly secular and rejects the language of "saving one's soul," depends on refusing to collaborate with evil. Or perhaps we believe, contrary to much evidence, that our Constitution really *is* about securing the blessings of liberty or establishing justice, and that this involves our working to place into our students' hearts and minds a passion for such liberty and justice for all. Ought we not be as concerned as Edwards was with trying to adopt pedagogical methods that bring home to students the consequences, and indeed the magnitude of evil, attached to certain positions? Pictures can be worth a thousand words, and the refusal to face—that is, use our eyes to observe—certain realities contributes to much social evil.

All of this being said, the fact is that I do not bring pictures into my classroom when teaching "ordinary" constitutional law to students. For many years, I did play for my students, when it came time to consider the constitutionality of the Civil Rights Act of 1964,[33] a tape of a public radio show on the difficulties faced by African Americans in traveling through the South in the 1950s. My purpose was not "neutral." I was trying to teach students who had literally no firsthand knowledge of the segregated South—and therefore might be quite sympathetic to arguments that the Act was not truly defensible under the Commerce Clause—to realize that the nation *had* to confront the true evil of segregation. Thus, the possibly pretextual use of the Commerce Clause was a small and utterly defensible price to pay to achieve that goal.

I am confident that most professors, as a matter of descriptive fact, rarely bring pictures into their classrooms, whatever their particular views on abortion or torture. Or, to put it slightly differently, I am quite sure that any professor who *did* bring vivid pictures of aborted fetuses or women who

31. *Id.* at 167.

32. *Id.* at 175 (quoting JONATHAN EDWARDS, 3 THE WORKS OF JONATHAN EDWARDS 336 (New York, Leavitt & Company 1844)).

33. Tit. VII, 42 U.S.C § 2000e-2(a) (2000).

had "back-alley" abortions—and, incidentally, is it imaginable that any given professor would bring *both* sets of pictures to a class on abortion?—would be dismissed by many colleagues as an over-the-top ideologue trying to substitute "passion" for the "reason" that is ostensibly the overriding commitment of legal education. That this is patently untrue would be the subject of quite another lecture and essay. However, my central argument is that no such pedagogical strategy of what might be called "detached reflection" is possible with regard to freedom of speech.

As Professor Nimmer unforgettably taught all of us, one must resist certain kinds of self-censorship,[34] even when commanded by the Chief Justice of the United States or the social norms that operate to define "good manners." We must instead put on the table, as it were, the actualities of what is at issue when we are asked (or hired) to discuss the complex matter of what we mean by freedom of speech. What is, after all, the *central* actuality? It is speech itself—the actual words (and, in the modern era, pictures)—that can be said or displayed in public without fear of adverse consequences from state authority.

Discussing such speech requires, for better and perhaps for worse, that one be willing to breach standard norms. At the very least, as I learned many years ago while listening to a particularly wonderful lecture by the orchestra conductor Benjamin Zander, one must sometimes be willing to risk making a fool of oneself—to burst out "singing" even if one's voice is more appropriate in a shower—in order to make a point one thinks important. Similarly, a teacher must sometimes risk being "ill-mannered," even "offensive." To refuse to give offense may label one a "gentleman" or "gentlewoman"; it may, however, betray one's responsibilities as a teacher, or as with Professor Nimmer, as a lawyer defending his client. This is not to say, of course, that one ought to go out of one's way to give such offense. Rather, anyone teaching about freedom of speech must be aware of the potential for offense and make fully conscious decisions about when it is indeed necessary to breach ordinary civility in the name of higher pedagogic values.

I will illustrate my point by marching through some of the standard issues of any course examining the political, philosophical, and legal issues surrounding

34. I put it this way because, as Fred Schauer has insisted in conversation, we are always engaging in what might be termed "self-censorship," otherwise known as "good manners." A truly "unself-censoring" person would be a social misfit, perhaps even a monster inasmuch as there would be no superego to tame the roiling desires of the id.

freedom of speech. All of them raise potential difficulties. In order, based on the chronology of my own syllabus when I taught such a course, they are:

1. seditious speech, that is, speech attacking basic institutions of government, including, of course, particular governmental leaders;
2. libelous speech, that is, speech involving grievous and injurious misstatements about others;
3. invasions of privacy, that is, speech that however truthful, brings before the public material that it has no legitimate interest in knowing and whose disclosure represents an assault on the human dignity of the victim of the invasion;
4. "offensive speech," that is, speech that ostensibly wounds listeners simply by its utterance;
5. "sexually explicit and/or pornographic speech," including visual representation.

Ultimately, the pedagogic question raised by these topics is (perhaps deceptively) simple: To what extent can one teach *about* seditious, libelous, or offensive speech, or about invasions of privacy or pornography, without simultaneously uttering or presenting what some students could well regard as seditious, libelous, or offensive speech, or invasions of privacy or pornography?[35]

I begin with subversive speech, although, ironically or not, speech that advocates violence and other criminal misconduct may be easier to teach than the other categories mentioned above. The reason is that a professor can quite easily turn such speech into what might be termed "indirect" or "second-order" speech by doing nothing more than overtly proclaiming that one is, after all, *not* the "true speaker" of the speech in question. Some philosophers distinguish between "use" and "mention," suggesting that "mentioned" speech is citation or quotation of someone else, as against the speech that one "uses" in one's own name.[36] So, with regard to subversive advocacy, the teacher in this context would simply be presenting or mentioning examples of someone else's speech that advocated disobedience

35. These are, of course, not the only subjects treated in any modern course on freedom of speech. One would surely want to include what are probably the two most important issues treated in contemporary litigation, limitations on the conduct of elections and conditions placed on governmental funding. And, of course, I am now aware of the interplay between copyright law, Professor Nimmer's specialty, and traditional First Amendment concerns in a way that I most certainly was not when I taught my courses in the 1980s. Still, I want to address some of the ways that the areas mentioned above present certain kinds of problems that are absent when discussing, for example, the constitutionality of limiting campaign contributions or even the legitimacy of refusing to fund museums that display the photographs of Robert Mapplethorpe.

36. *See, e.g.*, JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 73–76 (1969).

to the law, violent overthrow of the government, or even assassination of a president. Like Eugene Debs, some of the people whose speech we teach are well-known, even great; others, like Cincinnati Ku Klux Klan leader Clarence Brandenburg, are perhaps far more aptly described as what Justice Holmes once called "puny anonymities,"[37] or even more certainly, thugs. But in both instances, the teacher can say that "it is not *I* who am speaking (even if I'm mouthing the words)," but rather Eugene Debs, Clarence Brandenburg, or the other persons memorialized in the classic canon of freedom-of-speech cases.

Having presented my initial lecture in Los Angeles, perhaps I can use an analogy from the theater. We do not, after all, commonly attribute to an actor or actress the actual sentiments that he or she states while playing a part written by others. An actor who plays the part of a Nazi is not thought to be a Nazi himself. After all, Ralph Fiennes was deservedly nominated for an Academy Award for his portrayal of Amon Goeth, the truly evil Nazi concentration camp commander in *Schindler's List*.[38] Nobody confuses Goeth's casual violence toward Jews with Fiennes's own views, nor did I confuse him with the religious fanatic that he portrayed in a marvelous production of Hendrik Ibsen's *Brand* that I was privileged to see in London. The actor is wholly different from the role.

One might argue that the professor reading a seditious speech is best imagined as an actor reading a script written by someone else, similarly distanced from any responsibility for the sentiments conveyed. Interestingly enough, though—and this will be relevant to later discussion—there may be less of a willingness to accept what might be called "role differentiation" with regard to actors or actresses who appear nude, let alone engage in certain sexual acts, in a movie. There may be a tendency to identify the actor or actress as "the person who appears nude, or engages in sex, in a movie," rather than to say that it was simply a character being portrayed by a particular actor or actress. Perhaps this helps to explain why actors and actresses often use "body doubles" in "nude scenes," whereas they do not bring in someone else if the script's dialogue requires the articulation of a really terrible sentiment, such as the proposition that Jews deserve to be exterminated. Nudity is attributed to the actual person; terrible ideas, to the "character" merely being portrayed by the actor who is only the vessel for the script.

An added reality of the classic cases involving seditious advocacy is that, being "classics," they are all by now relatively old, so that some speech that was quite incendiary at the time it was delivered is often close to irrelevant

37. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).
38. SCHINDLER'S LIST (Universal Studios 1993).

for a contemporary audience. Perhaps this is the case with Eugene Debs's critique of American participation in World War I, though one might suggest that there is continuing relevance in being reminded, as in Justice Holmes's summary of Debs's speech, "that the master class has always declared the war and the subject class has always fought the battles . . . ."[39] It is quite likely, though, that we feel totally distanced from Clarence Brandenburg's call for "revengance" against Blacks and Jews,[40] not only because we reject his egregious views, but also because the Klan is, thankfully, irrelevant to contemporary America. As a technical matter, one of the things that students learn in a standard First Amendment course is that speech cannot be regulated unless it not only incites one to disobey the law, but also is delivered in a context that suggests the "imminent likelihood" of the disobedience actually occurring. This, after all, is Clarence Brandenburg's great contribution to American constitutional law. What this means, among other things, is that the sentence "All Jews should be gassed" does not in fact constitute an example of punishable speech unless it is said in a context that leads one to believe that the listeners will, with some alacrity, undertake violence toward Jews. For most of us, such sentences count more as "offensive speech," a topic I will discuss at greater length, than as plausible incitement to illegal activity.

So far then, it appears that what might be called "subversive speech" presents few pedagogical problems inasmuch as one always can distinguish clearly between first-order speaking in one's own name and second-order description of someone else's speech. One ought not believe, though, that the coast is entirely clear for the conscientious law professor. Consider the much-discussed issue of whether anti-abortion groups can circulate and place on the Internet pictures, names, and addresses of doctors who perform abortions (including presumptively approving X's drawn across the faces of doctors who had been murdered by anti-abortion activists). In a case involving such facts, the Ninth Circuit upheld a substantial award of damages,[41] finding that the jury could reasonably have viewed the postings as constituting the "threat of force" that is prohibited by the Freedom of Access to Clinics Entrances Act.[42]

39. Debs v. United States, 249 U.S. 211, 213 (1919).

40. Brandenburg v. Ohio, 395 U.S. 444, 446–47 (1969) (per curiam).

41. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

42. 18 U.S.C. § 248 (2004).

As it happens, the Ninth Circuit's decision drew an eloquent dissent by Judge Berzon, which was joined by UCLA's own distinguished alumnus, Alex Kozinski (who also authored his own separate dissent). Judge Berzon explained:

> The defendants here pose a special challenge, as they vehemently condone the view that murdering abortion providers—individuals who are providing medical services protected by the Constitution—is morally justified.
>
> But the defendants have not murdered anyone, and . . . neither their advocacy of doing so nor the posters and website they published crossed the line into unprotected speech. If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree—as the Supreme Court did when it struck down the conviction of members of the Ku Klux Klan for their racist, violence-condoning speech in *Brandenburg*—the First Amendment will become a dead letter.[43]

The practical consequence of the dissenting opinion, had it been adopted by the Ninth Circuit, would have been that the American Coalition of Life Activists in effect would risk no liability for posting pictures of doctors. This would be so even in a context that, as Judge Berzon noted, advocates the murder of such doctors and might even help to induce such behavior because persons logging onto their web sites could be stimulated to action by the mixture of arguments, pictures, and specific data such as addresses. It would seem to follow, then, that *I* could not possibly be held liable if I brought such materials into my classroom and assigned them to my students as an illustration of protected speech.

But, of course, the majority rejected Judge Berzon's view and upheld the award of massive damages in a suit brought by the affected doctors and their allies. So things get a bit more complicated, not only for the American Coalition of Life Activists, but also, possibly, for me. If I bring in the materials, am I potentially liable if some impressionable student concludes that the Activists are correct in advocating the murder of the doctors and acts on that resolution by actually murdering one? If I am not liable, why not?

Perhaps the answer is that my own motives presumably were altogether different from those of the Activists. I certainly am not intending, or even hoping, that some student is sufficiently affected by the "sensationalist" speech and photographs—and here you might recall the title of Miller's great essay on Edwards, *The Rhetoric of Sensation*[44]—to decide to murder a doctor who performs abortions. We should, though, recall that such a doctor, from the "pro-life view," is really no better than the Nazi Amon Goeth. Would any

43. *Planned Parenthood*, 290 F.3d. at 1121 (Berzon, J., dissenting).
44. MILLER, *supra* note 27, at 167–83.

of us resist the suggestion that Goeth deserved to be murdered by a prisoner or a member of the Resistance (even if we might oppose his capital punishment once the war is concluded and he is therefore "neutralized" as a force of evil)? So should I—indeed, *must* I—preface my display of the materials by stating that I support reproductive choice or, even if I didn't, that I certainly would not advocate the murder of doctors who perform abortions?

The question of ascertaining motive raises its own complications. At the very least, it raises what often is called the Marc Antony problem, when the assurance that one comes to bury Caesar and not to praise him is, of course, not to be taken seriously. Instead, it is what sociologists in the tradition of Erving Goffman would rightly call "strategic misrepresentation,"[45] where we profess to be doing one thing while in fact doing another. Needless to say, "strategic misrepresentation" is often present in what Goffman notably called "the presentation of self in everyday life."

Literary theorists have taught us about "the hermeneutics of suspicion,"[46] which is simply a fancy way for suggesting that one not automatically trust the statements that people give regarding their own motives for acting in certain ways, even if one rather optimistically believes that we can always be aware of our own motives. How is it, after all, that you *know* that I am "prochoice," instead of an anti-abortion mole, taking advantage of my position to spread the American Coalition's views about the propriety of murdering doctors? One of the most frightening aspects of terrorism, after all, is precisely that terrorists do not wear uniforms, that they pretend to be "ordinary," even "well-mannered" people, until the moment comes to reveal their "true selves." It is, indeed, just this "breaking of frame" that has led so many to be far more outraged at the sexual misdeeds of priests than at what might be termed the "ordinary" sexual predators who we would like to think can be more easily identified by looking at external indices like clothing, personal presentation, and the like.

As already suggested, it may be a mistake to attribute views to the actual person speaking lines or, in a classroom, reading speech aloud. Further confusion may be generated by trying to identify the "speaker" when reading fiction. What *is* the status of the speech of characters in a novel, particularly if it addresses issues

45. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 58–66 (1959). "Strategic misrepresentation," of course, can be viewed simply as a fancy name for "lying" or "deception," though it would be awful indeed to live in a world of absolute transparency. *See, e.g.*, RICHARD STENGEL, YOU'RE TOO KIND: A BRIEF HISTORY OF FLATTERY 16–18 (2000).

46. *See* PAUL RICOEUR, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 27, 32 (1970), *cited in* G.D. Robinson, *Paul Ricoeur and the Hermeneutics of Suspicion*, PREMISE, Sept. 27, 1995, at 12, *available at* http://www.gongfa.com/robinsonlike.htm.

of public concern? In particular, should it be interpreted as conveying the views of the novelist, who, after all, created the character? That seems untenable. It is the job of the novelist to try to evoke a character and put into his or her mouth all sorts of statements that the novelist, as a person, would most certainly denounce. A novelist who creatively imagines what Hitler might have said in a Munich bar—or a scriptwriter who writes down words that Amon Goeth might have said during his career as a Nazi thug—does not therefore become a Nazi even if he or she writes down, and in some sense successfully communicates to others, the most vicious aspects of Nazi philosophy. But, of course, one sometimes reads novels in which it is clear that the novelist is indeed making arguments through the voice of ostensibly fictional characters.

Consider in this context the recent novel published by Nicholson Baker, *Checkpoint*.[47] The novel presents a dialogue between two characters, one of whom is describing, and justifying, his plan (or more properly, his fantasy) to assassinate George W. Bush: "Ben, this guy is beyond the beyond. What he's done with this war. The murder of the innocent. And now the prisons. It's too much. It makes me so angry."[48] Later in the novel, Jay, the putative assassin, says:

> I can't understand why this outlaw, this FELON, who's killed something like twelve thousand people, should be alive when those girls [killed at a checkpoint by U.S. soldiers] are dead. It's just wrong. Not only is he alive, he's served coffee in special little fancy china cups, he's flown around in a big airplane with a living room, he's treated with round-the-clock, shit-eating deference! . . . It's got to stop.[49]

Jay argues that a proper manifestation of such anger—and bringing such deference to an end—is assassination. Denounced as "scummy" in the *New York Times Book Review* by Leon Weiseltier,[50] the book is actually quite interesting as a character study. It is even, at times, quite funny in its delineation of its two more-or-less-academic personalities. This being said, I can wonder if Barnes and Noble, from whose Internet site I ordered it, might have violated, when mailing it to me, the federal statute that prohibits the use of the mail to transmit "any document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . ."[51] The "threat," though, is made by a fictitious character. In any

47. NICHOLSON BAKER, CHECKPOINT (2004).
48. *Id.* at 7.
49. *Id.* at 110–11.
50. Leon Wieseltier, *The Extremities of Nicholson Baker*, N.Y. TIMES, Aug. 8, 2004, at 12 (book review).
51. 18 U.S.C. § 871 (2004).

event, would it be appropriate for the Secret Service to interview Baker or, even more to the point, to interview me, given that I have now reprinted in the pages of the *UCLA Law Review* one of its more incendiary passages? (And, of course, the recursion may continue: Should the editors be subject to interview for agreeing to publish this very paragraph of the Essay?)

Before one dismisses such questions as paranoid, consider Sue Niederer, the mother of a serviceman killed in Iraq. Ms. Niederer was arrested during a Republican campaign rally in New Jersey's Mercer County for interrupting a speech by Laura Bush by demanding some justification for the war that sent her son to his death.[52] She was later investigated by the Secret Service for posting a comment on the web site Counterpunch.org, stating that she wanted to "rip the president's head off" and "shoot him in the groined area."[53] To put it mildly, I think this only begins to capture what my own feelings would be—and what I certainly would feel like saying—if faced with a comparable situation.

Perhaps, though, one takes comfort in the Secret Service's viewing Ms. Niederer as a potential threat, given both contemporary reality and the age-old potential for violence in persons who feel betrayed by those they trusted. See, for starters, *Medea* or *Hamlet*. But consider an Associated Press headline: "Utah man's anti-Bush sticker prompts visit by Secret Service."[54] The bumper sticker in question included a "cartoonish" head of George Bush wearing a crown and the message, "King George—off with his head."[55] Two Secret Service Agents interrogated nineteen-year-old Derek Kjar for an hour and fifteen minutes, asking him, according to the press account, "about a broad range of things, including whether he had any ties to terrorist groups or enjoyed reading historical accounts of assassinations."[56] (Perhaps they should have asked him if he owned an album of Stephen Sondheim's recently staged musical *Assassins*, which "stars," so to speak, the various assassins, both successful (Lee Harvey Oswald) and unsuccessful (Lynette "Squeaky" Fromme), of American presidents.[57])

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52. *See* Associated Press, *Secret Service Probes N.J. Mother's Bush Comments* (Sept. 23, 2004), *available at* http://www.fac.org/news.aspx?id=4084.

53. *Id.*

54. *See* Associated Press, *Utah Man's Anti-Bush Sticker Prompts Visit by Secret Service* (Sept. 4, 2004), *available at* http://www.fac.org/news.aspx?id=13995.

55. *Id.*

56. *Id.*

57. ASSASSINS (P.S. Classics 2004). *Assassins* is seriously flawed, in fact, because it basically collapses all of these people into a single mold of psychological misfits, rather than noting there is a real difference between someone with serious, albeit terrible, politics like John Wilkes Booth, and "Squeaky" Fromme, a devotee of Charles Manson. Tyrannicide, after all, has a distinguished history in political thought.

A final example even closer to home (at least at UCLA) is an unsuccessful attempt by the Secret Service to interview *Los Angeles Times* cartoonist Michael Ramirez.[58] The act that brought him to the attention of the Secret Service was the publication by the *Times*, on July 20, 2003, of an editorial cartoon described by the Associated Press as

> a takeoff of a chilling 1968 photograph from the Vietnam War showing Vietnamese police Gen. Nguyen Ngoc Loan shooting a man he said was a Viet Cong in the right temple on a Saigon street. In the cartoon, the man pointing the gun at a caricature of the president has "politics" written across his back, and there's a sign on the street scene in the back reading "Iraq."[59]

Ironically enough, as any *Times* reader surely realizes, Ramirez is no critic of Bush; he was actually trying make the point that "President Bush is the target, metaphorically speaking, of a political assassination because of sixteen words [about the attempt of Iraq to purchase uranium from Africa] that he uttered in the State of the Union.... The image, from the Vietnam era, is a very disturbing image," Ramirez said.[60] "The political attack on the president, based strictly on sheer political motivations, also is very disturbing."[61]

One might well say, altogether accurately, that a visit from the Secret Service is far less ominous than being threatened with ten years of incarceration, as happened to Debs. But one might also say that living in a free society means that one is *not* visited by federal police officers unless they have far better reason than the words one utters about presidents. Do we in fact believe this, or should we—including Gold Star mothers, editorial cartoonists, and law professors—legitimately expect (or fear) a visit from the Secret Service whenever one uses, whatever the context, speech that involves fantasies of violence against the President?[62]

Mercifully, the rest of my Essay is considerably shorter with regard to the categories of speech that I am focusing on. The problem with teaching cases involving libel is simple enough: The cases one assigns by definition include falsehoods against the plaintiffs. One can say, of course, that the very fact that libel cases in the modern era almost always concede falsity and instead go off on abstruse discussions of the circumstances under which newspapers

58. *See* Associated Press, *Secret Service's Visit to Cartoonist 'Profoundly Bad Judgment'* (July 23, 2003), *available at* http://www.firstamendmentcenter.org/news.aspx?id=11737.

59. *Id.* Anyone who is at least fifty-five will almost certainly remember the image.

60. *Id.*

61. *Id.*

62. Fred Schauer suggests that one can analogize threats to the President to comments made in airports about the presence of bombs. At the very least, most of us, especially if we are frequent travelers, believe that those who make such comments can be detained for questioning.

can be held liable for such publications will itself help to salvage the plaintiff's reputation. Professional journalists may be under greater ethical strain in this regard than are law professors. Consider the decisions made by many newspaper editors and television producers in effect to collaborate with groups like the Swift Boat Veterans by repeating their almost certainty libelous accusations against Senator John Kerry. The so-called "free publicity" undoubtedly affected the rhythm of the 2004 presidential campaign and, indeed, may have cost Senator Kerry the election. Fortunately, the topic of journalistic ethics is beyond the scope of this Essay. As a practical matter, though, journalists may have more to answer for, with regard to actual consequences for American society, than do most law professors (whose influence, even on their own students, is really quite negligible). In any event, I am content to discuss the ethical responsibilities of the dutiful law teacher with regard to teaching about freedom of speech.

As already suggested, libel cases, which by definition involve aggrieved plaintiffs seeking vindication in court, may be "self-correcting" if the court finds that the speaker—most commonly a newspaper—in fact "got it wrong" with regard to the victim. Even students who tend to believe that smoke evidences some fire may be led to realize the falsity of particular charges when reading opinions that actually announce the falsity.

Invasion of privacy, however, presents significantly greater problems. Invasion of privacy is altogether different from libel. Libel deals with falsehoods; invasion of privacy, by definition, involves the publication of *truthful* material that, nonetheless, a plaintiff believes is inappropriate for what might be termed involuntary public revelation. I should note that this problem is not confined to classes in freedom of speech. Any professor of criminal law who teaches a case in which a rape victim is actually named, rather than referred to by the euphemistic, more mannerly, "Jane Doe," participates in what may well be regarded as an invasion of privacy. Still, this dilemma has occasion to arise far more often in a course on free speech.

Students should learn, for example, that American law is stunningly less protective of personal privacy than is the law of the United Kingdom.[63] Yet, of course, the very assigning of any of these cases proving the point necessarily means that we as professors are choosing to invade the privacy of the often-named plaintiffs. That fact that there might be a constitutional right to do so, at least in the United States, is totally irrelevant to deciding whether a professor can disclaim any responsibility for a decision to assign an unredacted version of the case in question. In assigning such versions, we necessarily

63. *Compare, e.g.*, Gilbert v. Nat'l Enquirer, Inc., 51 Cal. Rptr. 2d 91 (1996) *with* Argyll v. Argyll, [1965] 2 W.L.R. 790 (Ch. D. 1964) (enjoining publication of memoir by former spouse).

become collaborators with those who invade privacy against those individuals who would like to retain it. Consider, for example, a classic invasion of privacy case[64] that involves the distributors of a movie, *The Red Kimono*, who accurately had identified the plaintiff as a former prostitute. They had learned this because she had in fact been prosecuted for prostitution many years before. The California court might well have been correct, with regard to interpreting the Constitution, when it wrote, "When the incidents of a life are so public as to be spread upon a public record they come within the knowledge and into the possession of the public and cease to be private."[65]

As a matter of fact, this case was in effect overruled in a 1971 decision involving the *Reader's Digest*,[66] which held that a cause of action might lie in a tort case filed by an ex-convict against the magazine for the gratuitous use of his name in a humorous article on inept or unlucky criminals. (He had hijacked a truck that turned out to contain only bowling balls.) The California Supreme Court held that an action for invasion of privacy could be filed with regard to the injurious publication of nonnewsworthy material involving a rehabilitated ex-convict like the plaintiff. However, only on December 6, 2004 (after I delivered the lecture), the California Supreme Court overruled *Reader's Digest* in a case involving the Discovery Communications Company[67] and its reference, in a television documentary, to an ex-felon who, by the Justices' own description, in the many years following his release from prison "has since lived an obscure, lawful life and become a respected member of the community."[68] Indeed, the Court noted that he had received an official "certificate of rehabilitation" from the San Bernardino Superior Court.[69] It did not matter, however, for the Court held that its 1971 decision had in effect been invalidated by later decisions of the United States Supreme Court.[70] Thus, California law has reverted back to the doctrine set out in *The Red Kimono* case.

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64. *See* 297 P. 91 (Cal. Dist. Ct. App. 1931). I am aware that I am violating standard citation form by not including the name of the case. But why is it all important that even the last name of the plaintiff be spelled out? Anyone who wishes to check my reference to this case has been given ample information to track it down. What more is necessary?

65. *Id.* at 93.

66. 483 P.2d 34 (Cal. 1971), *overruled by* 101 P.3d 552 (Cal. 2004) (full titles omitted for reasons spelled out in note 64).

67. *See* 101 P.3d 552 (Cal. 2004) (full title omitted for reasons spelled out in note 64).

68. *Id.* at 553–54.

69. *Id.* at 554 n.1.

70. *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979); Okla. Publ'g Co. v. District Court, 430 U.S. 308 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). Note that the courts used initials in the first case, which involved, like the *Cox Broadcasting* case, the publication of the name of a rape victim. *Smith* and *Okla. Publ'g* both involved publication of the names of juvenile offenders in spite of state law prohibiting such publication.

Does review of the doctrine regarding the First Amendment freedom to publish names in such cases offer definitive absolution to the law professor who assigns the cases and brings the *de facto*, even if not *de jure*, invasions of privacy into his or her own classroom? Can we not sympathize with the rehabilitated law breakers in the *Red Kimono* and *Discovery Channel* cases and believe that they had amply paid society for their previous missteps and were entitled to a "clean slate" in constructing new lives? Or, as in two of the privacy cases decided by the Supreme Court, might we not sympathize with rape victims who preferred that their names be kept from the public even if, as a matter of constitutional doctrine, we agree with the results in those cases that held the newspapers free from liability?

That the law does not protect these plaintiffs really doesn't make what befell them any less of an invasion of privacy. It simply stands for the proposition that unmannerly conduct—that is, the invasion of privacy—should be protected, lest by restricting it, we unduly restrict important services that a free press undoubtedly performs for our society. I have no hesitation in agreeing with this balancing of the interests involved. Yet, if we ourselves are queasy about the propriety of given disclosures, whatever the degree of constitutional protection given to such disclosures, then we should be equally queasy about assigning the cases, or at least assigning them without taking pains to conceal the names of the plaintiffs. At the very least, I do not believe that professors can take easy refuge in the "use-mention" distinction unless they can adequately defend the need to mention names in their own classes.

Is this an invitation to precisely the kind of self-censorship of which I am quite critical? One way of answering this question is to ask what we would have wanted Professor Nimmer to do had he represented the plaintiff who objected to the publication by his or her psychiatrist of an ill-disguised reference to the plaintiff-patient. Surely we would have expected him to keep the identity of his client confidential. Indeed, the actual case is titled *Doe v. Roe*,[71] and it is hard to argue that there is any social loss to suppressing the name of the wronged patient (who won the case).

Offensive speech and pornography present by far the most difficult problems to someone who would choose to teach "about" such subjects. I begin with pornography. Some readers may be relieved to learn that I did not bring with me to my Nimmer Lecture any examples of allegedly hard-core pornography or even the kinds of "trouble cases" that force us to decide what constitutes the boundary between permitted "soft-core" and the constitutionally prohibited "hard-core." Nor are there accompanying illustrations in this

71. 400 N.Y.S.2d 668 (1977).

Essay. This may be a failure of nerve on my part, for I strongly believe that any course devoted to free speech as a legal concept must necessarily wrestle, in a very serious way, with how we define that boundary and, more to the point, how the inevitably abstract definitions that we proffer actually hold up when considered in light of potential examples of "pornography."

I believe, therefore, that anyone teaching courses on freedom of speech must assign to students sexually explicit and, indeed, pornographic materials and hold them responsible for the kinds of preparation involved with any other topic. One might do this "directly" or, as is the case with a law professor I know, suggest to students that they simply surf the Internet and find "appropriate" web sites. Of course, this latter strategy can raise a collateral issue if students attempt to use state-owned computers in a state that has, like Virginia, banned state employees' (or their students') use of state computers to access any "sexually explicit content," which is broadly defined to include almost all descriptions or depictions of "sexual excitement" or "sexual conduct."[72]

To be sure, there exist debates about the limits of what can be assigned, say, in English courses, a topic that I shall address more specifically in a moment. But I believe that it is especially problematic to say that *any* speech is off limits when addressing the question of which, if any, speech, can ever be ruled off limits. Consider the earlier discussion of subversive speech. Would we tolerate any student's refusal even to read a speech advocating the violent overthrow of the United States or declaiming the application of classical theories of tyrannicide to a contemporary president on the grounds that it was "just too disturbing" to confront such material?[73] I believe the answer should be no: A professor has no obligation to tolerate such a refusal, by, for example, constructing an alternative final exam question that will not require discussing the incendiary speech. For the same reason, I believe it follows that

72. VA. CODE ANN. § 2.1-804 to 806 (Michie Supp. 1999), *recodified at* § 2.2-2827 (Michie 2001). *See generally* Urofsky v. Gilmore, 216 F.3d 401, 404 (4th Cir. 2000) (rejecting the argument that Virginia's restriction infringes on the First Amendment rights of the plaintiff or his students).

73. For example, see *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1069-70 (6th Cir. 1987), where the court rejected a claim, based on the Free Exercise Clause, by "born-again Christian" parents that their children be exempted from having to read certain texts assigned as part of the public school curriculum. Although one may think, from the comments in the text, that I would endorse the court's decision, I do not. *See* SANFORD LEVINSON, WRESTLING WITH DIVERSITY 82–85 (2003). Part of the reason is that the texts were assigned as part of a reading curriculum and not, say, as part of an explicitly topical course. Thus, I would resist an argument that Fundamentalist students be exempted from reading (and being tested and graded) texts supporting neo-Darwinian theories of evolution in biology courses, or texts supporting the notion of a secular state in a course on American or world government. But one obviously can learn to read and analyze texts written in English (or French) without being forced to confront ideas that one finds disturbing. My argument is that one cannot learn about the First Amendment without such confrontations.

a student enrolled in a course on freedom of speech could legitimately be assigned a variety of materials that challenge one to define what precisely constitutes "pornography." Indeed, as more than one reviewer noted, Catharine MacKinnon's classic book, *Only Words*, invokes (in words) images that could certainly offend or disturb students, even though the very point of her book is to support the legal ability to the state to curb pornography and much other sex-related speech.[74] And, I am told, MacKinnon and the late Andrea Dworkin, in presenting programs on the evils of pornography, often displayed disturbing pictures in order to clarify to libertarian members of their audience what they were really defending.

I recognize that my pedagogical views are highly controversial, especially in a culture that has become so attuned to the notion of defining sexual harassment as consisting in part of the creation of "hostile environments," where such environments are defined in part by reference to the forced encounter with pornographic or even sexually explicit materials. UCLA's own Eugene Volokh has been the most influential proponent of the view that this branch of sexual harassment law is in potential conflict with the First Amendment.[75] I do not share all of Professor Volokh's views with regard to the ordinary workplace; I am somewhat more willing to limit speech rights at the workplace than he is. Whether or not it is a contradiction, however, I am most sympathetic to Volokh's arguments with regard to the extraordinarily peculiar "workplace" that is a law school class on the First Amendment itself.

In some ways, this is like Professor Nimmer's dilemma before the *Cohen* Court, where to hold his tongue would have been to concede the validity of the proposition under review. To hold back on bringing (ostensible) pornography into the classroom because one believes (or is told) that it would create a "hostile environment" is similarly to concede, without further discussion, that a non-hostile environment is always, without exception, a more important value than rigorous examination of how we define free speech.

Again, one is tempted to focus the inquiry on motivation. Surely, a professor would claim, there is a difference between someone who brings in a copy of *Playboy* or *Hustler* in order to establish a certain sort of power over hapless women who would prefer a different kind of workplace environment, and the professor who claims to be motivated by the purity of inquiry into the meaning of American law. Once again, though, especially with regard to sex, it is

74. CATHARINE A. MACKINNON, ONLY WORDS (1993).

75. *See, e.g.*, Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

foolish to believe that motivation is completely dispositive or, more basically, that we always are aware of or honest about our own motivations.

I conclude with a discussion of the kind of speech that took Professor Nimmer to Washington to defend Paul Cohen, which is usually labeled "offensive speech." Professor Nimmer's wonderful act of lawyering remains altogether relevant today, and not only in providing me with a way of structuring my remarks. As a matter of fact, Chief Justice Burger's dire view of what Professor Nimmer did continues to be reflected in the all too contemporary views of the Federal Communications Commission (FCC). On October 6, 2004, for example, Michael Powell, then-chair of the Commission, was interviewed by National Public Radio.[76] The conversation almost naturally turned to the FCC's crackdown on "indecency" and to an FCC investigation triggered by U2 singer Bono's televised remark, at the 2003 Golden Globe Awards, that the song "The Hands that Built America" (from Martin Scorsese's film *The Gangs of New York*) was "really, really fucking brilliant."[77]

Ultimately, the FCC determined that Bono's use of "[t]he word 'fucking' may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities."[78] The Commission noted that "in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the Commission's prohibition of indecent program content."[79]

This altogether sensible conclusion apparently did not satisfy Powell, who indicated that he wanted to have the Commission's decision on Bono reversed. "I personally believe," said Powell, "that this growing coarseness in use of such profanity . . . is abhorrent and irresponsible,"[80] justifying, presumably, the deployment of the full powers of the state on anyone whose standards of speech are less fastidious those of the Commissioner himself. According to Powell, "if the F-word isn't profane, I don't know what word in the English language is."[81]

I want to spend a few moments analyzing this altogether remarkable comment. I believe that its fifteen words offer us the opportunity to diagnose some central issues in our contemporary notions of freely speaking, both as a legal concept and, just as important, as what we do in our lives together as engaged citizens who should always be attentive to general social norms and

76. *Powell Lays out Plan for FCC* (NPR radio broadcast, Oct. 6, 2004), *available at* http://www.npr.org/templates/story.php?storyID=4073672.

77. *For Fuck's Sake Bono!* (May 2, 2004), *at* http://www.nme.com/news/107446.htm.

78. *See* Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859, 19,861 (2003).

79. *Id.*

80. *See For Fuck's Sake Bono!*, *supra* note 77.

81. *Powell Lays out Plan for FCC*, *supra* note 76.

the desirability of maintaining "good manners." I begin with the reference to "the F-word." I confess that I am usually quite unsympathetic to such euphemisms. I recognize, however, that many people, including, for that matter, one of my closest friends, require them as central to the display of "good manners," just as one of my best students from the Department of Government at Texas informed me that she, too, used the term *the F-word* when giving a lecture on *Cohen* to U.T. undergraduates. So why am I so irritated by Chairman Powell's euphemism? And why do I wish that the UT undergraduates had heard their instructor say *fuck* instead of *the F-word*?

One answer is simply that any listener automatically translates, as it were, *the F-word* into *fuck*. What is the point of refusing to say what is in fact being referred to? The only thing *the F-word* presumably refers to is *fuck*. If it referred to anything else, the speaker would have to make it clear, either explicitly or by enclosing it within a very specific context (as with, for example, a reference to *f-fried potatoes*). Imagine, for example, that some listener, perhaps from a foreign country, doesn't know what *the F-word* refers to, and she raises her hand for professorial clarification. What should the professor say? "I can't tell you"? "Come and see me during my office hours"? Surely he or she should delineate the meaning of *the F-word* and, perhaps, explain why serious people feel it necessary to engage in such terminology. (Perhaps Powell thought that *he* would be the victim of FCC sanctions if he simply said *fuck*.) But, some of you will say, I am missing the point, which is that the euphemism in effect allows us to have our cake and eat it, too, inasmuch as we in fact convey two things at once: First, the word *fuck*, and second, the fact that we know how contemporary conventions work, such that well-mannered people communicate *fuck* by saying *the F-word*. And perhaps there is some evidence for the proposition that they are somewhat different in what Austin called illocutionary force:[82] I have never heard anyone say *F-word you* or *you F-word moron*! (Though I confess that I *would* expect to hear just such terms from students determined to test the boundaries at some school that banned the use of *fuck* itself. And if it went on to ban *the F-word*, then I would expect creative youth to figure out some further way of driving their benighted teachers crazy, in an endless verbal recursion, such as returning to the older term *frig*, which has, among its many meanings, "copulation."[83] And, incidentally, would such a school forbid a student's saying "you look good enough to eat"?

82. *See* JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 99–107 (1962). *See generally* JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC (1985).

83. *See* THE F WORD, *supra* note 18, at 78.

I suspect that most of those who attended my initial lecture and who are now reading this Essay are relatively unsympathetic to Commissioner Powell and his apparent desire to crack down on Bono. Things get considerably more complicated, as a social matter, with regard to another such term, *the N-word*. I have a close friend at the Harvard Law School who simply refuses to say, that is, to "use," the title of *Nigger*,[84] a fascinating book written by his own friend and Harvard Law School colleague—and my close friend and former student—Randall Kennedy that includes copious quotations of manifestations of *nigger* in American law, literature, and oratory. The first friend takes no refuge in the "use-mention" distinction. To mention Kennedy's book, for him, just is to use a word that he loathes and finds degrading.[85]

So what should a thoughtful, presumably decent and (at least generally) well-mannered law professor do? You will not be surprised by now to learn that I believe that a professor generally should say all such words, not least because it is crucial to an understanding of what, precisely, makes their use offensive to some listeners or readers. Begin with the obvious question: Are such words *always* offensive? It is surely hard to argue that that is the case. With regard to *nigger*, the most common counterexample is the comedy of Chris Rock and other contemporary comedians.[86] Here the argument turns, of course, on *who* uses the word. A possible argument is that Rock can "use" it, but that I am not entitled even to mention it, perhaps because I am white.

Certainly as significant as Chris Rock, though, is the novel that Ernest Hemingway viewed as the fount of all subsequent American literature, which is, of course, Mark Twain's *Huck Finn*. Is it fit for assignment to the American young and concomitant discussion in American classrooms? Or does the pervasive presence of *nigger* make it the equivalent of a "non-book," at least among properly sensitive people? My own view is that it is a marvelously complex book about moral growth and the rejection of the conventional wisdom of one's thoroughly racist society. Perhaps the most telling description (and implicit critique) of that society is found in one of the most horrific exchanges in all of American literature. Huck is offering a (false) explanation to his Aunt Sally about his delay in arriving at her farm. (He has, of course, been drifting down the Mississippi on a raft with the runaway slave Jim.) Aunt Sally knows nothing about the circumstances of his travel and thinks that he

84. KENNEDY, *supra* note 14.

85. Kennedy himself not only titles his first chapter "The Protean N-Word," but also intersperses the term "*the N-word*" throughout the book. *See, e.g.*, *id.* at 114, 117, 136, 137, 141, 161, 162, 163, 170, 173.

86. *See id.* at 41–43.

took a regular boat, which, she surmises, might have run aground. For a variety of reasons, Huck rejects that explanation and offers, instead, the following:

> "It warn't the grounding—that didn't keep us back but a little. We blowed out a cylinder-head."
>
> "Good gracious! anybody hurt?"
>
> "No'm. Killed a nigger."
>
> "Well, it's lucky; because sometimes people do get hurt."[87]

This brief exchange instantiates at least as well as the hundreds of pages of *Dred Scott v. Sanford*[88] the particular kind of dehumanization visited upon those we today call African Americans. But, of course, acceptance of Jim as a member of our common community required the kind of revolution in consciousness that constitutes the greatness of Huck Finn as a fictive person (who, in his own way, suggests John Marshall Harlan, another presumably thoughtless slave owner who became the most visionary member of the post-bellum Supreme Court). The moral climax of the novel takes place when Huck decides not to return the slave Jim to his legally rightful owners. That is, he first writes a letter to Miss Watson informing her where her "runaway nigger Jim" can be found.[89] He then reflects on what he has learned (and experienced) while traveling down the Mississippi with Jim. Realizing what is at stake for his own soul, he utters one of the seminal lines in all American literature—"All right, then, I'll *go* to hell"—and tears up the letter.[90] Huck then ponders:

> It was awful thoughts and awful words, but they was said. And I let them stay said; and never thought no more about reforming.[91]

Huck literally accepts the identity of an "outlaw" who rejects, among other things, what John Marshall in *The Antelope*[92] had called the "sacred right[ ]" of private property in slaves in order to become a morally serious person, even if, in the eyes of those around him, this requires a commitment to "wickedness."[93] There may be something more important than fidelity to law (or to conventional wisdom regarding what is "wicked" or even "evil"). Or, more to the point, we put our own integrity at stake when we deify the law (including the United States Constitution, which I believe can indeed be

87. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 282 (Scholastic Inc. 1990) (1885).
88. 60 U.S. 393 (1857).
89. TWAIN, *supra* note 87, at 272.
90. *Id.* at 273.
91. *Id.*
92. 23 U.S. (10 Wheat.) 66 (1825).
93. *Id.* at 114.

described, as William Lloyd Garrison suggested, as a "covenant with Death and an Agreement with Hell"[94]). Surely law students—and even high school students—might need to discuss *that* possibility.

There is nothing "charming" about *Huck Finn*, which at times borders on the nihilistic in its—or in Twain's—contempt for constituted authority. No single novel is more truly subversive. Perhaps *that* constitutes a good reason for the state to desire that it not be taught to the impressionable young, given the state's general desire to reinforce in the young a sometimes mindless respect for constituted authority and conventional wisdom. It is, however, a tragically bad joke to object to assigning the novel because it is built, in substantial ways, around exploring the use and meaning of the word *nigger*, especially if we credit the claims of Shelly Fishkin that part of Twain's greatness was capturing the actual speech not only of whites but of his black characters, too.[95] Any serious course on the freedom of speech—and, indeed, on American law more generally—should have no hesitation to examine *Huck Finn* in depth, including intense class discussion on the semiotics of *nigger*, both in the novel and then for contemporary readers.

A final illustration of the general point that there may be times and places for the legitimate presentation of *nigger* (and, therefore, of any other discrete instance of presumptively offensive speech) is presented by a passage from Justice Ruth Bader Ginsburg's dissenting opinion in a case involving so-called racial districting in Georgia. The majority struck down Georgia's plan on the grounds that race played too great a role in the legislature's decisionmaking process, but Justice Ginsburg dissented. I am not interested in exploring which side had the better argument in this venue. What does interest me is the following paragraph from Justice Ginsburg's dissent:

> In the 1972 election, Georgia gained its first black Member of Congress since Reconstruction, and the 1981 apportionment created the State's first majority minority district. This voting district, however, was not gained easily. Georgia created it only after the United States District Court for the District of Columbia refused to preclear a predecessor apportionment plan that included no such district—an omission due in part to the influence of Joe Mack Wilson, then

94. A resolution adopted by the Anti-Slavery Society on January 27, 1843, declared that "The compact which exists between the North and the South is a covenant with death and an agreement with hell." *See also Isaiah* 28:15: "We have made a covenant with death, and with hell are we at agreement . . . ."

95. *See* SHELLEY FISHER FISHKIN, LIGHTING OUT FOR THE TERRITORY: REFLECTIONS ON MARK TWAIN AND AMERICAN CULTURE 73–74 (1996).

> Chairman of the Georgia House Reapportionment Committee. As Wilson put it only 14 years ago, "I don't want to draw nigger districts."[96]

Students should be well aware that a Georgia legislator was perfectly comfortable explaining his motives—and using such language—so candidly as late as 1982, twenty-eight years after *Brown v. Board of Education*.[97] This paragraph, of course, appears in the United States Reports, the official registry of all opinions of the Supreme Court. But it also appeared in a casebook on constitutional law that I coedit, and I had extensive discussions with my friend and coeditor Jack Balkin, about what we should do when reprinting it. One possibility, of course, is "n——r" or even a more simple "n——." Indeed, Justice William Rehnquist adopted just such a typography in a 1972 case involving the use of the term *motherfucking*, printed as "m—— f——."[98] Needless to say,

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96. Miller v. Johnson, 515 U.S. 900, 938 (1995) (Ginsburg, J., dissenting) (footnote omitted) (quoting Busbee v. Smith, 549 F. Supp. 494, 501 (D.D.C. 1982)).

97. 347 U.S. 483 (1954).

98. *See* Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. New Orleans, 408 U.S. 912 (1972); and Rosenfeld v. New Jersey, 408 U.S. 901 (1972). All three cases were remanded for consideration, in light of *Gooding v. Wilson*, 405 U.S. 518 (1972) and *Cohen v. California*, 403 U.S. 15 (1971). Four justices would have upheld the convictions for breach of the peace and similar offenses. The facts are set out in Justice Rehnquist's dissent, joined by Chief Justice Burger and Justice Blackmun. *See Rosenfeld*, 408 U.S. at 909–13 (Rehnquist, J., dissenting). (Justice Powell wrote a separate dissent, joined by Chief Justice Burger and Justice Blackmun.) Justice Rehnquist stated:

> In *Lewis*, the police were engaged in making an arrest of petitioner's son on grounds not challenged here. While the police were engaged in the performance of their duty, appellant intervened and ultimately addressed the police officers as "G— d— m—— f—— police."
>
> In *Rosenfeld*, appellant appeared and spoke at a public school board meeting that was held in an auditorium and was attended by more than 150 men, women, and children of mixed ethnic and racial backgrounds. It was estimated that there were approximately 40 children and 25 women present at the meeting. During his speech, appellant used the adjective "M—— f——" on four different occasions while concluding his remarks. Testimony varied as to what particular nouns were joined with this adjective, but they were said to include teachers, the community, the school system, the schoolboard, the country, the county, and the town.
>
> . . . .
>
> Appellant in *Brown* spoke to a large group of men and women gathered in the University of Tulsa chapel. During a question and answer period he referred to some policemen as "m—— f—— fascist pig cops" and to a particular Tulsa police officer as that ". . . black m— f— pig ___." Brown was convicted of violating an Oklahoma statute that prohibited the utterance of "any obscene or lascivious language or word in any public place, or in the presence of females . . . ."

Id. at 909–11. For what it is worth, I note that the long line following *pig* differs from the short dashes following *m* and *f*. Moreover, I am not certain what in fact followed *pig*. I suspect *shit*, but, of course, there are other possibilities. *See also* the indispensable article by Fred R. Shapiro, *The Politically Correct United States Supreme Court and the Motherfucking Texas Court of Criminal Appeals: Using Legal Databases to Trace the Origins of Words and Quotations*, *in* LANGUAGE AND THE LAW 367 (Marlyn Robinson ed., 2003).

my own view was that Justice Ginsburg made the right decision in effect to shock her reader by reprinting the uneuphemized *nigger*, and that we properly did likewise when deciding how to convey the case to our students. (Once again, this is exactly what "the rhetoric of sensation" is all about.)

I return to one final aspect of Michael Powell's statement—"if the F-word isn't profane, I don't know what word in the English language is"[99]—that deserves comment. I believe that he has made a category mistake in describing *fuck* as "profane." Let me offer two quick examples of "real" profanity, *God damned* and *Jesus Christ* to express one's exasperation about something. These terms are profane for a very simple reason, as can be verified by even the briefest look at a dictionary definition of "profane." The Random House dictionary, for example, defines "profane" as "characterized by irreverence for God or sacred things."[100] It is truly difficult to figure out how *fuck* could meet this definition. Perhaps one wants to argue that sex is so sacred that it is "profaned" by the use of the word *fuck*? But, then, what is it about *fuck* that is uniquely profane? One might think, after all, that this conclusion would also be applied to the word *screw*, which is as far away from, say, *making love*, as *fuck* is. Indeed, I strongly suspect that lovers far more often emulate Lady Chatterly and use *fuck* rather than *screw* when engaging in intimate speech. Yet Chief Justice Burger seemed to see a difference in the two words.

And, needless to say, it is particularly difficult to understand how *fuck* profanes sex when it is used in a context that has not the slightest overt reference to sex, as on Paul Cohen's jacket. The situation is quite different with, say, *Goddamn*, which presumably is profane in almost all contexts.[101]

CONCLUSION

This Essay, in large part, has been about what some theorists call "civility norms" or, more informally, "good manners." Adherence to these norms operate to demonstrate respect for one another and therefore to enable the creation and maintenance of social order and shared community. They are, however, no more "absolute" than is the First Amendment's guarantee that "no law" shall abridge freedom of speech or the press.[102] Instead, as every lawyer knows, what "no law" turns out to mean is that the

99. *See Powell Lays out Plan for FCC*, *supra* note 76.

100. *See* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1056 (2d ed. 1999).

101. Indeed, for many observant Jews, to write out *God*, rather than *G-d*, is to desecrate the name, which is surely the most basic notion of profanity.

102. U.S. CONST. amend. I.

state must in fact present a "compelling interest" to justify its breach of this important legal norm. So it is with civility norms. When they are breached, one must at least offer an excuse and sometimes offer an apology for doing so.

Professor Nimmer had a more-than-compelling interest in effectively representing his client, and so he breached what the Chief Justice, at least, viewed as a very basic civility norm. I obviously think he was right to do so. But what about the law school classroom? What justifies the breach there? I have argued that the suspension of "good manners" is in fact a sign of respect that we are joined with our students in a common enterprise of trying to understand the meaning of the First Amendment. My breaches of civility, such as they are, can, I believe, be contrasted with someone who more casually, without explanation, uses or even mentions some of the very same words.

But does this justify what some may believe to be my bad manners in a quite different context, a public lecture honoring one of UCLA's greatest scholars and teachers? One of my colleagues at UT asked me this question. While replying, I noted that I chose quite deliberately *not* to bring to the audience's attention actual examples of pornography. I was satisfied to speak *about* pornography, even though I would feel it incumbent to display pornography in the classroom if I chose once more to teach a course on freedom of speech. However, I am not certain that this reply is altogether defensible, given the general theme of the lecture and, now, this Essay.

I mentioned at the outset that I no longer teach a course on freedom of speech. What led to my decision to withdraw from teaching such a course ultimately may be a kind of cowardice, a refusal to face the potential controversy attached to the way I think one must teach about such subjects as "offensive (or hate) speech" and "pornography." Any problems linked with teaching invasion of privacy could in fact be relatively easily solved by redacting the names of the plaintiffs. I see no such easy solutions with regard to offensive speech and pornography. Thus, one *must* run the risk of offending. I think it is as simple as that.

Moving toward the conclusion of my lecture, I quoted Puck's speech to the audience at the conclusion of *A Midsummer Night's Dream*:

> Gentles, do not reprehend:
> if you pardon, we will mend:
> And, as I am an honest Puck,
> If we have unearned luck
> Now to 'scape the serpent's tongue,

We will make amends ere long;
Else the Puck a liar call.[103]

The one problem is that Puck most definitely is *not* merely a lovable scamp, and *A Midsummer Night's Dream* is just as certainly not only a jolly comedy. The "midsummer night" is the occasion for all sorts of typically Shakespearian deception and manipulation of others. I am not, therefore, at all comfortable if auditors or readers end up thinking of me as a "Puckish" lecturer or writer. Still, he offered an example of how to manipulate one's audience, a subject of absolutely central interest to all lawyers and even, if truth be known, to law professors. And so I did (and do) conclude by offering the final words of his closing soliloquy:

So, good night unto you all.
Give me your hands, if we be friends,
And Robin shall restore amends.[104]

103. WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM, act 5, sc. 1.
104. *Id.*

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