

To the Emory Faculty, August 17, 2018
From: Paul J. Zwier

I'm sure that many of you saw the email with the heading, "Law Communications " that came from the Dean, Provost and President. It reported that some faculty member at Emory Law School used the "N word" in class. The memo said that the use of the word was in a civil rights case, but the "N word" was not in the case itself. The memo gives no more explanation about how or why it was used and I am sure there are many rumors going around about what happened. You probably suspect that the reason I am no longer teaching my classes is related to this event. To say I am in shock is to put it mildly. I hope you will read my explanation.

First the circumstances where I used the "N word." It was getting towards the end of a Torts class on topic of offensive battery. As you may remember from your first year Torts class, offensive battery allows for extending the definition of contact beyond the person, to things immediately connected to the person. We were discussing the case, *Fisher v. Carrousel Motor Hotel, Inc.*, which involved (P), Fisher, a black man. The court describes Fisher as a mathematician and NASA employee. I'd wondered aloud with the class whether the court was showing its implicit racism to highlight Fisher's profession and employer as if to say **he** was entitled to respect, while others blacks may not be. The incident occurred in the mid 1960s in Houston at a luncheon, to which Fisher had been invited. Fisher had confirmed his attendance so the sponsors knew he would be there. The lunch took place in the hotel. The white manager of the hotel (D) approached Fisher. The case says, "As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club." Flynn died before trial. Fisher was never cross-examined, so I have often wondered whether he said something stronger. The question is which "N word" was used, not that an "N word" was not used. Perhaps this was in my mind as I continued my dialogue with the student.

The student who I called on for the case is a black female student with the last name [REDACTED]. I started the class calling on students with last names starting with the letter C. I had then decided to go to the front of the alphabet for the next group of students to call on. In asking [REDACTED] about more facts in the case some students reported to me later that I asked whether Flynn called Fisher a n..... when he slapped the plate from his hand. To the best of my recollection she answered yes. She may have been too startled by the question to have been answering consciously. I'm not sure whether I used the "N word" because I don't remember consciously choosing to use the word. I do remember that there was a reaction from at least one black student to my question, so I may have misspoken. I wondered to myself after class when it was brought to my attention, whether I had mispronounced negro, or said something else. My intent was to eventually raise the racist slur as a possibility to set up the case we would read in the next week, where the "N word" was used again. I admit that had I used the "N word" this was a mistake on my part and I have no doubt hurt

and offended students who heard it or later learned that I had used the word itself. I apologized the next morning. BLSA representatives were present in the classroom.

I do know that the “N word” was used in a following case that we would have discussed on Tuesday. In *Caldor Inc., v. Bowden*, (1993)(p. 64 in the casebook) a young black man is detained for hours by white security guards intent on getting him to confess that he stole from his employer. During the course of that detention (P) (Bowden) says that the security guard says, [as appears in the text] “ You people—you n___ boys make me sick, but you’re going to burn for this, you sucker.” (p. 66). In other words, it might be that this case was on my mind from the last time I taught it, and it is the source of my having thought that the word was also used in *Fisher*. In any event, the use of the word was not gratuitous. Nor was I trying to surprise the class or make it more provocative. The “N word” is an important part of the discussion of offensive battery and intentional infliction of emotional distress.

Of course, I may have made at least two mistakes in discussing the *Fisher* case. I conflated the facts in the case with a hypothetical to follow, and or the following case, and also should have said the “N word” rather than saying the “n....” . I was rushing at the end of class and should have picked my words more carefully and made my point more clearly.

My purpose was to discuss on Tuesday how tort law evolves away from requiring contact for battery into intentional infliction of emotional distress. Depending on how pressed we are for time, I want to show how the common law evolves along with the understanding of words, using the “N word” as an example. My purpose in setting the slur up in *Fisher* (1967) was then in *Bowden* (1991) to ask whether its use was worse in 91 then in 67? And to ask what about now, in today’s environment? Would it be worse to use it now?

As my past Torts students can attest, I often lead a discussion around the concept of “fighting words,” and how Tort law usually deals with them. This can lead to discussion roughly on the points raised in Randall Kennedy’s excellent article, *Who can use the word N___* (he uses the word in his title) *in Higher Education and Other Considerations*. I recommend it for all to read. <http://www.jstor.org/stable/2999172> .

There Professor Kennedy discusses the history of the use of the “n word” and how it has come to be seen as being so explosive over the years. He also dismantles the excuses people have for using it (even by Chris Rock) and comes to the position that it is an important example of how hurtful and provocative the word has become. His article is an example of how to have these discussions. The “N word’s history should be recognized and discussed, also to help understand the explosive nature of its current meaning. He does not use the “N word” but uses the word itself. I don’t presume to be Randall Kennedy and before that Thursday always used the “N word.”

I also must say the topic comes up in Evidence and Trial Advocacy. In court and in trial settings there are times that the word itself had to be used because witnesses use those words. It can be part of the discussion of what it means to “play the race” card in discussing trial strategy.

Back to what happened in Torts, to be clear, the use of the word was not directed at a student. It was used once. The purpose of my discussion of the N word was never to normalize its use. My purpose was just the opposite. I hoped to show Torts students how explosive and harmful words can be in so many setting and that words alone can qualify, without contact, as an intentional tort.

As Randall Kennedy’s article shows the discussion of how words are used in law is at the heart of the common law. He uses a quote from O.W. Holmes that makes the point,

“... a word is not a crystal, transparent and unchanged [but is] the skin of a living thought [that] may vary greatly in color and contact according to the circumstances and the time in which it is used.”

If time allows our discussion can lead to insights into the judge’s role as interpreter of the meaning of words in common law and originalism and textualism. I think these matters are essential to a first year understanding of the common law.

I was removed from the classroom for the semester on Friday evening, through a memo I received from the Dean. The class where the incident occurred was in my Torts class this last Thursday, the day before. The memo was followed that same evening by the “Law Communications” email referred to above that was sent to the entire Emory community.

Of course, this is my version of what happened and have tried to be as critical and objective in my telling as I can be. I thought I owed you an explanation of what happened and what was on my mind at the time. I feel compelled to make this clear to combat any narrative that would make assumptions that I am a racist or white supremacist or inhospitable towards racial minorities. I hope you know me well enough to understand, that though a work in progress, my heart is in the right place.

Sincerely,

Paul J. Zwier
Professor of Law