THE SECOND DRAFT

ARTICLE

The Kids Are Alright

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As with the law itself, law students are always changing. And law professors should regularly consider how those changes will impact the classroom and our pedagogical approach. For our year-long Legal Writing course, the law students of 2021-22 surprised us with the careful and nuanced way they thought about language. Our 1L students were more interested in parsing the meaning, effect, and approach to potentially offensive language than any students we had taught before. We learned a lot from them. And what we learned will have a lasting impact on how we teach legal writing and design our legal writing problems.

1. The Culture of Content Warnings

We are in the midst of a decades-long cultural shift regarding the use of language. Concerns, real and feigned, about free speech, "cancel culture," academic freedom, and "the new political correctness" are often the focus of public discussion and political debate.

Spurred by social media discourse and the reckoning over racial justice that became widespread in the spring and summer of 2020, many of our current law students are familiar with the idea that offensive speech is a form of violence[1] that should be ameliorated through the use of content or trigger warnings on syllabi, assigned materials, social media posts, and campus events.[2] Some professors have lauded the attributes of this generation—who on the whole are more informed, more aware, and more proactive than prior generations. Today's young adults demand and inspire sports teams,[3] companies,[4] and celebrities[5] to confront our nation's past and rectify wrongs. But this approach to language has not been mainstream in many law schools.[6]

Indeed, not everyone believes it is necessary, wise, or compatible with academic rigor to accept that certain language can be harmful and traumatic for today's students. There has been much hand wringing about the dangers of "coddling" today's young adults.[7] Often mocking them for being overly sensitive and referring to them as "Generation Snowflake," some fear that these young adults will be less resilient and less capable leaders and contributors to society. And so higher education and legal academia have been the site of repeated scuffles over how distressing topics and offensive language should be handled in the classroom.[8] While students, in law schools especially, have become more comfortable

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[1] Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (Jul. 14, 2017), https://www.nytimes.com/ 2017/07/14/opinion/sunday/when-is-speech-violence.html?_r=0.

[2] Johnathan Chatt, *Not a Very P.C. Thing to Say*, N.Y. MAGAZINE (Jan. 27, 2015), https://nymag.com/ intelligencer/2015/01/not-a-very-pc-thing-to-say.html.

[3] Emma Bowman, *For Many Native Americans, the Washington Commanders' New Name Offers Some Closure*, NATIONAL PUBLIC RADIO (Feb. 26, 2022, 12:07 PM), https://www.npr.org/2022/02/06/1078571919/washington-commanders-name-change-native-americans.

[4] Jon Haworth, *Aunt Jemima Announces New Name, Removes 'Racial Stereotypes' From Product*, ABCNews.com, Feb. 10, 2021, https://abcnews.go.com/US/aunt-jemima-announces-removes-racial-stereotypes-product/story? id=75797458.

[5] Marianne Garvey, *From Digital Detox to Apology Tours, How Some Celebrities Come Back From Being 'Canceled'*, CNN.com, July 19, 2021, https://www.cnn.com/2021/07/16/entertainment/ canceled-cancel-culture/index.html.

[6] Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent, A.B.A. J.* (Oct. 15, 2020), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_ be_intellectually_violent.

[7] Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

[8] Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 Cap. U. L. Rev. 1, 5 nn.1-21 (2021) (collecting examples from law schools and higher education).

raising concerns about classroom culture, some professors have worried that students' sensitivities to language may make them unable or unprepared to act as lawyers.[9] These professors raise the concern that "pandering" to the sensitivity of this generation means we are not preparing them for the rigors of the legal profession. And some professors feel that educators alter course content to avoid the ire of this generation to the detriment of their education.[10]

2. Students as Partners in the Legal Writing Classroom

Thus, the question of whether and how to use trigger warnings and the like in law school courses to prepare students for offensive language and distressing material remains unsettled. But some scholars have noted that trigger warnings are a doorway to rethinking the relationship between students and professors and between learning and law school pedagogy.

For example, in an article from 2015 about student requests for trigger warnings, Professor Kim Chanbonpin argued:

> Trigger-warning demands might . . . be read as a student critique of traditional law school pedagogy. Especially in the first year, the role of faculty is to indoctrinate students in a system of dispassionate analysis where subjective experiences and emotional reactions have no place. In this light, the trigger warning debate offers an opportunity to fundamentally alter the learning process by inviting students to become partners in the production of knowledge by allowing them to reclaim power in the classroom.[11]

This "Students as Partners" model is a recent development in higher education pedagogy. It has been described as "a relationship in which all involved—students, academics, professional services staff, senior managers, students' unions, and so on—are actively engaged in and stand to gain from the process of

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[9] *Id.* at 9 ("To us, enunciating slurs for pedagogical purposes is not simply defensible. We think that, used properly, such teaching helps convey and reinforce important academic and professional norms of accuracy and precision in use of sources. Accurate quotation is particularly proper in law teaching because grappling with unredacted facts is a professional requirement among jurists, one for which law students ought to be prepared.").
[10] Edward Schlosser, *I'm a Liberal Professor, and My Liberal Students Terrify Me,* VOX.COM (Jun. 3, 2015, 8:00 AM), https://www.vox.com/2015/6/3/8706323/college-professor-afraid.
[11] Kim D. Chanbonpin, *Crisis and Trigger Warnings: Reflections on Legal Education and the Social Value of the Law*, 90 Chi.-Kent L. Rev. 615, 616-17 (2015).

learning and working together."[12] These learning and teaching partnerships are beneficial to students and faculty and include "increased engagement with learning and enhancement activities, transformed thinking about teaching and learning, and developed awareness of one's own role and agency in the wider academic learning community."[13]

Drawing from this model and Chanbonpin's suggestion to invite students to be partners, we can make the legal writing classroom an active and engaging experience for all—while still effectively preparing students for the profession. Instead of bemoaning students' "fragility" in the face of offensive language or dismissing their concerns in an attempt to "toughen them up" or make them "practice ready," we can engage with our students' perspectives on language and directly connect those perspectives to the practice of law and the skill of legal writing.

In particular, we learned to use problems that involve offensive language and cases that describe offensive language as a starting point for a dialogue with our students about the norms of legal writing and the right way to treat offensive content in legal documents. Rather than using students' concerns as a reason to avoid conversations, assignments, or situations that may involve sensitive topics, we have an obligation to make these issues part of our pedagogy and to learn how to address them thoughtfully and responsibly.

By listening to our students and allowing them to write creatively and intuitively about offensive language for a persuasive writing assignment, we realized that the sensitivity of today's law students is not an obstacle to their learning or to their future legal careers, but a modern approach to thinking about how legal writing treats offensive language and depicts discriminatory incidents. In doing so, we learned to welcome our students' reflections on legal language and started to foster students' development into the culturally sensitive and activist lawyers they want to be.

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[12] Mick Healey et al., *Engagement Through Partnership: Students as Partners in Learning and Teaching in Higher Education*, HIGHER EDUC. ACAD. 1, 12 (July 2014), https://s3.eu-west-2.amazonaws.com/assets.creode. advancehe-document-manager/documents/hea/private/resources/engagement_through_partnership_1568036621.pdf.

[13] Mick Healey et al., *Students as Partners: Reflections on a Conceptual Model*, 4(2) Teaching & Learning Inquiry 1 (2016), https://files.eric.ed.gov/fulltext/EJ1148481.pdf.

3. Raising Issues of Offensive Language in Class

For the final writing assignment of our year-long course, we typically assign a motion for summary judgment on a federal statute. Often, we use problems based on gender or race discrimination under Title VII of the Civil Rights Act of 1964. In returning to this same area of law year after year, we get to see how different classes react differently to similar legal problems. And we have an opportunity to engage with our students in discussions about workplace discrimination.

In the spring of 2022, we used a persuasive writing problem that involved a hostile work environment claim brought by a Black woman against the venture capital firm where she worked. In an effort to give students–especially students who shared identities with our plaintiff–some control over their learning experience, we allowed our students to choose which side they represented and whether to write about discrimination on the basis of race, gender, or both.

As in prior years, the claim was largely based on supervisor comments. Because of our concern about subjecting our students to words that can cause trauma and to reflect more modern workplace discrimination situations, we chose to use mostly "code words"[14] that indicated and implied the sexist and racist motivations of the speaker, rather than stating them explicitly. For example, the supervisor referred to the plaintiff as "bossy and aggressive." He used the phrase "someone like her," and told her she was always "angry." He called her "shrill and entitled," a "killjoy," and "surprisingly articulate," and said she must "know all about welfare." In addition to these comments and some discriminatory actions like dismissing her work, the supervisor also used one slur—he called her "bitchy."

Why did we include that slur? The case law is sparse when it comes to discrimination claims based entirely on code words. Students likely would have struggled to find legal support for their arguments in a way that was counterproductive to our pedagogical goals. While we wanted students to realize that the Title VII case law hasn't caught up to the more subtle ways that discrimination often occurs in today's workplaces, we wanted them to have a fact that provided a simpler application of the case law. At the same time, we deliberately chose a word that we thought was relatively mild in the universe of gender-based insults to limit the stress that the facts would cause for our students.

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[14] Lloyd v. Holder, No. 11 CIV. 3154 AT, 2013 WL 6667531, at *9 (S.D.N.Y. Dec. 17, 2013) (citing Ash v. Tyson Foods Inc., 546 U.S. 454, 456 (2006)) (recognizing that "certain facially non-discriminatory terms can invoke racist concepts that are already planted in the public consciousness").

But we quickly learned that what we thought about the word "bitchy" and its connotations was different from the thoughts of our students. In fact, despite choosing a word that we thought was relatively minor, our students spent considerable time parsing and thinking about the word and how offensive it was and why.

For example, some students thought that it was important to quote the word "bitchy." Some did so believing it was necessary for their documents to be accurate and complete. Others did so because they believed that using the word was more persuasive—either to argue that there was blatant discrimination or that the plaintiff's complaints were not sufficiently severe.

Other students weren't comfortable quoting the word in their documents. They felt the word was inappropriate in a legal document or was better left unstated to demonstrate it was the kind of word that shouldn't be used. Even some of the students who represented the plaintiff and could have quoted the word for persuasive impact, declined to do so—thinking that including the word either legitimized it or risked duplicating its traumatic impact.

These students worked hard to find ways to describe, but not quote, the word. Here are just a few of their efforts to describe this language:

- The supervisor made "offensive remarks";
- He used "sexist language";
- He used a word "meant to disparage assertive women and play into gender stereotypes";
- He stated "a degrading sexual epithet";
- He employed a "gender slur";
- He used "a derogatory slur";
- He stated an "explicitly gendered insult"; and
- He called her "a well-known gendered derogatory term."

Unfortunately, the facts we created for our assignment weren't the only offensive language the students had to address. Many of the cases the students had to read and rely on to make the arguments for our assignment contain far more offensive language than the term we used in our facts. And none of the

cases reflects the kind of awareness and sensitivity that our students showed toward this language. It was glaring how cases quote at length grossly offensive language,[15] including the "n word."[16]

There was no way for students to avoid reading these cases in doing effective and comprehensive research. And so we warned students that they would encounter in the cases racist and sexist language that was presented by the courts unfiltered and at length. And we posted content warnings on cases that we posted to our Course Management System, so students could at least have notice that we would be engaging with offensive language in class. And we stated expressly that we would never use or read or repeat the offensive language in class, and we expected that they wouldn't either.

What might have been more distressing for some students was that in many of these cases the court determined the supervisor did not create a hostile work environment—despite using language that the students found abhorrent. Students were shocked to be confronted with these facts in print and then have to process how the court determined that there was not sufficient harm to create legal liability under Title VII. We chose to grapple with our discomfort over the language in the cases openly with our students. And we discussed in class, repeatedly, why the courts felt it necessary to quote offensive language, including when holding it wasn't sufficiently severe to support a discrimination claim.

Ultimately, the students' reasons for hesitating to repeat these words in their writing and to say them in class revealed ways the students could argue their positions as to the hostile work environment claim. The very reason the students hesitated to repeat some of these words is because they consider them discriminatory and severe, which tracks the standard for what creates a hostile work environment. The challenge in teaching them to be good legal advocates was to help them articulate why the language was severe, using legal precedent and molding their arguments to reflect the sensitivity they would hope a judge or jury would have in considering these issues.

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[15] *See* Torres v. Pisano, 116 F.3d 625, 628 (2d Cir. 1997) (explicitly quoting supervisor comments referring to a Latina plaintiff as the gender derogatory "c word" and the ethnically derogatory "s word").

[16] *See* Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 16 (2d Cir. 2014) (quoting supervisor comments using the "n word").

4. Be the Change

As legal writing professors, we can learn so much from our students who take language so seriously. Instead of trying to teach them to toughen up or acclimate to the use of offensive language, we are better off trying to understand how they see things and partnering with them to explore the material in new ways.

Years ago, we might have told students that it was "wrong" or "not persuasive" to avoid quoting offensive language. But our students have shown us a new way to think about language. To them, quoting offensive language perpetuates a sexist and racist perspective that seeks to minimize the harm that can be caused by these words. Asking our students to quote this language is a way of perpetuating and reenacting the harm the offensive language causes. In ignoring students' feelings and thoughts about the words used, professors are missing an opportunity to treat them as partners and demonstrating an aspect of the legal system and legal education that is ripe for change—a rigid adherence to the way things have been done.

Law professors should see that our students have a useful, modern perspective that we can learn from. Many of our students are adept at thinking deeply about words and using them carefully. They understand that words have great power and must be used with great care. In so many ways, this is exactly how law students and lawyers should think about language.

We can prepare our students to be good lawyers and good writers while still respecting and actually learning from the way they think about words. And by doing so, we can work to make our legal writing classrooms, which often exist in intimidating and exclusive white spaces, more inclusive and antiracist. Indeed, our students are showing us a new way forward that creates "an atmosphere that is attentive to [students'] intellectual and psychological well-being" and makes the most of "an opportunity for law teachers to begin dismantling the hierarchy of traditional legal education."[17]

[17] Chanbonpin, *supra* note 11, at 626.