Incorrect Speech, Incorrect Hearing: A Problem of Postmodern Legal Education

Paul D. Carrington

Thucydides observed that, although the Greeks shared a common tongue, it was their inability to speak to one another that spelled an end to their democracy.[1] If we may believe him, there were once those who could speak Greek so that it was understood not only by both Athenians and Spartans, but by Thebans and Corinthians too. That must have required not only sensitive speakers who were skilled dialecticians but also a readiness of their diverse audiences to discern their intended meanings and refrain from unwarranted attributions. It may thus have been a cause of the Peloponnesian War that differences in the nuances placed on common words by auditors from different cities led them to derive different and unintended meanings, meanings having corrosive effect on the mutual trust they once had shared. While it is unlikely that the history of the fifth century before Christ would have taken a different course if the citizens of Athens and Sparta had read the recent book of Randall Kennedy,[2] it is instructive to reflect on that possibility.

Public discourse in a multiethnic democracy cannot be conducted in a single King James or Mandarin tongue. While postmodern literary scholarship encourages readers of diverse ethnicities to find for their "communities" their own distinctive meanings of literature,[3] that is not a satisfactory approach to democratic law or politics. It is one thing for an interpretive community to share in isolation their reactions to a work of art—although even that is not without risks—and quite another for the critics to attend a discussion of public affairs by persons of different interpretive communities with the intent of imposing their subcultural meanings on words uttered in the shared language by a speaker who may be limited by her own subcultural diction or other impediments to communication. "Listener-centered" legal or political discourse of that kind is not unlikely to become no discourse at all.

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1. "The Greeks did not understand each other any longer, though they spoke the same language; words received a different meaning in different parts." Thucydides, History of the Peloponnesian Wars, trans. Thomas Hobbes, Bk. 3, para. 82, at 204 (Ann Arbor, 1959).
2. Nigger: The Strange Career of a Troublesome Word (New York, 2002).
3. For an elegant expression of this encouragement, see Barbara Herrnstein Smith, Contingencies of Value: Alternative Perspectives for Critical Theory (Cambridge, Mass., 1998).

This point, subtly made by Kennedy, deserves consideration not only by African-Americans, who are his primary addressees, but also by others who are as postmodernists prone to impose their politically correct interpretations on the diction of speakers who may be less correct than themselves. Perhaps those who advocate more sensitivity training for speakers might consider the possible additional need for sensitivity training for postmodern listeners. At least this is so for lawyers who counsel clients about the meaning of legal texts or engage in dispute resolution in any of its forms. Law students seeking professional competence need to master, as much as or more than any, the skill of understanding what writers or speakers are saying, and that depends heavily on their skill in discerning why they are saying it. For that reason, Kennedy's point has very broad application for lawyers.

Kennedy has previously proved himself willing to be politically incorrect,[4] and he has now written a book about the most incorrect of all words, one that supplies his despised title. His aim is moderately to relax the popular obsession with that word. He observes that this worst of all words is on rare occasions just the right word to say what needs to be said. His work contrasts with the work of more correct authors who have sought to criminalize the use of specific words they hear as *hate speech,* seemingly without regard for the purpose or context in which the despised words are used by a speaker.[5] Such audition might be denoted as *hate listening,* an activity that those preoccupied with the deterrence of hate speech might contemplate as a suitable additional object of correction, especially so if they are, or hope to become, competent lawyers.

As Kennedy records, and readers well know, many African-Americans and a multitude of others who deplore racial discrimination have made the utterance of the N word by white persons a *casus belli* without regard for the context or purpose of its use. Kennedy of course acknowledges that the word is often an insult (who would deny it?), and he offers a striking collection of examples. He offers no excuses for those using the word as an insult. For an example, he considers and approves (correctly in my own view) the removal from office of a public prosecutor who angrily used the N word as an insult while inebriated and in a barroom brawl with an African-American, on the ground that his expression, even if provoked, revealed him to be unfit for the office of public trust that he held.[6]

Kennedy's point, however, is that even the N word is not always an insult, even when used by white persons, and he cautions auditors and readers to note the difference between his examples and the numerous counterexamples he provides of persons and authors employing the word usefully, with no intent to harm. And while he notes that African-Americans may address one

4. See, e.g., Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327 (1986).

5. For a useful discourse, see Mari Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (Boulder, 1993). Their discussion would have been even more useful had the authors also considered Kennedy's point.

6. Kennedy, *supra* note 2, at 70–71. The case is In re Spivey, District Attorney, 480 S.E. 2d 693 (N.C. 1997).

another with the word as a means of expressing a common bond, he suggests that the negative consequences of its use are not wholly lacking when it is used by black comedians as a form of self-degradation.

The N word, as Kennedy notes, is only the strongest example of a word assigned notoriety by persons sensitive to insult. Its use as an insult is related to the institution of slavery in the United States, and it may have acquired its extraordinary power to offend in the period following the Civil War and the emancipation. It came to be taken as a suggestion that the person so addressed should be remanded to chains. It has acquired an implication familiar to *all* Americans that persons of dark skin denoted by that term have degraded traits and characteristics.

Kennedy compares other words that carry similar baggage, but less of it. Over time, he notes, a word can acquire, or can lose, such baggage. For an additional example, Hugh Henry Brackenridge reported in his 1792 novel that many American women were offended when addressed by the word *lady* for its unacceptable connotations of un-American class pretensions.[7] Following Cervantes, Brackenridge thought their overreactions might be related to the traditions of chivalry still remnant in America in his time. He noted that, among those given to fighting duels, the smaller the aggravation the greater the sense of honor manifested by the challenger. Anyone, he observed, could resent an intentional affront, but to kill (or despise) a man where there was no such intent showed great sensibility, at least in the tradition of chivalry. So, for a woman to hate a man for politely addressing her as a lady vindicated her honor as a patriot, much as a challenge to a duel would vindicate the honor of her escort if the offender were guilty of making a sexual invitation to her. So far as Brackenridge reports, women were not prone to take offense at the mere utterance of the word *lady* so long as it was not applied to themselves. Yet the contemporary propensity of some citizens to sense that they have been insulted by the mere utterance of a proscribed word such as the N word, regardless of the purpose of the utterance, is one that resonates with the *code duello* as Brackenridge describes it.

Not long ago, I had an encounter with another word of assigned notoriety. I was explaining to a class of law students the facts of a defamation case brought by a Hollywood actress named Jones against Calder, a journalist in Florida who wrote in a national publication.[8] The question I meant to pose was whether such a plaintiff might sue her defamer in California, or would have to go to Florida. What precisely Calder had said about Jones, so long as it was plausibly defamatory, was not germane to the jurisdictional issue I hoped we might discuss, so I abbreviated his reportage of her sex life to a syllable, reporting that he called her a "slut." After class, I was politely told by an amiable student that my diction was incorrect and marked me as a person lacking sympathy with the sexual liberation of women. It did not matter that the word was used not as an insult uttered by the speaker but as an accurate

7. Modern Chivalry, ed. Claude M. Newlin, 53 (New York, 1937). The work was first published serially and then in 1792 as a novel.

8. Calder v. Jones, 465 U.S. 783 (1984).

summary of an offensive utterance by someone else. The mere utterance of the syllable was, I was assured, an offense to sensitive women without regard to purpose or intent.

I do not contend here that persons of Victorian sexual mores are entitled to advocate them in public, or even in a law school classroom. I do contend that no other English word would have served my purpose so well, and I therefore ought not apologize for using it as I did. As I said to my informant, if she chooses to take offense when it is obvious that none was intended, that is primarily her problem as an auditor, and not mine as a speaker. If she can supply me with a one-syllable synonym of *slut,* I would consider using it to accommodate her sensitivities.

There are, I acknowledge, other special four-letter words which carry so much baggage that they are not allowed on network television and perhaps should not be used in a law school classroom either, even in the presence of adults, except perhaps on rare occasions when they are needed for the purpose of saying what needs to be said.

Kennedy's argument that I here endorse as compelling for lawyers is that auditors have an obligation to consider the context and purpose of an utterance, *even* of the N word. The morality of our discipline requires that legal texts be taken to have one meaning without regard to the subcultural identity of the persons to whom they are applied.[9] A lawyer reading legal texts as objects of subcultural interpretation will give his clients a lot of bad legal advice. Moreover, one who is quick to take personal offense, even at the misuse of an ugly four-letter word, is unsuited for the roles of advocate, counselor, or negotiator. If my informant about the postmodern meaning of *slut* is seriously interested in preparing herself to the work of a lawyer, she would do well to learn to deny herself the indulgence of attributing unexpressed and unwelcome intentions and sentiments to a speaker, whether a teacher or a fellow student, and in due course to control the same urge when the speaker is a client, an associate, an adversary, a juror, or a judge.

It was, indeed, at least arguable that the best thing a law student could acquire from the traditional case method as employed by many American law teachers for about a century was the ability to put his own personal vanity and choice of diction on the shelf while engaged in "thinking like a lawyer."[10] That, it seems, was the intellectual and emotional toughness that case-method teachers Charles Hamilton Houston and William Hastie sought to develop in their students at the Howard University Law School when their slogan was "no tea for the feeble, no crape for the dead."[11] One cannot imagine their student Thurgood Marshall, for example, expending much intellectual or emotional

9. See generally Lon L. Fuller, The Morality of Law (New Haven, 1964). This morality is of course also expressed in the Equal Protection Clause of the Fourteenth Amendment. And see Rule 1 of the Federal Rules of Civil Procedure.

10. Paul D. Carrington, Hail! Langdell! 20 Law & Soc. Inquiry 691, 743–45 (1995).

11. Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 126 (New York, 1976). On Houston's teaching, see more generally Genna Rae McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights 57–128 (Philadelphia, 1983).

energy at mere tasteless crudities of expression by other lawyers when it was obvious that no offense was intended, especially when there was a professional task to be performed.[12] Lawyers concerned with substance worry little over affect.

Perhaps postmodern law students should value the use by their teachers of an offending word for an inoffensive purpose as a significant element of their professional education, affording them an opportunity to divest themselves of the disabling intellectual habit associated with their postmodernism. If I could have taught my offended student to make that divestment, I would have achieved a much more important result than merely informing her of the law of state court jurisdiction.[13]

Hate words are such, I contend, only when it appears that they are used to express hate. They may be linked to hate conduct and might then be properly denoted as *hate crime.* For example, spray-painting such words on a public building is far more harmful to the public than spray-painting equally tacky graffiti. A law student who spray-painted the N word, or even its abbreviation, on a public sidewalk should be expelled, and in the absence of some extraordinary explanation should have a hard time with a character and fitness committee. But for those of us who have been making the case for *diversity* among populations of law students, it would be hypocritical to exclude students whose disqualification is that they are less attentive to the sensitivities of others than the others wish them to be.[14] Even the N word is a word capable of polite ironic usage and may in some circumstances be the most apt means of saying what needs to be said.

For example, Kennedy notes that Mark Twain uses it 215 times in *Huckleberry Finn.*[15] That book could not have been written without the word. Its most admirable character is referred to by the despised term because he could not have been credibly referred to in any other way. The story is convincingly told as the recollections of an ignorant mid-nineteenth-century adolescent who happened unselfconsciously to record seven distinct dialects reflecting differences of status and locality. That this was an accurate account of how people living along that river in the middle of the nineteenth century spoke to one another has not saved the author from recriminations about his use of the

12. On Marshall's career as an advocate see Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court 1936–1961 (New York, 1994). One wonders what advice Houston, Hastie, and Marshall, those great lawyers, might have offered the Black Law Student Association at the Harvard Law School in April 2002 over the imbroglio arising when, it was reported, a fellow student wrote the letters "nig." in a brief of an exclusionary zoning case and shared his brief with other students. It does not appear from the journalism that anyone involved in the event *intended* to give offense. As reported, the initial utterance giving offense was in bad taste, but the reaction as reported seems to have been indifferent to its context or purpose, or to the purposes of those who responded to what seemed to them an overreaction.

13. I made this point more generally in Teaching Civil Procedure: A Retrospective View, 49 J. Legal Educ. 311 (1999).

14. "Diversity!" has sometimes been a battle cry for politically correct nondiversity in just this sense. For extended comment, see Paul D. Carrington, Diversity! 1992 Utah L. Rev. 1105.

15. Kennedy, *supra* note 2, at 138.

despised word or kept his book on the shelves of many public libraries.[16] Nor has it saved Twain from efforts to suppress his art that, when he was a few bucks ahead, he paid the tuition of an African-American student at the Yale Law School, or that the student he helped was later an early mentor to Thurgood Marshall.[17] As Kennedy affirms, it is nonsense to try to suppress his great work simply because some readers are unable or unwilling to perceive the irony that the lowly Jim, identified as he is by the N word, is Twain's hero.[18]

There are situations aside from the accurate reportage of the expressions and sentiments of others in which the N word may still be exactly the right one. Several examples may be found, as Kennedy notes, in the diction of Lyndon Baines Johnson.[19] Johnson of course lived in a different time, and he was given to crude expressions of all sorts, many of them potentially offensive to his auditors. Indeed, he was often brutal in his speech. He was, however, a versatile dialectician, not unlike Twain in his ability to adapt his dialect to his purpose. That was one of the skills making him famous in his time for his remarkable ability to manipulate and overbear other legislators.[20] An important feature of his approach in lobbying colleagues was his ability to posture as a constituent of anyone he needed to persuade. He had mastered this art by the time he was a young adult,[21] for he employed it—often unconsciously I have no doubt—throughout his political career. His was a talent in that respect that any lawyer should envy.

Not an example chosen by Kennedy, but one I regard as a Mona Lisa performance of the dialectician's art, was a conversation between Lyndon Johnson and George Wallace—a three-hour exchange held on Sunday, March 13, 1965—featuring use of the N word by the president of the United States. It was summarized by Stephen Lesher, Wallace's biographer, who unsqueamishly recorded the recollections of Wallace and of Nick Katzenbach and other presidential aides who were in and out of the room during the three hours that Johnson and Wallace were together.[22] Lesher's summary of the exchange should hang in the Louvre of political expression even though it was appallingly incorrect even for 1965 and makes for shocking reading today.

16. John H. Wallace characterized the work as "the most grotesque example of racist trash ever written." The Case Against Huck Finn, *in* Satire or Evasion: Black Perspectives on Huckleberry Finn, eds. James S. Leonard et al., 16, 16 (Durham, 1992). For other thoughts on the racism in Twain, see Making Mark Twain Work in the Classroom, ed. James S. Leonard (Durham, 1999).

17. The lawyer sponsored by Samuel Clemens at Yale was Warner McGuinn, the Baltimore lawyer who shared work with Marshall in Marshall's first years of practice. Tushnet, *supra* note 12, at 10.

18. Aged readers may be reminded of my previous encounter with postmodernism, which rested on my reading of a different Twain book. Of Law and the River, 34 J. Legal Educ. 222 (1984). The resulting furor is recorded in Correspondence, 35 J. Legal Educ. 1 (1985).

19. Kennedy, *supra* note 2, at 11–12, 52–53.

20. An account of that success is Robert A. Caro, The Years of Lyndon Johnson: Master of the Senate (New York, 2002).

21. Robert A. Caro, The Years of Lyndon Johnson: The Path to Power 202–14 (New York, 1982).

22. George Wallace: American Populist 330–33 (Reading, 1994).

Wallace was himself no slouch of an artist in the use of dialect. He attributed his own political success as a governor of Alabama who commanded a national following (exhibited by a standing ovation from initially hostile Harvard students whom he addressed[23]) to his ability to "put the hay down where the goats can get at it."[24] Wallace, it must be noted, seldom if ever used the N word to describe his African-American constituents, not even when he was among those white constituents who often used it to degrade their fellow citizens. Wallace would later renounce the racist politics that had led him to stand in the schoolhouse door to forestall the desegregation of the University of Alabama,[25] and he would live to crown its first African-American homecoming queen.

It could be said of Johnson's method that he put the hay down where Wallace could get at it. In talking to Wallace, as he often had done with racist senators, Johnson deliberately used dialect marking himself as one of Wallace's white supremacist constituents. Wallace was staggered by the president's language. It prevented him from doing what he had come to the White House to do. Johnson could not have achieved that effect without the N word, much as it was indispensable to Twain in recording as he did in *Huck Finn* the utterances and recollections of an ignorant adolescent Missourian of his time. Johnson's usage was, I would guess, unconscious instinct derived from what he knew, or thought that he knew, about Wallace. No doubt the president could have dealt with a governor in many other ways, but not to the same effect.

The notable conversation was held at the request of Wallace to discuss recent events in Selma, Alabama. The Southern Christian Leadership Conference and other groups had centered efforts to secure voting rights in Selma, where only two percent of the eligible blacks had been registered to vote, despite registration efforts that had been underway for several years.[26] On the previous Sunday, March 6, there had been a brutal beating by Alabama state troopers of civil rights marchers seeking to walk along the state highway from Selma to Montgomery to petition for voting rights for black Alabamians. Judge Frank Johnson (no relation to Lyndon), who was the federal judge known as most favorable to civil rights lawyers,[27] had imposed a temporary restraint on a repetition of the attempted march pending further judicial consideration by him of the issues presented by the proposed police response.

Wallace publicly insisted that the issue was not voting rights, but the marchers' defiance of state law regarding demonstrations on state highways and the resulting endangerment of themselves and others. He asked the

23. *Id.* at 262–64.

24. On his style with Northern audiences, see *id.* at 267–310.

25. *Id.* at 502.

26. David J. Garrow, Bearing the Cross: Martin Luther King Jr. and the Southern Christian Leadership Conference 378–82 (New York, 1986).

27. Lesher, *supra* note 22. Johnson's biographies are Jack Bass, Taming the Storm: The Life and Times of Judge Frank M. Johnson Jr., and the South's Fight over Civil Rights (New York, 1993); Tinsley E. Yarbrough, Judge Frank Johnson and Human Rights in Alabama (Tuscaloosa, 1981).

president for a meeting to negotiate a resolution of the problem and secure Department of Justice help to influence Judge Johnson if possible, or otherwise to help the Alabama police keep the peace. He planned to alarm the president about the imminent violence to be expected from supremacist Alabamians who would not tolerate voters of dark skin pigments. That threatening message could not be borne to a person using the N word as the president did.

It was an important part of the context of the meeting that Congress had only recently enacted the Civil Rights Act of 1964. That event was in part a product of Johnson's talent. It was a comprehensive law, but it was silent on voting rights, a concession made to gain the required assent of Southern senators. It appears that Johnson planned to come back to Congress for voting rights, but not in 1965. His hand was in some measure forced by the events at Selma on the previous "Bloody Sunday."

On the governor's arrival in the oval office, President Johnson offered Wallace a deep, low seat that emphasized the governor's relatively diminutive stature. The president, a much larger man, pulled up his big rocking chair and rocked to and fro, suspending his face over that of the governor to magnify the force of what he was going to say. As Lesher summarizes the conversation, it went thus:

> JOHNSON: George, you see all those demonstrators there in front of the White House?
>
> WALLACE: Yes, Mr. President, I saw them.
>
> JOHNSON: Those goddam niggers have kept my daughters awake every night with their screaming and hollering night after night. Wouldn't it be just wonderful if we could put an end to all those demonstrations?
>
> WALLACE: Oh, yes, Mr. President, that would be wonderful.
>
> JOHNSON: Then why don't you let the niggers vote?
>
> WALLACE: They can vote if they're registered.
>
> JOHNSON: Well, then, George, why don't you just tell them county registrars to register those niggers?
>
> WALLACE: I don't have that power, Mr. President. Under Alabama law, that belongs to the county registrars.
>
> JOHNSON: George, don't you shit me. Who runs Alabama? Don't shit me about your persuasive powers. I had on the TV this morning and I saw you and you were talking and you was attacking me, George.
>
> WALLACE: Not you, Mr. President. I was speaking against federal intervention.
>
> JOHNSON: You was attacking me, George. And you know what? You were so damned persuasive that I almost changed my mind.[28]

At the end of the three-hour conversation, Johnson, we are told, arose from his rocker and led (or pulled?) Wallace into the White House Rose Garden for a press conference. There he stepped in front of cameras and microphones to announce that he was sending a draft of voting rights legislation to Congress immediately. Two days later, before an extraordinary joint session of Con-

28. Lesher, *supra* note 22, at 332.

gress, he declared in diction marking one of the finest moments in the annals of American politics: "Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome."[29]

His dramatic utterance of the lyric of the hymn most used by King and his followers was another exhibition of his skill as a dialectician. It brought tears to the eyes of King as he watched on television.[30] (Mine, too.) And to one of King's followers, it "suddenly dawned on me that King was no longer the number one civil rights leader in America, Lyndon Johnson was." Had Wallace stayed with the president any longer, he might have found it necessary to support federal voting rights legislation. For who was left to support him if a user of the N word such as Lyndon Johnson would not?

Johnson was not a lawyer. But the kind of skill exemplified by his performance with Governor Wallace and the Reverend King is one that a good lawyer might be proud to employ in many professional situations, even if it required the use of politically incorrect diction. The public mission of the American legal profession is, indeed, to bridge differences of class, of ethnicity, and of social mores, as well as those of race. Where people as diverse as Athenians and Spartans share turf, it is a job for law and lawyers to mediate. Professionals performing that role can scarcely afford to have thin skins when others are loose with their diction. Even more, they cannot take offense at the use of words used to a benign purpose and without intent to give offense.

Kennedy's point that the apparent purpose of an utterance informs its meaning is worthy of the attention of all those who have imbibed from literary theorists the idea that meaning is derived from audience response, and who thus justify their insistence on politically correct speech. Even the N word is capable of benign use. And lawyers who are quick to take offense at inappropriate diction, without respect for the manifest purpose of a writer or speaker, perform professional labors of all kinds under a grave handicap.

If this is so, it is an appropriate cause for concern of legal educators. In an age of consumerism in professional education, there is a risk of becoming too delicate in respecting the perceived sensitivities of students. Educators who contribute to the elevation of those sensitivities may be making it harder for students to learn to attend the sensitivities of others. Thinness of skin and attentiveness to the fragilities of others are not mutually exclusive traits, but they are not, in my experience, often manifested in the same person. The former trait is seldom observed in good lawyers who deal professionally with all manner of Greeks and administer law that applies equally to all of them.

29. 1 Public Papers of the Presidents of the United States: Lyndon B. Johnson (1965), 281, 284 (Washington, 1966).

30. Garrow, *supra* note 27, at 408–09.