Thomas W. Cranmer

Are Real Lawyers Sensitive?

This issue of the *Michigan Bar Journal* is devoted to one of the State Bar's most important programs—Justice Initiatives. Whether it is fundraising for the Access to Justice Campaign, training lawyers for the Domestic Violence Pro Bono Project, or supporting the Model Guidelines for Improving Criminal Defense Services, the Justice Initiatives Division is at the forefront of our equality and access efforts.

As a segue to the wonderful articles that you will read in the balance of this *Bar Journal,* I want to share with you a speech that I heard not long ago. The speaker, Alex Sanders, is the former chief judge of the South Carolina Court of Appeals and a former president of the College of Charleston. Although space limitations prevent me from reproducing his entire speech, the essence of Mr. Sanders' message is what follows. At the time I heard Mr. Sanders speak, I found his words to be compelling, thoughtful, and thought provoking. I hope you do as well. One caveat before you begin. As Mr. Sanders began his speech, he made the following disclaimer: "Hear me out and reserve judgment until I am finished. What I am about to say is carefully calculated to offend everyone. The point is at the end." If you follow Mr. Sanders' sage advice, you will find the effort well worthwhile. Enjoy.

Real Life Case Studies in Political Correctness— Or Are Real Lawyers Sensitive?

by Alex Sanders

Real life case studies in political correctness:

The most common transgressions involve words used in everyday speech. Perfectly good words have fallen into disrepute, words like "girl." The politically correct term for a female is "woman." "Lady" is a doubtful substitute. Thus, "girlfriend" is politically incorrect. Until recently, the politically correct term was "significant other." Now, it's "spousal equivalent." So, expect to get an invitation soon addressed to you and your "spousal equivalent." "Lover" has been recently suggested as an alternative. That's worse. Can you imagine introducing somebody as your "lover"? "This is my lover, Mom."

"Boy" is, of course, politically incorrect when applied to any African American. The politically correct term for persons of that race has evolved from "colored"—as in "National Association of Colored People"—to "Negro" to "Black" to "African American" to the designation most recently in vogue, "persons of color." Thus, the goal of achieving political correctness is a moving target, and we perilously approach full circularity, from "colored" to "persons of color," all in one lifetime. (Next Thanksgiving, I predict we will be calling turkey "poultry of size.")

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Adjectives have not escaped scrutiny. It is politically incorrect to say that someone is "disabled." The politically correct term is "challenged." Hence, a person who is "blind" is "visually challenged" or "photonically nonreceptive." "Short" is "vertically challenged." "Old" is "chronologically challenged." "Fat" is "volumetrically challenged" or "gravitationally challenged" or "person of girth" or "Ample American." "Bald" is "folically challenged" or "comb-free." "Bisexual" is "gender non-preferential." And so forth.

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It is politically incorrect to use any slang term in referring to a person's race, ethnic background, or body part. Except that it is okay to refer to a person as a "redneck"—that's politically correct. As former New York Senator D'Amato learned when he tried to imitate Judge Ito, the judge in the O.J. Simpson case, it is politically incorrect to mimic a person's dialect or accent. Except that it is okay to mimic a southern accent—that's politically correct. Does it sound like I have a little chip on my shoulder?

At one time, all we had to worry about was Bill Clinton's rule for the military: "Don't ask, don't tell." Now the rule is being challenged. A lot of people don't understand the rule. As nearly as I can tell, the rule amounts to this: It is okay for Uncle Sam to want you, but if you want Uncle Sam, keep it to yourself.

I do not, however, apologize for calling attention to the wretched excesses brought about by political correctness—a good idea run amuck. Speech can often be offensive, odious, repulsive, an instrument of domination and oppression. But, historically, speech has been far more significant as a means of liberation. The Bill of Rights doesn't guarantee freedom from speech. To silence an idea because it might offend a minority doesn't protect that minority. It deprives it of the tool it needs most—the right to talk back.

The idea of bringing harmony to the American society through censorship is an evasion of the real problem. Speech reflects social inequities and disparities and injustices; it does not cause them. The answer clearly does not lie in censorship. George Bernard Shaw said, "All great truths begin in blasphemy." In the marketplace of ideas, where appetite and ambition compete openly with wisdom and knowledge, truth is the result more often than not.

In the words of Professor Kenneth Lasson:

With the fullness of time, when all has been said and done in both the heat of the moment and the cooler perspective of experience, what has come to be called "Political Correctness" will be revealed as little more than passionate folly—merely another skirmish in the eternal battle for the minds, hearts, and souls of humankind.

Now, having convinced you—I trust—of the transparent absurdity of political correctness, just to prove I am still a lawyer, I will now proceed to convince you of just the opposite: that the means by which human beings express themselves is critically important and that decent people, including especially lawyers, have the positive obligation to be ever mindful of others and their particular situations in life. Are real lawyers sensitive; should they be?

When I was a judge, so long ago I can barely remember it, I wrote an opinion containing a startling concession to pragmatism—entirely remarkable for a court. My opinion adopted for the Court a rule: "Whatever doesn't make any difference, doesn't matter." I will demonstrate—I trust to your satisfaction—that three things matter: words matter, feelings matter, and the law, the area of endeavor to which I have devoted most of my life, matters. That is to say, you matter.

Herman Melville said:

Hate is unspectacular and always human,

And shares our bed and eats at our own table. . . .

Words do matter. I will address the proposition in terms of words other than those I have previously used.

Consider the term "mongoloid idiot." Up until the late 1970s, that terminology wasn't an insult, it was a medical diagnosis. It wasn't uttered by crude, ignorant people, it was pronounced by the best trained medical doctors in the world, who told families of kids with the condition that their children would never be able to dress themselves, recognize their parents, or lead "meaningful lives." Abortion was commonly recommended. At the very least, parents were advised to institutionalize the child. Only the most stubborn or inspired parents resisted the advice of their doctors.

Then something momentous happened: the terminology changed. "Mongoloid idiot" became Down syndrome. Parents began to take their Down syndrome children home and love them. They learned that the doctors were wrong.

They learned that children with Down syndrome are here for a very specific purpose: to teach us patience, humility, compassion, and sheer joy. They learned the profound interdependence of human hearts and minds. And they learned something else. They learned that they were very specially blessed.

Of course, the terminology did not cause Down syndrome. Did it have an effect on how Down syndrome children were treated? Certainly, it did. The term "mongoloid idiot" may look like only words, but the fragile little babies, whose lives were prematurely terminated or wasted in mental institutions, can surely testify in some celestial court to the power of mere language, to the intimate links between words and social policies.

We possess one crucial characteristic that makes us lawyers and makes us human: the ability to communicate, to understand, to put ourselves in some mutual reciprocal form of contact with each other. No matter how eloquently your dog can bark, he cannot tell you that his father was poor but honest. Among the many talents we have, communication is the one we could all stand to develop more fully.

To refer to a woman as a "girl" or "honey" or "sweetie" is not just demeaning, it is defining and limiting. To refer to a homosexual as a "queer" or a "fag," to call an African American by that most vile epithet, is not just insulting, it is killing. No race is superior; no gender is inferior. All collective judgments are wrong. Only racists make them.

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Words matter. Words are the skins of thoughts. History is filled with all too many examples of hateful words followed by hateful deeds—the assassinations of Lincoln, the Kennedys, Martin Luther King, Yitzhak Rabin, 168 innocent people in Oklahoma City, and the Columbine High School students; the horrendous events of 9/11. Words matter.

What about ebonics? If we don't teach ebonics, we can't teach Alex Haley or Mark Twain or "Swing Low Sweet Chariot." We will have to do without the music called "Jazz" and the "Blues." Did you know that B.B. King wrote the Blues in iambic pentameter—the most difficult meter of Shakespeare's sonnets? The next time you hear somebody ridiculing ebonics, ask him what particular meter he writes in.

Five years ago, the British Royal Navy abolished the prohibition against allowing gays and lesbians to serve in the Navy. The admirals reacted with predictable alarm. The *New York Times* reported last week that the British Royal Navy is now actively recruiting gays and lesbians to serve, and everybody wonders what all the fuss was about.

Feelings matter. In South Carolina, a tiresome debate rages from pulpits to cocktail parties: the Confederate flag is required by law to fly on the grounds of our State Capitol. Does the flag represent heritage or hate; patriotism or slavery. Everybody has a well-considered opinion on the subject. Everybody is ready, willing, and able to express an opinion.

I try to make it a practice never to enter upon a premises where the matter is being debated. It can suck all the oxygen out of the room. To date, nobody has convinced anybody of anything. The problem with the issue is that it has been played out impersonally by both sides. Everybody's talking; nobody's listening.

When I was the president of the College of Charleston, I was leaving the president's house one morning and I saw a co-worker of mine at the college, standing on the sidewalk in front of the fraternity houses. I recognized her immediately as Dorothy, one of our custodial workers who cleans up the residence halls at night. She was softly crying.

I know Dorothy, and I know she has problems. She lives a life of "quiet desperation." Everybody at the college knows Dorothy. She is a single mother. She works hard to support herself and her children. She bears her burdens privately. Her eyes are like the tinted windows of a limousine: she can see out, but you can't see in. She is always cheerful and uncomplaining.

Dorothy neither seeks nor expects any help from anybody. Nevertheless, I thought she might tell me what was causing her such acute distress. I thought she might let me help her.

"What's the matter, Dorothy?" I asked, fully expecting her to reveal some intractable financial crisis or perhaps a serious illness that had overtaken one of her children. I was wrong. She pointed up at the Confederate flag flying proudly on one of the fraternity houses. "I love these children," she said. "I love cleaning up after them. I don't mind their mess. But, when I see that flag, it makes me think they hate me." "They don't hate you, Dorothy," I said. "Those fraternity boys are just playing. You know how bad they are sometimes. You know how they like to play." I tried desperately to make her understand. She didn't. Memories of old experiences were too much with her. She sobbed audibly.

I went straight over to the fraternity house. "Men," I said, "I'm sorry, but I've got to ask you to take down that flag." Notice, I didn't order them to take it down. I only asked. Believe me, they knew the difference. They stiffened visibly.

I could see it in their eyes: they were going for their argument like a gunfighter preparing to draw his Colt 45. I was in for the diatribe. The bumper sticker argument: "It's part of our heritage. It doesn't represent

hate. We have a Constitutional right." And so forth.

The president of the fraternity stands six feet four. He has the ash blond hair and the indomitable spirit of his Nordic ancestors. He has eyes like a Weimaraner. He was ready for me. "Exactly why should we take it down?" he asked, cool as a cucumber. "Because it makes Dorothy cry," I said.

I told them all what had happened. "Oh," the president almost whispered, his eyes now more like those of a deer caught in headlights. "We didn't mean to make Dorothy cry," he said. That night the fraternity met. They discussed the matter of the Confederate flag as I'm sure they had many times before. But this time, the discussion was different. It centered now not on the lifeless pages of history but on the feelings of a single human being: Dorothy. The next day the flag came down. Perhaps it will go back up tomorrow or next year or four years from now, when all the fraternity boys now at the college have graduated. But, for one brief, shining moment an idea prevailed that is the best idea any of us ever had: the idea of unselfishness.

I make a lot of people angry when I tell that story because I neither condemned the fraternity boys as hate mongers nor did I defend their heritage. Both sides in the debate about the Confederate flag have the issue backwards.

It's not the intention of the person displaying the symbol that matters. The fraternity boys did not intend to show hate. They intended to represent what they perceive as their heritage. But, their intention really doesn't matter. What matters is the feeling invoked in the person to whom the symbol is displayed: Dorothy.

Approaching the issue from that perspective—from Dorothy's perspective—immediately invokes the familiar rule fundamental to all human relationships: Do unto others as you would have others do unto you—the rule common to literally every religion of the world, major and minor.

Hate is not the opposite of love; indifference is. George Bernard Shaw said, "The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them: that is the essence of inhumanity." Indifference to the feelings of others violates the rule.

Finally, the law: I will tell you one more story—as you may have gathered, I speak in parables. The story dispassionately describes the career in law of a Florida lawyer. His name is Virgil D. Hawkins. I use myself, and my own career, as sort of a yardstick to measure the story. The facts are otherwise taken from reported cases extending over almost 40 years. Ordinarily, cases provide a dreary literature. These cases are the rare exception.

In April 1949, when I was 10 years old and in the 6th grade, Virgil D. Hawkins applied for admission to the University of Florida Law School. His application was denied. He appealed and his case ultimately reached the Florida Supreme Court. The court said he had "all the scholastic, moral and other qualifications prescribed by the laws of Florida." But the Court, nevertheless, ruled he was not eligible for admission. Virgil D. Hawkins was, after all, black.

In May 1954, when I was 15 years old and a sophomore in high school, the United States Supreme Court ordered desegregation of the public schools, "with all deliberate speed."

In March 1956, when I was 17 years old and a senior in high school, the United States Supreme Court issued the second of two orders to the Florida Supreme Court regarding the admission of Virgil D. Hawkins to the University of Florida Law School. "There is no reason to delay," said the United States Supreme Court. "He is entitled to prompt admission."

In June 1956, I completed my public school education without ever attending school with a student who was black. By that time, Virgil D. Hawkins had been before the Florida Supreme Court three times, and the United States Supreme Court twice, but he still had not been admitted to the University of Florida Law School.

In March 1957, when I was 18 years old and a freshman at the University of South Carolina, the Florida Supreme Court again denied the application of Virgil D. Hawkins to attend the University of Florida Law School. The Court ruled that he "does not, in fact, have a genuine interest in obtaining a legal education."

In January 1962, when I was 23 years old, I graduated from the University of South Carolina Law School, still without ever having attended school with a single student who was black. I began my law practice in Columbia, the capital of South Carolina. African Americans were not allowed to use the bathrooms in the courthouses where I practiced. The water fountains were segregated, and even the plaques in the courthouses memorializing World War II veterans, who died fighting for their country, listed their names in separate columns, one labeled "White" and the other "Colored." The anti-lynching law had been defeated in Congress as a result of a filibuster by a South Carolina senator. Virgil D. Hawkins still had not been admitted to the University of Florida Law School.

In November 1976, when I was 38 years old and had been practicing law for almost 15 years, Virgil D. Hawkins, who had finally graduated from law school, appeared before the Florida Board of Bar Examiners. His application to take the Florida Bar Examination had been denied because the Massachusetts law school from which he had graduated was not accredited by the American Bar Association.

Virgil D. Hawkins made a novel argument: he argued that he should be admitted to the practice of law without being required to take the Bar Examination because, had he been admitted to the University of Florida Law School 27 years earlier, upon graduation, he would have become a member of the Florida Bar automatically under the so-called "diploma privilege." Sounds like a rather weak argument, right?

But Virgil D. Hawkins was able to cite a recently established precedent in Florida. After failing the Bar Examination several times, a relative of a justice on the Florida Supreme Court had been admitted to the practice because he had "expressed a desire to attend before the repeal of the diploma privilege." Virgil D. Hawkins pointed out that he, too, had previously "expressed a desire to attend law school." The Florida Board of Bar Examiners bought his argument, and finally—at long, long last—he became a member of the Bar. Virgil D. Hawkins was 70 years old.

Unfortunately, the story of Virgil D. Hawkins does not end there. Over time, his ability to practice law faded. He had gotten a late start in the profession. As he grew older, he simply could not keep up, and he once again came before the Florida Supreme Court, now for the last time.

According to the Court (and I quote directly from the case):

He seldom turned away an indigent client in need. However, his advanced age and lapse of years since attending law school, the loss of a quality law school education, and the strain

of practice as a sole practitioner made the successful practice of law difficult. . . . Worn and weary from the struggles of the last half of his life, . . . Hawkins put down his sword, and attempted to leave the battlefield.

On April 18, 1985, when I was 46 years old and chief judge of the South Carolina Court of Appeals, the Florida Supreme Court accepted his resignation from the Bar. Three years later, he died.

Fortunately, the story of Virgil D. Hawkins does not end there either. On October 20, 1988, when I was 50 years old and my daughter was making plans to attend law school, the Florida Supreme Court reinstated him as a member of the Bar. Although he had been dead for several months, the Court said—and again I quote directly from the reported order—"His lifelong struggle for equal justice under the law should be memorialized." The Court also said it was moved by his final plea. "When I get to heaven," he had said, "I want to be a member of the Florida Bar."

History teaches that wherever and whenever injustice has been banished, conflict reconciled, and human understanding fostered, the law and lawyers have played a vital role. The story of Virgil D. Hawkins serves to remind us sadly that the process has not always promptly responded. At the same time, there have been instances of startling change brought about by the process, the kind of change people thought would take forever to come about.

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Judges, like well behaved children, do not speak unless spoken to. The first voice must be that of the lawyer. Lawyers provide Plato's leaping spark that enables judges to see their way out of Socrates' dark cave. The position of a judge is like that of an oyster: static, anchored in place, unable to take the initiative, digesting what the currents churned up by lawyers wash their way.

If Thurgood Marshall and the other civil rights lawyers of the '50s and '60s had waited for Congress to act, or for state legislatures to act, we would still have segregated schools. If they had raised only those issues they were paid to raise, we would still have segregated water fountains in southern courthouses. The role of lawyers and the law in America was captured in poetry more than a hundred years ago.

One day a woman named Katherine Lee Bates walked up on top of Pike's Peak. She looked out as far as she could see, and she wrote a song about what she saw, a love song to America. My mother taught me that song when I was a little boy.

Oh beautiful for spacious skies
For amber waves of grain
For purple mountain majesties
Above the fruited plain.

America, America
God shed his grace on thee
And crown thy good, with brotherhood
From sea to shining sea.

We have been singing that song a lot lately as a patriotic anthem. But, for some reason, we haven't been singing the last verse. That verse has a discordant message: the suggestion that America the Beautiful isn't perfect. We should be singing that last verse today. The verse is in the form of a prayer.

America, America
God mend thine every flaw
Confirm thy soul in self-control
Thy liberty in law.

My mother has been dead for years, but I haven't forgotten what she taught me: our liberty is in law.

Properly practiced, the law can be the most noble pursuit of humankind. You and I are a part of a rich heritage. Nobody—not generals or admirals, not preachers, not journalists, not legislators, not governors, not kings or queens, not even presidents—have shaped America as profoundly as lawyers. As you live the rest of your professional lives, it will not do to assume that someone else will bear the major burdens, that someone else will demonstrate the key convictions, that someone else will preserve culture, transmit value, maintain civilization, and defend freedom. What you do not value will not be valued, that what you do not change will not be changed, and that what you do not do will not be done.

Real lawyers are sensitive. They realize that justice demands equality, and equality is brought about by application of the Golden Rule, as well as the Rule of Law. If we are serious about bringing everybody into full membership in our society, we must root out the prejudice in our souls. Our noble profession demands no less. America demands no less. The world demands no less. Our ethnic and cultural diversity—our differences in language, custom and beliefs—provide the strength, resiliency, and creativity of our country and our planet. Think often of the fragile little Down syndrome babies, remember Virgil D. Hawkins in heaven with them, and whatever you do, don't make Dorothy cry. ◆

ENDNOTES

Some of the job titles are from George Carlin's latest book, *When Will Jesus Bring the Pork Chops.* Some of the material in the paragraph on "centers" is also from his book.

The material about the North Carolina statute prohibiting profanity is from Robert Carpenter's column in the *SC Bar News.*

Norman Cousins said, "The Bill of Rights does not offer freedom from speech," etc.

The quoted language of Professor Lasson is from a law review article—as far as I know, yet unpublished—by him, entitled "Political Correctness Askew: Excesses in the Pursuit of Minds and Manners."

The argument against censorship is from an essay by Arthur M. Schlesinger, Jr., entitled "Multicultural Ayatollahs."

Former United States Senator Alan Simpson first used the phrase "appetite and ambition compete openly with wisdom and knowledge."

The Herman Melville quote is from John Mortimer's book, *Villains.*

The material, and much of the language, about Down syndrome is from an essay by Michael Bérubé, entitled "Life As We Know It: A father, a son, and genetic destiny."

Bertrand Russell first said, "No matter how eloquently your dog can bark, he cannot tell you that his father was poor but honest."

Henry David Thoreau said, "Most people lead lives of quiet desperation."

The story about Dorothy is true, although her identity has been disguised to protect her privacy.

The comparison between Hitler and Roosevelt is from the recent novel by Susan Isaacs, entitled *Shining Through.*

The story about Virgil D. Hawkins is based on an article by Bill Wagner in the December I988 issue of *Trial* magazine. See also *The Florida Bar re: Virgil Darnell Hawkins,* Opinion No. 72,240 (filed October 20, 1988).

The material about Elbert Tuttle, the old Fifth Circuit Court of Appeals, and judges responding to injustice is from a book by Jack Bass, entitled *Unlikely Heroes.*

The comparison between judges and oysters is from a *Harvard Law Review* article by Calvery McGruder, entitled "Mr. Justice Brandeis," 55 Hav L Rev 193, 194 (1941).

The words about our ethnic and cultural diversity providing the strength of our country and planet are based on something Octavio Paz once said.

See also, *McCall v Finley,* 294 SC 1, 362 SE2d 26 (Ct App 1987) ("Whatever doesn't make any difference doesn't matter."); and *Langley v Boyter,* 284 SC 162,325 SE2d 550 (Ct App 1984), quashed, 286 SC 85, 332 SE2d 100 (1985), but thereafter cited with approval in *Nelson v Concrete Supply Co,* 303 SC 243,399 SE2d 783 (1991) ("Judges are like well behaved children . . . .").

The rest of the speech I pretty much made up. I pretty much made up *McCall v Finley* and *Langley v Boyter* too.