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Respecting Powerful Words —Names and Pronouns

By *Daniel Kegan*

We have a long tradition of respecting the power of words. From magicians' "spells,"¹ and Gandalf's "Speak Friend and Enter,"² through George Carlin's Seven Dirty Words.³ Some religions don't speak the name of their deity, but use synonyms or drop letters in writing. Criminal defendants receive "sentences." Schoolyard bullies and some politicians taunt others with demeaning nicknames.⁴

Wartime enemies may become subhuman creatures, although who's the ally or who the enemy among Eurasia, Oceania, and Eastasia changes, as Orwell's Ministry of Truth "rectifies" history to align with current policy.⁵ Our pejorative wartime names for declared enemies become offensive shortly after peace, and economic interdependence. Some common words of high society and the courts appear stingingly improper, if attended to a century later. Some words have become so socially offensive they are replaced by an initial letter and "-word."

Folklore admixes lasting truths and lasting falsehoods.

Sticks and stones may break my bones
But words shall never hurt me.⁶

That's often false.⁷

Since the term was created in 1970, microaggressions are increasingly recognized: casual degradation of any socially marginalized group.⁸ The persons making the comments may be otherwise well-intentioned and unaware of the potential impact of their words—brief everyday exchanges that send denigrating messages to certain individuals because of their group membership. The microaggression concept, and its popularization, "were never meant to give a vernacular that then makes it OK to stop talking; it was to ask people to be flexible in their thinking and to be open-minded to the concept that we don't all walk through the world in the same shoes."⁹

Trademark Infringement and Name Rights

There is long established trademark law against calling your product or service a name confusingly similar to that of a prior user's product or service.¹⁰ More recently, the state law right of publicity warns against using without authorization the name, image, or likeness of another for commercial benefit.¹¹ But there is little law against calling someone a name they dislike.¹²

Social norms both persist, and change, sometimes slowly, sometimes rapidly. Until *Matal v. Tam* (THE SLANTS trademark registrable for a musical group),¹³ "scandalous and immoral trademarks" were denied federal Lanham Act registration.¹⁴ Some marginalized communities have sought to reclaim previously stigmatized names: Queer, Black, Cripple.

Our early colonists frequently intermingled with the nearby indigenous tribes, both learning survival skills from them while also, at times, considering them unchristian savages.¹⁵ Schools, sports teams, and diverse businesses have appropriated numerous Indian names and symbols, recently to increasing objection by federally recognized tribes and members and supporting others.¹⁶

Responding to changing public concerns, the Cleveland Indians baseball team, established 1894, announced this year that after the 2021 season it will change its name to the Cleveland Guardians. The team has had many successive names and nicknames: Grand Rapids Rustlers, Cleveland Lake Shores, Cleveland Bluebirds, Naps, Spiders, Tribe, Wahoos, Indians, and soon Guardians.¹⁷

It's one thing to change your own name, but quite another to have others call you a name you disfavor.¹⁸ Historian Mann's resolution of the naming question can be instructive: "In referring to particular groups of Indians—the Wampanoag or the Maya—I use a simple rule of thumb: I try to call groups by the name preferred by their members."¹⁹

Dichotomies Unstructured

Just as U.S. census forms have broadened from dichotomous White and Black to multiple categories,^{20,21} the differences between sex and gender and the non-binary nature of both are increasingly recognized.²² The USA will join over a dozen other nations in issuing passports with an X gender classification.²³ "Sex is a trait that determines an individual's reproductive function, male or female, in animals and plants that propagate their species through sexual reproduction."²⁴

Sexologist John Money introduced the terminological distinction between biological sex and gender as a role in 1955. Before his work, it was uncommon to use the word gender to refer to anything but grammatical categories. ... Today, the distinction is followed in some contexts, especially the social sciences and documents written by the World Health Organization (WHO). Both physiologists and biologists agree that gender is distinct from sex.²⁵

"Terminology within the health care field and transgender and gender nonconforming (TGNC) communities is constantly evolving²⁶. The evolution of terminology has been especially rapid in the last decade,²⁷ as the profession's awareness of gender diversity has increased, as more literature and research in this area has been published, as style guides adapt,²⁸ and as voices of the TGNC community have strengthened²⁹. Some terms or definitions are not

universally accepted, and there is some disagreement among professionals and communities as to the “correct” words or definitions, depending on theoretical orientation, geographic region, generation, or culture, with some terms seen as affirming and others as outdated or demeaning.”³⁰

“Sex (sex assigned at birth): sex is typically assigned at birth (or before during ultrasound) based on the appearance of external genitalia. When the external genitalia are ambiguous, other indicators (e.g., internal genitalia, chromosomal and hormonal sex) are considered to assign a sex, with the aim of assigning a sex that is most likely to be congruent with the child’s gender identity. For most people, gender identity is congruent with sex assigned at birth (see cisgender); for TGNC individuals, gender identity differs in varying degrees from sex assigned at birth.”³¹

Gender expression: the presentation of an individual, including physical appearance, clothing choice and accessories, and behaviors that express aspects of gender identity or role. Gender expression may or may not conform to a person’s gender identity.

Gender identity: a person’s deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral³²) that may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics. Because gender identity is internal, a person’s gender identity is not necessarily visible to others. “Affirmed gender identity” refers to a person’s gender identity after coming out as TGNC or undergoing a social and/or medical transition process.

Gender role: refers to a pattern of appearance, personality, and behavior that, in a given culture, is associated with being a boy/man/male or being a girl/woman/female. The appearance, personality, and behavior characteristics may or may not conform to what is expected based on a person’s sex assigned at birth according to cultural and environmental standards. Gender role may also refer to the social role in which one is living (e.g., as a woman, a man, or another gender), with some role characteristics conforming and others not conforming to what is associated with girls/women or boys/men in a given culture and time.

Sexual orientation: a component of identity that includes a person’s sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are gender queer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others.

Cisgender: an adjective used to describe a person whose gender identity and gender expression align with sex assigned at birth; a person who is not TGNC. (The prefix *cis-* derives from Latin meaning *on this side of*.)³³

Transgender: an adjective that is an umbrella term used to describe the full range of people whose gender identity and/or gender role do not conform to what is typically associated with their sex assigned at birth. Although the term “transgender” is commonly accepted, not all TGNC people self-identify as transgender.

Emerging Minorities

Conflating poverty with moral illness, many societies have initially discriminated against immigrant groups. The United States, by its residents and by its official government actions, has discriminated against Chinese, Italians, Germans, Jews, religions other than that of the Colony, and others.

Lawrence v. Texas held that a Texas law classifying consensual, adult homosexual intercourse as illegal sodomy violated the privacy and liberty of adults to engage in private intimate conduct under the 14th Amendment.³⁴ Diverse areas of legal, and common, discrimination against gay and lesbian behaviors persisted. The Stonewall rebellion, June 1969, has been seen as a watershed for an emerging gay rights movement.³⁵

Recognition of a transgender and gender nonconforming community is manifest in the addition of pronouns to signature blocks in email: (she, her, hers; he, him, his; them, them, theirs). Merriam-Webster Dictionary now includes “they” as “a single person whose gender identity is nonbinary, or intentionally not revealed.”³⁶ Traditional current English grammar assigns one of three genders to some nouns: male, female, and neutral.³⁷ Some other languages, such as Spanish, assign gender to proportionally more words than does English.

The existence of transgender individuals is recognized by such mainstream organizations as Starbucks, “Starbucks offers expanded benefits for trans people,”³⁸ Kroger, the “largest US supermarket chain, offers transgender workers full health benefits,”³⁹ and federal⁴⁰ and state court decisions.⁴¹ Tips for employers are becoming more common.⁴² The New York Times lead opinion column proclaims “Gender Pronouns Are Changing. It’s Exhilarating” (21Sep2021).⁴³

Some individuals identify with a gender that differs from the sex assigned at birth, and wish to be identified with gender pronouns differing from their birth gender marker (M, F) imposed. Apart from gender identification issues, some individuals prefer to be called by other than their legal name.⁴⁴

Internal Firm Procedures

Organizations, whether industrial, commercial, non-profit, or professional, including law firms, may wish to respect their members, whether in the midst of gender affirming medical treatment (surgery, hormones) or simply having a preference for the name to be called. Beyond courtesy, a few laws should inform and constrain the organizational response.

The American Bar Association recently presented a continuing legal education (CLE) seminar, “Why Inclusion Matters: Creating Cultures that Retain & Support All of Your People,” 16Dec2020. Recent research surfaces many law firms are not healthy places for lawyers, with disturbingly high attorney problems with alcohol, depression, stress, anxiety, and suicide. An inclusive organization supports belonging, authenticity and participation—cultural traits benefiting mainstream employees and managers as well as the traditionally marginalized.

For decades, if not centuries, there have been efforts for more readily understandable laws and legal documents.⁴⁵ Kati Pajak provides a guide “How to Write Gender-Neutral Contracts.”⁴⁶ Heidi Brown advises one can honor good grammar and societal change with inclusive legal writing.⁴⁷

One need not be a defrocked politician or celebrity to be harmed by unconscious bias and questionable language. The ABA Litigation Section presented a CLE program, “Eliminating Racist or Offensive Catch Phrases and Other Vernacular-In Front of a Jury or Otherwise.”

Attorneys deal with words. “A lawyer’s time and advice are his stock in trade.”⁴⁸ Lawyers generally seek to write well, persuasively, and with good grammar. Using the plural “they” to refer to a singular individual may initially feel improper. Between a person’s feeling of acceptance or rejection versus a fading grammar rule, perhaps the rule needs

flexibility—or historical perspective. Some historical years ago, “the singular second person pronoun was thou and the plural was you. During the 1600s, thou fell out of use to be replaced by the formerly plural you, which still uses the plural versions of verbs. Obviously, I would never say, “You needs more pie,” when talking to one person, even though “needs” is the singular version of the verb.”⁴⁹

Some functions of the organization need to maintain the legal name of the person and the cross-reference to their name as used. Access to this information should be restricted on a strict need to know basis, and as may be required by HIPAA, state privacy laws, and personally identifiable information (PII).⁵⁰

Police issues and background checks are two areas when use of the legal name will typically be required. Employment applications practicality likely depends on the prospective employing organization and the type of job. Patent attorneys needing security clearances differ from legal advice to a musical band.

Iron Pyrite

Kurt Vonnegut offered a QuickStart guide to life on earth: “Hello babies. Welcome to Earth. It's hot in the summer and cold in the winter. It's round and wet and crowded. On the outside, babies, you've got a hundred years here. There's only one rule that I know of, babies—“God damn it, you've got to be kind.”⁵¹

Perhaps necessary, but insufficient. Likewise, the ancient, multi-cultural Golden Rule has limitations, for it assumes others' preferences mirror one's own.⁵² Partly true, partly false, as evidenced by consumer choices at a multi-flavor ice cream store. A person is like all others, like some, and like no others.⁵³

People tend to consider what is kind by *their* understanding of the world, not the understanding and experience of the *other* person. European “explorers” from Columbus on believed they were helping the “New World” savages by seeking to convert them to Christianity. A century ago children were sequestered from their families and community to be resocialized in Indian Schools.⁵⁴ The explorers and subsequent colonists may have considered much Indian territory as unoccupied, due to the lack of fences (marking English property lines) and non-checkerboard Indian agricultural practices, growing the Three Sisters (maize, squash, and climbing beans) together.⁵⁵

Organizational diversity and governmental inclusion are often recognized as promoting productivity and morale.⁵⁶ The American Bar Association promotes its Model Diversity and Inclusion Plan for ABA Entities,⁵⁷ as does the Illinois State Bar Association, for Diversity & Inclusion.⁵⁸

Another anthropologist answered an audience question, have we made any progress since the Greeks, affirmatively: we have a broader acceptance of the other as a human.⁵⁹

We may have made progress; we still have issues to recognize and transcend. Our Twenty-First Century brains use past experience and assumptions to speed our perceptions and cognitive interpretations—speeding our reactions to perceived dangers while also exposing us to diverse cognitive biases.⁶⁰ The words we use not only affect others, they also affect ourselves.⁶¹ Even being aware of a potential bias does not immunize us from some of its effects.⁶²

As a perceptive psychologist has reflected, to understand another often takes moving outside yourself and understanding how other people, their identities and their needs, are made visible and supported and affirmed,

especially when aspects are outside one's own experience. It takes intentional focus, energy, and commitment to slow down and interrupt the automatic assumptions created by our brains, training, and own experience.

Acknowledgement

The author has benefited from the December 2020 presentation on Trans Inclusion and Pronouns by Matt Abtahi, Assistant Director for Multicultural Student Affairs at Northwestern University, mentioning the University now allows student ID cards to show the student's preferred name rather than the legal name, and from helpful psychologists. The author remains responsible for errors of omission and commission.

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13. 582 US ___, *137 SCt 1744, 198 Led2d 366*; 122 USPQ2d 1757.

14. 15 USC § 1052(a).

15. "Historically speaking, both 'Indian' and 'Native American' are remote from the way America's first peoples thought about themselves. Much as the inhabitants of the tenth-century Carolingian Empire did not describe themselves as 'Europeans,' a name coined in the seventeenth century, the inhabitants of the Western Hemisphere in that same era did not think in terms of 'Indians,' 'Native Americans,' or any other collective hemispheric entity. Instead they regarded themselves as belonging to their immediate group—the Patuxet village in the Wampanoag confederation, for instance."

Charles C Mann, 1491: New Revolutions of the Americas Before Columbus, p 474, Vintage, 2006.

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18. Ayers, Ian, Until I'm told otherwise, I prefer to call you 'they,' *New York Times*, 15Sept2021.

19. Mann, Op cit, Appendix A, Loaded Words.

20. "Initially, the United States Census only counted Americans as either white or black, with blacks classified as either free or slaves until 1860 (slavery in the United States was abolished in 1865). Over time, the United States has also added some other racial categories as well.[168] Asian and Native American categories were added in 1860. However, the first census to enumerate all Native Americans occurred in 1890. Before that point Native Americans living on reservations were not counted, and thus most Native Americans in the U.S. were not counted in census data before 1890. Between 1850 and 1870, and in 1890, 1910, and 1920, the U.S. Census Bureau also enumerated Mulattoes and sometimes other partially black groups (Quadroons and Octoroons) separately. The U.S. Census Bureau counted Mexicans as a separate race in 1930 and tried to retroactively determine the number of Mexicans in the U.S. in 1910 and 1920 as well."


"President Franklin D. Roosevelt promoted a "good neighbor" policy that sought better relations with Mexico. In 1935, a federal judge ruled that three Mexican immigrants were ineligible for citizenship because they were not white, as required by federal law. Mexico protested, and Roosevelt decided to circumvent the decision and make sure the federal government treated Hispanics as white. The State Department, the Census Bureau, the Labor Department, and other government agencies therefore made sure to uniformly classify people of Mexican descent as white. This policy encouraged the League of United Latin American Citizens in its quest to minimize discrimination by asserting their whiteness. ... In 2000 multi-race responses were tabulated for the first time (instructions now explicitly inform respondents that they can choose multiple race boxes). ... While people nowadays are enumerated by race based on self-identification, until 1950 their race on the census was mainly determined by their census enumerator. During this time multiracial people who were White and of another race were usually marked down as belonging to the other race due to the One drop rule. The instructions provided to enumerators endorsed this practice."

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25. Id.
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