1997

Is This Appropriate?

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Essay

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INTRODUCTION

The word "appropriate" is so wildly overused in American culture that, as with other vacuous words and phrases, a person learns to read right through it. "Appropriate" is verbal tofu. This Essay pauses instead of reading through, particularly to notice the instances in which "appropriate" and its negative counterpart are used to give the appearance of a moral or legal judgment.

"Appropriate," chosen to express a legal judgment, is not only vacuous; it is also irresponsible. It catches the legislator, judge, or administrator in the act of passing the buck, as the President did when he ordered the Justice Department "to take all appropriate steps" to obtain a reversal of a decision by the D.C. Circuit regarding the employment of replacement workers during strikes.[1]

The choice of "inappropriate" to express moral judgment is not only thoughtless; it is the attempt to have it both ways ethically, to appear to use the human capacity to separate right from wrong, good from bad, without actually doing so. Whatever slight moral judgment it implies rests on a cultural ethic of individualism, a moral discourse for a society of autonomous agents in which the principal or only criterion for moral action is choice: what makes an action right or good is that the actor chooses it, as liberated as possible from the moral influence of others. Every person is her own tyrant. For example:

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1. *Appeals Court Overturns Clinton's Order*, SOUTH BEND TRIB., Feb. 3, 1996, at A2.

Eva-Noel Bevilacqua completed the requirements for a high-school-equivalency diploma in Liberty, New York, in June 1995. She was invited to graduation ceremonies, and arranged to recite a poem, apparently of her own composition, called "Love Is a Challenge." When the time came for her poem, she took off her academic gown, under which she wore leather boots and nothing else. No one invited her to put her robe back on or attempted to stop her reading of the poem. Why not? When a reporter asked Barbara Provenzano, who was in the audience, for her opinion, Ms. Provenzano said, "She wanted to make a statement. I don't think it was inappropriate."[2]

Ms. Provenzano did not use "appropriate" in its traditional—and now antiquated—sense, to mean that recitation in the nude during diploma ceremonies is distinctive to the poetry of Ms. Bevilacqua.[3] She used the word to express but not explain her moral judgment. There is nothing unusual about this use of the word in America in the 1990s. "Appropriate" and "inappropriate" are trendy words. They have become common, various, and imprecise. They are used so often in the press, in discussion within the professions, particularly in the law, and in moral discourse, that they deserve the most disdainful of all verdicts pronounced by wordwatchers: the words are hackneyed.

By way of introduction to a more serious discussion, consider the headlines of newspapers and magazines. There is no more reliable way to locate what is hackneyed in American discourse than to compare these headlines (written by headline writers) with the language chosen by writers for the articles themselves. The *Christian Science Monitor*'s headline writer for the editorial page excelled at this sort of alteration for a while. Over a letter complaining that an editorial cartoon was in poor taste, the headline writer inserted "Appropriate Humor."[4] Over an editorial approving of the exercise of executive clemency by the governors of Virginia and Maryland, the headline writer crafted "Appropriate Clemency."[5]

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2. *Her Poem is Barely Acceptable*, SOUTH BEND TRIB., June 23, 1995, at A2.

3. *See* OXFORD ENGLISH DICTIONARY 587 (2d ed. 1989) (defining "appropriate" as "[a]ssigned to a particular person; special; individual"). Coleridge spoke in this sense of ennui, not of nudity, as "the chief and appropriate business of the poet." *Id.*

4. CHRISTIAN SCI. MONITOR, July 29, 1993, at 20.

5. CHRISTIAN SCI. MONITOR, Feb. 28, 1991, at 20.

In *Time*, William A. Henry, III, using clear words of moral judgment, produced an exacting essay on the journalistic ethics involved in reporting on the private lives of politicians. The job of journalists, he wrote, is to decide where the line is between privacy and the "right to know," and "then, having drawn the line, . . . to avoid being pulled across it by cunning manipulators."[6] He spoke of reporters who have "gone too far," of exercising journalistic judgment "thoughtfully and ethically," of the "compromise [of] standards," of journalists who "imperil their credibility and integrity."[7] The headline writer's contribution to that fine essay on ethics?—"To 'Out' or Not to 'Out': The Press Wrestles With a Thorny Issue: When is it Appropriate to Reveal the Private Lives of Public Officials?"[8]

A newspaper headline writer drew attention to an article on the removal of General Dimitrov's embalmed body from the public mausoleum in Sofia with: "The Ash Heap of History: Adoration Is No Longer Appropriate for a Former Communist Star."[9] The headline writer at *Sports Illustrated* placed atop a sensitive essay on a sensitive issue: "Indians Have Ceased to Be Appropriate Team Mascots."[10]

What is striking about these examples is that the reporters' text provides the moral language and the headline writers proceed to avoid it. The mausoleum and team-mascot examples in particular show how word-users have found a way to express and at the same time evade moral judgment. That modern development provokes this Essay. We are particularly interested in the use of the A-word in American discourse in the place of old moral words such as "bad" (or "good"), "wrong" (or "right"), "sinful" (or "virtuous"), and "outside" (or "within") the law. The time may come when someone writes an essay like this, and asks, to paraphrase

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6. *To "Out" or Not to "Out": The Press Wrestles With a Thorny Issue: When is it Appropriate to Reveal the Private Lives of Public Officials?*, TIME, Aug. 19, 1991, at 17.

7. *Id.*

8. *Id.*

9. TIME INT'L., July 30, 1990, at 19.

10. Franz Lidz, *Not a Very Sporting Symbol: Indians Have Ceased to Be Appropriate Team Mascots*, SPORTS ILLUSTRATED, Sept. 17, 1990, at 11. Another offending headline is found in the Indiana Code of Judicial Conduct, over text that never mentions the A-word: "A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity." IND. CODE OF JUD. CONDUCT Canon 5 (1989).

Karl Menninger:[11] "Whatever Became of 'Inappropriate?'" We hasten to make our contribution before that happens.

First, we venture a survey of the more common modern uses of the word; then an extended discussion of a representative legal context—sexual harassment; then a theory of where this modern usage plugs into moral reasoning (ethics); and, to conclude, a suggestion on how to interpret "appropriate" when we are able to take it seriously in ethics and in jurisprudence.

I. FOUR WAYS "APPROPRIATE" IS USED THESE DAYS

A. *"Appropriate" Meaning "Distinctive"*

The second edition of the *Oxford English Dictionary* gives five traditional meanings for the adjective "appropriate." The second, third, and fourth are "[b]elonging to oneself," "[a]ssigned to a particular person," and "[a]ttached or belonging as an attribute [or] quality."[12] In this sense, a member of a women's club in Danville, Virginia—an old and elite organization—complained that, "People sometimes suggest inappropriate speakers."[13] The Society of Jesus, addressing their new agenda for "collaboration with the laity in mission," encourages "participative decision-making where it is appropriate," that is, when the decision at hand is not one reserved to itself by the unmarried male clergy, who are, by decree, distinctive when it comes to ecclesiastical policymaking.[14] And an expert on dogs faced up to the charge that "Benji . . . barks inappropriately" by explaining that "[h]e's barking because he's trying to tell you something. You just don't know what it is."[15] Experts on automobiles understand that cars, like dogs, are not distinctively rude, because they are not capable of being rude.[16] If a car's

11. *See* KARL MENNINGER, WHATEVER BECAME OF SIN? (1973).

12. OXFORD ENGLISH DICTIONARY, *supra* note 3, at 586–87. Louis Auchincloss's *Fellow Passengers* illustrates this meaning in describing Clement Ludlow, Wall Street estate-tax lawyer: "His gentleness, equanimity, and mild formal good manners seemed appropriate to his slight, straight build and to the air of shadowy grayness on his grave, narrow, but still handsome face." LOUIS AUCHINCLOSS, FELLOW PASSENGERS 148 (1989).

13. Rheta Grimsley Johnson, *"Wednesday Club" Carries on Tradition*, SOUTH BEND TRIB., Feb. 19, 1995, at F3.

14. THE SOCIETY OF JESUS, COLLABORATION WITH THE LAITY IN MISSION, *quoted in* NAT'L CATHOLIC REP., Apr. 7, 1995, at 13.

15. Alisa Mullins, *Doggie Do's and Don'ts*, SOUTH BEND TRIB., Aug. 2, 1995, at D1.

16. *See Tom & Ray Magliozzi*, SOUTH BEND TRIB., July 30, 1995, Automotion Section, at 2 (column).

horn honks "inappropriately," it is because "the contacts in your [car's] steering column are probably all worn out."[17]

Anne Tyler, who never descends to the hackneyed unintentionally, has a scene in her novel *Ladder of Years*, in which Delia, the protagonist, a self-effacing woman from Maryland, is talked into pretending that she is the estranged wife of a man Delia encounters in a supermarket; the man has seen that his girlfriend is coming up the aisle, and he wants to make her jealous. When the charade is over, the man thanks Delia, and Delia says, "It was nothing. I just wish there'd been, oh, somebody really appropriate. . . . *you* know, as glamorous as your wife."[18]

When it is behavior that is appropriate-as-distinctive, the adjective's meaning tends to shade into moral judgment. The Jesuit moral theologian Thomas L. Schubeck, in writing about liberation theology, is thus careful not to accuse Father Gustavo Gutierrez of misusing the Bible; Gutierrez, Father Schubeck says, "does not demand from the Bible answers to inappropriate questions, such as biblical guidelines for governing guerrilla warfare."[19] It is not that the Bible—a distinctive source—lacks content that would speak to the conduct of warfare, but, we infer, that an attempt to use that content to justify guerrilla warfare would be a misuse—an immoral use, even—of the distinctive character of scripture.[20]

Medicine abounds with instances of usage that straddle the appropriate-as-distinctive category and the appropriate-as-moral category. For example, the mother of a two-year-old wrote to Dr. Allan Bruckheim, author of a "Family Doctor" newspaper column, complaining about an emergency-room physician who had been rude to her when she reported that her child had "stuffed a small calculator battery up his nose."[21] Dr. Bruckheim ruled that "the

17. *Id.*

18. ANNE TYLER, LADDER OF YEARS 13–14 (1995).

19. THOMAS L. SCHUBECK, S.J., LIBERATION ETHICS 169 (1993).

20. The moral justification of violence to bring about liberation is a tender question in liberation theology. *See id.* at 68–75 (evaluating moral theologian Juan Luis Segundo's contention that not all decisions to use violence are morally wrong). Tom Brokaw was, in this straddling way, congratulated by a fellow journalist for behaving well when he represented the United States in a 1987 conversation with Mikhail Gorbachev: "Brokaw's behavior was . . . for the occasion quite appropriate. It was a welcome relief from those television news performers who through hyperconfidence or gall treat everyone they face as their intellectual equals (or perhaps inferiors)." Thomas Griffith, *High Moments in a Low Key*, TIME, Dec. 14, 1987, at 68.

21. Dr. Allan Bruckheim, *Prevention is the Best Cure for Painful Hangnails*, CHI.

concern you sensed in the physician was appropriate," because the situation was both common and serious.[22] He did seem, though, to miss the point of the woman's question. She had written that the physician "made a bigger thing out of this than necessary. . . . [H]e really made me feel bad."[23] The issue, she argued, was a moral issue; it is immoral to make people feel bad over trifles. Dr. Bruckheim understood the issue to be about what is distinctive to medical art and what is not. If he had been alert to his calling he might have provided a clearer example of the fact that science typically aspires to use the A-word more carefully than popular culture does.[24]

TRIB., July 10, 1995, § 5, at 3.

22. *Id.*

23. *Id.*

24. "In test-tube experiments, the herb stimulated healthy cells to produce an anti-cancer substance called tumor necrosis factor-alpha. An appropriate dose, they reported, could some day prove useful against cancer." Doug Podolsky, *A New Age of Healing Hands: Cancer Centers Embrace Alternative Therapies as "Complimentary Care"*, U.S. NEWS & WORLD REP., Feb. 5, 1996, at 71. It is hard to mistake what the author means when he tells us about an "appropriate dose": an amount that is safe, that works, that other scientists accept. Similarly, we know what authors mean when they say: "Review of fluid intake for community-dwelling seniors is appropriate to incorporate into office and home visits in order to properly assess . . . risk factors [including hot weather and lack of access to regular medical care]. Community health fairs may be appropriate sites to educate older individuals on the importance of hydration to their overall health." Andrew D. Weinberg & Kenneth L. Minaker, *Dehydration: Evaluation and Management in Older Adults*, 274 JAMA 1552, 1553 (1995).

Other, less careful authors use "appropriate" to describe moral issues in the life-support/euthanasia context. Walter Farquharson, the former moderator of the United Church of Canada, said: "We believe that it is appropriate to withdraw medical treatments that are not benefiting the patient and that are prolonging suffering and dying when the competent patient decides and when . . . firm evidence of disease irreversibility exists. . . . We do not believe, however, that legalization of assisted suicide is justified." Hanns F. Skoutajan, *Post-sacred Society*, 112 CHRISTIAN CENTURY 948, 950 (1995). Francine Arsenault, Chairperson of the Council of Canadians with Disabilities, commented after a court's ruling on a father's assistance in his daughter's suicide that "[w]e cannot support [his] claim that he had the legal right to decided [sic] to commit suicide for his daughter. The verdict of the jury and sentence of the court are just and appropriate. To do otherwise is to say that the life of a person with a disability is not equal to that of someone non-disabled." *Id.* It is certainly important to distinguish between withholding medical procedures and physician-assisted suicide. But announcing that one behavior or the other is "appropriate" does not do that job. In contrast to the more careful medical use of the A-word, these examples showcase moralists who cannot explain their moral judgments.

When medical professionals deal with one another, they use "appropriate" as in etiquette, but in doing so they also invoke medicine's take on professionalism. For example: "Inappropriate and Appropriate Selection of 'Peers' in Grant Review." 272 JAMA 114 (1994). Another article discusses the "inappropriate" use of prescription drugs by the

B. *"Appropriate" Meaning "Proper"*

"Appropriate" is often used to express amateur judgments in etiquette. It is rarely used by the experts, and almost never by Miss Manners herself. She doesn't need it, for example, when she describes the relevant distinction with regard to changing American mores on smoking: "When smoking habits were considered a matter of etiquette, smokers (known then as 'gentlemen') were easily kept from annoying nonsmokers (known as 'ladies'). Now that it is treated as a moral problem, the smokers and nonsmokers are using not just smoke but emotional fire to kill one another."[25]

Lawrence Block presents a disturbing case. He wins, and deserves to win, prizes for his Matthew Scudder crime novels, but he has lately drifted into hackneyed use of the A-word. He uses it five times in *A Long Line of Dead Men.* In three instances he uses it to mean "proper," but his use is vague and without adequate context. Block's story involves an odd men's club which meets once a year to see which of them have died. Soon after the club's founding (established to replace a similar club which declined as no one was left to come to the meetings), a question arises about whether members should attend the funerals of recently-dead members. Some attend, some don't. One member "wasn't coming" to the funeral of the first member to die, another member explains. "[H]e didn't think it was appropriate."[26]

A majority of members of the club agrees not to provide "a case of good Bordeaux for the last man to drink. We decided whoever was left would be too old to enjoy it. Besides, it seemed inappropriate, even frivolous."[27] Both of these instances are more

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elderly, allegedly causing $20 billion worth of otherwise unnecessary hospitalizations each year. Here, "inappropriate" means that the prescribing physician committed an error. *See* Harry Rosenthal, *Drug Interactions Cause Big Problems*, SOUTH BEND TRIB., Sept. 17, 1995, at F9 ("The medical community belatedly is emphasizing the need to increase physicians' knowledge of geriatrics and elderly clinical pharmacology.").

25. JUDITH MARTIN, COMMON COURTESY: IN WHICH MISS MANNERS SOLVES THE PROBLEM THAT BAFFLED MR. JEFFERSON 26 (1985). Criticisms of humor with the levity of a "lead balloon" are probably the purest form of amateur etiquette judgment. Consider the newspaper column a fond adult daughter wrote for her father on Father's Day: "His raucous jokes—often wholly inappropriate—are the sign of a man who refuses to stand on ceremony." Lisa Bornstein, *One: A Father's Real Gifts Intangible*, SOUTH BEND TRIB., June 12, 1995, at B1.

26. LAWRENCE BLOCK, A LONG LINE OF DEAD MEN 30 (1994).

27. *Id.* at 116.

sensitive reactions than that of a chauffeur for one of the members, who neglects to thank Matt Scudder for giving him a message: "He shot me a guarded look; he was glad to have the information but didn't think it was appropriate for me to talk to him."[28] Some mystery writers do better. Carl Hiaasen, as nearly as we can find, uses the A-word only once in *Double Whammy*, and we are reluctant to fault him for it: "[Decker, the detective] tried to remember the polite thing to say when a beautiful stranger struck up a conversation about oral sex. None of the obvious replies seemed appropriate for a funeral."[29]

The differences between Block and Hiaasen here are twofold: not only does Hiassen 1) explain Decker's judgment about what is proper, but he 2) does so by providing a *context* for his use of the A-word. Block's "Dead Man's Club" is bizarre—its moral purposes are obscure; its social purposes macabre. For a member of the club to say it is not "appropriate" for survivor members to attend the funeral of one who dies, nor for the club to keep wine for the last to die, doesn't tell the reader anything at all. Why not attend the funeral or provide the case of wine?[30] It is impossible to tell what the purposes are, social or moral, without a context. Context, as we hope to show,[31] makes all the difference.

What is proper is rarely *precisely* what is moral. Thus the mother of a nursing student wrote to Ann Landers, worried about the fact that a guidance counselor at the nursing school was carrying on with one of the instructors. That may have been something law, morals, or etiquette should take account of, but that was not the subject of "Missouri Mother's" question: "I am tempted to inform the authorities . . . but I don't want to act inappropriately and perhaps get my daughter in trouble."[32] This example is unusual in the clarity with which it attempts to show a difference between the purely proper—the stuff of mere etiquette—and proper-meaning-moral. Missouri Mother's question has to do with propriety; she is simply asking *how to deal with* physicians and their coliorts. She does not doubt her own moral judgment.

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28. *Id.* at 184. We doubt that the chauffeur would have put it that way.

29. CARL HIAASEN, DOUBLE WHAMMY 44 (1987).

30. Both sound like good ideas to us, suggesting that maybe, given context, the members of the club would be some sort of support group.

31. *See infra* Part III.

32. Ann Landers, *1978 Poem Still Appropriate for Mother's Day*, SOUTH BEND TRIB., May 14, 1995, at F3.

The distinction between the proper and the moral is rarely that clear, even if judgments regarding propriety seem to be in *tension* with moral judgments that affirm individualism (as Ms. Provenzano's judgment on the nudity of Ms. Bevilacqua did, which probably shows that the ethics of radical individualism are inadequate, when not vacuous). Judgments of propriety—of an action's conformity to etiquette—are affirmations of communal behavior norms. Miss Manners demonstrates this when she writes, using the A-word carefully, about how a stranger should behave in a community that is not her own: "The overriding requirements of a polite person from any culture or subculture are: to have the sense to use the appropriate forms at the appropriate time and occasion."[33] Moral judgments, she realizes, are different: "Bigotry is rude. (Practicing it is immoral, but expressing it is rude.)"[34] Miss Manners illustrates here the capacity of moral language to state a moral question clearly—and the felicity of avoiding the A-word in doing so.[35]

This section has become a discussion of three things: 1) judgments of propriety[36] (which is what Miss Manners is paid for); 2) related, if undisclosed, communal moral judgments (which Miss Manners often makes and sometimes tries to hide); and 3) the blurring of both sorts of judgment by invoking the A-word instead of using either old, sound words of judgment, or explanation, or both. (Blurring weakens the ethical significance of a mixed judg-

33. Judith Martin, *"Cultural Tradition" Veils Rude Practices*, SOUTH BEND TRIB., Aug. 13, 1995, at F3. It is relatively common for Miss Manners' correspondents to ask about what is appropriate, to which she fashions an answer that avoids talking about what is "appropriate"—or at least avoids using the word. One young man, for example, asked with regard to a young woman he sometimes talked to at the gym, "Is it appropriate for me to ask her out . . . ? How do you rate the gym as a place to meet . . . . [Miss Manners said,] Better than the bar, a lot better than the bar exam . . . ." Judith Martin, *Nose Ring Not Appropriate for Doctor*, SOUTH BEND TRIB., Nov. 6, 1996, at D2. The local headline writer, alas, was not so careful.

34. Judith Martin, *In P.C.-Driven World, There are 2 Kinds*, SOUTH BEND TRIB., June 25, 1995, at F3.

35. In this case, though, given a clear issue expressed clearly, she was wrong. If you attend to the moral importance of community, it is immoral to express bigotry; such expression invites others in the community to become bigots and violates the scriptural injunction to "stir one another up to love and good works." *Hebrews* 10:23–24.

36. It is of passing interest that Adam Smith characterized Plato's moral philosophy as the ethics of propriety. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 267–70 (Liberty Classics ed. 1976) (1759).

ment of this sort. If the A-word can be used without blurring, as we hope to show, it can signal an interesting ethical argument.)

An example is Miss Manners' judgment regarding whether it is a violation of sound etiquette to throw food at sporting events.[37] First she attends to the argument her correspondent invited, about propriety: "The respectable argument is that this is a tradition which is part of a community ritual and that it is within the realm of acceptable behavior for the situation."[38] We classify that as a communal argument about propriety, invoking context as a method of explanation. If Miss Manners' sardonic tone implies a moral judgment, it is muted if not hidden. Not for long, however. "But," she then says, "not every tradition, however entrenched, is attractive. Some should be closed down immediately. Miss Manners could tell you of ancient wedding traditions that would make your hair stand on end."[39]

Ritualistic practices may be (merely) improper; they may also be immoral. Miss Manners argues that throwing food is both improper and immoral. She notices that the tradition that appears to regard the unattractive behavior as proper may also harbor a deeper strain that rules it out: "Ancient cities that have traditions of carnivals and other whoopee occasions on which wild behavior is tolerated also have their deeply imbedded rules about what cannot be done, as uninformed tourists sometimes find out the hard way."[40] Miss Manners also argues that throwing food is offensive and hence immoral, and backs the argument by referring to an advertent, communal, moral judgment: "Those who engage in the tradition of derisive shouting hear about it from both fellow fans and players when they overstep the acceptably insulting vocabulary. What is offensive to much of the participating community cannot be allowed."[41] The morality there is as clear and as elementary as the Golden Rule. It is the basis for etiquette, even if we concede to Miss Manners that many breaches of etiquette are, in themselves, not moral matters.

Lawrence Block's *A Long Line of Dead Men* contains two examples where the A-word straddles the proper and the moral,

37. *See* Judith Martin, *Tossing Tortillas a No-no at Sport Events*, SOUTH BEND TRIB., Dec. 17, 1995, at F3.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

both more interesting for ethics than the three examples from Block's novel that we quoted above.[42] At the end of the story, after the killer has been attended to (but is not dead), Matt Scudder is asked to join the club (which, please recall, is a club that meets once a year to notice which of its members have died). "We have never taken in a new member before," the inviter says, "and we've never replaced members who have died, because that would be contrary to our whole design. But this would be a case of replacing a member who has *not* died, and it seems curiously appropriate."[43] It is appropriate—the proper thing to do, but also the right (and even creative) thing to do—because Matt has fingered the member who was the killer and is in line for recognition and reward. Context provides the ethical explanation. Matt declines the offer, though; perhaps the inviter could have used a more persuasive word.

The other example from Block, near the border between the proper and the moral, occurs earlier in the story when Matt is employed by the club to seek the killer. Members do not want the investigation revealed to the police, but private investigators who are not licensed (Matt Scudder's situation) are not able to withhold information from the police if the police ask for it. The solution is that one of the members, who is a lawyer, formally employs Matt, which extends the lawyer-client privilege to Matt as the lawyer's investigator. That satisfies the members. It does not make any difference to Matt. "If I should feel it was appropriate for me to withhold information from the police, I'd do it irrespective of the legal ramifications."[44] There is no explanation and no context with which to determine whether, by "appropriate," Scud-

42. *See* BLOCK, *supra* note 26, at 186, 284.

43. *Id.* at 284.

44. *Id.* at 186. One way to notice the use of the A-word to mean proper and to notice as well the communal character of such a judgment is to guess where a good writer might have used the A-word, but, being a good writer, did not. Miss Manners is so adept, in both respects, that her correspondents tend to write better English than, say, the correspondents of medical columnists or Aun Landers and Abigail Van Buren. One of Miss Manners' correspondents, for example, complained of a legislator who, during a public hearing, noticed the presence of the writer and other members of a delegation of women, and said, "'Mr. Chairman, we've got a lovely group of ladies here. We thank you for your presence. I have no questions.'" Judith Martin, *Disarm Trivialization with Savvy Response*, SOUTH BEND TRIB., Aug. 9, 1995, at D2. The writer asked if that behavior was "correct" and "proper." *Id.* A lesser writer, subject to a lesser judge, might have accused the legislator of inappropriateness.

der meant "proper" or—more likely—"right." Matt, like Ms. Provenzano, is a person you have to know before you can understand what he is talking about.

C. *"Appropriate" Meaning "Moral"*

The Associated Press reported in April that a number of works of art were removed from an exhibit in Muskegon, Michigan, "after some people in the building where it was displayed complained it contained 'inappropriate' nudity."[45] With a sensitivity for elegance rare among modern American journalists, the anonymous reporter, using quotation marks, identified a moral agenda: "Bettye Clark Cannon, gallery namesake and its major underwriter, said she supported the action to remove [the works of art]. . . . 'I have no problem with nudity, but this was lewd nudity, degrading women,' she said."[46] Senator Charles Robb, according to the press, "confessed to behavior 'not appropriate for a married man.' (He insists he always stopped short of intercourse.)"[47] Egalitarian progress among the young moved the editor of a high-school yearbook in Cromwell, Connecticut, to excise the "most-likely-to-succeed" superlative. "I don't think it fits," she said. "I don't think it's appropriate."[48]

Sissela Bok, writer of books on the morals of lying and of secrecy—studies that manage to be both popular and learned—uses the A-word with uncommon discretion, and uses it to express moral judgments on the ethics of lying to those not entitled to the

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45. *Complaints Spur Order to Remove Art With Nudes*, SOUTH BEND TRIB., Apr. 22, 1995, at A3.

46. *Id.* There is a similar serious note in using the A-word in deliberation about morals—that is, in meta-ethics. Father Schubeck quotes the moral theologian Dennis McCann, who argues that the theologian Juan Luis Segundo is a utilitarian (a bad word in Roman Catholic religious ethics): "In principle there are no means that are intrinsically inappropriate to the struggle for liberation." SCHUBECK, *supra* note 19, at 74 (quoting DENNIS MCCANN, CHRISTIAN REALISM AND LIBERATION THEOLOGY: PRACTICAL THEOLOGIES IN CREATIVE CONFLICT 225 (1981)). We note again that approval of violence is a tender subject in liberation ethics. Professor McCann was sticking his neck out—which is Father Schubeck's point. By the way, Father Segundo, who narrowly missed being murdered when eight other people were slaughtered at a mission in San Salvador, admits that there are inappropriate means in the struggle for liberation. *See* SCHUBECK, *supra* note 19, at 253 (observing that Segundo condemned guerrilla warfare in Uruguay in the 1970s).

47. Paul Anderson, *Tarnished Opponents: A Confessed Liar and a Womanizer Lead U.S. Senate Race in Virginia*, DETROIT FREE PRESS, Apr. 8, 1994, at 5A.

48. *Superlatives Ended in School Yearbook*, SOUTH BEND TRIB., Nov. 3, 1996, at A7.

truth (an old category in the casuistry of truthfulness). Bok's ethical reasoning goes like this: 1) it is wrong to reveal secrets; 2) people who are trying not to reveal secrets may have to resort to telling lies; 3) their telling lies, in this circumstance, is not necessarily immoral, particularly when 4) the person seeking the information is not entitled to it, and 5) this person's requesting the information, when he is not entitled to it, may be wrong also. "The line between appropriate and inappropriate requests for information may shift from one society to another and be revised over time; but wherever the line is drawn, those charged with secrets have to decide how best to protect them."[49] This is a deft analysis of the example we two lawyers bring from our widely separated childhoods: "Is your mother at home?" "No," we answered, when she *was* at home, but, we were taught to think, "*not to you.*"[50]

D. *"Appropriate" Meaning "Legal"*

The use of "appropriate" as a substitute for "legal" is common in the law these days, in imprecise judgments about both legal procedure and legal substance. Thus one Indiana lawyer, representing a woman who filed a notice of claim for sexual harassment with the Attorney General of Indiana, said her client "wants . . . to be compensated for her losses and for the damage she has incurred . . . . to make sure [the employer] deals with the problem appropriately."[51] Doing so would resolve not only the moral and mannerly difficulties, but also the legal dispute. In another and later newspaper story, the same lawyer, representing another complainant against the same employer, involving the same supervisor, was reported to have said, "The harassment was inappropriate" and that the supervisor "engaged in inappropriate comments . . . of a sexual nature."[52]

One wonders why the behavior the lawyer describes is not called, simply, "wrong"—or, as the context would seem to require,

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49. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 148 (1978).

50. *See* Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195, 210 (1996).

51. Michael A. Slatin, *Employee's Complaint Names Cohen*, SOUTH BEND TRIB., May 13, 1995, at A1 (quoting attorney Brian J. Hurley).

52. Michael A. Slatin, *Third Woman Accuses Cohen*, SOUTH BEND TRIB., June 2, 1995, at A1 (quoting attorney Brian J. Hurley).

"illegal." This opaque usage is hardly unusual among lawyers and judges as well as in "lay" discussion. When lawyers use the A-word to talk about law, they almost always could have used "legal" instead and with more clarity. The Indiana Court of Appeals, for example, in a burglary case in which the voluntariness of the defendant's confession was at issue, referred to "Officer House's inappropriate questioning techniques."[53] That court used the A-word in the same (substantive legal) way when it reviewed a criminal sentence imposed by a trial judge: "[T]he consecutive sentences were inappropriate in the present case."[54] Hundreds of law journal articles use the A-word in the titles; such titles, like newspaper and magazine headlines, tend to be more hackneyed than what is in the articles.[55]

A lawyer for Bernard Nussbaum, defending Mr. Nussbaum's conduct as the lawyer for President and Mrs. Clinton, after the death in the White House of Vincent Foster, said: "Mr. Nussbaum's testimony will make it clear that he acted in a perfectly appropriate way."[56] That is, apparently, in a legal way, in the way prescribed by what has come to be called "the law on lawyers."[57] The A-word, used to express a legal judgment regarding a lawyer's behavior (a *legal* judgment that is for some reason called *ethical*) has become familiar in writing in that expanding, post-Watergate field; one writer shows both sides of the word choice we are talking about here when he equates "appropriate standards" with rejecting "a principal-agent/hired gun model of lawyering."[58]

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53. Sevits v. State, 651 N.E.2d 278, 281 (Ind. Ct. App. 1995). The Indiana court did better, we think, when it directed trial judges to consider context in exercising discretion in drafting marital property in dissolution cases: "Reversal of the trial court's decision is appropriate only where the decision is clearly against the *logic* and *effect* of the *facts* and *circumstances*." Simpson v. Simpson, 650 N.E.2d 333, 335 (Ind. Ct. App. 1995) (emphasis added). Trial judges will avoid reversal in such cases by *explicating* logic, effect, facts, and circumstances, which is what the trial judge did in *Simpson*.

54. Robertson v. State, 650 N.E.2d 1177, 1185 (Ind. Ct. App. 1995); *see also* Schiro v. State, 669 N.E.2d 1357 (Ind. 1996) (indicating when the death sentence is "appropriate").

55. *See, e.g.*, Amy Sabrin, *Thinking About Content: Can It Play An Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209 (1993); *see also infra* notes 58, 61 & 67.

56. Pete Yost, *Restrictions Defended: Nussbaum Action in Foster Case Seen Appropriate*, SOUTH BEND TRIB., Aug. 9, 1995, at A5.

57. *See* THOMAS L. SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES 1–8 (1991).

58. Myron C. Grauer, *What's Wrong With This Picture?: The Tension Between Ana-*

An opinion of the American Bar Association's ethics committee on contingent fees, which used the A-word throughout, strove to describe a fee that "is appropriate in the circumstances and reasonable in amount."[59] This was a reference to general rules on fees charged by lawyers, which require that such fees be "reasonable," and a vacuous way to suggest other criteria; sometimes the A-word was used to say that contingent fees are reasonable, and sometimes it was used to refer to fees that are reasonable without considering whether they are contingent. In another opinion, in 1993, the same ABA committee addressed settlement conferences that are presided over by judges. May such a judge legally (or "ethically") ask one of the lawyers about settlement authority given in confidence to the lawyer by the lawyer's client? The committee said no: "It is not appropriate for the judge to compel lawyers to make confidential admissions which may be against their clients' interests."[60]

The A-word may arise more often, as in these committee opinion instances, when the context is "legal ethics" (that is, the law on lawyers) than when the context is another kind of law. If that is the case, the tendency may signal a thoughtful choice of this word, rather than older "legal ethics" words such as "wrong," "bad," "immoral," "unprofessional," "unethical," or "illegal." And if *that* is so, this Essay may have happened on to something interesting: that deliberate use of the A-word is indicative of a reliance by "the law on lawyers" on a cultural ethic of individualism and

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lytical Premises and Appropriate Standards for Tax Practitioners, 20 CAP. U. L. REV. 353, 356-57 (1991).

59. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994) (discussing contingent fees). A class-action consumer lawyer in Houston, for instance, asked for fees amounting to two-thirds of the damages awarded. An alert reporter interviewed other lawyers, one of whom ruled the request "inappropriate," without explaining why. Others who responded to the reporter's question gave no more context but used moral words which, perhaps, carry a context of their own. One called the fee "the grossest sort of overreaching"; another "way too big"; and a third "almost scandalous." Mike Tolson, *Attorney Fees: How Much is Too Much?*, HOUSTON CHRON., Oct. 21, 1996, at A13.

60. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 370 (1993) (discussing judicial participation in pretrial settlement negotiations). The State Bar of Michigan Standing Committee on Professional and Judicial Ethics followed suit when it examined Michigan statutes to see if it was all right for a judge to give legal advice to members of her family; the legal issue, the committee said, was "whether the behavior at issue is appropriate." State Bar of Michigan Standing Comm. on Professional and Judicial Ethics, Op. JI-77 (1993).

autonomous moral agency. Otherwise, the preceding legal examples make lawyers' and judges' use of the A-word appear empty. But when, in legal literature, the word is used as a label and placed in context, or when it is used as a bridge to *connect* moral and legal reasoning, it seems to serve an intelligible purpose—or at least it, like chicken soup when you have a cold, seems not to do any harm. There are, we think, three categories of *coherent* use of the A-word in the law:

1. *The A-word as a Label.* Judicial opinions and academic discussions on attorneys' fees are an example. Here the legal writer uses "appropriate," often in a policy-based analysis, to signal rather than to explain (since the word does not by itself explain anything). Thus, in discussing whether plaintiffs who prevail under the Employee Retirement Income Security Act (ERISA) should receive attorneys' fees, as an analogy to fees awarded in civil-rights litigation, an academic author said the analogy is "appropriate" for fees for defendants, but "inappropriate" for fees for plaintiffs, and then provided analysis based partly on the notion of private attorneys general and partly on the policy of discouraging frivolous lawsuits.[61] This jurisprudential use of the word is not utterly awful because it is connected to a context—so that "fees are appropriate," for example, is not quite a statement *ex cathedra.* It adds little or nothing to the quality of the argument, but it gives the author a way to get started or to stop or both—one thinks of Christopher Robin's friend, who said, "[Either that is so] or my name's not Winnie-the-Pooh . . . [w]hich it is . . . [s]o there you are."[62]

2. *The A-word as a Bridge Between the Legal and the Moral.* Uses of the A-word in cases where the law being analyzed rests on moral judgment are more defensible than uses of it merely as a label or an argument-stopper, perhaps because in those cases "appropriate" serves as a bridge between legal and moral analysis. An example can be found in the literature on whether it is defensible for a tax lawyer to advise her client to exploit the "audit lottery" and take a chance with fatuous or dishonest claims

61. *See* Mark Howard Berlind, *Attorney's Fees Under ERISA: When Is an Award Appropriate?*, 71 CORNELL L. REV. 1037 (1986).

62. A.A. MILNE, WINNIE-THE-POOH 48 (E.P. Dutton & Co. 1974 (1926)).

on a tax return.[63] Some standards of practice are said to be appropriate (that is, morally defensible as well as defensible under "the law on lawyers" or tax regulations or both or all three) and some are not. When using "appropriate" as a bridge, though, it is necessary to be clear, and one way to be clear is to offer context, as Jeffrey Barker did in an essay entitled, "Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?"[64]

3. *The A-word in Statutes.* Judges and lawyers who have to cope with the A-word in a statute are in a third situation. They attempt to provide a coherent meaning for the A-word because the nature of statutory interpretation requires it. In the fees context, for example, the Clean Air Act provides that "[t]he court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[65] Congress may as well have put a period after "party." In an attempt at clarification, the Supreme Court did not offer a global definition of the word that Congress (no doubt purposefully) did not define, but it did say such things as: "[A]bsent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees . . . ."[66] An academic commentator had to provide the policy considerations.[67]

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63. *See, e.g.*, Grauer, *supra* note 58, at 357–64 (arguing that it is inappropriate to use the litigation standard of zealous advocacy for the attorney's role as tax advisor).

64. 40 U.C.L.A. L. REV. 1275 (1993).

65. 42 U.S.C. § 7604(d) (1994).

66. Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983).

67. *See* Walter B. Russell, III, & Paul Thomas Gregory, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307 (1984). Article 63(1) of the American Convention on Human Rights, Nov. 22, 1969, *in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 48 (1988), provides that "the Court shall . . . also rule, if appropriate, that . . . fair compensation be paid to the injured party." By contrast, Article 50 of the European Convention on Human Rights, Nov. 4, 1950, *in* BASIC DOCUMENTS IN INTERNATIONAL LAW 207 (Ian Brownlie ed., 1967), provides, "the Court shall, if necessary, afford just satisfaction to the injured party." The former document consulted the latter, but neither set of drafters explained the former's use of the A-word to guide international jurists. "Necessary" is probably more useful than "appropriate." We are indebted to Professor Dinah Shelton for pointing us to this interesting difference.

II. A CLOSER LOOK AT A LEGAL CONTEXT: SEXUAL HARASSMENT

Careful use of the word "appropriate" is especially important in the law because people need to be able to predict the legal consequences of their behavior. An example that justifies somewhat extended analysis in this Essay arises in the developing law on sexual harassment.

In the landmark case *Meritor Savings Bank v. Vinson*,[68] the United States Supreme Court endeavored to clarify sexual discrimination jurisprudence, citing guidelines from the Equal Employment Opportunity Commission (EEOC) that specified that sexual harassment is a form of sexual discrimination prohibited by Title VII.[69] The court noted that the guidelines defined sexual harassment by describing the kinds of conduct in the workplace that may be actionable under Title VII. Unlawful actions under the guidelines included "(u)nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[70] Following the EEOC's admirable example, the Court avoided using "inappropriate," and instead declared: "The gravamen of any sexual harassment claim is that the alleged sexual advances were '*unwelcome.*'"[71]

Despite the good example of the *Meritor* Court and the EEOC Guidelines, the Supreme Court blurred the line of demarcation for illegal conduct constituting sexual harassment in its 1993 decision *Harris v. Forklift Systems, Inc.*[72] In *Harris*, the Court affirmed *Meritor*'s standards, but, in an apparent attempt to clarify things, declared that the standard "takes a middle path between making actionable conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[73] *Harris* also held that in order to be actionable as an "abusive work environment," conduct need not go so far as to "seriously affect [the

68. 477 U.S. 57 (1986).

69. *Id.* at 65 (citing 29 C.F.R. § 1604.11(a) (1985)).

70. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)).

71. *Id.* at 68 (emphasis added). In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989), the Court was less astute, saying it "must defer to the experience, wisdom, and compassion of the . . . tribal council to fashion an appropriate remedy" (quoting *In re* Adoption of Halloway, 732 P.2d 962, 972 (Utah 1986)).

72. 510 U.S. 17 (1993).

73. *Id.* at 21.

plaintiff's] psychological well-being" or lead to actual injury.[74] In the wake of *Harris*, one commentator has observed, "It's clear that harassment law restricts speech. What's not clear is which kinds of speech the law prohibits, and which kinds can still legally be said."[75]

As a consequence of this imprecision, lesser courts have (predictably) fallen back on the A-word to describe conduct they mean to condemn. For example, in *Oslin v. State*,[76] former employees of a state treatment center sued the state under a number of theories, alleging damages arising from a supervisor's conduct. The judges in Minnesota noted that the supervisor engaged in "inappropriate behavior" when he beckoned one plaintiff, "grabbed her, touched the sides of her breasts, stated 'you are one hell of a woman,' and kissed her on the lips,"[77] to which she responded by pushing the supervisor away and stating that "this isn't right."[78] Another incident which the court counted as "inappropriate behavior" involved the supervisor grabbing the inside of the employee's leg, sliding his hand up her leg, and grasping her groin area.[79] The court further classified as "inappropriate" the supervisor's retaliation against another employee after she had filed a charge of sex discrimination.[80]

Although it is clear that the judge in *Oslin* regarded all three incidents of behavior as "inappropriate," and, if true as alleged, illegal, this perhaps would not be the case were another judge presiding. For example, in *Randi W. v. Livingston Union School District*,[81] California judges extended the misuse of the A-word to describe sexual abuse in school. The case involved a victim's action against school authorities who recommended a former employee for a position at another school, despite their knowledge of the employee's propensity for molesting female students.[82] The employee at issue had allegedly "touched, molested, and engaged

74. *Id.* at 22.

75. Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1012 (1996).

76. 543 N.W.2d 408 (Minn. Ct. App. 1996).

77. *Id.* at 411.

78. *Id.*

79. *See id.*

80. *See id.* Such retaliation clearly violates Title VII and thus could have been simply termed "illegal." *See* 42 U.S.C. § 2000e-3(a) (1994).

81. 49 Cal. Rptr. 2d 471, *reprinted at* 50 Cal. App. 4th 1570 (Cal. Ct. App. 1995).

82. *See id.* at 473.

in sexual touching of [a] 13-year old."[83] Later in the opinion, the court characterized an employee's sexual overtures to students as "prior inappropriate conduct."[84] We wonder (in both senses of the verb): does inappropriate behavior mean the same thing as molestation, or does a molestation victim need to show more than "inappropriate" conduct to prevail on his or her claim?

A federal district court in Georgia distinguished a police lieutenant's "alleged sexual harassment" of three subordinates from "inappropriate behavior" toward another.[85] In *Bosley v. Kearney R-1 School District*,[86] a federal district court in Missouri considered a harassment claim in a school setting where the plaintiffs alleged that the defendant and its agents "failed to fulfill their duty to stop inappropriate sexual harassment,"[87] which, again, appears to say that there are two types of sexual harassment—the appropriate kind and the inappropriate kind. In a federal court in California, a defendant's behavior, which included groping the plaintiffs' breasts and genital areas, commenting on their breast sizes, and exposing himself to them in public, was characterized as "sexual harassment and *other* forms of rude, obnoxious, and inappropriate behavior."[88] We pause to wonder which of the defendant's activities were actionable sexual harassment and which were merely "inappropriate," meaning not actionable. Maybe these judges throw in the A-word as a way of saying they don't want to talk about it.[89]

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83. *Id.*

84. *Id.* at 474.

85. Munn v. Mayor of Savannah, 906 F. Supp. 1577, 1581 (S.D. Ga. 1995).

86. 904 F. Supp. 1006 (W.D. Mo. 1995).

87. *Id.* at 1013.

88. Coplin v. Conejo Valley Unified School Dist., 903 F. Supp. 1377, 1380 (C.D. Cal. 1995) (emphasis added).

89. Justice O'Connor demonstrated such avoidance when the Court considered whether police violated a suspect's Fifth Amendment rights when, prior to securing a *Miranda* waiver, they lied to the suspect's counsel regarding his client's interrogation and failed to alert the suspect about his lawyer's desire to be present at any interrogation. *See* Moran v. Burbine, 475 U.S. 412 (1986). Reviewing the validity of the suspect's waiver, and eschewing reliance on the A-word, Judge Coffin of the First Circuit had characterized the interrogating officers' behavior as claimworthy, and found that "the failure to inform a suspect in custody that his attorney or an attorney retained for him was seeking to see him vitiated his waiver of his Fifth Amendment right to assistance of counsel at his questioning." Burbine v. Moran, 753 F.2d 178, 186 (1st Cir. 1985). Judge Coffin also observed:

> Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police

We imagine a manager's (or lawyer's) attempt to formulate a workplace sexual harassment policy with decisions such as these to guide her. The "sample sexual harassment policy" suggested in a Practicing Law Institute Handbook encourages employers to begin with the following "statement of policy": "[Employer Inc.] is committed to maintaining a work environment that encourages and fosters appropriate conduct among employees and respect for individual values and sensibilities."[90] This, of course, settles very little; the problem is figuring out when rudeness, boorishness, and unkindness—all of which are inappropriate-as-improper—are also inappropriate-as-illegal. A journalist, looking at all of the preceding attempts to describe the law, took them to encourage *moral* behavior, depending on extra-legal sources to determine what morality requires: "If men and women are temporarily more cautious and self-conscious about what they may say and do, that may not be too high a price to pay for a new understanding of what is appropriate behavior, and what is not."[91] She suggests that the inquiry for managers (or mere lawyers) is not really for an understanding of "appropriate behavior," but rather, for morally right, virtuous, and legal behavior. We think she's right, but we can imagine Ms. Provenzano saying, "Lots of luck."

The problem, we think, will be resolved when announcements of legal judgments by judges and scholars consistently provide a context for deciding what is "appropriate" (as in "fitting").[92] Without context, the politically correct adjective "inappropriate" detracts from the severity and wrongness of the behavior at issue. The word does not point to moral judgment, as the journalist hoped; it points away from moral judgment.

> a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary.

Id. at 187. Taking a different view of these facts, and invoking the A-word, Justice O'Connor stated that "[a]lthough highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." *Moran*, 475 U.S. at 423. Under Justice O'Connor's view, "inappropriate" apparently means wrong, disfavored and even deceptive, but not illegal or unconstitutional.

90. *Sample Sexual Harassment Policies*, *in* SEXUAL HARASSMENT LITIGATION, at 433 (PLI Litig. & Admin. Practice Course Handbook Series No. 520, 1995).

91. Nancy Gibbs, *Relationship of the Year: Man and Woman*, TIME, Jan. 6, 1992, at 47.

92. *See infra* Section III.C.

III. THREE PERSPECTIVES

We propose three broad perspectives for somewhat more serious consideration of the use of the A-word in ethics and in jurisprudence. The first treats it as a *linguistic* phenomenon, similar to many other shifts in language, that might show how moral discourse deteriorated among the English-speaking peoples as their societies became more "pluralistic." The second considers uses of the word as a form of earnest *ethical* argument in which a serious claim of appropriateness (or a serious accusation of inappropriateness) means something. The third returns to the subject of sexual harassment law for an example of a proper use of "appropriate" in a *legal* context.

A. *The Dynamics of Moral Words*

1. *Rational.* The use of the word "rational," to begin with the first of a number of suggestive analogues, teems with history and complexity.[93] Its root meaning identifies a mode or product of thought; to say that a principle or proposition is "rational" is to say that one is prepared to give reasons for it, to attempt to persuade others that the principle or proposition makes sense.[94] The adjective has had this meaning since the Middle Ages. Often, in early usage, its meaning was anchored to broad theological reasoning. Chaucer talks about a "reasonable prayer."[95] Raymond Williams located a seventeenth century religious argument for "reasonable wage demands."[96] Sometimes the word derogatorily referred to carnal appetite, to "carnal reason"—medieval people being lusty thinkers, as we know from Chaucer and Boccaccio.[97]

In these senses, from early usage, the appeal "developed a very early specialized sense of moderation or limitation, which says much about the understanding of the human condition within

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93. *See* RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 251–52 (rev. ed. Oxford Univ. Press 1985).

94. However, Martha Minow persuasively argues that "making sense" tends to exclude most people who are not male, "normal," and, in the typical case in which that appeal is made, white. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 146–72 (1990). Rationality, like natural-law reasoning, has as its premise "a basic human nature, found in the abstract individual capable of reason . . . [which] risks excluding any who do not meet it." *Id.* at 156.

95. *See* WILLIAMS, *supra* note 95, at 253.

96. *Id.*

97. *See id.*

a medieval theological perspective."[98] As late as the seventeenth century, to call someone a "rationalist" was to accuse him, in his arrogant and ultimate dependence on "sensible evidence" and his disdain for scripture and the memory of the church, of being an atheist—and therefore of not being reasonable at all.[99] Whatever the soundness of either side of that meta-ethical argument, each was at least relatively clear, so that, even in that venue, "in the most bitter disputes, most parties . . . claimed to have *reason* on their side."[100]

Then, as a product of the Enlightenment, "rational" began to claim a particular ethical provenance. It pointed to "a set of universal principles as distinguished from *reason* as the faculty of connected and demonstrated argument."[101] In this phase those making the appeal tended to use "rational" as often as they used "reason" meaning "reasonable." The Enlightenment appeals to "rationality" were not the same as the medieval characterization of humans as rational animals, but they retained a basis in ethical theory that both speaker and hearer took into account.[102] If there was (and is) an objection to reason as "a set of universal principles," it is that the Enlightenment turned human reason into a goddess and appropriated to itself the ability to judge the soundness of other kinds of moral argument.[103]

And then, in what we think of as a final stage, the claim that rationality is universal ran up against the fact that one person's rationality does not work the same way another person's does.[104]

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98. *Id.*

99. *See id.* at 254; *see also* Stanley Fish, *Why We Can't All Just Get Along*, FIRST THINGS, Feb. 1996, at 18, 20 ("[O]ne wonders what Augustine means by a 'reasonable person.' The answer is that a reasonable person is a person who believes what Augustine believes and who, like Augustine, can only hear assertions contrary to that belief as absurd.").

100. WILLIAMS, *supra* note 93, at 253.

101. *Id.*

102. *See id.*

103. A tendency, we note, that lingers in modern American law reviews.

104. *See* ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL INQUIRY 170–95 (1990) (restating this argument, in large part from his own earlier work); *see also* ROBERT L. WILKEN, REMEMBERING THE CHRISTIAN PAST 169–72 (1995) (arguing that rationality must be located within a tradition and cannot be an autonomous categorization); Michael Donaldson, *Some Reservations about Law and Postmodernism*, 40 AM. J. JURIS. 335, 337 (1995) ("Foundational to this 'theory' is the denial of absolutes and methods of categorization. People are to be seen as a point of intersection for millions of experiences, thoughts, and images. Thus it is the particular, rather than the universal,

This late historical development turned into a morality of autonomy, which, as we perceive it, says that no person's reason can be coherently labelled superior to any other person's reason. And that, in moral terms, means that no one need listen to anyone else: every person is her own tyrant. That position was, we guess, interesting for a while for ethics, but it seems to have run its course—as is signalled by the popular academic label "post modern."[105]

2. *Subjective* has had a similar, modern fate. To call something subjective, in the early nineteenth century, was to claim no more than that it existed "in the mind of him who judges," that is, that it was unreachable for ethical discourse.[106] This sometimes had a positive cast, as in reflection on the human dignity of a person even as she makes a subjective argument. Since then, however, "subjective" has been commouly used in contrast

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aspects of people and of life which are to be exalted.").

Professor MacIntyre also contributed to modern ethical reflection the neo-Aristotelian notion of the "practice," an activity-related small community for moral formation and reflection. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 187–94 (2d ed. 1984). In discussing the consequent issue of whether a person thinking ethically, within a practice, can manage without resorting to the perspective of persons not in the practice, Professor Stanley Fish said: "To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue 'naturally'—without further reflection—from one's position as a deeply situated agent." STANLEY E. FISH, DOING WHAT COMES NATURALLY 386–87 (1989). That is, what is rational in ethics includes the intuitive, but only, we suppose, when the context of a particular practice is described or invoked.

105. The term "postmodern" is not used much among careful thinkers. It seems to have become trendy first in critical studies of art and architecture. In speculative thought, it has come to signal rejection of ideas associated with the Enlightenment. Michael Weingrad says it "includes semiotic, deconstructive, psychoanalytical, and post-structural anthropological approaches to the analysis of art, politics, and culture." Michael Weingrad, *Jews (in Theory): Representations of Judaism, Anti-Semitism, and the Holocaust in Postmodern French Thought*, 45 JUDAISM: A Q.J. OF JEWISH LIFE & THOUGHT 79, 79 (1996). Michael Donaldson's reference is less complex: "Postmodernism . . . is the rejection of this faith in rationalism, and a recognition that any argnment, no matter how perfectly logical, is only as good as its presuppositions." Donaldson, *supra* note 104, at 336. Gertrude Himmelfarb says postmodernism is the same as post-structuralism and is familiarly known in academic circles and computer networks as "pomo." GERTRUDE HIMMELFARB, ON LOOKING INTO THE ABYSS 132 (1994). Ernest Gellner says postmodernism "is strong and fashionable. Over and above this, it is not altogether clear what the devil it is." ERNEST GELLNER, POSTMODERNISM, REASON AND RELIGION 22 (1992). And Alice M. McKenzie says it "should be flattered at its ability to draw a crowd." Alice M. McKenzie, *"Different Strokes for Different Folks": America's Quintessential Postmodern Proverb*, 53 THEOLOGY TODAY 201, 201 (1996).

106. WILLIAMS, *supra* note 93, at 311.

with the nobler "objective"; to claim "that there can be a kind of art or kind of thinking in which the active *subject* is not present."[107] The objective (not subjective) is something that can be taken as factual or fair-minded "and hence reliable."[108] That something is also sometimes called rational. The result is a confusion not unlike the confusion we have attempted to describe for the A-word: "Subjective and objective, we might say, need to be thought through—in the language rather than within any particular school—every time we wish to use [either] word."[109]

3. *Standard.* The early use of "standard" was to claim "an authoritative example of correctness." Royal Standard is an example, as is the "standard foot."[110] Then the word becomes a boast, as in "Standard Oil Company," where the word is "a term of assessment or grading . . . a concept of graded progress within a hierarchy."[111] Raymond Williams says, "It is often impossible, in these uses, to disagree with some assertion of *standards* without appearing to disagree with the very idea of quality."[112] He gives the familiar example of "university standards," when the claim (boast) goes so far as "a generalizing version of the essence of a civilization."[113] The modern development has been that the word merely signals disagreement, without implying an agreed-upon source for resolution of the disagreement, as in "standard wage" or "standard of living."[114]

4. *Civilized.* Early use here pointed to a process rather than a judgment—as in the legal distinction between a criminal case and a civil case.[115] By the late sixteenth century it had come to be a cultural boast as well—as when Thomas Hooker speaks of a "civil society" or Boswell compares civilization and barbarity[116]—and not, then, "so much a process as a state of social order and

107. *Id.*
108. *Id.*
109. *Id.* at 312.
110. *Id.* at 296.
111. *Id.* at 297.
112. *Id.*
113. *Id.*
114. *Id.* at 298.
115. *See id.* at 48.
116. *Id.* (citations omitted).

refinement." In the boasting stage—as in these examples—the word claims the superiority of "an achieved condition."[117] Burke refers, for instance, to "our manners, our civilization, and all the good things which are connected with manners, and with civilization."[118]

As soon as influential thinkers start boasting about civilization, the romantics begin scoffing at them and talking about "culture" instead; they invite the hearer to talk in the plural ("civilizations"), and to take his choice.[119] It was possible, that is, to argue, as Coleridge did, that "civilization," in Boswell's use of the word, is at best "a mixed good, if not far more a corrupting influence."[120] Williams concedes that the word still retains "some normative quality," but suggests that, for the most part, it is no longer useful in ethics.[121]

5. *Tasteful.* Taste is a good word with which to end this list, since throughout its development it has suggested (take your choice) individualism, subjectivity, or autonomy. Both Cicero and Aquinas said that, in matters of taste, there is no (interesting) dispute.[122] But the word has had some indicative escapades along the way. In thirteenth century England it was used where a modern would say "touch" or "feel." It signalled human experience, and came a bit later to the moral claim that it is a good thing to have ennobling experiences.[123] Addison spoke, in the eighteenth century, of "the fine taste of writing," for example.[124] In the nineteenth century it was, in Williams' phrase, "reanimated" in its pejorative sense (matters of taste being not worth taking into account). And today, in Williams' assessment, it mostly signals the consumer who for inaccessible reasons prefers one kind of beer to another.[125]

These examples tend to show, as our introductory exploration of the A-word does, that our moral discourse has deteriorated into

117. *Id.*
118. *Id.* at 99 (citation omitted).
119. *Id.* at 50.
120. *Id.* at 49–50 (citation omitted).
121. *Id.* at 50.
122. *See id.*
123. *See id.* at 313.
124. *Id.*
125. *See id.* at 315.

a radical individualism that makes ethical argument virtually impossible.[126] But against that observation one should note that such words and uses of such words in some ways retain moral force. Lakoff and Johnson, in their study of metaphors, demonstrate that moral words can take on meaning by taking on metaphorical context.[127] For example, "Love is a journey, love is madness."[128]

Even non-moral words take on moral meaning as they take on context: "gun," for example, as in "fake gun." That makes both positive claims for the object (a fake gun is, in some sense, a gun) and negative ones (a fake gun doesn't shoot).[129] Miles asked your elder author, his grandfather, as he and his brother Ezra and I came to a fallen tree in the woods, and Miles needed both hands to get over the log, to "hold my gun for a minute." Ezra said, "That is not a gun; it is a stick that looks like a gun." Miles said, "I know that, but sometimes I like to call it a gun that looks like a stick."

The point in this passing reflection on metaphors is that metaphorical context for words, even words that in direct signification have lost whatever moral force they once had, if any, may revive moral quality and even turn listless words into comprehensive moral judgment. Which could be to say that, focusing on notions such as "situation" and "what fits"—that is, on context—makes it more rather than less possible to make moral sense out of whatever is for the moment trendy in popular discourse. And that brings us to a second possibility for "appropriate."

B. *Maybe "Appropriate" Means Something in Ethics*

In a new study of the teachings of Jesus on wealth, Sondra Ely Wheeler, a teacher of Christian ethics, takes issue with the late Reinhold Niebuhr, one of the twentieth century masters of her trade.[130] She does it by invoking a method of ethical reason-

126. *See* SHAFFER & SHAFFER, *supra* note 57, at 9–21.

127. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 115 (1980); *see also* Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 228, 256–66 (1995) (assessing the impact of metaphors for the adversary system on the behavior and identity of those who work within it).

128. LAKOFF & JOHNSON, *supra* note 127, at 115, 117.

129. *See id.* at 121.

130. *See* SONDRA ELY WHEELER, WEALTH AS PERIL AND OBLIGATION 60–61 (1995).

ing often attributed to Niebuhr's brother Richard, and in doing so she uses the A-word as the focus of her moral reasoning. Her usage is careful; it is not an instance of decadence in moral thought. It gives us hope that the A-word might be used well in an ethical context.

One of the biblical texts Wheeler invokes is the twelfth chapter of St. Luke's Gospel, primarily the "do not worry" discourse in *Luke* 12:22–34.[131] Reinhold Niebuhr, in a judgment indicative of a broad argument he made in Christian ethics, said the discourse concerning the ethical problem of rewards revealed "the completely unprudential rigorism" of Jesus' ethic.[132] Wheeler disagrees:

> Jesus commands his disciples 'do not be anxious' and provides three arguments for the inappropriateness of anxiety. It is *inadequate* because it springs from an inadequate understanding of human life; it is *unnecessary* because God who feeds the birds will feed them; and it is *ineffective* because no one can add anything to his life by it . . . .
>
> . . . .

131.

> And he said to his disciples: . . . [D]o not worry about your life, what you might eat, nor about your body, what you might put on.
>
> For life is more than food, and the body more than clothing.
>
> Think of the ravens, that they neither sow nor reap, they have neither storehouse nor barn, and God feeds them: by how much you surpass the birds! . . . which of you can, by worrying, add a foot to your height?
>
> Therefore, if you cannot do the smallest thing, why do you worry about the other things?
>
> Think of the wild lilies, how they grow! They do not toil nor spin; but I tell you, Solomon in all his glory was not arrayed like one of these.
>
> But if God thus clothes the grass in a field, which exists today and tomorrow is thrown in an oven, how much more [will he clothe] you, o ones with little faith!
>
> And do not look for what you may eat and what you may drink, and do not be anxious; for all the nations of the world pursue these things, and your Father knows that you need them.
>
> But rather, look for his kingdom, and these things will be given to you as well.
>
> Fear no more, little flock, because it has pleased your Father to give you the kingdom.
>
> Sell your possessions and give alms; make for yourselves purses that do not grow old, an unfailing treasure in the heavens where no thief comes near nor moth destroys;
>
> For where your treasure is, there too your heart will be.

Id. at 59–60 (Wheeler's translation from the Greek).

132. REINHOLD NIEBUHR, AN INTERPRETATION OF CHRISTIAN ETHICS 25 (Seabury Press 1979) (1935). It has even been argued elsewhere that the extremism proved that St. Luke's report was authentic. *See* WHEELER, *supra* note 130, at 61 (citation omitted).

> Thus faith is the critical point; what must appear to one without faith as impossible and foolhardy counsel may be seen by those with it to be the only reasonable course, the one based on the truth about human beings and the world in which they live.[133]

That is, the faith Jesus enjoins is reality, is objective, reasonable, natural—and appropriate: "What unites these disparate appeals here and throughout the chapter, and makes their union intelligible, is Jesus' own 'reality perspective.'"[134] That is, the moral substance of the discourse is a response 1) to what is going on; and 2) to what God is doing in the world. The Kingdom has come. The accumulation of wealth is vain and useless, because you can't take it with you; and it is a waste of effort for a believer because God will take care of her. In each of these senses, and in both of them, Reinhold Niebuhr's appeal to worldly prudence is not appropriate.

Wheeler's reflection on the quoted discourse takes on Reinhold Niebuhr's "Christian realism" pointedly when she concludes one of these reflections: "To one who accepts Jesus' proclamation and is willing to shape her life by it, even the 'hard sayings' of chapter 12 are cause for rejoicing; they may be received as a liberation from anxiety, the promise of ultimate security rather than the demand for ultimate risk."[135]

Wheeler uses "appropriate" where H. Richard Niebuhr would have said "responsible."[136] The idea in religious ethics rests on a

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133. WHEELER, *supra* note 130, at 63–64.

134. *Id.* at 66.

135. *Id.* at 68. Wheeler extends her analysis into the latter part of Luke's chapter 12, the parables that commend "the wise and faithful steward" and disapprove of the unfaithful servant who cheats his master:

> Two things are especially noteworthy. One is that the servant's infidelity arises out of his incorrect belief about his master's return; it is his defective understanding of reality that leads to his undoing. The other is that the image of fidelity used by the parable is obedient stewardship of food and drink, suggesting that the area of obedience in question is related to the disposition of material goods.
>
> Thus, the teaching about anxiety and possessions offered in verses 22–34 is placed by Luke between a consideration of appropriate and inappropriate objects of fear (12:1–21) and a vivid parabolic presentation of the blessing or punishment received according to one's readiness for the kingdom (12:35–48) instanced by obedient disposition of goods. In all of these passages, human attitudes and actions are considered as they spring from underlying beliefs, and tend toward certain ends.

Id. at 67.

136. *See* H. RICHARD NIEBUHR, THE RESPONSIBLE SELF (1963); *see also* ALBERT R.

distinction Niebuhr borrowed from Martin Buber[137]—the difference between an "I–Thou" relation, which is "known and active in . . . dialectic," and an "I–It" relation, which is no relation at all because the "other" in an "I–It" encounter "is not a reflexive being. It does not know itself as known; it only knows; were it not for the accompanying I–Thou situation it would not know that it knows. It values but does not value itself or its evaluations."[138]

From that focus, H. Richard Niebuhr (in what was originally a series of lectures, given late in life, to a group of Scots academics) contrasted three ways of talking about morals. The first, oldest, and most Greek is to evaluate morals in reference to goals and purposes in life; Niebuhr called it "man the maker" ethics;[139] modern teachers of ethics often call it "teleological" (from "telos," the Greek word for "goal").[140] An ethical argument following this way of "doing" ethics would require a demonstration of the goal being contemplated. Aristotle is the classical example of doing ethics that way. When a "teleologist" uses the A-word, she has to include consideration of the contemplated goal or risk being incoherent (a bad word among ethicists). The second is often called "deontological," that is, moral evaluation reasoned from principles or commands; Niebuhr called it "man the citizen" ethics.[141] A person arguing in this way needs to demonstrate a principle or rule, such as Kant's invocation of the categorical imperative.

The third, and Niebuhr's lasting contribution to modern religious ethics, is the ethics of responsibility—or, we dare to say, with Professor Wheeler, the ethics of the *appropriate*. Wheeler invokes that school of ethical thought when she attends to Jesus' view of what is real—both of what is going on and of what God is doing. Niebuhr's theory was probably also the intellectual ancestor of Joseph Fletcher's once popular "situation ethics."[142] It asks, in

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JONSEN, RESPONSIBILITY IN MODERN RELIGIOUS ETHICS 140–147 (1968).

137. *See* MARTIN BUBER, I AND THOU (Walter Kaufman trans., 1970).

138. NIEBUHR, *supra* note 136, at 72–73. Buber went, we think, even further than that—into the ontological observation that, until a human person encounters a "Thou," in addition to all of her "Its," she does not even come into existence. *See* BUBER, *supra* note 137, at 120–22.

139. *See* NIEBUHR, *supra* note 136, at 48–49.

140. *See* WESTMINISTER DICTIONARY OF CHRISTIAN ETHICS 67 (James F. Childress & John MacQuarrie eds., 1986).

141. *See* NIEBUHR, *supra* note 136, at 60.

142. *See* WESTMINISTER DICTIONARY OF CHRISTIAN ETHICS, *supra* note 140, at 586–88.

Niebuhr's formulation, 1) "to whom am I responsible?" and 2) "in what community?" Niebuhr and his followers refer to it as the ethics of the fitting, the moral question being, "In this situation, what is appropriate?" That last was Wheeler's word, but Niebuhr would likely agree that it can be used here:

> [P]urposiveness seeks to answer the question: "What shall I do?" by raising as prior the question: "What is my goal, ideal, or telos?" Deontology tries to answer the moral query by asking, first of all: "What is the law and what is the first law of my life?" Responsibility, however, proceeds in every moment of decision and choice to inquire, "What is going on?" If we use value terms then the differences among the three approaches may be indicated by the terms, the *good*, the *right*, and the *fitting*; for teleology is concerned always with the highest good to which it subordinates the right; consistent deontology is concerned with the right, no matter what may happen to our goods; but for the ethics of responsibility the *fitting* action, the one that fits into a total interaction as response and as anticipation of further response, is alone conducive to the good and alone is right.[143]

Thus, H. Richard Niebuhr resolved the tension between the ethics of virtue and the ethics of duty by suggesting a third category that puts context at the center of ethical discussion. The word "appropriate" can be a way to signal ethical (and legal) orientation, but it won't work unless it comes with the context on which the theory, and therefore the discussion, depend.

C. *Maybe "Appropriate" Means Something in Law*

The Seventh Circuit Court of Appeals, via its Chief Judge Posner, used the A-word correctly in an emerging area of Title VII law. Recently, the courts have struggled with whether Title VII contemplates a cause of action for same-sex sexual harassment.[144] Expressing his views on the dilemma, Judge Posner noted that "[s]exual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or

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143. NIEBUHR, *supra* note 136, at 60–61.

144. *See, e.g.*, Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354–55 (D. Nev. 1996) (holding that Title VII "protects all persons, whether male or female, heterosexual or homosexual, from discrimination based on sex," but noting that "many recent district court opinions have struggled" with same-sex Title VII claims).

women by other women would not also be actionable in appropriate cases."[145] The context in which Judge Posner made this observation indicates that he thinks "appropriate" describes the legality of the conduct itself. He wrote:

> The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . . Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. . . . On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.[146]

Acknowledging the difficulty in distinguishing inappropriate (illegal) behavior from appropriate (legal though perhaps, to some, offensive) behavior, Judge Posner continued:

> We spoke in [an earlier case] of "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing." . . . It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other; and when it is uncertain on which side the defendant's conduct lies, the jury's verdict, whether for or against the defendant, cannot be set aside in absence of trial error. Our case is not within the area of uncertainty. [The alleged harasser], whatever his qualities as a sales manager, is not a man of refinement; but neither is he a sexual harasser.
>
> He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on primetime television.[147]

So it seems that in the Seventh Circuit, following *Baskerville*, inappropriate behavior is that which is actionable, and appropriate behavior is that which is not.

In a recent hostile work environment decision by the Sixth Circuit Court of Appeals, yet another court followed Judge

145. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995).
146. *Id.* (citations omitted).
147. *Id.* at 431 (citations omitted).

Posner's elegant diction. In *Black v. Zaring Homes, Inc.*,[148] Judge Kennedy reviewed a jury's verdict and award of compensatory and punitive damages to a plaintiff who had been subjected to numerous workplace comments about women's anatomy. The magistrate judge found that the evidence "revealed 'an atmosphere of a grade-school-level fascination with women's body parts combined with denigrating comments about women' which were 'not appropriate in the workplace.'"[149] Citing Judge Posner's *Baskerville* opinion with approval, Judge Kennedy emphasized that not every type of conduct which might be offensive is actionable.[150] She stated: "[T]here may be times when offensive comments have an impact in the workplace, indeed constitute 'harassment,' but do not create an objectively hostile work enviroument. Not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."[151] Reversing the verdict, the court found that "even when construed in a light most favorable to the plaintiff, the conduct does not appear to have been more than 'merely offensive,'"[152] and noted that "Title VII was 'not designed to purge the workplace of vulgarity.'"[153] It remains to be seen whether other circuits will adopt Judge Posner's appropriate use of "appropriate."

CONCLUSION

The A-word, then, makes sense in ethics, including legal ethics, in the law, and in jurisprudence, if and when the person using it shows how it *fits*, is able to provide a *context*. Indeed, with such assistance, "appropriate" not only makes sense, becoming useful for deliberation of all kinds; it also emerges as a particularly attractive choice for those who argue from narrative, from stories, and from social science. The A-word is still hackneyed, of course, but that aesthetic objection, an appeal to taste, does not ruin it for ethics and jurisprudence.[154]

148. 104 F.3d 822 (6th Cir. 1997).
149. *Id.* at 825.
150. *See id* at 826–27.
151. *Id.* at 827 (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)).
152. *Id.* at 826 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)).
153. *Id.* at 827 (quoting *Baskerville*, 50 F.3d at 430).
154. The headline writers we took to task in our opening pages might fairly claim

So, then, it is appropriate to use "appropriate"—sometimes.

It makes sense when the writer is carefully attending to the cast of characters, the time, the place, and the culture when she rules on what is *proper*. This is true when judgments about propriety are also communal moral judgments. The underlying ethical insight, as in Miss Manners' analysis of traditions that allow the throwing of food, is that offensive behavior is often not only improper but also wrong.

It does not, though, make sense to use the A-word when the writer, in addressing propriety, is attempting either to hide his moral judgment, or to lay claim to the modern ethics of radical individualism—to claim that what makes behavior moral or not is whether the actor chooses it, that the only mistake in ethics is to allow oneself to be influenced by those around her. That position, in ethics, leads nowhere.

After the deck is cleared, then, it is possible to re-read the legal examples and to conclude that, in general, judges' use of the A-word confuses more than it helps legal reasoning, except in the inevitable circumstances where sloppy legislators have used it—no doubt to avoid sounding moralistic—and thus have given judges and lawyers no choice. It is also possible—and necessary—to sort out examples of jurisprudential and moral judgment, separating those in derogation of sound, interesting, ethical argument from those that invoke enough context to be sound and interesting from either of the two perspectives we suggest are (forgive us) appropriate for ethical discussion.

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that we should apply this argument for "context" to their art, which, after all, is appended to the context provided by reporters. The reporters would then be reduced to the complaint that their careful prose is desecrated when hackneyed phrases in large type are piled on top of it.