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## RULE OF LAW

## Among Friends

By HARVEY A. SILVERGLATE

April 22, 2006; Page A9

The protracted battle between the First Amendment and the PC notion that we're all *entitled* to go through life without being made to feel uncomfortable took an unexpected turn two days ago. The California Supreme Court -- a pioneer in curtailing free speech, ostensibly to protect the "vulnerable" from "verbal harassment" -- unanimously reversed a lower court decision that would have allowed a sexual harassment lawsuit to proceed to trial against the producers of the sitcom "Friends."

Amaani Lyle, a former member of the show's scriptwriting team, based her employment discrimination claim on having been exposed to sexual humor and innuendo during brainstorming sessions for the sitcom. A court of appeal decided in 2004 that Ms. Lyle could sue Warner Brothers Television Productions, Inc., because, when she took a job as a scriptwriters' assistant assigned to summarize ideas bandied about in creative sessions, she had to endure banter uttered in the course of creating scripts for what the court described as "a show about the lives of young sexually active adults."



AP Photo/Michael Caulfield

This raised the possibility that a jury would be asked to decide not only what was said in Ms. Lyle's presence that constituted "sexual harassment," but whether it was really necessary for the scriptwriters to go

about their task in such an offensive manner. Were lewd words and gestures part and parcel of the creative process, or was banter indulged in "for purely personal gratification"? Such second-guessing of the creative process would have a chilling effect on writers.

Civil libertarians took some measure of hope when the California Supreme Court agreed to review the appellate court's decision. But also some trepidation -- because in 1999 this court

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had upheld a lower court's injunction prohibiting the use of racially charged language by an employee of an Avis facility toward fellow workers. "Prior restraints" against speech have long been considered the most severe form of censorship and are almost never sustained by appellate courts. Thus *Aguilar v. Avis Rent-a-Car* was deemed by First Amendment scholars to be both outrage and aberration. But the four justices who voted to uphold the seven-member court to review *Lyle*.

So it was a welcome surprise when the state Supreme Court ruled that vulgar language in a "creative workplace focused on generating scri comedy show featuring sexual themes" could not be punished for being a member of the work-team. The court stressed that none of the offer directly at Ms. Lyle, but rather merely in front of her; nor was she the short, she was a member of a team in a job she had voluntarily sought the program's content.

Along the way the court reaffirmed important but forgotten principle: tinging language in front of a woman could not be considered harassment and pervasive as to constitute "discrimination because of sex" in the terms or conditions of employment to which members of the other sex sexual banter would not suffice.

Because the court concluded that the banter did not constitute harassment, the question underlying workplace sexual harassment litigation (responsibility for curtailing virtually all controversial and potentially offensive speech floors): *Does the First Amendment protect such speech from official harassment?* If deemed to violate state and federal anti-harassment statutes and regulations, are many of our anti-harassment laws and speech codes unconstitutional?

But one member of the court, Justice Ming W. Chin, did reach the unasked question: "This case has very little to do with sexual harassment and First Amendment free speech rights." Quoting Felix Frankfurter, Justice must not tolerate laws that lead to timidity and inertia and thereby discourage expression indispensable for a progressive society."

Opponents of another plague on free speech -- campus "harassment codes" -- student speech that might annoy a fellow student on the basis of race or sexual orientation -- also found unexpected encouragement in *Lyle*. If a court could recognize the need to protect a nation's most hostile to free speech could recognize the need to protect obnoxious speech in a "creative workplace," shouldn't universities, by their truth-seeking mission, enjoy the highest degree of freedom from censorship? Should harassment codes that regulate speech be abolished?

Workplace censors have indulged in vast overreaching -- and we may hope the Supreme Court's newfound understanding of this fact may migrate in time to civic life. Indeed, one little-noticed development in a federal appeals court that migration. In February 2001, in *Saxe v. State College Area School District*, the Third Circuit invalidated on First Amendment grounds a school district's speech code of an entire public school district in Pennsylvania.

The opinion did not attract much attention at the time, but that changed

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opinion in Saxe was written by then-Circuit Judge, now Supreme Court Justice, Samuel A

***Mr. Silverglate is co-author of "The Shadow University: The Betrayal of Liberty on America's Campuses" (Free Press, 1998) and a director of the Foundation for Individual Rights in Education, which signed an amicus brief in the Lyle case.***

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