

Writers Gone Wild: “The Muse Made Me Do It” as a Defense to A Claim of Sexual Harassment

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*“The poet knows that he speaks adequately then only when he speaks somewhat wildly, . . . not with intellect alone but with the intellect inebriated by nectar.”*¹

I. INTRODUCTION

On July 21, 2004, the California Supreme Court unanimously agreed to review whether writers and their employers on the recently concluded hit sitcom *Friends* could be held liable for sexually harassing a writers’ assistant primarily based on what they said in the process of creating story lines for the show.² The writers’ assistant claimed that she was sexually harassed by the coarse talk that saturated the writers’ meetings she was required to attend during her four months of employment.³ The issues the Court agreed to review were: (i) whether “sexually coarse and vulgar language in the workplace” constitutes sexual harassment under the California Fair Employment and Housing Act (“FEHA”)⁴; and (ii) whether imposing such liability would violate the “defendants’ rights of free speech under the state Constitution.”⁵

The day after the Court granted review in this case, the Court, in *In re George T.*, reversed the conviction of a 15 year-old poet for making a criminal threat on the basis that he concluded a poem he gave to

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¹ RALPH WALDO EMERSON, “The Poet,” in *THE SELECTED WRITINGS OF RALPH WALDO EMERSON* 332, 332 (Random House 1968) (1844).

² *Lyle v. Warner Bros. Television Prods.*, 12 Cal. Rptr. 3d 511 (Ct. App. 2004), *rev. granted*, 94 P.3d 476 (Cal. 2004).

³ 12 Cal. Rptr. 3d at 515.

⁴ CAL. GOV’T CODE §§ 12900-12996 (2004).

⁵ 94 P.3d at 476.

two classmates, days after the Santee school shootings, with the lines: “[I]nside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!”⁶

Is the California Supreme Court—a court, like the state in which it sits, considered a trendsetter⁷—on the verge of establishing a special legal defense for writers accused of sexual harassment? How much weight should the freedom demanded by any creative process be given in actions brought against those involved in it? This article concludes that the same concern for the unique context of the creative process expressed in *In re George T.* should be extended to provide a defense against sexual harassment. The Court should consider establishing a “creative privilege” defense, akin to the statutory privilege that applies to statements made in connection with the litigation process.⁸ The article finally identifies, but does not answer, difficult questions raised in defining the scope of this privilege.

II. WITH FRIENDS LIKE THESE . . .

In *Lyle v. Warner Bros. Television Productions*, Amaani Lyle sued for sexual harassment after she was dismissed from her job as a writers’ assistant on *Friends* after only four months.⁹ Lyle’s job was to attend the show’s writers’ meetings to capture the ideas the writers generated during the meetings for story lines, gags, and dialogue.¹⁰ She claimed that several male writers made crude references in her presence to both their sexual fantasies and experiences, and made sexual gestures during these meetings and occasionally outside of the meetings.¹¹

The Second District California Court of Appeal reversed a summary ruling in favor of the show’s writers and producers, holding that Lyle was entitled to have a jury decide whether she suffered harassment.¹² The Court of Appeal held that Lyle could proceed with her claim of sexual harassment because, if her allegations were true, she had witnessed a “barrage of gender denigrating conduct . . . during writ-

⁶ 93 P.3d 1007, 1009 (Cal. 2004).

⁷ For example, the California Supreme Court was the first in the nation to allow recovery for strict product liability. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963). See generally MARK BALDASSARE, CALIFORNIA IN THE NEW MILLENNIUM: THE CHANGING SOCIAL AND POLITICAL LANDSCAPE 182 (2000) (“Americans are accustomed to looking to California as the trendsetter for the nation, the harbinger of things to come, and the symbol of what is right and wrong with the nation.”).

⁸ CAL. CIV. CODE § 47.

⁹ 12 Cal. Rptr. 3d 511, 513 (Ct. App. 2004).

¹⁰ *Id.*

¹¹ *Id.* at 516-517.

¹² *Id.* at 514.

ers' meetings which she had the duty to attend as a writers' assistant as well as in common areas such as the hallways and break room."¹³

The Court of Appeal rejected the writers' arguments that treating Lyle "just like one of the guys" absolved them from a claim of sexual harassment.¹⁴ "[U]nlawful sexual harassment can occur even when the harassers do not realize the oppressive nature of their conduct or intend to harass the victim."¹⁵ The Court of Appeal also held that the conduct was sufficiently pervasive to constitute hostile environment sexual harassment, observing that, if Lyle's evidence were believed, "[t]his conduct occurred nearly every working day of the four months Lyle spent on the show."¹⁶

The Court of Appeal then turned to the defendants' contention that the process of creating the show required the writers to engage in the language and behavior of which Lyle complained.¹⁷ The Court observed that the argument appeared to be "unique in the annals of sexual harassment litigation."¹⁸ Nonetheless, while rejecting "creative necessity" as a basis for the writers to avoid a trial altogether, the Court held that the writers could present such a defense at trial to a jury.¹⁹

The Court of Appeal held that a summary ruling in the writers' favor was inappropriate for two reasons.²⁰ First, a trial was necessary because the context in which offensive words are said, while relevant, is only one factor a court considers in determining whether sexual harassment has occurred.²¹ Second, the defendants had not established that the alleged conduct "was indeed necessary to the performance of their jobs" as writers.²² The Court excluded from this new "creative necessity" defense any physical or verbal sexual harassment directed toward a writers' assistant or other employee, none of which Lyle alleged.²³

The California Supreme Court has granted review, indicating it will consider more than just whether offensive language can ever be sexual harassment in a *creative* context. The Court will decide whether the liability for sexual harassment in *any* context based on coarse and vulgar language in the workplace would "infringe defendants' rights of

¹³ *Id.* at 515.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 517.

¹⁷ *Id.* at 518.

¹⁸ *Id.*

¹⁹ *Id.* at 518-21.

²⁰ *Id.* at 518.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 520.

free speech under the First Amendment or the state Constitution.”²⁴ This will be the Supreme Court’s second attempt in recent years to resolve the tension between free speech rights in the workplace and the right to be free of harassment. In *Aguilar v. Avis Rent A Car System*, a fractured Court upheld an injunction on the use of racial epithets in the workplace where there is a judicial finding that the continued use of the epithets would constitute a hostile or abusive work environment.²⁵ *Lyle* gives the Court the opportunity to bring much needed clarity to this aspect of employment discrimination law, especially where a creative process is at the center of the allegations of harassment.

III. MURDER, HE WROTE

The day after granting review in *Lyle*, the California Supreme Court decided *In re George T.*, reversing the conviction of a Santa Clara 15 year-old for making a criminal threat by giving poems he had written to two classmates shortly after recent school shootings elsewhere in California.²⁶ To be guilty of a criminal threat, a threat must be made “on its face and under the circumstances . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat”²⁷

The Court focused on the words used in the final lines of the poem²⁸ and held that the words used were too ambiguous to constitute a criminal threat.²⁹ The ruling came even as the Court acknowledged that two of the classmates to whom the young man had given his work considered the poems threats:

However the poem was interpreted by [the student’s classmates], and the [trial] court, the fact remains that ‘can [be the next kid to bring guns]’ does not mean ‘will.’ While the protagonist in [the poem] declares that he has the potential or capacity to kill students given his dark and hidden feelings, he does not actually threaten to do so. While perhaps discomfoting and unsettling, in this unique context this disclosure simply does not constitute an actual threat to kill or inflict harm.³⁰

²⁴ 94 P.3d at 476.

²⁵ 980 P.2d 846, 848 (Cal. 1999).

²⁶ 93 P.3d 1007, 1019 (Cal. 2004).

²⁷ CAL. PENAL CODE § 422 (2004).

²⁸ “[I]nside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!” 93 P.3d at 1016.

²⁹ *Id.* at 1016-17.

³⁰ *Id.*

The Court was referring to the “unique context” of the precise words used in the poem, but the Court was also squarely focused on the “unique context” of poetry itself.³¹ The Court accepted as plausible the juvenile’s explanation that the protagonist was intended to be fictional.³² The ambiguous nature of poetic expression helped the defendant the most. “Of course, exactly what the poem means is open to varying interpretations because a poem may mean different things to different readers. As a medium of expression, a poem is inherently ambiguous.”³³ Relying on an amicus curiae brief filed by several established poets in support of the defendant, the Court explained that the poem “was in the style of a relatively new genre of literature called ‘dark poetry’” that is an extension of the work of Sylvia Plath and others.³⁴

While clearly concerned about the implications of making any poetry a crime, the Court refused to rule, as the poets’ brief had suggested, that poems should carry a “very strong presumption” that they are not true threats.³⁵ “No bright-line rule may be drawn that adequately distinguishes a poem such as the one involved in the present case (or even poems of Plath, [Robert] Lowell, and [John] Berryman) from a ‘poem’ that conveys a threat, such as, ‘Roses are red. Violets are blue. I’m going to kill you and your family too.’”³⁶

IV. THE CREATIVE PROCESS AT WORK

Having so recently given poetic license to a criminal defendant, isn’t the California Supreme Court certain to extend the same license to those accused of sexual harassment because of what they said in the process of creating? Not necessarily. Whether conduct is considered sexual harassment is viewed from the perspective of the reasonable *victim* in the shoes of the accuser.³⁷ In contrast, to prove a criminal threat was made, the state must show beyond a reasonable doubt that the *speaker or writer* intended the words to be threatening,³⁸ not whether they could be interpreted by listeners or readers as a threat. This is why the California Supreme Court *rejected* the idea that there is a “very

³¹ *Id.* at 1017.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1018.

³⁵ *Id.* at n.9.

³⁶ *Id.*

³⁷ See, e.g., *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 852 (Ct. App. 1989) (citations omitted).

³⁸ CAL. PENAL CODE § 422 (2004).

strong presumption” that poems are not true threats.³⁹ The Court determined that the elements of a charge of criminal threat, “in particular the requirements that the communicator have the specific intent to threaten and that the threat be . . . unequivocal, unconditional, immediate, and specific,” in addition to “independent [judicial] review” of a conviction on such a charge, “adequately protect[] freedom of expression” as they did in *In re George T.*⁴⁰

But that is also precisely why a privilege may be necessary in the sexual harassment context, even where it is unnecessary in the context of a criminal threat. There are no such protections inherent in the elements of sexual harassment adequately to protect the freedom to create. There is no requirement that the alleged victim of hostile environment sexual harassment show that the alleged harasser intended to harass.⁴¹ And there is no *independent judicial* review on appeal from a finding of sexual harassment.⁴² All that is required is that the alleged harassment caused, objectively speaking, a “severe or pervasive” shift in the atmospherics of the workplace.⁴³

As the Court of Appeal in *Lyle* recognized, context and the nature of the work are important even in the law of sexual harassment.⁴⁴ Indeed, in *Herberg v. California Institute of the Arts*, the same Court of Appeal two years earlier upheld summary disposition of a sexual harassment claim against an art school based on students’ 24-hour exhibition of a vulgar and sexually explicit drawing depicting one of the school’s employees.⁴⁵ While denying that its holding was in any way inconsistent with *Herberg*, the *Lyle* court did not address the significance of the observation in *Herberg* that “it is undisputed that the drawing was not intended to harass plaintiffs, but rather to make a point about representational art.”⁴⁶ That observation contrasts with the *Lyle* court’s correct statement that a finding of sexual harassment does not depend on whether the harasser “intend[s] to harass the victim.”⁴⁷ That observation also is strikingly similar to the California Su-

³⁹ *In re George T.*, 93 P.3d 1007, 1018 n.9 (Cal. 2004).

⁴⁰ *Id.* (internal quotation marks omitted).

⁴¹ *See, e.g., Fisher*, 262 Cal. Rptr. at 851.

⁴² *See, e.g., Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510, 515 (Ct. App. 1998) (As it does when evaluating any verdict, an appellate court reviewing a jury verdict finding sexual harassment resolves “all conflicts in the evidence and all legitimate and reasonable inferences therefrom in favor of the jury’s findings and the verdict.”).

⁴³ *See, e.g., Fisher*, 262 Cal. Rptr. at 852 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

⁴⁴ 12 Cal. Rptr. 3d at 518-19.

⁴⁵ 124 Cal. Rptr. 2d 1, 2 (Ct. App. 2002).

⁴⁶ *Id.* at 9.

⁴⁷ 12 Cal. Rptr. 3d at 515.

preme Court's comment in *In re George T.* on why a student's "dark poetry" was not a criminal threat.⁴⁸

The creative process does not draw a distinction in the space it must be given to avoid criminal prosecution and the space it must be given to avoid civil liability, even if the consequences are qualitatively different. In the copyright context, for example, one United States Court of Appeals has rejected the idea that an individual's sole right to copyright could be jeopardized by someone else's minimal contribution to the work:

Because the creative process necessarily involves the development of existing concepts into new forms, any restriction on the free exchange of ideas stifles creativity to some extent. Restrictions on an author's use of existing ideas in a work, such as the threat that accepting suggestions from another party might jeopardize the author's sole entitlement to a copyright, would hinder creativity.⁴⁹

The courts cannot allow a justifiable concern for the victims of sexual harassment to provide those victims with a censor's veto over the often raw, sometimes profane, ways in which writers go from idea to completed work. Imagine the ideas D. H. Lawrence openly considered but ultimately rejected in completing *Lady Chatterley's Lover*, or even those Shakespeare discarded in creating the relatively chaste *Romeo and Juliet*.⁵⁰ As Justice Felix Frankfurter observed in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit"⁵¹ Laws should not "lead to timidity and inertia and thereby discourage the boldness of expression *indispensable* to a progressive society."⁵²

Must a concern for a harassment-free workplace, a vital goal, intrude on the right to speak and write freely in the process of creating? It must not. How, then, may the interests in both creative freedom and a harassment-free workplace be served? The "creative necessity" defense should be recast as a "creative privilege."

The problem with the "creative necessity" defense, at least as described by the Court of Appeal, is that it imposes a tremendous burden on the writers to prove that salacious talk during the writers' meeting

⁴⁸ See *supra* Part III.

⁴⁹ *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994).

⁵⁰ Cf. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684 (1959) (striking down New York law under which state courts had declared the film *Lady Chatterley's Lover* unlawful as obscene). In particular, see concurring opinion of Frankfurter, J. at 692-97 (quoting Lawrence's own views of pornography).

⁵¹ *Id.* at 695.

⁵² *Id.* (emphasis added).

was absolutely “necessary” or “indispensable,” to doing their jobs.⁵³ Just as there are an infinite number of ways to express any given idea, there are an infinite number of ways to conceive any given idea. Moreover, “necessity” has little to do with whether raw expression is necessary because of the nature of the particular workplace or project and much to do with the necessity of such unrestrained expression to the creative process itself. When the focus of the defense is primarily on the particular workplace, the issue will only infrequently be decided short of a jury because whether a particular workplace *requires* verbal rough-housing is almost inherently a subjective, fact specific analysis.

Instead, when it addresses the issue, the California Supreme Court should consider recognizing a creative privilege defense. Such a privilege would bar actions for sexual harassment where the alleged statements: (1) were made in connection with a creative process;⁵⁴ and (2) were neither directed nor intended to harass the complaining party because of his or her sex, or because of sexual interest in the complaining party.

Such a defense would be rooted firmly in the protection extended to statements made in connection with litigation, legislative, or executive proceedings.⁵⁵ Like the litigation privilege, it would extend even to statements that have no direct connection to the particular work.⁵⁶

The privilege is also suggested by the significant procedural obstacles to suing a person for making statements about matters of public concern, called Suits at Law Against Public Participation, “SLAPP”

⁵³ *Lyle*, 12 Cal. Rptr. 3d at 513, 518.

⁵⁴ The use of the indefinite article is deliberate. The definite article would add little because there would inevitably be a dispute about the appropriate scope of “the” creative process. More fundamentally, to restrict the privilege to “the” creative process, and thereby implicitly to the arts, is to ignore the inherently creative nature of many occupations not generally considered “creative,” but require the same kind of creative freedom considered indispensable in the arts. See, e.g., *Barrick Bullfrog, Inc. v. Parador Mining Co., Inc.*, No. 11877, 1995 WL 17012512 at *2 (Nev. Dist. Ct. Dec. 26, 1995) (“There are a lot of the same abilities within a talented artist, as are necessarily found within a good geologist. They have imaginations that allow them to project their thoughts and to find orebodies.”).

⁵⁵ CAL. CIV. CODE § 47.

⁵⁶ *Cf. Navallier v. Sletten*, 131 Cal. Rptr. 2d 201, 206 (Ct. App. 2003) (The litigation privilege bars claims, other than for malicious prosecution, based on any communication “that is made to achieve the objects of the litigation and has some connection or logical relation to the action.” (internal quotation marks omitted)). *Cf. also Lyle*, 12 Cal. Rptr. 3d at 521 (noting that Ms. Lyle had testified that much of the alleged offensive conduct “had nothing to do with the show”). It is no response to this contention that the litigation privilege is rooted in the constitutional right of access to the courts whereas there is no constitutional right of access to the creative process. But there is a right to create under the First Amendment. That is why any constitutional distinction between creative processes and the litigation process is illusory.

suits.⁵⁷ The core value underlying the defense is freedom of expression. Thus, establishing it as an extension of the litigation privilege provides a more secure foundation for the defense than, as the Court of Appeal suggested in *Lyle*, basing it on the “business necessity” defense used in cases where it is alleged that a facially neutral employment practice is discriminatory in effect.⁵⁸ To establish that defense, the employer must show the challenged practice is “necessary to the safe and efficient operation of the business”⁵⁹ Something more rugged and freewheeling is called for here.

The interest in a workplace free of sexual harassment may not be disregarded “for art’s sake.” While the “creative necessity” defense would require an adjustment in the expectations an employee would bring to the creative workplace, it would not tolerate harassment in which a job, job benefit, or the absence of a job detriment is conditioned on submitting to sex. It also would not permit any kind of physical sexual harassment, such as pinching or squeezing. The defense would, like the illustration given by the California Supreme Court in *In re George T.*,⁶⁰ also exclude such utterances to a writers’ assistant as “I have this idea for a script in which the two of us are making wild monkey love, but need your help in making it more true to life.” What it would do is acknowledge that the environment that surrounds the creative process is *necessarily* different from the environment that surrounds other kinds of workplaces, requiring an adjustment in what the law can fairly define as “hostile” for purposes of applying sexual harassment law in this context.

V. HARD QUESTIONS

The contemplated privilege would be limited to sexual harassment claims and would have no application in criminal law. Nonetheless, the development of such a privilege would have to confront difficult questions. Like the litigation privilege and “SLAPP” procedural hurdles, should this defense come from the legislature rather than the courts? What exactly is “a creative process” for purposes of the defense? Should the defense apply to only certain kinds of workplaces? For example, should the defense apply to the creative process in designing a script but not in designing a car? Should such a defense be qualified or absolute? Should it extend to all forms of workplace harassment, such

⁵⁷ CAL. CIV. PROC. CODE § 425.16.

⁵⁸ 12 Cal. Rptr. 3d at 520 n.71.

⁵⁹ *Id.* (quoting FEHA regulations now codified in CAL. CODE REGS. tit. 2, § 7286.7(b) (2004)).

⁶⁰ See *supra* Part III.

as racial and religious harassment? (Ms. Lyle also claimed that the writers had made racially bigoted comments in these meetings.)⁶¹ Would such a privilege apply to other kinds of claims such as defamation or infliction of emotional distress? The answers to all of those questions, except the first, may have to wait for new factual situations to be brought before the courts.

VI. CONCLUSION

The same benefit of the doubt the Supreme Court extended to a young poet accused of making a criminal threat should be extended to middle-aged sitcom writers accused of sexual harassment not directed at the complaining party. Young "George T." avoided a criminal conviction for his poetry largely because the State could not, as a matter of law, prove that "George" intended a threat and that the words were unambiguously a threat.⁶² There are no such hurdles to sexual harassment liability. Without a creative privilege in this field of law, rooted in the right to free expression, those involved in a creative process will have to be mindful that the next words out of their mouths may one day be preceded by "Ladies and Gentlemen of the jury."

⁶¹ *Lyle*, 12 Cal. Rptr. 3d at 513.

⁶² *See supra* Parts III and IV.