

**LET’S TALK ABOUT SEX BABY:
 LYLE V. WARNER BROTHERS
 TELEVISION PRODUCTIONS AND THE
 CALIFORNIA COURT OF APPEAL’S
 CREATIVE NECESSITY DEFENSE TO
 HOSTILE WORK ENVIRONMENT
 SEXUAL HARASSMENT**

SARAH PAHNKE REISERT*

Introduction113

I. Background.....114

 A. The Hostile Work Environment Sexual Harassment Doctrine
 Evolved from Judicial Interpretation of Title VII.....114

 1. The Beginning: Title VII and Its Failure to Define
 Discrimination Based on Sex.....114

 2. The Expansion: The Supreme Court’s Interpretation of
 Title VII and the Hostile Work Environment
 Doctrine.....116

 B. California’s Sexual Harassment Law Parallels Title VII and
 Federal Precedent.....119

 C. The Two Theories of Discrimination Under Title VII and
 FEHA.....119

* Editor-in-Chief, *American University Journal of Gender, Social Policy and the Law*, Volume 15; J.D. Candidate, May 2007, *American University Washington College of Law*; B.S. in Communications, summa cum laude, 2003, *Northwestern University*. Thank you to Ben Golant for sharing my love of pop culture and helping generate the topic for my Note. Many thanks to Associate Dean and Professor Mark Niles for his sage advice when writing this piece, my editor Kimberly Einzig for her attention to detail, and Publications Editor Erin Segreti for her hard work and help on this Note. Finally, special thanks to my mother Kathy for always making time for a quick proofread, and Simon for his endless support in all my academic endeavors.

D. The Facts and History of <i>Lyle v. Warner Brothers Television Productions</i>	121
1. Statement of the Case	121
2. Procedural History	122
II. Analysis.....	124
A. The Court of Appeal Wrongly Analogized its Creative Necessity Defense to the Business Necessity Defense.....	124
1. The Court of Appeal Misconstrued Disparate Impact and Disparate Treatment Discrimination.....	125
2. The Court of Appeal Misconstrued Case Law When Analogizing Creative Necessity to Business Necessity	128
a. The Court of Appeal Erred When Misapplying the Supreme Court’s <i>Oncale</i> Standard.....	128
b. The Court of Appeal Misread the Supreme Court of California’s <i>Reno v. Baird</i>	131
B. The <i>Lyle</i> Decision Undermines the Purpose of Title VII and FEHA Because it Narrows the Hostile Work Environment Sexual Harassment Doctrine	132
1. The Court of Appeal’s Creative Necessity Defense Ignores Federal and State Legislative Intent	133
a. The Court of Appeal Must Interpret Title VII and FEHA in Accordance with Legislative Intent	133
b. Title VII and FEHA Do Not Support the Creative Necessity Defense	134
i. The Creative Necessity Defense Ignores Title VII’s Statutory Language.....	135
ii. The Creative Necessity Defense Disregards FEHA’s Statutory Language.....	137
iii. The Creative Necessity Defense Undermines the Statutory Scheme of FEHA as a Whole.....	138
2. The Vague and Overbroad Framework of the Creative Necessity Defense Contravenes the Purpose of Title VII and	139
IV. Implications and Recommendations.....	142
A. The Creative Necessity Defense Will Maintain Sexism in the Television Industry	142
B. The Creative Necessity Defense Will Make it More Difficult for <i>Lyle</i> to Assert a Successful Sexual Harassment Claim and Collect Damages	143
C. The Supreme Court of California Must Abandon the Creative Necessity Defense and Follow the <i>Oncale</i> Precedent	145
Conclusion	145

INTRODUCTION

Everyday while working as a writers' assistant for the popular television sitcom "Friends," Amaani Lyle witnessed the show's writers continuously make sex-related jokes, discuss blow job stories, reference the actresses' sexuality, write sex-related words on scripts, and pantomime masturbation.¹ After four months of transcribing story line discussions, the supervising writers fired Lyle for her poor typing skills and for her failure to accurately record important jokes and dialogue in her notes.²

Following her dismissal, Lyle sued the individuals and organizations involved in producing "Friends" under California's Fair Employment and Housing Act based on race and gender harassment.³ The Los Angeles County Superior Court dismissed Lyle's complaint as frivolous.⁴ The Court of Appeal of California for the Second District reversed and remanded in part, holding that the case presented triable issues of fact regarding sexual harassment.⁵ Although the Court of Appeal concluded that the trier of fact could find that the writers' room on "Friends" constituted a hostile work environment,⁶ it also instructed that the trier of fact could consider the nature of the defendants' work in determining if their conduct amounted to a hostile work environment.⁷ By co-opting the defendants' argument

1. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511, 516 (Cal. Ct. App. 2004), *cert. granted*, 94 P.3d 476 (Cal. 2004) (No. S125271) (describing further the defendants' habits of drawing enlarged genitalia on cheerleaders' bodies in a pornographic coloring book in Lyle's presence); Appellant's Answer Brief on the Merits at 20, *Lyle v. Warner Bros. Television Prod.*, 94 P.3d 476 (Cal. filed Nov. 19, 2004) (No. S125271), 2004 WL 3256430 [hereinafter Appellant's Answer Brief] (recounting that the defendants openly and indiscriminately discussed Courtney Cox's fertility, commenting that her "pussy was full of dried up twigs" and that "if her husband put his dick in her she'd break in two").

2. See *Lyle*, 12 Cal. Rptr. 3d at 513 (asserting that because the writers fired Lyle for her poor typing skills and failure to accurately record notes, they terminated her employment based on nondiscriminatory factors).

3. See *id.* (noting that Lyle's first complaint alleged that the defendants terminated her in retaliation for regularly complaining that the show had no black characters, but later amended her complaint to allege racial and sexual harassment).

4. See *id.* (recounting that the lower court granted the defendants' motion for summary judgment because Lyle could not establish that the defendants terminated her on the basis of race or sex discrimination).

5. See *id.* at 515 (citing *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 853 n.8 (Cal. Ct. App. 1989)) (stating that an employee subjected to a hostile work environment is a victim even though coworkers or supervisors do not direct offensive remarks at the employee).

6. See *id.* at 517 n.59 (concluding that Lyle provided sufficient evidence to make a prima facie case of sexual harassment because the record showed that the defendants constantly engaged in crude and vulgar discussions about anal and oral sex using the words "fuck," "blow job," and "schlong").

7. See *id.* at 518 (acknowledging the defendants' argument that vulgar, crude, and disparaging language does not always support liability in the context of a creative

and creating the creative necessity defense, the Court of Appeal allowed for the “Friends” writers to avoid hostile work environment liability if they could prove that discussing sexual exploits, making lewd gestures, and displaying crude pictures denigrating women fell within the scope of necessary job performance.⁸

This Note argues that the California Court of Appeal incorrectly formulated the creative necessity defense because it is both inconsistent with the legislative intent of federal and state anti-discrimination laws and unnecessary given the Supreme Court’s decision in *Oncale v. Sundowner Offshore Services Inc.* Part II of this Note traces the development of the hostile work environment sexual harassment doctrine⁹ and provides a detailed summary of *Lyle v. Warner Brothers Television Productions*.¹⁰ Part III argues that the creative necessity defense undermines anti-discrimination principles.¹¹ Part IV discusses the implications of the creative necessity defense for employers and employees in television production and offers recommendations for the Supreme Court of California.¹² Part V concludes that courts should not recognize the creative necessity defense in sexual harassment cases.¹³

I. BACKGROUND

A. The Hostile Work Environment Sexual Harassment Doctrine Evolved from Judicial Interpretation of Title VII

1. The Beginning: Title VII and Its Failure to Define Discrimination Based on Sex

Title VII of the Civil Rights Act of 1964 is the centerpiece of federal

environment when the writers acted within the capacity of their job by generating ideas for an adult-oriented situation comedy).

8. See *id.* at 520 (analogizing the creative necessity defense to the business necessity defense to disparate impact discrimination, and allowing the defendants to convince a jury that the creative process for producing “Friends” required conduct that is considered harassment in other contexts).

9. See *infra* Part II (discussing Title VII of the Civil Rights Act of 1964, California’s Fair Employment and Housing Act, and the defenses to discrimination).

10. See *infra* Part II.D (detailing the conduct Lyle faced while working at Warner Brothers, as well as outlining the case’s procedural history).

11. See *infra* Part III (explaining that the creative necessity defense is inappropriate in sexual harassment cases because it is modeled after a disparate impact defense).

12. See *infra* Part IV (recommending that the Supreme Court of California follow *Oncale*’s totality of the circumstances test, which includes a consideration of social context).

13. See *infra* Part V (concluding that the Court of Appeal’s creative necessity defense is an unsound legal invention).

legislation aimed at eliminating workplace discrimination.¹⁴ However, at its passage, Title VII did not define sexual harassment as discrimination, nor did its legislative history offer guidance as to whether sexual harassment was a form of discrimination.¹⁵ The statute only made it unlawful for an employer to “discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”¹⁶ Consequently, the courts struggled to determine what constituted actionable sex discrimination.¹⁷

Despite Title VII’s ambiguity and the lack of legislative guidance regarding the definition of discrimination, the United States Court of Appeals for the Fifth Circuit first recognized that a hostile work environment could constitute actionable discrimination in *Rogers v. EEOC*.¹⁸ The *Rogers* court reasoned that Title VII prohibited discriminatory working environments that could destroy the emotional and psychological stability of minority employees; thus, statutory protection extended beyond economic or tangible discrimination.¹⁹

Further clarifying the definition of discrimination, the Equal Employment Opportunity Commission (“EEOC”)²⁰ issued guidelines declaring hostile work environment sexual harassment a violation of Title VII.²¹ Although no court had considered hostile work

14. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (stating that Congress’ objective in passing Title VII was to remove artificial, arbitrary, and unnecessary barriers to employment when they operate to invidiously discriminate on the basis of impermissible classifications); *Diaz v. Pan Am. Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (holding that the legislature designed the statute to provide equal access to jobs for both men and women as evidenced by the plain language of Title VII).

15. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (failing specifically to define sex discrimination).

16. See *id.*

17. Compare *Tompkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (holding that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII), with *Williams v. Saxbe*, 413 F. Supp. 654, 663 (D.D.C. 1976) (finding that sexual harassment constituted discriminatory treatment under Title VII).

18. See 454 F.2d 234, 238 (5th Cir. 1971) (interpreting Title VII as an expansive concept that proscribed the practice of creating work environments heavily charged with racial or ethnic discrimination).

19. See *id.* (interpreting Title VII’s phrase “terms, conditions, or privileges of employment” as evincing a congressional intention to define discrimination in the broadest possible terms).

20. See 42 U.S.C. § 2000e-4 (granting the EEOC authority to ensure compliance with the federal civil rights laws guaranteeing nondiscriminatory employment).

21. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(a)-(f) (2005) (responding to the courts’ struggle to find hostile work environment sexual harassment an actionable claim, the EEOC embraced the *Rogers*

environment sexual harassment an actionable claim under Title VII,²² the EEOC guidelines recognized that unwelcome sexual advances, requests for sexual favors, and other sexually-driven verbal and physical conduct constituted employee harassment, even if it did not affect the employee's economic benefits.²³ These guidelines, while not controlling upon the courts, served as a "body of experience and informed judgment" that the courts could consult in sexual harassment cases.²⁴

2. The Expansion: The Supreme Court's Interpretation of Title VII and the Hostile Work Environment Doctrine

Relying on the *Rogers* precedent and the EEOC Guidelines, the Supreme Court made it clear that hostile work environment sexual harassment violated Title VII in *Meritor Savings Bank v. Vinson*.²⁵ Mechelle Vinson worked as a bank teller and manager when her supervisor subjected her to unwelcome public fondling, repeated demands for sexual favors, and forcible rape.²⁶ The Court ruled that Title VII did not require Vinson to suffer an economic or tangible detriment in order to establish a discriminatory environment; a hostile or abusive work environment was enough.²⁷ *Meritor* limited the scope of Title VII by recognizing that not all harassing conduct

principle in its adopted guidelines).

22. See Susan Collins, Note, *Harris v. Forklift Systems: A Modest Clarification of the Inquiry in Hostile Work Environment Sexual Harassment Cases*, 1994 WIS. L. REV. 1515, 1518 (stating that courts viewed hostile work environment sexual harassment cases as a natural consequence of personality quirks and male-female interaction and, consequently, did not recognize them); David M. Jaffe, Note, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses*, 80 MINN. L. REV. 979, 991 (1996) (noting that before the 1980s, most sex discrimination claims only involved quid pro quo harassment, the demand for sexual favors in exchange for economic or tangible job benefits).

23. See 29 C.F.R. §§ 1604.11(a)-(f) (providing that sexual harassment, which unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment, violates Title VII).

24. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)) (announcing that the EEOC guidelines support the finding that harassment causing non-economic injury constitutes actionable discrimination).

25. See *id.* at 73 (holding that a claim of hostile work environment sexual harassment is actionable under Title VII when a plaintiff suffers unwelcome sexual conduct that is sufficiently severe or pervasive).

26. See *id.* at 60 (acknowledging that Vinson's toleration of sexual intercourse forty to fifty times, indecent exposure, and forcible rape as a condition of her employment created a hostile working environment).

27. See *id.* at 64 (explaining that the language of Title VII is not limited to sexual harassment resulting in economic discrimination because Congress intended to strike at the entire spectrum of disparate treatment of men and women in employment).

affects the terms, conditions, or privileges of employment.²⁸ The Court affirmed that the sexual harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile work environment for the complainant to have a cause of action.²⁹ However, the Court failed to provide a clear definition of what satisfied this "severe or pervasive" threshold of harm requirement.³⁰

The Supreme Court clarified the degree of harm required for an employee to have a viable hostile work environment sexual harassment claim in *Harris v. Forklift Systems, Inc.*³¹ Teresa Harris sued her employer for an abusive work environment, citing her supervisor's conduct of calling her a "dumb ass woman" in front of customers, making sexual innuendos about her clothing, and asking her to remove items from his front pocket.³² The Supreme Court unanimously held that Harris did not have to suffer psychological injury or adverse impact to make a prima facie showing that her supervisor's harassing conduct was sufficiently severe and pervasive, so long as a reasonable person would find the environment hostile and that she actually perceived it as abusive.³³ In enunciating this objective-subjective component of the *Meritor* hostile work environment standard, the Supreme Court stated that an "all the circumstances" analysis is necessary to determine whether an

28. See *id.* at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)) (announcing that the "mere utterance" of words that offend an employee would not alter the conditions of employment and, therefore, would not violate Title VII).

29. See *id.* at 66 (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (laying the foundation for the threshold a plaintiff must meet to make a prima facie showing of hostile work environment sexual harassment).

30. See Susan Deller Ross, *Workplace Harassment*, in *SPEECH & EQUALITY: DO WE REALLY HAVE TO CHOOSE?* 104 (Gara LaMarche ed., 1996) (remarking that *Meritor* did not resolve the controversy surrounding hostile work environment harassment because many courts still thought that a hypersensitive woman would build a case over mere words). Compare *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (requiring serious effects on employee's psychological well-being), with *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting *Rabidue* and stating that employees need not endure sexual harassment until it seriously affects their psychological well-being to bring a hostile work environment claim).

31. See 510 U.S. 17, 21 (1993) (resolving a circuit split on whether conduct must cause serious psychological injury to be actionable as hostile work environment sexual harassment and finding that a plaintiff need not suffer psychological harm).

32. See *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) (illuminating that the test for determining if harassing conduct violates Title VII is whether employers expose members of one sex to disadvantageous conditions of employment that members of the opposite sex are not exposed to, and whether the harassment interfered with the plaintiff's work performance).

33. See *id.* at 21 (announcing a hostile work environment standard that struck a balance between punishing conduct that is merely offensive and conduct that causes tangible psychological injury).

environment would reasonably be perceived as hostile.³⁴

Despite the Supreme Court's attempt to elaborate upon the *Meritor* hostile work environment standard in *Harris*, critics faulted the decision for its vague totality of the circumstances test.³⁵ In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court refined the test by instructing courts to consider the social context of the workplace when deciding sexual harassment cases.³⁶ Joseph Oncale sued his employer for hostile work environment sexual harassment under Title VII after working on an oil platform where his male coworkers derided him for his alleged homosexuality, threatened rape, and physically assaulted him.³⁷ Although the lower courts found that same-sex harassment was not actionable under Title VII, the Supreme Court concluded that the statute protects both men and women.³⁸ Cautious not to transform Title VII into a federal civility code, the Court reiterated that the statute does not proscribe all verbal and physical harassment with sexual connotations.³⁹ Moreover, the Court emphasized that considering the workplace context when determining whether the harassment met the threshold requirement would prevent the possibility of imposing liability on such social behavior as flirtation and horseplay.⁴⁰ The Supreme Court elaborated that the critical issue in hostile work environment cases is whether employees of one sex are unilaterally exposed to

34. See *id.* at 23 (attempting to provide guidance on the totality of the circumstances test and suggesting that it may include: (1) the frequency and severity of the conduct; (2) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (3) whether the conduct interferes with the employee's work performance). *But see id.* at 24 (Scalia, J., concurring) (arguing that the list of factors does little to clarify the vague hostile standard because it does not say how much of each element is necessary or identify any single factor as determinative).

35. See Collins, *supra* note 22, at 1537 (commenting that the Court could have proposed more specific requirements for its all the circumstances test, which would have made the test more circumscribed, limited consideration of improper stereotypes, and made the outcomes of hostile work environment cases more consistent).

36. See 523 U.S. 75, 81 (1998) (finding that a totality of the circumstances inquiry requires consideration of the social context where the target experiences the harassing behavior so courts can distinguish between simple teasing and harassment).

37. See *id.* at 77 (detailing that Oncale's supervisor failed to remedy the harassing and humiliating actions perpetrated by his coworkers, which forced Oncale to quit his job for fear of being raped and file suit).

38. See *id.* at 78-79 (holding that nothing in Title VII's text or legislative history bars a claim of discrimination because the plaintiff and defendant are of the same sex).

39. See *id.* at 81 (arguing that conduct that a reasonable person would not find hostile or abusive is beyond the scope of Title VII).

40. See *id.* (illustrating that an analysis of social context would allow courts to differentiate between a football coach smacking his player on the buttocks and smacking his office secretary on the buttocks).

disadvantageous terms or conditions of employment.⁴¹

B. California's Sexual Harassment Law Parallels Title VII and Federal Precedent

Section 12940 of California's Fair Employment and Housing Act ("FEHA"), echoes the language of Title VII, making it unlawful for an employer to discriminate in terms, conditions, or privileges of employment on the basis of sex.⁴² For hostile work environment sexual harassment to be actionable under section 12940 of FEHA, the harassment similarly must be sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment.⁴³

However, unlike Title VII, section 12490 explicitly recognizes hostile work environment harassment as unlawful discrimination.⁴⁴ FEHA also expressly defines harassment to include verbal, physical, and visual expressions or conduct.⁴⁵

C. The Two Theories of Discrimination Under Title VII and FEHA

Title VII and FEHA recognize two theories of actionable discrimination: disparate treatment and disparate impact.⁴⁶ Disparate treatment is intentional discrimination that occurs when an employer treats one group less favorably than another group on account of their race, color, religion, sex, or national origin.⁴⁷ Title VII and

41. See *id.* at 81 (reading the statute as forbidding behavior so objectively offensive as to alter the conditions of the victim's employment, but not interpreting it to mean that workplaces demand asexuality or androgyny).

42. See CAL. GOV'T CODE § 12490(a) (West 2005) (exemplifying that state legislatures consult federal decisions when drafting statutes that are synonymous in purpose).

43. See *Beyda v. City of Los Angeles*, 76 Cal. Rptr. 2d 547, 550 (Cal. Ct. App. 1998) (stating that, although the wording of Title VII differs in some particulars from FEHA, the anti-discriminatory objectives and overriding public policy of the two acts are identical).

44. See CAL. GOV'T CODE § 12940(j)(1) (stating that the plaintiff does not have to lose tangible job benefits to establish harassment).

45. See CAL. CODE REGS. tit. 2, § 7287.6 (West 2005) (providing a broader reading of harassment than Title VII by stating that actionable harassment under FEHA can include derogatory comments, physical interference with normal work, and derogatory drawings).

46. See, e.g., *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713 n.1 (1983) (stating that the Court consistently distinguishes disparate treatment cases from cases involving neutral employment standards that have a disparate impact on minority applicants).

47. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (declaring that disparate treatment, as the most easily understood type of discrimination, was the evil Congress had in mind when it enacted Title VII); see also Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Conduct be Actionable Under Title VII?*, 81 NEB. L. REV. 1152,

FEHA recognize sexual harassment as conduct that is discriminatory under a disparate treatment theory.⁴⁸ Contrastingly, disparate impact discrimination results when an employer's facially neutral employment practice disproportionately harms members of a protected class and lacks a business justification.⁴⁹

The Supreme Court first recognized the disparate impact theory in *Griggs v. Duke Power Company*, holding that Title VII prohibited both overt discrimination and facially neutral employment practices that were discriminatory in operation and unrelated to business necessity.⁵⁰ This ruling established the business necessity defense to disparate impact discrimination, which Congress later codified as part of the amended Title VII via the Civil Rights Act of 1991.⁵¹

Under the business necessity defense, courts will find otherwise unlawful employment practices legal, as long as less discriminatory alternatives are proven to be unavailable.⁵² Accordingly, an employer will not be held liable for disparate impact discrimination if it can prove that the challenged practice justifiably serves a legitimate business purpose.⁵³

The business necessity exception to Title VII and FEHA is defined in terms of job relatedness.⁵⁴ The majority of disparate impact cases have applied the business necessity defense to challenges involving employment practices for hiring, assignments, promotion, transfers,

1154 (2003) (illustrating that the classic sexual harassment pattern involves a male supervisor propositioning a female subordinate for sex in exchange for retaining her employment, a demand he would likely not make of a male employee).

48. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (explaining that sexual harassment is a pattern of behavior that inflicts disparate treatment on an employee with respect to terms, conditions, or privileges of employment).

49. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (explaining that the plaintiff only needs to demonstrate that the facially neutral hiring practice selects applicants in a significantly discriminatory pattern and that, once the prima facie case of discrimination is established, the employer must meet the burden of showing that the challenged practice bears a manifest relationship to employment).

50. See 401 U.S. 424, 430 (1971) (ruling that employers cannot maintain facially neutral employment practices if they freeze the status quo of prior discriminatory practices).

51. See 42 U.S.C. § 2000-e2(k)(1)(A)-(B) (2006) (establishing that an employer can rebut a disparate impact claim by showing that a challenged employment practice is a business necessity).

52. See CAL. CODE REGS. tit. 2, § 7286.7(b) (West 2005) (echoing *Griggs* and its progeny by codifying the business necessity defense to employment discrimination, which allows employers to avoid liability if there is not an alternative practice with a lesser discriminatory impact).

53. See *id.* (requiring that the practice serve the safe and efficient operation of the business, as well as fulfill the employer's said business purpose).

54. See *Griggs*, 401 U.S. at 431-32, 436 (defining business necessity as related to job performance, having a manifest relationship to the employment in question, and measuring the person's suitability for the job and not the person in the abstract).

and termination.⁵⁵ However, courts have never recognized it as a defense to disparate treatment cases affecting conditions of employment.⁵⁶

D. The Facts and History of Lyle v. Warner Brothers Television Productions

1. Statement of the Case

Lyle was hired as a writers' assistant for "Friends" in June 1999.⁵⁷ She worked directly for Defendants Adam Chase, Greg Malins, and Andrew Reich taking notes in the writers' room and compiling potential jokes and dialogue.⁵⁸ During the interview, the writers informed Lyle that they discussed sex and told lewd jokes during the creative process.⁵⁹ Lyle responded that she had worked at Nickelodeon where writers' discussion often turned racy.⁶⁰

While employed as a writer's assistant, Lyle spent fifty to seventy-five percent of her time working in the writers' room.⁶¹ According to Lyle, the creative sessions included yelling, throwing things at the ceiling,

55. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (finding that an employer's written promotion examination acted as a non-job related barrier and disparately impacted employees on account of their race in violation of Title VII); *Xiang v. Peoples Nat'l Bank*, 844 P.2d 389, 392 (Wash. Ct. App. 1993) (ruling that a bank's good-faith belief that the employee's accent would interfere with job performance was not a defense to national origin discrimination when conferring promotions).

56. See Timmons, *supra* note 47, at 1190 (offering that the limited use of the disparate impact theory in conditions of employment cases is based on the language of Title VII prior to its amendment by the Civil Rights Act of 1991); see also *Teal*, 457 U.S. at 448 (stating that disparate impact arises from the language of section 703(a)(2) of Title VII); *Griggs*, 401 U.S. at 426 n.1 (citing only section 703(a)(2) of Title VII).

57. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511, 513 (Cal. Ct. App. 2004), *cert. granted*, 94 P.3d 476 (Cal. 2004) (No. S125271) (establishing the date Lyle began to work directly under Chase and Malins).

58. See *id.* (noting that the most important duty of a writers' assistant was to type quickly to pick out ideas for future scripts). However, the defendants did not test Lyle's typing speed before hiring her. *Id.*

59. See Respondent's Opening Brief on the Merits at 13, *Lyle v. Warner Bros. Television Prod.*, 94 P.3d 476 (Cal. filed Sept. 17, 2004) (No. S125271), 2004 WL 2823287 [hereinafter Respondent's Opening Brief] (claiming that Lyle said she was not a "babe in the woods" and understood that she would encounter sexual conduct during the production of "Friends").

60. See *id.* at 13 n.3 (acknowledging Lyle's familiarity with working on a situation comedy because she previously worked as a writers' assistant on "Dream On," where she heard frank sexual discussion and saw nudity during her tenure). *But see* Appellant's Answer Brief, *supra* note 1, at 12 (asserting that Warner Brothers never warned Lyle that writers would subject her to discussions about their own sexual conduct).

61. See Respondent's Opening Brief, *supra* note 59, at 13 (explaining that the very nature of Lyle's job required exposure to themes with sexual content).

and sexually explicit conduct.⁶² Lyle witnessed the defendants regularly refer to women as “cunts,” share their dating preference for blondes with certain cup sizes, and discuss blow jobs.⁶³ Defendant Chase explained that, although these brainstorming sessions would become “silly” and continue in the common areas, the discussions would lead to interesting story lines and jokes.⁶⁴

After four months, the defendants terminated Lyle for poor job performance.⁶⁵ During her exit interview, Lyle complained that her supervisors discriminated against her because of her gender and race.⁶⁶ Shortly after her termination, Lyle filed complaints with the California Department of Fair Employment and Housing (“DFEH”), stating that the writers fired her because of her sex, race, and ancestry.⁶⁷ Lyle did not assert that she had been harassed during her employment at “Friends” until she amended her complaint approximately one year later.⁶⁸

2. Procedural History

Lyle’s first amended complaint alleged that the defendants’ employment practices violated FEHA and public policy because Warner Brothers terminated her due to her opposition to “Friends”

62. See *id.* at 16 (describing the writers’ room as a locker room because the defendants were “pimple-faced teenagers” and “silly little boys” who engaged in “juvenile, counterproductive behavior”).

63. See Brief for Legal Aid Society-Employment Center et al. as Amici Curiae Supporting Appellant at 2,3, *Lyle v. Warner Bros. Television Prod.*, 94 P.3d 476 (Cal. 2004) (No. S125271), 2005 WL 847604 [hereinafter Brief for Legal Aid] (stating that producer Marta Kauffman did not permit the use of the word “cunt” in her presence because she found it offensive, thus providing the defendants notice of the abusiveness of this term). However, the defendants continued to use the words “cunt,” “tits,” “pussy,” and “twat” when Kauffman was not present. *Id.*

64. See *id.* at 8 (emphasizing that the defendants engaged in conduct outside the writers’ room that consisted of calendar defacement, pornographic drawings, and loud sexist and racist speech). Lyle argued that these offensive discussions in the hallway were not a part of the creative process of the writers’ room. *Id.*

65. See Appellant’s Opening Brief at 8-9, *Lyle v. Warner Bros. Television Prod.*, Cal. App. 4th 1164 (2004) (No. B160528), 2003 WL 23153558 (arguing that the reason given for Lyle’s termination was a pretext for retaliating against her for criticizing the show’s discriminatory hiring practices toward black actors). Defendants never put Lyle on notice that she was in jeopardy of losing her job, nor did they alert her to any deficiencies in her work. *Id.*

66. See Appellant’s Answer Brief, *supra* note 1, at 15 (admitting that the human resources manager did not believe Lyle’s complaints warranted an investigation despite Warner Brothers’ policy requiring an investigation following sexual and racial discrimination claims).

67. See Respondent’s Opening Brief, *supra* note 59, at 16 (arguing that the defendants’ reason for terminating Lyle was a pretext for discrimination because they did not terminate other writers’ assistants who were slow typists).

68. See *id.* (suggesting that Lyle was not harassed because she was not touched, propositioned, threatened, demeaned, or the subject of any offensive statements in the writers’ room).

discriminatory hiring practices, her race, and her sex.⁶⁹ The trial court granted the defendants' motions for summary judgment and attorney fees in the amount of \$415,800.⁷⁰ On appeal, the court reinstated Lyle's harassment claims against the defendants, leaving the question as to whether the defendants conduct created a hostile work environment to a jury.⁷¹ The Court of Appeal also announced a creative necessity defense analogous to the business necessity defense, stating that the defendants could show that their conduct did not amount to harassment if it was within the scope of necessary job performance and not engaged in for purely personal gratification or other personal motives.⁷²

The Supreme Court of California granted the defendants' petition for review, limiting review to whether the use of sexually coarse and vulgar language in the workplace constitutes sexual harassment under FEHA, and whether the imposition of liability for sexual harassment infringes the defendants' free speech rights.⁷³ After reviewing the case, the California Supreme Court granted the defendants' motion for summary judgment, holding that Lyle did not establish a prima facie case of hostile work environment sexual harassment because her "meager facts" failed to show that the alleged conduct was severe or sufficiently pervasive.⁷⁴ The court further ruled that, while sexually coarse and vulgar language may constitute workplace harassment, such conduct did not constitute sexual harassment in this case because the defendants' comments were not personally directed at Lyle or other women because of sex.⁷⁵ Because the California

69. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511, 513 (Cal. Ct. App. 2004), *cert. granted*, 94 P.3d 476 (Cal. 2004) (No. S125271) (delineating common law causes of action for wrongful termination in violation of public policies against sex discrimination, in addition to Lyle's FEHA suit).

70. See *id.* at 14 (rejecting Lyle's FEHA cause of action because it was frivolous, unreasonable, and without foundation).

71. See *id.* (reversing the lower court's ruling because triable issues of fact existed as to whether the defendants' jobs necessitated their conduct).

72. See *id.* at 520 (citing *Reno v. Baird*, 957 P.2d 1333, 1336 (Cal. 1980)) (using the Supreme Court of California's definition of harassment to support its argument that the defendants could answer a sexual harassment claim with a creative necessity defense).

73. See *Lyle v. Warner Bros. Television Prod.*, 94 P.3d 476, 476 (Cal. 2004) (granting the defendants' petition for review, but dismissing Lyle's).

74. See *Lyle v. Warner Bros. Television Prod.*, 38 Cal.4th 264, 272, 294 (2006) (finding that no reasonable trier of fact could conclude that the comments were severe or sufficiently pervasive to create a hostile work environment in violation of FEHA). The court reasoned that the three instances cited by Lyle where the defendant's used derogatory epithets coupled with evidence of the actress-related comments was not enough to establish triable issues of fact regarding hostile work environment sexual harassment. *Id.* at 290-91.

75. See *id.* at 287 (stating that the record showed that the sexual antics and discussions were not directed at Lyle or any other female employee because the

Supreme remanded the case based on its finding that Lyle did not meet the burden of proof under FEHA or Title VII and did not suffer disparate treatment, it never directly analyzed or overruled the Court of Appeal's creative necessity defense.⁷⁶

II. ANALYSIS

Consideration of the creative necessity defense in hostile work environment sexual harassment cases is unwarranted because: (1) there is no business necessity defense to disparate treatment to which the Court of Appeal's newly minted defense might be compared to ensure its viability; (2) it does not comport with federal and state legal precedent; and (3) it disregards the legislative mandate to ensure equal employment opportunities for women and minorities.

A. The Court of Appeal Wrongly Analogized its Creative Necessity Defense to the Business Necessity Defense

The Court of Appeal correctly determined that *Lyle* presented triable issues of fact regarding sexual harassment, but it incorrectly applied the creative necessity defense as a variation of the business necessity defense.⁷⁷ Under current common and statutory law, the business necessity doctrine provides no basis for recognizing this unrelated variation of the defense.⁷⁸ Because the Court of Appeal misconstrued established case law, legislation, and legal principles, courts should not recognize the creative necessity defense as a legitimate legal defense to hostile work environment sexual harassment.⁷⁹

conduct occurred during group meetings where both men and women were present and participated in sharing personal sexual experiences).

76. See *id.* at 292 (indirectly referencing the Court of Appeal's creative necessity defense by agreeing with the Court of Appeal's reasoning that the defendants could prove that their conduct was not harassment if it was within "the scope of necessary job performance" and not engaged in for purely personal gratification or out of meanness or bigotry or other personal motives"). The California Supreme Court stated, "[T]he circumstances pertaining to an employer's type of work and to the job duties . . . of a plaintiff and her alleged harassers are properly considered in determining whether the harassers said or did things because of the plaintiff's sex and whether the subject conduct altered the terms or conditions of employment." *Id.*

77. See Brief for Legal Aid, *supra* note 63, at 44 (rebutting that there is a creative necessity defense to hostile work environment sexual harassment because a court's consideration of the type of workplace is limited to a totality of the circumstances test pursuant to *Harris* and *Oncale*); see also *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999) (characterizing the totality of the circumstances test as the most basic tenet of the hostile work environment cause of action).

78. See, e.g., 42 U.S.C. § 2000e-2(k)(1)(A)-(B) (2006) (amending Title VII, Congress codified the concept of business necessity as enunciated in *Griggs* when it passed the Civil Rights Act of 1991). Congress, however, did not intend this affirmative defense for disparate treatment cases. *Id.* at § 2000e-2(k)(2).

79. See, e.g., *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998)

1. The Court of Appeal Misconstrued Disparate Impact and Disparate Treatment Discrimination

The Court of Appeal's inventive effort to announce a creative necessity defense analogous to the business necessity defense to disparate impact discrimination is legally unsound because it conflates two distinct theories of discrimination.⁸⁰ The court failed to take into account that business necessity is an affirmative defense to a disparate impact claim and not sexual harassment, a form of disparate treatment.⁸¹ Therefore, a creative necessity defense based on the business necessity exception to disparate impact claims should not be applied to Lyle's sexual harassment case because she asserts a disparate treatment claim that challenges the conditions of her employment.⁸²

Under the theoretical framework of disparate treatment, the defense of business necessity may not be used against a plaintiff who seeks to assert a claim of sexual harassment.⁸³ Thus, the defendants could not permissibly raise a defense premised on business necessity to answer a claim of hostile work environment sexual harassment, a

(emphasizing that proper analysis of a hostile work environment requires careful consideration of the social context in which the behavior occurs because the real impact of such conduct depends on various surrounding circumstances). *Oncale's* social context standard does not provide for a creative necessity defense because a trier of fact could already determine if the writers' behavior fell within the scope of necessary job performance under the totality of the circumstances test. *Id.*

80. See *Dothard v. Rawlinson*, 433 U.S. 321, 329, 332-33 (1977) (illustrating that the Supreme Court has not applied the business necessity defense to a disparate treatment situation, even when both theories of discrimination were at issue); see also Timmons, *supra* note 47, at 1194 (discussing that courts do not think of disparate impact and harassment law as complementary because harassment is discriminatory).

81. See Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 932 (2004) (explaining that a disparate impact case is distinct from a hostile work environment harassment case because not every employment practice that causes a disparate impact on women and minorities creates a working environment imbued with discrimination against members of those protected groups). Additionally, employers charged with disparate impact discrimination under Title VII may avoid liability by proving that the practice that creates the disparate impact is justified by business necessity, a defense not available to employers that have created or maintained a hostile work environment. *Id.*

82. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (establishing that Title VII extends to facially neutral employment practices, such as employment tests, having a disparate impact). The Supreme Court did not define business necessity as a broad affirmative defense that applies to employment practices unrelated to job qualifications. *Id.* at 431-32, 434. See also 42 U.S.C. § 2000e-2(k)(2) (providing that an employment practice justified by business necessity is not a defense against a claim of disparate treatment).

83. See L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 365 (2005) (clarifying that *Johnson Controls* stands for the proposition that disparate impact analysis, particularly disparate impact defenses, cannot be exercised against a plaintiff who asserted a claim of disparate treatment).

form of disparate treatment.⁸⁴

Admittedly, the Court of Appeal could argue that the Supreme Court and Congress did not foreclose the possibility of raising a disparate impact defense against a hostile work environment sexual harassment claim because the definition of job relatedness does not specifically outline the type of employment practices the defense covers.⁸⁵ However, the judicial and legislative branches did not define job relatedness, the threshold requirement of business necessity, in terms of such practices because harassing conduct cannot be presumed to be facially neutral.⁸⁶ Rather, they created and codified the business necessity defense to apply to an employer's qualification standards or selection practices for hiring and promotion.⁸⁷ Accordingly, a disparate impact analysis is inappropriate for Lyle's claim because she is not challenging Warner Brothers' qualification standards, selection process for hiring or promotion, or termination decisions.⁸⁸ To the contrary, Lyle asserted that the writers subjected her to racial and sexual harassment through offensive comments and bigoted jokes.⁸⁹

Because Lyle never alleged a disparate impact discrimination claim against the defendants, it is irrelevant that the writers argue that their conduct was necessary for producing "Friends."⁹⁰ Their practice of

84. See 42 U.S.C. § 2000-e(k)(2) (codifying that the business necessity defense is not available against a claim of intentional discrimination).

85. See Hébert, *supra* note 83, at 345 (postulating that the disparate impact theory might appropriately be used to challenge sexually harassing behavior in cases where the absence of intent to discriminate or the absence of different treatment of men and women is a barrier to the applicability of the disparate treatment theory). *But see* Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 738-39 (1999) (arguing that the impact approach to sexual harassment claims is incorrect because sexual harassment is intentional discrimination).

86. See Steven Wellborn, *Taking Discrimination Seriously: Oncale and the Fare of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, n.45 (contending that sexual harassment cases fail to satisfy the disparate impact model because the conduct is not sex-neutral).

87. See *Connecticut v. Teal*, 457 U.S. 440, 443 (1982) (discussing the requirement that employees must pass a written examination for promotion consideration); *Dothard v. Rawlinson*, 433 U.S. 321, 327 (1977) (discussing the requirement that job applicants meet a certain height and weight); *see also* Timmons, *supra* note 47, at 1195 (arguing that the Supreme Court intended to extend the business necessity defense only to employment practices that are not caused by the sex of any person in the workplace).

88. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511, 515 (Cal. Ct. App. 2004), *cert. granted*, 94 P.3d 476 (Cal. 2004) (No. S125271) (alleging hostile work environment harassment based on the fact that Lyle personally witnessed the writers' gender denigrating conduct during the meetings she had a duty to attend).

89. See *id.* (arguing that because Lyle was often the only female writers' assistant in the writers' room, she could not overlook or ignore the defendants' offensive comments and behavior).

90. See *Int'l Union United Auto., Aerospace & Agric. Implement Workers of*

sharing blow job stories, talking out rape fantasies, and drawing enlarged genitalia in pornographic coloring books does not manifest a relationship to Lyle's qualifications for employment because, as the defendants admitted at trial, the practices at issue relate to their jobs as scriptwriters.⁹¹ If Warner Brothers followed the Court of Appeal's business necessity analogy and asserted the creative necessity defense, the defendants would have to demonstrate that publicly discussing personal sexual exploits relates to and/or measures Lyle's typing abilities and other skills necessary for her successful job performance.⁹² Such an application of this variation on the business necessity defense illuminates the inappropriateness of the Court of Appeal's analogy.⁹³

The discrimination Lyle challenges does not involve pass/fail or qualified/unqualified barriers to tangible job benefits; rather, it involves workplace conduct that evinced hostility toward women and minorities and affected the conditions of her employment.⁹⁴ Furthermore, Lyle's choice to base her sexual harassment claim in the disparate treatment theoretical framework is appropriate because the writers' conduct was likely based on stereotypical notions that women exist for the sexual pleasure of men and/or they wanted to make the

America v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (stating that whether an employment practice involves disparate treatment does not depend on why the employer discriminates, but rather on the explicit terms of the discrimination); see also Wellborn, *supra* note 86, at n.45 (suggesting that the disparate impact model is inappropriate for sexual harassment cases).

91. Compare *Lyle*, 12 Cal. Rptr. 3d at 513 (maintaining that the offensive and bigoted comments and jokes were an indispensable means of developing gags, dialogue, and story lines for "Friends"), with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973) (refusing to rehire an employee who engaged in illegal activity against the employer), and *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) (requiring airline pilot applicants to have a certain amount of previous flying experience). Creative necessity cannot be analogized to the business necessity defense because the writers' behavior is wholly unlike these miscellaneous employment practices that courts justified as business necessity.

92. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (explaining that a practice, which is a business necessity, must be predictive of or significantly correlated with the elements of the work that comprises the job for which the candidate is being evaluated).

93. See Wellborn, *supra* note 86, at n.45 (arguing that the disparate impact model is ill-suited for harassment cases because the conduct being challenged is generally not sex neutral and it would be too difficult to demonstrate how women are disproportionately affected by harassing conduct).

94. See Timmons, *supra* note 47, at 1180 (contending that pornography, discussions of sex, and other sexual conduct such as sex-related jokes can constitute disparate treatment of women when the conduct is motivated by a sexual desire for the plaintiff, when the conduct is directed only at women, or when the conduct is intended to intimidate or affect women); see also Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, With a Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1085 (1999) (stating the men flaunt symbols of male sexuality by using obscene language, exhibiting their genitalia, and posting pornographic pictures when they want to drive women out of the workplace).

workplace uncomfortable for Lyle and other female employees.⁹⁵ The writers' sexual comments, jokes, and epithets expressed gender hostility.⁹⁶ Similarly, their choice to display pornographic images depicting cheerleaders with their legs spread apart while in Lyle's presence conveyed the message that they see women as sex objects.⁹⁷ Because the writers' employment practice is distinct from aptitude tests, education requirements, and previous experience qualifications, the Court of Appeal's analogy between business necessity and creative necessity is an unwarranted leap of logic and, therefore, should not be recognized.⁹⁸

2. *The Court of Appeal Misconstrued Case Law When Analogizing Creative Necessity to Business Necessity*

a. *The Court of Appeal Erred When Misapplying the Supreme Court's Oncale Standard*

The Court of Appeal correctly stated that the workplace context is one of the many factors a trier of fact analyzes in a sexual harassment claim; however, this single factor cannot justify a separate defense that the defendants may assert to avoid liability under Title VII or FEHA.⁹⁹ Pursuant to *Oncale*, evidence about the specific workplace context in a sexual harassment case is properly considered as part of the totality of the circumstances test, but it is not a defense to a hostile work environment.¹⁰⁰ This Supreme Court precedent contemplates what

95. See *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (stating that sexual harassment consists of efforts by coworkers or supervisors to make the workplace intolerable or at least severely and discriminatorily uncongenial for women); see also Dorothy Roberts, *The Collective Injury to Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 365, 367 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004) (noting that males exhibit sexual conduct in the workplace to protect "male" jobs from intrusion by women or to insure that women incorporate into the workplace on inferior terms).

96. See, e.g., *Funk v. F & K Supply, Inc.*, 43 F. Supp. 2d 205, 216 (N.D.N.Y. 1999) (finding that the defendant's use of vulgarities, such as "stupid cunt," "dickbreath," and "asshole" constituted sex-based harassment).

97. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (finding that the display of nude female pictures conveys the message that women do not belong in the workplace).

98. See Brief for Legal Aid, *supra* note 63, at 43 (arguing that the creative necessity defense is impermissible because it is not rooted in the disparate treatment theory).

99. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998) (providing nothing to suggest that a creative necessity defense can be justified by the instruction to consider the totality of the circumstances).

100. See *id.* (stating that proper analysis of a hostile work environment requires careful consideration of the social context in which the behavior occurs because the real impact of such conduct depends on the surrounding circumstances, but offering nothing else); *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (stating that *Oncale* instructs that the severity of the alleged harassment be assessed in light of the

activity is within the scope of necessary job performance, thus proper application of the *Oncale* social context standard would render the creative necessity defense superfluous.¹⁰¹ Because the Court of Appeal misread and misapplied the *Oncale* social context standard, its creative necessity defense cannot stand.¹⁰²

The Supreme Court unanimously held that sexual harassment must constitute discrimination within the meaning of Title VII; that is, a plaintiff in a hostile work environment case must plead and ultimately prove the statutory requirement that discrimination arose because of sex.¹⁰³ By rejecting the idea that sexual conduct is a substitute for Title VII's "because of sex" requirement,¹⁰⁴ the Court ensured that no special defense was necessary to protect creative employers' legitimate business interests because a plaintiff must still establish that her environment is both objectively and subjectively hostile.¹⁰⁵ If Lyle cannot prove that the nature of her work environment, however unpleasant, resulted because of her sex, she is not a victim of hostile work environment sexual harassment.¹⁰⁶ Thus, a trier of fact could not hold the defendants liable simply because their harassing behavior is offensive or insensitive.¹⁰⁷

The *Oncale* Court further emphasized that when the trier of fact analyzes the objective severity of harassment, it should consider the

workplace's social context, but never suggesting that the prevailing culture of the workplace can excuse discriminatory conduct).

101. See Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 438 (2002) (arguing that *Oncale* endorses that courts examine the record to determine whether vulgar language and unpleasant conduct is a normal part of the workplace and, therefore, the standard already takes into account whether communications are actually necessary to the business or enterprise).

102. See *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) (emphasizing that a court cannot point to the nature of the workplace alone to excuse hostile work environment harassment because it should look at the totality of the circumstances).

103. See *Oncale*, 523 U.S. at 79-80 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)) (affirming that Title VII is only directed at discrimination because of sex).

104. See *id.* at 80 (reiterating that Title VII does not prohibit all verbal and physical harassment and that the Court has never recognized that harassment is automatically discrimination because of sex merely because the words used have sexual content or connotations).

105. See *id.* at 81 (stating that conduct that is not severe or pervasive enough to create an objectively hostile work environment is beyond Title VII's purview).

106. See *id.* at 80 (establishing that a plaintiff must demonstrate that she suffered disadvantageous terms or conditions of employment because of her sex to successfully prove her claim of sexual harassment).

107. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (declaring that not all workplace conduct, such as an offensive utterance, constitutes actionable harassment); see also Frank, *supra* note 101, at 468 (explaining that liability only arises when there is a causal nexus between the harassment and the employee's protected attribute of sex).

totality of the circumstances while paying careful attention to the social context in which the alleged harassment occurs and is experienced by the plaintiff.¹⁰⁸ This directive suggests that different workplace environments alter how the plaintiff interprets and receives allegedly harassing words and conduct.¹⁰⁹ Accordingly, an examination of a hostile work environment claim in light of the social context standard allows a reasonable trier of fact to determine if the “Friends” writers’ conduct related to their job of producing an adult-oriented sitcom.¹¹⁰ The Court of Appeal’s creative necessity defense is unnecessary because consideration of the social mores of the television writers’ room allows the trier of fact to determine whether: (1) the writers’ words and conduct were truly harassment or nothing more than office banter;¹¹¹ (2) the writers’ words and conduct were unwelcome or just accepted as unpleasant sophomoric behavior;¹¹² and (3) the writers’ speech and conduct were designed to harm Lyle because of her sex or instead served the legitimate business purpose of producing a sitcom.¹¹³

Because the social context standard allows for the writers’ sexual speech and expressive conduct, as long as it is not objectively and subjectively hostile, the defendants do not need the Court of Appeal’s creative necessity defense to convince a jury that the nature of writing for a television comedy necessitates talking about blow jobs, anal sex, and rape.¹¹⁴ Therefore, the Court of Appeal’s creative necessity defense does not comport with *Oncale*.

108. See Frank, *supra* note 101, at 466 (stating that courts have reasoned that certain blue-collar work environments and their traditionally unrefined atmosphere are relevant to evaluating the “because of sex” requirement in a hostile work environment analysis).

109. See *Oncale*, 523 U.S. at 82 (explaining that the real social impact of workplace behavior often depends on a constellation of surrounding circumstances that is not captured by a simple recitation of the words used or the physical acts performed).

110. See *id.* (commenting that an appropriate sensitivity to social context and common sense will enable courts and juries to distinguish between simple teasing or roughhousing and conduct that a reasonable person in the plaintiff’s position would find severely hostile or abusive).

111. See *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (recognizing that words that are commonplace in one setting are shocking in another).

112. See *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (requiring that the plaintiff must show that the harassing conduct was unwelcome to prove a claim of sexual harassment).

113. See *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (recognizing that the *Oncale* standard allows judges and juries to make the threshold determination whether certain forms of behavior in a given workplace are discriminatory or not).

114. See *Oncale*, 523 U.S. at 82 (ensuring that the trier of fact can use common sense to distinguish horseplay, flirtation, and the like from harassment).

b. The Court of Appeal Misread the Supreme Court of California's Reno v. Baird

The Court of Appeal also misconstrued state case law when gathering support for its creative necessity defense.¹¹⁵ In *Reno v. Baird*, the Supreme Court of California did not seek to define the parameters of unlawful harassing conduct under FEHA.¹¹⁶ Rather, the court explained the differences between harassment and discrimination and why the distinction mattered for supervisor liability.¹¹⁷ The Supreme Court of California concluded that supervisor liability could only be predicated on harassment because the nature of “harassment consists of a type of conduct not necessary for performance of a supervisory job,” as opposed to discrimination that arises out of employment practices necessary for personnel management.¹¹⁸ *Reno* does not stand for the proposition that Warner Brothers can escape liability for sexual harassment if they can prove that the writers’ choice of words or conduct was necessary for creating a comedic sitcom.¹¹⁹

Oncale and *Reno* cannot be read to suggest that Warner Brothers may answer Lyle’s claim of sexual harassment with a creative necessity defense, which would allow the writers to avoid liability if their conduct was necessary for the performance of producing “Friends.” Because the Court of Appeal’s creative necessity defense is premised on a misreading and misapplication of the business necessity exception to disparate impact discrimination, the *Oncale* standard, and the *Reno* definition of harassment, it is an impermissible legal standard.¹²⁰ The issue is not and should not be whether the writers’ behavior was job related, but rather, when considering the totality of

115. See Brief for the Employers Group et al. as Amici Curiae Supporting Respondents at 11, *Lyle v. Warner Bros. Television Prod.*, 94 P.3d 476 (Cal. 2004) (No. S125271), 2005 WL 847603 (arguing that the Court of Appeal’s reasoning based on *Reno* was misplaced because the *Reno* court did not address how the context of alleged wrongful speech or expressive conduct may bear upon an harassment claim).

116. See 957 P.2d 1333, 1334 (Cal. 1998) (deciding whether persons claiming discrimination may sue their supervisors individually and hold them liable for damages).

117. See *id.* at 1336 (distinguishing between harassment as a type of conduct not necessary to a supervisor’s job performance and business decisions that might later be considered discriminatory but are necessary to the supervisor’s performance).

118. See *id.* (proffering that employment-related decisions cannot constitute actionable harassment because personnel decisions are fundamentally different from conduct that is avoidable and unnecessary).

119. See *id.* (finding that necessary personnel actions such as hiring or firing, work station assignments, promotion or demotion, performance evaluations, deciding who will attend meetings, and the like do not come within the meaning of harassment).

120. See White, *supra* note 85, at 739 (arguing that *Oncale* precludes employers from framing claims under a disparate impact theory in sexual harassment cases).

the circumstances, whether their behavior created a hostile work environment.¹²¹

B. The Lyle Decision Undermines the Purpose of Title VII and FEHA Because it Narrows the Hostile Work Environment Sexual Harassment Doctrine

In *Lyle*, the Court of Appeal's surprising decision to recognize a creative necessity defense ignores the legislative intent underlying Title VII and FEHA.¹²² While the federal and state civil rights laws aim to cure employment discrimination on the basis of sex, the creative necessity defense narrows the hostile work environment sexual harassment doctrine because it could allow defendants to disguise discriminatory conduct in an indefinite number of "creative" workplaces.¹²³

It is understandable that the court found merit in the defendants' argument that sexually explicit discussion is a necessary element of creating the adult-oriented sitcom "Friends," but the court misconceived the nature of its role when it recognized the creative necessity defense.¹²⁴ The legislatures established a framework for courts to evaluate hostile work environment sexual harassment claims under Title VII and FEHA;¹²⁵ however, the framework does not give

121. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) (announcing that the critical issue is whether, when considering all the circumstances, the employers or coworkers exposed the plaintiff to disadvantageous terms and conditions of employment that members of the opposite sex did not suffer).

122. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (confirming that Congress' objective in enacting Title VII was to achieve equal employment opportunities by removing barriers that operate in favor of an identifiable group over the other employees); see also CAL. GOV'T CODE, § 12920 (West 2005) (declaring that it is necessary to safeguard against the practice of denying employment opportunities or discriminating in the terms of employment because it causes domestic strife, deprives the state of the fullest utilization of its capacities for development and advancement, and adversely affects the interests of employees, employers, and the general public).

123. Cf. *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) (asserting that a woman who chooses to work in a male-dominated trade does not relinquish her right to be free from sexual harassment). The court found it illogical that the lower court would excuse harassing conduct because it took place in a blue collar environment and argued that such reasoning means that the more hostile the environment and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute actionable harassment. *Id.*

124. See *id.* (claiming that courts cannot point to long-standing or traditional hostility toward women to excuse hostile work environment harassment, even when considering the nature of the workplace).

125. See 42 U.S.C. §2000e-2 (2006) (requiring courts to find that the harassing conduct was based on sex and was severe or pervasive enough to alter the employee's working conditions); CAL. GOV'T CODE § 12940(j)(1) (West 2005) (mandating that the trier of fact find that an employer or supervisor harassed the employee because of

the Court of Appeal discretion to insulate harassing conduct from the reach of these civil rights statutes simply because it took place in the context of a creative environment.¹²⁶ By announcing the creative necessity defense, the Court of Appeal departed from the legislative intent of promoting and enforcing workplace equality.¹²⁷

1. The Court of Appeal's Creative Necessity Defense Ignores Federal and State Legislative Intent

a. The Court of Appeal Must Interpret Title VII and FEHA in Accordance with Legislative Intent

When considering statutory issues, the Court of Appeal must ascertain the intent of the legislature to carry out the purpose of the anti-discrimination laws.¹²⁸ To act in conformity with legislative intent, the court was required to remedy any sexual harassment during the production of "Friends," advance the purpose of workplace equality, and avoid judicial interpretations or inventions that allow for the continuance of discriminatory conduct.¹²⁹ The legislative intent should have governed the decision in this case; however, the Court of Appeal ignored this standard of judgment when formulating the creative necessity defense,¹³⁰ a judicial invention that fails to remedy sexual harassment because it could

sex).

126. See *Williams*, 187 F.3d at 564 (rejecting the view that the standard for sexual harassment varies depending on the work environment); Alex Chun, *Hostile La Vista, Baby. Hollywood Lawyer's Delicate Task: Making Harassment Claims Go Away*, L.A. DAILY J., Sept. 27, 1997, available at http://www.rmslaw.com/in_the_media/art1.htm (stating that it is not a defense to sexual harassment for entertainment employers to claim that sexual joking is prevalent in the industry, and, thus, that the plaintiff knew what she was getting into).

127. See Christopher W. Deering, *Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because Of" Sex*, 27 CUMB. L. REV. 231, 270 (1996-97) (arguing that a court's reliance on a narrow application of Title VII inappropriately trammels the statute because it ignores the Congressional intent to construe the statute broadly and, thus, fails to eliminate the unfairness and humiliation of harassment).

128. See *Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001) (insisting that courts have the fundamental task of ascertaining the intent of the lawmakers to effectuate the purpose of the statute); see also SUTHERLAND STATUTORY CONSTRUCTION § 45:5 (Norman J. Singer ed., 6th ed. 2005) (explaining that the separation of powers principle mandates that the judiciary construe statutes so that they carry out the will of the lawmakers).

129. See SUTHERLAND, *supra* note 128, § 45:5 (expressing a classic formulation of statutory interpretation that requires judges to consider: (1) the common law before passing the act; (2) the evil that the common law did not cure; (3) the remedy the legislative body appointed to cure the evil; and (4) the true reason for the remedy).

130. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511 (Cal. Ct. App. 2004), cert. granted, 94 P.3d 476 (Cal. 2004) (No. S125271) (overlooking legislative intent by failing to cite any principle of statutory construction or consulting the policy goals of the federal or state legislatures to justify the defense it proposes).

allow the defendants to avoid liability and damages under Title VII and FEHA.¹³¹ Had the court followed the standard of statutory interpretation, which includes consulting the legislative history, the language of the statute, and the policy behind the anti-discrimination laws,¹³² it would have recognized that creative necessity cannot serve as a legitimate legal defense to hostile work environment sexual harassment because it undermines the federal and state legislatures' expressed intent of removing arbitrary barriers to sexual equality in the workplace.¹³³

b. Title VII and FEHA Do Not Support the Creative Necessity Defense

The text of Title VII and FEHA does not support the Court of Appeal's creative necessity defense. The statutory text is the starting point for assessing Lyle's cause of action, which is rooted in Title VII and FEHA's prohibitions.¹³⁴ On their face, the statutes do not instruct courts to consider the context of Warner Brothers' workplace as a defense to hostile work environment sexual harassment.¹³⁵ Although Title VII and FEHA regulate discrimination on the different bases of race, color, religion, sex, and national origin, the statutes apply the same prohibitions to all forms of discriminatory conduct regardless of whether it takes place in a blue-collar shipyard, a law firm, or a television writers' room.¹³⁶ This suggests that no special

131. See White, *supra* note 85, at 739 (discussing that a disparate impact-based legal principle would prevent a hostile work environment sexual harassment plaintiff from recovering damages because she suffered no out-of-pocket loss and, therefore, it would conflict with Congress' intent to provide remedies as a means for deterring intentional discrimination).

132. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Council, Inc.*, 467 U.S. 837, 859, 862, 866 (1984) (enunciating standards for the judicial interpretation of statutes and looking to statutory language, legislative history, and policy).

133. See *Robinson v. Jacksonville Shipyard, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (describing employees' conduct of displaying pornographic images and using derogatory, sexist language as actionable behavior that creates a barrier to the progress of women in the workplace because it communicates that they do not belong and that they must subvert their identities to the sexual stereotypes that permeate that environment).

134. See *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (affirming that logic and precedent dictate that the starting point of every case involving statutory analysis begins with the text).

135. See 42 U.S.C. § 2000e-2 (2005) (articulating the burden of proof for disparate impact cases, but nowhere promulgating factors to consider when deciding a disparate treatment sexual harassment case); CAL. GOV'T CODE § 12490(a) (West 2005) (delineating no factors for consideration in a hostile work environment case).

136. See 42 U.S.C. § 2000e-2(a) (1) (making it unlawful to discriminate on the basis of race, color, religion, sex, or national origin); CAL. GOV'T CODE § 12490(a) (proscribing employment practices that discriminate against an applicant or employee because of race, religion, color, national origin, ancestry, disability, marital status, sex, age, or sexual orientation).

exemption exists for creative workplaces within the framework of these anti-discrimination laws.¹³⁷ Their text recognizes one general standard for different types of hostile work environments;¹³⁸ thus, the creative necessity defense is inconsistent with federal and state legislative intent because it fails to treat employers and employees in different industries similarly under the law.¹³⁹

The Court of Appeal could argue that its function is to fill gaps in the anti-discrimination laws and remedy legislative oversights.¹⁴⁰ This argument has merit, especially when considering that the federal judiciary created the hostile work environment doctrine in light of the fact that Title VII did not expressly mention or define harassment.¹⁴¹ However, a close examination of the Title VII and FEHA's language reveals that the legislatures did not intend to limit or narrow the reach of the statutes and contemplated that the writers' sex-related behavior could constitute actionable harassment.¹⁴² Instead of correcting a defect in Title VII, the Court of Appeal's creative necessity defense will not only insulate discriminatory behavior, but also cause problems for courts and litigants.¹⁴³

i. The Creative Necessity Defense Ignores Title VII's Statutory Language

The key to enforcing sexual harassment law is to ascertain and effectuate legislative intent, which courts primarily obtain from the

137. See Frank, *supra* note 101, at 516 (stating that the same level of scrutiny should be applied to all sexual harassment claims across the board, regardless of whether the workplace is populated with "ruffians or royalty").

138. See Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998) (rationalizing that, although racial and sexual harassment take on different forms, it makes sense to harmonize the Title VII standards).

139. See, e.g., Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 194 (4th Cir. 2000) (rejecting the view that the text of Title VII permits an exception for harassment that takes place in the context of strenuous work).

140. See N.W. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981) (recognizing that federal courts have given broad and ambiguous statutes concrete meaning through case-by-case judicial decisions in the common law tradition); see also Frank, *supra* note 101, at 519 (arguing that if courts are free to fill the gaps in the law, they are also free to create the standards and burdens of, as well as defenses to hostile work environment claims).

141. See Ford v. West, 222 F.3d 767, 775 (10th Cir. 2000) (noting that Title VII does not explicitly mention hostile work environment, nor use any terms to describe the conduct it includes).

142. See generally New Jersey v. New York, 283 U.S. 336, 348 (1931) (declaring that judicial common law is subject to the paramount authority of Congress). The Court of Appeal cannot limit the scope of Title VII or FEHA because the lawmaking power is vested in the legislative, not the judicial branch of government. *Id.*

143. Cf. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1996) (reasoning that a law fails to be fair if it is so vague that it leaves the public uncertain as to what conduct is prohibited or leaves judges and juries, without any legally fixed standard, free to decide what is and is not prohibited).

plain meaning of Title VII's language.¹⁴⁴ The plain meaning rule assumes that the legislature intended the ordinary meaning of the statute.¹⁴⁵ The plain language of Title VII of the Civil Rights Act of 1964 forbids an employer from discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's sex.¹⁴⁶ The federal statute's language, however, does not expressly define the phrase "terms, conditions, or privileges of employment."¹⁴⁷ Nevertheless, the Supreme Court decided that Congress's choice not to specifically define what constitutes hostile work environment sexual harassment evinces its intent to "strike at the entire spectrum of disparate treatment of men and women in employment,"¹⁴⁸ especially since courts must construe Title VII liberally.¹⁴⁹ Because Title VII does not enumerate specific discriminatory practices or define the parameters of such harassing conduct, the broad statutory language reveals that Congress contemplated that television writers' sexually coarse and vulgar speech could possibly create the hostile work environment harassment Title VII aims to eliminate.¹⁵⁰ Consequently, the Court of Appeal was not free to read unwarranted meanings into Title VII,¹⁵¹

144. See *United States v. James*, 478 U.S. 597, 604 (1986) (stating that courts look first to the language of the statute to determine the legislature's intent).

145. See, e.g., *State v. Young*, 465 A.2d 1375, 1376 (Vt. 1983) (assuming that the plain and ordinary meaning of the statutory language was intended by the legislature). *But see State ex rel. Miller v. Santa Rosa Sales*, 475 N.W.2d 210, 218 (Iowa 1991) (noting that legislative intent can be expressed by omission as well as by the inclusion of language).

146. See 42 U.S.C. § 2000e-2 (2006) (condemning the disparate treatment of female employees).

147. See 42 U.S.C. § 2000e (failing to articulate what constitutes actionable harassment and not expressly defining unlawful conduct because Title VII was designed for courts to construe and apply the remedial statute liberally).

148. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (rejecting the view that Title VII's language shows that Congress intended to limit the reach of the statute to economic barriers erected by discrimination).

149. See *Ngiraingas v. Sanchez*, 495 U.S. 182, 197 (1990) (stating the Civil Rights Act was intended to protect, defend, and provide remedies for wrongs to all people and should be liberally and beneficently construed); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (stating that Congress intentionally drafted Title VII in the broadest possible terms so that it could reach all forms of harassment).

150. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972) (declaring that Title VII's language evinces Congress' intent to define discrimination in the broadest possible terms because it knew that constant change in the workforce would make seemingly reasonable practices of the present become the injustices of the future); see also *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) (extending Title VII to cover same-sex harassment illustrated that the statutory provisions go beyond the principle evil for which they were enacted to cover reasonably comparable evils).

151. See 42 U.S.C. § 2000e-2(k) (recognizing the business necessity defense in disparate impact cases, but nowhere providing for the same defense to disparate treatment or an exception for unique workplaces); see also *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1213 (9th Cir. 2002) (citing *Robinson v. Shell Oil Co.*, 519

even to support the supposedly desirable policy of balancing the writers' free speech rights, which is not a goal of the statute as written.¹⁵² Because the Court of Appeal's creative necessity defense potentially carves out an exception for the writers' sexual conduct, it undermines the intent of Congress because it could allow for the continuance of harassment in creative workplaces, the harm Title VII seeks to remedy.¹⁵³

ii. The Creative Necessity Defense Disregards FEHA's Statutory Language

Similarly, the plain language of FEHA reveals that the California legislature chose not to limit harassment to any particular kind of conduct because the state, like the federal government, intended to broadly extend its civil rights law as far as needed to remedy the sexual harassment that prevents workplace equality for women and minorities.¹⁵⁴ Although FEHA also does not explicitly define harassment, California's Fair Employment and Housing Commission extends the definition of harassment to epithets, derogatory comments or slurs, and derogatory posters, cartoons, or drawings.¹⁵⁵ This regulatory language further illuminates the state's intent to eliminate sexually-themed speech and conduct that amounts to harassment in the workplace.¹⁵⁶ Therefore, the language of FEHA

U.S. 337, 340 (1997)) (asserting that a court's inquiry in analyzing a statute ceases if the plain meaning of the statute conveys congressional intent and the statutory scheme is coherent and consistent).

152. See 42 U.S.C. § 2000e-2 (stating no reference to free speech issues in the workplace); see also *Taravella v. Stanley*, 727 A.2d 727, 731 (Conn. App. Ct. 1999) (stating that courts may not read provisions into clearly expressed legislation that are not expressed in its words).

153. See *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)) (stating that Congress enacted Title VII to eradicate the imbalance of power and abuse that results in discrimination against a discrete and vulnerable group); see also Joanna Grossman, *Are 'Friends' Writers 'Required to Engage in Sexual Banter?*, CNN, May 24, 2004, <http://www.cnn.com/2004/LAW/05/04/grossman.friends/> (arguing that the creative necessity defense will preserve the sexism in the entertainment industry).

154. See CAL. GOV'T CODE § 12940(a) (West 2006) (prohibiting employers from discriminating in terms, conditions, or privileges of employment on the basis of an employee's sex, but failing to define the term "harassment," the phrase "because of," or any particular type of conduct, thus, indicating broad construction).

155. See CAL. CODE REGS. tit. 2, § 7287.6 (2006) (recognizing that verbal and visual harassment can unreasonably interfere with an individual's work performance and create a hostile environment).

156. See *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 850 (Cal. Ct. App. 1989) (approving the FEHC's position that almost any type of conduct may constitute sexual harassment); see also *Am. Newspaper Publishers Assn. v. Alexander*, 294 F. Supp. 1100, 1103 (D.D.C. 1968) (noting that civil rights legislation has delegated broad discretion to the administrative agencies, and the courts have paid substantial respect to the administrative interpretations of such laws).

reasonably covers the situation in the “Friends” writers’ room. The defendants’ discussions of oral and anal sex, rape fantasies, and missed opportunities to “fuck” the actresses Courtney Cox and Jennifer Aniston, as well as their habits of viewing and depicting pornographic images, fall within the range of actionable conduct established by the FEHC because the regulatory language uses the word “includes,” signifying that the components of the statute can be enlarged.¹⁵⁷ Consequently, the defendants’ sexually coarse and vulgar speech can constitute sexual harassment within the meaning of statute, even when such conduct serves the creative process.¹⁵⁸ Because the defendants could assert the creative necessity defense as a pretext to preserve workplace hostility or excuse their harassing conduct, the Court of Appeal’s decision conflicts with the purpose of FEHA.¹⁵⁹

iii. The Creative Necessity Defense Undermines the Statutory Scheme of FEHA as a Whole

Although courts first examine the plain language of a statute to discern legislative intent, the Supreme Court recognized that statutory language considered in isolation from the context of the whole Act may not accurately convey legislative intent.¹⁶⁰ Accordingly, a court must construe FEHA so all parts of the statutory scheme operate in harmony and further the intent of the California legislature.¹⁶¹ Therefore, it was improper for the Court of Appeal to rest its decision in *Lyle* primarily on Section 12940 of FEHA.¹⁶²

157. See *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 926 (Wash. 2001) (stating that use of the word “includes” means courts can extend the scope of the statute); see also *Fisher*, 262 Cal. Rptr. at 850 (noting that FEHC’s non-exhaustive list of actionable harassment, as an administrative interpretation of the statute, should be accorded great respect by the courts and followed if not clearly erroneous).

158. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (reading Title VII’s broad-gauged language as proscribing conduct that destroys the emotional and psychological stability of women and minorities).

159. See Grossman, *supra* note 153 (suggesting that the Court of Appeal’s logic means that if indelicate forms of expression are accepted and endured as normal human behavior by many males and some women, then other women cannot sue).

160. See *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (stating that courts must follow the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context).

161. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (stating that it is the Court’s task in interpreting separate provisions of an Act to give the statute the most harmonious meaning possible in light of the legislative policy and purpose); *Dyna-Med v. FEHC*, 743 P.2d 1323, 1326 (Cal. 1987) (emphasizing that statutes must be construed in context with the statutory purpose and must be harmonized with the statutory sections relating to the same subject).

162. See *Richards v. United States*, 369 U.S. 1, 11 (1962) (declaring that it is the Court’s responsibility to look to the provisions of the whole law and to its object and policy when considering statutory issues).

Rather, the court should have considered this hostile work environment sexual harassment case in light of the related FEHA provisions and legislative history, which make clear that it is the State's public policy to safeguard Lyle's civil right to seek, obtain, and hold employment without discrimination on the basis of her sex.¹⁶³ Although the Court of Appeal recognized that creative necessity only operates as a limited defense to hostile work environment sexual harassment, it failed to fulfill its judicial duty of applying FEHA in accordance with its legislative intent. The defense is inconsistent with the State's policy of ensuring the development and advancement of a diverse workforce because it insulates a category of otherwise actionable conduct, creating a barrier to Lyle's promotion in the field of sitcom writing and conveying the message that women are not welcome in Hollywood unless they tolerate sexual stereotypes.¹⁶⁴ The creative necessity defense permits the writers to engage in conduct that would otherwise be discriminatory in different work settings;¹⁶⁵ thus, it goes against the intent of the legislature since it frustrates the goals of anti-discrimination law by allowing environments that have traditionally been dominated by men and hostile to women to remain that way.¹⁶⁶

2. The Vague and Overbroad Framework of the Creative Necessity Defense Contravenes the Purpose of Title VII and FEHA

The vague and overly broad creative necessity defense¹⁶⁷ is inconsistent with the federal and state policy of prohibiting employment discrimination on the basis of any protected

163. See CAL. GOV'T CODE § 12920 (West 2005) (declaring it public policy to protect an individual's right to nondiscriminatory employment); CAL. GOV'T CODE § 12921 (West 2005) (asserting that it is an employee's "civil right" to seek, obtain, and hold employment without suffering discrimination).

164. See CAL. GOV'T CODE § 12920 (expressing that FEHA's purpose is to provide effective remedies that will eliminate the cause and effect of discriminatory practices).

165. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511, 520 (Cal. Ct. App. 2004), cert. granted, 94 P.3d 476 (Cal. 2004) (No. S125271) (stating that the defendants may convince the jury that the artistic process for producing episodes of "Friends" necessitates conduct that might be unacceptable in other contexts).

166. See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1990) (contending that harassers should not be able to continue to harass merely because a particular discriminatory practice is commonplace because it leaves victims with no remedy); Grossman, *supra* note 153 (contending that traditionally male work environments cannot be exempted from contemporary standards of equality, especially since it is these environments in which such standards must be rigorously enforced).

167. See Frank, *supra* note 101, at 491 (commenting that courts have failed to discover guiding principles that effectively distinguish between unpleasant banter and full-blown harassment when applying judicial inventions).

classification.¹⁶⁸ The court's approach potentially creates an exemption for creative workplaces and conduct that is normally viewed as discriminatory in other settings, allowing for employers and employees to engage in discriminatory sexual (or racial, religious, ageist) speech without fear of reprisal¹⁶⁹ and reducing protection for many victims.¹⁷⁰ When formulating this defense, the Court of Appeal failed to outline what constitutes a creative workplace.¹⁷¹ Is the defense strictly limited to television production, or can employers in academia, advertising, film production, magazines, theater production, publishing, or even automobile design assert it against a claim of sexual harassment?¹⁷² The Court of Appeal did not create a principle whereby a judge or jury could differentiate between various cases and creative contexts.¹⁷³

The defense, as articulated by the Court of Appeal, is so broad that many types of conduct, which are clearly within the federal and state governments' power to prohibit under Title VII and FHEA, will be allowed, such as vulgar speech and conduct continually directed at

168. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (mandating that employment practices that are neutral on their face or in their intent cannot be maintained if they operate to freeze the status quo of prior discrimination); see also Grossman, *supra* note 153 (arguing that applying a more lenient standard for sexual harassment to comedy writers could mean that women will continue to feel like outsiders in the environment of the entertainment industry).

169. See Brief for Legal Aid, *supra* note 63, at 44 (arguing that the creative necessity defense would create a blanket exemption for any industry that deems itself "creative," permitting any type of words or conduct in the workplace that leads to the final product).

170. See *Jackson v. Quanax Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) (contending that special consideration for certain workplaces lowers the hostile work environment standard, making it more difficult for victims to have a successful sexual harassment claim).

171. See *Lyle v. Warner Bros. Television Prod.*, 12 Cal. Rptr. 3d 511, 520 (Cal. Ct. App. 2004), *cert. granted*, 94 P.3d 476 (Cal. 2004) (No. S125271) (offering no clarification as to what constitutes a creative workplace other than a reiteration of the state supreme court's definition of harassment to support the creative necessity defense).

172. See Daniel E. Eaton, *Writers Gone Wild: "The Muse Made Me Do It" As a Defense to a Claim of Sexual Harassment*, 12 UCLA ENT. L. REV. 1, n.54 (2004) (arguing that restricting creative necessity to the arts ignores the inherently creative nature of many occupations not generally considered creative, but that require the same kind of creative freedom indispensable to the arts); Brief for Alliance of Motion Picture and Television Producers et al. in Amici Curiae Supporting Respondents at 24, *Lyle v. Warner Bros. Television Prod.*, 94 P.3d 476 (Cal. 2004) (No. S125271), 2005 WL 847606 [hereinafter Brief for Alliance] (asking if a museum guard can sue for harassment if she had to look at an exhibit featuring *Playboy* centerfolds and listen to stupid, sexist, and lewd comments from patrons).

173. See *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1377 (S.D. Ga. 2001) (insisting that the current case law makes it more difficult to determine the severity and quantity of gesturing, touching, and banter necessary to create a hostile work environment than "nailing a jellyfish to the wall").

women generally.¹⁷⁴ Although the Court of Appeal explained that the creative necessity defense has limits, it failed to specify a standard of permissible conduct.¹⁷⁵ The Court explained that a trier of fact could find that the writers' sexually explicit conduct fell within the scope of necessary job performance if they did not engage in such behavior for purely personal gratification or other personal motives.¹⁷⁶ But it failed to define the line where sexually explicit conduct would no longer be deemed work related, and rather would be viewed as personally gratifying.¹⁷⁷ Consequently, it is unclear how a trier of fact will meaningfully determine if writing an episode of "Friends" necessitated the writers' sexual speech and conduct.¹⁷⁸

Moreover, the Court of Appeal's failure to specify permissible conduct in the context of a creative work environment poses an unfair burden on Warner Brothers and the writers to prove that their sexually-themed speech was necessary to their job performance.¹⁷⁹ When an employer or employee cannot predict how a trier of fact will apply or evaluate the creative necessity defense in recurring factual situations, they cannot know the scope of legal protection afforded to them.¹⁸⁰ The vagueness of the creative necessity defense makes it impossible for a supervisor or employer to know in advance whether their conduct is illegal, which could lead to two extreme consequences. On one hand, the creative necessity defense could

174. See Grossman, *supra* note 153 (recognizing that if the creative necessity defense is too broad, sexual harassment cases may be unsuccessful, despite the reality of the discrimination it is seeking to correct).

175. See *Lyle*, 12 Cal. Rptr. 3d at 520 (admitting that the creative necessity defense had limits by stating that writers could not kiss, fondle, or caress assistants for the purpose of developing a love scene, nor could they make lewd, offensive, or demeaning remarks personally directed at assistants).

176. See *id.* (relying, albeit improperly, on the *Reno* definition of harassment that explains that harassment is not conduct that is necessary for management of the employer's business).

177. See *id.* (providing no guidance for applying or evaluating the creative necessity defense other than stating that the defendants cannot engage in such conduct for meanness or bigotry).

178. See Grossman, *supra* note 153 (illustrating that a judge or jury could view the episode of "Friends" in which the character Rachel seduces a coworker by dressing up as a cheerleader as arising out of the many lewd drawings of naked cheerleaders and the writers' personal fantasies, or they could determine that the construction of the episode did not necessitate the writers' sexual conduct).

179. See *Eaton*, *supra* note 172, at 1, 7 (2004) (voicing that because there are an infinite number of ways to express and conceive any idea, the writers face a tremendous burden to prove that the nature of their workplace necessitated such expression).

180. Cf. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 771 (1998) (Thomas, J. dissenting) (rejecting the majority's vague affirmative defense to sexual harassment because the rule drew no support from established legal principles and did not explain how employers could rely on the affirmative defense thus leading to confusion).

chill creative speech because employers will be forced to limit the content of workplace discussions and writers will be forced to censor themselves.¹⁸¹ On the other hand, employers could under-regulate the workplace and employees might not police their own conduct because neither group knows the scope of the creative necessity defense and views it as overly protective.¹⁸²

Courts should not apply the creative necessity defense to hostile work environment sexual harassment claims because it cannot be interpreted narrowly.¹⁸³ If this newly minted defense is recognized by courts, it will potentially emasculate Title VII and FEHA because by allowing employers to deny employment opportunities, slow diversification of writers' rooms, cause minority employees strife, preserve male-dominated fields, and adversely affect the interest of employees, employers, and the public.

IV. IMPLICATIONS AND RECOMMENDATIONS

A. The Creative Necessity Defense Will Maintain Sexism in the Television Industry

Hollywood remains fraught with sexism¹⁸⁴ and the Court of Appeal's creative necessity defense will entrench the "boys club" atmosphere of television writing.¹⁸⁵ Male comedy writers have dominated the field of sitcom writing for decades, while females have had great difficulty breaking into the field.¹⁸⁶ If comedy writers are

181. See Brief for Alliance, *supra* note 172, at 41 (illustrating that the creative necessity defense will force comedy writers to ask themselves before speaking: "Should I say this potentially offensive thing, that might be funny enough to be part of the script, or will it be considered not good enough to be written down, thereby subjecting me, and my employer, to potential liability?").

182. See Frank, *supra* note 101, at 495 (arguing that vague legal standards in sexual harassment law may cause employers to overlook harassing conduct since they do not know what is prohibited).

183. *Cf. Diaz v. Pan Am. World Airways*, 442 F.2d 385, 387 (5th Cir. 1971) (explaining that Congress meant to limit the affirmative defenses to Title VII because it did not intend to open an enormous gap in the law that would exist if employers could legitimately discriminate against a group solely because his employees, customers, or clients did).

184. See Laurie Winer, *The Industry Women on the Side*, L.A. MAG., Sept. 2002, available at http://www.findarticles.com/p/articles/mi_m1346/is_9_45/ai_65091736 (reporting that the male partner of Endeavor Talent Agency described the company's ethos as "we fight and fuck"). Hollywood executives and producers do not hire women, do not see it as a problem, and never will. *Id.* For example, one producer said, "Women on film? Either naked or dead. Both are better." *Id.*

185. See Grossman, *supra* note 153 (arguing that permitting traditionally male environments that are hostile to women to remain in that state frustrates the goals of anti-discrimination law because it prevents the workplace from equally welcoming men and women).

186. See Writers Guild of America, *2005 Hollywood Writers Report*, at 46, available

entitled to assert the creative necessity defense, a more lenient sexual harassment standard, women could be deterred from joining the industry.¹⁸⁷ Furthermore, the effects of the creative necessity defense will have ramifications for consumers.¹⁸⁸ The television shows that Hollywood produces reflect the sexism that plagued the “Friends” writers’ room, as evidenced by the violent male aesthetic that dominates last season’s new television programs.¹⁸⁹ By maintaining the status quo in the writers’ room, the creative necessity defense will encourage production studios to continue telling stories from the narrow perspective of white, middle-class males.

B. The Creative Necessity Defense Will Make it More Difficult for Lyle to Assert a Successful Sexual Harassment Claim and Collect Damages

The creative necessity defense should not apply to Lyle’s claim because it would establish a higher level of protection for employers facing a hostile work environment claim, while making it more difficult for the plaintiff to make a prima facie showing of sexual harassment.¹⁹⁰ Although a reasonable trier of fact would recognize that the defendants would legitimately engage in some sexual conversations to write “Friends,” a creative necessity defense could insulate all sexually-themed discussions or displays of pornography, even when it is unrelated to job performance.¹⁹¹ This will unfairly

at http://www.wga.org/subpage_whoare.aspx?id=922 (finding that the top shows for women staff writers were more likely to be dramas than comedies); Writers Guild of America, *Women’s Share of Employment 1998-2004*, available at http://www.wga.org/uploadedimages/who_we_are/womens_employment_share.jpg (calculating that women currently comprise 27% of all television writers).

187. See Grossman, *supra* note 153 (arguing that giving writers carte blanche to do anything no matter how offensive and degrading to women runs the risk of creating an environment in which no woman would want to work); *No ‘Friends’ In This Lawsuit*, CBS NEWS, Dec. 23, 2004, available at <http://www.cbsnews.com/stories/2004/12/23/entertainment/printable662668.shtml> (relating that on sitcoms dominated by men, where the tone is often angry and anti-female, women have the choice to suffer a “mean room” or leave).

188. See Catherine A. MacKinnon, *Smut’s Insidious Threat*, L.A. TIMES, March 20, 2005, available at <http://www.latimes.com/news/printedition/suncommentary/la-op-discrimination20mar20,1,2183704.story?coll=la-headlines-suncomment&ctrack=1&cset=true> (arguing that the single most powerful force in undercutting sex equality at work remains the cultural sexualization of women by major corporations and mainstream media infusing pornography into daily life).

189. See Lisa De Moraes, *Female Characters Made to Suffer for Our ‘Art,’* WASH. POST, Sept. 18, 2005, at N1 (commenting that men have fashioned a trend in Hollywood to show women raped and murdered, tortured in chains while wearing a dog collar, and impaled on the ceiling before bursting into flames).

190. *Cf.* Int’l Union, United Auto., Aerospace & Agric. Implement Workers of America v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991) (stating that the business necessity defense is more lenient for employers to prove, while the impact approach is more difficult for plaintiffs to satisfy).

191. See Timmons, *supra* note 47, at 1205 (recognizing that only in a very unusual workplace, such as Playboy, could it be said that an employer legitimately utilized

raise the standard for plaintiff employees in creative environments, requiring Lyle to prove conduct that goes well beyond what is considered objectively hostile in other environments.¹⁹²

Furthermore, the creative necessity defense will allow employers to avoid damages for creating and maintaining hostile work environments.¹⁹³ For Lyle, compensatory and punitive damages are the only damages recoverable because she cannot point to a tangible employment action directly caused by the harassment suffered.¹⁹⁴ Permitting Warner Brothers and the writers to raise the creative necessity defense will allow the defendants to avoid damages for hostile work environment sexual harassment by reframing Lyle's claim as one of disparate impact, not disparate treatment.¹⁹⁵ Consequently, these circumstances would discourage employers from enforcing federal and state sexual harassment policies in creative workplaces because they know they could escape judicial scrutiny and avoid damages.¹⁹⁶ The creative necessity defense is not only inconsistent with recovering damages under hostile work environment claims, but it also undermines Congress's intent of deterring sexual harassment.¹⁹⁷

sexual conversations or the display of pornography). *But see Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (1999) (stating that women working in a blue collar profession do not deserve less protection from the law than women working in a courthouse). The view that the standard for sexual harassment varies depending on the work environment should be rejected. *Id.*

192. *See Williams*, 187 F.3d at 564 (contending that women employed in professions where crude language is commonly used by male employees will have more difficulty establishing a hostile work environment because this will mean that the more hostile the environment, and the more prevalent the sexism, the more difficult it will be to prove that sex-based conduct is sufficiently severe and pervasive).

193. *See White*, *supra* note 85, at 739 (rejecting the idea that hostile work environment claims should be equated with disparate impact claims because *Oncale* precludes employers from positioning claims as impact based in sexual harassment cases).

194. *See* 42 U.S.C. § 1981(a)(1) (2006) (providing that a plaintiff may seek compensatory and punitive damages against an employer who engaged in unlawful intentional discrimination, but these damages cannot be recovered from an employer whose employment practice is unlawful because of disparate impact); *see also* H.R. Rep. No. 102-40(I), at 65-69 (1991) (discussing the need for damages to compensate victims of sexual harassment).

195. *See White*, *supra* note 85, at 739 (discussing why Congress amended Title VII to provide a remedy for sexual harassment plaintiffs and explaining that they believed such damages were necessary because hostile work environment victims had no remedy for statutory violations because Title VII only permitted recovery for equitable relief).

196. *Cf.* Howard Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 798-800 n.37 (noting that damages ensure that the actor's conduct will not escape judicial scrutiny).

197. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (1991) (finding that additional remedies are needed to deter unlawful harassment and intentional discrimination in the workplace).

C. The Supreme Court of California Must Abandon the Creative Necessity Defense and Follow the Oncale Precedent

The Supreme Court of California should have addressed and nullified the creative necessity defense because *Oncale* takes into account whether the defendants' communications are actually necessary to writing an adult-oriented situation comedy.¹⁹⁸ Applying the *Oncale* social context standard, in theory, will lead the court to treat factually similar cases the same way.¹⁹⁹ Thus, following this legal precedent will resolve the problems that arise from the creative necessity defense's vagueness and prevent the trier of fact from reaching unpredictable decisions, such as allowing the defendants to avoid liability and damages or punishing the defendants for words that are ultimately edited from the final story line.

CONCLUSION

The Court of Appeal's creative necessity defense disregards the federal and state statutory mandate to promote and enforce civil rights because it will allow employers in creative industries to exclude women and minorities from the workplace. Because existing law already takes into consideration whether harassing conduct is necessary for a business, drawing a line between "creative" and other workplaces is not legally sound. Creative necessity cannot serve as a legitimate legal defense to hostile work environment sexual harassment claims because it undermines the current laws against employment discrimination.

198. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 82 (1998) (asserting that, with common sense, a judge or jury can determine if the alleged harassment within the specific workplace context amounted to discrimination).

199. See Frank, *supra* note 101, at 497-99 (arguing that examination of workplace culture increases uniformity in close cases because it clarifies the boundaries between lawful and unlawful conduct).

