Friends Writers Offer Creative Necessity Argument for Sexual Harassment: Justification or Abuse Excuse?

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The sitcom Friends was a hit show for ten years, and while millions laughed at the show’s jokes and antics, not everyone was laughing behind the scenes.¹ In 1999, the show’s writers’ assistant filed a complaint of environmental sexual harassment, claiming that the sexually explicit conversations and actions of the writers during brainstorming sessions created a hostile work environment. In response, the writers claim that, while their behavior could be considered sexual harassment in other contexts, it is not harassment in this case. They maintain that their jobs were to write for a sexually-oriented show, thus their behaviors were necessary for their work to be accomplished. The Court of Appeals has ruled to allow this unique “creative necessity” excuse, and the appeal is pending. At trial, the defendants will have to

convince a jury that the context of their workplace called for such sexual behaviors, and the jury will weigh this evidence under the totality of the circumstances.

Part I of this article will present the background of the case and Part II will discuss the judgment rendered by the California Court of Appeals. Part III will discuss the use of the creative necessity excuse and more general necessity defenses that have been used in other contexts. Part IV will discuss the history of context in past sexual harassment cases. Part V will analyze the evidence that the lawyers will present to the jury, including the sexual harassment allegations and the creative necessity defense. Part VI will present psychological and decision-making theories, which will predict how jurors will think about the case and the context excuse presented by the defense. Part VII will conclude that the Appeals court was correct in allowing the sexual harassment claim to stand, as well as in allowing the creative necessity excuse. A jury will ultimately decide if the context of the behavior (i.e., the sexual nature of the show) matters under the totality of the circumstances. Free speech implications for the entertainment industry and the future of sexual harassment claims will also be discussed.

I. BACKGROUND

Amaani Lyle was hired to sit in on Friends writers' meetings and keep a detailed account of potential story lines. During these meetings, the writers found it helpful to brainstorm through dialogue, jokes, drawings, and gestures. Lyle felt that these behaviors created a hostile work environment because many of these brainstorming sessions were highly sexual in content. Although she was hired for her typing skills, Warner Brothers

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3. See Lyle, 12 Cal. Rptr. 3d at 513; see also Grossman, supra note 2; see also McKee, supra note 1.
claims that she was fired because her notes lacked many important dialogues and jokes. Lyle sued Warner Brothers under California’s anti-discrimination law. Her allegations consisted of wrongful termination, retaliation, sexual harassment, and racial discrimination.

Lyle worked directly under executive producers and writers Gregory Malins and Adam Chase, and supervising producer and writer Andrew Reich. Throughout Lyle’s employment in the Warner Brothers Studio, Lyle urged the producers and writers of *Friends* to include African-American characters on the show. Lyle, being an African-American woman herself, criticized the show for racial discrimination against African-American actors, and claimed that her constant complaining is the real reason she was fired only four months after she was hired. Lyle filed a complaint under California’s Fair Employment and Housing Act (FEHA) for wrongful termination based on gender and race discrimination, and for retaliation due to her racial discrimination complaints. She later added racial and sexual harassment claims to her FEHA complaint.

Lyle received a right-to-sue letter from the Department of Fair Employment and Housing (DFEH), and brought an action against individuals and organizations involved in the show’s writing and production. The defendants included Warner Brothers Television Productions, NBC Studios (NBC), Bright, Kauffman, Crane Productions (BKC), producer Todd Stevens, and producer-writers

5. *Lyle*, 12 Cal. Rptr. 3d at 511; *Grossman*, supra note 2; *McKee*, supra note 1.
6. *Lyle*, 12 Cal. Rptr. 3d at 511, 513; *Grossman*, supra note 2; *McKee*, supra note 1.
8. *Lyle*, 12 Cal. Rptr. 3d at 513.
9. *Id.* at 513; *McKee*, supra note 1.
11. *Lyle*, 12 Cal. Rptr. 3d at 513; *McKee*, supra note 1.
12. *Lyle*, 12 Cal. Rptr. 3d at 513.
13. *Id.*
Chase, Malins, and Reich.\textsuperscript{14} Lyle's final allegations were rooted in both statutory and common law: in addition to the FEHA causes of action detailed above, her complaint also included wrongful termination for violating policies against gender and racial discrimination, and retaliation for racial discrimination complaints in violation of the FEHA.\textsuperscript{15}

The trial court granted the defendants' motions for summary judgment.\textsuperscript{16} It ruled that NBC and BKC were not Lyle's employers and, thus, were not liable.\textsuperscript{17} The court continued that Lyle's harassment claims were time barred, and her claims of gender and racial discrimination, retaliation, and harassment were not factually established against any defendant.\textsuperscript{18} The court also held that Lyle could not establish that the defendants wrongfully terminated her on the basis of gender or race, or in retaliation for her racial discrimination complaints.\textsuperscript{19} The court granted summary judgment in favor of all the defendants and awarded them $21,131 in costs.\textsuperscript{20} It found the FEHA causes of action to be "frivolous, unreasonable, and without foundation," and therefore awarded $415,800 in attorneys fees for the defendants in a post-judgment order.\textsuperscript{21} Lyle appealed the judgment and the post-judgment attorney fees award.\textsuperscript{22}

\textbf{II. APPEALS JUDGMENT}

The Second Circuit Court of Appeals affirmed some of the lower court's rulings, while reversing others.\textsuperscript{23} First, the Court of Appeals agreed that summary judgment in favor of the defendants

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.; Grossman, supra note 2.
\item \textsuperscript{17} Lyle, 12 Cal. Rptr. 3d at 513-14.
\item \textsuperscript{18} Id. at 514.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.; Grossman, supra note 2.
\item \textsuperscript{22} Lyle, 12 Cal. Rptr. 3d at 514; Grossman, supra note 2.
\item \textsuperscript{23} Lyle, 12 Cal. Rptr. 3d at 514.
\end{itemize}
was appropriate for the wrongful termination causes of action based on gender, race, and retaliation.\textsuperscript{24} It also agreed that there was insufficient evidence against NBC and Stevens to make a case for discrimination or harassment.\textsuperscript{25} However, the court concluded that triable issues of fact existed on Lyle’s racial and sexual harassment causes of action against Warner Brothers, BKC, Reich, Chase, and Malins.\textsuperscript{26} Finally, the attorney fees award to the defendants was reversed\textsuperscript{27} and the costs were ordered to be vacated and recalculated by the trial court based on the partial judgment reversal.\textsuperscript{28}

The Court of Appeals used sexual harassment precedent to explain its ruling.\textsuperscript{29} In Fisher v. San Pedro Peninsula Hospital, the California Appeals Court defined “sexual harassment” as employer or supervisor conduct that “sufficiently offends, humiliates, distresses or intrudes upon the victim so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being.”\textsuperscript{30} A reasonable trier of fact must also find that “the harassment complained of was sufficiently pervasive so as to alter the conditions of the employment and create an abusive working environment.”\textsuperscript{31}

Furthermore, sexual harassment is determined by evaluating the totality of the circumstances, which consists of weighing the following factors: “the nature of the unwelcome sexual acts, the frequency of the offensive encounters, the total number of days over which the offensive conduct occurs, and the context in which the sexually harassing conduct occurred.”\textsuperscript{32} Looking at the totality

\textsuperscript{24} Id.
\textsuperscript{25} Id. at n.1.
\textsuperscript{26} Id. This Article will focus on the sexual harassment claim.
\textsuperscript{27} Lyle, 12 Cal. Rptr. 3d at 514; Grossman, supra note 2.
\textsuperscript{28} Lyle, 12 Cal. Rptr. 3d at 514.
\textsuperscript{29} Id. at 514-20.
\textsuperscript{31} Lyle, 12 Cal. Rptr. 3d at 514; Fisher, 214 Cal. App. 3d at 608.
\textsuperscript{32} Lyle, 12 Cal. Rptr. 3d at 516; Fisher, 214 Cal. App. 3d at 610.
of circumstances, the court in *Lyle* determined that there was sufficient evidence to support the plaintiff’s sexual harassment claim. It found that the defendants’ acts were severe and pervasive, and that Lyle was forced to work in an atmosphere that was hostile and degrading to her gender. 33

The defendants did not deny making sexual comments and behaviors, 34 however they argue that their actions did not qualify as sexual harassment because their comments were not directed at Lyle. 35 In *Fisher*, the court held that the plaintiff does not have to be a “direct victim,” meaning that the harassment need not be directed at the victim personally. 36 In order to be considered a victim of sexual harassment, it is enough that the employee is continually exposed to offensive remarks. 37 While the defendants claim that they treated Lyle “just like one of the guys,” 38 the Court of Appeals found that they did not need to intentionally harass her or even realize that their conduct was offensive. 39

In sum, the court found that a reasonable jury, after hearing the evidence, could conclude that the atmosphere at *Friends* was an offensive or hostile work environment for a woman. 40 In reaching this ruling, the court noted other decisions finding that offensive, obscene, sexually explicit, and degrading dialogue and actions are pertinent in establishing environmental sexual harassment in the workplace. 41 The court concluded that a jury could find the

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33. *Lyle*, 12 Cal. Rptr. 3d at 514.
34. *Id.* at 517.
35. *Id.* at 514.
36. *Lyle*, 12 Cal. Rptr. 3d at 515; *Fisher*, 214 Cal. App. 3d at 610.
37. *Lyle*, 12 Cal. Rptr. 3d at 515; *Fisher*, 214 Cal. App. 3d at 610.
38. *Lyle*, 12 Cal. Rptr. 3d at 515.
39. Like Title VII, FEHA is not a fault based tort scheme. *Lyle*, 12 Cal. Rptr. 3d at 515; Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).
40. *Lyle*, 12 Cal. Rptr. 3d at 517; *Fisher*, 214 Cal. App. 3d at 609-10 (holding “when evaluating a sexual harassment claim, a reasonable employee is one of the same sex as the complainant”); *Ellison*, 924 F.2d at 878.
41. *Lyle*, 12 Cal. Rptr. 3d at 517-18; see *id.* at n.61 (citing as examples E.E.O.C. v. Farmer Bros. Co., 31 F.3d 891, 897 (9th Cir. 1992) [supervisor made “foul comments” about female employees including the size of their breasts]; Kotcher v. Rosa and Sullivan Appliance Ctr., 957 F.2d 59, 61 (2d Cir. 1992)).
defendants' sexual conduct to be severe because Lyle was a captive audience,\textsuperscript{42} as her job was to take notes on the writers' dialogue, jokes, and story lines.\textsuperscript{43}

The defendants argued that even if the crude and vulgar language they used could be considered sexual harassment in some contexts, it should not be considered harassment in this case because they were "only doing their job."\textsuperscript{44} The defendants posed a "creative necessity" defense against the sexual harassment claim due to the context of their workplace. They argued that creating storylines for an adult show with sexual themes entails blunt sexual dialogue among the writers.\textsuperscript{45} The court ruled that this creative necessity defense could be pursued at trial because of the unique circumstances or "context" of this case.\textsuperscript{46} However, summary adjudication based on this defense was unwarranted as "context" is only one factor that needs to be considered in the totality of circumstances.\textsuperscript{47} In determining whether this workplace was a sexually hostile environment or if the defendants' sexual conduct was necessary to perform their jobs, the jury must also consider the nature, frequency, and consistency of the sexual

\begin{footnotesize}
\textsuperscript{42} Lyle, 12 Cal. Rptr. 3d at 518; Robinson, 760 F. Supp. 1486, 1494 (M.D.Fla. 1991) ["extensive, pervasive posting of pictures depicting nude women, partially nude women [and] sexual conduct"]; Ways v. City of Lincoln, 871 F.2d 750, 753 (8th Cir. 1989) [a racial harassment case in which racially-offensive cartoons were posted on bulletin boards and racial jokes about blacks and American Indians were voiced in police officers’ locker room and other locations]).

\textsuperscript{43} Lyle, 12 Cal. Rptr. 3d at 518; Lipsett v. University of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988) [Playboy centerfolds in school dining hall and meeting rooms]; Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1494 (M.D.Fla. 1991) ["extensive, pervasive posting of pictures depicting nude women, partially nude women [and] sexual conduct"]; Ways v. City of Lincoln, 871 F.2d 750, 753 (8th Cir. 1989) [a racial harassment case in which racially-offensive cartoons were posted on bulletin boards and racial jokes about blacks and American Indians were voiced in police officers’ locker room and other locations]).

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 518; Grossman, \textit{supra} note 2; McKee, \textit{supra} note 1.

\textsuperscript{46} Id. at 518; Grossman, \textit{supra} note 2; McKee, \textit{supra} note 1.

\textsuperscript{47} Lyle, 12 Cal. Rptr. 3d at 518.
\end{footnotesize}
This Article will argue that the California Court of Appeals correctly used precedent to allow the case to stand because the acts in the complaint are enough to be considered sexual harassment. Context plays a role in justifying the sexual conduct; however, a jury needs to decide if the context outweighs the other factors in the totality of the circumstances. The next section will discuss necessity as a defense in previous cases, followed by an analysis of the "creative necessity" defense in this case.

III. ANALYSIS OF THE "CREATIVE NECESSITY" EXCUSE

While the "creative necessity" excuse that will be used in the Friends case is a unique type of necessity defense, such defenses have been used in many other contexts. Necessity has been a defense used in many context-specific cases, including medical marijuana, euthanasia, homelessness, breach of confidentiality, civil disobedience, and business. While

48. Id. at 518-19; Fisher, 214 Cal. App. 3d at 610.
49. Lyle, 12 Cal. Rptr. 3d at 512, 518.
certain behaviors are illegal, courts can make exceptions if they conclude that the context surrounding the defendant’s actions made the behavior necessary.

A. Medical Necessity Cases

Medical necessity is a well-accepted defense in both medical marijuana and euthanasia cases. Courts have allowed the use of medical marijuana when no alternative treatment is available for the suffering defendant. Medical necessity in euthanasia cases is also accepted when a terminally ill patient suffering from chronic pain has no alternative treatment options. Nearly every physician on trial for assisting suicide has been acquitted, demonstrating that jury’s accept the necessity of assisted suicide when the physician reasonably believes that it is a lesser evil than the patient’s suffering.

B. Necessity for Homelessness Offenses

Courts have also approved a necessity defense for camping and storing possessions in public places. While such acts are usually


56. Carter, supra note 50, at 701-02; Jenks, 582 So. 2d at 678, 680; Diana, 604 P.2d at 1317.

57. Carter, supra note 50, at 722-23; Campbell, 18 F.3d at 702.

58. Carter, supra note 50, at 701-02; Jenks, 582 So. 2d at 678, 680; Diana, 604 P.2d at 1317.

59. Carter, supra note 50, at 723; Campbell, 18 F.3d at 702.

60. Carter, supra note 50, at 722; Grover, supra note 55, at 294-01.

61. Fasanelli, supra note 52, at 323; Tobe, 892 P.2d at 1145; In re Eichorn,
illegal, homeless people can avoid conviction by demonstrating the involuntary necessity of sleeping in the public place.\textsuperscript{62} The lack of town resources to provide shelters for the homeless promotes the use of this necessity defense in the courtroom,\textsuperscript{63} which calls for weighing the "lesser evil."\textsuperscript{64} In \textit{In re Eichorn}, the court ruled that the lesser evil may be "unlawful camping" when the "significant evil" is sleep deprivation.\textsuperscript{65}

\textit{C. Necessity for Breach of Confidentiality}

This idea of weighing evils is also present in breach of confidentiality cases, specifically where doctors tell an at-risk third party that a sexual partner has AIDS.\textsuperscript{66} In \textit{Commonwealth v. Leno}, the court defined the elements for the necessity defense as:

- (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative;
- (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger;
- (3) there is no legal alternative which will be effective in abating the danger; and
- (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{62} Fasanelli, \textit{supra} note 52, at 335; \textit{Tobe}, 892 P.2d at 1155; \textit{In re Eichorn}, 81 Cal. Rptr. 2d at 535.
\item \textsuperscript{63} Fasanelli, \textit{supra} note 52, at 346; \textit{In re Eichorn}, 81 Cal. Rptr. 2d at 538.
\item \textsuperscript{64} Fasanelli, \textit{supra} note 52, at 346; \textit{In re Eichorn}, 81 Cal. Rptr. 2d at 540, n.4.
\item \textsuperscript{65} Fasanelli, \textit{supra} note 52, at 346; \textit{In re Eichorn}, 81 Cal. Rptr. 2d at 539.
\item \textsuperscript{66} Friedland, \textit{supra} note 53, at 3.
\item \textsuperscript{67} Id. at 16; Commonwealth v. Leno, 415 Mass. 835, 839 (Mass. 1993).
\end{itemize}
D. Necessity for Civil Disobedience

The necessity defense for civil disobedience has not been as successful as the other necessity defenses described above.\textsuperscript{68} Due to vague and poorly-developed law in this area, judges frequently determine before the trial that the necessity defense for protestors cannot be presented as evidence.\textsuperscript{69} Therefore, juries are often left to determine if the defendant's actions technically violated the law without having the ability to weigh if the actions were just.\textsuperscript{70}

E. Business Necessity

The \textit{Friends} writers assert a different type of necessity defense which the California Court of Appeals compared to that of "business necessity." The defendants claim that sexual jokes and dialogue had a "compelling business purpose" in creating story lines for a show with adult humor and sexual innuendos.\textsuperscript{71} The more general business necessity defense has been accepted in disparate impact cases due to the FEHA regulations stating:

\begin{quote}
[w]here an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect) the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve.\textsuperscript{72}
\end{quote}

The business necessity defense was first acknowledged in \textit{Griggs v. Duke Power Co.}, a case dealing with segregation in

\begin{itemize}
\item \textsuperscript{68} Quigley, \textit{supra} note 54, at 3.
\item \textsuperscript{69} \textit{Id}.
\item \textsuperscript{70} \textit{Id}.
\item \textsuperscript{71} \textit{Lyle}, 12 Cal. Rptr. 3d at 520.
\item \textsuperscript{72} \textit{Id} at n.71; 2 CAL. ADMIN. CODE § 7286.7(b) (2005).
\end{itemize}
hiring.\textsuperscript{73} The Supreme Court ruled that such practices need to be justified on the grounds of business necessity and job relatedness.\textsuperscript{74} Later cases proceeded with a strict and narrow interpretation of business necessity,\textsuperscript{75} asserting that the business practice must be "necessary to safe and efficient job performance."\textsuperscript{76} The Supreme Court then lowered the standard for raising the defense in \textit{Wards Cove Packing Co. v. Atonio},\textsuperscript{77} stating that "there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster."\textsuperscript{78} However, Congress restored the original strict standard in the Civil Rights Act of 1991.\textsuperscript{79}

In addition to the business necessity defense for disparate impact cases, the \textit{bona fide} occupational qualification ("BFOQ") defense has also been used against disparate treatment.\textsuperscript{80} In \textit{UAW v. Johnson Controls, Inc.}, the district court granted summary judgment in favor of the defendants who were being sued for their fetal protection policy.\textsuperscript{81} The Seventh Circuit reviewed this decision and found that the policy was "based upon real physical differences between men and women relating to childbearing capacity and [was] consistent with Title VII."\textsuperscript{82} While defendants in the \textit{Friends} case are being sued under the FEHA,\textsuperscript{83} Title VII is very similar,\textsuperscript{84} and the business necessity defense of BFOQ has been successful under Title VII.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{73} Griggs, 401 U.S. at 424; Grover, \textit{supra} note 55, at 389.
\item \textsuperscript{74} Griggs, 401 U.S. at 431; Grover, \textit{supra} note 55, at 389.
\item \textsuperscript{75} \textit{Albemarle Paper Co.}, 422 U.S. at 405; \textit{Dothard}, 433 U.S. at 321.
\item \textsuperscript{76} \textit{Dothard}, 433 U.S. at 331 n.14.
\item \textsuperscript{77} Grover, \textit{supra} note 55, at 391.
\item \textsuperscript{78} \textit{Id.}; \textit{Wards Cove Packing Co.}, 490 U.S. at 659.
\item \textsuperscript{80} Fielding, \textit{supra} note 55, at 137; Ervin, \textit{supra} note 55, at 241; \textit{UAW}, 110 S. Ct. at 871.
\item \textsuperscript{81} \textit{UAW}, 494 U.S. 1055; Ervin, \textit{supra} note 55, at 242.
\item \textsuperscript{82} \textit{UAW}, 494 U.S. 1055; Ervin, \textit{supra} note 55, at 247.
\item \textsuperscript{83} Lyle, 12 Cal. Rptr. 3d at 511; Grossman, \textit{supra} note 2; McKee, \textit{supra} note 1.
\item \textsuperscript{84} Lyle, 12 Cal. Rptr. 3d at 515.
\item \textsuperscript{85} \textit{UAW}, 110 S. Ct. at 890; Ervin, \textit{supra} nnote 55 at 247.
\end{itemize}
The Court of Appeals in the *Friends* case held that the creative necessity defense parallels the already accepted business necessity defense. Similar to the claim in the current case, defendants using the business necessity defense must prove that:

- the business purpose is sufficiently compelling to override any racial impact;
- the challenged practice must effectively carry out the business purpose it is alleged to serve; and
- there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

The Court of Appeals further ruled that the creative necessity excuse is to be weighed by the jury in addition to the other criteria (e.g., nature, frequency, and consistency of the sexual conduct) set forth in *Fisher*. Therefore, the *Friends* writers will have to convince the jury that their behaviors were truly necessary to fulfill their jobs. Ultimately, the writers must prove that, even though their behaviors would be considered sexual harassment in most situations, they should not be considered so in this particular context. The outcome of the case will be determined by jurors, who will accept or reject the concept of context (and also whether the behaviors still exceeded the acceptable boundaries for that context). The next section outlines the history and meaning of "context" in sexual harassment suits.

### IV. HISTORY OF CONTEXT

The defendants claim that the context of their workplace justifies their sexual behavior. This type of workplace “context” claim for environmental sexual harassment is notably mentioned in

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86. *Lyle*, 12 Cal. Rptr. 3d at 520.
88. *Id.* at 516; *Fisher*, 214 Cal. App. 3d at 609-10.
89. *Lyle*, 12 Cal. Rptr. 3d at 520.
90. *Id.* at 521.
91. *Id.* at 518; Grossman, *supra* note 2.
Oncale v. Sundowner Offshore Services, Inc. 92 In that case, the Supreme Court ruled that social context plays a part in determining whether a hostile work environment exists. 93 Justice Scalia gave an example of such a social context by explaining that it is considered appropriate behavior for a coach to slap his football player’s posterior, but inappropriate to slap his secretary’s. 94 The Court did not, however, define “social context,” leaving many courts to continue struggling over what this term means and how it should be applied. 95

A. The Strict Approach

Before the Supreme Court heard Oncale, 96 both the Sixth 97 and Tenth Circuits 98 applied a strict standard for proving sexual harassment in cases where defendants sought to justify offensive behaviors because of context. 99 In Rabidue v. Osceola Refining Co., 100 the Sixth Circuit affirmed the district court’s decision to enter judgment for the defendant 101 because of the blue-collar work environment. 102 In that case, the plaintiff’s co-worker made vulgar

93. Lyle, 12 Cal. Rptr. 3d at 519; Grossman, supra note 2; Frank, supra note 92, at 437; Null, supra note 92, at 262.
94. Grossman, supra note 2; Frank, supra note 92, at 451; Null, supra note 92, at 263.
95. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); Grossman, supra note 2; Frank, supra note 92, at 437; Null, supra note 92, at 263.
96. Oncale, 523 U.S. at 75.
100. Rabidue I, 805 F.2d at 611.
101. Id.
102. Id.; Grossman, supra note 2.
comments about women in general, and sometimes directed the comments to the plaintiff.\(^{103}\) In addition, the plaintiff and other female workers were exposed to pictures of naked or sparsely dressed women in their co-workers' offices.\(^{104}\) The Sixth Circuit concluded that the trier of fact "must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances."\(^{105}\) By denying certiorari, the court upheld the Michigan federal district court decision\(^{106}\) that stated, "[i]n fact, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—[n]or can—change this."\(^{107}\) Title VII was not "designed to bring about a magical transformation in the social mores of American workers."\(^{108}\)

Using the court's blue-collar environment reasoning in *Rabidue* as precedent,\(^{109}\) the Tenth Circuit ruled in *Gross v. Burgraff Constr. Co.* that "[i]n the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior."\(^{110}\) In this case, Gross admitted that she and her female co-workers used profanity on the construction site about as much as the males. The court used this evidence to demonstrate that blue-collar environments tolerate offensive speech that may be considered unacceptable in other workplaces.\(^{111}\) The court admitted that Gross's supervisor was hostile towards women when he said, "Mark, sometimes don't you just want to smash a woman in the face?"\(^{112}\) However, the Tenth Circuit used Supreme Court

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103. *Rabidue I*, 805 F.2d at 615.
104. *Id.*
105. *Id.* at 620.
107. *Id.* at 430; *Rabidue I*, 805 F.2d at 620-21; Grossman, *supra* note 2.
110. *Gross*, 53 F.3d at 1537.
111. *Id.* at 1538.
112. *Id.* at 1547.
precedent\textsuperscript{113} in holding that only one statement\textsuperscript{114} that "engenders offensive feelings in an employee\textsuperscript{115} would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII."\textsuperscript{116} Critics of this opinion believe that allowing such environments to remain hostile to women defeats the purpose of anti-discrimination laws, which intend to welcome men and women equally into workplaces.\textsuperscript{117}

\section*{B. Shift to a Moderate Approach}

One year after \textit{Rabidue}, the Sixth Circuit adopted the dissent’s reasoning in favor of viewing sexual harassment from the victim’s perspective.\textsuperscript{118} As an acknowledgment that she is a member of a protected class, the “reasonable woman” became the standard in cases with a female plaintiff.\textsuperscript{119} The Sixth Circuit continued to denounce \textit{Rabidue} in its discussion of Title VII and the “magical transformation” of workers’ mores.\textsuperscript{120} The court accepted that Title VII was not meant to suddenly remove all discrimination, but rather to “prevent bigots from harassing their co-workers."\textsuperscript{121} These cases overturned pieces of \textit{Rabidue} for the Sixth Circuit, and other Circuits followed suit.

The Ninth Circuit disagreed with \textit{Rabidue}, ruling that it is the harasser’s behavior, and not the change in work conditions, that needs to be severe and pervasive.\textsuperscript{122} Furthermore, the court held

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\textsuperscript{114} Gross, 53 F.3d at 1547.
\textsuperscript{115} Meritor, 477 U.S. at 60 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (CA5 1971)).
\textsuperscript{116} Gross, 53 F.3d at 1547 (quoting Meritor, 477 U.S. at 60).
\textsuperscript{117} Grossman, \textit{supra} note 2.
\textsuperscript{119} Yates, 819 F.2d at 637; Radtke, 471 N.W.2d at 664.
\textsuperscript{121} Id.
\textsuperscript{122} Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).
\end{small}
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that the victim's psychological well-being need not reach the point of anxiety and affliction to be considered sexual harassment.\textsuperscript{123} The Third Circuit also criticized \textit{Rabidue}\textsuperscript{124} and instead adhered to Fifth Circuit precedent.\textsuperscript{125} The court ruled that pornography and obscene dialogue could be considered "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse."\textsuperscript{126}

In addition to rejecting \textit{Rabidue}, the Sixth Circuit also disagreed with the Tenth Circuit's ruling in \textit{Gross}\textsuperscript{127} that held that different work environments have different standards for sexual harassment.\textsuperscript{128} In \textit{Williams v. General Motors Corp.}, the court held that women do not give up their rights to be free from sexual harassment because they decide to work in male-dominated fields.\textsuperscript{129} The court found the \textit{Gross} opinion:

illogical, because it 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 a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse."\textsuperscript{130}

If no single incident meets the Title VII standard, a work environment\textsuperscript{131} as a whole may still be eligible for a hostile environment claim. The court must decide if the plaintiff was

\begin{itemize}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990).
\item \textsuperscript{125} Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988).
\item \textsuperscript{126} Andrews, 895 F.2d at 1485-86 (quoting Bennett, 845 F.2d at 106).
\item \textsuperscript{127} Null, supra note 92, at 264.
\item \textsuperscript{128} Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999).
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\end{itemize}
“subjected to more than ‘genuine but innocuous differences in the ways men and women routinely interact.”[132] Furthermore, the court found that women should not be held to have “assumed the risk”[133] when working in a hostile environment.[134]

C. “Social Context” Related to the Creative Necessity Argument

The defendants in the Friends case claim that Lyle’s job as writers’ assistant included recording the writers’ sexual dialogue while developing storylines.[135] The Appeals Court in this case pointed to[136] Clark County Sch. Dist. v. Breeden,[137] where the Supreme Court analyzed the plaintiff’s nature of work.[138] Breeden was reviewing psychological evaluations with a fellow male employee and her male supervisor as part of a job applicant screening process.[139] Reading aloud from a report, the supervisor repeated a statement that one applicant made to a coworker:[140] “I hear making love to you is like making love to the Grand Canyon.”[141] The supervisor commented to Breeden, “I don’t know what that means.”[142] The other employee stated, “I’ll tell you later” and then both males laughed.[143] The court found that “[t]he ordinary terms and conditions of respondent’s job required her to review the sexually-explicit statement in the course of screening job applicants.”[144] Similarly, the writers of Friends claim that the nature of their work requires them to be sexually explicit in their dialogues and Lyle’s job, due to the terms and conditions of her

132. Id. (quoting Oncale, 523 U.S. at 81).
133. Id.
134. Williams, 187 F. 3d at 564.
135. Lyle, 12 Cal. Rptr. 3d at 518; Grossman, supra note 2.
136. Lyle, 12 Cal. Rptr. 3d at 519.
138. Id.; Lyle, 12 Cal. Rptr. 3d at 519.
139. Clark County, 532 U.S at 269.
140. Id.
141. Id.
142. Id.
143. Id.
144. Id. at 271.
employment, called for her to be present. The "social context" also plays a role when using a motivational analysis of hostile work environment claims. In Temple v. Auto Banc of Kansas, Inc., a car dealership held a beach party-themed sales event with two female models in thong bikinis who were hired to sit in the hot tub. Temple first complained to her supervisor when she saw the models, and then later protested again when one of the models left the hot tub to talk to her customer. The manager allowed Temple to leave for the day and promised that her job was not at risk. But, a few weeks later, Temple’s supervisor fired her for lack of sales. Temple filed a lawsuit, claiming that her employers had created a hostile work environment and fired her in retaliation for protesting the bikini models. The court found that “the circumstances surrounding the sales event had nothing at all to do with the plaintiff or her sex...[t]he defendant would have been as likely to have a ‘beach party’ sales event regardless of whether plaintiff or any other female salespersons were present in the workplace.” Using this reasoning, Friends writers could assert that their sexually explicit behaviors were completely unrelated to the plaintiff and her gender, and they always acted the same regardless of whether Lyle or other female workers were present in the office. The precedent of Temple suggests that such an approach could be successful.

D. Context: Acceptable and Necessary Behaviors

The cases presented above question if context allows workplace

145. Lyle, 12 Cal. Rptr. 3d at 520.
146. Frank, supra note 92, at 437.
148. Id. at 1126.
149. Id. at 1126-27.
150. Id.
151. Id.
152. Id. at 1128.
153. Temple, 76 F. Supp. 2d at 1130.
behaviors to be considered acceptable due to the nature of the employment. However, the defendants in the present case take this argument one step further by asserting that their behaviors were not only acceptable, but also necessary.154 Pending approval from the court of Appeals, the defendants will raise this "creative necessity" excuse at trial. The jury will consider the context of the workplace as one factor when weighing the totality of the circumstances. The next section of this Article presents evidence that jurors are likely to hear in this case. This evidence is crucial in determining if the defendants’ behaviors constituted sexual harassment, or if they were merely behaviors borne out of "creative necessity." If the jurors decide that the writers’ behaviors were not necessary in performing their jobs, then the Friends writers’ room likely will be deemed a hostile environment. Additionally, if jurors find that some sexual behaviors are a necessary part of the defendants’ jobs, they may still decide that the defendants’ behavior exceeded what was necessary.

V. TRIAL EVIDENCE

As the jury will be deciding whether the context of the work environment justified the writers’ behaviors, this Article will now look at the evidence that will be presented at trial. The plaintiff will allege that the behaviors at issue rise to the level of sexual harassment. The defense will introduce evidence of the show’s sexual nature and detail the storylines created from the writers’ sexually-explicit conversations. By presenting this evidence, the defendants will attempt to convince jurors that "context" is an excuse for otherwise inappropriate behavior.

A. The Plaintiff’s Allegations of Sexual Harassment

The plaintiff, Armani Lyle, will argue that the writers’ room was filled with sexual behaviors that were unjustified, even under

Malins constantly referred to oral sex experiences he had had and his sexual fantasies involving female actors on the show. He told the group when he and his wife fought he would get naked and they would never finish the argument. Malins had a ‘coloring book’ depicting female cheerleaders with their legs spread apart. He would sit in the writers’ meetings drawing breasts and vaginas on the cheerleaders and leave the book open on his desk and sometimes place it on other writers’ desks. Malins frequently used a pencil to alter portions of the name ‘Friends’ on scripts so it would read ‘penis.’ A constant banter went on between Malins and Chase about how Chase could have ‘fucked’ one of the female actors but missed his chance. Malins and Chase also frequently made references to the supposed infertility of another female actor on the show and joked about her having ‘dried branches in her vagina’ and a ‘dried up pussy.’ They would also speculate about sex between this actor and her boyfriend. Malins frequently brought up his fantasy about an episode of the show in which one of the male characters enters the bathroom while a female character is showering and rapes her.158

156. Lyle, 12 Cal. Rptr. 3d at 516-17.
157. Id.
158. Id. at 516.
Reich frequently commented on his encounters with oral sex and how he wanted ‘someone who could give him a good blow job.’ He regularly used the word ‘schlong’ which Lyle knew was a Yiddish word for penis. He would talk about ‘schlonging this and schlonging that.’ When Reich and the other writers were working on a script for a New Year’s episode Reich kept referring to ‘schlonging in the New Year’ and using ‘schlong’ in every other sentence. Reich would also pretend to masturbate while walking around the writers’ room and while sitting at his desk. While walking around Reich would hold his hand as if gripping his penis and gesture with it as if masturbating. While sitting at his desk he ‘would make little sounds’ and then ‘react as though he was pleasuring himself.’

Chase regularly discussed with other writers his preferences in women—their hair color and bra cup size—and his preferences when having sex—getting right to intercourse and not ‘messing around with too much foreplay.’

Such testimony is expected to be presented to jurors.

B. Testimony from Defendants

In their depositions, the defendants acknowledged their sexual behaviors in the workplace. The following passage reviews this
testimony as summarized by the Court of Appeals:162

Reich admitted at his deposition he had pantomimed masturbation in the writers' room during the time Lyle was employed on Friends. He also agreed he and other writers discussed sexual conduct and foreplay in the writers' room and break room. Reich also acknowledged he and others altered inspirational sayings on a calendar in the writers' room so that, for example, the word 'persistence' became 'pert tits' and 'happiness' became 'penis.'163

In his deposition, Malins admitted that he and other writers told "blowjob stories" in the writers' room. Chase testified that he had talked about his personal sexual experiences in the writers' room and that other writers had discussed their experiences with anal sex. Chase also admitted that he gestured as if he were masturbating on occasion. He could not recall ever doing so when Lyle was present.164

Although the defendants are likely to admit to these behaviors at trial, they will also present a "creative necessity" excuse for the behaviors.

C. The Defense's Case

1. Friends' Sexual Nature

In order to demonstrate that the sexually-explicit behaviors are part of "creative necessity," the defendants must first establish that Friends is a sexually-explicit show that would demand that type of creativity. Thus, defendants will establish that the episodes of Friends contain many sexual themes and comments. One common

162. Lyle, 12 Cal. Rptr. 3d at 517.
163. Id.
164. Id.
theme throughout the show’s running is homosexuality, which is demonstrated predominantly through three frequent plot lines, but also arises in isolated incidents. The show also contains other examples that counter sexual norms, including cross-dressing and incest. In addition, the show has many allusions to one-night stands and casual sex, as well as ménages à trois.

165. Ross’s ex-wife is a lesbian and raising his child with another woman; People suspect Chandler is gay in several episodes; Chandler’s dad is a cross-dressing homosexual.

166. Monica and Rachel kiss to win a bet; Phoebe fantasizes about Ross’s female cousin; Joey begs all the guys to kiss him to help him practice for an acting part and Ross finally kisses him; Joey and Chandler kiss on New Years; Joey tells a story about dating a “woman with a really big Adam’s apple;” Rachel recalls a night during college when she kissed a female friend and then she kisses her again in the episode to help “remind” the friend of the incident. The friend then makes a pass at Rachel, thinking she is a lesbian. Phoebe then kisses Rachel to “see what all the fuss is about;” Phoebe married a gay friend who needed a Green Card and she is still in love with him when he shows up in her life again; Chandler’s boss keeps patting him on the butt.

167. Chandler and Monica travel to Las Vegas to meet Chandler’s dad, who is a cross-dressing entertainer; Phoebe and her boyfriend trade underwear; Joey tries on women’s underwear and panty hose; Chandler complies with his date’s request to wear her thong.

168. Ross becomes attracted to his cousin; Ross discovers that he kissed his sister Monica in college thinking it was Rachel, and Monica then realizes that her brother was her first kiss; Rachel dates a man who is inappropriately close with his sister, particularly when they plan to take a bath together.

169. There are many references to Joey having casual sex and sometimes not remembering the woman later; Chandler can’t remember which of Joey’s sisters he made out with; Phoebe goes to complain to the upstairs neighbor about being loud but ends up having sex with him; Monica and Richard decide to be “Friends that have sex;” Rachel has a sexual relationship with Paolo, who doesn’t speak English, and then, after they break up, has a one night stand with him; Ross and Rachel discuss a “bonus night” of having sex with no strings attached and on a later episode they have a one-night stand.

170. Chandler and Joey discuss “ground rules” for having a threesome with a girl they just met (although she ends up sleeping with Ross instead); Jean-Claude Van Damme agrees to date Monica because Rachel tells him that Monica is dying to have a threesome with him and Drew Barrymore; Joey tells a story about seeing an ex-girlfriend with her new boyfriend, and he ended up having sex with the couple all afternoon; Rachel shares a dream she had about
Many episodes involve references to private body parts and inappropriate sexual behavior. There is also a continuous theme of voyeurism and sex among characters on the show. Additionally, *Friends* contains references to sexual fantasies, masturbation, and impotence. These examples demonstrate the

having sex with Chandler and Joey.

171. Monica helps Joey to make a fake foreskin so he will appear that he’s not circumcised to get a part in a movie; Joey takes a part as “Al Pacino’s butt double,” but has trouble with a shower scene because he tries to “act” too much with his butt; Phoebe does a “guy impression” and then proclaims “I’m ready for my penis now;” Phoebe dates a guy who wears loose shorts so everyone can see his genitals when he sits down; Monica draws a picture of a woman and numbers a woman’s “erogenous” zones, then emphatically describes to Chandler the number sequence she prefers and fakes an orgasm to make her point.

172. Chandler goes to Joey’s tailor and finds that the tailor fondles his clients while measuring them for suits. Joey is shocked to find out that is not the appropriate way to measure someone for a suit; Chandler’s boss keeps patting him on the butt; Monica applies for a job as a chef and the boss asks her to describe how she makes a salad in a sexual way.

173. The main characters often spy on the “ugly naked guy” that lives in the neighboring building.

174. The following main characters have engaged in explicit sexual activities with each other on the show: Rachel and Ross; Monica and Chandler. In addition, the following main characters have kissed each other on the show: Rachel and Joey; Phoebe and Joey; Chandler kisses Phoebe and Rachel after mistakenly kissing Monica in front of them when the two were secretly dating. These sexual interactions occur among the six main characters, except Monica and Ross who are brother and sister, and all the characters often have sex with temporary characters also.

175. Ross and Chandler discuss the common male sexual fantasy of having sex with Princess Leia and Rachel dresses the part to arouse Ross; the main characters discuss which celebrities they would like to have sex with; Rachel dresses up in her high school cheerleader uniform to get a man’s attention.

176. Joey says Chandler’s new bracelet will affect his sex life and Chandler replies, “It will slow me down at first, but I’ll adjust”; Monica catches Chandler masturbating to what she thinks is “shark porn.”

177. Chandler fears the consequences when he cannot become sexually aroused when in bed with Monica; Rachel fights with Ross and says, “Just so you know, it’s not that common, it doesn’t happen to every guy, and it is a big deal!” Chandler replies, “I knew it!”
prevalence of sexual themes and story lines in the show. This evidence forms the basis of the “creative necessity” excuse.

2. “Creative Necessity”

The defense will likely rebut the evidence that Lyle presents as evidence of sexual harassment by explaining that this dialogue was necessary to develop plots for the show. For example, writers will claim that sharing sexual fantasies lead to plot development. Specifically, the writers’ discussions about their sexual fantasies led to the creation of a storyline about the character Rachel dressing up as Princess Leia to fulfill Ross’s sexual fantasy.178 Similarly, Malins’s “coloring book” of cheerleaders with their legs spread open179 ultimately led to a scene where Rachel dresses up as a cheerleader to attract a man.

In addition, the writers will likely claim that sharing personal sex stories helped develop plots. For example, one of the writers related that his tailor fondled him while measuring his pants’ inseam. This generated a storyline in which the character Joey refers Chandler to his tailor, and then finds out that the tailor fondles his male clients.180 Another instance involved a writer telling a story about a person in a wig performing oral sex on him. The writer thought the person was a woman, but he later found out the person was a man.181 This story led to a reference in the show of Chandler kissing a man in a dark bar, thinking it was a woman.182

In sum, the defense will attempt to convince the jury that the writers’ behaviors are helpful in performing their jobs. Writers detail their personal exploits as a way of brainstorming what the characters might do. They list their fantasies of the actresses

178. In episode 49, “The One With The Princess Leia Fantasy,” Ross and Rachel discuss their sexual fantasies. Rachel’s fantasy is a man dressed up in uniform and Ross’s fantasy is a woman dressed as Princess Leia in a gold bikini.
179. Lyle, 12 Cal. Rptr. 3d at 516.
180. Id. at 521.
181. Id.
182. Id.
because it gives them ideas of what characters would do, or what viewers would be interested in seeing them do. The writers share fantasies because viewers might have those fantasies too and would be interested in seeing them acted out. Whether jurors accept this creative necessity excuse is yet to be seen. The next section presents psychological research on influences in decision-making. Such research can provide insight into how jurors will come to a verdict.

VI. PSYCHOLOGICAL AND PERSONAL INFLUENCES ON THE VERDICT DECISION

The essential question is how the jurors will perceive the "creative necessity" defense. Although human behavior is always difficult to predict, psychological theory and research can shed some light on the factors that are likely to affect jurors’ verdicts. Prior research\(^ {183}\) has shown that in the presence of both general and sexual harassment biases, the jury’s verdict will not be completely based on courtroom evidence, even though it is intended to be that way.\(^ {184}\)

This section will discuss psychological theories that are likely to bias jurors’ decision making. Such concepts include four inter-related theories: a common sense notion of the “assumption of the risk” principle, the “Belief in a Just World” theory, the tendency to blame the victim, and hindsight bias. This section also presents a theory of how jurors make decisions based on the “stories” that the attorneys present through arguments and evidence, as well as how


\(^{184}\) Devine, et al., supra note 183, at 622.
the jurors' gender and political ideologies affect the verdict. These psychological phenomena can bias jurors' personal beliefs and impact the verdict. This section will inform all of those involved in the case, including attorneys, parties, and judges, of the ways in which these biases can affect the verdict.

A. Psychological Factors that Bias Jurors' Decisions

1. Common Sense Notion of Assumption of the Risk Principle

Jurors often rely on their notions of common sense when making judicial determinations. Because many sexual references appear in the show *Friends*, jurors in this case are likely to adopt a "common sense notion of assumption of the risk" principle when determining if the defendants' behaviors were justifiable. Specifically, jurors may believe that Lyle assumed the risk of being exposed to sexual dialogue because she accepted a job working for a television show containing a great deal of sexual content. Common sense suggests that brainstorming among *Friends*' writers would include sexual dialogue, jokes, drawings, and gestures as sexual innuendos are abundant in the show. Such jurors will likely hold the opinion that any person working for a sexually-oriented television show should expect to discuss sex in some form and essentially be engulfed in it, just as a dentist's assistant would expect to discuss and be surrounded with discussions about teeth. In short, unsympathetic jurors may be influenced by their feelings that Lyle "assumed the risk" of observing sexual jokes, gestures, and drawings. In *Williams v.*

General Motor Corp., the court recognized the potential for blaming a victim under the assumption of the risk principle and opined that women should not be held to assume such a risk in hostile environment cases. Such thoughts may slip into jurors' thoughts, however, either intentionally or unintentionally.

2. Belief in a Just World Theory

The Belief in a Just World Theory states that people believe that the world is just or fair. If something happens that causes the belief not to hold true (e.g., an innocent person being victimized for no reason), then one becomes uncomfortable because of a fear that something similar could happen to her. Therefore, she will mutate her thoughts and beliefs to make the world a just place (i.e., people get what they deserve). This happens because people do not want to think that bad things could happen to them when they do not deserve it.

The Theory also states that when a victim is innocent, it is common for the jury to find fault in the victim's character. Derogating the victim preserves the idea that the world is just by making it appear that the victim deserved what happened because of his unfavorable character. Even when innocence exists, a juror may find it difficult to change her view that the world is just.

If the jury adheres to this theory, they may find in favor of the defendants because of a belief that Lyle deserved what happened to her. In continuing with their belief system, the jury will be

188. Williams, 187 F.3d at 564.
189. See generally, Isabel Correia, Jorge Vala, & Patricia Aguiar, The Effects of Belief in a Just World and Victim's Innocence on Secondary Victimization, Judgments or Justice and Deservingness, 14 SOC. JUST. RES. 327, 327 (2002).
190. Id.
191. Id.
192. Id.
193. Id.
194. Id.
satisfied that she has been punished for prior wrongdoings which justified the actions taken against her.196

3. Blame the Victim

In addition to the Belief in a Just World Theory, the desire to blame the victim also stems from common rape myths.197 Rape Myth Acceptance (RMA) is a culturally-based set of stereotypes and beliefs that describe what may happen to women if they allow themselves to be in certain places or with certain people.198 RMA is an extension of the aforementioned theories: the common sense notion of the assumption of the risk principle in combination with Belief in a Just World Theory. If a female allows herself to “bring about an incident of sexual harassment,”199 then she should not receive sympathy because she was in control of her situation and allowed herself to be victimized.200

In Lyle’s situation, the jury could think that working in a sexual environment involves sexual dialogue and jokes off screen as well as on. Therefore, Lyle would be to blame even if she were the victim because she allowed herself to be in that type of environment.

4. Hindsight Bias / Knew-it-All-Along Effect

Hindsight bias is essentially an overestimation of the probability of a certain outcome, caused by foreknowledge of the event’s occurrence.201 This bias is also known as the “knew-it-all-along”

196. Id.
197. Ishiguru Itaru, Contextual Effects of Personal Network on Individuals’ Tendency to Blame the Victims of Sexual Harassment, 6 ASIAN J. OF SOC. PSYCHOL. 201 (2003).
198. Id. at 202.
200. Itaru, supra note 197, at 201.
effect because people feel that the outcome was so obvious that they "knew all along" that it was certain to happen.\textsuperscript{202}

Lyle’s jury is likely to experience hindsight bias because they know the outcome (i.e., her experiencing sexual humor) of Lyle accepting a job as a writers’ assistant for the \textit{Friends} show. Therefore, they are likely to believe that the outcome was obvious and one that Lyle should have been able to foresee and prevent. The jurors are supposed to decide if the defendants are liable for what happened to Lyle, but the prior knowledge of the outcome may influence their verdict.\textsuperscript{203}

5. \textit{Creating a Story}

When reaching a verdict, jury members construct their own individual story from evidence and arguments presented in court.\textsuperscript{204} These stories are often shaped by a juror’s preconceptions based on her demographic characteristics, attitudes, and personality traits.\textsuperscript{205} The juror will then use this story to aid in reaching a decision on the verdict.\textsuperscript{206}

Essentially, attorneys can create a story and continually present it in every aspect of the trial so as to influence the story-creating process.\textsuperscript{207} For an attorney to construct a narrative that will be


\textsuperscript{203} See generally id.


\textsuperscript{206} See generally Huntley \& Costanzo, \textit{supra} note 183; see also \textit{Explaining the Evidence, supra} note 204, at 190.

\textsuperscript{207} See generally Stallard \& Worthington, \textit{supra} note 201.
persuasive, he needs to make sure that he keeps the events and evidence in the order that he wants the jury to remember them. The story that a juror adopts will affect her decision, suggesting that the attorney with the best constructed and coherent story will prevail.

Later, when presented with the verdict options, the jurors will choose the verdict that best encompasses their individually-constructed stories. However, if one’s story does not fit with any of the verdicts, the juror will likely default to a “not guilty” verdict. Occasionally a juror will construct more than one story and rely on the one that that “best fits” a verdict.

A possible source of bias exists when a verdict is based on fitting a constructed story. If jurors construct a story in which Lyle is simply a person going about her business when she was unexpectedly victimized, then they are likely to take her side to protect her and will find the defendants liable. However, if the defense counsel presents a strong enough argument that Lyle should have known what to expect when she accepted the job, then jurors may believe this story and take the defendants’ side. In this case, the jury will construct an account favoring the defendants or will use the story constructed by the defense counsel, resulting in a not liable verdict. Research has applied the story model specifically to sexual harassment cases and found that different verdicts do indeed result when jurors support different stories.

B. The Influence of Individual Juror Characteristics on the Verdict

In addition to the aforementioned theories, jury members tend to

208. See generally Practical Implications, supra note 204.
209. See generally Stallard & Worthington, supra note 201.
210. See generally, Huntley & Costanzo, supra note 183.
211. Practical Implications, supra note 204, at 94-95.
212. Id. at 95.
213. Id. at 94.
214. Id. at 94.
use personal experiences and attitudes in decision making.\textsuperscript{216} For example, jurors may have different opinions depending on their gender or political party.

\textit{1. Female versus Male Attitudes}

Prior research has shown that women jurors tend to favor female plaintiffs in sexual harassment cases\textsuperscript{217} and that they perceive more behaviors to be sexual harassment.\textsuperscript{218} Females are also less likely to blame the victim because they see themselves as being possible targets of sexual harassment and, thus, would not want to be blamed either.\textsuperscript{219} In deciding this, females are more likely to construct stories that display the plaintiff as the victim.\textsuperscript{220} Females may also do this because they view themselves as a minority group and are able to identify with the female in the case.\textsuperscript{221}

On the other hand, males commonly blame the victim in a sexual harassment case.\textsuperscript{222} If males fear being accused of sexual harassment someday, they are more willing to blame the victim.\textsuperscript{223} Additionally, males are also more prone to favor the defendant, regardless of victim gender.\textsuperscript{224} Therefore, Lyle and her attorneys will likely prefer females on the jury, while the defense will prefer male jurors.

\begin{itemize}
\item \textsuperscript{216} See generally id.
\item \textsuperscript{217} See generally id.; Rice, supra note 183; Jensen & Gutek, supra note 199, at 126.
\item \textsuperscript{218} Kimberly E. Smirles, \textit{Attributions of Responsibility in Cases of Sexual Harassment: The Person and the Situation}, 34 J. OF APPLIED SOC. PSYCHOL. 345 (2004).
\item \textsuperscript{219} Summers, supra note 183, at 381; Smirles, supra note 218, at 346.
\item \textsuperscript{220} See generally Practical Implications, supra note 205.
\item \textsuperscript{221} Teri Elkins, et al., \textit{Evaluating, Gender Discrimination Claims: Is There a Gender Similarity Bias?}, 44 SEX ROLES 3 (2001).
\item \textsuperscript{222} Summers, supra note 183, at 381.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} Teri Elkins, et al., supra note 221, at 3-4.
\end{itemize}
2. Conservative versus Liberal Views

Liberals tend to place more emphasis on looking at all elements of the crime, and their constructed stories tend to be less extreme.225 On the other hand, those who are conservative and, thus, more traditional, are more willing to accept various rape myths.226 Therefore, conservatives will be more likely to blame and derogate Lyle, while liberals may not be as willing to do so.227 Factors such as these could play an important part in the jurors’ decision making process.

VII. CONCLUSIONS

The California Court of Appeals was correct in allowing the case to stand because, based on the testimony described in Section V, a reasonable jury may find the defendants’ behavior severe and pervasive. In addition, Lyle was a captive audience228 — and probably quite frequently — because a major part of her job required her to be in the writers’ room.229 Therefore, the acts in the complaint230 substantiate a sexual harassment claim. Also, the court ruled appropriately in allowing the defendants to give a creative necessity excuse. Precedent suggests that context matters, and Friends writers are simply asserting a new type of context. Therefore, “creative necessity” is a logical extension of past cases, and the context claim is suitable because the writers need to have at least some level of sexual talk to perform their jobs. However, the exact level of sexual banter that is required to do the job is for the jury to decide, and the jury could decide that the writers crossed the line. The jury will have to determine whether to accept

226. Id. at 413.
227. Id.
228. Lyle, 12 Cal Rptr. 3d at 518.
229. Id. at 520.
230. Id. at 516-17.
the excuse, and evaluate the context of Lyle’s job. If they reject it, then the defendants will certainly lose. If they accept the excuse, the jurors will have to decide what level of behavior was appropriate, and whether the defendants surpassed the suitable threshold.

A variety of psychological theories suggest that the plaintiff will be assigned much of the blame. For example, jurors may believe that Lyle assumed the risk of hearing sexual conversations because she was working for an adult show with sexual innuendos. Even though a past case has stated that plaintiffs do not assume the risk of being harassed based on their presence within the workplace, psychological research suggests that it will be hard for jurors not to assign her some blame.

However it is possible, and perhaps likely, that jurors will still believe that the defendants crossed the line. For example, the defendants’ sexual stories may be judged as acceptable for brainstorming, but the sexual gestures, coloring book, and conversations about the actresses may be considered intolerable.

The entertainment industry is concerned about the consequences of a liable verdict for the right of free speech in the workplace. Studio executives believe that freedom to brainstorm is essential to the industry and restricting speech in the writers’ room is a violation of the First Amendment. In addition, the defense lawyers argue that an unfavorable outcome will “chill speech” in professional work settings. The defendants’ attorney, Adam Levin, contends that the First Amendment and California Constitution protect speech in any business that relies on free speech to function. He stresses the importance of the Appeals

231. *Williams*, 187 F.3d at 564.
4/10/17/arts/television/17noxo.html?ex=1255752000&en=66b4c5c5d195c41b&
ie=5090&partner=rssuserland (last visited Sept. 3, 2005).
236. *Id.*
Court opinion, saying that "cautious employers can be expected, in view of the court of appeal's opinion, to direct writers, professors, artists and other employees in 'communicative workplaces' to check their First Amendment rights at the workplace door." 237

On the other hand, Lyle's attorney, Scott O. Cummings, says that the defendants are using free speech as an excuse to avoid responsibility for creating a hostile environment. 238 Legal scholars argue that if the "creative necessity" claim is successful, then the entertainment industry will have a more lenient standard than other workplaces, including construction sites and other male-dominated fields. 239 Joanna Grossman, a sexual harassment law professor at Hofstra University, writes "the law should not say that people in a writers' room can refer to women in demeaning terms but no one else can." 240 She cautions that if writers have no limits on their brainstorming, there becomes a risk that no woman will want to work in such an environment. 241 Therefore, the outcome of this case also has implications for sexual harassment claims. If Lyle loses her case, then employees will have to be careful in their job selection. If someone chooses a job in which such creative brainstorming is necessary, then the person has to learn to tolerate the environment or find a new job. No matter the outcome of the case, the creative necessity excuse is a unique addition to the legal world of sexual harassment, and it will be interesting to discover the paths down which it leads.

237. Id.
238. No Friends, supra note 155.
239. Noxon, supra note 233.
240. Id.