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Males Need Not Apply: Assessing the Legality of American University Business Law Review's All-Female Issue

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MALES NEED NOT APPLY: ASSESSING THE LEGALITY OF *AMERICAN UNIVERSITY BUSINESS LAW REVIEW*'S ALL-FEMALE ISSUE

Michael Conklin[*]

I. INTRODUCTION

In a recent call for papers, the *American University Business Law Review* ("AUBLR") touted its all-female editorial boards from past volumes and the all-female editorial board for the upcoming volume 10.[1] Furthermore, it explicitly stated that the upcoming volume will contain another issue comprising exclusively "female-written" articles.[2]

This Article discusses the potential legal issues involved in such a sex-based exclusionary practice. These issues include comparisons to affirmative action jurisprudence, conflict with the university's stated anti-discrimination policy, difficulty of proving standing to bring suit, and whether Title IX protections apply to law reviews. Practices such as *AUBLR*'s female-only issue are highly relevant in the current climate, as President Trump's Department of Education has demonstrated a willingness to scrutinize similar policies that were

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[*] The *American University Business Law Review* maintains that it does not in any way discriminate on the basis of sex in article selection. Subsequent to the finalizing of this Article, the AUBLR has updated a previously published statement regarding its editorial board. The statements in this Article are in accordance with the original claims made on the AUBLR website.

[1] *All-Women Issue, 2020*, AM. U. BUS. L. REV., http://www.aublr.org/submissions/all-women-issue-announcement (last visited Aug. 29, 2020) ("All-women editorial boards of Volumes 8 and 9 have created an all-women authored issue, and Volume 10 will adopt this tradition for its upcoming publication."); *id.* ("Articles selected for publication will be featured in our second exclusively female-written issue 10.1.") (on file with the author).

[2] *Id.*

previously well established as acceptable.[3] This Article concludes by analyzing the pragmatism and potential unintended consequences of *AUBLR*'s policy.

II. AMERICAN UNIVERSITY ANTI-DISCRIMINATION POLICY

The practice of excluding male authors from a law journal issue appears to be in violation of American University's Discrimination and Sexual Harassment Policy, which applies to "all University programs and activities."[4] The policy defines discrimination as "when an individual suffers an adverse employment, academic, or other decision based on an individual's Protected Bases."[5] "Sex" is then listed as one of the many "Protected Bases."[6] It is important to note the use of "an individual" as opposed to "a member of the AU Community," which is used elsewhere in the policy.[7] By using "an individual," it appears American University intended for the policy to apply to more than just "all faculty, staff, and students of American University, and related third-parties," which is the definition of the "AU Community."[8]

A male whose submission to *AUBLR* is excluded from consideration solely because of the author's sex certainly "suffers an adverse . . . academic . . . decision based on . . . [sex]."[9] However, other law schools have similarly worded anti-discrimination policies while concurrently considering demographic factors—such as sex—in their article review processes. For example, Harvard Law School forbids student organizations from "discriminat[ing] against any person on the basis of . . . sex."[10] Meanwhile, *Harvard Law Review* considers sex

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[3] *See infra* note 37.

[4] *University Policy: Discrimination and Sexual Harassment Policy*, AM. UNIV. 1, https://www.american.edu/policies/au-community/upload/disrimination-and-sexual-harassment-policy-09-05-19-final.pdf (last updated Aug. 28, 2019) (on file with the author). However, the same "program or activity" language used in Title IX has been interpreted to not include independent law reviews. *See infra* notes 37-38.

[5] *University Policy*, *supra* note 4, at 2.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 1.

[9] *Id.* at 2.

[10] Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard L. Rev. Ass'n, No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at *6-7 (D. Mass. Aug. 8, 2019) [hereinafter FASORP] (alteration in original) (quoting Doc. No. 33 ¶¶ 20-21).

for purposes of membership and article selection.[11] Of course, there is a significant difference between considering sex as one factor in a holistic evaluation and imposing a blanket ban on publishing submissions from one sex.

III. STANDING

The nature of law review publishing results in a unique difficulty in identifying plaintiffs with standing to sue. Law reviews—especially those at top-fifty law schools like American University[12]—are highly selective. Many top journals have acceptance rates of less than 10%.[13] Furthermore, acceptances are based on a variety of subjective factors. While *AUBLR* clearly states its intention to exclude males from the women-only issue, that does not mean that—absent such a policy—a given submission from a male would have been accepted. The previously mentioned acceptance rates indicate that it would be nearly impossible for a male author to show that, but for the women-only policy, his article would have been accepted.

Furthermore, an author from an institution other than American University lacks standing to enforce the American University Discrimination and Sexual Harassment Policy. Even if an author claimed to be a third-party beneficiary of the agreement between the students that make up the editorial board of *AUBLR* and the university, he would clearly not be an intended beneficiary and would therefore lack standing to seek legal recourse under the terms of that agreement.[14]

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[11] *Id.* at *7.

[12] Paul Caron, *2021 U.S. News Law School Peer Reputation Rankings (and Overall Rankings)*, TAXPROF BLOG (Mar. 17, 2020), https://taxprof.typepad.com//taxprof_blog/2020/03/2021-us-news-law-school-peer-reputation-rankings-and-overall-rankings.html.

[13] *See* Brian Galle, *The Law Review Submission Process: A Guide for (and by) the Perplexed*, MEDIUM (Aug. 12, 2016), https://medium.com/whatever-source-derived/the-law-review-submission-process-a-guide-for-and-by-the-perplexed-9970a54f89aa. Galle gives the advice about publishing in a top journal: "It's tough. Remember, 3500 submissions. The average journal publishes something like ten articles. So you're talking about 200 out of 3500. Don't be disappointed. Many people have excellent careers without publishing in so-called top journals." *Id.*

[14] *See, e.g.*, Douglas v. Brookville Area Sch. Dist., 836 F. Supp. 2d 329, 348 n.15 (W.D. Pa. 2011) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291–92 (1998)) (noting that failure to properly implement the school's internal policies did not constitute a violation of Title IX).

A potential plaintiff could argue that the harm to him comes not from being denied an acceptance, but rather, from being denied the slight chance of acceptance he otherwise would have enjoyed. In other words, but for *AUBLR*'s policy excluding male submissions, a male author would have had, say, a 5% chance of publication and that he is now unlawfully denied that chance of acceptance.[15]

However, in the case of *Faculty, Alumni, and Students Opposed to Racial Preferences v. Harvard Law Review Association*,[16] the court mentioned in dicta that a plaintiff who had an article rejected by the Harvard Law Review Association ("HLRA")—or someone preparing to submit an article in the reasonably foreseeable future—would be adequate to meet the standing requirement, at least at the summary judgment stage.[17] Furthermore, while HLRA asks for demographic information from authors who submit manuscripts, the plaintiff produced "no facts whatsoever illuminating HLRA's article-selection process."[18] Therefore, while the plaintiffs suing HLRA lost at summary judgment, that does not necessarily mean a lawsuit against *AUBLR* would incur the same fate.

IV. AFFIRMATIVE ACTION

AUBLR could claim that an all-female edition is necessary as part of an affirmative action theory to correct past discrimination against women in higher education and to counterbalance the harmful effects of those policies that are still present today. Recent volumes of the traditional issues of *AUBLR* support this claim. Of the last eight

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[15] *See generally* David A. Fischer, *Tort Recovery Theory for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 605–06 (2001) (explaining that the novel tort theory of "loss of a chance" is predominantly limited to medical misdiagnosis cases but could apply to the above issue). "A major rationale for loss of a chance where the plaintiff cannot prove traditional damage is that the chance of obtaining a benefit or avoiding a harm has a value in itself that is entitled to legal protection." *Id.* at 617.

[16] No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at *6-7 (D. Mass. Aug. 8, 2019).

[17] *FASORP*, *supra* note 19, at *21. This case was ultimately dismissed due to lack of standing because the plaintiffs never identified a single person they were representing who had standing. *Id.* Rather, plaintiffs simply "acknowledge[ed] the existence of individual members who would have Article III standing." *Id.* at *16 (quoting Doc. No. 49 at 9).

[18] *Id.* at *25.

articles published, only one was written by a female.[19] And even in 2020, law school faculty are predominantly male.[20]

However, the conclusion that this gender disparity is the result of—or results in—biased treatment in legal publishing is unclear. Comprehensive studies in the area of legal publishing and gender call into question this notion. One study found that white female authors were cited 57% more than white men and that articles by minority women were cited 164% more than articles by white men.[21]

Johnson v. Transportation Agency[22] does support the notion that affirmative action plans can take gender into account in an effort to increase female representation in positions in which women are underrepresented.[23] However, the plan in question in *Johnson* only considered gender as one factor; it was not a universal exclusion based on gender.[24] Furthermore, the comparison is somewhat tenuous, as the subject matter in *Johnson* was a hiring decision for an employee.[25] Legal scholars who write in law reviews are not employed by the law review.

For college admissions purposes it is a well-established principle that universities can give preference to underrepresented minority groups as part of a holistic approach[26] but cannot implement a quota system in which spots are reserved for certain demographics.[27] The actions of *AUBLR* somewhat straddle the line between these two

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[19] The authors for Issues 1 and 2 of Volume 8 are Bernhard, Richard, Maxwell, Amy, Chen Li [male], Garry, Robert, and Allen.

[20] *2020 Raw Data Law School Rankings*, PUB. LEGAL, https://www.ilrg.com/rankings/law/1/desc/FacultyWomen (last visited Aug. 29, 2020) (showing that—of the law schools that reported data—only fifteen are majority female, while 176 are majority male). Furthermore, only one law school—CUNY Queens College—is 60% or more female, while ninety-three law schools are over 60% male. *Id.*; Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997). There is also evidence that males are disproportionately selected for high-status courses such as constitutional law, while women are disproportionately more likely to teach lower-status skills courses such as trusts and estates. *Id.* at 199-200.

[21] Ian Ayres & Frederick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 439 (2000).

[22] 480 U.S. 616 (1987).

[23] *Id.* at 632-33.

[24] *Id.* at 622 (explaining that the plan set "aside no specific number of positions for . . . women").

[25] *Id.*

[26] Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

[27] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318-19 (1978).

precedents. The spots in the female-only edition of *AUBLR* are clearly reserved exclusively for females. However, viewing all the issues that make up a volume of *AUBLR*, a court could conclude that there is no net discriminatory effect—because male authors are significantly overrepresented in the traditional journal issues. Therefore, a more apt comparison for *AUBLR* might be the practice of a university setting aside scholarships for a women's athletic team. While those spots are reserved exclusively for females, when the admissions and scholarships for the entire university are viewed holistically, there is likely not a problem.

In *Grutter v. Bollinger*,[28] the Court noted that diverse law school demographics are a compelling governmental interest and therefore upheld a race-conscious admissions program.[29] But the benefit of diversity to legal scholarship is not as clear as the benefit of diversity to law school admissions. In a law school setting, future judges, prosecutors, and legislators are formulating opinions based on their interactions with fellow students. Having classmates from diverse backgrounds is integral to forming a variety of lifelong opinions. It would be difficult to argue a similar benefit when comparing the difference between a male-written law review article and a female-written article. Law review articles are generally analytical analyses of highly nuanced issues of the law. For example, the most recent article in *AUBLR* is *Access to Justice and the Denial of Stay in a Pending Bankruptcy Appeal: Reviewability by the Court of Appeals*.[30] While two different authors could potentially have very different views on that topic—and therefore, readers would benefit from that diversity of opinion—it seems unlikely that author sex would be a good proxy for diverse opinions on the denial of stay in a pending bankruptcy appeal.

One argument available to *AUBLR* that would likely not be effective is to claim that male authors are no worse off than they were before the introduction of this female-only issue because there is still the same number of traditional, mixed-gender issues for males to submit to. This argument is unlikely to be successful, as illustrated in the following hypothetical: Imagine a restaurant that does not discriminate but opens a second, identical location that refuses to serve women. An

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[28] 539 U.S. 306 (2003).
[29] *Id.* at 328.
[30] Robert J. Landry III, *Access to Justice and the Denial of Stay in a Pending Bankruptcy Appeal: Reviewability by the Courts of Appeals*, 8 AM. U. BUS. L. REV. 171 (2019).

attempt to defend this action by claiming that women are not harmed because they still have the same ability to patronize the original restaurant is unlikely to be successful.[31] Likewise, regardless of how the current *AUBLR* ratio of male-to-female authorship was arrived at, the fact remains that a female author now has more options available to be published in *AUBLR* than a male author.

V. TITLE IX

Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[32] While American University directly accepts federal financial aid, *AUBLR* does not. Any potential lawsuit alleging Title IX discrimination against *AUBLR* would have to link *AUBLR* to American University's federal financial assistance involvement.

This was the same issue in the 2019 case of *FASORP v. Harvard*. Although HLRA did not directly receive federal financial assistance, the plaintiffs attempted to link the actions of HLRA to Harvard Law School ("HLS"), which does receive federal financial assistance. Faculty, Alumni, and Students Opposed to Racial Preferences ("FASORP") claimed that HLRA "receives Federal financial assistance" in the sense that it is made up of students that receive federal financial aid and because it "draws upon" the resources of HLS.[33] Furthermore, FASORP pointed out that HLRA members are required to be enrolled at HLS, that HLRA relies on HLS to provide first-year grades of applicants, that HLRA is subject to the rules and regulations of HLS, that HLRA is assisted by HLS faculty, and that HLRA is

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[31] This hypothetical was originally presented in Vikram David Amar & Jason Mazzone, *Is California's Mandate That Public Companies Include Women on Their Boards of Directors Constitutional?*, VERDICT (Oct. 5, 2018), https://verdict.justia.com/2018/10/05/is-californias-mandate-that-public-companies-include-women-on-their-boards-of-directors-constitutional. The context of this hypothetical illustration was a discussion regarding the argument that California's SB 826 mandating increased representation of women on corporate boards is lawful because the mechanism for reaching such result is to add more females to boards and not replace existing male members of boards with females. *Id.*

[32] 20 U.S.C. § 1681(a).

[33] *FASORP*, *supra* note 19, at *4.

located on Harvard's campus.[34] Regardless, the court held that "the plaintiffs allege no facts suggesting HLRA is an entity 'that receive[s] federal assistance, whether directly or through an intermediary'" as required to sue under Title IX.[35]

Analogous case law does seem to support the notion that, although Title IX applies to "all of the operations of . . . a college [or] university,"[36] an independent law review should not be considered an operation of a university. For example, an independent dental clinic run by a clinical instructor at the University of Missouri Kansas City was held not to be a "program or activity" for Title IX purposes.[37] Another court explained:

> No court has held that a plaintiff who is neither a potential beneficiary of a federally funded education program nor an employee of such a program can maintain a Title IX action for sex discrimination. Indeed, many courts, in dicta, have limited the range of proper Title IX plaintiffs to students and program employees.[38]

Even if *AUBLR* did directly receive federal financial assistance—and therefore trigger Title IX protections—it is still unclear that an all-female authored issue of *AUBLR* would violate Title IX. This is because Title IX allows numerous sex-conscious practices, such as the common practice in public universities to allow female-only scholarships.[39] For example, Auburn University has sixty-seven female-only scholarships and only one male-only scholarship.[40] Another sex-conscious practice that is commonplace at universities is women-only events and areas.[41]

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[34] *Id.*

[35] *Id.* at *23 (alteration in original) (quoting Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999)). While the court ultimately dismissed FASORP's case at summary judgement on standing grounds, it went on to discuss that the failure to allege that HLRA receives financial assistance from the federal government "also warrant[s] dismissal." *Id.*

[36] 34 C.F.R. § 106.2(h) (2019).

[37] Lam v. Curators of the Univ. of Mo., 122 F.3d 654, 656 (8th Cir. 1997).

[38] Lopez v. San Luis Valley, Bd. of Coop. Educ. Servs., 977 F. Supp. 1422, 1425 (D. Colo. 1997).

[39] *Sex-Specific Scholarships*, SAVE, http://www.saveservices.org/equity/scholarships (last visited Aug. 29, 2020).

[40] *Id.*

[41] Katie Engelhart, *Men's Rights Activists Are Attacking Women's Scholarships and Programs. The DOE Is Listening*, NBC NEWS (Dec. 15, 2018, 11:42 AM),

A potential plaintiff suing *AUBLR* may attempt to demonstrate that there are other, less discriminatory methods available to *AUBLR* to increase female authorship. Indeed, *AUBLR* could actively pursue female practitioners and scholars, encouraging them to submit. Additionally, it could produce symposium issues that focus on topics women are more likely to write about. And if it is believed that the modern editorial boards of *AUBLR* are discriminating against female-authored submissions—consciously or otherwise—an anonymous review policy could be implemented.[42] However, this is largely a moot point, as the "narrow tailoring" required in *Grutter* for affirmative action admissions purposes is not applicable for Title IX purposes.[43] As a federal district court described in a Title IX case involving college athletics, there is "nothing in Title IX that requires the institution to choose the method or benchmark for achieving gender parity that has the least negative impact on the overrepresented gender."[44] Furthermore, the Department of Education's interpretation of Title IX explicitly states that "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."[45]

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https://www.nbcnews.com/news/us-news/men-s-rights-activists-are-attacking-women-s-scholarships-programs-n947886. Although, under the Trump administration's Department of Education, such actions by universities are under scrutiny. *Id.*

[42] Michal Krawczyk & Magdalena Smyk, *Author's Gender Affects Rating of Academic Articles: Evidence from an Incentivized, Deception-Free Laboratory Experiment*, 90 EUR. ECON. REV. 326 (2016) (finding that female authors are perceived as less competent).

[43] Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." (citing Richmond v. J. A. Croson Co., 488 U.S. 469, 507 (1989) (plurality opinion))); *see also* Fisher v. Univ. of Texas, 136 S. Ct. 2198, 2208 (2016) ("A university . . . bears the burden of proving a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense." (quoting Fisher v. Univ. of Tex., 570 U.S. 297, 312 (2013))).

[44] Harper v. Bd. of Regents, 35 F. Supp. 2d 1118, 1123 (C.D. Ill. 1999).

[45] 34 C.F.R. § 106.3(b) (2019).

VI. PRAGMATISM OF FEMALE-ONLY JOURNAL ISSUES

While ultimately irrelevant to the analysis of a potential legal challenge to *AUBLR*'s practice, the pragmatism of female-only journal issues is an intricate topic worthy of discussion. The intentions of *AUBLR* editors for producing the issue are no doubt laudable; females are underrepresented in legal scholarship and apparently extremely underrepresented in *AUBLR*.[46] But there are potential downsides to such a policy that must be weighed against the perceived benefits. It could be argued that the practice perpetuates the harmful stereotype that women are somehow inferior at legal scholarship—otherwise why would they need to be singled out for advantageous consideration? Furthermore, it could be argued that the practice perpetuates the stereotype that there are inherent, cognitive differences based on sex—and thus, female scholarship is somehow identifiably different from male scholarship.

Another potential downside stems from the "publish or perish" climate that law school professors face.[47] The competitive environment created by this mindset can contribute to intense competition for acquiring publications. It is not hard to imagine a male legal scholar desperately seeking outlets to submit to in order to keep his job, coming across a journal that excludes consideration of his work based solely on his sex, and feeling animosity toward those who benefitted from such a practice. If such female-only journal issues become more widespread, this could create the false impression that publications by females are somehow lesser and should therefore be discounted in hiring and promotion decisions. This causal chain is illustrated by the near universally negative online comments to an article announcing *Harvard Law Review*'s consideration of gender.[48] They include:

- "Because course grades and anonymously graded competition scores are known for discriminating against women."[49]
- "Because it's not good enough that every African-American graduate carries around the stigma of presumptively lowered

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[46] *See supra* note 19.
[47] IMAD A. MOOSA, PUBLISH OR PERISH: PERCEIVED BENEFITS VERSUS UNINTENDED CONSEQUENCES 1–17 (2018).
[48] Complaint, ex. 3, *Faculty, Alumni, and Students Opposed to Racial Preferences v. Harvard Law Review Association*, No. 18-12105-LTS (D. Mass. Oct. 6, 2018).
[49] *Id.* at 3.

standards, now every woman graduate will bear the same burden. Way to spread the message that women can't compete!"[50]

- "And America and other Western nations[] wonder why they've been non-competitive for decades."[51]
- "Congratulations. When hiring in the future, I will assume that any woman on the law review was picked based on chromosomes, not merit."[52]
- "It's just another example of dumbing down of the country for the sake of 'diversity' - a goal that is anything but laudable."[53]
- "Harvard Law Review + Female = Worthless on a resume."[54]
- "Degrees from Harvard are now worth slightly less than they were before."[55]
- "I guess hard work, intelligence, and effort just aren't as important as a vagina."[56]

And these responses were from the result of merely a *consideration* of gender; journals that go further and ban male submissions from consideration would likely evoke even more vitriolic responses.

Admittedly, online comment forums are far from a scientific measure of public opinion. And perhaps the brash emotions displayed in these comments would be held by the commenters regardless of any policy. Nevertheless, the policy allowed these commenters to acquire—at least in their own minds—martyr status. It would be nice to think that such opinions are not shared by legal scholars—who perhaps have better uses of their time than posting on internet discussion forums. While this is ultimately unknowable, the comments were made in response to an article in *The Harvard Crimson*. And the pseudonyms used include "White male former law review," "MBA student," and "HLS Alum."[57] Even noted judge Richard Posner wrote in 1996 that "[t]he *Harvard Law Review*, with its epicycles of affirmative action, is on the way to becoming a laughingstock."[58]

However, the claim that *AUBLR*'s female-only issue inadvertently results in the unjustified dilution of female scholarship is

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 4.
[54] *Id.* at 5.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 3–4.
[58] RICHARD A. POSNER, OVERCOMING LAW 77 (1995).

somewhat inconsistent with the claim that male scholars are harmed by the policy. After all, if the value of female scholarship is diluted, then male scholarship would appear more valuable by comparison.

It appears that the *AUBLR* practice does not function to serve the purpose of promoting uniquely female viewpoints. Rather, it is simply a mechanism by which female authors are given an additional outlet to publish traditional law review articles. The call for papers for the 2020 all-women issue only requires that the submissions have "a business law nexus."

The topics for the Women in Business Leadership Conference presented by *AUBLR* also illustrate this point:[59]

- Changes in Big Law Since the Great Recession & Future Trends
- A Discussion on Recent ADA Title III Developments
- Current Supreme Court Matters
- Navigating the Waters: Career Advice for Young Lawyers

With the possible exception of the career advice section, these topics are not unique to the female experience. Meaning, a female is not more or less qualified to discuss the topic of "Changes in Big Law Since the Great Recession." Excluding males from law review issues and conferences would be more justified if the practice resulted in a product that contained topics related to sex, such as "Overcoming Obstacles Women Face When Negotiating a Raise," "How to Navigate a Predominantly Male Corporate Culture as a Woman," or "What Women Today Can Learn From Female Legal Pioneers of the Twentieth Century." Even the stated purpose of *AUBLR*'s Women in Business Leadership Conference supports the conclusion that the main goal was not to present uniquely feminine views: "An annual event dedicated to celebrating the achievements of outstanding women in all areas of business law."[60] By producing a more generic law journal issue and conference, the benefit derived from excluding men becomes less clear. In other words, the downsides that come with sex-based exclusionary practices would be more easily offset by the advantages if the exclusionary behavior was necessary—such as in communicating a uniquely female experience.

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[59] *All-Women Issue*, *supra* note 1.
[60] *Id.*

VII. CONCLUSION

As demonstrated by all the caveats in this Article, any potential plaintiff would face numerous obstacles to successfully suing *AUBLR*—the most fatal likely being an inability to demonstrate that Title IX protections apply to independent law reviews. And this is to say nothing of the extra-legal obstacle of a legal scholar willing to incur the stigma that would accompany such legal action for the unlikely chance of acquiring minimal compensation.[61]

Potential legal liability is only one matter that law journals should consider when deciding on publishing an all-female issue. The careful balancing of societal benefits and downsides is perhaps more relevant—and certainly more ambiguous—than the legal liability considerations. It is the sincere hope of this author that the legal issues discussed in this Article are rendered moot through increasingly equitable representation of females as law school faculty and legal scholars.

[61] In the unlikely event of a successful lawsuit against *AUBLR*, the compensatory damages would be insignificant compared to the time and money invested in litigation. Furthermore, the legal scholarly community is relatively small, and submissions to law journals are non-anonymous. It would likely not benefit one's career to be labeled a "men's rights activist" who sues law journals for their efforts to promote female scholarship.