Law Review Story

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ESSAY

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Lisa R. Pruitt

Stories . . . cause people "to think freshly." They "draw [our] attention" and cause us to "arrest the ready reaction." They can "shake up some assumptions" and "deprive [the present] of peace of mind." Given this disturbing quality, storytelling has much to offer those who are committed to reasoning from principles. Far from being a substitute for it, storytelling provides a means of interrogating the reasoning process. Moreover, it provides an occasion for considering which principles should guide us and a way of discovering how the prevailing principles came to be.

Harlan L. Dalton

And so, a law review story . . . . In the spring of 1988, a woman is elected editor-in-chief of the law journal of a state university's law school, only the second woman in the forty-something-year history of the law review to hold that prestigious position. On the day of the election, two men put up a small poster in the law review office. In the form of an election ballot, the poster features listings of candidates for three positions: "Law Review Chief Coffee Maker," "Law Review Chief Head Giver" and "Head Slut." Several women law review members' names, including that of the new editor-in-chief, are listed as "candidates" for each of the first two positions; for the third, "Head Slut," the new editor is the only listed candidate. The woman editor-in-chief removes the poster without comment. The following day, when she enters the law re-


view office, one of the men responsible for the poster approaches her and announces, in a mocking tone and in the presence of others, "You won't serve out the year as editor-in-chief because we're going to make your life hell." The woman responds by declaring to those in the law review office that the poster was unacceptable and that it, the man's comments, and the sort of low-level sexual harassment to which women in the law review office have been exposed will no longer be tolerated. She leaves the office in tears.

Word of the incident spreads like wildfire around the law school and is the subject of several letters (including one from the editor-in-chief in response to the initial salvo from a male law review member) to the law school newspaper; the poster incident is discussed among the faculty. There is no question as to the identity of the two men who were responsible for the poster; they admit putting up the poster, explaining that it was "just a joke." Although a few law school professors personally convey their support to the woman, the law school administration does not publicly acknowledge the incident. The law school's dean never makes a public statement that such behavior is unacceptable; the culprits do not suffer any consequences for their actions; they are not so much as scolded.

Yet the woman is devastated by the event. She is unable to sleep, unable to concentrate on her work. Previously an outgoing but (she thought) non-controversial person, she had not realized that these sorts of sentiments were lurking in the law school community. She had no disagreement with the poster artists; indeed, she barely knew them, having not been in many classes with them and moving in different social circles than they did. She can think of nothing she has done to provoke, let alone deserve, such treatment. She cannot understand why she has become a lightning rod for the ire of certain men.

2. The importance of this support was great indeed, and the woman remains eternally grateful to that handful of professors to this day. Without their enduring and earnest concern and encouragement throughout the events described, she might actually have quit law school, or at least have transferred to a different law school. Similarly, the woman had a number of very supportive and sympathetic friends.
In spite of her brief response on the day of the event—and perhaps because of it, as well as her spiel in the law school newspaper—the hostility escalates. She is given the "cold shoulder" by many in the law review office and throughout the law school community. Final exams come and go that spring, and her grades suffer. The hostility does not just go away with the summer break, either; it returns with the students that fall, no longer in the form of overtly sexist behavior or speech, but harassment all the same. It is now undeniably directed at the woman as an individual—not at the female law review members as a group. The editor-in-chief can only conclude that her attempt to stand up for herself—and, as she sees it, for the other women on law review and in the law school—prompted such controversy and retaliation beyond the initial furor over the poster. She finds its ironic that such harassment has flowed from her mild-mannered stand. After all, one of her law professors had advised her shortly after the poster incident that if she really wanted to compel an appropriate response from the law school, she should go to the New York Times with her story; that would give the school a big "black eye" and perhaps finally prompt an appropriate institutional response. She had told the professor that she could not do so because she really just wanted the matter to die down; she wanted the controversy to go away. She had not wanted the law school to fight such a badge of shame; she did not think she had the psychic energy to deal with the consequences of such a move; and, besides, she had been confident that the school would "do the right thing" if the harassment persisted. It did, and the law school did not.

At the end of the following year, as her law school career draws to a close, the woman’s frustration peaks. She has a stomach ulcer. A number of male law review members have refused to do their assigned work all year, and they have done so with impunity. She has learned, among

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3. A number of male law review members flatly refuse to complete the standard assignments and are generally belligerent to the editor-in-chief. Several items of the woman’s personal property are stolen from the law review office, accessible only to law review members. Other law review members do not have items of personal property stolen.
many things, that the position of editor-in-chief, while requiring a lot of work, is accompanied by no administrative power.

That same spring, another law student makes a spurious honor code allegation against the woman, claiming that the woman is using the same research paper for credit in two different courses. The honor council allows the allegation to be made anonymously, an unprecedented decision in the history of the institution. It is clear that the person making the allegation could have had no knowledge on which to base it because the only person who has seen a draft of the first paper is the professor for whom she is writing it. The second paper is at that time being cite-checked for publication as a comment in the law review, making it pretty clear that a hostile law review member’s knowledge of the latter paper, conjecture about the former, and desire to harass the woman, have led to the charge.⁴ Seeing this as part of the continuing law review harassment, the woman appeals from the student-run honor council to the law school faculty to be allowed to face her accuser. She also asserts the honor code equivalent of malicious prosecution against her accuser, saying that he could not possibly have knowledge adequate to support the charge. The faculty deny her appeal. She defeats the charge a few days before her last round of final examinations begins. Her last semester’s grades are well below her usual performance.

The woman can hardly wait to get away from that institution—away from that legal community, that state. It doesn’t seem that the harassers (by now their numbers increased well beyond the poster artists) have learned any lesson—except that, perhaps, if one engages in obviously sexually harassing behavior, one runs a risk of reproach. However, if one wants to make life miserable for a person bold enough to stand up to sexual harassment, it can easily be done—at least in the context of an institution unprepared to rise to the occasion and do what is necessary to maintain a non-hostile educational environment in which

all can flourish. The apparent lesson for the woman editor-in-chief is that she should never have spoken up about the poster—not even in the relatively timid way she did—because without institutional support, going it alone exacts a very high price. She will think twice before she responds similarly to any such situation that may arise in the future.

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Many readers will have guessed by now that the story I have told is my own. More than a few readers in the Arkansas legal community played parts in or witnessed the events. I have purposefully recounted these events as I experienced them, eschewing legal language (to the extent possible for one trained in the law) in doing so. I do not pretend that this account is entirely objective or that it is entirely complete. That it is my story, my experience is part of the point of recounting it now in this forum.

I am telling this story now not to evoke sympathy (though I could have used a bit more of that back in 1988) nor to throw a pity party at this late date. Rather, I tell it because I think it is important for people to understand how sexual harassment affects women. The caveat to this essay’s asserted value for this purpose is, of course, that I am only one woman, this is only one story. While I know that my response, including physical illness, to the sexual harassment I experienced is a typical response, some women have less dramatic reactions to harassing situations; for others, it leads to even more striking, tangible adverse consequences. I also recite this story as a constructive criticism of the University of Arkansas School of Law and as a lesson to institutions—particularly educational ones—concerned to respond effectively to incidents of sexual harassment.

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5. “Ninety percent of sexual harassment victims in one survey experienced nervousness, fear and anger, while sixty-three percent complained of nausea, headaches and exhaustion.” Mary Strauss, Sexist Speech in the Workplace, 25 HARV. C.R.-C.L. L. REV. 1, 12 (1990) (citing Working Women’s Institute, The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women, Research Series Report No. 3 (1979)).
When a subject is highly controversial—and any question about sex is that—one cannot hope to tell the truth. One can only show how one came to hold whatever opinion one does hold. One can only give one's audience the chances of drawing their own conclusions as they observe the limitations, the prejudices, the idiosyncracies of the speaker.

Virginia Woolf
A ROOM OF ONE'S OWN 6

My year served out as editor-in-chief of the *Arkansas Law Review* was an extremely difficult one, by far the most difficult one of my professional life thus far. Anyone who thinks the sort of harassment I have described is no big deal—that it is just about hurt feelings and personality conflicts—has probably never coped with it over an extended period of time. In spite of the bitter taste this experience left with me, I was determined to try to comprehend, to understand better, the social dynamic underlying it; I wanted something constructive to come from the experience. As I reflected on these events while they were happening and in the years that followed, I wondered why the injury I had suffered by being publicly labelled a "head giver" and "slut" by my colleagues, in a work setting, was treated by so many around me as of no moment? How could the men and their cronies say it was a joke and find so many—even some women who had been listed as candidates for the office of "Law Review Chief Head Giver"—sympathetic to its acceptability on that basis? You cannot joke about things like that—certainly not in an educational setting, can you? Who could see it as funny? Why was I treated as if I were over-reacting? I kept remembering what my mother told me as a child, when, as often happens among children, my feeling were hurt because I was taunted or called names. "Sticks and stones may break my bones, but words can never hurt me." The trite adage rang no more true with me as an adult than it had as a child. Of course words hurt. Besides, I felt less resilient than I had as a child; after all, these words and ensuing events at the law

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school were threatening the professional livelihood I had worked so hard to make for myself.

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The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Opinion of Mr. Justice Bradley

Bradwell v. Illinois

Although I had initially thought of the poster as ideologically bereft hate or assaultive speech, I later began to contemplate whether the poster had a message and, if so, what it was. To label women law review members "head givers" was not, I was pretty sure, to imply that these men literally expected the female law review members to perform fellatio on them. No, what it was intended to convey, I was quite sure, was that a woman's place was one of subservience (sexual and otherwise) to men, and not as intelligent contributors and decision-makers in an academic exercise such as the law review. This interpretation seemed consistent also with the "coffee maker" category—letting women know what they are fit for in a society still imbued with patriarchal ideology and gender-based double standards.

7. 83 U.S. (16 Wall.) 130, 140 (1872).

8. Similarly, when men sexually harass women in employment settings by "asking" them for sex, they are rarely seriously proposing that the targeted woman engage in sexual acts with them. They say these offensive things to harass and demean. See, e.g., Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (9th Cir. 1988).
As for the "slut" moniker, it could have been intended to imply that I was sexually promiscuous. (The dictionary lists various definitions, including "a slovenly woman," "a lewd or dissolute woman," "prostitute," and "saucy or brazen girl." 9) This seemed unlikely, however, especially given that I was not and, as far as I know, no one had any reason to believe that I was. Had the men used "slut" in the more commonly pejorative way that "bitch" is so often used—to indicate an unpleasant woman, a shrew? Or, similar to "head giver," was the word "slut" used because its sexual connotation effectively "put me in my place," conveying to me that my proper role was not as the chief officer of an academic publication; rather, my true place—like that of any woman in their opinion—was in the proverbial bedroom. I concluded that the poster's essential message was probably the latter, especially given the context in which it appeared—on the day a woman became editor-in-chief of the law review. The men were rebuking me, in the cruelest of terms, for not knowing my "proper place" as a woman, for aspiring to do a "man's job." In this sense, ironically, the poster's essential message was not so different to Justice Bradley's in Bradwell v. Illinois. The law review poster's message was cloaked in hostility, ridicule, arguably even outright hatred, whereas Justice Bradley's message was bathed in the paternalistic glow reflective of late nineteenth-century conventional wisdom about gender roles. Nevertheless, the basic message was arguably the same.

Increasingly frustrated by the law school's lack of acknowledgement of the poster—let alone meaningful responsiveness to it—I began to contemplate what causes of action I might have if I chose to seek legal redress for the injury I had suffered. A long-time student of media law, several causes of action came immediately to my mind, including defamation and intentional infliction of emotional distress. I recalled one of my professors saying at the time of the incident that it sounded to him like a "hostile working environment"—the term of art used to describe a situation that provides a basis for a sex discrimination suit.

under federal employment law in the United States. As I thought cursorily through these options, I doubted that any of them would, as a practical matter, actually provide re-dress for my grievance.

I was not convinced, for example, that given the vagaries associated with the meaning of the word “slut,” a jury would find it defamatory and, if it did, whether it would recognize damages flowing therefrom. After all, such crude labels and epithets are directed at women all the time; they hardly raise an eyebrow in many social settings these days. Plus, I knew that I was probably a “limited purpose public figure” for purposes of the law school community. (I was very active in student affairs, serving as president of the Student Bar Association at the time of the incident, as well as serving in other leadership capacities.) Accordingly, under New York Times v. Sullivan and its progeny, I would have to prove that the defendants knew the statement was false or acted in “reckless disregard” of its truth or falsity.

Contemplating issues of truth and falsity reminded me that the defendants could argue that the intended meaning was that I did, in fact, “give head” and that I was, in fact, sexually promiscuous. That is, they might well raise the defense of truth. That would put my sexual practices and morals at issue—the burden either being on the defendants to prove that I was sexually immoral or on me to prove that I was not. Needless to say, that is not a discussion—let

10. Of course, under the old slander per se rules, a statement impugning a woman’s chastity was considered slander per se. See Fruit, supra note 4, at 925. Whether labelling a woman a “slut” in modern parlance necessarily impugns her chastity is another question. See also Lee v. Metro. Airport Comm’n, 428 N.W.2d 815 (Minn. App. 1988) (holding that the word “bitch” is too imprecise to be actionable in defamation); Branda v. Sanford, 637 P.2d 1223 (Nev. 1981) (holding that the words “cherry” and “bitch” do not imply unchastity and are therefore not slander per se); Ward v. Zelikovsky, 643 A.2d 972 (N.J. 1994) (holding that allegations that the plaintiff was a “bitch” and “hate[d]” Jews were not actionable in defamation); Hallday v. Cienkowski, 3 A.2d 372 (Pa. 1939) (holding that the word “bitch” was not actionable per se).
12. Id. at 280.
13. The burden of proof depends on whether the matter is deemed to be of public concern. If it is, the burden of proof is on the plaintiff to prove falsity; if not,
alone a courtroom scenario—that any woman would relish or to which she would lightly expose herself. Besides, I wondered, how could sexual morality (or immorality) be quantified—that is, what sorts of sexual practices, performed with what frequency in what circumstances, render one a "slut"? It also seemed to me that the defendants could say they were just stating the opinion that I was a slut; it was not obviously a statement of fact. The oft-quoted maxim of First Amendment jurisprudence that "there is no such thing as a false idea" kept ringing in my ears. I didn't believe I could win a defamation suit based on the poster—especially not before a local jury.

As for intentional infliction of emotional distress, I didn't think I had much chance of recovery on that basis, either. I recalled the legal standard for establishing this tort or its Arkansas equivalent, outrage, as being quite extraordinary—requiring, well, "outrageous" behavior. Indeed, Arkansas law permits recovery only for the "most heinous conduct." For similar reasons to those that led me to conclude that a local jury would not consider "slut" defamatory, I doubted that a local jury would consider the poster sufficiently outrageous to be actionable. (After all, most of the people in the law school community did not seem to think it outrageous). Besides, the case of Hustler Magazine, Inc. v. Falwell had then recently been decided by the United States Supreme Court, which meant that if I were considered a public figure (and I'd already concluded I was a limited purpose public figure), I would have to prove the higher degree of fault associated with public figure plaintiffs with regard to this tort, too.

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17. Id. at 53.
I assumed the "hostile environment" analysis was irrelevant because the law review office was an educational setting, not an employment one. (We were, of course, working, but not for pay.) Still, it struck me that the same or a similar analysis should apply in the educational setting. As had been written recently in *Meritor Savings Bank v. Vinson*, a woman should not have to run a gauntlet of sexual harassment in order to remain employed. Surely the same could be said of women trying to remain in law school or undertaking any educational pursuit!

First Amendment concepts like "political speech," "fighting words," and "imminent incitement to lawlessness" came to mind. I recalled that under *Chaplinsky v. New Hampshire*, "fighting words"—words that inflicted injury or tended to incite a breach of the peace—were said not to be constitutionally protected. But then I remembered that the "injury-inflicting" prong of *Chaplinsky* had never been much relied on, and the words had not moved me to a "breach of the peace." This incident had not been about physical violence or breach of peace; it was about human dignity—my dignity, to be precise. Besides, there was no relevant state statute under which a prosecution could be brought based on the speech and therefore no statute to which the *Chaplinsky* test would apply. In addition, I knew the entire *Chaplinsky* decision represented questionable precedent following several Supreme Court decisions in the 1970s. I remembered that speech characterized as "political" was, in principle, given the greatest degree of protection under the United States Constitution because in the so-called marketplace of ideas, citizens need all the information they can get in order to make the best decisions about governance. Although ostensibly a verbal assault with no political content, I knew the poster’s language could also be construed as a political comment about the "proper" role of women—indeed, as I have already said, I believed this latter construction to be its essential meaning. I reasoned based on cases in which racially hateful speech was deemed

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20. Id. at 572.
constitutionally protected that the men's right to call me a "slut" was almost certainly also protected by the First Amendment.

Legal scholars were starting to talk about the harms arising from racially hateful speech, as well as about the level of First Amendment protection that should be afforded it. Still, I had not yet read any analysis of this type about sexually hateful speech.21 The law review incident occurred before the wave of campus speech codes (some of which have since been struck down22) and before the Supreme Court decision in R.A.V. v. City of St. Paul.23

The truth of the matter is that I never seriously considered legal action against either the poster artists or the law school. I did not have the emotional energy and reserves to undertake a lawsuit. Besides, one does not lightly initiate such a costly endeavor, especially knowing that the repeated publication of the offending statement could do more harm than the paltry judgment for which one might hope could ever provide recompense.24 What I really wanted was for someone in a position of authority at the law school to admit that I and the other women named on


23. 505 U.S. 377 (1992) (holding unconstitutional a St. Paul, Minnesota, ordinance which prohibited the display of symbols tending to arouse anger or alarm on the basis of race, color, creed, religion, or gender).

24. See Smith v. Atkins, 622 So. 2d 795 (La. App. 1993) (awarding female law student a mere $5,000 for prevailing in a defamation suit based on a professor calling her a "slut" in class).
the poster had been injured, that the poster was objectionable, that the men were wrong to put it up, that the ensuing harassment of me as an individual was reprehensible, and that the institution would not tolerate such behavior. Not getting such a statement from the law school authorities, I was unable to put the event completely behind me.

I was stunned, fascinated, and often gravely disappointed by people's reactions to what had happened in that law review office—both at the time and as I later recounted the events to people both within and without the Arkansas legal community. Some attorneys were deeply sympathetic and shared my dismay and anger; but others shrugged their shoulders and said, essentially, "boys will be boys." Formerly an aspiring journalist, I had always been a big believer in a very nearly absolutist interpretation of the First Amendment. But in the aftermath of the poster incident, I began to wonder why the law lent such enormous protection to such injurious speech. Why were communicative injuries like the one I suffered not legally cognizable? Why were so few people around me disturbed that this behavior was being tolerated by the University of Arkansas School of Law?

The most disillusioning part, perhaps, was realizing that when I had put my own views into the "marketplace of ideas," explaining why the poster was objectionable, demeaning of women, and particularly unacceptable in an educational setting, I had become a pariah in the eyes of many—I would say the "mainstream"—in the law school community. The men were pitied martyrs for making a little joke, and I was the "feminazi"25 villain for objecting to it. So, the First Amendment protected the men's sexually hateful speech, but when I exercised my own First Amendment right, the practical effect was to provoke a sort of back-lash against women generally and myself specifically. Was I to conclude that as a woman I had less credibility in the marketplace of ideas, indeed that the good old market-

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25. This word, coined I believe by Rush Limbaugh, post-dates the events I have described and was not, as far as I know, actually used to refer to me at the time. Nevertheless, the concept it expresses accurately represents the pariah status I achieved in some parts of the law school community that year.
place was not working for me at all, and that the truth of women's equality and dignity and personhood was not prevailing?

The spring I finished law school, another (male) professor suggested some reading in "feminist jurisprudence." I do not believe that at that time I had ever heard of feminist jurisprudence; certainly I did not consider myself a feminist. Nevertheless, I read a few articles, and I found that a good deal of what these feminist legal scholars had to say was consistent with my experiences both in and out of law school. I had long been told that all the formal barriers were down and that women could do whatever they wanted professionally—and my professional life was by far my main concern then. Yet, with this incident, I began to see that if women did not play the game the way "girls" were supposed to play it, their professional opportunities might be severely circumscribed. The official story of "equality" looked like a myth. The greatest degree of "equality" women could achieve—at least in that place and at that time—had to be bought, and part of the purchase price was by abiding the rules of the dominant group (in this case men), including not rocking the boat if someone put up a sign labeling you a "slut."

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Almost nine years and a good deal of analysis later, I remain convinced that the poster was intended as a message to women, and to me in particular, to "know your place." Of course the men who put up the poster may not have been conscious of this message, disguised as it was in their crass "joke." Nevertheless, I feel sure that the men who put up the poster were, in effect, announcing their opinion that a woman's place is not as editor-in-chief of the law review, or more generally, that a woman's place is not in a leadership position in the public (market) sphere of life. This being the sort of statement which, in light of today's formal guarantees of equality of the sexes (to which I feel certain, especially as lawyers, they would pay lip service), these men could not (or would not) come out and proclaim, they masked it with so-called humor. This "disguise" afforded the message two benefits it might not have enjoyed other-
wise. One was that the supposedly humorous form thwarted effective response to or countering of the essence of their message, which allowed it to gain force—and, in combination with existing attitudes, to prevail—in the limited marketplace of ideas of the law school.26

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[S]exist speech does hurt. It is an affront to individual dignity. Victims of such speech report feelings of personal anguish and powerlessness. Most victims experience isolation, decreased job satisfaction and diminished ambition. Many experience physical manifestations of the emotional harm.

Marcy Strauss27

Secondly, the speech injured me and some other women in a way that an ostensibly rational, albeit unabashedly sexist, statement about the role of women would not have done. The latter could have led to a reasoned debate about nurture versus nature or sameness versus difference—just like reading Bradwell v. Illinois does today. But, such was not the character of the law review poster's message. It was intended not to engage or prompt debate, but rather, I believe, to wound. The poster angered me, it inflicted emotional and psychic injury, and it made me feel that I, along with my professional achievements, was being threatened on the basis of my gender. I believe there were other female members of the law review and of the broader law student population who shared aspects of this injury. The poster artists and their sympathizers might as well have picketed outside the law review office with signs saying "Women Keep Out" or "Only Babes without Brains Admitted."28 Quite simply, the poster—as well as the law

26. In this sense, I would say, it is similar (in form, not necessarily substance) to the message of the parody that was at issue in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

27. Strauss, supra note 5, at 12.

28. Of course, one would hope that if they had taken that approach to conveying their message, the men would have been laughed off campus. Such a vehicle for their message, unlike the crass joke/poster format actually used, would have provided less of a disguise for the content of their communication and therefore would have left their opinions looking a lot more like Justice Bradley's in Bradwell v. Illinois.
school's implicit condoning of its message—made me feel I did not belong, was not welcome, in the law school.

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How often the story we tell is not the ones the listeners hear!

Judy Scales-Trent

I have also considered how my response to the described incidents either aided or impaired my cause. Most of my responses to the incident could be considered typically "feminine": I cried (often and in public, no less), and I chose not to "play hardball" by asserting myself and demanding a response from the law school administration. The only time I was vocal to the collective faculty was at the appeal regarding the honor code violation, and at that point, with a great deal stake and at the end of the year from hell, I daresay I was hysterical.

I am under no illusion that these responses assisted my cause in any way, and I am quite certain that they undermined my credibility and the seriousness of the injury in the eyes of law school decision-makers. First of all, the crying probably caused me to be seen as essentially a "girl with hurt feelings," an injury that neither the law nor many other institutions takes very seriously. If I had demanded an apology from the men or some formal response from the law school—if I had been completely confrontational and adversarial as perhaps a man would more likely have done—I probably would have gotten a response. 

Ironically, my one action or statement throughout the scenario that was assertive and in that sense might be considered "masculine"—though just barely—taking down the poster and announcing the following day that such behavior would no longer be tolerated in the law review office—is the very move that kept the whole affair from just going away. It is


30. I recall that the Black Law Students Association, later during the 1988-89 academic year, threatened to "go public" with a racist incident at the law school's Leftarfest party unless the law school administration officially denounced the objectionable incident. The law school publicly condemned the incident.
the very thing that I believe brought on the further harassment.

The paradox is that I was damned on the basis of both my feminine and masculine actions. The "masculine" competitiveness and ambition that led me to seek the editor-in-chief's role, that led me to seek a leadership position in a male-dominated arena, brought the gender-based attack on women law review members, and my initial "masculine" confrontational response to the poster created the row. Coming from a man, I have little doubt that this would have been seen as leadership, not trouble-making. But, the "feminine" manifestations of my injury were not readily cognizable to the establishment, and my "feminine," non-confrontational response to the harassment made it easy for the law school to ignore my predicament. If I had it to do over, I would follow up on my initial assertiveness. I would have formally requested a response from the law school administration and if I failed to get one, I would have called the New York Times.

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Most people share what social psychologists have labeled a "belief in a just world." Individuals generally want to believe that life follows orderly, predictable, and equitable patterns in which everyone gets what they deserve and deserves what they get. To sustain this view, people will often adjust their evaluations of merit to justify existing social arrangements.

Deborah Rhode31

I have had several opportunities in the past year to learn how people have remembered the 1988-89 events in the office of the Arkansas Law Review. One opportunity arose in the spring of 1996 when I met with the women faculty of the law school to discuss a proposal I had made for a dedicated endowment that would assist women students or otherwise foster a more woman-friendly learning environment at the law school. When I explained that

my desire and concern arose largely from the law school's failure to respond when I was sexually harassed in the law review office, the two women faculty members who had been at the law school in 1988-89 said they remembered no incident of harassment. One did recall, however, that there had been a conflict over the nerf basketball hoop in the law review office.32 When I briefly recounted events related to the poster, the female professors shrugged their shoulders, saying they simply had no recollection of the events I described. This simply cannot be so given that the matter was formally presented to the law faculty as relevant to the honor code charges.

I had another opportunity to observe how the events are mis-remembered when I spoke to a woman who had been on the honor council when the specious charge was brought against me. I called her in the summer of 1996, as I was preparing to submit my doctoral dissertation. Because I was telling the story of the law review poster in the introduction to my doctoral dissertation about sexually hateful speech, I wanted to be sure I was accurate in stating that the subsequent honor code charge had been brought by a member of the law review, and I sought her confirmation of this fact. In explaining why I was asking for the confirmation, I recounted the poster incident because it was, of course, relevant to my conclusion that the baseless honor code charge was part of the pattern of harassment I had been enduring in the law review. The woman stated that she never knew anything of the poster, and that she only recalled that there had been a "personality conflict" between me and the two men I named as having been responsible for the poster. This surprised me given that an important part of my argument to the honor council (and later to the faculty) that I should be allowed to face my accuser and that the charge against me must have been maliciously motivated because it was without supporting evidence, was to recount the harassment I had endured in the

32. One of the typical forms of harassment in the law review office, prior to the poster incident, had been in male law review members creating nerf hoop "trick shots" that involved parts of the female anatomy, e.g., "off the tilt and into the hoop."
law review office for the past year, commencing with the poster, and to explain why, based on limited knowledge of the papers I had written, the charge was almost certainly brought by a law review member. Of course the members of the honor council, like the faculty, knew of the poster incident at one time. If they had managed to escape knowledge of it at the time it was tacked up in the law review office—unlikely, given the volley of letters in the law school newspaper and all—it had been part of my case, put to them. Incidentally, the woman did not confirm that the honor code charge had been brought by a law review member.

One would not expect observers to or even players in these incidents to recall the details as clearly as I (and perhaps the poster artists) remember them. Still, I found it curious—and telling—that memories of the event were so mutated, so (presumably unconsciously) filtered over time as to absolve the harassers of any responsibility whatsoever. A poster labelling female members of the law review “head coffee maker,” “chief head giver,” and “head slut”—even if prompted by the poster artists’ personal dislike of the female member(s)—or, for that matter, if I had been the most disagreeable and unpleasant law review editor ever to cross the threshold of Waterman Hall—does not reduce to a simple personality conflict. Putting up the poster was an act of sexual harassment; it was an act of aggression. It is a wrong that cannot be rationalized or justified or excused by saying that there was a personality conflict between the harassers and those who were harassed. The desire to believe in a just world is indeed a powerful impulse—and one that I often experience myself. Nevertheless, I believe it is an impulse that we should learn to resist to the extent that it keeps us from seeing clearly the rights and wrongs of situations we witness. This is especially so when we are decision-makers in those dilemmas.

Another interesting comment was made by the current editor-in-chief of the *Arkansas Law Review* when I proposed publishing this essay in the fiftieth anniversary edition. His letter soliciting articles for the issue had also solicited law review anecdotes—“colorful (or off-color).” I
told him I had both article and anecdote for him, and I described briefly the poster incident and the law school's failure even to scold those responsible. He wrote back saying,

I found the story you related in your letter shocking. I can't say that that sort of thing could not happen at the Arkansas Law Review today, but I can say with certainty that it would not happen on my editorial board.33

I wasn't sure whether he, too, was implying that there must simply have been "bad blood" on my editorial board in order for such behavior to occur and that, by contrast, relations were so harmonious on his own editorial board as to preclude that. Alternatively, I thought he might simply be complimenting his editorial board and staff for their consistent good judgment, saying that he knew that none of them would engage in such harassment—that all were above that sort of behavior. If he was saying the former, he may have been buying unthinkingly into the same "just world" idea as some who were present for the events described, and he might have been assuming that I had done something to provoke the poster, that in a sense I "had it coming." If he was saying the latter, he might be wrong for a different reason. I know that I never realized that people on our law review staff were capable of the misogyny they exhibited. We deny the existence of latent hostility toward women (while also underestimating its potency) at peril to the meaningful gender equality we say we seek for our society.

* * *

Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

* * *

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would

run the risk of reinforcing the prevailing level of
discrimination. Harassers would continue to harass
merely because a discriminatory practice was common,
and the victims of harassment would have no remedy.

* * *

A complete understanding of the victim's view requires,
among other things, an analysis of the different perspec-
tives of men and women. Conduct that many men con-
sider unobjectionable may offend many women.

* * *

[A] sex-blind reasonable person standard tends to be
male-biased and tends to systematically ignore the ex-
periences of women.

* * *

Ellison v. Brady34

I analyzed cursorily above the legal causes of action
that I might have had available to me had I wished to pur-
sue them. I believe that my hunches about the judicial sys-
tem's likely response to my experience were pretty
accurate. Intentional infliction of emotional distress would
likely have been the tort action to serve me best—or defa-
mation might have worked35—but a great deal would have
been dependent on the fact finders' determinations.36

Intractable from those determinations would have
been the fact finders' assumptions about women, men, and
appropriate gender roles, as well as their individual predis-
positions—shaped by various experiences and characteris-
tics, including gender—about what is and is not sufficiently
"outrageous" to be actionable. As the judge in Ellison v.
Brady recognized, such assessments are rarely "sex-blind,"
and we should not pretend that they are.

* * *

[A] requirement that a man or woman run a gauntlet of
sexual abuse in return for the privilege of being allowed

34. 924 F.2d 872, 878-79 (9th Cir. 1991).
35. Cf. Smith v. Atkinson, 622 So. 2d 785 (La. App. 1993) (upholding a finding of
liability for defamation of a law professor who called a female student a "slut" in
class).
36. See generally Eugene Volokh, Freedom of Speech and Appellate Review in
to work and make a living can be as demeaning as the harshest of racial epithets.

* * *

Sexist speech, like rape, is not only—and perhaps not at all—about sex. It is about power.

Marcy Strauss

41. Strauss, supra note 5, at 13.
When I consider more closely why the poster had such a powerful impact on me, when I consider its power to injure with tangible consequences, I inevitably conclude that it has everything to do with the gender biases that are so deeply imbued in our society. I reach the same conclusion when I consider why my articulation of why the poster was objectionable and unacceptable was apparently ineffective at countering the poster’s message. We live in an ostensibly egalitarian society, but one in which females, no matter how enlightened their parents, no matter how progressive their educations, grow up realizing on some level that a huge segment of society does not value them as highly as men (or, to be generous, values them “differently” than it does men)—women are the “other” to man, who is standard, normative. Females rarely grow up taking for granted that they will become professionals like lawyers; they may aspire to, and they may know that there are no longer formal barriers to prevent them from doing so, but few walk into law schools (or medical schools or engineering colleges or trade workshops or science laboratories) with the same sense of belonging that men more typically possess.42 I certainly did not. I knew that in law school I would struggle to prove myself, but I believed that with hard work it could be done, and I was right. Because of the success I had enjoyed in my academic and other pursuits in college and law school, I—perhaps like others—was surprised at the blow the poster dealt me. It is no exaggeration to say that the incident brought me face to face with the fragility of my own confidence, which I had previously perceived to be genuine.

My essential point is this. The lack of authentic gender equality in our society was, in a sense, a double culprit in the incident I have described. First, it was the lack of true equality that led certain male law review members to attack certain female law review members on the basis of their

gender by implying that women are only fit for certain roles—roles associated with sex. To state it another way, there was nothing in the ethos or the culture of the law school to deter them—nothing to check their impulse to communicate the message in the poster. Second, that same lack of equality exacerbated the injury that I incurred from the poster—an injury that, in the context of authentic and meaningful gender equality might have been relatively minor, with few or no tangible consequences for me. Until our society reflects an authentic gender equality, until male and female both wholly assimilate it into their attitudes toward and treatment of others, sexually hateful speech will continue to inflict injury on those who, while not necessarily powerless, enjoy less power than the dominant group. As Professor Susan Williams has written, "Hate speech is so dangerous precisely because of the existence of deep inequality and injustice along particular lines in our society."43

For now, messages like the one in the poster can be very effective at silencing women. Because of this, I would argue that such messages forfeit some of their claims, as speech, to First Amendment protection. Free speech certainly is not free in the sense that it costs nothing; in the incident I have described it cost me plenty. I would argue that it was also costly to women collectively. How, one may ask? I cannot honestly say that my career has suffered as a direct consequence of the incident and its aftermath.44 Yes, my grades suffered, but I don't have any reason to believe that has affected my career path or prospects. Indeed, many around me have accentuated the positive: experiencing incidents such as these provides us with important insights for research and thought; this one arguably provided me with a lifetime agenda if I want to make it that. Besides, that which doesn't kill us makes us stronger, right?45

44. A plausible argument could be made that my career would have been hurt had I stayed in Arkansas. After the incident, several lawyers in Little Rock quizzed me about the "fuss" I'd made.
45. This is all true, although I will stop short of expressing thankfulness to those responsible for the poster.
Nevertheless, I would argue that the poster and ensuing incidents of harassment, unredressed as they were, ignored by the law school administration, had short-term as well as long-term negative consequences. They sent a message to all in the law school community that such harassment would not be shamed, let alone punished. They sent the message that the law school administration did not care whether the law school was a congenial learning environment for women. They sent the message that a woman who was publicly labelled a "slut," apparently in retaliation for excelling, was on her own. I daresay these messages deterred women in the law school community at the time from realizing their full potential, from seeking leadership positions they might otherwise have sought.\footnote{It is interesting to recall that when I decided to pursue the position of editor-in-chief, a couple of my law professors commented that it was unusual that, if selected, I would be only the second woman to serve in that capacity. They commented that several women students had, in the past, been at the top of their respective classes, and it was odd that only one other had become editor-in-chief, and that very few had sought the position. Considering my experience, I think I now understand at least one of the reasons why few women had ever sought the post. Perhaps they were simply acting consistently with the dominant group's expectations of them. Similarly, it is not surprising that only one woman has served as editor-in-chief since my tenure in that position.}

I know that until I was securely settled in another legal community far from Arkansas, it caused me to experience diminished ambition.\footnote{This is consistent with what Marcy Strauss has written. See supra note 5 and accompanying text.}

I have sometimes contemplated whether, if I experienced the same type of incident today in the workplace, it would have as great an impact on me. On the one hand, I doubt that it would; I am more confident now and have a greater sense of belonging in my work than I did in law school. On the other hand, I realize that my response and ability to cope—and I believe that of most women—would depend greatly on the reactions of those around me. They would depend on whether I received vocal and public institutional support, whether I had sympathetic superiors and colleagues, and whether there were any redress for the injury suffered (even if I chose not to pursue it). In that sense, nothing has changed. The variables that, in my opin-
ion, determine whether sexual harassment drives a woman from her job, simply shocks her sensibilities, or leads to any of a range of responses in between, are very much the same as they were for me nine years ago.

* * *

[T]he knowledge which men acquire of women, even as they have been and are, without reference to what they might be, is wretchedly imperfect and superficial, and always will be so until women themselves have told all that they have to tell.

Harriet Taylor

In the egalitarian and just society that we want the United States to be, the right to speech is just one right in an array of many that we should protect. Until we commit ourselves to gender equality in the same way that the United States Supreme Court has committed itself to the free speech principle, misogynist speech will remain a social force to be reckoned with by those committed to the social and economic advancement of women. To this end, we must continue to tell—and listen to—women's stories of how they experience sexually hateful speech and other forms of sexually harassing behavior, of both ephemeral and tangible harms flowing from such harassment. For until we hear what women have to say about these experiences we cannot begin to decide wisely and with credibility when such harms should be legally cognizable in tort, when they should give rise to a sexual harassment action, and how much First Amendment protection the speech actually deserves.

48. John Stuart Mill, The Subjection of Women 26 (1970). This attribution is a disputed one. Mainstream scholars attribute this work to John S. Mill, contending that Harriet Taylor assisted only with the editing. Many feminist scholars maintain joint authorship or alternatively, singular authorship with only Taylor given credit. See Kathleen Lahey, "... Until Women Themselves Have Told All That They Have to Tell...", 23 Osoode Hall L.J. 519 (1985).