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## Panes/Pains of Privilege

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## PANES/PAINS OF PRIVILEGE

Jessica L. Roberts\*

In *Panes of the Glass Ceiling: The Unspoken Beliefs Behind the Law's Failure to Help Women Achieve Professional Parity*, Kerri Lynn Stone masterfully describes how employment discrimination law fails to address the latent discriminatory attitudes toward women in the workplace. Interweaving personal accounts of professional women with legal doctrine and pop culture, Stone compellingly argues that stereotypes about how women should—and should not—behave at work are at the heart of many current employment disparities. Yet because these beliefs are both pervasive and unspoken, they often go unnoticed. The goal of *Panes of the Glass Ceiling* is to state these presumptions unequivocally, so that we may consider the role that they play in women's continuing inequality in the workplace and what, if anything, the law can do in response. In this short essay, I discuss Stone's recommendations for reform, which include both legal and extralegal responses. In so doing, I contextualize her observations that unspoken beliefs are the problem and that the law alone cannot provide the solution within the scholarly literature about privilege.

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### I. PANES OF THE GLASS CEILING

Like Stone, I am a white woman who attended an elite law school, entered the legal academy, and became a mother (in that order). Not surprisingly then, much of the book rang true to my personal and professional experiences. During law school and while on the teaching market, I was cautioned that the way I dressed and spoke might lead prospective employers to dismiss me. When I spent a summer working at a law firm, one senior associate who had a penchant for blazers told me that, based on my appearance and demeanor, she was surprised that I wrote her a good memo. And years later, I got similar advice to wear glasses and flats when I

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interviewed for law school positions. Once at work, I encountered many of the challenges articulated by Stone's interviewees. Students and colleagues expected more uncompensated work from me than from my male counterparts, whether it was a sympathetic ear about a personal challenge or the desire for gender balance on a committee or at a hiring dinner. When I was negotiating for an additional faculty line to staff a center that I run, a law school administrator described me as "emotional" to my *husband* (who is also on my faculty). My teaching evaluation numbers are as high as the best of my male colleagues, yet the student comments refer to me as "nice" and "helpful" and rarely "brilliant" or "funny." One student told a mutual acquaintance that he did not take a class with me, despite his interest in the area, because my voice was too bubbly. When I decided to have children, I cobbled together something equivalent to maternity leave through teaching relief and accumulated sick days because there was no formal policy. And with my second baby, my sick days ran out and I went a week and a half without pay. Throughout these experiences, I endured my fair share of off-color remarks and unwanted advances, most of which I laughed off or pretended not to notice. The list goes on and on.

This is all to say that Stone has written, at least for me, an incredibly relatable book. Every chapter, each one organized around a different unspoken belief, conjured memories from my own life. The chapters all follow the same format: she describes the unspoken belief, how it contributes to women's workplace inequality (the pane of the glass ceiling), the ways that belief harms women (the pain of the glass ceiling), how the belief manifests in other social contexts, and finally the legal and policy takeaways.<sup>1</sup> The conclusion from Stone's analysis is undeniable: employment discrimination law is currently failing working women. So where do we go from here?

Stone includes a variety of potential reforms to address the concerns that she describes. To combat stereotypes about how women should look or act, courts could take judicial notice of those beliefs or allow evidence about workplace culture and dynamics.<sup>2</sup> Similarly, she recommends that courts take judicial notice of situations in which women bear disproportionate shares of invisible or emotional labor at work and the harms that those disparities produce.<sup>3</sup> In response to allegations that women are too weak or too sensitive,

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<sup>1</sup> Professor Stone's book and the themes highlighted within it were discussed at the *Panes of the Glass Ceiling* Microsymposium at FIU College of Law in Miami, Florida, as described by Professor Stone in the Introduction to this issue. See generally Kerri Lynn Stone, *Panes of the Glass Ceiling: Introduction*, 17 FIU L. Rev. 739 (2023).

<sup>2</sup> KERRI LYNN STONE, PANES OF THE GLASS CEILING: THE UNSPOKEN BELIEFS BEHIND THE LAW'S FAILURE TO HELP WOMEN ACHIEVE PROFESSIONAL PARITY 57 (2022).

<sup>3</sup> *Id.* at 168.

Stone suggests anti-bullying legislation.<sup>4</sup> She also has a relatively straightforward fix to help combat the over-policing of female employees' appearances: the law should not permit dress codes that burden one gender more than another.<sup>5</sup> And Stone joins the chorus arguing for paid family leave and affordable childcare to combat the disadvantages faced by working mothers.<sup>6</sup> Regarding pay equity, she notes that legislatures have already started introducing bills to close the wage gap, often by prohibiting employers from considering prior salaries when setting an employee's pay.<sup>7</sup> Undoubtedly, these changes would lead to better working conditions, not just for women, but also for other kinds of employees who have found themselves at the wrong end of an unflattering social belief.

However, not every pane lends itself to clear legal solutions. Regarding locker room talk and sexist work cultures, Stone suggests that lawyers and judges be more attuned to the reality that a sexist working environment harms women and hopes that HR departments will respond accordingly.<sup>8</sup> Stone also wishes to enlist the help of "everyday people" in combatting toxic and demeaning behaviors.<sup>9</sup> Regarding men's hesitance to mentor, or even interact, with women at work, Stone calls for "[m]indfulness of this aspect of the struggle for equality in the workplace on the part of employers' internal regulators, from those who assign mentors and staff assignments to those who evaluate supervisors."<sup>10</sup> She also encourages courts to acknowledge that "seemingly small, nuanced things like the quality of mentoring and 'bonding,' and impromptu professional interactions spurred by comfort levels, may be eluding scrutiny."<sup>11</sup> But these suggestions beg the question of what accounting for these realities will mean for the law. Stone does not argue that plaintiffs should be able to prevail on discrimination or hostile work environment claims because they were excluded from happy hours or golf excursions. Instead, she admits that these issues "cannot be solved simply" and implores readers that "a more searching, honest conversation that challenges beliefs and focuses on results is bound to have some utility."<sup>12</sup>

And even some of the panes that have relatively clear legal and policy solutions will also require extralegal changes. For example, simply equalizing dress codes alone will not address the lack of agency that women

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<sup>4</sup> *Id.* at 75–78.

<sup>5</sup> *Id.* at 129.

<sup>6</sup> *Id.* at 193–94.

<sup>7</sup> *Id.* at 205–06.

<sup>8</sup> *Id.* at 102.

<sup>9</sup> *Id.* at 103–04.

<sup>10</sup> *Id.* at 150.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

experience at work. Stone, therefore, also urges employers to reflect on how their policies might patronize women and to make acknowledging women's independence and autonomy part of workplace trainings and culture.<sup>13</sup> While Stone advises courts to take judicial notice when women perform more invisible or emotional work, she also suggests that employers should “[c]ultivat[e] a culture [that includes] open discussion of assignment patterns, personal experiences with disparate expectations, and other issues.”<sup>14</sup> She urges employers and female workers themselves to challenge the conventional belief that care and clean up are the exclusive domain of women.<sup>15</sup> And regarding the disadvantages that working women encounter when they become mothers, Stone asserts that employers should adopt the position that “motherhood is not a source of inconvenience or shame.”<sup>16</sup> And, in considering how judges have constructed employment discrimination doctrines in ways that undermine plaintiffs' claims, Stone again calls for changing attitudes. She proposes “[p]rofessional training that focuses on Title VII and other antidiscrimination laws, whether for new judges or corporate executives, might be better off focusing not just on the dictates of the laws, as most does, but also on the purpose, need for, and effects of antidiscrimination laws.”<sup>17</sup>

After reading Stone's meticulously researched and beautifully written book, I was left with the uneasy feeling that, while changing the law might be necessary to address workplace inequality, it would not be sufficient. Certainly, antidiscrimination law fails women, but that is more a symptom of the problem than its cause. The target of *Panes of the Glass Ceiling* is not employment law and its doctrines but unspoken beliefs. And, until we address those underlying beliefs, changes to law and policy will only get us so far.

## II. PANES AS PRIVILEGE

Yet perhaps I should not have been so surprised that women's inequality at work is the result of silent forces and that the law cannot remedy these disparities on its own. Both Stone's premise—that unspoken beliefs form the root of the problem—and her conclusions—that hearts and minds, not just statutes and legal doctrines—must shift for women to achieve professional

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<sup>13</sup> *Id.* at 129.

<sup>14</sup> *Id.* at 167.

<sup>15</sup> *Id.* at 167–68.

<sup>16</sup> *Id.* at 194.

<sup>17</sup> *Id.* at 237.

parity—make perfect sense if you read her book as an extended exploration of male privilege in the American workplace.

One of privilege’s defining characteristics is that it is invisible. Privilege is a set of unearned, group-based advantages that allow certain kinds of people to move about the world more easily.<sup>18</sup> Privilege benefits individuals, but it is a systemic, society-wide phenomenon.<sup>19</sup> And while privilege is everywhere, it is simultaneously nowhere because it lies so deeply in the fabric of our culture that we often fail to notice it.<sup>20</sup> Stephanie Wildman was largely responsible for introducing the idea of privilege to legal academics in the 1990s.<sup>21</sup> In Wildman’s book, *Privilege Revealed*, she and Adrienne Davis explain that privilege has two foundational characteristics that contribute to its invisibility, particularly for those who enjoy it.<sup>22</sup> First, the qualities of the privileged group define the social norm.<sup>23</sup> In other words, the privileged group sets the baseline for what is normal, or even “natural,” in society, making everyone who does not experience that privilege an outlier. Consider that women play “women’s sports,” whereas men frequently just play sports. Second, privileged people have the ability to “opt out of struggles against oppression if they [so] choose.”<sup>24</sup> White privilege allows white parents to avoid difficult conversations with their children about racially driven police violence, whereas Black parents must educate their children early to protect them. Wildman and Davis explain that “[b]oth the conflation of privilege with the societal norm and the implicit choice to ignore oppression mean that privilege is rarely seen by the holder of the privilege.”<sup>25</sup> Thus, privilege often goes unnoticed and, as a result, undiscussed.

Wildman identifies the workplace as site of male privilege. She explains that “the very words we use to describe work and the location in which it occurs—masks systems of privilege.”<sup>26</sup> Wildman notes that women, in fact,

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<sup>18</sup> Peggy McIntosh famously described privilege as “an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 22, 23 (1995).

<sup>19</sup> Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. UNIV. J.L. & POL’Y 245, 247 (2005).

<sup>20</sup> Zachary A. Kramer calls this seeming contradiction “the paradox of privilege.” Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. UNIV. L. REV. 205, 209 (2009) (describing the privilege paradox with respect to heterosexuality).

<sup>21</sup> See STEPHANIE M. WILDMAN, *PRIVILEGED REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 16.

<sup>25</sup> *Id.* at 13–14.

<sup>26</sup> *Id.* at 25.

work everywhere yet, when we refer to “work” we associate that word with a particular location “the workplace.”<sup>27</sup> This linguistic quirk is the result of our unspoken belief that wage work—paid labor done outside the home historically by men—is “real work.”<sup>28</sup> She explains:

The very sense of the workplace has been defined, not by women, and not in our terms. To be in the workplace is to enter a male-defined world. Even the notion of workplace, which exists outside the home, privileges maleness, associating work with male values and culture. The sphere outside the home has traditionally been the situs of male work, and therefore attached to the very definition of work. This privileging of maleness in the workplace has not stopped simply because women now work there as well.<sup>29</sup>

And because men have defined what constitutes real work, their priorities and achievements also define what constitutes merit.<sup>30</sup> All the unspoken beliefs that Stone illuminates in her book can all be traced back to this important generative observation: the American workplace was not defined with women in mind. These unspoken beliefs exist because there remains a sense that we are interlopers who don’t quite belong. We are different than men and require more oversight, yet we are held to male standards. We must accept toxic, sexist workplaces as “the way things are,” yet our mere presence can be threatening and disruptive. We make less money because we are less valued as paid laborers, yet we are expected to do care-giving and house-keeping in the workplace for free. And, when we have babies, we confirm the sneaking suspicion that we were never “real” workers in the first place.

Unfortunately, the law does not adequately combat privilege. Both the law and the legal system in which it operates are products and instruments of privilege.<sup>31</sup> This reality holds true even for the body of law designed to promote equity and inclusion. Antidiscrimination law is one-sided, focusing on subordination and leaving privilege largely intact.<sup>32</sup> Davis explains that

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<sup>27</sup> *Id.* at 26.

<sup>28</sup> *Id.*

<sup>29</sup> Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, 4 TEX. J. WOMEN & L. 171, 172–73 (1995).

<sup>30</sup> Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 891 (1995).

<sup>31</sup> For example, authors have identified privilege in seemingly neutral legal doctrines, like standing. See Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002).

<sup>32</sup> Wildman, *supra* note 29, at 175 (quoting Adrienne Davis, *Toward a Postessentialist Methodology, or a Call to Countercategorical Practice* 35 (Sept. 1994) (unpublished manuscript) (on file with the *Texas Journal of Women and the Law*) (“Anti-discrimination advocates focus only on one half

we will never achieve equality with this incomplete approach because inequality can regenerate like the heads of hydra. She writes that “[a]ttacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege.”<sup>33</sup> Like Stone, Davis implores us that “discrimination cannot be ended by focusing only on active acts of subordination and domination.”<sup>34</sup> We must also address privilege and the unspoken beliefs upon which it rests.

Employment discrimination in particular falls short. Wildman explains that “Title VII law has missed the systemic nature of the discrimination it seeks to combat.”<sup>35</sup> The statute and its doctrines reflect our assumptions about the nature of work and who performs it. Because of these inherent limitations, even a reimagining of employment discrimination law may not be enough to challenge privilege in the workplace and the unspoken beliefs that it generates. Addressing privilege and truly ending inequality in the workplace will require extralegal changes in how we understand and construct opportunities, define merit, and allocate benefits. That is to say, it will require the changes to cultures and attitudes both in the workplace and beyond that Stone advocates in *Panes of the Glass Ceiling*.

Stone has written a compelling and thoughtful book, which stands alone as an important contribution to the literature. But it can also be read as a call to arms to address the effect of male privilege in the workplace. It is up to us to decide how to answer.

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of the power system dyad, the subordinated characteristic, rather than seeing the essential companionship between domination that accompanies subordination, and the resultant privilege that accompanies that discrimination.”).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*