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## Feminist Legal Theory and Stone's Panes of the Glass Ceiling

Rona Kaufman

*Duquesne University Kline School of Law*, [kitchenr@duq.edu](mailto:kitchenr@duq.edu)

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# FEMINIST LEGAL THEORY AND STONE'S *PANES OF THE GLASS CEILING*

Rona Kaufman\*

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## I. INTRODUCTION

Over thirty years ago, in her book, *Feminism Unmodified*, Catharine A. MacKinnon articulated the ways in which the structures that form American life are inherently discriminatory against women:

[V]irtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, *their socially-designed biographies define workplace expectations and successful career patterns*, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their

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\*Associate Professor of Law, Kline School of Law at Duquesne University.

military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.<sup>1</sup>

Three decades later, MacKinnon's description of how and why women are unequal remains prescient. In 2023 sex inequality persists.<sup>2</sup> It remains prevalent in every aspect of society. Women continue to confront the consequences of inequality across social, economic, and legal systems.<sup>3</sup> Women are still deprived of the right to the wages they earn, their bodily integrity, their physical safety, their reproductive autonomy, and an equitable share of power.<sup>4</sup>

Women are less likely than men to be paid for their work. When they are paid, they are paid less than men for the same work. Women of color experience the wage gap to a greater degree. Women are more likely than men to be raped, sexually assaulted, harassed, and suffer violence at the hands of an intimate partner. Women of color experience violence against them on the basis of their sex at higher rates than white women. Women control significantly less of the nation's wealth than men. Women of color control less of the wealth than white women.<sup>5</sup>

<sup>1</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36 (1987) (emphasis added).

<sup>2</sup> This was one of the issues discussed at the *Panes of the Glass Ceiling* Microsymposium at FIU College of Law, as described by Professor Kerri Lynn 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>3</sup> Rona Kaufman, *A Century Since Suffrage: How Did We Get Here? Where Will We Go? How Will We Get There?*, 59 *DUQ. L. REV.* 1, 10 (2021).

<sup>4</sup> *Id.* at 9–11.

<sup>5</sup> *Id.* at 8–9; see generally ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (2012); Catherine Clifford, *Global Wealth Inequality Is 'Founded on Sexism,' Says Oxfam International*, CNBC (Jan. 19, 2020, 7:06 PM), <https://www.cnbc.com/2020/01/17/global-wealth-inequality-is-founded-on-sexism-oxfam-international.html> (“[W]omen spend 37% more time doing unpaid care work than men . . . . Over a year, that means women are working more than 95 extra 8-hour-days for no pay.”); see also Gus Wezerek & Kristen R. Ghodsee, *Women's Unpaid Labor Is Worth \$10,900,000,000,000*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html>; Kristin S. Wilkerson, *Bridging the Gap: Achieving Pay Equity Between Men and Women*, 42 *WYO. LAW.* 16, 17 (2019); see Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 *NW. J. L. & SOC. POL'Y* 265, 270 (2020); see generally Katherine Richard, *The Wealth Gap for Women of Color*, *CTR. GLOB. POL'Y SOLS.* (2014).

As Catherine A. MacKinnon has argued, women's right to be recognized as fully human has yet to be realized.<sup>6</sup> American women and girls are enslaved in a barely hidden multi-billion dollar commercial sex industry.<sup>7</sup> Women are also victimized by the government as they are incarcerated at higher rates than ever before, stealing mothers from their children and leaving them more vulnerable to sexual assault, drug abuse, crime, poverty, and their own incarceration.<sup>8</sup> Pregnant women are incarcerated at higher rates in America than in any other nation.<sup>9</sup> Studies reveal that at least one in three girls will be sexually assaulted, with one in nine girls being sexually abused by an adult, thirty-four percent of them by a family member.<sup>10</sup> Further, despite efforts to combat it, domestic violence continues to threaten women with one in four women experiencing severe violence perpetrated by an

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<sup>6</sup> See generally CATHARINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES (2006).

<sup>7</sup> *Id.*; Carmen Niethammer, *Cracking the \$150 Billion Business of Human Trafficking*, FORBES (Feb. 2, 2020, 7:04 AM), <https://www.forbes.com/sites/carmenniethammer/2020/02/02/cracking-the-150-billion-business-of-human-trafficking/?sh=5770e1774142> (the global human trafficking industry is estimated to be a \$150 billion/year industry); Cara Kelly, *13 Sex Trafficking Statistics That Explain the Enormity of the Global Sex Trade*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2019/07/29/12-trafficking-statistics-enormity-global-sex-trade/1755192001/> (July 30, 2019, 8:11 AM) (profits from global sex trafficking are estimated to be \$99 billion and sex trafficking through illicit massage parlors alone are estimated to yield \$2.5 billion in profits in the United States).

<sup>8</sup> Lindsey Linder, *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*, 58 U. LOUISVILLE L. REV. 435, 438–42 (2020).

<sup>9</sup> Wesley Smithart, *Pregnant in Captivity: Analyzing the Treatment of Pregnant Women in American Prisons and Immigration Detention Centers*, 71 ALA. L. REV. 867, 870 (2020) (“[T]he United States has the highest rate of female incarceration in the world. Between 1980 and 2014, the number of women in American prisons and jails rose from 26,378 to approximately 215,000, an increase of over 800%.”); Molly Skerker et al., *Improving Antenatal Care in Prisons*, WHO 739 (Aug. 31, 2015) (the World Health Organization estimates that “24,000–60,000 pregnant women are incarcerated worldwide”); Cara O’Connor, *A Guiding Hand or a Slap on the Wrist: Can Drug Courts Be the Solution to Maternal Opioid Use?*, 109 J. CRIM. L. & CRIMINOLOGY 103, 112 (2019) (“Exactly how many . . . [incarcerated] women are pregnant is unknown, but studies from the early 2000s suggested that over 9,000 pregnant women are incarcerated [in the United States] each year”); see generally Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AMA J. ETHICS 779 (2013); see also *First of Its Kind Statistics on Pregnant Women in U.S. Prisons*, JOHNS HOPKINS MED. (Mar. 21, 2019), <https://www.hopkinsmedicine.org/news/newsroom/news-releases/first-of-its-kind-statistics-on-pregnant-women-in-us-prisons> (conducting a study of twenty-two prisons and finding that 1,396 women were pregnant at intake).

<sup>10</sup> *Nearly One in Three Teenage Girls Has Experienced Sexual Assault or Other Violence*, NEW NWLC NATIONAL SURVEY SHOWS, NAT’L WOMEN’S L. CTR. (Apr. 19, 2017), <https://nwlc.org/press-releases/nearly-one-in-three-teenage-girls-has-experienced-sexual-assault-or-other-violence-new-nwlc-national-survey-shows/>;

*Children and Teens: Statistics*, RAINN, <https://www.rainn.org/statistics/children-and-teens> (last visited Jan. 30, 2021).

intimate partner,<sup>11</sup> and approximately 1,600 being killed as a result.<sup>12</sup> Women in America have not yet achieved equality. Women do not have access to safety, economic power, political power, professional success, or reproductive freedom equal to that experienced by men.

Feminism seeks to both combat the injustices women experience and attain true sex equality for all. Feminism is the belief that women should have equality with regard to political, social, and economic rights.<sup>13</sup> Despite this seemingly clear definition, feminist thought and activism are fraught.<sup>14</sup> There is significant disagreement over how to define and achieve equality for women. As understandings of gender shift and evolve, there are also different views with regard to which people constitute women and which women's equality should be the focus of feminist work. Thus, feminist theory includes a variety of distinct schools of thought which seek the achievement of disparate feminist goals and, even where there is agreement on the goals themselves, feminists often disagree on the best path to achieve those goals. Philosopher Noëlle McAfee explains:

[F]eminism is both an intellectual commitment and a political movement that seeks justice for women and the end of sexism in all forms. Motivated by the quest for social justice, feminist inquiry provides a wide range of perspectives on social, cultural, economic, and political phenomena. Yet despite many overall shared commitments, there are numerous differences among feminist philosophers regarding philosophical orientation . . . , ontological commitments . . . , and what kind of political and moral remedies should be sought.<sup>15</sup>

Importantly, at the very least, feminists are united in their quest to see that women are treated as equal humans. Professor Patricia Smith notes that the “rejection of patriarchy is the one point on which all feminists agree.”<sup>16</sup>

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<sup>11</sup> *National Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <https://www.ncadv.org/statistics> (last visited Feb. 9, 2021).

<sup>12</sup> *When Men Murder Women*, VIOLENCE POL'Y CTR. 1, 3 (2020), <https://vpc.org/studies/wmmw2020.pdf>.

<sup>13</sup> See *Feminism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/feminism> (last visited Feb. 7, 2023).

<sup>14</sup> See FEMINIST JURISPRUDENCE 3 (Patricia Smith ed., 1993) (“Not even all feminists hold a single perspective, and not all women, of course, are feminists.”).

<sup>15</sup> Noëlle McAfee, *Feminist Philosophy*, STAN. ENCYCLOPEDIA PHIL. (June 28, 2018), <https://plato.stanford.edu/archives/fall2018/entries/feminist-philosophy/>.

<sup>16</sup> See SMITH, *supra* note 14, at 3 (“But all feminism does begin with one presumption, namely, that a patriarchal world is not good for women.”).

Feminism has been theorized across disciplines, from sociology to history to philosophy to law to anthropology and beyond. Feminist legal theory, which is particularly relevant to a critique of anti-discrimination law, is “premised upon the belief that the law has been instrumental in women’s subordination in society.”<sup>17</sup> It is characterized as a philosophy that:

identifies the pervasive influence of patriarchy and masculinist norms on legal structures and demonstrates their effects on the material conditions of women and girls and those who may not conform to cisgender norms. It also considers problems at the intersection of sexuality and law and develops reforms to correct gender injustice, exploitation, or restriction. To these ends, feminist philosophy of law applies insights from feminist epistemology, relational metaphysics and progressive social ontology, feminist political theory, and other developments in feminist philosophy to understand how legal institutions enforce dominant gendered and masculinist norms. Contemporary feminist philosophy of law also draws from diverse scholarly perspectives such as international human rights theory, postcolonial theory, critical legal studies, critical race theory, queer theory, and disability studies.<sup>18</sup>

More simply put, “feminist jurisprudence is the analysis and critique of law as a patriarchal institution.”<sup>19</sup> Feminist legal theory encompasses several philosophical perspectives including, most notably: equality theory as espoused by liberal feminists;<sup>20</sup> dominance or subordination theory as espoused by radical feminists;<sup>21</sup> difference theory as espoused by cultural or “ethic of care” feminists;<sup>22</sup> and anti-essentialist theory as espoused by Black and other intersectional feminists.<sup>23</sup> These four different approaches to feminist theory can be summarized as follows:

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<sup>17</sup> TRACY A. THOMAS & TRACEY JEAN BOISSEAU, *FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW* 18 (2011).

<sup>18</sup> Leslie Francis and Patricia Smith, *Feminist Philosophy of Law*, STAN. ENCYCLOPEDIA PHIL. (Oct. 24, 2017), <https://plato.stanford.edu/archives/fall2021/entries/feminism-law/>.

<sup>19</sup> FEMINIST JURISPRUDENCE, *supra* note 14, at 3.

<sup>20</sup> Amy R. Baehr, *Liberal Feminism*, STAN. ENCYCLOPEDIA PHIL. (Dec. 31, 2020), <https://plato.stanford.edu/entries/feminism-liberal/>; THOMAS & BOISSEAU, *supra* note 17, at 19–20.

<sup>21</sup> THOMAS & BOISSEAU, *supra* note 17, at 21–22.

<sup>22</sup> *Id.* at 19–20.

<sup>23</sup> *Id.* at 23–24; see Dana Neacsu, *The Red Booklet on Feminist Equality. Instead of a Manifesto*, 30 WOMEN’S RTS. L. REP. 106, 137–46 (2008) (describing the various strains of feminist thought and a chronology of the American feminist movement).

Formal equality theory . . . stressed equality between the sexes and a system of laws—both substantive and procedural—that was gender neutral. Difference theory emerged as a response to formal equality theory and recognized that certain life experiences, for example, pregnancy and motherhood, were uniquely female and must be factored into discussions of equality. In difference theory, true equality results not from gender-neutral application of the law, but from recognition that the law must take into account real differences between men and women. Dominance theory created an environmental context around the biological individuation of difference theory. In dominance theory, men exploit the inherent differences between men and women to maintain the status quo of existing male power structures and do so through sexual harassment, sex discrimination, domestic violence, pornography, rape, and other behaviors. Anti-essentialist theory sought to split the atoms of both cultural and radical models of feminism by postulating that a single theory of feminism excluded other important factors such as race, ethnicity, sexual orientation, and age. To the anti-essentialist, no monolithic theory of feminism could be accurate because gender is but one element of the many that define a woman.<sup>24</sup>

These different approaches to overall sex equality have manifested in different approaches to conceptualizing inequality in the workplace and how the law responds to it.

Liberal feminists seek to achieve equality by eliminating discrimination against women such that they are treated the same as men.<sup>25</sup> They seek formal equality and equal opportunity so that women can access all aspects of American life.<sup>26</sup> The Equal Pay Act of 1963 and Title VII's prohibition of discrimination against women in employment are legal interventions that align with liberal feminist thought.<sup>27</sup> Simply put, they deem unlawful

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<sup>24</sup> Jay Marhoefer, *The Quality of Mercy Is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession*, 78 CHI.-KENT L. REV. 817, 836 (2003).

<sup>25</sup> Dawn C. Nunziato, *Gender Equality: States as Laboratories*, 80 VA. L. REV. 945, 949 (1994) (“Essentially, liberal feminism calls for equal treatment of men and women, or formal equality, and focuses on the fairness of the means of legislation.”).

<sup>26</sup> *See id.*

<sup>27</sup> *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d); *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; *see* *County of Washington v. Gunther*, 452 U.S. 161, 182–88 (1981) (Rehnquist, J., dissenting) (discussing the “equal pay for equal work” protections afforded by the Equal Pay Act).

“unequal pay for equal work” and “discrimination on the basis of ... sex.”<sup>28</sup> They do not provide women with any preferential treatment.<sup>29</sup> They do not require employers to hire a proportional number of women.<sup>30</sup> They do not accommodate women's unique physiological or social position.<sup>31</sup> Rather, to the extent that they are intended to achieve equality for women, they assume that women will achieve equality so long as overtly discriminatory practices are eliminated.<sup>32</sup> Both the Equal Pay Act and Title VII have been instrumental in changing the landscape for working women.<sup>33</sup> However, the equality model upon which these anti-discrimination laws were founded is insufficient alone to remedy the entire scope of discrimination women face in the workplace. As Professor Mark M. Hager has explained:

The soul of liberal feminism is an anti-discrimination principle, which holds that women should not be constrained by law, bias, or inferior education. Liberal feminism is the doctrine on women's relationship to liberal democracy. It is not a utopia. It does not maximize any form of well-being for women except the freedom to choose, change and grow.<sup>34</sup>

In contrast, difference or “ethic of care” feminists argue that there is a “feminine” nature or essence that should be embraced by society. Difference feminists emphasize “relationships, the value of intimacy, the importance of mothering and caretaking, and other feminine activities. They call for a re-valuing of women's work and women's contributions to our culture and envision a better world in which the different voice of women [is] heard and acknowledged.”<sup>35</sup> Difference feminists reject the view that men and women are the same and that equality can be achieved by merely seeking formal

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<sup>28</sup> See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 9 (1975) (“The Equal Pay Act operates within a narrow frame; it is directed solely at compensation disparities for substantially equal work performed by men and women.”).

<sup>29</sup> See *id.* (“Significantly, both measures mandate nondiscrimination, not special favors.”).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (“But it would be misleading to suggest that when this legislation was adopted, Congress viewed eradication of gender-based discrimination as priority business.”).

<sup>33</sup> See Ginsburg, *supra* note 28, at 10 (“Title VII, strengthened by 1972 amendments, has become the most potent remedy against race and sex discrimination in employment.”); Andrea H. Beller, *The Effects of Title VII of the Civil Rights Act of 1964 on Women's Entry into Nontraditional Occupations: An Economic Analysis*, 1 L. & INEQ. 73, 75 (1983) (“Title VII has proved somewhat effective in narrowing the earnings gap between men and women. Despite the relative lack of improvement in women's gross earnings during the decade after Title VII became federal policy, regression estimates show that Title VII's enforcement between 1967 and 1974 narrowed the sex differential in earnings by about 7.1%.”).

<sup>34</sup> Mark M. Hager, *Sex in the Original Position: A Restatement of Liberal Feminism*, 14 WIS. WOMEN'S L.J. 181, 181 (1999).

<sup>35</sup> Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 162 (2010).



equality.<sup>36</sup> They also reject the idea that women can achieve equality in a man's world without that world adopting feminine values.<sup>37</sup> Difference feminists argue that a liberal feminist approach to equality cannot succeed because it assumes that men and women are the same and will never account for the inherent physiological and social differences between the sexes.<sup>38</sup>

Difference feminists focus on "the limitations of equality analysis and its inability to 'take into account real sex differences between women and men, to recognize that gender is a social construct, to acknowledge differences among women, particularly with regard to race, and to take into account the gendered dimensions of legal and social institutions.'"<sup>39</sup> Despite their belief that there are important and relevant differences between the sexes, as cultural feminist, poet, and author, Adrienne Rich explains, ultimately, difference feminists share the view of all other feminists regarding what women are and what they deserve:

Some ideas are not really new but keep having to be affirmed from the ground up, over and over. One of these is the apparently simple idea that women are as intrinsically human as men, that neither women nor men are merely the enlargement of a contact sheet of genetic encoding, biological givens. Experience shapes us, randomness shapes us, the stars and weather, our own accommodations and rebellions, above all, the social order around us.<sup>40</sup>

With regard to a cultural feminist approach to anti-discrimination law, the work of Professor Joan Williams is illustrative.<sup>41</sup> Williams has theorized anti-discrimination law to encompass discrimination against parents and has had success in getting family responsibilities discrimination recognized by the courts.<sup>42</sup> Prior to Williams's work, discrimination against mothers (and fathers) with young children was not a cognizable form of employment discrimination. Today, however, courts have begun to recognize that discrimination against mothers may be a form of unlawful sex

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<sup>36</sup> See THOMAS & BOISSEAU, *supra* note 17, at 19; Aya Gruber, *Neofeminism*, 50 Hous. L. Rev. 1325, 1338 (2013) ("[C]ultural feminism directly undermines liberal feminism's main premise that women can and should compete on the same terms as men in the workplace.").

<sup>37</sup> See Gruber, *supra* note 36 at 1338.

<sup>38</sup> THOMAS & BOISSEAU, *supra* note 17, at 19.

<sup>39</sup> *Id.* at 19 (quoting Karen J. Maschke, *Volume Introduction*, in *FEMINIST LEGAL THEORIES* ix (Karen J. Maschke ed., 1997)).

<sup>40</sup> ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* xv (10th Anniversary ed. 1986).

<sup>41</sup> See Chamallas, *supra* note 35, at 163–64.

<sup>42</sup> See *id.*

discrimination.<sup>43</sup> In addition to seeking better legal outcomes under existing law, cultural feminists also seek workplace equality by pushing for better family leave laws and policies.<sup>44</sup> The cultural feminist push to have feminine values incorporated into the workplace paved the way for adoption of the Pregnancy Discrimination Act (“PDA”), the Family Medical Leave Act (“FMLA”), and recognition of discrimination against parents as unlawful under Title VII. However, the PDA has been interpreted so narrowly that it protects pregnant women from discrimination on the basis of their status as pregnant women but does little to protect them from discrimination on the basis of the real-life consequences of a pregnancy.<sup>45</sup> As a result, many pregnant women can be legally fired when they are unable to fulfill their job responsibilities due to being pregnant. Unlike workers with disabilities or a sincerely-held religious belief, pregnant workers have no statutory right to a reasonable accommodation.

The Family Medical Leave Act, adopted in 1993 to ensure that women could maintain gainful employment even while fulfilling their roles as mothers (and daughters and wives),<sup>46</sup> has also failed to protect women from being fired on the basis of their inherent social and physiological realities. Despite the intentions behind the FMLA, a staggering eighty percent of new mothers have no job protection at all.<sup>47</sup> Moreover, even when covered by FMLA, a pregnant woman who encounters health complications during her pregnancy or who gives birth prematurely is denied needed bonding leave if she used her FMLA leave for her or her newborn infant’s serious health condition.<sup>48</sup>

Dominance or radical feminists reject the approaches of liberal and cultural feminists.<sup>49</sup> Dominance feminists “see a world of intentional

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<sup>43</sup> See generally *Gallina v. Mintz*, 123 F. App’x 558 (4th Cir. 2005) (upholding jury’s verdict in favor of a lawyer who received negative evaluations and was called names after her employer learned she had a small child); *Rathbone v. CVS Pharm., Inc.*, No. 3:03CV1478(DJS), 2006 U.S. Dist. LEXIS 30216 (D. Conn. May 12, 2006) (denial of summary judgment to defendant where plaintiff alleged discrimination when she took leave due to pregnancy complications); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (finding that stereotypical assumptions about a mother’s commitment to her job is a form of unlawful sex discrimination).

<sup>44</sup> See generally Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983).

<sup>45</sup> See generally *Young v. UPS*, 575 U.S. 206 (2015).

<sup>46</sup> Rona Kaufman Kitchen, *Missing the Mark: How FMLA’s Bonding Leave Fails Mothers*, 31 HOFSTRA LAB. & EMP. L.J. 303, 305–06 (2014).

<sup>47</sup> *Id.* at 309.

<sup>48</sup> *Id.* at 316 (“[T]o the extent a mother exhausts her twelve weeks of FMLA leave to *care* for her prematurely-born or seriously ill infant, her right to take leave to *bond* [italics in the original] with her infant will be limited.”).

<sup>49</sup> Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 LOY. L.A. L. REV. 691, 706 (2001).

hierarchical, rigidly structured, and self-reinforcing male domination and entitlement, characterized by the violent, hostile, sexualized, and systematic social and economic subordination of women to and by men.”<sup>50</sup> They argue that the path to equality must include a confrontation with and dismantling of the reality that women’s inequality is attributable to “men’s concerted effort to subordinate and control women.”<sup>51</sup> Dominance theory centers male control over women’s bodies and sexuality as a locus for the oppression of women. As Professor Kimberlé Crenshaw explains, “every feminist issue, every injustice and injury suffered by women, devolves upon sexuality; . . . sexual harassment, rape, and prostitution are all modes of sexual subordination; women’s lack of authoritative speech is women’s always already sexually violated condition.”<sup>52</sup> Cass Sunstein predicted that dominance theory as theorized by Catharine A. MacKinnon, “should have a significant impact on thinking about sex discrimination and on social and legal thought more generally.”<sup>53</sup> And it did. For one, MacKinnon’s work was instrumental in getting sexual harassment recognized as a cognizable form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>54</sup> It redefined what had previously been considered harmless “boys will be boys” behavior as an invidious form of workplace sex discrimination.

Anti-essentialist or intersectional feminists add an intersectional lens to feminist thought by arguing that inequalities due to sex should be viewed more holistically and recognize that the nature of the particular inequality, and the best solutions, may depend upon the particular woman’s other characteristics and traits. Intersectional feminists condemn other strains of feminist thought for defining women’s inequality as the inequality experienced by privileged white women. Black feminism is one form of intersectional feminism that is especially concerned with the intersection of

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<sup>50</sup> *Id.*

<sup>51</sup> Andrea Mazingo, *The Intersection of Dominance Feminism and Stalking Laws*, 9 NW. J.L. & SOC. POL’Y 335, 337 (2014).

<sup>52</sup> Gruber, *supra* note 36 at 1343 (2013) (citing WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 81 (1995)).

<sup>53</sup> Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 830 (1988).

<sup>54</sup> *See id.* at 829; *see also* Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 510 (1996) (“MacKinnon’s theory of sexual harassment as sex discrimination was revolutionary and it radically altered the case law regarding sexual harassment.”); Charles L. Barzun, *The Common Law and Critical Theory*, 92 U. COLO. L. REV. 1221, 1232 (2021) (“MacKinnon’s theory revolutionized our understanding of sex discrimination and essentially created the modern law of sexual harassment.”); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

racism and sexism.<sup>55</sup> The term “intersectionality”<sup>56</sup> was coined in 1989 when Kimberlé Crenshaw used it to describe how systems of oppression layer one upon another to form distinct barriers to equality for those with multiple identities.<sup>57</sup> However, as Crenshaw notes “intersectionality is not being offered here as some *new*, totalizing theory of identity.”<sup>58</sup> In fact, early black feminists including Maria W. Stewart, Ida B. Wells, Anna Julia Cooper, and Sojourner Truth were exploring intersections of race and sex well before the concept was named.<sup>59</sup> Arguably, intersectionality is and always has been an inextricable part of Black feminism.<sup>60</sup>

Finally, intersectional feminists are challenging the “single axis” failure of anti-discrimination law.<sup>61</sup> More specifically, intersectional feminism exposes anti-discrimination laws’ failure to capture discrimination against minority women because often their sex discrimination claims fail because white women were not similarly discriminated against. Similarly, their race discrimination claims fail because minority men were not similarly discriminated against.<sup>62</sup> Intersectional feminist thought is inspiring a new subset of “sex-plus-race” discrimination cases.<sup>63</sup>

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<sup>55</sup> Lisa A. Crooms, “*To Establish My Legitimate Name Inside the Consciousness of Strangers*”: *Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights*, 46 HOW. L.J. 229, 235 n.22 (2003). Crooms discusses “feminists of color” and describes it as including Black feminisms, Chicana feminisms, critical race feminisms, post-colonial feminisms, and third world feminisms.

<sup>56</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) (“Focusing on two dimensions of male violence against women-battering and rape-I consider how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and how these experiences tend not to be represented within the discourses of either feminism or antiracism. Because of their intersectional identity as both women *and* [italics in the original] of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.”).

<sup>57</sup> See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

<sup>58</sup> Crenshaw, *supra* note 56, at 1244 (emphasis added).

<sup>59</sup> See generally Amy Allen, *Feminist Perspectives on Power*, STAN. ENCYC. PHIL. (Oct. 28, 2021), <https://plato.stanford.edu/entries/feminist-power/#PoweResoLibeFemiAppr>.

<sup>60</sup> VALERIE SMITH, NOT JUST RACE, NOT JUST GENDER: BLACK FEMINIST READINGS xvi–xvii (1998) (“[T]here can be no black feminism without intersectionality . . .”).

<sup>61</sup> Shelley Cavalieri, *On Amplification: Extralegal Acts of Feminist Resistance in the #MeToo Era*, 2019 WIS. L. REV. 1498, 1503 (2019).

<sup>62</sup> See Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 111–19 (2018).

<sup>63</sup> See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that minority women may experience sex discrimination in violation of Title VII even when the discrimination is based on both race and sex); *Jeffries v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (holding that black women are a discrete subgroup entitled to Title VII protection). Despite the rise of this line of cases, recent scholarly commentary continues to observe the ways that intersectional forms of discrimination experiences by women of color are too often overlooked.

While this discussion highlights the differences between various feminist theories, it should also be noted that there is wide consensus among feminist theorists. As Nancy Levit and Robert R.M. Verchick explain:

All feminist theories share two things . . . First, feminists recognize that the world has been shaped by men, particularly white men, who for this reason possess larger shares of power and privilege. All feminist legal scholars emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. . . . Second, all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and on how to achieve it.<sup>64</sup>

Applying Levit and Verchick's view to the feminist approach to workplace equality, it can be said that while all feminists agree that discrimination against women should be eradicated and all feminist schools of thought theorize various manifestations of workplace inequality, there is some disagreement about what constitutes discrimination in the workplace and how the law can eradicate it.<sup>65</sup> Decades into the project of seeking workplace equality for women, it is clear that liberal feminism, cultural feminism, dominance feminism, and intersectional feminisms are all playing a role in addressing sex discrimination. It is also clear that, despite the gains made due to anti-discrimination law, sex equality in the workplace remains evasive.

Recently, in her book *Panes of the Glass Ceiling: The Unspoken Beliefs Behind the Law's Failure to Help Women Achieve Professional Parity*, Professor Kerri Lynn Stone explores and deconstructs the many practical reasons why women have been unable to achieve equality in employment. In 1984, magazine editor Gay Bryant coined the term "glass ceiling" to describe the invisible barriers that persist in preventing women from achieving workplace equality.<sup>66</sup> Since then, the "glass ceiling" has become a mainstream phrase to describe the "phenomenon whereby, despite the passage of the Civil Rights Act of 1964 and the widespread education of society about sex discrimination and sexual harassment, sex inequality persists in the American workplace when it comes to everything from

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<sup>64</sup> NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 15–16 (2006).

<sup>65</sup> For example, some sex-positive feminists would argue that "consensually" created pornography and prostitution is not a manifestation of patriarchal violence, while others would argue that all sex, including seemingly consensual sex between intimate partners, is a form of patriarchal violence.

<sup>66</sup> See KERRI LYNN STONE, *PANES OF THE GLASS CEILING: THE UNSPOKEN BELIEFS BEHIND THE LAW'S FAILURE TO HELP WOMEN ACHIEVE PROFESSIONAL PARITY* 4 (2022).

promotion to compensation.”<sup>67</sup> Professor Stone painstakingly deconstructs the belief systems that underlie the American workplace and the path to professional success to reveal many of the nuanced reasons why women, despite their education, skill, and commitment to the workforce, continue to struggle to achieve professional success comparative to men. Stone insightfully explains why women continue to experience irremediable discrimination in employment almost sixty years after Congress outlawed sex discrimination in employment. Stone’s book is about “viewing the failure of society and those entrusted with running its regulatory institutions to confer upon women parity and equality with men with respect to power, prestige, and compensation in the workplace.”<sup>68</sup> Her book explores the specific reasons why women, despite constituting “46.5 percent of the workforce,” make up “less than 8 percent of its top leadership.”<sup>69</sup>

Stone’s book is a long overdue deconstruction and indictment of the toxic masculinity and seemingly benign social norms that pervade workplace culture and its negative impact on women and equality. She breaks the silence and articulates the “unspoken beliefs” that constrain American work culture.<sup>70</sup> Stone’s book is an important critique of the American workplace, Title VII of the Civil Rights Act of 1964, and the interpretation and application of anti-discrimination law. It explains why and how Title VII has failed to capture many manifestations of discrimination against women and provides practical legal solutions for moving forward.

Stone’s book is geared toward an audience that wants to understand the problems women face in employment today and solve those problems. While she provides historical context for many of the beliefs that ground the panes of the glass ceiling, her focus is not on theory or history. It is a book about the reality of 2022 and a map for how to shift that reality in 2023 and beyond. This book review seeks to provide deeper grounding for Stone’s panes of the glass ceiling by placing her work in the broader historical and theoretical context of feminism, the women’s movement, and the history of women in the American labor force.

This discussion proceeds in three parts. Part I provides the historical context for discrimination against women in the American workplace and anti-discrimination law by tracing the evolution of the modern women’s movement and the history of women’s participation in the labor force. Part II discusses Professor Kerri Stone’s panes of the glass ceiling and places each pane in theoretical context. Part III concludes with a brief discussion of how

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Stone's articulation of the panes or the glass ceiling and her suggestions for reform contribute to the ongoing feminist legal theory discourse.

## II. PART I: THE MODERN WOMEN'S MOVEMENT

The modern women's movement is generally characterized as having at least three distinct phases, known as the "waves" of feminism.<sup>71</sup> The waves are organized chronologically and characterized by the primary feminist theory and goals that dominated each.

First wave feminism officially began in 1848 with the Seneca Falls Convention and culminated in 1920 with the passage of the 19th Amendment to the Constitution granting women the right to vote.<sup>72</sup> First Wave feminists were liberal feminists who focused on attaining educational and political rights for women, while also arguing for mother's rights. Early first wave feminists included Susan B. Anthony, Sarah Grimke,<sup>73</sup> Frances E.W. Harper, Elizabeth M'Clintock, Lucretia Mott, Elizabeth Cady Stanton, Maria Stewart, and Sojourner Truth.<sup>74</sup> Sojourner Truth and other Black feminists of the time facing oppression both on the basis of race and sex, at times, felt abandoned by white feminists. In her famous *Ain't I a Woman* speech, which she delivered at the Ohio Women's Rights Convention in 1851, Truth articulated the ways in which she, as a Black woman was doubly oppressed, both as a woman by all men, and as a Black person by all whites, even by her feminist and abolitionist sisters.<sup>75</sup> Despite the iniquities within first wave feminism, the movement was initially quite intersectional as its leaders were both abolitionist and feminist fighting simultaneously for the end of slavery and for women's equality. In an 1888 speech before the International Council

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<sup>71</sup> Constance Grady, *The Waves of Feminism, and Why People Keep Fighting over Them, Explained*, VOX (July 20, 2018, 9:57 AM), <https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth>.

<sup>72</sup> Laura Brunell & Elinor Burkett, *Feminism*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/feminism> (Mar. 9, 2023); *see generally* U.S. CONST. amend. XIX.

<sup>73</sup> *See generally* SARAH GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN (1838).

<sup>74</sup> *See generally* Lori D. Ginzberg, "All Men and Women Are Created Equal:" *The Life of Elizabeth Cady Stanton*, NAT'L PARK SERV., <https://www.nps.gov/articles/000/-all-men-and-women-are-created-equal-the-life-of-elizabeth-cady-stanton.htm> (Dec. 14, 2020); *Elizabeth M'Clintock*, NAT'L PARK SERV., <https://www.nps.gov/wori/learn/historyculture/elizabeth-mclintock.htm> (Apr. 4, 2023); Debra Michals, *Elizabeth Cady Stanton*, NAT'L WOMEN'S HIST. MUSEUM (2017), [www.womenshistory.org/education-resources/biographies/elizabeth-cady-stanton](http://www.womenshistory.org/education-resources/biographies/elizabeth-cady-stanton) (last visited Apr. 11, 2023).

<sup>75</sup> Sojourner Truth, *Ain't I a Woman?*, Speech delivered at the Women's Rights Convention, Old Stone Church, Akron, Ohio (1851) (transcript available at <https://www.nps.gov/articles/sojourner-truth.htm>).

of Women in Washington D.C., Frederick Douglass, eloquently articulated what today's activists would characterize as intersectionality:

All good causes are mutually helpful. The benefits accruing from this movement for the equal rights of women are not confined or limited to woman only. They will be shared by every effort to promote the progress and welfare of mankind every where and in all ages. It was an example and a prophecy of what can be accomplished against strongly opposing forces, against time-hallowed abuses, against deeply entrenched error, against worldwide usage, and against the settled judgment of mankind, by a few earnest women, clad only in the panoply of truth, and determined to live and die in what they considered a righteous cause.<sup>76</sup>

Ultimately, however, racism found a home in the first wave feminist movement. As one article describes:

[D]espite the immense work of women of color for the women's movement, the movement of Elizabeth Cady Stanton and Susan B. Anthony eventually established itself as a movement specifically for *white* women, one that used racial animus as fuel for its work. The 15th Amendment's passage in 1870, granting black men the right to vote, became the spur that politicized white women and turned them into suffragettes. Were they truly not going to be granted the vote before former slaves were?<sup>77</sup>

The issue of race in the years following the Civil War was a serious point of contention in the United States, and this issue spearheaded the divide of the women's suffrage movement in the late nineteenth and early twentieth centuries.<sup>78</sup> While some suffragists continued to organize to secure the right to vote for all women as well as Black men, others believed that suffrage for *any women* would be impossible without the support of powerful, white men in the South and, therefore, abandoned an intersectional feminist movement that prioritized the rights of Black women along with white women.<sup>79</sup>

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<sup>76</sup> Frederick Douglass, Speech at the International Convention of Women (Apr. 1888) (transcript available at <https://www.blackpast.org/african-american-history/speeches-african-american-history/1888-frederick-douglass-woman-suffrage/>).

<sup>77</sup> Grady, *supra* note 71.

<sup>78</sup> See Sharon Harley, *African American Women and the Nineteenth Amendment*, NAT'L PARK SERV., <https://www.nps.gov/articles/african-american-women-and-the-nineteenth-amendment.htm> (Apr. 10, 2019).

<sup>79</sup> *Id.*



The 19th Amendment was finally passed in 1920, a victory often credited to the more militant leadership of suffragette Alice Paul. First Wave feminists also acquired some rights for women in the areas of employment, education, and property rights.<sup>80</sup> By the end of the first wave, some Americans believed women had achieved equality. Libertarian feminist Suzanne LaFollette stated in 1926 that the women's struggle "is very largely won."<sup>81</sup> However, the basic rights of citizenship secured for women by first wave feminists did not result in women's equality. Some feminists of the time never believed that attaining political equality could ever lead to women's true liberation.

Anarchists and radical feminists Emma Goldman and Charlotte Perkins Gilman disagreed with the suffragettes that formal equality would lead to women's liberation.<sup>82</sup> They subscribed to the radical feminist view that the path to equality could never be found in political rights alone.<sup>83</sup> Emma Goldman, "mocking the notion that the ballot could secure equality for women, since it hardly accomplished that for the majority of American men," argued that women would find liberation, only

by asserting herself as a personality, and not as a sexy commodity . . . by refusing the right to anyone over her body; . . . by refusing to bear children, unless she wants them; by refusing to be a servant to God, the State, society, the husband, the family. . . ."<sup>84</sup>

Nevertheless, liberal feminist thought and the work of the suffragettes dominated first wave feminism and, ultimately, placed the American feminist movement on a path rooted in principles of formal equality.

Second wave feminism was largely characterized by dissatisfaction among American women regarding the post-World War II societal expectation that they must be married, raise children, and perform domestic work.<sup>85</sup> This dissatisfaction was documented in Betty Friedan's 1963 novel *The Feminist Mystique*, which is often credited with igniting the second wave of the feminist movement.<sup>86</sup> The second wave was led by thought leaders, writers, professors, organizers, activists, lawyers, and politicians, including Bella Abzug, Gloria Steinem, Dorothy Pittman-Hughes, Wilma Mankiller,

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<sup>80</sup> See Diane Klein, *Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture*, 59 DUQ. L. REV. 106, 107 (2021); Grady, *supra* note 71.

<sup>81</sup> Burkett & Brunell, *supra* note 72.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; EMMA GOLDMAN, ANARCHISM AND OTHER ESSAYS 217 (3d ed. 1917).

<sup>85</sup> See *Feminism: The Second Wave*, NAT'L WOMEN'S HIST. MUSEUM (June 18, 2020), <https://www.womenshistory.org/exhibits/feminism-second-wave>.

<sup>86</sup> *Id.*; see also Grady, *supra* note 71.

Ruth Bader Ginsburg, Brenda Eichelberger, Adrienne Rich, Audre Lourde, Shirley Chisholm, Catharine MacKinnon, Andrea Dworkin, Susan Brownmiller, Bell Hooks, and Phyllis Chesler.

Many goals and accomplishments of the second wave were encapsulated by the popular slogan, "the personal is political."<sup>87</sup> Where the major objective of the first wave was to establish complete citizenship for women in the political and legal sphere by securing the right to vote, second wave feminists focused their aim on increasing equality for women in the home, the workplace, and in the social hierarchy.<sup>88</sup> For example, the National Organization for Women (NOW) formed in 1966 in response to the Equal Employment Opportunity Commission's perceived failure to enforce the provisions of the 1964 Civil Rights Act, which pertained to discrimination on the basis of sex.<sup>89</sup> The efforts of NOW, as well as other organizations such as the Women's Equity Action League (WEAL), brought the issue of gendered workplace discrimination to the mainstream, which contributed to major victories such as strengthening the Equal Pay Act of 1963 and Title VII of the Civil Rights Act.<sup>90</sup>

The second wave also brought about calls for sexual autonomy and reproductive freedom. The birth control pill became available in 1960, which feminists used to separate female sexuality from procreation in the collective consciousness.<sup>91</sup> One of the most widely recognized victories of the second wave was the Supreme Court decision *Roe v. Wade*, which established "a constitutional right to privacy, including a woman's right to control her own body, and thus legal abortion."<sup>92</sup> The holding in *Roe v. Wade* is often attributed to the work of women's groups during the second wave that advocated for expanded access to safe, affordable abortions as well as contraceptives, such as the National Association to Repeal Abortion Laws and the Chicago Women's Liberation Union.<sup>93</sup>

In addition to advocating for workplace equality and reproductive freedoms, second wave feminists advocated for women's financial independence. Until 1974, married women were not permitted to

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<sup>87</sup> Lina Napikoski, *The Personal is Political: Where Did This Women's Movement Slogan Come From? What Does It Mean?*, THOUGHTCO (Jan. 3, 2020), <https://www.thoughtco.com/the-personal-is-political-slogan-origin-3528952>.

<sup>88</sup> See Judy D. Whipps, *A Historical Introduction: The Three Waves of Feminism*, in PHILOSOPHY: FEMINISM 3, 4 (Carol Hays ed., 2017).

<sup>89</sup> Van Gosse, *Women's Liberation and Second Wave Feminism: The Personal is Political*, in RETHINKING THE NEW LEFT: AN INTERPRETIVE HISTORY 150, 157 (2005).

<sup>90</sup> See *id.* at 161; Whipps, *supra* note 88, at 16–17.

<sup>91</sup> See Gosse, *supra* note 89, at 156.

<sup>92</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973); Gosse, *supra* note 89, at 162.

<sup>93</sup> Gosse, *supra* note 89, at 162.

independently secure lines of credit, such as credit cards or mortgages.<sup>94</sup> Feminist leaders advocated for the passage of the Equal Credit Opportunity Act, which prohibited lenders from discriminating against borrowers on the basis of sex and marital status.<sup>95</sup> Second wave feminists also initiated conversations about rape, domestic violence, and other forms of violence against women, with the goal of bringing visibility to issues that had previously been largely unaddressed.<sup>96</sup>

Second wave feminists launched the movement against domestic violence in the 1970s and NOW formed a National Task Force on Battered Women/Household Violence at its eighth annual conference in October of 1975.<sup>97</sup> Also in 1975, at the national Women's Year Conference, a resolution urging governmental action to assist battered women was adopted.<sup>98</sup> Prior to feminist attention, "criminal charges by wives against husbands, while possible in theory, [were] practically impossible to pursue in all but the most brutal and flagrant cases."<sup>99</sup> It was not until 1980 that most states even had legislation against spousal abuse.<sup>100</sup> Even then, however, "law enforcement agencies, prosecutors, and the courts" were often "still reluctant to intervene in wife beating cases."<sup>101</sup> Similarly, "[c]ivil remedies such as protective orders and restraining orders . . . proved ineffective as sanctions against wife beating."<sup>102</sup> Though federal legislation to address domestic violence was introduced in the 1970s and '80s, none was successfully passed until 1994.<sup>103</sup> In addition to bringing needed attention to violence against women in the home, second wave feminists also fought against rape and other types of sexual assault. College students organized the first Take Back the Night marches.

Finally, second wave feminists revived the call for the ratification of the Equal Rights Amendment ("ERA") that had started in the first wave with

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<sup>94</sup> Beth Dreher, *7 Shocking Things Women Weren't Allowed to Do Until Pretty Recently*, WOMAN'S DAY (Aug. 13, 2016), <https://www.womansday.com/life/real-women/a55991/no-women-allowed/>.

<sup>95</sup> See generally John W. Cairns, *Credit Opportunity Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960 (1976) (explaining the Equal Credit Opportunity Act and the various forms of discrimination against women that led to its enactment); see also Dreher, *supra* note 94.

<sup>96</sup> See Gosse, *supra* note 89, at 160 (describing "speak outs," where large groups of women discussed the violence that they suffered at the hands of men with members of the public).

<sup>97</sup> Kathleen J. Tierney, *The Battered Women Movement and the Creation of the Wife Beating Problem*, 29 SOC. PROBS. 207, 208 (1982).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 209.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 208.

<sup>103</sup> *Id.* at 209; Violence Against Women Act of 1994, 42 U.S.C. § 13931.

Alice Paul.<sup>104</sup> Although the second wave was not successful in bringing the amendment to complete ratification, the renewed interest carried through the second wave into the present, which is characterized as the third, or possibly even the fourth wave of feminism.<sup>105</sup>

From the late 1970s through the early 1990s, despite or in reaction to the many gains of the second wave feminist movement, feminism faced significant backlash in the mainstream.<sup>106</sup> The media characterized feminists as abrasive, “man-hating,” intolerant, and “anti-family.”<sup>107</sup> Many women sought to distance themselves from association with the feminist movement, and in 1990, *Newsweek* magazine declared that feminism was dead.<sup>108</sup> In addition to hostility toward feminism exhibited in the mainstream, significant issues within the movement began to arise as well. Tensions grew along racial lines, as “[w]hite, middle class women were called to address their racism and classism.”<sup>109</sup> It was clear to many within the feminist movement that the second wave was not unified, and that any replacement would have to address the multiple intersections of power and privilege that existed in the lives of women in order to be successful.<sup>110</sup>

It is in the spirit of intersectionality that Rebecca Walker, feminist activist and writer for *Ms. Magazine*, declared the commencement of the third wave in 1992.<sup>111</sup> In her article, Walker stated that modern women “find [them]selves seeking to create identities that accommodate ambiguity and multiple positionalities.”<sup>112</sup> This quest toward intersectionality, inclusion, and recognition of power and privilege is characteristic of the third wave of feminism. Scholars Susan Archer Mann and Douglas J. Huffman have explained that, “Common threads running through the diverse feminisms of the Third Wave are their foci on difference, deconstruction, and decentering.”<sup>113</sup> Key thinkers of the third wave included Judith Butler,

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<sup>104</sup> Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. JUST. (Jan. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained>.

<sup>105</sup> *Id.*

<sup>106</sup> Whipps, *supra* note 88, at 22 (explaining that the *Roe v. Wade* decision contributed significantly to mainstream backlash against the feminist movement because it established a strong anti-abortion movement which positioned feminism and women's liberation movements as “anti-family”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 23.

<sup>109</sup> *Id.* at 22.

<sup>110</sup> *See id.*; *see also* Susan Archer Mann & Douglass Huffman, *The Decentering of Second-Wave Feminism and the Rise of the Third Wave*, 69 SCI. & SOC'Y 56, 59–60 (2005).

<sup>111</sup> Whipps, *supra* note 88, at 23; *see also* Rebecca Walker, *Becoming the Third Wave*, *MS.*, Jan.–Feb. 1992, at 86.

<sup>112</sup> *See* Whipps, *supra* note 88, at 23.

<sup>113</sup> Mann & Huffman, *supra* note 110, at 57.

Kimberlé Crenshaw, and Gloria Anzaldúa.<sup>114</sup> These individuals, among many others, established robust feminist theory discussing intersectionality, the separation of sex from gender, queer theory, and post-colonialism, or feminist perspectives from the Global South.<sup>115</sup>

In addition to the production of robust academic theory, the third wave is also characterized by its uptick in activism focused on combatting sexual harassment and violence against women.<sup>116</sup> Walker's announcement of the third wave came in response to Anita Hill's 1991 testimony against then-Supreme Court nominee Clarence Thomas, and some researchers have characterized this cultural moment as the catalyst for the revival of feminist thought.<sup>117</sup>

There is some speculation that we are presently in a fourth wave of feminism.<sup>118</sup> This wave would be largely characterized by social media-based activism, such as the #MeToo movement, as well as the 2017 Women's March on Washington.<sup>119</sup> The #MeToo movement began in 2006, when social activist Tarana Burke coined the phrase as a way to express empathy with survivors of sexual harassment and/or abuse.<sup>120</sup> The phrase exploded into the popular culture mainstream in 2017; however, after allegations came forward from multiple Hollywood actresses that they had been sexually abused by renowned film producer, Harvey Weinstein.<sup>121</sup> In the wake of the news about Weinstein, actress Alyssa Milano took to her Twitter account calling for her followers to respond with "me too" if they had ever been sexually harassed or assaulted.<sup>122</sup> This prompt garnered tens of thousands of responses from women worldwide, who took the opportunity to share their stories and spread awareness of the endemic issue of sexual harassment and violence against women.<sup>123</sup>

<sup>114</sup> Whipps, *supra* note 88, at 23–26.

<sup>115</sup> *See id.* at 20, 24–26; *see also* Mann & Huffman, *supra* note 110, at 57.

<sup>116</sup> Grady, *supra* note 71; Whipps, *supra* note 88, at 26.

<sup>117</sup> Grady, *supra* note 71 (discussing Hill's testimony that Thomas had sexually harassed her at work); *see also* Walker, *supra* note 111 ("To me, the hearings were not about determining whether or not Clarence Thomas did in fact harass Anita Hill. They were about checking and redefining the extent of women's credibility and power."); Whipps, *supra* note 88, at 26.

<sup>118</sup> Grady, *supra* note 71; Whipps, *supra* note 88, at 27.

<sup>119</sup> Grady, *supra* note 71.

<sup>120</sup> #MeToo, #MOVEME: A GUIDE TO SOCIAL MOVEMENTS AND SOCIAL MEDIA, <https://moveme.berkeley.edu/project/metoo/#ftnt4> (last visited Feb. 7, 2023).

<sup>121</sup> Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?searchResultPosition=1>.

<sup>122</sup> Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?searchResultPosition=2>.

<sup>123</sup> *Id.*

Earlier that same year, women utilized social media to form a massive response against the election of President Donald Trump.<sup>124</sup> During his candidacy, President Trump had made multiple lewd comments about women, including his opponent, former Secretary of State Hillary Rodham Clinton.<sup>125</sup> When he was elected, many women saw this as a threat to the work that had been done by feminists of the past to establish the role of women as equal to men in society.<sup>126</sup> Women across the country used Facebook to plan a massive, physical show of support for modern feminism and to express that they would stand in opposition to any attempts to limit their hard fought-for rights.<sup>127</sup>

It is because of these very recent cultural moments surrounding feminist sentiment that some researchers have speculated that a fourth wave of feminism may have already begun.<sup>128</sup> However, there is very little formal research or cultural ephemera available to support the notion that feminism has entered its fourth wave. It is also arguable that the aforementioned movements fit squarely within the activism of the third wave, considering that they are mostly concerned with issues of sexual harassment.<sup>129</sup> In whole, it is clear that feminism is alive and well in the modern era, but time will tell whether current events are a continuation of the third wave or something entirely novel.

#### A. *The Evolutionary and Revolutionary Phases of Women's Employment*

Women's employment and participation in the American workforce has been described as evolutionary and revolutionary.<sup>130</sup> Economic historian and labor economist, Claudia Goldin, argues that three distinct evolutionary

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<sup>124</sup> *Women's March*, HISTORY, <https://www.history.com/this-day-in-history/womens-march> (last modified Jan. 18, 2023).

<sup>125</sup> Amy Chozik & Ashley Parker, *Donald Trump's Gender Based Attacks Have Calculated Risk*, N.Y. TIMES (Apr. 28, 2016), <https://www.nytimes.com/2016/04/29/us/politics/hillary-clinton-donald-trump-women.html> (describing that President Trump questioned his opponent's strength and stamina, and speculated that she would not have been as successful in politics if not for her being a woman); see also *Women's March*, *supra* note 124 (discussing the dissemination of President Trump's *Access Hollywood* tape, where he was recorded making sexually explicit remarks about women).

<sup>126</sup> See Charlotte Alter, *Here's What Donald Trump Thinks About Women's Issues*, TIME (Aug. 5, 2016, 4:21 PM) <https://time.com/4441052/donald-trump-women-issues/> (outlining President Trump's negative comments about abortion rights, paid family leave, equal pay, and child care subsidization).

<sup>127</sup> See *Women's March*, *supra* note 124.

<sup>128</sup> See Grady, *supra* note 71; Whipps, *supra* note 88, at 29.

<sup>129</sup> See Grady, *supra* note 71; Whipps, *supra* note 88, at 29–30.

<sup>130</sup> Claudia Goldin, *The Quiet Revolution That Transformed Women's Employment, Education, and Family*, 96 AM. ECON. REV. 1, 1 (2006).

phases of women's employment<sup>131</sup> preceded the current "quiet revolution" that changed the landscape of the American workplace and the trajectory of women's life experiences.<sup>132</sup> Economics Professor Dora L. Costa similarly breaks down the chronology of women's labor force participation.<sup>133</sup> Costa's explanation that the "factory girl" set the stage for the "office girl" who set the stage for the "modern career woman," neatly summarizes Goldin's four phases of women's employment:

In the first few decades of the twentieth century, the "factory girl" set the stage for the unmarried "office girl." The unmarried office girl paved the way for the entry of married women into the labor force in the late 1950s, even though this entry was primarily in dead-end jobs in the clerical sector. In turn, the married women in the labor force paved the way for the rise of the modern career woman, doing work that requires a lengthy period of training and that offers genuine opportunities for promotion.<sup>134</sup>

Goldin's first phase of the evolution of women's employment—or "factory girl" phase, which began in the late 19th century and ended in the 1920s, saw mostly young, single, poorly-educated women from immigrant families motivated by basic needs for subsistence working in jobs that were often "dirty, dangerous, repetitive, and long in hours per day and days per week."<sup>135</sup> While even prior to this phase poor women had "always worked, if not in the market, then at home," the nascent women's movement and related entry of women into the paid market "held the promise of real change" and marked the beginning of a "social movement."<sup>136</sup> Thus, as women entered the workforce as part of this first phase, women's paid labor was no longer merely an individual pursuit grounded in surviving poverty, it was part of something larger.

The second and third phases, or "office girl" phases, which spanned the 1930s through the late 1970s was marked by an increase in married women's labor force participation motivated by "several complementary factors that were, in large measure, exogenous to female labor supply."<sup>137</sup> The nature of women's paid labor shifted to include higher pay, safer working conditions,

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<sup>131</sup> *Id.* at 3–8.

<sup>132</sup> *Id.* at 8–14.

<sup>133</sup> See generally Dora L. Costa, *From Mill Town to Board Room: The Rise of Women's Paid Labor*, 14 J. ECON. PERSP. 101 (2000).

<sup>134</sup> *Id.* at 101.

<sup>135</sup> Goldin, *supra* note 130, at 3–4.

<sup>136</sup> *Id.* at 4.

<sup>137</sup> *Id.* at 5.

and shorter hours—shifts that enabled wives and mothers to work outside the home.<sup>138</sup> The laws that prevented married mothers from working “were almost entirely eliminated by the 1940s” thus enabling women to continue to work even during marriage and motherhood.<sup>139</sup> There was “great expansion of the female labor force and also immense strides in modern labor economics.”<sup>140</sup> It was during the third pre-revolutionary phase that Title VII of the Civil Rights Act of 1964 was adopted and discrimination on the basis of sex in employment was officially outlawed.<sup>141</sup>

The revolutionary phase began in the late 1970s when women’s work became entwined with their existential realities.<sup>142</sup> This phase was marked by the introduction of the “modern career woman.”<sup>143</sup> For the first time in history, women’s employment became a path to living lives with expanded horizons, altered identities, and autonomous decision making.<sup>144</sup> Women’s workforce participation propelled young women’s life plans as they “gained horizon and perceived that their lives would differ from those of their elders.”<sup>145</sup> Women began to invest more in their education, delayed marriage, and began to enter graduate professions such as law and medicine.<sup>146</sup> This workforce revolution also changed women’s outlook with regard to how they understood their individual identities.<sup>147</sup> Women’s identities became more concerned with recognition from colleagues and achieving professional and personal success.<sup>148</sup> The shift in women’s identities was multi-faceted:

Rather than jobs, most see employment as part of a long-term career. Most perceive their work as a fundamental aspect of their satisfaction in life and view their place of work as an integral part of their social world. They have added identity to their decision about whether to work or not to work given changes in wages and incomes. As a consequence women have become stickier in their labor force attachment. Leaving the workplace involves a loss in identity for a woman, just as being unemployed or retired

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138 *Id.*

139 *Id.*; see STONE, *supra* note 66, at 176–95.

140 Goldin, *supra* note 130, at 1, 7.

141 Goldin names this phase “Roots of the Revolution.” See *id.* at 6; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

142 Goldin, *supra* note 130, at 8.

143 Costa, *supra* note 133, at 101.

144 Goldin, *supra* note 130, at 8.

145 *Id.* at 9.

146 *Id.* at 9–11.

147 *Id.* at 11–13.

148 *Id.* at 11–12.



has commonly involved a loss of prestige and social belonging to most men.<sup>149</sup>

Women's identities continued to evolve throughout the revolutionary phase and were further propelled by extra-labor shifts:

The combination of the increase in divorce and the later age at first marriage for all women meant that the fraction of their lives they would spend married plummeted and economic independence became more valuable. These changes altered the identity of women and shifted it from a family- and household-centered world to a wider one that was more career oriented.<sup>150</sup>

In addition, the women's movement and the mainstreaming of feminist thought and its impact on employment law cannot be ignored. The various waves of the modern women's movement were instrumental in breaking down barriers that traditionally kept women out of the workforce and expanded the range of job opportunities that were available to women. The proliferation of feminist thought further instigated the social movement to claim women's rights including their rights at home, in employment, and to control their own bodies.

### III. PART II: STONE'S PANES

In her book, Professor Stone analyzes the persistent inequality that pervades the American workplace in the present day. She painstakingly deconstructs the proverbial glass ceiling<sup>151</sup> to reveal nine specific *panes* that create the translucent barrier to women's professional success. The panes are articulations of the unspoken beliefs that work to perpetuate discrimination against women in the workplace. Layered, one upon another, Stone argues that these panes of the glass ceiling prevent women from achieving employment parity with men. The panes encompass various distinct aspects of employment (and general American) culture which, when experienced together and when permitted to evade legal regulation, create an insurmountable obstacle for many women and explain why women continue to experience second-class status in employment. Stone uses colloquial phrases to describe the prevalent belief systems and cultural norms that comprise each of the nine panes of the glass ceiling: (1) we see you differently than we see men; (2) we expect you to take your (verbal) punches

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<sup>149</sup> *Id.* at 12.

<sup>150</sup> *Id.* at 13–14.

<sup>151</sup> *The Conundrum of the Glass Ceiling*, ECONOMIST (July 21, 2005), [www.economist.com/node/4197626](http://www.economist.com/node/4197626).

like a man; (3) accept locker room and sexist talk; (4) you don't operate with full agency; (5) women are the downfall of men; (6) just be grateful that you're there; (7) don't burden us with your (impending) motherhood; (8) he has a family to support; and (9) bad people don't do good things, but good people frequently say bad things (and employment discrimination plaintiffs can't be fully trusted).

Stone introduces each pane with a vignette of one woman's experience with that pane of the glass ceiling. She then gives voice to the unspoken belief that creates the specific pane. Stone deeply explores the pane. She offers an in-depth discussion of how courts confront the particular belief and why the law fails to provide a suitable remedy. She provides detailed case discussions and legal analysis. Further, Stone investigates other disciplines' understandings of the issue, often shedding light on the reasons why men, women, employees, and employers believe what they believe and act as they do. She then provides a clear explanation of the real-life manifestations of each pane and the harm it causes. Finally, Stone provides suggestions for how the law can do better and offers a viable path to a more equitable workplace.

A. *"We See You Differently Than We See Men"*

Stone's first pane refers to the perceived differences between men and women. The belief that underlies the pane is that women are "treated differently because they are *perceived* differently, or even viewed through a different lens so that descriptively, and even prescriptively, attributes and attitudes wholly outside of their control are projected onto them to their detriment."<sup>152</sup> This pane critiques both workplace culture and how courts adjudicate Title VII cases. The pane has two parts. It consists of: (1) the persistent stereotyping that occurs in the workplace and prevents women from achieving professional success; and (2) the refusal of courts to consider evidence of stereotyping when adjudicating Title VII claims. Stone's cataloging of the cases that illustrate hostility toward stereotyping evidence is an important revelation in light of the fact that the Supreme Court welcomed stereotyping evidence in sex discrimination cases in 1989 in *Price Waterhouse v. Hopkins*.<sup>153</sup> Stone critiques courts for failing "to create, in *Hopkins's* wake, a coherent legal doctrine of stereotyping evidence that would cement its legacy."<sup>154</sup>

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<sup>152</sup> STONE, *supra* note 66, at 34.

<sup>153</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 294 (1989).

<sup>154</sup> STONE, *supra* note 66, at 39.

While recognizing that this pane is grounded in deeply held cultural views that are difficult, if not impossible, for the law to dismantle,<sup>155</sup> Stone offers a clear practical solution for courts. She argues that courts should “take judicial notice of the connection between a protected class and a negative stereotypical phenomenon, outside of the record of a given case.”<sup>156</sup> While this solution will not directly disrupt reliance on stereotypes in the workplace, it would at least provide a path for legal remedy when women suffer discrimination on the basis of sexual stereotyping.

B. “*We Expect You to Take Your (Verbal) Punches Like a Man*”

Stone’s second pane is based on the belief that “women in the workplace should simply toughen up and ‘take bullying like a man.’”<sup>157</sup> Because workplace bullying “confers unique and disproportionate harm on women,” it prevents women from achieving workplace equality even when the bullying is “status-neutral.”<sup>158</sup> Stone grounds bullying in the masculine norms that pervade workplace culture:

Masculinities, then, make up the invisible structure that subordinates the traditionally feminine to the traditionally masculine. Tacit entrenching of sex stereotypes and privileging of masculine or “macho” behaviors like aggression, objectification, and competitiveness operate invisibly to maintain a sexist hegemony in the workplace. Being aggressive, even to the point of perhaps being abusive and antisocial, can actually *advance* one’s career in an industry or in a workplace, to the extent that many American girls find having been educated and socialized in a more typically feminine way to be a liability.<sup>159</sup>

Stone provides a detailed explanation of how men and women internalize and respond to workplace bullying differently and in ways that penalize women.<sup>160</sup> She draws upon interdisciplinary research to draw parallels between how girls respond to bullying in school and how women respond to bullying at work.<sup>161</sup> Because status-neutral bullying is not prohibited by law, this barrier to women’s equality is currently irremediable.

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<sup>155</sup> *Id.* at 29–32.

<sup>156</sup> *Id.* at 54.

<sup>157</sup> *Id.* at 59.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 61–62.

<sup>160</sup> *Id.* at 62–65.

<sup>161</sup> *Id.*

Stone favors adoption of a general anti-bullying statute, like the Healthy Workplace Bill, to remedy this aspect of the glass ceiling.<sup>162</sup>

C. *“Accept Locker Room and Sexist Talk”*

This pane refers to the belief that women should accept workplace conduct and language that does not rise to the level of actionable sexual harassment.<sup>163</sup> Stone grapples with the limits of Title VII to hold employers accountable for workplace sexism that is not deemed “because of sex” or “severe or pervasive” enough to be actionable.<sup>164</sup> Stone acknowledges that Title VII should not be transformed into a “civility code” and that federal judges should not act as “thought police.”<sup>165</sup> However, she argues that Title VII is misapplied when judges refuse to find sexual harassment when coworkers call women “bitchy” and “dumb,”<sup>166</sup> when sexually inappropriate and suggestive comments pervade the workplace,<sup>167</sup> and when women are called “bimbo” and “cunt.”<sup>168</sup> Stone argues for expanding the “confines of the law to include what truly harms women at work ‘because of their sex.’”<sup>169</sup>

D. *“You Don’t Operate with Full Agency”*

This pane is based on the belief that while “society and the law [generally] hold women accountable as adults with full agency for their actions,” women are perceived and treated as lacking full agency “when it comes to sex and attraction - in and outside of the workplace.”<sup>170</sup> Consequently, women are “regulated, watched, and even ‘rescued’” in ways men are not.<sup>171</sup> This belief manifests in the workplace with women being “admonished to be less ‘emotional,’ and ‘mentored’ to be more professional.”<sup>172</sup> Manifestations of this pane include the “double bind” women experience: getting punished for exhibiting “ambitious, assertive behaviors” as well as for “‘holding back’ and being too demure or withdrawn

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162 *Id.* at 77.

163 *Id.* at 79.

164 *Id.* at 83.

165 *Id.* at 84.

166 *Id.* at 85.

167 *Id.* at 86.

168 *Id.* at 96.

169 *Id.* at 101.

170 *Id.* at 106.

171 *Id.* at 105–06.

172 *Id.* at 106.

at work.”<sup>173</sup> Additional manifestations include the fact that women are less likely to be mentored and more likely to have their dress scrutinized and regulated.<sup>174</sup> The final manifestation of this pane is the disparate legal treatment of plaintiffs depending on whether they quit employment or submitted to their harasser in response to sexual harassment.<sup>175</sup> Stone identifies these subtle and not-so-subtle manifestations of the fourth pane as being partially responsible for the fact that despite women’s similar participation in the workforce, their ability to reach the “highest level of power, compensation and prestige” is hindered.<sup>176</sup> Importantly, in discussing this pane, Stone explores the deep history of denying women’s agency as well as how this history continues to inform the law outside of the employment context. She discusses how sexual assault, rape, and domestic violence law have penalized women who do not conform to the perfect victim narrative.<sup>177</sup> Stone struggles to find a legal solution to the deep social and workplace problems that flow from the unspoken belief that women lack agency.<sup>178</sup> In this instance, revealing the belief appears to be the most important step in moving toward a solution. Nevertheless, Stone identifies the failure of the law to recognize the discriminatory nature of dress codes as a first step toward solving this larger problem.<sup>179</sup>

E. *“Women Are the Downfall of Men”*

The unspoken belief underlying this pane is that men should avoid women because women are dangerous.<sup>180</sup> They are a “threat,” a “risk,” and a “liability.”<sup>181</sup> Like other beliefs, this belief is deeply rooted in historical views of woman as conniving seductress, but in recent years men’s fear of women has been seemingly reinforced by the #MeToo movement.<sup>182</sup> The impact of this pane on women in the workplace is obvious: men don’t want to work with women, they don’t want to mentor them, they don’t want to be alone with them. As a result, women are not properly mentored and are excluded

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<sup>173</sup> *Id.* at 109.

<sup>174</sup> *Id.* at 110–16.

<sup>175</sup> *Id.* at 116–21.

<sup>176</sup> *Id.* at 108.

<sup>177</sup> *Id.* at 124–28.

<sup>178</sup> *Id.* at 129 (“Since nobody credible is really out there saying that women, as a sex, are less self-possessed or have less agency than men do, it is a hard concept to wrangle with.”).

<sup>179</sup> *Id.* at 129–30.

<sup>180</sup> *Id.* at 131–32.

<sup>181</sup> *Id.* at 135.

<sup>182</sup> *Id.* at 132.

from a wide array of professional development. Stone identifies the multi-layered harms created by this pane:

At each layer, the failures and frailties of human nature and the law alike conspire to advance and magnify the harm. In the first instance, women report being mentored far less frequently and less intensively than do men . . . The next layer of the problem comes when women are either not aware of what is happening or aware of what is going on, but unwilling to approach HR . . . This segues into the next layer of the problem. Even if a woman complains about inequalities engendered by this belief, and her complaints are taken seriously by the employer, she may very well face retaliation from those complained about, and the law's prohibition of this retaliation may or may not prove useful.<sup>183</sup>

In the case of this pane, Stone does not provide a legal solution. Rather, she recognizes that men's avoidance of women in the workplace is rendered "virtually invisible when the lens of the law or social scrutiny tries to ensure workplace equality because it is not factored into the discussion or into the equation when the regulation of workplace behavior is discussed."<sup>184</sup> This insidious, invisible barrier to women's professional success, unlike some others, does not have a readily available legal solution. Rather, Stone suggests that "more searching, honest conversation that challenges beliefs and focuses on results is bound to have some utility."<sup>185</sup>

F. *"Just Be Grateful That You're There"*

This belief is noted by Stone to be, arguably, "most likely to be universally disclaimed and the least likely to be voiced in any way."<sup>186</sup> She notes that an additional iteration might be "And since you are here, we'd be best served if you made sure that all those around you were comfortable, happy, and taken care of."<sup>187</sup> Stone explains that women feel the presence of this belief in the workplace through "their assignment of domestic or menial tasks outside of their job description, the unvoiced expectation that they will perform emotional labor for those around them, or their consignment to roles of professional and emotional support in disproportionate numbers to those

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<sup>183</sup> *Id.* at 136–39.

<sup>184</sup> *Id.* at 150.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 152.

<sup>187</sup> *Id.*

of their male colleagues.”<sup>188</sup> This phenomenon has been thoroughly documented by author of *The Second Shift* and *The Managed Heart*, Arlie Russell Hochschild.<sup>189</sup> Women are expected to engage in extra work in the workplace. Such work, which often includes devoting time to employee wellbeing, taking the lead on diversity, equity, and inclusion initiatives, and being responsible for domestic tasks such as preparing food for office celebrations, has become known as “office housework.”<sup>190</sup> Women of color, not surprisingly, are “disproportionately saddled with office housework.”<sup>191</sup> Like the other unspoken beliefs that constitute the panes of the glass ceiling, this belief is “invariably bound up in unspoken sexist societal expectations and the sexist history of the American workplace . . . .”<sup>192</sup> The expectation that women engage in extra work affects both who volunteers, who is assigned, and who accepts invitations to volunteer to do extra work. Women are forty-eight percent more likely than men to volunteer for such “low promotability” work; women are asked to engage in such work forty-four percent more often than men; and seventy-six percent of the time women will accept the request to volunteer for such work as compared with just over half of men.<sup>193</sup> Importantly, women face a classic double-bind with regard to office housekeeping: they are penalized if they do the work because it “depletes their focus, time, and energy” and they are likewise penalized if they fail to do the work because “their work evaluations suffer.”<sup>194</sup> In addition to making suggestions for how workplaces can have more honest and transparent discussion and processes for assigning and recruiting volunteers for office housework, Stone suggests courts work harder to “‘strike at the entire spectrum’ of discrimination” by taking judicial notice of disparate treatment between men and women when it comes to such invisible labor.<sup>195</sup>

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<sup>188</sup> *Id.* at 153.

<sup>189</sup> *Id.*; see generally ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *supra* note 5; see also ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZING OF HUMAN FEELING* 6–11 (3d ed. 2012).

<sup>190</sup> STONE, *supra* note 66, at 153; see also Alexis Krivkovich et al., *Women in the Workplace 2022*, MCKINSEY & Co. (Oct. 18, 2022), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>.

<sup>191</sup> STONE, *supra* note 66, at 154.

<sup>192</sup> *Id.* at 156.

<sup>193</sup> *Id.* at 157.

<sup>194</sup> *Id.* at 158.

<sup>195</sup> *Id.* at 168 (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

## G. "Don't Burden Us with Your (Impending) Motherhood"

Despite public statements to the contrary, the belief at the heart of this pane is that having children produces unsightly, costly, and inconvenient burdens that should be absorbed by working mothers with minimal intrusion into the workplace.<sup>196</sup> As a result, women encounter obstacles "at all stages of planning and experiencing motherhood."<sup>197</sup> With regard to pregnancy specifically, "rather than being a reasonably anticipated experience in most women's lives, is some unforeseen, haphazard burden whose costs are typically best shouldered by the women who chose it."<sup>198</sup> These beliefs and their manifestations in the workplace, law, and policy, have played a significant role in preventing women from achieving professional and financial equality.<sup>199</sup>

The law has resisted conceptualizing pregnancy from a female perspective.<sup>200</sup> This resistance has resulted in absurd characterizations of pregnancy as illustrated by the Supreme Court in *General Electric Co. v. Gilbert*, as well as more recently in *Dobbs v. Jackson Women's Health*.<sup>201</sup> In *General Electric Co.*, the Court "failed to acknowledge that pregnancy is a common and pervasive part of the life cycle that simultaneously creates a unique and systemic impediment to many women's careers."<sup>202</sup> The Court concluded that pregnancy is a sex-neutral condition "nonsensically noting that, while it was admittedly 'confined to women,' it was 'not a "disease" at all, and is often a voluntarily undertaken and desired condition.'"<sup>203</sup> As Stone explains:

The Court sounded almost willfully blind regarding its professed limited understanding of the unity of identity of pregnancy discrimination and sex discrimination when it described the employer's challenged insurance coverage program as separating "potential recipients into two groups—pregnant women and nonpregnant persons," and inexplicably seeming to give weight to the fact that "[w]hile

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<sup>196</sup> *Id.* at 171.

<sup>197</sup> *Id.* at 173.

<sup>198</sup> *Id.* at 175.

<sup>199</sup> *See id.* at 190–93.

<sup>200</sup> *See* Rona Kaufman Kitchen, *Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother*, 26 HASTINGS WOMEN'S L.J. 207, 208–10 (2015).

<sup>201</sup> *See generally* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

<sup>202</sup> STONE, *supra* note 66, at 176.

<sup>203</sup> *Id.* (quoting *Gilbert*, 429 U.S. at 136).



the first group is exclusively female, the second includes members of both sexes.<sup>204</sup>

In *Dobbs*, despite the fact that Congress deemed pregnancy a sex-based classification in 1978,<sup>205</sup> the Court once again returned to the myth that pregnancy, in this case the termination of pregnancy, is somehow not sex specific to women, stating:

A State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is "mere pretext designed to effect an invidious discrimination against members of one sex or the other."<sup>206</sup>

Thus, the beliefs about pregnancy that underlie this pane, namely, that pregnancy is not sex-specific and therefore discriminations or intrusions against pregnant women are not a form of sex discrimination, have been repeatedly enshrined in law by the highest court of the land.

With regard to motherhood and child rearing, in recent years, the EEOC and courts have done better. The EEOC recognized discrimination against "women with small children as a subset of the protected class of all women and renders discrimination against them discrimination 'because of sex.'"<sup>207</sup> Furthermore, courts have taken judicial notice of the fact that women are "ascribed the primary responsibility for parenting and child-rearing . . . ."<sup>208</sup> Nevertheless, mothers continue to face irremediable discrimination in the workplace as a result of their caretaking realities because the law does not require they be given any accommodations.<sup>209</sup>

Stone suggests an "overhaul of the vast array of beliefs that underlie the various indignities and injustices that expecting and new mothers suffer in the workplace . . . ."<sup>210</sup> Further, like other scholars, she supports the adoption of family friendly work policies and laws to support mothers (and fathers) as they seek to earn a living and build a career while raising children.<sup>211</sup>

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<sup>204</sup> *Id.* at 176–77.

<sup>205</sup> Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

<sup>206</sup> *Dobbs*, 142 S. Ct. at 2245–46.

<sup>207</sup> STONE, *supra* note 66, at 183.

<sup>208</sup> *Id.* at 172.

<sup>209</sup> *See id.* at 184.

<sup>210</sup> *Id.* at 193.

<sup>211</sup> *See id.* at 193–95; *see generally* Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J. L. GENDER & SOC'Y 167 (2011).

H. "He Has a Family to Support"

This pane is based on the age-old belief that men are family breadwinners and therefore should earn more than women.<sup>212</sup> It is bolstered by stereotypes about men, especially fathers, being more dedicated workers than their female counterparts.<sup>213</sup> The main manifestation of this pane is pay inequity and the consequent wage gap. Women, as a group, are paid less than men. The disparities are worse in the case of women of color and mothers. The consequences of being paid less than men include marginalization in the workforce, higher rates of poverty, and less access to wealth and power.

I. "Bad People Don't Do Good Things, but Good People Frequently Say Bad Things" (and Employment Discrimination Plaintiffs Can't Be Fully Trusted)

This pane deconstructs how courts often view plaintiffs and defendants in employment discrimination suits and how such views impact employment discrimination litigation.<sup>214</sup> Stone demonstrates that courts often ignore discriminatory comments made by defendants<sup>215</sup> or absolve defendants of discriminatory intent.<sup>216</sup> Meanwhile, courts are often unreasonably suspicious of plaintiffs and quick to dismiss their claims at the pre-trial stage.<sup>217</sup> Stone explains this pane as part of a broader belief system in which male defendants are given the benefit of the doubt and assumed to be acting in a non-discriminatory manner, especially if they had ever helped promote the plaintiff,<sup>218</sup> while female plaintiffs are treated with undeserved suspicion and assumed to be misdiagnosing their experience in the workplace as unlawful discrimination.<sup>219</sup> Stone suggests that courts should heed Judge Easterbook's warning and remember to focus on the question at issue: whether the plaintiff was discriminated against on the basis of sex—rather than get lost in the many adjudicative frameworks that often make discrimination more difficult to prove.<sup>220</sup>

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212 See STONE, *supra* note 66, at 196–98.

213 *Id.*

214 See *id.* at 213–231.

215 *Id.* at 223–24.

216 *Id.* at 224.

217 See *id.* at 221.

218 See *id.* at 224–27.

219 *Id.* at 234–36.

220 See *id.* at 236.

#### IV. PART III: STONE'S PANES AND FEMINIST LEGAL THEORY

Stone's book grapples with the core questions of what women's equality looks like and how it can be achieved. It is an important and grounding contribution to the discourse surrounding women's equality. Stone reveals the litany of ways in which anti-discrimination law is failing women in the workplace. She focuses her attention on the norms and beliefs that feed discrimination against women, the history that gives rise to the discriminatory norms and beliefs, the persistent inequality experienced by women, the failure of anti-discrimination law to capture many forms of discrimination against women, the real-life experiences of women in the workplace, and practical legal and social solutions. Stone provides fact-specific explanations for why and how reform grounded in a liberal feminist approach to discrimination has failed. More specifically, in investigating why women have failed to achieve workplace parity with men, she reveals nine gendered beliefs that pervade workplace culture in the present day. This modern-day investigation of workplace norms and their impact on inequality provides valuable support for difference feminists seeking to isolate the differences that must be addressed so that women can gain equality with men. As Deborah Rhode notes, "[t]he crucial issue becomes not difference, but the difference difference makes."<sup>221</sup> Stone documents the impact of gendered beliefs, stereotypes, and the norms in the workplace. Her book is about "the difference difference makes."

With its focus on real-life stories, practical impact, and legal frameworks, it is possible to read Stone's book without considering how it interacts with the feminist discourse surrounding workplace inequities. In fact, Stone's book is a powerful unspoken critique of equality theory and the liberal feminist approach to achieving equality in employment. Her critique is largely focused on beliefs, stereotypes, and norms that expose real and perceived differences between men and women and how those beliefs, stereotypes, and norms prevent women from achieving workplace parity with men. Her critique echoes the voices of cultural, dominance, and intersectional feminists as they have revealed the many ways in which employment discrimination law cannot address the myriad of inequities women face because it is grounded in a liberal equality model that repeatedly fails to address perceived and real differences between men and women. Stone proves them right. At its core, Professor Stone's argument against the panes of the glass ceiling is a real-world application of Professor Christine A. Littleton's equality theory which states that "[t]he difference between human

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<sup>221</sup> Deborah L. Rhode, *Feminist Critical Theories*, in *FEMINIST JURISPRUDENCE* 594, 598 (Patricia Smith ed., 1993).

beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons.”<sup>222</sup>

Professor Mary F. Radford explains the limitations of equality theory in the employment context:

“Equality” theory began as a comparison of the treatment of women with the treatment of men. The focus initially was on laws and policies that treated women *less* favorably than men. It soon was evident that laws that ostensibly *avored* women could have the harmful result of those that discriminated against women in the workplace. These laws became the target of proponents of the “equal treatment” theory, which viewed as unacceptable any rule based either directly or indirectly on gender-based generalization. The equal treatment theory, however, was attacked vigorously in the context of pregnancy and child-rearing issues by “special treatment” proponents, who argued that certain “real” differences between men and women, particularly as they related to child-bearing, could not be ignored if women were to achieve an equal position in the workplace. An important offshoot of this debate was the conclusion by both sides that the framework of the working world in which women vie for equality is male-structured and male-dominated. From this examination has emerged the more recent theory that women are physically, sociologically, and psychologically doomed from the outset if they attempt to achieve equality in a world in which the norm is male.<sup>35</sup> Sex stereotyping in the workplace clearly reflects this theory; “female” or “feminine” roles and traits are usually the antithesis of the traits thought related to success and effectiveness. Consequently, feminists have extended the discourse on equality to encompass the notion that true equality is not currently available for women because male-defined reality renders women unequal.<sup>223</sup>

Professor Stone documents and deconstructs the specific real and perceived differences between men and women that pervade the workplace and prevent women from achieving equality, as theorized by Professor Radford. She examines the specific gendered stereotypes and norms that

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<sup>222</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284–85 (1987).

<sup>223</sup> Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 478–79 (1990).

inform workplace culture. In her book, Stone comprehensively describes the details of such gendered stereotypes and norms. Stone specifically deconstructs and illuminates how women's experiences at work are affected by nine discrete stereotyped views of women: that they are different, weak, sensitive, dependent, dangerous, undeserving, maternal, not responsible, and dishonest. By comprehensively documenting these gendered stereotypes and the real-life consequences for women in the workplace, Stone provides the evidence to support plans for workplace reform. Stone's book is a must-read for feminist legal theorists, activists, women in the workplace, and students of women's studies and law.