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SHATTERING STEREOTYPES

Stephanie Bornstein*

We are at a profound moment of simultaneous advancement and backlash¹ on gender equality. Just as membership on the U.S. Supreme Court achieved near gender parity with four female of nine justices, the same Court issued its opinion in *Dobbs v. Jackson Women’s Health*,² overturning *Roe v. Wade* and eviscerating women’s reproductive autonomy. While the U.S. Congress was enacting legislation to codify and protect the right of same-sex couples to marry,³ legislators in thirty-five states were considering—and passing—hundreds of bills hostile to LGBTQ+ individuals.⁴ In the year a woman of color was elected Vice President and a female Speaker of the House presided—two of the highest political offices in the country⁵—all U.S. women averaged only eighty-two percent of men’s annual earnings, and Black and Latina women a mere sixty-three and fifty-five percent of white men’s earnings respectively.⁶ It’s hard to know whether to cheer or cry.

How fortunate, then, that Professor Kerri Lynn Stone has published her important new book, *Panes of the Glass Ceiling: The Unspoken Beliefs*

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1 SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* xviii (1991) (coining the term and documenting “backlash”: the “powerful counterassault on women’s rights [in] an attempt to retract the handful of small and hard-won victories that the feminist movement did manage to win for women,” which “stands the truth boldly on its head and proclaims that the very steps that have elevated women’s position have actually led to their downfall.”).

2 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

3 See Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022) (codifying protections established as a matter of constitutional law in *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015)).

4 Matt Laviertes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 so Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022, 6:00 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418>; *Anti-LGBTQ+ Bills in 2022*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/state-maps/anti-lgbtq-bills-in-2021> (last visited Feb. 6, 2023) (highlighting thirteen states that have enacted and twenty-three states that have introduced such legislation in 2022).

5 Felicia Sonmez, *Kamala Harris Becomes First Woman to Serve as Acting President—for 85 Minutes*, WASH. POST (Nov. 19, 2021, 2:42 PM), https://www.washingtonpost.com/politics/harris-biden-presidency/2021/11/19/6879ccf0-4956-11ec-b8d9-232f4afe4d9b_story.html (“As House speaker, Pelosi is second in line to the presidency after the vice president.”).

6 U.S. BUREAU OF LAB. STAT., *HIGHLIGHTS OF WOMEN’S EARNINGS IN 2020* 1 (2021), <https://www.bls.gov/opub/reports/womens-earnings/2020/pdf/home.pdf>; AM. ASS’N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE PAY GAP* 2, 4 (2020), https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf.

*Behind the Law's Failure to Help Women Achieve Professional Parity.*⁷ Stone's book represents a capstone achievement in an already strong body of work that helps make sense of the "stickiness" of gender stereotypes.⁸ As Stone documents, our experiences at work are shaped at every turn by what she calls "unspoken beliefs" about women and work.⁹ "We know that something is amiss," Stone explains, "and we know that what is happening isn't right."¹⁰ Yet, as her book details with precision, U.S. workplace law has failed to keep pace with modern forms of bias. Anti-discrimination law has worked well to root out much overt exclusion and harassment committed by individuals, but it has fallen woefully short in redressing more subtle and structural forms of sex discrimination. Because the law has failed to reckon with the underlying gender stereotypes at the root of sex discrimination, stereotypical "unspoken beliefs" persist and recur.¹¹

Stone begins her book with a focus on gender stereotypes, identifying as her first belief that employers "see [women] differently than [they] see men."¹² This difference in perception is shaped by stereotypes about binary gender roles, rigid ideas about how women and men do (descriptively) or should (prescriptively) behave.¹³ The same attributes that are valued in male employees—being strong, tough, and decisive—are viewed as liabilities in women—being pushy, abrasive, and judgmental.¹⁴ Female employees are expected to be caring and nurturing, but then judged as too emotional or less competent for displaying such traits.¹⁵ Holding stereotypical beliefs, alone, is not the problem; allowing them to affect evaluations or acting on them at work is illegal discrimination. As Stone demonstrates in case after case, however, federal courts still fail more often than they succeed at recognizing this as actionable, in part because stereotypes affect judicial decisionmakers' perceptions, too.¹⁶

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

8 KERRI LYNN STONE, PANES OF THE GLASS CEILING: THE UNSPOKEN BELIEFS BEHIND THE LAW'S FAILURE TO HELP WOMEN ACHIEVE PROFESSIONAL PARITY 53 (2022).

9 *Id.* at 5–6.

10 *Id.* at 1.

11 *Id.* at 5–6.

12 *Id.* at 29–57 (discussing in Chapter 1 the belief, "We See You Differently Than We See Men" (But)).

13 *Id.* at 29–30; see also Stephanie Bornstein, *Degendering the Law Through Stereotype Theory*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE U.S. (Deborah Brake et al. eds., 2022), <https://doi.org/10.1093/oxfordhb/9780197519998.013.23>.

14 STONE, *supra* note 8, at 30–31.

15 *Id.* at 32.

16 *Id.* at 39–57.

This tone-setting first chapter builds on foundational work Stone published over a decade ago¹⁷ that influenced debate on the anti-stereotyping approach to discrimination claims, also known as “stereotype theory.”¹⁸ Stone was an early academic voice linking social science on how gender stereotypes operate in the workplace to the need for legal change to reach them.¹⁹ The anti-stereotyping approach was also key to advancing the argument that discrimination because of sexual orientation or gender identity is based on an employee’s perceived failure to conform to sex stereotypes and, as such, illegal sex discrimination.²⁰

Today, Stone remains appropriately skeptical about the reach of the stereotype theory, while acknowledging its success in one area of law—sex discrimination on the basis of family caregiving responsibilities.²¹ Thus after addressing gender stereotypes in the first chapter, the book moves forward, organized around “unspoken beliefs” that serve as “panes” of the glass ceiling, each with its own “pains” women experience navigating the workplace. These include that women should toughen up and expect “locker room talk” at work (Chapters 2 and 3) and that women should feel “grateful” to be at work and not “burden” their employers with their pregnancies or motherhood (Chapters 6 and 7).

Yet while Stone does not frame it as such, at the root of each of these “unspoken beliefs” is the most intractable gender stereotype of all: our long-held belief in the cult of domesticity, that women are suited for the domestic sphere of home and family, and men for the market sphere of work.²² If the workplace is for men, then women are and will always be the “outgroup.”²³ It should come as no surprise when male traits are valued and women are criticized for “acting like men.” And it makes sense that women are forced

17 See generally Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011).

18 See, e.g., Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 937–41 (2016) (citing and discussing Stone, *supra* note 17, at 594, 621); Tanya Kateri Hernandez, *One Path for “Post-Racial” Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32(2) LAW & INEQ. 309, 317 n.31 (2014) (citing Stone, *supra* note 17, at 599); Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 659 n.18 (2013) (citing Stone, *supra* note 17, at 624).

19 See Bornstein, *supra* note 18, at 940 (citing Stone, *supra* note 17, at 594, 621, 634–56) (“Kerri Stone has described stereotyping doctrine as lacking in definition and uniformity, leading to disparate results . . . [and] suggests that courts determine if a stereotype is . . . ‘voiced or somehow acted upon’ as opposed to ‘offhand’ . . . and if so, if there is a ‘sufficient nexus’ between that stereotype and the adverse employment action.”).

20 See, e.g., Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 606 n.509 (2013) (citing Stone, *supra* note 17, at 643).

21 STONE, *supra* note 8, at 57.

22 See generally JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); see STONE, *supra* note 8, at 187.

23 STONE, *supra* note 8, at 31.

to adapt to sexism at work and that the workplace ignores the reality of pregnant people's lives.

But Stone, who knows all too well the limitations of anti-stereotyping arguments in the courts, deftly adopts a more pragmatic approach. She makes sex stereotyping concrete by saying the quiet part out loud, highlighting the specific detrimental, and unlawful, effects of each unspoken belief. Where an explanation of stereotypes rooted in domesticity might not resonate, a judge may recognize that promoting a male employee because "he has a family to support"²⁴ over an equally qualified female employee, who should keep her motherhood to herself,²⁵ constitutes unlawful sex discrimination.

Applying this lens to modern gender debates explains our current backlash moment. Just as we are reaching a highpoint of gender equality, making real progress in breaking free from traditional, binary gender role stereotypes, they rise up again. Sadly, this story is not new. Despite the general forward trajectory of gender equality since the passage of civil rights laws in the 1960s, every few steps forward seems inevitably accompanied by one (or more) step back. By unearthing and interrogating the unspoken beliefs that drag women down at work—beliefs that flow from outdated yet irrepressible stereotypes about gender—*Panes of the Glass Ceiling* offers both an explanation for this pattern and a legal blueprint to help break it.

24 *Id.* at 196.

25 *Id.* at 170.