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ANTIDISCRIMINATION EFFORTS AND THE REPRESSIVE WEIGHT OF CULTURE

Matthew T. Bodie*

In *Very Important People: Status and Beauty in the Global Party Circuit*, sociologist Ashley Mears documented her experiences embedded in the ultra-rich global party circuit of the early 2010s.¹ Herself a former model, Mears accompanied promoters, young women, and wealthy partiers as they went from restaurants to night clubs to after-parties in some of the most glamorous locations around the world. The roles of the individual players in this scene, as Mears describes them, were sharply circumscribed. Bar and restaurant owners would pay promoters to bring “girls”—young women between eighteen and twenty-five who were tall, thin, and preferably models—to various festivities in order to confer social status and desirability upon the particular venue.² The other habitués of these types of gatherings were rich, powerful, and ostentatious: mostly men of great wealth or generous expense accounts who engaged in displays of competitive spending rituals.³ The book explains how the “girls” played a critical role in the elite party ecosystem and yet had little power within it.⁴ The young women in the circuit had unique importance, but their role was ornamental, rather than relational—functioning “as a form of capital.”⁵ Their presence may have served to generate important networking opportunities for bankers, lenders, hedge fund managers, financial advisors, and even cosmetic dentists, but the women themselves were not building future careers in these industries.⁶ And their roles in this tableau would end when they reached their late twenties. In

* Robins Kaplan Professor, University of Minnesota Law School. Many thanks to Professor Kerri Lynn Stone, Dean Antony Page, and Karla Rivas, Editor-in-Chief of the *FIU Law Review*, for the invitation to this Microsymposium on *Panes of the Glass Ceiling: The Unspoken Beliefs Behind the Law's Failure to Help Women Achieve Professional Parity*.

¹ ASHLEY MEARS, *VERY IMPORTANT PEOPLE: STATUS AND BEAUTY IN THE GLOBAL PARTY CIRCUIT* xii–xiii (2020).

² *See id.* at 16 (defining “girls” as “young (typically sixteen to twenty-five years old), thin, and tall (at least five feet nine without heels and over six feet with them)”).

³ *Id.* at 36.

⁴ *Id.* at 16 (“A ‘girl’ is a social category of woman recognized as so highly valuable that she has the potential to designate a space as ‘very important.’”).

⁵ *Id.* at 36 (“Their beauty generates enormous symbolic and economic resources for the men in their presence, but that capital is worth far more to men than to the girls who embody it.”). Mears found that the young women were there for their symbolic power and were not expected to be sexually or romantically involved. *Id.* at 97–98.

⁶ *Id.* at 92.

the meantime, the clients—“mostly white and male elites”—retained “privileged access to a valuable global space” throughout their careers.⁷

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against workers on the basis of sex or to limit, segregate, or classify workers because of their sex.⁸ This statute established the foundational antidiscrimination principle holding the promise of a more egalitarian society. But as Kerri Lynn Stone’s book *Panes of the Glass Ceiling* eloquently illustrates,⁹ the legal requirement to abstain from overt sex discrimination has left undisturbed many of the systemic barriers to sex and gender equality. These existing pockets of male privilege remain—despite significant strides towards legal equality—due to enduring reservoirs of money, power, and access still in male hands.¹⁰ *Panes of the Glass Ceiling* names the cultural frames that resist antidiscrimination protections and restrain movement towards equality.

The global party scene described in *Very Important People* is an extreme, exaggerated illustration of ways in which existing economic structures have been shaped to stifle efforts for equal opportunity. Such patterns of exclusionary cultures exist in many workplaces. Decades of male domination in fields like law, finance, sales, and management have driven these professions to revolve around the male perspective.¹¹ Professor Stone’s set of “panes” expertly illustrates many of these workplace norms, policies, and expectations. In discussing beliefs, understandings, and expectations such as “we expect you to take (verbal) punches like a man” and “accept ‘locker room’ and sexist talk,” Stone describes how women must endure cultural milieus that are at best alien and at worst hostile to their identities.¹² By minimizing the deleterious effects of these environments, courts have failed to make employment opportunities truly open to women.¹³ Similarly, ideas like “women are the downfall of men” and “just be grateful that you’re

⁷ *Id.* at 36–37.

⁸ 42 U.S.C. § 2000e-2.

⁹ KERRI LYNN STONE, *PANES OF THE GLASS CEILING: THE UNSPOKEN BELIEFS BEHIND THE LAW’S FAILURE TO HELP WOMEN ACHIEVE PROFESSIONAL PARITY* 2–3 (2022).

¹⁰ 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.

¹¹ *See, e.g.*, Ann C. McGinley, *Masculinities at Work*, 83 *OR. L. REV.* 359, 365 (2004) (“Masculinities are not merely practices by individual actors. Rather, masculine identities and norms are associated with the very definition of work, the identity of certain jobs as feminine and masculine, and the value attributed to those jobs.”).

¹² STONE, *supra* note 9, at 58–104.

¹³ *See, e.g.*, *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 432–33 (7th Cir. 1995); *Smart v. City of Mia. Beach*, 933 F. Supp. 1366, 1376–77 (S.D. Fla. 2013), *aff’d*, *Smart v. City of Mia. Beach*, 567 F. App’x 820 (11th Cir. 2014); *Reeves v. C.H. Robinson Worldwide, Inc.*, No. 2:06-CV-358-IPJ, 2006 U.S. Dist. LEXIS 97303, at *30 (N.D. Ala. Dec. 11, 2006).

there” demonstrate the assumption of a male perspective and the othering of women who try to enter the space.¹⁴ Each of these assumptions, norms, and cultural expectations serves to reinforce the existing power structures and hinder meaningful change.

Professor Stone makes clear that her book is “intended to serve as a springboard” and “an invitation to give voice to and confront the innumerable additional unspoken beliefs that comprise the ‘panes’ of the glass ceiling.”¹⁵ Rather than expecting antidiscrimination law to eventually eradicate sexism in employment, the remarkable staying power of male domination requires more direct intervention. Neutrality is not going to be enough. Antidiscrimination law should focus not on anti-classification or anti-differentiation rules but instead an anti-subordination principle.¹⁶ And to combat these hardened cultural molds, we need stronger policies aimed at intervention.

Two recent policy efforts are worth considering. As Professor Stone discusses in depth, pay inequality between men and women has persisted despite numerous attempts to attack the problem.¹⁷ Title VII outlaws discrimination in terms and conditions of employment,¹⁸ and the Equal Pay Act specifically forbids unequal pay for equal work.¹⁹ But beyond these flat prohibitions, more recent legislation has tried to change the culture around wage-setting in workplaces. Recognizing that women are often kept in the dark about pay differentials, the Lily Ledbetter Fair Pay Act provides more time to bring a suit upon discovery of disparate wages.²⁰ And many state and local statutes have recently prohibited employers from extending past discrimination into the future by banning questions about employees’ past pay history.²¹ Such restrictions on information gathering may seem heavy-handed or overbroad in their effects.²² But they endeavor to disrupt a settled

¹⁴ STONE, *supra* note 9, at 131–69.

¹⁵ *Id.* at 242.

¹⁶ Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (promoting the anti-subordination perspective); *see also* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 959 (2012) (arguing that “employment discrimination laws have been oriented around anti-subordination, in that they are designed to respond to a history of discrimination”); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (describing how anti-subordination and anti-classification principles overlap, and arguing “that their application shifts over time in response to social contestation and social struggle”).

¹⁷ STONE, *supra* note 9, at 202–06.

¹⁸ 42 U.S.C. § 2000e-2.

¹⁹ 29 U.S.C. § 206(d).

²⁰ *See* Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000a.

²¹ STONE, *supra* note 9, at 206 (discussing seventeen instances of the salary-history bans).

²² *See* Chamber of Com. for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773, 812 (E.D. Pa. 2018) (striking down Philadelphia’s ban on pay history questions as violative of the First Amendment),

culture that has largely succeeded in maintaining past legacies of unequal treatment. As Professor Stone argues, “In light of the fact that such queries and factoring in of past salary can simply replicate the discriminatory practices of other employers and other inequalities, it would seem to be a good business practice to avoid inquiring.”²³

An even more direct method of intervention is to mandate the hiring of women into positions of power and authority. Women have been grossly underrepresented on corporate boards of directors, even up to the present day.²⁴ In 2018, following the leads of countries like France, Norway, and Sweden,²⁵ California enacted SB 826, which requires publicly-held corporations to have female representation on their boards.²⁶ Prior to 2019, women only held seventeen percent of California director positions.²⁷ Almost thirty percent of firms headquartered in California had no female directors.²⁸ The new law was enacted to change that, mandating women on boards and imposing six-figure fines for noncompliance.²⁹

Critics of SB 826 contend the statute is a blatant effort to impose quotas that not only trammel upon the discretion of boards and shareholders but also unfairly discriminate.³⁰ A federal circuit court held that the act requires shareholders to engage in sex discrimination,³¹ and a state court struck down

aff'd in part & rev'd in part, Greater Phila. Chamber of Com. v. City of Phila., 949 F.3d 116, 121 (3d Cir. 2020).

²³ STONE, *supra* note 9, at 210.

²⁴ See Joan MacLeod Heminway, *Corporate Management Should All Be Feminists*, 40 MINN. J.L. & INEQ. 409, 416 (2022) (“Certainly, boards of directors of publicly held corporations have historically been, and some continue to be, a ‘Boys’ Club.’”).

²⁵ Bryce Covert, *The Secret to Getting More Women on Corporate Boards: The \$100,000 Threat*, POLITICO (Feb. 25, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/02/25/california-companies-women-boards-quotas-00010745>.

²⁶ CAL. CORP. CODE § 301.3(b) (2022) (requiring one or more female directors for boards with four or fewer directors, two or more female directors for boards with five directors, and three or more female directors for boards with six or more directors).

²⁷ Brian Melley, *Judge Says California Law Requiring Women on Corporate Boards Is Unconstitutional*, PBS NEWSHOUR (May 16, 2022, 7:50 PM), <https://www.pbs.org/newshour/politics/judge-says-california-law-requiring-women-on-corporate-boards-is-unconstitutional>.

²⁸ Margeaux Bergman, *How the “Exception” Becomes the Standard*, 17 HASTINGS BUS. L.J. 405, 418 (2021) (188 firms out of the 650).

²⁹ See Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079, 1094 (2019).

³⁰ See, e.g., Ben Taylor, *Why California Senate Bill 826 and Gender Quotas Are Unconstitutional: Shareholder Activism as a Better Path to Gender Equality in the Boardroom*, 18 FLA. ST. U. BUS. REV. 117, 118 (2019); Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826 1–2* (Rock Center for Corp. Governance, Stan. U., Working Paper No. 232, 2018), <https://ssrn.com/abstract=3248791>.

³¹ *Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021) (“Because [plaintiff shareholder] has plausibly alleged that SB 826 requires or encourages him to discriminate based on sex, [he] has adequately

the law as violating equal protection under the California Constitution.³² These responses demonstrate how the anti-classification approach to antidiscrimination law is not enough. Given the entrenched nature of board networks oriented around male privilege, regulatory impositions appear to be necessary.³³ And supporters can take solace that the law has already had a substantial effect. By calling attention to the problem and threatening sanctions, SB 826 pushed private actors into taking action.³⁴ One study found that the legislation led to a “surge” in women’s representation, even with the ongoing doubts as to the act’s enforceability.³⁵

As the Supreme Court signals a retrenchment in antidiscrimination doctrine and the #MeToo movement is met with backlash, Professor Stone offers an important counterweight. *Panes of the Glass Ceiling* masterfully catalogs the many ways in which our culture continues to protect working environments steeped in sexism. More must be done to uproot the malevolent network of assumptions, biases, and affinities that choke off change and reinforce the status quo. As we seek to explore new ways to bring a more just and equal society into existence, Professor Stone’s book will serve as a guide to the norms, attitudes, assumptions, and behaviors that need to change.

alleged an injury in fact, the only Article III standing element at issue, and thus has Article III standing to challenge SB 826.”).

³² *Crest v. Padilla*, No. 19STCV27561, 2022 WL 1565613, at *23 (Cal. Super. Ct. May 13, 2022).

³³ Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435, 1457 (2019) (“Quotas now appear necessary to respond to a fundamental market failure in corporate leadership.”). For a broader endorsement of this principle, proposing a “Substantive Equality Amendment” to the Constitution requiring positive action to achieve gender equality, see Kimberly A. Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the United States*, 63 WM. & MARY L. REV. 497, 497 (2021).

³⁴ Sung Eun (Summer) Kim, *Mandating Board Diversity*, 97 IND. L.J. SUPP. 31, 42 (2022) (“The true value of the California Board Diversity Bills is to be measured by not only the changes they propel in the companies they regulate but also by the attention they have brought to the issue of lack of diversity on corporate boards and the alternative solutions they have inspired.”); Covert, *supra* note 25 (noting that the act was an important “nudge” to many companies who had been dragging their feet in finding women directors).

³⁵ Daniel Greene, Vincent Intintoli & Kathleen M. Kahle, *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. CORP. FIN. 1, 2 (2020) (finding a twenty-three percent increase in female board representation between January and June 2019).