Promoting Change in the Face of Retrenchment

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PROMOTING CHANGE IN THE FACE OF RETRENCHMENT

Marcia L. McCormick*

I. Introduction ..................................................................................... 807
II. Where We Are ................................................................................ 809
III. Steps Forward and Back ................................................................. 818
IV. Conclusion ...................................................................................... 832

I. INTRODUCTION

Teaching antidiscrimination law is not for the faint of heart. First, there’s the complexity—the complexity built in and the complexity that has accreted like barnacles on the doctrine over time. Administrative exhaustion to nowhere, frameworks, modified in fractal complexity, for every conceivable employment situation, and heuristics and special rules for disregarding evidence. Then there’s constantly delivering bad news, at least the way many students see it. They have a sense of what discrimination looks like, and they believe that antidiscrimination law can reach that. Over and over, they discover that the narrow definition of discrimination by courts fails to match their instincts. Almost every day seems to bring yet more bad news—they have invested so much in the stories about law and courts as instruments of justice, and the results from the cases they read show that these stories may not be what they thought. So, the students resign themselves and learn the system that is, instead.

This translates into practice. Students graduate, they go into the field, and they’re swept up in the benefits that come from mastering the complexity and being able to manipulate it, reinforcing that complexity as they go. They navigate the narrow path that has been created by all of the cases that have come before, some working to narrow the path further, some just to stay on, and some to make small inroads to widen that path. They do this by selecting what cases to take, counseling their clients, and arguing to judges. And so, the cycle continues.

* Thanks to Kerri Stone and the editors of the FIU Law Review for organizing a terrific Microsymposium and including me. Thanks to Matthew Bodie, Rona Kaufman, Allyson Baker, J. Janewa Osei-Tutu, and Chioma Chukwu-Smith for their thoughts and feedback on this contribution. Excellent research support was provided by Manni Jandernoa, Connor Welby, Stephanie Richardson, and Laura Eckelkamp. Any errors or omissions are mine.
In the meantime, through everything, inequality remains. It remains in the form of wage gaps, achievement gaps, wealth gaps, vertical and horizontal labor market segregation, housing segregation, lack of educational opportunity, access to credit, harassment, a culture that centers only some of us, and more. The situation is not all bad; there has been progress—the arc of the moral universe bends toward justice, in the words of the Reverend Dr. King. But, as he also noted, that arc is long, and change is taking a long time. Also, we are faced with new challenges—like new technologies that are reshaping our interactions with each other and our economy in fundamental ways, and new resistance and fracturing along old fault lines.

So, what do we do? If each obstacle is an opportunity, we are overwhelmed with opportunity. It is tempting to throw out the whole thing and start over from scratch. That approach, right now, with large-scale reforms in this area not a Congressional priority, is unlikely to bring positive change. But there are things that can be done around the edges and under the surface that could have real and positive impacts. Professor Kerri Lynn Stone’s book, *Panes of the Glass Ceiling: The Unspoken Beliefs Behind the Law’s Failure to Help Women Achieve Professional Parity*, is one of those efforts. In it, she highlights stereotypes and assumptions so deeply embedded in U.S. culture that we often look right past them, giving us the language and tools to challenge them when they appear. And in that challenging are the roots to paths forward.

The persistence of the stereotypes that Professor Stone describes and the way that they frustrate the transformative potential of antidiscrimination law is worth further scrutiny. As Professor Stone argues, identifying and unpacking the stereotypes provide a target to push back on in litigation. Doing so also gives us an opening to make nonlegal changes that move us forward, something increasingly important in the current political environment. This article will reflect on some of the hidden assumptions revealed in *Panes of the Glass Ceiling* and others by considering them in the context of enforcement of discrimination law, and examining the political pushback on education and training designed to reveal these stereotypes. Part II summarizes the critiques of the current state of the law, outlining the ways that the law is both framed and practiced to produce a rigid set of rules, frameworks, and heuristics that have been so widely criticized as counterproductive to achieving equality. Part III reflects on ideologically driven efforts—ideology informed by the kinds of stereotypes surfaced in *Panes of the Glass Ceiling*—to limit education and training about the cultural norms that stand in the way of efforts at reform. This essay concludes with a call for

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1 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).
more opportunities to consider relevant cultural practices at play, including the assumptions and pervasive stereotypes illustrated in *Panes of the Glass Ceiling*.

II. WHERE WE ARE

The Civil Rights Act of 1964, and the statutes modeled on it which followed, were meant to transform society. Yet they haven’t. I, and others, have argued that the reasons are many, and at least some relate to the way the law is enforced and the mismatch between that and the reality of how discrimination operates. As Professor Stone painstakingly documents in *Panes of the Glass Ceiling*, deep-seated beliefs contribute to this result. And those beliefs have particularly strong effects when it comes to sex, both because of the incredible stickiness of beliefs about sex and because of the strange way that sex was included in Title VII.

The Civil Rights Act of 1964, as it was first proposed, prohibited discrimination in employment on the basis of race, color, national origin, and religion. These statuses were viewed as overlapping and the source of oppression at the center of the civil rights movement at the time. Sex was added to this list of statuses protected by Title VII at the last minute by a Southern Democrat who did not, generally, support the Act. There was no real debate on the matter, and so no examples or other evidence of what kind of conduct would constitute sex discrimination exist in the Congressional record. The conventional wisdom was that the addition of sex was meant to

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2 ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 4 (1993) ("The effort to ameliorate long standing patterns of race and sex subordination [through Title VII] is perhaps the most ambitious social reform effort ever undertaken in America." (emphasis in original)).


4 110 CONG. 1964). REC. 2577–84

5 See id. at 2584 (providing the only discussion of sex and noting that no hearings considered the topic).
defeat the bill.\textsuperscript{6} That conventional wisdom has been debunked, at least in part. The addition of sex had significant support, particularly in the House, where two Representatives rallied support and prevented defeat of the amendment in Committee.\textsuperscript{7} At the same time, it seems that something less than fifty percent of the House members voted in favor of the inclusion of “sex” in the bill, since forty percent of the House members were absent from the vote count on the bill entirely.\textsuperscript{8} The result of this history is two-fold. First, the prohibition on sex discrimination was viewed from the start as something of a joke, even by the initial Executive Director of the Equal Employment Opportunity Commission (EEOC).\textsuperscript{9} One reason for this view was the strange way that sex was added to the statute, but another was that stereotypes of women and men were so deeply ingrained that they were accepted as essentially true.\textsuperscript{10} Second, there is no Congressional record to be drawn on to flesh out the boundaries of sex discrimination or even provide examples of discrimination on the basis of sex.

While this inauspicious start did not bode well for the transformation of the workplace, that transformation wasn’t solely dependent on courts or the EEOC. While change may rely in part on agencies and courts, which are important interpreters of a law’s commands, so too are those who have to comply with the law and the people who can make use of new rights. Those protected by the law and those regulated inevitably will have beliefs about what is allowed and prohibited, and those beliefs shape their interactions; those actions create the law on the ground, which, in turn, influences how courts interpret what the law requires. Thus, when women began flocking to the EEOC from the start, that action quickly disabused any notion that the inclusion of sex in the statute was a joke.\textsuperscript{11} To the extent that the deep-seated

\begin{itemize}
\item \textsuperscript{6} NANCY F. COTT, NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 547 (2000); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 233–34 (1991); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 314 (1983); see 110 CONG. REC. 2577–84 (suggesting suspicion of Representative Smith’s motivations in amending the statute). Representative Smith, who proposed the amendment, denied that he did so to defeat the bill. HOFF, supra, at 233; Robert C. Bird, More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 159–60 (1997) (quoting Robert Stevens Miller, Jr., Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 884 n.34 (1967)).
\item \textsuperscript{7} MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 61 (1986); ROSALIND ROSENBERG, DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY 188 (2008); COTT, supra note 6, at 547–48; KESSLER-HARRIS, supra note 6, at 314.
\item \textsuperscript{8} HOFF, supra note 6, at 233.
\item \textsuperscript{10} See id.
\item \textsuperscript{11} HOFF, supra note 6, at 235.
\end{itemize}
beliefs about sex and discrimination described by Professor Stone form scripts that tell a story of when discrimination really counts or when the law ought to step in, they work at cross-purposes to the transformative potential of Title VII, preventing progress. The metaphor of panes of the glass ceiling is especially apt in this context.

Bolstering the effect of these background beliefs is the problematic enforcement system. The story of antidiscrimination enforcement should be pretty familiar to most people interested in this symposium. Most of the antidiscrimination statutes are enforced in substantially the same way, through private-party litigation following administrative exhaustion. For most statutes, that enforcement agency is the EEOC. In the initial design, the EEOC provided technical assistance, investigated charges, and attempted to conciliate claims of discrimination. Later it was given the power to prosecute actions in federal court and, for some statutes, the power to issue regulations with the force of law. Individuals have to pursue their claims in a relatively short time period with a state or local agency and/or the EEOC.


14 The exception is the Family and Medical Leave Act. The FMLA provides for unpaid leave for a person of any sex to care for a new child or for one’s own or close relative’s serious health needs. It is enforced by individuals who may file private causes of action and by the Department of Labor. 29 U.S.C. § 2617.


Under Title VII, a charge has to be filed with the EEOC within 180 days of a violation, or, if the discrimination occurred in a state or locality with a Fair Employment Practices Agency, within 300 days. 42 U.S.C. § 2000e-5(e)(1). In recent years, a number of states have lengthened their filing periods to 300 days. E.g. DEL. CODE ANN. tit. 19 § 712(c)(1) (2019); 775 ILL. COMP. STAT. 5/7A-102(a)(1) (2022); IOWA...
but the EEOC’s process has no bearing on subsequent litigation.\textsuperscript{18} And once the agency issues a notice of the right to sue, the individual has ninety days to bring an action in court.\textsuperscript{19}

To illustrate how challenging this process might be for individual employees to navigate, I assign my discrimination students a project that requires them to prepare to bring a discrimination claim. I give them a fictional case file and ask them to figure out how and where to file a charge, to evaluate the claim, to explain when the charge has to be filed, and to explain what happens if that deadline is missed. Before the EEOC opened its online portal, I required students to fill out the EEOC’s questionnaire or find and fill out a charge as well. After the assignment, we debrief on the process in class.

The assignment is eye-opening for them. Inevitably, the students spend much more time trying to navigate the system just to describe it than they expect. And they walk away with the sense that if they had so much trouble, the average person with no legal training will be completely lost. That sense has only increased since the EEOC’s online portal opened. The portal asks a series of screening questions, like the size of the employer, type of entity that discriminated, the date of the discrimination, and the protected status or

\textsuperscript{18} As Michael Selmi has written, “although a plaintiff must file a claim with the agency, it is entirely possible that the EEOC will serve no function other than to issue a mandatory right-to-sue notice, which is akin to requiring a driver to apply for a bridge token in advance.” Michael Selmi, \textit{The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law}, 57 \textit{Ohio St. L.J.} 1, 8 (1996). Savvy plaintiffs’ lawyers file a request for a right to sue letter at the same time they file a charge. Interview with Sean Oliveira, former EEOC Investigator (Jan. 16, 2020) (on file with author); see also \textit{Filing a Lawsuit, U.S. EQUAL EMP. OPPORTUNITY Comm’N}, https://www.eeoc.gov/filing-lawsuit (last visited Sept. 15, 2021) (scroll down to “Filing a Lawsuit Before the Investigation is Complete”) (suggesting that the EEOC will issue a right to sue letter early if it will be unable to complete its investigation within 180 days). The ADEA provides that a person can get a right to sue letter any time after sixty days. 29 U.S.C. \textsection 626(d)(1).

\textsuperscript{19} 42 U.S.C. \textsection 2000e-5(f)(1).
conduct at issue, presumably to ensure that the matter is covered by one of the statutes it enforces. If the responses suggest that there is coverage, the portal recommends scheduling an appointment with an EEOC investigator. One of the few FAQs on the main page reads, “I tried to use the online appointment system but there aren’t any appointment times available. What should I do?” suggesting that getting that interview might be a challenge.

The recommendation is to check the calendar every day, and “If you are running out of time to file and there are still no available appointments, you’ll see an email address and a special toll-free number you may use to contact us.”

To be sure, this portal serves an important screening and educational function. Employment protections in this country don’t match what people think their rights at work are, and as a result, people may go to the EEOC with any kind of claim because that’s the only route they know of. Still, this byzantine and inefficient system makes it hard for people injured by discrimination or retaliation to take the steps necessary to even have a chance to get to court.

More importantly once there—in court—things actually get worse. As many scholars have described, the Supreme Court has developed standards, frameworks, and narrow definitions on what counts as discrimination, often untethered to the law, that all serve to limit the viability of employee claims. These frameworks involve confusing, shifting burdens that encourage courts to look at evidence in isolation, making a case less likely to survive to trial. And the lower courts have extended these tendencies, further separating reality from the promise of antidiscrimination law. The frameworks come with heuristics, like the stray comment doctrine and same actor inference described in *Panes of the Glass Ceiling*, and more, each of which is used by

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21 Id.

22 Id.


courts to exclude some evidence from consideration. The result is that for each piece of evidence, a court will essentially ask whether it alone compels a finding of discrimination. If the answer is “no,” the court will hold that it has no evidentiary value at all. In this way, cases are dismissed as implausibly pled, or the employer is granted summary judgment. Few discrimination cases ever get to the trial stage, and for those that do, plaintiffs are so likely to lose on appeal that even success rates are misleading.

A number of tweaks to procedural rules have escalated the futility of litigation. When the Court decided *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, creating the plausibility standard for pleading, they made it more difficult to plead a discrimination claim with enough facts to withstand a court’s skepticism that discrimination was a possibility. When the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, the Court went out of its way to express that skepticism stating, “[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no

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actionable disparity at all.”34 Because of this skepticism, the Court held that the plaintiff class could not be certified because the putative class members lacked commonality. The legitimation of mandatory arbitration and class action waivers has further pushed matters away from the courts.35

As these developments foreshadow, the courts are deterring cases by narrowly defining discrimination and by expressing skepticism about the validity of different theories of discrimination and even about the continued prevalence of discrimination. These efforts play out in different ways depending on the type of discrimination claim at issue. Essentially, the courts recognize three forms of discrimination: disparate treatment, disparate impact, and harassment.36 Disparate treatment is often defined as “intentional” discrimination in the terms, conditions, or privileges of employment.37 Disparate impact doesn’t require proof of intent, but instead prohibits disparate effects on protected groups when those effects cannot be justified as a business necessity.38 And harassment is discrimination in the working environment that may or may not also lead to additional employment actions.39 The courts have interpreted disparate treatment and harassment very narrowly, and have called the validity of disparate impact litigation into serious question.

Disparate treatment has been interpreted to prohibit only those decisions where the employer’s motive in taking the unlawful employment action is the plaintiff’s protected class. This view of motive is extremely narrow, at least in one sense. This view of motive is narrow in the sense that if the employer’s motive is not literally the identity characteristic protected by statute, even if it is strongly correlated with that identity characteristic, then the employment decision won’t violate the statute. So, for example, deciding to fire a person because their pension was about to vest was not literally age discrimination,40 firing women because they were pregnant was not literally

36 Retaliation may seem a fourth type of claim under anti-discrimination laws, and that is accurate in the sense that it prohibits employer action based on certain employee conduct rather than that employee’s membership in a protected class. However, retaliation is just another form of intentional discrimination or disparate treatment.
sex discrimination\(^{41}\) (although it is now),\(^{42}\) and firing a Black woman because she wore braids or locs was not literally race discrimination.\(^{43}\)

Harassment has been defined relatively narrowly to encompass only tangible employment actions that are carried out (and not just threatened), and environments so hostile that a reasonable person would find them abusive.\(^{44}\) Moreover, that hostile-ness must be because of a person’s protected class in the same way that disparate treatment cases must be.\(^{45}\) Further limiting the reach of this framework, harassment cases are viewed as significantly different from other kinds of discrimination cases—personal to the victim and the harasser—such that courts have relieved employers of liability except in narrow circumstances.\(^{46}\)

Disparate impact has grown less and less viable, as well, spurred on by the Supreme Court’s decision in \textit{Ricci v. DeStefano}.\(^{47}\) In that case, the City of New Haven had refused to certify promotional lists generated by a process that had a disparate impact against Black and Latino applicants. The Court assumed that this decision was actually disparate treatment against white applicants and proceeded to hold that evidence sufficient to prove a prima facie case of disparate impact liability was not enough for the City to believe that it would be liable for that disparate impact. In addition to that prima facie case, the City needed more evidence that the tests and the ways that they were used were not job-related and consistent with a business necessity. Looking at the City’s promotional process, the Court went on to analyze a potential business necessity defense, divorced from its prior precedents, and held that because the test seemed fair, was carefully created, was adopted to prevent


\(^{44}\) \textit{See} \textit{Sperino & Thomas, supra} note 24, at 34–40 (describing cases).


cronyism, and was agreed to by the union, it was job-related and consistent with business necessity. Not only did the majority water down the business necessity test, almost beyond recognition, it also suggested that disparate impact liability conflicted with the prohibition on disparate treatment. Justice Scalia, concurring, would have gone so far as to hold that Congress could not prohibit disparate impact liability consistent with the Equal Protection clause except to the extent that it was used to ferret out disparate treatment.\footnote{Id. at 594–96. (Scalia, J., concurring).}

In addition to these examples of narrowed theories of discrimination, the Court has limited litigation by reinterpreting the causation standard in discrimination cases, creating a more demanding standard. Not too long after clarifying that amendments to Title VII meant that plaintiffs need only prove that their protected class was a motivating factor in an adverse employment action (and that defendants had an opportunity to show it was not a but-for cause) even in circumstantial cases,\footnote{Desert Palace, Inc. v. Costa, 539 U.S. 90, 97 (2003).} the Court considered a series of cases on mixed motives, limiting the effect of that decision. In \textit{Gross v. FBL Financial Services, Inc.}, the Court held that mixed motives liability was not available under the Age Discrimination in Employment Act (ADEA) because Congress hadn’t amended it in the Civil Rights Act of 1991.\footnote{Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009).} The Court described its holding as requiring “that a plaintiff bringing a disparate treatment claim pursuant to the ADEA must prove . . . that age was the ‘but-for’ cause of the challenged adverse employment action,” suggesting there would be just one but-for cause—age or something else.\footnote{Id. at 180 (emphasis added).} That was followed by \textit{University of Texas Southwestern Medical Center v. Nassar}, where the Court held that the retaliation provision of Title VII required a plaintiff to prove “that the desire to retaliate was the but-for cause of the challenged employment action,” again suggesting there could be only one but-for cause. In both \textit{Gross} and \textit{Nassar}, the Court held that the statutory language, “because of” means that plaintiffs must prove but-for cause.\footnote{Gross, 557 U.S. at 176; Nassar, 570 U.S. at 352.} Most recently, the Court held that 42 U.S.C § 1981 also requires but-for causation, despite not having causal language at all.\footnote{Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1015–16 (2020).} All of that said, the Court’s most recent discussion of but-for causation suggests this may not be as limited a standard as \textit{Gross} and \textit{Nassar} suggest. In \textit{Bostock v. Clayton County}, the Court

\footnotesize{48 Id. at 594–96. (Scalia, J., concurring).}
\footnotesize{49 Desert Palace, Inc. v. Costa, 539 U.S. 90, 97 (2003).}
\footnotesize{50 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009).}
\footnotesize{51 Id. at 180 (emphasis added).}
\footnotesize{52 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) (relying on Gross and holding that the Civil Rights Act of 1991 only amended Title VII’s causation standard for status claims).}
\footnotesize{53 Gross, 557 U.S. at 176; Nassar, 570 U.S. at 352.}
explained that “[t]his can be a sweeping standard. Often events have multiple but-for causes.” Implications of this development are discussed below.

All in all, this summary shows that antidiscrimination law is a mess, one that many, many scholars have also documented. And much of this mess is a product of the system of enforcement. Despite the veneer that antidiscrimination law is enforced by a federal agency (with the help of multiple state agencies), private parties actually drive enforcement. The EEOC depends on private parties coming to it to file charges, and the vast majority of enforcement actions filed in court are brought by private parties. If we believe that discrimination is rare, caused by a few bad apples, and all we need is to provide individuals injured a way to seek a remedy for their injury, maybe this system would look reasonable, if imperfect. Viewed in the abstract, this seems to allow that kind of individual remedy while creating a safety net to catch those rare situations that warrant a broader response by giving federal and state governments the first chance at the matter.

But this misperceives the harm and prevalence of discrimination. Discrimination, even by private employers, is a public harm in addition to a private harm. It injures our economy and perpetuates the subordination of marginalized groups. For enforcement to be effective through private parties, people must be able to recognize when they have been wronged and have the resources, incentives, and protections necessary to pursue a claim. Where courts ignore the effects of stereotypes—or worse, endorse the kinds of assumptions described in Panes of the Glass Ceiling—they frustrate the purpose of Title VII and reinforce discrimination.

III. STEPS FORWARD AND BACK

Despite the limited effectiveness of the enforcement system, Title VII has helped to transform employer practices, and those practices shape the law on the ground. Over the last fifty-plus years, larger employers, in particular, have come to emphasize diversity and inclusion. Some of that movement may

56 In fiscal year 2020, the EEOC brought only ninety-three lawsuits. U.S. EQUAL EMP. OPPORTUNITY COMM’N, FISCAL YEAR 2020 ANNUAL PERFORMANCE REPORT 46 (2021), https://www.eeoc.gov/sites/default/files/2021-01/FY%202020%20APR.pdf; see also Bornstein, supra note 24, at 295–97 (reporting enforcement statistics).
be to avoid liability for discrimination,\textsuperscript{58} either by ensuring policies and practices that afford defenses to claims or by presenting a public face that would make a jury less likely to believe discrimination claims—or at least less likely to believe that discrimination is an institutional problem and not a single bad apple who somehow managed to subvert the systems in place. Whatever the motive, the wealth of literature in business journals and magazines, plus the size of the industry that has grown up around Diversity, Equity, and Inclusion (DEI),\textsuperscript{59} suggest that many employers see a benefit in preventing discrimination. Employers have realized that diversity is valuable, either because a diverse workforce can provide greater profits,\textsuperscript{60} or, more controversially, because appearing to be a diverse workplace makes the business more attractive to employees, customers, and shareholders.\textsuperscript{61}

These employer-created systems, in turn, become the enforcement system and scatter definitions of discrimination into the world based on what the human resources professionals view the law to mean. The systems also shape what courts view the law to require. To use the words of Lauren Edelman, large employers have “managerialized” employment discrimination law, and this managerialization allows courts to defer to symbolic structures of compliance and shape employee rights accordingly.\textsuperscript{62}

A key part of the practices that employers have used to shape the law on the ground is training. Diversity training has been a part of the modern workplace since at least the early 1970s, growing out of race relations

\textsuperscript{58} Employers tend to overestimate their potential liability for discrimination, believing that they are much more likely to be sued, and if sued, much more likely to be found liable than they really are. See Laura Beth Nielsen & Aaron Beim, Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation, 15 STAN. L. & POL’Y REV. 237, 261–62 (2004).


\textsuperscript{62} See generally LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS AND SYMBOLIC CIVIL RIGHTS (2016) (developing a theory of legal endogeneity to explain how employers construct the meaning of compliance and of employment rights in a way that courts then adopt).
workshops brought into workplaces as a result of consent decrees in major discrimination cases.63

Complementing diversity training is sexual harassment training. That type of training began in the early 1980s, likely in response to guidance issued by the EEOC,64 and increased in popularity over time. When high profile harassment cases began to be widely publicized in the mid-2010s, illustrating that harassment continued to be prevalent, a number of states stepped in to create additional requirements surrounding training. Several states now require anti-harassment or antidiscrimination training. Seven of these state laws require private sector employers to mandate the training for their employees. Eleven require the training only for state employees. Lastly, five states recommend that training for all employers, but do not require it.65 A detailed summary of each state’s training requirements is provided in Table 1 below.

Table 1. State requirements for sexual harassment/antidiscrimination training.

<table>
<thead>
<tr>
<th>State</th>
<th>Subject Matter of the Training</th>
<th>Does the Statute Provide Minimum Standards?</th>
<th>Other Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>California66</td>
<td>Sexual harassment, other kinds of discriminatory harassment abusive conduct generally gender identity, expression &amp; sexual orientation</td>
<td>Yes</td>
<td>• Two hours for supervisors; One hour for non-supervisory employees</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Must be conducted within 6 months of starting</td>
</tr>
</tbody>
</table>


65 COLO. CODE REGS. § 708-1:20.6 (2023); HAW. CODE. R. § 12-46-109(g) (2022); MASS. GEN. LAWS ch. 151B, § 3A (2022); OHIO ADMIN. CODE 4112-5-05(J)(7) (2022); 28 R.I. GEN. LAWS §§ 28-51-2(c), 28-51-3 (2022).

<table>
<thead>
<tr>
<th>State</th>
<th>Training Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware^68</td>
<td>Sexual harassment: Very minimal; Delaware Code Ann. tit. 19, § 711A (2022). Must be interactive. Must be conducted within one year of starting employment and be repeated every two years.</td>
</tr>
<tr>
<td>District of Columbia^69</td>
<td>Sexual harassment: Yes; D.C. Code § 2-1411.05a (2022). Covers employers of tipped employees only.</td>
</tr>
<tr>
<td>Florida^70</td>
<td>Antidiscrimination: —; Florida Admin. Code r. 60L-40.001 (2022). Covers state executive branch supervisors only.</td>
</tr>
</tbody>
</table>

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^67 CONN. GEN. STAT. § 46a-54(15) (2022).
^69 D.C. Code § 2-1411.05a (2022).
^70 Fla. Admin. Code r. 60L-40.001 (2022).
^71 775 ILL. COMP. STAT. 5/2-109 (2022).
<table>
<thead>
<tr>
<th>State</th>
<th>Topic</th>
<th>Training Requirement</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>Antidiscrimination</td>
<td>—</td>
<td>• Covers state executive branch employees only</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• The state must provide the training, but employees are not required</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(only strongly encouraged) to attend</td>
</tr>
<tr>
<td>Kansas</td>
<td>Antidiscrimination,</td>
<td>—</td>
<td>• Covers state executive branch employees only</td>
</tr>
<tr>
<td></td>
<td>sexual harassment,</td>
<td></td>
<td>• Annual training</td>
</tr>
<tr>
<td></td>
<td>retaliation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>Sexual harassment</td>
<td>Yes; Minimal content</td>
<td>• Must be conducted within one year of starting employment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Supervisors &amp; managers must have extra training</td>
</tr>
<tr>
<td>Nevada</td>
<td>Sexual harassment</td>
<td>—</td>
<td>• Covers state employees only</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Training must take place within thirty days of hire and be</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>repeated every two years</td>
</tr>
</tbody>
</table>

75 NEV. ADMIN. CODE § 284.496 (2022).
### Promoting Change in the Face of Retrenchment

<table>
<thead>
<tr>
<th>State</th>
<th>Area</th>
<th>Training Requirement</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>Sexual harassment</td>
<td></td>
<td>• Covers state employees and applicants only</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Training must take place and be repeated within a reasonable period of time</td>
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<tr>
<td>New Mexico</td>
<td></td>
<td></td>
<td>• Covers licensed primary and secondary educational employees only</td>
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<td></td>
<td>• Training must be repeated yearly</td>
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<tr>
<td>New York</td>
<td>Sexual harassment</td>
<td>Yes</td>
<td>• Training must be interactive</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Training must be repeated annually</td>
</tr>
<tr>
<td>North Carolina</td>
<td></td>
<td></td>
<td>• Covers state employees and applicants only</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Antidiscrimination, sexual harassment</td>
<td></td>
<td>• Covers state employees only</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Sexual harassment</td>
<td></td>
<td>• Covers state employees only</td>
</tr>
</tbody>
</table>

78 N.Y. LAB. LAW § 201-g (McKinney 2022).
81 TENN. CODE ANN. § 4-3-1703 (2022).
Texas \(^{82}\) | Antidiscrimination | — | • Covers state employees only  
| | | • Training must take place within thirty days of hire and be repeated every two years |

Utah \(^{83}\) | Sexual harassment | Must be approved by the Department of Human Resources management | • Covers state employees only  
| | | • Refreshers every two years |

Washington \(^{84}\) | Sexual harassment | — | • Covers state employees only |

The content of this training and its history and effects produce something of a paradox for calling attention to the problems of stereotyping. During the 1980s and 1990s, much of the diversity training done by employers focused on educating participants about stereotypes.\(^{85}\) The idea behind this strategy was that by educating people about stereotypes, people would recognize their flawed thinking and their behavior would change. That is not what happened though. The training had a tendency to reinforce stereotypes or otherwise backfire in the face of resistance by those subject to the training.\(^{86}\) The kind of training that Professor Stone critiques in the Introduction to *Panes of the Glass Ceiling*, where women at Ernst & Young were provided training apparently designed to empower them, but which traded on deeply ingrained gender-based stereotypes, is an illustration of how


\(^{85}\) Anand & Winters, *supra* note 63, at 361.

the training might reinforce rather than disrupt stereotypes.\(^{87}\) Although sexual harassment training focuses on conduct to be avoided, and so is often different from diversity training, it too can reinforce sex stereotypes in the context of sexual behavior in particular.\(^{88}\)

Given how long training has been part of the workplace experience, it may surprise some readers that the effectiveness of that training has never been proven, and in fact not really researched until relatively recently. Moreover, the training itself appears to be about the least effective way to change employee behavior. Mandatory, talking-head, one-size-fits-all training, especially, can have the effect of inciting resistance and backlash.\(^{89}\)

Perhaps one of the best examples of that backlash is the widespread political attacks on diversity education and training currently sweeping across the country. This backlash poses real problems for addressing and even uncovering the kinds of stereotypes that Professor Stone challenges in *Panes of the Glass Ceiling*.

The current wave of official actions may have started with former President Trump’s memorandum in September of 2020 decrying diversity trainings and ordering those trainings to cease.\(^{90}\) That memorandum was focused on the race-based content of those trainings, and not on content focused on sex discrimination, but the executive order that followed, which essentially required color- and sex-blind diversity training in the federal workforce and for federal contractors focused on both.\(^{91}\) Moreover, a wave of legislation proposed and adopted after that included content related to sex


\(^{89}\) Dobbin & Kalev, *supra* note 86, at 55.


as well. Most of these bills have focused on education, many at the K-12 level, but some include state higher education institutions as well.

Perhaps the most controversial, and certainly the most sweeping, is Florida’s Individual Freedom Act ("IFA"), more commonly known as the “Stop WOKE Act." That statute governs education in Florida, both K-12 and higher education, but it also amended the state’s antidiscrimination law to prohibit certain kinds of training by private sector employers. The Act prohibits, among other things, any covered employer from requiring any activity that “promotes” or “advances” a number of concepts. Among the prohibited concepts are that a person’s “status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin,” and another is that “[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.” Another prohibited concept is that “[s]uch virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist . . . .” The statute does provide for some discussion, it says, as long as that “training or instruction is given in an objective manner without endorsement of the concepts.”

Unsurprisingly, this statute called into question the ability of employers to provide diversity or anti-harassment training. These provisions, focused on private-sector employers, were challenged by two employers who wanted

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92 See For Educational Gag Orders, the Vagueness Is the Point, PEN AM. (Apr. 28, 2022), https://pen.org/for-educational-gag-orders-the-vagueness-is-the-point (reporting as of April 2022 that 183 such bills had been introduced in 40 states and 19 had become law); see also Theodore R. Johnson, Emelia Gold & Ashley Zhao, How Critical Race Theory Bills Are Taking Aim at Teachers, FIVETHIRTYEIGHT (May 9, 2022, 6:00 AM), https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers (analyzing the language of proposed and passed legislation).

93 E.g., TEX. EDUC. CODE ANN. § 28.002(h-2)–(h-5) (2022) (providing that the state board of education define the essential knowledge required about the women’s suffrage and equality movement among other topics, and providing that any discussion of controversial public policy or social affairs be explored “from . . . contending perspectives without giving deference to any one perspective”); H.R. 2670, 2021 Leg. (Tenn. 2022) (prohibiting training that “promotes division between, or resentment of” “any class of people”); H.B. 1775, 2021 Leg. (Okla. 2021) (prohibiting orientation or any “requirement” that “presents” any form of race or sex stereotyping).

94 E.g., H.R. 1012, 2022 Leg., 97th Sess. (S.D. 2022) (prohibiting training or orientation at higher education institutions that “teaches” divisive concepts including concepts about sex discrimination, although not prohibiting that topic as course content).


96 FLA. STAT. § 760.10(8)(a) (2022).

97 Id. § 760.10(8)(a)(3).

98 Id. § 760.10(8)(a)(4).

99 Id. § 760.10(8)(a)(8).

100 Id. § 760.10(8)(b).
to mandate diversity training and a diversity and inclusion consultant, who provides that training, in a case called *Honeyfund.com, Inc. v. DeSantis.*\(^{101}\) The *Honeyfund.com* plaintiffs challenged the portion of the statute that applied to private-sector employers on the ground that it violated the First Amendment, arguing that the law was viewpoint based, and vague and overbroad.\(^{102}\) They sought a preliminary injunction, which the district court granted.\(^{103}\)

After finding that the plaintiffs had standing and the case was ripe for review,\(^{104}\) the court considered the First Amendment claims and found that the plaintiffs were likely to succeed on the merits. The plaintiffs argued that the statute targets particular speech because of its message and is thus a viewpoint-based restriction.\(^{105}\) The State countered that the statute didn’t regulate speech at all, but instead by focusing on mandatory trainings, regulated only conduct.\(^{106}\) The court rejected this assertion, noting that the statute did not prohibit all mandatory workplace trainings, but only those that conveyed a particular message about certain concepts.\(^{107}\) In fact, mandatory training, or any activity, that condemned the concepts in the statute would not violate it. To illustrate, the court noted, that “an employer could require every employee to read *Woke, Inc., Inside Corporate America’s Social Justice Scam* but could not require employees to read *The Color of Law.*”\(^{108}\) As a result, the court concluded that the statute clearly regulated speech and clearly did so based on the viewpoint that speech expressed.\(^{109}\)

Finding the speech at issue protected by the First Amendment the court went on to analyze whether the statute could nonetheless be valid because the State could show that the restriction passes the requisite level of scrutiny. The State first argued that only intermediate scrutiny applied, arguing that this was the test applied to captive audience speeches.\(^{110}\) It further argued that if strict scrutiny applied this statute had to satisfy that level of scrutiny because if it did not, then neither would Title VII.\(^{111}\) The court rejected both arguments. The court first noted that the captive audience doctrine had never

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\(^{102}\) *Id.* at *6.

\(^{103}\) *Id.* at *2–3, 6, 16 (not granting the preliminary injunction as to one defendant, Governor DeSantis himself, because the plaintiffs could not establish standing to seek that remedy against him).

\(^{104}\) *Id.* at *6.

\(^{105}\) *Id.* at *2, 6.

\(^{106}\) *Id.* at *6.

\(^{107}\) *Id.* at *7.

\(^{108}\) *Id.*

\(^{109}\) *Id.* at *7–8.

\(^{110}\) *Id.* at *9.

\(^{111}\) *Id.*
been held to apply in the employment context, much less in private employment.\textsuperscript{112} It then held that even if that doctrine did apply, the statute at issue would still have to pass strict scrutiny because it was viewpoint based.\textsuperscript{113}

The State’s strict scrutiny argument was essentially that holding that this statute did not pass strict scrutiny would create tension with the ability of courts to enforce Title VII, to the extent that Title VII prohibited hostile working environments.\textsuperscript{114} In rejecting this argument, the district court noted that Title VII did not directly burden speech. It primarily prohibited conduct, namely, hiring, firing, or other discrimination in compensation or the terms, conditions, and privileges of employment, and any burden on speech was incidental.\textsuperscript{115} Moreover, Title VII’s hostile environment standard—that the harassing conduct must be severe or pervasive enough to create an abusive working environment—protected the vast majority of speech. The court noted that Florida’s statute was “the inverse. It targets speech—endorsing any of eight concepts—and only incidentally burdens conduct.”\textsuperscript{116} The court went on to find that the statute did not pass strict scrutiny. The State asserted that it had a compelling interest in preventing employers from foisting speech it found repugnant on a captive audience of employees.\textsuperscript{117} The court held that this could not be a compelling interest because the State may simply not prohibit speech it finds repugnant.\textsuperscript{118} But even if the State did have a compelling interest—like prohibiting discrimination, which the state conceivably could have asserted, given the text of the statute—the court found the statute not narrowly tailored to serve that interest.\textsuperscript{119} The speech the statute arguably could reach was already prohibited by the prohibition on discrimination in state and federal law, and the additional prohibitions reached widely-accepted ideas, like that white privilege exists or that people should consider another person’s race or sex when interacting with them. “In sum, the IFA sweeps up an enormous amount of protected speech to ban a sliver of offensive conduct that exists somewhere between the trainings Plaintiffs wish to hold and what the FCRA already bars.”\textsuperscript{120}

The plaintiffs also argued that the statute was both vague and overbroad in violation of the First and Fourteenth Amendments. The court agreed that

\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at *10.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at *11.
the IFA was vague although it did not agree that it was overbroad. Statutes are vague if they fail to provide people of ordinary intelligence a way to understand what conduct is prohibited or if they authorize or encourage arbitrary and discriminatory enforcement.\textsuperscript{121} Analyzing the language of the statute, the court explained why the language failed to clearly explain what was prohibited and invited arbitrary and discriminatory enforcement.\textsuperscript{122} One example used by the court was an employer who during sexual harassment training cites statistics that women are the most common victims of harassment and in its examples of harassment, uses men as harassers and women as victims. The court asked whether that employer, by doing so, had “advanced” the belief that women are morally superior to men.\textsuperscript{123}

The court noted that one provision was particularly problematic. “Under that provision, employers cannot endorse the view that ‘[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.’” The court noted that this “feature[d] a rarely seen triple negative, resulting in a cacophony of confusion.”\textsuperscript{124} It is not clear whether this provision mandates a certain kind of colorblindness or even bans topics like diversity. It could limit sexual harassment trainings that include information on how to treat someone of another sex, or even go so far as to prevent employers from acknowledging their employees’ cultural backgrounds in any way.\textsuperscript{125} Lastly, the fact that the statute allows for “discussion” of these concepts if “given in an objective manner” did not save the statute, but in fact made the whole provision vague.\textsuperscript{126} The court was skeptical that these topics could be discussed in a way that all observers would agree was simply an objective recognition that these things exist as ideas, since the very fact of their mention would be reasonably taken as some kind of endorsement.\textsuperscript{127}

The last issue the court considered was whether the statute was impermissibly overbroad. A statute is overbroad when it impermissibly chills a substantial amount of protected speech in relation to its “plainly legitimate sweep.”\textsuperscript{128} The court noted that it had basically held that the statute had no legitimate sweep and thus, overbreadth was not the correct analysis. Finding that the plaintiffs had satisfied the other elements required for a preliminary injunction to issue, the court enjoined operation of the provisions that applied

\begin{footnotes}
\item[121] Id. at *13.
\item[122] Id. at *12–14.
\item[123] Id. at *12.
\item[124] Id. at *13 (quoting Fla. Stat. § 760.10(8)(a)(4) (2022) (emphasis omitted)).
\item[125] Id.
\item[126] Id. at *13–14.
\item[127] Id. at *14.
\item[128] Id.
\end{footnotes}
to private-sector employees. The State has filed an appeal of the preliminary injunction.

As a side note, the parts of the statute that apply in the education context have also been challenged in, for example, *Pernell v. Florida Board of Governors* and *Novoa v. Diaz*. In *Pernell*, the state’s opposition to the motion for preliminary injunction advances a somewhat shocking argument—that the curriculum in state universities and in-class instruction is government speech, not entitled to any First Amendment protection. This is an argument similar to one the University of Florida made when it attempted to prohibit state university faculty from serving as experts in litigation against the State, one the State lost, but it will have potentially more force in this context. Under the Supreme Court’s public employee speech doctrines, speech a public employee makes pursuant to their “official responsibilities” is essentially government speech and not protected by the First Amendment. It is not entirely clear how this holding ought to apply to teachers, especially in higher education, whose very job is to promote critical thinking and research in often sensitive, controversial areas.

In November of 2022, the district court issued a preliminary injunction against enforcement of the Act to limit classroom speech by public university professors. The court rejected the argument that classroom speech was somehow government speech, distinguishing between decisions about what courses to offer, which the state can decide, and what viewpoint professors express, which the state cannot constitutionally control. The IFA wasn’t the first time in this recent wave of anti-diversity actions that the State had challenged antidiscrimination measures either. In 2021, the Florida Supreme Court amended the rules regulating Florida Bar membership to prohibit continuing legal education credit for any course provided by a sponsor who "uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or

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132 *Austin v. Univ. of Fla. Bd. of Trs., 580 F. Supp. 1137, 1154–55, 1161, 1173 (N.D. Fla. 2022).*

133 *Garcetti v. Ceballos, 547 U.S. 410, 422, 424 (2006).*


135 *Id. at *7–9, 11.*
participants.” That rule change was made when a section of the Florida Bar adopted a speaker policy modeled on the American Bar Association’s speaker policy. That ABA policy required that for programs with three or more panelists, including a moderator, at least one person had to be a member of a diverse group, and for larger programs, those with five to eight panelists, two had to be from diverse groups. Diversity was defined in terms of historically underrepresented groups including women, members of racial and ethnic minorities or people of color, people with disabilities, and LGBTQ+ individuals. The ABA policy was adopted when the organization’s former policy had not created many opportunities for participation for members of underrepresented groups.

That policy, in the view of the Florida Supreme Court, represented a quota because it was a “number … constituting a … target minimum” and thus “necessarily cap[ped] the allowable percentage of nondiverse panelists.” Moreover, in the court’s view, such a policy was a violation of “basic American principles of nondiscrimination,” that foster stereotypes—what those stereotypes were was not described—and are divisive. The effect of the court’s decision was not to ban or foreclose participation in ABA programming, but to not allow that programming to count for continuing legal education credit for members of the Florida Bar. One justice dissented on the ground that the ABA requirement had never limited participation in any programming, because the requirement could always be waived, and because in practice, it had simply resulted in a non-diverse panel seeking out an additional member they would not have included otherwise. Accordingly, the policy was a one-way ratchet, so to speak—it only operated to include. As a result of the Florida Supreme Court’s rule change, the ABA changed its policy to remove the numerical aspect, and instead provide that CLE organizers “will invite and include” diverse panelists and

136 In re Amendment to Rule Regulating the Florida Bar 6-10.3, 315 So. 3d 637, 639 (Fla. 2021) (mem.).
138 See In re Amendment to Rule Regulating the Florida Bar 6-10.3, 335 So.3d 77, 79 (Fla. 2021) (mem.).
139 Id. at 79–80 (quoting AMERICAN HERITAGE DICTIONARY 1447 (5th ed. 2011)).
140 Id. at 80.
141 Id. at 79, 82.
142 Id. at 82–83 (Labarga, J., dissenting).
143 Id. at 82 (Labarga, J., dissenting).
The ABA also instituted a monitoring and reporting subcommittee to track compliance.

The Florida Supreme Court had invited comments from interested parties when it initially amended its rule, and nearly all of those comments were negative, many arguing that the amendment would frustrate diversity and inclusion efforts. It dismissed those comments, instead focusing on the harms of what it characterized as a quota, and implicitly expressing skepticism that a person’s experience as a member of an underrepresented group, might provide something important in a program relevant to the “subject matter or educational content of the CLE program.”

Pushing back on this implicit assumption may be where Professor Stone’s work is most valuable. The current efforts to limit the kinds of diversity and antidiscrimination training or education that can be offered rest on an assumption that discrimination is rare, at least discrimination that affects historically underrepresented groups, and people do not act upon harmful stereotypes. And yet Professor Stone’s work demonstrates that harmful stereotypes are as prevalent or nearly as prevalent as they have ever been. Her careful tracing of how those stereotypes manifest and where they can be found is essential to understanding barriers to equality and to countering them. Yet, as Florida and other states are demonstrating, there is great resistance to these efforts.

IV. CONCLUSION

Professor Stone’s book is both so needed and so vulnerable to some of the very forces it describes. Antidiscrimination law has not transformed American society the way Congress originally intended, and it cannot without the hard work of scholars like Professor Stone revealing the invidious ways that stereotypes continue to shape people’s perceptions and behavior. That is the only way to mold the enforcement system to promote effective approaches. And even more importantly, it gives us strategies that work around litigation or that might reorient the courts in litigation, providing the way forward we need right now.


145 In re Amendment to Rule Regulating the Florida Bar 6-10.3, supra note 136, at 638.

146 In re Amendment to Rule Regulating the Florida Bar 6-10.3, supra note 138, at 80, 82; id. at 82 (Labarga, J., dissenting).

147 See id. at 80–81 (majority opinion).