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THIRD GENERATION DISCRIMINATION: THE RIPPLE EFFECTS OF GENDER BIAS IN THE WORKPLACE

*Catherine Ross Dunham**

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I. INTRODUCTION

What is implicit bias? What does it look like? How can we define and address it in personal and legal contexts, working towards the end goal of making the workplace more amenable to successful career paths

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for all engaged? These questions constitute the modern taxonomy of questions in the area of gender¹ discrimination. Thanks to plaintiffs of the past 50 years and their arduous battles under Title VII with *quid pro quo* sexual harassment, hostile environment sexual harassment, pregnancy discrimination, gender discrimination in benefits and work assignments, and many other indignities, we have passed through the era of blatant, un-actionable gender-based discrimination. Of course, certain work environments continue to pose threats to female workers.² In those environments, employers and supervisors prey on women who are ill-positioned to access legal and other support services, and thus continue to operate workplace environments that openly discriminate based on gender and openly threaten female employees. But the risks to female workers are not only present in those extreme environments. Women in safe corporate jobs and professional jobs, those white-collar bastions of *Mad Men*³ fame, battle an evolved species of gender discrimination, which flows from implicit bias against women. Generally, and specifically, this happens to women attempting to compete in male-driven industries and professions.

Betty Dukes⁴ was a Wal-Mart employee who could not get promoted into an entry-level management position despite her employer's sophisticated employment policies, which included the legally appropriate policies designed to protect women at Wal-Mart from gender-based discrimination.⁵ At Wal-Mart, the decision to elevate employees into entry-level management positions was delegated to department and store managers. Those managers, who were predominantly male at the time of Betty Dukes' employment, used their discretion in determining

1. The term gender as used in this Article is intended to refer to all people identifying as female and is not intended to limit the discussion of gender-based discrimination to persons who possess a female reproductive system and secondary sex characteristics.

2. This Article is focused on implicit biases based on gender and cases alleging claims based on implicit bias. However, this focus is in no way intended to diminish the fact that many women continue to work in oppressive environments where they face overt gender discrimination and sexual harassment. For example, for many agricultural workers, threats of rape and physical violence continue. See GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* 240 (St. Martin's Press 2016).

3. *Mad Men* (AMC 2007-2015).

4. During the drafting of this Article, Betty Dukes passed away at age 67. She began working at Wal-Mart in 1994 and remained in her job throughout her lawsuit against Wal-Mart, retiring in 2016. Michael Corkery, *Betty Dukes, Greeter Whose Walmart Lawsuit Went to Supreme Court, Dies at 67*, N.Y. TIMES (July 18, 2017), https://www.nytimes.com/2017/07/18/business/betty-dukes-dead-walmart-worker-led-landmark-class-action-sex-bias-case.html?emc=edit_ca_20170719&nl=california-today&nid=18427111&te=1 [<http://perma.cc/8TJ5-EQVA>].

5. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 344, 353 (2011).

which employees should be elevated to the more lucrative manager positions. Despite a strong work record, Betty Dukes was overlooked time and time again. She ultimately filed suit against Wal-Mart under Title VII for gender-based discrimination, arguing that it was the discretion vested in the junior managers that caused the gender-based discrimination. Male managers tended to promote male employees onto the management track, defaulting at times to stereotypes about female managers and perceptions of which employees needed the better positions to advance in the company or to support families at home. The culture at Wal-Mart allowed stereotypes about women's ability to function as managers to block gateway promotions of female retail workers to managers. In this way, the covert message mimicked an overt message that women were less amenable to work and should not take jobs away from men. Betty Dukes argued that the male managers, who had the power to promote, used implicit bias against women that constituted Title VII gender-based discrimination.⁶

Ellen Pao worked in a very different professional context.⁷ Ellen Pao was an Ivy League educated management analyst and lawyer who had enjoyed success in the field of banking and finance. She was praised for her intellect and talents and rose in her profession to a position within the Silicon Valley venture capital firm Kleiner Perkins Caufield & Byers, LLC (Kleiner). She joined the firm as a junior partner performing various functions within the firm, including managing projects and new initiatives, identifying potential investments, and supporting the firm's managing partner, John Doerr. Her goal was to be promoted to a full partner at the firm, which specialized in venture capital financing for Silicon Valley start-up tech companies.

In this environment, she was a woman among men at every turn, dealing both with the male-dominated atmosphere of banking and finance as well as the male-dominated atmosphere of Silicon Valley tech. By her own assessment, she struggled at times to find her footing in this mixed environment. She also felt pressure to form good working relationships with her male colleagues and to please her male superiors. The firm's culture⁸ required close contact with colleagues, and Pao ultimately became romantically involved with Ajit Nazre, a same-level colleague, after rebuffing his advances and reporting Nazre's behavior to superiors in the firm. After complaining of harassment by Nazre and other partners,

6. *Id.* at 345.

7. Complaint for Damages at ¶¶ 2-3, *Pao v. Kleiner Perkins Caufield & Byers, LLC*, (Cal. Super. May 10, 2012) (No. CGC-12-520719) [hereinafter *Pao Complaint*].

8. *Id.* ¶¶ 3-4.

Pao continued her work at Kleiner, working towards her goal of partnership.

However, she was never considered for partner because she was excluded from opportunities, meetings, and events, which were essential to advancement in the firm. The firm relied on her personnel reviews in evaluating her for partnership. These reviews included evaluative comments that ran the gamut from her having sharp elbows and complaining too much, or being too quiet.⁹ Pao was forced to walk the impossible tightrope between femininity and perceptions of job-related masculine superiority. When she was brusque with colleagues and junior employees, she was criticized for mannerisms routinely employed by men in both the finance and tech industries. When she did not assert herself, she was labeled as weak. When she complained about harassment, she was criticized for making trouble. This storm of critique led her to leave Kleiner and file a claim for Title VII gender-based discrimination premised on the theory that her employer—despite written policies and procedures which protected against discrimination—used stereotypes, and that the male managers' implicit biases against women colleagues positioned Pao for her eventual failure.¹⁰

Betty Dukes and Ellen Pao may appear to have little in common, but they are both pioneers in developing a conversation about the role of implicit bias against women in the workplace. This Article will discuss their cases in greater detail to focus on a larger question regarding gender-based discrimination and implicit bias. Courts and scholars have recognized the existence of structural or second generation discrimination, which describes aspects of an organization's structure that facilitate or enable implicit gender bias.¹¹ Betty Dukes' case was an unsuccessful attempt to litigate a claim for second generation discrimination under Title VII, ultimately failing at the United States Supreme Court. Ellen Pao was also unsuccessful in her effort to persuade a San Francisco jury that she was a victim of second generation discrimination. In both cases, men and women of various backgrounds determined the ultimate fate of the claims. This Article asks if Title VII claims based on second generation discrimination are further inhibited by the implicit biases of judges and juries. How can a female plaintiff convince a fact-finder or a reviewing judge that she has been

9. *Id.* ¶¶ 6-7, 9-11.

10. *Id.*

11. See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (discussing aspects of an organization's structure that allow or encourage implicit bias); see also *infra* notes 133-166 and accompanying text.

discriminated against through stereotypes and bias if those hearing the case share the same implicit gender bias?

This Article will begin by examining the *Pao* and *Dukes* cases, focusing on the role of the decision-makers in the ultimate outcomes of those cases. The Article will then consider implicit bias as a concept, noting the interplay between implicit bias and gender-based stereotypes. Building on that understanding, the Article will explore generally the evolution of second generation discrimination as a legal theory, connecting that analysis back to *Dukes*' and *Pao*'s cases. The Article will then explore the role of implicit bias in the court system, reviewing social science literature regarding the role of gender-based bias in the courtroom as it relates to female attorneys, female litigants, and the effect of certain "feminine traits" in the courtroom. The Article will argue that gender-based implicit bias against female litigants plays out in the form of a Third Generation Discrimination, a term developed here, by layering on the biases of judges and juries. Third Generation Discrimination further undermines efforts by women seeking relief under Title VII for workplace discrimination based on claims that their employer allowed bias against them to curb their opportunities for advancement. Women will only succeed in implicit bias cases, such as those brought by *Dukes* and *Pao*, if the facts of the case are evaluated by those who can assess the case without regard to their own preconceptions about the role of women in the workplace and in society.

II. CONSIDERING THE ROLE OF IMPLICIT BIAS IN THE FACTUAL CONTEXT OF GENDER-BASED WORKPLACE DISCRIMINATION SUITS

As an entry point for the conversation about bias-based discrimination, this section examines and compares two cases filed as Title VII claims under a theory of second generation discrimination. The relevant background for the case analyses is an overview of the general theory of bias-based gender discrimination, which flows from social science literature.

A. *Bias and Discrimination Generally*

Bias is a preconceived opinion or a predisposition to decide a cause or issue in a certain way.¹² Bias flows from stereotypes, which are based

12. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012). The concepts of bias, explicit and implicit, and the related concept of confirmation bias have been studied extensively in social science literature. Any attempt to encapsulate that literature in this Article would be inept. As such, this Article offers basic definitions and references to other writings, which

on interactions with others in the regular course of society.¹³ Implicit biases are attitudes not consciously accessible, which flow from stereotypes.¹⁴ Implicit biases are often not understood by the holder or accepted as existing in relevant settings.¹⁵

Bias flows from stereotype, and stereotype thinking begins early in life, found in children as young as three years old.¹⁶ Research shows that young people use exposure to stereotypes to interpret the world around them, relying on messages from families, communities, and media to confirm or challenge the stereotype thinking.¹⁷ As individuals grow, the stereotypes harden.¹⁸ Even though a person may develop “non-biased views of the world,” stereotype thinking tends to become automatic, leading to implicit biases.¹⁹ Once a person reaches adulthood their implicit biases have been absorbed into their unconscious thinking process, and they rely on the stereotypes giving rise to those biases to frame their understanding of the world around them.²⁰

This evolution of implicit bias, specifically gender-based implicit bias, is a central tenet of gender discrimination in the workplace. Gender-based implicit bias flows from uncorrected stereotype thinking about the differences between men and women.²¹ Workplace discrimination, based

explore the issues with greater depth and scope.

13. *Id.* “A stereotype is an association between a concept . . . and a trait.” *Id.*

14. *Id.*

15. *Id.* at 1132. “[E]xplicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out we have them, we may indeed reject them as inappropriate.” *Id.*

16. Justin Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 5 (2010) (citing Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 203–04 (2005)).

17. *See* Page, *supra* note 16.

18. *See* Levinson & Young, *supra* note 16, at 6.

19. *Id.* Levinson and Young use this example related to gender bias: “In the context of gender stereotypes, children are likely to learn at an early age that men are ‘competent, rational, assertive, independent, objective, and self-confident,’ and women are ‘emotional, submissive, dependent, tactful, and gentle.’” *Id.* (quoting Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL’Y & L. 581, 604 (1997)).

20. Levinson & Young, *supra* note 16, at 6; *see also* Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 618 (2007) (discussing the role of stereotypes and perceptions in the workplace).

21. *See generally* Charles Elliot, *Juries, Sex and Emotional Affect*, 35 LAW & PSYCHOL. REV. 37, 38 (2011) (evaluating the impact of sex stereotypes on the legal process).

on implicit bias, has been pursued under a theory of second generation discrimination.²²

To clarify, early gender-based workplace discrimination cases are described here as first generation discrimination cases. First generation discrimination was grounded in the explicit biases of male employers, supervisors, and co-workers against female colleagues.²³ In early gender discrimination cases, male supervisors were alleged to have discriminated against women in overt ways, either through discriminatory policies or through discreet actions designed to intimidate and harass female workers.²⁴ Although the history of legal action for gender-based workplace discrimination began to take shape in the 1970s, the workplace practices long pre-dated the early cases.²⁵ Discriminatory practices existed because there was no professional or social cost to a man who discriminated against a woman in the workplace. If a male worker asserted a female worker was not suited to higher-level or higher paying work because of her sex, there was no pushback from either the male worker's supervisor, his colleagues, or even the female workers. His attitude, which flowed from the generally accepted stereotypes of men and women, was determined valid and did not raise issues of fairness in the minds and practices of employers. This was true in most workplace contexts, even those where physical size, strength, or level of education were not essential to the work assigned.

The workplace was simply a mirror of the greater social context wherein men worked and women acted as either caretakers or employees in traditionally female occupations, such as nursing, teaching, or clerical support.²⁶ Since the attitudes within the workplace followed the overall social norms of the time, no punishment—legal, social, or personal—was levied for constructing a workplace environment that excluded or inhibited female employees. For that matter, the actions and attitudes now determined to be discriminatory were not even seen as such prior to the evolution of gender-based workplace discrimination law.²⁷

22. Sturm, *supra* note 11, at 460; see *infra* pp. 76-85 regarding the theory of second generation discrimination.

23. Sturm, *supra* note 11, at 465-66.

24. *Id.*

25. *Id.* at 466-67.

26. *Id.*

27. *Id.*; see also THOMAS, *supra* note 2, at 3.

B. Pao v. Kleiner

Ellen Pao was not a slacker. She earned an electrical engineering degree from Princeton University, a law degree from Harvard Law School, and an MBA from Harvard Business School. She had worked in “Big Law” before entering business and beginning her business career working in technology firms.²⁸ In 2005, she joined Kleiner, a Silicon Valley venture capital firm that raises funds from wealthy institutional and individual investors and invests those funds in technology companies.²⁹

Kleiner’s structure included junior, senior, and managing partners.³⁰ Pao joined Kleiner as a junior partner with every intention of advancing to the highest levels and was told she would move into a full-time investing position after three years.³¹ She also had the opportunity to work with John Doerr, a managing partner, in which she initially wrote his speeches and articles, and ultimately, served as his chief-of-staff.³² In early 2006, Pao traveled on business with another junior partner, Ajit Nazre.³³ After the trip, Pao complained that Nazre made unwanted sexual advances toward her and became “brusque and distant” when she rebuffed his advances.³⁴ According to Pao, she spent the following year managing Nazre’s advances.³⁵ When she refused him, he became an obstructionist and excluded her from important business interactions.³⁶ She ultimately consented to his advances, then ended their relationship in October 2006.³⁷ Pao contends that after she ended the relationship, Nazre retaliated in the form of further exclusion from access to important business matters.³⁸ Pao complained to Kleiner management and the human resources department, but received no relief.³⁹ According to Pao, members of the firm told her this retaliation was unfair, but that she should probably just accept it and even consider continuing her relationship with

28. Pao Complaint, *supra* note 7, ¶ 5.

29. *Id.* ¶ 7.

30. *Id.* ¶ 6.

31. *Id.* ¶ 7.

32. *Id.*

33. *Id.* ¶ 8.

34. *Id.* ¶¶ 8-9.

35. *Id.* ¶ 8.

36. *Id.* ¶ 9; Trial Brief of Plaintiff Ellen Pao at 2, Pao v. Kleiner Perkins Caufield & Byers, LLC, (Cal. Super. Feb. 17, 2015) (No. CGC-12-520719) [hereinafter Pao Trial Brief].

37. Pao Complaint, *supra* note 7, ¶ 8.

38. *Id.* ¶ 9.

39. *Id.*

Nazre to better her career advancement.⁴⁰ Pao also reported unwanted romantic advances from another Kleiner partner and again received no responses from Kleiner management.⁴¹ Nazre was promoted to senior partner in December 2007 and put in a position of supervision over Pao.⁴² When Pao complained about Nazre's supervision of her, in light of their earlier relationship and in light of his new office location across the hall from Pao, Pao was asked to relocate her office, which she refused on the basis of it being retaliation. She was then offered relocation to the China office, which she also refused.⁴³

Three years after her arrival at Kleiner, Pao was not given a performance review, and thus, could not be evaluated for a next-level partnership position.⁴⁴ By this time, she was labeled as a complainer and was not able to make her case for promotion or rebut her detractors because of management's refusal to review her. She continued to be excluded from business matters, including exclusion from essential activities during an important New York board-level meeting in October 2011.⁴⁵ In December 2011, Pao learned that another female employee had complained about Nazre's sexual harassment.⁴⁶ That complaint led to an internal investigation. Following the internal investigation, Nazre left Kleiner⁴⁷ and Pao filed suit in San Francisco Superior Court for gender discrimination under California law.⁴⁸

Pao's gender discrimination claims were grounded in California's Fair Employment and Housing Act, which allows claims for gender-based discrimination and retaliation, which are substantially similar to Title VII claims.⁴⁹ Under federal law, Pao's claims would be considered disparate impact workplace discrimination claims. She was not alleging *quid pro quo* sexual harassment, but rather that the conditions in her workplace, caused by the overall culture of Kleiner, as well as sexual harassment and gender-based discrimination by Nazre, were hostile to her advancement, and ultimately to her ability to continue to work at Kleiner. Pao alleged

40. *Id.*

41. *Id.* ¶¶ 10, 12.

42. *Id.* ¶ 15.

43. *Id.* ¶ 16.

44. *Id.* ¶ 19.

45. *Id.* ¶ 32.

46. *Id.* ¶ 31.

47. *Id.* ¶ 31, 47; Pao Trial Brief, *supra* note 36, at 4.

48. Pao Complaint, *supra* note 7.

49. The California Fair Employment and Housing Act, WEST'S ANN. CAL. GOV'T CODE §§ 12900–906 (West through 2017 Sess. Ch. 859). Pao's state law claims were substantially the same as Betty Dukes's claim for Title VII gender discrimination—both women alleged they were victims of second generation discrimination.

that Kleiner had an overall culture that favored male employees, demonstrated by the firm's acceptance of Nazre's sexual advances and failure to respond to Pao's complaints about the actions of Nazre and others.⁵⁰ Furthermore, Pao argued that her performance evaluations were heavily focused on Kleiner's partner assessments of her interpersonal skills, commenting she was "territorial," while also criticizing her for acting entitled and complaining too much.⁵¹ Some evaluations urged her to be less aggressive, some urged her to be less passive and not wait for orders from others, and others labeled her entitled and not trustworthy.⁵²

In further support of her second generation discrimination claim, Pao argued Kleiner had a practice of advancing male candidates over female candidates.⁵³ Kleiner had not had a female partner since its inception in the 1970s until 2005, the year of Pao's hire.⁵⁴ In 2009, Pao was among six junior partners eligible for promotion to senior partner status at Kleiner.⁵⁵ In 2011, three male junior partners were promoted to senior partner over four eligible female junior partners, including Pao, despite the fact that the women had more experience and longer tenures than any of the male candidates.⁵⁶ According to Kleiner management, the promotion decisions followed an analysis of the candidate's successful business outcomes for the firm.⁵⁷ However, none of the three promoted male partners had successful business outcomes for Kleiner prior to promotion.⁵⁸ In contrast, Pao had been instrumental in Kleiner's investment in RPX Corporation, leading to a successful initial public offering in 2011.⁵⁹ Kleiner did not promote a woman into a senior partner role until 2012, which was after Pao filed her lawsuit.⁶⁰

At base, the Kleiner workplace had similar attributes to the Wal-Mart workplace: the supervisors were male and the culture fostered the advancement of male candidates by allowing implicit biases against

50. Pao Complaint, *supra* note 7, ¶ 37.

51. Trial Brief of Defendant Kleiner Perkins Caufield & Byers, LLC at 6, Pao v. Kleiner Perkins Caufield & Byers, LLC, (Cal. Super. Feb. 17, 2015) (No. CGC-12-520719) [hereinafter Kleiner Trial Brief]; See Pao Complaint, *supra* note 7, ¶¶ 23, 27, 30.

52. Pao Trial Brief, *supra* note 36, at 4-5 (explaining that Pao's company claimed she was not talkative enough in meetings and that she had issues with her colleagues for "much of her employment"); see Pao Complaint, *supra* note 7, ¶¶ 23, 27, 30.

53. Pao Trial Brief, *supra* note 36, at 4.

54. *Id.*

55. *Id.*

56. *Id.*

57. Pao Complaint, *supra* note 7, ¶ 19.

58. Pao Trial Brief, *supra* note 36, at 4.

59. *Id.*

60. *Id.*

female candidates to play a role in promotion and pay decisions. Kleiner merged two male-dominated professional worlds—finance and tech. The Silicon Valley tech industry has been widely criticized as being male-dominated and, at times, hostile to female intrusion.⁶¹ The tech industry's reluctance to hire and promote female professionals may flow from general antipathy towards women in the STEM fields, which has led to male-dominated contexts in higher education and professional environments.⁶² The Silicon Valley tech culture is heavily populated by men who have not worked with women and lack an understanding of female colleagues without reference to stereotypes.⁶³ Banking and finance has long been male-dominated, with a culture so testosterone-driven as to be examined academically and immortalized in pop culture.⁶⁴ Banking has evolved into a better environment for female employees, but the world of venture capital financing is still male-dominated and focused on big deals and major players.⁶⁵ This blending of professional cultures defined the Kleiner culture, and Pao argued that these factors, among others, interfered with her opportunities for success in the firm.

A San Francisco jury heard Pao's case in 2015 and on March 27, 2015, a jury of six men and six women delivered a verdict in favor of

61. See Vauhini Vara, *The Ellen Pao Trial: What Do We Mean by "Discrimination"?*, THE NEW YORKER (Mar. 14, 2015), <http://www.newyorker.com/business/currency/the-ellen-pao-trial-what-do-we-mean-by-discrimination> [<http://perma.cc/FPC9-4MXD>] ("Deborah Rhode, a law professor at Stanford, told me, 'The sort of evidence you're seeing in the Ellen Pao case is very typical of what's out there in Silicon Valley. There are no smoking guns; much of it is what social scientists call micro-indignities—small incidents that viewed individually may seem trivial, but when viewed cumulatively point to a practice of insensitivity and devaluation that can get in the way of work performance.'").

62. See Ernesto Reuben et al., *How Stereotypes Impair Women's Careers in Science*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF U.S. 4403 (2013); see also Lawrence H. Summers, President, Harvard Univ., Remarks at NBER Conference on Diversifying the Science & Engineering Workplace, p. 5 (Jan. 14, 2005) (transcript available at http://www.harvard.edu/president/speeches/summers_2005/nber.php [<http://perma.cc/NYE7-F37R>]) (explaining that Harvard President Larry Summers suggested that one reason there are relatively few women in top positions in science may be "issues of intrinsic aptitude").

63. Summers, *supra* note 62, at 2, 4, 6, 7; see also Pao's Trial Brief, which notes that from its inception in the 1970s until 2009, every managing partner was male, thus preventing the male Kleiner partners from working with women colleagues on venture capital projects. Pao Trial Brief, *supra* note 36, at 3.

64. See THE WOLF OF WALL STREET (Red Granite Pictures 2013). For an interesting discussion of sexual harassment in the legal workplace, see Pamela J. White & Susan R. Matluck, *Conduct Unbecoming a Lawyer: Expanding Tort Remedies for Sexual Harassment*, 24 Brief 16, 59 (1995); see generally THOMAS, *supra* note 2.

65. Valentina Zarya, *Venture Capital's Gender Gap is Actually Getting Worse*, FORTUNE MAGAZINE (Mar. 13, 2017), <http://fortune.com/2017/03/13/female-founders-venture-capital/> [<http://perma.cc/P2XH-GBUA>].

Kleiner on all of Pao's claims.⁶⁶ On the issue of gender discrimination, the jury voted 10–2 in favor of Kleiner with the vote counts split evenly by gender.⁶⁷ On the question of whether Kleiner had retaliated against Pao for complaining of sexual harassment by not promoting her to partner, the jury again found in favor of Kleiner 10–2.⁶⁸ She was awarded no damages by the jury on any aspect of her claim.⁶⁹

Workplace discrimination lawsuits are notoriously complex and risky at trial. It is very hard to determine how a jury will react to the parties in the case, who are invariably witnesses, and to information about the culture in each workplace. In most Title VII claims, a jury will most likely hold a defendant accountable when a female employee is forced into a sexual relationship with a supervisor or required to work in an area with posted pornography and sexually offensive content. Most juries will be sympathetic to a woman who is denied a job, pay, benefits, or promotion because of her gender, her pregnancy, or her caretaker responsibilities. In the past 50 years, society has evolved to a point where acceptance of this level of indignity is marginalized. However, people continue to use stereotypes as a means to assess the parties in a lawsuit and the relevant facts.⁷⁰ If a juror, male or female, follows the stereotype that successful women are pushy and unpleasant, that juror will be inclined to assess the female plaintiff's performance evaluations as true reflections of a person who is hard to work with, regardless of gender.⁷¹ Likewise, if a juror is inclined to believe that a female subordinate is more likely to have seduced her boss than he is to have harassed her, that juror is inclined to disbelieve a woman's allegation of sexual harassment and retaliation.⁷² These implicit biases against women can form the lens through which the

66. Dan Brekke, *Ellen Pao vs. Kleiner Perkins: Jury Rejects Gender Discrimination Claims*, KQED NEWS (Mar. 27, 2015) <https://ww2.kqed.org/news/2015/03/24/final-arguments-in-ellen-pao-gender-discrimination-trial/> [<http://perma.cc/P37A-5PLK>].

67. *Id.*

68. *Id.*

69. *Id.*; see also Heather Kelly, *Ellen Pao Drops Appeal, Will Pay Kleiner Perkins \$276K*, CNN MONEY (Sept. 10, 2015) <http://money.cnn.com/2015/09/10/technology/ellen-pao-kleiner-perkins-case-ends/index.html> [<http://perma.cc/SJJ2-GNTX>] (explaining that Pao lost on all four counts and received no monetary award; she was later ordered to pay Kleiner \$276,000 in legal costs and fees).

70. See generally Kang et al., *supra* note 12 (noting that explicit biases of jurors pose a different threat to fairness than the threat posed by people with implicit biases who remain on a jury).

71. See *id.*; see generally Shelley Correll & Caroline Simard, *Research: Vague Feedback is Holding Women Back*, HARV. BUS. REV. (2016); see also Hon. Cheryl Ann Krause, *From the Bench: Moving Beyond Gender: Effective Deployment of the Legal Arsenal*, 43 A.B.A. J. LITIG. 66 (2017).

72. Brekke, *supra* note 66.

jury views the facts, thus negating any practical application of second generation discrimination.

C. *Wal-Mart v. Dukes*

Wal-Mart v. Dukes is an employment discrimination lawsuit filed in federal court in 2001, grounded in the law protecting women from gender-based discrimination in the workplace.⁷³ The case alleged, based on the experience of lead plaintiff Betty Dukes and others, that Wal-Mart made promotion decisions that favored male employees and paid women less than their male counterparts in comparable positions.⁷⁴ At base, the plaintiffs alleged that Wal-Mart's corporate policy of allowing individual managers to make discretionary pay and promotion decisions created a corporate culture that discriminated against women, while allowing male employees to succeed and advance.⁷⁵ The *Dukes* plaintiffs did not allege that Wal-Mart had an express corporate policy against the advancement of women, rather the plaintiffs complained that the "local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees."⁷⁶ Plaintiffs further alleged that because Wal-Mart was aware that its policies had the effect of disadvantaging female employees, its refusal to alter the policies allowing manager discretion amounted to disparate impact, making Wal-Mart liable to all employees negatively affected by the discretionary pay and promotion policies.⁷⁷ The lawsuit, styled as a class action lawsuit brought under 28 U.S.C. § 1332(d), sought injunctive and declaratory relief, back pay, and punitive damages.⁷⁸

The lawsuit reached the United States Supreme Court by Wal-Mart's appeal of a district court decision certifying the class, which was affirmed by the court of appeals.⁷⁹ The focus of Wal-Mart's appeal was on the decision to certify the class identified as consisting of "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's

73. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

74. *Id.* at 343-45.

75. *Id.* at 345.

76. *Id.* at 344.

77. *Id.* at 345.

78. *Id.*; see also Class Action Fairness Act, 28 U.S.C. § 1332(d) (2012) (allowing class actions to meet the subject matter jurisdiction requirements for federal court if minimal diversity is met and the aggregated claims of the class members are in excess of \$5,000,000.00); FED. R. CIV. P. 23 (analyzing in *Wal-Mart v. Dukes* whether the lawsuit met the prerequisite of commonality under Rule 23(a)(2)).

79. *Wal-Mart*, 564 U.S. at 347-48.

challenged pay and management track promotions policies and procedures.”⁸⁰ The plaintiff class was estimated at 1.5 million persons and thought to be one of the largest class actions ever, particularly in the context of a Title VII gender discrimination or disparate impact lawsuit.⁸¹ As the Court noted, the size of Wal-Mart’s operations and total number of employees nationwide created the risk of large-scale action if Wal-Mart employed discriminatory practices in evaluating employees for promotion and pay increases.⁸² The scale of the lawsuit, when combined with the disparate impact theory, created an ambitious proposition for litigation. The plaintiffs would have to show not that one, a few, or even a district of Wal-Mart’s female employees were adversely impacted by the discretionary pay and promotion policies, but that all female employees had suffered harm. Given that pay and promotion policies were discretionary, thus unique to every store, region, or district, the alignment of all female employees into one class created insurmountable difficulties under Federal Rule of Civil Procedure 23, particularly the requirement that all members of the class share questions of law and fact in common.⁸³

Although not the primary purpose of this Article, the Rule 23 context of the Court’s decision is important to the case’s role in the overall analysis of implicit bias. The Rule 23(a) requirement of commonality forms one of four prerequisites to class certification, regardless of the remedies sought.⁸⁴ Traditionally, the class’s ability to demonstrate at the certification stage that all the class members shared common questions of fact or law rested largely on the description of the class as provided in the Complaint.⁸⁵ Through early workplace discrimination cases, plaintiffs learned that a certain type of overreaching in the class description could lead to a failure to certify a class under Rule 23.⁸⁶ For example, attempts to certify classes of workers who were not promoted based on a discriminatory reason in the same lawsuit with persons who were not hired based on discriminatory reasons failed the commonality requirement because the class contained two distinct groups of persons who had

80. *Id.* at 346.

81. *Id.* at 342.

82. *Id.* at 345.

83. *Id.* at 359-60; *see also* FED. R. CIV. P. 23.

84. FED. R. CIV. P. 23. The Rule 23(a) prerequisites are: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” *Id.*

85. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982).

86. *Id.* at 156-58.

suffered differing injuries.⁸⁷ In those cases, the common feature was the defendant; the same employer had acted against both current and prospective employees.

In the *Dukes* lawsuit, the class description limited itself to female employees at United States retail stores after December 26, 1998.⁸⁸ The class was further limited to those female employees who had been subjected to the relevant policies.⁸⁹ Estimates on the numerical size of the class were based on Wal-Mart's employee data, but the actual numerical size of the class could only be determined after the class was certified and given notice of the action.⁹⁰ Justice Scalia, writing for the majority, identified early in the opinion that "the crux of this case is commonality."⁹¹ Justice Scalia noted that the mere fact that a group of employees all claim to have been discriminated against by their employer is insufficient to show commonality—the claims must depend on a "common contention."⁹² "What matters to class certification . . . is not the raising of common "questions" . . . but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."⁹³ Based on this broad reading of the commonality requirement, the Court found that establishing commonality "necessarily overlaps" with an analysis of plaintiffs' claims that Wal-Mart engaged in a pattern or practice of discrimination.⁹⁴

The commonality analysis served as the Court's platform to analyze the plaintiff class's Title VII claim based on the theory of second generation discrimination.⁹⁵ Second generation discrimination stands apart from first generation discrimination as it involves subtle actions and patterns of preference that exclude certain groups over time.⁹⁶ First generation discrimination involves easy-to-recognize, blatant

87. *Id.* at 151, 158.

88. *Wal-Mart*, 564 U.S. at 346.

89. *Id.*

90. *Id.*

91. *Id.* at 349.

92. *Id.* at 350 ("[T]he mere claim by employees of the same company that they have suffered a Title VII injury . . . gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.").

93. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

94. *Wal-Mart Stores*, 564 U.S. at 352 ("In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern* or *practice* of discrimination.").

95. Sturm, *supra* note 11, at 460.

96. *Id.* (calling such claims "second generation" discrimination claims because they are "difficult to trace directly to intentional, discrete actions of particular actors").

discrimination, such as has been litigated in Title VII cases since the 1970s.⁹⁷ The Court in *Dukes* recognized that second generation discrimination was a viable theory of recovery under Title VII, and even noted that giving discretion to lower-level supervisors can create liability for the employer under a disparate impact theory of discrimination, as a ““system of subjective decision-making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.””⁹⁸ But the Court imparted that the fact that one manager may use discretion inappropriately does not create a common question of law or fact for the entire employee class.⁹⁹ Justice Scalia, writing for the Court, found that to certify the class the plaintiffs must show a common mode of exercising discretion that affects all employees in the company.¹⁰⁰

In reaching this decision, the Court conducted what was, for all intents and purposes, a merits analysis of plaintiffs’ claim. The court reviewed and rejected three categories of evidence the plaintiffs brought forth to show the company-wide effect of the discretionary pay and promotion policies. First, the plaintiffs had submitted statistical evidence regarding the disparities in pay and promotion for female employees throughout Wal-Mart retail stores.¹⁰¹ The Court found the evidence insufficient to show commonality, noting that even if the data showed disparities across regions or across the nation, it was insufficient to show how the challenged employment practice tied together the claims of approximately 1.5 million employees.¹⁰² In this regard, the Court suggested that the plaintiff class members needed individual proof of injury, a position completely inapposite to class action litigation. The plaintiffs also submitted anecdotal evidence—statements from female employees at various retail stores.¹⁰³ The Court found this evidence insufficient in type and quality, stating that even if every statement was

97. *Id.* at 466.

98. *Wal-Mart*, 564 U.S. at 355 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988)).

99. *Wal-Mart*, 564 U.S. at 355-56.

100. *Id.* at 359 (“Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.”).

101. *Id.* at 356-57.

102. *Id.* at 357 (“Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart’s 3,400 stores, that would still not demonstrate that commonality of issue exists.”).

103. *Id.* at 358.

true, the evidence was not enough to demonstrate company-wide discrimination.¹⁰⁴

The majority's review of the evidence submitted at the certification stage and its analysis of the second generation discrimination claim under Title VII contain several outstanding observations which belie the majority's inability to understand the difficulties women have navigating the mixed-gender workplace. Notably, the Court finds that managers are unlikely to rely on gender-based criteria when using discretion to promote or raise pay for employees.¹⁰⁵ The Court reasoned that the manager would be unlikely to do so when there are corporate policies that forbid sex discrimination.¹⁰⁶ This analysis assumes that the supervising managers are all of impeccable character and will defer at all times to the company's direction. What is more likely, however, is that the store manager will see the company's gender discrimination policies as legal requirements the company must publish and any training on those matters as a part of the job he must endure. He is also more likely to promote people he likes, regardless of gender.¹⁰⁷ If his preferences create greater affinities with other men, then those employees stand a greater chance at promotion.¹⁰⁸ This type of self-replication is not novel—people have been advancing the careers of others like themselves since time immemorial. As Justice Ginsberg noted in her dissent:

104. *Id.* ("Even if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination' which is what respondents must show to certify a companywide class.") (internal citations omitted).

105. *Id.* at 355 ("[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 actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude test or educational achievements.") (internal citations omitted); *see also id.* at 357 ("Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store.").

106. *Id.* at 355.

107. *See generally* Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359 (2012); *see, e.g.*, Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS YELLOW PAPER SERIES (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> [<http://perma.cc/UDV4-MSK6>]. In the study by Dr. Reeves, a memo that included grammatical and analytical mistakes was disseminated to 60 law partners. Half of the partners were informed the memo writer was a black third-year student at NYU and half were told the writer was a white third-year student at NYU. For the exact same memo, the black writer scored an average rating of 3.2 out of 5 and the white writer scored an average rating of 4.1 out of 5. *Id.*

108. Sarine, *supra* note 107, at 1368.

Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.¹⁰⁹

The practice Justice Ginsberg describes has even been elevated to an art under the label “mentoring,”¹¹⁰ where mentors are those in the position to bring along others. But if the mentors are men, and those men tend to self-replicate in their selections for mentees, the collective effect of that subjective process in an organization is gender discrimination. Despite its reference to second generation discrimination as a viable Title VII theory, the *Dukes* majority was blind to the reality of workplace exclusion. The Court’s blindness delivered the fatal blow to Betty Dukes and her co-workers.

III. IMPLICIT GENDER BIAS AND SECOND GENERATION DISCRIMINATION

Ellen Pao and Betty Dukes both worked in environments where implicit bias operated underground, allowing workplace policies to erupt into full-fledged workplace discrimination. The unifying component in both cases is male-dominated leadership at the top. In both cases, the predominantly male leadership was not allowed, through the workplace structure, to interact with women colleagues at the same level. Thus, there was little opportunity for male supervisors to challenge their own implicit understanding of male to female differences in society and, more specifically, in the workplace. If a male supervisor believes women are more emotional and his experiences validate this bias, he will have difficulty overcoming this bias when interacting with women in the workplace. Without malice, the male supervisor may operate on a presumption that men make better managers, as males are less emotional and more operational. If these implicit biases can operate without challenge, either through structural policies or a lack of cross-gender interaction, the result is a homogeneous workplace where female

109. *Wal-Mart*, 564 U.S. at 372-73 (Ginsberg, J., dissenting).

110. See Caela Farren, *Eight Types of Mentors: Which Ones Do You Need?*, MASTERYWORKS, INC. (2006), http://www.masteryworks.com/newsite/downloads/article3_eighttypesofmentors-whichonesdoyouneed.pdf [<http://perma.cc/373U-NSXQ>] (“Mentoring is a learning and development partnership between a professional with in-depth experience and knowledge in a specific area and a protégé seeking learning and coaching in the same area.”); see also BUSINESS DICTIONARY, *Definition of Mentoring*, <http://www.businessdictionary.com/definition/mentoring.html> (last visited July 5, 2017) (“[Mentoring is an] [e]mployee training system under which a senior or more experienced individual (the mentor) is assigned to act as an advisor, counselor, or guide to a junior or trainee. The mentor is responsible for providing support to, and feedback on, the individual in his or her charge.”).

employees cannot ascend. This implicit bias and its consequences are at the core of the existing theory of second generation discrimination, as alleged by Dukes and Pao, and the new theory of Third Generation Discrimination.

A. *First Generation Discrimination*

The first generation of gender-based discrimination cases dealt with workplace policies that appear draconian by 21st century standards. Early cases involved women struggling simply to attain simple job retention and security.¹¹¹ The relative meaning of the word “sex” within the 1964 Civil Rights Act, specifically within Title VII, was tested through a series of early cases.¹¹² Ida Phillips, who was denied even an opportunity to apply for a position on the assembly line at Martin-Marietta Corporation because she had preschool-aged children, was vindicated when the United States Supreme Court ruled that Title VII required that “persons of like qualifications be given employment opportunities irrespective of sex.”¹¹³ Brenda Mieth sued the state of Alabama when she was denied the opportunity to be an Alabama State Trooper because she weighed less than 160 pounds.¹¹⁴ Her lawsuit revealed the 160 pound rule¹¹⁵ as a thin

111. See generally THOMAS, *supra* note 2 (examining court cases focused on women’s attempts to secure rights in the workplace).

112. 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”) (emphasis added).

113. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam).

114. See generally Dothard v. Rawlinson, 433 U.S. 321 (1977); Mieth v. Dothard, 418 F. Supp. 1169, 1171-74 (M.D. Ala. 1976). Plaintiff Mieth’s case was combined and filed as a class action against the same defendant. Plaintiff Rawlinson had been denied a position as a Correctional Counselor in the Alabama Prison System because she did not meet the height and weight requirements for that position. Both women alleged the height and weight requirements violated Title VII. *Id.*

115. Mieth, 418 F. Supp. at 1173 (“[R]equires the following qualification [for an Alabama State Trooper]: (1) Graduation from a standard senior high school or GED certificate; (2) Possession, upon appointment, of a valid Alabama driver’s license; (3) Passage of a physical examination equivalent to that established by the United States Army; (4) Measure at least 5 feet, 9 inches in height without shoes and weigh at least 160 pounds without clothing; (5) Sound teeth and vision correctable to 20/20, free from color blindness; (6) Be between the ages of 21 and 36 years; (7) Must never have been convicted of a felony or a misdemeanor involving either force, violence, moral turpitude or serious traffic violations.”). The qualifications for an Alabama Corrections Counselor were substantially similar, requiring that the applicant fell between the minimum height and weight requirements of 5 feet, 2 inches, 120 pounds and the maximum of 6 feet, 10 inches and 300 pounds. *Id.*

veil over the department's true purpose—not to have any women as Alabama State Troopers—and challenged the argument that physical strength was a bona fide occupational qualification (BFOQ)¹¹⁶ of law enforcement.¹¹⁷ The Court found there was room for an exception to job requirements which have a “disparate impact” on women, and that the BFOQ in question must be correlated to the job and effective at determining the necessary job requirement.¹¹⁸

Another important round of first generation cases involved women suing employers under Title VII for sexual misconduct in the workplace. These cases expanded the legal heft of Title VII and outed a workplace indignity women had endured for years. In the most noteworthy case, Michelle Vinson suffered through years of relentless harassment by her supervisor at Meritor Savings Bank before finally seeking legal advice and filing suit under Title VII.¹¹⁹ Her case, one of the first to bring suit on this theory, came to trial before a judge who disregarded Vinson's testimony, questioning the very existence of a sexual relationship because Vinson failed to complain about her boss to upper management, ultimately, ruling in favor of the defendant.¹²⁰ Only through appeals did Vinson receive relief when the United States Supreme Court held that “when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor ‘discriminate[s]’ on the basis of sex” under Title VII, thus adding the hostile work environment theory of sexual

116. See 42 U.S.C. 2000e-2(e) (2012). The statute explains it is not unlawful to base employment decisions on the employee's religion, sex, or national origin “in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .” *Id.*

117. See *Dothard*, 433 U.S. at 334. *Dothard* held that the defendants failed to rebut the plaintiff's prima facie case of discrimination by showing that strength was an essential characteristic of the job or that the height and weight restrictions were adequate to gauge strength. However, the Court found that the physical requirements could constitute a BFOQ per §703(e) of Title VII upon a showing that the female prison guards could create a security threat in Alabama's maximum security prisons, which are “characterized by rampant violence and a jungle atmosphere.” *Id.*

118. *Id.* at 345 (Marshall, J., dissenting). Justice Marshall dissented from the application of the BFOQ exception applied here, noting that “the real disqualifying factor in the Court's view is ‘(t)he employee's very womanhood.’” Justice Marshall further stated that “the danger in this emotionally laden context is that common sense will be used to mask the ‘romantic paternalism’ and persisting discriminatory attitudes . . .” *Id.*

119. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

120. See *Vinson v. Taylor*, No. 78-1793, 1980 WL 100 (D.D.C. 1980), *rev'd* 753 F.2d 141 (D.C. Cir. 1985) At a bench trial before Judge John Barret Penn, Vinson was not allowed to offer evidence of other incidents of sexual harassment involving the same supervisor, Taylor, and other female employees or evidence of Vinson's medical treatment after being sexually assaulted by Taylor. Judge Penn limited Vinson's evidence to her testimony and treated the case as a “he said/she said” case, completely disregarding Vinson's core allegation of workplace discrimination. *Id.*

harassment as another basis for gender-based workplace discrimination lawsuits under Title VII.¹²¹

As this first generation of workplace discrimination litigation moved into the 1980s, employers began to adjust by creating policies that avoided discrimination against women generally, including pregnant women and women with children.¹²² Social norms adjusted as well, marked by protests and other political statements offered in response to Title VII litigation and the Court's apparent support for gender-based workplace discrimination cases under Title VII.¹²³ Despite this growth and change, other more subtle types of discrimination led to court challenges. *Pricewater House v. Hopkins* is notable.¹²⁴ Hopkins was denied a partnership in a prestigious accounting firm and sued her employer under Title VII.¹²⁵ The case brought forth evidence of Hopkins's employee evaluations, revealing how private conversations among men about women can contain the same discriminatory imperative as overt statements and actions.¹²⁶ Hopkins's partnership evaluations contradicted the firm's positive partnership nominating statement by criticizing her "unduly harsh" manner and suggesting she be more feminine in her manner.¹²⁷ Her partnership application was put on "hold" and Hopkins was counseled by her mentor to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have your hair styled, and wear jewelry."¹²⁸ Hopkins was in a "double-bind" situation—if a

121. *Meritor*, 477 U.S. at 64 (explaining that the Supreme Court accepted the EEOC Guidelines regarding hostile environment sexual harassment as violating Title VII, comparing sexual harassment to various actionable forms of racial harassment).

122. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (upholding California law protecting a women's job while she is out on maternity leave as consistent with Title VII).

123. See generally THOMAS, *supra* note 2 (examining the ways in which social norms changed as a result of societal pressure and litigation).

124. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

125. *Id.* at 228.

126. *Id.* at 234-35; see also Benjamin Artz et al., *Do Women Ask*, 1127 WARWICK ECON. RES. PAPER SERIES, July 2016 (concluding that women do ask for salary increases but receive less, which challenges the general hypothesis that women do not ask because they are worried about workplace relationships); see also Correll & Simard, *supra* note 71.

127. *Price Waterhouse*, 490 U.S. at 233-35 ("Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her 'interpersonal skills.' Both '[s]upporters and opponents of her candidacy . . . indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.'").

128. *Id.* at 235 ("But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'").

woman is seen as feminine she will be viewed as less competent, but if she is seen as masculine she will be less likeable.¹²⁹ Hopkins argued this “double-bind” was based on stereotypes and amounted to gender discrimination.¹³⁰ The Supreme Court agreed, finding that the partners had engaged in sex stereotyping, which led to her partnership denial and amounted to a Title VII violation.¹³¹ Hopkins’s case, which bears an eerie factual similarity to Ellen Pao’s case, is considered one of the first examples of second generation discrimination.¹³²

B. Second Generation Discrimination

Second generation discrimination, also known as structural discrimination, is a theory developed by Columbia Professor Susan Sturm as a means to pursue relief for workplace discrimination under Title VII.¹³³ In her groundbreaking 2001 article, Sturm explored the role of implicit bias in workplace policies and established a legal theory that argued implicit bias among supervisors or managers; stating that those persons holding higher positions in the workplace hierarchy lead to policies which favor the majority demographics, typically white and male.¹³⁴

The theory argues that gender-based discrimination flows from “ongoing patterns of interaction shaped by organizational culture.”¹³⁵ The interactions, particularly those interactions between male employees, influence access, workplace conditions, and the opportunities for

129. See Brief for Am. Psychol. Ass’n as Amici Curiae Supporting Respondent, at 37, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167) [hereinafter Brief for Amicus Curiae]. The theory of implicit bias-based workplace discrimination was developed in this brief and through other testimony in *Price Waterhouse*.

130. *Id.*

131. *Price Waterhouse*, 490 U.S. at 258. The Court noted further that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” In evaluating the testimony regarding sex stereotyping offered by Plaintiff’s expert Dr. Susan Fiske, the Court noted that “[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’ Nor, turning to Thomas Beyer’s memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.” *Id.* at 256.

132. See Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 928-29 (2016); see also Sturm, *supra* note 11, at 468.

133. See generally Sturm, *supra* note 11.

134. *Id.*

135. *Id.* at 470.

advancement over time.¹³⁶ If the group that controls access, conditions, and opportunities is all male, that group will begin to define “fit” and “success” in terms of those who fit and are successful in the workplace environment.¹³⁷ The result is that traits deemed as masculine will take on a positive cast in the workplace, whereas traits deemed as more feminine will be unusual, misunderstood, and devalued in a male-dominated workplace environment.¹³⁸ Ultimately, the male-dominated culture can lead to overt statements of bias, but second generation theory cases do not typically involve bad actors who harass and discriminate in the manner more easily prosecuted under Title VII.¹³⁹ Rather, the bias-based culture works to affirm sexual stereotypes, thus confirming the biases of male workers—whether conscious or unconscious—and leading to a discriminatory workplace environment for women who attempt to join or advance.¹⁴⁰ Sturm notes the discriminatory effect of “sex segregation and marginalization” in a workplace environment where stereotype-based biases impact overall workplace culture.¹⁴¹ Comments or behavior, which may not lead to gender exclusion in an integrated environment, can be discriminatory when occurring in a workplace environment that is male-dominated and not diverse.¹⁴²

Sturm uses the following law firm example to define the key features of second generation discrimination:

Consider a large law firm in which complaints have surfaced about a series of issues involving gender. Almost half of the firm’s associates are women, but the representation of women drops off precipitously at the senior associate/junior partner level. The firm’s senior management

136. *Id.* at 471.

137. *Id.* at 470-74; *see also* Artz et al., *supra* note 126.

138. *See* Levinson & Young, *supra* note 16, at 11-14 (examining gender stereotypes in the legal profession) (citing Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J., 401, 439 (2003)).

139. Sturm, *supra* note 11, at 471; *see also* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); *see generally* Harris v. Forklift Sys., 510 U.S. 17 (1993). Teresa Harris sued her employer for sexual harassment after being forced to quit her job to avoid her supervisor’s sexual advances. She appealed her case to the United States Supreme Court. The Supreme Court found that a hostile environment cannot be proven by one single factor and struck down a requirement that the plaintiff alleging a hostile environment show psychological harm. *Id.*

140. Sturm, *supra* note 11, at 471-75.

141. *Id.* at 471 (“The overall organizational culture affects the extent to which particular acts produce bias in a given workplace. Comments or behavior occurring in conjunction with sex segregation and marginalization may be discriminatory, while the same statements may produce little gender exclusion in a more integrated context.”).

142. *Id.*

is almost entirely male. Several firm departments, such as tax and mergers and acquisitions, have particularly low numbers of women. Lawyers at this firm “work around the clock” and frequently collaborate on large and complex cases. For many lawyers, the law firm functions as both their professional and social community. Decision[-]making about personnel issues is largely subjective and discretionary, with little systemic assessment of its efficacy or fairness. Advancement depends upon informal decisions about assignment of cases, access to training, and exposure to significant clients. Mentoring of new lawyers, which is also crucial to professional success, blurs the line between personal and professional interaction.

A group of women has questioned recent decisions denying women promotion to partnership, the firm’s general failure to retain and promote women despite comparable entry credentials, and a series of individual incidents that triggered complaints of sexual harassment and gender bias. In part because the firm aggressively recruits women at the entry level and fails to track patterns in work assignment and promotion, the firm’s management has been largely unaware of any problem until these complaints arose. The complaints involved a range of issues: differences in patterns of work assignment and training opportunities among men and women; tolerance of a sexualized work environment by partners who are otherwise significant ‘rainmakers;’ routine comments by male lawyers, particularly in the predominantly male departments, on the appearance, sexuality, and competence of women; harsh assessments of women’s capacities and work styles based on gender stereotypes; avoidance of work-related contact with women by members of particular departments; and hyper-scrutiny of women’s performance by some, and the invisibility of women’s contributions to others. These complaints coincide with a concern about low morale and productivity among diverse work teams. Upon examination, the firm discovers dramatic differences in the retention and promotion rates of men and women in the firm.¹⁴³

In Sturm’s law firm example, the firm has developed recruitment practices that encourage hiring female associates, but it has failed to create a culture that allows female associates to achieve and advance. The failure of the firm to assess its internal culture relative to its diversity goal leads to the type of homogeneous environment characteristic of workplaces where female employees experience second generation discrimination.

Second generation gender discrimination addresses a complex problem as the discriminatory behaviors are based in attitudes, which a

143. *Id.* at 469-71.

person may not understand he possesses.¹⁴⁴ In a law firm environment like the example, it is unlikely the senior management partners and the lawyers in the male-dominated practice areas view themselves as persons who are biased against women.¹⁴⁵ If asked about gender bias, they are most likely to state they support equal access for male and female lawyers, they would welcome more qualified women into the firm's upper levels, and they have worked with many talented female lawyers.¹⁴⁶ And although some men may offer these remarks as cover for gender-based attitudes about the roles of men and women in the workplace and the home, most do not have a conscious understanding of bias in their workplaces or elsewhere. The role of implicit bias, the unconscious bias based on stereotypes that manifests in attitudes and behavior, is most impactful in sex-segregated environments, where exclusionary behavior goes unchallenged.¹⁴⁷

Sturm recognizes three possible constructs within the theory of second generation discrimination.¹⁴⁸ First, the workplace utilizes a facially-neutral policy, in which the bias-based discrimination violates a "norm of functional, as opposed to formal, equality of treatment" by applying a facially-neutral practice or policy to a group of similarly situated employees.¹⁴⁹ In this construct, the focus is on a group of employees that is predominantly female, such that female employees are disproportionately impacted by the practice or policy.¹⁵⁰ The second construct contemplates the effect of formal policies on the dominant group, evaluating whether a workplace policy violates a norm of equal access.¹⁵¹ The third construct contemplates stereotype and bias, analyzing

144. Kang et al., *supra* note 12, at 1126.

145. See generally Levinson & Young, *supra* note 16; see also Stella Tsai & Debra Rosen, *Litigation Woman Advocate, Know Thyself: Affinity Bias in the Legal Profession*, ABA (Mar. 9, 2015), <https://apps.americanbar.org/litigation/committees/womanadvocate/articles/winter2015-0315-know-thyself-affinity-bias-legal-profession.html> [http://perma.cc/X4NC-LS7C] (noting that thinking about bias can make bias worse if the senior lawyers do not see themselves as biased and do not understand the need to explore bias issues in their business settings).

146. See Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) (discussing the role of "schema" in developing implicit biases and errors in judgment caused by the use of schema); see also Correll & Simard, *supra* note 71 (noting that men may employ a "protective hesitation" when giving feedback to women, barring women from critical feedback needed to advance their careers).

147. See Sturm, *supra* note 11, at 471.

148. *Id.* at 473-74.

149. *Id.* ("One such theory would apply to decisions or conditions that violate a norm of functional, as opposed to formal, equality of treatment.")

150. *Id.* ("This theory defines discrimination to include differences in treatment based on group membership, whether consciously motivated or not, that produce unequal outcomes.")

151. *Id.* ("Second generation bias could also violate a norm of equal access, which defines discrimination to include employment decisions that are formally fair but functionally biased in favor

the effect of using sex stereotyping to exclude.¹⁵² These three constructs create a self-perpetuating cycle of discriminatory policies and actions, labeled here as the Second Generation Discrimination Continuum (see Figure 1.1).

The *Dukes* case was premised on the theory of second generation discrimination, challenging Wal-Mart's policies and practices as defined by the unchallenged implicit biases of male supervisors who had the discretion to promote from within.¹⁵³ The outcome and reasoning in *Dukes* highlights the complexity of second generation discrimination theory as each of the theory's three constructs were at issue. First, the discretionary promotion policies at Wal-Mart invoked the first construct, labeled as Phase I on the Continuum, in that the formal policies of promotion focused on group membership. The discretionary promotion policy allowed a manager to promote from a group of retail employees.¹⁵⁴ The policy was not directed at women, but at a group of employees.¹⁵⁵ At Wal-Mart that group of employees was predominantly female.¹⁵⁶ The discretionary promotion policy regulated the availability of promotion for this group, and the *Dukes* plaintiffs argued these facially-neutral policies hindered female employees' access to management positions.¹⁵⁷ The use of a discretionary promotion policy allowing the managers to evaluate the entire group negated any apparent discriminatory effect of the promotion policies, as the policies applied to the full group of eligible retail

of the dominant group by using criteria that advantage one group over another for arbitrary reasons, meaning reasons that do not advance the articulated goals of the employment decision.”).

152. *Id.* at 474 (“A third possibility is that these subtle, exclusionary practices violate an antistatutory principle, which itself is a plural normative category that could include stereotyping, gender policing, undermining women’s competence, or maintaining gender or racial hierarchy.”).

153. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 344 (2011); *see also* Roger W. Reinsch & Sonia Goltz, *You Can’t Get There from Here: Implications of the Wal-Mart v. Dukes Decision for Addressing Second Generation Discrimination*, 9 NW. J. L. & SOC. POL’Y 264, 280 (2014) (“*Dukes* fundamentally changed how courts address second-generation discrimination . . .”).

154. *See Wal-Mart*, 564 U.S. at 343 (“Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as ‘support managers,’ which is the first step on the path to management.”).

155. *Id.* (explaining that all hourly retail employees were theoretically eligible for promotion to an entry level management position as a “support manager,” thus the group effected by the facially neutral promotion policy consisted of all non-management Wal-Mart employees).

156. *Id.* at 370 (Ginsberg, J., dissenting) (explaining that female employees constituted 70% of the hourly jobs in the retail stores and only 33% of the management positions at the time of the lawsuit).

157. *Id.* at 344 (“These plaintiffs, respondents here, do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers’ discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees . . .”).

employees, and thus were not targeted at the female employees.¹⁵⁸ However, when allowed to operate in a sex-segregated environment, where biases existed and were unchallenged, the effect of this formal policy was to functionally marginalize the female employees.¹⁵⁹

The second construct in second generation discrimination, labeled Phase II on the Continuum, evaluates whether a workplace policy violates a norm of equal access, considering employment decisions that are formally fair, but functionally biased in favor of the dominant group¹⁶⁰ (see Figure 1.1). In *Dukes*, the discretionary promotion policy was formally fair—it allowed promotion for any eligible employee.¹⁶¹ It was the male-dominated management that allowed this formally fair policy to become functionally biased as managers promoted persons like themselves.¹⁶² Also, Wal-Mart's promotion policy included criteria like the ability to relocate, a qualification more accessible to men in traditional families where the male head of household can move and the family will follow.¹⁶³ By allowing these policies to operate unchecked by corporate supervisors, the policies favored the dominant group—the male employees.

Wal-Mart's policies and practices also implicated the third construct of second generation discrimination, labeled as Phase III on the Continuum, which addresses the effect of using sex stereotyping to exclude.¹⁶⁴ If male managers witnessed the exclusion of women as less suited to management, through the relocation policy or otherwise, those male managers were then validated in their beliefs that men were better candidates for promotion. The corporate culture evolved from there into a culture with male-dominated management—a single-sex environment that offered no check on bias.¹⁶⁵

158. *Id.*

159. *See id.* at 371 (Ginsberg, J., dissenting).

160. *See Sturm, supra* note 11, at 473.

161. *Wal-Mart*, 564 U.S. at 343 (“Admission to Wal-Mart’s management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year’s tenure in the applicant’s current position, and a willingness to relocate.”).

162. *Id.* at 372-73 (Ginsberg, J., dissenting); *see also* Reinsch & Goltz, *supra* note 153, at 264, 279.

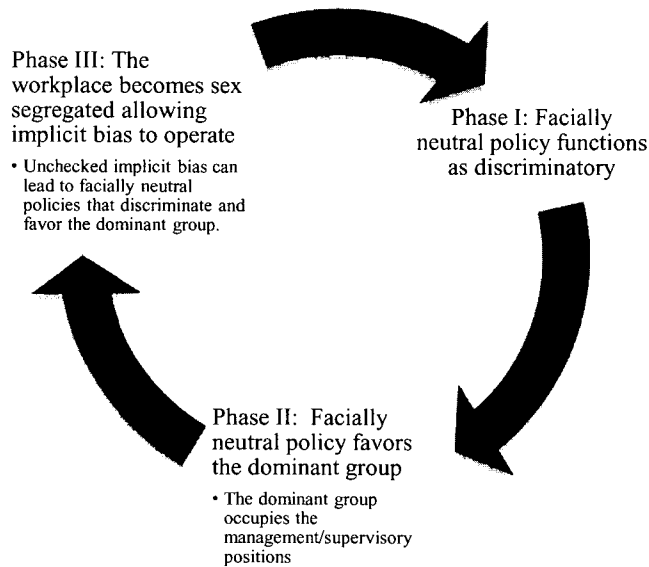
163. *See generally* Williams, *supra* note 138; *Wal-Mart*, 564 U.S. at 370 (Ginsberg, J., dissenting). Justice Ginsberg’s dissent noted the complexity of a relocation requirement for working women who may not be the sole income in the family or may require family support to maintain a job. *Id.*

164. *See Sturm, supra* note 11, at 465.

165. *See id.* at 473.

The third construct doubles back to the first, and a continuum of unchecked bias develops: facially-neutral formal policies develop, the formal policies are applied disproportionately based on the gender demographics of the subject group of employees, the female employees have restricted access under the formal policies, the male employees access management as a favored dominant group, and the male-dominated manager group is allowed to employ discretion based on sex stereotypes unchecked by a formal corporate practice. This interplay between the three constructs creates a continuum wherein the result is a continuous culture of bias and discrimination (see Figure 1.1).

Figure 1.1: The Second Generation Discrimination Continuum¹⁶⁶



166. See generally Sturm, *supra* note 11. The Second Generation Discrimination Continuum diagramed here is intended to visually represent Sturm's description of the various theories, herein called constructs that are components of the general theory of second generation discrimination. In considering Sturm's description, it became apparent how these components work together in a workplace to create a culture where the dominant group is able to discriminate, perhaps without conscious knowledge of the discrimination, further marginalizing the subordinate group(s).

Ellen Pao argued the effect of the Continuum in her case against Kleiner.¹⁶⁷ First she argued Phase I, that facially-neutral policies on promotion to partner were operating to functionally prohibit women from advancement.¹⁶⁸ As opposed to Wal-Mart in the *Dukes* case, where the retail employee group eligible for promotion was predominantly female, Pao's group of Kleiner executives eligible for partnership was predominantly male.¹⁶⁹ Even so, the facially-neutral policies functioned in a discriminatory manner when applied to the female candidates.¹⁷⁰ Kleiner relied on supervisor recommendations in evaluating executives for partnership.¹⁷¹

In fact, the facts in Pao's case are frightfully similar to the facts in *Price Waterhouse*.¹⁷² Pao, like Hopkins, was groomed for partnership, being given responsibilities commensurate with partnership, and encouraged that she was moving forward in the company.¹⁷³ Also like Hopkins, Pao struggled with the masculine/feminine balance in her workplace.¹⁷⁴ Both women received simultaneous criticism for being abrupt, yet weak.¹⁷⁵ Both women were considered interpersonally difficult, with reviews that reported masculine behavior, such as cursing and shouting, and being "difficult" to work with in various ways.¹⁷⁶ Both women struggled with the "double-bind" associated with being a woman in a man's career.¹⁷⁷ The facially-neutral rules regarding partnership at Kleiner and Price Waterhouse were not discriminatory; however, the over-reliance on partner evaluations, specifically the interpersonal

167. Pao Complaint, *supra* note 7, ¶ 37.

168. *Id.* ¶¶ 24, 25, 34-36.

169. Pao Trial Brief, *supra* note 36, at 4.

170. Pao Complaint, *supra* note 7, ¶¶ 23, 27, 30; Kleiner Trial Brief, *supra* note 51, at 6.

171. Kleiner Trial Brief, *supra* note 51, at 6.

172. Pao Trial Brief, *supra* note 36, at 4; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989).

173. *Price Waterhouse*, 490 U.S. at 233.

174. Pao Complaint, *supra* note 7, ¶¶ 34, 37, 40; Pao Trial Brief, *supra* note 36, at 4.

175. *See generally* Pao Trial Brief, *supra* note 36; *see also* Price Waterhouse, 490 U.S. at 235; Correll & Simard, *supra* note 71 ("Stereotypes about women's capabilities mean that reviewers are less likely to connect women's contributions to business outcomes or to acknowledge their technical expertise.").

176. Kleiner Trial Brief, *supra* note 51, at 6 (asserting that Pao was labeled "territorial" while also criticized as "reluctant to speak out."); *see also* Correll & Simard, *supra* note 71. An analysis of 200 performance reviews in a large tech company showed women tended to receive vague feedback, whereas men were more likely to receive developmental feedback targeted to business outcomes. The study also showed negative feedback to women tended to focus more on communication and interpersonal skills. *Id.*

177. *See generally* Correll & Simard, *supra* note 71; *see also* Price Waterhouse, 490 U.S. at 235.

reviews of the candidates, turned neutral policies into policies that functioned in a discriminatory manner, limiting the ability of women to advance to partnership.¹⁷⁸

The discriminatory effect of Phase I moves the Continuum forward to Phase II wherein the male employee is part of a favored dominant group for management positions. The facially-neutral partnership evaluation policies at Kleiner and Price Waterhouse worked effectively for the male candidates attempting to advance into a partner group composed of other men. Although the same weight may have been given to evaluations for both men and women, men's evaluations generally contained less negative assessments regarding interpersonal behavior.¹⁷⁹ If the male candidate was harsh or abrupt, his behavior may have been overlooked as it was expected of men in the firm's culture, or it may have been praised as signs of intelligence, seriousness, or competence.¹⁸⁰ Thus, evaluations have different weight in a sex-segregated environment where male culture dominates.¹⁸¹ As a result, the policies act to favor the dominant group and, therefore, more men are made partner.¹⁸²

The Continuum then moves into the Third Phase—the male-dominated partner group is allowed to evaluate others based on sex stereotypes unchecked by a formal corporate practice.¹⁸³ At Kleiner and Price Waterhouse, the majority of partners were men.¹⁸⁴ To the extent those men held implicit biases against women, those biases were allowed to operate unchecked either by corporate policy or by cross-gender integration. There were no women in the upper hierarchy to police the application of facially-neutral partnership evaluation policies.¹⁸⁵ Also, the

178. *Price Waterhouse*, 490 U.S. at 250-51; Pao Trial Brief, *supra* note 36, at 4.

179. See generally Correll & Simard, *supra* note 71; see also Levinson & Young, *supra* note 16, at 11-13 (“[W]omen are hindered from career advancement by stereotypes that peg them as home and family-focused, as well as those that construe their personalities as weak and gossip-driven . . .”).

180. Correll & Simard, *supra* note 71, at 3.

181. *Id.*

182. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 462 (D.C. Cir. 1987) (explaining that at the time of Hopkin's candidacy for partner at Price Waterhouse, seven out of the firm's 662 partners were women); Pao Complaint, *supra* note 7, ¶ 34; Pao Trial Brief, *supra* note 36, at 4; see also Levinson & Young, *supra* note 16, at 4 (reporting on a 2009 NAWL study finding that in the nation's 200 largest law firms, only 6% have female managing partners, 15% have women on the management committee, and fewer than 16% of equity partners are women) (citing National Association of Women Lawyers & The NAWL Foundation, Report of the Fourth Annual National Survey on Retention and Promotion of Women in Law Firms (2009)).

183. See Sturm, *supra* note 11, at 494.

184. *Hopkins*, 825 F.2d at 462; Pao Complaint, *supra* note 7, ¶ 34; Pao Trial Brief, *supra* note 36, at 4.

185. Pao Trial Brief, *supra* note 36, at 4.

male partners had few women colleagues to interact with, thus greatly reducing the possibility that implicit biases against women would be displaced by interaction with same-level colleagues.¹⁸⁶ Without a check on the firms' policies, the male partners have no incentive to change or improve policies, thus allowing sex stereotyping and implicit bias to continue to operate in the firms' institutional culture. In both *Pao* and *Price Waterhouse*, unchecked sex stereotyping is evident in the partnership evaluations.¹⁸⁷

Undoubtedly, litigation, which revealed the language in partner evaluations as evidence of the Title VII claims, led to changed practices. Imagine that Kleiner changed its evaluation policies after *Pao*'s suit to remove narrative comments from the relevant form, allowing partners to provide only a numbered score on evaluations. If so, the new evaluations would have to be approved by male management. If the male management possesses implicit biases against women in the tech and banking industries, it is unlikely the new evaluation forms will take the second generation effect into consideration. At that point, the discriminatory pattern returns to the top of the Continuum with a facially-neutral policy functioning as discriminatory when applied to female candidates.

IV. CONSIDERING THE ROLE OF THE COURT SYSTEM—THIRD GENERATION DISCRIMINATION

Second generation discrimination theory has yielded mixed success in Title VII litigation. The cases examined here, with the exception of *Price Waterhouse*, are examples of the theory's failure to garner recovery for the plaintiff. It is reasonable to assume that at least some portion of the claims' failures were due to factors unique to each case; however, both *Pao* and *Dukes* involved attempts to explain the complex continuum of implicit bias to juries and judges. This section analyzes the role of gender bias in the court system and theorizes that gender discrimination cases based on implicit bias may not be successful if presented to a fact-finder or reviewing court that employs its own implicit bias to the challenged employer actions, resulting in a Third Generation of gender discrimination.

186. See generally *id.*; see also Sturm, *supra* note 11.

187. See generally *Pao* Complaint, *supra* note 7.

A. *Implicit Bias and the Jury*

The Supreme Court has endeavored to curb the conscious biases that effect jury selection.¹⁸⁸ Challenges to conscious bias in jury selection begin with the Sixth Amendment to the Constitution, which provides the right for criminal defendants to have an impartial jury.¹⁸⁹ Jury selection, the process of seating the impartial jury, is effectuated through *voir dire* examination, leading to a series of challenges, either “cause challenges” or “peremptory challenges.”¹⁹⁰ Cause challenges in jury selection are monitored by the presiding judge, and thus carry less risk of shielding racial and gender bias because the reason for the cause challenge must be openly argued.¹⁹¹ However, peremptory challenges often involve a lawyer’s “gut feeling,” allowing the lawyer to eliminate jurors based on an assessment of which jurors benefit the client’s position, without argument or explanation.¹⁹² Peremptory challenges went unrestricted for nearly 200 years.¹⁹³ In 1986, in *Batson v. Kentucky*, the Court declared that a prosecutor’s use of peremptory challenges to exclude jurors solely on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁴ Five years later, the Court held that *Batson* applied in civil cases and permitted parties to make *Batson*-type arguments to preclude racially based preemptory challenges in civil trials.¹⁹⁵ In 1994, in *J.E.B. v. Alabama*, the Court extended the holding in *Batson* to include intentional discrimination on the basis of gender, stating that the use of peremptory challenges to eliminate a particular gender from the jury also violates the Equal Protection Clause, and is thus prohibited in criminal and civil trials.¹⁹⁶

Batson and *J.E.B.* permit challenges to jury selection based on the use of *voir dire* to achieve race or gender homogeneity.¹⁹⁷ However,

188. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (disallowing the use of peremptory challenges to control the gender balance on a jury); see generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (disallowing the use of peremptory challenges to control the racial make-up of a criminal jury).

189. U.S. CONST. amend. VI.

190. FED. R. CIV. P. 47 (allowing for juror *voir dire* and cause and peremptory challenges).

191. *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981) (citing *Connors v. United States*, 158 U.S. 408 (1895)).

192. Michael I. Norton & Samuel R. Sommers, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467, 468 (2007).

193. *Id.* at 469.

194. 476 U.S. 79, 86 (1986).

195. *Edmonson v. Leesville Concrete*, 500 U.S. 614, 631 (1991).

196. 511 U.S. 127, 143 (1994).

197. See Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN’S L.J. 35 (1992) (providing an overview of the historical antecedents to modern jury selection cases).

courts and litigants have struggled to effectively implement strategies that determine the role of jurors' implicit biases in decision-making.¹⁹⁸ As noted in Part II above, implicit biases often operate without acknowledgement by the holder.¹⁹⁹ A person may not be aware of her own biases or the role stereotyping has played and does play in her decision-making.²⁰⁰ If the holder is unaware of the bias, the *voir dire* process is unlikely to reveal biases that can affect the outcome of a trial, as a juror can honestly answer a *voir dire* question without revealing an outcome-determinative bias.²⁰¹ Research has been done on the role gender plays in courtroom dynamics, finding that juries react differently to female attorneys and female litigants.²⁰² The research supports the view that implicit bias effects the juror's assessment of the case depending on what is at issue, who is arguing the case, and who is seeking relief.²⁰³ How can claims for second generation discrimination prevail if implicit bias against women is at play in the courtroom, especially in a workplace discrimination case, like Ellen Pao's, where a female plaintiff who was represented by a female attorney²⁰⁴ was seeking relief from a male-dominated employer through a jury equally divided between men and women?

198. *Id.* at 56.

199. *See supra* notes 107-10 and accompanying text.

200. *See supra* notes 107-10 and accompanying text.

201. Forman, *supra* note 197, at 72 ("[B]ecause of their desire to please the person in the most authoritative position, jurors questioned by judges during voir dire may not respond honestly. Rather, cued by the form of the questions or the judge's demeanor, the jurors may provide the answer they believe the judge wants to hear.").

202. Shari V.N. Hodgson & Burt Pryor, *Sex Discrimination in the Courtroom: Attorney's Gender and Credibility*, 71 WOMEN LAW. J. 7 (1985). Research completed by Hodgson and Pryor studied the relationship between attorney's gender and perceived credibility and showed that it was the women participants who rated female attorneys significantly lower on six of the twelve credibility scales. In the Hodgson and Pryor study, research participants read a summary of a mock court case involving charges of breaking and entering. The participants then listened to an audiotape of a closing argument. The closing arguments were the exact same textually but half of the participants heard a female attorney give the argument and the other half heard a male attorney give the argument. The results of the study showed that women rated the female attorney significantly less intelligent, less friendly, less pleasant, less capable, less expert, and less experienced than the male attorney, while male participants did not show any preference in attorney gender. Even though male participants did not show a significant preference in attorney gender, the client represented by the female attorney received more guilty verdicts. Also, when the participants were asked if they would hire the attorney they heard, it was the male attorney who participants stated was more likely to be hired. This study suggests that women attorneys face the hardest battles with other females, both clients and jurors. *Id.*

203. *See id.* at 7; *see generally* Monica Biernat & Kathleen Fuegen, *Shifting Standards and the Evaluation of Competence: Complexity in Gender-Based Judgment and Decision Making*, 57 J. OF SOC. ISSUES 707 (2001).

204. Brekke, *supra* note 66.

The *Pao* jury was composed of equal numbers of male and female jurors.²⁰⁵ However, it is naïve and somewhat offensive to assume that female jurors are less biased against female litigants and attorneys. In fact, research supports the opposite conclusion. When the relationship between the attorney's gender and perceived credibility was studied, female participants rated female attorneys significantly lower on six of twelve credibility scales.²⁰⁶ Women "rated the female attorney significantly less intelligent, less friendly, less pleasant, less capable, less expert, less experienced, and less trained" than the male attorney.²⁰⁷ Another study showed that women hold other women to higher standards than men when evaluating competence.²⁰⁸ In considering why jurors show preferences for male attorneys, another study indicated that certain personal characteristics and traits are typically associated with the perception of attorney competence, and those traits are typically deemed masculine, not feminine, traits.²⁰⁹ Aggressive attorneys were typically more successful than passive attorneys, and aggression as a trait is associated positively in men and negatively in women.²¹⁰ In contrast, emotion is a trait associated positively in women and negatively in men.²¹¹ In the courtroom, a female attorney who is aggressive elicits negative responses, whereas an aggressive male attorney is viewed as effective, zealous, and skilled.²¹²

205. *Id.*

206. *See* Hodgson & Pryor, *supra* note 202, at 7.

207. *Id.*

208. *See* Biernat & Fiegen, *supra* note 203, at 711-14. These two studies evaluated predictions in hiring decisions. The first study included 175 introductory psychological students as participants. Participants were asked to play the role of a hiring professional. Each participant was given a folder that included a job description, resume, and evaluation form. The job description remained the same where the job title was either executive secretary or an executive chief of staff position. All participants reviewed the same resume with half of the resumes having the name Kenneth and the other half having the name Katherine. The participants would decide if they would hire the applicant they were reviewing. The data suggested only female participants showed evidence of predicted patterns and were harsher on female applicants. In study two, 64 participants were presented with 16 applications to consider for a position of mechanical engineer. The applications created seven pairs and one resume was a female's name and the other a male's name. They were to view 14 applicants from the pool and select three to move on to the short list and then from those applicants, one would be hired. This study showed that women would be more likely to make the short list but less likely to be hired.; *see also* Hodgson & Pryor, *supra* note 202, at 7 (explaining that female attorneys may face the hardest battles when working with other women).

209. Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 538 (1996).

210. *Id.* at 548 (explaining that "successful" in this study is defined as being the more influential and effective attorney).

211. *Id.* at 549-50.

212. *Id.* at 549.

The double-bind for female attorneys in the courtroom comes into play when a female attorney exhibits a feminine trait, such as emotion.²¹³ The female attorney who is viewed as emotional may lose credibility with the jury because she is seen as unreliable, rather than passionate.²¹⁴ A study of personal injury cases showed that male-dominated juries awarded higher damage amounts to male plaintiffs and lower damage amounts to female plaintiffs.²¹⁵ Female-dominated juries awarded female plaintiffs above average damages in only 3% of cases studied.²¹⁶ Other studies have found that female plaintiffs seeking damages in wrongful death cases with the loss of a male spouse are more likely to prevail and receive a higher damages award, whereas male plaintiffs seeking damages for wrongful death of a female spouse prevail less and receive smaller damages awards.²¹⁷

The research referenced here demonstrates the overwhelming complexity of gender bias in the courtroom. The research shows that gender bias, predominantly implicit gender bias, effects the jury's assessment of the facts and parties in the case.²¹⁸ A juror may assume the female plaintiff provides less financially, and should thus receive a smaller award in a personal injury case and a larger award in a wrongful death case where she is the surviving spouse.²¹⁹ Likewise, a juror may generally disfavor a female litigant or attorney if the litigant or attorney is

213. *Id.*; see also Brief for Amicus Curiae, *supra* note 129 (defining the "double-bind" dynamic).

214. Hahn & Clayton, *supra* note 209, at 550.

215. Stuart Nagel & Lenore Weitzman, *Sex and the Unbiased Jury*, 56 JUDICATURE 108, 109 (1972) (explaining that male-dominated juries awarded amounts 12% above the average award to male plaintiffs and 17% below the average award to female plaintiffs in cases with the same or substantially similar injury claims).

216. *Id.* at 110. Nagel and Weitzman analyzed data collected by the Jury Verdict Research Company in 364 personal injury cases. They examined the gender composition of the juries who served on these cases and the magnitude of the damage awards for the prevailing plaintiffs. The study notes that in most cases the male plaintiffs suffered more severe injuries and this discrepancy could factor into the study's conclusions. *Id.*

217. Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 LAW & SOC'Y REV. 263, 264 (1991). The article reports on studies conducted by the Washington State Supreme Court and the King County Superior Court in Seattle, Washington. Data to conduct these studies was gathered from the Superior Court Management System and Jury Verdicts Research, Inc. It should be noted that while the data covered a five-year period, neither source had a complete record of all the wrongful death cases tried within that time. *Id.*

218. Kang et al., *supra* note 12, at 1144 ("Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be 'unintentional and even non-conscious processes.'") (internal citations omitted).

219. *Id.*

aggressively seeking relief.²²⁰ It may be impossible for plaintiffs like Betty Dukes or Ellen Pao to prevail when the case itself examines gender bias and places the issues of implicit bias and discrimination before the jury.

B. *Implicit Bias and the Judiciary*

The previous section raised the question of how implicit bias can operate with regard to the jurors' evaluations of the case, the lawyers, and the parties. Our system of civil justice puts trial judges in the role of presiding over the civil trial and appellate judges over the appeal, thus any discussion of gender discrimination litigation must consider the role of implicit bias in the judiciary.²²¹

The trial judge presides over the jury selection process, often asking her own *voir dire* questions.²²² Based on *Batson* and *J.E.B.*, the party challenging the use of peremptory challenges to exclude jurors based on race or gender makes the initial objection.²²³ The burden then shifts to the other party to provide a neutral explanation for exercising peremptory challenges to include jurors of one gender.²²⁴ The judge then evaluates the sufficiency of the proffered neutral explanation.²²⁵ In racial discrimination cases following *Batson*, neutral explanations have included various factors, such as English language proficiency, as well as similarities in age, background, or neighborhood.²²⁶ In gender cases, women have been excluded from juries based on neutral explanations, such as marital status, number of children, smiling during questioning, and eye contact.²²⁷ The trial judge alone determines if the proffered reason for the peremptory strike is pre-textual, thus her own implicit biases can give effect to gender-based exclusion if she finds the explanations gender neutral. In sum, the

220. Hahn & Clayton, *supra* note 209, at 550.

221. The author intentionally switches between indicating the judges as male and female throughout the text to show that both male judges and females judges employ implicit biases against female litigants and advocates.

222. *Darbin v. Nourse*, 664 F.2d 1109, 1113-14 (9th Cir. 1981) (citing *Connors v. United States*, 158 U.S. 408 (1895)).

223. *J.E.B. v. Alabama*, 511 U.S. 127, 144-45 (1994).

224. *Id.*; see also Forman, *supra* note 197, at 58-59.

225. Forman, *supra* note 197, at 59.

226. *Id.*

227. *Id.* at 61-63 (citing *People v. Irizarry*, 142 Misc. 2d 793, 536 N.Y.S.2d 630 (1988), *rev'd*, 168 A.D.2d 715, 560 N.Y.S.2d 279 (1990) (discussing a state court case challenging the Bronx prosecutor's use of peremptory challenges to exclude women from a criminal trial jury). During *voir dire* of 34 potential jurors, the prosecutor challenged nine women and one man, offering pre-textual reasons for each peremptory challenge against a female juror. *Id.*

judge's own implicit bias may lead her to accept the pre-textual explanations.²²⁸

The trial judge also functions as the gatekeeper in presiding over motions to dismiss at the pleading stage and later in the discovery process.²²⁹ If a judge has an implicit bias against women, which can affect his assessment of the female plaintiff's gender discrimination claim, is he more likely to rule in favor of the party seeking dismissal? There are no studies that have tested whether biases, explicit or implicit, influence how actual trial judges decide motions to dismiss in actual cases.²³⁰ However, there is no reason to think judges are immune from implicit bias.²³¹ When considering the role of the trial judge in determining pre-trial motions, we must consider the entire nature of making judgments.²³² Generally, judges turn to judicial experience and common sense when making determinations as to whether a party has a legally cognizable claim.²³³ Common sense generally refers to the social context for making the relevant judgment—how do we understand the social context of the issues to be determined?²³⁴ Studies have shown that people rely more on general categorical information, also known as schema, to make judgments when they lack specific information.²³⁵ That reliance on categorical information

228. Forman, *supra* note 197, at 63 ("Each of these explanations reflects stereotyped assumptions about a woman's role, abilities, and character. Is striking a woman because she is a mother 'neutral' or pre-textual? One might conclude that it was pre-textual, at least if the prosecutor did not strike fathers. Should a prosecutor be allowed to excuse 'homemakers' or any other occupational category that is predominantly female? And, of course, explanations based on demeanor or appearance, commonly accepted to rebut *Batson* claims based on race, could just as easily mask gender discrimination. In one case reported anecdotally, an attorney apparently struck a male juror 'solely in order to have another woman to look at in the jury box.'").

229. See FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56; see also *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (cases holding that to survive a motion to dismiss at the pleading stage, the complaint must meet a plausibility standard).

230. Kang et al., *supra* note 12, at 1162.

231. *Id.* at 1146.

232. *Id.* at 1160-61.

233. *Id.* at 1160 ("How are courts supposed to decide what is 'Twombly' plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'") (internal citations omitted).

234. *Id.* (citing Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994), which developed the theory of "social judgeability").

235. Kang et al., *supra* note 12 at 1160 ("And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category)

can be further complicated when the judge either thinks he has more relevant information than is actually available, as at the pre-trial stage, or the information available is being assessed through his own implicit biases.²³⁶

For example, in a Title VII case, the judge may be asked to rule on a motion to dismiss under Rule 12(b)(6), determining whether the plaintiff's claim is "plausible."²³⁷ A ruling at this stage assesses the pleadings only, thus the judge lacks detailed factual information that would be available after discovery.²³⁸ Given the lack of individuated information about the facts of the claim, the judge may rely more heavily on categorical assumptions, for example, assumptions about certain workplace environments or the general viability of workplace discrimination cases.²³⁹ The judge may rely on her knowledge of past cases, such as *Ellen Pao's* case, which did not render a verdict for the plaintiff. She may rely on her own experiences in the workplace in the absence of fully developed facts about the case at bar. She may further consider herself better informed based on her own experiences and knowledge, which could lead her to rely too much on categorical information about gender discrimination cases.²⁴⁰ This over-reliance on categorical information is an impediment to quality judgments as it allows the judge's implicit biases formed by her experiences to influence her assessment of the motion and the case.

Appellate judges are not immune from similar questions about implicit bias. It would be again unreasonable to assume that judges, even at the highest level, are immune from the biases we all experience.²⁴¹ In *Dukes*, Justice Scalia, writing for the majority, included statements that can be read to reveal his own inexperience with workplace discrimination and implicit bias.²⁴² In evaluating the unlikelihood that Wal-Mart

information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.”).

236. *Id.*; see Yzerbyt et al., *supra* note 234, at 49. In discussing a study on social judgeability, the authors note that because participants in the study had received no individuating information about the study subjects, the study participants tended to judge the subjects in accordance with their schemas, or categorical information, about the subjects, basing their judgments on general, categorical information about comedians and archivists. *Id.*

237. See *Bell Atlantic v. Twombly*, 550 U.S. 544, 545 (2007).

238. *Id.*

239. Kang et al., *supra* note 12, at 1160.

240. *Id.*

241. *Id.* at 1146.

242. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011).

managers would exercise discretion in a manner that disadvantaged female employees, Scalia stated:

To the contrary, left 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 actionable disparity at all.²⁴³

The majority further dismissed the plaintiffs' evidence of discrimination, which consisted of statistical evidence, anecdotal evidence, and an expert's social framework analysis. The expert concluded that Wal-Mart's culture and personnel policies made it vulnerable to gender discrimination.²⁴⁴ The all-male majority's rejection of the social framework analysis as evidence of gender discrimination at Wal-Mart was perhaps most demonstrative of the majority's lack of understanding of the claim.²⁴⁵ The opinion rejects wholesale the idea that certain social frameworks—those where male-dominated management is able to self-replicate through discretionary pay and promotion policies—can substantiate a Title VII claim.²⁴⁶ Perhaps most telling on the question of whether implicit bias affected the judicial evaluation in *Dukes* is Justice Ginsberg's dissent, which addressed the intrepid blindness of the majority.²⁴⁷ On the question of whether discretion could be used to discriminate, she stated:

The practice of delegating to supervisors' large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.²⁴⁸

There are other indicators that appellate judges, at the Supreme Court and elsewhere, are not immune to implicit biases in their judgments and

243. *Id.*

244. *Id.* at 356.

245. *See generally id.* Justices Scalia, Roberts, Kennedy, Thomas, and Alito formed the majority in Parts I, II, and III. Justices Ginsberg, Breyer, Sotomayor, and Kagan concurred in Parts I and III and dissented in Part II, which addressed the certification of the putative class under FRCP Rule 23(a). *Id.*

246. *Id.* at 354-55 (rejecting Dr. William Bielby's social framework analysis entirely, stating that Bielby's evidence is "worlds away" from significant proof that Wal-Mart operated under a general policy of discrimination); *see also* Reinsch & Goltz, *supra* note 153, at 272-73.

247. *Wal-Mart*, 564 U.S. at 367-78 (Ginsburg, J., dissenting).

248. *Id.* at 372-73 (Ginsburg, J., dissenting).

their conduct.²⁴⁹ A recent study found that male justices at the Supreme Court interrupt female justices far more frequently than the other way around.²⁵⁰ The female justices use fewer words than the male justices, and yet are still interrupted with greater frequency.²⁵¹ Changing habitual modes of thinking and acting on gender requires a concerted effort by the judiciary.²⁵² State and federal courts have engaged in serious and thorough inquiry into the role of gender bias in the court system; however, the impact of that introspective work remains unclear.²⁵³ And suggestions that biased attitudes in the judiciary will “age out” when older judges are replaced by younger lawyers are not supported by the evidence.²⁵⁴ The result is that litigants in Title VII cases predicated on theories of implicit bias, and specifically second generation discrimination, face a separate hurdle when seeking relief in the court system. The litigant is again placed on a continuum of bias that flows from a male-dominated culture and operates largely unchecked. The court system thus subjects the litigant to a Third Generation of gender discrimination.

249. See generally Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994) (reporting on an extensive study undertaken by the Ninth Circuit to explore gender bias at the trial and appellate court levels); see also Lynn Hecht Schafran, *Women Shaping the Legal Process: Judicial Gender Bias as Grounds for Reversal*, 84 KY. L.J. 1153, 1155 (1996) (examining the ruling in *Catchpole v. Brannon*, 42 Cal. Rptr. 2d 440 (Ct. App. 1995), review denied (Cal. Sept. 14, 1995), which reversed a trial court ruling based on the court’s demonstrated gender bias); see generally Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15 (1997).

250. See Tonja Jacobi & Dylan Schweers, *Justice Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. (forthcoming Fall 2017); see also Adam Liptak, *Let Me Finish Please: Conservative Men Dominate the Debate*, N.Y. TIMES (Apr. 18, 2017), at A13.

251. Jacobi & Schweers, *supra* note 249, at 74.

252. Justice Ruth Bader Ginsberg, *Foreword*, 84 GEO. L.J. 1651 (May 1996). In her Foreword to the Journal’s special section on The Report of the Special Committee on Gender prepared for the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, Justice Ginsberg wrote “self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.” In a short but impactful writing, the Justice encourages the federal judiciary to “exert strong leadership to eliminate unfairness and its perception in federal courts.” The Foreword also relates an incident of “good-natured amusement” when Justice Ginsberg was criticized for an opinion written by Justice Sandra Day O’Connor. In response to the confusion, the National Association of Women Judges presented Justices Ginsberg and O’Connor with T-shirts which said “I’m Sandra, not Ruth” and “I’m Ruth, not Sandra.” Justice Ginsberg relates this incident to illustrate one of the study’s findings, that women attorneys are often mistaken for non-attorneys more than their male counterparts. *Id.*

253. See Coughenour, *supra* note 249, at 809-35.

254. See *id.* at 810-11.

C. *Third Generation Discrimination*

This Article has attempted to draw together various sources to support a working theory that gender-based discrimination has deep roots in stereotype and social bias, preventing any one theory of recovery to prevail. Although overt gender discrimination has been largely reformed, the bias-based species of gender discrimination understood as second generation discrimination has endured despite strong legal challenges.²⁵⁵ As discussed in Part II, one theory for why second generation cases have not been more successful is the complexity of the claims themselves.²⁵⁶ In stating a second generation claim, the bias-based nature of the claim must be understood by the trial judge, the jury, and the appellate courts. And the understanding must be more than intellectual, as the very nature of the discrimination claim rests in human behavior that operates at an unconscious level.

The Second Generation Discrimination Continuum (see Figure 1.1) depicts a cycle of bias-based behaviors that self-perpetuates and creates environments that offer fewer opportunities for change.²⁵⁷ A similar cycle has evolved in the court system's review of discrimination cases. Overall, juries are no longer exclusively male, and jury pools often mimic the gender balance of the relevant community.²⁵⁸ However, studies have shown that female jurors employ implicit bias when evaluating female attorneys and litigants, thus gender diversity in the jury pool offers no assurance that a second generation discrimination claim will be better understood.²⁵⁹ The federal judiciary is predominantly male, meaning that those presiding over motions to dismiss, *voir dire*, and appellate review in Title VII cases, are less likely to possess the experiences and information that is necessary to facilitate a full understanding of second generation discrimination.²⁶⁰ The dynamics of judging and the demographics of the

255. See generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); see also Pao Trial Brief, *supra* note 36.

256. See generally Sturm, *supra* note 11; see also Continuum, Figure 1.1, *supra* at p. 82.

257. See Continuum, Figure 1.1, *supra* at p. 82.

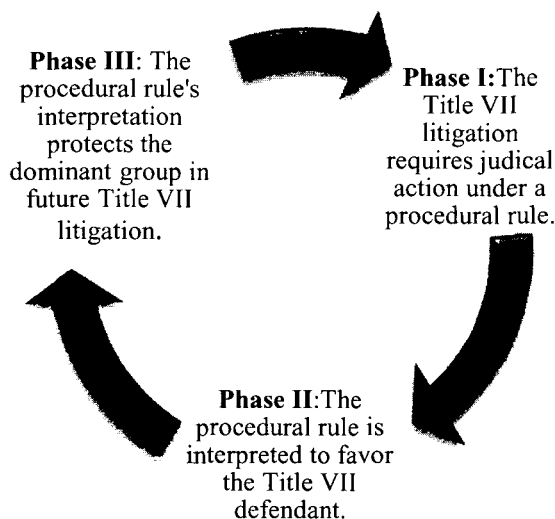
258. See Karen L. Cipriani, *The Numbers Don't Add Up: Challenging the Premise of J.E.B. v. Alabama ex rel T.B.*, 31 AM. CRIM. L. REV. 1253, 1266 (1994) (explaining that the author surveyed the D.C. Circuit jury pool from January to June 1993, a sample of 4,302 persons, and found that in the 105 juries selected in civil and criminal trials during the six-month period, 55.8% of jurors were female and 43.1% were male) (noting that national level data on the gender composition of civil and/or criminal trial juries was not available).

259. Hodgson & Pryor, *supra* note 202, at 7.

260. See *Women in the Judiciary: Still a Long Way to Go*, Fact Sheet, Nat'l Women's Law Ctr., (Oct. 2016) (noting that there have only been four women judges on the U.S. Supreme Court with three currently sitting on the Court; 60 of 167 (35%) of circuit court judges are women; and 33% of United States District Court judges are women).

judiciary create another obstacle to effective relief—Third Generation Discrimination.

The Third Generation Discrimination Continuum (Figure 1.2)



Like the theory of second generation discrimination, Third Generation Discrimination also operates on a continuum that can proceed without interruption if certain factors are present. Consider a hypothetical case with facts similar to *Dukes*, where the gist of the female plaintiff's claim is that she was discriminated against by her employer through the use of discretionary pay and promotion policies administered by male managers.²⁶¹ The theory of the case is predicated on second generation discrimination under Title VII. Assume the defendant files a motion to dismiss the plaintiff's complaint per Rule 12(b)(6), arguing the plaintiff has failed to state a claim that is plausible on its face, triggering Phase I in Figure 1.2. Rule 12(b)(6) is a facially-neutral rule of civil procedure designed to dismiss implausible claims, eliminating the time and expense of further pleading or discovery.²⁶² Assume the trial judge is male and

261. See generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

262. FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that the plausibility standard has been criticized for requiring an assessment of the case itself at the pleading stage, thus requiring the judge to evaluate a motion to dismiss before hearing individuated information about the facts or

lacks personal experience with gender-based discrimination either through his experience as an attorney or his experience as a judge. In the absence of individuated information about this case or these parties, the judge may default to categorical information when judging the defendant's claim for relief and dismiss the plaintiff's claim as not plausible, employing reasoning similar to the majority's reasoning in *Dukes*.²⁶³ If so, the facially-neutral rule, Rule 12(b)(6), has been interpreted to favor the employer-defendant, illustrating Phase II of the Continuum (see Figure 1.2).

Next, assume the plaintiff appeals the trial judge's ruling dismissing her case. The plaintiff-appellant is now asking a predominantly male appellate judiciary to assess the lower court's action, which requires the appellate court to assess *de novo* the plausibility of her claim.²⁶⁴ If the appellate court affirms the lower court, this interpretation of Rule 12(b)(6) can perpetuate a general misunderstanding of a second generation discrimination claim and weaken the availability of the theory for other litigants (see Phase III of Figure 1.2). The cycle will then repeat, as the first case becomes precedent for the next, diminishing Title VII litigation and validating the suspect employment practice.

This Continuum adds insult to injury as it provides even more barriers to successful gender bias litigation. The Third Generation Discrimination Continuum needs an interrupter—a force that can cause the system to examine itself and rely less on personal experience, or the lack thereof, when assessing a second generation discrimination claim. It is beyond the scope of this Article to suggest the necessary interrupter. In fact, the next steps in developing a working Third Generation Discrimination theory requires empirical research exploring the procedural histories of Title VII cases predicated on implicit gender bias. To evaluate the role of the jury and judge on implicit bias-based Title VII litigation, a sample of cases should be studied, evaluating the ultimate disposition of the sample cases and the means of disposition. How many second generation cases are dismissed at the pleading stage? At the summary judgment stage? How many second generation cases reach a jury, and what is the result of jury deliberations? What is the appellate landscape for second generation claims? How many cases are appealed and what is the level of success on appeal for a plaintiff-appellant? With

circumstances of the case).

263. See *supra* notes 240-41 and accompanying text.

264. *Women in the Judiciary*, *supra* note 259; see also *Bell Atlantic*, 550 U.S. at 568-70 (holding that the appellate court reviews *de novo* the trial court's ruling on a motion to dismiss under Rule 12(b)(6)).

this information, we can explore the system's impact on these complex claims.

V. CONCLUSION

As Justice Ginsberg noted, "self-inspection heightens appreciation."²⁶⁵ Self-inspection requires that lawyers and judges assess their own biases, remaining open to the possibility that we, as members of the legal profession, operate on our own biases in a manner which inhibits reform. The lack of specific information about experiences, which differ from our own, prompts us to revert to stereotypes and general, categorical information about people and places. If a male judge has never worked in a setting where advancement predicated on relocation would interfere with his career, he may not fully understand the chilling effect that requirement has on a female employee, otherwise qualified for promotion, who is not in a position to relocate her family away from family support or other resources. But, if he knows he lacks this perspective, he can seek it, requesting arguments and evidence that allow him to better evaluate the specific facts of the plaintiff's claim. True "self-inspection" is the ultimate interrupter of any bad cycle.

265. See Ginsberg, *supra* note 251, at 1652.