OHIO STATE LAW JOURNAL
VOLUME 67, NUMBER 5, 2006

The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace

LETICIA M. SAUCEDO*

The existence of a rapidly growing Latino immigrant population in the United States raises questions about how the "brown collar" worker is being incorporated into our economy. Newly arrived Latino immigrants, or "brown collar" workers, are increasingly found in segregated workplaces throughout the country. They typically perform the least desirable jobs in the most unstable conditions in our economy. This Article explores the creation of these workplaces by focusing first, on the conditions that create brown collar subservience and second, on employer practices that seek workers out for their subservience. Today's anti-discrimination law does not adequately capture the form of discrimination lurking in the interaction between brown collar workers taking the jobs no one else wants and employers seeking subservient workers.

The myth of the immigrant worker taking the job nobody else wants resonates in our public culture. This Article challenges the myth by exploring sociological theories that explain how and why employers, through their preference for subservient workers, create jobs that native born workers will not take. It also uncovers assumptions about the dynamics of immigrant workplaces embedded in neoclassical economic theories at the heart of judicial opinions. Practices such as network hiring, job structuring, targeting subservience, and avoiding native born workers

---

* Associate Professor, William S. Boyd School of Law, University of Nevada Las Vegas. J.D., Harvard Law School, 1996. I thank the following people who gave me ideas and who commented on earlier drafts of this Article: Raquel Aldana, Annette Appell, Mary Berkheiser, Robert Correales, Jennifer Gordon, Daniel Kaplan, Kate Kruse, Ann McGinley, Ngai Pindell, and Elaine Shoben. I also wish to thank the participants of the LatCrit X workshop, and the William S. Boyd School of Law faculty workshop, who challenged some of the ideas put forth in this Article. My research assistants, Chris Blakesley and Giovanni Andrade, provided excellent research assistance. I owe much gratitude to my dean, Richard Morgan, the generous supporters of the William S. Boyd Law School, and the Boyd faculty community, for their complete support and encouragement of the writing process.

are all couched in terms of worker choice. Alternative sociological theories provide a counter-narrative: employers take advantage of the social conditions that make brown collar workers subservient by setting workplace conditions and pay rates.

There is no adequate place in the current anti-discrimination frameworks for such a narrative. This Article explores the power of the anti-subordination principle to recognize employer preferences for the subservient worker as a possible form of discrimination. It suggests that incorporation of the alternative sociological theories into current Title VII frameworks can provide a remedy for brown collar workers seeking the advancement opportunities that the American dream promises.

I. INTRODUCTION

In what is an age-old problem in the structure of our economic system, one group of workers is perpetually consigned to the least desirable, segregated jobs in our economy. In the latest twist, Latino immigrants—brown collar workers[1]—fill the positions, in part because of their subservience. Meanwhile, the myth of unwanted jobs that no one but Latino immigrants will take persists.[2] This Article explores how employers create these "unwanted" jobs through their preferences for subservient workers.[3] It analyzes the creation of brown collar workplaces by focusing, first, on the conditions that create brown collar subservience and, second, on employer

---

[1] I define the "brown collar workplace" as one in which newly arrived Latino immigrants are overrepresented in jobs or occupations. Because the newly arrived Latino can be documented or undocumented, it is less immigration status than the employer's perception of the worker as a newly arrived immigrant that marks the identity of the brown collar worker. *Infra*, Part II.

[2] This popular view is reflected in the assumptions of the media, immigrant advocates, employers and policy makers. *See, e.g.*, Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004 at 62 (One of the arguments that is regularly advanced to justify hiring illegal workers is that they are merely doing jobs American workers won't take. President Bush echoed the theme earlier this year when he proposed the immigration-law changes that would allow millions of illegals to live and work in the U.S.: "I put forth what I think is a very reasonable proposal, and a humane proposal, one that is not amnesty, but, in fact, recognizes that there are good, honorable, hardworking people here doing jobs Americans won't do.").

[3] Edward J.W. Park, *Racial Ideology and Hiring Decisions in Silicon Valley*, 22 QUALITATIVE SOC. 223, 231 (1999) (analyzing the role of racial ideology in employer preferences for immigrant workers over Blacks for high technology jobs in Silicon Valley).

practices that target workers for that subservience. Today's legal frameworks do not adequately capture the form of discrimination lurking in the interplay between brown collar workers accepting the jobs no one else will take and employers seeking subservient workers. That inadequacy is a direct consequence of the law and economics assumptions reflected in anti-discrimination decisions that prevent protection through Title VII enforcement. This Article suggests the incorporation of three alternative sociological theories into the existing frameworks so that brown collar workers can seek adequate remedies.[4]

Part II of this Article defines the brown collar worker. It analyzes the social conditions that contribute to the brown collar worker's subservience. It then describes some of the harmful effects of segregated workplaces.

Part III discusses how the social dilemma transforms into a legal dilemma for brown collar workers. It exposes the fallacies of the myth that brown collar jobs are a natural consequence of economic trends and labor market conditions. It describes the methods that employers use to target brown collar workers for segregated jobs and analyzes the effect of employer targeting on native born minority workers. It then analyzes the problems for brown collar workers with the current legal frameworks.

Part IV explores, as background, mainstream economic theories, including the neoclassical economic theory, that underlie current interpretations of anti-discrimination law. It describes how the theory justifies the existence of segregated workplaces and it illustrates the operation of neoclassical economic theory in examples from case law.

Part V discusses three sociological theories that provide an alternative narrative for explaining the large role the employer plays in creating segregated workplaces. These theories explain how employer behavior and preferences influence employment structures, as well as methods used to create segregated workplaces. This Part illustrates the operation of the three theories in sociological case studies, as well as in cases challenging subjective employment practices.

Part VI offers recommendations that open the way for a remedy for brown collar workers. It suggests incorporating the alternative sociological theories and their narratives into current anti-discrimination frameworks. It concludes that legal mechanisms must exist for brown collar workers to

---

[4] If the obstacles to brown collar claims discussed in this Article were removed, the remedies would remain limited to providing advancement opportunities. Neither of the current Title VII frameworks provide an adequate remedy to fix the "unwanted" job. The limitations in the remedies—especially the limitation on improving conditions in the "unwanted" jobs—are the topic of a separate article. Leticia Saucedo, *The Brown Collar Workplace: Seeking the Solution for the Inexorable 100* (unpublished manuscript, on file with author).

challenge their treatment within the anti-discrimination context if there is any hope for eliminating the segregation and working conditions that characterize the "unwanted" job.

II. THE SOCIAL DILEMMA: THE SUBSERVIENT BROWN COLLAR WORKER AND THE SEGREGATED WORKPLACE

The problem of the brown collar worker is a growing social dilemma. The brown collar worker is increasingly present in large numbers in the low wage sectors of our economy. The social conditions that contribute to a brown collar worker's subservience combine to create a particularly vulnerable workforce. The harmful effects of being segregated into these "unwanted" jobs demonstrate why brown collar workers need the protections of anti-discrimination laws.

A. *The "Brown Collar" Worker and "Overrepresentation" in the Segregated Workplace*

A "brown collar" worker is a newly arrived Latino[5] who works in jobs or occupations in which Latinos are overrepresented.[6] Generally, brown collar workers experience wage penalties, occupational segregation,[7] and pay

---

[5] "Latino," as it is used in this Article, encompasses those born in, or with ancestry from, Mexico, Central or South American countries, or the Spanish-speaking Caribbean.

[6] The term "brown collar" comes from sociologist Lisa Catanzarite, who coined the term to describe the workplace conditions of these workers in mostly low-wage industries. Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 WORK AND OCCUPATIONS 300, 301 (2002) [hereinafter *Dynamics of Segregation and Earnings*]; Lisa Catanzarite, *Occupational Context and Wage Competition of New Immigrant Latinos with Minorities and Whites*, *in* THE IMPACT OF IMMIGRATION ON AFRICAN AMERICANS 59, 60 (Steven Shulman ed., 2004) [hereinafter *Occupational Context and Wage Competition*]; Lisa Catanzarite, *Wage Penalties in Brown-Collar Occupations*, LATINO POLICY AND ISSUES BRIEF NO. 8 (UCLA Chicano Studies Research Ctr., Los Angeles, Cal.), Sept. 2003, http://www.chicano.ucla.edu/press/siteart/LPIB_08Sept2003.pdf [hereinafter *Wage Penalties*]; Lisa Catanzarite & Michael Bernabè Aguilera, *Working with Co-Ethnics: Earnings Penalties for Latino Immigrants at Latino Jobsites*, 49 SOC. PROBS. 101, 103 (2002); Lisa Catanzarite, *Race-Gender Composition and Occupational Pay Degradation*, 50 SOC. PROBS. 14, 17 (2003) [hereinafter *Race-Gender Composition*].

[7] *Dynamics of Segregation and Earnings*, *supra* note 6, at 303; MAUDE-TOUSSAINT COMEAU, THOMAS SMITH & LUDOVIC COMEAU, JR., PEW HISPANIC CTR., OCCUPATIONAL ATTAINMENT AND MOBILITY OF HISPANICS IN A CHANGING ECONOMY, A REPORT TO THE PEW HISPANIC CENTER 23–25 (2005), *available at* http://www.pewhispanic.org/files/reports/59.1.pdf [hereinafter PEW OCCUPATIONAL

degradation because of their status in the workplace.[8] They are increasingly concentrated in low-wage occupations within industries such as construction, hospitality, and service.[9] The term "brown collar worker" describes an increasingly large sector of the American labor pool.[10] It is the fastest-growing segment of the labor force today.[11] Latino employment increased by one million workers in 2004,[12] the very large majority of which was driven by immigrant labor.[13]

The workplace condition of brown collar workers is characterized, in part, by segregation or overrepresentation. "Overrepresentation" in the brown collar worker context means that a disproportionate number of workers compared to the general population work in a particular job or occupation. "Overrepresentation" in the brown collar context is important for what it represents: a segregated workplace with a growing underclass of Latino workers. While the prototypical brown collar worker has recently arrived in the United States, his or her presence in a particular job often goes hand-in-hand with the presence of more settled Latinos in the job. Because the current Latino immigration stream has lasted longer than in previous European immigration cycles,[14] and because Latinos advance slowly in

---

MOBILITY STUDY]. Both of these sources describe an index of segregation, which measures the percentage of Latinos who would have to switch occupations to gain an integrated workforce. The index demonstrates that newly arrived immigrants have higher degrees of segregation in the industries where they are concentrated.

[8] *Dynamics of Segregation and Earnings*, *supra* note 6, at 301.

[9] These industries cannot go off-shore for their labor, so they must draw employees to their market from any available source. RAKESH KOCHHAR, PEW HISPANIC CTR., SURVEY OF MEXICAN MIGRANTS: THE ECONOMIC TRANSITION TO AMERICA 1, 14 (2005), *available at* http://pewhispanic.org/files/reports/58.pdf [hereinafter PEW MEXICAN MIGRANTS SURVEY]; *see generally Occupational Context and Wage Competition*, *supra* note 6, at 301.

[10] *See* PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 1; PEW MEXICAN MIGRANTS SURVEY, *supra* note 9, at 1; RAKESH KOCHHAR, PEW HISPANIC CTR., LATINO LABOR REPORT, 2004: MORE JOBS FOR NEW IMMIGRANTS BUT AT LOWER WAGES 6 (2005), *available at* http://www.pewhispanic.org/files/reports/45.pdf [hereinafter PEW LABOR REPORT 2004].

[11] PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 87.

[12] The total job growth amounted to 2.5 million jobs. PEW LABOR REPORT 2004, *supra* note 10, at 6.

[13] More than 950,000 workers were immigrants. The employment levels of brown collar workers increased by 914,000 jobs, or 88% of the total Latino growth in employment in 2004. *Id.* at 8.

[14] Frank D. Bean, Susan Gonzalez-Baker & Randy Capps, *Immigration and Labor Markets in the United States*, *in* SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 669, 689 (Ivar Berg & Arne L. Kalleberg eds., 2001).

occupational status,[15] earlier-arrived and native born Latino workers continue to work alongside brown collar workers. These sets of Latino workers—newly arrived, earlier arrived, and native born workers who fit the profile of the vulnerable worker—together suffer the fate of the brown collar worker. From the employer's point of view, earlier arrived and some native born Latinos are all part of the brown collar supply of labor for the "unwanted" jobs, even though they do not quite fit the brown collar profile completely.

B. *Social Conditions that Contribute to the Brown Collar Worker's Subservience*

One of the defining characteristics of brown collar workers is their "newly arrived" status. Several elements of newly arrived status, including perceived immigration status, lack of knowledge about workplace rights, political disenfranchisement, "push" factors, language deficiencies, and fear of job loss or deportation, or both, combine to create an especially vulnerable workforce.

The term "newly arrived" describes recent immigrants, or those who have entered the United States within the past five years.[16] The term applies regardless of the immigration status[17] of the individual.[18] Nonetheless, a large portion of the brown collar labor pool is presumed to be undocumented.[19] The high percentage of undocumented workers—up to 85%—among the recently-arrived-immigrants category signals their vulnerability.[20] The vast majority of those who entered the United States

---

[15] PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 6.

[16] *See Dynamics of Segregation and Earnings*, *supra* note 6, at 301.

[17] Immigration and documentation status are used interchangeably. The terms refer to whether one has authorization to be present and work in the United States. *See* Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 574–80 (2004), for an in-depth description of the documentation categories.

[18] A recent survey of over 4500 Mexican migrants throughout the United States revealed that although immigrants with documents may have more mobility than those without, all immigrants, regardless of status, continue to be concentrated in one of four industries: agriculture, hospitality, construction, and manufacturing. PEW MEXICAN MIGRANTS SURVEY, *supra* note 9, at 9–11.

[19] The numbers are estimates because records of undocumented status are difficult to maintain. *See generally* JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1 (2005), *available at* http://www.pewhispanic.org/files/reports/44.pdf.

[20] PEW MEXICAN MIGRANTS SURVEY, *supra* note 9, at 1, 16; PASSEL, *supra* note 19, at 1.

within the past two years have no United States government-issued identification, indicating presumptive undocumented status.[21]

Newly arrived Latino workers know less about their workplace culture or workplace rights than native born workers.[22] Less educated than their native born counterparts,[23] they often do not know they can complain about violations of their rights. They do not perceive, as do their native born counterparts,[24] that they have greater workplace rights than they actually do. In fact, because of their "newly arrived" status, they tend to perceive the opposite. High levels of unemployment, poor living conditions, and political instability create "push" factors for Latino workers who enter the United States seeking stable working conditions, which they believe will be better in the United States than at home.[25] The need to support families in their home countries motivates them to work in even the most adverse conditions that employers offer in the United States.[26] The current political climate encourages the differences in treatment between the rights of native born and immigrant workers, especially those entering from southern borders.[27]

---

[21] PEW MEXICAN MIGRANTS SURVEY, *supra* note 9, at 2, 5.

[22] ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 163 (2003).

[23] PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 63.

[24] Pauline Kim provides an empirically based analysis of the differences between employee perceptions and attitudes about their workplace rights and their actual rights. She finds that employees perceive that they have more robust rights than they actually do. *See generally* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

[25] KEITH GRINT, THE SOCIOLOGY OF WORK 256–57 (3d ed. 2005); WALDINGER & LICHTER, *supra* note 22, at 5; MICHAEL J. PIORE, BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES 189 (1979).

[26] Lyon, *supra* note 17, at 594 n.119.

[27] As evidence of this trend, President Bush recently signed the Secure Fence Act of 2006, which authorized the construction of over 700 miles of additional fencing along the U.S.-Mexico border. Pub. L. No. 109-367, Oct. 26, 2006. The House and Senate each also passed versions of immigration reform legislation. The House version, H.R. 4437, was comparatively more onerous and restrictive than the Senate version. It criminalized unlawful presence in the United States, and increased sanctions for those working in the United States without employment authorization. The Senate version, while including a path to legalization, had a similar focus on border enforcement, and includes a guest worker provision. Neither version does much to advance immigrant workplace rights, regardless of documentation status. Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2006); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

Newly arrived workers fear more than job loss. They fear deportation, either their own or that of their family members.[28] It is almost impossible for most newly arrived workers to obtain legal status under current immigration law, which restricts the number of unskilled worker visas to 10,000.[29] The only alternative for obtaining a visa requires family sponsorship by a close relative.[30] Even then, immigration law deems someone who entered or worked in the United States without authorization inadmissible and ineligible for adjustment to legal permanent resident status.[31] Similarly, changes in immigration law have imposed harsh consequences on immigrant workers who enter illegally and who are unlawfully present.[32] These components of the immigration system create an atmosphere of fear among undocumented workers, as well as documented workers who have undocumented family members and friends.

Newly arrived workers fear "rocking the boat" at work because recent court rulings have fueled the perception that immigrant workers have limited rights. For example, the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* threatened the effectiveness of undocumented worker organizing efforts by limiting the remedies available to such workers suffering from employers' unfair labor practices.[33] The case opened the way for a number of challenges to undocumented worker rights in other areas of employment and labor law, including challenges under the Fair Labor Standards Act, state worker compensation and wage statutes, and Title VII.[34]

---

[28] Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 145 (2002).

[29] Immigration and Nationality Act [hereinafter I.N.A.] §§ 203(b)(3)(A)(iii), 203(b)(3)(B) (2000).

[30] I.N.A. § 203(A).

[31] I.N.A. § 245(c).

[32] I.N.A. § 212(a)(9)(B). An immigrant who is unlawfully present in the United States for more than 180 days and leaves the country is barred from re-entering the United States for up to ten years. This provision of immigration law actually creates an incentive for the undocumented population to remain in the United States as long as they are undetected, rather than risk the three and ten-year bars.

[33] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002).

[34] Courts have held that the *Hoffman* holding does not apply in many of these contexts. *E.g.*, Rivera v. Nibco, 364 F.3d 1057, 1066–67 (9th Cir. 2004) (holding that *Hoffman* does not apply in Title VII cases); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003) (noting that "every case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly"); De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 239 (C.D. Ill. 2002) (declining to conclude that *Hoffman* was "dispositive of the issues raised in the motion to compel" discovery of immigration status in a Title VII action); *cf.* Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D.

Hoffman also provided an impetus for co-workers to challenge the presence of immigrant workers in the workplace.[35] Likewise, employer sanctions provisions, which penalize knowingly hiring undocumented workers, have rendered them even more exploitable.[36]

Newly arrived workers are disenfranchised informally, because of their "new" status in the community. Language deficiencies keep them from moving freely across jobs.[37] Many of the jobs that newly arrived Latinos find do not require English language skills, although many job advancement opportunities tend to require English language fluency.[38] As outsiders, newly arrived workers do not become involved in local affairs, nor do they tend to exercise collective political will. They are also disenfranchised formally. Because they have no political rights in this country until they become citizens, they cannot exercise voting rights.[39] Disenfranchisement and inability to participate in civic affairs fuels the treatment of newly arrived workers as the "other," both in the community and in the workplace.[40]

Tex. 2003) (holding that *Hoffman* "did not specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes"); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (finding *Hoffman* inapplicable to a Fair Labor Standards Act (FLSA) action); Flores v. Amigon, 233 F. Supp. 2d 462, 464–65 (E.D.N.Y. 2002) (holding that *Hoffman* does not apply in FLSA actions and granting a protective order from discovery of immigration status); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (questioning the applicability of *Hoffman* to the FLSA and denying the employer's request for discovery of immigration status); *see also*, Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 146–57 (2003).

[35] *E.g.*, Williams v. Mohawk Indus., Inc., 411 F.3d 1252 (11th Cir. 2005), *cert. granted in part*, 126 S. Ct. 830 (Dec. 12, 2005), *cert. dismissed as improvidently granted*, 126 S. Ct. 2016 (June 5, 2006); Trollinger v. Tyson Foods Inc., 370 F.3d 602, 615–20, 622 (6th Cir. 2004) *class certification granted*, 2006 WL 2924938 (E.D. Tenn. 2006); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1169–71 (9th Cir. 2002) (holding that laborers were direct victims of alleged racketeering), *class certification granted*, 222 F.R.D. 439 (E.D. Wash. July 13, 2004); Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2d Cir. 2001) (sustaining RICO complaint alleging hiring of undocumented workers).

[36] I.N.A. § 274A (2000); *see also*, Jennifer Gordon, *Transnational Labor Citizenship*, S. CAL. L. REV. (forthcoming 2007). Gordon describes the effect of employer sanctions on worker exploitability and suggests the development of a "transnational labor citizenship" paradigm to deal with immigrant worker vulnerability.

[37] PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 57–58.

[38] *Id.*

[39] Legal Permanent Residents who try to vote are deportable. I.N.A. § 237(a)(6)(A).

[40] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF

These characteristics are bound up in the brown collar worker's identity. For employers categorizing their workforce, these characteristics, especially subservience, are "inherently" linked to national origin, and form part of the identity imposed on workers. As one employer noted, "[t]he Latinos in our locations, most are recent arrivals. Most are tenuously here, and here on fragile documents. I see them as very subservient."[41] These pre-conceived ideas about brown collar workers—which are, in reality, perceptions based on their social conditions—influence the employer's use of national origin as a proxy for the subservient worker.[42]

Because employers link the brown collar worker with national origin, the "brown collar workplace" is characterized by newly arrived immigrants working alongside earlier-arrived and native born Latino workers. Reflecting the social reality of mixed-status families, worker treatment in mixed-status workplaces affects all Latinos, regardless of documentation status. As one historian notes:

> [t]he presence of large illegal populations in Asian and Latino communities has historically contributed to the construction of those communities as illegitimate, criminal, and unassimilable. Indeed, the association of these minority groups as unassimilable foreigners has led to the creation of 'alien citizens'—persons who are American citizens by virtue of their birth in the United States but who are presumed to be foreign by the mainstream of American culture and, at times, by the state.[43]

Even documented workers, fearing for their own continuing legalization status, are affected. Current immigration law penalizes legally admitted immigrants, through criminal and non-criminal grounds for deportation. Conviction of a domestic violence crime or violation of a protection order, for example, makes a documented immigrant deportable.[44] The trend toward restrictive deportation laws makes even documented workers more vulnerable to deportation threats. Current proposed legislation penalizes as an aggravated felony, and therefore, a deportable offense, driving while under the influence of alcohol.[45] One version would punish bringing a family

---

MODERN AMERICA 61–63 (2004).

[41] WALDINGER & LICHTER, *supra* note 22, at 163. Waldinger and Lichter's interviews of employer preferences revealed observations such as the one provided by this employer, who described how his perception of the workers' social conditions played into his decision making about who to hire for certain jobs. *See* discussion *infra* Part V.D.

[42] *See infra* Part V.D.

[43] NGAI, *supra* note 40, at 2.

[44] I.N.A. § 237(a)(2)(E) (2000).

[45] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,

member across the border.[46] The increasingly restrictive character of immigration law and the current debates surrounding it chill the workplace activism of documented immigrants, who do not want to draw unnecessary attention to themselves.

The effects extend even to native born Latinos, especially those who fit the Latino immigrant profile. Kitty Calavita analyzes the dilemma of this group as one in which, "immigration law and economics work together to establish immigrant otherness, even as economic realities ensure that many who are formal citizens are similarly cast as strangers in a process that both is fortified by law and undermines legal distinctions."[47] The conditions in the brown collar workplace, therefore, harm all Latinos who work in it.[48]

All of these factors contribute to public perceptions of brown collar workers as subservient. Moreover, they create a particularly constricted set of choices for brown collar workers in the U.S. labor market.[49] These same factors, not coincidentally, influence employer preferences for these workers to fill "unwanted" jobs. The social constraints, including perceived immigration status, the climate of fear, educational and language deficiencies, political disenfranchisement—all of the characteristics that confine the brown collar worker—also color the employer's perceptions of who is subservient.

C. *The Harmful Effects of Segregated Workplaces*

1. *The Wage Differential Effects*

Brown collar workers experience wage differentials over time as a result of their segregated status.[50] Wage differentials correlate positively with the percentage of brown collar workers in a job or occupation.[51] Wages for Latino workers have continued to fall relative to wages in non-Latino

---

H.R. 4437, 109th Cong. (2006).

[46] Current law considers smuggling an aggravated felony and deportable offense, but it exempts the smuggling of immediate family members in some instances from the definition of smuggling. I.N.A. § 237(a)(1)(E)(i)–(ii); I.N.A. § 101(a)(43)(N).

[47] Kitty Calavita, *Law, Citizenship and the Construction of (Some) Immigrant "Others,"* 30 LAW & SOC. INQUIRY 401, 402 (2005).

[48] *Id.*

[49] For an excellent and thorough analysis of the effects of choices on worker and employer preferences and vice versa, see Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992).

[50] *Wage Penalties*, *supra* note 6, at 1–2.

[51] *Id.* at 1.

occupations. Real weekly earnings declined in 2004 for the second year in a row for Latinos.[52] These statistics are consistent with sociological data showing wage suppression and unstable wages in industries and occupations that become brown collar over a period of time.[53]

2. *Occupational Status Gap and Segmented Market Effects*

The occupational status gap between Latinos and whites increased over the 1990-2000 decade.[54] Wage comparisons by occupation reveal that brown collar workers experienced slower occupational mobility, regardless of educational status.[55] A recent report for the Pew Hispanic Center describes Latinos' low occupational and mobility rates as follows: "[a]n occupational bifurcation has resulted whereby more and more Hispanic workers are in occupations with lower socioeconomic status, while fewer non-Hispanic workers hold these jobs. At the same time, more non-Hispanic workers have occupations with higher occupational status while fewer Hispanic workers have these occupations."[56]

The Latino immigrant experience is characterized by a very slow incorporation and, at times, nonexistent movement up economic and social ladders.[57] Industry shifts to more segmented occupational ladders have increased the employment of Latinos in the low wage, low status occupations.[58] More importantly, the higher the percentage of brown collar workers, the more all Latinos, regardless of their status or place of birth, experience segregation in the worksite.[59] Over time, they suffer wage disparities and wage suppression at a higher rate than their non-segregated counterparts.[60]

---

[52] PEW LABOR REPORT 2004, *supra* note 10, at 2. Latinos are the only major group for whom wages fell two years in a row. *Id.*

[53] *See generally Wage Penalties*, *supra* note 6; ABEL VALENZUELA, JR. ET AL., UCLA CENTER FOR THE STUDY OF URBAN POVERTY, ON THE CORNER: DAY LABOR IN THE UNITED STATES 10–12 (2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.

[54] PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 47.

[55] *Id.*

[56] *Id.* at 48–49. Job mobility over time remains limited. *Wage Penalties*, *supra* note 6, at 1–3.

[57] NGAI, *supra* note 40, at 5.

[58] PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 29, 47, 88–89.

[59] *Wage Penalties*, *supra* note 6, at 1.

[60] *Race-Gender Composition*, *supra* note 6, at 29; *Dynamics of Segregation and Earnings*, *supra* note 6, at 303.

III. THE LEGAL DILEMMA: DISMANTLING THE MYTH OF THE UNWANTED JOB AND TARGETING EMPLOYER PREFERENCES FOR THE SUBSERVIENT WORKER

Employers targeting brown collar workers use national origin as a proxy for subservience. This practice deserves legal scrutiny, as do the mechanisms or structures that employers utilize to carry out their preferences. The myth that no one but immigrants will take brown collar jobs obscures employer intentionality in targeting immigrants for brown collar jobs or occupations. The brown collar workplace is not, in fact, part of a natural process of immigrant incorporation into the economy. Current legal doctrine and theory are ineffective, however, especially in the face of the myth that brown collar workers "choose" these jobs.

A. *The Myth of the "Unwanted" Job*

The myth of the "unwanted" job is simply that brown collar workers will take the jobs no one else wants. The myth is, in part, a product of debates over whether current immigration streams hurt or help the economy and native born workers. The debate focuses on whether immigrants take the jobs nobody else wants. The myth has an important and overlooked side effect, however, in that it perpetuates the idea that interest in, and decisions about, which jobs to take lie solely with the employee. It masks the power that employers have to create the jobs that no one else will take and target brown collar workers for those jobs. Employers can choose the ethnic composition of their workforces when they, among other things, set pay rates and working conditions, rely on word-of-mouth hiring practices, and seek subservience for particular positions.[61] They pre-select who will be interested in a job when they adopt such policies as allowing languages other than English to be spoken on the job in some positions and not in others. This job-structuring process creates a set of jobs or occupations that employers reserve for brown collar workers.[62] Typically, an employer hires brown collar workers into jobs because of a reluctance to hire native born Anglo or minority workers. One

---

[61] Debra C. Malamud, *Affirmative Action and Ethnic Niches*, *in* COLOR LINES 313, 335–36 (John David Skrentny ed., 2001).

[62] The side effect of employers reserving jobs for Latino immigrants is that, for a myriad of reasons, they do not offer them to native born workers, especially African Americans. *See* WALDINGER & LICHTER, *supra* note 22, at 17–20, 187–91; Park, *supra* note 3, at 229; Earl Ofari Hutchinson, *Why So Many Blacks Fear Illegal Immigrants—Pt. 1*, BLACKNEWS.COM, http://www.blacknews.com/pr/immigrants101.html (last visited Sept. 10, 2006) (describing the perception in the African American community that immigrants are taking jobs that Blacks are not offered).

rationale for targeting brown collar workers is that they are perceived as willing to work harder for less pay than their native born counterparts. The simple reality, however, is that no one—not even the immigrants who fill them—really "wants" these jobs, at least in the form they are offered. The jobs have so deteriorated in pay and conditions after becoming "immigrant" jobs that they no longer resemble the jobs held by predecessor employees.[63] Moreover, brown collar workers are constrained in their choices by employer job structuring on the one hand and an immigration legal system that refuses to recognize their existence on the other. To the extent that employers are active participants in setting up the structures that take advantage of workers' constrained choices, their practices should be scrutinized.[64]

The "immigrant job" myth coincides with a corollary myth regarding the historical incorporation of immigrants into the economic life of our society. The "immigrant success story" myth portrays the immigrant as starting at the bottom of the economic ladder and moving up in steady progression over time.[65] It allows for the popular perception that, with time, the brown collar worker will assimilate and move up the economic ladder if only he desires to

---

[63] Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV., 303, 312–13, 324–25 (2004). Considerable social science research describes the devaluation of jobs once they are associated with a protected class. *See, e.g.*, Donald Tomaskovic-Devey, *Sex Composition and Gendered Earnings Inequality: A Comparison of Job and Occupational Models*, *in* GENDER INEQUALITY AT WORK 23 (Jerry A. Jacobs ed., 1995); BARBARA F. RESKIN & PATRICIA A. ROOS, JOB QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS, GENDER QUEUES 11–15 (1990).

[64] *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, VAND. L. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=903791 (follow "Download the document from: Social Science Research Network" hyperlink, at p. 37). Green argues that employers "as organizational actors are active, causal participants in the wrong of structural discrimination, and prevailing norms concerning organizational facilitation of individual acts of wrongdoing suggest that employers should be held responsible for their role in that wrong." *Id.* at 42.

[65] *See* WALDINGER & LICHTER, *supra* note 22, at 4, for a description of the traditional narrative of immigrants steadily ascending the occupation ladder. *See also*, RICHARD D. ALBA, ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA (1990); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1409 (1995). ("The tale of European immigration—embodying the powerful concepts of freedom, independence and self-sufficiency through wage work as they have been reinterpreted since the nineteenth century—provides a dominant 'text' against which social and political claims are made and measured in the twentieth century."). Notably, at least one scholar suggests that a similar myth for Blacks masks inequities that hinder their advancement. Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85, 86–88 (1999).

do so.[66] In other words, should the immigrant choose to invest in his own human capital, he will not suffer harmful workplace conditions for long. As with the corollary myth of the unwanted job, however, the immigrant success story does not consider the degree to which brown collar workers' choices are constrained by social and legal policies. Nor does it acknowledge how employers take advantage of those constraints to develop a segmented market that inhibits job advancement opportunities.

The myth of the "unwanted" job also masks the degree to which employer perceptions about who will be the subservient worker influence the creation of segregated workplaces. Societal and governmental treatment of Latino immigrants, in general, fuels these stereotypes. Once brown collar workers occupy a job, employers will devalue the position and its function, pay rate, terms and conditions, and advancement ladder. Employer biases infect the hiring process to create the brown collar jobs in the first place, and then influence the workplace conditions after the job is considered an "immigrant" job.

Professor Debra Malamud acknowledges the difficulty in challenging brown collar workplaces precisely because they conform to the narrative of the employer as an innocent participant in a natural process.[67] In this narrative, the ethnic niche is a normal and natural consequence of immigrant incorporation into American society.[68] Rather than an oppressive environment, the brown collar workplace is seen as a nurturing training ground that develops skills and human capital for those who enter it.

Given the power of the myth's narrative, current disparate impact and disparate treatment frameworks may be too weak to dismantle the brown collar structure simply because no one perceives it as a structure. If the myth prevails, individual employers will not be held responsible for the historically

---

[66] NGAI, *supra* note 40, at 5: ("The myth of 'immigrant America' derives its power in large part from the labor it performs for American exceptionalism . . . . [T]he myth 'shores up the national narrative of liberal consensual citizenship, allowing a disaffected citizenry to experience its regime as choiceworthy, to see it through the eyes of still-enchanted newcomers whose choice to come here . . . reenact[s] liberalism's . . . fictive foundation in individual acts of uncoerced consent.'") (citation omitted).

[67] Malamud, *supra* note 61, at 336.

[68] *Id.* ("There is an increasing tendency in the courts to view the disparate impact cause of action as a tool that ought to be reserved for circumstances in which there is reason to believe that impermissible intentional discrimination is taking place. It may well be that courts view the immigrant-business ethnic niche as so natural and normal that it is unlikely to be the product of intentional discrimination . . . . Or it may simply be that case that courts are so committed to these ethnic niches as part of the ongoing success story of American immigration that they are unwilling to use the powerful tool of disparate impact litigation to dismantle them.").

inevitable employment patterns surrounding immigrant workforces.[69] Judicial decision makers who accept the view that brown collar workplaces are inevitable will conclude that employees who stay in unwanted jobs suffer from societal discrimination or lack of human capital, and not from the effect of deliberate employer practices.

B. *Employer Intentionality: Targeting the Brown Collar Worker*

Brown collar workers suffer from the mirror image of the type of discrimination that keeps potential employees out of targeted jobs. In other words, they get the "jobs nobody else wants" because the employer targeted them for those jobs and made the jobs so onerous that no one but the choiceless would fill them. The employer practices that result in brown collar workplaces can be characterized as having inclusionary as well as exclusionary aspects.[70] Because of Title VII's focus on employment opportunities, traditional practice and theory have focused on the exclusionary aspect, reserving a cause of action for plaintiffs who were prevented from job opportunities. The myth that no one else will take brown collar jobs hides the inclusionary aspect of discrimination, and makes it more difficult for a brown collar plaintiff to challenge the terms and conditions of the job the employer offered. The focus in this Article is on the inclusionary aspect of discrimination in employer practices. The inclusionary character of discrimination occurs when a protected group is perceived as better equipped for the least desirable jobs, and an individual from that group is treated accordingly. Discrimination thus occurs in the interplay between network hiring, targeting subservience, and job structuring.

1. *Network Hiring*

Employers conduct word-of-mouth hiring through social networks that exist within immigrant communities.[71] For Latino immigrant workers, insider referrals account for the bulk of informal job matching possibilities.[72]

---

[69] *Id.*

[70] Park, *supra* note 3, at 231. As Park notes, "the same racial logic that causes employers to avoid African Americans and whites make [sic] Asian Americans and Latinos attractive. On this front, *racial discrimination* can have both an exclusionary as well as an inclusionary impact." *Id.*

[71] WALDINGER & LICHTER, *supra* note 22, at 11; PEW MEXICAN MIGRANTS SURVEY, *supra* note 9, at 12–13.

[72] James R. Elliott, *Referral Hiring and Ethnically Homogeneous Jobs: How Prevalent Is the Connection and for Whom?*, 30 SOC. SCI. RES. 401, 421 (2001) (concluding that Latinos are more likely than native born Whites to enter jobs through

Much of the brown collar work exists in the secondary market,[73] where employers utilize social networks and other recruitment tools to attract brown collar workers.[74] Sometimes, employers directly recruit outside the country for these jobs.[75] They utilize labor recruiters, or intermediaries, so as to shield themselves from questions about immigration status.[76] They also seek workers through day-labor pools.[77] These methods are all variations of word-of-mouth, or network, recruiting. These forms of recruitment, in turn, produce a steady stream of subservient workers for the "unwanted" job.[78] The numbers of Latinos concentrated in these occupations as a result of such employer recruitment efforts leaves no doubt as to the segregated character of brown collar occupations.[79]

2. *Structuring the Job: The Creation of the "Unwanted" Job and the Segregated Workplace*

Employers pre-determine the ethnic composition of their workforce by setting pay rates and conditions for certain jobs. This form of job structuring attracts certain workers and deters others from seeking the jobs.[80] Processes

---

insider referrals).

[73] *See infra*, Part IV.B., for a discussion of the secondary market within dual labor market economic theories.

[74] Not surprisingly, employers in these industries are recruiting for workers with experience in these occupations. PEW MEXICAN MIGRANTS SURVEY, *supra* note 9, at 13.

[75] Newly arrived immigrants especially tend to be more experienced in construction and manufacturing in their home country than their earlier-arrived counterparts. A recent study revealed that more than 60% of recently arrived construction workers found similar work in the U.S., while 45% of hospitality workers found similar work in the U.S. *Id.* at 14.

[76] Saucedo, *supra* note 63, at 303; Steven Greenhouse, *Wal-Mart to Pay U.S. $11 Million in Lawsuit on Immigrant Workers*, N.Y. TIMES, Mar. 19, 2005, at A1.

[77] VALENZUELA JR. ET AL., *supra* note 53, at 4–6.

[78] In the typical case, network hiring has been analyzed as a structure that keeps workers out of the hiring loop. *See, e.g.*, EEOC v. Chi. Miniature Lamp Works, 947 F.2d 297 (7th Cir. 1991); EEOC v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993); NAACP v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982); Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984); Malamud, *supra* note 61, at 334–35; *see also* BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 32–34 (1998), providing for a concise explanation of network hiring as a discriminatory practice that entrenches the racial, ethnic and sex composition of a workplace.

[79] Saucedo, *supra* note 63, at 307–10.

[80] Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 100–04 (2003).

such as up-skilling and down-skilling[81] of jobs and the movement toward more contingent job structure, are examples of practices that perpetuate segregated workplaces. The de-skilling of jobs, for instance, creates opportunities at the entry level but little to no advancement opportunities for brown collar workers. The process evolves naturally because employers create job descriptions based on who they think will take the jobs.[82] De-skilling facilitates the hiring of unskilled workers for jobs that once required a variety of skills. Employers' compartmentalization of skills needed for jobs contributes to market segmentation, which hinders advancement for workers entering at the bottom of the economic ladder. An employment model with short advancement ladders and dead-end jobs reduces opportunities over the long-term, especially at the lower end of the skills spectrum.[83]

3. *Targeting Subservience*

Employer preferences for the subservient worker do not, by themselves, signal the existence of discriminatory practices. The hiring process turns discriminatory when the employer uses race or national origin as a proxy for choosing the subservient worker. This is true even if the employer may not consciously have equated subservience with an ethnic category.[84]

Employers target the newly arrived Latino population for the least desirable, often lowest paid jobs in the workplace, precisely because they perceive and anticipate the subservience of Latino immigrants. In the case of brown collar workers, perceptions about the compliant nature of immigrant workers are generated, in part, through unconscious or automatic stereotypes about immigrant workers,[85] and such stereotypes certainly exist.[86] Employer

---

[81] "Up-skilling" and "down-skilling" occurs when employers reconstruct jobs to make them more specialized. An up-skilled job requires almost exclusively skilled job tasks. A down-skilled job requires fewer to no skills. Before restructuring, a particular job could include both skilled and unskilled tasks.

[82] This structuring of jobs has been analyzed in the context of race and gender. *See, e.g.*, Green, *supra* note 80, at 110; RESKIN, *supra* note 78, at 35 ("By designing jobs based on the assumption that one sex or another will hold them, employers create structural barriers against women filling specific jobs . . . .").

[83] Green, *supra* note 80, at 100–02.

[84] WALDINGER & LICHTER, *supra* note 22, at 152. Ironically, workers embrace the characteristics that employers seek in order to become more attractive to employers, thus converting employers' perceptions about group characteristics into reality. Professors Devon Carbado and Mitu Gulati argue that this phenomenon should be captured in the anti-discrimination frameworks. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1269–70 (2000).

[85] *See* Barbara F. Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE

perceptions are reflected in workers' pay, working conditions, assignments, and status within a company. Because employers tend not to distinguish between newly arrived and other immigrants at the bottom of the economic ladder, national origin maintains its power as a proxy for subservience.

Employers intentionally target brown collar workers for certain jobs because of their subservient character—this is the inclusionary impact of discrimination. Once an employer begins to target a particular ethnic group, the company relies on network hiring to fill positions. These three mechanisms—targeting, structuring, and network hiring—combine to maintain racially and ethnically stratified worksites.[87]

4. *Avoiding Hiring Native Born Workers for the "Unwanted" Job*

On the other side of the equation, employers avoid hiring native born workers, especially African Americans, for these jobs. This, of course, is the exclusionary impact of discrimination. Employers provide all kinds of reasons for avoiding native born workers, although foremost among them is the perception that native born workers are more willing to exercise their workplace rights to the detriment of the company. The following excerpt of an employer interview illustrates this perception:

> As a small businessman, my main fear is having a worker who is bent on filing formal complaints or lawsuits. It would surely drive me out of business. As I see it, Asians and Mexicans are generally not like that. If they have a problem, they try and solve it personally, or they just go to another company. But whites and blacks, they like to stand up for their rights, even if it means they can drive me out of business and all of the other workers lose their jobs. For blacks, I'm afraid that they will not just involve lawyers but bring outsiders, like the NAACP or the Black Panther's Party or whatever they have now. Then I'm really dead.[88]

J.L. & FEMINISM 313, 321 (2002) ("The automatic nature of stereotyping helps to maintain stereotypes, despite evidence that they are inaccurate . . . . We are more likely to stereotype when we are under time pressure, partly because stereotyping conserves mental resources.").

[86] WALDINGER & LICHTER, *supra* note 22, at 155–80 (describing the prejudices and stereotypes about immigrant workers and native born minorities that influence employer decision making).

[87] Other studies confirm the patterns described in the Waldinger/Lichter study. *See, e.g.*, Park, *supra* note 3, at 227–28 (describing ethnic hiring processes for unskilled labor in high technology industries, and the inclusionary/exclusionary impact of such processes).

[88] *Id.* at 230.

These employer assumptions about who should and should not fill certain jobs influence how employers set pay rates and conditions for the jobs. They also influence who will take the jobs once the jobs are structured. Specifically, they serve to replace African Americans with "more acceptable" Latino workers. As the excerpt above reflects, the acceptability of immigrant workers exists because of the narrative that they work harder, complain less, and are more reliable for the lower wage jobs. On the other hand, native born workers will not fill these jobs, precisely because the pay rate, conditions, and opportunities for advancement do not fulfill their expectations. In other words, "racial discrimination finds different expressions for different groups: the same racial logic that causes employers to avoid African Americans and whites make[s] . . . Latinos attractive."[89] To complete the cycle, "jobs become culturally labeled as 'immigrant jobs', and native workers" refrain from competing for them or seek to move out of them.[90]

A devaluation process occurs over time, as reflected in wage suppression statistics of segregated workplaces. If employers structured jobs differently—paid higher wages, offered benefits, recruited outside of Latino social networks—the available or interested labor pool for them would likely include more native born workers.[91] The devaluation cycle demonstrates the role of employers' discriminatory attitudes in creating and maintaining inferior job structures for brown collar workers.

C. *The Current Legal Framework and its Theoretical Underpinnings*

1. *The Statute and the Current Frameworks*

In theory, Title VII is broad enough to target and eliminate employer practices that classify workers into segregated jobs. Section 703(a)(2) of Title VII states:

---

[89] *Id.* at 231.

[90] Gordon F. De Jong & Michele Steinmetz, *Receptivity Attitudes and the Occupational Attainment of Male and Female Immigrant Workers*, 23 POPULATIONS RESEARCH AND POLICY REVIEW 91, 95 (2004); Douglas S. Massey, *Why Does Immigration Occur? A Theoretical Synthesis*, *in* THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 34, 43–52 (Charles Hirschman et al. eds., 1999); WALDINGER & LICHTER, *supra* note 22, at 153.

[91] *See* Scott Baker, Comment, *Defining "Otherwise Qualified Applicants": Applying an Antitrust Relevant-Market Analysis to Disparate Impact Cases*, 67 U. CHI. L. REV. 725, 745–46 (2000).

> It shall be an unlawful employment practice for an employer . . . 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.[92]

The EEOC Compliance Manual, which guides the federal government's employment discrimination investigations, lists as examples of classification: "assigning women and minorities to menial, dirty, confining, less desirable, less prestigious, nonsupervisory, and lower paying jobs."[93] Notably, these are the same types of practices that create brown collar workplaces. The data in the first Part of this Article show that brown collar workers fill the least desirable, lowest-paying, wage suppressed, menial jobs in the economy. These jobs also transform quickly into segregated jobs once the public perceives them as "immigrant jobs."

Lawsuits challenging the existence of a brown collar workplace can arise in one of two contexts. First, plaintiffs excluded from the brown collar workplace can challenge employer practices that create barriers to those jobs.[94] Second, workers can challenge barriers to their opportunities for advancement.[95] In the case of brown collar workers, the plaintiffs must show that they are targeted for the least desirable jobs and have been denied opportunities available to non-Latinos, because of their national origin. For purposes of this Article, I will focus on obstacles for brown collar workers in the second context.

Why do brown collar workers resist pursuing claims to escape their segregated working conditions?[96] In part, they resist because interpretation of

---

[92] 42 U.S.C. § 2000e-2(a) (2000).

[93] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, PUBL'N NO. 294, EEOC COMPLIANCE MANUAL: SEGREGATING, LIMITING, AND CLASSIFYING EMPLOYEES, § 618, at 618:0009 (BNA 2003).

[94] EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 294 (7th Cir. 1991).

[95] *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 187 (5th Cir. 1983) (addressing how African American plaintiffs challenged subjective job assignment and promotion practices); Davis v. Califano, 613 F.2d 957, 961 (D.C. Cir. 1979) (discussing how female plaintiffs challenged discriminatory promotion practices); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 148 (N.D. Cal. 2004) (discussing how female employees challenged discriminatory assignment and promotion practices); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 266 (N.D. Cal. 1992); Butler v. Home Depot, Inc., 70 Fair Empl. Prac. Cas. (BNA) 51, 52 (N.D. Cal. 1996).

[96] Because there is no separate proof framework for dismantling segregated workplaces, there is no straightforward method for improving the conditions in the existing job. The remedy for a claim in a segregation lawsuit should be the improvement

current proof frameworks hinders successful litigation. The frameworks establish the proof methods for showing by circumstantial evidence that an employer has segregated, limited, or classified employees "because of" a prohibited reason.[97] Meeting the "because of" element proves a difficult task for a brown collar worker, given the prevailing narratives surrounding the willingness of brown collar workers to take the jobs no one else wants.

2. *Disparate Impact Theory*

In the disparate impact case, a plaintiff must show that an employment practice causes an adverse impact on a protected group.[98] The plaintiff must identify a specific employment practice that causes a substantial adverse impact on a protected group, unless "the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis."[99] In that case, "[t]he decision making process may be analyzed as one employment practice."[100] The difficulty in the brown collar context arises from a resistance to the idea that the employer is involved in *any* practice, much less a discriminatory process.

Even when alleging that combined practices produce segregated brown collar workplaces, brown collar plaintiffs must prove causation. To demonstrate causation, a plaintiff must "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[101] An employer will argue that the brown collar worker takes the "unwanted" job, and stays in it, by choice. An employer may also argue that he is simply seeking subservience, rather than targeting national origin. The plaintiff must be careful to—indeed, may not be able

---

of conditions in the segregated workplace. Such a remedy presumably would re-integrate the job once nonminority workers perceived that the terms and conditions were no longer substandard. Likewise, the reintegration of the job would also ensure continued improvement in its terms and conditions. A discussion of how this framework would operate is the subject of a separate article. Leticia Saucedo, The Brown Collar Workplace: Seeking the Solution for the Inexorable 100 (Aug. 31, 2006) (unpublished manuscript, on file with author).

[97] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973); *see generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[98] 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

[99] 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

[100] *Id.*; Stender v. Lucky Stores Inc., No. C-88-1467 MHP, 1992 WL 295957 at *2 (N.D. Cal. Apr. 28, 1992) (finding that a defendant's subjective decision making process could be scrutinized as a process "not capable of separation for analysis").

[101] Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 994 (1988).

to—make clear causal connections between a specific employer practice and the protected category.[102] The myth that the market determines a worker's place, and that a brown collar worker's place is inevitably at the lower end of the economic ladder, proves intractable.

If the brown collar plaintiff meets the prima facie hurdle, the employer has the burden of showing that the practice is "job related for the position in question and consistent with business necessity."[103] Under the current framework, if an employer does prove business necessity, a plaintiff can then demonstrate that the employer refused to adopt an effective alternative practice or selection device that would have a less adverse impact.[104] In the brown collar context, the employer may argue that subservience is a job related qualification for the position at hand. Such an assertion provides another opportunity for assumptions about the brown collar worker's situation to infiltrate the decision maker's determination about whether the employer practice is discriminatory. In other words, a judge may agree that an employer is simply seeking willing workers and should not be responsible for the societal discrimination that creates the subservience.

3. *Disparate Treatment Theory*

In the typical disparate treatment case—the most likely claim for a brown collar worker challenging employer targeting—a plaintiff must show a prima facie case of intentional discrimination. In the absence of direct evidence, the individual plaintiff's prima facie case requires a showing that the plaintiff is a member of a protected class, is qualified for a targeted job, and that those outside the protected class were treated more favorably.[105] Once a plaintiff establishes a prima facie case, the employer must respond with a legitimate, nondiscriminatory reason for its actions.[106] If the employer comes forward with a legitimate, nondiscriminatory reason for its decision, the plaintiff must then establish that the employer's legitimate business reason is a pretext for unlawful discrimination.[107] Alternatively, a group of

---

[102] *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 614–19 (2004) (warning of the "red herring" argument embedded in disparate impact claims and of the need for plaintiffs to make strict causal connections between the employer practice and the protected category).

[103] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[104] 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[105] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

[106] *Id.*; Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981).

[107] *McDonnell Douglas*, 411 U.S. at 802–04; Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

plaintiffs can show a pattern or practice of discrimination, by demonstrating that differential treatment is the employer's standard operating procedure.[108] This claim involves an allegation that the defendant's conduct rises to the level of intentional discrimination against a protected class. Here, the plaintiffs demonstrate through statistical evidence, together with anecdotal evidence, the disparities that create an inference of discrimination.[109]

In a disparate treatment case, the plaintiff must show that the employer operates with some sort of discriminatory intent in mind. In the early cases, a background assumption of employer discrimination was unstated yet understood.[110] Increasingly, courts have begun to accept the premise that employers are color blind.[111] Thus, the existence of segregated jobs continues to be judged as nothing more than a societally driven phenomenon. Debra Malamud suggests the dangers of this interpretation:

> If facially neutral business decisions that are not (or not yet) subject to Title VII challenge are perpetuating a labor market in which racial and ethnic segregation is an everyday occurrence, then labor market segregation continues to be accepted as natural and normal. The segregation caused by intentional discrimination does not stand out as clearly as it otherwise would; it just becomes another thread in the segregated fabric of American life. And segregation, which we still claim to reject in principle, becomes ever more accepted as fact.[112]

The formal elements of an intentional discrimination claim—individual or class-based—leave much room for an employer to provide alternative explanations for the existence of brown collar segregated workplaces. The doctrine holds that if differential treatment occurs for some legitimate reason

---

[108] *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 303 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

[109] *Teamsters*, 431 U.S. at 339.

[110] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."); *see also* Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998 (1994) (chronicling the shift among courts, commentators, and others away from a working assumption of discrimination in the workplace toward an assumption that discrimination is no longer a problem).

[111] Sheila Foster argues that the Court's narrative "reveals a normative vision that the world in which we live is rooted in a *contra*factual assumption of equality between groups." Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1546 (2005).

[112] Malamud, *supra* note 61, at 336.

other than national origin (or some other protected category), the employer may not be held liable for discriminatory behavior.[113] The employer would argue that its preference for subservient workers has absolutely nothing to do with the employee's national origin; it has more to do with the employee's constricted choices stemming from his social situation.[114] In that case, the employer has not treated potential candidates differentially by offering a job at a lower pay rate and with worse conditions that anyone can take. The formal doctrinal requirement that workers be treated the same is met. However, it must be scrutinized more carefully to determine the employer's true role.[115]

As another example, if differential treatment or impact can be explained as reflecting the brown collar worker's interests, the employer will not be held liable.[116] The brown collar worker case is actually the mirror image of the type of case which traditional anti-discrimination frameworks typically address. The brown collar worker is "interested" in the job nobody else is interested in, so he has not been "denied" the opportunity to fill that job. On the other hand, the employer argues, the brown collar worker is not interested in other opportunities because they require skills he neither has nor wants to acquire. The structure of the jobs, combined with increasing market

---

[113] In nepotism and related cases, for example, the employer may argue that his decision to hire certain workers has more to do with favoritism that is not based on protected category status. *See, e.g.*, Foster v. Dalton, 71 F.3d 52 (1st Cir. 1995) (holding that the supervisor did not discriminate by hiring a friend over an African American employee); Odom v. Frank, 3 F.3d 839, 845 (5th Cir. 1993) (accepting employer's argument that his direct supervisory relationships with non-African American applicants merited stronger promotion evaluations); Holder v. City of Raleigh, 867 F.2d 823, 826–27 (4th Cir. 1989) (holding that nepotism does not, by itself, constitute disparate treatment); *cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 n.9 (1989) ("This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities.").

[114] *See* discussion *supra* Part II. C.

[115] Several scholars have written extensively on the need for the doctrines to incorporate employer agency in the structuring of jobs that, in turn, affects employee interest and choices. *See, e.g.*, Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815–39 (1990) (introducing social science research showing that women's job preferences are based on structural and cultural features of employing organizations); Schultz & Petterson, *supra* note 49 (analyzing the relative success of the lack of interest defense in title VII cases); Green, *supra* note 80 (suggesting the need for Title VII doctrine to emphasize structural factors that enable unconscious bias to enter into workplace dynamics).

[116] A number of scholars have rebutted this argument in the gender and race context. Schultz, *supra* note 115. The same type of evidence is necessary in the brown collar context.

segmentation, will prevent the brown collar worker from showing he is "qualified" for advancement opportunities. The skill gap may be too wide to bridge. Even if a brown collar worker could show that the employer's practice of relegating workers to low-wage jobs was a "standard operating procedure," as required in a pattern-or-practice case, the brown collar worker would still have to show differential treatment of similarly situated workers. In the increasingly segmented nature of the brown collar workplace, proof problems will arise.

In short, the assumptions behind why immigrants take and keep these jobs are difficult to overcome. For these reasons, the formal doctrine must be adjusted to fit the brown collar context. The next Part discusses the assumptions—arising out of traditional economic theories—operating within jurisprudence in the implementation of the doctrine. These assumptions are increasingly embedded in the color blind, anti-differentiation interpretation of equal protection. The economic models ignore the social factors that make brown collar workers subservient as long as employers treat all workers equally.

IV. ECONOMIC THEORIES OF SEGREGATED WORKPLACES: THE TRADITIONAL NARRATIVES

In the color blind model of antidiscrimination law, segregation is explained in individualistic economic terms such as lack of interest, or lack of human capital. The assumptions of courts and decision makers have shifted to conform to the narratives provided by the neoclassical economic theories and the law and economics theorists who propound them. The dominant economic theories—neoclassical and dual labor market—form the underpinnings for color blind anti-differentiation perspectives in anti-discrimination law.

A. *Neoclassical Law and Economics Theory of Segregated Workplaces*

The neoclassical economic theory and its law and economics counterparts employ narratives for the existence of segregated workplaces that are rooted in the individual tastes and preferences of employers and employees.[117] The theory underestimates the employer's role in cultivating

---

[117] GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 14–17 (2d ed. 1971); *see also* Kenneth Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS (Orley Ashenfelter & Albert Rees eds., 1973).

brown collar workplaces. Nonetheless, because it guides judicial review in employment discrimination claims,[118] an overview of the theory is important.

In a truly unregulated market, according to the theory, the market drives out discriminatory preferences because they are not related to productivity.[119] Law and economics theorists, advancing traditional economic models, argue that discrimination persists in the workplace because external forces interfere with the market's proper function.[120] They contend that government regulation should not interfere with the market process unless government action itself is causing discriminatory behavior, or unless the market is so skewed that it affects worker choice.[121] Antidiscrimination laws, therefore, harm or endanger the efficiency of the market. Segregation persists because state policies interfere with market processes.[122] Thus, for example, Jim Crow legislation produced a segregated textile industry, when other industries at the time enjoyed an overrepresentation of Blacks.[123]

While this argument may address employer rationales for failing to hire workers, it does not adequately respond to the problem of "overrepresentations" in segregated occupations as possible indicators of discriminatory practices. Instead, overrepresentation in a job is attributed to individual human capital and employee preference.[124] The theory is that a worker's investment in his or her human capital will determine the worker's place in the occupational distribution.[125] The law and economics version of

---

[118] *See, e.g.*, Wards Cove Packing v. Atonio, 490 U.S. 642, 653 (1989); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 320–22 (7th Cir. 1988).

[119] BECKER, *supra* note 117, at 14–16.

[120] *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 91–97 (1992).

[121] *Id.*

[122] *Id.* at 248.

[123] *Id.* at 244–51. Epstein argues that government legislation and not "cognitive bias, endogenous preferences, or calculation error" perpetuated segregated workplaces in the textile industry. *Id.* at 248.

[124] *Id.*; ROSS M. STOLZENBERG, OCCUPATIONAL DIFFERENCES BETWEEN HISPANICS AND NON-HISPANICS, N-1889-NCEP (1982) (a report prepared for the National Commission for Employment Policy); *cf.* CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (Oxford U. Press 1997). The Supreme Court adopted this rationale in *Wards Cove*, when it found that minorities stay in low-paying jobs because they lack the social capital to seek better alternatives. *See generally* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). This may account for some, although not all, of the distribution. WALDINGER & LICHTER, *supra* note 22, at 7; PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 57.

[125] EPSTEIN, *supra* note 120, at 152–53.

this argument is demonstrated in Justice Posner's explanation of wage disparities in *American Nurses' Association v. State of Illinois*:[126]

> Economists have conducted studies which show that virtually the entire difference in the average hourly wage of men and women, including that due to the fact that men and women tend to be concentrated in different types of job [sic], can be explained by the fact that most women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their "human capital" (earning capacity); and since part of any wage is a return on human capital, they tend therefore to be found in jobs that pay less.[127]

With respect to human capital arguments, the theory fails to account for why immigrant workers, unskilled and with less education than most Blacks, have established themselves in niches—such as construction or manufacturing—where they should not exist.[128] Neoclassical economic theory has been criticized for its inability to capture the social and political landscape surrounding employer decisions. In other words, the theory fails to explain how or why employers choose certain workers for a given set of jobs.

Critics also point out that discrimination can, in fact, be an economically rational decision for employers. Rational discrimination, therefore, may actually perpetuate segregation. Stereotypes and generalizations, although broad and inaccurate, continue to exist throughout market decision making because they are efficient. This type of categorization replaces more individualized decision making about worker productivity. Such categorization, however, does nothing to eradicate segregation. Cass Sunstein succinctly summarizes the problem:

> Despite their imprecision, such categorical judgments might well be efficient as a cost-saving device and thus persist in free markets; but they might also disserve the cause of equality on the basis of race and gender .... The conclusion is that free markets will not drive out discrimination to the extent that discrimination is an efficient use of generalizations that, while inaccurate in some ways, have sufficient accuracy to persist as classificatory devices.[129]

---

[126] Am. Nurses' Ass'n v. State of Illinois, 783 F.2d 716 (7th Cir. 1986). Judge Posner's description is dicta in a case that allows female nurses to prove pay discrimination.

[127] *Id.* at 719.

[128] WALDINGER & LICHTER, *supra* note 22, at 7.

[129] Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2416–17

B. *Dual Labor Market Theories of Segregated Workplaces*

Dual labor market theory explains "persistent structural inequalities, despite increases in human capital."[130] According to the theory, the current segmented labor market results from market restructuring over the past thirty years. The labor market consists of primary and secondary markets. The primary market controls core, stable jobs. The less desirable, unstable jobs occupy the secondary market.[131] Dual labor market theories define distinctions between core and secondary jobs in terms of pay, occupational distribution, and conditions.[132]

According to dual labor market theory, jobs are stratified according to skill requirements. The skill levels define higher and lower paying jobs within a market. In the restructured labor market of the past several decades, employers up-skilled several jobs and de-skilled others. Up-skilling refers to the process of creating more specialized jobs that require higher level skills. De-skilling refers to the process of stripping the higher-level skills from a job to create a low or no-skill position. This process has created even more specialized and routinized skilled and unskilled positions. Consequently, even within a company, the lines of progression are stratified. This polarized labor market concentrates highly and poorly paid jobs in the same geographic market, or even in the same location.[133]

Theorists have advanced several different reasons for market polarization. Doeringer and Piore's seminal work describes the phenomenon as the result of technological shifts creating firm-specific skills that keep primary market employees in their jobs over time.[134] This aspect makes the primary jobs more stable. The primary market may also reflect efforts to advance the interests of those who hold primary jobs, at the exclusion of

---

(1994).

[130] Lesley Williams Reid & Beth A. Rubin, *Integrating Economic Dualism and Labor Market Segmentation: The Effects of Race, Gender, and Structural Location on Earnings*, 44 SOC. Q. 405, 411 (2003).

[131] *See, e.g.*, PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 165 (1971); Reid & Rubin, *supra* note 130, at 407; Nestor Rodriguez, *"Workers Wanted": Employer Recruitment of Immigrant Labor*, 31 WORK AND OCCUPATIONS, 453, 463 (2004).

[132] Reid & Rubin, *supra* note 130, at 407.

[133] Rodriguez, *supra* note 131, at 462; PEW OCCUPATIONAL MOBILITY STUDY, *supra* note 7, at 8; BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA (1988).

[134] DOERINGER & PIORE, *supra* note 131, at 29–34; GRINT, *supra* note 25, at 246.

others.[135] This phenomenon makes the secondary jobs even more unstable, and the primary jobs more difficult to obtain.

The employer's role in creating the character and contours of the labor market is especially influential in the secondary sector. In other words:

> In the models of economic segmentation, the employer emerges as an especially critical starting and end point for the mustering of workforces in the secondary labor market. In contrast to employers in the primary labor market who often must follow established company policies, employers in the secondary labor market have greater room to maneuver in organizing a workforce.[136]

Thus, while the primary labor market reflects a seller's market, the secondary labor market is a buyer's market. The employer has much more leeway to form a "picture in his head" about what type of person can best fill the secondary market job.[137]

The unstable character of the secondary labor market forces employers to continually and actively seek workers in order to avoid labor shortages.[138] The introduction of immigrant workers into this dual labor scheme helps explain why the neoclassical model of labor supply and demand does not work, especially in the secondary sector.[139] The neoclassical model assumes a potential labor scarcity, while, in reality, alternative sources of labor exist, as is evident today with the existence of brown collar workplaces.[140]

---

[135] GRINT, *supra* note 25, at 246.

[136] Rodriguez, *supra* note 131, at 463.

[137] William T. Bielby, *Social Science Accounts of the Maternal Wall: Applications in Litigation Contexts*, 26 T. JEFFERSON L. REV. 15, 22 (2003); WALDINGER & LICHTER, *supra* note 22, at 106–07.

[138] Although secondary market employers actively recruit workers from different sources, foreign workers in the secondary market must secure their own visas or employment authorization documents. Work visas for employees in the secondary market are extremely restricted or non-existent. The employer's sole responsibility under the current law is to ensure that documents are facially valid. For the most part, if workers have possibilities for legalization, those possibilities come from family sponsorship. I.N.A § 274A(a)(7)(b)(1)(A); I.N.A. § 274B(a)(6) (2000).

[139] The secondary market remains vibrant in large part because the federal government does little to enforce employer sanctions laws punishing employers for hiring undocumented workers. Congress passed these provisions in 1986 to protect all workers, regardless of immigration status, from substandard conditions. H.R. REP. No. 99-682(I), at 47 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5662. Lax enforcement of the provisions perpetuates the problem. Consequently, employers can hire an exploitable labor force without a high risk of sanction.

[140] GRINT, *supra* note 25, at 257.

Evidence of an employer pull demonstrates that employers are searching outside of their surrounding communities for labor pools.[141] As a result, the wages of existing workers in the market need not be driven up.

The dual labor market theory helps explain why brown collar workers occupy jobs with short career ladders and in polarized, segmented markets. It also helps explain wage disparities over time. Most importantly, it provides a framework for understanding the powerful role of employers' recruitment, hiring and assignment practices, especially in the secondary market. It does not, however, explain how and why employers' targeting of subservience leads to brown collar workplaces. Both economic theories appear in judicial opinions, and each would explain the existence of brown collar workplaces as natural, inevitable processes. Examples from case law illustrate this point.

C. *Case Law Illustrations of the Neoclassical and Dual Labor Market Economic Theories*

Courts that accept the color blind, conventional economic theories would be skeptical of the allegation that an employer's biases, coupled with its structuring of "unwanted" jobs ultimately creates the segregated brown collar workplace. The presumption is that the employer, by treating similarly situated employees equally, has not discriminated, even though the plaintiffs may find themselves in subordinated or disadvantaged positions. Three cases demonstrate the power of the mainstream economic theories in the case law.

1. Wards Cove Packing Co. v. Atonio[142]

Wards Cove Packing Co. v. Atonio is the classic example of segregation that the disparate treatment and disparate impact frameworks no longer adequately address. In *Wards Cove*, a group of minority workers sued under Title VII's disparate treatment and disparate impact theory, alleging the employer's hiring and promotion practices relegated minority workers to the lower-status cannery positions and denied them opportunities as noncannery workers on the basis of race.[143] The plaintiffs produced statistics showing the overrepresentation of minority workers in the unskilled cannery positions, and their under representation in the more desirable, better-paying, skilled,

---

[141] Evidence shows that in the agricultural and construction sectors, the migration pattern for Latinos reflects recruiting practices that date back to programs such as the Bracero Program of the 1940's. Under this program, the U.S. and Mexican governments contracted to allow the importation of Mexican labor for agriculture and construction jobs. *See* NGAI, *supra* note 40, at 127–66; David Barboza, *Meatpackers' Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES, Dec. 21, 2001, at A26, *available at* 2001 WLNR 3364808.

noncannery positions, filled predominantly by Anglos.[144] The plaintiffs identified several employment practices—including subjective hiring criteria, English language requirements, separate hiring channels, and a practice of not promoting from within—that were responsible for the racial stratification of the workforce.[145] The employer argued that the nonwhite workers were overrepresented in the less-desirable cannery jobs because the employer filled the jobs pursuant to a hiring hall agreement with a predominantly nonwhite union.

The court of appeals held that the statistics showing the imbalance proved a prima facie case of discrimination.[146] The Supreme Court reviewed the disparate impact claims and reversed, holding that simply showing an imbalance in the workforce was not sufficient proof of discrimination.[147] The proper statistical comparison in a disparate impact analysis was between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs.[148] The holding made it more difficult to bring disparate impact claims involving classification or segregation of employees.[149] The Court refused to read employer bias into the imbalance in

---

[142] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[143] *See* Brief for the National Association for the Advancement of Colored People as Amicus Curiae Supporting Respondents, Wards Cove Packing v. Atonio, 490 U.S. 642 (1989) (No. 87-1387) [hereinafter NAACP Brief]. The NAACP's brief did an excellent job of describing the difficulties inherent in trying to squeeze a segregation fact pattern into one of the existing proof models:

> The courts below did not recognize the job segregation of minorities as a violation of Title VII. The District Court discounted evidence of segregation of minorities in low paying jobs as "over-representation" of minorities. It then analyzed several employment practices separately but never examined the interaction between segregated hiring, job assignment, and the refusal to consider minorities for promotion or transfer. The Court of Appeals analyzed employment procedures under the disparate impact principle and reversed the District Court. In applying the impact principle, it recognized a "business necessity" defense to the maintenance of job segregation. This is not the law. Job segregation is illegal . . . the facts—segregation in hiring, job assignments, . . . and refusal to transfer or promote minorities—make this case an inappropriate vehicle to resolve questions concerning disparate impact theory.

Id. at *3.

[144] *Id.*

[145] *Id.*

[146] Atonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987).

[147] *Wards Cove*, 490 U.S. at 650.

[148] *Id.*

[149] However, the opinion leaves open the possibility of a claim if the dearth of qualified nonwhite applicants were due to the employer's practices that deterred

its workforce, noting that such a conclusion would leave any employer with an imbalance not of his own making vulnerable to a lawsuit.[150] The Court noted that bottom line statistics of racial imbalance in the workforce were insufficient to prove causation.[151] The Court required a showing that each of the specific employment practices actually caused a statistically significant imbalance.[152] Its decision created a tremendous burden for plaintiffs seeking to eradicate segregated workplaces through the available proof models. As Justice Blackmun noted in his dissent:

> This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunized these practices from attack under a Title VII disparate-impact analysis.[153]

Justice Stevens, who also dissented, criticized the majority for underestimating "the probative value of evidence of a racially stratified work force."[154] He noted that "such evidence of racial stratification puts the specific employment practices challenged by [the minority workers] into perspective."[155] In fact, the "overrepresentation" in this case is a euphemism for segregation.[156]

---

protected class members from applying for jobs.

[150] *Wards Cove*, 490 U.S. at 652. As the Court noted:

> Racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers). As long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions . . . if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities.

Id. at 653.

[151] *Id.*

[152] *Id.* This particularly onerous burden was removed by Congress when it reversed parts of the Wards Cove opinion in the Civil Rights Act of 1991.

[153] *Id.*

[154] *Id.* at 663.

[155] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989). The dissent also notes that the overrepresentation of nonwhites in a particular position is significant as a potential sign of barriers to opportunity in another part of the company's workforce. *Id.*

[156] NAACP Brief, *supra* note 143, at *9. ("Treating segregation as 'over-representation' obscured segregation as a violation. The argument that because plaintiffs

In effect, the *Wards Cove* opinion required a showing of both segregation *and* proof of discrimination through one of the existing models, even though, on its face, Title VII makes segregation illegal. As the National Association for the Advancement of Colored People ("NAACP") stated in its amicus brief to the Court:

> The statute is intended to assist those who have been segregated to break out of their situations, not to permit the fact of segregation to justify restrictions against them. The segregation into low paying jobs does not constitute favored treatment as the term "over-representation" suggests; rather, it constitutes the continued exploitation of minority workers trapped into low paying jobs.[157]

By the time the Court decided *Wards Cove*, it and other courts had distanced themselves from the background assumption that employer practices reflected the perpetuation of historical discrimination or were even discriminatory in and of themselves.[158] In the Court's narrative, the employer was an innocent party operating in a color-blind world.[159] This narrative of the color-blind employer exemplified in *Wards Cove* raises the evidentiary bar for plaintiffs, who must present evidence to rebut the court's assumption of colorblindness, even though the framework may not require it.

The Supreme Court refused to accept the argument that the *Wards Cove* facts demonstrated a form of illegal segregation akin to that in *Brown v. Board of Education*.[160] The NAACP brief described the similarities between the segregation of Blacks before the passage of Title VII and the segregation in *Wards Cove*:

> Because of the litigation under Title VII, many of the overt forms of discrimination, such as hiring from dual segregated labor markets, discrimination in job assignments, and discriminatory refusals to allow

---

are segregated they are entitled to no relief because they are over-represented is disingenuous.").

[157] *Id.* at *10.

[158] Schultz & Petterson, *supra* note 49, at 1149–61. Schultz and Petterson provide an excellent empirical analysis of changes in the courts' willingness to accept the lack of interest argument over a period. Their analysis shows that in early cases courts were more willing to reject arguments that plaintiffs were not interested in at-issue jobs, and accept plaintiffs' evidence of past discrimination as the explanation for segregated work conditions.

[159] Sheila Foster argues that the Court's narrative "reveals a normative vision that the world in which we live is rooted in a *contra*factual assumption of equality between groups." Foster, *supra* note 111, at 1546.

[160] NAACP Brief, *supra* note 143.

> Blacks into better paying jobs, have been abandoned. However, there still remain circumstances in which minorities are restricted today, in precisely the same manner as in earlier years.[161]

As the NAACP brief succinctly asserted, "job segregation is illegal."[162] The NAACP urged the Court to analyze the case as one involving segregation, with its own framework for analysis outside of the disparate impact framework.[163] As the brief noted:

> This obvious violation of Title VII was obscured because of the efforts of the courts below to fit this case of brutal segregation into the framework of disparate impact or disparate treatment. The concept of disparate impact was intended to address facially neutral practices. The concept of disparate treatment was intended to order the proofs in an individual case of discrimination . . . . [The frameworks] were not developed in, nor have they been applied to, cases of current work force segregation.[164]

The Civil Rights Act of 1991 fixed many of the problems that the NAACP brief cited as obstacles to showing segregation as a Title VII violation. Most notably, although it requires plaintiffs to articulate specific employer practices that cause a disparate impact, it allows the plaintiffs to target an employer's decision making process as a whole, if the plaintiffs can show that "the elements of a respondent's decision making process are not

---

[161] *Id.* at *2. The NAACP also argued that the lower courts erred in characterizing the segregated conditions of workers in the cannery lines as an "overrepresentation."

[162] *Id.* at *4. The brief further noted:

> The argument that because plaintiffs are segregated they are entitled to no relief because they are over-represented is disingenuous . . . . The segregation into low paying jobs does not constitute favored treatment as the term "over-representation" suggests; rather, it constitutes the continued exploitation of minority workers trapped into low paying jobs . . . . This deprivation of individual rights cannot be justified by a claim that the concentration of minorities in segregated jobs constitutes "over-representation."

Id. at *9–11.

[163] *Id.* at *7. As the NAACP argued:

> None of the cases previously before this Court involved an employer who hired minorities through recruiting practices separate from those used to hire whites, assigned them to lower paying jobs and then, as a matter of general policy, refused to consider them for promotion or transfer to the better "white" jobs. The refusal to consider minorities for promotion out of segregated jobs is illegal *per se* as maintaining segregation.

Id. at *4.

[164] *Id.* at *7.

capable of separation for analysis."[165] This provision allows a plaintiff to challenge employer decisions that are not easily identifiable.[166] It presumably ensures that an employer remains liable for multi-factor decision making.[167]

The statute's amendments did not, however, provide a separate framework for analyzing segregation cases. Consequently, conditions of segregation, such as those in the brown collar workplace, are still subject to the proof structures of the disparate treatment or disparate impact frameworks, absent direct evidence of discrimination.

2. EEOC v. Chicago Miniature Lamp Works[168]

In early word-of-mouth cases, especially those challenging practices that reserved jobs for Anglos, courts condemned word-of-mouth hiring as discriminatory.[169] Since then, a line of cases condoning word-of-mouth hiring is rooted in the *Wards Cove* narrative. Those cases involve immigrant hiring practices, which courts are reluctant to disturb. In *EEOC v. Chicago Miniature Lamp Works*, the court allowed the practice when it involved ethnic niches within immigrant communities in Chicago. The EEOC sued on behalf of a class of black applicants, challenging the company's word-of-mouth hiring practices that resulted in the disproportionate hiring of other minorities into entry level positions. The trial court found the company liable

---

[165] 42 U.S.C. § 2000e-2(k)(B)(i) (2000).

[166] 42 U.S.C. 2000e-2(k)(B)(i) (2000); *see, e.g.*, Stender v. Lucky Stores Inc., No. C-88-1467 MHP, 1992 WL 295957, at *2 (N.D. Cal. Apr. 28, 1992) (finding that a defendant's subjective decision making process could be scrutinized as a process "not capable of separation for analysis").

[167] Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 564 (1991) ("Just as the Supreme Court ruled that an employer's use of subjective criteria does not protect it from claims of disparate impact discrimination, the use of multiple criteria or one criterion with multiple components should similarly not afford immunity."). This is important because the employer practices that manifest themselves in brown collar workplaces tend to be multiple. Moreover, the practices intertwine with subconscious reasons for employer behavior in ways that cannot easily be separated. Addressing the overall practice that manifests itself through multiple decisions will allow courts to root out potential bias in employer decision making. Schulz, *supra* note 115, at 1816.

[168] EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991).

[169] *See, e.g.*, Domingo v. New England Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984) (holding that word-of-mouth hiring that relegated minority workers to less desirable jobs and whites to more desirable jobs was discriminatory); NAACP v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982) (holding that pattern and practice of word-of-mouth hiring perpetuated the effects of past discrimination); *see also* Schultz & Petterson, *supra* note 49, at 1135–40.

under both disparate treatment and disparate impact theories. The circuit court reversed, holding that the plaintiffs failed to show either an active employer practice that caused the disparate impact or that the employer intentionally discriminated. Instead, the court held that the employer passively relied on word-of-mouth hiring to fill its low-wage jobs. In downplaying the EEOC's statistics, the court considered other causal factors affecting the relevant labor market, including commuting distance and English fluency requirements. The court credited the employer's lack of interest defense, and the neoclassical economic theory of supply and demand underlying the defense. The defense asserts that workers—in this case, the African Americans who were not hired—choose the jobs that interest them, and eschew others, for a variety of reasons.[170] Ethnic immigrant workers chose these particular jobs, and maintained a lock on their hiring over time. This competition among workers, according to the argument, cannot be attributed to any employer practice.

The court's reliance on the dominant neoclassical economic theory to explain the employer's behavior as passive[171] ignores the sociological evidence to the contrary.[172] Network recruiting is a process that reflects employer preferences and employer attitudes about employee traits. The process starts with what the employer seeks from workers for a particular job, and transforms into employers actively soliciting workers from a particular pool.[173]

3. EEOC v. Consolidated Service Systems[174]

The Seventh Circuit Court's reasoning in *EEOC v. Consolidated Service Systems* reflects the assumption of the employer as a color-blind, rational economic actor. In that case, the EEOC sued a Korean-owned janitorial and cleaning services company on behalf of a group of blacks, alleging that the company discriminated in favor of Korean workers. The EEOC targeted the company's word-of-mouth hiring practices as intentionally discriminatory. The court found that although the percentage of Koreans was

---

[170] EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 354–25 (7th Cir. 1988); Schultz, *supra* note 115, at 1811–13; *see generally* Schultz & Petterson, *supra* note 49.

[171] *Chi. Miniature*, 947 F.2d at 305. ("[I]t is uncontested that Miniature passively waited for applicants who typically learned of opportunities from current Miniature employees . . . . [A] more affirmative act by the employer must be shown in order to establish causation.").

[172] *See infra* discussion, Part V.

[173] WALDINGER & LICHTER, *supra* note 22, at 141–54.

[174] EEOC v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993).

disproportionate to their percentage in the labor market, that evidence did not create an inference of discrimination. The court assumed the inevitability, and therefore non-discriminatory nature, of word-of-mouth hiring:

> Of course if the employer is a member of an ethnic community, especially an immigrant one, this stance is likely to result in the perpetuation of an ethnically imbalanced work force. Members of these communities tend to work and to socialize with each other rather than with people in the larger community. The social and business network of an immigrant community racially and culturally distinct from the majority of Americans is bound to be largely confined to that community, making it inevitable that when the network is used for job recruitment the recruits will be drawn disproportionately from the community.[175]

The court's opinion in *EEOC v. Consolidated Service Systems* echoed the prevalent narrative of the struggling immigrant small business owner, while ignoring the need for anti-discrimination law to protect the immigrant worker at the center of the employer's preference:

> The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses—grocery stores, furniture stores, clothing stores, cleaning services, restaurants, gas stations—have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring.[176]

The court utilized the myth of the immigrant worker climbing the economic ladder to condone the employer's network hiring mechanism. It further noted that bringing a claim under the disparate impact theory would not have changed the outcome. The court would have decided, as it did in *Miniature Lamp*, that there was no employment practice.[177] The court pointed out that "[i]t is not discrimination, and it is certainly not active

---

[175] *Id.* at 235.

[176] *Id.* at 237–38.

[177] *Id.* at 236.

discrimination, for an employer to sit back and wait for people willing to work for low wages to apply to him."[178]

4. *Effect of the Economic Theory in Case Law*

The powerful myth of the unwanted job infiltrates all levels—employers, workers, policy makers, courts, and the public. It obscures employer intentionality, giving the illusion that taking unwanted jobs is a natural part of the economic incorporation process for brown collar workers. The mainstream economic theories support the myth and its corollary that by investing in one's own human capital, one can advance from these jobs. This dominant view is then reflected in the implementation of the disparate impact and disparate treatment frameworks.

The next Part of this Article provides the support for an alternative narrative that portrays the hiring of brown collar workers for the unwanted job as a much more deliberate and intentional process. The alternative theories discussed here may provide the key to dismantling the myth of the immigrant worker's willingness to take the job no one else wants. If so, they may provide a claim for brown collar workers seeking to improve their workplace status through advancement opportunities.

V. SOCIOLOGICAL THEORIES OF SEGREGATED WORKPLACES: THE ALTERNATIVE NARRATIVES

The mainstream economic theories simply do not fully explain how employer perceptions of the potential labor pool affect the creation of a company's workforce. Three interrelated sociological theories provide the alternative to the mainstream economic narratives.

A. *Economic Sociology Theories of Segregated Workplaces*

Economic sociology theories posit that labor markets do not develop in isolation. Labor markets develop in the context of personal relationships and social structures that inform economic decisions.[179] Economic sociologists critique neoclassical and dual labor market theories for their inability to recognize that social conditions continually influence economic decision making.[180] Neoclassical theories ignore social, religious, and political

---

[178] *Id.* at 237.

[179] THE SOCIOLOGY OF ECONOMIC LIFE 11–12 (Mark Granovetter & Richard Swedberg eds., 2001).

[180] Mark Granovetter, *Economic Action and Social Structure: The Problem of*

institutions; dual labor market theories assume that actors always act according to their class and social status.[181] In the economic sociology literature, economic actors are not simply isolated, pre-determined, rational, lowest-cost benefit seekers. Nor are they playing a pre-determined role based on their class or social status. Instead, economic transactions are embedded in interpersonal relationships that influence decisions such as labor market prices and workplace conditions.[182]

Economic sociology theory explains the prevalence of network hiring for jobs that become segregated over time. Employers take advantage of the networks that newly arrived immigrants have built around them.[183] In the words of economic sociologists, "economic institutions are constructed by the mobilization of resources through social networks, conducted against a background of constraints given by previous historical development of society, polity, market, and technology."[184]

Network hiring, therefore, is a method for maintaining existing job structures. Networks perpetuate the ethnic and racial composition of the workforce. Ultimately, the employer benefits from network hiring both because it is less costly and because it ensures stability in the workplace without much of an implicit promise from the employer beyond the initial job.[185] Economic sociology, through its network theory, explains how the

---

Embeddedness, *in* THE SOCIOLOGY OF ECONOMIC LIFE 51 (Mark Granovetter and Richard Swedberg eds., 2001).

[181] *Id.* at 54.

[182] *Id.* at 57.

[183] Although the theory remains important as an analytical tool for how immigrants become incorporated into and maintain employment streams, there is some disagreement about the characteristics of network ties that are ultimately successful. The dominant theory in economic sociology holds that a person's weak and extensive ties prove more successful than strong ties among people who do not penetrate very high up the economic ladder. *See generally* Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973). Some evidence shows that among Latino immigrants, strong ties are more important for maintaining and expanding hiring networks. Roger Waldinger, *Network, Bureacracy, and Exclusion: Recruitment and Selection in an Immigrant Metropolis*, *in* IMMIGRATION AND OPPORTUNITY: RACE, ETHNICITY, AND EMPLOYMENT IN THE UNITED STATES 254–55 (Frank Bean & Stephanie Bell-Rose eds., 1999). The important point here is that the theory behind network hiring helps explain the social structures that employers utilize that ultimately lead to segregated brown collar workplaces.

[184] THE SOCIOLOGY OF ECONOMIC LIFE, *supra* note 179, at 18.

[185] This relationship is very different from that of previous generations, when the implicit employer-employee contract involved the employer providing job and retirement security in return for a long-term employment relationship. DOERINGER & PIORE, *supra* note 131, at 33; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 571–

social relations between employer and employee, coupled with the social conditions of the employees, perpetuate segregated workplaces. Once a group of pioneers successfully plays the subservient role that employers seek, employers continue to seek them out, thus starting a hiring cycle that quickly develops into segregated workplaces.[186]

Certain jobs become the domain of a particular ethnic group, especially after a network hiring pattern is established.[187] The economic sociology model helps reveal that network hiring requires active communication, cultivation of a particular group of workers, and maintenance of a network of social relations over time. Network hiring is far from the passive process some courts have portrayed.[188]

B. *Socio-Psychological Theories: Employer Biases Influencing Segregated Workplaces*

The socio-psychological literature on employer bias, addressed extensively in legal scholarship, explains the dynamics that cause the employer to act on unconscious or cognitive biases that link the brown collar worker with subservience.[189] Charles Lawrence's groundbreaking article,

---

72 (2001) (arguing that employment structures have shifted from an internal labor market system, reflecting a "psychological contract" between employer and employee that promises long-term, stable employment with one employer, to a "boundaryless workplace" where employees expect employability, general training, micro level job control, and market-based pay); Alejandro Portes, *The Economic Sociology of Immigration: A Conceptual Overview*, *in* THE ECONOMIC SOCIOLOGY OF IMMIGRATION: ESSAYS ON NETWORKS, ETHNICITY, AND ENTREPRENEURSHIP 8 (Alejandro Portes ed., 1995).

[186] WALDINGER & LICHTER, *supra* note 22, at 103–15; Waldinger, *supra* note 183, at 228. These structures, once in place, are very difficult to change. As Barbara Reskin notes, "organizational practices that were designed or evolved at a time when the labor force was mostly male and when African Americans, Asians, and Native Americans were confined to the worst jobs tend to persist in contemporary workplaces unless they are explicitly challenged." RESKIN, *supra* note 78, at 32-34.

[187] Malamud, *supra* note 61, at 328; WALDINGER & LICHTER, *supra* note 22, at 83–120.

[188] EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991); EEOC v. Consol. Serv. Sys., 989 F.2d 233, 235 (7th Cir. 1993). *See* discussion, *supra* Part IV.C.

[189] *See, e.g.*, Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987); David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901 (1993); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1170 (1995) (describing further the effects of categorization through cognitive bias, explaining that the process distorts a person's perception of a situation without the person necessarily being aware of his or her

The Id, The Ego, and Equal Protection,[190] analyzes cognitive psychologists' explanations of unconscious racism stemming, in part, from a process of "categorization" in which people maximize and minimize differences according to the categories in which they fall.[191] The unconscious racism that stems from the categorization process explains the employer's willingness to preserve differentiations between in-group and out-group members.[192]

The story does not end there, however. Social cognition theory demonstrates the effects of categorization on humans' perceptions even when out-group bias is not at issue.[193] Bias can arise as much from in-group favoritism as from aversion to an out-group.[194] The in-group is favored for the more desired positions and the out-group fills the remaining positions.[195] In-group status makes in-group members undesirable for jobs on the lower

---

bias); Barbara F. Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEMINISM 313, 318–23 (2002) (explaining categorization, in-group favoritism, stereotyping, and their effects on work structures); Schultz, *supra* note 115 (introducing social science research showing that women's job preferences are based on structural and cultural features of employing organizations); Schultz & Petterson, *supra* note 49 (analyzing the relative success of the lack of interest defense in Title VII cases); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 425–34 (2000) (presenting socio-psychological theories that provide the basis for including unconscious bias, prejudice and stereotyping in the interpretation of current Title VII frameworks); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (pointing out several normative theories, including an anti-subordination principle, not captured by the current frameworks); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001) (exploring devaluation and biased prototypes as forms of cognitive bias not adequately captured in existing anti-discrimination frameworks); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (updating social psychological research on the development of stereotypes, and suggesting implications for advocates).

[190] Lawrence, *supra* note 189, at 337; *see also* Krieger, *supra* note 189 (describing further the effects of categorization through cognitive bias, explaining that the process distorts a person's perception of a situation without the person necessarily being aware of his or her bias); *see generally* Reskin, *supra* note 189 (explaining categorization, in-group favoritism, stereotyping and their effects on work structures).

[191] *See generally* Reskin, *supra* note 189.

[192] Lawrence, *supra* note 189, at 337.

[193] For an excellent analysis of social cognition theory and the assumptions of current Title VII doctrine, see Krieger, *supra* note 189.

[194] Krieger, *supra* note 189, at 1191–95.

[195] WALDINGER & LICHTER, *supra* note 22, at 8–9, 155–59; *see also* Green, *supra* note 80, at 99; Barbara F. Reskin, *The Proximate Cause of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321 (2000) (arguing that social cognition theory can explain how and why discrimination exists).

rungs.[196] Thus, inferior jobs become the domain of the out-group, in this case, immigrants.

The cognitive bias conception of discrimination is not adequately captured by current anti-discrimination law.[197] Professor Linda Krieger analyzes how categorization affects humans' perceptions in ways that the frameworks do not recognize.[198] She draws on behavioral studies that show how stereotypes "influence how information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory."[199] It is in this subconscious process that bias can emerge. Moreover, as Professor David Oppenheimer suggests, the search for motive in the intentional discrimination framework may be incomplete:

> [I]f, as asserted herein, experimental psychology reveals that unconscious racism governs behavior among white employers who would not consciously choose to discriminate against African Americans, then their conduct cannot be explained by a search for malice or bigotry. If those whites charged with making employment decisions have internalized negative stereotypes about African Americans, as the experimental data suggest, the stereotypes will be reflected in their decisions, even if they have no desire, motivation or intent to treat African Americans differently.[200]

Other legal scholars have reached similar conclusions. Professor Ann McGinley, for example, explores sociological and psychological experiments that reveal how racist attitudes are often rooted in unconscious behaviors.[201] Unconscious stereotypes result in automatic, unconscious behavior, a process which she argues must be considered within an effective anti-discrimination framework.[202]

The socio-psychological theories, rooted as they are in employer behavior, explain some of the motivations that make employers equate brown collar workers with the subservient workers they seek. They help explain

---

[196] WALDINGER & LICHTER, *supra* note 22, at 159.

[197] See *supra* note 189 for examples of scholars who critique the inability of the current frameworks to fully incorporate socio-psychological theories of unconscious or cognitive bias.

[198] Krieger, *supra* note 189, at 1186–95.

[199] *Id.* at 1199.

[200] Oppenheimer, *supra* note 189, at 902.

[201] McGinley, *supra* note 189, at 425–34.

[202] *Id.* at 429–30 (citing John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230 (1996)).

how employers internalize bias and how bias can emerge through employer decisions. These theories complement the economic sociology theories, as well as those theories that focus on how employment organizational structures perpetuate segregated workplaces.[203] They allow us to understand the targeting of brown collar workers for their subservient qualities as a form of discrimination.

C. *Structuralist Theories*

Structuralist critics of dual labor market theories challenge their inability to explain why wage inequality and segregation persists even within establishments.[204] Structuralist sociologists have provided much evidence to support the argument that segregated workplaces are more than simply a byproduct of restructured labor markets.[205]

Barbara Reskin, for example, draws important connections between social cognition theories and organizational theories to explain current segmented labor structures.[206] Reskin, who has conducted several women's workplace studies, attributes wage disparities and segregation to employer attitudes—usually unconsciously motivated—about race and sex.[207] According to those studies, although labor market structure may explain a part of earnings (e.g., a manager at an auto parts store will make less than a

---

[203] *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 53–100 (1999), for an explanation of the organizational theory of discrimination and its relationship to the broader economic sociology literature.

[204] Reid & Rubin, *supra* note 130, at 408; Reskin, *supra* note 195, at 319.

[205] Reskin, *supra* note 195, at 321–23 (reviewing studies that show the effect of organizational context on cognitive processes and vice versa); Bielby, *supra* note 137, at 17; William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 129 (2000); NELSON & BRIDGES, *supra* note 203.

[206] Reskin, *supra* note 195, at 321–22.

[207] Barbara F. Reskin, *Employment Discrimination and Its Remedies, in* SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 567, 590–91 (Ivar Berg & Anne Kalleberg eds., 2001). Reskin argues that social cognition research is important to understanding the real roots of discrimination and that the legal system must discard the assumption that "employment practices are usually fair and that it is idiosyncratic psychological pathologies (i.e., prejudice) that prompt some people to break these rules and discriminate."; *see generally* Reskin, *supra* note 195, at 29; BARBARA F. RESKIN & HEIDI I. HARTMANN, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 124–28 (1986); RESKIN & ROOS, *supra* note 63, at 38 ("Because employers tend to place greater weight on custom, stereotypes about sex differences in productivity, and anti-female or pro-male biases than they place on minimizing wages, labor queues typically operate as gender queues that favor men over women.").

manager at a brokerage firm), race and gender play a large role in pay inequalities.[208] Employers relegate non-whites to less desirable jobs, in part because they harbor biases and stereotypes that infect employment decisions. These decisions create labor queues in which white males are favored. As one set of researchers concluded:

> [D]espite changes in the structure of work over the past thirty years, we continue to observe the costs of working in secondary labor markets within both economic sectors and the costs of working in the peripheral sector regardless of labor market location. These findings belie the claims of postindustrial theorists who argue that the new economy has eliminated the barriers to mobility that characterized earlier decades . . . . Race, therefore, contributes to earning disparities, but its effect operates through the distribution of nonwhites to less lucrative jobs across industries.[209]

The structuralist focus on the organizational side of the employer-employee dynamic brings together the various sociological theories into a coherent narrative regarding the preference for and treatment of brown collar workers. Much of structuralist theory focuses on the differences in employer treatment of men and women. To sum up the structuralist account, "differential treatment is built into organizational policy and practice and taken for granted in assumptions about, in any particular organization, what kinds of work is men's work and what kind of work is women's work."[210] Its insights apply as well to the brown collar context.[211]

Legal scholars embracing structuralist theories have asserted that the current doctrine fails to capture the discriminatory practices that create unfavorable structures. These practices are difficult to pinpoint because they fall between, or outside of, disparate treatment and disparate impact frameworks.[212] They also remain difficult to pinpoint because of strong employer narratives regarding employee interest in jobs.[213]

The structuralist theories explain the methods by which employer cognitive or unconscious bias can turn into systems that perpetuate discrimination in the workplace. They help link the economic sociology and socio-psychological theories into a broader theory that encompasses an

---

[208] Reid & Rubin, *supra* note 130, at 407–09.

[209] *Id.* at 423, 426.

[210] Bielby, *supra* note 137, at 17; Bielby, *supra* note 205, at 129; NELSON & BRIDGES, *supra* note 203.

[211] WALDINGER & LICHTER, *supra* note 22, at 31–41.

[212] *See, e.g.*, Schultz & Petterson, *supra* note 49; Green, *supra* note 80; Sturm, *supra* note 189, at 459–61.

[213] *See, e.g.*, Schultz & Petterson, *supra* note 49.

employer's economic decisions, the social context of those decisions, the employer's cognitive biases, and the ultimate structures that create and perpetuate the brown collar workplace.

Empirical and ethnographic data, from studies of employers who have hired immigrant workers, illustrate the power of the sociological theories in explaining how segregation occurs and is maintained in the brown collar workplace. These examples illustrate how the sociological theories can play a role in understanding how employer actions contribute to maintaining a segregated workforce.

D. *Illustrations of the Alternative Theories in Case Studies*

1. *The New York Civil Service Example: Historical Precedent*

Immigration sociologist Roger Waldinger, who has studied ethnic niches for decades, explains that immigrant niches arise from changes in employment structures, which, in turn, allow for shifts in the type of employee hired.[214] In a case study of immigrant professionals entering engineering niches in New York City, Waldinger explored the historical and situational shifts in the civil service system that allowed for initial immigrant penetration in some civil service jobs.[215] In this historical example, the employer's decision to require standardized exams for what had previously been patronage jobs shifted the pool toward more educated Jewish immigrants.[216] This population had not previously enjoyed access to such jobs.[217] This job structuring process opened a door for one ethnic group by creating a distaste for it among others. By 1975, when New York City experienced a fiscal crisis that resulted in massive layoffs and job restructurings, immigrants had begun to cluster in a narrow range of occupations.[218] During the fiscal crisis, the city encouraged older workers to take early retirement, and kept its more recent hires, many of them immigrants.[219] After the city began to rehire employees, the immigrant niches expanded, in part, through informal, word-of-mouth networks. By then, because the jobs were considered "immigrant" jobs, salaries had been suppressed for years.

---

[214] Roger Waldinger, *The Making of an Immigrant Niche*, 28 INT'L MIGRATION REV. 3 (Spring 1994).

[215] *Id.*

[216] *Id.* at 7.

[217] *Id.*

[218] *Id.* at 14.

[219] *Id.*

The city's explanation for not being able to attract white workers was that only immigrants wanted those jobs.[220] This narrative, of course, ignores the city's participation in structuring the jobs in such a way as to attract particular minorities, in a dynamic that Waldinger calls "a matrix shaped by difference in the behavior of native and immigrant workers, the role of recruitment networks, and the internal labor market structure of the civil service itself."[221]

The New York civil service story can be retold today through the brown collar experience. One important characteristic of the story parallels the brown collar experience. City managers relied on the narrative of the unwanted job to explain how immigrant workers fit into their occupations. The narrative of the "unwanted job" is advanced by employers' and immigrants' rights advocates alike today in response to arguments that immigrants are taking jobs away from native born workers.[222]

2. *How the Other Half Works: The Waldinger/Lichter Survey of Immigrant Workers*

In a survey of Los Angeles low-wage employers conducted between 1993 and 1997, sociologists Waldinger and Lichter interviewed employers to figure out how and why they determined whether and where to use immigrant workers in their operations.[223] The conclusions from this survey illustrate how employers seeking subservient workers operate to create and perpetuate segregated workplaces. The survey findings demonstrate the accuracy of structuralist sociology, economic sociology, and socio-psychological theories to explain how employer preferences for subservient workers lead to the development of segregated workplaces.

Over a period of three years, Waldinger and Lichter interviewed 228 employers in low-wage industries in Los Angeles county.[224] The sociologists

---

[220] Waldinger, *supra* note 214, at 17. Waldinger quotes a city human resources manager declaring as a "fundamental reality" that "the city has not been able to get people to come and get these jobs, except for the immigrants."

[221] *Id.* at 24. City employers, in turn, created preferences based on their own perceptions of the reliability of immigrants. As one manager noted: "Management recognized that they [the immigrants] had a hard work ethic. Not tainted by the American work ethic of stretching out three hours into eight hours work. They recognized that immigrants work much harder. They'd bring their lunch to work. The immigrants' work habits were different." *Id.*

[222] *See, e.g.*, Barlett & Steele, *supra* note 2.

[223] WALDINGER & LICHTER, *supra* note 22.

[224] The survey covered employers in the printing, furniture, manufacturing, hospital, department stores, hotel and restaurant industries. *Id.* at 22–23.

sought to understand how employer perceptions about workers and their social conditions determined a worker's place within a company.[225]

The survey found that "when asking which workers bosses prefer, understandings of groups' suitability for subordination—as opposed to employers' ethnic attitudes, independent of content" was the crucial consideration in hiring and recruitment.[226] Employers viewed themselves as looking for workers suitable to fill a type of job, rather than looking for a particular type of person.[227] In other words, employers were not trying to keep workers out of jobs as much as they were trying to figure out what workers best fit certain jobs. Cognitive bias, in turn, plays a role in how employers determine who gets what job and the conditions of those jobs.

Subservience was key to the employer's requirement for the jobs at the bottom of the wage scale: "The greater the demand [in the workplace] for subordination, the more likely it is that fitness for subordination, even subservience, will loom large in the employer's eyes."[228] As Waldinger and Lichter summarized, "[s]imply put, bosses want *willing* subordinates. After all, employers are looking for workers who will do the job as told, with the minimum amount of 'lip' . . . they also prefer 'cooperative' to 'combative,' and deferential over rebellious—in other words, a worker who knows her or his place."[229]

Employers prefer subservient workers precisely because they are less likely to cause workplace or production disruptions or sow discontent among their colleagues.[230] Employers also seek subservient workers because they are less likely to grow unhappy with the job as the employer has structured it.[231]

Waldinger and Lichter's survey indicated that employers' perceptions of who would make a good subordinate were important to the employment process. Immigrant workers, in part because of their social and legal status,

---

[225] *Id.* at 21. Initially they sought to determine whether immigrants were taking jobs that native born workers wanted. During the project, however, the sociologists found that the question was too narrow to define what they viewed as a broader issue of employer expectations and perceptions, and the interaction between ethnicity and the organization of the modern workplace.

[226] *Id.* at 143.

[227] *Id.*

[228] *Id.* at 144.

[229] WALDINGER & LICHTER, *supra* note 22, at 15–16.

[230] *Id.*

[231] *Id.* at 145 ("[H]igh among employers' preferences—and hence, among their criteria for selection—rank workers who are accepting of their station, and are least likely to challenge the employers' definition of the situation.").

fill a role for those employers who seek subservient workers.[232] In other words, in the low-wage sector, employers perceive that because of their social situation, immigrant workers are more compliant than, and therefore, preferable to native born workers. This characteristic makes immigrant workers more desirable, precisely because of their political disenfranchisement.[233]

The degree to which society accepts a group of immigrants affects employer attitudes toward that group. Historically, government and society have accepted immigrants differentially.[234] Of course, the extent to which government policies accept or reject immigrant groups over a period of time affects their incorporation into society.[235] The workplace will reflect hostile or ambivalent social policies toward immigrants. Policy makers have treated Latino workers poorly throughout history.[236] Recent court decisions[237] and Congressional mandates[238] reflect such hostility. These hostile measures only increase the vulnerability of brown collar workers. Today's ongoing debates in Congress and in the public realm about undocumented immigration and guest worker programs are perfect examples of the effect of governmental

---

[232] Employers readily made the link between subservience and Latino immigrant status. As one employer noted, "[t]he Latinos in our locations, most are recent arrivals. Most are tenuously here, and here on fragile documents. I see them as very subservient." WALDINGER & LICHTER, *supra* note 22, at 163.

[233] Similar observations were made of hiring queues in manufacturing jobs in the Silicon Valley:

> [T]he search for an acquiescent labor force encourages employers to find workers who are less likely to assert their rights, either individually through filing a formal complaint to a regulatory agency or filing a lawsuit or collectively through the labor unions. The perceived racial difference in each of the groups' willingness to 'rock the boat' is a recurrent theme in the explanation of the composition of assembly workers in Silicon Valley.

Park, *supra* note 3, at 230.

[234] As sociologist Alejandro Portes describes, "[i]mmigrants from Britain and northwestern Europe have typically experienced the least amount of resistance, while those of phenotypically or culturally distinct backgrounds have endured much greater social prejudice." Portes, *supra* note 185, at 24.

[235] *Id.*

[236] NGAI, *supra* note 40, at 1–14.

[237] *See, e.g.*, Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 149 (2002).

[238] *See, e.g.*, The Secure Fence Act of 2006 which authorizes the Department of Homeland Security to extend portions of the fence parallel to the U.S.-Mexico border to deter unauthorized entries. The legislation reflects a hostile attitude to the migration flows on the U.S. southern border. Secure Fence Act of 2006, Pub. L. No. 109-367.

and societal attitudes on employer behavior.[239] The current anti-immigrant sentiment emerging from policy makers and the public affects workplace dynamics. In the language of economic sociology, the possibilities and limits placed on brown collar workers in the workplace will reflect the constraints and possibilities which society and government place on Latino immigrants.[240] The Waldinger/Lichter study illustrates that treatment.

An employer's perception of an employee's social status, station or class affects an employer's hiring practices.[241] Waldinger and Lichter found that the closer applicants were to the employer's class or station, the less willing the employer was to hire them for menial jobs, because of perceptions they would quickly be dissatisfied with the job.[242] Where employers perceive a job as demeaning, they reserve it for workers who are unrespected.[243]

As a corollary, employers perceive that native born workers are not willing to do the work that low-wage jobs require.[244] Sociologist Karen Hossfeld, a white native born woman, found that employers tried to dissuade her from taking a job as an electronics assembler—primarily held by immigrant women—by telling her she would not want that work.[245] Anthropologist Steve Striffler found a similar reception when he tried to apply for a production job in a poultry plant in Arkansas.[246] These examples illustrate the effects of employer perception in the creation of segregated workplaces in general. In the context of low-wage hiring, personal attitudes about a given race or ethnicity often translate into hiring preferences for certain positions. Thus, the perception that Latinos are complacent translates into a preference for Latinos for the least desirable, dead-end jobs in a plant.[247] The study's findings support the conclusions of the socio-psychological literature about the role of unconscious bias in employer decision making.

---

[239] *Id.*

[240] Portes, *supra* note 185, at 25.

[241] NGAI, *supra* note 40, at 131–35.

[242] WALDINGER & LICHTER, *supra* note 22, at 156–57.

[243] *Id.* at 40.

[244] *Id.* at 156–57.

[245] Karen Hossfeld, *"Their Logic Against Them": Contradictions in Sex, Race, and Class in Silicon Valley*, *in* WOMEN WORKERS AND GLOBAL RESTRUCTURING 149–78 (Kathryn Ward ed., 1990).

[246] Steve Striffler, *Inside a Poultry Processing Plant: An Ethnographic Portrait*, 43 LAB. HIST. 305, 306–07 (2002).

[247] WALDINGER & LICHTER, *supra* note 22, at 163.

In the Waldinger/Lichter survey, employers explain their preferences for immigrant workers in nuanced terms such as work ethic.[248] Employers claimed that immigrant workers were superior to native born workers because they maintained a stronger work ethic.[249] Employers articulated worker ethic, in turn, in terms of docility: "American workers are more concerned with their rights, as opposed to immigrants who just want a job and will settle for minimal pay without fuss. [Without immigrants] we'd have more problems managing workers that would be more difficult and more demanding."[250] Waldinger and Lichter interviewed numerous employers who articulated immigrant workers' willingness to perform the difficult work as positive characteristics for selection. Employers couched their assessment in contextual terms, "praising the immigrants for traits especially valuable in the function that the newcomers filled."[251] Foremost among these traits, of course, was subservience. Employers consistently found immigrants suitable for the "hard, menial, poorly remunerated" work that was not suitable for native born workers.[252] Employers especially praised immigrant workers who took menial jobs with short job ladders and few outlets for upward mobility.[253] Importantly, in those cases where the job ladder was more extended, employers tended to view whites' work ethic more favorably.[254]

The Waldinger/Lichter survey also revealed that employers blamed third party preferences for the position of immigrant workers in their workplaces.[255] In other words, employers claimed they were respecting the

---

[248] *Id.* at 159.

[249] A similar study of unskilled workers in Silicon Valley high technology manufacturing firms found the same type of nuanced explanations:

> [T]he majority of racial explanations are more nuanced. In these explanations, innate and immutable notions recede as more sociological and cultural explanations emerge. A typical explanation in this regard underscores the 'positive' cultural qualities of Asian Americans and Latinos that make them ideal candidates for the specific requirements of assembly work while relying on more sociological explanations to explain why whites and African Americans would not.

Park, *supra* note 3, at 22

[250] WALDINGER & LICHTER, *supra* note 22, at 161.

[251] *Id.* at 162.

[252] *Id.*

[253] *Id.*

[254] *Id.* at 159.

[255] Law and economics theorists have posited the same rationales for the persistence of discrimination in the workplace. For an explanation of neoclassical rationales and responses to them, see SUNSTEIN, *supra* note 124, at 151, 153–54. Sunstein notes that third party preferences are examples of external factors that interfere with the proper

desires of customers and co-workers when they kept workers segregated from each other. Moreover, employers expressed concern about customer preferences as well as the preferences of more skilled workers in making hiring decisions at the low-wage level.[256] Employers rationalized segregating immigrant from native workers as a measure to keep the peace among both customers and upper level workers, who might otherwise feel threatened when opportunities were opened to foreign-born workers. This rationalization accounts for workplaces in which brown collar workers fill "back of the house" jobs, but not "front of the house" jobs in stores, restaurants and hotels.[257]

The Waldinger/Lichter study demonstrates the power of the alternative theories to break down the myth of the unwanted job and the effects on brown collar workers of employers seeking subservience. It explains several employer attitudes with a coherent narrative that goes beyond the traditional economic explanations for segregated workplaces. It explains the brown collar workplace as the product of subordination based on several practices that neither the frameworks, nor the economic theories underlying current jurisprudence, adequately recognize: cognitive bias, structural dynamics in the workplace, and organizational impediments to advancement. These are interrelated dynamics in the brown collar workplace. The strength of the alternative sociological theories lies in their power to dismantle the traditional views of why segregated workplaces exist. They help us understand how discrimination perpetuates itself in the brown collar context.

E. *Illustrations of the Alternative Theories in Current Anti-Discrimination Law: The Subjective Criteria Cases*

Subjective criteria cases provide some good examples of the alternative theories at work in the litigation context. They utilize the existing

---

functioning of free markets. He notes that third party preferences often produce segregated workplaces along with discrimination. *Id.*

[256] WALDINGER & LICHTER, *supra* note 22, at 15; Michael Lichter & Roger Waldinger, *Producing Conflict: Immigration and the Management of Diversity in the Multiethnic Metropolis*, *in* COLOR LINES 150–55, 161–63 (John David Skrentny ed., 2001).

[257] Plaintiffs have challenged such practices as discriminatory, with varying levels of success. *See, e.g.*, Rhodes v. Cracker Barrel, 213 F.R.D. 619 (N.D. Ga. 2003); *see also* EEOC v. Abercrombie & Fitch Stores, Inc., Case No. CV-04-4731 SI (N.D. Cal., Nov. 10, 2004). The lawsuit alleged that the clothing retailer, Abercrombie & Fitch, violated Title VII of the Civil Rights Act of 1964 by recruiting and hiring salespeople who fit the A&F image of the clean-cut, Anglo college student. The parties settled the lawsuit and a consent decree was entered.

frameworks to move workers—mostly women—out of the employment tracks to which they have been relegated. They provide one potential model for brown collar workers who seek to realize the advancement opportunities that the traditional immigrant myth promises.[258]

In the subjective criteria cases, plaintiffs challenge an employer's subjective decision making on the theory that it masks bias in the employer's treatment of a protected class. Subjective decision making is "based on the exercise of personal judgment or the application of inherently subjective criteria."[259] Although subjective criteria do not automatically give rise to an inference of discrimination,[260] courts have scrutinized them because of their potential as "ready mechanism[s] for discrimination."[261] As such, they have been found to violate Title VII under both the disparate impact and disparate treatment theories.

In subjective criteria channeling cases, plaintiffs identify subjective promotion and assignment practices that channel plaintiffs into particular jobs and keep them out of more desirable jobs, or track plaintiffs into positions with relatively short progression tracks.

Of course, the key to successful litigation in the brown collar context is to overcome the overwhelmingly popular perception that immigrant workers want these jobs. The subjective criteria cases have tackled parallel burdens in the gender and race context. Three case examples show how this litigation has changed employment structures that relegated plaintiffs to dead-end jobs in the gender context.

1. Butler v. Home Depot[262]

Subjective criteria channeling cases have effectively attacked segregated workplaces by requiring employers to provide real advancement tracks to their employees. In *Butler v. Home Depot*, the plaintiffs filed a class action lawsuit alleging that Home Depot discriminated against women in all aspects of its personnel management, including the hiring and segregating of women in initial job placement, promotion, and compensation.[263] Underlying these practices were employer stereotypes about the type of work women could or

---

[258] *See* NGAI, *supra* note 40.

[259] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 988 (1988).

[260] *Id.* at 990–91.

[261] Sengupta v. Morrison-Knudson Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986); *see also infra* notes 273, 274.

[262] Butler v. Home Depot, No. C-94-4335 SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996).

[263] *Id.* at *1.

wanted to perform in the stores. Women were relegated to dead end cashier positions, while men were initially assigned to floor positions, which led to management positions. The court certified the class, allowing the plaintiffs to show just how the company's subjective hiring criteria relegated them to the dead-end jobs.

2. *The Grocery Store Cases*

Women have launched class action suits against several grocery store chains for practices that channel and segregate women into dead end jobs.[264] The typical pattern in these cases involved women being hired into bakery and deli positions, and men being hired into produce and grocery positions. The plaintiffs in these cases alleged that their segregation was due to subjective decision making in hiring and recruiting. Managers, who were not provided guidance regarding assignments, steered women into gender-stereotyped positions. Management maintained a "tap on the shoulder" system for recruiting workers into management and training opportunities. The employers' responses included women's lack of drive, their desire for flexibility, their career choices, and customer preferences for male managers as reasons for the segregation. These are all arguments traditionally found in neoclassical economic explanations for segregated workplaces.

Many of these cases settled before trial. In the one published case, *Stender v. Lucky Stores*,[265] the court found the company liable for discrimination for its subjective practices. The court held that the plaintiffs proved sex discrimination was the company's standard operating procedure. The plaintiffs showed that the employer's subjective assignment and promotion policies left open the possibility for bias.[266] The plaintiffs prevailed on their disparate treatment and disparate impact claims.[267]

---

[264] Among those facing lawsuits were Publix, Albertson's, Fred Meyer, Safeway, Thrifty, Save Mart, Winn-Dixie, and Lucky Stores. Margaret A. Jacobs, *Albertson's Settles Bias Suit*, WALL ST. J., Nov. 23, 1993, at B12; Arthur M. Louis, *Sex Bias Settlement Roils Industry: Changes in National Supermarket Personnel Practices Expected*, S.F. CHRON., Dec. 18, 1993, at D1 (discussing Save Mart lawsuit); Hal Taylor & Cathy Cohn, *Four Chains Sued for Sex Bias*, SUPERMARKET NEWS, Aug. 25, 1986, at 18 (noting suits against Albertson's, Fred Meyer, Safeway, and Thrifty Stores); Robert Berner, *Winn-Dixie Settles a Bias Lawsuit for $33 Million*, WALL ST. J., July 19, 1999, at B2; Stender v. Lucky Stores Inc., No. C-88-1467 MHP, 1992 WL 295957, at *2 (N.D. Cal. Apr. 28, 1992).

[265] 803 F. Supp. 259 (N.D. Cal. 1992).

[266] *Id.* at 302.

[267] *Id.* at 335.

3. Dukes v. Wal-Mart[268]

The recent *Wal-Mart* case is a classic example of the channeling case utilizing social science evidence to show that employer cognitive bias hinders women's advancement. A class of female plaintiffs claimed that Wal-Mart's subjective promotion decisions resulted in a workforce that is 65% female hourly workers and only 33% female salaried managers.[269] Wal-Mart has claimed that women are disproportionately not interested or available for management positions because they do not have the time for the long, demanding, inflexible hours that management jobs require.[270] The plaintiffs' social science evidence rebuts the allegation. The plaintiffs' social scientists have drawn on the socio-psychological research regarding cognitive bias to point out features of Wal-Mart's management promotion system that allow stereotypes to influence decision makers' idea of the perfect candidate for the management jobs.[271] The district court has certified the case a class action lawsuit.[272]

4. *The Mixed Success of Subjective Criteria Cases*

These cases demonstrate the increasing difficulty with characterizing segregation cases as subjective criteria cases. Although plaintiffs have successfully mounted numerous challenges to an employer's subjective decision making practices,[273] there are almost as many unsuccessful

---

[268] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 148 (N.D. Cal. 2004).

[269] *Id.* at 146.

[270] *Id.* at 164–66.

[271] Bielby, *supra* note 137 at 21–23. Mr. Bielby is one of the plaintiffs' social science experts in the case.

[272] The decision is currently on appeal.

[273] *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999) (reversing summary judgment in favor of defendants, allowing plaintiff to prove that subjective evaluations that resulted in a layoff were racially motivated); Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313 (3d Cir. 2000) (reversing summary judgment in favor of defendant based, in part, on plaintiffs' evidence that the company's "objective" job assignment matrix masked a subjective evaluation process); McCullough v. Real Foods, Inc., 140 F.3d 1123 (8th Cir. 1998) (reversing summary judgment in favor of defendant, finding that the extremely subjective nature of the employer's promotion criteria should be scrutinized in light of its ability to mask discrimination); Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1218 (10th Cir. 2002) ("Courts view with skepticism subjective evaluation methods such as the one here."); Alexander v. Local 496, Laborers' Int'l Union, 177 F.3d 394 (6th Cir. 1999) (plaintiffs established *prima facie* disparate impact claim challenging union's selective use of recruiting rules and its word-of-mouth referral practices; court analyzed practice as reinforcing past patterns of discriminatory behavior);

challenges.[274] The unsuccessful cases illustrate the limitations of the

---

Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001) (granting class certification on disparate impact claim regarding employer's subjective decision making practices around promotion; employer can still show that the subjective practice is necessary for the position in question); Dunn v. Hercules, Inc., Civ. A. No. 93–4175, 1995 WL 66828 (E.D. Pa. Feb. 15, 1995) (on a *Daubert* motion in an age discrimination claim, plaintiff was allowed to use statistical expert analysis to prove that the employer's subjective employer practice has a disparate impact, although plaintiff would need to show that the practice is linked to a specific employer practice); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (granting partial class certification to female plaintiffs on claim that Wal-Mart's subjective transfer and promotion practices have a disparate impact); Butler v. Home Depot, 984 F. Supp. 1257 (N.D. Cal. 1997) (plaintiffs prevailed on subjective promotion and channeling policy challenge); Jenkins v. Wal-Mart Stores, Inc., 910 F. Supp. 1399 (N.D. Iowa 1995) (allowing plaintiffs to proceed to trial on a disparate impact subjective decision making promotion claim; plaintiffs argued that the employer's subjective process resulted in an underrepresentation of Blacks in targeted positions); Banks v. City of Albany, 953 F. Supp. 28 (N.D.N.Y. 1997) (denying summary judgment motion and allowing plaintiff to proceed on claim that fire department's use of subjective criteria in hiring had a disparate impact on minorities); Gaines v. Boston Herald, Inc., 998 F. Supp. 91 (D. Mass. 1998) (unsuccessful applicants for entry level printing press positions were allowed to go forward after summary judgment motions on a claim that a bundle of employer practices—including word-of-mouth referrals and nepotism—added up to subjective decision making practice that created a barrier for minorities; the court found that the employer practices were not passive); McKnight v. Circuit City Stores, No. Civ. A. 3:95CV964, 1996 WL 454994 at *7 (E.D. Va. Apr. 30, 1996) (granting class certification to plaintiffs on claim that employer's subjective promotion and transfer policies had a disparate impact on Blacks and employer's reasons were not consistent with business necessity); Stender v. Lucky Stores Inc., No. C-88-1467 MHP, 1992 WL 295957, at *2 (N.D. Cal. Apr. 28, 1992) (plaintiffs could proceed with allegation that Lucky Stores' subjective decision making causes a disparate impact, because its discretionary decision making structure falls within the rubric of a decision making process "not capable of separation for analysis.").

[274] *See, e.g.*, Anderson v. Westinghouse Savannah River Co., 406 F.3d 248 (4th Cir. 2005); Sattar v. Motorola, Inc., 138 F.3d 1164, 1170–71 (affirming summary judgment in favor of employer because plaintiff failed to produce objective evidence that subjective evaluations were a mask for discrimination); Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 515 (7th Cir. 1996) (affirming summary judgment in favor of defendant because plaintiff failed to introduce evidence other than the subjectiveness of the employer's evaluation process: "[d]emonstrating that an interview process is influenced by subjective factors does not go any distance toward proving that Vitug's religion or national origin were among those subjective factors."); Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986) (finding that subjective criteria are not conclusive evidence of discrimination, especially because they are "indispensable to the process of selection in which employers must engage."); Walker v. New York State Office Of Mental Health, Rockland Psychiatric Ctr., 162 F.3d 1149 (2d Cir. 1998) (affirming summary judgment in favor of defendant because, although the plaintiff showed that subjective pre-selection

doctrines as courts move away from the presumption that subjective criteria mask bias or discrimination in the workplace.[275] Courts continue to resist the idea that employers can have general policies of subjective decision making. Many of the cases fail on the causation element, indicating that courts continue to credit employer's narratives for employees' failure to advance.[276] As a result, the outcome continues to depend on the background assumptions of the court deciding a case. The successful cases target more overt examples of discrimination that are based on old-school stereotypes about women's roles in the workplace.[277] The alternative sociological theories should begin to challenge the stereotypes in the brown collar context in the same way. As yet, the overt biases in, and consequent structures that result from, employers seeking subservient workers are not as apparent as they have been in the successful subjective criteria cases.

---

practices deserved scrutiny, plaintiff could not overcome defendant's argument that it needed to appoint people whose leadership abilities and skills were already proven); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000) (plaintiffs failed to produce adequate statistical evidence showing causal link between employer's subjective hiring practices for food servers and a statistical disparity between percentage of women in the labor pool and percentage hired; case was remanded for more evidence on a disparate treatment theory that the restaurant intentionally refused to hire female food servers); Cooper v. S. Co., 260 F. Supp. 2d 1258 (N.D. Ga. 2003) (plaintiff failed to show that use of subjective promotion criteria caused a statistical disparity); Russell v. Enter. Rent-A-Car Co. of R.I., 160 F. Supp. 2d 239 (D.R.I. 2001) (plaintiff failed to establish prima facie case of disparate impact discrimination because of lack of evidence to show that employer's subjective promotion and disciplinary practices caused a disparate impact on women); Lewis v. Del. Dept. of Pub. Instruction, 948 F. Supp. 352 (D. Del. 1996) (plaintiffs failed to establish prima facie case of disparate impact discrimination because they failed to produce the refined statistical analysis that is part of the plaintiffs' causation burden; court defined the qualified labor pool narrowly in this case); Beckett v. Dept. of Corr. of Del., 981 F. Supp. 319 (D. Del. 1997) (plaintiff failed to produce evidence that use of employer's subjective criteria in promotion evaluation process had a disparate impact on a protected class); *see also* Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 321 (3d Cir. 2000) ("a plaintiff can not ultimately prove discrimination merely because his/her employer relied upon highly subjective qualities").

[275] *See generally* Calloway, *supra* note 110.

[276] *See supra* note 274.

[277] Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 33 (2005).

VI. WORKING TOWARD A REMEDY FOR BROWN COLLAR WORKERS: INCORPORATING AN ANTI-SUBORDINATION PRINCIPLE AND THE SOCIOLOGICAL THEORIES INTO ANTI-DISCRIMINATION FRAMEWORKS

Several commentators have called for the reincorporation of the anti-subordination or "anticaste"[278] principle into anti-discrimination law.[279] Incorporating the alternative sociological theories into the existing frameworks is a step in that direction.

The anti-subordination principle holds that the law should eliminate any mechanisms that subjugate or subordinate a particular protected class. The principle works on the assumption that the law should do everything it can to remove the conditions that contribute to the establishment of an underclass in society.[280] This principle has actually existed since early in our jurisprudence.[281] The anti-subordination principle acknowledges the different ways in which structures interact to keep protected classes subjugated.[282] In the brown collar context, legal systems, societal conditions, political disenfranchisement, and the "newness" of the workforce all interact to create the subservience that employers actively seek for their workplaces. Employers take advantage of these societal forces to create the elements for

---

[278] Sunstein, *supra* note 129, at 2411. Sunstein argues that anti-discrimination law should strive for an understanding of equality which "forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage." *Id.*

[279] *See, e.g.*, Cass Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1655 (2004); Sunstein, *supra* note 129, at 2410; CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 3–5, 116–17 (1979); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 111–17 (1976); Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003).

[280] Martha Chamallas explores a form of this subordination in her review of cases in which the labor of women and minorities was devalued. *See* Chamallas, *supra* note 189, at 756–78.

[281] Strauder v. West Virginia, 100 U.S. 303 (1879); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ. 347 U.S. 483, 494 (1954): ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone ... the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.") (citations omitted).

[282] Hutchinson, *supra* note 279, at 622.

segregated workplaces. Framed as "societal discrimination," this type of subordination is not actionable.[283]

The Supreme Court's opinion in *Griggs v. Duke Power*,[284] which created the disparate impact model of proof for anti-discrimination cases, includes elements of the anti-subordination principle. In that case, the Court prohibited hiring practices that have a disproportionate impact on minorities unless the employer can justify the practice with a business necessity. The Court's rule applies even to facially neutral policies or practices that have an adverse impact on a protected class. This interpretation of the statute incorporates the anti-subordination principle.[285] Because a facially neutral practice has a disproportionate impact on a protected class, it has the power to subordinate that class. It is acceptable upon a showing of business necessity only if less discriminatory alternatives are unavailable.

The subjective criteria channeling cases discussed earlier can also be re-interpreted as anti-subordination segregation cases. These cases were litigated in the context of the wage gap effects of continued gender segregation, especially in the retail market. The subjective criteria channeling cases confront the myths of "choice" that the color-blind principle in the law perpetuates. By framing the cases as ones in which women have been relegated to dead-end jobs, the subjective criteria channeling cases invoke the spirit of the anti-subordination principle. They have served to target the most obvious forms of categorization, even as they point to specific subjective practices that have adverse effects, as the frameworks require. The cases confront the belief that gender segregation is the result of women's choice. Instead, the subjective criteria channeling cases seek to break down the structures that keep women in second-class jobs. The successful cases have identified and challenged the myths that keep women subordinated. The same must be accomplished for brown collar workers.

---

[283] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). In other contexts, see, for example, *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973), holding that poverty is not a suspect classification requiring strict scrutiny and ignoring the relationship between poverty and race.

[284] Griggs v. Duke Power, 401 U.S. 424 (1971).

[285] David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 951 (1989). Unfortunately, the disparate impact model has been influenced by the impartiality and color-blind principles in intentional discrimination. Consequently, the doctrinal framework does not adequately address the problem of the segregated workplace. Just as in the disparate treatment framework, the disparate impact framework requires the plaintiff to show that he or she is similarly situated in terms of skills and job classification to be compared to the rest of the workforce. The required comparison does nothing to help the plaintiff improve the conditions of the segregated job.

If the anti-subordination principle were at the center of anti-discrimination theory, the sociological theories presented here would play an important role in revealing discriminatory employer practices. The research presented here is especially suited to an anti-subordination theory that aims to weed out the targeting of vulnerable populations that is at the root of brown collar workplaces.

The anti-subordination principle is a simple, yet, admittedly, politically-elusive "fix" that will allow brown collar workers to eliminate segregated working conditions. It is a politically-elusive fix precisely because of the strength of mainstream economic assumptions about how our labor markets operate.

Ultimately, reincorporating the anti-subordination principle would benefit both the workers relegated to the least desirable positions and those excluded from them. If the purpose of the Title VII frameworks was truly to eliminate segregated workplaces on the theory that they perpetuate subordination in the workplace, all workers would be able to use Title VII to improve the terms and conditions of jobs. The anti-subordination theory of anti-discrimination would effectively target the development of substandard jobs by allowing for remedies that go to the elimination of such jobs—through the elimination of wage suppression, the creation of benefits, and development of safer working conditions—that would not have existed but for discriminatory practices.

VII. CONCLUSION

Brown collar workers cannot suffer without a remedy in anti-discrimination law. Although formally, brown collar workers may be able to make a case—as women have in successful subjective criteria cases—the barriers remain high without a shift in popular thinking about how, or even whether, employers choose their workforces.

Employer preferences for subservient workers cause them to target brown collar workers and create for them a set of "unwanted" jobs. Employers essentially choose the ethnic composition of jobs by their recruitment methods, and by setting the pay and conditions of those jobs. The result is a group of segregated jobs and occupations, with their attendant harms, including wage disparities, occupational disparities, wage suppression over time, and a general worsening of work conditions over time. Brown collar workers hired into those jobs have little recourse in anti-discrimination law to improve their conditions.

The cases involving segregated workers illustrate the power of neoclassical economic theories in decision makers' assumptions about how employers treat immigrant jobs. The Title VII frameworks have incorporated

the mainstream economic assumptions, making it difficult to attack the existence of brown collar workplaces.

The three alternative sociological theories support the premise that employers, in fact, target subservient workers for certain jobs. Their biases help identify brown collar workers as the subservient workers of choice. Employers play a larger role than the neoclassical economic theories suggest in creating the labor pool and structuring jobs in the low wage sector. The alternative theories allow us to pierce through the myth that the resultant segregated workplaces are inevitable and natural consequences of labor market dynamics. A shift toward the anti-subordination principle in Title VII jurisprudence, reflected in the sociological theories, is necessary.

The problem of the brown collar worker ultimately reflects the problem of all workers in the American economy, especially those at the lower rungs of the economic ladder. The assumptions about the subservience of brown collar workers that make them desirable have a mirror image in assumptions about native born workers that make them undesirable. In these mirror image assumptions lie the seeds for bringing together all workers to challenge through anti-discrimination law the ways that employers set wage rates and conditions. The first step is to recognize the connections between employers targeting brown collar workers for their subservience and the resultant segregated workplaces. This Article has provided some of the theories that make those connections more visible. The deterioration of job conditions over time, and the creation of "immigrant" jobs is not a natural occurrence. The anti-discrimination frameworks should more readily facilitate challenges to the practices that create these conditions.