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THE BROWNING OF THE AMERICAN WORKPLACE: PROTECTING WORKERS IN INCREASINGLY LATINO-IZED OCCUPATIONS

*Leticia M. Saucedo**

INTRODUCTION

Marielena González¹ was recruited from her hometown in Mexico to work in a large poultry processing plant in northwest Arkansas. She works alongside hundreds of Latinos on a line that produces breaded chicken pieces. Her work is difficult, dirty, low-paying and dangerous. It was not quite the job she expected when she first took it. The labor contractor who recruited Marielena, her family, and some of her co-workers in Mexico showed them a videotape of an air-conditioned plant with people in clean white coats, lined along a conveyor belt performing different sets of tasks on the chickens loaded onto the belt. Marielena recalls that the line depicted in the video was not moving nearly as fast as the line actually runs at the processing plant. She also recalls that the videotape showed a much cleaner, safer, more desirable job than the one she and her colleagues were hired into. Marielena was concerned that her working, pay, and safety conditions were getting worse over time. The company continued to demand more and more production from the workers with no increase in pay. Many of the supervisors were Anglo, but there were almost no Anglos on the processing lines. Marielena discovered that her job pays less and the line moves much faster now than it had in the past. It was her impression that the ethnic makeup of the workforce had been much more mixed in the past than it now is. En-

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1 The name is a pseudonym; Marielena's account represents the stories of several workers I interviewed in northwest Arkansas in 2000–2001.

tire production lines and jobs at the plant are now dominated by Latinos.²

Marielena González is what social scientists call a “brown collar” worker. A brown collar worker is a recent Latino immigrant (arriving in the United States within the past five years) who works in an occupation in which Latinos are concentrated or overrepresented.³ Brown collar workers can be found in fields such as service, manufacturing, construction, food processing and agriculture-related work. When an occupation becomes overrepresented by these low-tier workers, conditions worsen for all workers in the occupation. The emergence of brown collar workers and their impact on wages and conditions in the workplace has implications not just for these workers themselves, but for the American workplace. As these workers populate more and more fields, the workplace risks the re-emergence of segregated workforces.

This Article explores the concept of the brown collar phenomenon and some of the issues it presents in employment law, specifically with respect to disparate treatment theory. It provides a preliminary analysis of the impact on antidiscrimination law posed by the “browning” of large sectors of the U.S. labor force. In Part I of this Article, I introduce social-science data on the existence and growth of brown collar occupations, that is, occupations in which recent immigrant Latinos are overrepresented or concentrated. I use the poultry industry as a case study, or lens, through which we can examine the phenomenon. In Part II of this Article, I describe longitudinal and comparative studies that explore the effects of the brown collarization of certain occupations on wages and conditions in the workplace. The studies focus attention on brown collar workers, a particularly vulnerable part of a minority population. The findings show positive correlations between the numbers of recent immigrant Latinos in brown collar occupations and wage suppression, worsening conditions and segregation. The data shows that wage suppression occurs over time as the brown collar population increases. In Part III, I provide a profile of brown collar workers, the characteristics that make them particularly vulnerable in the workplace, and their importance to broader efforts to protect the rights of all workers. Brown collar workers are some of the most vulnerable workers in the American workplace because of their

2 For similar accounts of Marielena’s story, see Lourdes Gouveia & Donald D. Stull, *Dances with Cows: Beefpacking’s Impact on Garden City, Kansas, and Lexington, Nebraska*, in *ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA* 85 (Donald D. Stull et al. eds., 1995).

3 Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 *WORK AND OCCUPATIONS* 300, 301 (2002).

recent immigration status, their rural or isolated origins, and their limited English proficiency. They also face a legal barrier in the Supreme Court's recent decision in *Hoffman Plastic Compounds, Inc., v. NLRB*⁴ that other workers may not face. Yet, because they are part of an ever-growing minority and because workers face difficulty changing workplace conditions without the involvement of this population, it remains vital to the vindication of rights in the American workplace to ensure that existing laws effectively protect brown collar workers. In Part IV of the Article, I suggest legal strategies for protecting brown collar workers through immigration and employment discrimination law. First, I suggest that federal administrative agencies cooperate to provide workers who help in investigations of workplace violations with U visas and employment authorization documents. This will give a large segment of brown collar workers the security they need to come forward with complaints. Second, I review disparate treatment theory in employment discrimination law and identify two areas where longitudinal data can help plaintiffs with their proof in a discrimination case. I suggest that brown collar plaintiffs use longitudinal data in place of comparator data in situations where the brown collar workforce in an occupation has reached close to a 100% Latino population rate. If the trend continues, this will soon become the case in some poultry plants, and is certainly already the case on some poultry lines within plants. I also suggest that the longitudinal data be used to rebut an employer's argument that it is merely responding to market forces in hiring brown collar workers into certain occupations. This data can help the plaintiff show a causal connection between the browning of an occupation and wage suppression and worsening conditions. I conclude by providing suggestions for further research and development of theories that will more effectively protect brown collar workers.

I. THE BROWNING PHENOMENON: POULTRY AS A MICROCOSM

Marielena González's description of her work situation is reflected in ethnographic studies of brown collar workers' conditions in the poultry industry.⁵ Over the past two decades, the poultry industry has been completely restructured, resulting in a much greater demand for low-wage labor.⁶ The changes in the industry include the

4 535 U.S. 137 (2002).

5 See Steve Striffler, *Inside a Poultry Processing Plant: An Ethnographic Portrait*, 43 LAB. HIST. 305, 306-07 (2002).

6 A similar phenomenon has occurred in the meatpacking industry, another industry that has experienced an influx of brown collar workers. See JAMES M. MACDON-

increased demand for chicken both at home and abroad, increased domestic consumer demand for further processed poultry products (like cut-up chickens, chicken nuggets, and fast food chicken products), and a consolidation in the poultry industry—including vertical integration—that radically strengthened the market penetration of the top four poultry firms.⁷ Industry consolidation has also resulted in larger poultry plants, which by the 1990s accounted for almost three quarters of the poultry produced in the country.⁸ Moreover, the industry now requires less formal skill and training for its jobs, and seeks a workforce willing to do more repetitive and labor intensive tasks. This industry change, and the concomitant change in workforce composition over the past decade, illustrates the issues that arise in increasingly brown collar occupations in several industries.⁹

The changes wrought by “further processing” in the poultry industry, along with pressures to heighten productivity, increase the safety risks imposed on workers. For example, companies may assign fewer workers to perform the same level of production as in the past. So, where three workers were at one time assigned to a task, two are now assigned to complete the same task, which, combined with increased line speed, leads to more workplace injuries.¹⁰ The restruc-

ALD ET AL., CONSOLIDATION IN U.S. MEATPACKING 37–39 (USDA, AGRIC. ECON. REP. No. 785, 1999), available at <http://www.ers.usda.gov/publications/aer785/aer785.pdf> (last visited Oct. 5, 2004).

7 See William Kandel & Emilio A. Parrado, *Industrial Transformation and Hispanic Migration to the American South: The Case of the Poultry Industry*, in HISPANIC SPACES, LATINO PLACES: A GEOGRAPHY OF REGIONAL AND CULTURAL DIVERSITY (Daniel D. Arreola ed., forthcoming 2004). As of 2002, the top four companies controlled 50% of the poultry market, 59% of the pork market, and 81% of the beef market. Tyson and ConAgra were among the top four in each of these markets. See DONALD D. STULL & MICHAEL J. BROADWAY, SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA 158 (Lin Marshall et al. eds., 2004). For a description of similar consolidation effects in the meatpacking industry, see MACDONALD ET AL., *supra* note 6; Rochelle L. Dalla et al., *Economic Strain and Community Concerns in Three Meatpacking Communities*, 17 RURAL AM. 20 (2002), available at <http://www.ers.usda.gov/publications/ruralamerica/ra171/ra171c.pdf>.

8 Kandel & Parrado, *supra* note 7, at 9.

9 See MACDONALD ET AL., *supra* note 6; see also LOURDES GOUVEIA & DONALD D. STULL, LATINO IMMIGRANTS, MEATPACKING, AND RURAL COMMUNITIES: A CASE STUDY OF LEXINGTON, NEBRASKA (Mich. St. Univ., Julian Samora Research Rep. No. 26, 1997) (examining the changes expected to result from the opening of a meatpacking plant in a Nebraska town and the arrival of Latinos).

10 Striffler, *supra* note 5, at 308. Safety issues are even more prevalent in the meatpacking industry. See Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2654 (2004), for a description of safety concerns in the meatpacking industry, including accidents and repetitive stress injuries caused by fast moving lines.

turing in the industry, in other words, is reflected in workers taking on more work for the same or less pay than their predecessors.

Various factors contribute to the low-wage character of poultry processing jobs. These factors include the dangerous and undesirable character of the jobs and the extended economic growth throughout the eighties and nineties that created a disincentive in the traditional workforce to take relatively low paying poultry jobs.¹¹ Normally, these factors would create a premium for employees, which would require employers to pay higher wages. That has not been the case here, as employers have gone outside the local market to places like Mexico and Central America for workers.¹² Marielena's story is indicative of the labor recruitment for these jobs; the labor pool has become international. As a result of such recruiting practices, a geographic region that previously had low numbers of Latinos has been able to increase its workforce significantly.¹³ A review of the top eighty-six poultry producing counties in the country and the top seventy-one rapid growth Latino counties reveals an overlap of twenty-six counties.¹⁴ We can infer from this statistic that poultry production is responsible for a Latino population boom in one-out-of-three to one-out-of-four of the top growing Latino counties.

Although the workforce is not monolithic, the trend towards brown-collarization is distinct and severe. The poultry example is stark. Over the past two decades, the Latino workforce population in poultry has increased from 1% to 17%.¹⁵ Although the transformation is remarkable, it still does not reflect the even more phenomenal changes in some plants and corresponding counties throughout the Southeast.¹⁶ For example, Benton County, Arkansas, which hosts a

11 Kandel & Parrado, *supra* note 7, at 11.

12 There is a body of social science literature discussing the historical links between Mexican migration and the poultry industry. See DAVID GRIFFITH, JONES'S MINIMAL: LOW-WAGE LABOR IN THE UNITED STATES (1993); Greig Guthey, *Mexican Places in Southern Spaces: Globalization, Work, and Daily Life in and around the North Georgia Poultry Industry*, in LATINO WORKERS IN THE CONTEMPORARY SOUTH 57–67, (Arthur D. Murphy et al. eds., 2001); ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL TOWN AMERICA (Donald D. Stull et al. eds., 1995); see also Sylvia R. Lazos Vargas, "Latina/o-ization" of the Midwest: Cambio de Colores (*Change of Colors*) As Agromaquilas Expand Into the Heartland, 13 BERKELEY LA RAZA L.J. 343 (2002) (reporting on recruiting practices in Missouri).

13 Kandel & Parrado, *supra* note 7, at 12; see Lazos Vargas, *supra* note 12, at 366 tbl.1.

14 Kandel & Parrado, *supra* note 7, at 12.

15 *Id.* at 13–14.

16 See U.S. CENSUS BUREAU, CENSUS 2000 EEO DATA TOOL [hereinafter CENSUS 2000], at <http://www.census.gov/eo2000/index.html> (last visited Oct. 29, 2004).

chicken processing plant, has a 72.5% Latino poultry/meatpacking worker rate.¹⁷ The Latino population in the county totals approximately 9%.¹⁸ In Hall County, Georgia, where ConAgra Foods has a poultry plant, the Latino poultry worker rate is 84%.¹⁹ The Latino population in the county is approximately 20%.²⁰ In Duplin County, North Carolina, the poultry processing labor force breaks down into 17.5% white, 53.8% Latino, and 27.5% black.²¹ In one Duplin County poultry processing plant, the Latino labor force reaches 65% of the total workforce.²²

This pattern is repeated in other areas of the country and in other industries.²³ For example, McDonald County, Missouri, which hosts Simmons and Hudson Foods plants, experienced a 2107% growth in the Latino population between 1990 and 2000.²⁴ Moniteau County, Missouri, which hosts a Cargill food processing plant, experienced an 846% growth in Latino population.²⁵

Changes in the poultry workforce and in geographic settlement patterns of Latinos parallel changes in the industry over the past decade. This is especially true in nonmetropolitan counties in traditionally poultry-producing southeastern states, including Alabama, Arkansas, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia, and in midwestern states like Iowa, Nebraska, and Missouri.²⁶ These states produce over two-thirds of the nation's chicken products.²⁷ The growth of the Latino nonmetropolitan popu-

The Census 2000 EEO Data Tool contains race and ethnicity breakdowns for listed occupations. For this Article, I conducted a search of the occupation category, "Butchers and Other Meat, Poultry, and Fish Processing Workers," in counties in Arkansas, Georgia, and North Carolina. The search includes employment by census occupation codes, residence, county sets, and race/ethnicity categories.

17 *Id.*

18 U.S. CENSUS BUREAU, ARKANSAS QUICKFACTS: BENTON COUNTY, at <http://quickfacts.census.gov/qfd/states/05/05007.html> (last revised July 9, 2004).

19 CENSUS 2000, *supra* note 16.

20 U.S. CENSUS BUREAU, GEORGIA QUICKFACTS: HALL COUNTY, at <http://quickfacts.census.gov/qfd/states/13/13139.html> (last revised July 9, 2004).

21 CENSUS 2000, *supra* note 16.

22 Kandel & Parrado, *supra* note 7, at 20.

23 *See also* Lazos Vargas, *supra* note 12, at 366–67 tbls. 1–3. *See generally* Gouveia & Stull, *supra* note 2 (detailing the rapid growth in the Latino/a population throughout the Midwest);

24 Lazos Vargas, *supra* note 12, at 367, tbl. 2.

25 *Id.*

26 Gouveia & Stull, *supra* note 2, at 89; Kandel & Parrado, *supra* note 7, at 2; Lazos Vargas, *supra* note 12, at 346–47.

27 Gouveia & Stull, *supra* note 2, at 85; Kandel & Parrado, *supra* note 7, at 10.

lation in those states is among the highest in the nation.²⁸ The pattern of growth is concentrated: over one-third of the rural Latino population lived in just 109 of the country's 2288 nonmetropolitan counties.²⁹ Research indicates that the employer pull figures prominently among the reasons for both the Latino population growth in nonmetropolitan areas and the concentration in certain counties:

[I]mmigrants are also moving to nontraditional areas because of recruiting efforts by employers to sustain the number of workers needed for production in industries with less-than-desirable jobs. Consequently, the proportion of Hispanics in industries with low wages and harsh working conditions—meat processing, carpet manufacturing, oil refining, and forestry, to name a few—has increased dramatically in the past decade.³⁰

The *United States v. Tyson Foods, Inc.* case,³¹ in which executives allegedly paid labor contractors for access to labor, illustrates the links between brown collar workers' settlement patterns and employer recruitment practices. In that case, the U.S. government alleged that Tyson officials paid "coyotes," or labor contractors to recruit an ongoing stream of undocumented workers for its plants in Arkansas, Indiana, Missouri, North Carolina, Tennessee, Texas, and Virginia.³² The indictment itself contains details about employer recruiting practices, such as paying \$200 per worker delivered to a plant.³³ Although no executive was convicted under the indictment, the general recruiting practices have been documented elsewhere. A *New York Times* article summed up the practice:

Industry experts said it has long been believed that American food companies recruit in Mexico and knowingly hire illegal workers. Some said the companies advertise on the radio in Mexico, dis-

28 Kandel & Parrado, *supra* note 7, at 3.

29 *Id.*

30 *Id.* at 4; see also WAYNE A. CORNELIUS & PHILIP L. MARTIN, *THE UNCERTAIN CONNECTION: FREE TRADE AND MEXICO-U.S. MIGRATION* (1993) (arguing that immigration will decrease as these jobs move to Mexico); ALEJANDRO PORTES & RUBEN B. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 17–20 (1990) (noting that immigration is a two-way process driven by the changing needs immigrants and those who profit from immigrant labor).

31 The indictment is available online. See Indictment, *United States v. Tyson Foods, Inc.*, (E.D. Tenn.) (No. 4:01-CR-061) (Dec. 11, 2001) [hereinafter *Tyson Indictment*], available at <http://www.tned.uscourts.gov/cases/401cr061/tyson.PDF>.

32 *Id.* at 9.

33 *Id.* at 26.

tribute leaflets, show videos and hire immigrant smugglers, or “coyotes.”³⁴

In part because of the employer pull, and in part because of the ever-growing Latino population, the number and variety of brown collar occupations will continue to increase. It is important to understand the impact of brown collarization on the evolving workplace.

II. WAGE AND OTHER IMPACTS IN BROWN COLLAR OCCUPATIONS

As Marielena described, and sociologist Lisa Catanzarite demonstrates in her recent studies of brown collar workers, the browning of an occupation tends to correlate with wage depression, segregation and worsening conditions in a workplace.³⁵ Dr. Catanzarite is one of a few researchers who correlated wages with brown collar job composition over time to determine whether any positive correlation exists.³⁶ She has conducted groundbreaking work on the subject of brown collar workers and the impact of their presence on wages and working conditions. One important aspect of Dr. Catanzarite’s work is that she has compared wage data both longitudinally and in contemporaneous comparisons of workers in various occupations. Her longitudinal work, along with the contemporaneous studies, provide a more comprehensive view of the dynamics of wage setting in brown collar occupations. In her longitudinal studies, Dr. Catanzarite conducted analyses of job and occupation categories over several occupations and over decades.³⁷ She found that occupations with strong over-

34 David Barboza, *Meatpackers’ Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES, Dec. 21, 2001, at A26, available at 2001 WL 32006540.

35 Dr. Catanzarite has studied the brown collar phenomenon and has produced several reports on the relationship between brown collarization, wages and job concentration. See Catanzarite, *supra* note 3; Lisa Catanzarite, *Occupational Context and Wage Competition of New Immigrant Latinos with Minorities and Whites*, in REVIEW OF BLACK POLITICAL ECONOMY (forthcoming 2004) [hereinafter Catanzarite, *Occupational Context*]; Lisa Catanzarite, *Wage Penalties in Brown-Collar Occupations*, LATINO POLICY & ISSUES BRIEF no. 8 (UCLA Chicano Studies Research Ctr., Los Angeles, Cal.), Sept. 2003 [hereinafter Catanzarite, *Wage Penalties*]; Lisa Catanzarite & Michael Bernabé Aguilera, *Working with Co-Ethnics: Earnings Penalties for Latino Immigrants at Latino Jobsites*, 49 SOC. PROBS. 101 (2002); see also Lisa Catanzarite, *Race-Gender Composition and Occupational Pay Degradation*, 50 SOC. PROBS. 14 (2003) [hereinafter Catanzarite, *Race-Gender Composition*] (suggesting that composition-related wage degradation is due to the greater vulnerability of occupations where subordinate groups are overrepresented).

36 While other researchers have conducted studies on the effects of job composition on wages, few have conducted studies with data over time in order to track the causal link between the two. See Catanzarite, *supra* note 3.

37 *Id.* at 301.

representations of minorities, including Latinos, experience a substantial wage penalty over time.³⁸ A wage penalty is defined as a relative pay loss, such as that which occurs when average wages fail to keep up with those in similar fields, or as a loss relative to comparable workers.³⁹

Dr. Catanzarite has conducted other studies that confirm the results of her work using longitudinal data. Whereas much of the research on the wage effects of immigrant labor compares aggregate wages across metropolitan areas, Dr. Catanzarite's research focuses on occupations within local markets. This methodology better approximates wage setting by employers in certain occupations.⁴⁰ In her most recent study, Dr. Catanzarite conducted a comprehensive analysis of occupations in thirty-eight immigrant receiving metropolitan areas.⁴¹ Her analysis compared wages for whites with those for minorities by occupation in each of the metropolitan areas.⁴² She then employed a statistical model which estimates the dollar penalty associated with brown collar representation in an occupation.⁴³ She found that brown collar occupations suffered substantial wage penalties, the penalties were larger for minorities than for whites, and educational levels of the workers in the study did not affect the outcome.

Dr. Catanzarite analyzed the data even further and found that occupations in which recent Latino immigrants represented 25% or more of the workplace population experienced an average wage penalty of approximately \$2400.⁴⁴ By contrast, occupations with a much lower percentage of recent Latino immigrants (5% or less), where there is a relative absence of brown collar workers, experienced an average wage penalty of approximately \$500.⁴⁵ Because minorities are far more likely to be employed in brown collar occupations, they suffer deeper and more frequent wage penalties than do whites.⁴⁶ In an occupation with a 15% recent immigrant Latino population, earlier-immigrant Latino men earn \$4584 less than their counterparts in similar non-brown collar occupations, African Americans earn \$2280 less, native Latinos earn \$1523 less, and whites experience a \$1034 wage

38 Catanzarite, *Race-Gender Composition*, *supra* note 35, at 29.

39 *Id.* at 14 n.2.

40 Catanzarite, *Occupational Context*, *supra* note 35 (describing her methodology in her study of wages in brown collar occupations across thirty-eight markets).

41 Catanzarite, *Wage Penalties*, *supra* note 35, at 1-3.

42 *Id.*

43 *Id.* at 2.

44 *Id.* at 1.

45 *Id.*

46 *Id.* at 2.

penalty.⁴⁷ When brown collar workers occupy a field, all workers suffer a wage penalty—though whites suffer a much smaller penalty than do minorities.⁴⁸ Dr. Catanzarite found that the wage penalty exists even after controlling for workers' qualifications and occupational characteristics.⁴⁹ Additional schooling does little to improve either pay or working conditions in brown collar occupations.⁵⁰ There seems to be no correlation in brown collar jobs between the extent of a worker's education and the amount of his pay.⁵¹ If this is the case, additional education does little to improve wages in brown collar jobs. Dr. Catanzarite concluded that something other than the social status and human capital of brown collar workers steers the wage setting process. There seem to be structural dynamics that produce the non-competitive labor market.⁵²

A gradual wage deterioration is linked with proportionately higher percentages of Latinos in a particular workforce. In other words, as recent immigrant Latinos increasingly concentrate in low-skill, low-paying occupations, wage penalties emerge, and wages become suppressed.⁵³ In social science, a devaluation theory model explains that occupational pay falls once a position becomes filled with women or racial minorities.⁵⁴ There seems to be a "tipping" point beyond which the identification of a job or occupation with a particular race, gender, or national origin signals a less-desirable job.⁵⁵ Under this theory, biases emerge in the wage setting process. In other words, "once a job is associated with a subordinate group, the job's pay declines because it suffers from 'status contamination.'"⁵⁶ The experience of brown collar workers indicates that some portion of wage rate suppression may be attributable to discrimination. As Dr. Catanzarite describes:

47 Catanzarite, *Occupational Context*, *supra* note 35, at 12.

48 *Id.* at 14 ("[N]ative-born men employed in brown-collar occupations suffer a substantial wage discount relative to their counterparts in other fields without over-representations of recent-immigrant Latinos.").

49 Catanzarite, *Wage Penalties*, *supra* note 35, at 2.

50 *Id.*; see also Catanzarite & Aguilera, *supra* note 35, at 119 (finding that attending school in the United States generates no wage benefit for the Latino survey participants).

51 Catanzarite, *Wage Penalties*, *supra* note 35, at 2.

52 Catanzarite & Aguilera, *supra* note 35, at 122.

53 Catanzarite, *supra* note 3, at 330.

54 Julie A. Kmec, *Minority Job Concentration and Wages*, 50 Soc. PROBS. 38, 40 (2003).

55 See Catanzarite, *Race-Gender Composition*, *supra* note 35, at 17 (citing to several studies showing a similar tipping phenomenon in female dominated fields).

56 Kmec, *supra* note 54, at 40.

Beliefs in lesser competence or worthiness fuels discrimination. Systematic hiring discrimination restricting low-status workers to relatively undesirable fields produces a constrained opportunity structure and thus is implicated in their acquiescence. Similarly, discriminatory beliefs in lesser competence or worthiness of low-status groups may drive devaluation. Accordingly, work done by low-status immigrants is likely to be culturally devalued, consonant with [the] argument that immigrants' low social status can transfer to their work itself. . . . Brown-collar fields are candidates for this type of devaluation and downward wage pressure, and native incumbents' pay degradation is tied to newcomer Latinos' low status.⁵⁷

Another characteristic of brown collar occupations is that brown collar workers are much more likely to be segregated from other ethnic groups in the workplace. Marielena's story is consistent with research findings that show recent immigrant Latinos are more likely to work in segregated workplaces in several brown collar occupations.⁵⁸ Moreover, an analysis of brown-collar occupations in eighteen immigrant-receiving, ethnically heterogeneous metropolitan areas shows that whites are the population most likely to be segregated from brown collar workers, followed by native blacks, native Latinos, and earlier immigrant Latinos.⁵⁹ White males benefit because segregated jobs tend to "crowd" white males into higher-paying positions.⁶⁰ This segregation pattern is repeated in nonmetropolitan areas.⁶¹ The trend is especially troubling because it may signal the re-segregation of the workplace throughout the South and Midwest.

Female brown collar workers tend to be even more isolated than their male counterparts, and they suffer the effects of both gender and national origin in the workplace. In the poultry industry, certain brown collar jobs within the industry are also segregated by gender.⁶² The line jobs at the Tyson plant in northwest Arkansas are occupied by women even though most of the workforce is male.⁶³ The line jobs are the worst in the plant because they require repetitive tasks with the same sets of movements all day long.⁶⁴ Women are excluded from most other work in the plant.⁶⁵ Although case law has addressed the

57 Catanzarite, *supra* note 3, at 306.

58 Catanzarite, *Occupational Context*, *supra* note 35, at 9.

59 *Id.*

60 *Id.*

61 Kandel & Parrado, *supra* note 7, at 3-5.

62 Striffler, *supra* note 5, at 307.

63 *Id.*

64 *Id.*

65 *Id.*

interplay between race and gender in discrimination,⁶⁶ further research is needed to document the intersectionality between gender and national origin in brown collar work to determine whether and how much brown collar female workers are affected by their status. Such research in this arena would help determine how best to fashion strategies to protect this subgroup of brown collar workers.

In sum, the research indicates that as brown collar workers enter an occupation, wages begin to deteriorate, and they continue to depress as the percentage of brown collar workers increases. The longitudinal data confirms that the wage penalty occurs over time, and creates a more effective causal connection than studies that merely compare workers' salaries contemporaneously. Dr. Catanzarite's studies comparing occupations with different percentages of brown collar workers complete the picture: not only does the wage penalty accrue over time, but the penalty remains for all workers as the percentages of brown collar workers increase. The wage penalty also correlates with the increasing segregation of brown collar workers from the rest of the workplace population.

III. A PROFILE OF BROWN COLLAR WORKERS' STATUS

Before examining how existing legal paradigms may apply to this growing brown collar dynamic, we must first identify some of the outside factors that affect brown collar workers' status in the workplace. Recall that brown collar workers are recently arrived Latino immigrants working in occupations where Latinos are over-represented or concentrated. Many, though not all, have questionable legal status. As they enter the workplace, segregation trends increase, wages become depressed and conditions worsen. This context in and of itself makes for a vulnerable workforce. Yet, there are additional factors that work against this population to make it even more susceptible to workplace exploitation and to the wage and segregation dynamics described in this Article. First, the brown collar pool tends to be drawn from rural areas and tends to be undereducated.⁶⁷

66 The intersectionality between national origin and gender may give rise to overlapping forms of discrimination, which are distinct from either gender or national origin claims. See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that a claim based on race and gender could not be reduced to its distinct components); *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) ("Discrimination against black females can exist even in the absence of discrimination against black men or white women."); *Anthony v. County of Sacramento*, 898 F. Supp. 1435, 1445 (E.D. Cal. 1995) (holding that a derogatory term aimed at a black woman could not be exclusively racist or sexist).

67 *Lazos Vargas*, *supra* note 12, at 351.

Employers are drawing from a mobilized group of transnational workers whose needs exceed the ability to leverage better wages and working conditions. They tend to be isolated from social service structures and they have less job mobility than the rest of the population. They understand little about U.S. legal culture and may be intimidated by its formality. As a result they have less understanding of their rights in the workplace. Their lack of job mobility, moreover, gives them less incentive to protect themselves.

Second, brown collar workers have limited English skills.⁶⁸ This barrier keeps them isolated. It also contributes to a perceived inability to seek a more desirable job once they have secured an initial job, and it makes them reluctant to vindicate their rights for fear of losing their jobs.

Third, brown collar workers may fear immigration consequences if they come forward with complaints. This holds true whether a brown collar worker is documented or undocumented. The current immigration law framework engenders fear in a population that does not understand immigration law and its evolving standards. The fear is not without some reason, as immigration authorities have targeted brown collar industries like meatpacking for enforcement of immigration laws.⁶⁹ The Ninth Circuit noted in *Rivera v. Nibco, Inc.*⁷⁰ that all immigrant workers may be chilled by issues such as employer questions about immigration status because all workers may feel intimidated by having their immigration history examined publicly.⁷¹ In that case, workers sought protection from an employer's questions about immigration status during discovery in a Title VII action. As the court stated: "Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends"⁷² Because a large portion of brown collar workers may be undocumented, they fear retribution should they complain about workplace conditions. Not only do they face workplace retaliation, but they risk deportation or crimi-

68 *Id.*

69 In 2001–2002, for example, the INS conducted a series of raids in the Midwest, called Operation Vanguard, targeting all meat processing plants in a specified area in Nebraska and Iowa. The INS reviewed over 40,000 employee records in an attempt to identify undocumented workers. See David Bacon, *INS Declares War on Labor*, THE NATION, Oct. 25, 1999, available at <http://www.thenation.com/doc.mhtml?i=1999102585=bacon>.

70 364 F.3d 1057, 1074–75 (9th Cir. 2004) (holding that questions about a plaintiff's immigration status constitute an undue burden on the plaintiff and the public interest).

71 *Id.* at 1064–65.

72 *Id.* at 1065.

nal prosecution should they be reported to immigration authorities.⁷³ This fear, in turn, hinders the ability of all brown collar workers to make changes within their occupations.

Fourth, brown collar workers must confront a legal barrier that most other workers may not face. Brown collar workers may be especially vulnerable and fearful of cooperation with employment law enforcement authorities after the U.S. Supreme Court's holding in *Hoffman Plastic Compounds v. NLRB*.⁷⁴ In that case, the National Labor Relations Board (NLRB) awarded post-termination back pay to Jose Castro, an undocumented worker who was fired after he became involved in union organizing activities in the workplace.⁷⁵ The employer appealed the decision until it reached the U.S. Supreme Court. The Court held that a backpay award to Castro for work not performed was outside the scope of the NLRB's authority because exercising its remedial authority in such a manner ran counter to federal immigration policy.⁷⁶ Thus, under *Hoffman*, undocumented workers have fewer remedies than their counterparts who are authorized to work. Employers and worker rights' advocates are engaged in a struggle to define the reach of *Hoffman* that will take years to resolve.⁷⁷ The case continues to have a chilling effect on workplace complaints because employers have tried to expand the reach of *Hoffman* to limit the rights of immigrant workers in other arenas.⁷⁸

73 *Id.* at 1064.

74 535 U.S. 137 (2002).

75 *Id.* at 137.

76 *Id.* at 149.

77 Arguably *Hoffman* could be limited to remedies that the NLRB has the authority to grant, and is limited to the enforcement of the National Labor Relations Act (NLRA). A Ninth Circuit panel recently intimated as much in *Rivera v. Nibco*, stating that *Hoffman* did not apply to Title VII actions because "Title VII's enforcement regime includes not only traditional remedies for employment law violations, such as backpay, frontpay, and reinstatement, but also full compensatory and punitive damages." *Rivera*, 364 F.3d at 1067. The *Rivera* court's analysis of the Title VII issue demonstrates the questions left unanswered after *Hoffman* that will continue to be litigated.

78 See, e.g., *Renteria v. Italia Foods*, No. 02-C-495, 2003 WL 21995190 (N.D. Ill. Aug. 21, 2003) (deciding a case where employer argued that *Hoffman* precludes any protection under the Fair Labor Standards Act (FLSA) for undocumented workers); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1060 (N.D. Cal. 2002) (same); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); *Cortez v. Medina's Landscaping*, No. 00-C-6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) (deciding a case where employer claimed that the plaintiff was barred from recovery under the FLSA because of undocumented status); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238 (C.D. Ill. 2002) (deciding a case where employer argued that *Hoffman* applied in an FLSA action); *Topo v. Dhir*, 210 F.R.D. 76

Because the Latino population will likely continue to increase rapidly, brown collar occupations will likely grow more prevalent without strategies to reverse the trend. These workers labor under harsh conditions and although the law extends protections, few avail themselves of these protections. The danger is two-fold. First, all workers in brown collar occupations run the risk of losing ground in terms of employment and labor protections if brown collar workers fear the consequences of making workplace complaints. This fear makes it difficult for those who work alongside them to vindicate their own rights or to create change in the workplace. Thus, without the ability of brown collar workers to assert their rights, wages and working conditions will continue to deteriorate for all workers. Second, as brown collar occupations become more prevalent, there is a risk that the pattern will become entrenched. As the numbers of brown collar workers in occupations grow, we will begin to see an increase in segregated workplaces. This is the pattern we can see developing in poultry plants, where more than 80% of the workplace is Latino in some places.

I suggest that we can utilize existing frameworks to deal with the fear of brown collar workers and to help reverse the trend toward segregation in brown collar occupations. I will focus on two areas. The first is the creative use of the administration of immigration law. The second focuses on legal strategies under Title VII disparate treatment theory that address the changing workforce dynamics in brown collar occupations.

IV. LEGAL STRATEGIES FOR PROTECTING WORKERS IN BROWN COLLAR OCCUPATIONS

In this section I offer several approaches for protecting workers in brown collar occupations within existing legal frameworks. I start with the premise that legal protection of the brown collar worker population inures to the benefit of all workers. I first suggest that federal administrative agencies cooperate more fully to protect workers who complain, especially in cases of more egregious workplace violations. I suggest that agencies cooperate to issue U visas to workers who cooperate in investigations of unlawful employment practices.

I then suggest that brown collar plaintiffs utilize the type of data that has been described in this Article to address the barriers that may

(S.D.N.Y. 2002) (same); *Flores v. Albertsons, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002) (same).

exist for brown collar workers in disparate treatment claims.⁷⁹ One possible barrier may be that brown collar plaintiffs may not be able to identify similarly situated employees to compare to, especially as brown collar occupations reach the 100% Latino population rate. I suggest that brown collar plaintiffs use longitudinal data as a substitute for comparators. Another barrier may be that brown collar plaintiffs will have to respond to the employer's argument that brown collarization is the result of market factors to which employers are merely reacting. I suggest that plaintiffs utilize the data developed by Dr. Catanzarite as evidence of a causal link between the employer's recruiting practices, wage penalties or worsening conditions, and the employer's intent. I also suggest that brown collar plaintiffs utilize strategies developed by plaintiffs in Racketeer Influenced and Corrupt Organizations Act (RICO) complaints to show that employer's wage setting practices are deliberate and not merely a response to market forces. In concluding this section, I discuss the possible consequences of the strategies I propose.

A. *Increasing Cooperation Between Immigration and
Employment Authorities*

Although it may seem counterintuitive, in order to ensure and protect the rights of all workers in brown collar occupations, it may be necessary to devise strategies for protecting undocumented workers against immigration law enforcement. Because a large portion of brown collar workers may be undocumented, their fear of complaining about workplace conditions hinders the ability of all workers in brown collar occupations to make changes. In the absence of legislation offering legalization to undocumented workers in the United States, employment and immigration law enforcement agencies must work with one another to meet common goals of ensuring employer compliance with labor and employment law as well as immigration policy. Although not all brown collar workers are undocumented, they suffer the same wage penalties and working conditions by virtue of positions alongside undocumented workers.

In order to partially address the chilling effect of the *Hoffman* decision, I suggest that agencies such as the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC) and the United States Citizenship and Immigration Services (USCIS)

⁷⁹ I focus on some ideas for disparate treatment claims, although they are by no means exhaustive of the ways in which brown collar workers should be protected by existing laws. I am fully cognizant that the other theories in Title VII law as well as other employment and labor laws should be further explored.

within the Department of Homeland Security (DHS) could cooperate to protect workers who come forward with complaints about workplace abuses. There is precedent for cooperation. In October 2003, Wal-Mart became the target of a federal investigation involving charges that the company used labor contractors to knowingly hire undocumented workers for its cleaning crews in stores throughout the country. The janitors agreed to cooperate in a criminal investigation of Wal-Mart's practices.⁸⁰ Labor investigators worked with USCIS to defer the deportation of nine immigrant janitors who complained of wage and hour violations.⁸¹ Although it is not clear whether visas were issued to the janitors, this is the type of case where U visas should be used to protect cooperating undocumented workers more fully.

The EEOC helping complainants obtain work authorization status through existing immigration programs is the kind of cooperation that would encourage employer compliance with existing laws. One avenue of legalization within the current immigration system, the U visa, can be used to provide brown collar workers with employment authorization if they cooperate in criminal investigations by local or federal authorities. U visas provide victims of certain crimes with legal status, work authorization and the opportunity for permanent status. These can be utilized in cases where the EEOC is investigating the type of particularly egregious workplace violations that arguably exist now in brown collar industries.⁸² In 2000, Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) and strengthened the Violence Against Women Act (VAWA) to provide more effective protections for immigrant victims of violence, in and out of the workplace.⁸³ Congress amended the Immigration and Nationality Act (INA) to add a new category of nonimmigrant visas to protect immigrant victims of several crimes from deportation and to help law enforcement agencies in the detection, investigation and prosecution of various crimes. The U visa provides legal nonimmigrant status to victims or material witnesses of the following or similar crimes: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive mutilation, being held hostage, peonage, involuntary servitude, slave

80 Brian Donohue, *U.S. Lifts Departure Threat for 9 Janitors—Illegal Immigrants Could Testify in Wal-Mart Hiring Investigation*, STAR-LEDGER (Newark, N.J.), July 4, 2004, at 19, available at 2004 WL 56548744.

81 *Id.*

82 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, 163–65 (2002).

83 Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy or solicitation to commit any of the above mentioned crimes.⁸⁴ The visa is available to a victim of any of these offenses who has been or is being helpful to a federal, state or local law enforcement official, or to the United States Immigration and Customs Enforcement (USICE)/USCIS in the investigation of the criminal activity described above or a similar activity.⁸⁵ EEOC investigators may have the ability to investigate criminal activity that is associated with workplace discrimination in ways similar to those utilized by federal investigators in the Wal-Mart situation. One of the requirements of visa eligibility is that the law enforcement agency certify a worker's cooperation.⁸⁶ EEOC investigators should consider the practice of using such certifications to protect brown collar workers who do come forward with complaints. No doubt this practice will increase the demand for U visas. Currently there are 10,000 U visas available per year.⁸⁷ Congress may need to revisit the U visa category to increase the numbers of such visas available yearly if this is to become an effective vehicle for the protection of brown collar workers who cooperate with federal or local authorities.

Removing immigrants' fear of making workplace complaints also removes much of the employer's incentive to target immigrant populations for low wage and undesirable jobs. This is an important first step in vindicating the rights of brown collar employees in the workplace.

B. Bringing an Employment Discrimination Lawsuit in the Brown Collar Context

Title VII has become the tool to eradicate discriminatory workplace practices related to recruitment, hiring and assignment of workers and it can be used here to vindicate brown collar workers' rights. In Title VII cases it is unlawful for an employer to discriminate against an employee on the basis of race, color, religion, sex, or national origin.⁸⁸ Title VII cases cover issues such as hire, discharge, terms and conditions of employment, limitation, segregation or classification of employees. A Title VII plaintiff must demonstrate a causal connec-

84 8 U.S.C. § 1101(a)(15)(U)(iii) (2000).

85 *Id.* § 1101(a)(15)(U)(i)(III).

86 *Id.*

87 *Id.* § 1184(p)(2)(A).

88 42 U.S.C. § 2000e-2(a)(1) (2000).

tion, showing that an employer's action was because of race or national origin. In this section I offer two specific suggestions that may make existing Title VII law more effective in the brown collar context. Although there are several methods of proving causation in discrimination cases, I will concentrate here on the disparate treatment theory of discrimination.

C. *The Existing Disparate Treatment Framework*

Under section 703(a)(1) of Title VII, an employer may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."⁸⁹

In disparate treatment cases courts focus on whether the employer's actions were motivated by a discriminatory intent.⁹⁰ The Supreme Court set out the standard for a plaintiff's prima facie case in *McDonnell Douglas Corp. v. Green*.⁹¹ The *McDonnell Douglas* scheme requires a plaintiff to establish a prima facie case for discrimination by proving that the plaintiff is a member of a protected class, that the plaintiff was denied an employment opportunity for which he was qualified and that the employer continued to seek employees with plaintiff's qualifications for that employment opportunity.⁹² The framework requires the plaintiff to show a similarly situated person with whom he can compare his treatment. A disparate treatment theory requires that the plaintiff show that the defendant's actions were motivated by discriminatory intent through the three-part *McDonnell Douglas* framework. The plaintiff must establish a prima facie case of discrimination; the employer must respond with a legitimate, nondiscriminatory reason for its actions; and the plaintiff must establish that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination.⁹³

An employee can also bring a disparate treatment pattern and practice or class action claim alleging discrimination against a protected group.⁹⁴ Here the plaintiff bears the initial burden of showing

89 *Id.*

90 *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988) (holding that disparate treatment analysis requires proof of discriminatory intent).

91 411 U.S. 792 (1973). The Supreme Court reaffirmed the standard in *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

92 *McDonnell Douglas*, 411 U.S. at 802.

93 *Id.* at 806.

94 *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

that a pattern and practice of differential treatment is the employer's standard operating procedure.⁹⁵ The plaintiff can use statistical evidence along with anecdotal evidence to create an inference of discrimination.⁹⁶ Once a plaintiff establishes a prima facie case of discrimination, the employer can rebut the evidence with its own statistical evidence or by undermining the plaintiff's statistical evidence. If the employer is not successful in rebutting the plaintiff's prima facie case, the court can infer discrimination and the case moves to a remedial stage where the court determines the damages to be awarded to each individual.⁹⁷

D. Disparate Treatment Theory in the Brown Collar Context

The studies discussed in the first part of this Article demonstrate that as occupations become more brown, wages and working conditions worsen, and workers become increasingly segregated. This phenomenon promises to become even more prevalent unless we can use existing law to reverse the trend.

In the brown collar context, the plaintiff can claim that the employer intentionally targeted her for recruitment because of her national origin, expecting that she would take a lower-paying job. The plaintiff will claim that the employer either channeled her into the undesirable position or decreased her wages as the position began to tip toward brown collar status. The plaintiff will also claim in a pattern and practice case that the employer's practice was to target brown collar workers for the undesirable jobs in the workplace.

Two potential problems that may arise in brown collar disparate treatment cases can be addressed by the strategies I suggest in this Article. The first is the problem of a lack of comparator, especially in brown collar occupations where the numbers of Latinos continue to rise. Traditional disparate treatment theory requires the plaintiff to show similarly situated employees who are treated differently, usually better than, the plaintiff. The theory is less applicable where a job, company site or occupation is completely Latino and the plaintiff cannot identify the opportunities from which he/she is precluded. The case of the chicken processing plant in Hall County, Georgia, shows

95 *Id.* at 325.

96 *Id.* at 339; *see also* Bazemore v. Friday, 478 U.S. 385, 401-02 (1986) (accepting plaintiff's statistical evidence of hiring disparities along racial lines); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977) (holding that gross statistical disparities can be used to show a prima facie case of a pattern and practice of discrimination).

97 *Teamsters*, 431 U.S. at 361-62.

the difficulty of proving that similarly situated workers are treated differently: more than 80% of the plant is comprised of Latino workers. It is clear that some job lines will be exclusively Latino. What happens, then, if the entire plant, or a vast majority, is Latino, as is the case with poultry plants throughout the Southeast? Without proof that brown collar workers are treated differently than similarly situated employees outside their protected class, a plaintiff may have trouble meeting her prima facie burden.⁹⁸

The second problem involves rebutting the employer's argument that it is merely responding to market forces. Under the traditional framework, once a brown collar plaintiff proves her prima facie case, an employer can posit a nondiscriminatory reason for wage depression and/or segregation which is related to a legitimate business purpose. Here the employer may assert that paying the market rate for a job is legitimate reason enough to recruit and hire Latino immigrants because they happen to be the only ones who will take the jobs that the employer has to offer. Employers, the argument goes, are simply reacting to market forces that set wages and conditions at a level that no other U.S. worker will accept. This "market" defense was used in a previous generation of cases targeting gender and race pay inequity.⁹⁹ The market defense asserts, in part, that employees choose to take the jobs that employers offer at a given rate, an argument that has been challenged in social science and legal literature.¹⁰⁰ The defense has

98 See *McDonnell Douglas*, 411 U.S. at 802; see also *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1087 (D.C. 1994) (noting that part of the *McDonnell Douglas* requirement includes a showing that similarly situated employees are treated more favorably).

99 See, e.g., *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); *American Nurses Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986); *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985); *Lewis v. Tobacco Workers Int'l Union*, 577 F.2d 1135 (4th Cir. 1978); ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* 357-58 (Mark Granovetter ed., 1999).

100 See generally NELSON AND BRIDGES, *supra* note 99 (describing the market defense in various cases and contexts); Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 711 (1986) (contending that part-time work is regarded as inferior by employers and society, and that laws prohibiting sex discrimination in employment have provided little protection for part-time workers); 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 (1990) (providing a good overview of sociological research showing that women do not "choose" to remain in low-paying jobs, but actually develop job preferences based on structural and cultural features of employing organizations, and arguing that employers play a larger role than is recognized in shaping employees' expectations of work); Vicki Schultz & Stephen Petterson, *Race, Gender, Work and*

had mixed results, depending on the evidence the plaintiff provides to show that the employer's reason is a pretext for discrimination. In those cases where men and women are clearly treated differently with respect to the same job, courts tend to disregard the market defense. So, for example, in *City of Los Angeles Department of Power & Water v. Manhart*, the Supreme Court held that Title VII prohibited companies from charging women more for retirement insurance than men even though the company showed that the differences were based on actuarial charts used throughout the market.¹⁰¹ In those cases where the basis for a pay differential may be less than clear, the courts tend to accept the employer's market argument.¹⁰² For example, in *AFSCME v. Washington*, a comparable worth case, female plaintiffs sued the state of Washington for gender-based discrimination in its wage-setting practices.¹⁰³ The Seventh Circuit court held that the plaintiffs failed to establish a link between the cause of the disparity and intent on the part of the employer:

The requirement of intent is linked at least in part to culpability. That concept would be undermined if we were to hold that payment of wages according to prevailing rates in the public and private sector is an act that, in itself, supports the inference of a purpose to discriminate. Neither law nor logic deems the free market system a suspect enterprise.¹⁰⁴

Likewise, outside the comparable worth context, in *May v. Shuttle*, the court affirmed summary judgment in favor of an employer that argued its decision to terminate the plaintiff and outsource her department was based on economic factors and was, therefore, a legitimate business reason.¹⁰⁵

E. Strategies to Address Issues that May Face Brown Collar Workers in Disparate Treatment Lawsuits

1. Using Longitudinal Data as Comparator Evidence

A disparate treatment plaintiff should be able to utilize the longitudinal data such as that developed by Dr. Catanzarite regarding jobs that were previously held by non-Latinos—and now held by brown

Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. CHI. L. REV. 1073 (1992) (analyzing the relative success of the lack of interest defense in Title VII cases based on gender and race claims).

101 435 U.S. 702, 709 (1975).

102 NELSON & BRIDGES, *supra* note 99, at 358.

103 770 F.2d 1401, 1403 (9th Cir. 1985).

104 *Id.* at 1407 (citations omitted).

105 *May v. Shuttle*, 129 F.3d 165, 180 (D.C. Cir. 1997).

collar workers—to satisfy the first prong of the *McDonnell Douglas* prima facie case. Using this data, a plaintiff can establish the comparator as the predecessor group of employees, and the comparator's pay would be based on past wages in the industry. Such proof of a causal link between workforce tipping and wage degradation can create an inference of discrimination.

This strategy ultimately requires that plaintiffs posit and courts accept longitudinal data as a substitute for similarly situated employees where there are none. Longitudinal data should demonstrate that industry practices change with the introduction of new workplace populations and that the changes in working conditions correlate with workplace composition. Further longitudinal research may be necessary to show that the jobs or occupations remain essentially unchanged despite any restructuring the industry may have undergone. In the case of deskilled industries, further research may be needed to show either that wage penalties remain even after controlling for changes in job characteristics, or to show that wage penalties are one aspect of an overall job devaluation that occurs once an occupation tips from one ethnic group to another. Either of these scenarios could still be considered discrimination if the longitudinal data exhibited trends that pointed to employer bias.¹⁰⁶ Disparate treatment based on longitudinal data should be actionable even though the plaintiff successfully obtained a job with the employer. The plaintiff in that case should be able to argue that even treatment considered favorable (here, a position with the employer) can constitute actionable disparate treatment.¹⁰⁷

2. Using Data to Rebut the Market Defense

Here, I suggest developing models that more closely link an employer's ability to set wages in a market with an employer's intent to differentiate between brown collar workers and predecessor employees. There is a good deal of literature regarding how much an employer can rely on the market as part of a business necessity

106 See, for example, DONALD TOMASKOVIC-DEVEY, *GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCE AND CONSEQUENCES OF JOB SEGREGATION* 12–132 (1993), for a description of how the composition of a job influences its pay, level of complexity, and autonomy among other factors.

107 See, e.g., *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999) (requiring African American telemarketers to canvass an African American neighborhood violated § 1981); *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1177–78 (7th Cir. 1998) (allowing the plaintiff to prove disparate treatment in case where he was assigned to new position servicing minority travelers).

defense.¹⁰⁸ A review of the market defense and pro-market ideology in employment law opinions is beyond the scope of this Article. Nonetheless, I want to suggest some strategies for beginning to challenge the argument that an employer is simply responding to market forces in setting its wage scale, and so develop an alternative view of the relationship between employers, markets, and wages. Part of the goal in determining the role of employer decisionmaking in wage setting is to identify that portion of wages arising from employer bias in order to show a linkage between the cause of the wage disparity and employer intent or motive.¹⁰⁹ Control of market forces and recruiting practices signals that an employer may be targeting brown collar workers because of their perceived willingness to accept low pay and worse working conditions. Information from the type of data that Dr. Catanzarite provides, as well as from other sources, can be gleaned to support an argument that employers in brown collar industries control enough factors in the labor market to set at least a portion of wages, especially for a noncompetitive market. For example, evidence in longitudinal studies of wage depression indicates that a wage penalty exists even after controlling for educational levels of brown collar workers, suggesting that something other than an individual's human capital is at stake in wage setting. Evidence uncovered during the Tyson criminal investigation about employer recruiting and hiring practices also reveals much-needed insight about the bargaining power of employers as well as their intent, especially when it comes to hiring and assigning brown collar workers to their occupations.¹¹⁰ Each of these pieces of evidence may be used as indicators of an employer's

108 See *supra* notes 99–100. See generally NELSON & BRIDGES, *supra* note 99, at 371–84, for a good overview of publications discussing the relationship between employers, markets, and wages; Cynthia D. Anderson & Donald Tomaskovic-Devey, *Patriarchal Pressures: An Exploration of Organizational Processes that Exacerbate and Erode Gender Earnings Inequality*, 22 WORK AND OCCUPATIONS 328–56 (1995); William P. Bridges & Robert L. Nelson, *Markets in Hierarchies: Organizational and Market Influences on Gender Inequality in a State Pay System*, 95 AM. J. SOC. 616–58 (1989); Schultz, *supra* note 100; Schultz & Petterson, *supra* note 100.

109 Proof of intent requires more than awareness of the consequences; the plaintiff must show that the employer's actions were "because of, not merely in spite of its adverse effect upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotations omitted). In other words, the plaintiff must show that membership in a protected class is a motivating factor in the adverse employment decision. See 42 U.S.C. § 2000e-2(m) (2000); see also *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding that to prevail under § 2000e-2(m), a plaintiff need only demonstrate, through either direct or circumstantial evidence, that an employer used a forbidden consideration with respect to any employment practice).

110 See *Tyson Indictment*, *supra* note 31.

intent. If the gender pay inequity cases are any indication, the clearer the connection between the employer's action, the employer's ability to affect the market, and the employer's motive, the more successful a brown collar plaintiff's ability to rebut the employer's business necessity defense. Otherwise, brown collar workers face the danger that courts will refuse to deconstruct an employer's assertions regarding the effect of market forces on wage setting.

Here, we can take lessons from plaintiffs in a similar set of cases who have proposed utilizing social science and economic data to show that employers in brown collar industries actually control much more of the wage setting than they profess. Although the causes of action in those cases are based on violations of RICO, I will discuss these cases briefly to provide a flavor of the type of data that plaintiffs can bring into Title VII cases. The plaintiffs in those cases sued employers because they suffered depressed wages caused by the employers' practice of hiring undocumented workers in violation of INA § 274 and 8 U.S.C. § 1324, and paying them below-market wages.¹¹¹ The plaintiffs sued under RICO, which requires them to show that the employers' illegal schemes to hire undocumented workers caused the plaintiffs to suffer wage penalties. In order to show causation, the plaintiffs in these cases must prove that employers have the power to affect the labor market in a particular geographic area, either because they have the ability to define wages by virtue of their market share, or because they are involved in a scheme to build a noncompetitive labor market.¹¹² I suggest that brown collar plaintiffs heed such data and import it into the existing Title VII framework as proof to rebut the employer's business necessity argument that it is merely responding to the market in wage setting.

In *Mendoza v. Zirkle Fruit*, for example, the plaintiffs, a group of legally authorized workers, alleged that their employers "comprise a large percentage of the fruit orchards and packing houses in the area, and therefore affect wages throughout the labor market."¹¹³ They

111 See, e.g., *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004); *Baker v. IBP*, 357 F.3d 685 (7th Cir. 2004); *Williams v. Mohawk Indus., Inc.*, 314 F. Supp. 2d 1333 (N.D. Ga. 2004) (presenting a case where plaintiffs sued the second largest carpet and rug manufacturer in the United States for depressing wages by hiring undocumented workers). In 1996, Congress amended the RICO statute to include as racketeering activity any act indictable under INA § 274, if committed for the purpose of financial gain. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Sec. 433, § 4, 110 Stat. 1214, 1274 (codified at 18 U.S.C. § 1961(1)(F)(2000)). Knowingly hiring a group of undocumented workers is included in this category. See 8 U.S.C. § 1324(1)(B) (2000).

112 See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002).

113 *Id.* at 1167.

also alleged that the “[d]efendants have exploited these workers’ precarious economic situation and fear of asserting their rights to drive the wage rate for both documented and undocumented workers lower than it would be if defendants did not hire undocumented workers.”¹¹⁴ The circuit court reversed the district court’s dismissal of the case and allowed the plaintiffs to move forward with their pleadings, noting that “the workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effects of the illegal scheme [of hiring undocumented workers].”¹¹⁵

Trollinger v. Tyson Foods provides a similar example in the poultry context.¹¹⁶ After the U.S. government indicted Tyson managers in Shelbyville, Tennessee, for conspiring to smuggle and then hire undocumented workers in violation of INA § 274, several plaintiffs in the Shelbyville plant sued Tyson under RICO for depressing wages by knowingly hiring workers who were paid wages well below those paid in labor markets composed of legally authorized workers. According to the plaintiffs, Tyson’s manipulation of the labor market allowed the company to pay wages substantially below the wage level paid to low-skill workers in the areas surrounding the Tyson facilities in Shelbyville.¹¹⁷ The appellate court recently reversed the district court’s dismissal of the case, allowing the plaintiffs to bring forward evidence of both Tyson’s ability to influence the labor market in the area, and Tyson’s ability to depress wages in the area.¹¹⁸ This and the other RICO cases indicate that the possibility does exist for showing the employer’s role in the setting of wages for brown collar workers. I suggest that brown collar plaintiffs take note of and import this kind of data into the existing Title VII framework as proof to rebut the em-

114 *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at *2 (E.D. Wash. Sept. 27, 2000).

115 *Mendoza*, 301 F.3d at 1171. The district court’s reluctance to delve into market factors was evident:

[T]he wage rate that plaintiffs might have been paid would depend on the wage rate paid by other orchardists and similar employers, the general availability of laborers, documented and undocumented, in the Yakima Valley, the profitability of the defendants’ businesses, the qualifications of each plaintiff, whether the plaintiffs individually or as a class would have been hired at a higher rate, and other factors. Sifting through those factors to determine the exact amount of loss attributable to the defendants’ alleged violations would be a daunting task at best.

Mendoza, 2000 WL 33225470, at *10.

116 370 F.3d 602 (6th Cir. 2004).

117 *Id.* at 606.

118 *Id.* at 622.

ployer's business necessity argument that it is merely following the market in wage setting.

Why not just use a RICO theory to protect the rights of brown collar workers? Although the strategy is innovative and should be successful, the set of RICO cases described above are based on a tactic of dividing the brown collar population into those who deserve remedies and those who do not. Although the theory should not be discounted, it is not clear whether the interests of all brown collar workers, documented and undocumented, can be represented in the same RICO action. In fact, the Ninth Circuit in *Mendoza* noted in its analysis of whether the plaintiffs suffered a direct harm from the employer's practice that the undocumented workers in these cases "cannot be counted on to bring suit for the law's vindication."¹¹⁹ A cause of action based on Title VII, on the other hand, is more likely to protect *all* workers in a brown collar occupation, rather than simply the documented workers, because Title VII has been held to protect all employees, regardless of immigration status.¹²⁰ In the case of brown collar occupations, all workers are affected by the employer's wage setting practices. Protecting one set of workers over another does little to ensure employer compliance over the long run; it merely pushes undocumented workers further underground in the labor market.

The data in the first part of this Article provides circumstantial evidence that employers have pulled recent Latino immigrants into the workforce through their recruiting methods. The data also suggest that the employer pull has created a segregated brown collar workforce in several industries. Finally, the data shows that as brown collar occupations become increasingly more Latino, the wage penalty over time is correspondingly high, and that factors specific to individual workers, such as education, have no effect on the wage penalty. I suggest that more than simply providing the context for Marielena's story, these pieces of evidence can be linked together to help brown

119 *Mendoza*, 301 F.3d at 1170 (citations omitted).

120 *See, e.g.*, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989); *EEOC v. Switching Sys. Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992); *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 593-94 (E.D. Cal. 1991) ("Congress did not intend [for IRCA to] amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII."); *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12, 21 (Cal. 1998) (finding that the employment discrimination statutes apply to undocumented alien employees notwithstanding the illegality of employing them). *But see Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187-88 (4th Cir. 1998) (finding that undocumented applicants have no cause of action under Title VII because they are unqualified to work under IRCA).

collar plaintiffs develop a more clear correlation between the employer's action and the employer's intent in an individual or a pattern and practice case.

In a pattern and practice disparate treatment claim, longitudinal data can provide evidence that the disparate treatment is part of an employer's normal operating procedure. In such a case, the plaintiff will be able to show through statistics that a particular occupation has become increasingly populated by one ethnic group over time. Here, the brown collar plaintiff can use the statistical data to track the changes in occupation over time and to show that the employer's practices (such as decreasing wages over time as the population changed) led to an undesirable overrepresentation of Latinos in a job. The plaintiff can use the data along with anecdotal evidence such as Marielena's story to build an inference of disparate treatment.¹²¹

This suggested use of the data requires that courts move toward a stricter standard that holds employers accountable to wage and working condition differentials which cannot be explained by market forces. Moreover, courts must accept the notion that differentials can be explained with longitudinal data. Nonetheless, the data describing brown collar workers deserves attention. No doubt, still more research is needed on the methods and practices employers utilize to set wages and working conditions once an occupation starts to move toward brown collarization. This is especially true for data regarding the relationship between pay, gender, and ethnic origin in brown collar occupations.

F. Consequences of Implementing Suggested Strategies in Brown Collar Lawsuits

Some would argue that the strategies I suggest in this Article would eliminate brown collar jobs, to the detriment of the very workers the reforms aim to protect. If these proposals were successfully implemented, they would likely result in employers paying more for brown collar labor as well as incurring costs to improve workplace conditions. This may well result in fewer jobs available in brown collar occupations in the United States, as employers attempt to cut costs in other ways. I suggest that in brown collar fields, where occupational hazards are relatively high and particularly debilitating, a worker would opt for better working conditions, even if it meant fewer jobs. Brown collar workers are, no doubt, also willing to compete for those jobs on the same level as their non-Latino counterparts.

121 See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 325, 339 (1977).

What about the cost of the suggested reforms to society and the consumer? Communities that host large influxes of immigrants are more susceptible to increased public costs in safety, education, housing, social services, and medical care.¹²² The communities that are integrating the brown collar population into their fabric would likely benefit from the higher wages and improved working conditions that these proposals would bring, as such improvements would soften the usual social service and integration costs these communities may incur.¹²³ It is less clear how consumers would fare, as we need more empirical work to determine how much of these increased labor costs an employer might pass on to consumers. As we can see from the costs that communities incur in brown collar regions, however, consumers already pay for cheap products in terms of social costs. Empirical data may well show that direct and indirect costs tend to cancel each other out.

CONCLUSION

In this Article I have provided a general overview of the types of problems that brown collar workers will continue to face to an even greater degree in the future as the Latino population grows in the workplace. I have introduced some issues that face brown collar workers both in and outside the workplace that affect their status at work. I have suggested methods for administering immigration law and for applying existing disparate treatment frameworks in a brown collar context. Developing and utilizing longitudinal data on the effects of brown collarization on pay over time can provide the basis for comparator evidence as an occupation grows increasingly Latino. Developing and utilizing economic models to show employer control over the labor market gives brown collar plaintiffs some of the evidence they need to show disparate treatment.

Several areas remain to be explored in future writings on this topic. For example, brown collarization is similar in its characteristics to pink collar work and yet provides another opportunity to reevaluate the effectiveness of employment and labor law in protecting workers from conditions of subordination. More research and study is needed

122 See STULL & BROADWAY, *supra* note 7, at 151 (“[P]ackinghouses bring significant social and economic costs to host communities: declining per capita income, housing shortages, increases in population mobility, and rising demands for health care, public safety, education and indigent care.”).

123 Although it is not entirely clear whether the existence of brown collar workers overextends social service capacity, brown collar jobs tend to turn over quickly, and this characteristic creates problems in housing, education, and the stability of a community. See Gouveia & Stull, *supra* note 2, at 15.

to develop an appropriate and adequate alternative enforcement paradigm, for both male and female brown collar workers. There is a real need to study the effect of brown collar workers on evolving employment and labor law, especially with respect to other theories of proof in Title VII (including disparate impact and hostile work environment cases), FLSA, NLRA, and state laws such as workers' compensation statutes. As the brown collar population grows, we will need to examine whether current doctrinal frameworks adequately protect brown collar workers and whether changes are required in any of these laws to better protect them. This is especially pressing if we are to reverse the growing trend toward re-segregation in these low-wage industries. Although the empirical data that currently exists supports theories that plaintiffs can test in the current framework, more longitudinal and economic data would be useful in developing theories and models for improving existing law. The Latino population will continue to expand in the American workplace, and as it does, brown collar occupations promise to become more commonplace. It benefits all workers if we begin to examine more deeply whether our laws fit this emerging workplace paradigm. It remains important both for all workers and for the continued viability of our employment and labor laws that this most vulnerable population enjoy all the protections that our laws promise.