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ADDRESSING SEGREGATION IN THE BROWN COLLAR WORKPLACE: TOWARD A SOLUTION FOR THE INEXORABLE 100%

Leticia M. Saucedo*

Despite public perception to the contrary, segregated workplaces exist in greater number today than ever before, largely because of the influx of newly arrived immigrant workers to low-wage industries throughout the country. Yet existing anti-discrimination frameworks no longer operate adequately to rid workplaces of the segregation that results from targeting immigrant workers. This Article suggests a new anti-discrimination framework to address workplace segregation. The Article reviews how litigants have attempted to rid the workplace of conditions resulting from segregated departments through existing anti-discrimination frameworks. It then suggests a simple, yet powerful, shift in the inferences that can be drawn from the inexorability of a segregated workplace. It asks the reader to imagine an inference created from the "inexorable 100," the mirror image of the inexorable zero inference, and a shorthand description for a segregated job category or department within a workplace. The Article proposes a segregation framework that views segregation as an expression of subordinated work conditions, and that offers courts the opportunity to craft broader remedies, both to eliminate segregation and improve the working conditions of segregated workers.

INTRODUCTION

Despite public perception to the contrary, segregated workplaces exist in greater number today than ever before, largely because of the influx of newly arrived immigrant workers to low-wage industries throughout the country.[1] These "brown collar" workplaces, like segregated workplaces of the past, are often exploitive and dead end. The same discriminatory practices that exclude native-born workers from segregated workplaces target

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1. *See* Rogelio Saenz et al., *The United States: Immigration to the Melting Pot of the Americas, in* MIGRATION AND IMMIGRATION: A GLOBAL VIEW 211, 211–32 (Maura I. Toro-Morn & Marixsa Alicea eds., 2004).

immigrant workers for these less-desirable jobs.[2] Yet, ironically, because "job opportunities" are open to them, brown collar workers are less readily recognized as discrimination victims. Brown collar workers are what some globalization scholars term "weak winners." In contrast to the "strong losers" who previously held these once more-desirable jobs,[3] the weak winners may enjoy the benefits of a job, but they certainly do not enjoy a job with the labor standards that existed before it became a brown collar job.[4]

In the current mythos, low-wage jobs, which are often segregated, are idealized as the natural starting point for immigrant workers entering the workforce. The myth "portrays the system as open to those who are willing to work hard and pull themselves over barriers of poverty and discrimination."[5] However, the structural aspect of segregation—the fact that it persists over time despite legal strategies attacking it—belies the individualist narrative of workers freely choosing the occupations they desire. The endurance of segregation may also reveal the existence of a workplace dynamic unaffected by, and out of the reach of, current anti-discrimination law.

The Civil Rights Act of 1964 was enacted partly in response to the exploitation that accompanied segregation under Jim Crow laws.[6] Title VII of the Act prohibits the segregation or classification of jobs on the basis of one or more of the protected categories.[7] Anti-discrimination law focuses on eliminating structural barriers to employment opportunity or advancement.[8] Consequently, the

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2. Employers carry out their preferences for brown collar workers by creating workplace structures that are unappealing to native born workers and then hiring immigrants into them. Some of these structures include independent contractor or other workplace arrangements that have been stripped of traditional employee benefits arrangements. *See generally* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 158–59 (2004); 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); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1894–95 (2000).

3. *See* SHAHRA RAZAVI, GENDERED POVERTY AND WELL-BEING 21, 249, 259–60 (2000) (discussing women's roles in export-oriented industries which arise out of off-shore operations once operating in developed countries and analyzing the effect of such operations on working conditions and labor standards).

4. *Id.* at 259–60.

5. Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1408 (1995).

6. *See* Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 471–74 (1968).

7. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. § 2000e-2 (2004)).

8. The text of Title VII makes it an unlawful employment practice 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

Title VII frameworks that courts have developed—disparate treatment and disparate impact—best address an employer's failure to provide equal employment opportunities on a clearly delineated job track. The frameworks are not adequate to target and eradicate the overrepresentation of workers in a particular job, especially ones as segmented and contingent as those that immigrant workers populate.

While the current legal regime typically focuses on breaking down barriers to entry or opportunity, Title VII also has a history of broad remedial power over discrimination in the workplace. In *Albemarle Paper Co. v. Moody*, for example, the Supreme Court focused on the injury to formulate a remedy that would make the plaintiffs whole.[9] The Court noted:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[10]

This Article posits that this kind of broad remedy is necessary to definitively dismantle modern segregation in the brown collar workplace.[11] With this goal, it proposes a Title VII segregation framework, centered on recognizing a new inference of discrimination when all—or 100 percent of—workers in a job category are from a protected group, the "inexorable 100." The inexorable 100 is the mirror image of the "inexorable zero," an inference of discrimination currently recognized by courts where there is a complete absence of a protected group in a job category.

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origin." *Id.* (codified as amended in pertinent part at 42 U.S.C. § 2000e-2(a)(2) (2004)). This is in part because of historical legal strategies aimed at eradicating segregated workplaces by focusing on legal structural impediments like Jim Crow laws, on the assumption that their eradication would naturally lead to desegregation in the workplace. *See* Risa Lauren Goluboff, *"Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1442 (2005).

9. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

10. *Id.* at 418 (citations omitted).

11. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006) (providing an explanation and in-depth discussion of the existence, development and maintenance of the brown collar workplace).

There are two motivations for the exploration in this Article. The first is the incomplete analysis of the role of immigrants in the American workforce in both the immigration and employment discrimination debates. The uni-dimensional character of the debate, specifically the focus on immigrants alternatively taking away jobs others want or taking jobs no one else wants, masks the subordination that often exists in the segregated workplace.[12] As noted above, the argument assumes that no unlawful discrimination occurs as long as immigrants have opportunities to take jobs that no one else will take.[13] It also myopically focuses on the worker's role and choices, ignoring the employer's role in creating isolated, dead-end jobs. The rhetoric instead presumes that these jobs are an inevitable part of American economic life.[14] Further, by focusing on the employee's role, the debate draws attention away from the employer and government policies that have allowed the creation of jobs with lower wages, no health insurance or other benefits, and lax safety regulations.

The second purpose of this Article is to move beyond the debate over which workers should hold which particular jobs. This debate pits employee groups against each other in an increasingly segmented labor market, engendering tensions between groups,[15] and allowing employers to avoid liability by pointing to the segmented nature of the market, much as employers have successfully done to explain wage disparities.[16]

Part I of this Article analyzes traditional approaches to segregation through the existing anti-discrimination frameworks. It critiques their limited ability to eradicate segregation, as evidenced by the continued existence of workplace segregation. Part II analyzes the effectiveness of strategies attacking segregated conditions

12. *See e.g., Both Sides of the Borders: The Voice of Paul McKinley* (Chi. Pub. Radio broadcast Aug. 21, 2006), http://www.chicagopublicradio.org/Program_848_Segment.aspx?segmentID=1021 (featuring ex-offender and activist Paul McKinley speaking out against immigrants taking jobs from African Americans).

13. This assumption itself contains two further assumptions: first, that by taking these jobs, immigrants are signaling a "preference" for them. Second, and relatedly, that the "choice" of immigrants to take these jobs should preclude any discrimination claim. *See* Saucedo, *supra* note 11, at 973–76.

14. *Id.* at 973.

15. The narrative of groups taking each others' jobs has played out in various litigation arenas. *See, e.g.*, EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Leah Beth Ward, *Global Horizons Labor Suit Granted Class-Action Status*, YAKIMA HERALD-REPUBLIC, Aug. 1, 2006.

16. *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 49–50 (1999) (explaining that supporters of the free market model attribute sex-based wage differences to market forces).

under the existing frameworks, such as wage inequity, conditions, and national origin cases. Part III identifies the inexorable zero in traditional anti-discrimination law as the foundational theoretical concept for the mirror-image inexorable 100 in the modern segregated environment. Part IV demonstrates why a segregation framework is the necessary and appropriate step in anti-discrimination law to address the segregation in the brown collar workplace. It then suggests an anti-discrimination framework that arises out of a view of segregation as an expression of subordinated work conditions. The key component of this framework is the inexorable 100. In an ideal world, an inexorable 100 inference would allow a judge to impose remedial measures to dismantle the segregation. More importantly, recognition of an inexorable 100 concept should also open the way for a remedy that includes the improvement of conditions in segregated occupations.

I. THE INABILITY OF CURRENT PARADIGMS TO REMEDY SEGREGATED WORKPLACES

The argument that segregation is discriminatory is not novel, yet courts still reject it even in traditional workplace segregation fact patterns, as illustrated by *Marion v. Slaughter Co.*[17] In *Marion*, a female assembler sued her employer because she was consigned to a segregated department and did not have opportunities for advancement.[18] She attempted to show that the employer's practices had a disparate impact on women simply by showing the fact of segregation.[19] The circuit court affirmed the district court's dismissal of her argument, stating that Title VII requires more than a showing of the mere fact of segregation to make out a prima facie case of discrimination.[20] As the *Marion* court noted:

> [T]he fact, standing alone, that [the company] has all men in sheet metal positions and all women in assembly is not a per se violation of Title VII; nor is it self-proving as to the existence of a policy or practice, lawful or otherwise. The section of the statute to which the plaintiff refers . . . refers to segregation or classification that tends to deprive protected individuals of employment opportunity or otherwise adversely affect employment status. Thus, it is not the fact of separate

17. Marion v. Slaughter Co., 1999 WL 1267015 (10th Cir. 1999).
18. *Id.* at *2.
19. *Id.* at *4–5.
20. *Id.* at *6.

> genders in departments that is prohibited, it is the deprivation of opportunity or adverse effect on status that is prohibited.[21]

Thus, even though Title VII prohibits the "classification or segregation" of positions, as a result of the doctrinal focus on opportunities for advancement, the disparate impact and disparate treatment frameworks developed by the courts require more—specifically, a showing of a deprivation of opportunity. This analysis ignores the strong historical correlations between segregated workplaces and inferior positions and conditions for minorities and women. Social science research shows that the more segregated the occupation, the more its employees experience wage disparities, less desirable work tasks and assignments, and deteriorating pay over time.[22] That such conditions deserve antidiscrimination protection is a tenet of the Civil Rights Act of 1964.[23] *Marion* is stripped of the bedrock assumption underlying historical segregation cases such as *Brown v. Board of Education*[24] and *Hernandez v. Texas*[25] and their progeny: that segregation is a *per se* equal protection violation because of its subordinating aspects. Modern cases, like *Marion*, rest on a new assumption of nondiscrimination, in the absence of clear evidence to the contrary.[26]

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21. *Id.*

22. *See, e.g.*, 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, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 WORK & OCCUPATIONS 300, 301 (2002) [hereinafter *Dynamics of Segregation and Earnings*]; Lisa Catanzarite, *Race-Gender Composition and Occupational Pay Degradation*, 50 SOC. PROBS. 14, 17 (2003) [hereinafter *Race-Gender Composition*]; Lisa Catanzarite & Michael Bernabé Aguilera, *Working with Co-Ethnics: Earnings Penalties for Latino Immigrants at Latino Jobsites*, 49 SOC. PROBS. 101, 103 (2002); 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*].

23. *See* Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2004)); United Steelworkers of Am. v. Weber, 443 U.S. 193, 202–03 (1979). *See also*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 466–68 (2001).

24. Brown v. Board of Education, 347 U.S. 483 (1954).

25. Hernandez v. Texas, 347 U.S. 475 (1954).

26. With the shift in assumptions about the relationship between segregation and discrimination, many of the disparate impact cases that challenge segregation in the workplace focus on employer practices that prohibit the advancement of protected groups from one job or occupation to another. *See e.g.*, Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007) (affirming district court's grant of class certification to female employees of Wal-Mart alleging sex discrimination); Butler v. Home Depot, Inc., 984 F. Supp. 1257 (N.D. Cal. 1997) (admitting expert testimony in support of plaintiffs' challenge against employer's subjective

In the past, courts have sometimes successfully addressed segregated workplace issues within the disparate impact and disparate treatment frameworks. However, as employer practices have become more multi-faceted and subtle,[27] and the labor market has changed, attacking segregation and its effects within these frameworks has become more difficult. Consequently, the employer practice of targeting minority immigrants for less desirable jobs goes undetected as a discriminatory practice in current anti-discrimination jurisprudence.[28]

Moreover, under the modern frameworks, the fact of segregation in a particular job is virtually irrelevant to a hiring, promotion, or wage discrimination claim, unless the segregation is a symptom of adverse employment conditions. Because mere segregation does not in itself require an explanation, even if a discrimination claim is successful the remedy need not necessarily eliminate it. The assumption may be that the remedy—for example, promotion into a more desirable position—will eventually dismantle the segregated workplace. Under that assumption based on anti-classification principles, there is no need to address the structures that make the job substandard. Presumably, this is unproblematic because the equality and anti-discrimination principle does not necessarily encompass the right to be free from substandard working conditions. Below, I briefly review the disparate impact and disparate treatment paradigms and discuss a frequent employer defense under the paradigms.

A. The Traditional Disparate Impact and Disparate Treatment Paradigms

Under the disparate impact framework, the plaintiff must show that some facially neutral employment policy or practice has a

promotion and channeling policy); 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); Jenkins v. Wal-Mart Stores, Inc., 910 F. Supp. 1399 (N.D. Iowa 1995) (allowing plaintiff to proceed to trial on a disparate impact claim where plaintiff argued that employer's subjective evaluation procedure for promotion resulted in an underrepresentation of Blacks in targeted positions).

27. Examples include the restructuring of industries so that jobs are more decentralized, contingent, and segmented. *See* STONE, *supra* note 2, at 72–86.

28. This use of race and national origin is analogous to the first generation discrimination that legal scholar Susan Sturm describes in her article. Sturm, *supra* note 23, at 465–68. The fact that employers discriminate so openly in tracking people into jobs rather than keeping them out of opportunities makes the inexorable 100 concept both salient and necessary in today's workplace.

significantly disproportionate impact on a protected class.[29] If the plaintiff makes this showing, the employer must demonstrate by a preponderance of the evidence that its policy or practice is related to the job in question and consistent with business necessity.[30] If the employer meets the burden, the plaintiff can still prove that the defendant refused to adopt a less discriminatory alternative practice; and the employer may still be found liable for discrimination.[31]

The disparate treatment model, in contrast, requires proof of intentional, differential treatment. Under the traditional framework developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*, the plaintiff can prove employer intent by bringing forward direct evidence of that intent or by introducing circumstantial evidence that the plaintiff sought an opportunity, was denied that opportunity on account of her or his membership in a protected category, and the employer continued to offer the opportunity to others.[32] If the plaintiff meets the *McDonnell Douglas* burden, the employer must provide evidence of a legitimate nondiscriminatory reason for the employment action to avoid liability.[33] Where the employer supplies a legitimate nondiscriminatory reason, the plaintiff may still show that the employer's business reason is a pretext for discrimination.[34] Under this model, the focus of the inquiry remains on the employer's intent, which is difficult to prove, especially through circumstantial evidence.

A plaintiff also may challenge disparate treatment in job terms and conditions. In these cases, the plaintiff challenges an employer's intentional practices or actions that result in a protected group getting worse treatment than other employees. In the classic example, an employer maintains a weight cap for stewardesses be-

29. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); Dothard v. Rawlinson, 433 U.S. 321, 328–331 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

30. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Title VII states:

(k) **Burden of proof in disparate impact cases.**

(1) (A) An unlawful employment practice based on **disparate impact** is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a **disparate impact** on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party [demonstrates] . . . an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1) (2000) (emphasis added).

31. 42 U.S.C. § 2000e-2(k)(1) (2000).

32. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973).

33. *Id.* at 802–03.

34. *Id.* at 804; Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143–48 (2000).

cause all of the employees in the category are women.[35] The women claim differential treatment based on their gender. The differential treatment is often substantially worse than the manner in which the company treats those in similarly situated positions. The segregated status of the stewardess position, per se, is a secondary consideration.

B. The Employer Interest Defense in the Traditional Frameworks

Employers frequently defend themselves against both disparate treatment and disparate impact claims by arguing that they should not be held responsible for employees' interest or lack of interest in a particular job. This argument asserts that employees have preconceived and circumscribed notions of what types of jobs they are willing to accept, and it is those notions rather than employers' actions that are responsible for segregated workplaces.

Neither of the current frameworks effectively scrutinizes the interrelationship between the employer's ability to structure jobs and the choices that employees make about jobs. Commentators on the lack of interest defense and the rhetoric of choice have introduced sociological and empirical studies to show that an employee's choice is much more structured and circumscribed by employer practices than is typically believed.[36] Presumably, the overrepresentation of a particular group in a particular job may reflect the employees' choices as much as anything else. If we consider, however, that employers have the power to circumscribe workers' choices, then the employer's response to a differential impact or disparate treatment allegation—that the market dictates labor composition—carries less weight.

In the brown collar context, the employer may argue in defense to a disparate impact or treatment claim that no one else is interested in the brown collar job, and that the employer is not responsible for the interest of employees in certain jobs,

35. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000). Part II.C *infra* provides an analysis of this and other conditions cases in segregated workplaces and their effectiveness in eradicating discriminatory terms and conditions of employment.

36. *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 53–100 (1999); William T. Bielby, *Social Science Accounts of the Maternal Wall: Applications in Litigation Contexts*, 26 T. JEFFERSON L. REV. 15 *passim* (2003); Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee Agency*, 55 ME. L. REV. 241, 251–59 (2003); 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).

particularly when that interest is influenced by societal factors.[37] Again, this argument ignores the possibility that workplace structures are established through an employer's hiring and assignment policies, and that the ensuing segregation is at least an indication of discriminatory practices.[38] For example, an employer may act on a preconception that Latinos are more desirable for service jobs than other workers because of their work ethic.[39] The employer hires and assigns Latinos to entry level service jobs, and other requirements, such as language proficiency, hinder their promotion opportunities. As a result, Latinos are very quickly overrepresented in entry level service jobs and underrepresented elsewhere.

One of the original purposes of anti-discrimination law was to eliminate segregated workplaces and the inferior terms and conditions of employment that persist in them.[40] The existing disparate impact and disparate treatment frameworks, however, do not recognize segregation as per se discrimination. As a result, they do not easily or directly capture or remedy the harm of working in segregated environments.[41] In each, the ultimate focus of the inquiry is whether the employer's practices denied an opportunity or created a barrier for a member of a protected class.[42] Plaintiffs in segregated workplaces already have been hired and must overcome the assumption that they have not been denied opportunity and thus have suffered no harm since they were selected for a position. As a

37. *See* EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 301–304 (7th Cir. 1991) (crediting defendant's argument that employees chose jobs according to their interests in a disparate impact case); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 320–22, 354–55 (7th Cir. 1988) (crediting defendant's argument that employees chose jobs according to their interests in a disparate impact claim and disparate treatment claim, respectively).

38. STONE, *supra* note 2, at 165–66; Green, *supra* note 2, at 104, 108–09.

39. ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 160–63 (2003).

40. *See* Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 471–74 (1968) (explaining that Title VII was initially directed at recruitment and hiring practices that excluded or segregated minorities); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987) (stating that Title VII was designed to dismantle segregated workplaces, including those based on sex); United Steelworkers of Am. v. Weber, 443 U.S. 193, 202–03 (1979) (reviewing Title VII of the Civil Rights Act of 1964 and concluding that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them . . ."); 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, 1075 (1992) (analyzing the success rate of employer arguments that certain groups are underrepresented in some occupations because they choose not to work in those occupations).

41. Richard Epstein's description of Blacks offered jobs under segregated conditions reflects this view. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 91–97 (1992).

42. *See* Civil Rights Act of 1964, tit. VII, Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 (2004)); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973).

consequence, plaintiffs are forced to attack segregated conditions indirectly.

II. RESPONSES TO SEGREGATED CONDITIONS WORKING UNDER THE DISPARATE TREATMENT AND DISPARATE IMPACT PARADIGMS

In this section, I analyze how plaintiffs have attacked segregated workplaces under the existing frameworks and the extent of their success. The first case examined, *Wards Cove Packing v. Atonio*, presents a classic challenge to segregation because its resolution has created enduring obstacles to challenging segregation.[43] The remaining cases examined are examples of pay equity and comparable worth cases, conditions cases, and national origin cases. In earlier generations, these have served the purpose of attacking the conditions of segregated workplaces.

In most cases, the plaintiffs have had to identify some harm, other than the segregation itself, to succeed in their discrimination claims. To accomplish this plaintiffs have pointed out channeling practices in some cases; in other cases, non-hired plaintiffs make the claims, indirectly pointing out the fact of segregation. In still other cases and with mixed success, plaintiffs have made the segregation and its conditions the focus of the claim.

A. Wards Cove Packing Co. v. Atonio*: The Anti-Inexorable Zero Case*

Wards Cove is an example of the classic plaintiff challenge to segregated workplaces. Its outcome presents challenges for plaintiffs working in segregated jobs and occupations today, even though Congress passed the Civil Rights Act of 1991 to ameliorate its most harmful effects. In *Wards Cove*, minority employees in cannery jobs challenged the job structure and composition of the cannery and noncannery jobs in a packing plant. Filipino, Hispanic, Asian, and Eskimo employees held the unstable, lower-paying, and less desirable cannery jobs.[44] Anglos held the stable and more desirable noncannery jobs.[45] In challenging the employer's practice of hiring minorities for the cannery jobs and nonminorities for the noncannery jobs, the plaintiffs utilized both disparate impact and

43. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
44. *Id.* at 647.
45. *Id.*

disparate treatment theories.[46] They demonstrated, through statistical evidence of racial composition of the workers in each job category, that the underrepresentation of workers in a targeted job was not likely the result of chance.[47]

The employer responded with the interest defense, alleging that minority workers simply were not interested in or skilled enough for the more desirable jobs.[48] It also argued that the statistical evidence was both overinclusive and underinclusive.[49] It was overinclusive because it included people who may not have been interested in the jobs.[50] It was underinclusive because the numbers did not include the composition of the local labor pool,[51] even though the plaintiffs demonstrated that the company used its internal labor market as the pool for transferring from one job to another.[52] The Supreme Court accepted the employer's argument and held that because the plaintiffs failed to produce adequate statistical evidence that measured the status of similarly situated employees, the plaintiffs did not meet their causation burden.[53]

1. The Problems of *Wards Cove*

The Court's narrow framing of the issue in *Wards Cove*—whether plaintiffs were worse off than similarly situated employees, rather than whether the employer was targeting minority workers for the bottom-rung jobs—prevents current plaintiffs from attacking segregation of nonminority and minority employees into high-wage, highly desirable, and low-wage, undesirable, positions respectively—the type of segregation prevalent today. The Court ignored the segregation and the subordinated conditions in the lower-paying jobs. Although this narrow review may have been doctrinally sound in a strict sense, for a hiring case, it did not adequately address the general claim that minorities were relegated to the least desirable jobs. As Justice Stevens' dissent noted:

> The Court points out that nonwhites are "overrepresented" among the cannery workers. Such an imbalance will be true

46. *Id.* at 648. The employer appealed the Ninth Circuit's disparate impact holding to the Supreme Court. *Id.* at 649–50.
47. *Id.* at 650.
48. *Id.* at 652.
49. *Id.* at 653–54.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 654–55.

> in any racially stratified work force; its significance becomes apparent only upon examination of the pattern of segregation within the work force. In the cannery industry nonwhites are concentrated in positions offering low wages and little opportunity for promotion. Absent any showing that the "underrepresentation" of whites in this stratum is the result of a barrier to access, the "overrepresentation" of nonwhites does not offend Title VII.[54]

Justice Blackmun's dissent in *Wards Cove* set out the dilemma for future plaintiffs:

> 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 immunize these practices from attack under a Title VII disparate-impact analysis. Sadly this comes as no surprise.[55]

The formalistic application of the anti-discrimination frameworks prevented the Court from inquiring into the overrepresentation of minority workers, and the mechanisms that placed and kept them, in low-wage jobs.

2. The Civil Rights Act of 1991

The Civil Rights Act of 1991 superseded many of the *Wards Cove* holdings.[56] Under the Act, the plaintiff must still show a causal connection between the adverse employment conditions and specific employer conduct.[57] However, the plaintiff now can point to a constellation of factors to show causation.[58] Notably, in response to a prima facie disparate impact claim, the defendant must establish that a challenged employment practice is "job related for the position in question and consistent with business necessity."[59] The

54. *Id.* at 678 n.25 (Stevens, J., dissenting). Justice Stevens' concerns underscore the need for an inexorable 100 inference. The inference would focus a Court's inquiry on the overrepresentation of minority workers and the mechanisms that place and keep them in low-wage jobs, allowing the Court to develop remedies to fix those conditions.

55. *Id.* at 662 (Blackmun, J., dissenting).

56. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991).

57. *Id.*

58. *Id.*

59. *Id.* Congress left ambiguity, however, when it embraced both the "job related" and "business necessity" interpretations of the defendant's burden. *See id.* § 3. Congress' reference to cases before *Ward's Cove* for direction on the defendant's burden provides little

defendant has both the burdens of proof and persuasion on this element of the defense.[60]

Significantly for the purposes of this Article, however, the 1991 Act failed to provide clear guidance on whether a segregated workplace by itself created an inference of discrimination when minorities and non-minorities were sorted into jobs with different skill requirements. Consequently, litigators bringing cases in the wake of the Act took their cues from *Wards Cove* and refrained from attacking segregated workplaces head on. Thus, most of the cases since 1991 have been argued within the existing frameworks, either through channeling, subjective criteria theories, or by challenging word-of-mouth or other mechanisms.[61] The remaining subsections explore how plaintiffs have attacked segregation indirectly.

B. The Wage Inequity Cases

Wage inequity cases challenge the devaluation of jobs held predominantly by women and minorities, a phenomenon long considered a symptom of segregated workplaces.[62] The theory, framed early on as comparable worth, asserted that women and men should be paid equally for jobs that produced equivalent value. A wage inequity claim involved comparing male and female pay rates through job evaluation studies,[63] which would demonstrate the internal worth of a particular job, regardless of who held it.[64] A job that was underpaid in comparison to a job evaluation

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guidance because those courts were just as ambiguous about what the defendant had to demonstrate to overcome a showing of disparate impact. *See* Michael Sarno, *Employers Who Implement Pre-Employment Tests to Screen Their Applicants Beware (or Not)*, 48 VILL. L. REV. 1403, 1415, n.41 (2003) (explaining the political compromises made across the aisle to reach consensus on the language for the business necessity defense); *see also* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2022–23 (1995); David E. Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, 785–93 (2000) (describing different standards used by circuit courts in applying the business necessity defense).

60. 1 EMPLOYMENT DISCRIMINATION LAW HANDBOOK 119 (Barbara Lindemann & Paul Grossman eds., 4th ed. 2007).

61. *See, e.g.*, EEOC v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993) (addressing word of mouth); EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (same); Butler v. Home Depot Inc., 984 F. Supp. 1257 (N.D. Cal. 1997) (addressing channeling); Stender v. Lucky Stores Inc., 803 F. Supp. 259 (N.D. Cal. 1992) (same).

62. Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REFORM 397, 428–34 (1979).

63. NELSON & BRIDGES, *supra* note 36, at 25.

64. NELSON & BRIDGES, *supra* note 36, at 50.

study was presumed to be shaped by market forces that adversely affected a particular protected group, usually females.[65]

The implicit assumption behind comparable worth theory was that dismantling unequal wage structures would naturally result in more desirable jobs for the people who held the jobs.[66] For example, in *EEOC v. General Telephone Co. of Northwest, Inc.*, female plaintiffs claimed that they were relegated to lower-paying jobs because they were women, showing through regression analyses that they were denied access to the higher-paying jobs.[67] The remedy for such a claim would involve giving women access to the more desirable jobs. The inquiry in such a case could easily have focused on whether women were interested in the targeted job, but significantly, the court held that the EEOC did not have to account for differential interest in the jobs as part of its proof burden.[68] Thus, the employer could not benefit from an inference of nondiscrimination simply because the EEOC failed to account for lack of interest in its analysis.[69]

The more typical wage inequity claim, however, forced plaintiffs to account for all possible nondiscriminatory factors that might result in pay inequities. Often nondiscriminatory factors were considered outside of the employer's control. In *Spaulding v. University of Washington*, for example, the court held that market forces were not considered a specific employment practice, a necessary element of an adverse impact claim.[70] Likewise, in *EEOC v. Hartford Insurance Co.*, the court held that the plaintiffs had to demonstrate that other factors, such as education, seniority, or experience, did not explain the wage differential.[71] Other courts have reached similar conclusions.[72] As a result, the comparable worth theory was short-lived. The disparate impact and disparate treatment frameworks made too many allowances for the power of the market to

65. Blumrosen, supra note 62, at 428. *See also* County of Washington v. Gunther, 452 U.S. 161, 166 n.6 (1981) (citing Blumrosen's article).

66. Blumrosen, *supra* note 62, at 466–68.

67. *EEOC v. Gen. Tel. Co. of Northwest*, 885 F.2d 575, 577 (9th Cir. 1989).

68. *Id.* at 581.

69. *Id.*

70. Spaulding v. Univ. of Wash., 740 F.2d 686, 708 (9th Cir. 1984).

71. EEOC v. Hartford Fire Ins. Co., No. H-77-554, 1983 WL 30378 (D. Conn. Feb. 18, 1983).

72. *See, e.g.*, AFSCME v. County of Nassau, 799 F. Supp. 1370 (E.D.N.Y. 1992); Int'l UAW v. State, 673 F. Supp. 893 (E.D. Mich. 1987), *aff'd*, 886 F.2d 766 (6th Cir. 1989); EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); AFSCME v. State, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982); NELSON & BRIDGES, *supra* note 36, at 12–13, 40–45.

explain wage difference.[73] To the extent that courts were reluctant to attribute causation to employers in the wage setting, plaintiffs failed to succeed in their claims.[74]

One of the major problems with the comparable worth theory, therefore, was its simultaneous reliance on and rejection of the market. In other words, "[i]t accepted the orthodox economic view that pay differentials originated in the 'market,' but it also entailed the intractable position of rejecting markets as a valid basis for wage setting."[75] The first of the following two cases demonstrates the limited use of pay equity theory in eliminating segregation, while the latter case illustrates the upper bound of the theory.

1. *County of Washington v. Gunther*: The Limited Use of Pay Equity Theory to Dismantle Segregation

A limited line of cases successfully attacked pay inequalities under the disparate treatment framework by demonstrating that the employer intentionally devalued jobs held by women.[76] The focus of these cases was on differential treatment and not subordinating structures. The Supreme Court examined this theory in *County of*

73. *See e.g.*, *AFSCME v. State*, 770 F.2d at 1408 (reversing district court's finding that defendant violated Title VII) ("The State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII, notwithstanding that the Willis study deemed the positions of comparable worth. Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees."); *AFSCME v. County of Nassau*, 799 F. Supp. at 1414 ("The defendants are correct to argue that their reliance on the market in their compensation system does not give rise to Title VII liability. . . . The market has animated every aspect of the County compensation system since 1967. Thus . . . the plaintiffs have failed to demonstrate current Title VII sex discrimination by the County."); *Int'l UAW v. State*, 673 F. Supp. at 900 ("[W]age disparities between predominantly male and female groups do exist in the labor market."), *aff'd*, 886 F.2d at 769–70 ("Title VII is not a substitute for the free market, which historically determines labor rates. . . . Mere failure to rectify traditional wage disparities that exist in the marketplace between predominantly male and predominantly female jobs is not actionable. . . . Without discriminatory motive, defendant's reliance on the market to guide its classification and compensation system is not actionable under Title VII."); *Briggs*, 536 F. Supp. at 445, 447 ("The statute's remedial purpose is not so broad as to make employers liable for employment practices of others or for existing market conditions. . . . Where . . . different skills are required for the performance of the jobs, the employer may explain and justify an apparent illegal wage disparity by showing that persons possessing the requisite skills are commanding higher wage rates in the local market."); NELSON & BRIDGES, *supra* note 36, at 40–45.

74. NELSON & BRIDGES, *supra* note 36, at 49.

75. NELSON & BRIDGES, *supra* note 36, at 3.

76. *See e.g.*, AFSCME v. County of Nassau, 799 F. Supp. 1370 (E.D.N.Y. 1992).

Washington v. Gunther.[77] In *Gunther*, female jail wardens alleged that the County of Washington, Oregon, intentionally paid female wardens, but not male wardens, less than what a county survey of equal jobs commanded in the market.[78] These were clearly segregated jobs, and the employer had several rationales for their continued segregation.[79] The district court dismissed the wage discrimination claim, and the circuit court reversed.[80] The Supreme Court granted certiorari.[81] At the outset of the opinion, Justice Brennan noted that this case was not a "comparable worth" case, "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[82] Instead, he noted, "respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted."[83]

The Court concluded that where an employer accepted the results of a job survey for male employees, paying them the full value under the survey, while at the same time rejecting job evaluation studies for female employees, paying them seventy percent of the value of their worth according to a job survey, could lead to an inference of intentional discrimination.[84] This differential treatment, the Court noted, did not require the Court to evaluate statistical or other subjective methods of wage discrimination proof.[85] The Court ruled that Title VII covered compensation discrimination in cases like the plaintiffs' where the jobs being compared were not equal to each other.[86]

The *Gunther* court attempted to address one of the consequences of segregated workplaces through the intentional discrimination framework, but it did not directly address the actual segregating dynamic of the workplace. The Court's remedy involved changing the pay structure to reflect a more equitable wage

77. County of Washington v. Gunther, 452 U.S. 161 (1981).
78. *Id.* at 164–65.
79. *Id.* at 164. The plaintiffs conceded that gender was a bona fide occupational qualification for some of these positions. *Id.* at 164 n.2.
80. *Id.* at 165–66.
81. *Id.* at 166.
82. *Id.* (citation omitted).
83. *Id.*
84. *Id.* at 180–81.
85. *Id.* at 181.
86. *Id.*

system.[87] The pay equity theory works, however, only if litigants can point to some employment practice that is intentionally applied differentially or has differential effects. Even then, it can be as vulnerable to market-based defenses as is the traditional comparable worth theory.

2. *AFSCME v. County of Nassau*: The Limits on Pay Equity Theory for Eradicating Segregation

Cases such as *AFSCME v. County of Nassau*[88] demonstrate the vulnerability of the pay equity strategy to employers' market-based arguments, even in the wake of Civil Rights Act of 1991. In *AFSCME*, the plaintiffs sued Nassau County, alleging that the county discriminated "in compensation on the basis of sex by paying historically female job classifications less than historically male classifications which require an equivalent or lesser composite of skill, effort, responsibility and working conditions."[89] The term "female dominated" was defined in the lawsuit as job classifications in which females comprised seventy percent or more of the classification.[90]

The plaintiffs specifically challenged the initial job evaluation process, which established the pay scales for each job within the county structure.[91] The court, however, did not find intentional discrimination in the initial establishment of the process.[92] The court refused to credit the testimony of the plaintiffs' expert, who explained that the job evaluation process produced lower salary grades for female-dominated job classifications that had the same evaluated worth as those of male-dominated jobs.[93] Instead, the court credited the county's explanation that the 'market' determined the wage rates,[94] finding it sufficient to explain differential treatment of segregated job categories.[95] This precluded any finding of intentional discrimination.

The court also found that the evidence of segregation produced by the plaintiffs was insufficient to support their intentional wage

87. County of Washington v. Gunther, 452 U.S. 161, 165–66 (1981).
88. AFSCME v. County of Nassau, 799 F. Supp. 1370, 1370 (E.D.N.Y. 1992).
89. *Id.* at 1372 (quoting Am. Compl. ¶ 3(D)).
90. *Id.* at 1373.
91. *Id.* at 1378.
92. *Id.* at 1379.
93. *Id.* at 1380.
94. *Id.* at 1401–02.
95. *Id.*

discrimination claims.[96] While the sex segregation in county jobs was higher than the national average, no evidence existed of defendant's intent to create such segregation.[97] Segregation was instead presumed to be a natural occurrence, and additional evidence was required to support a finding of discrimination.[98] Even acknowledging that the county historically had created barriers to participation for women in some jobs, the court accepted the employer's lack of interest defense for the contemporary existence of sex segregated jobs: "the better explanation for the existing sex segregation in Nassau County job titles is that which was agreed upon by all the experts who testified in this case: that men and women do not, on the whole, seek the same positions."[99] The court attributed the segregation to employee choice, rather than any choices made by employers, and the comparable worth theory could not counter that argument. The court noted that "the mere fact that most Nassau County employees work in job titles that are either female-dominated or male-dominated does not in itself support an inference of discriminatory intent."[100]

In addition to demonstrating the vulnerability of disparate impact and treatment frameworks to market-based defenses, the *AFSCME* court's analysis indicates that it may be irrelevant that the job conditions of a particular position that happens to be female-dominated are less than adequate, as long as there are adequate means of advancing from the position. Moreover, the court's reasoning reiterates that under the current frameworks, segregation alone is not enough to support a discrimination finding.

C. The Conditions Cases: The Anti-Subordination Paradigm Response

In the conditions cases, plaintiffs challenged other aspects of exploitation in segregated environments. In a disparate treatment framework, courts analyze exploitative conditions as possible evidence of differential treatment. In the disparate impact model, parties attempt to identify a facially neutral policy or practice that has substantial adverse effects on the conditions experienced by a protected group. This line of cases initially arose out of the comparable worth theory's premise that women's work is devalued, and that the jobs are treated as "women's jobs," rather than that the

96. *Id.* at 1404.
97. *Id.* at 1405.
98. *Id.* at 1404–05.
99. *Id.* at 1404.
100. *Id.* at 1405.

people in the jobs are being treated discriminatorily. The prototype cases under this theory are *Gerdom v. Continental Airlines*[101] and *Frank v. United Airlines, Inc.*[102] In conditions cases, plaintiffs allege that an employer has implemented a practice or policy that affects the terms and conditions of employment in a particular job category because it is comprised of a particular social group, for example. In *Gerdom*, a group of airline stewardesses sued Continental Airlines for maintaining a strict weight requirement for its stewardesses.[103] Stewardesses who did not stay within the weight limit were suspended or fired.[104] No similar restriction was placed on any all-male classes of employees, including the male attendant category.[105] The plaintiffs alleged that Continental imposed the requirement—a condition of work—precisely because the stewardess job category was a traditionally female category.[106] In other words, the requirement existed because the job was considered a "woman's job." The court held that the policy was discriminatory because it relied on the composition of the workforce.[107] Had men been in the position, the court reasoned, the weight requirement would not have been implemented, as evidenced by the fact that the weight requirement did not exist in any of the other positions.[108]

Gerdom alluded to the theory accepted in *Gunther* that the differential application of a policy (there, the implementation of a job worth study) can be proof of discrimination.[109] The *Gunther* line of cases illustrates the breadth of the doctrine when an anti-subordination principle undergirds its operation. Because the *Gunther* court focused on the jobs involved, rather than on the people holding the jobs, it targeted the cognitive biases that surround employer decisions about jobs perceived as belonging to one group or another. The *Gerdom* opinion followed a similar line of reasoning.

Frank v. United Airlines, Inc. is representative of cases where a formerly segregated job classification becomes integrated, yet the job conditions for female workers remain worse than the job con-

101. Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982).
102. Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000).
103. *Gerdom*, 692 F.2d at 603.
104. *Id.* at 604.
105. *Id.*
106. *Id.* at 605.
107. *Id.* at 607–08.
108. *Id.* at 610.
109. Like *Gunther*, it was not a comparable worth claim in the sense that it did not seek a remedy based on a comparison between the worth of the job and that of other jobs in the company or in the community. *See* County of Washington v. Gunther, 452 U.S. 161, 166 (1981).

ditions for male workers.[110] In *Frank*, a group of female flight attendants sued United Airlines for its discriminatory weight requirement policies.[111] The plaintiffs showed that even though United imposed maximum weight requirements on both female and male flight attendants, the weight requirements were more onerous for women than for men.[112] The plaintiffs claimed disparate treatment in the way that United formulated its weight restrictions.[113] United had maximum weight limits for men that corresponded to large frame males on a MetLife height/weight chart.[114] For women, however, United had weight maximums that corresponded to medium frame females on a Continental height/weight chart.[115] The Ninth Circuit held that United's differential treatment of weight restrictions was facially discriminatory because it was more onerous for women than for men.[116]

Frank demonstrated that without dismantling the underlying causes of discrimination, the conditions created before integration would persist. Further, it showed that where a previously segregated occupation becomes integrated, but the underlying conditions remain unchanged, women are forced to rely on an unequal treatment argument, rather than on the structural argument that their jobs are being treated as "women's jobs," to achieve redress. With such claims, a court may still limit remedies to redress the specific areas of unequal treatment rather than dismantle the forces at work behind the traditionally segregated occupation.

D. The National Origin Cases

Although not strictly segregation cases, national origin-based claims have been aimed at brown collar workplaces.[117] These cases attack employer practices that target or affect immigrants, regardless of status, because of their national origin. Given the focus on national origin, these cases address exploitation of workers who may or may not have proper immigration status.

110. 216 F.3d 845 (9th Cir. 2000).
111. *Id.* at 848.
112. *See id.*
113. *Id.* at 848–49.
114. *Id.* at 848.
115. *Id.*
116. *Id.* at 855.
117. *See, e.g.*, Colindres v. Quietflex, 427 F. Supp. 2d 737 (S.D. Tex. 2006); EEOC v. John Pickle Company, Inc., 446 F. Supp. 2d 1247 (N.D. Okla. 2006); EEOC v. Bice of Chicago, 229 F.R.D. 581, 583 (N.D. Ill. 2005).

Under traditional doctrine, cases alleging discrimination based on immigration status do not fall within the rubric of national origin discrimination.[118] In a foundational case, *Espinoza v. Farah Mfg. Co.*,[119] the Supreme Court reviewed an employer policy that prohibited the hiring of noncitizens for manufacturing jobs.[120] Pursuant to this policy, the plaintiff claimed that she had been discriminated against on the basis of national origin.[121] The Court held that alienage, or immigration status, was not a necessary characteristic of national origin[122] and that national origin means the country of descent or ancestry.[123] An employer could make distinctions between immigration status without running afoul of the prohibition on national origin discrimination.[124] The Court acknowledged, however, that if an employer used alienage distinctions as a proxy for national origin discrimination, it could face liability.[125] As it noted, "a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination," or "an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination."[126]

The warning in *Espinoza* that employer practices distinguishing between employee immigration statuses might signal national origin discrimination has since resulted in successful challenges to employer treatment of immigrants. In a recent case, the EEOC applied the theory to employment practices that intentionally target immigrant workers for less desirable, lower-paying positions—essentially, the segregated, "inexorable 100" jobs. In *EEOC v. Technocrest Sys., Inc.*, the EEOC investigated a technology firm after a group of Filipino workers filed claims of national origin discrimination.[127] Technocrest was an electronics and computer repair company in Missouri that employed approximately 100 technical employees, all of whom were in the United States from the Philippines on non-immigrant H-1B visas.[128] The plaintiffs claimed that Technocrest specifically recruited them in the Philippines, and

118. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95–96 (1973).
119. *Id.*
120. *Id.* at 87.
121. *Id.*
122. *Id.* at 88–89.
123. *Id.* at 89.
124. *See id.*
125. *Id.* at 92.
126. *Id.*
127. EEOC v. Technocrest Sys., Inc., 448 F.3d 1035, 1037 (8th Cir. 2006).
128. *Id.* at 1037.

then subjected them to working conditions and wages worse than promised and worse than those of other workers.[129]

During its investigation, the EEOC issued an administrative subpoena to Technocrest seeking the work history and immigration status for all workers who filled the same positions as the Filipino workers, namely, electronics engineers, field service representatives, and systems analysts.[130] The district court narrowed the subpoena's scope to information about the six charging parties.[131] It required the company to submit work history information in spreadsheet form for all other employees in the same three categories of jobs.[132] Both sides appealed the decision to the Eighth Circuit Court of Appeals.[133]

Technocrest argued that it should not be required to submit information about all employees in the plaintiffs' job categories because it included irrelevant information about employees who were not similarly situated.[134] Technocrest also objected to the demand for information regarding immigration and citizenship status on the grounds that such information was not relevant to national origin discrimination.[135] Technocrest acknowledged that its technical employee job category, in essence, was segregated, but asserted that the EEOC could not make out a prima facie case of discrimination where "all the technical employees of Technocrest are Filipino."[136] In other words, Technocrest argued that proof of the inexorable 100 could not, without more, provide the inference of discrimination that plaintiffs sought. The logical extension of this argument is that if all the employees are Filipino, they cannot allege differential treatment within the same job category.

The Eighth Circuit, however, left the door open to an inexorability inference. It observed that the Supreme Court:

> recognized in *Espinoza* that in some instances "a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination" and that Title VII "prohibits discrimination on the basis of citizenship whenever

129. *See id.*
130. *Id.* at 1037–38.
131. *Id.*
132. *Id.*
133. *Id.* at 1038.
134. *See id.* at 1039.
135. *Id.*
136. *See id.* Technocrest attempted to use *Espinoza* to its advantage, arguing that because national origin did not extend to citizenship requirements, the Filipino charging parties could not make claims based on their immigration status. *See id.*; Espinoza v. Farah Mfg. Co., 414 U.S. 86, 89, 92 (1973).

> it has the purpose or effect of discriminating on the basis of national origin."[137]

The Eighth Circuit broadened the scope of the district court's order, allowing the EEOC to collect information about working conditions as well as immigration status of all Technocrest employees in the relevant job categories in order to develop the case for national origin discrimination.[138]

National origin cases could become crucial in the brown collar worker context because the public is increasingly accepting of immigrants being channeled into second-class jobs with fewer rights. Temporary worker proposals, for example, potentially condone segregation and create a legal mechanism through which employers can exploit groups based on their alienage.[139] Such treatment masks what many commentators consider discrimination based on national origin or similar subordinated group status.[140]

Several scholars have addressed the alienage/national origin distinction, and have found that alienage classifications tend to legitimize unlawful ethnic discrimination.[141] What makes alienage distinctions so dangerous, and yet so attractive, is that they are a socially acceptable way of distinguishing the majority from the "other." They appeal to both nativist and protectionist tendencies without necessarily invoking allegations of racism. Thus, while jobs populated by temporary workers and other aliens lose wage status, exhibit higher wage differentials, and deteriorate in terms and conditions over time,[142] the existing anti-discrimination frameworks do not readily accept such treatment as discriminatory. The Su-

137. *Id.* (quoting *Espinoza*, 414 U.S. at 92).

138. *See id.* at 1040.

139. *See, e.g.*, Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 507–09 (2007) (arguing that a temporary guest worker program places immigrant workers outside the "labor citizenship" paradigm and undermines the quality of work in the jobs occupied by these workers).

140. *See, e.g.*, Kevin R. Johnson, *Immigration, Civil Rights and Coalitions for Social Justice*, 1 HASTINGS RACE & POVERTY L.J. 181 (2003). *See generally* Ian Haney Lopez, *Race and Colorblindness After* Hernandez *and* Brown, 25 CHICANO-LATINO L. REV. 61, 66 (2005).

141. *See, e.g.*, Christopher David Ruiz Cameron, *How the Garcia Girls Lost Their Accents*, 85 CAL. L. REV. 1347, 1348–57 (1997) (analyzing, among other things, the limited ability of Title VII to protect Latinos in language cases); Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 515–19 (2003) (discussing the ambiguous status of immigrants and their rights in workplace law); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 823–27 (discussing the difficulties of constructing the definition of national origin); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 90–95 (1998) (arguing that by conflating distinct Latino identities the dominant legal culture has marginalized Latinos).

142. Saucedo, *supra* note 11, at 964–65.

preme Court case law supports the dominant view that alienage distinctions are both benign and to be tolerated, in and out of the workplace.[143] Moreover, it distinguishes between alienage and national origin and tends to condone different treatment based on alienage where it cannot be shown that immigration status differences serve as a proxy for national origin discrimination.[144]

The cases discussed here provide examples of plaintiffs challenging segregating practices through the existing frameworks. Each type of strategy has met with varying degrees of success. Importantly, however, because there is no segregation model that directly ferrets out segregation, each only partially resolves this multifaceted problem. The pay inequity/comparable worth cases deal with one symptom of segregation, the conditions cases attempt to eradicate other terms and conditions that occur in segregated workforces, and the national origin cases attempt to target employer assignment practices. In these cases, moreover, because the courts operate within the existing frameworks, their opinions ignore or devalue the vulnerabilities and specific social conditions that allow employers to exploit brown collar workers.[145] A segregation model with a theoretical underpinning of exploitation/subordination as discrimination would more effectively attack segregation. Recognizing the inexorable 100 inference, based on the inexorable zero concept, is the proper first step in establishing such a model.

143. *See* DeCanas v. Bica, 424 U.S. 351 (1976) (holding that a California statute prohibiting an employer from knowingly hiring undocumented workers was not preempted by federal law); Mathews v. Diaz, 426 U.S. 67 (1976) (holding that federal discrimination against permanent residents in a medical insurance context was valid under a rational basis review); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (accepting employer rules that distinguished on the basis of alienage). *But see* Plyler v. Doe, 457 U.S. 202 (1982) (holding that, with respect to primary education, states could not discriminate against children based on immigration status); Graham v. Richardson, 403 U.S. 365 (1971) (holding that state welfare laws conditioning benefits on citizenship and residency requirements violated the Equal Protection clause).

144. *See Espinoza*, 414 U.S. at 92.

145. Scholars such as Richard Delgado, Jean Stefancic and Juan Perea discuss the dangers of frameworks that fail to consider the effects of subordinating conditions outside of a black-white paradigm. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 70–71 (2001); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1214–16 (1997).

III. THE ORIGIN OF THE INEXORABLE ZERO IN THE PATTERN AND PRACTICE PARADIGMAND THE INITIAL IMPETUS FOR A SEGREGATION FRAMEWORK

The class action equivalent of the disparate treatment and impact frameworks is the "pattern and practice" discrimination case. In individual disparate impact and treatment cases, plaintiffs must provide comparator evidence in order to show that they suffer substantially worse terms and conditions of employment. In group animus claims, plaintiffs must show that an employer had a policy, or "pattern or practice," of discrimination, often through highly sophisticated statistical models. These models are typically highly contested, and they frequently become the focus of the litigation. The concept of the inexorable zero, the foundational theoretical concept for the recognition of an inexorable 100 inference proposed in this Article, originates in this class, or pattern and practice, approach.

A. The Pattern and Practice Paradigm and the Inexorable Zero

Pattern and practice theory allows plaintiffs to attack systematic discrimination that affects a protected class of employees within a company. Since 1977, courts have accepted a pattern and practice model of proof in class action disparate treatment and disparate impact cases that allows the plaintiff to show, through a combination of statistical and anecdotal evidence, that the employer's standard operating practice is discriminatory.[146] For example, the plaintiff may present statistics that show that members of a protected class are excluded from a targeted position. Typically, the plaintiff must supplement the statistical evidence with anecdotal evidence of animus.

The Supreme Court first recognized the pattern and practice model of proof in the context of employment discrimination in *International Brotherhood of Teamsters v. United States*.[147] In that case, pattern and practice evidence revealed locked-in practices of employers and unions that excluded minorities from desirable jobs despite the passage of the Civil Rights Act of 1964.[148] In *Teamsters*, the government, on behalf of a group of Blacks and Latinos employed as short haul drivers, challenged several employment practices that resulted in these groups being denied access to the

146. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
147. *Id.*
148. *Id.* at 324–25.

more desirable long haul driving routes held by white drivers.[149] The employer and the Teamsters union maintained a lock on those jobs through a combination of a seniority system and a word-of-mouth hiring system.[150] The Supreme Court held that the employer had a discriminatory hiring system as a matter of practice, or as a standard operating procedure.[151] It based its ruling on both statistical and anecdotal evidence.[152]

Possibly the most damning evidence was the fact that virtually no minorities held the more desirable line driver positions. Justice O'Connor noted this fact in response to the employer's challenge to the plaintiffs' statistical evidence:

> The company's narrower attacks upon the statistical evidence—that there was no precise delineation of the areas referred to in the general population statistics, that the Government did not demonstrate that minority populations were located close to terminals or that transportation was available, that the statistics failed to show what portion of the minority population was suited by age, health, or other qualifications to hold trucking jobs, etc.—are equally lacking in force. At best, these attacks go only to the accuracy of the comparison between the composition of the company's work force at various terminals and the general population of the surrounding communities. They detract little from the Government's further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs. Such employees were willing to work, had access to the terminal, were healthy and of working age, and often were at least sufficiently qualified to hold city-driver jobs. Yet they became line drivers with far less frequency than whites (of 2,919 whites who held driving jobs in 1971, 1,802 (62%) were line drivers and 1,117 (38%) were city drivers; of 180 Negroes and Spanish-surnamed Americans who held driving jobs, 13 (7%) were line drivers and 167 (93%) were city drivers).
>
> In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut

149. *Id.* at 328–29.
150. *Id.*
151. *Id.* at 324.
152. *Id.* at 339–42.

the inference of discrimination came not from a misuse of statistics but from "the inexorable zero."[153]

The opinion spawned the "inexorable zero" as a rule of inference that commands deeper scrutiny in discrimination cases.[154]

B. The Focus on and Meaning of the "Inexorable Zero" as a Rule of Inference

In many of the cases alleging workplace discrimination, plaintiffs must rely on statistics, in the absence of direct evidence, to show a pattern and practice of discrimination. As in *Teamsters*, disputes surrounding the validity of statistical methods, the definition of available labor pools, and the meaning of the statistics dominate typical pattern and practice cases. In one specific instance, however, the focus on statistical evidence in a case—and on its strengths and flaws—historically has yielded to common sense. This is the instance of the "inexorable zero," where the plaintiff demonstrates a complete absence of members of a protected category in a targeted job or occupation.[155] At the very least, the zero itself provides some evidence that the employer may have a policy or practice that results in a denial of opportunity for a protected group or has an adverse effect on job status for that group.[156] The "inexorable zero" thus became its own rule of inference, supporting a presumption of discrimination independent of any statistics introduced in a case.[157] Plaintiffs have invoked the inexorable zero inference to demonstrate the effects or outcomes of discriminatory practices in a wide variety of employment contexts, as discussed further below.[158] In addition, the inexorable zero concept has

153. *Id.* at 342 n.23 (citations omitted).

154. *See* Note, *The "Inexorable Zero"*, 117 HARV. L. REV. 1215, 1215–16 (2004).

155. *Id.* at 1216.

156. *Id.*

157. *Id.* at 1218.

158. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 656–57 (1987) (O'Connor, J., concurring) (employment); Ewing v. Coca Cola Bottling Co. of N.Y., Inc., No. 00 CIV. 7020(CM), 2001 WL 767070, at *6 (S.D.N.Y. June 25, 2001) (work assignments, training, and discipline); Victory v. Hewlett-Packard Co., 34 F. Supp. 2d 809, 823 (E.D.N.Y. 1999) (sex discrimination in promotion); Ortiz-Del Valle v. Nat'l Basketball Ass'n, 42 F. Supp. 2d 334, 338 n.1 (S.D.N.Y. 1999) (hiring); Barner v. City of Harvey, No. 95 C 3316, 1998 WL 664951, at *50–51 (N.D. Ill. Sept. 18, 1998) (firing); Lumpkin v. Brown, 960 F. Supp. 1339, 1352–53 (N.D. Ill. 1997) (age discrimination in hiring); EEOC v. Joe's Stone Crab, Inc., 969 F. Supp. 727, 736–37 (S.D. Fla. 1997) (hiring); United States v. City of Belleville, No. 93CV0799-PER, 1995 WL 1943014, at *4 (S.D. Ill. Aug. 8, 1995) (hiring); Brief of American Law Deans Association as Amicus Curiae in Support of Respondents at 3, Grutter v. Bollinger, 539 U.S. 306

grown beyond the bounds of employment discrimination and found traction in higher education and other types of segregation cases.[159]

In employment discrimination case law, the circuits split on how far courts should carry the inexorable zero inference in evaluating employer motive.[160] Under the dominant view, the zero represents an employer's intent to keep a protected group out of a particular job category.[161] In a subset of those circuits, the inexorable zero carries an inference because the zero, in addition to its common sense meaning, also represents a statistically significant disparity from comparison numbers.[162] In the minority view, the zero only represents an absence of a protected group from a particular job category and courts require additional evidence to establish an inference of discrimination.[163]

(2003) (No. 02-241), 2003 WL 399070 (higher education; "Law schools seek . . . to avoid approaching 'the inexorable zero.' ").

159. *See, e.g.*, Jean v. Nelson, 711 F.2d 1455, 1487–90 (11th Cir. 1983) (discussing the use of statistics to establish a plaintiff's burden in the inexorable zero context in an immigration case); Chin v. Runnels, 343 F. Supp. 2d 891, 905 (N.D. Cal. 2004) (noting that a complete absence of Hispanic, Chinese or Filipino forepersons over a thirty year period merited closer scrutiny, including scrutiny into possible unconscious biases preventing their selection, despite the court denying writ of habeas corpus); *Brief of American Law Deans Association*, *supra* note 158, at 3 (higher education; "Law schools seek . . . to avoid approaching 'the inexorable zero.' ").

160. *See* Note, *supra* note 154, at 1225–27. *Compare* EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 879 (7th Cir. 1994) (using inexorable zero helped plaintiffs prove discrimination by a preponderance of the evidence), *with* Craik v. Minn. State Univ. Bd., 731 F.2d 465, 494 (8th Cir. 1984) (noting that zero is not inexorable without a showing of statistical significance).

161. *See, e.g.*, Loyd v. Phillips Bros., 25 F.3d 518, 524 n.4 (7th Cir. 1994); EEOC v. Atlas Paper Box Co., 868 F.2d 1487, 1501 n.21 (6th Cir. 1989); Capaci v. Katz & Besthoff, Inc., 711 F.2d 647, 662 (5th Cir. 1983); *Ewing*, 2001 WL 767070, at *6; *Ortiz-Del Valle*, 42 F. Supp. 2d at 337 n.1; *Barner*, 1998 WL 664951, at *50; EEOC v. Andrew Corp., No. 81 C 4359, 1989 WL 32884, at *13–14 (N.D. Ill. Apr. 3, 1989); Calloway v. Westinghouse Elec. Corp., 642 F. Supp. 663, 695–98 (M.D. Ga. 1986).

162. In these cases, courts acknowledge an inference of discrimination from the inexorable zero evidence even though there is disagreement about its strength or significance in statistical terms. *See, e.g.*, Hill v. Ross, 183 F.3d 586, 591–92 (7th Cir. 1999); *O & G Spring & Wire*, 38 F.3d at 879.

163. *See, e.g.*, Carter v. Ball, 33 F.3d 450, 456–57 (4th Cir. 1994) (requiring a comparison to the qualified labor pool); Frazier v. Ford Motor Co., 176 F. Supp. 2d 719, 724 (W.D. Ky. 2001) (requiring evidence of numbers of African Americans in the qualified labor pool); Jordan v. Shaw Indus., Inc., No. 6:93CV542, 1996 WL 1061687, at *10 (M.D.N.C. Aug. 13, 1996) ("Without evidence of the relevant labor pool, Jordan's 'inexorable zero' evidence is insufficient, standing alone, to show discriminatory motive on the part of Shaw Industries."), *aff'd*, 131 F.3d 134 (4th Cir. 1997); EEOC v. Turtle Creek Mansion Corp., Civ. No. 3:93-CV-1649-H, 1995 WL 478833, at *9–11 (N.D. Tex. May 18, 1995) (finding that, because the total number of hiring decisions was small, inexorable zero evidence did not in itself require a finding of discrimination), *aff'd*, 82 F.3d 414 (5th Cir. 1996).

C. Finding Support for the Inexorable 100 in the Inexorable Zero Employment Cases

Currently, because of the focus in the disparate impact and treatment frameworks on jobs from which minorities have been excluded rather than on jobs to which minorities have been relegated, courts have not recognized the converse of the inexorable zero, an inexorable 100 inference of discrimination. Ideally, the inexorable 100 would be a shorthand common sense signal of a discriminatory employer preference in the evolving labor market. At the very least, it would alert an employer—in much the same way that the inexorable zero currently does—that it should review its practices to avoid future liability. The contribution of an inexorable 100 inference would be an opportunity to create remedies that both improve conditions in substandard jobs and that reach further to end the segregation contributing to those conditions. Just as the inexorable zero addresses the effects of extreme imbalance by remedying the structures that cause a complete absence of a protected category in a targeted job, the mirror image inexorable 100 would remedy the structures that create an overrepresentation of a protected group in a particular job category.

Since *Teamsters*, over eighty cases[164] have discussed or made use of the inexorable zero in a variety of contexts, from employment[165] to grand jury selection mechanisms[166] to immigration policy challenges.[167] In the employment discrimination context, courts have invoked the inexorable zero in segregation cases, as well as in hiring, firing, and assignment cases. A review of some of the fact patterns and holdings in the employment discrimination context will illustrate the types of cases in which an inexorable 100 inference could also provide adequate inferences of discrimination, but go beyond the inexorable zero inference to open the door to attack segregated jobs and substandard conditions.

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164. This analysis is based on a review of cases in which the "inexorable zero" terminology is used in describing the plaintiffs' complaint.

165. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 656–57 (1987) (O'Connor, J., concurring); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977).

166. *See e.g.*, Chin v. Runnels, 343 F. Supp. 2d 891, 905 (N.D. Cal. 2004) (noting that a complete absence of Hispanics, Chinese or Filipino forepersons over a thirty year period merited closer scrutiny, including scrutiny into possible unconscious biases preventing their selection, despite the court denying writ of habeas corpus).

167. Jean v. Nelson, 711 F.2d 1455, 1495–96 (11th Cir. 1983) (discussing the use of statistics to establish a plaintiff's burden in the inexorable zero context in an immigration case).

1. *The Inexorable Zero and Barriers to Opportunity*: Ewing v. Coca Cola Bottling Co.

A typical way of utilizing inexorable zero evidence is as proof that the employer has created a barrier to advancement opportunities. In *Ewing v. Coca Cola Bottling Co. of New York*,[168] for example, the plaintiffs, Black and Latino production workers at a bottling plant, alleged that they were assigned to the least desirable jobs with the most onerous working conditions.[169] In addition plant management failed to train the plaintiffs for advancement into the semi-skilled jobs in the plant.[170] The Anglo workers in the plant, on the other hand, were trained early and often so that they could quickly advance to the less onerous assignments.[171]

The plaintiffs focused on the inexorable zero in the more skilled positions as evidence of both the segregated nature of the plant and the employers' intentional disparate treatment of minority workers.[172] The court denied the defendant's motion to dismiss, noting that the inference of discrimination resulted from:

> plaintiffs' allegation that Black and Hispanic production workers are assigned to work exclusively at the most onerous dead-end jobs, while similar situated white production workers are given the more desirable, and possibly career enhancing machine jobs.[173]

Arguably, in cases like this, the court already recognizes the inexorable 100 condition. Thus, it would require only a small shift in the law for courts to make an inference of discrimination from that condition, which would allow courts to address the intentional steering of groups of workers into dead-end jobs and to construct a remedy for exploitive job conditions.

2. *The Inexorable Zero and Promotion Practices*: Loyd v. Phillips Brothers *and* Capaci v. Besthoff

The inexorable zero has also been used successfully to attack unlawful promotion practices that deny opportunities to protected

168. Ewing v. Coca Cola Bottling Co. of N.Y., Inc., No. 00 CIV. 7020(CM), 2001 WL 767070 (S.D.N.Y. June 25, 2001).
169. *Id.* at *1–5.
170. *Id.* at *5.
171. *Id.*
172. *Id.* at *6.
173. *Id.*

groups. In *Loyd v. Phillips Bros.*,[174] the plaintiffs challenged the structures used by the employer to maintain a sex-segregated workforce.[175] One of the employer's practices was to offer promotion opportunities to males from the male-dominated department.[176] Pursuant to this practice, the company went directly to male employees without posting or otherwise making the position publicly available, either internally or externally.[177] Another practice of the employer was segregating men and women into two separate feeder positions that supposedly both led to higher-level positions, but then only promoting from the male position.

The court found that the inexorable zero in the higher-level position supported a finding of disparate treatment.[178] As the court noted, "that Phillips' promotional procedure inexorably maintained the existing zero is strong evidence that it was intended to do so."[179]

Notably, the court found that the segregation itself should be cause for scrutiny: "the 100% sex-segregated workforce is highly suspicious and is sometimes alone sufficient to support judgment for the plaintiff."[180] Presumably then, although not explicitly discussed in the case, the maintenance of the inexorable 100 in the female feeder positions would also have provided evidence of discrimination.

In *Capaci v. Katz & Besthoff, Inc.*, the EEOC sued Katz & Besthoff, a pharmacy chain in Louisiana, for discrimination in its promotion practices.[181] The individual plaintiff was a female pharmacist who unsuccessfully sought promotion to management within the company.[182] The EEOC alleged, and the appellate court agreed, that the company discriminated against women by failing to promote them to management trainee positions.[183] All 267 trainee positions were awarded to men.[184] Much of the trial centered on testimony about whether the numbers were statistically significant.[185] The evidence also indicated that the company advertised for management

174. Loyd v. Phillips Bros., 25 F.3d 518, 521 (7th Cir. 1994).
175. *Id.* at 521.
176. *Id.*
177. *Id.* at 523–25.
178. *Id.* at 523–24.
179. *Id.* at 524 n.4.
180. *Id.* (citing Babrocky v. Jewel Food Co., 773 F.2d 857, 867 n.7 (7th Cir. 1985); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977)).
181. Capaci v. Katz & Besthoff, Inc., 711 F.2d 647, 651 (5th Cir. 1983).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 651–56.

positions by seeking "local men" in newspaper classified ads.[186] While acknowledging the strength of the statistics in the case, the appellate court indicated that the zero is a much more powerful signal of discrimination:

> We cannot escape the fact that during these seven and one-half years, there were hundreds of male manager trainees chosen and not a single woman. The hiring record demonstrates not just disparities in hiring, but *total exclusion* of women from the entry level management position. We differ with the defendant's suggestion that "zero is just a number." To the noble theoretician predicting the collisions of weightless elephants on frictionless roller skates, zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes. Evidence of two or three acts of hiring women as manager trainees during this period might not have affected the statistical significance of the tests performed by the experts, but it would indicate at least some willingness to consider women as equals in firm management. Perhaps for this reason, the courts have been particularly dubious of attempts by employers to explain away "the inexorable zero" when the hiring columns are totalled.[187]

Thus, the court remedied the discrimination inferred from the presence of the inexorable zero by dismantling a promotion structure that left women stranded in lower-level positions within the pharmacy structure. A similar focus on the inexorable 100 would have highlighted the positions into which women were tracked and the less than desirable conditions attached to such jobs. The corresponding remedy could have been different in that case, perhaps improving wages and training in the jobs held by women and changing the policies behind the segregation.

3. *The Inexorable Zero and Termination Policies:* Barner v. City of Harvey

Barner v. City of Harvey employed the inexorable zero in the context of firing.[188] The plaintiffs, a group of African Americans, claimed that the City of Harvey laid off a hugely disproportionate

186. *Id.* at 659.
187. *Id.* at 662 (citations omitted).
188. Barner v. City of Harvey, No. 95 C 3316, 1998 WL 664951 (N.D. Ill. Sept. 18, 1998).

number of African Americans after the election of a new mayor.[189] One hundred percent of those laid off for "budgetary reasons" were African American.[190] Here, the inexorable zero was identified in the numbers of non-African Americans who were laid off. The federal district court ruled that the plaintiffs had overcome a summary judgment challenge with a showing of the skewed numbers.[191] As the court noted:

> In the end, the tremendous drop in African-American presence in Harvey's workforce, both in general and across the board, and the "inexorable zero" means that Plaintiffs, despite their lack of statistical sophistication, have successfully shown a prima facie case both of disparate impact and disparate treatment.[192]

The court's focus on the composition of the laid off workers supports the concept of an inexorable 100, even if the court did not clearly articulate it. The court stressed the importance of extremes in demonstrating racial and ethnic imbalances that are, in turn, a sign of discrimination. In this case, the inexorable 100 would have been a more natural way to view the situation because framing it in terms of an inexorable zero suggests the African Americans were simply not given an opportunity to stay in their jobs, whereas framing it in terms of an inexorable 100 correctly reflects that African Americans were disproportionately targeted in the layoffs.

Babrocky v. Jewel Food Co. provides yet another example of the power of the zero, and of the potential power of the 100, in a Title VII termination case.[193] In *Babrocky*, the circuit court considered sex-segregated job categories in a meat packing plant.[194] The employer laid off a group of meat wrappers—from a mostly female meat wrapping department—and did not similarly lay off meat packers from the predominantly male meat packing department.[195] The plaintiffs alleged that "Jewel violated Title VII by maintaining sex-segregated job classifications, by failing to recruit, train, transfer, or promote females, by paying plaintiff women less than men who performed comparable work, by discharging women because of their sex, and by instituting a seniority and promotional system

189. *Id.* at *9.
190. *Id.* at *9.
191. *Id.* at *50.
192. *Id.* at *50.
193. Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985).
194. *Id.* at 859–60.
195. *Id.* at 860.

to further those practices."[196] The plaintiffs also alleged that the company "misused an employment ratio of one meat wrapper to four meat cutters to justify the discriminatory layoff of female employees."[197]

The court held that the sex-segregated nature of the job should trigger more scrutiny and required an analysis of the employer practices outside of the traditional *McDonnell Douglas* framework.[198] The court noted the differences in hiring patterns between the meat wrapping and meat cutting jobs, observing that one hundred percent of meat cutters were male, and one hundred percent of the meat wrappers were female.[199] This difference was sufficient to support a prima facie case of discrimination.[200] While the court focused on the lack of opportunity for women that ultimately resulted in the layoffs, it also noted that the segregation was a symptom of that lack of opportunity.[201] Had the court used an inexorable 100 inference, its analysis could have been more direct, starting from the segregation, and its remedy could have addressed not only firing and hiring, but also the policies that created the segregation.

4. *The Inexorable Zero and Hiring:* EEOC v. O&G Spring and Wire Forms Specialty Company

The inexorable zero can also support plaintiffs in hiring cases. In *EEOC v. O & G Spring & Wire Forms Specialty Co.*, the EEOC sued a manufacturer for its failure to hire African Americans.[202] Over a six-year period, the company made eighty-seven hires into one of its low-skill departments; none of them were African Americans.[203] The trial court found the inexorable zero in the company's hiring decisions supported a prima facie case of hiring discrimination.[204]

The company appealed, arguing that the plaintiffs' statistics were flawed, especially due to their use of the general population as the relevant labor market.[205] The circuit court affirmed, however,

196. *Id.*
197. *Id.*
198. *Id.* at 867–69.
199. *Id.* at 867 n.7.
200. *Id.*
201. *Id.* at 865 n.3.
202. EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 874 (7th Cir. 1994).
203. *Id.*
204. *Id.* at 878.
205. *Id.* at 876–77.

concluding that the percentage of African American availability in the labor market would have to have been much lower than it was to yield a zero percent hiring percentage.[206]

The company also argued that the lack of African American hires could be explained by African Americans' lack of interest in working in a place where Polish or Spanish were spoken.[207] The appellate court found that the argument had no support in the evidence.[208] The court rejected this formulation of the interest argument, noting that such evidence would be relevant only if "African-Americans exhibited this propensity in significantly greater proportion to other native-born English speakers."[209] Only then could an employer defend an argument of self-selection bias on the part of African Americans.

Finally, the company argued that its exclusive hiring of immigrants could be explained by the fact that its relevant labor market was composed mostly of Polish immigrants "since O & G offered poor working conditions and low pay, but, as a compensating factor, did not require English."[210] The district court found this rationale unpersuasive and the appeals court affirmed "particularly in light of testimony from O & G staff and application data indicating that African-Americans represented about 20% of the walk-in applicant pool."[211]

Significantly, in this case, a segregation framework approach with an inexorable 100 inference would have had important benefits beyond offering the opportunity for a broader remedy. Initially, the EEOC could have brought this case on the theory that the employer targeted immigrants for subordination. This strategy would have had at least three advantages. First, the poor conditions combined with the absence of an English requirement would become a focus of the inquiry because they are symptoms of the segregated nature of the workplace. The poor conditions, in other words, support the inference of discrimination from the one hundred percent composition of the workforce. The poor conditions of a job in question should be as important in anti-discrimination law as the lack of opportunity for those seeking entry.

Second, the company's argument that the limited language ability requirement created the inexorable 100 would not justify the existence of poor working conditions or pay—rather, it would be a

206. *Id.* at 878.
207. *Id.* at 877.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*

red flag, especially when the workforce is composed primarily of immigrants. This is an example of how limited the current anti-discrimination paradigm has become. Limited English proficiency should not be a business necessity for the job in question.[212] In fact, it is one of the methods that an employer will utilize to structure a job to attract a particular group of workers.[213] An inexorable 100 inference would challenge, rather than fail in the face of, the employer's argument.

Third, an inexorable 100 inference would render the defendants' interest arguments more vulnerable. A company would have to explain why only certain groups were attracted to a job, while other groups were repelled by it, without resorting to the poor conditions or the absence of an English requirement as explanations. There is nothing inherent in either the job or the employees' characteristics that would explain poor conditions, the absence of an English requirement, or the employer's hiring or assignment practices, all of which are in the employer's control rather than the employees'.

5. *The Inexorable Zero and Assignment:* Pegues v. Mississippi State Employment Service of Mississippi Employment Security Commission

In *Pegues v. Mississippi State Employment Service*, inexorable zero evidence was introduced to support the plaintiffs' claim alleging segregated referral and hiring practices.[214] The plaintiffs challenged the Mississippi State Employment Service's practice of honoring employer preferences for females to fill lower-paying, less desirable positions, and males to fill more desirable positions, where none of the positions required specific skills.[215] Specifically, the plaintiffs showed that in referrals to a major local employer, Travenol Laboratories, women were referred exclusively to lower-paid assembler jobs, while men were referred exclusively to higher-paid material handler jobs.[216] Neither job required special skills.[217]

212. *See generally* 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (2000) (introducing concept of "business necessity").

213. *See, e.g., O & G Spring & Wire*, 38 F.3d at 877. This is the structure that was set up and then defended in this case. *Id.*

214. Pegues v. Miss. State Employment Serv., 699 F.2d 760 (5th Cir. 1983).

215. *Id.* at 768.

216. *Id.*

217. *Id.*

The court held that this imbalance alone was insufficient to establish a prima facie case if it was not also statistically significant[218] and ruled that the plaintiffs had to overcome any evidence that the imbalance results from other factors.[219] It gave little weight to evidence showing the level of disproportionate classifications because the plaintiffs failed to introduce evidence that work preferences, experience, education, and the state of the job market did not cause the imbalances.[220] The court then reviewed the evidence of the inexorable zero in terms of statistical significance. Although it did not infer discrimination simply from the existence of an inexorable zero, it did note that such evidence could be significant if other factors, such as qualifications, were controlled for.[221]

Using an inexorable 100 inference, the court could still require the plaintiffs to demonstrate the absence of other factors explaining the segregation. However, it would be easier to prove discrimination. Although the burden would not change for the plaintiffs, it would alleviate plaintiffs of the requirement to show qualification for other positions, which is difficult to prove in an increasingly segmented market. It would also free plaintiffs of the requirement to show that more desirable opportunities exist within a department, or even a company, which itself is difficult in segregated workplaces. Importantly, by doing this, it would allow courts to recognize that certain practices generate segregated workplaces.

Each of the inexorable zero cases discussed here demonstrates the potential power of the inexorable 100. At bottom, the inexorable 100 is evidence of an extreme, just like the inexorable zero, which courts have accepted as sufficient to support a prima facie case for plaintiffs—one that defendants must rebut with solid evidence explaining the existence of the extreme imbalance. Except in limited cases, plaintiffs have not presented arguments from the point of view of the inexorable 100, in part because of a historical focus on employment opportunity as a goal or remedy. This focus comes from a historical need to deal with the systematic exclusion of minorities from workplace participation. An alternative focus on the inexorable 100 could improve conditions in segregated workplaces, as a first step toward their eradication.

218. *Id.* at 765–66.
219. *Id.* at 767–68.
220. *Id.* at 766–67.
221. *Id.* at 768–69.

D. A Potential Problem for the Inexorable 100: The Weakening of the Inexorable Zero Inference

It is important to note that over time the inexorable zero inference has experienced some dilution.[222] In the majority of discrimination cases, it still remains a powerful inference,[223] but as discussed above, there is currently a circuit split regarding the proper significance of the inexorable zero. Some of the circuits have retreated from recognizing the strong inference of discrimination in the case of the zero and have instead attempted to merge it into statistical disparity analysis, focusing on the diagnostic value of the zero in comparison to other forms of statistical analysis.[224]

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222. *See, e.g.*, Carter v. Ball, 33 F.3d 450, 457 (4th Cir. 1994) ("[T]he mere absence of minority employees is not enough to constitute a *prima facie* case of discrimination."); Craik v. Minn. State Univ. Bd., 731 F.2d 465, 494 (8th Cir. 1984) ("[Z]ero is not always 'inexorable.'").

223. *See* Jordan v. Wilson, 649 F. Supp. 1038, 1060 (M.D. Ala. 1986) (accepting evidence of inexorable zero in promotions to higher ranks in police force as prima facie showing of discrimination); Calloway v. Westinghouse Elec. Corp., 642 F. Supp. 663, 696 (M.D. Ga. 1986) (holding that inexorable zero evidence and evidence of subjective promotion practices demonstrated that company discriminated against Blacks); EEOC v. Local 798, United Ass'n of Journeymen, 646 F. Supp. 318, 325 (N.D. Okla. 1986) (finding that union failed to rebut evidence of inexorable zero women or minorities in union local's membership); Veazie v. Greyhound Lines, Inc., Civil Action No. 72-2729, 1983 WL 677, at *9–11 (E.D. La. Nov. 8, 1983) (accepting inexorable zero evidence that Greyhound had maintained black and white departments in its terminals and garages); Bridgeport Guardians, Inc. v. Delmonte, 553 F. Supp. 601, 610 n.14 (D. Conn. 1982) (noting that Black and Latino officers successfully showed the existence of segregated assignment practices and units by demonstrating an inexorable zero assignment rate for minorities in low-crime areas); Monroe v. United Air Lines, Inc., No. 79 C 360, 1981 WL 268, at *5 (N.D. Ill. Sept. 29, 1981) (denying summary judgment because evidence of inexorable zero in transfer rates for pilots over age sixty provided sufficient evidence to present case, despite paucity of other statistics); United States v. San Diego County, Civil Action No. 76-1094-S, 1979 WL 269, at *4 (S.D. Cal. July 6, 1979) ("The gross disparity between the number of positions filled by white males as compared with minorities and women supports plaintiffs' *prima facie* case and creates an inference of discrimination especially where the historic figures for promotion of blacks, Mexican-American/Latinos and even women, approach the 'inexorable zero.'").

224. *See* Note, *supra* note 154, at 1226–27; *see also* Capruso v. Hartford Fin. Servs. Group, Inc., No. 01 Civ.4250(RLC), 2003 WL 1872653, at *6 (S.D.N.Y. Apr. 10, 2003) (refusing to allow plaintiff to rely on inexorable zero inference with respect to a subgroup of a protected group, in this case women with children, and instead focusing on statistical evidence and flaws in comparator categories); Jordan v. Shaw Indus., Inc., No. 6:93CV542, 1996 WL 1061687, at *10 (M.D.N.C. Aug. 13, 1996) ("Without evidence of the relevant labor pool, Jordan's 'inexorable zero' evidence is insufficient, standing alone, to show discriminatory motive on the part of Shaw Industries."), *aff'd*, 131 F.3d 134 (4th Cir. 1997); EEOC v. Turtle Creek Mansion Corp., Civ. No. 3:93-CV-1649-H, 1995 WL 478833, at *9–11 (N.D. Tex. May 18, 1995) (finding inexorable zero evidence insufficient to establish a prima facie case of discrimination because defendant's hiring numbers were too small, and employer testified that women were underrepresented in the waitstaff profession in the area), *aff'd*, 82 F.3d 414 (5th Cir. 1996); Csicseri v. Bowsher, 862 F. Supp. 547, 573 (D.D.C. 1994) (finding that inexorable zero evidence of employer's failure to appoint anyone over age fifty to high level positions was outweighed by evidence of few appointments), *aff'd*, 67 F.3d 972 (D.C. Cir.

Even in these circuits, however, the inexorable zero still has the value of providing at the very least, some evidence of discrimination that requires a response from the employer.[225]

The inexorable 100 likewise may be eroded or even initially considered in light of its statistical power relative to other statistical analysis. However, the evolution of the inexorable zero suggests that even if that were to be the case, the inexorable 100 would still have value.

IV. TOWARD A SEGREGATION FRAMEWORK

A segregation framework centered on an inexorable 100 inference of discrimination is the necessary and appropriate step to take in anti-discrimination law to address segregation in the brown collar workplace. By focusing on segregation when scrutinizing employment practices, the legal system could effectuate the goals of Title VII, namely to eliminate poor working conditions for protected groups. This Part demonstrates why a segregation framework would be effective in countering modern segregation and then sets out the framework in detail.

1995); EEOC v. Nat'l Broad. Co., 753 F. Supp. 452, 466–67 (S.D.N.Y. 1990) (deciding that inexorable zero inference was weakened by limited number of openings for sports director positions, which female employee sought), *aff'd*, 940 F.2d 648 (2d Cir. 1991); EEOC v. Andrew Corp., No. 81 C 4359, 1989 WL 32884, at *20–21 (N.D. Ill. Apr. 3, 1989) (determining that, while the inexorable zero was relevant for Black clerical workers compared to their labor force numbers, the same was not true for Hispanic clerical workers, whose labor forces numbers were much smaller); Presseisen v. Swarthmore Coll., 442 F. Supp. 593, 625 (E.D. Pa. 1977) (concluding that female professor failed to show existence of inexorable zero when she did not provide adequate labor pool numbers), *aff'd*, 582 F.2d 1275 (3d Cir. 1978); GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE, 59–60 (2001) (describing the inexorable zero as a common sense test used where the court finds "no need to rely on even elementary tests of statistical significance.").

225. *See* Note, *supra* note 154, at 1226; *see also* Victory v. Hewlett-Packard Co., 34 F. Supp. 2d 809, 823 (E.D.N.Y. 1999) ("The complete lack of female participation in management is highly persuasive evidence of a disparate impact claim."); United States v. City of Belleville, No. 93CV0799-PER, 1995 WL 1943014, at *4 n.2 (S.D. Ill. Aug. 8, 1995) (noting that regardless of definition of relevant labor market in statistical comparisons, "[t]he inexorable-zero provides sufficient evidence to establish a *prima facie* case."); EEOC v. Costello, 850 F. Supp. 74, 77 (D. Mass. 1994) (finding that plaintiffs carried burden of showing *prima facie* case of discrimination where no Blacks or Hispanics were hired for unskilled steamship clerk positions over several years), *aff'd in relevant part sub nom.* EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 603 (1st Cir. 1995); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 869–70 (D. Minn. 1993) (scrutinizing employer's reasons for failure to promote women in mining company in response to inexorable zero evidence).

A. Why a Segregation Model?

A segregation framework provides an opportunity to eradicate the subordinating practices associated with low-wage industries that have repelled native born workers and trapped immigrant workers. Such a framework may also be more effective than the current anti-discrimination paradigms at targeting poor working conditions in an increasingly segmented market, where the problem is not getting into the workplace, but getting out of segregated jobs. Moreover, a segregation framework avoids pitting workers against each other and will allow workers—both those hired and those rejected—to join together to create more desirable jobs. This section discusses each of these reasons for establishing a segregation model in anti-discrimination law.

1. Workplace Segregation as a Subordinating Practice

Segregation in the brown collar workplace should properly be viewed as an extension of the historical subordination of Latinos in U.S. society. Employer targeting of Latino immigrants for the most difficult, least desirable jobs because of their perceived work ethic is analogous to taking advantage of a group's social condition because of racial difference. The U.S. Supreme Court recognized this in *Hernandez v. Texas*.[226] At the time of that case, Jim Crow legislation often took the form of language or cultural restrictions, which inevitably were tied to race.[227] The Jim Crow system in practice, however, was more nuanced. In some cases, state and private practices classified by perceived language ability, which resulted in the segregation of Mexicans and Mexican Americans.[228] In others, state actors implemented policies that excluded Latinos from participation in a way that precluded them from claiming discrimination.[229] In *Hernandez*, for example, the plaintiffs alleged that state policies alternately defined Mexicans as white or

226. Hernandez v. Texas, 347 U.S. 475 (1954).

227. Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 354–60 (2007).

228. *Id.* at 338.

229. *Id.* at 340–42 (arguing that Mexican Americans were "covered with the Caucasian cloak" in order to exclude them from participating on juries, on the theory that since they were considered white and whites served on juries, they could not claim equal protection violations); *see also Hernandez*, 347 U.S. at 479 (noting that while the challenged statute was neutral on its face, it could be applied in a discriminatory manner, and therefore, "[t]he petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class . . . distinct from 'whites.'").

non-white, depending on the situation, in order to exclude them.[230] The novelty of their argument was that they framed the issue of segregatory practices to be not so much the categorization by race but "subordinat[ion of] groups based upon ideas of racial difference."[231] In *Hernandez*, Mexicans were considered white for jury selection purposes, but they were treated as a separate subordinated class in other respects.[232] As legal scholar Ian Haney Lopez noted in his analysis of the importance of *Hernandez* in the struggle against segregation, "*Hernandez* unambiguously insists, in a way that *Brown [v. Board of Education]* does not, that it is race as subordination, rather than race per se, that demands constitutional intervention."[233]

The lesson of *Hernandez*—that anti-discrimination law should be concerned more with subordination than with classification—reaches beyond the narrow context of this case. In *Hernandez*, Chief Justice Warren dealt with what was essentially race or national origin discrimination as a group subordination issue. In reasoning through that issue, the court stated: "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists . . . is a question of fact."[234] Thus, as formulated by Haney Lopez, the test to determine whether a group deserves constitutional protection is: "[i]n the context of the local situation, was the group mistreated?"[235] In *Hernandez*, it was Mexicans' subordination in the context of their mid-century lives, rather than their race, that required protection. Today it is subordination in the context of a restrictive immigration law regime and a weak employment and labor enforcement framework.

Following *Hernandez*, and departing from the current disparate treatment and impact paradigms, a segregation framework makes subordination rather than classification the critical issue of the anti-discrimination inquiry. Therefore, the question under a segregation framework is whether the employer is subjecting brown collar workers to worse pay and less desirable conditions based on their race or ethnicity, as opposed to whether an employer used race classifications in making employment decisions.

230. *Hernandez*, 347 U.S. at 479.
231. Haney Lopez, *supra* note 140, at 75–76; *see also Hernandez*, 347 U.S. at 479–80.
232. *Hernandez*, 347 U.S. at 479.
233. Haney Lopez, *supra* note 140, at 62.
234. *Hernandez*, 347 U.S. at 478.
235. Haney Lopez, *supra* note 140, at 66–67.

2. The New Labor Market

Today's labor market is increasingly segmented, contingent, and unstable. Jobs are specialized, leaving little opportunity for predictable advancement on a career ladder within a company. Legal scholar Katherine Stone describes the "new psychological contract," or the "new deal at work," as one in which "the long-standing assumption of long-term attachment between an employee and a single firm has broken down."[236] In the modern workplace, a worker's identity is linked to their skills, and employers discourage employees from expecting long-term job security.[237] This is a dramatic change from the past. Title VII and New Deal labor legislation were formulated in an era when the predominant method of advancement was within a single company over a long period of time.[238] Workers thought of their jobs as stable and did not move out of them.[239] In that context, segregation was about excluding minorities from advancement tracks or particular jobs in a company.[240]

As Katherine Stone argues, today's labor and employment laws reflect the employment reality of a different era:

> The labor and employment laws we have inherited from the New Deal were built upon the template of an employment relationship characterized by internal labor markets—an employment system that offered long-term attachment between the employee and the firm in which the employee advances up the job ladder of a particular employer for most of his or her working life. Thus the labor law regime was compatible with and tailored to the job structures of the industrial era.[241]

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236. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at 3.

237. *Id.* at 124–26.

238. 42 U.S.C. § 2000e-2(a) (2000); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 253 (2006) [hereinafter *Legal Protections for Atypical Employees*] (explaining employment trends toward contingent, temporary labor forces); *see also* Blumrosen, *Wage Discrimination*, *supra* note 62, at 458 n.222 (describing the breadth of Title VII with respect to employment opportunity); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 582 (2007) (commenting on the role of worker centers in increasingly unstable labor markets).

239. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at 68; DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS 17, 20–21 (1996).

240. *See* Goluboff, *supra* note 8, at 1478–80, 1482.

241. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at ix.

In sum, labor laws are still focused on strengthening the internal labor market and reflect the expectation of long-term employment relationships, and employment laws continue to focus on providing opportunities for minorities and women to break into, not out of, job categories. Traditional labor law, moreover, protects insiders, not outsiders—minorities and women. Benefit negotiations center on length of service, seniority and long vesting periods.[242] Collective bargaining contracts include just-cause and seniority provisions in order to protect the long-term employment paradigm.[243] In her analysis of historical labor regulation trends, Katherine Stone writes:

> [t]he labor laws and the employment practices of large firms reinforced a sharp divide between those inside and those outside the corporate family. Insiders benefited from the collective bargaining laws and the implicit job security of the internal labor market; outsiders had neither.[244]

In the absence of labor union protections for "outsiders," federal legislation, such as the Fair Labor Standards Act, the Occupational Health and Safety Act, the Worker Adjustment and Retraining Notification ("WARN") Act, and similar state statutes have become the default protections for these workers.[245] Similarly, employment discrimination laws, such as Title VII, the Equal Pay Act, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990, have protected the rights of women and minorities in the workplace in ways that traditional labor regulation could not.[246] Yet, even these laws are not helpful in the current labor market. As Katherine Stone notes, anti-discrimination laws:

> provided a mechanism for orderly, rule-based, and accountable decisions about such matters as hiring, promotions, and pay rates. These rule-based systems injected an external order into the otherwise private and often anarchic domain of the workplace. In particular, equal employment laws provided

242. *See* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 206–09 (2002).

243. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at 121–122.

244. *Id.* at 121.

245. LICHTENSTEIN, *supra* note 242, at 206–11.

246. *Legal Protections for Atypical Employees*, *supra* note 238, at 262.

> rules by which women and minorities could break into workplaces that had been white, male, privileged clubs.[247]

The problem today, however, is not so much that minorities cannot break into the workplace, given the rules that have developed in employment and labor law.[248] The problem in the current labor market is that they cannot break out of segregation—an old-style problem. In other words, while the individualist labor protection paradigm helps protected groups of workers break into jobs, it does not provide the collective protections that traditionally have helped improve workplace conditions.

Similarly, the era in which labor and employment law developed influenced the manner in which the disparate impact and disparate treatment discrimination frameworks developed and grew. The focus in a discrimination case was nearly always advancement opportunities based on the assumption that this remedy offered a way out of segregated conditions for minorities and women.[249] These assumptions fell in line with the broader civil rights aspiration to eradicate segregation at all levels of society.[250] In the traditional civil rights models,

> civil rights enforcement efforts were initially directed at corporate hiring and compensation practices in order to obtain equal pay and access to jobs for women and minorities. But it quickly became apparent that women and minorities needed not simply jobs, but good jobs. . . .
>
> In an era of promotional ladders within firms, it was logical and appropriate for Title VII plaintiffs to seek remedies that gave women and minorities access to the upper rungs of the promotion ladders. . . .
>
> Title VII remedies for employment discrimination were tailored to redress discrimination within firms that utilized internal labor markets. Affirmative action and requirements that firms promulgate goals and timetables for measuring

247. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at 168.

248. *See* Sturm, *supra* note 23, at 461–62 ("Efforts to reduce the uncertainty of general and ambiguous legal norms by articulating more specific and detailed rules produce a different but equally problematic result. Specific commands will not neatly adapt to variable and fluid contexts. Inevitably, they will be underinclusive, overinclusive, or both.").

249. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66; United Steelworkers v. Weber, 443 U.S. 193, 203 (1979).

250. Goluboff, *supra* note 8, at 1479–80.

> their compliance with equal employment objectives helped numerous women and minorities gain access to previously segregated workplaces and helped them move up within the firm. However, the remedies assumed that there were identifiable job ladders that defined advancement opportunities within firms, and operated to move women and minorities up within them.[251]

Today, the advancement mechanisms within a company are not so clear. In addition to segmented job structures, companies have turned to multiple job categories and titles, contingent hiring, and team-style work models—all of which affect how a discrimination lawsuit will fare under the traditional models.[252]

The evolving labor structure necessitates consideration as to how discrimination may occur in these different scenarios and develop frameworks that fit them. The discrimination that most affects brown collar workers is old-fashioned segregation manifested in the new form of the segmented labor market. A segregation framework would enable plaintiffs to reach this discrimination. Because the focus is on the segregated job and not on opportunities for advancement, it does not require a comparison to similarly situated employees that in the new labor market, like in *Wards Cove*, do not exist.

3. Uniting Workers, Putting the Focus on Employers

The current discrimination frameworks tend to pit workers against each other and distract from the core issue: employer policies and practices that perpetuate segregation. A recent case, *Colindres v. Quietflex Mfg.*, provides an illustration.[253] In Houston, a group of Latino workers filed suit against a manufacturing company alleging discrimination in its hiring, assignment, and promotion policies.[254] The Latinos, the vast majority of whom were immigrants, worked in department 911, a segregated entry-level department that assembled the air conditioning ducts.[255] Another entry-level department, 910, produced the jackets for the ducts.[256]

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251. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at 182–83.

252. *Id.* at 2–4.

253. Colindres v. Quietflex Mfg., No. Civ.A. H-01-4319, 2004 WL 3690215 (S.D. Tex. Mar. 23, 2004).

254. *Id.* at *1–2.

255. *Id.*

256. *Id.*

It was populated mostly by Vietnamese workers.[257] Department 911 employees, unskilled workers, performed the most difficult, dirty, and lowest paid work in the plant.[258] Department 910 employees, also unskilled workers, performed more desirable work, for better pay.[259] Structural requirements such as a transfer policy that required English to transfer to the more desirable department (but not vice versa), a six-month transfer requirement, and a policy or practice that forced transferees to transfer into less desirable shifts kept the Latino workers segregated in department 911.[260]

Although the Vietnamese workers arguably were as segregated as the Latino workers in the sense that they, too, were isolated from other workers, the current discrimination frameworks required the Latino plaintiffs to articulate their legal claims in a manner that placed the Latino and Vietnamese workers on opposite sides of the suit. The Latino plaintiffs had to show that their conditions were substantially worse than those of the Vietnamese workers, and that their prospects for advancement were diminished by the employer's structural requirements.[261] These frameworks also prevented the Vietnamese workers from easily joining with the Latino workers to combat structural practices that affected both sets of workers, such as antiquated piece-rate systems, seniority systems that kept both sets of workers in entry level positions, and intra-departmental promotion policies that kept workers in their own departments.[262]

By forcing the plaintiffs to focus on the employees' situations vis-à-vis each other, the available anti-discrimination frameworks required the employees to focus on the targeted jobs and the groups that held them, rather than on the conditions that maintained the segregation and the exploitative conditions—some of which also existed in the Vietnamese department. In other words, it was not enough to show segregation per se. The plaintiffs had to show the detrimental effects of the segregation by pointing to a comparator employee group that had more desirable work conditions. Instead of being the target of immigrant workers' discrimination claims,

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at *4; Marion v. Slaughter Co., No. 98-6286, 1999 WL 1267015, at *5–6 (10th Cir. Dec. 29, 1999) (finding segregation in itself was not sufficient to sustain a Title VII discrimination claim).

262. *Colindres*, 2004 WL 3690215, at *1, *2. Practices such as piece-rate wages and English language transfer requirements are structural in that they create the parameters within which a worker will operate on the job. *See* Saucedo, *supra* note 11, at 977–978. They are the means by which an employer creates a job so that no one else will be interested in it. *Id.*

employer policies and practices were simply a backdrop to the broader issue of whether one group or another held the desired positions. An anti-discrimination paradigm that focuses on differential treatment rather than on the ways in which a particular group can be subordinated tends to foster division rather than unity among minority groups in the workplace.

Moreover, in anti-discrimination law, the focus on the comparative positions of employee groups inevitably leads to an inquiry as to whether the challenging parties possess "qualifications" for the targeted jobs, which is one element of an individual disparate treatment claim.[263] Because of its anti-classification nature, this inquiry risks creating long-term animosity between groups of workers who perceive that they are competing with each other for their jobs.[264] The targeted job and its composition then becomes the relevant inquiry. In a legal culture increasingly dominated by color-blind, anti-classification equal protection principles,[265] the focus on targeted jobs as the remedy for exploitative employer practices simply re-creates a zero-sum environment that can spiral into decades of litigation over the desired job.

The Hurricane Katrina disaster provides an example of how employer practices pit workers against each other. In immigration law, employment-based visas are supposed to be granted only if they do not otherwise create entry or advancement barriers for willing native-born workers.[266] This system stems from the popular public perception that the U.S. government should not allow immigrant workers coming into the United States to take jobs away from willing U.S. workers.[267] This policy is overly simplistic because

263. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

264. This has been the case in the affirmative action cases, for example, in which employers responding to perceived exclusionary practices are then sued by Anglo or male plaintiffs. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 619–20 (1987) (hearing claim of employment discrimination by male after female promoted pursuant to an affirmative action plan).

265. *See, e.g.*, *Johnson*, 480 U.S. at 641–642 (promoting a female employee over a male employee with higher interview scores did not violate Title VII because sex was only one of many factors in the Agency's affirmative action plan). *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

266. The labor certification process determines whether there are not sufficient workers who are able, willing, qualified, and available at the time of the visa application, and ensures that the employment of an immigrant will not adversely affect the wages and working conditions of native born workers. Immigration and Nationality Act § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A) (2000). Similar provisions exist to determine if an alien is labeled "nonimmigrant alien." Immigration and Nationality Act § 101(a)(15)(H)(i)–(ii), 8 U.S.C. § 1101(a)(15)(H)(i)–(ii).

267. Media accounts tend to play up this perception. *See, e.g.*, Stephanie Chavez, *Racial Tensions Over South L.A. Jobs Grow*, L.A. TIMES, July 22, 1992, at B1; Darryl Fears, *Job Issue*

it ignores the demonstrated ability of employers to structure a job so that no native-born worker will want it. The governmental policy, therefore, unnecessarily pits one set of workers against another. Under Title VII law, the workers who are entering the job market for the newly restructured jobs do not have a cause of action, while the workers who do not get hired into the jobs, have little interest in fighting for them.

A segregation framework, by contrast, would unite workers instead of driving them apart, and would put the focus where it should be—on employers. This is because, again, a segregation framework would not require comparator evidence as the focus would be on the segregated job and the employer practices creating it, and both workers targeted for an undesirable job as well as those excluded from it have the incentive to challenge the employer practices. The potential of a segregation framework to bring together all workers was illustrated by immigrants' rights groups that recently sued a hotel owner in New Orleans on behalf of immigrant guest workers from Peru, Bolivia, and the Dominican Republic.[268] The lawsuit highlighted how an employer used the H-2 temporary worker system to exploit immigrant workers even as it failed to hire local workers, including African Americans.[269] The lawsuit claimed that hotel owners violated the Fair Labor Standards Act and other labor laws when they lured immigrant workers into jobs at lower pay and in worse conditions than existed when the native Louisianans held them.[270] Lawyers for the workers explained that the "lawsuit illustrates how U.S. businesses systematically recruit and exploit vulnerable immigrants to drive down wages and undercut worker rights."[271] The suit alleged that the hotel owners lured workers to New Orleans through labor recruiters, who

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Muddles Immigration Views, WASH. POST, Apr. 8, 2006, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/07/AR2006040701579.html; M.L. Ingram, *Are Undocumented Immigrants Taking Jobs from Blacks?*, PAC. NEWS SERVICE, Apr. 10, 2006, http://news.pacificnews.org/news/view_article.html?article_id=370fa6cabebbd4fbe63259c57f0ae571. For an in-depth discussion of the tensions between the black community and the Latino immigrant community around perceived work-related tensions, see Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2511–19 (2007).

268. Complaint, Castellanos-Contreras v. Decatur Hotels, L.L.C, 488 F. Supp. 2d 565 (E.D. La. 2007) (No. 06-4340), 2006 WL 2705205, https://secure.splcenter.org/pdf/dynamic/legal/Decatur_Amended_Complaint.pdf; S. Poverty Law Ctr., SPLC Exposes Exploitation of Immigrant Workers (Aug. 16, 2006), https://secure.splcenter.org/legal/news/article.jsp?aid=205&site_area=1.

269. *Id.*

270. Complaint, *supra* note 268, at 7–8 (describing how defendant hotel owners failed to pay immigrant workers the applicable minimum wage).

271. S. Poverty Law Ctr., *supra* note 268.

promised high wages, stable jobs and good living conditions in the U.S.[272] The recruiters charged workers $3,500 to $5,000 each to transport them to New Orleans and secure their visas through the H-2B temporary worker program.[273] In order to qualify to hire temporary workers, hotel owners had to certify that they could not find U.S. workers to take these jobs.[274] The hotel claimed in its certification that it offered jobs to Katrina evacuees but no one applied.[275]

Once they arrived in New Orleans, the guest workers questioned the absence of African Americans in their workplaces.[276] Hotel owners claimed that "black people don't like to work."[277] By seeking enforcement of whatever rights immigrant workers have under current law, these workers aimed to become allies of African American workers. The development of an inexorable 100 inference and a segregation framework surely would advance that effort. Further, the inference can complement the efforts of immigrant rights advocates to highlight the dangers of segregating any workers—including immigrant or temporary workers—into low-status jobs.

To make the employer's policies and practices the true focus of the inquiry into whether the creation of an exploitative workplace environment creates unlawful discrimination, the law of employment discrimination needs a framework that scrutinizes the indicators of exploitation as a form of discrimination, without regard to whether a comparable set of similarly situated employees exists.[278] The proposed segregation framework gives the employee in the job as much standing to sue for conditions as if there were other workers on the job. It provides the potential for the "weak" winners on the job to join with the "strong" losers—native born workers—for better working conditions and a more desirable job.

4. The New Discrimination—Targeting

As today's labor market differs from the labor market present when existing discrimination law and frameworks were developed,

272. Complaint, *supra* note 268, at 1–2.

273. *Id.*

274. Immigration and Nationality Act § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (2000).

275. S. Poverty Law Ctr., *supra* note 268.

276. *Id.*

277. *Id.*

278. Title VII conditions cases and wage discrimination cases have attempted this scrutiny, although not explicitly, as discussed *infra* Parts II.B and C.

today's discrimination also differs from the discrimination of that era. Rather than strictly excluding minority employees from opportunities, employers today specifically target minorities for low-wage, undesirable jobs.[279] The current segregation narrative that describes the discrimination harm as exclusion from opportunity cannot respond to the discrimination attendant to targeting. This is in part because the traditional approach to segregation in *Brown*—that segregation is a harm that, in and of itself, violates Equal Protection principles—has been transformed over time into a classification principle.[280] Under this transformed paradigm, segregation is defined as a classification based on race, which itself violates the Equal Protection clause. When the classification principle becomes unlinked from a subordination principle, however, differential treatment analysis fails to capture exploitative practices in brown collar workplaces. Employers can, for example, much more easily explain away segregation with a legitimate reason for their targeting. Legal scholar Reva Siegel argues that this transformation occurred in part because the harm analysis was susceptible to corruption by those who argued that integration was, in fact, more harmful than segregation.[281] Classification thus became a way of "insulating a body of constitutional law concerned with status harm inflicted on blacks against unremitting charges of jurisprudential illegitimacy."[282] Siegel points out that in the decade after *Brown* was decided, "questions of anti-classification and questions of group status harm were not bifurcated frames of analysis, as they would later come to be. Anti-classification discourse acquired this new significance only as it was asked to solve a variety of new questions . . . ."[283] As the Supreme Court began to address new issues like anti-miscegenation statutes, for example, the equal protection framework began to focus more on classification than on the harm of segregation.[284] In fact, a series of arguments attacked both the anti-classification and harm frameworks, so that "[w]hen courts justified disestablishment of segregation in the language of harm, critics attacked judicial decrees in the language of harm. As judges began to justify disestablishment of segregation in the language of classification, opponents of desegregation decrees and policies expressed their objections in terms of the anticlassification principle

279. Saucedo, *supra* note 11, at 964–66.
280. Haney Lopez, *supra* note 140, at 69–74; Siegel, *supra* note 265, at 1499.
281. Siegel, *supra* note 265, at 1499.
282. *Id.*
283. *Id.* at 1500.
284. *Id.* at 1502.

itself."[285] Siegel sums up the eventual bifurcation of the anti-classification and harm principles as follows:

> [I]n the years after the Supreme Court first announced the presumption that state action classifying on the basis of race was unconstitutional, courts applied that presumption in accordance with an understanding, sometimes implicit and sometimes explicit, that its purpose was to dismantle segregation and other practices that enforced racial hierarchy. In this period, segregation was understood as wrongful both because it failed to treat members of a group as individuals and because it treated one group as inferior to another, and there was little felt sense that expressing segregation's harm in terms of a presumption that racial classification was unconstitutional amounted to a choice between the accounts of the harm. . . . But in time, as the struggle over desegregation unfolded and shifted away from the question of whether courts would intervene in segregation to the question of when and how, the meaning of the presumption came to be increasingly contested.[286]

The problem is that the classification principle undermines the anti-subordination principles on which *Brown*, *Hernandez*, and similar cases were based.[287] As a result, the current discrimination paradigms cannot adequately address the new breed of discrimination. In the context of modern discrimination, where subordination occurs in targeting Latinos for jobs rather than denying them opportunity, there is a need for a framework that can combine the anti-classification and anti-subordination principles into one unified theory. A segregation framework would achieve this first, by setting up a presumption of discrimination in cases where the inexorable 100 exists; second, by allowing courts to scrutinize employer practices for further signs of exploitative working conditions; third, by setting up a legal mechanism that signals discrimination whenever employment structures such as English language proficiency or weakened pay rates perpetuate segregation; and fourth, by providing broader remedies for improving work conditions in the targeted segregated job.

285. *Id.* at 1520.
286. *Id.* at 1534.
287. *Id.* at 1473 n.10.

B. The Proposed Framework

A segregation framework would center on the inexorable 100 inference. This focus would create the opportunity for remedies that could reach the re-segregation occurring in today's workplaces. The traditional remedy of opening up opportunities for advancement is now less effective than eliminating the structures that create segregation in the first place and remedying conditions in the unskilled and semi-skilled jobs that scholars argue are structured now into segmented labor markets.[288] Title VII's remedial powers are broad enough to permit such remedies as long as the issue is approached with the segregation framework as a starting point.[289]

1. The Prima Facie Case: The Existence of an Inexorable 100

The core of a segregation framework would be an inference of discrimination from the existence of an inexorable 100, the one hundred percent minority composition of a workforce. An inexorable 100, possibly bolstered by additional evidence of discrimination, would lead to scrutiny of employer practices to determine whether a historically protected class is being discriminated against. For example, in the case of a brown collar workplace, the inference created by the inexorable 100 would expose the employer to an evaluation of whether it illegally targeted brown collar workers for "unwanted" jobs. As discussed, in the inexorable zero context courts pay particularly close attention to the fact of an absence of minorities among the targeted job regardless of the type of claim.[290] With a promotion claim, the focus of the inquiry is on the promotion job category. With a termination case, the focus of the inquiry is on the employees who were not terminated. The inexorable zero carries powerful probative value in each of these scenarios. The inexorable 100 can and should perform the same function in examining modern workplaces.

288. STONE, FROM WIDGETS TO DIGITS, *supra* note 2, at 3, 8.

289. Blumrosen, *Wage Discrimination*, *supra* note 62, at 492; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

290. *See supra* notes 167–170 and accompanying text.

a. "Inexorability" and Degree

Like the inexorable zero, an inexorable 100 inference relies on common sense rather than statistical tests. To meet the requisites of the inference, plaintiffs would need to address both the inexorability of the situation and the degree of the segregation.

Inexorability is defined as something "[n]ot capable of being persuaded by entreaty; relentless."[291] Arguably, just as with the zero, not every 100% is inexorable.[292] Proof of inexorability may require a review of longitudinal data to establish that a practice is deep-seated.[293] Longitudinal data can show trends in segregation and can reveal long-standing overrepresentation of a protected group in a less desirable job. Longitudinal analyses of wage determinations may also provide long-term data needed to prove inexorability.[294]

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291. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 896 (4th ed. 2000), *available at* http://www.bartleby.com/61/26/I0122600.html.

292. *See* Craik v. Minn. State Univ. Bd., 731 F.2d 465, 494–95 (8th Cir. 1984).

> The plaintiffs argue that the women candidates' loss in all five of these elections constitutes the 'inexorable zero' found so damning in *Teamsters*. But zero is not always 'inexorable.' The *Teamsters* zero was observed after hundreds of hiring decisions, a result that was surely statistically significant. The disparity observed in this case, by contrast, is not statistically significant. The candidates in the five elections included fifty men and eight women. If all of these candidates were pooled and chance were the sole determinant of outcome we would expect women to win .69 of the five positions; the standard deviation is 2.63; and the observed outcome—zero—is .26 standard deviations from the expected outcome. The probability that the observed outcome occurred purely by chance is about 40% under a one-tailed test, or about 80% under a two-tailed test—far higher than the level at which a social scientist would become suspicious so as to deem the result statistically significant. In reality, of course, there was not simply a single pool of fifty-eight candidates for five positions; in some of the individual contests the women candidates were not as outnumbered as in others. Even if we assume, however, that each of the elections was a contest between one man and one woman the results would not be startling. In that case we would expect women to win 2.5 of the positions; the standard deviation would be 1.58; and the observed outcome would be 1.58 standard deviations from the expected. The probability of the observed outcome occurring by chance would be between 5% and 10% under a one-tailed test, or between 10% an d 20% under a two-tailed test. Thus, even if we focus only on the contested elections in which women competed against men, rather than on all contested elections, as the magistrate did, and as the majority finds improper, we do not observe enough statistical disparity to make us suspect discrimination.

Id. (Swygert, J., dissenting).

293. *See* Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 324–25 (2004).

294. *See* Cooper v. Southern Co., 205 F.R.D. 596 (N.D. Ga. 2001) (holding that plaintiffs failed to establish historical context of zero appointments to union representative position).

Inexorability also may require evidence of the numbers affected by the employer's decision-making.[295] In *EEOC v. O & G Spring & Wire Forms Specialty Co.*, dissenting justice Manion wrote:

> Where a zero may be inexorable when such a large work force is involved, it is not when the work force is so small. Moreover, where, as here, the 100% work force is statistically explainable, the absence of a certain race or gender is alone insufficient to support a finding of intentional discrimination.[296]

As this shows, plaintiffs must be careful where small numbers of decisions are involved, as they may similarly tend to counterbalance the inexorability of the situation.[297]

b. Supplemental Evidence of Employer Discrimination: Other Indicators of Exploitation as Evidence of Actionable Segregation

As described earlier, the fact of segregation currently bolsters other elements of discriminatory practice. Under a segregation framework, it would be appropriate to look to evidence indicating discrimination to support the inexorable 100 inference. For example, evidence of longer hours, higher productivity requirements, lower wage rates based on who holds the jobs, and substandard safety conditions could all help support the prima facie segregation case.

Further, courts are increasingly requiring supplemental statistical evidence of gross imbalances where plaintiffs allege inexorable

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295. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337 (1977); *see also* EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 889 (7th Cir. 1994) (Manion, J., dissenting) ("Where a zero may be inexorable when such a large work force is involved, it is not when the work force is so small."). Some courts have also held that the inexorable zero cannot be used to support individual or non-pattern and practice claims, especially when the numbers involved are small. *See, e.g.*, Davis v. Precoat Metals, 328 F. Supp. 2d 847, 856 (N.D. Ill. 2004); Clark v. ALFA Ins. Co., No. Civ.A. 00-AR-3296-S, 2002 WL 32366291, at *2 (N.D. Ala. May 28, 2002).

296. *O & G Spring & Wire*, 38 F.3d at 889.

297. *See* Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 734 (8th Cir. 1982) (holding in sex discrimination suit that a small number of decisions made it more difficult to infer discrimination, especially since a number of the positions were awarded to women); *Davis*, 328 F. Supp. 2d at 856 (finding that in the absence of a pattern and practice case, and with evidence of only three instances of disparate impact, plaintiffs could not rely on inexorable zero to provide inference of discrimination). The court in *Davis*, comparing the case to *Barner v. City of Harvey*, No. 95 C 3316, 1998 WL 664951 (N.D. Ill. Sept. 18, 1998), noted that "[u]nlike *Barner*, this case involves a difference between zero and three, not zero and 68." *Davis*, 328 F. Supp. 2d at 856.

zero evidence.[298] The same should be expected with an inexorable 100 inference. In jurisdictions where evidence of an inexorable 100 constituted only weak evidence of discrimination, plaintiffs would necessarily have to combine the inference with anecdotal evidence of employer bias to establish the prima facie case.[299]

2. The Employers' Opportunity to Respond with a "Legitimate Explanation"

Where a plaintiff established a prima facie case using the inexorable 100 inference, the employer would then have the opportunity to show that it does not in fact operate through bias factors. This element of the segregation framework is similar to the business necessity defense in a disparate impact case or a legitimate business reason in a disparate treatment claim. Here, an employer could show that it has not restructured a particular job to attract a Latino profile, or that it lacks sufficient power in the market to control wage rates or conditions in a job category.

If an employer is unable to provide a legitimate explanation for the inexorable 100, the plaintiff would prevail on her claim. Significantly, between the required proof of inexorability and the employer's opportunity to provide an alternate explanation for an inexorable 100, the framework proposed above provides ample opportunity for employers to defend themselves in the face of an inexorable 100 inference.

3. The Plaintiff's Response to Employer Defenses

If an employer provides a legitimate explanation, the plaintiff will have one more opportunity to counter the employer's explanation or, as in the disparate impact framework, demonstrate that a less discriminatory alternative is feasible. One important employer defense that will likely recur in the segregation framework is the

298. *See* Md. Troopers Ass'n v. Evans, 993 F.2d 1072, 1078–79 (4th Cir. 1993); Brown v. Cost Co., No. Civ.A. 03-224 ERIE, 2006 WL 544296, at *4 (W.D. Pa. Mar. 3, 2006) ("We do not view *Teamsters* as necessarily eliminating a foundational requirement in a disparate treatment case where there are no members of the plaintiff's protected class in the relevant workforce. In fact, there was evidence in *Teamsters* that members of the plaintiffs' class were available for work, had access to the job site, and were qualified.").

299. *See* Ortiz-Del Valle v. Nat'l Basketball Ass'n, 42 F. Supp. 2d 334, 338 (S.D.N.Y. 1999) (finding evidence that no women were hired as basketball referees over a period of time, combined with testimony of regarding differential treatment of women, could support a discrimination finding).

interest defense, where an employer may argue that only a certain group has an interest in the particular job. In an inexorable 100 case, however, the argument should be rejected once the plaintiff shows that a particular employer policy or practice created a job that no other group wants.

Employers might also respond that they structured a job specifically to benefit a particular protected group.[300] The plaintiffs could counter this argument in a segregation framework by presenting alternatives that would confer similar benefits to the group, but would not perpetuate segregation. Such a response protects against segregation being a permanent condition within the company.

Finally, employers may attempt to attribute the conditions of the undesirable job to market forces. The inexorable 100 inference will allow plaintiffs to respond to this defense because it presumes that even in a market-controlled environment a 100% job composition in a particular job category is unlikely. Moreover, plaintiffs can bring forth evidence of particularly subordinating aspects of the segregated job that could not be attributable to market pressures to show that employer practices structured jobs to target a protected category of workers. Employers should not be able to attribute particularly subordinating practices to market pressures.

4. The Remedy

In the end, the inexorable 100 serves a dual purpose. First, it will require employers to explain the dynamics underlying the segregated workplace. This enables plaintiffs to hold employers who hire immigrants or brown collar workers because they do not want to hire native born workers accountable, and allows workers the opportunity to offer a counter-narrative that highlights a history of subordination. Second, the inference will focus attention on conditions within the segregated occupation and provide the groundwork for a remedy that involves improving conditions in the segregated position.

300. Under the current frameworks the employer argument that the segregation benefits the plaintiff could end the discrimination inquiry. For example, in *Woodson v. Pfizer, Inc.*, 34 Fed. App'x 490, 492–93 (7th Cir. 2002), the Seventh Circuit faced the argument that a company that targeted minority communities to sell its pharmaceuticals intentionally hired African Americans exclusively as its sales agents. The African American who sued the company claimed that it engaged in a practice that amounted to the "flip side of the inexorable zero." *Id.* at 492 (internal quotations omitted). The court dismissed the argument as illogical based on the company's explicit goals of providing scholarships and job opportunities to disadvantaged minorities. *Id.* at 493.

An anti-discrimination framework that scrutinizes the conditions of segregated workers invites a broader remedial scheme than one traditionally found in employment discrimination cases. In addition to improving workplace conditions, remedies could include, when appropriate, a more open immigration policy for those workers who prove discrimination under a segregation framework. The availability of visas and legalized status for workers who come forward to complain about segregation would strengthen the position of brown collar workers in the workplace. It would reduce the vulnerabilities that make those workers attractive to employers in the first place. The availability of such a remedy would recognize that undocumented status engenders its own form of subordination for which employers should be responsible. Additionally, the remedial scheme could formally require courts or law enforcement officials to certify workers as discrimination victims and require employers to pay the fees to navigate the immigration system. A visa category could be created, similar to the existing U visa category available now for certain crime victims.[301]

CONCLUSION

Policy-makers, social scientists, litigants, and courts must re-evaluate the assumptions that underlie the jurisprudence and judicial remedies in employment cases. Under current paradigms, decision-makers assume that the remedy for the problem of segregated workplaces lies in ordering the compensation, training, and job placement opportunities that plaintiffs in protected groups have been denied. In an evolving labor market, however, anti-discrimination law must play a broader role. The segregated workplace, still alive and thriving, now requires a new examination to avoid the re-establishment of the conditions that Title VII meant to eradicate. The time is right for the development and implementation of a segregation framework that can focus on improving conditions in segregated jobs. The principle of broad remedial relief in the Title VII context provides the foundation upon which a court should be able to order changes in employment structures that lead to the segregated workplace. Under a segregation framework, a court need not limit relief to promotional opportunities or relief that simply provides advancement opportunities to segregation victims. The inexorable 100 inference, like its predecessor, the

301. Immigration and Nationality Act § 101(a)(15)(U)(ii), 8 U.S.C. § 1101(a)(15)(U) (2000).

inexorable zero inference, can bridge the gap in Title VII law as the labor market and employment structures continue to evolve. Without such an inference, segregation in the workplace and its effects will remain a problem in anti-discrimination law.