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Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII

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I. INTRODUCTION

THE concepts of intersectionality and multidimensionality have become increasingly salient as we think about strategies for targeting national origin discrimination in the future. But what exactly do the concepts of intersectionality and multidimensionality mean in the immigrant workplace context, and how are such claims proved in the traditional evidentiary framework for discrimination? What changes would operationalize these concepts in the immigrant workplace, which is now the fastest growing sector of the labor market? These questions are not simply academic. Recently, the Equal Employment Opportunity Commission (EEOC) held a series of hearings seeking input from civil rights organizations and employers on its own guidance on national origin discrimination.[1] Civil rights representatives testified that Title VII in the current enforcement climate was limited in its effectiveness at targeting discrimination in general and at targeting national origin discrimination specifically.[2] Most of the advocates testifying, along with EEOC representatives, spoke of intersectionality as a key concept for understanding the types of discrimination they observed in today's workplace and as an important direction for the doctrine.[3] Lucila Rosas, director of the EEOC's immigrant worker task force, defined intersectionality as "when a charging party alleges discrimination on more than one covered basis."[4] Other than this definition, however, there was no theory for discussing how intersectionality or multidimensionality operate in immigrant

* Professor of Law, U.C. Davis School of Law. Thanks to the AALS Minority Groups and Employment Discrimination Sections for allowing me to participate on the AALS Annual Meeting's celebration of the 50th Anniversary of the Civil Rights Act of 1964, and to the AALS participants who provided feedback on the ideas for this essay. Thanks also to Jonathan Mulligan for his excellent research and editorial assistance.

1. U.S. Equal Emp't Opportunity Comm'n, Transcript of EEOC Meeting of Nov. 13, 2013–National Origin in Today's Workplace (2013), *available at* http://www.eeoc.gov/eeoc/meetings/11-13-13/transcript.cfm.

2. *Id.*

3. *Id.*

4. U.S. Equal Opportunity Emp't Comm'n Written Testimony, Lucila Rosas, EEOC Lead Coordinator, Immigrant Worker Team, Meeting of Nov. 13, 2013–National Origin Discrimination in Today's Workplace (2013), *available at* http://www.eeoc.gov/eeoc/meetings/11-13-13/rosas.cfm [hereinafter Lucila Rosas].

workplaces.[5]

This article demonstrates how intersectionality and its cousin, multidimensionality, might be operationalized in the immigrant workplace. It suggests theories of a case that target the ways that discrimination might be manifested differently for Latino immigrant workers than that suggested by traditional sex and national origin cases. First, this article will provide a short description of the critical race approach to discrimination and demonstrate its usefulness for unveiling modes of discrimination that might not otherwise be revealed in the litigation context. I also describe how the evolving literature around multidimensionality and masculinities advances the theory of intersectionality in discrimination. In part two, I describe a scenario in which the intersectionality/multidimensionality approach demonstrates how multiple axis discrimination works. The scenario is based on a case that the EEOC is currently litigating in an immigrant workplace.[6] In part three, I explore how single axis discrimination frameworks cases might be reconfigured to fit the existing reality of multidimensional identity and the discrimination that arises from it. I suggest in this section reconceptualization of both sex and national origin discrimination theories in the immigrant worker context. I conclude the article by noting that as long as the law and its development—including the fact that development of individual cases—do not explicitly recognize multidimensional identities in the law, the EEOC cannot effectively enforce anti-discrimination laws in immigrant workplaces.

II. THE INTERSECTIONALITY/CRITICAL RACE APPROACH TO DISCRIMINATION

According to critical race theory, the paradigmatic claims in Title VII cases fail to capture the lived experiences of those with intersectional or multidimensional identities.[7] Kimberle Crenshaw argues in her groundbreaking piece that the black women at the intersection of race and gender are affected by discrimination in ways that cannot be captured by frameworks that have evolved to address each category separately.[8] As a result, the boundaries of race and sex discrimination have been policed based on the experiences of white women and black men, without consideration for the particular ways that the intersection of race and sex affected black women.[9] Importantly, Crenshaw argued that the flaw is in

5. *See id.*

6. Second Amended Complaint, *Equal Emp't Opportunity Comm'n v. Koch Foods of Miss., Inc.*, No. 3:11-CV-00391-CWR-LRA (S.D. Miss. Sept. 17, 2012) [hereinafter Complaint].

7. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. R. 1242–43 n.3–244 (1991) [hereinafter Crenshaw *Mapping*]; *see also* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140–41 (1989) (hereinafter Crenshaw *Demarginalizing*).

8. Crenshaw, *Demarginalizing*, *supra* note 7 at 139–40.

9. *Id.* at 144–45, 150, 152.

the doctrinal approach to discrimination.[10] The narratives that best fit the dominant anti-discrimination framework are either one of a discriminator who targets a protected class, or one who carries out a practice or policy that disproportionately affects a protected class.[11] In either narrative, the discriminator treats everyone in the class similarly.[12] Any statistical variation in treatment within the class signals either no discrimination or that conflicting interests exist within the class that prevent bringing "a common claim."[13] As Crenshaw notes, those who are "multiply-burdened" by membership in several classes do not get relief from the limited anti-discrimination regime unless their experiences are similar to those whose single-level experiences are recognized by Title VII.[14] As a result,

> [T]he dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes. This narrow objective is facilitated by the top-down strategy of using a singular "but for" analysis to ascertain the effects of race or sex. Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics.[15]

Angela Harris's groundbreaking article on essentialism in anti-subordination theory is useful in the context of intersectionality theory.[16] She emphasizes that theories of oppression that essentialize gender or race—by assuming a monolithic experience based on race or gender—necessarily fragment subjects into discrete categories for analysis.[17] The effect, according to Harris, is to "reduce the lives of people who experience multiple forms of oppression to addition problems: 'racism + sexism [=] straight black women's experience, or racism + sexism + homophobia [=] black lesbian experience.'"[18] The anti-essentialist view warns against imposing a limited and essentialized identity on a multidimensional identity of groups because to do so prevents us from identifying how race, gender, class and nation interact differently to create subordination.[19]

In the evolution of intersectionality theory, critical race theorists and feminists have introduced concepts of multidimensionality and masculini-

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10. *Id.* at 140.
11. *Id.* at 150.
12. *Id.*
13. Crenshaw, *Demarginalizing*, *supra* note 6 at 150–51.
14. *See id.* at 151–52.
15. Crenshaw, *Demarginalizing*, *supra* note 6 at 151. After the 1991 Civil Rights Act allowed plaintiffs to show that discrimination was a motivating factor in the employer's behavior, the "but for" analysis has re-emerged in the Title VII retaliation context. *See Univ. of Tex. SW. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529–30, 2531–32 (2013) (holding that mixed motive analysis does not apply to retaliation claims, which must demonstrate a "but for" cause of an employer's adverse action).
16. *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).
17. *Id.* at 585, 589.
18. *Id.* at 588.
19. *See* Athena D. Mutua, *The Multidimensional Turn: Revisiting Progressive Black Masculinities*, *in* MASCULINITIES AND THE LAW 80–82 (Cooper and McGinley eds., 2012).

ties theories to study the effects of essentializing groups and individuals further. The theories help explain the ways that the multiple aspects of immigrant worker statuses interact in the context of broader social and legal conditions. Sociologist Sherene Razack's interlocking theory approach seeks to understand "how systems of oppression work . . . and how they come into existence in and through one another . . . ."[20] These systems form a "matrix of privilege and oppression," as theorist Athena Mutua suggests, that "interact, intersect, and are mutually reinforcing such that for example, in the United States, racism is patriarchal and patriarchy is racist."[21] The multidimensionality turn in intersectionality theory focuses on the effects of hierarchical systems, such as those found in the workplace, to determine how the different aspects of identity are treated when they come together in one group.[22] Because context matters, it is important to analyze how a system in the workplace might affect groups differently and differentially. Multidimensionality theory, then, posits that "gender, race, class, and other aspects of identity operate simultaneously, inextricably, and in a context-dependent manner."[23]

Finally, multidimensional masculinities theory posits that even when men are privileged as a group over women in a particular system, men as a category should not be essentialized either.[24] For example, in examining the intersection of privileged and subordinated positions (minority males, for example) in racial scenarios, multidimensionality theory posits that the race and gender of the subjects matters in the outcome.[25] In the context of racial profiling, for example, black males are treated differently from black females.[26] There are multiple masculinities at work in the employment context, operating to further differentiate minority males, or in this case immigrant males, from the rest of the workforce, including their female immigrant counterparts.[27] The result is that discriminatory acts might affect different groups differently.[28] In the discrimination framework, for example, masculinities theory might explain how both men and women might both experience discrimination because of sex.[29]

As we multiply the levels of intersectionality and multidimensionality, we find that workers' identities inevitably involve categories that are not historically or statutorily facially protected. This is the case with immigration status. The arguments for why a particular practice is not discriminatory become more convincing. It becomes relatively easy, in other words,

20. SHERENE H. RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS 12 (1998).
21. Mutua, *supra* note 19, at 85.
22. *Id.* at 87.
23. Frank Rudy Cooper, *The King Stay the King: Multidimensional Masculinities and Capitalism in* The Wire, in MASCULINITIES AND THE LAW 103 (Cooper and McGinley eds., 2012).
24. *See id.*
25. *See id.* at 103–04
26. *See* Mutua, *supra* note 19, at 93–94.
27. *See* Cooper, *supra* note 23, at 108.
28. *See* Mutua, *supra* note 19, at 83–85.
29. *See Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80–82 (1998).

to argue that immigrant workplaces are out of the reach of Title VII because the standard operating procedure in these workplaces is for the employer to treat immigrant workers differently because alienage status is not protected within any of the categories.[30] As one commentator at the recent American Association of Law Schools (AALS) annual meeting's session on the future of the Civil Rights Act of 1964 noted:

> [Title VII] has certain categories that it protects . . . . this is the real world . . . . in the real world you've got to litigate with an opportunity for success. The employer in [a] case could say as a defense the reason we are mistreating these people is we want to grind them down . . . . We want treat everybody like crap so we can get most work out of them at the lowest wage. That's a defense because it is not illegal under Title VII. And so what the EEOC [does is] try to fit into those categories. . . . They ha[ve] to litigate [a] case within the realities of these categories. And there's no question that Title VII does not proscribe alienage discrimination. . . that's the reality that the EEOC confronts.[31]

This statement characterizes both the dilemma of institutions like the EEOC and the problem with a doctrine struggling to capture the lived reality of immigrant workers within a single-axis framework. The aspects of identity that interlock to make a whole of one's identity are typically disaggregated in the Title VII framework in order to bring claims that can be understood as viable in the current litigation climate.[32] As a result, the claims of minority men and women, here, immigrant workers, tend to be marginalized because they do not neatly fit within either the national origin or the gender categories.[33] The context in which a hierarchical employment system might use multiple identities to reinforce discrimination is ignored. And employers can attribute their motives simply to getting the most out of their workers for the lowest wage.[34]

In the case of immigrants, citizenship status is only one part of the dynamic at play when an employer discriminates, in other words. Discrimination works on several planes at the same time and with multiple effects. Immigrant women, for example, will feel both gender and national origin effects of discrimination in the immigrant workplace.[35] So will immigrant

30. *See, e.g., Espinoza v. Farah Mfg.*, 414 U.S. 86, 95 (1973). This case spawned a line of cases that distinguishes between immigration status and national origin in analyzing employer motives for workplace discrimination. *See, e.g., Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir.) (2012) (finding that employer acted based on employee's husband's status and as "unauthorized" person and not based on his national origin).

31. Am. Ass'n of Law Sch., Comment of participant at AALS Annual Meeting, *Joint Panel on the Civil Rights Act of 1964* (Jan. 2, 2014).

32. *See, e.g.*, Complaint, *supra* note 6, at 6–8.

33. *See* Kimberle Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CALIF. L. REV. 1467, 1473 (1992) (arguing that feminist theory must move "beyond the usual practice of incorporating only those aspects of women's lives that appear to be familiar as 'gender' while marginalizing those issues that seem to relate solely to class or race").

34. *See* JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 218, 240 (2014).

35. *See* William Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F.L. REV. 253, 260–69 (2009); *see* Complaint, *supra* note 6, at 6–8.

men.[36] The multiple statuses of immigrant workers interlock to produce a type of discrimination endemic in the immigrant workplace.[37] Citizenship or immigration status is a necessary part of this interlocking identity, and it has a role in creating the particular kind of discrimination found in the immigrant workplace.[38]

III. HOW GENDER, NATIONAL ORIGIN AND IMMIGRATION STATUS CREATE INTERLOCKING/INTERSECTING SYSTEMS OF DISCRIMINATION

This section explores how gender, national origin, and immigration or citizenship status create levels of dominance and subordination that rise to the level of discrimination. I focus on gender, national origin, and immigration status to highlight the aspects of identity that are likely to be invoked together in schemas defining immigrant workers in (usually) segregated workplaces.

The composition of the workforce has changed dramatically since the passage of Title VII. In a recent EEOC hearing, the head of the immigrant worker task force at the EEOC noted the following statistics:

> Not only has the labor force grown from 73 million in 1964, the year the EEOC was created, to over 155 million workers in 2013, it has also become much more diverse. In 1990, minorities represented approximately 23 percent of the total civilian workforce. By 2000, the number grew to approximately 29 percent and, by 2010, to 33 percent of the civilian workforce, an increase of over 22 million or 77 percent in 20 years.
>
> In addition, in 2000, approximately 33 percent of the minority population in the United States spoke a language other than English. By 2010, this percentage had increased to 50 percent. This accounted for a 52 percent rise between 2000 and 2010. The most recent 2012 American Community Survey data shows that the estimated percentage of the minority population who speak a language other than English has remained at 50 percent.[39]

As the composition of the workplace has changed, so have the forms in which discrimination arises for minority employees. There are several different ways that gender, national origin, and immigration status have effects on the employment relationship separately from their effect as interlocking aspects of identity. Gender, for example, predicts the type of jobs available to men and women.[40] Gender may also play a role in the

36. *See Oncale*, 523 U.S. at 80–82; Complaint, *supra* note 6, at 6–8 (an example of how both male and female workers might be affected differently but disparately at the same time).

37. *See* Crenshaw, *Mapping*, *supra* note 7, at 1250; Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 970, 976 (2006).

38. *See* Saucedo, *supra* note 37, at 970, 976.

39. Lucila Rosas, *supra* note 4.

40. There is a large selection of literature on gender-based segregation. *See, e.g.*, William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical*

boundaries of relationships.[41] Employers have changed workplace policies and practices in response to the Supreme Court's guidance on workplace sexual harassment.[42] This, in turn, has elicited commentary about the effects of such changes on workplace relationships.[43] National origin might also predict the type of job one holds and the opportunities available for advancement at a particular job site.[44] Moreover, identity with one's ethnicity or cultural background might produce performative expectations that a worker must navigate.[45] A Latino worker, for example, might take advantage of the expectation that Latinos are hard workers.[46] Or, a black female employee might have to navigate expectations that she places a premium on family over work.[47]

Immigration status comes with its own set of predictors and expectations. Immigration law has become more restrictive and more focused on workplace enforcement since the passage of the employer sanctions provisions in the Immigration Control and Reform Act of 1986.[48] As a result, employers have been required to assume more of a responsibility for determining the work authorization of their employees,[49] leading both to more scrutiny of minority employees and to more opportunity for employer discrimination and leverage in the workplace relationship.[50] The opportunities for employers to exploit citizenship status have increased.[51] As a result, over time, employers have come to value the hardworking, subservient immigrant employee without much thought to how increasingly restrictive immigration laws have constructed that worker.[52]

Discrimination, 91 AM. J. SOC. 759, 760 (1986) (describing the studies documenting the prevalence of occupational segregation); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Class Actions Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1076–77 (1992) (analyzing the lack of interest defense in statistical discrimination gender segregation cases); 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, 1754–56 (1990) (exploring the persistence of occupational segregation based on gender).

41. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2082–83, 2087, 2091–92 (2003) [hereinafter Schultz, *Sanitized*).

42. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806, 808 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–59 (1998).

43. *See generally*, Schultz, *Sanitized*, *supra* note 41, at 2063–72.

44. *See* SKRENTNY, *supra* note 34, at 77–78, 85, 216–64.

45. *See* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA 23–25 (2013).

46. *See id.*; *see also* Saucedo, *supra* note 37, at 980.

47. *See* Carbado & Gulati, *supra* note 45 at 23–27, 76–77.

48. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 101, 100 Stat. 3359, 3360–74 (1986).

49. *See id.*

50. U.S. GOV'T ACCOUNTING OFF., REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION, GAO/GGD-90-62 49–52 (1990), *available at* http://www.gao.gov/assets/150/148824.pdf (describing examples of employer discrimination arising out of employer sanctions requirements, including discrimination based on language and appearance).

51. *See id.*; *see also*, ROBERT BACH, ET AL., THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM 229–30 (Michael Fix ed. 1991).

52. Saucedo, *supra* note 37 at 966–68, 973–74.

When we add the dimension of immigration status, or perceived immigration status, to national origin and sex, the risk of the detrimental effects of subordination become more clear. An immigrant Latina worker will perceive that sexual slurs or innuendos, even if not pervasive or severe in and of themselves, will carry additional consequences of subordination because—by virtue of her status and the possibility of deportation or threats to her citizenship status—she cannot complain as vociferously as a white native-born woman might.[53] The same is true of a Latino immigrant male. The risks and consequences are much more severe than simply retaliation. Again, by virtue of their immigration status, immigrant males in a department where women are being harassed will not perceive that they have the ability to speak out against such harassment.[54] At the same time, they might be forced to stay quiet because of veiled or explicit threats to deport.[55] Not only are they emasculated in their inability to rectify sexual harassment against their female counterparts, they are emasculated by reference to their immigration status.[56] This type of harassment has yet to find a place in Title VII jurisprudence, although it produces the same type of severe and pervasive conduct that might be actionable under any one of the forms of discrimination.

IV. LATINO IMMIGRANTS, EXPLOITATIVE WORKPLACES, AND MULTIDIMENSIONAL DISCRIMINATION

The future of discrimination in low-wage workplaces lies at the intersections of identity categories. While it may be the case that Title VII proscribes discrimination based on limited categories, the EEOC has the experience necessary to understand how those categories interact with each other in the workplace.[57] The EEOC already speaks in the language of intersectionality.[58] It has investigated and litigated cases in which plaintiffs with intersectional or multidimensional identities have sought relief under Title VII.[59] The population of immigrants in the low-wage work sector has increased exponentially at the same time, the EEOC has acknowledged that the protected categories are intersecting more often today than ever.[60] This is an opportune time for the EEOC to take advantage of its position and advise employers who are seeking guidance about what discrimination might look like in the immigrant workplace.[61]

53. *See* Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 819–21, 823 (1993); Saucedo, *supra* note 37 at 973–74.

54. *See* Complaint, *supra* note 6 at 6–8, 14; Tamayo, *supra* note 35, at 263–64.

55. *See* Complaint, *supra* note 6, 6–8; Tamayo, *supra* note 35 at 263–64.

56. *See* Saucedo, *supra* note 37, at 967–68.

57. *See* Tamayo, *supra* note 35, at 261–69.

58. Lucila Rosas, *supra* note 4.

59. *See, e.g.*, Jefferies v. Harris Cnty. Cmty. Action Assoc., 615 F.2d 1025, 1034 (5th Cir. 1980).

60. Lucila Rosas, *supra* note 4.

61. *See* EEOC Meeting, *supra* note 1 (statement of Michael Eastman, Senior Counsel and Vice President for Public Policy, Equal Employment Advisory Council).

The institution has the unique advantage of being able to provide to employers and to the courts clear examples of how intersectionality concepts arise in the immigrant workplace because of its own history of investigation and litigation in immigrant workplaces.[62]

This section provides an overview of one such case, focusing on the ways in which evidence can be mustered to tell the story of the lived reality of immigrant workers. In 2011, the EEOC filed a lawsuit on behalf of over one hundred Latino immigrant workers at a poultry plant owned by Koch Foods in Morton, Mississippi.[63] The suit alleged that the company discriminated against a class of Latino female and male employees in the plant's deboning unit.[64] The complaint alleged a hostile work environment based on sex, national origin, and race.[65] The framing of the lawsuit was an attempt to get at how discrimination in that workplace affected all the Latino immigrant workers, albeit in different ways. The facts supporting the allegations were categorized, however.[66] The facts noted that the harassment was because of sex or because of national origin and race.[67] The sex harassment allegations on behalf of the women included instances of unwanted touching and groping, sexual assault and attempted sexual assault, and requests for sex in exchange for money.[68] The national origin and race harassment allegations included instances of punching and hitting and demands for money in exchange for job positions, benefits, or favorable job assignments.[69] The lawsuit also alleged that supervisors told Latino workers "that they did not have the same rights as non-Hispanic workers and could be terminated if they complained."[70] Nowhere in the allegations did the lawsuit mention the immigration status of the workers the EEOC represented. Nor did the allegations in the complaint mention threats to deport as part of the humiliation and harassment that the workers suffered, presumably because Title VII has been interpreted not to reach discrimination based on immigration status.

The EEOC's complaint does not convey how these forms of harassment might be interrelated. Many would agree that workplace supervisors in these types of cases maintain control over both female and male workers through methods that exploit workers' fears of detention or deportation.[71] The National Employment Law Project, a national immigrant worker advocacy organization, has coined the term "immigration abuse" to describe a form of harassment that implicates one's immigra-

62. *See* Tamayo, *supra* note 35, at 261–69.
63. *See* Complaint, *supra* note 6, at 1.
64. *Id.* at 1, 5.
65. *Id.* at 6, 13–14.
66. *See id.* at 6–8.
67. *Id.* at 6–8.
68. *Id.* at 14.
69. *Id.* at 7–8.
70. *Id.* at 8.
71. Saucedo, *supra* note 37, at 967–68.

tion status.[72] Immigration abuse occurs when:

> [A]n abuser of an undocumented immigrant victim threatens deportation and/or actively uses . . . power over a victim's immigration status to exploit the victim's fear of deportation. The aim of this abusive strategy is to prevent a worker from seeking help or contacting law enforcement. In the workplace, immigration abuse takes place when a worker's immigration status is used to exploit, keep a worker trapped in harmful working conditions, or prevent a worker from cooperating with law enforcement officials. It also includes instances where the employer or supervisor tells workers that [the employer or supervisor has] paid ICE to refrain from enforcing immigration laws in their workplace.[73]

The notion of "immigration abuse" does not appear in the EEOC's lawsuit. The traditional Title VII doctrine does not easily target such abuse as any particular form of harassment.[74] It is missing from either a national origin theory or a sex discrimination theory of the facts in this case. Intersectionality theory is useful in analyzing what actually occurs in the immigrant workplace, with both men and women, and may provide litigators and policymakers with the tools to address such harassment as either sex, national origin, immigrant status, or some combination of all three. I will first analyze the scenario of the threat to deport under traditional sex and national origin discrimination theories to show how immigrant abuse—especially the threat to deport—is left out of the spheres of Title VII's protection.

1. How the Sex Discrimination Theory Fails to Capture Immigrant Abuse

In a typical Title VII claim, the plaintiffs, or the Equal Employment Opportunity Commission on behalf of the workers and the public interest, would bring a claim against the company for sex discrimination. If the claim were based on a hostile work environment theory, the claimant would need to demonstrate that the harasser's behavior was unwelcome, sufficiently severe, or sufficiently pervasive to change the claimant's terms and conditions of employment, and because of sex.[75] The harassment might include "[u]nwelcome sexual advances, requests for sexual

72. *See* Letter from Eunice Hyunhye Cho, Staff Attorney, Nat'l Emp't Law Project, Giselle Hass, Clinical Psychologist, Georgetown Univ. Law Ctr., Gail Pendleton & Sonia Parras Konrad, Co-Directors, ASISTA to Laura Dawkins, Chief, Regulatory Coordination Div., Office of Policy & Strategy, U.S, Citizenship & Immigration Servs., Dep't Homeland Sec. (Mar. 28, 2013), http://www.asistahelp.org/documents/resources/Worthplace_u_visasubatantial_abuse_a_DAACF071FEA01.pdf.

73. Letter from Eunice Hyunhye Cho to Laura Dawkins, *supra* note 72.

74. *See* U.S. Equal Emp't Opportunity Comm'n, No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment (1990), *available at* http://www.eeoc.gov/policy/docs/currentissues.html; *see also* William A. Blue & Jill Stricklin Cox, *New Approaches to Harassment Claims*, 47 FED. LAW. 34. 35 (2000).

75. *See, e.g.*, Oncale v. Sundowner Srvs. Inc., 523 U.S. 75 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986).

favors, and other verbal or physical conduct of a sexual nature," or it might include nonsexual sex-based harassment based on gender stereotypes.[76]

In a typical sex harassment case, the direct victim of harassment is the person who shows either an altered term or condition because of the harassment or a hostile work environment based on the harassment.[77] The Supreme Court held in *Meritor Savings Bank, FSB v. Vinson* that the definition of "because of . . . sex" includes the creation of workplace conditions, such as "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive' 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[78] In *Faragher v. City of Boca Raton*, the Supreme Court drew the line at "simple teasing, offhand comments, and isolated incidents (unless extremely serious)," noting that these behaviors do not violate Title VII because they are not so severely or pervasively discriminatory as to alter "the terms and conditions of employment."[79] As legal scholar Vicki Schultz noted, the problem with the interpretation is that, even within the sex-based category "[d]isaggregating the so-called sexual and nonsexual forms of misconduct can obscure a full understanding of the conditions of the workplace and make both the hostile work environment and accompanying disparate treatment claims look trivial."[80] Ultimately, when disaggregated, neither set of claims rises to the level of discrimination.[81] The claims based on sexual advances, touching, etc. might seem trivial if not considered alongside the subordinating, yet nonsexual, aspects of the harassment, such as failure to train properly, questions of incompetence or even preconceived notions of the type of work suitable for immigrant workers.[82] The nonsexual aspects of the treatment are considered under a disparate treatment analysis and may not meet the "because of sex" causation standard.[83] This is the case when sex discrimination alone is analyzed. Consider what happens when discrimination at the intersection magnifies the dynamic.

Several legal scholars long ago identified the problem with sex harassment and sex discrimination frameworks in the context of Latinas and

76. 29 C.F.R. § 1604.11 (2014).

77. *See* Blue & Cox, *supra* note 74, at 35.

78. Meritor Sav. Bank, FSB, 977 U.S. at 63, 65–67 (citations and internal quotation marks omitted).

79. Faragher v. Boca Raton, 524 U.S. 775, 788 (1998) (citations and internal quotation marks omitted).

80. Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 18–19 (2006) (noting that "[w]hen considered apart from the larger workplace context of discriminatory hiring, assignments, training, evaluation, or pay that are associated with job segregation by sex, the complained-about sexual conduct often appears too minor to be actionable").

81. *See id.*

82. *See id.*

83. *See id.*

other minorities in the workplace.[84] Elvia Arriola's research on women in the construction industry demonstrates that the merging of racial and sexual harassment against Latinas in the construction industry signals the desire of employers to maintain workplaces that perpetuate the dominant white male power structure.[85] Maria Ontiveros has argued that race and gender intertwine to create injuries that are different for different subgroups, although they are equally detrimental.[86] She notes that women of color are "less powerful, less likely to complain, and the embodiment of particular notions of sexuality."[87] She suggests a method for analyzing the differential risk in sex harassment that takes account of the intertwining aspects of identity at play.[88] I take direction from the suggestions of these and other scholars that provide narratives that take account of intersectionality, including immigration status, in the immigrant workplace. In this case, under the framework set out in case law and the regulations, the female worker's sex discrimination claim fits squarely within the control-dominance paradigm that the courts have accepted as discriminatory.[89]

There is no theory of the case in *Koch Foods*, moreover, that describes the treatment of the males as harassment because of sex.[90] Under the single-axis discrimination model,[91] the male immigrant worker would be in the difficult position of proving that the same employer act was discriminatory on sex grounds.[92] Precisely because it can be attributed to several different factors—legitimate and illegitimate—discrimination at the intersections is much more difficult to identify. To the immigrant worker, however, the threats to deport and the sex harassment reinforce each other, creating a more intractable discrimination in its multidimensional form.

2. *How National Origin Discrimination Theory Fails to Protect Against Immigrant Abuse*

Just as with sex discrimination, national origin discrimination theory protects classes based on a single aspect of their identity: their country of birth or their ethnicity.[93] Even that aspect is severely limited, however, making the national origin category underinclusive.[94] Supreme Court ju-

84. Elvia R. Arriola, *What's the Big Deal? Women in the New York City Construction Industry and Sexual Harassment Law, 1970–1985*, 22 COLUM. HUM. RTS. L. REV. 21, 58–60 (1991), Crenshaw, *Demarginalizing*, *supra* note 6, at 144–45, 150–52.

85. Arriola, *supra* note 84, at 58–60.

86. Ontiveros, *supra* note 53, at 818–19.

87. *See id.*

88. *See id.* at 827–28.

89. *See id.*

90. *See* Complaint, *supra* note 6, at 6–8.

91. *See* Harris, *supra* note 16, at 588–89.

92. *See* Complaint, *supra* note 6, at 6–8. Nor would either the male or the female worker be able to make an adequate claim on national origin grounds because it is less clear to a court how the threats to deport are linked to the sex harassment.

93. Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23, 23–25 (1994).

94. *Id.*

risprudence does not include citizenship status in the definition of national origin, unless it is a clear proxy for national origin.[95] In *Espinoza v. Farah Mfg.*, the Supreme Court held that citizenship status could not serve as a proxy for national origin except in limited circumstances.[96] The national origin claim works only if the court is convinced that the employer used immigration status to substitute for national origin.[97] The court noted that a citizenship requirement violates Title VII if it has the purpose or effect of discriminating on the basis of national origin.[98] The Court went on to note examples of when a citizenship requirement might be considered evidence of national origin discrimination: "In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination."[99]

The practical import of this case is that a citizenship requirement, or any type of classification based on immigration status, would not necessarily violate Title VII.[100] If the plaintiff failed to show that the employer discriminated against a class of people that included *both* foreign and native-born members of the ethnic group, for example, the alleged discrimination would not fall into the national origin category.[101] In *Espinoza* it was important to the Court that, while the employer screened out foreign-born Mexicans, the employer continued to hire American-born Mexicans.[102] This fact saved the employer's classification from being defined as discriminatory.[103] Later interpretations of this case have limited the power of the national origin category for immigrant workers in segregated positions, who might otherwise argue that threats to deport were a form of national origin discrimination.[104] Consequently, immigration status is simply not considered a subset of national origin.[105] An employer faced with such a single-axis challenge could argue that it continues to hire native-born members of the ethnic group, so it could not be accused

95. *See* Espinoza v. Faran Mfg. Co., 414 U.S. 86, 92 (1973).

96. *See id.* at 92, 95.

97. *See id.* at 92.

98. *Id.*

99. *See id.*

100. *See, e.g.*, EEOC v. Switching Sys. Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 376 (N.D. Ill. 1992) (termination based on falsified information on employment application did not rise to the level of national origin discrimination); Cortezano v. Salin Bank & Trust Co., 680 F.3d 936, 940–40 (7th Cir. 2012) (termination based on husband's undocumented status does not rise to the level of national origin discrimination); *cf.* EEOC v. Technocrest Sys. Inc., 448 F.3d 1035, 1039 (8th Cir. 2006) (allowing EEOC subpoena seeking information about employees' immigration status because the *Espinoza* court noted that "'a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination'").

101. *See Espinoza*, 414 U.S. at 94–95.

102. *Id.* at 92–93.

103. *Id.* at 95–96.

104. *See id.* at 95.

105. *Id.*

of national origin discrimination.[106] In other words, the prototypical national origin claimant is a citizen whose ethnicity is targeted or affected by an employer's actions.[107] Under this limited interpretation, the rest, including immigrants—by virtue of their citizenship status—are trying to fit into the typical national origin framework.[108]

Existing national origin theories do not easily reach the situation in which a supervisor physically abuses, extorts money, or threatens deportation from a worker unless the worker showed that these acts were part of a wider scheme of national origin discrimination. Because the employer's immigrant abuse falls somewhere between sex discrimination (in its emasculating character) and national origin discrimination (in its targeting of workers who cannot speak out because of the employer's perceived understanding of the meaning of deportation) the single-axis framework will not recognize it. Instead, the behavior, while abusive, seems neutral and not discriminatory.

V. INTRODUCING MULTIDIMENSIONALITY INTO TITLE VII: WORKING WITH THE LIMITATIONS OF THE DOCTRINE

I propose in this section several ways in which the EEOC might provide guidance around intersectionality and its use in discrimination cases in the immigrant workplace.

The limitations of the doctrine require a re-imagination of the type of case that Title VII was meant to target. Congress created Title VII to deal with the seemingly intractable symptoms of discrimination in the workplace: occupational segregation, failure to hire or promote, and unequal treatment in the terms and conditions of employment.[109] These were all symptoms of discrimination on the basis of race, religion, color, sex, or national origin.[110] The courts further refined the doctrine to include proscriptions on intentional discrimination as well as disparate impact discrimination.[111]

The doctrine might be expanded in several ways to deal with the multidimensional identities of immigrant workers.[112] First, the definition of each form of discrimination, sex, or national origin, say, can be expanded to include the different ways that each affects the interlocking nature of one's identity. Hostile work environment sex discrimination, for example, might also encompass the hostile, intimidating, or offensive behaviors imposed on immigrant males who must work in the same environment. In the national origin context, this requires rethinking and redefining the

106. *Id.*
107. *Id.*
108. *Id.*
109. 42 U.S.C. § 2000e-2 (2012).
110. *Id.*
111. *See, e.g.* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).
112. This type of discrimination would otherwise be considered just an exploitative workplace environment with no remedy in the law.

Supreme Court's guidance that "a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination" and that citizenship requirements might be a pretext for national origin discrimination.[113]

Second, the doctrine might be interpreted to allow for the introduction of evidence to show that an employer's acts might be discriminatory based on several grounds after considering the social conditions and circumstances of the workers perceiving the acts. More important, the evidence would show how one form of discrimination is reinforced through other systems of oppression. As Mutua notes, "racism is patriarchal and patriarchy is racist."[114] I use the term "multidimensional discrimination" to describe these forms of discrimination that mutually reinforce one another. In the case of immigrant workers, a multidimensional discrimination approach targets, in addition to protected category discrimination, the ways in which immigration status is used to control workers.

A. Expanding the Single Axis Forms of Discrimination

1. The Hostile Work Environment Sex Discrimination Framework

Sexual violence at work is often thought of as an attempt to "intimidate and subordinate women in the workplace"[115] because of their sex. While this perspective is central to understanding the victimization of women as a group, it tends to essentialize the experience of all women into that of privileged or white women.[116] The victimization of women with intersecting vulnerable identities, such as race or immigration status, is streamlined, and simplified and the multidimensional aspects of a woman's identity are downplayed.[117] An immigrant woman's sex discrimination claim might include descriptions of the physical or other forms of contact, but may downplay the way that an employer or its agents use threats of deportation or removal and threats to scrutinize or audit employment authorization to create a hostile work environment based on sex. This is a mistake. Several law scholars have written about the indivisibility of sex and race in the harassment context.[118] Maria Ontiveros has noted about the intersection that "[f]rom the viewpoint of the harasser, women of color appear to be less powerful, less likely to complain, and the embodiment of particular notions of sexuality."[119]

Deportation threats reflect a form of control over immigrant women, whether or not they experience unwanted contact based on sex. These

113. *See Espinoza*, 414 U.S. at 92.
114. Mutua, *supra* note 19, at 85.
115. Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 Yale J.L. & Feminism 155, 202 (1999).
116. Angela Harris, *supra* note 18, at 588.
117. *Id.*
118. Maria Ontiveros, *supra* note 87, at 827–28,
119. *Id.* at 818.

threats are imposed in part by employers who perceive that such threats have meaning. Even if immigrant women are not deportable, the threats are highly offensive. Part of the hostile work environment discrimination, in other words, involves invoking the worker's identity as an immigrant to further exercise control (based on sex) over the worker. In *Koch Foods*, the EEOC alleged unwanted sexual touching, groping, assault, and harassment.[120] These are all examples, which, if severe or pervasive, would lead a factfinder to finding of sex harassment. The non-sexual sex-based actions of the employer must also be developed in the fact investigation of this type of case. Were threats to deport made in conjunction with sexual advances? Were they made in situations in which the supervisors sought to exercise control over the workers? Did threats to deport—whether explicit or implicit—arise in situations in which the immigrant women sought promotion or transfer to more desirable positions? Were threats to deport used to keep the immigrant women in segregated positions within the worksite? These lines of inquiry would allow the agency to create a theory of the case that shows how sex harassment and Anglo male dominance in the immigrant workplace are reinforced through regular reminders of a harassed woman's immigration status. In this context, evidence of threats to deport or insinuations made about immigration status would be integral parts of the proof structures for sex discrimination, rather than extraneous information provided simply to demonstrate a picture of exploitation in the workplace.

2. *Claiming Same Sex Discrimination for Male Immigrant Workers*

In the sex discrimination scenario described in the EEOC's lawsuit against Koch, the same acts—sexual aggression coupled with threats to act on suspicion of immigration status—could raise sex discrimination claims by all immigrant workers, female as well as male.[121] In other words, the employer's acts are received differentially, and much depends on the multidimensional aspects of one's identity.[122] The women saw what was happening to the men in their departments.[123] They understood the intent to humiliate behind the supervisors' actions.[124] They interpreted the atmosphere of intimidation as a signal that they should not complain about their treatment, lest everyone in the workplace risk dismissal or deportation.[125] The physical abuse was meant *both* to humiliate the men and maintain control over the women.[126] In developing the theory of the case that supports a finding of sex discrimination for the men, we must rely on the precedent offered by *Oncale v. Sundowner Offshore*

120. Complaint, *supra* note 6.
121. *Id.* at 11.
122. *Id.* at 2.
123. *Id.* at 7–8.
124. *Id.* at 11.
125. *Id.* at 8.
126. *Id.* at 7–11.

Servs., Inc.[127] There, the Supreme Court decided "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant are . . . of the same sex."[128] The Court described three possible ways to prove that same-sex harassment occurred "because of . . . sex" and "was not merely tinged with offensive sexual connotations."[129] The case has been interpreted by some courts as allowing claims based on gender nonconformance, such as those based on sex-stereotyping discrimination.[130]

The circuit court held in *Bibby v. Philadelphia Coca Cola Bottling Co.*, for example, that "[s]ame-sex harassment might . . . be found where there is no sexual attraction but where the harasser displays hostility to the presence of a particular sex in the workplace."[131] *Bibby* offers a useful framework for same-sex harassment claims brought by male workers against male supervisors who sexually assault fellow female workers. In these cases men sexually assault not only to control women but also to oppress other men by showing that they are powerless to confront a supervisor. In the immigrant workplace, the control is exacerbated by the social conditions of the workers, who cannot complain about their subordination.

Clearly, the great challenge for the same-sex claims brought by male friends of direct victims will be proving either that the sexual violence against female co-workers occurred *because of the male's sex, or that the men themselves were targeted because of sex.*[132] This is where multidimensional masculinities theories are helpful. The key factor to a successful claim based on both sex and national origin is to tell the story in a way that fits the theory as well as the doctrine. In the *Koch Foods* case, the plaintiffs would argue that, in fact, the sexual advances coupled with threats to deport were made to intimidate both the female and the male workers. The doctrinal twist—and the plaintiffs' narrative—lies in showing that the violence against the women occurred because of the men's sex. In the context of an immigrant workplace, control depends on maintaining subservience, intimidation, and Anglo masculine norms. Violence

127. 523 U.S. 75 (1998).

128. *Oncale*, 523 U.S. at 79.

129. *Id.* at 81.

130. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263–64 (3d Cir. 2001) (cannot punish workers for noncompliance with gender stereotypes); Nicholas v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (impermissible to discriminate against a man "for acting too feminine"); Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005) (noting that the traditional [*Oncale*] routes for proving discrimination are not exhaustive); Davis v. Coastal Intern. Sec., Inc., 275 F.3d 1119, 1123 (D.C. Cir., 2002) (treating the *Oncale* forms of same-sex harassment as mere suggestions); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").

131. 260 F.3d at 262.

132. In *Rayford v. Ill. Cent. R.R.*, for example, the court declined to find actionable, *inter alia*, a male supervisor's remarks to a male worker about the supervisor's sexual exploits with a woman absent evidence that the male worker "was subjected to the remarks because of his sex." 489 Fed. App'x 1, 4 (6th Cir. 2012).

against the immigrant women, in addition to clearly amounting to a hostile work environment against them, is also aimed at maintaining Anglo male dominance in the workplace over immigrant men perceived as subservient. It is simultaneously applied. It is directed at the women, whom society already accepts as more vulnerable by virtue of not being masculine. It is also directed at the men, who face threats to deport, or worse, if they perform outside their subservient, emasculated stereotypes to complain about the workplace harassment.

Masculinities theories provide a paradigm for understanding the set of workplace structures that subordinate women and minority men at the same time by privileging white men. In a hierarchical system, such as that found in a low wage workplace where control over the workplace occurs through foremen, shift leads, supervisors, and the like, even men are ranked in the hierarchy. Although the workplace is itself a gendered system that privileges men as a group over women as a group,[133] masculinities theory incorporates the anti-essentialist position that men are not all created equal and that systems in the workplace maintain hierarchies among men that operate to differentiate men one from another in the workplace hierarchy.[134] This is where gender, race, national origin and immigrant status all play a role from the hiring to the terms and conditions of employment of male immigrant workers. Studies continue to show the employer preference for immigrants, particularly immigrant males, for their subservience, their complacency and their docility.[135] These emasculated characteristics place immigrant males toward the bottom of a workplace hierarchy in which the white masculine ideal is at the top.[136] These men are also expected to continue to exhibit, or perform, these characteristics after they are hired.[137] If immigrant male workers are expected not to rock the boat, and the workplace reinforces that they will keep their jobs as long as they perform as expected, the workplace structures themselves will keep them from speaking out when immigrant women are sexually assaulted in the workplace. Their terms and conditions are certainly different from the terms and conditions of employment of white or native-born males, who neither were hired for their subservience, nor feel the threat of deportation or some immigration-related consequence for refusing to perform as subservient, complacent workers.[138] Because employers hire immigrant workers expecting them to perform differently than their white male or white female counterparts, the workers' experience both sex-based and national origin discrimination. This

133. Nancy E. Dowd, Nancy Levit, & Ann C. McGinley, *Feminist Legal Theory Meets Masculinities Theory*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, 25, 42–44, (Cooper and McGinley, eds., 2012).

134. *Id.*

135. Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 Harv. J. L. & Gender 625, 644 (2010).

136. *Id.* at 638.

137. *Id.*

138. *Id.* at 638, 649.

aspect of immigrant workers lived experience must be made more explicit in the fact development of these cases.[139] Under a masculinities theory, because of their intent to maintain dominance or control, or, in the words of a commentator, "to grind down"[140] immigrant workers, a supervisor's sexual assaults on women can also be aimed at immigrant men—grinding down women through sexual acts and men through nonsexual sex-based discrimination. Threats of deportation or exposure to law enforcement, co-worker innuendos about immigration status, and exploiting one's fear of deportation are all forms of "nonsexual" sex discrimination even if they do not seem so on the surface.

In the *Koch Foods* case, lines of inquiry that would allow for a masculinities theory of this case include: What happened when male workers tried to protect against treatment of the female workers? What kept the workers from complaining? How did supervisors expect the male workers to act? What happened when supervisors perceived workers as rocking the boat? These lines of inquiry are designed not so much to make a retaliation claim, but to expose the ways in which the employer sanctioned any behavior outside the expected set of behaviors for these workers.

3. *Expanding the National Origin Discrimination Framework: Reinterpreting Espinoza v. Farah Mfg.*

Current interpretation of the national origin doctrine limits employer liability when the employer bases decisions on immigration status or when the effect of the employer's actions result in immigrant workplaces.[141] Yet, the Supreme Court contemplated instances in the workplace in which citizenship requirements or decisions based on immigration status more broadly would rise to the level of national origin discrimination.[142] The *Espinoza* Court left open the question of how an employee would show that citizenship status might be a proxy for national origin discrimination, assuming that such cases would be rare. The statistics on immigrant workplaces tell a different story, however.[143]

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139. At least one court has accepted this type of gender stereotyping as a cause of action. In *Nichols v. Azteca Rest. Enter.*, the Ninth Circuit analyzed a sex discrimination case in the context of the holdings in *Hopkins* and *Oncale*, 256 F.3d 864 (9th Cir. 2001). Antonio Sanchez, alleged that he faced discrimination that "was closely linked to gender." *Id.* at 874. The court assumed that if Sanchez could satisfy the requirements for establishing sex stereotyping under Hopkins, he could therefore prove discrimination "because of . . . sex" under Title VII. *Id.* Similarly, in *Heller v. Columbia Edgewater Country Club*, the court found that a jury could find that a supervisor harassed the plaintiff because she "did not conform to [the supervisor's] stereotype of how a woman ought to behave." 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

140. Audience commentator at AALS Panel on the Future of the Civil Rights Act of 1964, Jan. 2, 2014.

141. *See, e.g.*, EEOC v. Consol. Serv. Sys., 989 F.2d 233, 235 (7th Cir. 1993).

142. Espinoza v. Farah Mfg., 414 U.S. 86, 89–91 (1973).

143. Leticia Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 307–309 (2004) (describing the "browning" of the poultry industry as an example of increasingly segregated immigrant workplaces).

Moreover, in increasingly segregated immigrant workplaces, if no native-born Latinos work alongside Latino immigrants, the context is distinguishable from that in *Espinoza* where the Court found it relevant that the employer continued to hire native-born Mexicans.[144] This distinction in today's immigrant workplace sets the stage for guidance on how immigrant status might be used as a proxy for discrimination.

A more forward-thinking view of national origin discrimination—one that the EEOC is in a unique position to provide—would demonstrate through the facts how immigrants replace Mexican ancestry in the employer's lexicon to achieve the same discriminatory results.[145]

Re-examining situations in which immigration status plays a role in employer decisions may reveal those instances. One set of circumstances comes to mind because it is so prevalent in the immigrant workplace: employer preferences for Latino immigrant workers because of their compliant behavior.[146] Today, the explicit preference is so commonplace that employers simply state their preferences for immigrant workers openly as preferences for Latinos.[147] These preferences are based in part on historical stereotypes of Latino workers and their subservience.[148] The conflation is rampant and prevalent in today's low wage workplaces. As Tom Saenz, executive director noted in his testimony at the EEOC hearings:

> Many unscrupulous employers believe that national-origin minority workers are substantially less likely to complain and to seek and obtain relief to which they are entitled . . . . [P]erception and stereotype have taken on a force of their own, resulting in real targeting of national-origin minority workers by discriminator-employers.[149]

To the extent the stereotypes are closely associated with those of Latinos in the United States, they are ripe for challenge as the use of immigration status as a proxy for national origin.

Gulati and Carbado argue that performative identity affects employer's responses, motivating them to seek out workers based on conduct which itself is given racialized meaning, even though an employee's behavior might more appropriately be attributed to social or economic con-

144. Espinoza, 414 U.S. at 92–93.

145. *See* Leticia Saucedo, *Mexicans, Immigrants, Cultural Narratives and National Origin*, 44 ARIZ. ST. L.J. 305, 341 (2012).

146. This expected behavior is racialized, with employers applying the stereotype to Latino and Asian immigrant workers. *See* Skrentny, *supra* note 34, at 218; ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS IMMIGRATION AND THE SOCIAL ORGANIZATIONS OF LABOR, 15-16 (2003); Saucedo, *supra* note 37, at 1007–12. The employer preference is operationalized, for example, by targeting immigrant workers for undesirable jobs through the use of word-of-mouth hiring. *See, e.g.* EEOC v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993).

147. Skrentny, *supra* note 44, at 218.

148. Saucedo, *Mexicans, Immigrants, Cultural Narratives and National Origin*, *supra* note 145, at 310–13.

149. Written Testimony of Thomas A. Saenz, MALDEF, EEOC Hearing on National Origin Discrimination in Today's Workplace (Nov. 13, 2013), *available at* http://www.eeoc.gov/eeoc/meetings/11-13-13/saenz.cfm.

straints.[150] In the case of *Koch Foods*, evidence of the transformation of the workforce from black to Latino immigrant workers should be examined more carefully. Evidence of a transformation could show that the employer targeted Latino immigrant workers specifically to create an exploitable workforce. This is not such a far-fetched scenario. In her work, sociologist Laura Lopez-Sanders describes the hiring and recruiting strategies of a manufacturing plant in South Carolina.[151] The company implemented a "project" to replace temporary black workers with Latino employees.[152] The company set out to create what it termed "enclaves" of Latinos in its departments.[153] Company officials were upfront about their purpose, engaging in a "wholesale effort to change the racial composition of its workforce following perceptions of varying racial abilities."[154] The Latino recruiter for the company openly and explicitly conflated Latinos and immigrants in describing the desired labor force: "The company really likes hiring Hispanics. They know that our people are here to work hard . . . they like that Hispanics are always on time for work and that they are rarely absent . . . Hispanics are dependable and reliable and the company likes that."[155]

Facts that demonstrate the conflation of immigration status and Latino national origin support a conclusion that immigrant status is serving as a proxy for national origin in the case of employers like Koch Foods. A narrative that includes evidence of the employer's intentional recruiting activities supports a theory of the case that immigrant status is simply the latest construction of the Latino worker in our society. The fact of the employer's intentional acts demonstrates that the employer is creating jobs that are on different terms and conditions than what a native-born worker would expect.

Even if courts adopted the position suggested by Justice Douglas's dissent in *Espinoza* that "discrimination on the basis of alienage always has the effect of discrimination on the basis of national origin," it does not go far enough in capturing just how intertwined the several forms of discrimination have become.[156] For that we must look to multidimensionality theory for organizing the evidence in a case.

150. Carbado & Gulati, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA 40–42 (2013).

151. Laura Lopez-Sanders, *Trapped at the Bottom: Racialized and Gendered Labor Queues in New Immigrant Destinations*, Ctr. for Comparative Immigration Studies U.C. San Diego, Working Paper No. 176, 15 (2009).

152. *Id.*

153. *Id.*

154. Skrentny, *supra* note 34 at 231.

155. *Id.* at 230.

156. Espinoza v. Farrah Mfg., 414 U.S. 86, 97 (1973).

B. MULTIDIMENSIONAL DISCRIMINATION

1. Reinforced Discrimination

This section explores how to tell the immigrant worker's story through the lens of the several different theories available to us in order to begin to re-imagine the proof structures for a more inclusive and contextual theory of discrimination. For that, we must re-apply the lessons of scholars from Kimberle Crenshaw to Athena Mutua. Discrimination at the intersections requires both an expanded view of each of the categories, but also an understanding—growing out of the facts of the particular case—that intersectional discrimination is not additional but exponential and that multidimensional discrimination reinforces itself through different sets of "isms." In the words of legal scholar Kevin Johnson, "[v]iewed mathematically, subordination based on immigration status, ethnicity, gender, and class, is not simply the sum of the various components, but indeed may best be viewed as a multiple of them."[157]

In addition, the employer's acts are based on behavior that reinforces itself through the use of other forms of discrimination. For example, the employer might discriminate based on one's ethnicity by using emasculating forms of behavior to drive home the discrimination. This is the insight that Athena Mutua and her colleagues have provided to the discussion.[158] In the immigrant workplace, the employer might target male immigrant workers for a particularly back-breaking job by saying to his supervisor that he should pick Latinos because they will not complain. The work requires both hypermasculinizing stereotypes (Latino immigrants are particularly suited for back-breaking work because of their strength) and emasculating (they are subservient and will not complain). In operation, as in the EEOC's case against Koch, the supervisor picks Latino immigrants,[159] channels them into one department, keeps them separate from the rest of the company, sexually assaults the female workers, humiliates and emasculates the Latino male employees and at the same time threatens to deport them. These employer actions set up a hostile work environment based on several reinforcing factors, including sex, race, color, and national origin.

In previous articles, I have argued that immigrant workers experience different conditions of employment than their non-immigrant counterparts in the workplace.[160] Historically, employer narratives have included

157. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1542 (1995).

158. *See* Mutua, *supra* note 19.

159. It would be very difficult for the employer to choose anything but Latino immigrants. The company's recruiting mechanisms have attracted an immigrant population that has grown very quickly and exponentially over the last decade or so. For the company to claim that Latinos and immigrants are distinguishable in this part of rural Mississippi would be to create only a theoretical distinction. *See* Skrentny, *supra* note 44, at 235; Saucedo, *supra* note 143, at 308.

160. *See* Leticia Saucedo, *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L. J. 547 (2013).

sex stereotypes that have emasculated or hypermasculinized the view of immigrants as the perfect workers for a particular job.[161] The form of discrimination, in other words, is operationalized through gender-related stereotypes about the workers in question. As legal scholar Maria Ontiveros notes, "[R]acism and sexism can blend together in the mind of the harasser and be displayed as an inseparable whole . . . [and] subjects each race and ethnicity to its own cruel stereotype of sexuality."[162] Latinas, for example, are seen by their harassers as "readily available and accessible for sexual use."[163] The attitude can be multiplied when the Latina victim is an immigrant. The EEOC itself has litigated several cases of immigrant women in agricultural fields experiencing exactly this type of egregious behavior.[164] Ontiveros identified the problem for immigrant women more than two decades ago as one of "'rape by duress.'"[165] She noted that immigrant women "do not report such crimes because they are too intimidated by their fear of deportation, ignorance of their legal rights and presumed power of their employers."[166] In her article, Ontiveros emphasized the most egregious violations of sex harassment—rape and sexual assault.[167] Even absent such violations, however, the multiplier effect of immigration status is large. The effect of the stereotype of Latinas and immigrants creates a pervasive dehumanizing environment for both men and women that is grounded in the vulnerability of having questionable or unstable legal status.[168]

For both women and men in the immigrant workplace, there is also fallout from discrimination that reinforces itself through sexualized racial stereotypes plus racialized sexual stereotypes. Legal scholar Sumi Cho, writing about the phenomenon in the Pacific Asian context, terms it "racialized (hetero) sexual harassment" which describes "a particular set of injuries resulting from the unique complex of power relations" facing Asian Pacific American women and other women of color in the workplace.[169] The same is true for Latino immigrant women. And, as I have described earlier in this essay, it is true for immigrant men. Supervisors rely on the performative aspects of hypermasculinity and emasculinity that are found together in male immigrant workers.[170] These stereotypes are racialized and based on a long history of racializing low-wage work.[171] Importantly, employers use tactics like extortion and deportation threats to maintain those performative expectations after hire. In the *Koch* law-

161. *Id.* at 548–49.
162. Ontiveros, *supra* note 53, at 819.
163. *Id.* at 820.
164. *See* Tamayo, *supra* note 35 for a description of cases the EEOC has litigated on behalf of immigrant workers.
165. Ontiveros, *supra* note 53, at 822.
166. *Id.*
167. *Id.*
168. *Id.*
169. Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 181 (1997).
170. *See* Saucedo, *Anglos Views on Mexican Labor*, *supra* note 160, at 548–49.
171. Saucedo, *Mexicans, Immigrants, Cultural Narratives*, *supra* note 147, at 310–13.

suit, for example, evidence could be adduced that supervisors harassed men because of sex as much as they did women. In the traditional paradigm the narrative produces cognitive dissonance. How could the same behavior be aimed at men and women and still be because of sex? In a paradigm where immigration status multiplies the power of the supervisor over the worker, however, even what might be considered off-hand remarks or horseplay takes on a more serious connotation for some workers, including male workers in the immigrant workplace. Without this narrative, a finding of national discrimination seems unlikely because comments or remarks such as "pay me or else," seem innocuous, or at the very least, not discriminatory. It is the context here that makes the difference.

2. *Capturing the Multi-Dimensional Effects of National Origin and Sex Discrimination*

The multidimensional nature of discrimination can also be masked when an employer attributes its discriminatory actions to the non-protected aspects of a group's identity. Employers can more easily blame employee or customer preference for occupational segregation, or discrimination in hiring or assignment. One employer at recent EEOC hearings on the state of national origin discrimination stated several reasons attributable to employee choice or the demographics of the community for occupational segregation:

> Consider, for instance, the example of a large employer with many entry-level jobs that require little training or experience and which do not require English proficiency. Such an employer may find itself with large number of applicants who are recent immigrants or refugees . . . [i]t may find that when it looks at its selection rates by national origin, the selection rates for some groups of applicants are significantly higher than average. This may happen for a number of reasons. For example, current employees of one community may be more aggressively recruiting friends and neighbors to work with the employer, while others do not. . . . Alternatively, the employer may look at the composition of its job groups by national origin and observe that significantly more people of one national origin are assigned to a particular shift or task. While clearly an employer cannot make assignments based on national origin, what if the heightened concentration was due to employee choice?[172]

In the case of immigrant workers, citizenship status bears the brunt of blame for discriminatory actions and provides easy cover for an employer's behavior. The employer representative quoted above went on to explain that overrepresentation of immigrant workers on a shift occurred because recent immigrant employees living in the same housing complex

172. Written testimony of Michael J. Eastman, Vice President, Public Policy Equal Employment Advisory Council, EEOC Hearing on National Origin Discrimination in Today's Workplace (Nov. 13, 2013), *available at* http://www.eeoc.gov/eeoc/meetings/11-13-13/eastman.cfm.

requested the same shift so that they could share rides to work.[173] Their recent arrival, in other words, made them more vulnerable societally, and it was not the employer's actions, but societal conditions that affected their workplace terms and conditions.[174]

In the case of possible discriminatory segregation or hiring and assignment policies, the other forms of discrimination—sex, race, color, or religion—must be scrutinized to ensure that an employer is not also taking advantage of the social condition of their employees. Threats to deport, sexual harassment, emasculation of the workforce, or even use of hypermasculinity stereotypes all signal multidimensional discrimination which manifests itself in the symptoms of occupational segregation or discriminatory assignment policies.

The framework that best encompasses this form of multidimensional discrimination can be found in the early Title VII cases that were trying to address the most obvious forms of discrimination, namely segregation and racially or sexually charged environments.[175] It is from these early cases that we can elicit a more context-based theory for multidimensional discrimination.

The line of Title VII cases that explores the notion of discrimination in an environment charged with racial or ethnic bias and segregation, whether or not aimed at the plaintiff, includes *Rogers v. EEOC*.[176] In that case, Josephine Chavez sued her employer, Texas State Optical, for segregating Latino customers and for allowing her to serve only the Latino customers. The court noted that an employer was responsible for the workplace environment, noting that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection."[177] The court in that case held that a Latina employee's allegation that her optometrist employer had discriminated against her on the basis of national origin by segregating patients along ethnic lines stated a Title VII violation sufficient to support an EEOC investigation.[178] *Rogers* signaled the promise of Title VII to alleviate unequal workplace burdens based on any one of the protected characteristics

173. *Id.*
174. *Id.*
175. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Int'l Bhd. Of Teamsters v. U.S., 431 U.S. 324 (1977).
176. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972); *see also* Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (discrimination on the basis of the employee's national origin); Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 661 (8th Cir. 1980) (discrimination on the basis of the employee's race), *aff'd*, 702 F.2d 137 (8th Cir. 1983); Jackson v. Quanex Corp., 191 F.3d 647, 658 (6th Cir. 1999) (Title VII provides a cause of action for racial harassment in the workplace); Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996) (discrimination may take the form of racial harassment); Daniels v. Essex Grp., Inc., 937 F.2d 1264, 1270 (7th Cir. 1991) (recognizing a Title VII claim on the basis of racial harassment); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993) (finding racial harassment possible after looking at totality of circumstances); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082–83 (3rd Cir. 1996) (noting racial harassment can be inferred by race-neutral activity of employer).
177. *Rogers*, 454 F.2d at 237–38.
178. *Id.*

arising out of the relational aspects of the workplace.[179] In other words, under this view, discrimination arises not simply out of the unequal requirements for and of the job, but also from the unequal social, relational, or performance burdens placed on employees because of the race, national origin, religion, or sex.[180]

The early hostile environment cases, based on race, dealt with issue such as segregation in the workplace, pervasive racial epithets, or other psychological harm inflicted on the claimants, together.[181] In *James v. Stockham Valves & Fittings*, an early case, black workers claimed race discrimination in part because of the segregated condition of their work, which manifested itself in the worst jobs for blacks:

> [B]lacks were assigned the least desirable jobs at Stockham both in terms of working conditions and the pressures associated with the work. Otto Carter, a white company superintendent, admitted that the hottest, dirtiest, and dustiest parts of the operation at Stockham are the foundry departments, grey iron, malleable, and ductile. Of the 586 hourly employees in these departments as of September 1973, 551 or 94 percent were black.[182]

The Stockham court followed the view of other courts of its time in noting that plaintiffs who could show they suffered the "'indignities of segregation'" made out a successful Title VII case.[183] The *Stockham* court focused on the conditions wrought by a segregated environment, as demonstrated by "segregated jobs, the concentration of blacks in certain departments, the lengthy unlawful segregation of facilities and programs, the admitted total allocation of jobs on the basis of race before 1965, and the subjective selection of employees for assignment, transfer, and promotion by an overwhelmingly white supervisory staff."[184]

It was the condition of the environment itself, moreover, that the court found intolerable precisely because it signaled unequal work due to segregated conditions.[185] In directing the lower court to address injunctive relief, the circuit court recognized that evidence of psychological harm is a proper measure of the effects of the employer's decisions that go to the environment.[186]

In the more recent of the *Rogers* line of cases, the courts emphasize the importance of social and organizational norms in creating a hostile work

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179. *Id.*

180. *Id.* at 245–46.

181. *See, e.g.*, James v. Stockham Valves & Fittings Co., 559 F.2d 310, 319–20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); Reed v. Arlington Hotel Co., 476 F.2d 721, 726 (8th Cir. 1973); Swint v. Pullman Standard, 539 F.2d 77 (5th Cir. 1976); Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 50–10 (8th Cir. 1977); Lucero v. Beth Israel Hosp. & Geriatric Ctr., 470 F. Supp. 452, 454 (D. Colo. 1979).

182. *Stockham*, 559 F.2d at 327.

183. *Id.* at 333.

184. *Id.*

185. *Id.* at 354–55.

186. *Id.*

environment that includes isolation.[187] In *Rodgers v. Western-Southern Life Insurance*, for example, the circuit court held that even race-neutral comments are racially motivated given the context of the situation.[188] The court noted while an analysis of the harassment required both an objective and a subjective standard, the objective standard required consideration of

> [T]he nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment."[189]

The court went on to take note of the profound psychological effect of the hostile work environment on the plaintiff, including the effect of race-neutral insults on his self-esteem and ability to work, which exacerbated the effect of the racial slurs.[190]

In *Aman v. Cort Furniture Rental Company*, the plaintiffs, in alleging race discrimination, painted a complex picture that included forms of harassment that, when taken together, amounted to racial animus.[191] The employer yelled at employees on a daily basis, hid office documents from them, ignored them during the workday, withheld relevant information, and gave orders that contradicted company policy.[192] The court looked at all of these in the broader context of racially motivated comments, and noted that race could be found to be a substantial factor in the hostile work environment.[193] The court noted in explaining its analysis that "a discrimination analysis must concentrate not on individual incidents, but on the overall scenario . . . . What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other incidents."[194]

The early cases and their progeny are still powerful and quite relevant in the multidimensional discrimination context. In these cases, the courts put themselves in the place of the minority plaintiffs and, given the circumstances of the workplace environment—including isolation and segregation—considered whether the plaintiffs would perceive the

187. *See* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1912); Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984); Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655 (8th Cir. 1980), aff'd 702 F.2d 137 (8th Cir. 1983); Lattimore v. Polaroid Corp., 99 F.3d 456 (1st Cir. 1996); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993); Aman v. Cort Furniture Rental, 85 F.3d 1074 (3rd Cr. 1996).

188. 792 scup. 628, 635 (E.D. Wis. 1992), *aff'd*, 12 F.3d 668 (7th Cir. 1993).

189. *Rodgers*, 12 F.3d at 674 (citing *Daniels*, 937 F.2d at 1274).

190. *Id.* at 676–77.

191. *Aman*, 85 F.3d at 1083.

192. *Id.*

193. *Id.*

194. *Id.* (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d Cir. 1990)) (internal quotation marks omitted).

employer's actions as discriminatory and whether they would be psychologically harmed by them. In other words, the courts considered the race or sex-neutral forms of employer action as multiplying the plaintiffs' harm.

If we applied the theories in these early cases to the theory of the case in Koch Foods, we would find similar working conditions. The lines of inquiry for *Koch Foods* employees include questions to elicit evidence of segregated departments, units, or shifts, isolated employees, and policies that keep employees in dead-end jobs without opportunities for advancement. In the *Koch Foods* case, the theory of the case, which involves the multidimensional effect of national origin and sex discrimination, requires a story that demonstrates the isolation and segregation of the workers. Were the workers channeled into one shift, unit or department? Were the men and women further separated within the unit? Did these workers live in separate parts of the town from the rest of the community? Were the workers assigned to dead-end jobs? Were they dissuaded from applying to other positions, departments or units? These lines of inquiry might produce a narrative to counter the employer's story that the workers chose their position. They would, more importantly, provide the context that makes a national origin or sex discrimination case more reflective of the real discriminatory practices at play.

VI. CONCLUSION

In the scenario of the Koch lawsuit the story goes something like this: the EEOC investigates a workplace from which several complaints of immigrant abuse have surfaced. Because there is no specific claim under Title VII for discrimination that covers immigrant abuse, the EEOC tries to fit the facts into claims that have proven successful. One such claim is a sexual harassment claim based on allegations of sexual assault, groping, and unwanted touching. For this claim, the immigrant men in the department have seen the harassment occur but have done nothing about it for fear of losing their livelihood. Based on these threats and the treatment of the women, the men feel completely disempowered in the workplace and unable to come forward either to protect the women, or alert management of the harassment, but doctrinally, may not have a sex-based claim.

With respect to the national origin claim, the EEOC developed facts to show that the supervisors physically abused the male immigrant workers, extorted money from them in exchange for benefits such as vacation time or sick leave, and created an atmosphere of intimidation.[195] The EEOC presented these facts simply as examples of national origin discrimination, without any mention of the workers' citizenship status or how that might affect workers' terms and conditions of employment differently.[196]

195. Complaint, *supra* note 6.
196. *Id.*

By disaggregating the claims of the workers, the EEOC may have done the right thing doctrinally. That is, it fit the claims into their respective categories and was careful to avoid mention of immigration status. The multidimensional and intersectional forms of discrimination, which, in large part depend on the immigration status of the discrimination victims here, are lost in the EEOC's story. I have provided in this essay a set of alternate stories for the workers that base their claims within multidimensional paradigms. The alternate narratives and their lines of inquiry more effectively capture the lived reality of the workers and hopefully produce a better outcome than the current disaggregated model.