

# MASCULINITIES NARRATIVES AND LATINO IMMIGRANT WORKERS: A CASE STUDY OF THE LAS VEGAS RESIDENTIAL CONSTRUCTION TRADES

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## TABLE OF CONTENTS

<i>Introduction</i> .....	625
I. <i>The Development of Brown-Collar Construction Work in Las Vegas</i> .....	628
A. <i>The Study</i> .....	628
B. <i>The Independent Contractor Arrangement</i> .....	629
C. <i>Piece Rate Wages</i> .....	631
D. <i>Safety Conditions</i> .....	633
II. <i>Masculinities Operating in the Residential Construction Industry</i> .....	634
A. <i>Masculinities Theory in General</i> .....	635
B. <i>The “Brown-Collar” Worker Masculinities</i> .....	641
III. <i>Changing the Narratives: Opportunities for Empowerment</i> .	650
A. <i>Shifting the Narratives</i> .....	651
B. <i>The Role of the Legal System</i> .....	655
<i>Conclusion</i> .....	659

## INTRODUCTION

Masculinities theories explain that the norms governing how men behave perpetuate male gendered social constructs.<sup>1</sup> These theories typically expose how masculinities narratives and behaviors sustain white, male hegemony. They also explain how individuals in subordinated positions utilize

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<sup>1</sup> See, e.g., Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 368–70 (2004) (discussing the foundations of masculinities study, which asserts that “[g]ender is not a natural occurrence resulting from biology, but a socially constructed phenomenon.”) (citation omitted). For a fuller discussion of masculinities theories, see *infra* Part II.A.

similar narratives to distinguish themselves from females.<sup>2</sup> In the subordination narratives, even though men have low status, they still maintain positions above women in a hierarchical structure. After conducting a study of residential construction workers in Las Vegas, we observed this dynamic in the case of Latino immigrant workers, who are increasingly segregated into low-wage workplaces.

The Immigrant Construction Worker Study, a qualitative empirical study of immigrant construction workers employed in the Las Vegas residential construction industry, provides us with data on the narratives of immigrant male construction workers.<sup>3</sup> Over a two-year period, the authors interviewed over seventy male and female construction workers in Las Vegas, with the purpose of understanding the demographic changes in the residential construction industry and their effects on workers. We found that demographic changes resulting from the restructuring and deunionizing of the industry have given rise to a mostly male, “brown-collar” residential construction industry.<sup>4</sup> We also discovered that the restructuring of the residential construction industry in Las Vegas reflects a parallel trend: immigrant women’s entry into the labor market in traditional labor and in nontraditional labor, such as construction.<sup>5</sup> The demographic changes in residential construction raise the question of how immigrant women are being incorporated into a brown-collar, mostly male, Latino immigrant workplace that once was an Anglo, blue-collar environment. By analyzing the workers’ attitudes through the lens of masculinities theories, this Article suggests that the existence of certain workplace structures explains male workers’ treatment of women, both on and off the job.<sup>6</sup> Our interview data suggests that

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<sup>2</sup> See McGinley, *supra* note 1, at 364 (“Masculinities comprise both a structure that reinforces the superiority of men over women and a series of practices associated with masculine behavior, performed by men or women, that aid men in maintaining their superior position over women.”) (citation omitted).

<sup>3</sup> The authors collaborated in an Institutional Review Board-approved study at the University of Nevada, Las Vegas entitled *Labor Demographics and Union Activity in the Las Vegas Construction Industry*. The study consisted of focus groups and interviews with union leaders and construction workers over a two-year period. For a detailed explanation of the study, see discussion *infra* Part I.A.

<sup>4</sup> See Lisa Catanzarite, *Dynamics of Segregation and Earnings in Brown-Collar Occupations*, 29 *WORK & OCCUPATIONS* 300, 301 (2002) (defining “brown-collar occupations” as occupations with “strong overrepresentations” of recent-immigrant Latino workers).

<sup>5</sup> See, e.g., NANCY FONER, *IN A NEW LAND: A COMPARATIVE VIEW OF IMMIGRATION* 89–105 (2005) (comparing the entry of immigrant women into the wage market at the turn of the twentieth and twenty-first centuries); PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE* (2001) (documenting the entry of immigrant women into the field of paid domestic work, in which they are employed as housecleaners and nannies in U.S. homes).

<sup>6</sup> This Article contributes to the literature on Latin American masculinities, even though its participants currently work in the United States. The vast majority of interviewees were foreign-born Latinos and Latinas, with social, economic, and family roots in their home countries. Masculinities studies from a Latin American perspective have not concentrated on the effects felt by men when women enter into male-dominated occupations. See Mara Viveros Vigoya, *Contemporary Latin American Perspectives on Mas-*

immigrant men reinterpret their experiences in ways that elevate them above women in the workplace hierarchy.

There are few studies that theorize or analyze how masculinities narratives operate in the immigrant worker context.<sup>7</sup> The Immigrant Construction Worker Study reveals, in relevant part, that male immigrant workers develop their own masculinities narratives to explain their entry and assignment into non-unionized and segregated occupations within the residential construction industry in Las Vegas. These narratives reflect and track the masculinities narratives found in traditional Anglo blue-collar work,<sup>8</sup> even as they are invoked to justify jobs that now pay less and offer fewer benefits than when Anglo men held them.<sup>9</sup> This is an important contribution to the literature, because it engages class, immigration status, and national origin in the analysis of how masculinities are perpetuated in low-wage workplaces. Masculinities theories explain the process of internalizing what otherwise seem natural or endemic gendered qualities and practices in the immigrant workplace.<sup>10</sup> If gendered practices are, in essence, responses to the structures that employers use to maintain low-wage, segregated jobs, then we can start to focus on and identify what those structures might be. Ultimately, masculinities theories, by unmasking the operation of narratives, should facilitate holding employers accountable for their operation in the workplace.

Part I of this Article discusses the Immigrant Construction Worker Study, as well as the employer structures that may have led to a demographic shift from blue-collar to brown-collar construction work in Las Vegas.<sup>11</sup> Part II will explore masculinities theories in general, and then as they apply in the immigrant construction worker context. Part III discusses the advantages of viewing the dynamics of the immigrant workplace through masculinities theories. This part provides guidelines for the types of changes needed in the traditional judicial anti-discrimination doctrines in order for us to understand how discrimination might manifest itself in these workplaces.

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*culinity*, 3 *MEN & MASCULINITIES* 237, 255 (2001) (noting the need for masculinities studies that focus on “how men in Latin America have been affected by women taking over traditionally male jobs . . .”).

<sup>7</sup> See Amel Adib & Yvonne Guerrier, *The Interlocking of Gender with Nationality, Race, Ethnicity and Class: The Narratives of Women in Hotel Work*, 10 *GENDER, WORK & ORG.* 413, 430 (2003) (noting the need for further empirical research and theorization on the intersections of nationality, race, ethnicity, class, and gender in the workplace).

<sup>8</sup> See KRIS PAAP, *WORKING CONSTRUCTION: WHY WHITE WORKING-CLASS MEN PUT THEMSELVES—AND THE LABOR MOVEMENT—IN HARM’S WAY* (2006) (analyzing the culture and practices of white, male, “blue-collar” construction workers in order to reveal how gender, race, and class interact in the construction industry).

<sup>9</sup> See Mike Rabourn, *Organized Labor in Residential Construction*, 33 *LAB. STUD. J.* 9, 16 (2008) (discussing the decline in workers’ pay and benefits after the introduction of large numbers of foreign-born immigrant workers into the construction industry).

<sup>10</sup> See, e.g., PAAP, *supra* note 8, at 116; McGinley, *supra* note 1, at 364–65.

<sup>11</sup> The term “employer structures” refers to the workplace arrangements, terms, or conditions that make brown-collar construction jobs qualitatively different from the blue-collar construction jobs previously held by unionized Anglo workers.

I. THE DEVELOPMENT OF BROWN-COLLAR CONSTRUCTION  
WORK IN LAS VEGAS

A. *The Study*

In 2006 and 2007, we interviewed over seventy workers in the Las Vegas residential construction industry. In 2008, we traveled to Hidalgo, Mexico to interview former construction workers who had returned to Mexico after the construction boom in Las Vegas and other regions of the United States went bust. We sought information from workers about why and how they entered construction work, about workplace conditions, about the security of their jobs, and about their attitudes toward unionization. During the course of the study, we collected the data reported in this article regarding gendered perceptions of the work and the workplace among immigrant workers in residential construction. The masculinities in the immigrant construction workplace are worth scrutiny, because they demonstrate how much race, national origin, and immigration status can affect the adoption of the general masculinities narratives to a specific context.

Along with our interviews with union leaders and construction workers, observation revealed that the residential construction industry is dominated by immigrant workers.<sup>12</sup> The shift from Anglo to Latino immigrant labor has occurred over a period of years. It is apparent that employers sought out immigrant workers in part because of their willingness to take fewer benefits than unionized workers.<sup>13</sup> As the numbers of immigrant workers in construction grew, employers changed the terms of their agreements with workers, most notably by transforming workplace arrangements from employment to independent contractor arrangements.<sup>14</sup> Masculinities narratives seemed to play an important role in revaluing the work that historically had been well paid.

We observed masculinities narratives operating at several levels in our discussions with immigrant workers. The extent to which workers internalized the ideology of male hegemony—even in low-wage positions—was noteworthy. Workers justified specific workplace terms and conditions by using masculinities narratives, which in turn made the workplace tolerable. In this article, we will focus on masculinities narratives responding to the independent contractor arrangement, safety conditions and workplace dangers, and the workers' approaches to workplace grievances. The purpose of

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<sup>12</sup> See Rabourn, *supra* note 9, at 15–17.

<sup>13</sup> See Mark Erlich & Jeff Grabelsky, *Standing at a Crossroads: The Building Trades in the Twenty-First Century*, 46 LAB. HIST. 421, 425–26 (2005); Interview with Union Leaders Focus Group, in Las Vegas, Nev. (June 20, 2006).

<sup>14</sup> See Rabourn, *supra* note 9, at 15. See generally MARC LINDER, WARS OF ATTRITION: VIETNAM, THE BUSINESS ROUNDTABLE, AND THE DECLINE OF CONSTRUCTION UNIONS (2000) (providing a historical analysis of the decline of construction unions in the last quarter of the twentieth century).

a detailed focus on the narratives is to provide an alternative to a discrimination framework that focuses solely on employer state of mind or motive. Here, a focus on the dynamic created in the workplace allows us to think more broadly about how today's segregated workplaces occur, what role masculinities narratives play, and what role the legal system can have in changing the narratives.

### B. *The Independent Contractor Arrangement*

Transnationally and domestically, employers have used independent contractor arrangements to reduce labor costs.<sup>15</sup> Sociological studies in several disciplines have revealed that independent contractor or informal economic relationships exist in occupations where the worker has the least amount of power.<sup>16</sup> Thus, the employer may be signaling its strength in the labor market when it offers independent contractor employment arrangements; only employers who have leverage or power in bargaining can make such arrangements.<sup>17</sup> Employers save costs since they do not have to pay employment taxes, benefits, insurance, or workers' compensation benefits for such arrangements.<sup>18</sup> Consequently, the worker pool shrinks to include only those who have little choice for alternate employment. The workers we interviewed accepted the independent contractor structure in part because they had no choice.

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<sup>15</sup> See Erlich & Grabelsky, *supra* note 13, at 428–29; Linda H. Donahue, James Ryan Lamare & Fred B. Kotler, *Employee or Independent Contractor? Misclassification Comes at a Price*, IMPACT BRIEF (Cornell Univ. I.L.R. Sch., Ithaca, N.Y.), Apr. 2007; Steven Greenhouse, *Investigating Mislabeled Workers*, N.Y. TIMES, June 9, 2007, at B1.

<sup>16</sup> See LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 21–23 (2007) (discussing the characteristics of “informal” work and economies, in which women and immigrants are disproportionately represented); Cynthia Cranford, *Gender and Citizenship in the Restructuring of Janitorial Work in Los Angeles*, 16 GENDER ISSUES 25 (1998) (discussing the contracted, non-union nature of the Los Angeles janitorial industry, which consists primarily of Latinas); Rabourn, *supra* note 9, at 15 (discussing the existence of independent contractor arrangements in the residential construction industry, which consists primarily of recently arrived immigrant workers).

<sup>17</sup> The proliferation of informal arrangements in the residential construction industry mirrors a similar phenomenon in other industries where work has become devalued by virtue of who holds the job. See, e.g., BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS* (1990) (discussing the feminization and resultant wage deterioration of occupations formerly held by men); DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 13 (rev. ed. 2007) (explaining how European American workers in the North placed a value on “whiteness” in order to distinguish their work from that of blacks during the antebellum period). This devaluation has been replicated in the restructuring of other service and manufacturing sectors. See Cranford, *supra* note 16 (explaining how restructuring facilitated the entry of Latinas into the janitorial industry).

<sup>18</sup> See Rabourn, *supra* note 9, at 16; Greenhouse, *supra* note 15.

Our interviews revealed that immigrant residential construction workers in Las Vegas were, for the most part, hired as independent contractors, and were responsible for their own benefits, pensions, and workers' compensation. A union leader described the arrangement as follows:

I don't know how they do it, but [employers] pay these guys and . . . these guys are responsible for their own taxes, their own social security. And they could do the job whenever they want and basically release them from the company, from any kind of liability because they're subcontracting supposedly, that work out to these guys [who] are not subcontractors.

They don't have a license but that's what they're calling them.<sup>19</sup>

These arrangements skirt the edges of legality.<sup>20</sup> Workers are more likely misclassified employees of a subcontractor, who directs their work on a daily basis. Somehow, the arrangement seems natural in the construction industry—an inevitable evolution in a competitive housing market.<sup>21</sup> The prior existence of union employment and of union-employer relations in the housing construction industry demonstrates, however, that the independent contracting arrangements in the current workplace regime are anything but inexorable.<sup>22</sup> Had the unions succeeded in organizing the new wave of workers into the industry, the workplace relationship would mirror the employer-employee relationships in commercial construction, and even in the hospitality industry in Las Vegas. Both of these industries are typified by strong employee leverage, relatively higher wages, and fewer wage competition issues.<sup>23</sup>

Because the independent contractor arrangement makes accountability for employer liability much more difficult, it can lead to worker exploitation

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<sup>19</sup> Interview with Joe, Union Leader, in Las Vegas, Nev. (June 20, 2006).

<sup>20</sup> To the extent that an employer controls a worker's time, assignments, work details, and similar terms and conditions of employment, the worker is considered an employee under the Fair Labor Standards Act. Workers in the immigrant workplace are frequently misclassified as independent contractors and hence are not protected by workplace laws. See Donahue, Lamare & Kotler, *supra* note 15; Greenhouse, *supra* note 15.

<sup>21</sup> See Erlich & Grabelsky, *supra* note 13, at 426 ("With wages too low to attract the industry's traditional demographic base of recruits, contractors turned to immigrants to fill the vacuum.").

<sup>22</sup> See *id.* at 423–24 (explaining that the decline of the union movement was caused by a combination of factors, including the campaign by contractors to undermine the strength of unions).

<sup>23</sup> See Rabourn, *supra* note 9, at 14 (discussing the decline of unionized workers in the residential construction industry, in large part due to unionized workers' mass migration to the commercial construction industry); C. Jeffrey Waddoups, *Unions and Wages in Nevada's Hotel-Casino Industry*, 26 J. LAB. RES. 345, 346 (2000) (discussing the significant presence of unions in the hotel-casino industry in Las Vegas); Interview with Union Leaders Focus Group, *supra* note 13 (contending that unions have maintained their presence in the Las Vegas commercial construction industry, even though the number of unionized workers in the Las Vegas residential construction industry has declined dramatically).

in ways that a traditional employer-employee relationship cannot. The independent contractor relationship, for example, raises legal questions about who is ultimately liable for employment discrimination, wage disputes, and unfair labor practices.<sup>24</sup> The independent contractor arrangement has become acceptable among workers in part because of the narratives that immigrant workers appropriate to explain and justify the arrangement. Some of the workers we interviewed said they preferred the arrangement because of its flexibility and the possibilities for greater wealth accumulation under the arrangement.<sup>25</sup> Ultimately, as will be shown, the narrative of the worker as “entrepreneur” plays a substantial role in deflecting criticism about the exploitative nature of the independent contractor arrangement.<sup>26</sup>

### C. Piece Rate Wages

In addition to an independent contractor norm, the introduction of immigrant workers into the industry coincided with an increase in informal piece rate wage arrangements. Indeed, workers explained that they are paid by the piece in many situations, depending on the whim of the subcontractor, who is himself paid on a contract basis for the work that his workers perform. An individual or a group of individuals will be paid per task and per house.<sup>27</sup> The subcontractor decides how much each worker will be paid and sometimes negotiates piece rates separately with each worker. One worker described the process as follows:

Based on budget they give a series of houses or a certain amount of houses to a foreman. . . . [T]here are people who can make money with what the house pays because that worker brings his cousin, his neighbor, or his friend from Mexico and he puts them to work with him. And the foreman acts as if he doesn't notice anything. But it's good for them—those are the ghost workers. Who's paying? Well the other worker because he's producing more, more houses. For this reason he is paying that worker, but

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<sup>24</sup> Numerous cases have been litigated over the definition of employee and whether contracting companies are considered employers under Title VII, the Fair Labor Standards Act (“FLSA”), and the National Labor Relations Act. *See, e.g.,* Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003) (declaring that the “economic reality” test should be used to determine whether a worker is an employee under the FLSA); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (holding that a drugstore corporation that outsourced delivery services was considered joint employer under the FLSA), *aff'd*, 255 F. Supp. 2d 197 (S.D.N.Y. 2003); Bureerong v. Uvawas, 922 F. Supp. 1450, 1467–68 (C.D. Cal. 1996) (noting that the factors used to determine employer status under FLSA should be considered holistically, not in isolation from one another).

<sup>25</sup> *See* discussion *infra* Part II.B.3.

<sup>26</sup> *See* discussion *infra* Part II.A.2.

<sup>27</sup> *See, e.g.,* Interview with Deltorro, Construction Worker, in Las Vegas, Nev. (June 15, 2007) (“[The pay] depends on the size of the house. A big house could take up to four days and they paid about 600 to 800 dollars.”).

of course, he is not paying him that much because he's also paying the other worker.<sup>28</sup>

Union leaders we interviewed criticized the exploitative nature of the system:

[A]ccording to the law, when one is working piece work one has a right to overtime. So what happens? [T]he superintendent or foreman comes and says on a Friday afternoon, he says "Look," he says, "I need you to do this house. . . . I want it by Monday at ten in the morning." That means [they have] to work late Friday, Saturday, and even Sunday. On Monday, he has to sandpaper it and turn it in. But what's the problem? . . . [What happens] is that they work with you, they work ten, fifteen hours. But the problem is that they put in seventy hours. Seventy hours but since they get paid by the piece, then they don't get paid overtime. But according to federal law, if you work seventy hours for piece work you have to get paid overtime, but they are not paying that. They do not pay like that. It's a huge exploitation.<sup>29</sup>

Piece rate wages, although now prevalent in the industry, are not inevitable. When the work was unionized, it was paid on an hourly basis, and workers were entitled to, and often received, overtime pay and bonuses for their work.<sup>30</sup> Assignment policies were governed by a union contract, which regulated the type of work that employees would be required to do, the safety and other conditions under which the work could be performed, and the wages and hours to be paid for such performance.<sup>31</sup> A high level of deskilling has occurred in residential construction over the past few years,<sup>32</sup> similar to the Taylorization processes evident in the manufacturing and service industries.<sup>33</sup> One union leader described the before and after structures, and how they have affected both the skill base and pay structures for residential construction workers:

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<sup>28</sup> Interview with Timoteo, Paint Supervisor, in Las Vegas, Nev. (June 20, 2006).

<sup>29</sup> Interview with Joe, *supra* note 19.

<sup>30</sup> See Interview with Union Leaders Focus Group, *supra* note 13 (describing how unionized workers would "work [their] eight hours, and [the companies would] pay [them for] the eight hours . . . the contracts that [unions] have must provide benefits, must provide vacation, insurance, pension, and like I was saying, a salary, a good salary.").

<sup>31</sup> *Id.* (describing how union contracts not only provided for good wages and benefits, but also included provisions that "the work environment be dignified and clean and good. You must have water, you must have a decent place to eat . . .").

<sup>32</sup> See Rabourn, *supra* note 9, at 11 ("The construction of housing is generally managed and designed for efficiency. Repetition in key details allows for speed of erection and installation. Workers become experts in specific tasks, performed over and again . . . thus lowering the need for broadly skilled workers . . .").

<sup>33</sup> Taylorization refers to the assembly line nature of work. See GEORGE RITZER, *THE MCDONALDIZATION OF SOCIETY* 105–17, 181 (2000) (describing the effects of deskilling and routinizing job tasks on society).

[E]mployers, over the last twenty years, have broken the craft down to where . . . you have a person who spackles and caulks paste board, that's all they do. They go house to house [and] do four or five or ten houses a day. And then maybe they're sent back to mask . . . . But, generally, the opportunity for them to learn more or do more is really dependent on, you know, the foreman . . . if you got somebody that can prep ten houses in a day, why would you want him to start painting? "This guy's making me money. I'm gonna keep him right where he's at." . . . [T]hey broke the trade down to operations [and] really deflated . . . the salaries of these workers by doing that.<sup>34</sup>

This description shows large-scale industry changes undermining the traditional trade union structure that encourages the development of a broader set of skills. Importantly, the growth of these piece rate wage policies have created a set of jobs that no one but immigrant workers will take.<sup>35</sup> It reflects the shift in power toward employers in the evolution of construction jobs. The structures themselves gave rise to a masculinities narrative unique to the immigrant worker context.

#### D. *Safety Conditions*

The biggest problems with both the independent contractor and the piece rate wage systems are their effects on productivity, workplace conditions, and, most importantly, safety on the job. The workers who complained reported not receiving satisfactory responses from employers to their safety concerns. For example, workers were not provided with adequate equipment when working with chemical solvents:

I had to scrub ladders on Friday with lacquer thinner, a strong solvent. I began at 1 p.m. and our shift ends at 3 p.m., but an hour after I started, I started to get a headache and they gave me a regular mask. But what we need is a special mask with filters. But if we ask for that mask they say they don't have it and a regular mask will do.<sup>36</sup>

One worker, a woman, explained how her employer failed to provide adequate ladders:

We don't have the right equipment to do the work . . . . For example, they make us move these really heavy ladders back and forth

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<sup>34</sup> Interview with Union Leaders Focus Group, *supra* note 13.

<sup>35</sup> See Erlich & Grabelsky, *supra* note 13, at 426–27; Rabourn, *supra* note 9, at 15–16; see also 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) (describing how employer structures create brown-collar niches in certain industries).

<sup>36</sup> Interview with Women's Focus Group, in Las Vegas, Nev. (Dec. 12, 2006).

that are sometimes too heavy . . . . These companies know that they can provide the adequate equipment that allows us to do our work more efficiently and what they have done is use . . . the same old equipment over and over again. When in fact they are not providing the safety conditions that they should be providing to help us all work efficiently.<sup>37</sup>

Male workers, on the other hand, tended to accept more personal responsibility for safety conditions on the job.<sup>38</sup> The differential perceptions about employer responsibility are key to understanding how women continue to be locked out of construction work. The immigrant masculinities narratives motivate men to accept more dangerous work conditions, while women tend to complain about them. The masculinities narrative does the work of preventing or hindering legitimate complaints, whether about safety, pay, working conditions, or a hostile work environment. As one female worker noted, “[i]f we go to the head of the company, we are seen as problematic and they say we go only to complain, and we are only looking for problems.”<sup>39</sup> Viewed from the complainant’s perspective, masculinities operate to hinder the ability of an individual to step forward and try to improve working conditions on behalf of all. Those who complain—male or female—are classified as not up to the task, even if the task is itself unsafe. The norm of not complaining that accompanies hypermasculinity carries an even higher risk for immigrant workers. Because of their status, workers believed they had fewer rights than their Anglo or native born counterparts.<sup>40</sup> The belief that they had fewer rights dovetailed with a sense that complaints would not resolve workplace grievances.<sup>41</sup>

## II. MASCULINITIES OPERATING IN THE RESIDENTIAL CONSTRUCTION INDUSTRY

In addition to the structural developments discussed earlier, the masculinities narratives discussed in this section are themselves structures that perpetuate gender-based barriers to opportunity. In one set of narratives, construction work is men’s work, and, more precisely, immigrant men’s

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<sup>37</sup> Interview with Women’s Community Forum, in Las Vegas, Nev. (Dec. 12, 2006).

<sup>38</sup> See, e.g., Interview with Worker Focus Group, in Las Vegas, Nev. (Sept. 13, 2006).

[S]ince you’re working to get ahead and you want to get ahead the most you can do, for example, right here it’s forbidden to make a wooden scaffold. However, in order to not fall behind we make it quickly out of wood and that’s how we pass through here. And it’s forbidden, but since you’re working by production you have to get ahead. If not you don’t make a good paycheck.

*Id.*

<sup>39</sup> Interview with Women’s Focus Group, *supra* note 36.

<sup>40</sup> See, e.g., Interview with Miguel, Construction Worker, in Las Vegas, Nev. (June 14, 2007).

<sup>41</sup> See discussion *infra* Part II.B.4.

work.<sup>42</sup> In a second narrative, immigrant men do not complain because they prefer to “man up” in the face of tough conditions.<sup>43</sup> In a third narrative, immigrant workers embody the traits of risk, ambition, and ultimate reward, which are inherent in entrepreneurs.<sup>44</sup> In the fourth narrative, immigrant men endure the risks of the job, just as they endure the risks of undocumented or immigrant status, because they are responsible family providers.<sup>45</sup> Interestingly, each of these narratives affects and is affected by the vulnerable immigration status of the men who operate in the construction industry. The workers tolerate exploitative work conditions because of their undocumented status, and it is, paradoxically, their ability to withstand such status-based conditions that makes them manly. It is as if the masculinities narratives elevate the stakes for success among the immigrant men who participate, while at the same time erecting barriers for those who refuse to participate. These narratives are explored in depth here, to explain how they operate to create barriers to employment for those who refuse to accept or do not fit into the images created by the narratives. This section explores general theories about masculinities and then applies them to the behaviors and attitudes expressed by the workers in our study.

#### A. *Masculinities Theories in General*

The term “masculinities” refers to norms governing how men should behave in a given context. The study of masculinities is informed by the notion that our gendered identities and gender performances are socially constructed everywhere, including in the workplace.<sup>46</sup> They are invisible, however, because they seem so natural.<sup>47</sup> Masculinities shift over time and place; “[t]hey are historically, culturally, and temporally contingent.”<sup>48</sup> Because they can change over time and place, “their making and remaking is a

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<sup>42</sup> See discussion *infra* Part II.A.1.

<sup>43</sup> See discussion *infra* Part II.A.2.

<sup>44</sup> See discussion *infra* Part II.A.3.

<sup>45</sup> See discussion *infra* Part II.A.4.

<sup>46</sup> See, e.g., McGinley, *supra* note 1, at 368–70. For a discussion of masculinities narratives operating within the workplace, see generally DAVID L. COLLINSON, *MANAGING THE SHOPFLOOR: SUBJECTIVITY, MASCULINITY AND WORKPLACE CULTURE* (1992); David L. Collinson & Jeff Hearn, *Men and Masculinities in Work, Organizations, and Management*, in *HANDBOOK OF STUDIES ON MEN & MASCULINITIES* (Michael S. Kimmel, Jeff Hearn & R.W. Connell eds., 2005); Paul Willis, *Shop Floor Culture, Masculinity and the Wage Form*, in *WORKING-CLASS CULTURE: STUDIES IN HISTORY AND THEORY* (John Clarke, Chas Critcher & Richard Johnson eds., 1979).

<sup>47</sup> See McGinley, *supra* note 1, at 368–70; see also Willis, *supra* note 46, at 185.

It is one of the fundamental paradoxes of our social life that when we are at our most natural, our most *everyday*, we are also at our most cultural; that when we are in roles that look the most obvious and given, we are actually in roles that are constructed, learned and far from inevitable.

*Id.*

<sup>48</sup> Collinson & Hearn, *supra* note 46, at 295.

political process affecting the balance of interests in society and the direction of social change.<sup>49</sup> The contextual twist in the residential construction trades involves the transformation of the work composition from Anglo to immigrant workers. What was once a set of masculinities narratives and behaviors invoked by Anglo blue-collar workers is now adapted by immigrant workers to fit their own experience in the construction industry. The narratives themselves have changed just enough to accommodate the deterioration in the jobs and the change in demographic.

In the workplace, masculine norms are expressed within a hierarchy and are embedded into certain jobs and occupations.<sup>50</sup> Such norms as aggressiveness, competition, and entrepreneurship become part of workplace culture at all levels.<sup>51</sup> In the same space, several levels of hegemony and subordination can operate. So, for example, one worker who is subordinate to another group of workers can still invoke masculinities narratives that subordinate others.<sup>52</sup>

Masculinities researchers note that the “gendering of men only exists in the intersections with other social divisions and social differences.”<sup>53</sup> Masculinities are replicated in institutional structures, such as workplaces, where they shape and are shaped by the relationships developed within the institution, and where they influence terms such as pay, assignment practices, hiring practices, and workplace conditions. Masculinities scholar David Collinson posits that while individuals are shaped by institutional power structures, they are also agents in explaining and fitting themselves within those power dynamics.<sup>54</sup> The power dynamic between employer and workers operates within the residential construction industry to create gendered definitions of who can do what kind of work, affecting co-worker and employer-employee relationships. Masculinities are not simply an inherent property of maleness, in other words. Instead, they are the processes—variable, ever-changing, contextual, and fluid—by which gender relations are played out and by which practices that create a gender hierarchy become

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<sup>49</sup> R.W. CONNELL, *MASCULINITIES* 44 (2d ed. 2005).

<sup>50</sup> See Cynthia J. Cranford, “It’s Time to Leave Machismo Behind!”: Challenging Gender Inequality in an Immigrant Union, 21 *GENDER & SOC’Y* 409, 411 (2007).

<sup>51</sup> See, e.g., ATTILA BRUNI, SILVIA GHERARDI & BARBARA POGGIO, *GENDER AND ENTREPRENEURSHIP: AN ETHNOGRAPHICAL APPROACH* 59 (2005).

<sup>52</sup> See, e.g., Mark Maier & James W. Messerschmidt, *Commonalities, Conflicts, and Contradiction in Organizational Masculinities: Exploring the Gendered Genesis of the Challenger Disaster*, 35 *CAN. REV. SOC. & ANTHROPOLOGY* 325, 332–37 (1998). Maier and Messerschmidt examined the relationship between male managers and engineers during the Space Shuttle Challenger launch decision-making process and identified the development of masculinities narratives within each group. The engineers’ masculinities narratives focused primarily on “technical competence/achievements” and devalued the goals pursued by their superiors. *Id.* at 336.

<sup>53</sup> R.W. Connell, Jeff Hearn & Michael S. Kimmel, *Introduction*, in *HANDBOOK OF STUDIES ON MEN & MASCULINITIES*, *supra* note 46, at 3.

<sup>54</sup> See COLLINSON, *supra* note 46, at 207.

established and replicated.<sup>55</sup> There may be different masculinities operating at the same time that workers utilize to fit themselves within the workplace hierarchy. In analyzing immigrant construction worker masculinities, we were influenced by the work of sociologists and theorists studying two types of masculinities: working class “blue-collar” masculinities and entrepreneurial masculinities. We saw strains of each in the immigrants’ narratives.

### 1. “Blue-Collar” Hypermasculinity

From the inception of masculinities studies, several scholars have analyzed Anglo “blue-collar” workplace masculinities and their effects on work relationships.<sup>56</sup> In studying Anglo working class culture in the manufacturing environment, sociologist Paul Willis found that workers in dead-end jobs recreated their experiences and gave them positive, transformative meaning, in part to make their work lives tolerable.<sup>57</sup> Willis observed that the workers developed a culture that embraced “the sheer mental and physical bravery of surviving in hostile conditions, and doing difficult work on intractable materials.”<sup>58</sup> The narrative of the tough, brave, fearless male helped workers develop self-esteem, in addition to some measure of control over difficult, sometimes unbearable, working conditions. Willis terms this the “mythology of the masculine reputation,”<sup>59</sup> or the way in which a difficult work environment is transformed into a bearable one by giving it significance beyond the work itself and instilling it with masculine requirements.<sup>60</sup> Willis’s study concluded that workers express their place in the work hierarchy through a series of masculinities narratives that define worker solidarity through humor and language in the workplace, distrust of abstraction or of

<sup>55</sup> See BRUNI, GHERARDI & POGGIO, *supra* note 51, at 61.

<sup>56</sup> See, e.g., COLLINSON, *supra* note 46; PAAP, *supra* note 8; Joseph A. Blum, *Degradation Without Deskillling: Twenty-Five Years in the San Francisco Shipyards*, in GLOBAL ETHNOGRAPHY: FORCES, CONNECTIONS, AND IMAGINATIONS IN A POSTMODERN WORLD 106 (Michael Burawoy et al. eds., 2000); Anastasia Prokos & Irene Padavic, ‘*There Oughtta Be a Law Against Bitches*’: Masculinity Lessons in Police Academy Training, 9 GENDER, WORK & ORG. 439 (2002); Willis, *supra* note 46.

<sup>57</sup> See Willis, *supra* note 46, at 188.

<sup>58</sup> *Id.* at 189.

<sup>59</sup> *Id.* at 189, 196.

<sup>60</sup> See *id.* at 196.

Manual labour is suffused with masculine qualities . . . . Whatever the specific problems of the difficult task, they are always essentially masculine problems, requiring masculine capacities to deal with them. We may say that where the principle of general abstract labour has emptied work of significance from the inside, a transformed patriarchy has filled it with significance from the outside. . . . Difficult, uncomfortable or dangerous conditions are seen, not for themselves, but for their appropriateness to a masculine readiness and hardness. They are understood more through the toughness required to survive them, than through the nature of the imposition which asks them to be faced in the first place.

*Id.*

theory, and devaluing or denigrating the work of women, minorities, and nonmanual workers, such as managers and professionals.<sup>61</sup> In short, masculinities narratives helped blue-collar workers explain or make sense of their subordinated lives.

Sociologist Kris Paap recently studied masculinities among Anglo blue-collar construction workers, spending two years working on a construction site in the Midwest.<sup>62</sup> Paap described the masculinities narratives among Anglo construction workers as structures that maintain a power hierarchy at the intersection of gender and race.<sup>63</sup> The behaviors that Paap described among Anglo blue-collar workers are similar to those we uncovered within brown-collar work environments saturated with recently arrived immigrant workers. Her descriptions of the hypermasculine male narrative are especially relevant to what we call “brown-collar masculinities,” or narratives infused with the hypermasculine immigrant norms found among our interview subjects.<sup>64</sup>

The hypermasculine male narrative explains “manly man” behavior on construction sites. Paap argues that the narrative that “men are animals” gives workers permission to be rude, crude, or unrefined on the job.<sup>65</sup> Moreover, the narrative propels the expectation that because they are animals, men will perform all sorts of tough, difficult, and dangerous jobs.<sup>66</sup> The narrative itself serves several purposes. First, it provides a cover for the use of slurs and politically incorrect behaviors, such as sexism, racism, and homophobia, which would not be tolerated in other contexts.<sup>67</sup> It excuses behavior that is otherwise inappropriate outside the construction site.<sup>68</sup> This is why the stereotypical image of men on a construction site is difficult to eradicate: hypermasculine behavior becomes so embedded in the masculinities narrative that it seems natural or endemic to the prototypical construction worker’s character.<sup>69</sup>

<sup>61</sup> See Willis, *supra* note 46, at 196.

<sup>62</sup> See PAAP, *supra* note 8.

<sup>63</sup> See *id.* at 25–27.

<sup>64</sup> See *id.* at 133–34. Paap labels the hypermasculine narrative “pigness.” She explains that pigness is not meant as an insult; it is actually a term that working men use to describe themselves. “The assertion that men are pigs and animals is strategic because it communicates who belongs in the industry, the appropriate forms of workplace conduct, the nature of the men who do the work, and the reasonable managerial responses to violations of both cultural codes and the law.” *Id.* at 133.

<sup>65</sup> *Id.* at 134–35.

<sup>66</sup> See *id.* at 136–38.

<sup>67</sup> See *id.* at 135.

<sup>68</sup> See *id.* at 134.

<sup>69</sup> See *id.* at 133. Paap explains,

By claiming that this is just how guys are and that these are just the things that these guys will do and say, [workers communicate] that this is the nature of men . . . . This assertion matters, of course, because biologically based behaviors are not likely to be easily changeable, if at all. And if the behaviors are natural and not to be changed, then the pigs’ co-workers must know that it is useless to complain or push for change. Not only should other workers save their energy and

Second, hypermasculinity acts as an affirmation of one's manhood or heterosexuality.<sup>70</sup> It allows men to act out in the workplace in ways that would be unacceptable in less "manly" contexts.<sup>71</sup> Examples of hypermasculine behavior include excessive competitiveness, aggressiveness, and overt hypersexual acts aimed at women.<sup>72</sup>

Third, just as in Willis' blue-collar study described above, hypermasculinity in the U.S. construction context is the method by which working class men value themselves and their otherwise undervalued jobs. Describing themselves as animals allows men to define themselves as less sophisticated and, at the same time, more masculine than their middle class superiors.<sup>73</sup> In other words, the "identity of raw masculinity and real manhood is clearly a nonmonetary job benefit that the men can cash in on when they claim that they are 'pigs' and 'animals.'" <sup>74</sup> Hypermasculine behaviors, in turn, allow construction workers to define themselves as "natural workers," who are made to perform work that is physical, tiring, dangerous, and manly.<sup>75</sup> Anyone who complains about the abuse is not strong enough or manly enough to do the job.<sup>76</sup> The narrative, then, operates as a self-policing or regulatory mechanism that screens for those who are not "tough enough."<sup>77</sup>

Fourth, hypermasculinity gives rise to what Paap calls a "Culture of No Complaints" among the workers, who individually may fear ridicule or ostracism if they cannot tolerate the tough conditions on the job.<sup>78</sup> The Culture of No Complaints preserves a set of behavioral responses to the work environment, such as unsafe conditions, undesirable job tasks, and even harassment on the job.<sup>79</sup> Workers are expected to put up with harsh conditions, and even harassment, because "[t]o complain about harassment and mistreatment . . . is to violate the widespread code of the industry."<sup>80</sup> Paap describes

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just "let it go" (i.e., ignore the offending behaviors), but the managers as well are freed from any expectation that they would attempt to correct their men.

*Id.*

<sup>70</sup> *See id.* at 134–35.

<sup>71</sup> *See id.* at 134.

<sup>72</sup> *See* McGinley, *supra* note 1, at 365. Although not a focus of this article, it is worth noting that we observed evidence of this kind of behavior in the immigrant construction workplace. Several of the women we interviewed described their experiences with coworker sexual harassment. *See, e.g.,* Interview with Carlotta, Construction Worker, in Las Vegas, Nev. (June 16, 2007) (describing how a male worker would leave her phone messages commenting on her appearance, try to touch her during the workday, and offer to give her his bank card so that she could "go over to Victoria Secret . . . buy that type of clothes . . . and show them off to [him]"); Interview with Nancy, Construction Worker, in Las Vegas, Nev. (June 13, 2007) (describing how male workers, including the foremen, believed they could "cross the line" with female workers).

<sup>73</sup> *See* PAAP, *supra* note 8, at 135.

<sup>74</sup> *Id.* at 136.

<sup>75</sup> *Id.* at 138.

<sup>76</sup> *See id.* at 145.

<sup>77</sup> *See id.* at 148.

<sup>78</sup> *Id.* at 143–48.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 145.

this culture as a structure in and of itself, supporting workplace norms that bar women from construction work:

By imposing a Structure of No Complaints upon the construction workforce . . . pigness is able to protect the jobs for people who can “handle” the environment—most often and most likely, people who look like or are related to the men working in the jobs already.<sup>81</sup>

The narrative relies on the corollary myth that individuals choose their jobs and career paths, and those who cannot tolerate the hypermasculine environment would naturally choose to be elsewhere.<sup>82</sup> Hypermasculinity itself operates subliminally and at cross-purposes to formal legal prohibitions on discrimination. Masculinities narratives blur the line between activities for which employers are responsible and those which are societal and therefore endemic to a worker’s character. If hypermasculinity is a structure that helps employers maintain the job for the tough, hardened worker who can handle it, Paap argues:

[P]igness is able to do informally what exclusionary laws and rules, discriminatory practices, and systematic violence did for many years but are no longer formally allowed to do. It is not that women . . . aren’t *formally* and *legally* welcomed, it is simply that the men who chose to be construction workers are “pigs” and that under the right conditions most women (and nonpig men) will choose to do something else somewhere else. Thus pigness serves companies as an *occupational gatekeeping* mechanism for women . . . without their having to hire or fire explicitly on these lines.<sup>83</sup>

In other words, the narrative masks or hides the operation of employer practices that encourage discrimination by allowing the narrative to self-perpetuate.

## 2. *Entrepreneurial Masculinities*

Entrepreneurial masculinities in general assume that risk-taking, leadership qualities, and a competitive spirit are attributes that are gendered male. Not only are entrepreneurship activities gendered, but so are the narratives used to sustain this type of economic activity. Entrepreneurial masculinities

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<sup>81</sup> *Id.* at 148.

<sup>82</sup> *See id.*

<sup>83</sup> *Id.* This masculinity, while seeming to create solidarity among white male workers, is in many ways counterproductive to a solidarity in which workers are defined by their class status in relation to the owners of capital.

narratives appeal to ideas of freedom, success, and individualism.<sup>84</sup> They embody the heroic quality of the entrepreneur, one that evokes images of the rugged individualist, the risk taker, the leader and manager, the rational decision maker, and the competitor.<sup>85</sup> Each of these, separate and together, has been packaged into a cultural narrative as masculine characteristics.<sup>86</sup>

Entrepreneurial masculinities narratives incorporate elements that contrast with descriptions of employees in the workplace. For instance, the language of risk or the assumption of responsibility for others if something goes awry is a form of entrepreneurial masculinity.<sup>87</sup> The language of risk is used to describe the initial decision to start an enterprise, as well as subsequent decisions to expand.<sup>88</sup> The narrative also involves the notion of reinvestment into the enterprise and concern for long-term planning involving the enterprise.<sup>89</sup> As such, this narrative distinguishes the entrepreneur from the worker or the employee, who is concerned primarily with salary and less with efficiency or quality of production.<sup>90</sup>

In the construction industry, entrepreneurship is one of the narratives that constructs masculinity in the workplace.<sup>91</sup> “The individual,” “choice,” and “the market” are the buzz words for explaining workplace arrangements—like independent contracting—in which the employee or contractor carries the vast majority of the risk of illness, injury, disability, and market downturns.<sup>92</sup> As we will show, for immigrant workers, the entrepreneur narrative ameliorates the harsh effects of downsizing, benefit loss, and reduction of safety net benefits on men’s self-image and self-respect.

### B. *The “Brown-Collar” Worker Masculinities*

Interviews with both male and female immigrant construction workers revealed the operation of workplace masculinities. Although similar to the masculinities described above, brown-collar masculinities had distinct characteristics and impetuses.

The similarities between masculinities narratives in general and as they appear in the immigrant workplace give credence to masculinities theorists who argue that “gendered power relations can simultaneously both change (in character) yet remain broadly the same (in structure).”<sup>93</sup> The fact that our

<sup>84</sup> See BRUNI, GHERARDI & POGGIO, *supra* note 51, at 59 (quoting O.F. COLLINS & D.G. MOORE, *THE ENTERPRISING MAN* 5–6 (1964)).

<sup>85</sup> *Id.* at 59–60.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 144.

<sup>88</sup> *See id.* at 146–47.

<sup>89</sup> *See id.* at 148–49.

<sup>90</sup> *See id.* at 149.

<sup>91</sup> *See id.* at 57–60.

<sup>92</sup> See R.W. Connell, *Globalization, Imperialism, and Masculinities*, in *HANDBOOK OF STUDIES ON MEN & MASCULINITIES*, *supra* note 46, at 76.

<sup>93</sup> Collinson & Hearn, *supra* note 46, at 295.

female interviewees experienced several forms of discrimination from masculine behaviors in the immigrant workplace shows that masculinities narratives adapt to different cultural environments.<sup>94</sup> Just as with the blue-collar workers described in Paap's study, brown-collar workers emphasize the masculine characteristics of their jobs as a way to build collective self-esteem about their work and to devalue the contributions of women in the workplace.<sup>95</sup>

We identified four principal forms of masculinities that the interviewees described. The first is constructed around the narrative that brown-collar work is labor that no one else will do.<sup>96</sup> In this narrative, the workers are proud that they are performing dangerous, difficult, and physically demanding labor. This narrative responds to the changes in wage structures and assignment policies within the industry. Closely related, the second set of masculinities is constructed around hypermasculine behaviors, emphasizing the craft, skill, and toughness required of the workers, even as the jobs themselves are deskilled.<sup>97</sup> It responds, in part, to the piece rate wage policies and safety conditions described earlier. As with Anglo blue-collar workers, the danger of the work is masked by a narrative that discourages complaints. The third set of masculinities, growing out of the independent contractor relationships with employers, is constructed around the idea of workers as entrepreneurs or businessmen-in-the-making.<sup>98</sup> It responds to the independent contractor arrangements prevalent in the residential construction industry. The fourth set of masculinities centers on the men as breadwinners, and on their masculinity in enduring the dangers of border crossing and undocumented status to get to their jobs in the United States.<sup>99</sup> Each of these narratives is discussed in detail below.

### 1. *No One Else Can/Will Do the Job*

A form of masculinity is embedded in the claim that the jobs into which newly arrived immigrants are segregated are jobs that only immigrants will take. Male interviewees expressed the sentiment that they felt good about doing their jobs, because they worked hard to perform work that no native-born worker would do. They took pride in performing dirty, difficult, low-paying, and dangerous jobs in construction and in tolerating the work conditions. One worker from an indigenous Mexican community noted:

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<sup>94</sup> See Interview with Women's Focus Group, *supra* note 36.

<sup>95</sup> See PAAP, *supra* note 8, at 148 (arguing that hypermasculinities narratives tend to operate as an "occupational gatekeeping mechanism" for women); Willis, *supra* note 46, at 196.

<sup>96</sup> See discussion *infra* Part II.B.1.

<sup>97</sup> See discussion *infra* Part II.B.2.

<sup>98</sup> See discussion *infra* Part II.B.3.

<sup>99</sup> See discussion *infra* Part II.B.4.

What happens is that the majority of us indigenous people, it does not matter what we earn, just as long as we earn something. Just as long as we have work, it does not matter if it's cheap. What interests us more is to stay active, to know that we will be getting paid at the end of the week, even if it's a small paycheck.<sup>100</sup>

The worker's assertion that the level of pay or the type of work does not matter implies a different attitude from one ascribed to native-born workers who do care about pay and working conditions. At the same time, the workers asserted that, even among immigrants, only a few can or will do these jobs. As one worker put it:

Construction in and of itself is a very difficult job. There are many people who have worked in construction who are now working in casinos because you have food, a uniform, and you're in a shaded area, with air conditioner there. Regardless of what you earn in construction, it's a difficult job.<sup>101</sup>

Study interviewees displayed an attitude of self-satisfaction that they were doing a job no one else could do, thus internalizing and valuing the sentiment heard in the public that immigrant workers took jobs no one else would take. This sentiment parallels that of the blue-collar construction workers studied by Paap, who carried with them an attitude of superiority at being able to do a job that their middle-class counterparts could not do.<sup>102</sup> It also parallels the opinions of manufacturing workers in Willis's study, who disdained professionals and others who did not master a task by doing it.<sup>103</sup> Interestingly, immigrant men felt pride in their work even though they understood that their jobs were devalued as work that no native-born worker would perform.<sup>104</sup>

The masculinity expressed in "doing a job nobody else will do" serves several purposes. First, it dignifies the otherwise dirty, difficult, and undesirable aspects of a job. Second, as some masculinities theorists have suggested, it rationalizes the wage deterioration of the job.<sup>105</sup> A worker can rationalize taking a job that pays less if it somehow increases his status through masculinization.<sup>106</sup> This second aspect is important, because masculinities narratives compensate for the devaluation of a job once it becomes a

<sup>100</sup> Interview with Antonio, Construction Worker, in Las Vegas, Nev. (June 12, 2007).

<sup>101</sup> Interview with Worker Focus Group, *supra* note 38.

<sup>102</sup> See PAAP, *supra* note 8, at 135–36.

<sup>103</sup> See Willis, *supra* note 46, at 194 ("Another important element of this culture is the massive feeling on the shop floor, and in the working class generally, that practice is more important than theory. . . . Practical ability always come first and is a *condition* of other kinds of knowledge.").

<sup>104</sup> See Interview with Worker Focus Group, *supra* note 38.

<sup>105</sup> See, e.g., Willis, *supra* note 46, at 196–97; Maxine Baca Zinn, *Chicano Men and Masculinity*, 10 J. ETHNIC STUD. 29, 39 (1982).

<sup>106</sup> See Willis, *supra* note 46, at 196–97; Zinn, *supra* note 105, at 39.

“brown-collar” job.<sup>107</sup> Third, this narrative operates to maintain a gendered performative masculine identity in the workplace. When workers performed the role of the prototypical male construction worker, their performance suppressed others’ complaints about working conditions. Employers desired those who performed to meet expectations of the hardworking, subservient, and compliant employee. The idea that they do the work nobody else will do bolsters expectations about their hardworking character and about the conditions they will endure to continue to be the ones chosen to do that work.<sup>108</sup> As with hypermasculinity, this expression of masculinity encourages individual workers to take more risk and accept more dangerous conditions.

## 2. *Hypermasculinity in the Brown-Collar Context*

The hypermasculine male stereotype continues to reproduce itself among immigrant workers. While the stereotype of the manly construction worker once had an Anglo, male face, the stereotype in the residential industry has taken on the face of the Latino immigrant.

Some of the workers we interviewed provided several examples of hypermasculinity among the men, both in the form of sexual advances and sexual innuendos and in the form of attitudes about what kind of work was appropriate for men.<sup>109</sup> Not only did men banter about sex and sexual activities in front of women, they also treated them as sexually loose women.<sup>110</sup> Some of the women reported that they had to develop their own mechanisms of self-protection in reaction to men’s comments about why they worked in

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<sup>107</sup> Several scholars have studied the effects on wages once a job is identified with minorities or immigrants. See, e.g., ROEDIGER, *supra* note 17, at 13–14.

[T]he pleasures of whiteness could function as a “wage” for white workers. That is, status and privileges conferred by race could be used to make up for alienating and exploitative class relationships . . . . White workers could, and did, define and accept their class positions by fashioning identities as “not slaves” and as “not Blacks.”

*Id.*; Catanzarite, *supra* note 4 (noting the phenomenon of wage suppression in occupations overrepresented by newly arrived Latino immigrants); Robin D. G. Kelley, “*We Are Not What We Seem*”: *Rethinking Black Working-Class Opposition in the Jim Crow South*, 80 J. AM. HIST. 75, 101 (1993) (describing how black miners performed what had been designated as menial labor “with the pride of skilled craftsmen,” but they nonetheless found it difficult to overcome the social meaning of “nigger work” as less manly).

<sup>108</sup> Here, we invoke the work of legal scholars Devon Carbado, Mitu Gulati, and Catherine Fisk, who write about the power of workplace structures to define the performative identity of the worker through its workplace requirements. In the immigrant worker case, workers will keep their employment over the long-term if they live up to the “hard worker” stereotype established by the myth of the job nobody else will take. In contrast, those immigrant workers who complain about working conditions tend to lose their jobs over time. See Devon Carbado, Catherine Fisk & Mitu Gulati, *Foreword: Making Makeup Matter*, 14 DUKE J. GENDER L. & POL’Y 1, 10 (2007); Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

<sup>109</sup> See *supra* note 72 and accompanying text.

<sup>110</sup> See *supra* note 72 and accompanying text.

construction.<sup>111</sup> One woman observed that the men she worked with questioned her morals simply because she decided to take a job in a male-dominated environment. Her frustration was evident:

For the majority of the people, women who work in construction come from a bad background . . . . I don't know why they have that idea of women in construction, but women don't work in construction . . . [merely] because they like men.<sup>112</sup>

Nonsexual forms of harassment took the form of opinions about what women could and could not do. Female construction workers provided several examples of sex-role stereotyping in the assessment of their work capabilities:

[I]f we as women go and apply to the company, the response we get is "what do you know how to do" . . . it's sort of this presumption that you don't know how to do this kind of work.<sup>113</sup>

[T]here are assumptions as well that women can't do the work that men are doing in these jobs, in this industry.<sup>114</sup>

The problem is when the company doesn't have enough work . . . they give [women] the heaviest work so we can feel pressured to do it and if we tell them, "how are we going to do it?" They say "aren't you asking for equality?" That is how they put pressure on us.<sup>115</sup>

Unless we come in with a recommendation, what we see there are even barriers of entry and we go in and turn in an application to the company and as soon as we leave that application goes into the trash can.<sup>116</sup>

The hypermasculinity was also manifested in the ways that men accepted unsafe tasks or worked in unsafe conditions without complaint. One male worker who built an unsafe wooden scaffold in order to get ahead with his production quota explained his disregard of safety in terms of productivity:

That's why accidents occur more often, because there are no safety norms. They're just given a paper that talks about safety, but since you're there for production . . . the more you make, the better. . . .

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<sup>111</sup> See, e.g., Interview with Carlotta, *supra* note 72 (describing how she would ignore harassing behavior when possible, but she would verbally defend herself when her male co-workers refused to leave her alone).

<sup>112</sup> Interview with Women's Focus Group, *supra* note 36.

<sup>113</sup> Interview with Women's Community Forum, *supra* note 37.

<sup>114</sup> *Id.*

<sup>115</sup> Interview with Women's Focus Group, *supra* note 36.

<sup>116</sup> Interview with Women's Community Forum, *supra* note 37.

Yes, you sign it, but since you're working to get ahead and you want to get ahead the most you can do, for example, right here it's forbidden to make a wooden scaffold. However, in order to not fall behind we make it quickly out of wood and that's how we pass through there. And it's forbidden, but since you're working by production you have to get ahead; if not you don't make a good paycheck.<sup>117</sup>

His response was typical of men's responses to safety problems in the workplace. Safety was invariably balanced against the production and quota requirements of the piece rate wage system now prevalent in the industry. The masculinities narratives encouraged a Culture of No Complaints in the brown-collar context, which was also evident in similar blue-collar environments discussed by Paap in her study.<sup>118</sup> In such a hypermasculine environment, only those who cannot "man up" to the task will complain about the terms and conditions, including unsafe conditions, of the job.

By conceptualizing hypermasculinity as an endemic trait (rather than as a response to external workplace conditions), the narrative in the immigrant worker context devalues the humanity of the individual. After all, the more we associate the workers with their animalistic behaviors, the less we have to consider their human worth. In this sense, the narrative easily accommodates the concomitant racialization of the jobs in construction. As Paap notes with respect to Anglo blue-collar workers:

To attribute animal status to a group is to remove them from the moral responsibility and consciousness of the nation. It is to mark them as a group whose interests, pain, and suffering are to be seen as bearing little relation to those of the general public. And under conditions of increasingly globalized market pressures, ongoing if not rising drives for profit, and increasingly tight production schedules in the construction industry, this sort of cultural posturing might be all that the industry—and the public—needs to turn its attention and concerns elsewhere.<sup>119</sup>

Paap's observations apply equally to immigrant workers. In the immigrant worker context, the hypermasculinity narrative is especially powerful and dangerous, because it compounds immigration and prosecution policies that make undocumented workers both invisible and vulnerable.<sup>120</sup> Not only

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<sup>117</sup> Interview with Worker Focus Group, *supra* note 38.

<sup>118</sup> See discussion *supra* Part II.A.1.

<sup>119</sup> PAAP, *supra* note 8, at 156–57.

<sup>120</sup> The Immigration and Nationality Act ("INA") makes employers liable for knowingly hiring undocumented workers. See INA § 274A(a)(1)–(2), 8 U.S.C. § 1324a (2006). The INA also prohibits those who have worked without authorization from adjusting status should they have the opportunity. See INA § 245(c), 8 U.S.C. § 1255 (2006). These laws punish already vulnerable workers. The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) prohibits undocumented

is the work now assigned to the immigrant “other,” but ascribing animal-like qualities further separates the residential construction worker from the rest of the Las Vegas population. Removal from public consciousness facilitates exploitation both because employers can more easily ignore undocumented status if everyone is undocumented and because undocumented workers will complain less in order to avoid intrusive questions.

### 3. *Entrepreneurial Masculinities in the Brown-Collar Context*

Immigrant workers have accepted the independent contractor arrangement because it is the only employment structure offered to them in the construction business.<sup>121</sup> The arrangement lacks the medical benefits, pension, workers’ compensation, unemployment insurance, and higher wage structures of a traditional employer-employee relationship.<sup>122</sup> It also frees the employer of tax liabilities, including the employer portions of Social Security and Medicare taxes.<sup>123</sup> This trend toward independent contracting, despite bordering on illegality in some instances, has become a successful business model for trade employers.<sup>124</sup>

In response, immigrant workers have created their own narratives about the benefits of the independent contractor arrangement, which parallel those of the entrepreneurial masculinities narratives described earlier. For instance, the independent contractor model afforded one worker the freedom and flexibility to accumulate money, plan for a future business in construction, and fulfill his dream of building toward the future:

When one is under contract . . . there’s more opportunity to make more money. Well, you make good money with a contract, because there is no set hours. You can work until you want. And with salary and hourly, you can only work the certain hours that they give you and you cannot work more hours.<sup>125</sup>

This narrative also mirrors the neoliberal entrepreneurial masculinities written about in the transnational context, which serve the function of digni-

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workers from seeking backpay remedies available to other workers who suffer employer labor violations. Recent workplace raids, moreover, have targeted undocumented workers for criminal fraud violations for presenting false documents in order to obtain work. A recent essay on the Postville, Iowa raids and subsequent criminal fraud prosecutions of undocumented workers demonstrates workers’ vulnerability. See Erik Camayd-Freixas, *Raids, Rights, and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. SOC. JUST. 1 (2008).

<sup>121</sup> This structure has been repeated in other industries that attract immigrant workers and in other contexts with disempowered workers. See AGUSTÍN, *supra* note 16, at 21–23; Cranford, *supra* note 16, at 25–26.

<sup>122</sup> See Rabourn, *supra* note 9, at 15.

<sup>123</sup> See Greenhouse, *supra* note 15.

<sup>124</sup> See Rabourn, *supra* note 9, at 15–17.

<sup>125</sup> Interview with Deltorro, *supra* note 27.

fyng jobs that are now contingent and unstable.<sup>126</sup> In the immigrant construction worker context, the entrepreneurial masculinity narrative not only redignifies a job's status (raising it as a noble enterprise even though it is now occupied by immigrant workers), it also dignifies the working conditions, the pay structures, and the relative inferiority and declining position of the job, providing the possibility of opportunity even as it transforms into a menial job. The workers envisioned themselves following the business model of the labor brokers who brought them into the business by utilizing social networks, family ties, and friendships to build contracting crews.<sup>127</sup> One worker described this subcontracting structure, highlighting the business aspect of the arrangement, even as he acknowledged its exploitative nature:

I work for a company but directly I don't work for that company. I work for the sub-contractor and that sub-contractor tells me, "Look tomorrow you are going to the *Silverado Ranch*." Then the next day he tells me, "Now you are going somewhere else." Then he gives me the price of a house but the company is giving him a higher price. He wins just because he moves me around and because I am new, illegal, fearful, without a passport, without transportation, and without tools.<sup>128</sup>

The entrepreneurial narrative is an example of how workplaces reflect the dynamic social relationships between employer and employee. The independent contractor arrangement was a fringe employment structure when unions were strong in the residential construction industry.<sup>129</sup> It has now surpassed union employment as the dominant employment arrangement in residential construction, in part because of employers' aggressive campaigns to de-unionize the industry.<sup>130</sup> The entrepreneurial narrative adapts easily to a restructured industry. It places a positive light on the changes in the industry that would otherwise be viewed as a defeat for a formerly unionized, higher-paying workforce. Entrepreneurship in the immigrant workplace was viewed as the path to upward mobility for the risk-taking, aggressive, and

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<sup>126</sup> For an explanation of the growth of contingent (also referred to as temporary) employment in the United States since the 1970s, see KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-72 (2004).

<sup>127</sup> See Interview with Worker Focus Group, *supra* note 38 (describing how workers obtained construction jobs through their "friendships" and connections with other workers from their home countries); see also Erlich & Grabelsky, *supra* note 13, at 428 (discussing the "labor brokers" and "coyotes," who "arrange[] for border crossings out of Mexico and job placements on construction sites in the US.").

<sup>128</sup> Interview with Worker Focus Group, *supra* note 38.

<sup>129</sup> See Rabourn, *supra* note 9, at 11, 14.

<sup>130</sup> See Erlich & Grabelsky, *supra* note 13, at 423-24. See generally LINDER, *supra* note 14 (discussing the assault on U.S. construction unions by employers, the state, industrial customers, and the media in the last quarter of the twentieth century).

ambitious worker. The alternate narrative of collective empowerment was not deemed attractive or even possible.

#### 4. *Masculinities in Rights Perception, Immigration Status, and Family Provider Status*

In addition to masculinities narratives, immigration status is a reason why workers do not seek to challenge their working conditions in the brown-collar environments. Restrictive immigration policies and laws create the conditions for exploitation that native-born workers do not experience. The specter of raids and deportations in the brown-collar workplace adds to the danger of the job.<sup>131</sup> As a group, the men feel powerless to enforce whatever workplace rights they might have or to protect themselves from scrutiny about their immigration status. The response among men is to construct narratives for themselves that incorporate their journeys into the United States. Their ability to withstand dangers upon crossing the border bolsters the claim that they can handle whatever dangers they face in the workplace and justifies the decision to take jobs that nobody else will take.<sup>132</sup> Interwoven among the stories the workers shared was a sense that they had endured much pain, difficulty, and hardship to arrive in the United States as undocumented workers. One interviewee noted that he had to walk several days “in the desert during night and day, hungry, cold, thirsty.”<sup>133</sup> The workers focused on enduring their treatment on the job because of their undocumented status. If they could endure the dangers of the border crossing, they could endure tough working conditions including, if need be, limited workplace rights, all for the sake of supporting their families.<sup>134</sup>

The story that we saw emerging from our series of interviews was two-fold: first, the workers had endured a tremendous amount of danger and personal suffering to cross the border; and second, they had endured both the border-crossing difficulties and workplace exploitation because they had families to support. The overall endurance story provides a justification for tolerating poor workplace conditions. In other words, poor workplace treatment is tolerable compared to what the worker had to endure to get into the United States. Enduring exploitation because of their undocumented status was just one more set of difficulties that came with crossing the border illegally to support their families. This narrative is unique because of its peculiar application to border-crossing culture. While they understood that their exploitation stemmed from their undocumented status, they accepted the

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<sup>131</sup> See Interview with Worker Focus Group, *supra* note 38; see also Erlich & Grabelsky, *supra* note 13, at 427 (discussing how the threat of deportation is used by employers to discourage worker protests).

<sup>132</sup> Of course, the masculinities narratives themselves serve to subordinate the men who resort to them to explain away exploitative work structures.

<sup>133</sup> Interview with Samuel, Construction Worker, in Las Vegas, Nev. (June 15, 2007).

<sup>134</sup> See Interview with Miguel, *supra* note 40.

conditions that arose from the status because they took ownership of the situations they now found themselves in. Listening to the stories, it was almost as if the workplace exploitations were an expected part of the overall difficulties the workers voluntarily accepted when they crossed the border. The deliberate acceptance of the status gave the workers agency and some level of empowerment over their situation. Even though they had grievances, they endured.

A related masculinities narrative, the family provider narrative, provided the rationale for enduring much of the difficult work imposed on our interviewees. As one worker noted, "There were times when I . . . had to leave my house at 6 in the morning and I would get home at 11 at night. Sometimes we'd work twelve and a half hours. . . . We all come here [for] our families."<sup>135</sup> Another worker explained that he did work that "[o]nly Latinos" did, even though he did not like the work, in order to support his family in Mexico.<sup>136</sup>

In contrast, many of the female workers we interviewed struggled to accept the endurance narrative. Instead, they voiced complaints openly and persistently on the job.<sup>137</sup> The women themselves viewed their subordination in terms of *both* immigration status and gender, as demonstrated by one interviewee's assessment:

[W]hat they see is and what they think is that because we're immigrants, because we're women and because we are Latinas they can exploit us and they can step all over us and that we are not going to do something about this. But [complaining openly shows] them that we can actually do something about [our work conditions].<sup>138</sup>

While the women we interviewed were offended by the treatment enough to seek redress, the men accepted it as part of their role as responsible family providers.

### III. CHANGING THE NARRATIVES: OPPORTUNITIES FOR EMPOWERMENT

Employers benefit from the masculinities narratives to the extent that these narratives provide for a stable, complacent workforce. Moreover, employers benefit to the extent that they can remove themselves from direct liability for harassment or a hostile work environment. The narratives uphold the myth that hypermasculinity is endemic to the workers themselves. Employers can easily say that it is reasonable to expect the type of hypermasculinity experienced in the immigrant workplace because such be-

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<sup>135</sup> Interview with Tony, Construction Worker, in Las Vegas, Nev. (June 5, 2007).

<sup>136</sup> Interview with Samuel, *supra* note 133.

<sup>137</sup> See *supra* notes 37–39 and accompanying text.

<sup>138</sup> Interview with Women's Community Forum, *supra* note 37.

havior is in the nature of immigrant construction workers. If employers create the conditions that spark the development of masculinities narratives and the concomitant behaviors that workers engage in to maintain gender superiority, what kinds of leverage can the law and alternative narratives generate to change employer practices?

Sociologists have posited that organizational changes can disrupt the existing structures and their narratives, allowing men and women to both perceive themselves differently and work together to reshape the workplace dynamic that creates the dominant masculinities narrative.<sup>139</sup> In this section, we will discuss some of those disruptive narratives and the employer's role in their development. We are assuming an employer's will to change the narratives in this section. In the following section, we will analyze some of the ways that the law can encourage or force employers to develop the conditions for alternate narratives in the workplace. We will also discuss how, given the external legal institutional incentives, alternate narratives can start to change the workplace.

#### A. *Shifting the Narratives*

Organizational theorists Robin Ely and Debra Meyerson have developed a theory describing how employers and organizations can change their processes to emphasize how alternative identities are important to the life of the organization.<sup>140</sup> After studying workplace dynamics in an offshore oil platform operation—a stereotypically hypermasculine work environment—they found that the employer's emphasis on safety and performance changed the way that men enacted their male identities in the workplace.<sup>141</sup> The focus on the masculine nature of the job had forced workers to act defensively for themselves, rather than proactively to meet the company's overall goals.<sup>142</sup> In contrast, Ely and Meyerson found that a company-wide initiative focusing on safety created a set of norms and practices that “released men from the performance of masculinity commonly associated with dangerous work.”<sup>143</sup> These practices and norms “served to decouple idealized images of masculinity and definitions of competence so that proving masculinity did not render men competent. Instead, practices and norms legitimated the expression of vulnerability as an element of competence by linking such expressions to core work requirements.”<sup>144</sup>

Specifically, practices and norms that emphasized the importance of working together to meet broader goals, driven by larger concerns, such as a

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<sup>139</sup> See, e.g., Robin J. Ely & Debra E. Meyerson, *An Organizational Approach to Undoing Gender* (unpublished manuscript, on file with authors).

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 2, 39, 44.

<sup>142</sup> *Id.* at 49–50.

<sup>143</sup> *Id.* at 27.

<sup>144</sup> *Id.* at 46.

team or social ideal, enabled workers to release concerns over “self-image goals” for the broader organizational good.<sup>145</sup> These practices, in turn, resulted in more positive relational processes.<sup>146</sup> In other words, masculinities performed in the service of work-related goals, rather than in service of individual or collective self-worth, operate to benefit those within the workplace more than the defensive use of masculinities to construct the self in the workplace.<sup>147</sup> It was the change in organizational practices and norms that elicited the change in individual worker behavior.<sup>148</sup> Once safety became a real and stated priority over production and profit, the men felt secure in letting go of masculinities narratives that encouraged individualism, risk-taking, aggressiveness, and danger.<sup>149</sup> Organizational practices that signaled to workers that they were part of a larger community communicated the importance of workers within the organization.<sup>150</sup> Practices that communicated the company’s preference for workers who learned from mistakes and worked well in teams decoupled masculinities narratives from notions of competence.<sup>151</sup>

An example of a disruptive practice, therefore, involves the decoupling of masculinity from the requirements of the job. To the extent that the employer incentivizes workplace practices that distance masculinities behaviors from success on the job, all workers will feel more ownership of and take a stake in the success of the employer’s business. In the oil rig scenario, for example, an emphasis on a knowledge culture that focused on reflecting on the relative successes or failures of implementing alternative systems de-

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<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 52 (“By consistently putting contribution goals front and center, cultural practices anchor men to work goals that connect them to others. Men’s sense that others’ well-being is at stake in how they perform their jobs gives them a compelling reason to deviate from conventional masculinity when the work requires it.”).

<sup>147</sup> *See id.*

Our findings suggest that learning-oriented organizational cultures provide some evidence that contradicts such views of the self, paving the way for more malleable self-conceptions. Hence, while self-theories clearly promote different goal orientations, it may also be the case that different goal orientations—supported by an organization’s cultural practices—promote different self-theories, and such theories in turn may prove to be critical mediators of gender-related behavior at work.

*Id.*

<sup>148</sup> *See id.* at 56. Organizations can disrupt masculinities behaviors by:

[i]nstituting policies, practices, and norms that anchor men in meaningful work, decouple masculine traits from definitions of competence, and give men practice in interacting with coworkers without regard for the culture’s normative conceptions of manly behavior, while at the same time providing assurance that others will not penalize or think less of them for it.

*Id.*

<sup>149</sup> *See id.* at 2, 27.

<sup>150</sup> *See id.* at 44–45.

<sup>151</sup> *See id.* at 31–35.

creased workers' reliance on masculinities and defensive behaviors.<sup>152</sup> This change to knowledge and reflection from production and individualism fostered a more collaborative and inclusive environment for all workers. In the immigrant construction context, an alternative narrative might involve rewarding workers for collaborative, team-based approaches to potentially dangerous conditions. Compensating team-based approaches to safety, rather than, or in addition to, compensating individuals on a piece rate basis might encourage workers to think more reflectively about carrying heavy ladders or building safe scaffolds more efficiently.

Ely and Meyerson concluded from a separate study of gender dynamics that deconstructing the way that work privileges men and how men sustain that privilege will expose where seemingly neutral practices and policies have a gendered effect.<sup>153</sup> In the immigrant construction context, one practice is the deskilling of jobs. Deskilling invites masculinities narratives that overcompensate for decreased satisfaction, the contingent nature of the work, the increased repetitiveness, or the decreased wages.<sup>154</sup> These narratives include the myth that no one else will do the job, the hypermasculinity narrative, and the provider narrative. One possible set of changes that employers can consider is to reduce the amount of deskilling taking place in occupations within low-wage workplaces. This change would involve creating more worth and less rigidity in the tasks assigned to a particular job. It would likely also require de-emphasizing productivity and profit, and emphasizing the overall value of the worker as part of a larger team of tradespeople. Some of the women we interviewed spoke about the difficulty of learning new skills on the job, precisely because the tasks in each trade had become so compartmentalized. They were told that they could not learn new skills because they were not suited for them.<sup>155</sup> Union leaders also commented on how the compartmentalized nature of the work made it difficult to build expertise in workers who, historically, had amassed several types of skills within a trade.<sup>156</sup> The deskilled nature of the work made it much less appealing to union workers who were accustomed to practicing several skills

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<sup>152</sup> See *id.*

<sup>153</sup> See Robin J. Ely & Debra E. Meyerson, *Advancing Gender Equity in Organizations: The Challenge and Importance of Maintaining a Gender Narrative*, 7 *ORG.* 589, 593 (2000).

<sup>154</sup> See STONE, *supra* note 126, at 92 (“Taylorism, with its emphasis on deskilling and narrow, rigidly organized job classifications, not only bred boredom and instilled resistance among workers, it also deprived management of workers’ creative contributions.”).

<sup>155</sup> See, e.g., Interview with Maria, Construction Worker, in Las Vegas, Nev. (June 5, 2007).

[W]omen are . . . considered to do less of a job, even though [they do] the same work as a man. And [they get] paid less, as well. I mean, they don’t realize that we are doing a tough job, and that just because we are women, they think that we aren’t doing a good job.

*Id.*

<sup>156</sup> See, e.g., Interview with Union Leaders Focus Group, *supra* note 13 (describing how house track painters used to have to:

as part of their jobs.<sup>157</sup> Thus, changing the employer practice of deskilling and compartmentalizing work would make it more desirable and less vulnerable to the wage and condition deterioration that elicits masculinities narratives.

Another practice and narrative example is that of the independent contractor, who is solely responsible for his failures, leaving employers and their structures unaccountable. Immigrants and women are especially vulnerable to and harmed by this construction of the worker, because it exploits workers who have few resources with which to self-insure when things go wrong.

A narrative that disrupts the myth that the independent contractor model leads to upward mobility centers on workers leveraging their collective bargaining or organizing strength. The idea that workers have to collect their strength in order to bargain for better conditions runs directly counter to the independent contractor model of work. In this narrative, workers are not small businessmen, but rather have a more traditional employer-employee relationship, in which the employer has the upper hand as long as workers are divided. The organizing narrative emphasizes connections among workers, as well as connections between workers and employers. Employer practices that may contribute to the disruptive, alternate narrative include an emphasis on safety, community-building, and stating a broader company mission than short-term production and profit maximization. In this narrative, the employer is responsible for the welfare of the workers, rather than the workers being responsible for themselves. The employer provides the safety net of benefits that were traditionally part of the job when it was held by unionized workers. The employer is held accountable for workplace accidents and therefore is incentivized to avoid them. In this narrative, immigrant workers can gain leverage, because they are active and engaged members of the polity, who can voice their concerns without fear of removal from the polity. In the immigrant context, because of the implication of immigration status (or lack thereof), this narrative is different from the traditional union organizing narrative. It necessarily includes organizing for the rights of immigrants outside the workplace as well as inside. Its success in changing employer practices necessarily depends on the effectiveness of or-

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[I]earn all of it. You had to be able to prep it, you had to be able to paint it, you had to be able to, you know, prep, prime, paint . . . [W]ell, employers, over the last twenty years, have broken the craft down to where . . . you have a person who spackles and cocks paste board, that's all they do . . . but, generally, the opportunity for them to learn more or do more is really dependent on . . . the foreman . . . if [the foreman has] somebody that can prep ten houses in a day, why would you want him to start painting? ("This guy's making me money." I'm gonna keep him right where he's at.")

*Id.*

<sup>157</sup> *Id.* (discussing how a worker's "whole world" now consists of one specific function, which is different from the skilled construction labor of the past and has caused a deflation in wages).

ganizing efforts in garnering legal status for the undocumented in the workforce.

### B. *The Role of the Legal System*

What can the law or the legal system do to encourage the development of these alternative narratives in the workplace? Assuming that employers are responsible for workplace conditions from which masculinities narratives arise, the legal system should hold employers accountable and should incentivize change. Stronger enforcement of existing labor and employment laws could accomplish a narrative shift, much in the same way it occurred on Ely and Meyerson's oil rig operation.<sup>158</sup> In addition, focusing on the narrative as a structure provides a different perspective on use of an anti-discrimination framework to change the narrative.

#### 1. *Stronger Enforcement of Existing Laws*

Stronger enforcement of workplace laws could disrupt masculinities narratives and at the same time generate the development of alternative narratives. In residential construction, conditions described by our interviewees involved changes in the employer-employee relationship, pay disputes, safety issues, and sexual harassment, in addition to the deterioration of jobs that interviewees attributed in part to their immigration status. The workers responded with masculinities narratives that made the workplace seem more tolerable, at least for men. If employer practices changed to accommodate enforcement, however, the masculinities narratives would themselves shift, much as Ely and Meyerson documented in their oil rig study, precisely because the narrative would no longer fit the reality of the workplace.<sup>159</sup> The independent contractor arrangement, for example, requires some level of buy-in from the workers who accept the arrangement. In this case, the buy-in was facilitated by several masculinities narratives, including the entrepreneurial narrative and the narrative that only immigrant workers would take these jobs. If the federal Department of Labor ("DOL") or state labor agencies enforced employee classification requirements through inspections of residential construction worksites, employers would have difficulty proving that their workers were, in fact, independent contractors and not employees as defined by state or federal statute.<sup>160</sup> Labor agency investigations

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<sup>158</sup> See Ely & Meyerson, *supra* note 139.

<sup>159</sup> See *Id.*

<sup>160</sup> Under the FLSA, courts use a several factor "economic reality" test to determine whether a worker is an employee or an independent contractor. Courts consider factors such as degree of control over daily work, investment in equipment, opportunity for profit or loss, permanency of the position, skill, and whether the work constitutes an integral part of the employer's operation. See *United States v. Silk*, 331 U.S. 704, 713-16 (1947). Importantly, for immigrant workplaces like those discussed in this article, recent cases have focused on the low skill of the work performed to determine that workers

could reveal that the workers are, in fact, employees who have been misclassified as independent contractors.<sup>161</sup> The distinction is important because independent contractors do not have access to the safety-net benefits available to employees. Nor do independent contractors have the protection of anti-discrimination laws, safety standards, or laws governing collective bargaining. If the workers are actually employees and adjudicated as such, however, the entrepreneurial narrative that legitimizes the arrangement might give way to the alternate narrative of workers who need to collaborate to gain leverage with an employer and seek the protections of labor and employment laws. Interestingly, undocumented status has increasingly begun to factor into workplace protections for workers in much the same way that independent contractor status affects terms of employment. Courts have considered a worker's immigration status, for example, in determining proper remedies for employment violations under the National Labor Relations Act and in lost wages calculations in workplace accident or workers' compensation cases.<sup>162</sup> The similar treatment of undocumented and independent contractor status, in terms of workplace protections, is difficult to ignore in the low-wage workplace, where workers are already so poorly protected. The proliferation of masculinities narratives surrounding the independent contractor arrangement makes the arrangement seem that much more inevitable. Stronger enforcement would necessarily disrupt the perception of inevitability.

Another example of the possibility of narrative shifts exists around the piece rate wage structure in the industry. As we saw from our interviews, the piece rate wage structure was also imbued with the entrepreneurial masculinities narrative. Workers did not think of their work in terms of overtime pay, because they did not consider themselves employees. As with misclassification cases, strong DOL or private enforcement, along with stiff penal-

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were actually employees under the FLSA. *See, e.g.,* *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 184 (S.D.N.Y. 2003) (holding that delivery drivers were "employees" of a contractor under the FLSA); *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000) (holding that "chicken catchers" were "employees" of corporation under the FLSA); *see also*, National Labor Relations Act, 29 U.S.C. § 152(3) (2006) (providing a parallel definition of employees covered by the Act).

<sup>161</sup> The trend toward misclassifying employees as independent contractors is not limited to the residential construction industry. *See* Donahue, Lamare & Kotler, *supra* note 15; Greenhouse, *supra* note 15.

<sup>162</sup> *See* *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (holding that the awarding of "backpay to an undocumented alien who has never been legally authorized to work in the United States . . . is foreclosed by federal immigration policy"). Other courts have since applied the rationale in *Hoffman* to damages calculations. *See* *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003) ("In addition to trenching upon the immigration policy of the United States and condoning prior violations of immigration laws, awarding lost wages would be tantamount to violating the IRCA."); *Hernandez-Cortez v. Hernandez*, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at \*7 (D. Kan. Nov. 4, 2003) (finding that plaintiff's status as an illegal alien precluded his recovery for lost income based on projected earnings in the United States).

ties for wage violations, would change both employer practices and the narrative.

A third example revolves around safety conditions. Stronger enforcement of OSHA standards, and more frequent onsite investigations, fines, and enforcement orders would incentivize safer worksite behavior. No longer would the narratives of the family provider, the hypermasculine male, or the entrepreneur fit the reality of a workplace that values safety over profit.

Of course, stronger enforcement of workplace laws alone will not protect immigrant workers, especially undocumented workers. Stronger enforcement must be accompanied by a path for legalizing workers who cooperate with enforcement investigations. Arguably, one such legalization vehicle is available in the form of a U visa for egregious workplace violations. Accordingly, regulations governing U visas can and should clarify that they are available for workers who cooperate with labor agencies investigating workplace violations in situations where the agency finds that the employer (in this case, the local industry) has purposefully structured jobs to attract the most vulnerable workers in the labor market (in this case, undocumented workers).<sup>163</sup>

## 2. *Changes in Anti-Discrimination Doctrine*

In the anti-discrimination context, the existence of masculinities narratives should raise red flags about the possibility of workplace discrimination. The traditional anti-discrimination frameworks, however, would not easily capture as discriminatory employer practices such as the independent contractor arrangement, the piece rate arrangement, or other exploitative conditions the workers described.

Indeed, these workplace arrangements may not be considered discriminatory under disparate impact or disparate treatment frameworks. Leticia Saucedo has written elsewhere about the limitations of the anti-discrimination frameworks to capture such exploitative conditions.<sup>164</sup> In short, the traditional frameworks focus on employer actions—such as practices or policies—that are themselves discriminatory. In a disparate treatment framework, the plaintiff must demonstrate differential treatment. To establish a prima facie case, the plaintiff must show: (i) that she was a member of a protected class; (ii) that she was qualified for a particular position; (iii) that she was passed over for the position despite her qualifications; and (iv) that the employer continued to hold the position open after rejecting the plain-

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<sup>163</sup> See Leticia Saucedo, *A New U: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008) (exploring the viability and potential effectiveness of immigration law's U visa to contribute to the protection of groups of workers in substandard and dangerous workplaces).

<sup>164</sup> See Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Saucedo, *supra* note 35, at 964–71 (discussing employer practices that encourage subservience from immigrant workers with constrained choices).

tiff.<sup>165</sup> Implicit in this proof is the differential treatment which the doctrine requires. In a disparate impact framework, the plaintiff must show that an employer's facially neutral policy or practice had a significant disparate impact on the basis of race, color, religion, sex, or national origin, and that the employer cannot demonstrate that the challenged practice is job-related and consistent with business necessity.<sup>166</sup> Again, the plaintiff must show that a particular policy, practice, or employer action was the cause of the disparate impact.<sup>167</sup> In each of these traditional frameworks, then, the legal issues focus on whether there was an employer action or series of actions that the plaintiff can isolate as the cause of the differential treatment or impact. In the case of the brown-collar workplace, however, an employer could conceivably point to all kinds of factors outside of employer action that contribute to workplace discrimination. The traditional frameworks allow for this kind of speculation about who is responsible for the altered terms and conditions of employment for a class of workers, because the burden remains heavily on the plaintiff to show the connection between the employer practice and the discrimination.<sup>168</sup> So, for example, female workers may be victims of societal bias or immigrations laws that subordinate them based on how the economy prices their work. The employer, therefore, could rebut an argument that a particular employer policy or practice creates these conditions.

In an alternate discrimination framework, the focus would be on the dynamic created between the employers' structuring of the job and the employee's response. This dynamic is itself a structure, as legal scholar Tristin Green has noted in her work.<sup>169</sup> Green argues that "workplace dynamics" themselves must be considered in determining whether the employer is discriminating in the way it sets up its workplace arrangements.<sup>170</sup> In such a nontraditional framework, the context and the dynamic created between employer and workers in the workplace could lead to the conclusion that discrimination has occurred. Under this framework, employers who target particular workers for a set of jobs at the bottom of the economic ladder encourage altered terms and conditions by requiring the very performance that they elicit from their workers. In the immigrant construction trades context, subservience, flexibility, and conformance to an independent contractor and piece rate system are all attributes that employers seek and immigrant workers provide. The very masculinities that workers use to bring value to

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<sup>165</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>166</sup> See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (2006); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that Title VII of the Civil Rights Act prohibits employment tests that are not a "reasonable measure of job performance").

<sup>167</sup> See 42 U.S.C. § 2000e-2k(1)(B).

<sup>168</sup> See 42 U.S.C. § 2000e-2(k); *McDonnell Douglas*, 411 U.S. at 802.

<sup>169</sup> See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 847, 857 (2007).

<sup>170</sup> Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003).

their work in dynamic response to their work conditions further subjugate them and their female counterparts in the workplace. The drawback of this approach is that it would require more explanation among, within, and around the contours of the existing frameworks, which insist on identifying particular employer actions. The alternative framework describes what is happening much more aptly and at the same time provides an alternative proof mechanism for a showing of discrimination that would not otherwise be obvious. The alternative framework would, in other words, explain just how the dynamic between employer and worker, which includes the development of the masculinities narratives, can be discriminatory.

#### CONCLUSION

Masculinities theories illuminate how employer practices can foster, exacerbate, and take advantage of discriminatory and exploitative conditions. Uncovering the masculinities narratives present in the immigrant workplace, and placing them in the context of employer structures and arrangements, reveals just how discrimination and exploitation manifest themselves in the immigrant workplace and what role workers play in the perpetuation of such conditions. In the case of the Immigrant Construction Worker Study in Las Vegas, employer structures such as the independent contractor arrangement and piece rate wages elicited the masculinities responses that we observed. The effects of such responses are demonstrated in gendered responses to workplace safety, to perceptions of rights in the workplace, to workers' perceptions about their entrepreneurial character, and to hypermasculinity and pride over doing the difficult work in construction.

The workers' responses to workplace conditions provide us with opportunities to see how an alternative set of structures and their accompanying narratives can empower workers. Sociological studies demonstrate how masculinities narratives can be disrupted. Employers who change their practices can change the underlying narratives and behaviors that perpetuate masculine workplace environments.

Why would an employer want to disrupt a narrative that they perceive as encouraging productivity, profit maximization, and a smooth running operation? One response is that external incentives might force employers to change their practices. This is where the legal system plays a crucial role. Enforcement of existing laws goes a long way towards creating employer incentives for change in the immigrant workplace. Focusing on the dynamic created by employer structures, moreover, captures more effectively the discriminatory nature of employer practices. Each of these legal system interventions should result in change. Masculinities theories, by exposing how practices are related to workplace dynamics, can facilitate change in the immigrant workplace. Ultimately, masculinities theories deserve a place in the further investigation of these types of workplaces so that we can continue to formulate more effective ways to improve their conditions.

